

BETWEEN:

CASTLE CONSTRUCTIONS PTY LIMITED
Appellant

and

SAHAB HOLDINGS PTY LTD
First Respondent

REGISTRAR-GENERAL
Second Respondent



APPELLANT'S SUBMISSIONS

Part I: Internet publication

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

Part II: Issues

2. Where the Registrar-General has intentionally (albeit incorrectly) expunged an easement from the Register, do the principles of indefeasibility give the registered proprietor of the servient tenement an indefeasible title freed of the easement?
3. Was there an "omission" of the easement within the meaning of ss 12(1)(d) and 42(1)(a1) of the *Real Property Act* 1900 (NSW) (the "Act"), such that the easement could be restored to the Register pursuant to an exception to indefeasibility?
4. Were the proceedings brought by the First Respondent ("Sahab") proceedings for the recovery of land from the registered proprietor pursuant to s138 of the Act (thereby empowering the Court to order the Registrar-General to restore the easement to the Register), in circumstances where:
 - (i) the proceedings were brought to compel the Registrar-General to amend the Register; and
 - (ii) Sahab had never had the benefit of the easement?

5. If Sahab's proceedings were for the recovery of land, could such proceedings be brought in the face of the prohibition against proceedings for the recovery of land contained in s118 of the Act?
6. Where Sahab's predecessors-in-title had not objected following receipt of notice of the Registrar-General's intention to remove the easement, could Sahab bring proceedings against the Registrar-General under s122 of the Act in the face of the prohibition contained in s12A(3) of the Act?
7. If Sahab was not prohibited by s12A(3) from bringing proceedings under s122, was Sahab a person "*dissatisfied*" (within the meaning of s122) with the decision of the Registrar-General to expunge the easement from the Register, in circumstances where Sahab acquired the dominant tenement with full knowledge that the easement had been expunged years earlier?

Part III: Section 78B of the *Judiciary Act 1903* (Cth)

8. The Appellant certifies that it has considered whether any notice should be given to the Attorneys-General in compliance with s78B of the *Judiciary Act 1903* (Cth) and has concluded that no such notice need be given.

Part IV:

9. The three decisions of the primary judge are as follows:
 - (i) *Sahab Holdings Pty Limited v Registrar-General* (2009) 75 NSWLR 629;
 - (ii) *Sahab Holdings Pty Limited v Registrar-General* (No 2) (2010) 14 BPR 27,459;
 - (iii) *Sahab Holdings Pty Limited v Registrar-General* (No 3) [2010] NSWSC 403.
10. The three decisions of the Court of Appeal are as follows:
 - (i) *Sahab Holdings Pty Limited v Registrar-General* (2011) 15 BPR 29,627;
 - (ii) *Sahab Holdings Pty Limited v Registrar-General* (No 2) (2012) 16 BPR 30,353;
 - (iii) *Sahab Holdings Pty Limited v Registrar-General* (No 3) (2012) 16 BPR 30,353.

Part V: Relevant facts

A. Facts

11. Sahab is the registered proprietor of the property at 69 Strathallen Avenue, Northbridge (“Strathallen”), the rear boundary of which abuts the property at 134 Sailors Bay Road (“Sailors Bay”), owned by the Appellant (“Castle”). The properties and the easement at issue in the appeal are depicted in Sketch “A”.¹
12. By Transfer A752953 dated 26 October 1921, an easement was created (by the owners of Sailors Bay/transferees of Strathallen – a Mr and Mrs Middleton) in the form of a right of way along the western boundary of Sailors Bay which provided access to the rear of Strathallen (then transferred to a Mr Davis).² The easement was expressed to be “*limited as stated in the covenants*” specified in Schedule B to the Transfer.³ Schedule B commenced as follows:-

*“The transferee for himself and his assigns for the benefit of the residue of the land comprised in the said Certificate of Title registered Volume 2978 Folio 91 but only during the ownership thereof by us (the transferors) our executors, administrators and assigns other than purchasers on sale covenants with us (the transferors) that”*⁴

13. Castle purchased Sailors Bay in June 2001.⁵ On 3 September 2001, Castle requested the Registrar-General to remove the right of way and covenants from the Register.⁶ Castle’s request was supported by a solicitor’s statutory declaration, which noted that the right of way and covenants were only to apply during Mr Davis’ ownership.⁷ In fact, the relevant ownership was that of the transferors, Mr and Mrs Middleton, not that of the transferee, Mr Davis. The executors of the Middletons had sold Sailors Bay in 1960.⁸
14. After receiving Castle’s request, the Registrar-General, pursuant to his obligation under s12A(1), notified the then owners of Strathallen (a Mr and Mrs Howard) of his

¹ AB

² *Sahab Holdings Pty Limited v Registrar-General* [2011] NSWCA 395 at [24]-[27].

³ *Sahab Holdings Pty Limited v Registrar-General* [2011] NSWCA 395 at [25].

⁴ *Sahab Holdings Pty Limited v Registrar-General* [2011] NSWCA 395 at [28].

⁵ *Sahab Holdings Pty Limited v Registrar-General* [2011] NSWCA 395 at [33].

⁶ *Sahab Holdings Pty Limited v Registrar-General* [2011] NSWCA 395 at [34]-[36].

⁷ *Sahab Holdings Pty Limited v Registrar-General* [2011] NSWCA 395 at [37].

⁸ *Sahab Holdings Pty Limited v Registrar-General* [2011] NSWCA 395 at [31].

intention to remove the right of way from the Register.⁹ The Howards did not object.¹⁰

15. In November 2001, the Registrar-General removed the easement and covenants from the Register¹¹ (pursuant to s32(6) of the Act¹²), after forming the view that “*the easement and covenant had expired by virtue of its own terms*” and because the Howards had not objected.¹³ The Court of Appeal held that the removal of the easement from the Register was based upon “*a mistaken, but arguably correct, interpretation of the terms of the subject covenants*”.¹⁴
16. Sahab purchased Strathallen in 2007,¹⁵ with full knowledge that the previous right of way had been extinguished in 2001.¹⁶ In September 2008, Sahab requested the Registrar-General to restore the right of way to the Register.¹⁷ In October 2008, the Registrar-General declined Sahab’s request.¹⁸

B. Proceedings below

17. In November 2008, Sahab commenced proceedings in the Supreme Court of New South Wales against the Registrar-General seeking a declaration that the right of way had been wrongly extinguished and orders requiring the Registrar-General to restore the easement to the Register.¹⁹
18. In December 2008, Castle filed a Notice of Motion in Sahab’s proceedings, seeking to be joined as a defendant.²⁰ Sahab resisted Castle’s joinder on the basis that the Registrar-General was the appropriate and only defendant in the statutory procedure

⁹ *Sahab Holdings Pty Limited v Registrar-General* [2011] NSWCA 395 at [41] and [57].

