The Vexed Question of Agency and Torrens Fraud: The High Court in *Cassegrain*

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Abstract

The question of whether a principal may be held liable for the fraud of his or her agent is not a simple matter. There are difficult questions of law and legal policy at play. These issues arose in *Cassegrain v Gerard Cassegrain & Co Pty Ltd*. However, as the High Court in both the majority and minority opinions found that no relevant agency relationship existed, these issues passed largely unexplored. In setting out their reasons, both the majority and minority opinions of the High Court endorsed the approach that Street J took in *Schultz v Corwill Properties Pty Ltd* in determining the scope of an agent's authority. This article sets out two criticisms of the High Court's decision in *Cassegrain*. First, the article contends that there were in fact sound reasons to find that the husband acted as agent for the wife in effecting both the initial sales transaction and first transfer to himself and his wife as joint tenants. Those who set up an agency relationship, however slightly or informally, should bear the consequences of that relationship where the agent causes harm to third parties in the furtherance of his and the principal's interests. It is imperative that agency law should look closely at the question of whom should bear the risk of the agent's fraud. Second, the article sets out three criticisms of the approach of Street J in *Schultz v Corwill Properties Pty Ltd*.

I INTRODUCTION

In its recent decision in *Cassegrain v Gerard Cassegrain & Co Pty Ltd*,[1] the High Court considered whether an agency relationship had arisen between a husband and wife in relation to the registration of a title under the Torrens system. Had such an agency been found to exist and had the actions of the husband been within the scope of the agency, then the title of the wife might have been rendered defeasible due to the fraud

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1 (2015) 254 CLR 425 ('*Cassegrain*'). The case has already drawn some useful commentary. See Penny Carruthers and Natalie Skead, 'Confirming Torrens orthodoxy: The High Court decision in *Cassegrain v Gerard Cassegrain & Co Pty Ltd*' (2015) 24 *Australian Property Law Journal* 211.

perpetrated by her husband.[2] However, the High Court's findings on agency are rather equivocal with the majority judgment appearing to suggest that some limited agency might have existed.[3]

There is precious little literature or jurisprudence available on the intersection of agency law and Torrens fraud. In particular, there is little clarity as to the precise circumstances under which a fraud committed by an agent in the course of obtaining a registered title for his or her principal should be attributed to the latter under Torrens law. It is generally accepted that the fraud may be attributed to the principal where the impugned act falls within the scope of the authority that the former has conferred upon the agent.[4] However, there is some controversy concerning how the question of the scope of the agent's authority should be approached. This particular issue arose in *Schultz v Corwill Properties Pty Ltd*.[5] It was considered again by both the majority and minority opinions of the High Court in *Cassegrain* and the reasoning of Street J in *Schultz* was cited with approval in both judgments.[6]

Regrettably, the endorsement of *Schultz* leaves unexplored some rather complex issues involving agency and Torrens fraud.[7] In particular, it is unclear whether the sensible approaches of the New Zealand Supreme Court in *Dollars & Sense Finance* and the eminent commentator Atiyah,[8] can be usefully applied in Australian law to a situation where an agent commits Torrens fraud in furtherance of the interests of his or her

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2 The agency issue primarily related to the first transfer in which both the husband and wife received the property as joint tenants. Thereafter, by way of a second transfer the husband transferred his share to his wife for nominal consideration. The High Court held that the interest that the wife received from her husband could be recovered on the basis that she was not a bona fide purchaser for value. See *Cassegrain* (2015) 254 CLR 425, 445 (French CJ, Hayne, Bell and Gageler JJ), 458 (Keane J).

3 See *Cassegrain* (2015) 254 CLR 425, 439, 445 (French CJ, Hayne, Bell and Gageler JJ). Notably, at 445 the majority states, 'Claude was not her "agent" in any relevant sense.' By implication this suggests that some other less relevant form of agency might have existed. However, see the discussion below nn 56–63.

4 FMB Reynolds, *Bowstead and Reynolds on Agency* (20th ed, 2014) 8-062. See also *Ruben v Great Fingall Consolidated* [1906] AC 439; *Morris v CW Martin & Sons Ltd* [1966] 1 QB 716.

5 [1969] 2 NSWLR 576 ('*Schultz*').

6 *Cassegrain* (2015) 254 CLR 425, 439 (French CJ, Hayne, Bell and Gageler JJ), 452 (Keane J).

7 See Carruthers and Skeed, above n 1. The authors briefly acknowledge some of the differences between the approaches of Street J in *Schultz* and the Supreme Court of New Zealand in *Dollars & Sense Finance Ltd v Rerekohu Nathan* [2008] 2 NZLR 557 ('*Dollars & Sense Finance*'). This article takes the argument much further and sets out three detailed criticisms of the way *Schultz* engages with the task of constructing the scope of an agency. Carruthers and Skeed adopt the terminology of 'substantive agency' and 'procedural agency' to deal respectively with the questions of whether an agency exists, and, if so, what the scope of that agency may be. This terminology has no basis in the law of agency and will not be adopted in this paper.

8 PS Atiyah, *Vicarious Liability in the Law of Torts* (Butterworths, 1967).

principal.[9] In *Cassegrain*, the High Court has quite arguably missed an opportunity to revisit and clarify these particular matters. Given the criticisms that the New Zealand Supreme Court made of *Schultz* in its decision in *Dollars & Sense Finance*, it would have been helpful if the High Court could have indicated whether *Dollars & Sense Finance* would be applicable within Australian jurisdictions.

This article advances two criticisms of the High Court's decision in *Cassegrain*. The first is that even though there may have only been a threadbare agency in place between Felicity and Claude Cassegrain, it should have been sufficient to warrant holding the principal liable for the fraud committed by the agent even though the principal might not have been aware of the fraud at the time. The second criticism is that the Court's support for the approach in *Schultz* is problematic. This article first provides a brief overview of some of the fundamental principles of agency law. The article then examines the treatment of agency law in *Cassegrain* by the NSW Court of Appeal and the High Court. The article lastly advances three criticisms of the approach in *Schultz*.

II THE LAW OF AGENCY

For the most part agency law is a creation of commercial convenience. Where a person finds a particular task difficult or inconvenient to do for themselves, they may assign it to another to act on their behalf in the matter. Though it is primarily a creature of commercial law, agency is now so well established that it may arise in a wide variety of contexts. All that is required is the existence of a principal who consents to an agent acting on his or her behalf in their dealings with third parties.[10] In *International Harvester Co*, the High Court stated that agency is, 'a word used in law to connote an authority or capacity in one person to create legal relations between a person occupying the position of principal and third parties.'[11]

It is important to note that agency law is both a relationship between the parties, where one delegates responsibilities to the other, and a consequence dictated by law.[12] In *Branwhite*, Lord Wilberforce noted that the relevant parties may act in such a manner as to create, 'a state of fact

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9 Some doubt has already been raised about *Schultz* in light of the equitable principle that a principal should not benefit from the fraud of an agent. See further, *Davis v Williams* [2003] NSWCA 371 (16 December 2003) [38] (Hodgson JA) ('*Williams*'). See below nn 133–4.

10 *International Harvester Co of Australia Pty Ltd v Carrigan's Hazeldene Pastoral Company* (1958) 100 CLR 644 ('*International Harvester Co*').

11 Ibid 652.

12 *Branwhite v Worcester Works Finance Ltd* [1969] 1 AC 552 ('*Branwhite*').

upon which the law imposes the consequences which result from agency.'[13] That the parties themselves have not explicitly recognised the existence of an agency relationship is of no great importance.

In *South Sydney District Rugby League Football Club*, Finn J stated:

> The consents so given need not necessarily be to a relationship that the parties understand, or even accept, to be that of principal and agent. It is sufficient if 'they have agreed to what amounts in law to such a relationship'; notwithstanding that they may have 'artfully disguised' it by express disclaimers.[14]

Fundamentally, substance triumphs over form in agency law.[15] The scope of an agency relationship may be limited by the parties. That an agent may have authority to act in one capacity does not mean that they have the authority to act in other capacities.[16] More pertinently, an agency relationship is not without its risks or complications. By creating authority in the agent the principal has set up a situation in which the agent might potentially harm the principal's interests. This can happen through fraud,[17] negligence[18] or simply by poor judgment. Moreover, an agent might knowingly act beyond the limits of his authority in good faith so as to allow his principal to gain the benefit of an advantageous transaction.[19]

It is well settled that a principal may bear liability for the actions of his or her agent where the latter has exceeded the scope of his or her authority.[20] The doctrine of ostensible authority essentially provides that where a principal represents to a third party that an agent has authority to act on behalf of the principal and the third party, in reliance of that representation, alters his position through dealings with the agent, the principal will be

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13 Ibid 587. See also *South Sydney District Rugby League Football Club v News Limited* (2000) 177 ALR 611 ('*South Sydney District Rugby League Football Club*').

