

HIGH COURT OF AUSTRALIA

GLEESON CJ
GUMMOW, HAYNE, CALLINAN AND CRENNAN JJ

STUART ALEXANDER BLACK & ORS

APPELLANTS

AND

BRYCE LACHLAN GARNOCK & ORS

RESPONDENTS

Black v Garnock
[2007] HCA 31
1 August 2007
S401/2006

ORDER

1. *Appeal allowed with costs.*
2. *Set aside the orders of the Court of Appeal of the Supreme Court of New South Wales made on 1 June 2006 and in their place order that:*
 - (a) *the appeal to that Court be dismissed with costs; and*
 - (b) *there be an inquiry into what damages, if any, the first to third respondents in the Court of Appeal (namely, Stuart Alexander Black, Vaughan Lee Chapman and Andrew Philip Carter) suffered by reason of either the injunction granted by Campbell J by order made on 7 October 2005 or the injunction granted by Basten JA by order made on 21 December 2005 which the appellants in the Court of Appeal (namely, Bryce Lachlan Garnock, Sarah Jane Garnock, Robert Leonard Luff and Lynette Anne Luff) ought to pay.*

On appeal from the Supreme Court of New South Wales

Representation

J Stoljar with K W Dawson for the appellants (instructed by SBA Lawyers)

G C Lindsay SC with A J Grant and G F Mahony for the first to fourth respondents (instructed by Capon & Hubert)

Submitting appearance for the fifth respondent

No appearance for the sixth respondent

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Black v Garnock

Conveyancing – Land titles under the Torrens system – Execution against land under the Torrens system – Recording of a writ for the levy of property in respect of land under the *Real Property Act* 1900 (NSW) ("the Act") – Appellants obtained judgment against the sixth respondent ("judgment debtor") – Judgment debtor was registered proprietor of land – Judgment debtor agreed to sell land to the first to fourth respondents ("purchasers") – Prior to settlement, a writ for the levy of property was recorded in respect of the land – Following settlement, Registrar-General refused to register transfers – Purchasers sought interlocutory injunction restraining appellants and Sheriff of NSW from executing the writ – Nature of interest of purchasers in land – Whether person claiming estate or interest not recorded in the Register and not preserved by the Act is entitled to an injunction to prevent execution of a writ for the levy of property.

Practice and procedure – Enforcement – Enforcement of judgment debt by way of writ for the levy of property in respect of land – Purchasers of property sought interlocutory injunction restraining appellants and Sheriff of NSW from executing writ – Whether person claiming estate or interest not recorded in the Register and not preserved by the Act is entitled to an injunction to prevent execution of writ.

Statutes – Interpretation – Meaning and effect of s 105A(2) of the Act – s 105A(2) prohibited the Registrar-General from registering, during a "protected period", a dealing that affected land subject to a writ for the levy of property – Whether person claiming estate or interest not recorded in the Register and not preserved by the Act is entitled to an injunction to prevent execution of writ.

Words and phrases – "judgment creditor", "judgment debtor", "protected period", "writ for the levy of property", "writ of execution".

Real Property Act 1900 (NSW), ss 42, 43A, 74F, 74H, 105, 105A, 105B.
Civil Procedure Act 2005 (NSW), ss 112, 113, 115.

1 GLEESON CJ. I have had the advantage of reading in draft form the reasons for judgment of Crennan J. I agree that the appeal should be dismissed with costs, for the reasons given by her Honour. I would add the following brief comments.

2 The judgment creditors had, and have, no interest in the subject land. Section 105(1) of the *Real Property Act* 1900 (NSW) ("the Act") makes that clear. Nobody suggests otherwise. Furthermore, there having been no sale of the land by the Sheriff pursuant to the writ for levy of the property, there is no transferee to whom the provisions of s 105B(2) of the Act apply. At the time of the proceedings in the Court of Appeal, the only people with any interest in the land were the registered proprietor (the relevant judgment debtor) and the purchasers to whom she sold the land. It is, therefore, strictly inaccurate to speak of the dispute as one of "priorities"; of the principal contending parties to the litigation, only the purchasers have an interest in the land.

3 That the purchasers have an interest in the land appears to be accepted. It is acknowledged, indeed asserted, that, prior to the recording of the writ for levy of the property, they could have lodged a caveat. The fact that they could have lodged a caveat is relied upon argumentatively to deflect criticism of the statutory construction for which the appellants (the judgment creditors) contend. Basten JA, who dissented in the Court of Appeal, qualified his conclusion about the effect of the legislation by reference to the possibility of a caveat. He said:

"The apparent effect [of the 1976 amendments to the Act] is twofold. First, they preclude the purchaser for valuable consideration from the registered proprietor having his or her interest immediately recorded in the register, unless the application were lodged prior to the application to record the writ, or the transfer had the Sheriff's consent. Secondly, the Sheriff's purchaser will be entitled to have the transfer to him or her registered, pursuant to s 105A(1)(a) during the protected period. The purchasers from the registered owner will thus be pre-empted, unless they caveated their interest before the recording of the writ."

4 To lodge a caveat, the purchasers from the registered proprietor required a caveatable interest. What might that interest have been, if not the interest described by Crennan J? Thus, by hypothesis, the purchasers (from the registered proprietor) have a caveatable interest in the land, the judgment creditors have no interest in the land, and there is no purchaser from the Sheriff. It may be accepted that the purpose of the 1976 amendments was to protect purchasers from the Sheriff; but in the events that occurred, there are no such persons requiring protection.

5 There is no statutory provision forbidding intervention, of the kind undertaken by the Court of Appeal, to protect the interest of those who had purchased from the registered proprietor; and it is accepted that by lodging a

caveat the purchasers could have obtained such protection. The complaint is not that the orders of the Court of Appeal contradicted any provision of the Act, but that they intercepted impermissibly a statutory process which had as its ultimate object the making of a sale by the Sheriff and the bringing into existence of a transferee who would in due course enjoy the protection of s 105B(2). That appears to me to overstate the purpose and the legal effect of the statutory scheme. This is demonstrated by the consideration mentioned above, that is, the acknowledged consequences of lodging a caveat. The appellants' argument proves too much.

6 As appears from the speech of Minister Crabtree, the purpose of the 1976 amendments was to bring about the result that "a purchaser at a sale in execution takes the estate or interest then appearing upon the register"¹. The purpose was not to turn unsecured creditors into secured creditors, or to defeat the interests of people who, to the knowledge of the judgment creditors and the Sheriff, had contracted to buy the land. It was not to require the Sheriff to sell land which the Sheriff knew had already been sold to a bona fide purchaser for full value, conduct that would ordinarily be regarded as improper. Injunctive relief of the kind given by the Court of Appeal did not negate the protection intended to be conferred on a purchaser from the Sheriff; there was no such purchaser.

7 In *J & H Just (Holdings) Pty Ltd v Bank of New South Wales*², Barwick CJ said of a caveat:

"Its purpose is to act as an injunction to the Registrar-General to prevent registration of dealings with the land until notice has been given to the caveator. This enables the caveator to pursue such remedies as he may have against the person lodging the dealing for registration. The purpose of the caveat is not to give notice to the world or to persons who may consider dealing with the registered proprietor of the caveator's estate or interest though if noted on the certificate of title, it may operate to give such notice."

8 It being accepted that, if the purchasers had lodged a caveat before the writ for levy of the property was recorded, then by that form of statutory injunction they would have protected their position against a threat of sale to a third party by the Sheriff, it is difficult to see why the injunction granted by the Court of Appeal was inconsistent with the legislative scheme, or subversive of

1 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 30 September 1976 at 1293.

2 (1971) 125 CLR 546 at 552.

3.

the legislative purpose. It protected the interest of the purchasers, and it did not interfere with the legal rights of anyone else.

9

There is a further matter, also related to legislative purpose. It is referred to at the end of the reasons of Crennan J. The land was sold by the registered proprietor to the purchasers for \$1 million. It was heavily encumbered. Basten JA recorded that, on settlement, "[t]he funds distributed to those persons having secured interests [in the land] ... amounted to a figure in excess of \$900,000". The judgment debtor (the registered proprietor) had very little "equity" in the land, using that term in its colloquial or commercial sense. If the appellants succeed in their arguments, then the practical result appears to be that, at the expense of the purchasers from their debtor, they will have obtained blood from a stone. This incongruous result seems unlikely to reflect any legislative intent. The response that is offered is to say that, although the result seems unjust, it could have been avoided by the timely lodging of a caveat by the purchasers. Yet, if that is so, it shows that the legislative scheme is not as far-reaching as the appellants contend.

10 GUMMOW AND HAYNE JJ. The decision in this appeal turns upon the proper construction of provisions of the *Real Property Act* 1900 (NSW) ("the RP Act") concerning the recording of writs of execution in respect of land under the RP Act. The task of construction must be undertaken recognising and applying the fundamental proposition that:

"The Torrens system of registered title of which the Act is a form is not a system of registration of title but a system of title by registration."³

11 The essential facts of the case may be stated shortly. The appellants ("the judgment creditors") obtained a judgment in the District Court of New South Wales for a money sum against the sixth-named respondent ("the judgment debtor"). The judgment debtor was the registered proprietor of some farming land comprised in three folios of the Register maintained under the RP Act. Some months after the judgment creditors obtained judgment against the judgment debtor, but before the issue of any writ of execution, the judgment debtor agreed to sell the land to the first to fourth-named respondents ("the purchasers"). The contract of sale was completed at about 2.00 pm on 24 August 2005. The purchasers paid the balance of the purchase price to or at the direction of the vendor of the land, the judgment debtor. The judgment debtor, as vendor, gave the purchasers memorandums of transfer, procured certain mortgagees to provide discharges of their mortgages, and procured the holder of a registered lease to provide an instrument of surrender. It is not suggested that any of these documents (the transfers, the discharges of mortgages or the surrender) was not in registrable form.

12 At about 9.00 am on settlement day, the purchasers' solicitors obtained a title search with respect to the land. That search revealed no unexpected encumbrance. About half an hour after that search was made, the solicitor for the judgment creditors notified the purchasers' solicitors that the judgment creditors had an unsatisfied judgment against the judgment debtor, that a bankruptcy notice had been issued against the judgment debtor, and that the judgment creditors had obtained a charging order in respect of the deposit that had been paid under the contract of sale.

13 At about 11.53 am on that day (about two hours before the settlement of the sale of the land by the judgment debtor to the purchasers) a writ of execution, issued out of the District Court of New South Wales on the previous day at the instance of the judgment creditors, was recorded in respect of the land in the

3 *Breskvar v Wall* (1971) 126 CLR 376 at 385 per Barwick CJ. See, further, *Halloran v Minister Administering National Parks and Wildlife Act 1974* (2006) 80 ALJR 519 at 526 [35]; 224 ALR 79 at 88.

Register maintained by the Registrar-General. It was not suggested in this Court, or in the courts below, that the judgment creditors acted unconscientiously in seeking the issue of the writ, or in having it recorded in the Register.

14 On 8 September 2005, the purchasers' solicitors were told that the transfers they had lodged in respect of the land could not be registered because a writ was recorded against the title to the land. Three weeks later the purchasers commenced proceedings in the Supreme Court of New South Wales and on 7 October 2005 Campbell J granted an interlocutory injunction restraining the judgment creditors and the Sheriff of New South Wales from executing the writ⁴. Although the order that was taken out does not record any undertaking as to damages, it was common ground in the appeal to this Court that the purchasers gave an undertaking, in the usual form, as the price for obtaining the injunction. On 2 December 2005, Lloyd AJ dismissed⁵ the proceedings instituted by the purchasers, and discharged the interlocutory injunction that had been granted by Campbell J.

15 The purchasers appealed to the Court of Appeal of New South Wales and on 21 December 2005, an interlocutory injunction was granted⁶ pending the determination of the appeal, or further order, restraining the judgment creditors and the Sheriff of New South Wales from executing the writ. The purchasers gave the usual undertaking as to damages.

16 By majority (Beazley and Ipp JJA; Basten JA dissenting)⁷, the purchasers' appeal to the Court of Appeal was allowed. The Court of Appeal made a declaration that the purchasers "as holders of equitable interests in the land the subject of this appeal, are entitled to priority over any rights to the land that might be held" by the judgment creditors, and the judgment creditors and the Sheriff were restrained, for 60 days from the date of delivery of the Court of Appeal's reasons, from executing the writ of execution. It is against those orders that the judgment creditors appeal. Neither the judgment debtor nor the Sheriff played an active part in the appeal in this Court.

17 While it will be necessary to examine the reasons given by the Court of Appeal for reaching the orders against which the judgment creditors appeal, it is essential to begin with the relevant statutory provisions.

4 *Garnock v Black* [2005] NSWSC 1052.

5 *Garnock v Black (No 2)* [2005] NSWSC 1218.

6 *Garnock v Black* [2005] NSWCA 475.

7 *Garnock v Black* (2006) NSW ConvR ¶56-158.

The writ of execution

18 The writ in issue in this case was a writ for the levy of property within the meaning of Pt 8 of the *Civil Procedure Act* 2005 (NSW) ("the CPA") and was, therefore, a "writ" as that term was defined in s 3(1)(a) of the RP Act. The writ was "sufficient authority for the Sheriff ... to enter into possession of, and to sell, land of or to which the judgment debtor is seized or entitled, or which the judgment debtor may, at law or in equity, assign or dispose of"⁸. The proceeds of enforcement of a writ for the levy of property were to be applied⁹, firstly, to the Sheriff to cover the Sheriff's fees and expenses in executing the writ, secondly, to the judgment creditor to satisfy the judgment debt and thirdly, to the judgment debtor as to any amount remaining.