¹⁰ *Sahab Holdings Pty Limited v Registrar-General* [2011] NSWCA 395 at [247].

¹¹ *Sahab Holdings Pty Limited v Registrar-General* [2011] NSWCA 395 at [9].

¹² *Sahab Holdings Pty Limited v Registrar-General* [2011] NSWCA 395 at [55].

¹³ AB

¹⁴ *Sahab Holdings Pty Limited v Registrar-General* [2011] NSWCA 395 at [161].

¹⁵ *Sahab Holdings Pty Limited v Registrar-General* [2011] NSWCA 395 at [10].

¹⁶ AB

¹⁷ *Sahab Holdings Pty Limited v Registrar-General* [2011] NSWCA 395 at [10].

¹⁸ *Sahab Holdings Pty Limited v Registrar-General* [2011] NSWCA 395 at [10].

¹⁹ AB

²⁰ AB

being invoked in the proceedings.²¹ In February 2009, the Court ordered that Castle be joined to the proceedings.²²

19. In May 2009, Sahab filed a Notice of Motion seeking an order, pursuant to s121 of the Act or s65 of the *Supreme Court Act* 1970 (NSW), that the Registrar-General provide reasons for his decision to remove the easement from the Register in 2001.²³ In October 2009, the primary judge delivered a judgment in which he ordered the Registrar-General to provide Sahab with the reasons for his 2001 decision.²⁴ In November 2009, the Registrar-General provided Sahab with his reasons.²⁵
20. In the primary judge's second judgment, which "*deals with issues of final relief*",²⁶ his Honour held that:
 - 20.1 the Registrar-General had no power to alter the Register pursuant to s12(1)(d), which section was restricted to addressing administrative or departmental errors and omissions rather than providing a broad power inconsistent with the principles of indefeasibility embodied in the Act: *State Bank of New South Wales v Berowra Waters Holdings Pty Limited*²⁷ and *McGuinness v Registrar-General*^{28,29}
 - 20.2 relief was unavailable under s138 because the proceedings were not "*for the recovery of any land, estate or interest from the person registered as proprietor of the land*", but rather proceedings against the Registrar-General to compel him to exercise his powers under the Act to alter the Register;³⁰ and
 - 20.3 s122 could not be used to alter the Register so as to conflict with the paramount status of the Register conferred by s42 of the Act; and that s122 is

²¹ *Sahab Holdings Pty Limited v Registrar-General* (2009) 75 NSWLR 629 at 645 [75].

²² *Sahab Holdings Pty Limited v Registrar-General* (2009) 75 NSWLR 629 at 645 [75].

²³ AB

²⁴ *Sahab Holdings Pty Limited v Registrar-General* (2009) 75 NSWLR 629 at 645 [85].

²⁵ AB

²⁶ *Sahab Holdings Pty Limited v Registrar-General (No 2)* [2010] NSWSC 162 at [1].

²⁷ (1986) 4 NSWLR 398 at 403.

²⁸ (1988) 44 NSWLR 61 at 69.

²⁹ *Sahab Holdings Pty Limited v Registrar-General (No 2)* [2010] NSWSC 162 at [88]-[90].

³⁰ *Sahab Holdings Pty Limited v Registrar-General (No 2)* [2010] NSWSC 162 at [80].

concerned with the performance of “*present identifiable duties*”, not duties exercised many years previously.³¹

21. On appeal, the New South Wales Court of Appeal held that Sahab was entitled to relief pursuant to s138 of the Act because:
 - 21.1 the proceedings were “*for the recovery of any land, estate or interest from the person registered as proprietor*” within the meaning of s138(1);³²
 - 21.2 subject to any effect of s118, s138(3) was an available source of power for the Court to make ancillary orders for restoration of the easement;³³ and
 - 21.3 s118 “*complements*” ss 42 and 45 of the Act;³⁴ as such, it had no application because Castle did not obtain an indefeasible title upon cancellation of the easement,³⁵ that cancellation being an “*omission*” of the easement within the exceptions to indefeasibility specified in s42(1)(a1).³⁶

22. As to s122, the Court of Appeal concluded that:
 - 22.1 the easement, properly construed, had not expired, so that it was wrongly cancelled by the Registrar-General in 2001;³⁷
 - 22.2 the expungement of the easement from the Register, being an “*omission*” of the easement within the exception to indefeasibility specified in s42(1)(a1), was also an “*omission*” within s12(1)(d),³⁸ so that the Court had power pursuant to s122(4)(b) to order reinstatement of the easement by the Registrar-General;³⁹ and
 - 22.3 the absence of objection by the registered proprietors of Strathallen to the cancellation of the easement in 2001 did not prevent Sahab from now seeking review under s122, as s12A(3) should not be construed so as to prohibit relief

³¹ *Sahab Holdings Pty Limited v Registrar-General (No 2)* [2010] NSWSC 162 at [92]-[94].

³² *Sahab Holdings Pty Limited v Registrar-General* [2011] NSWCA 395 at [103].

³³ *Sahab Holdings Pty Limited v Registrar-General* [2011] NSWCA 395 at [130] - [131].

³⁴ *Sahab Holdings Pty Limited v Registrar-General* [2011] NSWCA 395 at [239].

³⁵ *Sahab Holdings Pty Limited v Registrar-General* [2011] NSWCA 395 at [249].

³⁶ *Sahab Holdings Pty Limited v Registrar-General* [2011] NSWCA 395 at [251] - [274].

³⁷ *Sahab Holdings Pty Limited v Registrar-General* [2011] NSWCA 395 at [224].

³⁸ *Sahab Holdings Pty Limited v Registrar-General* [2011] NSWCA 395 at [274].

³⁹ *Sahab Holdings Pty Limited v Registrar-General* [2011] NSWCA 395 at [231].

against the Registrar-General where a provision such as s122 empowered the Supreme Court to require him to correct the Register.⁴⁰

Part VI: Argument

A. Introduction

23. The decision of the Court of Appeal from which this appeal is brought has significantly widened the operation of the exceptions to indefeasibility contained in the Act.
24. Indeed, it has done so in a manner which is inconsistent with *Frazer v Walker*;⁴¹ and it has done so notwithstanding the statement by this Court in *Leros Pty Limited v Terara Pty Limited*⁴² that the statutory exceptions to indefeasibility should be strictly construed.
25. In its consideration of the sections of the Act material to the status of the Register, the Court of Appeal favoured a construction which impermissibly erodes, rather than promotes, indefeasibility of title.

