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

FIRST RESPONDENT'S WRITTEN SUBMISSIONS IN CHIEF ON APPEAL, NOTICE OF CONTENTION, CROSS-APPEAL

Part I: Internet certification

1. These submissions are in a form suitable for publication on the internet.

Part II: Concise statement of issues

2.(a) **Appeal** (AB398)

(i) Does "omission" mean "not there" or "left out" irrespective of the reason for that state in *Real Property Act 1900 (NSW) ("RPA")* ss 12(1)(d) and 42(1)(a1)?

(ii) Does *RPA* s118 preclude reinstatement of an omitted easement?

(iii) Does "recovery" in *RPA* s118 include only those interests in land which were previously registered to the claimant?

(iv) Does *RPA* s12A(3) preclude review under *RPA* s122?

(v) Was the appellant ("Castle") precluded from raising on appeal the first respondent ("Sahab")'s entitlement as a "person dissatisfied" under *RPA* s121(a)-(c) and, if not, was Sahab such a person?

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(b) **Notice of contention** (AB402)

(i) Is *RPA* s138(3) a separate source of authority and power to correct the Register where a party's rights to land are determined and declared, as in this proceeding?

(ii) Does *RPA* s136(1) empower correction of the Register folio?

(iii) Is the second respondent ("Registrar-General)'s failure to be satisfied or state of being satisfied, and choice whether or not to exercise a power under the *RPA*, a decision open to review under *RPA* s122 or only in accordance with judicial review principles?

10 (iv) Does "wrongfully obtained" in *RPA* s136(1)(c) extend to an intentional act (the making of a statutory declaration) that was not rightful?

(v) Should "error" in *RPA* ss12(1)(d), 136(1)(a) and (b) be read down from its ordinary meaning, which applied here, to encompass only those errors which had no impact on who has an indefeasible title or right, and was this such a correctable error anyway?

(vi) Does each of *RPA* ss12(1)(d), 136(1)(a),(b) and (c), 122 and 138(1) and (3) provide a source of authority and power statutorily recognised within the regime of indefeasibility to correct the Register as sought by Sahab, whether or not that correction was or would be authorised under
20 s42 or any other provision of the *RPA*, s65 of the *Supreme Court Act 1970(NSW) ("SCA")* or the general law?

(vii) Does the coda to *RPA* s122(4)(b) provide a broader power than that contained in s122(4)(b) itself?

(viii) Was Sahab a person claiming "through or under" a person said to have been notified under *RPA* s12A(1); was there any proper evidence of a s12A(1) notice?

(c) **Notice of cross-appeal** (AB411)

(i) Did the covenants cease to restrict the scope of enjoyment of the right of way on the registration in 1960 of transfer H403542?

Part III: Section 78B certification

3. The first respondent certifies that it considers that no notice should be given in compliance with section 78B of the *Judiciary Act 1903 (Cth)*.

Part IV: Contested facts

4. The following qualifications apply to Castle's statement of relevant facts. First, as the primary judge and Court of Appeal found, against Castle's submissions[1], the easement by right of way continued to exist, was not limited in existence by the covenants, only in scope of enjoyment, and had been removed by the Registrar-General apparently on an erroneous interpretation of the terms of the easement promulgated in Castle's removal request. The interpretation put forward to the Registrar-General by Castle (AB80) was hopelessly unarguable in relying upon the Davis transfer (as the primary judge put it, "incorrect and misleading").[2]

5. Secondly, the Registrar-General "may" issue a notice under *RPA* s12A(1) – it is not obligatory. If and only if one is issued, s12A(3) applies.[3]

6. Thirdly, the only contemporary (2001) reasons produced at time of the order of 26.x.09 (AB167) by the Registrar-General were "No objection received to the applications. Applications granted." (AB107). The document first produced on 26.xi.10 (AB245-246) as contemporary does not lead, nor does other evidence, to the necessary conclusion that the Registrar-General formed a view on the expiry of the easement, only that such a view (in a hopelessly incorrect form) was put forward in Castle's request 792428 of 3.ix.01 (AB78).[4]

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[1] *Sahab Holdings Pty Limited v Registrar-General* [2010] NSWSC 162 ("T2") [29]-[36], [76]-[77] (AB179-182, 197-198); [2011] NSWCA 395 ("CA1") [4], [44], [56], [73(a)], [74]-[76], [78], [195]-[196], [224] (AB259, 273, 280, 286-289, 332-333, 343).

[2] T2 [76] first words (AB197); see also references in note 35. Davis was the transferee whereas the terms of the easement and covenant relevantly relied upon the transferor.

[3] As contended later, there was no proper evidence of a s12A(1) notice and this is confirmed if one takes into account the document first produced on 26.xi.10 (AB245-246) (presumably said to be "requested" by the notice of motion that led to the orders of 26.x.09 (AB167)).

[4] The references in note 1, particularly CA1 [44], [56], [195]-[196] and [224], show that the Court of Appeal saw it as not necessary ultimately to resolve this issue beyond saying that there was an apparent assumption by the Registrar-General that the easement was not subsisting in 2001 and there was no reason to infer that the Registrar-General failed in his duty properly to consider the 2001 request by Castle on its merits. Whether or not

7. Fourthly, Sahab purchased in December 2006 (completed in April 2007) with knowledge, from title search, that the previous right of way had been extinguished in 2001 and had been removed from the folio identifier for the servient tenement subject to the right of way (**"134 Sailor's Bay Road"**) but not (in its reference to the covenants in the same instrument which related to the easement (AB56)) from the dominant tenement at 69 Strathallen Avenue that it was buying (**"Strathallen"**), *and did not know at time of purchase the circumstances of the removal* (AB11-13, 15). Up until the removal of the easement in 2001, the right of way had been in continuous use by the registered proprietor for the time being of Strathallen. Without the right of way, access to the top (second) floor of the premises on Strathallen and to the rear courtyard was landlocked because the premises occupied the entire frontage, there was no internal staircase and the ground floor shop was leased and had been for many years. The top floor of Strathallen has not been used since that time.

Part V: Appellant's statement of statutory provisions

8. The appellant states applicable provisions, with the addition of sections 45, 49 and 136; their effect is the subject of dispute. Copies of the additional provisions are attached, being the same at date of submission as at the relevant time.