19 Subdivision 2 of Pt 8 of the CPA provided (s 112) for the effect of a judgment and a writ of execution on land and (s 113) for sale or mortgage by a judgment debtor of land the subject of a writ for the levy of property. The first of those provisions (s 112) must be considered; the second (s 113) need not. Section 112 provided:

- "(1) A writ of execution against land binds the land, as from the time the writ is delivered to the Sheriff, in the same way as a writ of execution against goods binds the property in the goods.
- (2) Despite subsection (1), a writ of execution does not affect the title to land acquired by a person in good faith and for valuable consideration unless, when the person acquires title, he or she has notice that such a writ has been delivered to the Sheriff and remains unexecuted.
- (3) A judgment in any action at law does not of itself bind or affect any land."

These provisions derived from s 13 of the *Judgment Creditors' Remedies Act* 1901 (NSW). Section 13 of that earlier Act had provided, by sub-s (1), that no judgment recovered or to be recovered in any action at law shall bind or affect or be deemed to have bound or affected any land in New South Wales. Sub-section (2) of s 13 had provided, in effect, that a writ of execution, when delivered to the Sheriff, shall affect and be deemed to have bound such land, *from the time of delivery*, in a like manner as a writ of fieri facias binds chattels. By fixing upon the time of delivery of the writ as the time at which the writ

8 *Civil Procedure Act* 2005 (NSW), s 106(2).

9 Uniform Civil Procedure Rules 2005 (NSW), r 39.15.

"bound" the land, the *Judgment Creditors' Remedies Act* abolished the rule, derived ultimately from the Statute of Westminster II in 1285, by which land was "affected" from the date of entry of judgment¹⁰. But neither under the old rule, nor under the *Judgment Creditors' Remedies Act*, did the judgment creditor obtain some proprietary interest in the land. Rather, the judgment creditor could take in execution what interest the judgment debtor had in the land at the time the writ was delivered to the Sheriff, and those who dealt with the debtor *after* that time would have their interests postponed to that of the judgment creditor, if the judgment creditor procured execution of the writ.

20 As Sykes recorded in his 1953 article, "The Effect of Judgments on Land in Australia"¹¹, s 189 of the *Conveyancing Act* 1919 (NSW) may have appeared to contradict s 13 of the *Judgment Creditors' Remedies Act*, by providing that no judgment shall operate as a "charge" on land unless and until the writ for the purpose of enforcing it was registered in the Register maintained under the *Conveyancing Act*. It is, however, not necessary to examine the resolution of that apparent contradiction. For present purposes, it suffices to recognise that under the *Judgment Creditors' Remedies Act* the judgment creditor obtained no interest in the land by delivering a writ of execution to the Sheriff. And likewise, when s 112 of the CPA provided that a writ of execution against land "binds" the land as from the time the writ is delivered to the Sheriff, the mere fact of delivery of the writ creates no interest in the land. If the land affected by a writ is not land under the RP Act, questions of priority of interests in the land, if the writ is executed, will be determined having regard to the fact that the standing of an execution creditor (as against third parties) is made retrospective to the date the writ is delivered to the Sheriff. But where, as here, the land in question is land under the RP Act and the writ was recorded in the Register, it is the RP Act which regulated the consequences of recording the writ and selling the land in execution.

Recording of a writ under the RP Act

21 Subject to some exceptions which are not now material, s 105(2) of the RP Act¹² permitted the Registrar-General to "record a writ in the Register pursuant to an application in the approved form". Section 105(1) provided that "[a] writ, whether or not it is recorded in the Register, does not create any interest in land under the provisions of this Act".

10 Sykes, "The Effect of Judgments on Land in Australia", (1953) 27 *Australian Law Journal* 226 at 228-229.

11 (1953) 27 *Australian Law Journal* 226 at 229-230.

12 References are to the RP Act as it stood at the time of the recording of the writ.

22 Section 105A provided for the effect of recording a writ. The central provision of that section was sub-s (2) which provided that:

"Where a writ is recorded under section 105 and a dealing (other than a dealing to which, by the operation of subsection (1), this subsection does not apply) that affects the land to which the recording relates is lodged for registration within the protected period, the Registrar-General shall not, during the protected period, register the dealing unless the writ is referred to in the dealing as if it were a prior encumbrance."

The "protected period" was defined in s 105A(9) as the period beginning when the writ is recorded in the Register and ending at the expiration of six months after the writ is recorded in the Register, or on the expiration of the writ, whichever first occurs.

23 Section 105A(2) enjoins the Registrar-General not to register a dealing which is lodged for registration within that six month period. The order of events upon which the sub-section fixes is the recording of the writ and the subsequent lodgment of a dealing. There is no further temporal criterion, being the date of any dealing which, if registered, would give title by that registration. In particular, there is no requirement that the dealing post-date the recording of the writ.

24 No warrant appears from the text or the purpose of the legislation to exclude from the prohibition upon registration imposed by the Registrar-General dealings which are lodged in the protected period but relate to a transaction, such as the settlement of the purchase in this case, occurring in the protected period, not before it commenced. However, that is how the majority in the Court of Appeal appeared to have construed s 105A(2). Later in these reasons attention is given to the difficulties said to arise unless the legislation be read in that fashion and it is seen that those difficulties are exaggerated.

25 Several kinds of dealing were excepted from the application of the general prohibition imposed by s 105A(2) prohibiting the Registrar-General, during the protected period, from registering a dealing unless the writ was referred to in the dealing as if it were a prior encumbrance. Among the excepted dealings were "a dealing which, upon registration, will record the determination of a registered lease"¹³ and "a dealing by a mortgagee or chargee in exercise of the mortgagee's or chargee's powers under a mortgage or charge that was recorded in the Register before the writ was so recorded"¹⁴. The discharges of mortgage and the surrender

13 s 105A(1)(e).

14 s 105A(1)(f).

of lease provided to the purchasers on settlement of the contract of sale they had made with the judgment debtor in this matter could, therefore, be registered despite the recording of the writ.

26 It is not necessary to notice the detail of other exceptions to the general prohibition of s 105A(2) but it is desirable to say a little more about the significance of the "protected period". First, where a writ recorded under s 105 was not, within the protected period, executed by sale, a dealing with the land lodged for registration before the writ was executed could be registered notwithstanding the recording of the writ¹⁵. Secondly, upon registration of a transfer or other dealing that for valuable consideration disposed of the whole estate or interest in land affected by a recording of a writ (not being a transfer pursuant to a sale under the writ) the writ lapsed in relation to that land unless the transfer or other dealing referred to the writ as if it were a prior encumbrance¹⁶. It follows that when the protected period had ended and the Registrar-General was no longer prohibited by s 105A(2) from registering a transfer of the land, the writ would lapse upon registration of a transfer that, for valuable consideration, disposed of the whole estate or interest in the land.

27 These provisions (of s 105A(6) and s 105C) revealed that the policy of the legislature was generally similar to the policy of other much earlier (and different) legislation concerning writs of execution and Torrens title land considered by the Privy Council in *Registrar of Titles v Paterson*¹⁷. Of that earlier legislation in Victoria, the Privy Council said¹⁸:

"The policy of the Legislature in framing this section was obviously to prevent titles from being affected by the operation beyond a limited time of unexecuted writs of execution as charges on the land; and to reconcile the rights of a judgment creditor with those of a purchaser for value, whether with or without notice. Both objects are effected by compelling the creditor to proceed within a limited time to enforce an execution by actual sale of the land affected thereby."

28 Section 105B made provisions about the registration of a transfer pursuant to a sale under a writ. Sub-section (1) of s 105B provided that a transfer pursuant to a sale under a writ is registered when it is recorded in the Register despite the

15 s 105A(6).

16 s 105C(1).

17 (1876) 2 App Cas 110.

18 (1876) 2 App Cas 110 at 118.

relevant certificate or copy certificate not having been produced. Sub-section (2) of that section set out the consequences of registration of such a transfer. It provided that:

- "(2) Upon the registration of a transfer referred to in subsection (1), the transferee holds the land transferred free from all estates and interests except such as:
- (a) are recorded in the relevant folio of the Register or on the relevant registered dealing,
 - (b) are preserved by section 42, and
 - (c) are, in the case of land comprised in a qualified folio of the Register, subsisting interests within the meaning of section 28A."¹⁹

29 Central to the proper understanding of s 105B(2) is the recognition that registration of a transfer pursuant to a sale under a writ leaves the transferee holding the land transferred "free from all estates and interests except" those specified in s 105B(2). Consonant with the fundamental premise of the Torrens system of land title, the transferee pursuant to a sale under a writ obtains a particular kind of title by registration. In particular, that transferee obtains a title that is not limited to whatever interest the judgment debtor would have been understood to have had in the land if account were to be taken of rights and interests not recorded in the Register and not preserved by the RP Act, particularly s 42.

30 The essential purpose of the application which the purchasers made to the Supreme Court was to prevent s 105B(2) taking effect according to its terms. The purchasers claimed an estate or interest not recorded in the Register and not preserved by the RP Act (whether by s 42 or otherwise) and sought to prevent execution of the writ lest a transferee pursuant to the sale by the Sheriff obtain by operation of the RP Act, and s 105B(2) in particular, a title freed from the interest they claimed. The purchasers' claim to that relief was founded only in the proposition that was reflected in the declaration made by the Court of Appeal: that "as holders of equitable interests in the land ... [they] are entitled to priority over any rights to the land that might be held" by the judgment creditors.

19 Part 4A (ss 28A-28R) establishes a system for the creation of qualified folios upon certain applications to bring the land under the provisions of the RP Act and for the entry on qualified folios of "subsisting interests".

The reasons of the Court of Appeal

31 The hinge about which the reasons of the majority turned was the proposition²⁰ that:

"prior to the registration of the writ and the payment of the balance of the purchase price, the purchasers had an equitable interest in the land."

This, without more, was held to be sufficient basis for the purchasers to take action to protect their equitable interest by restraining the judgment creditors from proceeding with a sale by the Sheriff²¹.

32 To speak of the purchasers having an "equitable interest" in the land has the difficulties and limitations identified in *Tanwar Enterprises Pty Ltd v Cauchi*²². As five members of the Court pointed out in *Tanwar*²³: "the 'interest' of the purchaser is commensurate with the availability of specific performance." Upon completion of the contract now under consideration the judgment debtor, as vendor, was bound to tender transfers in registrable form. In the events that happened, the transfers tendered could not be registered because of the intervening recording of the writ. To focus upon the rights and duties of the vendor and the purchasers, without regard to this intervening event, entails circularity of reasoning of the kind referred to in *Tanwar*.

33 Furthermore, to speak of the purchasers' rights as having "priority" over the writ or the rights of the judgment creditors imposes upon the debate an assumption, contrary to the explicit terms of the Act, that there is some competition between the holders of different interests in land. Section 105 of the RP Act makes plain that a writ, whether or not recorded in the Register, does not create any interest in land. Hence counsel placed no reliance upon s 43A of the RP Act²⁴. As interpreted in *Meriton Apartments Pty Ltd v McLaurin & Tait*

20 (2006) NSW ConvR ¶56-158 at 59,867 [33] per Ipp JA, Beazley JA agreeing.

21 (2006) NSW ConvR ¶56-158 at 59,867 [33].

22 (2003) 217 CLR 315.

23 (2003) 217 CLR 315 at 333 [53].

24 Section 43A(1) and (2) provided:

"(1) For the purpose only of protection against notice, the estate or interest in land under the provisions of this Act, taken by a person under a dealing registrable, or which when appropriately signed by or on behalf of that person would be registrable under this Act shall, before registration of that dealing, be deemed to be a legal estate.

(Footnote continues on next page)

(*Developments*) Pty Ltd²⁵, the section confers upon a purchaser who has received a registrable instrument and paid the purchase money the same protection against notice of an earlier unregistered interest as that achieved by a purchaser who acquires the legal estate at common law. In the present case, there is no competition between unregistered interests and the unregistered interest of the purchasers cannot defeat the statutory consequence of the earlier recording of the writ.

34 The premises for the reasoning of the majority in the Court of Appeal were, therefore, flawed in fundamental respects. There was no competition between interests in the land. To identify the purchasers as having (as against the judgment debtor, the vendor) an interest in the land does not identify, with sufficient particularity, the nature or extent of the rights constituting that interest. In any event, to speak of the purchasers having an "interest" in the land either assumes the answer to the very question that must be decided (what is the consequence of recording the writ) or focuses upon the position as between vendor and purchasers to the exclusion of any consideration of the consequences of recording the writ.

35 In considering the consequences that are to be attached to the recording of the writ, it is important to understand the mischief to which the relevant provisions of the RP Act were directed. It is therefore relevant to examine, as the Court of Appeal did, the history of provisions governing the effect of judgments and execution of judgments on land under the RP Act. But it is important to examine that history bearing at the forefront of consideration that it was not until 1971, by this Court's decision in *Breskvar v Wall*²⁶, that the long-running controversy about indefeasibility of title, stemming at least from *Clements v Ellis*²⁷, was finally resolved.

36 Thus when it is observed that, in 1976, new provisions concerning writs of execution were made by the *Real Property (Amendment) Act* 1976 (NSW), it is necessary to recognise that by then, it was clearly established that the title obtained by registration under the RP Act was not historical or derivative, but

(2) No person contracting or dealing in respect of an estate or interest in land under the provisions of this Act shall be affected by notice of any instrument, fact, or thing merely by omission to search in a register not kept under this Act."

