SUPREME COURT OF QUEENSLAND

CITATION:	*Secure Funding Pty Ltd v Doneley & Anor* [2010] QSC 91
PARTIES:	**SECURE FUNDING PTY LTD ACN 081 982 82 (FORMERLY KNOWN AS LIBERTY FUNDING PTY LTD)** (plaintiff/applicant/enforcement creditor) **v** **ADRIAN ROGER TYSON DONELEY** (defendant/enforcement debtor) AND **JOHN DANIEL KWASNIUK** (first respondent) AND **STEWART JAY HOWSON** (second respondent) AND **DONNA MAREE MCCAMLEY** (third respondent)
FILE NO/S:	File No. 630 of 2009 Enforcement Warrant No. 351 of 09
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	7 May 2010
DELIVERED AT:	Brisbane
HEARING DATE:	24 February 2010
JUDGE:	Martin J
ORDER:	**A.THE REGISTRAR'S QUESTIONS ARE ANSWERED** **1. Has title passed to the third party purchasers?** **No.** **2.a. If the answer to 1. is 'yes', does the Enforcement Officer have the ability to act on the registered writ**

of execution?

Unnecessary to answer.

2.b. If the answer to 1. is 'no' what effect does the caveat registered on the title have on the Enforcement Officer's ability to act on the registered writ of execution?

While the caveat is in place the Sheriff is prevented from registering any transfer.

3. Where there are two lots on one title, and only one lot has a writ of execution registered over it, does the Sheriff have the power to enforce the warrant of seizure and sale over the whole title (i.e. both lots)?

No.

4. If the answer to 3. is 'no', can the Sheriff, exercising power of sale under the registered writ of execution, seize and sell one lot?

Yes – the lot referred to in the writ.

B. THE APPLICATION AND CROSS-APPLICATION ARE BOTH DISMISSED.

CATCHWORDS: REAL PROPERTY – TORRENS TITLE – CAVEATS AGAINST DEALINGS – FORM OF CAVEAT – NATURE OF ESTATE OR INTEREST CLAIMED – where the Defendant sold property to the Respondents – where the property comprised two registered lots with a house that occupied part of both registered lots – where the Applicant erroneously applied for an enforcement warrant over only one of the lots and a writ was subsequently registered only in relation to the one lot – where the Respondents lodged a caveat over both lots – whether the caveat prevents the Enforcement Officer from registering any transfer – whether title passed to the Respondents

REAL PROPERTY – TORRENS TITLE – TRANSFERS – EXECUTION – where the Defendant sold property to the Respondents – where the property comprised two registered lots with a house that occupied part of both registered lots – where the Applicant erroneously applied for an enforcement warrant over only one of the lots and a writ was subsequently registered only in relation to the one lot – where the Respondents lodged a caveat over both lots – whether the writ of execution should be removed – whether the release of

mortgage and transfer should be registered in respect of each lot

REAL PROPERTY – TORRENS TITLE – TRANSFERS – EXECUTION – where the Defendant sold property to the Respondents – where the property comprised two registered lots with a house that occupied part of both registered lots – where the Applicant erroneously applied for an enforcement warrant over only one of the lots and a writ was subsequently registered only in relation to the one lot – where the Respondents lodged a caveat over both lots – whether the Sherriff has the power to enforce a warrant of seizure and sale over both lots – whether the Sheriff has the power to seize and sell one lot under the registered writ of execution

Acts Interpretation Act 1954 (Qld), s 14C
Land Title Act 1994 (Qld), ss 39, 41, 78, 116, 117, 120, 183
Real Property Act 1861 (Qld), s 91
Real Property Act 1877 (Qld), s 14
Real Property Act 1900 (NSW), ss 105A, 105B
Uniform Civil Procedure Rules 1999 (Qld), rr 455, 982

Anderson v Liddell (1968) 117 CLR 36
Black v Garnock (2007) 230 CLR 438
Bond v McClay [1903] St R Qd 1
Coleman v De Lissa (1885) 6 LR (NSW) Eq 104
Commonwealth Trading Bank of Australia v Austral Lighting Pty Ltd [1984] 2 Qd R 507
Corfield v Groundwater (1868) 1 QSCR 194
Day v General Credits Ltd [1981] Qd R 115
Garnock v Black (2006) 66 NSWLR 347
Halloran v Minister Administering National Parks and Wildlife Act 1974 (2006) 229 CLR 545
Re Deane's Transfer (1889) 9 QLJ 106
Re Footbridge Pty Ltd; ex parte Commissioner of Taxation (1985) Q Conv R ¶54-188
Re Real Property Acts of 1861 and 1877 (1891) 4 QLJ 70
Registrar of Titles v Paterson (1876) 2 App Cas 110
Re Shears and Alder (1891) 17 VLR 816
Tanwar Enterprises Pty Ltd v Cauchi (2003) 217 CLR 315

Christensen, Dixon and Wallace, "Land Titles Law and Practice" (Lawbook Co., 2009)
Sykes, "The Effect of Judgments on Land in Australia" (1953) 27 ALJ 306
Working Paper 32 Queensland Law Reform Commission
Report 40 – Consolidation of Real Property Acts Queensland Law Reform Commission

COUNSEL:	P Hastie for the plaintiff/applicant/enforcement creditor A B Crowe SC and A B Fraser for the respondents
SOLICITORS:	Norton Rose for the plaintiff/applicant/enforcement creditor O'Reilly Lillicrap for the respondents

[1] On 4 February 2010 the Registrar referred this matter to the Court under r 982 and/or r 455 of the *Uniform Civil Procedure Rules* 1999 (Qld) ("the UCPR"). In the reference the Registrar seeks directions in respect of a number of questions which are set out below.

[2] The applicant, Secure Funding Pty Ltd ("Secure Funding") and John Daniel Kwasniuk, Stewart Jay Howson and Donna Maree McCamley (collectively "the Respondents") also sought orders which are referred to below.

