IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No S263 of 2012

BETWEEN:

CASTLE CONSTRUCTIONS PTY LIMITED
Appellant

and

SAHAB HOLDINGS PTY LTD
First Respondent

REGISTRAR-GENERAL
Second Respondent

CROSS-APPELLANT'S REPLY

Part I: Internet certification

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

Part II: Concise reply on cross-appeal

2. It is in the interests of justice to consider the short issue of interpretation raised by the cross-appeal while determining the appeal, which can be heard without inconvenient addition to the argument or the material. The covenants remain referred to on the Register in respect of the dominant tenement (AB56). If the appeal fails, then the correct scope of use of the easement should be determined as part of confirming the ongoing property right, especially since the continued existence of the easement on the terms of the grant is no longer in issue (confirmed in appellant's reply 5.xi.12 para 3). If the appeal succeeds, then the cross-appeal forms a basis for removing the reference on title to the covenant and avoids a further application for removal.

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3. The appellant/first cross-respondent ("Castle") in effect repeats, as its submissions on the cross-appeal, the arguments on interpretation in existing reasons at primary and appellate level on the covenants (Castle reply paras 25, 26). Most of these have been dealt with in Sahab's submissions in chief para 43. The indicia there mentioned strongly point to the unity of the covenants in their temporal limitation by the opening words, as does the history of subsequent references in title documents there mentioned.

4. As to additional indicia mentioned in the CA reasons, the capitalisation of "And" is a weak counterindication. A separate item in the list could easily, in the formal drafting style, be started with capitalisation (and it is not clear on the original document creating the covenants, A752953, that it was capitalised, as the CA recognized at CA1 [29] (AB72, 83, 87, 267-268). It does not change the strong indication from the final concluding phrase, at the end of the sequence of covenants, that the benefit and burden described in that concluding phrase refers to each item in a list which is uniformly presaged by the opening time limitation.

5. The phrase to which CA1 [75] and [77] (AB287-288) draws particular attention is not in the primary judge's reasons. It actually favours, with respect, the interpretation contended for by Sahab. It should be read as referring to the same class of persons who benefited from the covenant, being the transferors and their executors, administrators and assigns other than purchasers on sale (beyond that scope is otiose). In that reading it is consistent with the final concluding phrase at the end of the sequence of covenants, but extends that final phrase slightly to permit release, variation or modification of the fencing covenant by persons other than the transferors. That is appropriate because a person with the benefit of a fencing covenant (which protects that person from the cost of erecting a fence) potentially may wish to alter the terms of the

covenant during its limited life more than covenants governing scope of use of a right of way or the use of a shop on adjoining land. The final concluding phrase is the only place where the benefit and burden are specified, in relation to the "foregoing covenants" (emphasis added to the plural), which reinforces the unity of the sequence and its overall governance by the opening words of temporal limitation.

6. Further, one would think that the use of "assigns" would be consistent throughout the drafting when it is used in relation to the transferors (the Middletons). Using the agreed text at CA1 [28] (AB267) as the reference, the opening phrases govern at least the first item, the fencing covenant, so "assigns" there excludes assignment in the form of a purchaser on sale. By parity of usage in the fencing covenant itself, "assigns" in lines 10 and 12 must mean the same. There is no reason to say that "assigns" has a different meaning in line 19. The opening words of the second covenant reinforce for that and the third covenant that the parties to each covenant are the same. Such parity of usage reads harmoniously with features pointed out in submissions in chief: the covenants can be released, varied or modified by "the transferors" (with the appropriate limited extension for the fencing covenant discussed above); the second and third covenants restrict the obligation in them to being one on the transferee alone[1] and, in the final part of the second covenant, the benefit of payment to the transferor alone.

7. The overall strong impression is that usage of 69 Strathallen was to be restricted while the Middletons or their family had a personal interest in governing the usage of the limited part that had been subdivided and sold away in 1921 that adjoined the land they kept, while preserving the right of

[1] Only the second covenant was mentioned in this respect in chief; the third also ought to have been mentioned.

way, unrestricted after the Middletons sold away completely, for ongoing access to the otherwise-landlocked rear of 69 Strathallen.[2]

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[2] The history supports that impression, as referred to in chief. The easement over the same part of 134 Sailors Bay Road in favour of 136 Sailors Bay Road in 1958 (AB66-69, 103) was not subject to covenants similar to those in Transfer A752953Q in 1921 (AB72, 83, 87). This was at a time when the last of the Middletons' successors in title within the meaning of the 1921 covenants in Transfer A752953Q (Mr Middleton's executors) had subdivided and were in the process of selling the remaining part of the land held in 1921 by the Middletons. Further, in 1960, on the completion of the last transfer of land owned by the Middletons in 1921 out of the ownership of the Middletons' successors in title to purchasers on sale, a CT vol 7987 fol 98 (AB63, 103) issued which *showed the easement created by Transfer A752953 in 1921 without reference to the covenants affecting it.* This was repeated when the Townsends on-sold in 1964 (AB126). The acceptance by the Registrar-General for registration of the transfers in this form would be a serious omission unless the Registrar-General considered the omission to be correct.