25 (1976) 133 CLR 671 at 676.

26 (1971) 126 CLR 376.

27 (1934) 51 CLR 217.

was a title which registration itself created in the proprietor. The competing view, expressed by Dixon J in *Clements v Ellis*²⁸, had been rejected.

37 When introducing the 1976 amending legislation the Minister for Lands said in his Second Reading Speech²⁹:

"Since the commencement of the Real Property Act on 1st January, 1863, it has generally been acknowledged that the machinery provided by that Act for giving effect to sales in execution has not worked effectively. The breakdown is largely due to a judicial decision in *Coleman v. De Lissa*³⁰ in 1885 that, irrespective of the provisions of the Real Property Act, a transferee taking under a sale by the sheriff or other court official selling pursuant to a writ of execution acquired only the beneficial interest of the execution debtor, burdened by any unregistered interests which might exist. The result of this judicial ruling has proved disastrous. Upon such a sale, because potential purchasers are buying an asset whose value cannot be ascertained, the maximum bid is usually a couple of dollars, not sufficient to cover the advertisement and conduct of the sale. As a result the judgment creditor usually gets nothing of the amount owing to him; the judgment debtor loses ownership of the land without any reduction of the judgment debt; a purchaser from the sheriff or from the district court bailiff may get a windfall or more probably, if unregistered interests affect the land, gets nothing. The obvious solution is to provide, legislatively, that a purchaser at a sale in execution takes the estate or interest then appearing upon the register. The provisions of the bill are designed to implement this principle."

The reference to a purchaser at a Sheriff's sale taking "the estate or interest then appearing upon the register" is critical to understanding what the 1976 amending legislation was intended to achieve. It was by focusing attention on, and attaching legal consequences to, the *registered* estate or interest of a judgment debtor that the price to be paid at a sale in execution would more closely approximate the market value of the land. The judgment creditor may, then, recover what was owing and the judgment debtor would satisfy or at least reduce the judgment debt. The purchaser would obtain a title that could not be defeated.

28 (1934) 51 CLR 217 at 237.

29 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 30 September 1976 at 1293.

30 (1885) 6 LR (NSW) Eq 104.

Two hypothetical cases

38 Much of the oral argument of the appeal proceeded by examining what would have happened if orders restraining the Sheriff executing the writ had not been made in this case, and what would have happened if, before the writ was recorded on the Register, the purchasers had lodged caveats. It is convenient to address those questions now.

39 If execution of the writ had not been restrained, and the Sheriff had sold the land, a purchaser at the Sheriff's sale would have found, on searching the title, that the land was encumbered by mortgages and was subject to a registered lease. Yet, at the settlement of the purchasers' contract with the judgment debtor, the mortgagees had been paid what was owing, and the lessee had been paid a substantial sum to surrender the lease. What would a purchaser at a subsequent Sheriff's sale have been buying? What would that purchaser have paid? Would the purchase price reflect the value of vacant land, tenanted land, mortgaged or unmortgaged land? Could the mortgagees and the lessee retain what they had received from the purchasers at the judgment debtor's direction?

40 In the end, the answers to these questions are not relevant to the construction of the applicable provisions of the RP Act. They are questions that arise, and could arise, only because the purchasers settled the contract of sale with the judgment debtor in ignorance of the judgment creditors' procuring the recording of the writ. If the recording of the writ had been known, it may safely be assumed that settlement of that contract would not have proceeded. The several questions that would arise if, after the settlement of the sale, the Sheriff sold the land in execution of the writ are properly dismissed from consideration as not bearing upon the ordinary operation of the relevant provisions.

41 In any event, it is not immediately evident why the intervening settlement would have significantly reduced the price a purchaser from the Sheriff would have paid for the land, regardless of whether the discharges of mortgage and surrender of lease provided at the settlement were to be given effect according to their terms. If the surrender of the lease was effective, presumably a new purchaser would not have paid significantly less for the land than the purchasers had agreed to pay to the judgment debtor. (The purchasers from the judgment debtor had paid a substantial additional sum to the lessee to obtain vacant possession.) And if the surrender was not effective, there is again no reason to think that the land subject to lease would realise less than the price payable under the original contract, even if the new purchaser were to allow for some additional sum to be paid to secure vacant possession of the land. And so far as the registered mortgages are concerned, if the mortgagees were owed nothing by the judgment debtor, the mortgages registered on the titles would, it may be assumed, be discharged at little cost to a purchaser at the Sheriff's sale.

42 The other questions debated in argument are of more direct assistance in resolving the question of construction that must be decided. If, before the writ was recorded on the Register, the purchasers had lodged caveats on the titles to the land, claiming an interest as purchasers of the land, how would relevant provisions of the RP Act have operated?

43 The first point to notice is that the lodging of caveats and entry of particulars of caveats on the Register would not have prevented the Registrar-General from recording the writ with respect to the land³¹. The second and more directly relevant point is that, if caveats had been lodged and particulars of the caveats entered on the Register, and if the Sheriff then sought to sell the land in execution of the writ, a purchaser at the Sheriff's sale would not have been able to obtain registration of a transfer of the land so long as those caveats remained in force. It is necessary to explain the basis for this conclusion.

44 While a caveat lodged under s 74F remained in force, s 74H precluded the Registrar-General, except with the written consent of the caveator, from recording any dealing in the Register, if it appeared that the recording of the dealing was prohibited by the caveat. It would follow from s 74H, considered in isolation from the provisions of the RP Act which dealt with the recording of a writ (s 105A) and the registration of a transfer given pursuant to a sale under the writ (s 105B) that, if the purchasers in the present matter had lodged caveats over the land, before the writ was recorded, a purchaser at any sale by the Sheriff in execution of the writ could not have obtained a transfer that would be registered. Section 74H would have prohibited registration of a transfer tendered by a person who purchased the land at the Sheriff's sale.

45 The provisions of s 105A and s 105B neither required nor permitted a different outcome.

46 The prohibition in s 105A(2) focused upon a dealing that affects the land to which the recording of the writ related. As noted earlier, s 105A(2) was subject to various exceptions. But a transfer by the judgment debtor to a purchaser who had lodged a caveat and who had agreed to buy the land from the judgment debtor was not excepted from the general prohibition of s 105A(2). A transfer giving effect to a sale under the writ was excepted³². But the exception made by s 105A(1)(a) for a transfer giving effect to a sale under the writ was an exception to a prohibition: the prohibition directed by s 105A(2) to the Registrar-General against registering, during the protected period, a dealing that

31 s 74H(5)(f).

32 s 105A(1)(a).

affected the land. The temporal duration of that limitation is not immediately significant. What is important is that neither s 105A(1)(a) nor s 105A(2) *required* the Registrar-General to register a transfer giving effect to a sale under the writ. Both sub-s (1) and sub-s (2) of s 105A (and the other provisions of that section) were consistent with effect being given to the separate and distinct prohibition contained in s 74H.

47 Nor does any aspect of s 105B require some different conclusion. That section was cast in terms that first, fixed when a transfer pursuant to a sale is registered (it is registered when recorded) and second, fixed the consequences of registration (the transferee holds the land free from all estates and interests except those specified in s 105B(2)). But nothing in s 105B cut down the applicability of a prohibition against registration that would arise if the provisions of s 74H were engaged.

48 It therefore follows that if caveats had been lodged, and if the Sheriff had then sought to sell the land in execution of a writ recorded after the caveats had been lodged, a purchaser at the Sheriff's sale could not have obtained registration of a transfer so long as the caveats remained in force.

49 When this intersection of the provisions of the RP Act dealing with caveats and those dealing with the recording of writs is observed, much of the difficulty apparently presented by the circumstances of this case is resolved. In particular, the purchasers under the contract of sale made with the judgment debtor had steps available under the RP Act which, if taken, would have prevented a purchaser at a subsequent sale made in execution of the writ obtaining registration as owner of the land. In addition, of course, a search of the Register conducted immediately before settlement would have revealed the recording of the writ.

50 It also follows from this examination of the provisions of the RP Act that the bare fact that the purchasers made their contract of sale with the judgment debtor before the writ was recorded did not constitute any sufficient reason to intercept what otherwise would have been the operation of the RP Act. And, as noted earlier, it was the bare fact of making the contract before the writ was recorded that was treated as determinative by the majority in the Court of Appeal. Neither in the Court of Appeal nor on appeal to this Court did the purchasers seek to make some alternative case. In particular, it was not said that the judgment creditors' procuring of the recording of the writ was unconscionable and it was not said that the purchasers' completion of their contract with the judgment debtor put them in any better position than their making of the contract. Nor was anything said to turn on the provisions of s 43 of the RP Act³³.

33 Section 43(1) provided:

Conclusion and orders

51 For these reasons the appeal should be allowed with costs. The orders of the Court of Appeal of the Supreme Court of New South Wales made on 1 June 2006 should be set aside. In their place there should be orders:

- (a) that the appeal to that Court is dismissed with costs; and
- (b) that there be an inquiry into what damages, if any, the first to third respondents in the Court of Appeal (namely, Stuart Alexander Black, Vaughan Lee Chapman and Andrew Philip Carter) suffered by reason of either the injunction granted by Campbell J by order made on 7 October 2005 or the injunction granted by Basten JA by order made on 21 December 2005 which the appellants in the Court of Appeal (namely, Bryce Lachlan Garnock, Sarah Jane Garnock, Robert Leonard Luff and Lynette Anne Luff) ought to pay.

"Except in the case of fraud no person contracting or dealing with or taking or proposing to take a transfer from the registered proprietor of any registered estate or interest shall be required or in any manner concerned to inquire or ascertain the circumstances in or the consideration for which such registered owner or any previous registered owner of the estate or interest in question is or was registered, or to see to the application of the purchase money or any part thereof, or shall be affected by notice direct or constructive of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding; and the knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud."

52 CALLINAN J. It used to be the practice of careful conveyancers, acting for persons acquiring registrable estates or interests in Torrens title land, to lodge with the officials in charge of the Register, a caveat as soon as the agreement for the relevant dealing was made, in pre-emptive protection of their clients' prospective legal estates or interests pending completion of their agreements and registration of the instruments perfecting them. It was a further practice of those conveyancers to effect the actual settlement of the agreement by the exchange of all relevant instruments and funds at that office, simultaneously with a search of the Register, to verify that no other such caveat or record of dealing had been lodged as might obstruct, delay or detract from the registration of their clients' instruments to perfect their estates or interests.

53 The questions raised in this case would be unlikely to have arisen had those salutary practices not fallen into disuse, whether by reason of electronic recording of dealings or otherwise, although it is difficult to understand why some comparable prudent practice could not equally, and perhaps more easily, have been adopted here to accommodate electronic lodgment, searching and recording. The questions are as to the effect of the registration of a writ of execution, and the rights of purchasers whose transfer of Torrens title land was lodged subsequent to that.

Facts

54 On 17 September 2004 the appellants obtained judgment in the District Court of New South Wales for about \$228,000 against the sixth respondent and her husband.

55 Between 11 October 2004 and 19 August 2005 the appellants moved to bankrupt the sixth respondent and her husband, but later agreed to adjourn the hearing of the bankruptcy petition in exchange for assurances that the sixth respondent would sell property, including the Torrens title land in question here ("the land"), to raise funds to discharge their liabilities.

56 On 15 July 2005 the sixth respondent and the first to fourth respondents ("the purchasers") exchanged contracts for the sale of the land for the sum of \$1,000,000. A deposit of \$100,000 was paid by the purchasers.

57 On 19 August 2005 the sixth respondent's solicitors informed the appellants' solicitors that although settlement of the land would occur on 24 August 2005, the appellants would probably receive little of the proceeds. In consequence, on 23 August 2005, the appellants obtained a writ of execution from the District Court of New South Wales. The next day, the purchasers' solicitors made a search of the Register on which, until then, the writ of execution had not been registered. At about 9.20 am on 24 August 2005 the appellants' solicitors notified the purchasers' solicitors of the judgment in favour of the appellants, the currency of the bankruptcy proceedings, and that the

appellants had obtained a charging order in respect of the deposit. To reinforce that caution, the first appellant told the principal of the purchasers' solicitors that the price of the land was less than its market value, that the purchasers were related to the sixth respondent, that there were creditors other than the appellants, and that they intended to try to prevent the sale. At the purchasers' solicitors' request, the appellants' solicitors provided, by facsimile to them, a copy of the charging order. Entry of the writ of execution on the Register was effected at 11.53 am on 24 August 2005 and settlement of the sale, without any intervening search of the Register, occurred almost two hours later.

Case History

58 The purchasers commenced proceedings in the Supreme Court of New South Wales on 28 September 2005 for orders that the appellants be restrained from executing the writ, cancellation of the recording of the writ, and related relief. On 7 October 2005 the purchasers were granted an interlocutory injunction to restrain execution, but on 2 December 2005 the Court (Lloyd AJ) dismissed the proceedings and discharged the interlocutory injunction. The purchasers appealed to the Court of Appeal of New South Wales which granted an interlocutory injunction to them subject to an undertaking as to damages:

"THE COURT ORDERS THAT:

1. Upon the [purchasers], by their counsel, giving the usual undertaking in accordance with rule 25.8 of the Uniform Civil Procedure Rules 2005, the [appellants] and their servants and agents be restrained from executing registered Writ for Levy on Property AB718530 (Writ No 908/03) issued on 23 August 2005 against any of the land contained in Folios 2/594272, 109/658087 and 110/658088 and known as 'Wanaka' via Bombala, New South Wales pending determination of this appeal;
2. The costs of this application be the [purchasers] costs in this appeal;
3. The hearing of the appeal be expedited and listed on 22 February 2006; ..."