Part VI: Statement of first respondent's argument on appeal

9. **Introduction** The reasoning adopted by the Court of Appeal on matters the subject of Castle's appeal was essentially correct. It is consistent with

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the Registrar-General formed a view ultimately does not affect the contentions below, although it strengthens the basis for review if that finding is made. If the Registrar-General failed to form a view (or formed a view on the hopelessly incorrect interpretation put forward by Castle in 2001), then he could not have been satisfied, under *RPA* s32(6) or any other provision, even on judicial review principles, let alone on a merits review under *RPA* s122; if he formed a view that *RPA* s49 applied because the easement was abandoned as it had expired on an erroneous interpretation of the easement, that was patently unreasonable even on judicial review principles and clearly wrong on a merits review because there was no *physical* abandonment, actual or deemed, of the easement which is required to attract s49, quite the contrary, and he clearly didn't call for let alone consider any material on physical use of the easement: *Grill v Hockey* (1991) 5 BPR 11,421; *Treweeke v 36 Wolseley Road Pty Ltd.* (1973) 128 CLR 274; *Proprietors SP 9968 v Proprietors SP 11173* [1979] 2 NSWLR 605 at 616-617; *Swan v Sinclair* [1925] AC 227; *James v Stevenson* [1893] AC 162 at 168; *Lolakis v Konitsas* (2002) 11 BPR 20,499 at [58]-[65]. In his correspondence of 2.x.08 and 20.x.08 (AB47, 52) refusing Sahab's 2008 request to reinstate the easement (AB40ff), the Registrar-General said that, once he had determined to grant the request, notice was sent to the then registered proprietor of Strathallen "pursuant to" *RPA* s12A: see CA1 [41]-[48] (AB271-276). A contemporary copy of a s12A notice was never produced, in response to notice or court order.

established principle on the relationship between indefeasibility and the power to correct the Register, and with jurisdiction given to the Court. It recognises, and does not widen, the special statutory protection afforded to easements within the regime of indefeasibility, which 1995 statutory amendments clarified applied to easements created under the *RPA* as well as those that pre-existed being brought under the *RPA*. There is no broader practical or policy effect than arises from the long-standing decision of the Court of Appeal in ***Dobbie v Davidson*** (1991) 23 NSWLR 625[5], which Castle and the Registrar-General do not challenge. The reasoning in ***Dobbie*** said that earlier appellate authority[6] was too restrictive because it required a deliberate decision of the Registrar-General (an act or omission which was in breach of duty). But that earlier authority would cover the present situation even if the extended meaning of "omission" in *Dobbie* was restricted to its facts (pre-*RPA* easements).

10. If the appellant's argument succeeded, then an admittedly erroneous decision (or decision not properly made) of the Registrar-General that leads to an error or omission in the Register and which is initiated (in the erroneous interpretation) by the person who seeks to benefit from it *who is still the registered proprietor without any intervening or supervening registered interest on the title benefited*, would not be reviewable or compensable by the Registrar-General or the courts despite clear rights of review and conferral of jurisdiction in the statutory regime of indefeasibility. The Registrar-General would be able to exercise power without the constraint that one expects that a statutory official works under, especially when there is a merits review (*RPA* s122). Paramountcy of the Register could be circumvented because a wrong decision of the Registrar-General removes a *registered* interest (the easement) without recourse, an extraordinary result.[7]

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[5] It appears from the report that a special leave application was filed but not pursued. *Dobbie* has been applied in the context of restrictive covenants inadvertently left off in *Cirino v Registrar-General* (1993) 6 BPR 13,260 and in relation to a ct issued on the basis of a false statutory declaration in *Challenger Managed Investments Ltd v Direct Money Corporation Pty Ltd (2003) 59 NSWLR 452 (Bryson J) at [72]-[73].*

[6] *Australian Hi-Fi Publications Pty Ltd v Gehl* [1979] 2 NSWLR 618 (CA).

[7] The same point applies in relation to the notice of contention, below. Such an outcome appears contrary to the compensation regime rationale: see *Challenger Managed Investments Pty Ltd v Direct Money Corporation Pty Ltd* (2003) 59 NSWLR 452 (Bryson J) at [82]-[84].

11. **Indefeasibility, *RPA* sections 12(1)(d), 42(1)(a1), 45, 118** In the Court of Appeal's reasoning on the matters the subject of Castle's appeal there is no challenge to the doctrine of indefeasibility.

12. The Court of Appeal relied[8] upon an express exception to indefeasibility in *RPA* s42(1)(a1): "in the case of the *omission or misdescription* of an easement subsisting immediately before the land was brought under the provisions of this Act *or validly created at or after that time under this* or any other *Act* or a Commonwealth Act" [emphasis added]. That provision, inserted in 1995, relevantly replaced former *RPA* s42(1)(b) (previously s42(b)): "in the case of omission or misdescription of any right-of-way or other easement created in or existing upon any land". Former s42(1)(b) was interpreted by the Court of Appeal in ***Dobbie v Davidson*** (1991) 23 NSWLR 625. "Omission" was held to mean "left out" or "not there", irrespective of the cause and without attribution of cause or fault or reason for the error[9]: The phrase "omission or misdescription" appears identically in the current legislative formulation. There is nothing in the CA reasoning in ***Dobbie v Davidson*** which restricts its correct application on the meaning of omission to easements which existed before the relevant land was brought under the *RPA* and which were not recorded once the land was brought under the *RPA*. Indeed, the 1995 amendment expressly endorsed[10] the application of the provision to easements validly created (as the present easement was) after the relevant land was brought under the *RPA*. This requires registration of the easement under the *RPA* and a *deliberate expungement of that registration if the easement is no longer to be there.* ***Dobbie v Davidson*** was followed by the CA in the present case[11]. The CA in ***Dobbie*** focused on the ordinary meaning of "omission". "Left out" refers to the leaving which encompasses both deliberate and inadvertent acts, as does "not there". The ordinary meaning of "omission" was correctly identified in ***Dobbie***.[12]

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[8] CA1 [251]-[274] (AB350-358).
[9] See esp at 629F-630E, 634B, 635B-F, 643F-G, 647E, 653B-D, 657E-F, 659E, 660E, 670E.
[10] The amendment endorsed the preponderance of existing case law: *James v Registrar-General* (1967) 69 SR (NSW) 361 at 367, disapproving on this aspect *Jobson v Nankervis* (1943) 44 SR (NSW) 277 at 279; *MauriceToltz Pty Ltd v Macy's Emporium Pty Ltd* [1970] 1 NSWR 474, and McLelland CJ in Eq at first instances in *Berger Bros Trading Co Pty Ltd v Bursill Enterprises Pty Ltd* (1969) 91 WN (NSW) 521.
[11] CA1 esp [266]-[268] (AB355-356).
[12] See *Macquarie Dictionary* (1981) relevant definitions: "omission ... *n.*1. the act of omitting. 2. the state of being omitted. 3. something omitted."; "omit ... *v.t.* ... 1. to leave out ... 2. to forbear or fail to do, make, use, send, etc". See also *New Shorter Oxford English Dictionary* (1993) relevant definitions: "omission ... *n.* ME. 1 The action or

13. There is no reason in principle or policy to read the exception to indefeasibility restrictively. The 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, so the rationale for the express exception to indefeasibility uniformly applies. As the CA pointed out at CA1 [267] (AB355), *RPA* s42(1) is directed to the state of the Register, not the reason for that state being as it is.

