

ANNOTATED

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S263 of 2012

BETWEEN:

CASTLE CONSTRUCTIONS PTY LIMITED
Appellant

and

SAHAB HOLDINGS PTY LTD
First Respondent

REGISTRAR-GENERAL
Second Respondent



APPELLANT'S REPLY

Part I: Internet publication

1. This Reply is in a form suitable for publication on the internet.

Part II: Reply

A. Introduction

2. Sahab's submissions provide no basis upon which to conclude that the Court of Appeal was correct in holding that Sahab was entitled to orders pursuant to either s122 or s138 of the *Real Property Act* 1900 (NSW) (the "Act").

B. Contested Facts

3. Castle does not dispute that the easement "*continued to exist*"¹ – up until 2001. Once the Registrar-General cancelled the recording of the easement in the Register, however, the easement was thereby extinguished.² This is a consequence of the Torrens system being one of title by registration, rather than registration of title.³

¹ Sahab's Submissions, para. 4.

² See Appellant's Submissions, para. 38; *Scallan v Registrar-General* (1988) 12 NSWLR 514 at 518E-F; *State Bank of New South Wales v Berowra Waters Holdings Pty Limited* (1986) 4 NSWLR 398 at 402E.

³ *Breskvar v Wall* (1971) 126 CLR 376 at 385-386.

4. Contrary to Sahab's suggestion that the interpretation of the terms of the easement proffered in Castle's removal request was "*hopelessly unarguable*",⁴ the Court of Appeal concluded that Castle's interpretation was "*mistaken, but arguably correct*".⁵
5. The Court of Appeal found that notice was given by the Registrar-General to Sahab's predecessors-in-title pursuant to s12A(1) of the Act.⁶ Sahab may not in this Court seek to overturn this finding by relying upon a document that was not in evidence below:⁷ *Mickelberg v The Queen*;⁸ *Clodumar v Nauru Lands Committee*.⁹
6. While the evidence disclosed that Sahab was aware, at the time of its purchase, that the easement had been extinguished,¹⁰ there was, in fact, no evidence that Sahab "*did not know at [the] time of purchase the circumstances of the removal*".¹¹
7. Given that there is access to the top floor and the rear courtyard of Sahab's premises via the ground floor,¹² those areas were "*landlocked*"¹³ only in the sense that the ground floor had been leased separately from the remainder of the premises.

C. Section 42 – "*omission*"

8. Sahab's extensive reliance upon *Dobbie v Davidson*¹⁴ is not in point.¹⁵ In *Dobbie v Davidson*, the Court of Appeal was not called upon to address, and did not address, the question relevant here – namely, whether the term "*omission*" in s42(1)(a1) is apt to describe a deliberate expungement from the Register. Similarly, *Australian Hi-Fi Publications Pty Limited v Gehl*¹⁶ did not address the consequences of a deliberate cancellation of an easement by the Registrar-General.

⁴ Sahab's Submissions, para. 4.

⁵ *Sahab Holdings Pty Limited v Registrar-General* [2011] NSWCA 395 at [161] [AB 322].

⁶ *Sahab Holdings Pty Limited v Registrar-General* [2011] NSWCA 395 at [57] [AB 280].

⁷ The "*document first produced on 26.xi.10*", referred to in Sahab's Submissions at paras. 5 and 6.

⁸ (1989) 167 CLR 259.

⁹ (2012) 288 ALR 208 at 214-215 [28].

¹⁰ AB 133.45.

¹¹ Sahab's Submissions, para. 7.

¹² AB 32.10.

¹³ Sahab's Submissions, para. 7.

¹⁴ (1991) 23 NSWLR 625.

¹⁵ Sahab's Submissions, paras. 9, 12, 14, 15 and 16.

¹⁶ [1979] 2 NSWLR 618.

9. Sahab submits that if Castle’s argument succeeds, “*then an admittedly erroneous decision...would not be reviewable or compensable....*”¹⁷ However, depending upon the circumstances, such a decision may be reviewable pursuant to s122. Furthermore, compensation is available (pursuant to s129 of the Act) to anyone who has suffered loss or damage as a result of *any* act or omission of the Registrar-General in the performance of his duties (including an erroneous decision).¹⁸
10. Sahab’s contentions that there is “*no reason in principle or policy to read the exception to indefeasibility restrictively*” and “*that [t]he effect on the Register and the rights of the registered proprietor are the same whatever the reason for the easement not being on the Register...*”¹⁹ are both incorrect:-
- 10.1 The first proposition is inconsistent with the view expressed in this Court in *Leros Pty Limited v Terara Pty Limited*.²⁰ It is also contrary to the statement of principle expressed by the Privy Council in *British American Cattle Co. v Caribe Farm Industries Limited* that to achieve the objectives of indefeasibility “*it is critical to keep to a minimum the number of matters which may defeat the title of the registered proprietor.*”²¹
- 10.2 As to the second proposition, the rights of registered proprietors, where an easement has been omitted through a “*slip*”, remain unaffected in the sense that the easement may be restored by the Registrar-General pursuant to s12(1)(d); contrast the registered proprietor’s rights where the easement is intentionally removed by court order or by consensus of the parties, in which case the easement could not be restored.
11. Contrary to what appears at paragraph 17 of Sahab’s Submissions, even if there were an “omission” of the easement, there *are* further impediments to the granting of relief to Sahab, namely those raised by ss 12A(3) and 118, and those within ss 122 and 138 themselves.²²

