

BETWEEN:

CASTLE CONSTRUCTIONS PTY LIMITED
Appellant

and

SAHAB HOLDINGS PTY LTD
First Respondent

REGISTRAR-GENERAL
Second Respondent



FIRST RESPONDENT'S FURTHER WRITTEN SUPPLEMENTARY SUBMISSION

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1. This submission refers to certain paragraphs of Sahab's written submission filed 23 October 2012 and provides complementary reasoning and references to the argument in those paragraphs. The same abbreviations are used.
 2. **Paras 10, 18-19, 35-38, 40:** With respect, it is fundamentally misconceived to see the power to correct the Register in *RPA* s12(1)(d) and the review power in s122 as a broad-ranging intrusion on immediate indefeasibility. It is neither an intrusion nor broad-ranging, as the narrow facts of this case illustrate. The centrepiece provisions on indefeasibility recognise that it is not, as is examined below. This case, and the principles on which Sahab is properly given relief, should not be decided on submissions that raise, in general terms, potential broad-ranging intrusion or on an a priori assumption that question-begging catchphrases such as "the Register is everything" or "the primary purpose of the Act" limit certain means of changing the Register (such as s12 or s136 or s138) but not others (such as ss36, 46, 47, 49 or 56). That approach is not consistent with how one interprets statutes, particularly where a regime is established that has expressly built into it exceptions, and corrective powers which are subject to the Court's merits-based review if not properly exercised.
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3. The text of the centrepiece provisions recognises this. Thus, *RPA* s42(3) refers to s42 prevailing over any inconsistent provision of any "other" Act or law, not the provisions of the *RPA* itself. Section 42(1) provides that a registered proprietor holds ("except in case of fraud") the registered interest "absolutely free from all other estates or interests that are not so recorded except" the "estates or interests" in (a) to (d) including in (a1) omitted or misdescribed easements.¹ Section 45(1) protects a purchaser or mortgagee "[e]xcept to the extent to which *this Act* otherwise expressly provides"; s45(2) protects an innocent purchaser or mortgagee against fraud, error or nullity in preceding title or in the registration process "[d]espite any other provision of *this Act*" (emphasis added). Section 45(1) includes in its exception the express powers of correction of errors and omissions in the Register in s12(1)(d) (and s136) and protects innocent purchasers and mortgagees subject to that exception. Section 45(2) overrides that exception for innocent purchasers and mortgagees in the areas of fraud, error or nullity in preceding title or in the registration process. *That override is not the narrow facts of this case, as the CA at CA1 [250] (AB350) recognised.* Castle was not a purchaser or mortgagee after it procured the erroneous removal of a *registered* interest, the 1921 easement. Contrast *Leros Pty Ltd v Terara Pty Ltd* (1992) 174 CLR 407, where a subsequent registered dealing gained the protection of indefeasibility, which is simply an application of the statute (s45) and existing authority (at 418-419).²
4. When the 1921 easement was removed on Castle's application in 2001, irrespective of its basis that was a "decision" by the Registrar-General, which attracted the Court's merits-based review jurisdiction under *RPA* s122. It was also an "error" in the ordinary meaning of that term, as the CA found at CA1 [181]-[182] (AB327-328), a finding not challenged in this Court.

¹ It is significant that both s12(1)(d) and s42(1) refer to the status of the Register and estates or interests there registered, not to acts of the Registrar-General leading to that status [contrast s136].

² See also *Parramore v Duggan* (1995) 183 CLR 633 at 652 per McHugh J, where his Honour clearly envisaged the power of correction was available on appropriate facts and circumstances *and where the Registrar-General or his equivalent was a party.*

5. It is a fundamental misconception, with respect, to say that once the 1921 easement was removed by the Registrar-General in 2001, Castle's title was thereby enlarged indefeasibly against exercise of statutory right of review of that removal. Castle did not get the protection of section 45 for that outcome, nor by any provision which conferred conclusive title by registration. Although, as the CA found, the review was also proceedings for possession or recovery of an interest in land, Castle could not get the protection of s118 against such a review of the *Registrar-General's* decision to remove because the decision to remove a *registered* interest to which Castle's registered title was subject at time of its registration on purchase, and any effect that decision had on title, had built into it a statutory right of review and reversal to which any effect on Castle's title is subject. If the Court's review found that the Registrar-General's decision was wrong, as it has here (a finding not challenged by Castle), then the Court in exercise of its jurisdiction could order the Registrar-General to exercise the power under s12(1)(d) (and in respect of the certificate of title under s136) to restore the easement, which means that Castle's title as registered proprietor continued to be subject to the prior registered interest of the easement as the CA recognised at CA1 [244] (AB348).³ To find otherwise would make the right of review a dead letter, even in the narrow circumstances in which it operates.⁴
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6. The right of review is narrow. It requires no change of registered interest in the land in respect of which review is sought, merely the reversal of the decision being reviewed. While not time-limited in respect of the person seeking review (where there may be a change of registered interest), the grant of relief is discretionary.