14. Whatever the meaning given to "omission", a registered proprietor will be subject to the potential exception. As Priestley JA in ***Dobbie*** exhaustively explored,[13] an exception to indefeasibility for omitted easements (even against subsequent registered proprietors as noted in CA1 [250] (AB350)) has been present since the inception of Torrens legislation for the consistent reason that an important property right should receive such protection. The subjection of a registered proprietor therefore arises from the presence of the exception and the special protection which it gives to easements, not from the means by which an easement came to be not there on the Register. Removal by a deliberate but wrong decision of the Registrar-General will be easier to identify and deal with than an easement by prescription that pre-dated the title (which will not appear in any record) but which, as Kirby P pointed out in ***Dobbie***, cannot be taken off the owner (intentionally or otherwise) by someone else in the course of making title.[14] Lapse of time until the matter is raised, and claimed prejudice, are grounds for an application for extinction of the easement by reason of abandonment (for instance), or the exercise of the discretion on review.[15] In the narrow circumstances of this case: Castle has not sold or mortgaged the title; the claim is made shortly after Castle's request initiated the erroneous removal on grounds put forward by Castle that were hopelessly erroneous in fact; there is an easement by right of way in favour of 136 Sailor's Bay Road over

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an act of neglecting or failing to perform something, esp a duty. ME 2 The action of omitting or failing to include something or someone, the fact of being omitted; an instance of this. ME."; "omit ... *v.t.* IME ... 1 Leave out; fail to include.IME. 2 Fail to perform, leave undone; neglect *to do*. M16". Giving the word its ordinary meaning accords with Richmond J in the NZCA in *Sutton v O'Kane* [1973] 2 NZLR 304 at 349 line 44.

[13] (1991) 23 NSWLR 625 at 643E et seq (including Appendix at 661 et seq). See also *Registrar-General v Cihan* [2012] NSWCA 297 at [23]-[25].

[14] (1991) 23 NSWLR 625 at 632B et seq.

[15] See cases on physical abandonment at note 4; *RPA* s49; *Conveyancing Act 1919 (NSW)* s89 (which encompasses grounds other than abandonment). This cuts the ground from under Castle's submissions para 61, implicit also in the Registrar-General's submission.

the same, still existing access route on 134 Sailor's Bay Road (unrestricted by covenants on the scope of use of the access route).[16]

15. "Omission" is not qualified in *RPA* s42(1)(a1), nor was it in former s42(1)(b). The clear meaning of the word rationally expounded in the Court of Appeal in 1991 limits the potential utility of extrinsic material. *Interpretation Act 1987 (NSW)* s34(1)(a) permits an Explanatory Note to confirm the ordinary meaning of the text (taking into account the text's context and the statutory purpose and object). Here the 1995 Explanatory Note expressly said the amendment was consistent with ***Dobbie v Davidson*** after saying that, "In the case of an easement that is omitted, it does not make any difference if the easement has never been recorded or, although previously recorded, it is omitted from the folio because of administrative error". "Administrative error", to be internally consistent with ***Dobbie*** as the Note says is intended, appears to be used in the Note to encompass deliberate acts or decisions in the Registrar-General's administrative processes to record dealings and generally to superintend and maintain the integrity and accuracy of the register as is the Registrar-General's duty[17]. In any event, as the CA said at CA1 [271] (AB358) (in respect of the Explanatory Note going beyond the clear words of s49) and at CA1 [272]-[273] (AB357-358) (in respect of the Explanatory Note on s42(1)(a1)), the text of the legislation takes precedence over the Explanatory Note and it is impermissible to use the Explanatory Note to construe "omission" in a manner different from the construction of that word adopted by the CA in ***Dobbie***.[18] One is not required by authority cited by Castle to distort a recognised meaning, and a recognised exception to indefeasibility, so as to fit a preconception of the scope of the *RPA* protection for indefeasibility.[19]

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[16] AB59, 66-68.

[17] *Pirie v Registrar-General* (1962) 109 CLR 619 at 624, 644; *James v Registrar-General* (1967) 69 SR (NSW) 361 at 367, 370-371, 376-377; *Ex parte Smart* (1867) 6 SCR (NSW) 188; *Perpetual Executors and Trustees Assoc of Aust Ltd v Hosken* (1912) 14 CLR 286 at 295.1; *St Abanoub Properties Pty Ltd v Registrar-General* [2002] NSWSC 615 (Barrett J) at [35].

[18] As the CA explained at CA1 [54(d)-(f)]-[56], [271] (AB279-280, 357), *RPA* s49 may provide an alternative source of power to deal with abandoned easements but is not the exclusive source and the Explanatory Note was inconsistent with the clear text of s49 itself. The limited purpose of s49 appears to be, within the limited area of physical abandonment proved as a fact or deemed by proof of 20 years' non-use, to provide an administrative alternative to a Court application under s89(1)(b) of the *Conveyancing Act 1919 (NSW)*; compare in particular s89(1A) and s49(2) (with the R-G's satisfaction subject to at least judicial principles review CA1 [163] (AB322)) and ss 89(4) and 49(4).

[19] Submissions 2.x.12 paras 24, 27. The Registrar-General's submissions accept that one applies ordinary interpretation principles: submissions 3.x.12 authority in note 8. Indefeasibility is a package description for the

16. In ***Dobbie v Davidson***, the Court of Appeal said that the meaning of "omission" given by an earlier Court of Appeal in ***Australian Hi-Fi Publications Pty Ltd v Gehl*** [1979] 2 NSWLR 618 was encompassed in the meaning of "omission" but too restrictive.[20] ***Gehl*** had required something which the Registrar-General ought to have done, but had not (or, in converse, non-fulfilment of an obligation), so that the *RPA* had not functioned correctly.[21] Such breach of obligation includes a deliberate but wrong decision to remove an easement from its recording in the Register, as in the present case, as the Court of Appeal found at CA1 [268] (AB355-356).

