

BETWEEN:

CASTLE CONSTRUCTIONS PTY LIMITED
Appellant

and

SAHAB HOLDINGS PTY LTD
First Respondent

REGISTRAR-GENERAL
Second Respondent



SECOND RESPONDENT'S SUBMISSIONS

Part I – Internet Publication

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

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Part II – Issues

2. The second respondent (“Registrar General”) supports the appeal. At the time of preparation of these submissions the Registrar General has not had the benefit of considering the appellant’s (“Castle”) submissions. The Registrar General wishes to make submissions on the following issues in support of the appeal:

- 30
- (a) When is an easement “omitted” within the exception to indefeasibility of title provided by the second limb of s 42 (1) (a1) of the *Real Property Act* 1900 (NSW) (“RPA”)?
 - (b) Whether the words “omitted” in s 42 (1)(a1) and “omission” in s 12 (1)(d) RPA should be construed to include the deliberate cancellation and removal from the Register of an easement by the Registrar General?
 - (c) Whether the words “a person who is dissatisfied” with a decision of the Registrar General in ss 121 and 122(1) RPA should be construed to

THE SECOND RESPONDENT'S WRITTEN SUBMISSIONS dated 2 October 2012 is filed by:

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include the first respondent ("Sahab"), a person who had no interest in land affected by that decision at the time the decision was made?

3. The contest in the appeal is whether the Court of Appeal erred in holding that the subject easement should be reinstated to the Register in circumstances where:
- (a) the easement had been deliberately, but wrongly, cancelled and removed by the Registrar General from the Register; and
 - (b) the applicant for reinstatement, the first respondent ("Sahab") had no interest in land affected by the easement at the time of the Registrar General's decision.
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Part III – Section 78B of the *Judiciary Act 1903 (Cth)*

The Registrar General has considered whether any notice should be given in compliance with s 78B of the Judiciary Act 1903 (Cth) and considers that no notice should be given.

Part IV – Contested Facts

4. The Registrar General has not, at the time of preparation of these submissions, had the benefit of considering Castle's narrative of facts or chronology. The Registrar General will identify any contested material facts in his Reply.
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Part V – Statement of applicable constitutional provisions, statutes and regulations

5. The Registrar General has not, at the time of preparation of these submissions had the benefit of considering Castle's statement of applicable constitutional provisions, statutes and regulations. The Registrar General will identify in his Reply the respect, if any, in which the appellant's statement is wrong or incomplete.
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Part VI – Argument

The Decision of the Court of Appeal – Omitted Easement

6. The Torrens legislation of all Australian States and Territories contains exceptions to indefeasibility of title in the case of “omitted” easements.¹
7. The Court of Appeal rejected the submission that the Registrar General’s cancellation of the recording of the easement in the Register, pursuant to s 32(6), conferred on Castle an indefeasible title to the Sailor’s Bay Road property. The Court of Appeal relied in its reasoning on the exception to indefeasibility contained in s 42(1)(a1) RPA in respect of “omitted” easements².
8. The Court of Appeal followed its decision in *Dobbie v Davidson*³ and construed the word “omitted” to mean something “left out” or “not there” irrespective of the cause⁴. Accordingly, the Court of Appeal held that the easement was “omitted” within the statutory exception to indefeasibility of title contained in the second limb of s 42(1)(a1)⁵. It followed that Castle could not claim indefeasible title to the Sailors Bay property and rely on s. 118 RPA.

20 Statutory Construction

9. The issues in this appeal raise for consideration the proper construction of provisions of the RPA concerning the statutory exception to indefeasibility of title contained in s. 42(1) (a1) RPA concerning “omitted” easements, the Registrar General’s power to correct “omissions” contained in s 12 (1) (d) RPA and the “control mechanism” for review of decisions of the Registrar

¹ *Real Property Act 1900 (NSW) s42(1)(a1); Transfer of Land Act 1958 (VIC) s42(d); Land Titles Act 1994 (QLD) s185(1)(c); Real Property Act 1886(SA)s69(d); Transfer of Land Act 1893 (WA) s68(1A); Land Titles Act 1980 (TAS) s40(3)(e); Land Titles Act 1925 (ACT) s58(1)(b); Land Titles Act (NT) s189(1)(c). Some, but not all of these provisions are set out in like terms.*