14 *South Sydney District Rugby League Football Club* (2000) 177 ALR 611, [133]–[134].

15 *Technology Leasing Ltd v Lennmar Pty Ltd* [2012] FCA 709 (6 July 2012).

16 *Petersen v Moloney* (1951) 84 CLR 91.

17 *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd and another and another appeal* [2011] 3 SLR 540 ('*Skandinaviska*').

18 *Scott v Davis* (2000) 204 CLR 333 ('*Scott*'); *Colonial Mutual Life Assurance Society Ltd v Producers and Citizens Co-operative Assurance Co of Australia Ltd* (1931) 46 CLR 41 ('*Colonial Mutual Life Assurance Society*').

19 Cheng-Han Tan, 'Unauthorised agency in English law' in Danny Busch and Laura J. Macgregor (eds), *The Unauthorised Agent: Perspectives from European and Comparative Law*, (Cambridge University Press, 2009) 187.

20 *Freeman and Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480; *Egyptian International Foreign Trade Co v Soplex Wholesale Supplies Ltd, and P S Refson & Co Ltd* [1985] 2 Lloyd's Rep 36 ('*The Raffaella*'); *First Energy (UK) Ltd v Hungarian International Bank* [1993] 2 Lloyd's Rep 194; *Pacific Carriers v BNP Paribas* (2004) 218 CLR 451.

bound to the third party.[21] Claims of ostensible authority have been entertained by the courts even where the agent has forged documents.[22] For example, in *Klement v Pencoal Ltd*[23] a claim of ostensible authority was upheld even though the agent had forged documents.

It follows then that holding a principal liable for the consequences of her agent's fraud is not an altogether controversial proposition provided that the agent is acting within the scope of his actual or apparent authority.[24] That is not the same thing as saying that the principal has directed the agent to commit fraud. Instead, where the fraudulent actions of an agent have created a loss, which one of two innocent parties must bear, there are sound reasons for ascribing the loss to the principal on the basis that he or she demarcated the scope of the agent's authority or failed to properly oversee the agent's actions.

III FINDING AN AGENCY RELATIONSHIP IN *CASSEGRAIN*

The facts of *Cassegrain* are not uncomplicated. Gerard Cassegrain & Co Pty Ltd (GCC) was the registered proprietor of a dairy farm in New South Wales. Claude Cassegrain was a director of the company. After GCC had received a settlement amount of $9.5 million from the Commonwealth Scientific and Industrial Research Organization (CSIRO), Claude contrived to make a debt of $4.25 million appear in the books of the company. The debt appeared to arise due to a loan made by Claude to GCC, though it was recognised during the various court proceedings that he was never entitled to any such amount from GCC. In 1996, Claude and his sister Anne-Marie Cameron, who was a co-director of GCC, decided that the loan would be settled by the sale of the dairy farm (the sale transaction) and other assets to Claude and his wife Felicity as joint tenants.[25]

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21 Ostensible authority is sometimes referred to as apparent authority or agency by estoppel. See further *Hely-Hutchison v Brayhead Ltd* [1968] 1 QB 549; *Crabtree-Vickers Pty Ltd v Australian Direct Mail Advertising & Addressing Co Pty Ltd* (1975) 133 CLR 72.

22 See *Skandinaviska* [2011] 3 SLR 540. See also *Cavenagh Investment Pte Ltd v Kaushik Rajiv* [2013] SGHC 45.

23 [2000] QCA 152 (5 May 2000).

24 *Lloyd v Grace, Smith & Co* [1912] AC 716 ('*Lloyd*'); *Clancy v Prince* [2001] NSWSC 85 (26 February 2001) [61].

25 There is an argument that Claude could be seen as an agent for both GCC and his wife. However, he does appear to have acted on his own behalf and Felicity's in the transaction, and not as an agent of GCC. Even were he to be regarded as an agent for GCC in the transaction, there is an exception within agency law to the rule that the knowledge of an agent is imputed to the principal to the effect that the rule does not apply where the agent is seeking to defraud the principal. See *Re Hampshire Land Co* [1896] 2 Ch 743. See also Reynolds above n 4, 8–213. This particular exception has been applied for over 150 years. See *Kennedy v Green* (1834) 3 My & K 699; *Re European Bank* (1870) 5 LR 5 Ch App 358; *Re Hampshire Land Co Ltd* [1896] 2 Ch

In February 1997, Claude gave instructions to his solicitor Chris McCarron to register the transfer of the dairy farm. There was no allegation that McCarron had any part in the fraud that Claude was perpetrating and he acted in good faith. The transfer was registered in March 1997. No evidence was adduced to demonstrate that Felicity Cassegrain had given any instructions to McCarron. Neither Claude nor Felicity gave evidence at trial. Consequently, there was no direct evidence as to the communications between Claude and Felicity. GCC did not call McCarron during the trial before Barrett J in the NSW Supreme Court.

Later, the other siblings of the Cassegrain family sued Claude and Anne-Marie in 1996 claiming harsh and oppressive dealings in relation to the $4.25 million loan. In July 1998, Davies J in the Federal Court ruled in their favour.[26] This fact colours the next major dealing in the whole saga. On the 24th of March 2000, Claude Cassegrain transferred his interest in the dairy farm to Felicity for the princely sum of just $1.

There might have been a particular cunning in Claude's decision to initially transfer the land to both himself and Felicity as joint tenants, rather than just to himself as sole proprietor. The effect of s 118(1)(d)(ii) of the *Real Property Act 1900* (NSW) is to deprive a volunteer of their registered title where such title derives from a prior owner who has committed Torrens fraud. In the High Court, Keane J noted:

> If Claude had procured the registration of the transfer from the respondent to himself as sole registered proprietor of the land, and then transferred the land to the appellant for one dollar, there could be no doubt that the respondent would be entitled to recover the land from the appellant under s 118(1)(d)(ii) of the Real Property Act.[27]

There was no evidence that Felicity was aware of Claude's fraud at the time of the first transfer. However, it was generally accepted by the various courts in *Cassegrain* that Claude had committed Torrens fraud within the

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743; *JC Houghton & Co v Nothard, Lowe and Wills Ltd* [1928] AC 1, 15 (Viscount Dunedin); *Belmont Finance Corp Ltd v Williams Furniture Ltd (No 1)* [1979] 1 Ch 250, 260–1 (Buckley LJ); *Cricklewood Holdings Ltd v CV Quigley & Sons Nominees Ltd* [1992] 1 NZLR 463, 482 (Holland J); *Duncan v McDonald* [1997] 3 NZLR 669, 679 (Blanchard J); *Beach Petroleum NL v Kennedy* (1999) 48 NSWLR 1, 99 (Court of Appeal). However, in recent times the application of the exception has been doubted. See *Nathan v Dollars & Sense Finance Ltd* [2007] 2 NZLR 747, [99] (Glazebrook and Robertson JJ); *Tonto Home Loans Australia Pty Ltd v Tavares* [2011] NSWCA 389 (21 December 2011) [208]–[209] (Allsop P). See further Peter Watts, 'Imputed Knowledge in Agency Law: Excising the Fraud Exception' (2001) 117 *Law Quarterly Review* 300.

[26] *Cassegrain v Cassegrain* (Unreported, Federal Court of Australia, Davies J, 15 July 1998).

[27] *Cassegrain* (2015) 254 CLR 425, 453. Keane J did note that if the dairy farm had initially been transferred solely to Felicity then she would have received an indefeasible title. However, this would have deprived Claude from ever having enjoyed a legal estate in the property.

meaning of s 42 of the *Real Property Act 1900* (NSW). Section 42 provides:

> Notwithstanding the existence in any other person of any estate or interest which but for this Act might be held to be paramount or to have priority, the registered proprietor for the time being of any estate or interest in land recorded in a folio of the Register shall, except in case of fraud, hold the same, subject to such other estates and interests and such entries, if any, as are recorded in that folio, but absolutely free from all other estates and interests that are not so recorded.

