

THE CASE OF *BLACK v GARNOCK*:

A NEW TRAP FOR BUYERS BETWEEN EXCHANGE AND COMPLETION

A recent case in the High Court of Australia, *Black v Garnock* (2007) HCA 31, has highlighted the complexities of conveyancing, and emphasised the need for expert care when buying real estate.

The Garnocks agreed to buy a farm from Mrs Smith for \$1 million. They paid a deposit of \$100,000 and exchanged contracts. Settlement was set to take place at 11am on 24 August 2005.

The buyers didn't know that Mrs Smith owed a lot of money to Mr Black's firm of accountants. The previous year, the accountants had taken her to court, and she had been ordered to pay them \$228,000. Now, nearly a year later, they were still chasing their money.

Knowing that if the farm was sold they would never get it, they decided to take action.

The day before settlement, the accountants took out a writ of execution in the District Court. A writ instructs the sheriff to seize and sell property to pay money owed to the judgement creditor.

A writ also has the practical effect of stopping a buyer from registering their transfer.

Registration is proof of ownership and is the essence of our Torrens title system.

The accountants knew of the sale, and on the morning of settlement warned the seller that they would stop it. But they didn't let on that they had a writ all ready to lodge. The settlement was put back until 2.00pm.

At 11.53am, the writ was recorded against the title of the land. The buyers' solicitors had done their normal final title search at 9am on that day, and it showed a clear title. Without more, they settled the purchase unaware of the writ, thinking that they were in the clear.


Only later did the buyers discover, to their horror, that they couldn't get their transfer registered. They were beaten by the writ on the title. Meanwhile, the registered mortgagees were paid out from the buyers' money, and what little was left over went to Mrs Smith.

Mr Black and his partners wouldn't take their writ off the land until they too were paid. They had the buyers over a barrel.

The Garnocks went to court to get the writ removed so they could register their transfer.

They lost their case before the trial judge in the NSW Supreme Court; then they won 2:1 in the Court of Appeal; and finally they lost 3:2 in the High Court of Australia.

The High Court decided that, in this case, priority of registration, under the NSW Torrens title system, meant that **the writ legitimately defeated the later transfer.** The *unregistered* interest of the buyers (which existed from the



moment they contracted to buy from Mrs Smith) did not beat the *registered* writ of the accountants.

It did not matter that the buyers' contract existed *before* the writ was registered.

How did the court justify its decision?

The majority judges said that the buyers could have lodged a caveat with the Registrar General straight after exchange of contracts. It would have protected their interests.

A caveat on the title tells all the world that the buyers have a claim to the land under their purchase contract, and it stops anyone else from registering any dealings with the land.

The judges also said that a final title search, just before settlement, would have revealed the writ, and deterred the buyers from completing the purchase.

But the judges in the minority were unimpressed: Justice Crennan (the youngest judge) pointed out that the decision meant that the debtor, Mrs Smith, unfairly wound up with part of the sale proceeds, at the expense of the buyers.

And Chief Justice Gleeson, the most senior judge agreed: "The purpose of the law is not to turn unsecured creditors into secured creditors, or to defeat the interests of people who contracted to buy the land.

The practical result appears to be that, at the expense of the purchasers, the accountants *will have obtained blood from a stone.*"

This case goes to show that conveyancing is no game for the unwary. Managing the sale or

purchase of real estate is laden with risk. That is why it's important to choose a lawyer who can provide you with the right advice, based on long experience, to keep you safe from all the hazards.

For further information about how you can protect your interests as a purchaser, please contact Shire Legal on 02 9531 1808 or info@shirelegal.com.au