³ Note that s136 itself gives power over the certificate of title the issue of which Castle says indicates or constitutes the extinction. If Castle was correct, again any power of correction would be a dead letter against the person who benefited and in certain circumstances "wrongfully obtained" the certificate of title. That cannot be justifiable in legal principle, policy or in a Court's jurisdiction to review (on the merits or by supervision) the decisions of an administrative official with immense power over rights of property.

⁴ Section 42(1) does not achieve the result for Castle as registered proprietor. It does not read "absolutely free from all other rights or provisions of this Act" and does not include at the start "Despite any other provision of this Act".

7. There is no dramatic effect on the title affected by the decision subject to review (in this case, Castle's title). An intervening purchaser or mortgagee of that title is protected against review. Any prejudice to the title-holder who benefited from the change and who still holds the land can be taken into account in exercise of discretion to grant relief on review and in the form of that relief.⁵
8. The foregoing analysis is not startling but, rather, orthodox. In 1970, in his article on the centenary of the Torrens system⁶, Professor Woodman in his opening included the power of correction in *RPA* s12, with the exceptions in s42 and statutory charges and encroachments under other Acts as the coordinate exceptions to immediate indefeasibility. The learned author, in words remarkably similar to those used by the majority of the High Court (Mason CJ, Dawson and McHugh JJ) in *Leros* and in s45, referred at 102 in the following terms to the conclusions of the Privy Council in *Frazer v Walker*. "The powers of the Registrar to correct errors are significant and extensive, but the exercise of such powers *must be limited to the period before a bona fide purchaser, or mortgagee, acquires a title under the other provisions of the Act.*" (emphasis added). That perfectly describes the current narrow case and puts the Privy Council's dicta on s12 in proper context. The learned author reinforced the point at 103 where he pointed out that the New Zealand Act being considered by the Privy Council contains no complete equivalent to the width and force of *RPA* s12(1)(d) (then s12(d)), to which s136⁷ was considered in New South Wales to be complementary, and went on: "It is clear that the two sections must be read as an integral part of the whole Act, with the consequence that the exercise of the Registrar's powers must be limited to the *period before a*

⁵ No such prejudice is present here and would be difficult to find if it arose simply from an argument that Castle ought to be entitled to keep the benefit of a situation that it wrongly or erroneously initiated.

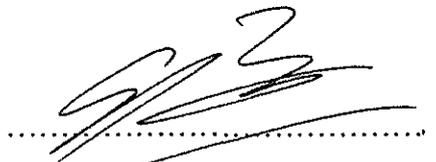
⁶ "The Torrens System in New South Wales: One Hundred Years of Indefeasibility of Title" (1970) 44 *ALJ* 96.

⁷ The Privy Council's focus was on the NZ equivalent of s136, being s81 of the *Land Transfer Act 1952 (NZ)*, not on s80.

bona fide purchaser, or mortgagee, acquires a title under the other provisions of the Act (emphasis added). Again, this is the narrow facts of this case.⁸

9. **Paras 12-19:** Section 42(1)(a1) contains an alternative protection on the facts of this case, which is broader than the foregoing avenue of relief. This is the historic special protection for omitted or misdescribed easements which binds subsequent acquirers of registered interests even if, by definition, they are not visible to search or inquiry as the CA found. That existing risk is but one interest overriding the conclusiveness of the Register: see statutory charges in other Acts protected by s42(3), for instance. Overstating, in catchphrases, the conclusiveness of the Register masks this fact and leads to the misconception already mentioned.⁹

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⁸ Professor Woodman went on to analyse the following of this approach by the majority of the NSWCA in *James v Registrar-General* (1967) 87 WN (Pt 1) (NSW) 239, a case cited by Sahab, along with *Re Jobson* (1951) 51 SR (NSW) 76 and *Pirie v Registrar-General*, (1962) 109 CLR 619 to the trial judge and the CA in the present narrow case.

⁹ See the cautionary note sounded by Professor Woodman in this respect in his article discussed above at p106.