59 The purchasers' appeal to the Court of Appeal (Beazley and Ipp JJA, Basten JA dissenting) was successful. The decision of that Court was given on 1 June 2006.

60 All of the judges considered the statutory position before 1976. Ipp JA, for the majority, observed that it had been settled law in New South Wales that a Sheriff's sale under a registered writ of execution could confer no greater interest upon a purchaser than the judgment debtor had at the time of registration. That is, the purchaser under a writ of execution took the land subject to all interests,

registered or unregistered, which subsisted at the time of the registration of the writ: *Coleman v De Lissa*³⁴. The underlying principle was that equitable interests could not be seized under a writ of *fieri facias*: *Scarlett v Hanson*³⁵; *Miller & Company v Solomon*³⁶.

61 The issue, therefore, was whether the amendments to the *Real Property Act* 1900 (NSW) ("the Act") in 1976, introducing ss 105 to 105D, had the effect of reducing or postponing the rights of holders of equitable interests in land, whether they had caveated or not, during the period prescribed by the Act.

62 The purchasers argued that their equitable interests in the land as purchasers under an unexecuted but enforceable contract were untouched by the registration of the writ: in substance that the amendments made no relevant changes to the law as it had been settled for many years.

63 Ipp JA sought to reconcile s 105(1) of the Act, expressly providing as it does, that a writ does not create any interest in land, with s 112(1) of the *Civil Procedure Act* 2005 (NSW), which provides that a writ of execution "binds the land". He referred to, and effectively adopted the meaning of "binds" in its application to a writ for the sale of goods³⁷:

"A [writ of execution] 'binds' the execution debtor's goods ... from delivery of the writ to the Sheriff ... ; but this means only that no dealing with any of the goods which belong to the debtor when the writ becomes binding can alter the fact that they are goods which the writ requires the Sheriff to seize and sell. It gives the creditor neither property in the goods nor possession of them"

Ipp JA went on to say³⁸:

"[T]he 'binds the land' provision of s 112(1) of the Civil Procedure Act does not give the [appellants] priority of any kind over holders of equitable interests in the land. It follows that, subject to any provision to the contrary, express or implied, in the Real Property Act and the Civil

34 (1885) 6 LR (NSW) Eq 104.

35 (1883) 12 QBD 213.

36 [1906] 2 KB 91.

37 *Garnock v Black* (2006) NSW ConvR ¶56-158 at 59,868 [39], quoting *Hall v Richards* (1961) 108 CLR 84 at 91 per Kitto J, Dixon CJ and Windeyer J agreeing.

38 *Garnock v Black* (2006) NSW ConvR ¶56-158 at 59,868 [40].

Procedure Act, the interests of holders of equitable interests in the land have priority over whatever rights may accrue to judgment creditors upon registration of a writ"

64 His Honour was of the further opinion that the conferral of a power upon the Registrar-General, by s 105(3) of the Act, to refuse to record a writ when it appears that the land is held by the registered holder as a fiduciary, shows that the Parliament intended to protect the rights of holders of equitable interests³⁹. To allow the construction advanced by the appellants would, his Honour said, be "strange" in light of the purpose of s 105(3)⁴⁰. Accordingly, holders of equitable interests in property subject to a registered writ are entitled to orders to protect their interests notwithstanding the statutory scheme⁴¹.

65 Ipp JA expressly followed a decision of the Full Court of the Supreme Court of Queensland in *Commonwealth Trading Bank of Australia v Austral Lighting Pty Ltd*⁴² which turned upon the meaning of s 35 of the *Real Property Act 1877* (Qld)⁴³.

66 His Honour held that the insertion of ss 105-105D in 1976 did nothing to reduce the rights of holders of equitable interests in land to seek orders to protect their interests before registration of a transfer by the Sheriff. He was of the opinion that the amendment was intended to deal with the specific problem of sales at an undervalue at a Sheriff's sale; a problem that did not require "changes to legal and equitable principle otherwise than by the express terms of the amendments"⁴⁴. Given, his Honour said, that courts will recognize equitable rights and estates except insofar as they are prevented from doing so by legislation⁴⁵, the amendments were not to be interpreted to diminish the rights of the holders of equitable interests in this way.

39 *Garnock v Black* (2006) NSW ConvR ¶56-158 at 59,868-59,869 [41].

40 *Garnock v Black* (2006) NSW ConvR ¶56-158 at 59,868-59,869 [41]-[42].

41 *Garnock v Black* (2006) NSW ConvR ¶56-158 at 59,869 [43].

42 [1984] 2 Qd R 507.

43 *Garnock v Black* (2006) NSW ConvR ¶56-158 at 59,869-59,871 [44]-[56].

44 *Garnock v Black* (2006) NSW ConvR ¶56-158 at 59,871 [60].

45 *Butler v Fairclough* (1917) 23 CLR 78 at 91 per Griffith CJ.

67 Basten JA, who was of a different mind, quoted from the Second Reading Speech of the responsible Minister for the Bill introducing the amendments⁴⁶:

"Since the commencement of the Real Property Act on 1st January 1863, it has generally been acknowledged that the machinery provided by that Act for giving effect to sales in execution has not worked effectively. The breakdown is largely due to a judicial decision in *Coleman v De Lissa*^[47] in 1885 that, irrespective of the provisions of the Real Property Act, a transferee taking under a sale by the Sheriff or other court official selling pursuant to a writ of execution acquired only the beneficial interest of the execution debtor, burdened by any unregistered interests which might exist. The result of this judicial ruling has proved disastrous. Upon such a sale, because potential purchasers are buying an asset whose value cannot be ascertained, the maximum bid is usually a couple of dollars, not sufficient to cover the advertisement and conduct of the sale. As a result the judgment creditor usually gets nothing of the amount owing to him; the judgment debtor loses ownership of the land without any reduction of the judgment debt; a purchaser from the Sheriff or from the district court bailiff may get a windfall or more probably, if unregistered interests affect the land, gets nothing. The obvious solution is to provide, legislatively, that a purchaser at a sale in execution takes the estate or interest then appearing upon the register. The provisions of the Bill are designed to implement this principle."

His Honour weighed up the competing considerations⁴⁸:

"There are, in principle, three different ways of approaching the legal issues raised in this case. The first, adopting the perspective of the judgment debtor and the Sheriff, is to ask at what point in time the power of the judgment debtor, as the registered proprietor of the land, to convey the land to a third party, is suspended and vested in the Sheriff (assuming for present purposes that the withdrawal and conferral of such powers occurs at the same moment). The second approach is to look at the matter from the point of view of a purchaser from the registered proprietor and ask whether the statutory scheme demonstrates a clear intention to deprive a bona fide purchaser for value of the benefit of the purchase, obtained from the registered proprietor at a time when her power to convey an

46 *Garnock v Black* (2006) NSW ConvR ¶56-158 at 59,881 [122]. See New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 30 September 1976 at 1293.

47 (1885) 6 LR (NSW) Eq 104.

48 *Garnock v Black* (2006) NSW ConvR ¶56-158 at 59,882 [126]-[127].

23.

estate in the land was unconstrained. The third approach, is to take the perspective of a Sheriff's purchaser, namely that, by relying upon the register, he or she had no reason to suppose that the Sheriff could not convey the title of the registered proprietor, as established by the register at the date on which the writ was recorded.

There are two other perspectives which could be considered. One is that of the judgment creditor, who seeks to assert an entitlement to have the Sheriff sell the property, in knowledge of the existing equitable interest in the purchasers. Another is that of the Registrar-General, who may be invited to register a transfer to a Sheriff's purchaser, whilst a transfer to the purchasers from the registered proprietor is awaiting registration, being the document lodged earlier for registration. However, for present purposes these can be put to one side."

Referring to apparent effect, Basten JA said⁴⁹:

"The apparent effect of these provisions is twofold. First, they preclude the purchaser for valuable consideration from the registered proprietor having his or her interest immediately recorded in the register, unless the application were lodged prior to the application to record the writ, or the transfer had the Sheriff's consent. Secondly, the Sheriff's purchaser will be entitled to have the transfer to him or her registered, pursuant to s 105A(1)(a) during the protected period. The purchasers from the registered owner will thus be pre-empted, unless they caveated their interest before the recording of the writ."

Later he said⁵⁰:

"The answer to the purchasers' submission is not that they had no 'title' because they had no registered title ... Rather, they did have a title but, until their interest was recorded under the Real Property Act, it remained defeasible by the registration of another interest which obtained the protection of s 42(1) of the Real Property Act. The effect of recording the writ was to allow the Sheriff to sell precisely that interest which was vested in the then registered proprietor, subject to any registered encumbrance, but free of any unregistered estate or interest."

68 His Honour was influenced by the purpose of the amendments discernible from the Second Reading Speech and the language of the amendments themselves⁵¹:

49 *Garnock v Black* (2006) NSW ConvR ¶56-158 at 59,882 [129].

50 *Garnock v Black* (2006) NSW ConvR ¶56-158 at 59,883-59,884 [137].

"Given that the very purpose of the 1976 Amendment Act was to allow a sale in execution of a writ by the Sheriff to defeat any unregistered interest in the land, it is perhaps unfortunate that the Parliament did not expressly provide for that consequence. Nevertheless, the consequence follows inexorably from the statutory scheme and must be accepted. Unregistered interests in Real Property Act land have always been defeasible by registration of another interest. Where the holder of the unregistered interest controls the certificate of title or otherwise believes that the registered proprietor will not seek to create a later inconsistent interest which may be registered, a caveat to protect the unregistered interest may be thought unnecessary. The statutory scheme with respect to the registration of writs of levy, subverts such comfortable assumptions, by vesting in a third party, who does not hold the certificate of title and is not on the register, a right and obligation to sell the land as validly and effectually as if by the registered proprietor, as described in s 115(1) of the Civil Procedure Act."

69 Basten JA pointed out, correctly, that reliance by the majority on *Austral Lighting*⁵² was misconceived⁵³:

"With respect, that conclusion is true, so far as it goes, but it is beside the point. In neither case was the interest of the purchasers (or the mortgagee) recorded on the register prior to the recording of the writ. That part of s 35 dealing with interests notified by caveat was irrelevant even in *Austral Lighting* itself, because it was limited to caveats lodged 'prior to the date of the registration of the writ'. In the present case, the fact that the purchasers had a caveatable interest is beside the point, because they did not seek to lodge a caveat prior to the registration of the writ. The discussion ... of Part 7A of the Real Property Act, dealing with caveats, does not relevantly advance the argument."

70 His Honour summarized his conclusions in this way⁵⁴:

"On the reasoning set out above, the recording of the writ on the register prevented, for a period of six months, the registration of any prior interest acquired by the purchasers. The delivery of the writ to the Sheriff empowered that officer to sell the interest of the judgment debtor in the

51 *Garnock v Black* (2006) NSW ConvR ¶56-158 at 59,884 [138].

52 [1984] 2 Qd R 507.

53 *Garnock v Black* (2006) NSW ConvR ¶56-158 at 59,884 [140].

54 *Garnock v Black* (2006) NSW ConvR ¶56-158 at 59,886 [153]-[154].

land, as recorded in the register under the Real Property Act, subject to such encumbrances as were recorded on the title at the date of the recording of the writ.

The equitable interest of the purchasers, not being identified in a dealing lodged before the lodgement of the writ, became, upon lodgement of the writ, defeasible by a sale in execution of the writ within the protected period. Accordingly, the purchasers were not entitled to the relief they sought in the Equity Division. The appeal should be dismissed with costs."

The Appeal to this Court

71 The appellants' appeal to this Court has as its object the obtaining of damages pursuant to the detailed undertaking given by the purchasers pending the determination of the appeal to the Court of Appeal.

72 The purposes and objects of the Torrens system of title were to simplify conveyancing, to introduce a greater assurance, indeed certainty, of title and in consequence to reduce the expense of establishing and protecting title under the old land titles system. In his Second Reading Speech for the Bill which introduced the *Real Property Act 1857* (SA), the model for like legislation throughout Australia, Sir Robert Torrens said this⁵⁵:

"The system of retrospective or derivative title is the grand source of complication, uncertainty, and expense, attending the existing practice. Whenever real estate is transferred, the history of the property has to be traced back to the original grant from the Crown, through all the intermediate hands, every mortgage deed, release, conveyance, settlement, must be produced and carefully examined, to see that there are no outstanding equities affecting the title. This renders conveyancing a laborious and costly process; but if after the labour has been expended and the cost incurred, the fruits of it could be secured and held available for future occasions, we should not have so much to complain of. The grievance is, that this labour and outlay has to be repeated again and again each time the property is dealt with. The solicitor of an intending purchaser or mortgagee is not content to accept the opinion given after full enquiry by the solicitor of a recent purchaser, it may be, only ten days before. He too must be furnished with an abstract and examine all documents for himself, and this process must be gone over again and again every time the property is dealt with, each transaction adding to the

55 South Australia, Legislative Council, *Parliamentary Debates* (Hansard), 4 June 1857 at 203-204.

labour and cost of the subsequent one and increasing the risk and uncertainty. The chain of evidence, however lengthened, is no stronger than its weakest link, and in proportion as documents of title are multiplied, so are the risks that in one of them, an important word may have been omitted or some formality in execution neglected. Heavy as are the certain costs of conveyancing, the contingent risks of expensive costs in law and equity inherent in the system of derivative titles is probably much more burdensome to the land owner. The first and leading principle of the measure which I introduce is therefore designed to cut off the very source of all costliness, insecurity, and litigation by abolishing altogether the system of retrospective titles, and ordaining that as often as the fee simple is transferred the existing title must be surrendered to the Crown, and a fresh grant from the Crown issued to the new proprietor. The principle next in importance prescribes that Registration *per se* and alone shall give validity to transactions affecting land. ... This method is designed to give confidence and security to purchasers and mortgagees through the certainty that nothing affecting the title can have existence beyond the transactions of which they have notice in the memoranda endorsed on the grant."