The combined operation of s 42 and s 118(1)(d)(i) effectively provides that the title of a registered proprietor is defeasible where fraud can be brought home to the registered proprietor's title.[28] The system of title by registration under the Torrens system confers immediate indefeasibility upon registration.[29] Subject to some qualifications,[30] the fraud that would render a title defeasible must occur prior to registration.[31] In *Stuart v Kingston*,[32] it was noted that Torrens fraud requires, 'something in the nature of personal dishonesty or moral turpitude.'[33] Similarly, in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd*,[34] the High Court noted the need for 'actual fraud, moral turpitude.'[35] This obviously suggests conscious wrongdoing and the knowing perpetration of some scheme of deception.[36]

Given the nature of Torrens fraud, it is submitted that in most cases a person who lacks either knowledge or active participation in a fraud cannot have their title set aside under s 118(1)(d)(i). However, where the

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[28] In the High Court in *Cassegrain*, Keane J dissented from the majority decision on the interpretation of s 118(1)(d)(i). In particular, the phrase "registered through fraud" which appears in s 118(1)(d)(i) has been interpreted to refer to fraud by the registered proprietor. See for example, *Register of Titles (WA) v Franzon* (1975) 132 CLR 611, 618 (Mason J). Such an interpretation of s 118(1)(d)(i) is consistent with the protection offered under s 42(1) to registered proprietors who achieve registration without fraud. However, in *Cassegrain*, Keane J at [106]–[116] pointed out that the statutory language of s 118(1)(d)(i) could regard the statutory title of a joint tenant as defeasible even though he or she was innocent of the fraud perpetrated by the other joint tenant. The statutory interpretation issue that arose in *Cassegrain* is an important matter. However, it is beyond the scope of the article.

[29] *Frazer v Walker* [1967] AC 569, 580–1 (Lord Wilberforce) ('*Frazer*'); *Breskvar v Wall* (1971) 126 CLR 376, 385 (Barwick CJ) ('*Breskvar*').

[30] See *Bahr v Nicolay (No 2)* (1988) 164 CLR 604 ('*Bahr*') where assurances that were given prior to registration were later repudiated. Mason CJ and Dawson J were willing to regard these actions, which in their view amounted to equitable fraud, as fraud within the meaning of s 42.

[31] *Mayer v Coe* [1968] 2 NSWR 747, 754 (Street J).

[32] (1923) 32 CLR 309.

[33] Ibid 329 (Knox CJ).

[34] (2007) 230 CLR 89.

[35] Ibid [192] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).

[36] *Frazer* [1967] AC 569; *Breskvar* (1971) 126 CLR 376; *Assets Co Ltd v Mere Roihi* [1905] AC 176 ('*Assets Co Ltd'*).

fraudulent party was the agent of the person who became the registered proprietor, there are two ways in which a Torrens fraud can be brought home to such a registered proprietor. The first arises where the fraud falls within the scope of the agency.[37] The second occurs where the agent knew of the fraudulent conduct and that knowledge can be imputed to the principal. Accordingly, GCC sought to argue that Felicity was the principal and that Claude acted on her behalf as agent. The basis for the agency argument emerges from a famous quote by Lord Lindley in *Assets Co Ltd* on the subject of Torrens fraud. Lord Lindley stated:

> [T]he fraud which must be proved in order to invalidate the title of a registered purchaser for value ... must be brought home to the person whose registered title is impeached or to his *agents*. Fraud by persons from whom he claims does not affect him unless knowledge of it is brought home to him or his *agents*.[38]

Lord Lindley's statement appears applicable to two scenarios. In the first situation, the person's agent is directly involved in the fraud. In the second, Lord Lindley appears to suggest that if a person's agent has knowledge of a fraud then that too necessarily binds the principal so as to place him or her within the parameters of Torrens fraud.[39] In that position the principal's registered title would then be defeasible.

Where this leaves a passive principal, such as that which Felicity Cassegrain was alleged to be, is altogether unclear.

On its bare terms the first limb of Lord Lindley's statement suggests that where the agent is the architect and perpetrator of the fraud in whole or part for the benefit of the principal,[40] the existence of an agency is no shield against fraud being brought home to the title of the registered proprietor. Indeed, where the first scenario is concerned, the active participation of the agent in the fraud should be enough to deprive the principal of an indefeasible title. Crucially, there is no suggestion in Lord Lindley's statement that the limited nature of the agency is any defence against the defeasibility of the principal's title. This is why the existence of an agency relationship was one of the most crucial matters in *Cassegrain*.

In the High Court in *Cassegrain*, the Justices in the majority, French CJ, Hayne, Bell and Gageler JJ questioned whether Lord Lindley had knowingly used the term 'agents'. Their Honours stated:

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37 *Schultz* [1969] 2 NSWLR 576, 582–3. See also Reynolds, above n 4.

38 (1905) AC 176, 210 (emphasis added).

39 Even then Street J in *Schultz* suggested that something more was required. See below n 73.

40 *Frazer* [1967] AC 569, 580–1 (Lord Wilberforce) ('*Frazer*'); *Breskvar* (1971) 126 CLR 376, 385 (Barwick CJ).

> What Lord Lindley meant by his reference to "agents" was not explored then or in later decisions of this Court. It may be thought that the reference to "agents" was intended to do no more than refer to those natural persons through whom the corporation, Assets Company Limited, had acted in acquiring the registered title that it did.[41]

However, their Honours acknowledged that later courts had not interpreted Lord Lindley's comments in this manner.[42] Nonetheless, it is well known that an agency relationship can arise in a number of ways. An agent might be appointed by the principal, or the agency relationship might arise from the manner in which the parties have conducted themselves. An agency relationship can arise by implication from the actions of the relevant parties.[43] In *Equiticorp*, Clarke and Cripps JJA noted that the parties, 'may conduct themselves in such a way that it is proper to infer that the relevant authority has been conferred on the agent.'[44] That said, the existence of a marital relationship alone does not give rise to an agency relationship between the husband and wife.[45] What must occur is that the principal must consent to the agent representing them in some way.[46]

At some point prior to the first registration, Felicity Cassegrain must have known that Claude Cassegrain was going to purchase the farm from the respondent and that he would register it in both their names as joint tenants. In the absence of evidence to the contrary, and with Felicity having chosen not to give evidence, it is hard to resist the conclusion that Claude acted on Felicity's behalf. Further, with nothing to suggest that Felicity ever gave any instructions to the solicitor, it must be assumed that Claude gave the instructions for registration. On this point the appellant's arguments were exceedingly coy. The appellant submitted in her written submissions that the respondent could easily have called the solicitor as a witness to definitively prove that she had given him no instructions. Leaving matters of confidentiality aside, where the presumption of agency had arisen the burden should surely have shifted to the appellant to disprove such a relationship.

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41 *Cassegrain* (2015) 254 CLR 425, 438. Nonetheless, the law of agency would likely apply here as well. There is a degree of overlap between the general rules on attribution of acts to a corporation and the law of agency. See *Colonial Mutual Life Assurance Society* (1931) 46 CLR 41.

42 *Frazer* [1967] 1 AC 569, 580 (Lord Wilberforce). See also *Schultz*. In each of these cases Lord Lindley's statement was interpreted as applying directly to the law of agency.

43 See *Branwhite* [1969] 1 AC 552, 587 (Lord Wilberforce); *Cadd v Cadd* (1909) 9 CLR 171. See also *Equiticorp Finance Ltd (in liq) v Bank of New Zealand* (1993) 32 NSWLR 50 ('*Equiticorp*').

44 (1993) 32 NSWLR 50, 132.

45 *Pollard v Wilson* [2010] NSWCA 68 (8 April 2010) [113] (McClellan CJ).

46 *International Harvester Co* (1958) 100 CLR 644. Of course, the agent must also consent to the agency relationship.

On the facts before the NSW Court of Appeal and the High Court, it could reasonably be inferred that Claude was Felicity's agent for the purposes of the initial sale transaction. Felicity was certainly a passive recipient of her property interest in the farm. However, as the registration could not be brought about without the existence of the sale transaction, it is not unreasonable to suggest that at some point she had consented to Claude procuring both the sale transaction and subsequent registration on her behalf. Having drawn that inference, it can then be said that as well as acting for himself, Claude acted as Felicity's agent in achieving the sale transaction and registration.