² *Sahab Holdings Pty Ltd v Registrar General* [2011] NSWCA 395 at [251] – [274]

³ (1991) 23 NSWLR 625

⁴ *Sahab Holdings Pty Ltd v Registrar General* [2011] NSWCA 395 at [266]

⁵ *Sahab Holdings Pty Ltd v Registrar General* [2011] NSWCA 395 at [275]

General contained in the words “a person who is dissatisfied” contained in ss. 121 and 122 RPA.

10. The task of construction must be undertaken recognizing and applying the fundamental proposition that⁶:

“The Torrens System of registered title...is not a system of registration of title but a system of title by registration.”⁷

- 10 11. The relevant provisions of the RPA should be construed in a way that is consistent with the context, general purpose, policy and language of the RPA as a whole.⁸

12. The principle object of the RPA is to save people from the trouble and expense of going behind the Register to investigate the history of title.⁹ The Register should “reveal all about the title”.¹⁰ The Register is to be the first and

⁶ *Black v Garnock* (2007) 230 CLR 438 at 443 per Gummow and Hayne JJ; *Halloran v Minister Administering National Parks and Wildlife Act* (2006) 229 CLR 545 at 559 – 560 [35]; *Farah Constructions Pty Ltd v Say Dee Pty Ltd* (2007) 230 CLR 89 at 167 – 172 [190] – [198]; *Westfield Management Ltd v Perpetual Trustee Company Ltd* (2007) 233 CLR 528 at 539 [38] per Gleeson CJ, Gummow, Kirby, Hayne and Heyden JJ.

⁷ *Breskvar v Wall* (1971) 126 CLR 376 at 385 per Barwick CJ

⁸ *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381 [69] per McHugh, Gummow, Kirby and Hayne JJ “The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute. The meaning of the provision must be determined ‘by reference to the language of the instrument viewed as a whole’. In *Commissioner for Railways (NSW) v Agalinos*, Dixon CJ pointed out that ‘the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed’. Thus, the process of construction must always begin by examining the context of the provision that is being construed.;”

The context of the words, the consequences of a literal or grammatical construction, the purpose of the statute or the canons of construction may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning.” (citations omitted)

Interpretation Act 1987 (NSW) s 33; see also *Bropho v State of Western Australia & anor* (1990) 171 CLR 1 at 20 and *CIC Insurance Limited v Bankstown Football Club Limited* (1997) 187 CLR 384 at 408.

⁹ *Gibbs v Messer* [1891] AC 248 at 254; see also *Black v Garnock* 230 CLR 438 at 461 [12] – [13]

¹⁰ *Queensland Premier Mines Pty Ltd v French* (2007) 235 CLR at 90 [15].

last point of search except in the case of stated exceptions to indefeasibility of title.¹¹

13. There are some exceptions to the primary object of the RPA which require going behind the Register: easements; statutory charges; estates or interests; and short term leases.¹² Those exceptions should, where possible, be interpreted in a way which does not conflict with the primary object of the RPA and for that reason should be strictly construed¹³.

10 The Easement Exception to Indefeasibility

14. Section 42(1) RPA relevantly provides as follows:

"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:

.....
(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,"

15. Section 42(1)(a1) creates an exception to indefeasibility which has been described as an "overriding interest", that is, a valid property right that does not derive from a recording on the Register¹⁴.

16. Prior to 1995 the relevant provision was s. 42(1)(b), which read:

¹¹ *Black v Garnock* 230 CLR 438 at 463 [75]

¹² *Section 42 (1) (a) – (d) RPA*

¹³ *Leros Pty Ltd v Terara Pty Ltd* (1991) 174 CLR 407 at 424 per Mason CJ, Dawson and McHugh JJ

¹⁴ *Pamela O'Connor, "Title Double Indemnity – Title Insurance and the Torrens system" (2003) 3 Queensland University of Technology Law and Justice Journal 141 at 152.*

“...in the case of the omission or misdescription of any right of way or easement created in or existing upon land.”