¹⁷ Sahab’s Submissions, para. 10.

¹⁸ See s129(1)(a) of the Act; *see also Challenger Managed Investments Pty Limited v Direct Money Corporation Pty Limited* (2003) 59 NSWLR 452 at 461 [84] per Bryson J.

¹⁹ Sahab’s Submissions, para. 13.

²⁰ (1992) 174 CLR 407 at 424.

²¹ [1998] 1 WLR 1529 at 1533H.

²² See Appellant’s Submissions, paras. 41-62, and paras. 13-21, below.

12. Sahab submits that reinstatement of the easement “*could not be seen to be an assault on Castle’s indefeasible title*” because reinstatement “*would do no more than confirm the status of Castle’s title at the time it first acquired the land.*”²³ However, the status of the proprietor’s title at the time it acquired its land is not to the point – the land may have been the subject of numerous dealings since then. Whether a mortgage, lease or easement has been registered after acquisition of the land, the proprietor will hold his title in accordance with what is recorded on the certificate of title. This accords with the principles of immediate indefeasibility endorsed by this Court in *Breskvar v Wall*.²⁴ Equally, upon removal of the easement from the Register here, Castle acquired an indefeasible title to its land, freed of the easement.²⁵ Castle’s freshly issued certificate of title,²⁶ showing no easement, was and is “*definitive of the title of the registered proprietor*”: *Breskvar v Wall*.²⁷
13. The description of s118 as “*complementary*” to s42²⁸ provides no answer to the obstacle to relief posed by the section. The approach adopted by the Court of Appeal effectively involves a total disregard of s118. Section 42 provides for exceptions to indefeasibility, but does not, of itself, regulate the circumstances in which an easement may be reinstated. Sahab must point to some other provision of the Act pursuant to which it may obtain reinstatement. Section 138 is unavailable in this case: it is “*effectively barred by*” s118.²⁹ The construction adopted by the Court of Appeal (and Sahab) effectively inserts into s118 an additional exception for omitted easements for which the legislature has not provided.

D. Section 138

14. Sahab invokes as “*clearly correct in principle and policy*” the view of the Court of Appeal that the term “*recovery*” in s138(1) includes a right to obtain an easement which Sahab had never previously enjoyed; the Court’s reasoning is said to be “*congruent*” with relevant dictionary definitions.³⁰ However, the footnoted

²³ Sahab’s Submissions, para. 18.

²⁴ (1971) 126 CLR 376 at 385.

²⁵ *Scallan v Registrar-General* (1988) 12 NSWLR 514 at 518E-F.

²⁶ AB 59.

²⁷ 126 CLR at 385.

²⁸ Sahab’s Submissions, para. 19.

²⁹ *Breskvar v Wall* 126 CLR at 385.

³⁰ Sahab’s Submissions, para. 21.

definitions are equivocal, most referring to the regaining of something lost or earlier enjoyed.

15. Sahab also propounds s138(3) as a “*standalone*” source of power to order correction to the Register.³¹ This submission ignores the description in subsections (1) and (2) of the orders in subsection (3) as “*ancillary*”. The Court of Appeal stated that “[i]t would be an oddity of statutory construction if s138(3) could apply in a wider variety of circumstances...than those identified in the immediately preceding subsections...”³² If Sahab’s construction of s138(3) were correct, the Supreme Court would be permitted to create a new folio of the Register, or issue a new certificate of title, in proceedings of any kind. Such a construction is repugnant to the principles of indefeasibility embodied in the Act.

E. Section 122

(i) Person dissatisfied

16. It is correct, as Sahab suggests,³³ that the term “*person dissatisfied*” in ss 121 and 122 is not, in terms, restricted by reference to time or status. Nevertheless:-

16.1 The change from the statutory predecessor of these sections³⁴ expanded the scope of applicants for review beyond “*proprietors*”, but not otherwise (either temporally or by reference to the relationship between the applicant and the subject matter of the decision).

