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## ***Black v Garnock***

### **Implications for Queensland Conveyancing Practice**

What was previously established as a fundamental principle, that a judgment creditor may take no interest beyond what the judgment debtor could give, has now been called into question by the decision of the High Court in *Black v Garnock* [2007] HCA 31. This article examines the implications of the decision of the High Court for conveyancing practice in Queensland.

The relevant facts of *Black v Garnock* [2007] HCA 31 may be briefly stated:

The Garnocks and the Luffs, as purchasers, entered a contract to purchase a rural property from Mrs Smith with settlement due on 24 August 2005. On 23 August 2005, a creditor obtained a writ against Mrs Smith from the District Court of New South Wales.

No caveat was lodged on behalf of the purchasers prior to settlement (there being no equivalent, in New South Wales, of the Queensland settlement notice mechanism).

On the day of settlement:

- the purchasers' solicitors conducted a check search of the title at 8.55 am (which revealed nothing adverse to the purchasers' interest);
- some time between 9.20 am and 9.30 am, certain discussions took place between the solicitors for the creditor and the solicitors for the purchasers. While the solicitors for the creditor indicated their intention to "stop the sale" they did not indicate their intention to register the writ;
- the writ, obtained the day before, was recorded at 11.53 am; and
- settlement took place at 2.00 pm.

When the purchasers attempted to register their transfer they were advised that the New South Wales Registrar General would not register the transfer because of the prior registration of the writ.

In adopting this stance, the Registrar General relied on s 105A(2) of the *Real Property Act 1900* (NSW) that prohibits the Registrar-General from registering, during the six month "protected period", a dealing that affected land subject to a writ of execution. In a 3-2 decision, the High Court upheld the correctness of this approach and thereby upheld the interest of the judgment creditor under the writ of execution against the earlier unregistered equitable interest of the purchasers from the judgment debtor. In particular, the majority held that a subsequent sale of the property during the six month protected period by the sheriff acting under the writ would defeat the earlier

equitable interest of the purchasers. The majority considered this result to be consistent with s 105B(2) of the *Real Property Act 1900* (NSW) which provides, in part, that the effect of the registration of a transfer from the Sheriff is that the purchaser from the Sheriff holds the land transferred free from all estates and interests except such as are recorded in the relevant folio of the Register or on the relevant registered dealing.

The judges in the majority were Gummow, Hayne and Callinan JJ with Gleeson CJ and Crennan J dissenting. In their joint judgment, Gummow and Hayne JJ were prepared to discount the purchasers' unregistered interest in the land in circumstances where that equitable interest had not been protected by the lodgement of a caveat prior to the lodgement of the writ of execution. In their view, the bare fact that the purchasers made their contract of sale with the judgment debtor before the writ was recorded did not constitute sufficient reason to intercept the operation of the *Real Property Act 1900* (NSW). Significantly, the other majority judge, Callinan J expressly disapproved (at [87] to [89]) of the approach evinced in *Commonwealth Trading Bank of Australia v Austral Lighting Pty Ltd* [1984] 2 Qd R 507, namely that an equity created prior to lodgement of a writ of execution may be set up until a transfer from the Sheriff has been registered.

Although the provisions of the New South Wales legislation under consideration by the High Court do not exactly mirror the provisions in the *Land Title Act 1994* (Qld), the decision of the High Court may be considered significant to the extent that the approach of the majority judges is inconsistent with the principle that a judgment creditor may take no interest beyond what the judgment debtor could give at the time of lodgement of the writ of execution.

Against this background, it is useful to consider how similar factual circumstances to those prevailing in *Black v Garnock* [2007] HCA 31 may be dealt with in terms of Queensland Titles Office practice. In order to consider this matter further, the impact of standard contractual provisions must also be considered.

