

# News

December 2007

## Property Newsletter

### Love Thy Neighbour – An Update on Problems with Trees

The *Trees (Disputes Between Neighbours) Act 2006 (Act)* commenced on 2 February 2007 and allows an owner of land to approach the NSW Land and Environment Court (**LEC**) for an order to remedy, restrain or prevent damage to the owner's property or injury as a consequence of a tree situated on adjoining land. The Court may also order compensation if damage has already been caused by a tree.

Historically, councils in New South Wales have lacked the power to deal with disputes between neighbours over trees or to direct neighbours to remove or prune trees that grew on their own land unless there was evidence that the tree was dangerous. Consequently, conflict over the management of private trees was the responsibility of both neighbours to resolve and has traditionally been resolved informally through mediation or common law remedies such as nuisance.

The new statutory scheme is designed to provide a simple, inexpensive and accessible process for the resolution of disputes between neighbours about a tree which is caused, is causing or is likely to cause damage to property in the near future or trees which are likely to cause injury to a person. It should be noted that the Act only covers trees on land zoned Residential, Village, Township, Industrial or Business or land having the substantial character of such a zone, with only minor exceptions. However, the Act is scheduled to be reviewed two years after its assent and after that time it is expected that trees on land owned and managed by councils will be covered by the scheme.

The Act does not apply to disputes between neighbours regarding light, access and views and the Act limits the ability to bring a common law action in nuisance by providing that any such action that poses a danger or is causing damage may only be brought in the LEC under the Act.

The LEC may consider a number of issues in making an order which may include the location of the tree, the intrinsic value of the tree, whether the tree has historical, cultural, social or scientific value. The Court may also consider any contribution of the tree to the natural landscape and scenic value of the land on which the tree is situated.



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The scope of the orders that can be made are fairly broad and they include trimming or removing the tree and orders regarding costs and payment of compensation for damage to property. Councils are given the discretion to carry out work ordered by the LEC where the tree owner has not complied with an order and are able to recoup reasonable costs for completing such work.

The Act has changed conveyancing practice as it amends the *Conveyancing (Sale of Land) Regulation 2005* to require vendors to give an implied warranty in sale contracts that there is no application for an order under the Act or any order under that Act that requires work to be carried out in relation to a tree has been carried out fully in compliance with that order. If this is not the case, vendors should disclose the existence of any application or outstanding order. The Act also amends the *Environmental Planning & Assessment Act 1979* to provide for the inclusion of information regarding court orders made under the Act on section 149 certificates issued by Councils.

Orders made under the Act will run with the land. This means that a purchaser may be required to carry out work directed by the LEC where the person who has sold the land has not carried out the Court's orders. Vendors, purchasers and their legal representatives have yet another checklist item to contend with when buying and selling urban land. Given the potential for the orders to be onerous and costly, a purchaser of land should include, among its inquiries of the vendor, whether any order pursuant to the Act has been made in relation to the land and if so, whether the order has been complied with.

## Changes to NSW Mortgage Duty

Mortgage duty is being abolished in NSW in three stages, commencing with the abolition of duty on mortgages for the purposes of owner occupied housing from 1 September 2007.

### Stage 1

From 1 September 2007, a mortgage which secures an advance or advances made for the purpose of owner occupied housing and no other advances is not liable for mortgage duty.

The borrower must be a natural person or, if there is more than one borrower, each of them is a natural person. However, the mortgagor (as opposed to the borrower) can be a company.

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An advance is made for the purpose of owner occupied housing if it is to be applied wholly or predominantly (ie more than 50%) for one or more of the following purposes:

- (a) financing the purchase of a residence,
- (b) financing the construction of a residence,
- (c) financing alterations or additions to a residence,
- (d) repaying another advance, if the advance to be repaid was made for the purpose of owner occupied housing (within the meaning of the relevant legislation).

## Stage 2

From 1 July 2008, mortgage duty will not be chargeable if the mortgage secures an advance or advances made for the purpose of investment housing and no other advances. Again, borrowers will need to be natural persons.

An advance will be made for the purpose of investment housing if it is to be applied wholly or predominantly (ie more than 50%) for one or more of the following purposes:

- (a) financing the purchase of investment housing,
- (b) financing the construction of investment housing,
- (c) financing alterations or additions to investment housing,
- (d) repaying another advance, if the advance to be repaid was made for the purpose of investment housing.

## Stage 3

Mortgage duty will be entirely abolished and not be chargeable on advances made on or after 1 July 2009, regardless of the purpose of the advance or whether the borrower is a natural person or otherwise.

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## The Decision in Black v Garnoch

What does it mean for Purchasers?

