

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



**APPELLANT'S REPLY TO FIRST RESPONDENT'S FURTHER WRITTEN
SUPPLEMENTARY SUBMISSION**

1. Sahab, in its Further Written Supplementary Submission dated 17 December 2012 ("Sahab's Supplementary Submissions"), seeks to answer Castle's submission¹ that the Registrar-General's power of correction of the Register under s12(1)(d) of the *Real Property Act* 1900 (NSW) (the "Act") is confined to the correction of administrative errors and omissions or "slips". Sahab does so by arguing that:-
 - 1.1 Section 42(3) provides that s42 "*prevails over any inconsistent provision of any other Act*"; thus, the section should be taken not to prevail over any "inconsistent" provisions of the **same** Act, such as s12(1)(d).²
 - 1.2 The principles of indefeasibility are not undermined by construing s12(1)(d) broadly, because s45(2) limits the operation of s12(1)(d) by preventing the Registrar-General from correcting the Register once a new purchaser or mortgagee acquires title.³
 - 1.3 Section 12(1)(d) should be construed so as to empower the Registrar-General to correct **any** error in the Register, so long as the correction occurs "*before a bona fide purchaser, or mortgagee, acquires a title*".⁴

¹ Accepted by the Court of Appeal: *Sahab Holdings Pty Limited v Registrar-General* [2011] NSWCA 395 at [192] [AB 331].

² Sahab's Supplementary Submissions, para. 3.

³ Sahab's Supplementary Submissions, paras. 2, 3 & 8.

⁴ Sahab's Supplementary Submissions, para. 8.

2. Sahab's arguments with respect to s12(1)(d) fail:-

2.1 Section 12(1)(d) is not "inconsistent" with s42, but is facultative. Section 42 is the "*main foundation*" of the Torrens system in New South Wales.⁵ Section 12(1)(d), on the other hand, is a purely mechanical provision – it contains one of the enumerated powers granted to the Registrar-General for the purposes of administering the Act. Accordingly, s12(1)(d) ought to be read so as to give effect to, and not detract from, s42:

*"A provision departing from the policy of the system at so cardinal a point, by giving the Registrar-General a discretionary power to detract from the indefeasibility of a registered title, ought to be construed with the utmost strictness."*⁶

2.2 In other words, s12(1)(d) does "*not permit the Registrar-General, in the exercise of the powers of "correction", to create a situation forbidden by the Act itself*", so as "*to breach the ramparts of indefeasibility*".⁷

2.3 Next, contrary to Sahab's submission,⁸ s45(2) does not "*override*" the power of the Registrar-General to correct errors under s12(1)(d). Indeed, section 45(2) does not deal at all with the Registrar-General's power to correct the Register – it prohibits only "*proceedings...for the possession or recovery of land...against a purchaser or mortgagee...*".

2.4 Consequently, if the Registrar-General's power to correct the Register pursuant to s12(1)(d) extends beyond administrative errors, as Sahab contends, then the registration as proprietor of a bona fide purchaser by means of a fraudulent transfer could be corrected by the Registrar-General as an "error" in the Register (as s45(2) does **not**, in fact, protect the purchaser against such a correction). Such a result would effectively overturn the principle of immediate indefeasibility as expounded in *Frazer v Walker* [1967] 1 AC 569 and *Breskvar v Wall* (1971) 126 CLR 376.

⁵ *Pirie v Registrar-General* (1962) 109 CLR 619 at 644 per Windeyer J.

⁶ *Pirie v Registrar-General* (1962) 109 CLR 619 at 632 per Kitto J (Owen J agreeing) [in reference to s88(3) of the *Conveyancing Act 1919* (NSW)].

⁷ *State Bank of New South Wales v Berowra Waters Holdings Pty Limited* (1986) 4 NSWLR 398 at 403 per Needham J.

⁸ Sahab's Supplementary Submissions, para. 3.

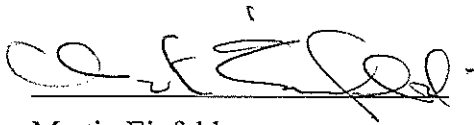
3. Sahab's additional submissions as to the right of review under s122 of the Act⁹ take the matter no further:-

3.1 Whilst it may be accepted that any decision of the Registrar-General is potentially subject to a statutory right of review under s122, there is, contrary to Sahab's submission, no statutory right of "reversal".¹⁰ Indeed, unlike most judicial review provisions, s122(4) does not give the Court the power to set aside (or "reverse") a decision of the Registrar-General: the Court is restricted to ordering the Registrar-General to take such action as the Registrar-General is empowered to take under the Act. Accordingly, one returns to the proper construction of s12(1)(d). Were the Court empowered simply to "set aside" any decision of the Registrar-General (such as the registration of a fraudulent transfer to an innocent purchaser), immediate indefeasibility would cease to exist.

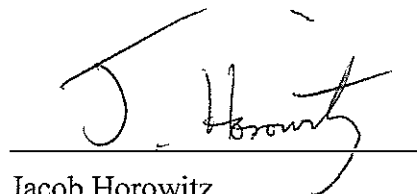
3.2 If, as Sahab suggests, the s122 review sought by Sahab constituted proceedings for "recovery of an interest in land",¹¹ then such proceedings are expressly barred by s118 of the Act.

3.3 The fact that s12(1)(d) is limited to the correction of administrative errors and omissions does not make the right of review under s122 a "dead letter".¹² Both *Pirie v Registrar-General* (1962) 109 CLR 619 and *James v The Registrar-General* (1967) 69 SR (NSW) 361 are examples of review proceedings that are consistent with such a construction of s12(1)(d).

Dated: 23 January 2013



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⁹ Sahab's Supplementary Submissions, para. 5.

¹⁰ Sahab's Supplementary Submissions, para. 5.

¹¹ Sahab's Supplementary Submissions, para. 5.

¹² Sahab's Supplementary Submissions, para. 5.