### **Background – Impact of Standard Contractual Provisions**

If a check search of the title is conducted on the day of settlement and an enforcement warrant affecting the property is discovered, under the standard REIQ contract the Seller will be in breach of warranty (namely that at settlement there will be no unsatisfied judgment, order or writ affecting the property). The discovery of the writ upon a check search being conducted will trigger a right in the purchaser to terminate the contract by notice to the Seller.

Unless the purchaser or the purchaser's representative fail to conduct a check search of the title on the day of settlement, any potential difficulties arising from the lodgement of a form 12 Request to Register Writ/Warrant of Execution with office copy of the writ of execution (subsequently referred to as a 'form 12') should be confined to circumstances where the form 12 is lodged

after the check search is conducted but before registration of the transfer to the purchaser.

At least four (4) different scenarios may be formulated:

### **Lodgement of Transfer precedes Lodgement of Form 12**

1. A transfer from a judgment debtor is lodged, but is unregistered, when a form 12 is lodged.

In these circumstances, by virtue of s 117 of the *Land Title Act 1994* (Qld) the purchaser is not bound by the writ of execution until it is registered, whether or not there is actual or constructive notice of the writ. As the transfer has priority it will be registered. The writ of execution will not be capable of registration as the registered owner of the lot will no longer be the judgment debtor. Accordingly, the form 12 will be requisitioned to be withdrawn.

### **Lodgement of Form 12 precedes Lodgement of Transfer**

2. A form 12 is lodged and registered after the check search but before the lodgement of a transfer to a purchaser from the judgment debtor. The purchaser has not deposited a settlement notice nor has the purchaser lodged a caveat.

In these circumstances, if the approach evinced in *Black v Garnock* [2007] HCA 31 (in similar factual circumstances) is followed in Queensland the form 12 will have priority. However, it must be noted that the decision of the High Court was concerned with the impact of particular statutory provisions and the particular mischief that these New South Wales statutory provisions were designed to remedy. In light of existing Queensland authority dealing with the impact of statutory provisions largely comparable to those presently contained in the *Land Title Act 1994* it would seem to be arguable that the purchaser's equity created prior to the lodgement of the form 12 may be set up until any transfer from the Sheriff has been registered. This issue must await final determination in Queensland.

It should be noted that in the case where the transfer was pursuant to the exercise of a power of sale under a prior registered mortgage, s 120A of the *Land Title Act 1994* (Qld) makes it clear that the registration of the writ does not prevent registration of the transfer and on registration of the transfer, the registrar must cancel registration of the writ of execution.

#### *With settlement notice deposited prior to settlement*

3. A settlement notice is deposited (referring to the interest of the transferee from the judgment debtor), then a form 12 is lodged after the check search but before the lodgement of the transfer to the purchaser from the judgment debtor.

In these circumstances, the Queensland Titles Office takes the view that the effect of the settlement notice deposited before the form 12 is lodged is to prevent registration of the form 12. If this view is correct, there is no impediment to the registration of the transfer to the purchaser from the judgment debtor.

*With caveat lodged prior to settlement*

4. A caveat is lodged (notifying the equitable interest of the purchaser from the judgment debtor), then a form 12 is lodged after the check search but before the lodgement of the transfer to the purchaser from the judgment debtor.

In these circumstances, the Queensland Titles Office takes the view that the effect of the caveat notified on the title before the form 12 is lodged is to prevent registration of the form 12 (unless the caveator specifies in the caveat that it is not to apply to a form 12). If this view is correct, there is no impediment to the registration of the transfer to the purchaser from the judgment debtor.

**Comment**

In summary, if the view adopted by the Queensland Titles Office in scenarios 3 and 4 is correct, it would appear that any difficulties that *Black v Garnock* [2007] HCA 31 may raise as to the correct interpretation of the Queensland legislation may be restricted, at least in the conveyancing context, to circumstances where the purchaser or the purchaser's representative fails to either conduct a check search on the day of settlement or fails to protect its unregistered interest by way of a caveat or a settlement noticed deposited before the settlement date. Given the provisions of the Conveyancing Protocol in Queensland, it would be hoped that these circumstances will arise infrequently.

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