Indeed, in the NSW Court of Appeal, Beazley P and Macfarlan JA found that Claude was Felicity's agent. In doing so Beazley P and Macfarlan JA relied in part upon the principle in *Blatch v Archer*,[47] that an inference could be drawn where certain facts are wholly within the knowledge of one party.[48] However, notwithstanding the principle in *Blatch*, Beazley P found sufficient basis upon which to draw the inference of an agency relationship.[49] Macfarlan JA concurred with her Honour's reasoning on this point.[50]

In the High Court, the majority took issue with the findings of both Beazley P and Macfarlan JA on the issue of agency. In their judgment, the majority of the High Court noted that the term 'agent' is much abused. Further, the majority stated:

> At least for the most part, the word "agent" appears to have been used in the Court of Appeal as a term explaining how events happened rather than as a term attributing legal responsibility for those events. The relevant question was treated as one of fact.[51]

In the view of the majority, a finding that an agency relationship existed should have been the beginning rather than the end of the inquiry. On this point a valid criticism of the judgments of the Court of Appeal may lie in the lack of attention given to the question of the scope of Claude's authority. Nonetheless, a close reading of the judgments of Beazley P and Macfarlan JA makes it clear that their Honours understood the full import of a finding of agency between Claude and Felicity.

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47 (1774) 98 ER 969 ('*Blatch*').

48 *Gerard Cassegrain & Co Pty Ltd v Cassegrain* [2013] NSWCA 453 (18 December 2013) [26]–[31] (Beazley P) ('*Gerard Cassegrain & Co Pty Ltd*'). However, it should be noted that her Honour did not wholly rely on *Blatch v Archer*, but rather drew reasonable inferences from the known facts. See also *Gerard Cassegrain & Co Pty Ltd* [2013] NSWCA 453 (18 December 2013) [155] (Macfarlan JA).

49 *Gerard Cassegrain & Co Pty Ltd v Cassegrain* [2013] NSWCA 453 (18 December 2013) [31].

50 *Gerard Cassegrain & Co Pty Ltd* [2013] NSWCA 453 (18 December 2013) [155].

51 *Cassegrain* (2015) 254 CLR 425, 438 (French CJ, Hayne, Bell and Gageler JJ).

It is possible to read the majority opinion in the High Court of French CJ, Hayne, Bell and Gageler JJ as accepting that there was an agency relationship between Felicity and Claude with respect of registration. The language employed by the majority is decidedly equivocal and it is also possible to read the judgment as suggesting that there was no agency.

The majority opinion did acknowledge that Felicity acquiesced to Claude registering the title in both their names.[52] The majority stated that 'Felicity was no more than the passive recipient of an interest in land which her husband had agreed to buy, but which he wanted (with her acquiescence) put into their joint names.'[53] The majority did not expressly state that Claude was Felicity's agent for the act of registration and this omission must be reconciled with the majority's finding that there was no agency in 'any relevant sense'.[54] With respect of Claude's actions in procuring registration, the majority also stated that 'without more' these actions, 'showed no more than that Claude had performed tasks that were of advantage to Felicity.'[55] As such, apart from their rejection of the reasoning of the NSW Court of Appeal, the majority's actual findings on agency are decidedly ambiguous.

If Felicity consented to Claude doing an act on her behalf, which the majority did appear to concede when they noted her acquiescence to the registration in both their names, then at least for the mere purposes of that particular act, he was her agent. It might be a very limited type of agency, but nonetheless it should be regarded as an agency relationship. The majority stated:

> Without more, the conclusion that Claude had taken the steps necessary to procure registration of the transfer from the company to Felicity and him as joint tenants did not show that his fraud was within the scope of any authority she had, or appeared to have, given to him. Without more, it did not show that knowledge of his fraud was to be imputed (in the sense of 'brought home') to her.[56]

However, this statement appears almost to conflate the first and second limbs of Lord Lindley's famous statement on Torrens fraud and agency. Moreover, if the majority did indeed hold the view that Claude was Felicity's agent for the act of registration, but not the sale, then two problems arise. The first is that this suggests some sort of sharp distinction between the sale transaction and the registration. Yet, in a Torrens context registration is the end-point of any sale transaction. As such, it may not be

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52 Ibid 439.
53 Ibid.
54 Ibid 445.
55 Ibid 439.
56 Ibid.

tenable to attempt to draw a distinction between the sales transaction and the registration as one cannot exist without the other.

Second, to the extent that it does appear to acknowledge a slight agency, the majority judgment seems to suggest that the limited nature of this agency tells against imputing any knowledge of the fraud to Felicity. However, this runs counter to Lord Lindley's statement which appears on its first limb to require no more than the conscious participation of the agent in the fraud. Moreover, it is difficult to suggest that Claude's fraud ceased prior to registration as the fraudulent scheme that he was perpetrating in its entirety consisted of a fake loan, a sale and subsequent registration. The achievement of a registered title was the end point of the fraud.

The majority opinion in *Cassegrain* should be criticised for failing to make plain what capacity it believed that Claude was acting in when he procured registration over the property for himself and Felicity. It could be possible to construe Claude's actions in registering the title to the property in both his and Felicity's names as a gift to Felicity of a joint interest.[57] Neither the majority nor minority opinions of the High Court in *Cassegrain* expressly contemplate this possibility, though this does appear to be the assumption upon which the members of the Court based their judgments. Nonetheless, even if they had done so, there would be no reason at all to suppose that the making of a gift precludes a finding of agency in circumstances where the purported principal is aware of the nature of the gift that is being procured.

It is important to note that in procuring the sale transaction, Claude was acting both for himself and Felicity. Though it is submitted that a neat distinction between the sales transaction and the registration is not entirely viable in a Torrens context, it does follow that an argument could have been advanced to the effect that Felicity's actions in retaining her title after the first registration amounted to ratification by conduct of the actions done on her behalf in the sales transaction itself.[58] In effect, this would have been a ratification of Claude's ability to act as agent on Felicity's behalf and all of his actions in obtaining registration.[59] Moreover, the absence of any explicit authorisation by Felicity is not problematic as an agency relationship can be retrospectively ratified by conduct.[60] It is quite likely that retaining the benefit of a registered title, in circumstances where the

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[57] However, the making of a gift is not necessarily inconsistent with the existence of an agency. It is also possible to regard Claude as the donor and Felicity as the donee. Other than acknowledging Felicity as a 'passive recipient' the majority fails to ascribe any given legal category to Claude and Felicity's roles in the transfer.

[58] *Keighley, Maxsted & Co v Durant* [1901] AC 240. The absence of dissent to the act of the first registration is also a relevant consideration in assessing ratification. See *Lamshed v Lamshed* (1963) 109 CLR 440, 448 (Kitto J).

[59] Ibid.

[60] *Davison v Vickery's Motors Ltd (in liq)* (1925) 37 CLR 1, 19 (Isaacs J).

principal has taken no positive steps to procure the registration, is in effect ratification by conduct.[61] It would not have been necessary to suggest that Felicity was ratifying Claude's fraud. However, this would have raised an issue concerning the requirement that the principal must know all the material circumstances in order to ratify an act.[62] In turn, this would have brought the doctrine of ratification into conflict with the *Mair* principle,[63] in that Felicity would be declaiming the existence of the agency and the authorisation of the transaction whilst retaining the benefit of the fraud. It is notable that those cases where an agent's fraud or misconduct have precluded ratification have been those concerning the acts of an agent which have seriously disadvantaged or defrauded the principal.[64]

It was actually Felicity who raised the issue of ratification before the NSW Court of Appeal when she submitted that asserting the indefeasibility of her title did not amount to a ratification of Claude's conduct. Her Honour, Beazley P, briefly noted this point,[65] but as she found that an agency existed by other means it was not developed further. Curiously, GCC did not advance a ratification argument before the NSW Court of Appeal or the High Court. Whilst Felicity is undoubtedly correct in stating that claiming indefeasibility does not amount to ratification, this does not preclude the suggestion that the act of retaining a registered title after that registration has been procured for the 'principal' by the acts of another amounts to a ratification of both the agency relationship and the transaction in question.

