

BLACK & ORS v GARNOCK & ORS (S401/2006)

Court appealed from: New South Wales Court of Appeal

Date of judgment: 1 June 2006

Date of grant of special leave: 10 November 2006

This application involves the interpretation of section 112(2) of the *Civil Procedure Act 2005* (NSW) ("the Civil Procedure Act") and section 105 of the *Real Property Act 1900* (NSW) ("the Property Act"). It also involves the nature of a purchaser of land's interest under a contract exchanged but not completed prior to the recording of a writ of execution pursuant to section 105 of the Property Act.

The Applicants are judgment creditors of the Sixth Respondent who is the registered proprietor of land at Bukalong, NSW. The Sixth Respondent sold the land to the First to Fourth Respondents ("the Purchasers"). A search of the register was completed on the morning of the settlement, but unbeknown to the Purchasers, the Applicants registered a writ for levy on the property several hours later (and prior to the completion of the sale). The Registrar declined to register the transfer and the Purchasers sought declarations that they were entitled to priority over the judgment creditors. They also sought an injunction restraining the execution of the writ against the property.

Justice Lloyd dismissed the Purchasers' application on the basis that the protection provided by section 112(2) of the Civil Procedure Act was restricted to title obtained upon registration. His Honour also held that section 105A(2) of the Property Act was unambiguous, which meant that the Purchasers' transfer could not be registered unless the writ was recorded as a prior encumbrance.

On 1 June 2006 the Court of Appeal (Beazley and Ipp JJA, Basten JA dissenting) allowed the Purchasers' appeal. The Court agreed that the definition of "title" in section 112(2) of the Civil Procedure Act included unregistered interests in land. The majority also found that the delivery of a writ of execution to the Sheriff did not give a judgment creditor priority over equitable interests. Furthermore, none of the provisions relied upon by the judgment creditors expressly or impliedly prevented the Purchasers from taking action to restrain any sale by the Sheriff.

Justice Basten however would have dismissed the Purchasers' appeal. His Honour held that the amendments to the Property Act precluded a purchaser from having their interests recorded unless they were lodged prior to the writ (or with the Sheriff's consent). The Purchasers' title therefore remained defeasible by the registration of another interest which obtained the protection of section 42(1) of the Property Act.

On 5 December 2006 the Purchasers filed a notice of contention, the grounds of which include:

- Sections 105 to 105D of the Property Act, on their true construction, do not deprive the Court of jurisdiction to determine questions of priority of competing rights affecting land.
- The primary judge erred in law in admitting into evidence the affidavit of Neville James Moses sworn 4 November 2005 and in concluding that the Respondents failed to undertake a search of the land that ought reasonably to have been carried out.

The grounds of appeal include:

- The Court of Appeal erred in holding that an unregistered equitable interest in Torrens title land, of itself and without more, entitled the Purchasers to a final injunction restraining the exercise of a right arising from the recording of a writ under the Property Act.
- The Court of Appeal erred in construing the legislative scheme contained in sections 105-105D of the Property Act as conferring on the Purchasers a right to protect an unregistered interest in a manner which would give them a right to registration over a Sheriff's purchaser during the protected period (as defined in section 105A(9) of the Property Act.)