B. Indefeasibility

26. Central to the reasoning of the Court of Appeal was its rejection of the proposition that the Registrar-General's expungement of the easement from the Register conferred upon Castle an indefeasible title to Sailors Bay, freed of the easement.
27. Recent decisions of the High Court have stressed the importance of the principle of indefeasibility in litigation concerning title to land under the Torrens system: *Westfield Management Limited v Perpetual Trustee Company Limited*.⁴³ The approach adopted by the Court of Appeal in this case failed adequately to recognise that the objects of the Act are achieved by "*the elevation of the Register*

⁴⁰ *Sahab Holdings Pty Limited v Registrar-General (No 2)* [2012] NSWCA 42 at [11] - [14].

⁴¹ [1967] 1 AC 569.

⁴² (1992) 174 CLR 407 at 424.

⁴³ (2007) 233 CLR 528 at 539 [38].

above all else”: *Black v Garnock*;⁴⁴ and that the Register should “reveal all about the title”: *Queensland Premier Mines Pty Limited v French*.⁴⁵

28. The intentional act of the Registrar-General in cancelling the easement (and issuing to Castle a fresh certificate of title⁴⁶) conferred upon Castle a title freed of the easement, which was good against the world, including Sahab as a subsequent purchaser of the dominant tenement: *State Bank of New South Wales v Berowra Waters Holdings Pty Limited*;⁴⁷ *Scallan v Registrar-General*.⁴⁸ By allowing the appeal, the Court of Appeal has permitted Sahab to “breach the ramparts of indefeasibility” in a manner prohibited by the Act, and has required the Registrar-General to “create a situation forbidden by the Act itself”: *Berowra Waters*.⁴⁹
29. The doctrine of indefeasibility is maintainable by permitting rectification of the Register where there is a slip or administrative error: *Frazer v Walker*;⁵⁰ *State Bank of New South Wales v Berowra Waters Holdings Pty Limited*;⁵¹ *McGuinness v Registrar-General*.⁵² However, it is subverted if it is open to the Court to overturn deliberate decisions of the Registrar-General to alter the Register, even if those decisions are considered to have been incorrectly made.
30. It would erode the principles of indefeasibility to require purchasers of land to make their own judgment as to whether or not the Registrar-General had correctly removed an easement from the Register:

*“The third party who inspects the Register cannot be expected, consistently with the scheme of the Torrens system, to look further for extrinsic material which might establish facts or circumstances existing at the time of the creation of the registered dealing and placing the third party (or any court later seized of a dispute) in the situation of the grantee.”*⁵³

⁴⁴ (2007) 230 CLR 438 at 463 [75].

⁴⁵ (2007) 235 CLR 81 at 90 [15].

⁴⁶ AB

⁴⁷ (1986) 4 NSWLR 398 at 402.

⁴⁸ (1988) 12 NSWLR 514 at 518.

⁴⁹ (1986) 4 NSWLR 398 at 403.

⁵⁰ [1967] 1 AC 569 at 581.

⁵¹ (1986) 4 NSWLR 398 at 403.

⁵² (1998) 44 NSWLR 61 at 69.

⁵³ *Westfield Management Limited v Perpetual Trustee Company Limited* (2007) 233 CLR 528 at 538-539 [39].

C. Was the easement “omitted” within the meaning of ss 12(1)(d) and 42(1)(a1)?

31. The term “*omission*”, as it appears both in the provision permitting corrections to be made by the Registrar-General (s12(1)(d)) and as an exception to the paramount principles of indefeasibility (s42(1)(a1)), ought be narrowly construed.⁵⁴ An easement is not “*omitted*” where the Registrar-General has, upon application, made a deliberate decision to remove it.
32. In *Frazer v Walker*, their Lordships described the New Zealand equivalent of s12(1)(d) as “*little more than a ‘slip’ section and not of substantive importance*”;⁵⁵ that is, the provision permitted correction by the Registrar-General of errors or omissions resulting from oversight or other administrative mistake, but not from deliberate alteration of the Registrar. Section 12(1)(d) has been consistently applied in this manner.⁵⁶
33. In *Scallan v Registrar-General*, the expungement of a mortgage from the Register as a result of an untrue statutory declaration was held by Young J not to be an error capable of correction under s12(1)(d).⁵⁷ In *McGuinness v Registrar-General*, Hodgson CJ in Eq held that resort to the provision, so as to correct a recording in the Register which inaccurately reflected the true beneficial ownership of property, was “*so contrary to the intention of*” the RP Act that s12(1)(d) could not be applied; it would be “*inconsistent with the intention of the Act that the register be conclusive*”.⁵⁸
34. Accepting the view of the Court of Appeal that the term “*omission*” should be given the same meaning where it occurs in both ss 12(1)(d) and 42(1)(a1),⁵⁹ their Honours erred in construing “*omission*” as apt to include the Registrar-General’s deliberate expungement from the Registrar of the subject easement.

⁵⁴ *Leros Pty Limited v Terara Pty Limited* (1992) 174 CLR 407 at 424 per Mason CJ, Dawson and McHugh JJ; *Pirie v Registrar-General* (1962) 109 CLR 619 at 632 per Kitto J; *Medical Benefits Fund of Australia Limited v Fisher* [1984] 1 Qd R 606 at 611 per McPherson J.

⁵⁵ [1967] 1 AC 569 at 581.

⁵⁶ See, e.g., *State Bank of New South Wales v Berowra Holdings Pty Limited* (1986) 4 NSWLR 398 at 403 per Needham J – the provision is not available to “*breach the ramparts of indefeasibility...*”; *Quach v Marrickville Municipal Council (No 1)* (1990) 22 NSWLR 55 at 60 per Young J; *Quach v Marrickville Municipal Council (No 2)* (1990) 22 NSWLR 55 at 71 per Young J.

⁵⁷ (1988) 12 NSWLR 514 at 518.

⁵⁸ (1998) 44 NSWLR 61 at 69.

⁵⁹ *Sahab Holdings Pty Limited v Registrar-General* [2011] NSWCA 395 at [274].