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17. There is no novelty or contention in the Court of Appeal, at CA1 [274] (AB358)[22], saying that in general the one word should be given the same meaning whenever it occurs in a statute unless the context requires otherwise.[23] The CA pointed out that it was not suggested by any party that "omission" should be construed any differently in *RPA* sections 12(1)(d) and 42(1)(a1). Castle does not so contend before this Court. The Registrar-General was therefore empowered to correct the Register in accord with the 2008 request by Sahab to do so and should have done so. The CA said at CA1 [274] (AB358) that neither Castle nor the R-G contested the proposition
20 that, if the right of way had been omitted within the meaning of s42(1)(a1), there was no impediment to the Court making orders to correct the Register by ordering that the Registrar-General amend the Register so as to record on the folios for the dominant and servient tenements the easement and ordering that the Registrar-General issue new certificates of title to each of Castle and Sahab giving effect to those amendments[24].

18. The Court of Appeal at CA1 [244] (AB348) correctly observed that the right of way burdened Castle's interest in 134 Sailors Bay Road when it was first

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regime established by the *RPA*; it does not impose *a priori* perspectives on the words establishing the regime, which should be given their full operation on usual principles: *Nelson v Hughes* [1947] VLR 227 at 230..

[20] (1991) 23 NSWLR 625 at 632B, 658E-660D.

[21] *Gehl* [1979] 2 NSWLR 618 esp at 622A-E. Applied in *Beck v Auerbach* (1986) 6 NSWLR 454 (CA); *Papadopoulos v Goodwin (No 2)* [1983] 2 NSWLR 113 (Wootten J); *Christodopoulos v Kells* (1988) 13 NSWLR 541 (CA).

[22] See also CA1 [200] (AB334).

[23] *Registrar of Titles (WA) v Franzon* (1975) 132 CLR 611 at 618.

[24] See also CA1 [6] (AB260-261).

acquired in 2001. A reinstatement of the right of way to the folio of the Register for 134 Sailors Bay Road would do no more than confirm the status of Castle's title at the time it first acquired the land. Reinstatement, therefore, could not be seen to be an assault on Castle's indefeasible title.

19. In any event, the express exception to indefeasibility in *RPA* s42(1)(a1) applied and is orthodox principle.[25] As the CA stated at CA1 [267] (AB355), s42(1), the exceptions contained within it are directed to the state of what is to be the conclusive Register. The Register must be conclusive on its own terms which *include* the express exceptions to that conclusiveness such as s42(1)(a1). If s42 itself was subject to (rather than complemented by) s118, any registered proprietor, even one such as Castle who by erroneous interpretation promulgated by it gained the advantage while it was registered proprietor, would be immune from action or review even during the period it was the registered proprietor despite one of the express exceptions that defines the conclusive state of the Register. In contrast to some consistency in the omitted easements exception across Australia, the language of a provision such as s118, where it exists, is not uniform.[26] It clearly is intended to complement rather than to govern the central provision, s42.

20. ***RPA* section 138** Castle's arguments on indefeasibility have been answered, in relation to the appeal grounds, at 18-19 above.

21. The reasons at CA1 [97]-[103] (AB298-300) are clearly correct in principle and policy in encompassing an entitlement even if the claimant had not personally enjoyed the recognition of that entitlement. The CA reasoning is congruent with the relevant dictionary definitions of "recovery" and "recover".[27]

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[25] CA1 [103], [132], [237]-[250] esp [239], [249] (AB300, 310-311,

[26] See comparative table of legislative provisions separately provided.

[27] *Macquarie Dictionary* "*n.* ... 2. the regaining of something lost or taken away, or the possibility of this. ... 4. restoration or return to a former (and better) state or condition. ... 9. *Law.* the obtaining of right to something by verdict or judgment of a court of law. ... *v.t.* 1. to get again, or regain (something lost or taken away) ... 4. *Law.* a. to obtain by judgment in a court of law, or by legal proceedings ... b. to acquire title to through judicial process. ... 11. *Law.* to obtain a favourable judgment in a suit."; *New Shorter Oxford English Dictionary n.* IME. ... 1 Possibility or means of recovering or being restored to a former, usual, or correct state. ... 4 *Law.* The fact or process of gaining or regaining possession of or a right to property, compensation, etc; ... *v.* ME. ... 4 Get back into one's hands or possession; win back; *spec.* get back or obtain possession of or a right to by legal process".

22. As the primary judge said,[28] "Castle sought joinder [to the proceedings by motion 23.xii.08, shortly after their commencement] on the basis that its property rights were affected and submitted that it should have been joined initially." This was a clear recognition, contrary to Castle's present contention,[29] that the proceedings, so far as Castle was concerned, were for the recovery of an interest in land "from the person registered as proprietor of the land". Once joined, Castle was directly subject to the claim for a declaration made in claim 1 of the amended summons filed 17.ii.09 (AB3) and was bound by the orders sought in that amended summons in so far as the Register was altered. This was recognised by the Court of Appeal in both its reasons and its orders.[30]

23. ***RPA* ss 122 and 12A(3)** First, if the path to relief under *RPA* s138 is available, then the appeal fails because *RPA* s138 is not subject to s12A(3).[31]. Castle has not challenged that finding.

24. Secondly, the Court of Appeal at CA2 [12]-[13] (AB370-371) found that the Registrar-General's refusal in 2008 to reinstate the right of way (where there was no s12A notice) grounded a review under *RPA* s122 and also did not involve an alteration to the Register which is the trigger for s12A to apply. Castle has not appealed against the findings in those paragraphs and they are in any event clearly correct. In so finding the Court of Appeal clearly treated the 2008 application as distinct from the 2001 alteration and not parasitic upon it; it was not "the taking of the action specified in the notice".

