

**CASTLE CONSTRUCTIONS PTY LTD v SAHAB HOLDINGS PTY LTD & ANOR (S263/2012)**

Court appealed from: New South Wales Court of Appeal  
[2011] NSWCA 395

Date of judgment: 15 December 2011

Date of special leave: 7 September 2012

In 1921 the property known as 134 Sailors Bay Road, Northbridge ("Sailors Bay") was burdened by an easement in favour of 69 Strathallen Avenue, Northbridge ("69 Strathallen"). In September 2001 the owner of Sailors Bay, Castle Constructions Pty Ltd ("Castle"), successfully requested that the Registrar-General either cancel or delete that easement from the folios in the Register relating to the two properties. In October 2008 the Registrar-General declined a request from the owner of 69 Strathallen, Sahab Holdings Pty Ltd ("Sahab"), that that easement be restored. Sahab then commenced proceedings, seeking a declaration that the easement had been wrongly extinguished. It also sought its restitution to the folios in the Register of the two properties.

On 8 March 2010 Justice Slattery dismissed Sahab's summons, rejecting the proposition that the Registrar-General was bound to correct the Register. His Honour subsequently also made certain orders as to costs.

On 15 December 2011 the Court of Appeal (McColl & Campbell JJA; Tobias AJA) unanimously upheld Sahab's appeal, finding that the Registrar-General had no power to remove the easement in 2001. Their Honours also held that the Registrar-General had the power under s 12(1)(d) of the *Real Property Act* 1900 (NSW) ("the Act") to restore the easement because there had been "an omission" in the Register in 2008. They further found that Castle had not obtained indefeasible title because of the exception in s 42(1)(a1) of the Act relating to "the omission ... of an easement". It was therefore unable to rely on s 118(1) which, with limited exceptions, otherwise prohibits proceedings against the registered proprietor for recovery of an interest in land.

With respect to the Court's power to compel the Registrar-General to reinstate the easement, their Honours held that Sahab's proceedings were proceedings "for the recovery of any land, estate or interest from the person registered as proprietor "within the meaning of s 138(1) of the Act". They further found that the term "recovery" encompasses a claim for an interest in land to which a party was entitled (even unknowingly) and where it had been taken by a process that turns out to be defective and ineffective. Since Sahab's proceedings fell within s 138(1) and the indefeasibility provisions were not engaged, the Court therefore had the power make orders under s 138(3) of the Act.

The grounds of appeal include:

- The Court of Appeal erred in holding, contrary to the principles of indefeasibility embodied in the Act that the subject easement should be reinstated to the Register, despite it having been deliberately removed by the Registrar-General in 2001.
- The Court of Appeal erred in holding that the Registrar-General had power to reinstate the easement pursuant to s 12(1)(d) of the Act.

On 27 September 2012 Sahab filed a notice of cross-appeal, the grounds of which include:

- The Court of Appeal erred in finding (CA1 [70]-[72], [73(e)], [75]-[79]) that the easement by right of way created by transfer A752953 continued to be subject to the four restrictions contained in the Schedule of Covenants relating to the right of way.
- The Court of Appeal ought to have found, as the cross-appellant submitted and the Court of Appeal recorded (CA1 [74]), that the four restrictions set out in the Schedule of Covenants relating to the right of way ceased upon the registration in 1960 of transfer H403542 (described in CA1 [31]-[32]).

On 2 October 2012 Sahab filed a notice of contention, the grounds of which include:

- The Court of Appeal ought to have found, but did not, that s 138(3) of the Act provided a separate and independent source of authority and power for the correction of the Register sought by Sahab, whether or not that correction was or would be authorised under s 12(1)(d), s 42, s 136(1), 138(1) or 138(2) or any other provision of the Act, s 65 of the *Supreme Court Act* 1970 (NSW) or the general law, including where there is a determination and declaration of the rights of a party to land under the Act in proceedings that do not otherwise conform to those referred to in s 138(1) or s 138(2), and that these proceedings came within such scope of s 138(3) (CA1 [122], [129],130]).