35. The Court of Appeal, relying upon its earlier decision in *Dobbie v Davidson*,⁶⁰ concluded that “*omitted*” means “*left out*” or “*not there*”, irrespective of the cause of or reason for the omission.⁶¹ However, that conclusion is not maintainable for the reasons set out below.
36. To construe the term “*omission*” in s42(1)(a1) to signify something that is “*not there*” is to ascribe to the term the broadest possible meaning, contrary to the approach taken by this Court to exceptions to indefeasibility.⁶²
37. If the construction preferred by the Court of Appeal were correct, an easement expunged following its consensual termination by the owners of the dominant and servient tenements, or by court order, would be “*left out*” or “*not there*”; there would accordingly be an “*omission*” of the easement, and the easement would be susceptible to reinstatement as an exception to indefeasibility within s42(1)(a1). That outcome does not sit readily with the paramountcy of the Register identified by this Court in the decisions earlier cited.
38. The effect of the Registrar-General’s deliberate removal of an easement from the Register is that the easement is thereby extinguished.⁶³ The easement in the present case was created under the Act when Transfer A752953 was registered: s46 of the Act. Upon its expungement from the Register, and certainly upon the issue to Castle (as owner of the servient tenement) of a new certificate of title,⁶⁴ the easement ceased to exist. The easement has no continued existence cognisable under the Act and it is not relevant to speak of it as “*left out*” or “*not there*”.
39. The reliance place by the Court of Appeal on *Dobbie v Davidson* was, in any event, misplaced. The Court in *Dobbie* considered only an easement over old system land which was not recorded when the land was brought under the Act. In those circumstances, to speak of an existing easement as “*left out*” or “*not there*” was understandable. However, the Court of Appeal in *Dobbie* did not address itself to the

⁶⁰ (1991) 23 NSWLR 625.

⁶¹ *Sahab Holdings Pty Limited v Registrar-General* [2011] NSWCA 395 at [267] and [273].

⁶² *Leros Pty Limited v Terara Pty Limited* (1992) 174 CLR 407 at 424 per Kitto J.

⁶³ This outcome appears to have been accepted by the Court of Appeal: *Sahab Holdings Pty Limited v Registrar-General* [2011] NSWCA 395 at [98] and [100]; it is also the conclusion to which Gillard J came in *Riley v Penttila* [1974] VR 547 at 573-4 (cited in *Westfield Management v Perpetual Trustee* (2007) 233 CLR at 539 [39], although not on this point).

⁶⁴ AB

question of the deliberate expungement of an easement once registered under the Act. An easement which has been “*taken out*” of the Register can hardly be said to have been “*left out*”.

40. Accordingly, the Court of Appeal erred in its construction of the term “*omission*” in ss 12(1)(d) and 42(1)(a1). The Register may not be corrected under s12(1)(d), and the exception to indefeasibility in s42(1)(a1) does not extend to circumstances where the relevant interest has been deliberately expunged from the Register.

D. Section 138 – were Sahab’s proceedings for the recovery of land from Castle?

41. The Court of Appeal held that Sahab was entitled pursuant to s138 of the Act to orders that the Registrar-General reinstate the easement.⁶⁵ However, the proceedings brought by Sahab⁶⁶ were not proceedings for the recovery of any interest in land from Castle within the meaning of s138(1):

41.1 The proceedings were, as the primary judge observed,⁶⁷ brought to compel the Registrar-General to alter the Register. The ancillary relief sought against Castle to produce its certificate of title was purely incidental to the main purpose of the proceedings.⁶⁸

41.2 Given that Sahab purchased the land in 2007 without the benefit of the easement, as it well knew,⁶⁹ Sahab had nothing taken from it. In consequence, it could not be seeking to “*recover*” that which it never had.

E. The prohibition in section 118

42. Section 118 prohibits proceedings against the registered proprietor for recovery of an interest in land, except in the case of certain specified exceptions, of which the reinstatement of an easement is not one.
43. Section 118 is one of a suite of provisions (ss 40, 42, 43, 43A, 118, 126, 135) which together provide the system of indefeasibility central to the Torrens system. In that

⁶⁵ *Sahab Holdings Pty Limited v Registrar-General* [2011] NSWCA 395 at [275].

⁶⁶ AB

⁶⁷ *Sahab Holdings Pty Limited v Registrar-General (No 2)* [2010] NSWSC 162 at [80].

⁶⁸ *Sahab Holdings Pty Limited v Registrar-General (No 2)* [2010] NSWSC 162 at [80].

⁶⁹ AB

sense, it may be correct to characterise ss 42 and 118 as “*complementary*”.⁷⁰ However, the Court of Appeal’s decision to deny to s118 any application where an exception to indefeasibility exists by reason of s42(1)⁷¹ is not correct.

44. In *Frazer v Walker* itself, their Lordships characterised the equivalent New Zealand provisions to ss 42 and 118 as follows:

“...while s62 [s42] secures that a registered proprietor, and consequently anyone who deals with him, shall hold his estate or interest absolutely free from encumbrances, with three specified exceptions, section 63 [s118] protects him against any action for possession or recovery of land, with five specified exceptions. Subsection (2) of section 63 [s118] is a particularly strong provision in his favour: it provides that the register is, in every court of law or equity, to be an absolute bar to any such action against the registered proprietor, any rule of law or equity to the contrary notwithstanding.”⁷²

45. The application of these principles provides a complete answer to Sahab’s claim for relief under s138.
46. Given that the legislature has identified in s118(1)(a)-(f) the range of exceptions to the general prohibition on proceedings for recovery of interests in Torrens land, there is no warrant for the introduction by the Court of a further exception (for easements and profits à prendre).

F. Section 122 review

47. The Court of Appeal’s conclusion that the easement could be reinstated under s122 of the Act⁷³ was incorrect for three reasons:

47.1 Section 122(4)(b) prevented a grant of relief where the Registrar-General had no power to rectify the Register under the Act.

47.2 An action against the Registrar-General is prohibited by s12A(3), where (as here) the Registrar-General’s decision to remove the easement was taken after the then registered proprietors failed to respond to his notice of intention to do so.

⁷⁰ *Sahab Holdings Pty Limited v Registrar-General* [2011] NSWCA 395 at [239].

⁷¹ *Sahab Holdings Pty Limited v Registrar-General* [2011] NSWCA 395 at [249].

⁷² [1967] 1 AC 569 at 580.

⁷³ *Sahab Holdings Pty Limited v Registrar-General* [2011] NSWCA 395 at [234].

47.3 Sahab was not a person dissatisfied with that decision within the meaning of s122(1), having had no interest in the subject land at the time of the Registrar-General's decision to remove the easement.

These reasons are addressed in turn below.