Background

[3] The original claim in this dispute was between Secure Funding, as plaintiff, and Adrian Roger Tyson Doneley ("Doneley"), as defendant, in which Secure Funding sought money owed by Doneley under a loan agreement with Secure Funding. Secure Funding also sought recovery of possession of land at 43 Mountainview Road, Pomona ("the Pomona property") under s 78 of the *Land Title Act* 1994 (Qld) ("the LTA").

[4] The chronology of the relevant events is as follows:

23 March 2009	Default judgment was entered by Secure Funding against Doneley in the sum of $543,889.19.
13 May 2009	An enforcement warrant was issued with respect to the Pomona property. The Pomona property was eventually sold by Secure Funding, but the proceeds from the sale were insufficient to satisfy the judgment and Doneley remained indebted to Secure Funding in the sum of $123,183.11.
14 August 2009	Doneley entered into a contract of sale with the Respondents for property at Herston ("the Herston property") for $640,000. The Herston property was under Title Reference 50679983, which comprised two lots: Lot 160 on Registered Plan 475 and Lot 2 on Registered Plan 10641.
25 August 2009	Secure Funding applied for an enforcement warrant to issue with respect to the Herston property but, apparently due to an oversight, only sought it with respect to lot 160.
26 August 2009	The enforcement warrant was issued referring only to Lot 160.
14 September 2009	The contract for the sale of the Herston property settled. Of the purchase price approximately $600,000 was directed to satisfy the mortgages on the property.

21 September 2009	The writ based on the enforcement warrant was registered but, as with the warrant, only referred to Lot 160.
28 September 2009	The Respondents lodged a release of mortgage and transfer for the Herston Property.
30 September 2009	A requisition was issued advising the Respondents of the writ concerning Lot 160. Secure Funding lodged a writ with respect to Lot 2. It has not been registered.
24 December 2009	The Respondents lodged a caveat over both Lot 2 and Lot 160.

[5] At this point it is appropriate to note that there is a house built on the Herston property and that it occupies part of both Lot 2 and Lot 160. This is a matter of some practical importance given that the writ only relates to Lot 160.

Referral from Registrar

[6] The Registrar referred the matter to the Court pursuant to r 982 and/or r 455 of the UCPR. These rules provide:

> "**455 Referring relevant application**
> (1) If a judicial registrar or registrar considers it would be proper for a relevant application to be decided by the court as constituted by a judge, the judicial registrar or registrar must refer the application to the court as constituted by a judge.
> (2) The court, as constituted by a judicial registrar or registrar, must also refer the application to the court as constituted by a judge if, before the hearing starts--
> (a) a party asks the court to do so; and
> (b) the judicial registrar or registrar considers it is in the interests of justice to do so.
> (3) On a reference, the court, as constituted by a judge, may give a direction about the conduct of the application.
>
> **982 Referral to judge or magistrate**
> (1) If a question arises in a matter before a registrar that the registrar considers appropriate for the decision of a judge or a magistrate, the registrar may refer the matter to a judge or a magistrate.
> (2) If a party asks a registrar to refer a matter before the registrar to a judge or a magistrate, the registrar must refer the matter to a judge or a magistrate.
> (3) The judge or magistrate may then dispose of the matter or refer it back to the registrar with the directions the judge or magistrate considers appropriate."

[7] The Registrar sought directions in respect of the following questions:

> "1. Has title passed to the third party purchasers?

2.a. If the answer to 1. is 'yes', does the Enforcement Officer have the ability to act on the registered writ of execution?

2.b. If the answer to 1. is 'no' what effect does the caveat registered on the title have on the Enforcement Officer's ability to act on the registered writ of execution?

3. Where there are two lots on one title, and only one lot has a writ of execution registered over it, does the Sheriff have the power to enforce the warrant of seizure and sale over the whole title (i.e. both lots)?

4. If the answer to 3. is 'no', can the Sheriff, exercising power of sale under the registered writ of execution, seize and sell one lot?"

Orders sought by the parties

[8] Both parties, in addition to submitting what answers should be given to the Registrar's questions, sought orders.

[9] Secure Funding sought a declaration that the Sheriff is both obliged and able to act under the enforcement warrant to seize and sell Lot 160.

[10] The Respondents sought orders that the writ "be removed" and that the relevant release of mortgage and transfer be registered in respect of each Lot.

[11] Mr Hastie, who appeared for Secure Funding, submitted that the High Court's decision in *Black v Garnock* (2007) 230 CLR 438 is the controlling authority and that I should, in effect, declare that the Sheriff may sell the property the subject of the enforcement warrant. Mr Crowe SC, who appeared with Mr Fraser for the Respondents, argued that *Black v Garnock* should be regarded as being confined to the New South Wales legislation and that I was bound to follow *Commonwealth Trading Bank of Australia v Austral Lighting Pty Ltd* [1984] 2 Qd R 507, a decision of the Full Court of this Court.

Writs of execution

[12] Writs of execution are dealt with in Part 7 Division 1 of the LTA. A "writ of execution" is defined in Schedule 2 of the LTA to mean:

> "a writ or warrant of execution after judgment in any court, and includes an enforcement warrant."

[13] Section 116 permits the Registrar of Titles to register a writ of execution:

> "**116 Registering a writ of execution**
> The registrar may register a writ of execution only if a request to register it, and an office copy of it, is lodged."

[14] Section 117 of the LTA provides that if a writ of execution is "executed and put in force" within six months of lodgement, the writ will "bind or affect" the registered lots:

> "**117 Effect of registering a writ of execution**
> For purchasers, lessees, mortgagees and creditors, a writ of execution--
> (a) can not, until registered, bind or affect registered lots, whether or not there is actual or constructive notice of the writ; and
> (b) binds or affects registered lots only if the writ is executed and put in force within--
> (i) 6 months of its lodgment; or
> (ii) the extended time allowed by the court where the writ is filed and notified to the registrar."