25. Thirdly and in any event, the Court of Appeal at CA2 [8], [14]-[22] (AB369, 371-374) correctly reconciled, in terms of established principle and public policy confirmed by legislative history and extrinsic material, the scope of the Court's power to review and intervene under *RPA* s122 with the prohibition in

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[28] (2009) 75 NSWLR 629, [2009] NSWSC 1143("T1"), at [75] (AB164).
[29] Submissions 2.x.12 para 41.1.
[30] CA1 [101]-[103] (AB299-300); [2012] NSWCA 72 ("CA3") [5] (AB385); orders 5.iv.12 (AB392). Cp *Bull v Wimble* (2004) 12 BPR 22,223; *Andrew Garrett Wine Resorts Pty Ltd v National Australia Bank Ltd (No 6)* (2005) 92 SASR 419; *Kyabram Property Investments Pty Ltd v Murray* [2006] NSWSC 54; *GE Commercial Corp Pty Ltd v Lehane* [2008] NSWSC 963.
[31] [2012] NSWCA 42 ("CA2") [9], [22] (AB369-370, 374).

s12A(3) against the taking of action against the RG where a notice under s12A(1) is served and no objection is taken. The Court of Appeal at CA1 [222]-[224] (AB341-343) observed that the right to review and intervene under s122 is plenary. However broad the word "action" can be in some contexts, its essential character does not extend to proceedings in the nature of merits-based review of an administrative decision such as that which the Registrar-General makes in relation to the Register. Further, express words or necessary implication much stronger than and different from those in s12A(3) would be required to, in effect, oust the jurisdiction of the Court, which is the result contended for by Castle.[32] The Court of Appeal recognised at CA2 [11]-[12], [14] (AB370-371) that s12A(3) cannot "trump the jurisdiction of the Court" without clearer express intent.

26. Castle's interpretation of s122 itself neuters the power of review and is detrimental to those with the protection of indefeasibility. The Registrar-General may, by conscious decision or inadvertence, fail to give notice to a registered interest (say, a registered lessee or mortgagee) when giving notice to a registered proprietor (the mortgagor or lessor) of an alteration to the Register which affects all those with registered interests in the land. The person notified, for a variety of reasons, may not take action when one of those not notified would have done so, so the alteration to the Register is made. If Castle's interpretation was correct, those registered interests not notified are claiming "through or under" the registered proprietor (who is the mortgagor or lessor) and have had part of their indefeasible title removed without ability to redress because they are precluded by s12A(3).

27. ***RPA* s121** Castle's contentions that it ought to have been allowed to agitate on appeal the question whether or not Sahab was a "person dissatisfied" under *RPA* s121 is an application of established principle to the facts of this case, as the CA recognised at CA1 [209]-[219] (AB337-341) and CA2 [10] (AB370). The indications of the Court of Appeal at CA1 [205]-[208], [227]

[32] *Public Service Association (SA) v Federated Clerks' Union* (1991) 173 CLR 132 at 160 and authority cited at n79; *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 at [48] and authority there cited at n50.

(AB336-337, 344) are applications of statutory provisions to the facts of this case. Even if the decision at T1 [53]-[62] (AB155-158) was interlocutory in nature, it was fully argued, the reasons given fully dealt with the matter on a final concluded basis and were in the nature of final relief on this aspect because it was the precondition that needed to be satisfied for Sahab both to obtain the relief it sought in terms of production of the 2001 reasons from the Registrar-General and the right to review under s122.

28. The matter now sought to be raised by Castle was not the subject of its notice of contention in its original or amended form (AB241-242) and was not bound up with the issues raised in the notice of contention. Sahab submitted at final hearing that it satisfied the criteria in s121(1)(a)-(c) for reasons congruent with the findings already made in T1. As the CA found, there was in effect no contest on the primary judge's 2009 findings or on satisfaction of the criteria at primary hearing.[33]

29. In any event, Sahab was within one or more of the categories in *RPA* s121(1)(a)-(c), and was a person dissatisfied for the reasons given by the primary judge, which summarised and adopted Sahab's submissions rather than Castle's and the Registrar-General's.[34] Section 121 has no restriction in defining the "person dissatisfied" by reference to time or a particular status, in contrast to its statutory predecessor. As to s121(1)(a), the Registrar-General's 2001 decision was to register or record the 2001 request (the request was given dealing no 7924028 (AB78)) and the removal of the easement was action taken directly because of it, recording is defined in *RPA* s3(1)(d) to include amending, cancelling or deleting and the 2001 decision amended, cancelled or deleted dealing A752953 (AB70) being the 1921 transfer creating the easement. As to s121(1)(b), a new certificate of title for 134 Sailors Bay Road issued without the easement on it (AB59). As to s121(1)(c), the Registrar-General, whether pursuant to his general duty to

[33] Copies of the parties' submissions, written or oral, are not in AB but can be provided if the factual statements are the subject of contest (which was not the case on the special leave application).
[34] T1 [38]-[69] (AB151-162). The Registrar-General's submissions on this point in the HC in essence repeat the submissions made to the primary judge on the motion for reasons, as summarised in T1 [38]-[46] (AB153-155).

maintain the integrity and accuracy of the Register[35] or pursuant to a specific duty to respond to and not ignore a request (to remove an easement), was required to exercise or perform a function or duty to register or refuse to register the request, take or not take action directly because of the request and amend, cancel or delete an earlier dealing. If one of the categories did not cover Castle, then Castle (if the 2001 request had been refused) would have had no right of review. It would be remarkable (and a statutory mischief such that one could not read the legislative categories that way) if Castle had a right of review for an unsuccessful request but a subsequent registered proprietor, found to be a person dissatisfied, did not have a right of review for a successful request because outside the categories (a)-(c).

Part VII: Statement of argument on notice of contention

30. ***RPA* ss 12(1)(d), 136(1)(a) and (b), "wrongfully obtained", "error".** The CA did not determine the meaning of "error" in *RPA* s12(1)(d): CA1 [193], [198] (AB332, 333). The appeal grounds 9, 12 and 13 (AB235-236) did not exclude s136(1)(b) as the CA said at CA1 [201] (AB334), the concept of "error" in it raised the same matters as the submissions on s136(1)(b) and s12(1)(d) and s136(1) was referred to as a whole in submissions.