- 10 17. Section 42(1)(a1) RPA has two limbs; the first limb concerns land converted to Torrens title from old system. In that case, where an easement existed over the burdened land when it was under old system title, but was not recorded on the folio of the burdened land when converted to Torrens title, the easement is enforceable as an exception to indefeasibility. This was the case under the former s 42(1)(b): *Beck v Auerbach*¹⁵. In this context the easement was “omitted” without the need to prove neglect by the Registrar General; it was enough that the easement was “left out” or “not there”: *Dobbie v Davidson*¹⁶. *Dobbie* was a case that would fall within the first limb of s 42(1)(a1).
18. The present case falls within the second limb of s 42(1)(a1); that is where the burdened land has been under Torrens title at all relevant times and the easement was “validly created” under the RPA. Where the easement was “omitted” when new folios issued for the burdened land the easement has also been held to be enforceable¹⁷.

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The Decision in *Dobbie v Davidson* in context

19. *Dobbie* considered the former s 42 (1) (b) RPA, not the present s 42 (1) (a1) In that case the appellant appealed from a decision of Waddell CJ in Equity who found that a prescriptive easement, which had been created prior to the land being converted to Torrens title, was omitted for the purposes of the statutory exception to indefeasibility, and although unregistered was still enforceable against the owner of the burdened property.
- 30 20. On appeal Kirby P, Priestly and Handley JJA unanimously dismissed the appeal finding that because the easement had existed for some 60 years

¹⁵ (1986) 6 NSWLR 454

¹⁶ (1991) 23 NSWLR 625

¹⁷ *James v Registrar General* (1967) 69SR (NSW) 361; *Rock v Todeschino* [1983] 1 Qd R 356; *Hutchinson v Lemon* [1983] 1 Qd R 369; and *Wambo Coal Pty Ltd (No 3)* [2011] NSWSC 788.

prior to the land being brought under the provisions of the RPA, it was within the class of easements described by s. 42(b) RPA.

21. The decision in *Dobbie* is important for its determination of the meaning of the word "omission" for the purposes of the exception provided in s. 42, but it must be considered in its context: that is, the first limb of the present s 42 (1) (a1) and the then controversy of whether or not there must be some fault on the part of the Registrar General before there can be an "omission" within the statutory exception to indefeasibility. There can be no criticism of the decision in that context. But the decision did not attempt to consider whether "omission" applies to an easement which has been deliberately cancelled by the Registrar General. Kirby P set out 8 reasons as to why "omission" means "left out" in the context of s. 42(b)¹⁸. Of particular note was his Honour's reason that blame need not be attributable to the Registrar General in order for the statutory exception to indefeasibility to apply. The decision in *Dobbie* was at odds with the decision in *Australian Hi-Fi Publications Pty Ltd v Gehl*¹⁹, which had been binding authority in New South Wales for some 12 years with reference to the grounds for invoking the statutory exception to indefeasibility. As a result, Kirby P distinguished²⁰ *Australian Hi-Fi Publications Pty Ltd v Gehl* by confining it to the precise issue which was then before the Court:

"My own preference is therefore to agree with Priestly JA's ultimate conclusion that this Court need not and should not follow Australian Hi-Fi Publications Pty Ltd v Gehl...[it] adopted an unduly narrow meaning of the word "omission"²¹."

22. In *Australian Hi-Fi Publications Pty Ltd v Gehl*²² the Court of Appeal had earlier considered whether or not an easement implied under the rule in *Wheeldon v Burrows*, which had been created after the land had been brought under the provisions of the RPA, constituted an "omission" for the

¹⁸ (1991) 23 NSWLR 625 at 630-633

¹⁹ (1979) 2 NSWLR 618

²⁰ (1991) 23 NSWLR 625 at 633

²¹ at 633

²² (1979) 2 NSWLR 618

10 purposes of s. 42(b) RPA. Mahoney JA, which who Samuels and Reynolds JJA agreed, found that easements implied under the rule in *Wheeldon v Burrows* which are created after the land is converted to Torrens title are only enforceable under the exception to indefeasibility provided by s. 42(b) RPA. In coming to that conclusion Mahoney JA said that the term “omission” involves two things: that something is “not there” and that it is so because of something which should not have been done²³. In that regard, Mahoney JA held that the omission must generally be attributable to the conduct or fault of the Registrar General in order for the easement to qualify as an omission for the purposes of s. 42(b)²⁴.