(i) Section 122(4)(b)

48. Although the language of ss 121 and 122 may appear to be broadly expressed, the review provisions must be understood to operate within the confines of, and so as not to subvert, the provisions for indefeasibility contained in the Act. So much is apparent from the terms of s 122(4)(b), whereby the relief which the Court may grant is confined to ordering the Registrar-General to take action that he is otherwise empowered by the Act to take.

49. Section 122 does not operate to permit alteration of the Register in disregard of the other provisions of the Act, simply because the Court considers a decision of the Registrar-General was incorrectly made.

50. The Court of Appeal held that the Registrar-General could have exercised his powers pursuant to s12(1)(d) to correct the omission of the easement.⁷⁴ For reasons already given above, however, those powers do not include reinstatement of an easement previously expunged as a result of a deliberate decision by the Registrar-General.

(ii) Section 12A(3)

51. The proceedings below were brought to compel the Registrar-General to alter the Register by restoring the easement. As such, they fail *in limine* because of s 12A(3).

52. In 2001, the Registrar-General gave to the then proprietors of Strathallen (Mr and Mrs Howard) notice of his intention to cancel the easement.⁷⁵ The Howards did not notify any objection to removal of the easement.⁷⁶ The easement was then cancelled. Section 12A(3) prohibits the bringing against the Registrar-General of any action in respect of that cancellation, by those proprietors or "*any person claiming through or under*" those proprietors.

⁷⁴ *Sahab Holdings Pty Limited v Registrar-General* [2011] NSWCA 395 at [231].

⁷⁵ *Sahab Holdings Pty Limited v Registrar-General* [2011] NSWCA 395 at [41] and [57].

⁷⁶ *Sahab Holdings Pty Limited v Registrar-General* [2011] NSWCA 395 at [247].

53. The proceedings brought by Sahab are of such a kind.
54. The term “*action*” in s12A(3) is of wide import.⁷⁷ It is certainly sufficiently broad to include the commencement of proceedings against the Registrar-General, as here.
55. For the purposes of s12A(3), Sahab is a “*person claiming through or under*” its predecessors in title (Mr and Mrs Howard), who failed to respond to the Registrar-General’s notice of intention to remove the easement. Their successor in title can be in no better position to challenge removal of the easement than were the Howards.
56. Section 12A(3) is plainly intended to obviate the bringing of proceedings against the Registrar-General where the person receiving notice of an intended dealing, such as the registered proprietor, does not respond to notification of a proposed change to the Register. That purpose would be entirely defeated if a registered proprietor who declined to object to the proposed change, was later able to challenge the alteration (all the more so, where the proprietor sold his land after the Register was altered, yet the incoming proprietor could challenge the earlier alteration).
57. The Court of Appeal erred in concluding that s12A(3) should be read together with s122 by denying any operation to the prohibition in s12A(3) in proceedings against the Registrar-General for review under s122.⁷⁸
58. That attempted reconciliation of the two provisions is not available. Section 122 provides a broad power of review by a person dissatisfied with a decision of the Registrar-General. Section 12A(3) imposes a limitation on that broad power of review where the registered proprietor has received notification of the proposed alteration but has not objected.
59. The Court of Appeal’s conclusion that an “*action*” in s12A(3) does not extend to proceedings against the Registrar-General permitted by other sections of the Act,⁷⁹ cannot be correct. Indeed, Campbell and Tobias JJA recited the terms of the second reading speech, in which the Minister stated that one of the effects of s12A(3) was to deprive a person who had not responded to a notice of any right to be compensated

⁷⁷ *Herbert Berry Associates Limited v Inland Revenue Commissioners* [1978] 1 All ER 161 at 170; *Daemar v Industrial Commission of New South Wales* (1988) 12 NSWLR 45 at 54.

⁷⁸ *Sahab Holdings Pty Limited v Registrar-General* (No 2) [2012] NSWCA 42 at [11] & [14].

⁷⁹ *Sahab Holdings Pty Limited v Registrar-General* (No 2) [2012] NSWCA 42 at [14].

from the assurance fund;⁸⁰ but, claims on the assurance fund can *only* be brought under the provisions of the Act.

(iii) Sahab is not a person “dissatisfied” with a decision of the Registrar-General

60. The primary judge correctly observed that s122 is concerned with the performance of “*present identifiable duties*”.⁸¹ Sahab was not a party to the Registrar-General’s decision and took title to the dominant tenement knowing that the easement had been expunged.⁸²

61. In a case such as the present, s122 cannot provide a means for a successor in title of the dominant tenement to have reversed the effect of a decision taken by the Registrar-General many years earlier to expunge an easement from the Register. Otherwise, the owner of a modern development on land once burdened by an easement, removed decades before, might face the prospect of reinstatement of the easement over his land, requiring demolition of his building, at the suit of his neighbour under s122 – this, despite the right of each successive purchaser over many years to rely upon clear title to the developed land as shown in the Register. Such a result would place indefeasibility precepts at nought.

62. The Court erred in holding that Castle was estopped from arguing this issue.⁸³ The decision of the primary judge that Sahab was a person “*dissatisfied*”⁸⁴ was quintessentially interlocutory – it was made for the purpose of requiring reasons for the Registrar-General’s decision in order that the substantive issues might subsequently be determined. It remained open to Castle to raise this issue on appeal from the final decision and orders of the primary judge.

G. Conclusion

63. The Court of Appeal erred in concluding that Castle did not acquire an indefeasible title to Sailors Bay, free of the easement, after it was expunged from the Register in 2001. The easement was not “*omitted*” from the Register, there was no exception to

⁸⁰ *Sahab Holdings Pty Limited v Registrar-General* (No 2) [2012] NSWCA 42 at [16].

⁸¹ *Sahab Holdings Pty Limited v Registrar-General* (No 2) [2010] NSWSC 162 at [93].

⁸² AB

⁸³ *Sahab Holdings Pty Limited v Registrar-General* [2011] NSWCA 395 at [219].

⁸⁴ *Sahab Holdings Pty Limited v Registrar-General* (2009) 75 NSWLR 629 at 640-642 [53]-[62].

indefeasibility, and the Supreme Court had no power to direct the Registrar-General to amend the Register to reinstate the easement.

Part VII: Applicable statutory provisions

64. The applicable statutory provisions as they existed at the relevant time are: *Real Property Act* 1900 (NSW) ss. 12(1)(d), 12A(3), 32(6), s42(1)(a1), 46, 118, 121, 122 and 138 (copies attached). These provisions are still in force, in the form attached, as at the date of these submissions.