- 73 The other States quickly moved to enact similar legislation. Of the New South Wales Act, the *Land Titles Registration and Transfer Act* 1862 (NSW), the Attorney-General, Mr Hargrave said⁵⁶:

"The object of the former bills and of the present measure [is] to facilitate and simplify the transfer of landed property; and thus [save] the country the great trouble and expense incurred in conveyancing. Measures almost identical with that introduced by Mr Torrens in South Australia [have] been passed in Queensland, Victoria and Tasmania, and, with some variations, in New Zealand, and [I feel] bound to say [that] ... the colony would be benefited by the adoption of Mr Torrens' system."

- 74 The legislation has served the country very well. It has generally achieved all of the objects that its author had hoped that it would⁵⁷.

56 *The Sydney Morning Herald*, Wednesday, 17 September 1862 at 3.

57 Sir Robert Torrens had become familiar with the system for registering ownership of and dealings with ships under merchant shipping legislation. Initially, he envisaged a system of land registration based solely on this shipping system; but in time the advice of others (notably Dr Ulrich Hübbe, a German-born lawyer living in Adelaide) persuaded him that amendments were needed, and the scheme eventually formulated was in fact modelled as much on the centuries old system of land registration in the Hanseatic towns (especially Hamburg) as on the merchant shipping system: see Butt, *Land Law*, 5th ed (2006) at 717-720 [2001]-[2004].

75 The principal way in which the legislation has achieved its objects has been the elevation of the Register above all else. The Register has the first and last word on all relevant titles and interests. In general, it operates on the basis of "first in first served". It would be unfortunate if the best of its features were to be eroded by electronic registration of dealings. The practices did vary between the States, but one useful feature was the notation in pencil on the relevant folio in the original book of titles at the Registrar-General's office of any instrument, almost immediately after it was lodged, but before it could be fully processed and registered. Inevitably, processing took some time and checking, but in the meantime the pencil notation, which could be erased on registration of the instrument, served as a notice to anybody searching the Register that a caveat or instrument had been lodged and could, on request, be inspected.

76 Provision was generally made in essentially the same sorts of ways for the lodgment and noting of a caveat, not just to forbid registration of dealings not yet the subject of an instrument lodged with the Registrar, but also to serve as a notice to anybody interested in the land, and troubling to search the Register, that there was some other dealing or transaction on foot of which any interested person should be aware. I respectfully disagree therefore with the limited operation and purpose of a caveat which Barwick CJ sought to attribute to it in *J & H Just (Holdings) Pty Ltd v Bank of New South Wales*, in which he said⁵⁸:

"Its purpose is to act as an injunction to the Registrar-General to prevent registration of dealings with the land until notice has been given to the caveator. This enables the caveator to pursue such remedies as he may have against the person lodging the dealing for registration. The purpose of the caveat is not to give notice to the world or to persons who may consider dealing with the registered proprietor of the caveator's estate or interest though if noted on the certificate of title, it may operate to give such notice."

77 That the provisions relating to caveats have utility for the two purposes is apparent from the provisions which I will relevantly set out:

"74F Lodgment of caveats against dealings, possessory applications, plans and applications for cancellation of easements or extinguishment of restrictive covenants

(1) Any person who, by virtue of any unregistered dealing or by devolution of law or otherwise, *claims to be entitled to a legal or equitable estate or interest in land* under the provisions of this Act may lodge with the Registrar-General a caveat prohibiting the recording of any

58 (1971) 125 CLR 546 at 552.

dealing affecting the estate or interest to which the person claims to be entitled.

...

(6) On the lodgment of a caveat under subsection (1), the Registrar-General must give *notice* in writing of the lodgment of the caveat to the registered proprietor of the estate or interest affected by the caveat ...

(7) In subsection (6), a reference to the registered proprietor in relation to an estate or interest referred to in that subsection includes a reference to a person who claims to be entitled to such an estate or interest under a dealing lodged in the office of the Registrar-General for recording in the Register.

...

74G Registrar-General to enter particulars of caveat lodged under section 74F in Register

For the purpose only of acknowledging the receipt of a caveat lodged under section 74F, the Registrar-General shall, if satisfied that the caveat complies with the requirements made in respect of it by and under this Act, record in the Register such particulars of the caveat as the Registrar-General considers appropriate.

74H Effect of caveat lodged under section 74F

(1) Subject to this section, while a caveat lodged under section 74F remains in force:

(a) *the Registrar-General must not, except with the written consent of the caveator:*

(i) *record in the Register any dealing, ...*

if it appears to the Registrar-General that the recording of the dealing ... is prohibited by the caveat, and

(b) the caveat does not have the effect of prohibiting:

(i) the recording in the Register of a dealing, ...

except to the extent that the recording of such a dealing ... would affect the estate, interest or right claimed in the caveat.

...

29.

(4) Where, at the time when a caveat is lodged under section 74F to protect a particular legal or equitable estate or interest in land, a dealing which relates to the same land has been lodged for recording in the Register and is in registrable form, the caveat does not prohibit the recording in the Register of that dealing.

(5) Except in so far as it otherwise specifies, a caveat lodged under section 74F to protect a particular legal or equitable estate or interest in land ... does not prohibit the Registrar-General from recording in the Register with respect to the same land:

...

(f) a writ or the cancellation of the recording of a writ in accordance with section 105D,

(g) in relation to a mortgage, charge or covenant charge recorded or lodged in registrable form before the lodgment of the caveat – a dealing effected by the mortgagee, chargee or covenant chargee in the exercise of a power of sale or other power or a right conferred by the mortgage, charge or covenant charge or by or under law,

(h) in relation to a lease recorded or lodged in registrable form before the lodgment of the caveat – a dealing effected by the lessee pursuant to a right conferred by the lease or by or under law,

...

(t) an application under section 74I(1) or (2), 74J(1) or 74JA(2) for the preparation of a lapsing notice,

...

(y) a dealing by a lessor or sub-lessor recording the determination of a lease or sublease if the caveat is not recorded against the lease or sublease that is the subject of the determination, or

(z) a dealing recording the bankruptcy of a registered proprietor.

...

74I Lapse of caveat where dealing etc subsequently lodged for recording

(1) Whenever:

(a) a dealing ... is lodged with the Registrar-General for recording or registration, and

(b) the recording of the dealing ... is prohibited by a caveat that has been lodged under section 74F,

the Registrar-General shall, on an application being made in the approved form by the registered proprietor or by any person who is or claims to be entitled to an estate or interest in the land to which the dealing ... relates, prepare for service on the caveator a notice to the effect that the dealing ... has been lodged for recording or registration and that, unless, before the expiry of 21 days after the date of service of the notice, the caveator has:

(c) obtained from the Supreme Court an order extending the operation of the caveat for such further period as is specified in the order or until the further order of that Court, and

(d) lodged with the Registrar-General the order or an office copy of the order,

the caveat will (subject to evidence of due service of the notice on the caveator) lapse in accordance with subsection (5) and the dealing or plan will be recorded or registered.

...

(3) The applicant must, within 4 weeks after the issue of the notice, lodge with the Registrar-General, in the form of a statutory declaration or such other form as the Registrar-General may accept, evidence of the due service of the notice on the caveator.

(4) If the applicant does not comply with subsection (3), the Registrar-General:

(a) may refuse to take any further action in connection with the notice prepared under subsection (1) or (2) (as relevant), or

(b) may serve on the applicant a notice allowing a further 4 weeks from the date of issue of that notice for lodgment of the evidence and, if the evidence is not lodged within the further period, may refuse to take any further action in connection with the notice prepared under subsection (1) or (2) (as relevant).

(5) If:

(a) the evidence required by subsection (3) is lodged within the time permitted by this section, and

(b) the caveator has not lodged with the Registrar-General the order or office copy of the order referred to in subsection (1) or (2) (as the case may require) in accordance with the relevant subsection,

the Registrar-General is to make a recording in the Register to the effect that the caveat has, to the extent that it would prohibit the recording of the dealing or the registration of the delimitation plan, or the granting of the possessory application, lapsed, and the caveat so lapses on the making of that recording.

74J Lapse of caveat on application of proprietor of estate or interest

(1) Where a caveat lodged under section 74F remains in force, the Registrar-General shall, on an application being made in the approved form by the registered proprietor of an estate or interest in the land described in the caveat, prepare for service on the caveator a notice to the effect that, unless the caveator has, before the expiry of 21 days after the date of service of the notice:

(a) obtained from the Supreme Court an order extending the operation of the caveat for such further period as is specified in the order or until the further order of that Court, and

(b) lodged with the Registrar-General the order or an office copy of the order,

the caveat will (subject to evidence of due service of the notice on the caveator) lapse in accordance with subsection (4).

(2) The applicant must, within 4 weeks after the issue of the notice, lodge with the Registrar-General, in the form of a statutory declaration or such other form as the Registrar-General may accept, evidence of the due service of the notice on the caveator.

(3) If the applicant does not comply with subsection (2), the Registrar-General:

(a) may refuse to take any further action in connection with the notice prepared under subsection (1), or

(b) may serve on the applicant a notice allowing a further 4 weeks from the date of issue of that notice for lodgment of the evidence and, if the evidence is not lodged within the further period, may refuse to take any further action in connection with the notice prepared under subsection (1).

(4) If:

(a) the evidence required by subsection (2) is lodged within the time permitted by this section, and

(b) the caveator has not lodged with the Registrar-General the order or office copy of the order referred to in subsection (1) in accordance with that subsection,

the Registrar-General is to make a recording in the Register to the effect that the caveat has lapsed, and the caveat so lapses on the making of that recording.

...

74K Power of Supreme Court to extend operation of a caveat lodged under section 74F

(1) Where a caveator is served with a notice prepared under section 74I(1) or (2), 74J(1) or 74JA(3), the caveator may prepare, in the manner prescribed by rules of Court, an application to the Supreme Court for an order extending the operation of the caveat.

(2) Subject to subsection (3), on the hearing of an application made under subsection (1), the Supreme Court may, if satisfied that the caveator's claim has or may have substance, make an order extending the operation of the caveat concerned for such period as is specified in the order or until the further order of that Court, or may make such other orders as it thinks fit, but, if that Court is not so satisfied, it shall dismiss the application.

(3) Unless the Supreme Court has made an order dispensing with service, it may not hear an application made under subsection (1) unless it is satisfied that all interested parties disclosed by the notice which gave rise to the application have been served with copies of the application before the hearing.

(4) An order under subsection (2) may be made ex parte or otherwise.

(5) When making an order under subsection (2), the Supreme Court may make such ancillary orders as it thinks fit.

...

74MA Application to Court for withdrawal of caveat

(1) *Any person who is or claims to be entitled to an estate or interest in the land described in a caveat lodged under section ... 74F may apply to the Supreme Court for an order that the caveat be withdrawn by the caveator ...*

(2) After being satisfied that a copy of the application has been served on the person who would be required to withdraw the caveat if the order

33.

sought were made or after having made an order dispensing with service, the Supreme Court may:

(a) order the caveator or another person, who by virtue of section 74M is authorised to withdraw the caveat to which the proceedings relate, to withdraw the caveat within a specified time, and

(b) make such other or further orders as it thinks fit.

(3) If an order for the withdrawal of a caveat is made under subsection (2) and a withdrawal of the caveat is not, within the time limited by the order, lodged with the Registrar-General, the caveat lapses when an office copy of the order is lodged with the Registrar-General after that time expires.

...

74O Restrictions on lodgment of further caveats if earlier caveat lapses or is withdrawn

(1) This section applies if a caveat lodged under a provision of this Part in respect of any particular estate or interest in land ... :

(a) subsequently lapses, or

(b) is, after an application is lodged with the Registrar-General for the preparation of a notice under section 74C(3), 74I(1) or (2), 74J(1) or 74JA(3), withdrawn under another provision of this Part, or

(c) is withdrawn or lapses under section 74MA,

and the same caveator lodges a further caveat with the Registrar-General in respect of the same estate, interest or right and purporting to be based on the same facts as the first caveat.

(2) A further caveat to which this section refers has no effect unless:

(a) the Supreme Court has made an order giving leave for the lodgment of the further caveat and the order or an office copy of the order accompanies the further caveat when it is lodged with the Registrar-General, or

(b) the further caveat is endorsed with the consent of the primary applicant or possessory applicant for, or the registered proprietor of, the estate or interest affected by the further caveat.

74P Compensation payable in certain cases

(1) *Any person who, without reasonable cause:*

(a) *lodges a caveat with the Registrar-General under a provision of this Part,*

(b) *procures the lapsing of such a caveat, or*

(c) *being the caveator, refuses or fails to withdraw such a caveat after being requested to do so,*

is liable to pay to any person who sustains pecuniary loss that is attributable to an act, refusal or failure referred to in paragraph (a), (b) or (c) compensation with respect to that loss.

(2) Compensation referred to in subsection (1) is recoverable in proceedings taken in a court of competent jurisdiction by the person who claims to have sustained the pecuniary loss.

(3) A person who is a caveator is not entitled to bring proceedings under subsection (1)(b) if that person, having had an opportunity to do so, has failed to take all reasonable steps to prevent the caveat from lapsing.