IV THE VEXED QUESTION OF THE SCOPE OF AN AGENT'S AUTHORITY

In the course of discussing the agency relationship between Claude and Felicity, the High Court relied upon the reasoning of Street J in *Schultz*.[66] The remarks of Street J in *Schultz* are relevant to the question of the scope of an agent's authority. The Court's approval of the position of Street J in

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61 *Cox v Isles, Love & Co* [1910] St R Qd 80; *Australian Blue Metal Ltd v Hughes* [1962] NSWR 904, 925; *McLaughlin v City Bank of Sydney* (1912) 14 CLR 684.

62 *Victorian Professional Group Management Pty Ltd v Proprietors 'Surfers Aquarius' Building Units Plan No 3881* [1991] 1 Qd R 487; *Sinclair v Hudson* (1995) 9 BPR 16, 259. Though there is an argument that knowledge of the registration is sufficient to dispense with the knowledge requirement even though Felicity may have been unaware of the fraud. This interpretation of the rules on ratification would be consistent with the *Mair* principle: see below n 63.

63 *Mair v Rio Grande Rubber Estates Ltd* [1913] AC 853, 870 (Lord Shaw) ('*Mair*'); *Refuge Assurance Co. Ltd v Kettlewell* [1909] AC 243; *Williams* [2003] NSWCA 371 (16 December 2003) [128]–[129] (Young CJ). See below nn 132–5. In *Williams*, Young CJ stated, '[w]here a person receives a benefit from the fraud of another, that person is not permitted to deny the agency.'

64 *Taylor v Smith* (1926) 38 CLR 48, 54–5 (Knox CJ); *Fried v National Australia Bank Ltd* (2001) 111 FCR 322, 361; *Porteous v Donnelly* [2002] FCA 862 (8 July 2002).

65 *Gerard Cassegrain & Co Pty Ltd* [2013] NSWCA 453 (18 December 2013) [29].

66 *Cassegrain* (2015) 254 CLR 425, 439 (French CJ, Hayne, Bell and Gageler JJ).

Schultz is not unproblematic. In particular, the continued reliance upon *Schultz* might put Australian courts at odds with the approach of the New Zealand Supreme Court if matters arise in the future in which the scope of an agent's authority is directly relevant. This is an area of Torrens law that has not been fully explored.

In *Schultz*, Street J based his reasoning on Lord Lindley's consideration of fraud and agency in *Assets Co Ltd*. Justice Street noted that the discussion of agency and Torrens fraud in *Assets Co Ltd* contemplated two different situations:

> The first is one in which the fraud is actually committed by ('brought home to') the person whose title is impeached or his agent. And the second is one in which he or his agents have knowledge that a fraud has been committed whereby the previous registered proprietor is being deprived of some or all of his interests.
>
> Each of these two concepts is capable of being applied in accordance with settled principles of law. The first, namely, fraud on the part of the person whose title is impeached or his agents, *involves the application of the ordinary principles governing the responsibility of a principal for the fraud of his agent*. If the fraud in question is the immediate act of the person whose title is impeached, then the position is not open to doubt. If, however, the fraud is that of an agent for the person whose title is impeached, the principle of respondeat superior, with all its limitations and qualifications, is applicable. The matter is to be tested by investigating whether or not the principal is, in the particular circumstances under consideration, liable to the person who has been defrauded for the acts of the agent.[67]

In *Schultz*, the defendant company was the registered proprietor of a parcel of land in NSW. Mrs Schultz sought to invest £3000 by securing a mortgage over the land. She gave the money to her lawyer, Clive Galea, to further the grant of the mortgage and to register it on her behalf. The defendant company had two shareholders and directors, one of whom was Clive Galea's mother. Galea himself was the secretary of the company.[68] Though he did register a mortgage, Galea misappropriated Mrs Schultz's money for his own purposes. Given the fraud of Galea and his role as her agent, the issue that came to be in dispute was whether Mrs Schultz's mortgage was indefeasible.

On the issue of knowledge of a fraud, Street J further stated:

> It is not enough simply to have a principal, a man who is acting as his agent, and knowledge in that man of the presence of a fraud. *There must be the additional circumstance that the agent's knowledge of the fraud is to be*

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67 [1969] 2 NSWR 576, 582–3 (emphasis added).

68 It seems also to have passed without comment in *Schultz*, that Galea was agent for both the plaintiff and the defendant.

> *imputed to his principal.* This approach is necessary in order to give full recognition to (a) the requirement that there must be a real, as distinct from a hypothetical or constructive, involvement by the person whose title is impeached, in the fraud, and (b) the extension allowed by the Privy Council that the exception of fraud under s 42 can be made out if 'knowledge of it is brought home to him or his agents'.[69]

Justice Street did not elaborate upon the circumstances under which the knowledge of the agent might be imputed to the principal. There are two important principles of agency law that might govern this matter. The first is the long-standing exception, which is now rather controversial, that the knowledge of an agent is not to be attributed to the principal where the former is defrauding the latter.[70] The second is the equitable rule that a principal cannot benefit from his or her agent's fraud.[71] It should ordinarily be the position that knowledge of an agent's fraud is to be imputed to a principal where he or she stands to benefit from the fraud. This would be consistent with other rules of agency law.[72] Though he might easily have done so, Street J did not expressly refer to the fraud exception to the principal's liability for the conduct of their agents or any of the cases that have dealt with that exception.[73] Nor did Street J discuss any of the general agency law cases that have dealt with the issue of whether an agent is acting within the scope of his authority.[74] Street J did cite *Bowstead on Agency*, which states the general principle that a principal may be liable for the acts of an agent acting within the scope of his authority, but no other cases were discussed.[75]

A *Demarcating the agent's authority too narrowly*

There are three criticisms that can be made of Justice Street's opinion in *Schultz*. The first is that in *Schultz*, Street J defined the scope of the agent's authority in a manner that was too specific.[76] This places Street J's approach at odds with later decisions. In *Schultz*, Street J stated that with regard to the principal's liability to the third party:

> On this topic one need not delve more deeply than the general statement in Bowstead on Agency, 13th ed., p.242:-

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69 *Schultz* [1969] 2 NSWLR 576, 583 (emphasis added).
70 *Frazer* [1967] AC 569; *Breskvar* (1971) 126 CLR 376; *Assets Co Ltd* [1905] AC 176.
71 See below nn 132–3.
72 For example, the rule that where by a wrongful act the money of a third party is acquired by the agent for the benefit of the principal it is inequitable for the principal to retain such moneys. See Reynolds, above n 4, 8–201. See *Campden Hill Ltd v Chakrani* [2005] EWHC 911.
73 See above n 68.
74 See for example *Lloyd* [1912] AC 716.
75 *Schultz* [1969] 2 NSWLR 576, 582–3
76 Pamela O'Connor, Immediate Indefeasibility for Mortgagees: A Moral Hazard?' (2009) 21(2) *Bond Law Review* 133, 142–3.

> 'An act of an agent within the scope of his actual or apparent authority does not cease to bind his principal merely because the agent was acting fraudulently and in furtherance of his own interest.
>
> This principle is general, applicable to cases of actual and apparent authority; in tort; in the disposition of property; a similar result even appears in criminal cases. But the mere fact that the principal, by appointing an agent, gives that agent the opportunity to steal or otherwise to behave fraudulently does not without more make him liable: *the agent must normally be acting within the scope of his actual or apparent authority for the principal to be responsible*'.[77]

Much confusion in this area of the law might well have been averted had Street J delved deeper on this topic than the general statement in *Bowstead*. In *Schultz*, Street J dealt with the issue of the scope of the agent's authority by simply stating that Schultz had given authority to Galea to register a *valid* mortgage.[78] The approach that Street J took in *Schultz* almost amounts to treating the fraud as if it automatically severs any connection between the action of the agent and their actual or apparent authority.