Part VIII: Orders sought

65. Castle seeks the following orders:

- (i) the appeal be allowed;
- (ii) the orders made by the Court of Appeal be set aside and in lieu thereof it be ordered that the appeal to that Court be dismissed with costs; and
- (iii) the First Respondent pay the Appellant's costs of the appeal to this Court.

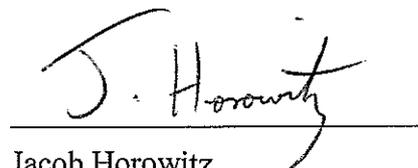
Part IX: Estimate of time required for oral argument

66. Castle estimates that 2-3 hours will be required for the presentation of its oral argument.

Dated: 2 October 2012



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New South Wales Consolidated Acts

[\[Index\]](#) [\[Table\]](#) [\[Search\]](#) [\[Search this Act\]](#) [\[Notes\]](#) [\[Noteup\]](#) [\[Previous\]](#) [\[Next\]](#) [\[Download\]](#)
[\[History\]](#) [\[Help\]](#)

REAL PROPERTY ACT 1900 - SECT 12

Powers of Registrar-General

12 Powers of Registrar-General

(1) The Registrar-General may exercise the following powers, that is to say:

(a) The Registrar-General may require any person who may have possession or control of an instrument relating to land the subject of a dealing, or relating to the title to any such land, to produce that instrument, and the Registrar-General may retain any such instrument, whether produced pursuant to this paragraph or otherwise, until it is no longer required for action in connection with a dealing lodged with the Registrar-General.

(b) The Registrar-General may summon any person referred to in paragraph (a) or any person who to the Registrar-General appears to be interested in any land, title to land, or instrument affecting land, the subject of a dealing to appear and give an explanation respecting that land, title, or instrument.

(c) The Registrar-General may administer oaths or may take a statutory declaration in lieu of administering an oath.

(d) The Registrar-General may, subject to this section and upon such evidence as appears to the Registrar-General sufficient, correct errors and omissions in the Register.

(d1) The Registrar-General may, subject to subsection (3A), on such evidence and after such notices (if any) as appear to the Registrar-General to be sufficient, and with the consent of the proprietors and any mortgagees of the land, correct the Register by correcting a reference to one or more lot numbers in a plan. The Registrar-General may make the correction on the application of a proprietor or mortgagee or on the Registrar-General's own initiative.

(e) The Registrar-General may record in the Register a caveat on behalf of any person under any legal disability or on behalf of Her Majesty to prohibit the transfer or dealing with any land belonging or supposed to belong to any such person as hereinbefore mentioned, and also to prohibit the dealing with any land in any case in which it appears to the Registrar-General that an error has been made by misdescription of such land or otherwise in any folio of the Register or instrument, or for the prevention of any fraud or improper dealing.

Note: See *Trustee Act 1925*, sec 11.

(f) For the protection of any person interested in land under the provisions of this Act the Registrar-General may record in the Register a caveat, or may otherwise record the interest of that person in the Register in such manner as appears to the Registrar-General to be appropriate.

(g) The Registrar-General may, on such evidence as appears to the Registrar-General sufficient, record in the Register any change in the name of a registered proprietor, whether the change is consequent upon the marriage of the proprietor or otherwise.

(h) The Registrar-General may at the Registrar-General's discretion, and notwithstanding anything in this Act, dispense with any advertisement or the supply to the Registrar-General of any information or the production to the Registrar-General of any instrument.

(h1) The Registrar-General may give notice by advertisement or by personal service, whenever and to whomever the Registrar-General thinks appropriate, of the intended exercise or performance of any power, authority, duty or function conferred or imposed by this Act. The Registrar-General may instead, if the Registrar-General considers it to be appropriate, direct another person to give notice in a manner and form approved by the Registrar-General.

(i) The Registrar-General may, where the Registrar-General is satisfied that an estate or interest has been extinguished by merger, make such recording in the Register as the Registrar-General considers appropriate.

(1A) Notwithstanding subsection (1) (h1), a notice of intention to bring land under the provisions of this Act or to grant a possessory application or to register a plan of survey lodged for the purposes of section 28V may be served by post.

(2) Where a person required to produce an instrument pursuant to paragraph (a) of subsection (1) fails to produce the instrument or to allow it to be inspected or, being summoned pursuant to paragraph (b) of that subsection, refuses or neglects to give an explanation which the person is, pursuant to that paragraph, required to give, or knowingly misleads or deceives any person authorised to demand any such explanation, the person shall for each such offence incur a penalty not exceeding 2 penalty units, and the Registrar-General, if the instrument or information withheld appears to the Registrar-General material, may reject the relevant dealing referred to in that subsection.

(3) Where the Registrar-General, in the exercise of the powers conferred upon the Registrar-General by subsection (1) (d), makes a correction in the Register:

(a) the Registrar-General shall, by an appropriate recording in the Register, authenticate the correction and record the date thereof,

(b) to the extent that, but for this paragraph, the correction would prejudice or affect a right accrued from a recording made in the Register before the correction, the correction shall be deemed to have no force or effect,

(c) subject to paragraph (b), the Register shall, as so corrected, have the same validity and effect as it would have had if the error or omission had not occurred, and

(d) the Registrar-General shall, while any right preserved by paragraph (b) is subsisting, maintain available for search a record of the date, nature and effect of the correction.

(3A) If the Registrar-General makes a correction referred to in subsection (1) (d1):

(a) the correction:

(i) must not make original words or symbols illegible, and

(ii) must be dated, and

(iii) must be initialled by the Registrar-General, and

(b) the correction takes effect as if the error corrected had not occurred, and

(c) the correction does not affect the construction of any instrument made or entered into before the correction so as to prejudice any person claiming under that instrument.

(4) Where the Registrar-General exercises the powers conferred upon the Registrar-General by subsection (1) (f) otherwise than by entering the Registrar-General's caveat, the interest recorded shall be deemed to be an interest within the meaning of section 42 but otherwise shall have no greater operation or effect than it would have had if not so recorded.

(5) Upon the recording, pursuant to subsection (1) (i), of the extinction of an estate or interest by merger, that estate or interest shall be deemed to have been extinguished accordingly.



New South Wales Consolidated Acts

[\[Index\]](#) [\[Table\]](#) [\[Search\]](#) [\[Search this Act\]](#) [\[Notes\]](#) [\[Noteup\]](#) [\[Previous\]](#) [\[Next\]](#) [\[Download\]](#)
[\[History\]](#) [\[Help\]](#)

REAL PROPERTY ACT 1900 - SECT 12A

Power of Registrar-General to serve notice of proposed action

12A Power of Registrar-General to serve notice of proposed action

(1) The Registrar-General may, before taking any action that alters the Register, give notice of the proposed action to any person that the Registrar-General considers should be notified of it.