[15] Two of the phrases used in s 117 are of importance with respect to the issues in this case.

"binds or affects"

[16] The phrase "binds or affects", or phrases like it, have been used in the legislation which preceded the LTA and have been the subject of judicial consideration.

[17] In the *Real Property Act* 1861 (Qld), s 91 provided:

> "**No writ of execution binding until a memorial shall have been entered in the register book and also upon the instrument evidencing title**. No writ of execution issued in pursuance of any judgment notwithstanding any purchaser mortgagee or creditor may have had actual or constructive notice thereof shall **bind or affect** or be effectual against any land under the provisions of this Act or any estate or interest therein as to purchasers mortgagees or creditors unless and until a memorial of the said writ shall have been entered in the register book and also upon the instrument evidencing title to the estate or interest intended to be charged or taken in execution in case such instrument shall be produced to the Registrar-General.
> …
> Provided always that no writ of execution although duly entered in the register book as aforesaid shall affect any land under the provisions of this Act or any estate or interest therein as to purchasers mortgagees or creditors unless such writ be executed and put in force within three calendar months from the date of the entering such writ." (emphasis added)

[18] The purpose of this type of legislative provision was considered with respect to an equivalent Victorian statute in *Registrar of Titles v Paterson* (1876) 2 App Cas 110 where Sir James Colville, giving the opinion of the Privy Council, said (at 118):

> "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.

> Again, there is nothing in the statute, or in this particular section of it, to prevent a judgment debtor from making a contract for the transfer of his land to a purchaser for value, subject to the rights which the section gives to an execution creditor, or to a possible purchaser through the sheriff.
>
> Such a contract, no doubt, can only be perfected by registration, and must, therefore, remain defeasible until the writ is withdrawn, or satisfied or the term of three months from the day on which the copy was served, has expired."

[19] Section 91 was the subject of consideration by a Full Court of this Court in *Re Deane's Transfer* (1889) 9 QLJ 106 and in *Bond v McClay* [1903] St R Qd 1. In *Re Deane's Transfer* it was held that the writ affects the land from the date when the writ is produced to the Registrar. The basis for that opinion was that s 14 of the *Real Property Act* 1877 provided that all instruments registered should take effect from the date of production for registration. In *Bond v McClay* it was held that the effect of a writ of execution in binding land was that it prevented the execution debtor from dealing with the land, so that the entry of a memorial merely nullified any dealing by the owner during the prescribed period of three months. Under the *Real Property Act* 1861, the execution creditor did not, by virtue of the entry on the register book of the writ of execution, obtain any right of property in or any proprietary charge upon the land itself. See also *Corfield v Groundwater* (1868) 1 QSCR 194. Sir Samuel Griffith (at pp7-8 of *Bond v McClay*) examined the law which applied prior to the enactment of the *Real Property Act* 1861 and concluded:

> (a) that the entry of the memorial of a writ did not constitute a registered charge upon the land; and
> (b) that a Sheriff's sale would not prevail over an equitable mortgage or other equitable estate created prior to notification of the writ of execution to the Registrar of Titles.

[20] In *Day v General Credits Ltd* [1981] Qd R 115, Connolly J considered the effect of s 91 of the *Real Property Act* 1861 and said (at 117-118):

> "… when the Act of 1861 was passed the concept of land being bound by a judgment or a writ of execution and the manner in which it was so bound had long been known to the common law, and to courts of equity.
>
> **To say that land was bound by a judgment or by a process of execution, meant no more than that it was beyond the power of the owner to deal with the land so as to put it beyond the reach of execution.** Thus in *Holmes v. Tutton* (1855) 5 Bl. & El. 65; 119 E.R. 405 it was said of a provision of the Common Law Procedure Act 1854 that service of an order of attachment should bind debts due to the judgment debtor:

> "We construe the word 'bind' as not changing the property or giving even an equitable property, either by way of mortgage or lien, but as putting the debt in the same position as the goods when the writ was delivered to the Sheriff. We take the word 'bind' to mean that the debtor, or those claiming under him shall not have power to convey, or do any act, as against the right of the party in whose favour the debt is bound; and we construe it as not giving any property in the debt in the nature of a mortgage or lien, but a mere right to have the security enforced …"

This is not the place for an elaborate examination of the history of the execution of judgments against land. For present purposes it will be sufficient shortly to state the position in 1861 when the *Real Property Act* was passed. The common law principle had been that on the seizure of the land in execution by a judgment creditor, the rights of the creditor prevailed over interests created by the debtor after the entry of the judgment.

[His Honour considered earlier legislation in New South Wales and went on to say -]

Against this background it is clear, in my judgment, that s. 91 enlarges the rights of the judgment debtor in two ways. **First, his power to deal with the land as against the judgment creditor is not suspended by judgment or by the delivery of the writ of execution to the Sheriff but only, in the case of land under the Act, by registration of the writ. Second, it puts a term to the period during which he may not create interests which will take priority over the judgment creditor.** Properly understood however, the section says nothing to the position between the debtor and the creditor or Sheriff. Indeed the references in the first paragraph of the section to purchasers mortgagees and creditors, as also in the proviso, emphasises this very point." (emphasis added)

"executed and put in force"

[21] Before a registered lot can be bound or affected the writ must be "executed and put in force". In *re Real Property Acts of 1861 and 1877* (1891) 4 QLJ 70 those words (as used in s 91 of the *Real Property Act* of 1861) were held by the Full Court to mean the sale of the land by the Sheriff within the time specified, but that they did not require that a transfer must be produced for registration within the time limit. This was followed by Moynihan J in *Re Footbridge Pty Ltd; ex p. Commissioner of Taxation* (1985) Q Conv R ¶54-188.