74Q Registrar-General not obliged to ensure that caveator is entitled to the subsisting estate or interest claimed in a caveat

Except to the extent of ensuring that a caveat lodged under a provision of this Part apparently complies on its face with the requirements of this Part and with the requirements of any regulations made for the purposes of this Part, the Registrar-General is not required to be satisfied that the caveator is in fact entitled to the estate or interest claimed in the caveat or otherwise as to the validity of the caveat.

74R Right to obtain injunction not affected

In relation to a caveat lodged under a provision of this Part, nothing in this Part shall be construed as preventing or restricting the caveator from applying for and obtaining from the Supreme Court an injunction for the purpose of:

(a) where the caveat relates to land that is the subject of a primary application – restraining the Registrar-General from bringing the land under the provisions of this Act,

(b) where the caveat relates to the recording of dealings – restraining the Registrar-General from recording a dealing the recording of which is prohibited by the caveat,

(c) where the caveat relates to a possessory application – restraining the granting of the possessory application,

(d) where the caveat relates to a delimitation plan – restraining the Registrar-General from registering the delimitation plan, or

(e) where the caveat relates to an application for the cancellation of the recording of an easement – restraining the cancellation of the recording of the easement, or

(f) where the caveat relates to an application for the extinguishment of a restrictive covenant – restraining the extinguishment of the restrictive covenant." (emphasis added)

78 It can be seen from those provisions that the Act contains a complete code for the lodgment, recording, maintenance, removal, renewal and lapsing of caveats. They mesh neatly with the system of registration of titles and dealings generally. In doing so, they also give effect to the purposes of the Act and the means by which it gives priority to instruments according to their time of lodgment. The provisions of the Act to which I referred in *Hillpalm Pty Ltd v Heaven's Door Pty Ltd*⁵⁹, s 31B(2) defining the "Register" to include "dealings registered ... under this or any other Act", and s 32(7) which requires the Registrar-General to maintain a record of "action taken in respect of, a computer folio and such other information, if any, relating to the folio as the Registrar-General thinks fit" similarly reflect the policy of the Act, of comprehensive notification to, and on the Register.

79 In *J & H Just (Holdings)* Barwick CJ also said this⁶⁰:

"To hold that a failure by a person entitled to an equitable estate or interest in land under the *Real Property Act* to lodge a caveat against dealings with the land must necessarily involve the loss of priority which the time of the creation of the equitable interest would otherwise give, is not merely in my opinion unwarranted by general principles or by any statutory provision but would in my opinion be subversive of the well recognized ability of parties to create or to maintain equitable interests in such lands. Sir Owen Dixon's remarks in *Lapin v Abigail*⁶¹ with which I respectfully agree, point in this direction."

80 I must respectfully disagree. What is much more likely to be subversive of the whole of the scheme of the Torrens system is that a person interested in, or entitled to deal with, land, who has not acted fraudulently, might suddenly and

59 (2004) 220 CLR 472 at 509-510 [117].

60 (1971) 125 CLR 546 at 554.

61 (1930) 44 CLR 166 at 205.

unexpectedly be saddled with, or postponed to, an equitable estate or interest in land which could have been, but was not made the subject of protection by prompt lodgment of an instrument or the filing of a caveat pending the lodgment.

81 I am not speaking of course about a contest between two holders of competing equitable interests or estates, neither of whom has thought to avail himself of either of the statutory means of protection of his interest that I have just mentioned. Subject to other registered estates or interest, their respective entitlements will fall to be adjusted according to ordinary equitable and proprietary principles.

82 It is critical to keep in mind, in cases concerning land under the Torrens system, that, as Barwick CJ said on another occasion and Gummow and Hayne JJ repeat in this case⁶²:

"The Torrens system of registered title of which the Act is a form is not a system of registration of title but a system of title by registration."

83 No one doubts that the purchasers here could have lodged a caveat immediately after the exchange of contracts. That they had that right, and that upon doing so an appropriate notation on the Register would have served as a notice to all others of their dealing with the land, is accepted on all sides. It is unnecessary in this case to define precisely the nature of their interest after the contracts were exchanged: whether it was an actual equitable interest in the land, or an interest measurable by their right, conditional or otherwise, to obtain specific performance, or whether it was an interest commensurate with the deposit that they paid, does not matter: on any view it gave rise to a caveatable interest⁶³.

84 The fact that the purchasers might have protected themselves by lodging a caveat here may not be decisive of this case, but that the Act enabled them to do so, and also provided for a comprehensive public register of information relating to the folio to which they could have had timely recourse to protect themselves, are factors relevant to the proper construction and reconciliation of the two enactments governing the respective rights and interest of the parties.

85 I do not think it is any answer to say, in relation to the omissions of the purchasers, and to other matters to which I will refer, that, effectively, the interdiction against the registration of their interest by grant of an injunction of

62 *Breskvar v Wall* (1971) 126 CLR 376 at 385.

63 See *KLDE Pty Ltd v Commissioner of Stamp Duties (Qld)* (1984) 155 CLR 288 at 296-297 per Gibbs CJ, Mason, Wilson and Dawson JJ.

the court is to be equated with, and is no different from, a caveat, and that therefore they should be entitled to registration without regard to, and not subject to, a, or the, writ of execution. An injunction does not serve as a general notice to all the sufficiently interested world, as a caveat does. An injunction may not be noted on the Register as a caveat may be. An injunction is not to be elevated to the same level as a caveat. The lodgment of a caveat does not preclude the seeking and granting, in an appropriate case, of an injunction as the provisions which I have set out show: in any event, an injunction, to be effective, needs to be sought and obtained with the same expedition as the lodgment of a caveat.

86 The relevant legislation which is analyzed in the judgment of Gummow and Hayne JJ makes it clear, that although writs of execution do not create proprietary interests in land, they are capable of registration on the title and, for the period of their effective subsistence, confer rights upon the Sheriff to deal with the land by and on the face entirely of the Register. It is therefore of no relevance that the judgment which founds the writ may not in any particular case be for a large sum of money.

87 I pointed out earlier that the majority in the Court of Appeal were influenced in reaching their conclusion by the Queensland case of *Austral Lighting*⁶⁴. In that case the Full Court of Queensland (Connolly J, Campbell CJ and Demack J agreeing) considered s 35 of the *Real Property Act 1877* (Qld) which provided that a transfer, in consequence of a sale under a writ of execution, "shall be subject to all equitable mortgages and liens notified by any caveat lodged with the Registrar-General prior to the date of the registration of the writ of execution and to all other encumbrances liens and interests notified by memorandum entered on the register".

88 It seems to me that there Connolly J failed, in the same way as the majority in the Court of Appeal did here, to give full effect to the words in the section that any transfer pursuant to a Sheriff's sale "shall be subject to all equitable mortgages and liens notified by any caveat lodged with the Register-General prior to the date of the registration of the writ of execution and to all other encumbrances liens and interests notified by memorandum entered on the register". All of this is to emphasize the importance of lodgment, and the priority that it confers. It also clearly implies that nothing lodged after the registration of the writ is to affect the title that the sale under the writ will pass, because it is only after lodgment, the step leading to notification, that "other encumbrances liens and interests" can be entered on the Register.

89 To take the view of Connolly J that resort to the Court for protection and priority of an equitable interest should be available regardless that the writ of

64 [1984] 2 Qd R 507.

execution has earlier been recorded on the Register, is to fail to give effect to the clear purposes of the legislation to clarify, provide certainty and avoid litigation⁶⁵, and indeed to the language of the section itself.

90 For these, and the reasons given by Gummow and Hayne JJ, I would allow the appeal and join in the orders proposed by them.

⁶⁵ [1984] 2 Qd R 507 at 511.

91 CRENNAN J. This is an appeal from a decision of the New South Wales Court of Appeal⁶⁶ in which a majority (Beazley and Ipp JJA; Basten JA dissenting) upheld an appeal by the present first to fourth respondents from orders made by a judge in the Equity Division of the Supreme Court (Lloyd AJ)⁶⁷ refusing to grant them relief against the present appellants.

92 As the purchasers for valuable consideration⁶⁸ of a rural property, Wanaka, the first to fourth respondents ("the purchasers") were unable to register the transfer after completion under the *Real Property Act* 1900 (NSW) ("the Act"). This was because a writ for levy of the property⁶⁹ in respect of a total amount of \$243,106.60 had been recorded in the Register on behalf of the appellants ("the judgment creditors") just over two hours before completion. In those circumstances, the purchasers sought to restrain any sale in execution of the writ together with related relief, until such time as their interest could be registered.

93 The purchasers obtained an interlocutory judgment on 7 October 2005 before Campbell J upon the usual undertaking as to damages⁷⁰. The injunction permitted the sheriff to take certain preliminary steps towards selling under the writ⁷¹, stopping short of fixing a date for sale⁷². On 2 December 2005, Lloyd AJ discharged that interlocutory judgment and dismissed the purchasers' summons⁷³. A further interlocutory injunction was obtained pending an appeal to the Court of Appeal of New South Wales⁷⁴. On the upholding of the appeal, the Court of Appeal enjoined the judgment creditors from executing the writ for 60 days⁷⁵,

66 *Garnock v Black* (2006) NSW ConvR ¶56-158.

67 *Garnock v Black (No 2)* [2005] NSWSC 1218.

68 The price was \$1,000,000.00.

69 See Pt 8 of the *Civil Procedure Act* 2005 (NSW).

70 Set out in Uniform Civil Procedure Rules 2005 (NSW), r 25.8.

71 Those permitted under Uniform Civil Procedure Rules 2005 (NSW), r 39.22(1)(a)-(d).

72 *Garnock v Black* [2005] NSWSC 1052.

73 *Garnock v Black (No 2)* [2005] NSWSC 1218.

74 *Garnock v Black* [2005] NSWCA 475.

75 *Garnock v Black* (2006) NSW ConvR ¶56-158.

which had the effect that the transfer of land to the purchasers was able to be registered.

94 Before the introduction of ss 105-105D into the Act in 1976⁷⁶ ("the 1976 provisions"), a transferee of land pursuant to a sale by the sheriff in execution of a writ acquired the beneficial interest of the judgment debtor subject to all interests, including unregistered interests, which subsisted at the time of the entry of the writ⁷⁷.

95 In an article dealing with the legislation as it was and remained until the 1976 provisions, Professor Sykes described the position of purchasers who acquired an interest in land before a writ was recorded⁷⁸:

"if a transaction conferring a proprietary interest came into existence before date of service or entry of writ it would be of no moment that the registrable instrument embodying it did not come into existence until afterwards. Thus if the debtor has agreed to sell the land before entry of writ it would not affect the priority of the purchaser that the transfer by him was executed only after such date."

96 Whilst the 1976 provisions are not entirely free of obscurities, s 105B(2) provides that, subject to certain exceptions, a transferee of land pursuant to a sale by the sheriff in execution obtained an indefeasible title free of all estates and interests. However, the question which arose for determination on this appeal in respect of the facts set out immediately below was whether the holders of an unregistered equitable interest in the land, acquired by them prior to the recording of the writ, were entitled (prior to any sale by the sheriff) to the injunctive and declaratory relief granted by the Court of Appeal⁷⁹.

76 By the *Real Property (Amendment) Act* 1976 (NSW), Sched 10; there were other provisions introduced by that Act.

77 *Coleman v De Lissa* (1885) 6 LR (NSW) Eq 104 at 111; *Re Elliot* (1886) 7 LR (NSW) 271 at 276 per Martin CJ; *Smith v Deane* (1889) 10 LR (NSW) Eq 207 at 209 per Owen CJ in Eq; *Johnson v Johnson* (1904) 4 SR (NSW) 585 at 588-589; *Re Retallack and Real Property Act* (1911) 11 SR (NSW) 332 at 333; *In re Broughton* (1916) 17 SR (NSW) 29 at 32; *Bruce v Woods* [1951] VLR 49 at 53. See also Sykes and Walker, *The Law of Securities*, 5th ed (1993) at 513-518.

78 Sykes, "The Effect of Judgments on Land in Australia: Part II", (1953) 27 *Australian Law Journal* 306 at 311.

79 *Garnock v Black* (2006) NSW ConvR ¶56-158.

The facts

97 On 15 July 2005 contracts were exchanged between the sixth respondent, Marilyn Smith, and the purchasers for the sale of Wanaka, being some 1,600 acres at South Bukalong, near Bombala, New South Wales. A deposit of \$100,000 was paid. The purchasers did not lodge a caveat against dealings with the land, as they were entitled, but not obliged, to do under s 74F(1) of the Act⁸⁰. Had the purchasers lodged a caveat that circumstance would not have prohibited the Registrar-General from recording a writ in the Register in respect of the same land (s 74H(5)(f))⁸¹.

98 Some ten months earlier, on 17 September 2004, the judgment creditors had obtained judgment in the District Court of New South Wales in the sum of approximately \$228,000 against the sixth respondent, Marilyn Smith (then the registered proprietor of Wanaka), and her husband, Peter Smith. Between October 2004 and August 2005 the judgment creditors used various processes in order to enforce the judgment debt. During this time, there was correspondence between the judgment creditors and Marilyn and Peter Smith to the effect that the latter would use the interests in Wanaka and their interests in another rural property, Toorallie, to meet the judgment debt.

99 On 26 July 2005, Marilyn and Peter Smith's legal representatives advised the judgment creditors' solicitor of the abovementioned exchange of contracts between the purchasers and the sixth respondent and also advised that settlement was to occur on 26 August 2005. That date was brought forward to 24 August 2005.