31. In ***Scallan* v *Registrar-General*** (1988) 12 NSWLR 514 at 519A-G, Young J (as his Honour then was) said, citing New Zealand authority, that a recording in the Register is wrongfully obtained and a certificate of title is wrongfully obtained or retained within the meaning of *RPA* s136(1)(c) or (d) if it is obtained by an intentional act which is not rightful but which may fall short of "fraud" within its meaning in the *RPA*. A consciously made incorrect declaration on behalf of the person requesting an alteration to the Register was held to come within s136. This case is similar. The statutory declaration of 9.ix.01 (AB80) was in support of the 2001 request and on behalf of the person making that request. It was consciously incorrect because it was

[35] *Pirie v Registrar-General* (1962) 109 CLR 619 at 624, 644; *James v Registrar-General* (1967) 69 SR (NSW) 361 at 367, 370-371, 376-377; *Ex parte Smart* (1867) 6 SCR (NSW) 188; *Perpetual Executors and Trustees Assoc of Aust Ltd v Hosken* (1912) 14 CLR 286 at 295.1;*St Abanoub Properties Pty Ltd v Registrar-General* [2002] NSWSC 615 (Barrett J) at [35].

consciously made on its face, even though it is not asserted and does not need to be demonstrated that the maker knew it to be incorrect or didn't care whether or not it was correct. The learned trial judge found that the statutory declaration was "[i]ncorrect and misleading".[36]

32. Young J in ***Scallan*** 12 NSWLR at 520C-E and 518Gff referred to Needham J in ***State Bank of New South Wales v Berowra Waters Holdings Pty Ltd*** (1986) 4 NSWLR 398 at 404U-V (containing the phrase "where documents are sought from persons who should not be in possession of them") and said that he did not consider "that this statement would necessarily preclude relief in a case where a mortgage had been expunged", expounding by reference to New Zealand authority on the equivalent provision which his Honour said apparently had not been cited to Needham J. Expunging a mortgage is substantially similar to expunging a dealing such as a right of way.

33. As Young J recognised in ***Scallan*** 12 NSWLR at 520C-E, recording in the Register of the expunging does not confer indefeasibility if the expunging recording was wrongfully obtained (or, as submitted below, obtained by relevant error). Wrongful obtaining of the recording in the Register is an express power *within* the system of title by registration. It is expressly provided for by a statutory provision in the *same* statute that provides for indefeasibility of title by registration. *RPA* s42(1) provides that the registered proprietor holds the registered estate "subject to such other estates or interests and such entries, if any, as are recorded in that folio" of the Register, recognising powers within the *RPA* to make recordings in the folio. As Young J said at 520D, the certificate of title is called in to make the same correction as is made to the recording in the folio of the Register. *RPA* s136(1)(c) expressly refers to a wrongfully obtained recording in the Register in addition to the wrongfully obtained certificate of title. The provision expressly mentions fraud but goes further than fraud in s42[37] and goes

[36] T2 [76] first words (AB197); see also T2 [28] last sentence (AB179), [37] (AB182). See also *Housing Corp of NZ v Maori Trustee* [1988] 2 NZLR 662 (McGechan J), [1988] 2 NZLR 708 (CA) at 717; *Registrar-General of Land v Marshall* [1995] 2 NZLR 189 at 198-199; contrast *Town & Country Marketing Ltd v McCallum* (1998) 3 NZConvC 192,698.

[37] Which relates to fraud in the act of acquiring a registered title by or on behalf of the person obtaining the registered title: see, eg, *Bahr v Nicolay (No 2)* (1988) 164 CLR 604 at 615, 630-633, cf 652-656.

further than any type of fraud. If recording in the Register of the incorrect dealing, however wrongfully obtained, could not affect indefeasibility unless s42 fraud was proved, then s136 would be a dead letter (as would any power to correct the Register). This is further illustrated by s42(3) which provides that s42 prevails over any inconsistent provision of any *other* Act or law unless there is an express override in that other Act or law.[38]

34. In ***Scallan***, Young J held that s136(1) had no work to do on the facts because the certificate of title did not need to be called in; it already showed the mortgage which had been wrongly removed, on an incorrect declaration, from the Register and which was sought to be reinstated on the Register. It is clear that Young J saw s136 as apposite if the certificate of title needed to be called in to make the same correction to it as that being made to the Register: 12 NSWLR at 520D. That is the situation here.[39]

35. The 2001 removal of the easement was prompted by a non-response to the Registrar-General's notice on its own or by that combined with an acceptance of the incorrect interpretation put forward in the statutory declaration accompanying the 2001 request. Either was an "error": non-response on its own was insufficient; an acceptance of the interpretation did not constitute abandonment so as to attract s49; acceptance of the incorrect interpretation itself was an error. There was a clear, unjustified interference with a registered interest in response to that error: removal of the registered easement. Restoration of that registered interest, even without the s42(1)(a1) exception, did not constitute an interference with indefeasibility (if that was important to establish which is argued against below) *as against the person who caused the original interference who was still on the title*, a narrow situation encountered in this case. In ***Re Jobson and the Real***

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[38] See *ConveyancingAct* s89(8). See also the discussion of the true scope of indefeasibility, and the acknowledgement of the place of corrective provisions within the regime of indefeasibility, in *Frazer v Walker* [1967] 1 AC 569 (PC) at 579G-580A, 580G, 581C-G, 584E-G, 585E-586B, [1967] NZLR 1069 (PC) at 1075.18, 1075.53, 1076.11-.37, 1078.26-.39, 1079.8-.31 and *CN & NA Davies Ltd v Laughton* [1997] 3 NZLR 705 (CA) at 711.37-.39, 712.46-713.4.

[39] The Registrar-General's letter of 20.x.08 second last dot point (AB52) showed that he wrongly considered that he had no power to call in the certificate of title for the servient tenement in this case under s136(1). In *Scallan* at 520E, Young J held that the Registrar-General could be compelled by Court order to exercise power under s136 in order to restore the former correct state of the title.

Property Act 1900 (1951) 51 SR (NSW) 76, the transfer was taken off the Register and the prior, removed caveat against transfer was restored to the Register. The interference with a caveat's protection justified the removal of the erroneously registered interest. There was no suggestion that indefeasibility was compromised because the registered interest being removed arose from and was an intrinsic part of the error, the interest that had been removed continued, as happened with the easement in this case CA(1) [221] (AB341), and the Register ought to reflect that. If the transferee had further transferred, there would have been a different outcome because a right to indefeasibility was impinged upon. ***Jobson*** was a more difficult case than the present, where there is no new interest registered and the person claiming an enlargement of an existing registered interest is still the registered proprietor having initiated and prompted the error which is subject to review rights under the statute itself in s122. This was a clearly correctable error even if the CA's more limited meaning of "error" is adopted. All the more so was this an "error" within the ordinary meaning of the word as the CA found.[40]

36. Either of the foregoing scenarios was an error "in" the Register so as to attract s12(1)(d) or recording "made in error" in the process so as to attract s136(1)(b). There was a consequential erroneous issue of a certificate of title so as to attract s136(1)(a).[41] Even if errors were limited to clerical errors - what Needham J called "departmental errors" in ***SBN v Berowra Waters*** 4 NSWLR at 403C-G - then these were such because as the CA held at CA1 [192] (AB 331), the errors resulted from a departmental slip.