The Origin of the Easement Exception

23. Paragraph (a1) was added to s 42(1) RPA by the *Property Legislation Amendment (Easements) Act 1995*. As regards easements pre-dating the burdened land coming under the provisions of the RPA, s 42(1)(a1) codifies the law that had developed under the former s 42(1)(b)²⁵. That provision had a counterpart in the original Torrens legislation of New South Wales. Section 40 of the *Real Property Act 1862* provided that a registered proprietor held:

20 “...subject to such encumbrances, liens, estates or interests as may be notified on the folium of the Register Book constituted by the grant or certificate of title of such land but absolutely free from all other encumbrances, liens, estates or interests whatsoever.... except as regards the omission or misdescription of any right of way or other easement created in or existing upon any land...”(emphasis added)

30 24. The exception of omitted or misdescribed easements burdening land despite not being notified on the Register was an established feature of Torrens system legislation by 1862. This exception was introduced in South Australia in December 1858 as an amendment to the first *Real Property Act* which was assented to in January of that year. There was much opposition by the legal

²³ (1979) 2 NSWLR 618 at 622

²⁴ (1979) 2 NSWLR 618 at 622-3

²⁵ *Peter Butt Land Law 6th Ed 2010* at 808 [2085]

profession to the introduction of the Torrens system²⁶. The amendments to the 1858 Act were designed to attempt to quiet that opposition. The easement exception was introduced because it was thought:

*"It was not necessary to make the protection of a registered proprietor so absolute that a neighbour should be deprived of an easement merely because it has been omitted from the certificate"*²⁷.

10 Deliberate Cancellation of an Easement is not an Omission

25. The Registrar General's deliberate cancellation of the recording of an easement in the Register pursuant to s 32(6) RPA should not be characterized as an "omission" in the *Dobbie* sense of being "left out" or "not there". That was not the original purpose of the omitted easement exception, nor is there any good reason to suppose that it was a purpose of any subsequent iteration of the exception.
26. If the interpretation of the Court of Appeal is accepted then the burden on those who must prudently search behind the Register in relation to easements will be greatly increased. In the case of easements which were "validly created" under the Act the searcher will need to scrutinize the Registrar General's reasons for cancellation²⁸. Further, there will be the potential for challenges to the Registrar General's cancellation well into the future. This interpretation is likely to be productive of uncertainty and at odds with the primary object of the RPA²⁹.
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²⁶ Douglas Whalan, "Immediate Success of Registration of Title to land in Australasia and early failures in England" (1966 – 67) 2 *New Zealand Universities Law Review* 416 at 419. See also Rosalind F Croucher "Inspired Law Reform or Quick Fix?" (2009) 30 *Adelaide Law Review* 291 for a detailed account of the introduction of the Torrens system in South Australia.

²⁷ W N Harrison, "The Transformation of Torrens's System into the Torrens System" (1961 – 1964) 4 *University of Queensland Law Journal* 125 at 130.

²⁸ But the searcher is unlikely to be "a person who is dissatisfied" within the meaning of ss 121 and 122 RPA and so is unlikely to be granted access to those reasons.

²⁹ See *Westfield Management Limited v Perpetual Trustee Company Limited* (2007) 528 at 593 [37] – [39] per Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ.