80 Under s 74F(1) of the Act a caveat may be lodged by "[a]ny person who, by virtue of any unregistered dealing or by devolution of law or otherwise, claims to be entitled to a legal or equitable estate or interest in land under the provisions of this Act". See also Butt, *Land Law*, 5th ed (2006) at 736 [2028].

81 Section 74H(5) provides:

"Except in so far as it otherwise specifies, a caveat lodged under section 74F to protect a particular legal or equitable estate or interest in land, or a particular right arising out of a restrictive covenant, does not prohibit the Registrar-General from recording in the Register with respect to the same land:

...

(f) a writ or the cancellation of the recording of a writ in accordance with section 105D".

100 Then on 19 August 2005 Marilyn and Peter Smith's legal representatives advised the judgment creditors' solicitor that, following settlement, "funds will not be available to pay your client in full". On 23 August 2005 at about 4.53 pm the judgment creditors obtained a writ for levy of the property in the District Court of New South Wales which was enforceable against any property owned by Marilyn and Peter Smith situated in New South Wales.

101 The events which took place the next day, 24 August 2005, and their sequence, are important. At 8.53 am the solicitor for the purchasers conducted a title search for Wanaka, the settlement being set down for 11.00 am. The search revealed prior encumbrances: two mortgages, a lender's caveat and a leasehold interest. A special condition in the contract provided that the lease registered on the title "must be surrendered on or before completion". The lease was surrendered on 24 August 2005 on payment of consideration of \$109,258.19.

102 That same morning the judgment creditors obtained a charging order against the deposit ("the charging order"). At about 9.30 am the judgment creditors' solicitor made a telephone call to the purchasers' solicitor. He advised her that he acted for the judgment creditors in relation to the judgment debt owed to them by Marilyn and Peter Smith, that a bankruptcy notice had been issued against Marilyn Smith, that the sale of Wanaka might be set aside if completed and that the charging order had been obtained. However, he did not notify her of the writ. She then conducted a bankruptcy search for Marilyn Smith at about 9.48 am. No entries were disclosed. She requested, and the judgment creditors' solicitor provided, a copy of the charging order between about 10.40 am and 11.00 am.

103 At approximately 11.30 am the writ was lodged with the Registrar-General to be recorded in the Register, which occurred at about 11.53 am. At about 12.15 pm the purchasers' solicitor sent a facsimile to the judgment creditors' solicitor notifying him that she had received instructions to proceed to settlement which had been delayed in the abovementioned circumstances. The purchase was completed at about 2.00 pm. The proceeds of the balance of the purchase price were paid to discharge various encumbrances.

104 The purchasers' solicitor obtained the documents received on completion from her Sydney agent on 25 August 2005 and forwarded these to her Sydney registration agents, Lawpoint Galloways, the following day. The writ was delivered to the sheriff on 26 August 2005. On 8 September 2005 Lawpoint Galloways informed the purchasers' solicitor that they had been unable to register the transfer as the writ was recorded on the Register. On 9 September 2005 the purchasers applied to lodge a caveat, the legal effect of which would have been

to obtain "a statutory injunction"⁸². The recording of the writ precluded this course.

105 On 28 September 2005 the purchasers commenced proceedings in the Supreme Court of New South Wales (Equity Division) to enjoin the judgment creditors and their agents from executing the writ and for ancillary declaratory relief. The ensuing controversy between the purchasers, as holders of an unregistered equitable interest in the land, and the judgment creditors, who had the benefit of a writ for levy of the property recorded on the Register, involved questions of statutory construction.

106 While the parties construed the purposes of the 1976 provisions differently, and contended for different interpretations of s 105A(2), there was no dispute about certain uncontroversial principles, with which one commences a consideration of the submissions on the appeal. It was accepted that the Torrens system is a system of "title by registration"⁸³ and that indefeasibility of title was "the foundation of the Torrens system of title"⁸⁴. It was also not in dispute that the purchasers had a "caveatable interest" in Wanaka once they had exchanged contracts and paid the deposit of \$100,000⁸⁵ thereby, before completion, acquiring an equitable interest in land commensurate with what a court of equity would order to enforce the contract by way of specific performance⁸⁶, injunction or otherwise⁸⁷.

82 *Hall v Richards* (1961) 108 CLR 84 at 92 per Kitto J.

83 *Breskvar v Wall* (1971) 126 CLR 376 at 384 per Barwick CJ.

84 *Bahr v Nicolay (No 2)* (1988) 164 CLR 604 at 613 per Mason CJ and Dawson J.

85 Woodman and Nettle, *The Torrens System in New South Wales*, 2nd ed (2003) at [74F.100]; Butt, *Land Law*, 5th ed (2006) at 736 [2028].

86 *Tanwar Enterprises Pty Ltd v Cauchi* (2003) 217 CLR 315 at 334 [56] per Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ.

87 *Chan v Cresdon Pty Ltd* (1989) 168 CLR 242 at 253 per Mason CJ, Brennan, Deane and McHugh JJ; *Stern v McArthur* (1988) 165 CLR 489 at 522 per Deane and Dawson JJ; *Legione v Hateley* (1983) 152 CLR 406 at 446 per Mason and Deane JJ.

Background to the legislation

107 As they were entitled to do⁸⁸, the judgment creditors relied on the explanation of the purpose of the 1976 provisions given by the Minister for Lands, in the Second Reading Speech⁸⁹:

"Since the commencement of the Real Property Act on 1st January, 1863, it has generally been acknowledged that the machinery provided by that Act for giving effect to sales in execution has not worked effectively. The breakdown is largely due to a judicial decision in *Coleman v De Lissa* in 1885 that, irrespective of the provisions of the Real Property Act, a transferee taking under a sale by the sheriff or other court official selling pursuant to a writ of execution acquired only the beneficial interest of the execution debtor, burdened by any unregistered interests which might exist. The result of this judicial ruling has proved disastrous. Upon such a sale, because potential purchasers are buying an asset whose value cannot be ascertained, the maximum bid is usually a couple of dollars, not sufficient to cover the advertisement and conduct of the sale. As a result the judgment creditor usually gets nothing of the amount owing to him; the judgment debtor loses ownership of the land without any reduction of the judgment debt; a purchaser from the sheriff or from the district court bailiff may get a windfall or more probably, if unregistered interests affect the land, gets nothing. The obvious solution is to provide, legislatively, that a purchaser at a sale in execution takes the estate or interest then appearing upon the register. The provisions of the bill are designed to implement this principle."

108 The Minister for Lands also said "the priority of the interest taken by a purchaser at a sale under a writ attaches at the time of the sale"⁹⁰.

109 *Coleman v De Lissa*⁹¹ concerned a priority contest between the plaintiff who was sold land by the registered proprietor under the Torrens system and failed to have the transfer registered, and a defendant who had purchased the property at a sale conducted by the sheriff pursuant to a writ. It was held that at

88 See s 34 of the *Interpretation Act* 1987 (NSW).

89 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 30 September 1976 at 1293.

90 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 30 September 1976 at 1294.

91 (1885) 6 LR (NSW) Eq 104.

the time of the sale by the sheriff, the registered proprietor had already disposed of her interest in the land⁹².

110 Prior to the enactment of the 1976 provisions, whilst a purchaser at a sheriff's sale obtained the benefits of indefeasibility in accordance with s 42 of the Act, according to the decision in *Coleman v De Lissa* such a purchaser was at risk of losing priority to the holder of an unregistered prior interest in the period between acquiring the property at a sheriff's sale and registration of the transfer from the sheriff. Thus the Minister for Lands envisaged much better "machinery" provisions designed to ensure that a purchaser at a sheriff's sale obtained priority over unregistered prior interests so as to encourage such a purchaser to offer full value at such a sale.

The legislation

111 It is convenient to extract the following applicable provisions⁹³:

"105 Recording of writ in Register

- (1) A writ, whether or not it is recorded in the Register, does not create any interest in land under the provisions of this Act.

...

- (3) Where application is made under subsection (2) for the recording of a writ and it appears to the Registrar-General that the land to which the application relates is held by the registered proprietor in a fiduciary capacity the Registrar-General may refuse to record the writ unless it is proved to the Registrar-General's satisfaction that the writ was issued pursuant to a judgment against the registered proprietor in that fiduciary capacity.

...

- (6) Where, at the time of lodgment of an application for the recording of a writ, a dealing for valuable consideration affecting the land ... is awaiting registration and is in registrable form, the Registrar-General shall not record the writ [subject to exceptions of no relevance here].

92 (1885) 6 LR (NSW) Eq 104 at 111.

93 As they stood at 24 August 2005 when the writ was recorded.

...

105A Effect of recording writ

...

- (2) Where a writ is recorded under section 105 and a dealing (other than a dealing to which, by the operation of subsection (1), this subsection does not apply) that affects the land to which the recording relates is lodged for registration within the protected period, the Registrar-General shall not, during the protected period, register the dealing unless the writ is referred to in the dealing as if it were a prior encumbrance.⁹⁴

...

- (6) Where a writ recorded under section 105 has not, within the protected period, been executed by sale of the land to which the recording relates, a dealing with that land lodged for registration before the writ is so executed may be registered notwithstanding the recording of the writ.

...

- (9) In this section, *protected period*, in relation to a writ, means the period:
 - (a) that begins when the writ is recorded in the Register, and
 - (b) that ends at the expiration of 6 months after the writ is recorded in the Register, or on the expiration of the writ, whichever first occurs.

105B Registration of transfer pursuant to sale under writ

...

- (2) Upon the registration of a transfer referred to in subsection (1) [a transfer pursuant to a sale under a writ], the transferee holds the land transferred free from all estates and interests except such as:

⁹⁴ Section 105A(1)(a)-(r) sets out numerous exceptions to the provisions of s 105A(2), none of which, in terms, cover the position of the purchasers here.

47.

- (a) are recorded in the relevant folio of the Register or on the relevant registered dealing,
- (b) are preserved by section 42, and
- (c) [not presently relevant]."

112 It can also be noted that whereas custody of a certificate of title can protect holders of an unregistered interest⁹⁵, s 105B(1) permits registration of a transfer from the sheriff without the production of a certificate of title.

113 Section 105C provides for lapsing of the writ, and s 105C(1) provides that upon registration of a transfer or dealing for valuable consideration of the land affected by the recording of a writ (such as the purchasers here), the writ lapses unless the transfer or dealing refers to the writ as a prior encumbrance. Section 105D provides for the cancellation of the recording of a writ.

The controversy

114 Relying on s 105A(2), the primary judge concluded that having recorded the writ, which precluded the purchasers from registering their interest during the protected period, the judgment creditors were entitled to have the sheriff effect a sale in accordance with the statutory procedures laid down in ss 105-105D.

115 On the purchasers' appeal, the majority in the Court of Appeal (Ipp JA with whom Beazley JA agreed) found that none of the 1976 provisions relied on by the judgment creditors expressly or impliedly prevented the purchasers, prior to a sale by the sheriff, from taking action to protect their equitable interest by restraining the judgment creditors and their agents from proceeding with a sale⁹⁶. This conclusion was based on the Court's ability to "recognize equitable estates and rights except so far as they are precluded from doing so by the Statutes"⁹⁷. Another consideration was that s 105(3) of the Act (providing that the Registrar-General may refuse to record a writ where it appears the land was held by the registered proprietor in a fiduciary capacity) signified an intention on the part of the legislature to protect equitable interests such as the interest obtained on an exchange of contracts⁹⁸. The majority approved the opinion of Connolly J

95 As, for example, in *J & H Just (Holdings) Pty Ltd v Bank of New South Wales* (1971) 125 CLR 546.

96 *Garnock v Black* (2006) NSW ConvR ¶56-158 at 59,871-59,872 [60]-[64].

97 *Butler v Fairclough* (1917) 23 CLR 78 at 91 per Griffith CJ.

98 *Garnock v Black* (2006) NSW ConvR ¶56-158 at 59,868-59,869 [41]-[42]; *Tanwar Enterprises Pty Ltd v Cauchi* (2003) 217 CLR 315 at 331 [48] per Gleeson CJ, (Footnote continues on next page)

in *Commonwealth Trading Bank of Australia v Austral Lighting Pty Ltd*⁹⁹ ("*Austral Lighting*") dealing with a priority contest between a holder of an unregistered interest and a judgment creditor on whose behalf a writ had been recorded. The relevant provision¹⁰⁰, different in terms from s 105B(2), provided that a registered transfer pursuant to a sheriff's sale was subject to equitable interests notified by caveat. No provision like s 105A(2) was under consideration. In circumstances where the holder of a prior interest failed to lodge a caveat, Connolly J held that the holder of an unregistered interest created prior to the lodgment of the writ of execution may set up that interest against a judgment creditor until a sheriff's transfer has been registered¹⁰¹.

- 116 Basten JA, dissenting, held that although the purchasers' interest in Wanaka arose prior to that of the judgment creditors, this is irrelevant under the statutory scheme set up by the 1976 provisions. He concluded that the purchasers' interest was to be treated like any other equitable interest not recorded on the Register, and would be defeasible by a sale by the sheriff during the statutory "protected period"¹⁰². His Honour said the purchasers' argument reflected the position before the 1976 provisions, as explained by Professor Sykes¹⁰³, and he regarded *Austral Lighting*¹⁰⁴ as a clear statement of accepted principle before the 1976 provisions¹⁰⁵. Basten JA said the clear legislative intention of the 1976 provisions "was to allow a Sheriff's purchaser to take, through the Sheriff, the interest of the registered proprietor, subject to whatever limitations or encumbrances might be recorded on the register, but without the risk of unregistered interests taking priority"¹⁰⁶.