37. **Scope of review** The Registrar-General has a duty to be satisfied or not satisfied, as part of the general duty to maintain the integrity and accuracy of

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[40] CA1 [181]-[198], [221], [224], [236], [268] (AB327-333, 341, 343, 346, 355-356). Here also the CA has found a clear case where the court has determined the rights of the parties on the merits of the dispute: Professor Douglas Whalan, *The Torrens System in Australia* (1982) pp 368n17, 369n27,28, 370. See also *FNCB-Waltons Finance Ltd v Crest Realty Pty Ltd* (1977) 10 NSWLR 621 (Waddell J) at 629C-631B.

[41] cp *Quach v Marrickville Municipal Council (No 2)* (1990) 22 NSWLR 65 at 71A-F. Even if the wording in s136(1)(a),(b) is broader than in s12(1)(d), the latter is sufficient.

the Register.[42] Whether or not there is such a general duty, the act of becoming satisfied or failing to be satisfied itself involves a decision, which is the trigger for *RPA* s122; it is the essential pre-requisite to the exercise of power.[43] A lack of active consideration so as to become satisfied or non-satisfied, if not a decision, would clearly be unreasonable under judicial review principles whether or not it is also a breach of the duty contended for above. To the extent that an exercise of discretion is involved without an overarching duty (which, it is submitted, is not the correct characterisation), then such exercise must be subject to judicial review principles.[44]

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38. In the present case there was either a failure to become satisfied or not satisfied or a failure not to be satisfied for such reasons[45] that there was unreasonableness so as to attract judicial review or a decision to that effect so as to attract merits review under s122.

39. ***RPA* s138(3) as standalone power *Mogo v Eurobodalla SC*[46]** supports s138(3) as a standalone source of power, There is nothing in those words that limit them to situations where s138(1) or (2), which themselves are standalone powers, apply. A case such as the present where rights to land
20 are determined and declared is within s138(3).

40. ***RPA* ss12(1)(d), 136(1)(a),(b),(c), and 122 as standalone power** These powers are *within* the statutory regime of indefeasibility rather than a qualification to it. They have no meaning or purpose or use unless they are a standalone source of authority and power even though not expressly mentioned as an exception in s42. Their use is governed by the discretionary remedy inbuilt in s122(4)(b) and by the effect of s45 (formerly s135) in relation to subsequent registered interests.[47] Their standalone scope is

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[42] See authorities in notes 17, 34.
[43] *Timbarra Protection Coalition Inc v Ross Mining NL* (1999) 46 NSWLR 55, [1999] NSWCA 8 at [42], [94]; *Franklins Ltd v Penrith City Council* [1999] NSWCA 134 at [27]-[29].
[44] cp *Medical Benefits Fund of Australia Ltd v Fisher* [1984] 1 Qd R 606 at 611.40; *Equitiloan Securities Pty Ltd v Registrar of Titles (Qld)* [1997] 2 Qd R 597 at 598.47-599.2 (both on legislation different from the current NSW provision but illustrating the principle of review).
[45] As set out in note 4.
[46] (2002) 54 NSWLR 15 (CA) at [4]-[6], [10]-[20], [49]-[52]; also *City of Canada Bay v Bonaccorso Pty Ltd* (2007) 71 NSWLR 424 at [94], [97].
[47] See 17 above.

therefore narrow but necessary. ***Jobson*** 51 SR 77 did not see any requirement to investigate if there was an exception in s42 which enabled s12(1)(d) to be used. Young J in ***Scallan*** 12 NSWLR at 518F, 520C-E and 520F clearly saw *RPA* s136(1)(c) as an express standalone source of corrective power for the wrongfully obtained recording in the Register. Such an analysis is correct in principle and policy. The Registrar-General has a duty to maintain the integrity and accuracy of the Register.[48] The foregoing provisions *within* the system of title by registration provide the means by which that duty is fulfilled, and themselves contain functions and/or duties and/or powers and/or discretions the exercise of which attract review under s122. All that s122 requires is a "decision" that qualifies within s121(1)(a),(b) or (c).

41. ***RPA* s122(4)(b) coda as separate source of power** The wording of the coda to s122(4)(b) is sufficiently broad and distinct, and subject to discretion, as to exist beyond the limits of (b) itself. It empowers "further" as well as "other" orders.[49]

42. **"Through or under" in *RPA* s12A(3)** Title by registration (in contrast with old system derivative title or registration of such title) is a new title under the Torrens system, unless, as with an executor by transmission or a trustee in bankruptcy, that derivation is recognised in the legislation.[50] A registered purchaser on sale, mortgagee or lessee has such non-derivative title in its own right.[51] Under *RPA* ss45(2)(c) and 118(1)(d), derivative title "from or through" stops with a good faith purchaser.[52]

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[48] See authorities in notes 17 and 34.
[49] For instance, to amend the Register in conjunction with calling in the CT under s136(1).
[50] *RPA* ss 90, 93; see the approved dealing forms for such transmissions in contrast with the transfer dealing form.
[51] *Black v Garnock* (2007) 230 CLR 438, [2007] HCA 31 at [72]; *Breskvar v Wall* (1971) 126 CLR 376 at 383-386, esp at 385.10-386.2.
[52] *Breskvar* 126 CLR at 388.4; *Tanning Research Laboratories v O'Brien* (1990) 169 CLR 332 at 341-343, 354.3 (arbitration);*Piercy v Young* (1879) 14 ChD 200 (CA) (trustee in bankruptcy); *Griffith University v Tang* (2005) 221 CLR 99 at [17], [78], [80], [89] (decision made under an enactment).

Part VIII: Statement of argument on notice of cross-appeal

43. The land subdivided and sold in 1921 had an enduring commercial need for rear access. By contrast, the restrictions on the scope of use of the right of way and the other covenants protected a personal interest while the Middletons or their family remained owners of the servient tenement. The opening words are not restricted to the fencing covenant by words of re-commencement before each covenant: there are no such words before the butcher's shop covenant yet it is clearly a distinct item in a list, each item in which should then be seen to be governed by the opening words. Each of the first and second covenants has the operative word "covenants" or "further covenants", which is intended to be sequential to the opening words. The persons giving the covenants are the transferee and his assigns in the first and second covenants, which makes equally apposite to each covenant the opening words. The covenants could be released, varied or modified by "the transferors" (being the Middletons) again inferring a limited life to the covenants. The second covenant restricts the obligation in it to one on the transferee alone and, in its final part, the benefit of payment to the transferor alone.[53]

Part IX: Estimate for oral argument

44. 2 hours, with an equivalent allocation to the appellant and balance of the day to the second respondent (supporting the appellant) and reply.