Other courts have not treated the existence of fraud as being decisive as to whether the agent is acting outside or within the scope of his or her authority. In *Perpetual Limited v Barghachoun*,[79] the defaulting mortgagor, Mr Abdul Barghachoun, challenged the indefeasibility of Perpetual's mortgage on the basis that the latter's agent had acted 'fraudulently' by procuring the former's signature when he was unwell and not in a fit state to sign a mortgage. Notwithstanding the question of whether these acts fell within the scope of Torrens fraud, Rothman J was prepared to accept:

> for present purposes that relate to whether Mr Barghachoun's proposition is arguable, that the act of the agent, within the scope of its actual or apparent authority, does not cease to bind Perpetual, merely because the agent may have been acting fraudulently and in furtherance of its own interests.[80]

At the very least, the existence of a fraud should not immediately place the agent's act outside the scope of his authority.

In *Dollars & Sense Finance*, the New Zealand Supreme Court took issue with the narrow treatment of the scope of authority in *Schultz*. In *Dollars & Sense Finance*, a finance company, Dollars & Sense Finance Ltd (DSF), agreed to lend $245,000 to Rodney Nathan to assist him in purchasing shares in a business. However, DSF asked Rodney to get a security for the loan from his parents in the form of a mortgage over their home. DSF's lawyer gave Rodney the relevant mortgage papers including the papers his

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77 *Schultz* [1969] 2 NSWR 576, 583 (emphasis added).
78 Ibid.
79 [2010] NSWSC 108 (26 February 2010).
80 Ibid [30] (Rothman J).

parents were to sign. Rodney did not tell DSF that his parents were in fact separated. Rodney procured his father's signature, but he forged his mother's signature on the papers. Rodney returned the documents to DSF and the mortgage was duly registered.

At the time that the case was litigated Rodney's father had passed away, so his mother challenged the validity of DSF's registered mortgage on the grounds that it was defeasible for Torrens fraud. During the proceedings it was argued that Rodney had acted as DSF's agent in procuring the mortgage over his parents' home. On the facts in *Dollars & Sense Finance* there was stronger evidence of an agency than there was in *Cassegrain*. However, this is attributable to the fact that the key parties actually gave direct evidence as to what had transpired. Crucially, because DSF, through its lawyer, gave Rodney the relevant documents and asked him to procure his parents' signatures, an agency relationship was created between the parties for this purpose. It was acknowledged that DSF was not instigating a fraud and was unaware of what actually transpired at the relevant time.[81]

Having established that an agency relationship existed, the New Zealand Supreme Court turned its attention to the scope of the agency. The Court found that it would be misguided to rely on *Schultz*, in part due to the overly specific construction of the scope of the authority.[82] The Court stated:

> No one suggests of course that D & S actually authorised the particular forgery or any forgery or fraudulent act at all. But it does not follow from that fact alone that the forgery was beyond the scope of the agency.[83]

In essence, the suggestion that a fraud immediately places the actions of the agent outside the scope of their authority, except where they have been authorised to commit the fraud, takes 'too narrow a view of an agent's task.'[84]

The Court relied on Atiyah in constructing the scope of the authority.[85] Atiyah has suggested that determining the scope of an agent's authority depends on: (i) what acts the principal has authorised; and (ii) whether what the agent has actually done is sufficiently connected to those acts as to constitute a mode of performing them.[86] In *Dollars & Sense Finance* the Court found that what was authorised was the obtaining of the signatures

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81 *Dollars & Sense Finance* [2008] 2 NZLR 557, [31].
82 Ibid.
83 Ibid. See also Carruthers and Skeed, above n 1, 218–219. The authors suggest that the New Zealand Supreme Court relied upon the principle of respondeat superior to determine the liability of the principal. However, the judgment of the Court makes no mention of this principle.
84 *Dollars & Sense Finance* [2008] 2 NZLR 557, [46].
85 Ibid.
86 Atiyah, above n 8, 178; ibid [32].

and related acts.[87] The Court formed the view that an agent's acts could have a close connection to the authorised acts even though it is criminal and fraudulent.[88] The Court stated:

> A fraudulent act impacting on a third party may vis-à-vis the third party be seen as done within the scope of an agency even if done exclusively for the benefit of the agent, and a fortiori may be seen as an act within the agency if it is done for the benefit of the principal as well as for the benefit of the agent.[89]

In developing its position the Court drew on vicarious liability cases in tort, notably *Lister v Hesley Hall Ltd*,[90] where a boarding school was found vicariously liable for the sexual abuse of children by a school warden. The Court also placed weight on the obiter remarks of Lord Millett in *Dubai Aluminium Co Ltd v Salaam*,[91] where his Lordship had suggested that the question of connection had to be dealt with by looking at the authorised acts and the actual acts of the agent while keeping the rationale underpinning vicarious liability in mind.[92] In *Dollars & Sense Finance*, the Court suggested that this rationale was

> a loss distribution device based on grounds of social and economic policy by which liability is imposed for all those torts which can fairly be regarded as reasonably incidental risks to the type of business being carried on.[93]

The Court in *Dollars & Sense Finance* appears to have been influenced greatly by the concept of risk, in the sense that the party that created the risk should bear the consequences if it materialised.[94] Notably, in *Dollars & Sense Finance*, Blanchard J delivering the opinion of the Court stated:

> The tenor [of the relevant authorities] is that someone who creates an agency in which there is a risk of improper behaviour by an agent (or, as in this case, by someone entrusted with a sub-agency) should expect to bear responsibility where that risk eventuates and loss is thereby caused by the agent to a third party. The nature of that risk and the extent of the liability will depend upon the nature and scope of the agency.[95]

Subsequently, in *Hickman v Turn and Wave Ltd*,[96] Young J expressed support for this view. If a criticism could be made of the way in which the New Zealand Supreme Court addressed the question of the scope of

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87 *Dollars & Sense Finance* [2008] 2 NZLR 557, [34].
88 Ibid.
89 Ibid [35].
90 [2002] 1 AC 215.
91 [2003] 2 AC 366.
92 Ibid [124].
93 *Dollars & Sense Finance* [2008] 2 NZLR 557, [37].
94 Ibid [42].
95 Ibid [48].
96 [2013] 1 NZLR 741.

authority it would be that it draws a little too heavily on the nexus between agency law and vicarious liability in tort, with too little consideration for the internal doctrinal concerns of Torrens fraud.

In *Dollars & Sense Finance*, the New Zealand Supreme Court saw no difficulty in relying upon principles of vicarious liability to develop the law of agency. This broadly reflects the position under Australian law.[97] However, in the UK Supreme Court in *Jetivia SA and another (Appellants) v Bilta (UK) Limited (in liquidation)*,[98] Lord Sumption stated in obiter:

> Vicarious liability does not involve any attribution of wrongdoing to the principal. It is merely a rule of law under which a principal may be held strictly liable for the wrongdoing of someone else. This is one reason why the law has been able to impose it as broadly as it has. It extends far more widely than responsibility under the law of agency: to all acts done within the course of the agent's employment, however humble and remote he may be from the decision-making process, and even if his acts are unknown to the principal, unauthorised by him and adverse to his interest or contrary to his express instructions … indeed even if they are criminal … personal or direct liability, on the other hand, has always been fundamental to the application of rules of law which are founded on culpability as opposed to mere liability.[99]

The statement by Lord Sumption does not necessarily mean that vicarious liability cannot influence the development of agency law. Rather, it means that some care must be taken to ensure that the two do not completely overlap. This safeguarding might well be achieved by the two-step test that was employed in *Dollars & Sense Finance* to construct the scope of the agent's authority. In particular, the sufficient connection requirement in the second step means that not every act of the agent can be attributed to the principal for the purposes of liability. Moreover, in *Dollars & Sense Finance* the New Zealand Supreme Court made it abundantly clear that a finding that the fraud was within the scope of the agency did not amount to a suggestion that the principal had authorised the fraudulent act.[100]

B *The Schultz approach ignores valid reasons for finding the principal liable*

The decision of the New Zealand Supreme Court in *Dollars & Sense* sets the basis for the second criticism of the approach in *Schultz*. That is, the narrow approach taken to constructing the scope of authority in *Schultz* more or less obscures the valid reasons for holding a principal liable for the wrongful acts of an agent. Notwithstanding the objection raised by Lord

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97 *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21, [99] (McHugh J) ('*Hollis*'). See the discussion below nn 114–18.

98 [2015] UKSC 23.

99 Ibid [70]. His Honour was not joined by the other members of the Court on this point.

100 *Dollars & Sense Finance* [2008] 2 NZLR 557, [31].