27. The Explanatory Note to the *Property Legislation Amendment (Easements) Bill* 1995 refers, in relation to s 42(1)(a1), to easements “*omitted from the folio because of administrative error*”. The amendment is said to be “consistent” with the decision in *Dobbie v Davidson*. But, as noted above, that decision considered only an easement within the first limb of s 42(1)(a).
28. The same Bill introduced into the Act the present s 49 by which the Registrar General may cancel the recording of an easement in the folio of the Register if satisfied that the easement has been abandoned. The Explanatory Note envisages³⁰ that the satisfaction of the Registrar General as to 20 years or more of non-use of an easement is to be the sole criteria of abandonment. Section 49 (4) provides for service of notice of intention to cancel on interested parties. If the dominant owner, with an interest in the easement, wishes to prevent cancellation of the easement, he or she may lodge a caveat under s 72 F (4A) or serve an injunction with the Registrar General.
29. Section s 42(1)(a1) should be interpreted in a way that is consistent with the evident purpose of s 49. The deliberate decision of the Registrar General pursuant to s 49, after giving notice, cannot be properly characterised as an “*omission*” under s 42(1)(a1) or an error or omission under s 12(1)(d). To do so would mean that there is no utility in the s 49 cancellation procedure, and the notice procedure under s 49(4), in particular. To do so would mean that the dominant owner of land could, at any later time, challenge the Registrar General’s decision and that cancellation pursuant to s 49(1) or (5), of itself, would be of limited effect. It should be noted that, prior to the introduction of s 49, the Registrar General had, the power to cancel the recording of an easement pursuant to s 32(6).
30. Other than the decision of the Court of Appeal there appears to be no Australian decision which has held that an easement which has been deliberately cancelled by a Registrar General or Registrar of Titles remains

³⁰ at page 7

enforceable by reason of the exception to indefeasibility in s 42(1)(a1) of the RPA or comparable legislation.

The Registrar General's Power to Correct Errors and Omissions in the Register

31. The Court of Appeal erred in construing "omission" in s 12 (1) (d) RPA to include the deliberate decision of the Registrar General to cancel registration of the easement³¹.
- 10 32. Section 12 (1) (d) RPA confers power on the Registrar General to "correct errors and omissions in the register". Again the section, as an exception to indefeasibility of title, ought be narrowly construed³², as it has been. The section has been treated as being restricted to the correction of obvious clerical or administrative errors: *State Bank of New South Wales v Berowra Waters Holdings Pty Ltd*³³; *Scallan v Registrar General*³⁴; *McGuinness v Registrar General*³⁵ and *Frazer v Walker*³⁶. To give the section a wider operation would be inconsistent with the principal object of the RPA.

A Person who is Dissatisfied

- 20 33. Section 122 RPA provides that: "*a person who is dissatisfied*" with a decision of the Registrar General referred to in s 121 may apply to the Supreme Court for a review of the decision.
34. The Court of Appeal held that the Registrar General's 2001 decision to cancel registration of the easement was a decision within the meaning of s. 121(b)³⁷. Further the Court of Appeal held that Castle and the Registrar General are estopped from denying that the 2001 decision did not fall within

³¹ *Sahab Holdings Pty Ltd v Registrar General* [2011] NSWCA 395 at [274]

³² See para 13 above

³³ (1986) 4 NSWLR 398 at 402

³⁴ (1988) 12 NSWLR 514 at 518

³⁵ (1998) 44 NSWLR 61 at 69

³⁶ [1967] 1 AC 569 at 581

³⁷ *Sahab Holdings Pty Ltd v Registrar General* [2011] NSWCA 395 at [206]

s. 121³⁸. Accordingly, the Court of Appeal held that Sahab was a “*person dissatisfied*” within the meaning of s. 121(1) and that the precondition for the operation of s. 122 was satisfied³⁹. It is submitted that this was an erroneous finding by the Court of Appeal.

10 35. It is common ground between the parties that, in 2001 when the Registrar General decided to cancel registration of the relevant easement, Sahab had no interest in the land having the benefit of that easement and there was no circumstance, at that time, that could have caused dissatisfaction to Sahab. Sahab could not have called for a review of the Registrar General’s decision at that time. Sahab purchased the property in 2007 knowing that the easement had been cancelled. In these circumstances the real source of any dissatisfaction on the part of Sahab is not the decision of the Registrar General to cancel registration of the easement, but rather the purchase by Sahab of the property and its disappointed hope that the Registrar General would reverse his earlier decision.