Dated: 23 October 2012

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[53] Further, the recording of transactions by the Registrar-General supports a limited life for all covenants – for the period of ownership of the Middleton family: the history is set out by the primary judge T2 [40]-[44] (AB183-185).

New South Wales Consolidated Acts

REAL PROPERTY ACT 1900 - SECT 45

Bona fide purchasers and mortgagees protected in relation to fraudulent and other transactions

45 Bona fide purchasers and mortgagees protected in relation to fraudulent and other transactions

(1) Except to the extent to which this Act otherwise expressly provides, nothing in this Act is to be construed so as to deprive any purchaser or mortgagee bona fide for valuable consideration of any estate or interest in land under the provisions of this Act in respect of which the person is the registered proprietor.

(2) Despite any other provision of this Act, proceedings for the recovery of damages, or for the possession or recovery of land, do not lie against a purchaser or mortgagee bona fide for valuable consideration of land under the provisions of this Act merely because the vendor or mortgagor of the land:

(a) may have been registered as proprietor through fraud or error, or by means of a void or voidable instrument, or

(b) may have procured the registration of the relevant transfer or mortgage to the purchaser or mortgagee through fraud or error, or by means of a void or voidable instrument, or

(c) may have derived his or her right to registration as proprietor from or through a person who has been registered as proprietor through fraud or error, or by means of a void or voidable instrument.

(3) Subsection (2) applies whether the fraud or error consists of a misdescription of the land or its boundaries or otherwise.

New South Wales Consolidated Acts

REAL PROPERTY ACT 1900 - SECT 49

Cancellation of recordings of easements after abandonment, consolidation of tenements or release

49 Cancellation of recordings of easements after abandonment, consolidation of tenements or release

(1) The Registrar-General may cancel a recording relating to an easement in the Register if the easement has been abandoned.

(1A) The Registrar-General may, under this section, cancel a recording relating to an easement in relation to:

(a) all of the land benefited or burdened by the easement, or

(b) any one or more of the lots, or part of a lot, burdened by the easement, or

(c) any one or one or more of the lots benefited by the easement.

(2) An easement may be treated as abandoned if the Registrar-General is satisfied it has not been used for at least 20 years before the application for the cancellation of the recording is made to the Registrar-General, whether that period commenced before, on or after, the date of assent to the *Property Legislation Amendment (Easements) Act 1995* .

(3) However, an easement is not capable of being abandoned:

(a) if the easement does not benefit land, or

(b) to the extent (if any) that the easement benefits land owned by the Crown, or by a public or local authority constituted by an Act, or

(c) if the easement is of a class of easements prescribed by the regulations as being incapable of being abandoned.

(4) Before cancelling any such recording, the Registrar-General must:

(a) serve a notice of intention to cancel the recording, personally or by post, on:

(i) where the instrument creating the easement does not allow the identification of the land benefited by the easement-any person that the Registrar-General considers should receive such a notice taking into consideration the nature and location of the easement, the circumstances surrounding the creation of the easement and the physical characteristics of any relevant land, or

(ii) in any other case-all persons having a registered estate or interest in land benefited by the easement, and

(b) consider any submission made by those persons (but only if the submission is made by the date specified in the notice, being a date later than one month from the date on which the notice is served).

(4A) However, the Registrar-General may give notice of the intention to cancel a recording to some or all of the persons referred to in subsection (4) (a) by advertisement in a newspaper rather than by personal or postal service if the Registrar-General is of the opinion that:

(a) it is appropriate in the circumstances to give notice by advertisement in a newspaper, and

(b) the relevant easement is unlikely to be of real benefit to the land benefited by the easement because the land benefited is no longer connected to the land burdened by the easement in a way that allows access to the site of the easement.

(5) The Registrar-General may cancel a recording in the Register relating to an easement:

(a) if satisfied that the recording relates to land for which the easement has no practical application because separate parcels of land that were respectively burdened and benefited by the easement have been consolidated into a single parcel, or

(b) if the easement has been released under section 88B of the *Conveyancing Act 1919* .

(6) An application for cancellation of any such recording must be made in the approved form or in a form prescribed by regulations made under the *Conveyancing Act 1919* .

New South Wales Consolidated Acts

REAL PROPERTY ACT 1900 - SECT 136

Wrongful retention of certain instruments

136 Wrongful retention of certain instruments

(1) Where the Registrar-General is satisfied that:

(a) a certificate of title has been issued in error or contains any misdescription of land or of boundaries,

(b) a recording has been made in error in the Register,

(c) a certificate of title or recording in the Register has been fraudulently or wrongfully obtained, or

(d) a certificate of title or duplicate registered dealing is fraudulently or wrongfully retained:

or where the possessory applicant has pursuant to a possessory application made by the possessory applicant become registered as the proprietor of an estate or interest in land comprised in a folio of the Register for which a certificate of title has been issued, the Registrar-General may by notice in writing to the person to whom the certificate of title or duplicate registered dealing, as the case may be, has been issued, or by whom it has been so obtained or is retained, or by whom any certificate of title or duplicate registered dealing showing any such recording is held, require such person to deliver up the certificate of title or duplicate registered dealing, as the case may be, for the purpose of it being cancelled or corrected, as the case may require.

(2) If such person:

(a) cannot be found for the giving of such notice of requirement, or

(b) having been given such notice does not comply with the requirement:

the Registrar-General may, if the Registrar-General thinks fit, commence proceedings against such person in the Supreme Court for an order that such person deliver up the certificate of title or duplicate registered dealing, as the case may be, for the purpose of it being cancelled or corrected, as the case may require.

(3) The Court may order that service upon the defendant of the originating process and of all other documents in the proceedings be dispensed with.

(4) Subject to the *Supreme Court Act 1970* , the Court shall not order that service upon the

defendant be dispensed with unless the Court is satisfied that:

(a) the defendant cannot be found in New South Wales, or

(b) it is uncertain whether the defendant is living.

(5) The Court may order the personal attendance before it of the defendant.

(6) Upon the personal appearance before the Court of the defendant the Court may examine the defendant upon oath.

(7) The Court may order the defendant to deliver up to the Registrar-General, within such time as the Court may fix, the certificate of title or duplicate registered dealing, as the case may be.