Sumpton in *Jetivia*, the parallels with vicarious liability in tort are hard to miss in this area of law.[101] The rationale for holding a principal liable for their agent's wrongful act was set out in *Bayley v Manchester, Sheffield and Lincolnshire Railway Co*,[102] where Willes J stated:

> A person who puts another in his place to do a class of acts in his absence, necessarily leaves him to determine, according to the circumstances that arise, when an act of that class is to be done, and trusts him for the manner in which it is done; and consequently he is held answerable … provided that what was done was done, not from any caprice of the servant, but in the course of employment.[103]

Dal Pont sensibly notes that it is immensely difficult to demonstrate that there was an express authority to commit fraud.[104] Nevertheless, a principal might still be liable for a fraud committed in the scope of an agent's authority.[105] For example, in *Lloyd* a fraud committed by a managing clerk in the course of dealings with a widow, was attributed to his firm because it fell within the broad parameters of the conveyancing business which the latter had entrusted to him. The fact that the firm was innocent did not prevent the House of Lords from attributing responsibility to it as principal to a rogue agent.[106] Quite pertinently, in a passage cited with approval by McHugh J in *Scott*[107] Bramwell LJ in *Weir v Bell*,[108] stated:

> [E]very person who authorizes another to act for him in the making of any contract, undertakes for the absence of fraud in that person in the execution of the authority given, as much as he undertakes for its absence in himself when he makes the contract.[109]

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101 Gino Dal Pont, *Law of Agency*, (2nd ed), (LexisNexis Butterworths, 2008) 595.
102 (1872) LR 7 CP 415.
103 Ibid 420.
104 Dal Pont, above n 101, 599.
105 *Lloyd* [1912] AC 716.
106 Ibid 738 (Lord Macnaughten), 725 (Earl Loreburn).
107 (2000) 204 CLR 333, [49]. *Scott* concerned a claim for vicarious liability in tort on the basis of an agency argument. In *Scott*, the alleged principal owned several light planes which he used for his own enjoyment. At a party that he organised, he allowed another pilot to use one of his planes for a joyride involving some passengers. The plane crashed killing the pilot and severely injuring a young boy. The plaintiffs alleged that the pilot was an agent of the plane's owner. In the absence of any employment relationship or contract, all of the judges of the High Court, apart from McHugh J, declined to find any agency relationship. See also *Sweeney v Boylan Nominees Pty Ltd* (2006) 226 CLR 161. See Dal Pont, above n 101. Dal Pont's criticisms of the way in which McHugh J in *Scott* and Kirby J in *Sweeney* handle agency law are worth noting. Dal Pont at 597 suggests that their Honours deal with agency law in a 'cursory' manner, 'ostensibly driven more by securing a particular outcome than necessarily grounded in principle.' In other words, agency law is used as a means to an end, but receives too little attention to its own internal rules. This problem appears to persist in *Cassegrain*.
108 (1878) 3 Ex D 238.
109 Ibid 245.

It is quite notable that where situations similar to those faced in agency law arise in the field of tort law, the fact that an 'agent' has completed an authorised task in an unauthorised manner is not problematic. Moreover, where agency and vicarious liability in tort have overlapped in the past this issue has not created great difficulty. In *Hollis* McHugh J, commenting on an agency argument that was raised in the dispute, stated, 'it is not necessary for the principal "specifically" to "instigate, authorise or ratify" the agent's wrongful act.'[110] In other words the principal does not need to tell the agent specifically to commit fraud on his or her behalf. He or she may simply give the agent permission to procure the title to a property.

There is an issue that arises here that requires some thought. Given the remarks of various judges of the High Court in *Hollis* and *Scott*, and the endorsement of *Schultz* in *Cassegrain*, there is now a difference between the treatment of a person's responsibility for the wrongs of another on the one hand in the fields of agency law and vicarious liability in tort, which on the one hand seem to be quite similar, and Torrens fraud on the other hand, which appears almost radically different. In fact, it appears as if tort law takes agency in one direction and Torrens takes it in another, with little thought given by Australian courts to the resulting confusion. The question is whether this differential treatment is necessary or desirable. I submit that where Torrens principles and agency law combine, it is important for the principles of agency law to be more carefully applied. Given that the fundamental question of the liability of a principal for the wrongful actions of an agent, is very much the same across Torrens, tort law and the general law of agency (that the principal is responsible for the wrongful actions of an agent), the law should try to move in the same direction. If there are genuine reasons for applying agency law differently within the Torrens system then this needs to be clearly articulated.

Indeed, it is worth asking the question as to whether there is something so special about Torrens fraud that it warrants the differential treatment of agency law in a Torrens context. The issue could be that safeguarding the robust nature of immediate indefeasibility under Torrens requires a restrictive approach to the fraud exception and that in turn has conditioned the operation of agency law.[111] If this is indeed the case then the High Court did not explore it in *Cassegrain*.

Where an agent has done some wrong which will result in a loss to one of two innocent parties, either the third party or the principal, agency law invariably asks which of the two is more deserving of bearing the loss.[112] The reasoning in both *Bayley v Manchester, Sheffield and Lincolnshire Railway Co* and *Lloyd* bear out this point. In a sense, agency asks who has contributed more to the loss. In *Skandinaviska*, the Singapore Court of

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[110] *Hollis* (2001) 207 CLR 21, [99]. See also Dal Pont, above n 101, 597.

[111] However, this idea is not directly addressed in the jurisprudence.

[112] This is a question of *contribution* to the loss rather than connection to authorised tasks.

Appeal found that the third party should bear the loss for a loan it made to Asia Pacific Breweries (APBS). The third party, Skandinaviska Enskilda Banken (SEB), a commercial bank, made the loan to APBS on the basis of representations made by an agent of APBS. SEB knew that APBS had not conferred on the agent any authority to accept the loan. However, the agent was a rogue and he forged documents that made it appear as if he had the authority to accept the loan. He then misappropriated the monies to support his gambling habit. The Singapore Court of Appeal held that SEB could easily have checked with APBS to determine the true extent of the agent's authority. In this instance SEB's failure to take precautions contributed the most to the loss.

Such an argument could quite easily have been raised in *Cassegrain*. It could have been argued that GCC could have been more diligent in checking the bona fides of the claim that monies were owed to Claude.[113] There should have been better oversight of Claude and his sister in their role as directors. Yet, it could easily be said that Felicity's suspicions ought to have been aroused at least by the time of the second transfer.[114] In this sense, Felicity could hardly have been unaware of the litigation in *Cassegrain v Cassegrain*.[115] Had such matters been raised the arguments would have been more finely balanced.

In the context of fraud, the Torrens system approaches the question of allocating loss between two innocent parties in a manner that is somewhat different to the law of agency. For example, in that crucial passage in *Assets Co Ltd*, Lord Lindley stated:

> Fraud by persons from whom he claims does not affect him unless knowledge of it is brought home to him or his agents. The mere fact that he might have found out fraud if he had been more vigilant, and had made further inquiries which he omitted to make, does not of itself prove fraud on his part. But if it be shewn that his suspicions were aroused, and that he abstained from making inquiries for fear of learning the truth, the case is very different, and fraud may be properly ascribed to him.[116]

In other words, a person who is innocent of actively seeking to commit a fraud does not become liable for Torrens fraud through mere want of care,[117] but rather through wilful blindness.[118] In this sense, Torrens law

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[113] It is worth observing that at least in the initial stages of the sales transaction Claude was an agent for both GCC and Felicity.

[114] This in of itself would not have rendered Felicity's title defeasible with respect of the first title. With regard to the second title, it might have raised a question of ratification. This was raised before the NSW Court of Appeal by Felicity herself, but curiously GCC did not press this point. Felicity argued that the concept of ratification was not available with regard to indefeasibility. There is nothing to suggest that the operation of the Torrens system precludes the operation of the doctrine of ratification.

[115] [1999] NSWSC 1165 (1 December 1999).

[116] *Assets Co Ltd* [1905] AC 176, 210.

[117] *Grgic v Australian and New Zealand Banking Group Ltd* (1994) 33 NSWLR 202.