16.2 The review provisions must be understood to operate within the constraints of, and so as not to subvert, the provisions for indefeasibility contained in the Act. Section 122 ought be construed narrowly, rather than broadly, so as to confine the circumstances in which the title appearing on the Register might be defeated.

16.3 Section 122 is not directed to a review by the Court of a decision taken by the Registrar-General years before, to which the applicant for review was not privy and in which it then had no interest. The primary judge correctly

³¹ Sahab’s Submissions, para. 39.

³² *Sahab Holdings Pty Limited v Registrar-General* [2011] NSWCA 395 at [129] [AB 309].

³³ Sahab’s Submissions, para. 29.

³⁴ AB 159.40-160.50.

concluded that s122 “*is concerned with the performance of present identifiable duties.*”³⁵ The expression “*person dissatisfied*” does not encompass a person who was not affected by the decision at the time it was made. Otherwise, a decision of the Registrar-General could be challenged by each successive purchaser, even where that purchaser knew of the decision when acquiring the land. That would lead to the possibility of challenges to the Register being made indefinitely.

(ii) Section 122(4)

17. Contrary to Sahab’s submission,³⁶ the coda to s122(4) does not provide a separate source of power for the Court to amend the Register. Section 122(4)(b) confines the relief which the Court may grant to ordering the Registrar-General to take action that he is otherwise empowered by the Act to take. The suggestion that the coda to s122(4) is not limited by s122(4)(b) would effectively deprive s122(4)(b) of any operation, and further, would invest the Court with an unlimited discretion to alter the Register. Such a construction of s122(4) would tend to detract from, rather than bolster, the conclusiveness of the Register. The Court of Appeal took the (provisional) view that the coda to s122(4) does not provide a broader power than that contained in s122(4)(b).³⁷

(iii) Sections 122 and 12A(3)

18. The failure of the registered proprietors to respond to the Registrar-General’s notice in 2001 cannot be overcome by a subsequent request that the Registrar-General reverse his earlier decision.³⁸ Section 12A(3) would be rendered ineffective if a registered proprietor who failed to respond to a notice could avoid the consequences of the provision simply by requesting the Registrar-General to reverse the earlier decision, thereby effectively enabling (as it were, by the back door) s122 review of the original decision.

³⁵ AB 204.15.

³⁶ Sahab’s Submissions, para. 41.

³⁷ *Sahab Holdings Pty Limited v Registrar-General* [2011] NSWCA 395 at [233] [AB 345].

³⁸ Sahab’s Submissions, para. 24.

19. Sahab's attempt to exclude from the concept of an "*action*" the statutory review provided by s122 is not justified.³⁹ The relevant second reading speech to which Sahab refers,⁴⁰ does not assist Sahab's position; to the contrary, the speech indicated that the legislature intended s12A to prevent both claims on the assurance fund and actions against the Registrar-General seeking review (in circumstances where registered proprietors have not objected to a notified decision).⁴¹ In fact, the term "*action*" was used by the Minister to refer specifically to proceedings in the Supreme Court in which the Registrar-General is required to justify the grounds for his decision⁴² – i.e. review proceedings. Such an interpretation is consistent with the Torrens policy of keeping challenges to the Register to a minimum.
20. It is incorrect to say that Castle's interpretation of the effect of s12A(3) on s122 "*neuters the power of review*".⁴³ Rather, it qualifies it. The section reflects the policy whereby a person with an interest in land who is notified by the Registrar-General of his intention to modify the Register should not be permitted to challenge that decision after receiving, but failing to object to, that notice. It is entirely reflective of the principles of indefeasibility and a legislative policy that a registered proprietor who does not so object should not have a later right to subvert that decision.
21. The words "*through or under*" in s12A(3) should not be construed in the technical sense suggested by Sahab.⁴⁴ Just as the words "*from or through*" in s118(1)(d)(ii) of the Act signify the acquisition of title from a predecessor in title (rather than from the Crown), the words "*through or under*" should be similarly construed.⁴⁵

³⁹ Sahab's Submissions, para. 25.

⁴⁰ Sahab's Submissions, para. 25 (third line).

⁴¹ AB 372.18-38.

⁴² AB 372.26-32.

⁴³ Sahab's Submissions, para. 26.

⁴⁴ Sahab's Submissions, para. 42.

⁴⁵ AB 375.