(2) Where the Registrar-General has given notice pursuant to the powers conferred upon the Registrar-General by subsection (1), the Registrar-General may refuse to take the action until after the expiration of a period specified in the notice and the Registrar-General may proceed to take the action at or after the expiration of the period so specified unless the Registrar-General is first served with, or with written notice of, an order of the Supreme Court restraining the Registrar-General from so doing.

(3) Where a person given notice under subsection (1) does not within the time limited by the notice serve upon the Registrar-General or give the Registrar-General written notice of an order made by the Supreme Court restraining the Registrar-General from taking the action, no action by that person or by any person claiming through or under that person shall lie against the Registrar-General in respect of the taking of the action specified in the notice.

(4) No action shall lie against the Registrar-General for failure to give a notice under subsection (1).

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New South Wales Consolidated Acts

[\[Index\]](#) [\[Table\]](#) [\[Search\]](#) [\[Search this Act\]](#) [\[Notes\]](#) [\[Noteup\]](#) [\[Previous\]](#) [\[Next\]](#) [\[Download\]](#)
[\[History\]](#) [\[Help\]](#)

REAL PROPERTY ACT 1900 - SECT 32

Folios of the Register

32 Folios of the Register

(1) The Registrar-General creates a folio of the Register for land by making a record of:

(a) a description of the land and of the estate or interest therein for which it is created,

(b) a description of the proprietor for the time being of the estate or interest and the fact that any such proprietor is a minor if the Registrar-General knows that to be the case, and

(c) such particulars, as the Registrar-General thinks fit, of:

(i) other estates or interests, if any, affecting the land, and

(ii) other information, if any, that relates to the land or any estate or interest therein and is included in that record pursuant to this or any other Act (including an Act of the Parliament of the Commonwealth) or an instrument made under any such Act,

and by allocating a distinctive reference to the record so made.

(2) Subsection (1) does not apply in respect of a folio of the Register constituted under section 22 or 23 of the *Strata Schemes (Freehold Development) Act 1973* or section 25 or 27 of the *Strata Schemes (Leasehold Development) Act 1986*.

(2A) Subsection (1) (c) applies, in the case of a qualified folio of the Register, subject to the provisions of section 28I.

(3) Where a person is registered as proprietor of a lease registered under this Act, the Registrar-General may:

(a) if the Registrar-General thinks fit so to do, create a folio or folios of the Register for the estate or interest of that person in some or all of the land leased, and

(b) for that purpose, require the deposit in the office of the Registrar-General of a plan of the land (together with copies) which shall, if the Registrar-General so requires, be a plan of survey.

(4) The Registrar-General may, if the Registrar-General thinks fit so to do, create a new folio or new folios of the Register for the whole or any part of the land comprised in one or more of the folios of the Register.

(5) Where, under this Act, the Registrar-General creates a new folio of the Register for land contained in a previously created folio of the Register, the Registrar-General shall appropriately cancel the previously created folio and may, for the purposes of this subsection, require the production to the Registrar-General of any certificate of title.

(6) The Registrar-General shall have, and shall be deemed always to have had, power to cancel in such manner as the Registrar-General considers proper any recording in the Register that the Registrar-General is satisfied does not affect the land to which the recording purports to relate.

(7) The Registrar-General shall maintain a record of all dealings recorded in, or action taken in respect of, a computer folio and such other information, if any, relating to the folio as the Registrar-General thinks fit.



New South Wales Consolidated Acts

[\[Index\]](#) [\[Table\]](#) [\[Search\]](#) [\[Search this Act\]](#) [\[Notes\]](#) [\[Noteup\]](#) [\[Previous\]](#) [\[Next\]](#) [\[Download\]](#)
[\[History\]](#) [\[Help\]](#)

REAL PROPERTY ACT 1900 - SECT 42

Estate of registered proprietor paramount

42 Estate of registered proprietor paramount

(1) Notwithstanding the existence in any other person of any estate or interest which but for this Act might be held to be paramount or to have priority, the registered proprietor for the time being of any estate or interest in land recorded in a folio of the Register shall, except in case of fraud, hold the same, subject to such other estates and interests and such entries, if any, as are recorded in that folio, but absolutely free from all other estates and interests that are not so recorded except:

(a) the estate or interest recorded in a prior folio of the Register by reason of which another proprietor claims the same land,

(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,

(b) in the case of the omission or misdescription of any profit à prendre created in or existing upon any land,

(c) as to any portion of land that may by wrong description of parcels or of boundaries be included in the folio of the Register or registered dealing evidencing the title of such registered proprietor, not being a purchaser or mortgagee thereof for value, or deriving from or through a purchaser or mortgagee thereof for value, and

(d) a tenancy whereunder the tenant is in possession or entitled to immediate possession, and an agreement or option for the acquisition by such a tenant of a further term to commence at the expiration of such a tenancy, of which in either case the registered proprietor before he or she became registered as proprietor had notice against which he or she was not protected:

Provided that:

(i) The term for which the tenancy was created does not exceed three years, and

(ii) in the case of such an agreement or option, the additional term for which it provides would not, when added to the original term, exceed three years.

(2) In subsection (1), a reference to an estate or interest in land recorded in a folio of

the Register includes a reference to an estate or interest recorded in a registered mortgage, charge or lease that may be directly or indirectly identified from a distinctive reference in that folio.

(3) This section prevails over any inconsistent provision of any other Act or law unless the inconsistent provision expressly provides that it is to have effect despite anything contained in this section.

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New South Wales Consolidated Acts

[\[Index\]](#) [\[Table\]](#) [\[Search\]](#) [\[Search this Act\]](#) [\[Notes\]](#) [\[Noteup\]](#) [\[Previous\]](#) [\[Next\]](#) [\[Download\]](#)
[\[History\]](#) [\[Help\]](#)

REAL PROPERTY ACT 1900 - SECT 46

Transfers

46 Transfers

(1) Where land under the provisions of this Act is intended to be transferred, or any easement or profit à prendre affecting land under the provisions of this Act is intended to be created, the proprietor shall execute a transfer in the approved form.

(2) This section does not apply to the creation of an easement or profit à prendre that burdens and benefits separate parcels of land if the same person is the proprietor of the separate parcels of land.