McHugh, Gummow, Hayne and Heydon JJ; *KLDE Pty Ltd v Commissioner of Stamp Duties (Q)* (1984) 155 CLR 288 at 296 per Gibbs CJ, Mason, Wilson and Dawson JJ.

99 [1984] 2 Qd R 507.

100 *Real Property Act 1877 (Q)*, s 35.

101 [1984] 2 Qd R 507 at 511-512.

102 *Garnock v Black* (2006) NSW ConvR ¶56-158 at 59,886 [153].

103 Sykes, "The Effect of Judgments on Land in Australia: Part II", (1953) 27 *Australian Law Journal* 306.

104 [1984] 2 Qd R 507.

105 *Garnock v Black* (2006) NSW ConvR ¶56-158 at 59,885 [143].

106 *Garnock v Black* (2006) NSW ConvR ¶56-158 at 59,883 [132].

The submissions in this Court

117 The judgment creditors adopted the reasoning and conclusions of Basten JA in the Court of Appeal and contended that the purchasers were not entitled to protect their unregistered interest in the land by an injunction. The effect of this was to defeat the "interest" of the judgment creditors arising from the recording of the writ. The interest of the judgment creditors was said to be an interest, not in the land, but an interest which enables a statutory process to take place culminating in title¹⁰⁷. It was submitted that the 1976 provisions constituted a statutory scheme, the purpose of which was to enable the sheriff to transfer to a purchaser at a sheriff's sale a title unencumbered by unregistered interests. Section 105A(2) was relied on to support that submission as it precluded the purchasers from recording their interest in "the protected period" described as the period during which their interest was defeasible by the registration of an interest obtained from a sale by the sheriff. The judgment creditors construed s 105B(2) as evincing a legislative intention to alter, not only the interests and right of holders of unregistered equitable interests after the registration of transfer to the sheriff's purchaser, but also to prevent holders of unregistered equitable interests from asserting their interest against a judgment creditor during the protected period.

118 The purchasers contended that s 105A(2) did not have the significance ascribed to it by the judgment creditors. It was submitted that s 105A(2) did not give the judgment creditors any entitlement to insist upon a sale by the sheriff which would defeat unregistered estates or interests created prior to the recording of a writ. It was asserted that the fact that s 105A(2) deferred registration of the purchaser's entitlement did not deny the entitlement. It was submitted that nothing in the 1976 provisions conferred some priority or "indefeasibility of title" upon a judgment creditor. Rather, it was submitted that the purpose of s 105B(2) was to confer on a transferee from the sheriff, indefeasibility of title corresponding with that generally afforded by s 42; and it was this aspect of the statutory scheme which constituted the "reform" envisaged by the Minister. It was contended, more generally, that the statutory scheme evinced in the 1976 provisions simply provided machinery whereby steps towards a sale by the sheriff in execution of a writ could be taken in an orderly manner. Section 112(1) of the *Civil Procedure Act* 2005 (NSW) ("the CPA"), which provides that a writ of execution "binds" the land from the time the writ is delivered to the sheriff, was relied on as complementing these submissions. Further, it was said that the interpretation of s 105B(2) for which the purchasers contended was reinforced by s 43A of the Act and s 115(1) of the CPA.

107 This accords with the description by Kitto J of the interest of a judgment creditor after a seizure of property by the sheriff in *Hall v Richards* (1961) 108 CLR 84 at 91-92.

The question

119 Simply stated, the question on the appeal to this Court was whether the purchasers were entitled to an injunction, before a sale to any other purchaser, to restrain the judgment creditors and the sheriff from execution of the writ which was recorded on the Register, after the purchasers had acquired an interest in the land, but before they had registered that interest.

120 In the reasons which follow considerations of the purpose¹⁰⁸ of the 1976 provisions, their context¹⁰⁹, which includes consideration of the prior state of the law, the mischief which the provisions were intended to remedy¹¹⁰ and fairness¹¹¹ lead to the conclusion that the result in the Court of Appeal should be upheld. The appeal to this Court should be dismissed.

The interest of the judgment creditors – s 105(1)

121 Section 105(1) of the Act makes it clear that a writ, recorded or not, does not create any proprietary interest in a judgment creditor. The ownership of the land passes from the judgment debtor to any purchaser via the sheriff, who has the power under the CPA to enter into possession of and sell the land¹¹². Section 112(1) of the CPA complements s 105(1) by providing that a writ delivered to the sheriff "binds" the land. As explained by Kitto J in *Hall v Richards*¹¹³ a "binding" of property mentioned in a writ occurs both with the delivery of a writ to the sheriff and the actual seizure of the property by the sheriff. "Binding" means that no dealing with the property by the judgment

108 Section 33 of the *Interpretation Act* 1987 (NSW) provides "[i]n the interpretation of a provision of an Act ... a construction that would promote the purpose or object underlying the Act ... (whether or not that purpose or object is expressly stated in the Act ...) shall be preferred to a construction that would not promote that purpose or object."

109 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 368 [21] per Brennan CJ, 381 [69] per McHugh, Gummow, Kirby and Hayne JJ.

110 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 384 [78] per McHugh, Gummow, Kirby and Hayne JJ.

111 Dixon CJ pointed out in *Commissioner for Railways (NSW) v Agalinos* (1955) 92 CLR 390 at 397 that "fairness" is one of the guides to the meaning of legislative provisions.

112 Sections 106(2)(d), 114 and 115 of the CPA.

113 (1961) 108 CLR 84 at 91.

debtor when the writ becomes "binding" can alter the fact that the property referred to in the writ is that which the sheriff is required to seize and sell. Seizure places the property *in custodia legis*. As Kitto J explained, "[b]y the seizure the creditor acquires the legal right to have the sheriff's duty performed"¹¹⁴.

122 In the case of land where the sheriff enters into possession, the creditor acquires a legal right against the sheriff to have the land sold and to be paid out of the proceeds. That legal right is not an interest in the land, a position recognised expressly in s 105(1). Whilst ss 105 and 105A eschew any reference to a writ "binding" the land, ss 105(2) and 105A(2) are machinery provisions which have the effect that the land is "bound" by the writ and therefore, subject to exceptions in s 105A(1), the judgment debtor cannot deal with the land during the protected period.

Land held in trust – s 105(3)

123 In coming to his conclusions in the Court of Appeal, Ipp JA treated s 105(3) as evidencing a legislative intention not to absolutely exclude consideration of prior unregistered equitable interests under the statutory scheme constituted by the 1976 provisions¹¹⁵. I agree. Whilst s 105(3) might be construed narrowly as referring only to matters which appear on the face of the Register, such as a description of a registered proprietor as a trustee, such a provision nevertheless raises the possibility that a beneficiary under a trust, for example, is not precluded by the 1976 provisions from approaching the Court for protection of his or her interest.

Protected period – s 105A(2) and (9)

124 As the Minister explained when introducing the 1976 provisions, a protected period during which the writ "bound" the land and during which the sheriff could execute the writ was not new¹¹⁶. What is being "protected" during

114 *Hall v Richards* (1961) 108 CLR 84 at 91.

115 *Garnock v Black* (2006) NSW ConvR ¶56-158 at 59,869 [42], 59,871-59,872 [60]-[61].

116 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 30 September 1976 at 1293, and see former s 105(5) of the Act, as repealed by the *Real Property (Amendment) Act 1976* (NSW). See also *Re Bosquet* (1883) 17 SALR 173; *National Bank of Australasia v Morrow* (1887) 13 VLR 2 at 7-8; *Clarke v Roe and Falkner* (1899) 1 WALR 123 at 127-128 per Stone J, 128-129 per Hensman J; *Austral Lighting* [1984] 2 Qd R 507 at 510; *Re Sang* (1985) Q ConvR ¶54-191; *McDonald v McNally* [1990] WAR 365 at 367-369.

the protected period is the potential priority of a purchaser from the sheriff against any dealings in the land by the judgment debtor during the protected period. Here the judgment debtor disposed of the land under a specifically enforceable contract before the writ was recorded and before the protected period commenced to run.

The exceptions to the operation of s 105A(2)

125 Numerous exceptions to the operation of s 105A(2) are referred to in s 105A(1). These function as statutory directions to the Registrar-General and govern disparate situations. For example, s 105A(1)(p) excepts from the provisions of s 105A(2) "a dealing the registration or recording of which is ordered or directed under section 122(4), 124 or 138". Although of no immediate application here, the nature of that exception, and the extent of the exceptions taken as a group, show that whilst the Registrar-General is comprehensively directed in respect of a range of situations, such policy considerations as inform s 105A(2) will be tempered in a number of specific circumstances. That said, it must be recognised that many of the exceptions are obvious and do not necessarily depend on any action by the judgment debtor.

126 The machinery of s 105A(1) operates such that a judgment creditor's rights on the recording of a writ do not include a right to have the sheriff transfer land to a purchaser free of all interests, except those shown on the Register as at the date of the recording of the writ. Further, s 105A(1) and (2) considered together achieve the effect that the priority of a purchaser from a sheriff over holders of other interests (including a prior purchaser for valuable consideration whose interest is unregistered) attaches on the sale to a purchaser by the sheriff¹¹⁷. It is at that moment that protection is accorded to the purchaser from the sheriff against a prior purchaser for value whose interest is unregistered.

Effect of registration of a transfer from a sheriff – s 105B

127 Section 105B states the requirements for registration of a transfer from the sheriff and the effect of the registration. Whilst not using the epithet "paramount" (to be found in s 42) to describe the interest or estate of a purchaser from a sheriff upon registration, s 105B incorporates s 42 and operates in the same way as s 42 as the source of indefeasibility in favour of a purchaser from the sheriff.

128 The purpose of the detailed machinery of the 1976 provisions is to ensure that at the date of a sale by the sheriff a purchaser from the sheriff takes priority

¹¹⁷ As contemplated by the Minister for Lands: New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 30 September 1976 at 1294.

over prior unregistered purchasers for valuable consideration (or other interest holders). A purchaser from a sheriff under the previous regime acquired indefeasibility upon registration (s 42), but had no protection against prior purchasers for valuable consideration in the interim between the sale by the sheriff and registration of the transfer. A purchaser from a sheriff under the 1976 provisions not only acquires indefeasibility on the registration of the transfer (s 105B(2)) but also has priority over prior unregistered purchasers (or other interest holders) from the date of sale as a result of the operation of the machinery provisions (particularly s 105(2) and s 105A(1), (2) and (9)). Thus the effect of *Coleman v De Lissa*¹¹⁸ is overcome. These provisions work to ensure that, prior to the registration of a transfer from the sheriff, a purchaser from the sheriff is not vulnerable to a contest between unregistered interests in which the later purchaser from the sheriff may be defeated by a prior purchaser, who has not registered a transfer.

129 The 1976 provisions construed as described do not preclude the holders of prior unregistered interests such as a beneficiary under a trust, a mortgagee holding an unregistered mortgage (with or without a certificate of title) or a purchaser, as here, with unregistered transfer documents, from seeking to raise their interests against a judgment creditor prior to any sale by the sheriff.

130 The detailed operation of the 1976 provisions will, however, preclude the holders of such interests from setting them up against a purchaser between the date of the sale by the sheriff and the registration of the transfer. That is the import of the relationship between ss 105A(2) and 105B(2) which distinguishes the 1976 provisions from the repealed legislation, the position according to *Coleman v De Lissa*¹¹⁹ and the situation considered in *Austral Lighting*¹²⁰ which was only concerned with a provision protecting a purchaser from a sheriff from prior purchasers after the transfer from the sheriff had been registered.

The purchasers' failure to lodge a caveat

131 The conclusions reached render it unnecessary to consider the purchasers' failure to lodge a caveat when contracts were exchanged or at any time thereafter before the recording of the writ. It was the recording of the writ, not the failure to caveat, which gave rise to the possibility that another interest could be created,

118 (1885) 6 LR (NSW) Eq 104.

119 (1885) 6 LR (NSW) Eq 104.

120 [1984] 2 Qd R 507.

not by the registered proprietor, but by the sheriff¹²¹. Consideration of the precise interaction between ss 74F, 74H including 74H(5)(f), 105A(1)(a) and 105B(2) can be undertaken as necessary on another occasion.

132 It also does not matter that the purchaser failed to make a second search of the Register just before completion.

133 A further matter deserves mention. If s 105A(2) operated to preclude the purchasers from setting up their prior unregistered interest against the judgment creditors during the protected period but prior to a sheriff's sale, one possible result is that at a sheriff's sale, during that period, the price achieved for the land would be in the order of the price paid by the purchasers, \$1,000,000. The prior encumbrances had all been cleared on completion of the sale to the purchasers on the same day as the recording of the writ. Alterations to the interests of holders of prior encumbrances were able to be recorded on the Register under s 105A(1)¹²². The result would be that after a sale, payment of the sheriff's fees and expenses and payment to the judgment creditors, the sheriff would be obliged to pay the balance to the judgment debtor¹²³. Neither the detail of the 1976 provisions nor established principles concerning the Torrens system suggest that the legislature intended that result.

Order

134 I would dismiss the appeal with costs.

¹²¹ Cf *Butler v Fairclough* (1917) 23 CLR 78; *Abigail v Lapin* (1934) 51 CLR 58; *Osmanoski v Rose* [1974] VR 523.

¹²² Section 105A(1)(e) covers determination of a lease; s 105A(1)(f) covers dealings by a mortgagee or chargee.

¹²³ Uniform Civil Procedure Rules (2005) NSW, r 39.15.