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Black v Garnock – are trusts also at risk?

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Four years ago, the High Court in *Black v Garnock* [2007] HCA 31 held that the right of a judgment creditor under a registered writ of execution to force a sale of land under the *Real Property Act* prevails over the interest of a purchaser not protected by a caveat. It is interesting that, despite this, apparently only 10 to 20 per cent of solicitors are lodging caveats on property purchases.

It seems that in addition to this we also have to worry about trusts of land under the *Real Property Act* that are unprotected by caveat.

Suppose, for example, a farmer, George, dies, leaving his farm to his widow Mary for her lifetime with the remainder to their children John, Andrew and Ann. George has appointed John as sole executor and trustee, and as trustee the property is transferred into his name. There is no mortgage and no caveat is put on the on the title.

However, John unfortunately overindulges in gambling and ends up with a significant judgment against him by the Crown Casino, which then lodges a writ of execution for registration against his apparent interest in the farm.

Mary and Ann find out about the writ and apply to the Supreme Court for an injunction restraining the sale and an order to remove the writ.

Would not they have to fail given *Black v Garnock*?

Assuming the obvious, that the judgment debt is purely in John's personal capacity, it seems that, as a practical matter, there is nothing to stop Crown Casino registering its judgment debt against John on the land of which he is registered proprietor, whether or not Crown Casino actually knows that he only holds the land as trustee.

Once the Writ is registered, this starts the '*protected period*' of six months running, during which no other interest (such as any equitable interest of any beneficiary of the Trust in the land) can be registered (unless prepared to concede priority to Crown Casino).

Black v Garnock authoritatively holds that this cannot be circumvented by such an interest holder seeking an injunction to restrain the sheriff from selling the land during the *protected period*.

Once the transfer from the sheriff (as vendor) to the purchaser is registered, the purchaser generally takes the land free of any interests not registered prior to the commencement of the *protected period*, according to s.105B(2).

The only contrary view could be if one of the exceptions in s.105A applies, the section sets out a list of exceptions to the general thrust of the statutory scheme, none of which would appear to apply in the example.

This view assumes a scenario where John is the sole trustee. But what if George appointed, say, three trustees (John & two others) who become registered on title?

Crown Casino is only entitled to execute its judgment debt against John's (and no other person's) interest in the land.

This might well not stop the sheriff from selling the land, but two-thirds of the proceeds of sale would be likely to remain in the trust and Crown Casino would be likely only to receive one-third of the proceeds of sale. Still, a pretty devastating result for the beneficiaries.

It also seems that the other two trustees (or any appointor) could not resolve the problem by sacking John as a trustee. They might well be able to do so for all other purposes, but the problem would remain that John is one of

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the three registered proprietors of the land. And they probably would not be able to remove him as a registered proprietor by filing the necessary land and property information because of the prohibition on doing so during the *protected period*.

It may be that, because the trustees hold as joint tenants the Registrar-General may suspect a trust and may exercise his power under s.105(3) to "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", but this appears far from certain.

So, unless there is a convincing argument otherwise, does not prudent practice dictate that a caveat should always be lodged to protect a trust of land under the *Real Property Act*, except in cases where the beneficiaries otherwise give informed consent?

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