

# KQ NEWSLETTERS

November 2007

## CONVEYANCING – LODGEMENT OF CAVEATS BETWEEN EXCHANGE AND COMPLETION

A recent High Court decision in the matter of *Black v Garnock* (2007) HCA 31 makes it clear that it is now prudent conveyancing practice to lodge a caveat upon exchange of contracts and ensure that a final search of the Land and Property Information Register is delayed until as late as possible at the time of settlement.

### BACKGROUND TO THE CASE

Two hours before Mr and Mrs Smith were due to settle the sale of their farm in Southern NSW to the Garnocks on 24 August 2005, a Creditor of Mrs Smith ('the Creditor') registered a Writ for the levy of property from the District Court of NSW on the property to be sold.

Settlement occurred on 24 August 2005, however the Garnocks were subsequently prevented from registering the Transfer on title which would enable the property to be transferred into their name as the Creditor's Writ was already registered on title and thus took precedence over the unregistered Transfer.

The Garnocks began proceedings to stop the creditors from executing the Writ and selling the property. On 1 August 2007, by a 3-2 majority, the High Court held that the prior unregistered interest of the Garnocks was defeated by the subsequent, but registered Writ on title of the Creditors.

The High Court held that the Writ took priority because it was recorded on the land, it was recorded before the attempted registration of the sale to the purchasers and it was irrelevant that the actual date the contracts were exchanged preceded the issue and registration of the Writ.

The practical effect of the decision of the High Court in *Black v Garnock* is:

1. Purchasers and mortgagors are exposed to being defeated by creditors of the vendor in the event that a Writ for the levy of property is registered on title in the period between exchange of contracts and registration on title of the purchaser's interest, the result being that the purchaser is not entitled to exercise the right to sue under the contract for sale of land or specific performance of the contract and is exposed to the possibility of losing their deposit and or other monies invested in the property after exchange of contracts.
2. As a consequence a caveat on title should be lodged immediately after exchange of contracts.
3. Final title searches of the register should be completed as near as possible to the time of settlement.

### RECOMMENDATION

As a result of the decision in *Black v Garnock* KQ Lawyers now strongly recommend and consider it to be best practice to lodge registration of a Caveat on title immediately following an exchange of contracts in order to protect a purchaser's equitable rights above those of potentially interested third parties in the subject property.

If you have any questions in relation to the impact on purchasing your property as a result of the decision in *Black v Garnock*, please do not hesitate to contact Kelli Grennan or Paul Quinn of this office.

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