[22] In this case there has been no sale by the Sheriff. Whether the decisions referred to above with respect to s 91 of the *Real Property Act* 1861 should be followed when construing s 117 of the LTA need not, therefore, be decided. It would, though, seem sensible to do so in appropriate circumstances as it is tolerably clear that, so far as the prerequisites for a property to be bound or affected are concerned, s 117 of the LTA is intended to have the same effect (apart from the extended time limit) as s 91 of the *Real Property Act* of 1861. This conclusion is supported by the origins of s

117. In its *Working Paper 32* the Queensland Law Reform Commission said (at p 196) that the requirement that the writ be "executed and put in force" was unsatisfactory as "it has been held to mean merely that the sale be effected in that time, and not that it be registered." The Commission recommended that there be a requirement that the transfer by the Sheriff be lodged for registration within time. However in enacting the LTA, the term used in the *Real Property Act* 1861 – "executed and put in force" – has been used again. There is no reason to conclude that the legislature intended to change the requirement as described in *re Real Property Acts of 1861 and 1877* (1891) 4 QLJ 70.

The Registrar's Questions

[23] I turn now to the Registrar's questions and answer them as follows.

1. Has title passed to the third party purchasers?

No.

Section 181 of the LTA provides:

> "**Interest in a lot not transferred or created until registration**
> An instrument does not transfer or create an interest in a lot at law until it is registered."

So far as is relevant a "lot" is defined (LTA Sched. 2) to mean a separate, distinct parcel of land created on—

(a) the registration of a plan of subdivision; or
(b) the recording of particulars of an instrument.

An unregistered instrument does not create or transfer any interest in land but the antecedent agreement will be effective to bring into existence an equitable estate or interest in the land. *Chan v Cresdon* (1989) 168 CLR 242.

2.a. If the answer to 1. is 'yes', does the Enforcement Officer have the ability to act on the registered writ of execution?

Unnecessary to answer.

2.b. If the answer to 1. is 'no' what effect does the caveat registered on the title have on the Enforcement Officer's ability to act on the registered writ of execution?

While the caveat is in place the Sheriff is prevented from registering any transfer.

3. Where there are two lots on one title, and only one lot has a writ of execution registered over it, does the Sheriff have the power to enforce the warrant of seizure and sale over the whole title (i.e. both lots)?

No.

The writ refers only to Lot 160. Section 117 can only have effect with respect to the registered lot or lots referred to in a writ of execution.

4. If the answer to 3. is 'no', can the Sheriff, exercising the power of sale under the registered writ of execution, seize and sell one lot?

Yes – the lot referred to in the writ.

The parties' applications

[24] The more complex issues arise out of the parties' applications. Each seeks orders which would work to diminish or defeat the interests of the other.

[25] The Respondents argue that, in the circumstances of this case, I am bound to follow *Commonwealth Trading Bank of Australia v Austral Lighting Pty Ltd* [1984] 2 Qd R 507 as *Black v Garnock* (2007) 230 CLR 438 should be confined to the legislation upon which it is based. Secure Funding submits that I must follow *Black v Garnock.* It will be necessary to closely examine both cases.

Commonwealth Trading Bank of Australia v Austral Lighting Pty Ltd

[26] In 1982 the Commonwealth Trading Bank made an advance to Crombourne Pty Ltd. The advance was secured by a mortgage over land owned by Crombourne. Although it was in a registrable form the mortgage was not registered at the time. In June 1983 Austral Lighting Pty Ltd obtained a judgment against Crombourne. On 16 June a writ of fieri facias was issued and it was produced for registration at the Titles Office on 23 August. The Bank produced its mortgage for registration on 24 August. The writ of fi. fa. was registered on 11 October. On 25 October the Bank lodged a caveat. The Sheriff had intended to sell the property the subject of the writ of fi. fa. on 31 August but the Bank obtained an injunction restraining the sale pending the determination of the respective rights of the parties. The action came on for trial on motion for judgment, with the Bank seeking declarations that at all times its mortgage ranked in priority to the rights of the judgment creditor under its writ of execution and that any sale by the Sheriff would be subject to the Bank's equitable rights as mortgagee. The trial judge refused relief on the basis that a transferee from the Sheriff would not take subject to the Bank's equitable mortgage. By the time the matter came before the Full Court there had been a change at least in the Bank's position as its mortgage had been registered.

[27] The principal judgment was given by Connolly J. He reviewed the circumstances which existed at the time of the enactment of the *Real Property Act* 1877 and in particular the fact that, prior to that time, the Sheriff could not convey the legal estate to a purchaser and so a purchaser under a writ of fi. fa. acquired an equitable title only and then needed recourse to the *Trustee Acts* relating to vesting orders in order to obtain a legal title. This was remedied by s 35 of the 1877 Act which provided:

> "35. Sheriff's Sales. Whenever any land under the provisions of this Act or any estate or interest therein or security thereon shall have been sold under any writ of execution registered under the ninety-first section of the Principal Act the Sheriff or the Registrar of the District Court (as the case may be)

> shall execute a transfer thereof to the purchaser in form U of the schedule hereto.
>
> Such transfer 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 and the Registrar-General shall on receiving such transfer make an entry thereof in the register book and on the making of such entry the purchaser shall subject as aforesaid be deemed the transferee or owner of such land estate interest or security."

[28] His Honour referred to the analysis of s 35 by Griffith CJ in *Bond v McClay* (at p. 10) to the effect that the Sheriff could not transfer any greater interest than the execution debtor appeared by the register to have at the date of the lodgement of the transfer for registration. That, though, was not the view which had been taken by the trial judge. He had held that as the Bank's equitable mortgage was not one of the types of encumbrance to which the transfer was expressed to be subject, there was a necessary implication that the transferee took the property free of such an encumbrance.

[29] Mr Justice Connolly then considered the situation where the holder of an equitable interest omitted to lodge a caveat before the writ of execution was registered. He said (at 510):-

> "Section 35 should, in my opinion, be regarded as a provision for the protection of the purchaser from the Sheriff rather than of the judgment creditor … however, the protection is not accorded, as against a prior purchaser for value (including an equitable mortgagee) until the transfer is registered …."