20 36. Authority appears to be lacking as to the construction of the term “*a person who is dissatisfied*” in the context of the RPA. The term has long been in use in revenue statutes, but there has been little relevant discussion of the term⁴⁰. Other terms such as “person interested”, “person affected” and “person aggrieved” are frequently used in conjunction with standing in other contexts. In each case the term serves as a control mechanism to limit the class of persons entitled to exercise a statutory remedy.

37. In *Allan v Transurban City Link Limited*⁴¹ Gleeson CJ, Gaudron, Gummow, Kirby, Hayne and Callinan said:

“15 The expression “affected by” and cognate terms appear in a range of laws of the Commonwealth. This is not the

³⁸ *Sahab Holdings Pty Ltd v Registrar General* [2011] NSWCA 395 at [219]

³⁹ *Sahab Holdings Pty Ltd v Registrar General* [2011] NSWCA 395 at [220]

⁴⁰ See *CTC Resources NL v Commissioner of Taxation* (1994) 48 FCR 397 at 404 – 405 per Gummow J, and *McCallum v Commissioner of Taxation* (1997) 75 FCR 458.

⁴¹ (2001) 208 CLR 167 at [15] – [16]

occasion for a disquisition on that topic. It is necessary to answer the questions posed above in respect of s 119(1) of the Authority Act by reference to the subject, scope and purpose of that statute, rather than by the application of concepts derived from decisions under the general law respecting what has come to be known as "standing". "Standing" is a metaphor to describe the interest required, apart from a cause of action as understood at common law, to obtain various common law, equitable and constitutional remedies.

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16 *In Re McHattan and Collector of Customs (New South Wales)*, Brennan J stated that "[a]cross the pool of sundry interest, the ripples of affection may widely extend". However, as Davies J pointed out in *Alphapharm Pty Ltd v SmithKline Beecham (Australia) Pty Ltd*, Brennan J "did not propose that any ripple of affection would be sufficient to support an interest". A particular statute may establish a regime which specifically provides for its own measure of judicial review on the application of persons meeting criteria specified in that statute. The present case involves such a statute. The starting point, as indicated by several authorities in the Full Court of the Federal Court, is the construction of the Authority Act with regard to its subject, scope and purpose." (citations omitted)

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38. The Court of Appeal's wide construction of the control mechanism provided in ss 121 and 122 by the term "a person who is dissatisfied" is at odds with the subject, scope and purpose of the RPA⁴².

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39. It is not consistent with the purpose of the RPA to allow Sahab to challenge the Registrar General's 2001 decision several years after the event. A construction of ss 121 and 122 which allows a person to go behind the Register to re-argue a controversy in which that person had no interest at the time the Registrar General made his decision does not sit well with the object of the RPA to provide certainty of title by reference to the Register.

40

40. If Sahab has any remedy as a consequence of the Registrar General's decision to cancel registration of the easement then that remedy must be by

⁴² See paragraph 12 above

way of a claim for compensation against the Torrens Assurance Fund⁴³. That is the remedy for those who suffer loss or damage by reason of the operation of the indefeasibility provision of the RPA by reason of an act or omission of the Registrar General in the performance of his functions under the RPA in relation to land⁴⁴

41. The Registrar General submits that the following orders should be made:

- (1) The appeal be allowed;
- 10 (2) The Orders of the Court of Appeal be set aside and in lieu thereof the appeal to that Court be dismissed with costs;
- (3) Sahab pay the costs of the parties to this appeal.

Part VII:

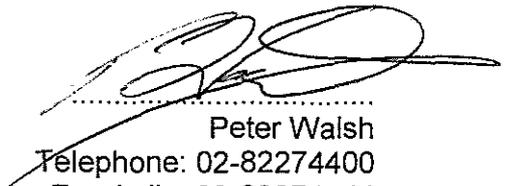
42. The Registrar General makes no submissions in respect of Sahab's notice of cross appeal filed 27 September 2012.

20 **Part VIII:**

43. The Registrar General estimates that not more than 1.5 hours will be required for presentation of his oral argument.

Dated: 2 October 2012

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⁴³ RPA Pt 14 Div 2

⁴⁴ RPA s 129