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New South Wales Consolidated Acts

[\[Index\]](#) [\[Table\]](#) [\[Search\]](#) [\[Search this Act\]](#) [\[Notes\]](#) [\[Noteup\]](#) [\[Previous\]](#) [\[Next\]](#) [\[Download\]](#)
[\[History\]](#) [\[Help\]](#)

REAL PROPERTY ACT 1900 - SECT 118

Registered proprietor protected except in certain cases

118 Registered proprietor protected except in certain cases

(1) Proceedings for the possession or recovery of land do not lie against the registered proprietor of the land, except as follows:

(a) proceedings brought by a mortgagee against a mortgagor in default,

(b) proceedings brought by a chargee or covenant chargee against a charger or covenant charger in default,

(c) proceedings brought by a lessor against a lessee in default,

(d) proceedings brought by a person deprived of land by fraud against:

(i) a person who has been registered as proprietor of the land through fraud, or

(ii) a person deriving (otherwise than as a transferee bona fide for valuable consideration) from or through a person registered as proprietor of the land through fraud,

(e) proceedings brought by a person deprived of, or claiming, land that (by reason of the misdescription of other land or its boundaries) has been included in a folio of the Register for the other land against a person who has been registered as proprietor of the other land (otherwise than as a transferee bona fide for valuable consideration),

(f) proceedings brought by a registered proprietor under an earlier folio of the Register against a registered proprietor under a later folio of the Register where the two folios have been created for the same land.

(2) Despite any rule of law or equity to the contrary:

(a) the production of a manual folio is an absolute bar and estoppel to any such proceedings commenced before the production of the folio against the person named in the folio as a registered proprietor or lessee of the land, and

(b) the production of a computer folio certificate for a computer folio is an absolute bar and estoppel to any such proceedings commenced before the time specified in the certificate against the person named in the certificate as a registered proprietor or lessee of the land.

(3) Subsection (2) does not apply to proceedings of the kind referred to in subsection (1) (a)-(f).

(4) This section does not affect:

(a) any proceedings in relation to land for which a qualified folio of the Register has been created, being proceedings based on a subsisting interest within the meaning of Part 4A, or

(b) any proceedings brought by a person deprived of, or claiming, land that (by reason of the misdescription of other land or its boundaries) has been included in a limited folio of the Register for the other land, whether or not the registered proprietor of the other land is a transferee of the land bona fide for valuable consideration.



New South Wales Consolidated Acts

[\[Index\]](#) [\[Table\]](#) [\[Search\]](#) [\[Search this Act\]](#) [\[Notes\]](#) [\[Noteup\]](#) [\[Previous\]](#) [\[Next\]](#) [\[Download\]](#)
[\[History\]](#) [\[Help\]](#)

REAL PROPERTY ACT 1900 - SECT 121

Registrar-General to supply reasons for certain decisions

121 Registrar-General to supply reasons for certain decisions

(1) A person who is dissatisfied with the Registrar-General's decision:

(a) to have land brought under the provisions of this Act, or to have any dealing registered or recorded, or

(b) to have any certificate of title, order for foreclosure or other instrument issued in relation to land, or

(c) to have exercised or performed in relation to land any function or duty which, by this Act, is required to be exercised or performed by the Registrar-General,

may apply to the Registrar-General for a copy of the Registrar-General's reasons for the decision.

(2) It is the Registrar-General's duty to provide the person with those reasons.

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New South Wales Consolidated Acts

[\[Index\]](#) [\[Table\]](#) [\[Search\]](#) [\[Search this Act\]](#) [\[Notes\]](#) [\[Noteup\]](#) [\[Previous\]](#) [\[Next\]](#) [\[Download\]](#)
[\[History\]](#) [\[Help\]](#)

REAL PROPERTY ACT 1900 - SECT 122

Review of decisions by Supreme Court

122 Review of decisions by Supreme Court

(1) A person who is dissatisfied with a decision referred to in section 121 (1) may apply to the Supreme Court for a review of the decision.

(2) For the purpose of conducting such a review, the Supreme Court may reconsider and determine any question of fact involved in the decision.

(3) If the Registrar-General has provided reasons for the decision, the Registrar-General may not rely on any grounds that are not set out in those reasons except by leave of the Supreme Court.

(4) After reviewing the Registrar-General's decision on an application under this section, the Supreme Court:

(a) may uphold the decision, or

(b) may order that the Registrar-General take such action in relation to the matters raised by the application as the Supreme Court considers appropriate, being action that the Registrar-General could, but for the order, have taken,

and may make such further or other orders as the Supreme Court considers appropriate.

(5) This section does not apply to the determination of the position of a boundary under Part 14A.

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New South Wales Consolidated Acts

[\[Index\]](#) [\[Table\]](#) [\[Search\]](#) [\[Search this Act\]](#) [\[Notes\]](#) [\[Noteup\]](#) [\[Previous\]](#) [\[Next\]](#) [\[Download\]](#)
[\[History\]](#) [\[Help\]](#)

REAL PROPERTY ACT 1900 - SECT 138

Court may direct cancellation of folios and other actions related to folios

138 Court may direct cancellation of folios and other actions related to folios

(1) A court may, in proceedings for the recovery of any land, estate or interest from the person registered as proprietor of the land, make ancillary orders of the kind set out in subsection (3), if the court is of the opinion that the circumstances of the case require any such order to be made.

(2) A court may, in proceedings for the possession or production of a certificate of title or in proceedings in which the court makes a determination as to an estate or interest in land, make ancillary orders of the kind set out in subsection (3), if the court is of the opinion that the certificate of title has not been, or is not likely to be, produced by a person for the purposes of the registration of a dealing affecting the land concerned.

(3) A court may order the Registrar-General to do one or more of the following:

- (a) cancel or amend a folio of the Register,
- (b) cancel, amend or make a recording in a folio of the Register,
- (c) create a new folio of the Register,
- (c1) create a new edition of a computer folio,
- (d) issue a new certificate of title.

(3A) If a court makes an order under subsection (3) (c), the Registrar-General may require a person to lodge with the Registrar-General a plan (being, where the Registrar-General so specifies, a plan of survey) of the relevant land, together with such number of copies of the plan, if any, as the Registrar-General may specify.

(4) The Registrar-General must give effect to any such order.

(5) A court that makes an order under this section may order that a person deliver a certificate of title or other instrument to the Registrar-General for the purpose of giving effect to any such order.

(6) An action does not lie against the Registrar-General for recovery of damages sustained through deprivation of land, or any estate or interest in land, because of compliance by the Registrar-General with an order under this section.

(7) In this section:
"court" does not include the Local Court or a tribunal.