[30] Proceeding on that analysis means that s 35 says nothing about the position of a prior equitable mortgagee before registration of the Sheriff's transfer. His Honour said that until that occurred, the prior equitable interest could be set up and would, in an appropriate case, be protected by injunction. He then referred to an article written by E.I. Sykes – *The Effect of Judgments on Land in Australia* (1953) 27 ALJ 306. He referred, in particular, to a part of the article (at 310-311) which, he said, accurately stated the legal position:-

> "However it is a well settled principle that the transferee from the sheriff takes merely what interest the judgment debtor had at the time of such service or entry. Thus if at such time there was any equitable proprietary interest (whether it is embodied in an instrument which is registrable under the Act or springs from an unregistrable transaction) such interest has priority. This is shown in various decisions too numerous to mention and is the best known principle associated with these provisions … It is quite clear that the interest need not be one contained in a registrable instrument or capable of being embodied in a registrable instrument under the Act. It may be an unregistrable interest. Further it is clear that if it is embodied in a registrable instrument, for instance a transfer, there is no requirement that that transfer be lodged for registration before the date of entry of writ or even that it was executed before that date, provided that in the

> latter case the transaction out of which it took its rise was consummated before such date."

[31] It is important to note that in the cases relied upon by Sykes for the propositions he advanced, the case of *Coleman v De Lissa* (1885) 6 LR (NSW) Eq 104 is mentioned. It is important because of the reference which is made to it in the reasoning in *Black v Garnock* and about which more will be said.

[32] His Honour then went on:-

> "It is true that a registrable instrument which antedates the delivery of the writ of execution may not be registrable during the three month period: *Registrar of Titles v. Paterson* …; *Re Shears and Alder* … but this does not prevent resort to the court for the protection of the equitable interest and of course, once the binding effect of the delivery of the writ of execution has expired, the instrument will be registered in the priority to which the date of lodgment entitles it, as indeed has occurred here."

[33] The decision in *Commonwealth Trading Bank of Australia v Austral Lighting Pty Ltd* clearly expressed the law to the effect that a purchaser from the Sheriff is bound by any interest existing in the land at the date of production of the enforcement warrant at the Titles Office. Since that decision, of course, the relevant legislation has changed and is now contained in the LTA. I consider that statute later in these reasons.

Black v Garnock

[34] This case was concerned with those provisions of the *Real Property Act* 1900 (NSW) which deal with writs of execution. In 1976 that Act was amended by, so far as is relevant, the replacement of s 105 and the insertion of s 105A to s 105D. It is important to note one of the express purposes for those amendments. When introducing the 1976 amending legislation the Minister for Lands said in his second reading speech:-

> "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**." (New South Wales Legislative Assembly, Parliamentary Debates, 30 September 1976, p1294) (emphasis added)

[35] In order to expose the changes made by the 1976 amendments I need to set out s 105 as it applied before 1976:

> "**105**(1) **No writ of fieri facias or other writ of execution shall bind, charge, or affect any land, estate, or interest under the provisions of this Act, but whenever any land or any estate or interest in land under the provisions of this Act is seized or sold by the Sheriff or the registrar or bailiff of any District Court under any writ, or is sold under any direction, decree, or order of the Supreme Court or District Court**, **the Registrar-General, on being served with an office copy of the writ, direction, decree, or order as the case may be, shall enter into the register-book and also upon the instrument evidencing title to the said estate or interest, if produced for that purpose**, the date of the said writ, direction, decree or order, and the date and hour of the production thereof.
>
> (2) **After such entry as aforesaid the sheriff or person authorised by the Supreme Court or the registrar or bailiff or any District Court shall do such acts and execute such instruments as under the provisions of this Act may be necessary to transfer or otherwise to deal with the said estate or interest**.
>
> (3) **Unless and until such entry has been made as aforesaid no such writ shall bind or affect any land under the provisions of this Act or any estate or interest therein, nor shall any sale or transfer by the sheriff, registrar, or bailiff be valid as against a purchaser or mortgagee notwithstanding such writ may have been actually in the hands of the sheriff, registrar, or bailiff at the time of any purchase or mortgage, or notwithstanding such purchaser or mortgage may have had actual or constructive notice of the issue of such writ.**
>
> (4) Upon production to the Registrar-General of sufficient evidence of the satisfaction of any writ so entered as aforesaid, he shall enter in the register-book a memorandum to that effect, and such writ shall be deemed to be satisfied accordingly.
>
> (5) No writ of execution shall bind any land under the provisions of this Act, nor shall any transfer on a sale of such land under such writ be registered unless a true copy of such writ is served on the Registrar-General within six months from the teste date of such writ, or date of

any renewal thereof, for the purpose of making the entries described in this section.

(6) Every such writ shall be deemed to have lapsed unless the same is executed and put in force within three months from the day on which it was entered in the register-book as aforesaid." (emphasis added)

[36] The relevant parts of the amended legislation are:

"**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.

…

(6) Where, at the time of lodgment of an application for the recording of a writ, a dealing for valuable consideration affecting the land identified under subsection (2) (a) in the application is awaiting registration and is in registrable form, the Registrar-General shall not record the writ unless:

(a) the dealing is withdrawn from registration, or

(b) the dealing does not dispose of the whole estate and interest in the land so identified and the application indicates to the satisfaction of the Registrar-General that, unless the dealing is subsequently withdrawn from registration, its registration is to precede the registration of any transfer giving effect to a sale under the writ.

105A Effect of recording writ

(1) Subsection (2) does not apply to a dealing affecting land in respect of which a writ is recorded under section 105 where the dealing is:

(a) a transfer giving effect to a sale under the 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.**

…

105B Registration of transfer pursuant to sale under writ

(1) A transfer pursuant to a sale under a writ is registered when it is recorded in the Register and the Registrar-General may make a like recording on the relevant certificate of title or duplicate registered dealing when it becomes available to the Registrar-General.

(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.