On 1 August 2007 the High Court handed down its decision in *Black v Garnoch* [2007] HCA 31. The majority of the Court held that a prior unregistered equitable interest of a purchaser under a Contract for Sale was defeated by a subsequently registered writ for the levy of the property by an unsecured creditor. The case has significant implications for conveyancing practice. There are several procedural steps and safe guards that are recommended as a result of the decision but these will ultimately lead to increased costs for purchasers.

The facts

On 15 June 2005, the Garnochs and the Luffs (**Purchasers**) entered into a contract to purchase a rural property in NSW. Settlement was due to take place on 24 August 2005. On the day before settlement was to take place, a firm of accountants (**Black**) obtained a writ for the levy of the property from the District Court for an unsatisfied judgement Black had against the Vendor. On the morning of settlement the Purchaser's solicitors obtained a final title search in respect of the property and nothing adverse was disclosed. Shortly after that search was undertaken, the solicitors for Black contacted the Purchasers solicitors and advised that they proposed to stop the sale but without revealing how they intended to do so. At approximately midday, Black's solicitors registered the writ on the title to the property without informing the Purchasers or their solicitors. Settlement took place later that day at 2:00pm. In the days following settlement the Purchaser attempted to register the Transfer of the property however, the Department of Lands refused to register the Transfer because of the writ that was registered on the title prior to settlement.

Key issues and the law

The key issue in the case was how the registration of the writ affected the Purchasers and in particular whether the Purchasers equitable interest in the property under the Contract for Sale could be defeated by the writ.

Pursuant to section 105B(1) of the *Real Property Act* 1900 the Registrar General is empowered to register a transfer to a purchaser from the sheriff upon execution of a writ. Section 105B(2) states that the purchaser from the sheriff obtains title to the land free from all estates and interests except from those recorded in the relevant folio of the Register. However, section 112(2) of the *Civil Procedure Act* 2005 provides that a writ of execution does not affect the title to land

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acquired by a person in good faith and for valuable consideration, and without notice that the writ has been delivered to the sheriff and remains unexecuted.

In the case of *Black v Garnoch*, the creditor Black argued that as the Purchasers' interest was not registered on the title any purchaser from the sheriff pursuant to the writ would have priority over the Purchasers. On the other hand the Purchaser argued that the title was unaffected by the writ as it was only binding upon the land from the time it was delivered to the sheriff and that occurred after completion.

The decision

The case ultimately ended up in the High Court. The majority held that the effect of section 105B(2) of the *Real Property Act 1900* was that a sheriff's purchaser pursuant to a writ would be unaffected by any unregistered interest. It was further noted that the Torrens title system is fundamentally a system of title by registration and that the register "*has the first and last word on all relevant titles and interests*". Consequently, the Court held in favour of Black and confirmed that the unsecured creditors writ took priority over the equitable interest of the Purchaser.

Outcomes from the decision

As a direct result of this decision it is recommended that all Purchasers must consider whether or not they wish to go to the expense of registering a Caveat on the title following exchange to notify all relevant parties of their equitable interest in the property. Failure to do so could result in a situation like that which occurred in *Black v Garnoch*. The case has also highlighted the need to conduct a final search as close as possible to the settlement time as is reasonably practicable in an effort to detect any dealings or affectations that may have been registered against the title at the last minute.

## GST and forfeited deposits

The Australian Taxation Office (**ATO**) has long held the view that GST is payable on a forfeited deposit in a transaction where the proposed sale is a taxable supply but did not proceed to completion. This view was expressed by the ATO in its ruling GSTR 2006/2.

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The Federal Court in the case of *Reliance Carpet Co Pty Limited v Federal Commissioner of Taxation* however decided that when a deposit is paid under a contract for sale of land and the deposit is subsequently forfeited there is no “supply” within the meaning of the GST Act.

As a consequence, the Federal Court held that the vendor was not required to remit any GST on the forfeited deposit.

Businesses, retailers and individuals have been paying GST on forfeited deposits since GST was introduced in 2000 based upon the position taken by the ATO. This latest decision by the Federal Court could give rise to entitlements to refunds for GST paid on forfeited deposits and possibly on similar payments such as cancellation fees, penalties, lease termination fees and late fees.

Anyone who has remitted GST to the Australian Taxation Office based on a forfeited security deposit should immediately notify the ATO in writing of their claim for a refund of GST. Claims for refund must be made within four years from the tax period to which the amount relates.

The ATO has decided to appeal against the decision of the Federal Court and has lodged an application seeking leave to do so in the High Court.

It is unlikely that the ATO will pay any refunds pending the outcome of the High Court proceedings.

## Assistance

If we are able to assist you in any of these areas, or other property matters, please contact one of our Property & Construction Practice Group Team:

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## Disclaimer

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