F. Sahab's Notice of Contention

22. This Court does not need to consider the meaning of “*wrongfully obtained*” or “*error*” in s136,⁴⁶ because:-

- (a) s136 does not permit rectification of the Register; the provision is facultative, permitting the Registrar-General to call in a certificate of title or duplicate dealing to cancel or correct it so as to bring the document into conformity with the Register;⁴⁷
- (b) there is no power to invoke s136(1) where (as here) the relevant entry on the certificate of title in fact reflects the comparable entry in the folio of the Register;⁴⁸ and
- (c) s136 only applies when the Registrar-General is satisfied that a recording has been made in error in the Register or has been wrongfully obtained, and here he was not so satisfied.⁴⁹

23. Sahab seeks to support the judgment below on the basis that the Registrar-General's removal of the easement was a correctable “*error*” within the meaning of s12(1)(d).⁵⁰ This is not so:-

23.1 The meaning of “*error*” must be limited so as not to impinge on indefeasibility,⁵¹ and (consistently with the views expressed in *Frazer v Walker*⁵²) s12(1)(d) is not a provision of substantive importance, in that it is addressed to errors (and omissions) in the nature of a slip.

23.2 Sahab's contention that the Registrar-General's deliberate expungement of the easement was a “*slip*”,⁵³ reflecting the conclusion of the Court of Appeal,⁵⁴ strains the ordinary understanding of the difference between a deliberate decision on the one hand and a “*slip*” on the other hand; and it impermissibly

⁴⁶ Sahab's Submissions, paras. 30-36.

⁴⁷ *Sahab Holdings Pty Limited v Registrar-General* [2011] NSWCA 395 at [171]-[172] [AB 325].

⁴⁸ *Sahab Holdings Pty Limited v Registrar-General* [2011] NSWCA 395 at [172] [AB 325].

⁴⁹ *Sahab Holdings Pty Limited v Registrar-General* [2011] NSWCA 395 at [194] [AB 332].

⁵⁰ Sahab's Submissions, paras. 30-36.

⁵¹ *Sahab Holdings Pty Limited v Registrar-General* [2011] NSWCA 395 at [193] [AB 332].

⁵² [1967] 1 AC 569 at 581.

⁵³ Sahab's Submissions, paras. 35 (last two sentences) and 36.

⁵⁴ *Sahab Holdings Pty Limited v Registrar-General* [2011] NSWCA 395 at [192] [AB 331]

strains indefeasibility concepts expressed in *Frazer v Walker* and the many decisions which have applied it.

23.3 *Re N Jobson and the Real Property Act 1900*⁵⁵ is unhelpful in resolving the current matter.⁵⁶ Whilst the erroneous removal of the caveat in that case may properly be regarded as a “slip” which can be corrected pursuant to s12(1)(d),⁵⁷ it is doubtful, in light of *Frazer v Walker*, that the subsequent registration of a transfer could today be corrected. In *Breskvar v Wall*,⁵⁸ this Court held that *Caldwell v Rural Bank of New South Wales*⁵⁹ – in which Roper CJ in Eq held that registration of the Minister as proprietor, following an invalid resumption of land, was an error which could be corrected under the equivalent of s12(1)(d)⁶⁰ – was no longer good law following *Frazer v Walker*.

G. Sahab’s Cross-Appeal

24. Sahab should not be granted special leave to undertake its proposed cross-appeal. The subject covenants⁶¹ were agreed in 1921 and were unique to the circumstances of transferor and transferee; it can safely be anticipated that their terms will not ever be repeated. The cross-appeal raises no question of law and no matter of general importance.
25. If, contrary to the above, special leave were granted, the cross-appeal should nonetheless be dismissed. For reasons given by the Primary Judge and the Court of Appeal,⁶² the first (“fencing”) covenant expired upon the transfer of the Sailors Bay land by the Middletons, but the remaining restrictive covenants as to usage and payment continued to attach during the life of the easement.

⁵⁵ (1950) 51 SR (NSW) 76.

⁵⁶ Sahab’s Submissions, para. 35.

⁵⁷ *State Bank of New South Wales v Berowra Waters Holdings Pty Limited* (1986) 4 NSWLR 398 at 404.

⁵⁸ (1971) 126 CLR 376 at 396-397.

⁵⁹ (1951) 53 SR (NSW) 415.

⁶⁰ At 426.

⁶¹ AB 72 and 84.

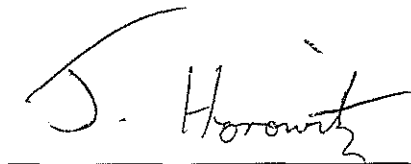
⁶² AB 286-289.

26. This is so, in particular because the part of the Schedule containing the first (fencing) covenant⁶³ commences "*The transferee... but only during the ownership thereof by us... covenants... that no fence...*"; that is, it embodies the temporal qualification. The second part, containing the remaining restrictive covenants, commences "*and the transferee... further covenants...*", to which no such temporal limitation is attached.

Dated: 5 November 2012



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⁶³ AB 72.9-29 and 84.11-25.