(3) An action for recovery of damages sustained through deprivation of land, or of any estate or interest in land, by reason of the registration of a transfer purporting to give effect to a sale under a writ does not lie against the Registrar-General.

(4) In this section, transfer means a transfer in the approved form." (emphasis added)

[37] With those provisions in mind I turn to the basic facts giving rise to the matter which eventually came before the High Court.

17 September 2004	Judgment entered for Black against Smith.
15 July 2005	Garnock enters into a contract to purchase real property from Smith with a settlement date of 24 August 2005.
19 August	Solicitors for Smith advise Black of the proposed settlement involving the property. It was noted that funds would not be available to pay Black in full as Mrs Smith had other creditors.
24 August	Black obtained from the relevant Court a "writ for levy on property" which was enforceable against any real property owned by Smith in New South Wales.
24 August –	
9.00 am	Garnock's solicitors undertake a search and find only the already known encumbrances.
9.20 am	Black's solicitors tell Garnock's solicitors that they: (a) intend to prevent the sale going ahead, (b) have obtained a charging order against the deposit, and (c) have instituted bankruptcy proceedings.
11:30 am	Black lodges an application at the relevant office seeking to register the writ with respect to the land subject to the contract of sale with Garnock. The writ was registered at 11:53 am on 24 August. Black does not advise Garnock of this.
2:00pm	The sale between Garnock and Smith is completed and the balance of the purchase money is paid by way of bank cheque mainly to secured creditors.
26 August	Writ of execution delivered to the Sheriff.

8 September	The solicitors for Garnock receive advice that the writ of execution has been lodged and that the transfer and company dealings could not be registered. Garnock lodges a caveat.
28 September	Garnock commences proceedings in the Supreme Court seeking a declaration that, as purchasers of the land, they were entitled to priority over any interest in the land held by the judgment creditors. They also sought orders against the judgment creditors and the Sheriff restraining them from executing the writ and requiring the judgment creditors to lodge an application for cancellation of the recording of the writ.

[38] In the High Court a majority (Gummow, Hayne and Callinan JJ) held that Garnock was not entitled to an injunction to restrain the execution of the writ recorded on the register by sale of the land. The fact that the purchasers had executed a contract of sale before the writ was recorded was insufficient to deny the right of the Sheriff, under the statutory regime, to sell the vendor's interest, as recorded in the register, subject only to such encumbrances as were recorded on the title at the date of the recording of the writ.

[39] In the joint judgment of Gummow and Hayne JJ, their Honours (see [18]-[20]) referred to the "old rule" that a judgment creditor could only take in execution the interest the judgment debtor had in the land at the time the writ was delivered to the Sheriff. Their Honours then went on to consider the sections of the *Real Property Act* 1900 (as amended in 1976) which are set out above. They said:

> "[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" (s 105A(1)(e)) 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" (s 105A(1)(f)). The discharges of mortgage and the surrender 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." (emphasis added)

[40] Their Honours then considered the effect of s 105B:

> "[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 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."
>
> [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."

[41] Their Honours then referred to the basis of the reasons of the majority in the Court of Appeal. That basis was 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." ((2006) 66 NSWLR 347 at [33]).

[42] This was criticised because referring to an "equitable interest" in the land entailed the circularity of reasoning of the kind referred in *Tanwar Enterprises Pty Ltd v Cauchi* (2003) 217 CLR 315. Their Honours said:

> "[32] …As five members of the Court pointed out in *Tanwar*: 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."

[43] Their Honours identified the flaw in the reasoning of the majority in the Court of Appeal in the following way:-

> "[34] …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 'interests' 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."

[44] Justices Gummow and Hayne considered two hypothetical cases which had taken up much of the oral argument on the appeal. The first concerned what would have happened if orders restraining the Sheriff executing the writ had not been made in this particular case. The second was what would have happened if, before the writ was recorded on the Register, the purchasers had lodged caveats.

[45] As to the first question their Honours identified a number of issues which would arise if the Sheriff had sold the land and the purchaser at the Sheriff's sale had found, on searching the title, that the land was encumbered by mortgages and was subject to a registered lease. Of course, because of the settlement of the contract between Garnock and Smith, the mortgagees had been paid what was owing and the lease had been surrendered so there would have been many questions as to what should occur. Unfortunately, their Honours declined to answer any of those questions because they were merely hypothetical and unnecessary for the determination of the appeal before them. The second question which was considered concerned the lodging of caveats. It was concluded that, had caveats been lodged, then if the Sheriff had sought to sell the land in execution of a writ recorded after the caveats have been lodged, a purchaser at such a sale could not have obtained registration of the transfer so long as the caveats remained in force. Their Honours said:-

> "[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 unconscientious 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 Act."

[46] Justice Callinan agreed with Gummow and Hayne JJ and also specifically considered the judgment of Connolly J in *Commonwealth Trading Bank of Australia v Austral Lighting Pty Ltd*, it having influenced the Court of Appeal in reaching its conclusion. Justice Callinan said:

> "[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* … . 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 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'. All of this is to emphasise 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 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 litigation … , and indeed to the language of the section itself."

[47] A question arises as to the nature of those remarks and how I should treat them. The discussion by Justice Callinan of *Austral Lighting* does form part of the ratio of his decision. To find the true majority in this case it is important to analyse what was said by Callinan J with respect to his reasons and his agreement with Gummow and Hayne JJ. He says:-

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

Justices Gummow and Hayne did not refer to *Austral Lighting* but, although their reasons do not refer to the reasons of Callinan J, it is implicit in them that they did not accept that the reasoning in that case applied in the circumstances before them.

The LTA and the applicability of Black v Garnock

[48] In 1991 the Queensland Law Reform Commission reported pursuant to a request from the Attorney-General on the issue of consolidating the law expressed in the *Real Property Act* 1861-1990 and the *Real Property Act* 1877-1990. The QLRC issued *Report 40 – Consolidation of Real Property Acts* in March 1991. It included a draft of a new statute designed to achieve the consolidation which was sought. In the comments made by the Commission about writs of execution the following was said:-

> "There has been very little change to the policy of the legislation about the registration and sale of land under writs of execution. …

> The only policy change in this area relates to the time within which a sale must be carried out by the Sheriff."