[118] *Young v Hoger* [2000] QSC 455 (6 December 2000).

does look at contribution to the loss, but it has to balance it against the concept of immediate indefeasibility. Courts which have dealt with Torrens matters have in the past had to decide between an innocent buyer for value who becomes registered and an innocent former registered proprietor. This was the case in *Frazer* where an innocent owner had been defrauded by his wife and daughter and had lost his registered title. In that case the Privy Council chose to support the innocent buyer in order to implement the principle of immediate indefeasibility. The policy choice in favour of immediate indefeasibility was made in order to make the Torrens system a workable system of title by registration. This also involved an explicit rejection of the deferred indefeasibility concept that was raised in *Gibbs v Messer*.[119]

It might well be that where agency law mixes with Torrens fraud, its application must be carefully managed to avoid the spectre of deferred indefeasibility. That is, if it were to be otherwise, the principal's title would be defeasible until it were abundantly clear that his or her agent had neither knowledge nor involvement in any fraud. In *Schultz*, Street J did suggest that Torrens fraud could be attributed to a principal where the agent acts within the scope of his actual or apparent authority. However, he resolved the matter by more or less suggesting that the scope of the authority would have had to have contemplated fraud. This resolution does not sit well with agency law, though it might help Torrens law evade a type of deferred indefeasibility.[120] It does appear that in situations such as those in *Schultz*, the courts are looking not just at the nature of the parties' contribution to the loss, whether it might be a lack of prudence or wilful blindness, but also at the need to maintain coherency within the Torrens system itself. If there are concerns about the impact that agency law might have upon immediate indefeasibility then they were not raised and addressed in *Schultz* or *Cassegrain*.[121] The best that can be said here is that the paucity of the reasoning in *Schultz* on the nexus between agency law and Torrens fraud has left too much unanswered.

It might also be that Torrens fraud, as a statutory concept, necessarily conditions the application of the common law of agency. Yet, here the looseness of the language used by Lord Lindley in *Assets Co Ltd*, which was adopted again in *Schultz* and *Cassegrain*, causes difficulties. There is no doubt that Torrens fraud requires conscious wrongdoing. However, if it

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119 [1891] AC 248. Also *Clements v Ellis* (1934) 51 CLR 217.

120 Under deferred indefeasibility the title of a registered proprietor who obtains their title as a consequence of a fraud is not entitled to indefeasibility even though they themselves are completely innocent of any involvement in the fraud. In this situation the indefeasibility is deferred until they pass on good title to another buyer. See *Gibbs v Messer* [1891] AC 248.

121 While this is understandable in light of the High Court's findings on agency it is undesirable.

is admitted that the conscious wrongdoing of an agent can be imputed to a principal,[122] then what explains the reluctance of the courts to do so when the opportunity has arisen?

C *A principal should not benefit from the fraud of their agent*

One of the more troubling aspects of *Cassegrain* is that Claude's fraud was done for the benefit of himself *and* Felicity. If an agency relationship had been found to exist, then the equitable principle, referred to in *Williams* as the *Mair* principle,[123] which provides that a principal cannot retain the benefit of a fraud committed by their agent might have been applicable.[124] As noted, the equitable principle prevents a principal from relying upon their own innocence in order to take advantage of the fraud that has been done by their agent.[125] How this principle should interact with a Torrens statute is somewhat less clear in light of immediate indefeasibility. In *Williams*, Hodgson JA stated:

> For the *Mair* principle to apply, in my opinion the principal must have a real choice whether or not to take or retain the benefit, and the benefit must be more than trivial. I refer to an analogy from the law of contract. If a person does work altering a house without being requested to do so by the house owner and without the house owner's knowledge ... the house owner will not be taken to have undertaken to pay for that work merely because the house owner has the benefit of the work through ownership and occupation of the altered house. This is because the house owner has no real choice in the matter. In my opinion, much the same approach should be taken in connection with the *Mair* principle.[126]

It is arguable that but for Claude's fraud, Felicity would never have acquired the dairy farm. Moreover, when she eventually discovered fraud she could have ceded the title to GCC. As the facts of *Cassegrain* did not suggest that the dairy farm was Felicity's only possible residence, a real choice did exist. Her position was quite different to the facts of *Williams* where the benefit in question was insubstantial.[127] While this matter was not pursued before the High Court or the NSW Court of Appeal, Felicity did suggest that her assertion of indefeasibility did not amount to an act of ratification.[128] Whether the same argument would work to preclude the application of the *Mair* principle seems less likely, at least to the extent that the NSW Court of Appeal did not dismiss the issue out of hand when it

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122 *Assets Co Ltd* (1905) AC 176, 210.

123 Though, the principle is older than the *Mair* case discussed above n 63. See *Dixon v Olmius* (1787) 1 Cox 414; *Huguenin v Baseley* (1807) 14 Ves 273, 290 (Lord Eldon LC).

124 See *Homeward Bound Gold Mining Co NL v McPherson* (1895) LR (NSW) Eq 281, 319 (Owen CJ).

125 *Mair* [1913] AC 853, 872–3 (Lord Moulton). See also *Welch v Handcock* (1907) SR (NSW) 404.

126 *Williams* [2003] NSWCA 371 (16 December 2003) [39].

127 Ibid [40].

128 However, in my view the relevant act of ratification is not the pleading of indefeasibility at trial, but rather the retention of title after the first registration.

arose in the context of indefeasibility in *Williams*. The concept of 'real choice' that Hodgson JA outlines above appears a workable model for balancing the *Mair* principle with the imperatives around immediate indefeasibility.

It is submitted that in any Torrens transaction there is an implied representation made by each of the parties to the other that the transaction itself is free from fraud. Nobody would rationally choose to deal with a party who refused to give a guarantee that they were not acting fraudulently. It is then almost self-evident that parties who choose to deal with each other are assuming the absence of any fraud and would also know that the other is acting on the same basis. In the context of *Cassegrain*, if Felicity was the principal and Claude the agent at the commencement of the sales transaction then she implicitly made a representation to GCC that there was no fraud at play. When this representation later turned out to be untrue and Felicity chose to retain the benefit of the fraud the *Mair* principle should have applied. The Torrens system has contemplated in *Bahr* that post-registration conduct that repudiates a pre-registration representation should give rise to an in personam exception. In *Bahr*, the Court was equally split as to whether this conduct should be considered Torrens fraud.

In his considered analysis of agency law, Dal Pont has suggested that the Third Restatement might be a sensible compromise between the differing approaches in *Schultz* and *Dollars & Sense Finance*.[129] In the United States, the Third Restatement of the Law of Agency provides:

> For purposes of determining a principal's legal relations with a third party, notice of a fact that an agent knows or has reason to know is not imputed to the principal if the agent acts adversely to the principal in a transaction or matter, intending to act solely for the agent's own purposes or those of another person. Nevertheless, notice is imputed: (a) when necessary to protect the rights of a third party who dealt with the principal in good faith; or (b) when the principal has ratified or knowingly retained a benefit from the agent's action.[130]

The Restatement attempts to balance the competing goals of protecting the principal against the fraud of the agent and protecting third parties who unwittingly deal with a rogue agent. There is something about Felicity knowingly retaining the benefit of Claude's fraud, in circumstances where she must have had some inkling by the time of the second transfer that something was amiss, that is contrary to both the principles of the Torrens

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[129] Dal Pont, above n 101, 633. In this passage Dal Pont refers to a well-established exception to the presumption that the agent's knowledge is to be imputed to the principal. This principle operates on the basis that it is unfair to impute knowledge of a fraud to a party when they are one of the victims of that fraud.

[130] American Law Institute, *Restatement* (*Third*) *of Agency* (2006) § 5.04.

system and the law of agency. There have been a number of cases in which parties have relied upon indefeasibility despite the fact that some fraud, of which they themselves had no part, was present in the transaction that provided them with their indefeasible title. However, in these cases, such as *Mercantile Mutual v Gosper*[131] and *Frazer*, the indefeasible title was not procured by their agent.

V CONCLUSION

The High Court's decision in *Cassegrain* leaves a number of key issues concerning the relationship between Torrens and agency law unanswered. While this is understandable given the majority's view of the agency question, it will be incumbent upon future courts to untangle these issues. At the very least, *Schultz* should no longer be regarded as the best approach to determining the scope of an agent's authority in light of Torrens fraud. The two step process outlined by Atiyah and adopted by the New Zealand Supreme Court in *Dollars & Sense Finance* is an altogether more workable approach.

[131] *Mercantile Mutual Life Assurance Co v Gosper* (1991) 25 NSWLR 32.