[49] In February 2004 the Minister for Lands moved that the *Land Title Bill* 1994 be read a second time and in so doing told Parliament that the Bill was "based substantially on a draft Bill which was included in the Law Reform Commission's report number 40…" The only additions or alterations of substance related to the introduction of the automated titling system. The Minister made no reference to writs of execution.

[50] As one would expect, the language used in the 1994 Act differs substantially from that used in the 1861 and 1877 Acts. The first question that arises, then, is whether the provisions of ss 116, 117 and, in particular, 120 have a different meaning to that which s 35 of the 1877 Act has been held to have. It seems clear that there was no express intention to change the meaning in the new provision. Rather, there is more to support a conclusion that no change was intended.

[51] The long title of the LTA is "An Act to consolidate and reform the law about the registration of freehold land and interests in freehold land, and for other related purposes." Given that there is no extrinsic material which would support a conclusion that Part 7 Division 1 was an area in which the law was reformed, it follows that that part of the enactment was intended to consolidate the law on that topic. Guidance can be obtained from s 14C of the *Acts Interpretation Act* 1954 which provides:

> "**Changes of drafting practice not to affect meaning**
> If—
> (a) a provision of an Act expresses an idea in particular words; and
> (b) a provision enacted later appears to express the same idea in different words for the purpose of implementing a different legislative drafting practice, including, for example—
> (i) the use of a clearer or simpler style; or
> (ii) the use of gender-neutral language;
> the ideas must not be taken to be different merely because different words are used."

[52] On this particular part of the statute there was, in my view, no intention to change the effect of the previous legislation; rather, all that was intended was the modernisation of the earlier provisions. I can see no difference in effect between the provisions of s 91 of the *Real Property Act* of 1861 and s 116, s 117 and s 120 of the LTA. It follows, then, that the principles outlined by Connolly J in *Commonwealth Trading Bank of Australia v Austral Lighting Pty Ltd* would apply in the circumstances of this case, **unless**, as is urged by Secure Funding, the principles in *Black v Garnock* have overtaken those referred to above. I turn, then, to the effect of that decision on the LTA.

[53] In *Black v Garnock* Gummow and Hayne JJ commenced their reasons with this important observation:

> "[10] …The task of construction [of the *Real Property Act* 1900 (NSW)] 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 (*Breskvar v Wall* (1971) 126 CLR 376 at 385 per Barwick CJ).'"

[54] At this point it is also appropriate to recall that the use of terms such as "equitable interest" can be unhelpful unless the basic purpose of the Torrens system is always borne firmly in mind. As was said by Gleeson CJ, Gummow, Kirby and Hayne JJ in *Halloran v Minister Administering National Parks and Wildlife Act 1974* (2006) 229 CLR 545:

> "[35] With respect to the land registered under the provisions of the RP Act, references to vesting at law and vesting in equity are apt to mislead. The Torrens system is one of title by registration, not of registered title … . The assimilation of the registered title to a legal title may be convenient so long as it is appreciated what is involved. It is likewise with respect to the use of the term "equitable" to describe interests recognised in accordance with the principles of equity but not found on the Register … ."

[55] As is set out above, *Black v Garnock* was decided by reference to the 1976 amendments to the *Real Property Act* 1900 (NSW). The key provision was s 105B which relevantly provides:

> **"105B Registration of transfer pursuant to sale under writ**
>
> (1) A transfer pursuant to a sale under a writ is registered when it is recorded in the Register and the Registrar-General may make a like recording on the relevant certificate of title or duplicate registered dealing when it becomes available to the Registrar-General.
>
> (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."

[56] Secure Funding argues that the provisions of s 105B(2)(a) are relevantly indistinguishable from s 120(2)(a) of the *Land Title Act*:

> "**120 Transfer of lots sold in execution**
>
> (1) If a lot is sold under a registered writ of execution, the sheriff, registrar or clerk of the court of the relevant court may execute an instrument of transfer to the purchaser.
>
> (2) On registration of the transfer, the transferee becomes the registered owner of the lot subject to—
>
> (a) registered interests; and

(b) equitable mortgages notified by caveat lodged before registration of the writ of execution."

In both cases, it was contended, a transferee under a sale from the Sheriff receives the property subject only to the interests already appearing on the register. While that is a construction of s 120 which is arguable, it is inconsistent with the decisions in *Bond v McClay* [1903] St R Qd 1, *Anderson v Liddell* (1968) 117 CLR 36, and *Commonwealth Trading Bank of Australia v Austral Lighting Pty Ltd* [1984] 2 Qd R 507 which support the principle that an enforcement officer can only sell the interest that the debtor actually has in the property at the time the warrant of execution is registered.

[57] Section 120 makes no reference to unregistered interests impinging upon the transferee's title apart from the reference in s 120(2)(b) to equitable mortgages which is mainly of historical interest. As is explained in *Land Titles Law and Practice* (Christensen, Dixon and Wallace; Lawbook Co, 2009) at [7.445], it:

> "is only capable of application to those non-lapsing caveats under the provisions of s 30A of the *Real Property Act* 1877 (Qld), which were lodged prior to the commencement of the *Land Title Act* 1994 (24 April 1994), which caveats are still recorded on the Freehold Land Register. In these very limited circumstances any registered transferee from the sheriff or other court officer will be subject to the interests of such an equitable mortgagee provided the caveat was lodged by the equitable mortgagee before registration of the enforcement warrant."

[58] What, then, is the effect of *Black v Garnock* in the circumstances of this case? It is clear that the majority decisions are inconsistent with the principle that a judgment creditor can take no interest beyond that which was held by the judgment debtor at the time of lodgement of the writ of execution. Those in the majority held that this principle could not apply given the words of the statute and Callinan J also referred to the policy of Torrens type legislation. As Gummow and Hayne JJ said:

> "**[29]** … 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." (emphasis added)

[59] An important issue which must be resolved is whether the words in s 105B(2) – "holds the land transferred free from all estates and interests except [those] … recorded … in … the Register" – mean anything more than the words in s 120 – "becomes the registered owner of the lot subject to … registered interests". The pre-1976 version of s 105 created a procedure very different to that post-1976. Under the earlier version the steps which would occur if property was sold under a writ were as follows:

(a) If land was seized or sold under a writ, then the Registrar-General would enter on the Register the date of the issue of the writ and the date of its production to the Registrar-General.
(b) After the entry, the Sheriff could execute the necessary documents to effect the transfer.
(c) Until the entry was made the writ did not bind or affect the land. Nor would any sale or transfer by the Sheriff be valid as against a purchaser or mortgagee notwithstanding that such purchaser or mortgagee may have had actual or constructive notice of the issue of the writ.

[60] The answer lies, in my respectful opinion, in this paragraph in the reasons of Gummow and Hayne JJ:

> **"[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* …, that the long-running controversy about indefeasibility of title, stemming at least from *Clements v Ellis* … , was finally resolved." (emphasis added)

[61] The mischief was identified by the Minister for Lands (NSW) in his statement set out in [34] above, namely, that "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". That, of course, has been the accepted consequence in Queensland since, at least, *Bond v McClay* [1903] St R Qd 1.

[62] The issue in *Black v Garnock* was identified by Callinan J in the following way:

> **[61]** The issue, therefore, was whether the amendments to the *Real Property Act* 1900 NSW (the Act) in 1976, introducing ss 105-105D, 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.

[63] The decision in *Black v Garnock* is, then, based upon those provisions of the *Real Property Act* 1900 (NSW) which were specifically designed to change the law so far as the purchasers under enforcement warrants and the holders of equitable interests were concerned. It was neither said nor implied by Gummow and Hayne JJ that their decision would have been the same had there not been the 1976 amendments to the *Real Property Act* 1900 (NSW). The LTA does not contain similar provisions to those in s 105B of the *Real Property Act* 1900 (NSW) and it should not, in my respectful opinion, be construed in a way which would dictate the same result as that which flowed in *Black v Garnock*.

Are there other means by which persons in the position of the respondents can protect themselves?

[64] Some argument was directed to the capacity of a purchaser in Secure Funding's position to take steps to protect itself. Although I have held that the consequences in *Black v Garnock* do not apply I will, in deference to those arguments, make the following observations.

[65] The scheme established by Part 7 of the LTA provides a protected period within which the Sheriff can dispose of the property. The majority in *Black v Garnock* recognised the utility of the provisions allowing for the lodgement of caveats under the New South Wales legislation. This was directly addressed at [42] of the joint reasons:

> **"**[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?**" (emphasis added)

[66] Justices Gummow and Hayne then considered the provisions of the New South Wales statute allowing for the lodgement of caveats. They said:

> "[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 land…. 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 ss 105A and 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 excepted…. 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 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 subs (1) and subs (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."** (emphasis added)

[67] Justice Callinan was more emphatic. He commenced his reasons with this encomium for past practice:

> "[52] 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."

[68] The provisions in Part 7 Division 2 of the LTA which deal with caveats are relevantly to the same effect as those referred to in *Black v Garnock.* It would appear that a caveat would work to prevent the registration of a writ of execution as the latter is "an instrument affecting the lot" and so is covered by s 124 of the LTA.

[69] In addition to the capacity to lodge a caveat there is, under the LTA, an additional mechanism by which an unregistered purchaser can obtain protection. Part 7A of the LTA provides for a person in the position of the respondents to deposit a "settlement notice" which, by s 141, has the effect of preventing "registration of an instrument affecting the lot or an interest in the lot until the notice lapses or is withdrawn, removed or cancelled."

[70] Both these methods – caveat or settlement notice – can be lodged or deposited by a purchaser upon entry into a contract of sale. These are provisions which are available for the protection of an unregistered transferee.

[71] Of course, had the Purchasers ensured that the relevant documents were registered in a more timely way then none of these questions might have arisen.

Orders

[72] The Respondents sought orders that the writ "be removed" and that the relevant release of mortgage and transfer be registered in respect of each Lot. I was not referred to, and I have not been able to locate, a power which would allow the Court to order that the writ be removed from the Register. (Unlike the power to order removal of a caveat (s 127) or a settlement notice (s 144).) The authorities suggest that the Respondents could seek an injunction which would prevent the Sheriff from exercising the power of sale until the term in s 117(b) expires.

[73] Secure Funding seeks a declaration that the Sheriff is "obliged and able to act under the enforcement warrant" with respect to Lot 160. There is a caveat, though, lodged with respect to both that lot and Lot 2. Until that caveat is withdrawn or it lapses, is removed or cancelled, any transfer under the writ could not be registered. It would be pointless, then, to make such a declaration. No application was made under s 127 for its removal.

[74] I answer the questions as follows:

1. Has title passed to the third party purchasers?

   No.

2.a. If the answer to 1. is ‘yes’, does the Enforcement Officer have the ability to act on the registered writ of execution?

Unnecessary to answer.

2.b. If the answer to 1. is ‘no’ what effect does the caveat registered on the title have on the Enforcement Officer’s ability to act on the registered writ of execution?

While the caveat is in place the Sheriff is prevented from registering any transfer.

3. Where there are two lots on one title, and only one lot has a writ of execution registered over it, does the Sheriff have the power to enforce the warrant of seizure and sale over the whole title (i.e. both lots)?

No.

4. If the answer to 3. is ‘no’, can the Sheriff, exercising power of sale under the registered writ of execution, seize and sell one lot?

Yes – the lot referred to in the writ.

[75] The application and the cross-application are dismissed.

[76] I will hear the parties as to costs.