

BETWEEN: CASTLE CONSTRUCTIONS PTY LIMITED
Appellant

and

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SAHAB HOLDINGS PTY LTD
First Respondent

REGISTRAR-GENERAL
Second Respondent

SECOND RESPONDENT'S REPLY

Part I – Internet Publication

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

20 **Part II – Issues**

2. For the reasons previously submitted the second respondent (“Registrar General”) submits that the deliberate cancellation of the recording of an easement in the Register should not be characterized as an “omission” within the meaning of ss. 12(1)(d) and 42(1)(a1) *Real Property Act 1900* (NSW) (“RPA”).
3. RS1 10: The first respondent (“Sahab”) submits that if the appellant’s (“Castle”) argument succeeds then an error or omission by the Registrar General would “not be reviewable or compensable”, that the “Registrar General would be able to exercise power without ...constraint...” and that
30 “(p)aramountcy of the Register could be circumvented because a wrong decision of the Registrar General removed a registered interest (the easement) without recourse”. This submission, insofar as it is made in general terms overlooks the existence and purpose of the Torrens Assurance Fund.

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4. The purpose of the Fund has been described as being to compensate persons who without any fault on their part, have been deprived of their property¹. The Fund "is in the position of a quasi security, guaranteeing against losses which, but for the Act, could not occur"².
5. Section 129 RPA (1)(a)(c) relevantly provides as follows:

"129 Circumstances in which compensation payable

(1) Any person who suffers loss or damage as a result of the operation of this Act in respect of any land, where the loss or damage arises from:

10 (a) any act or omission of the Registrar-General in the execution or performance of his or her functions or duties under this Act in relation to the land, or

...

(c) any error, misdescription or omission in the Register in relation to the land, or

...

is entitled to payment of compensation from the Torrens Assurance Fund." (emphasis added)

- 20 6. RS1 13: Sahab submits that there is no reason to read the omitted easement exception to indefeasibility restrictively³. That submission is contrary to the decision of the Court in *Leros Pty Ltd v Terara Pty Ltd*⁴ in which it was said that exceptions to indefeasibility, where possible, should be interpreted in a way which does not conflict with indefeasibility of title, the primary object of the RPA⁵ and for that reason should be strictly construed.
7. RS1 14: The decision in *Dobbie* required an examination of the decision of the Court of Appeal in *Australian Hi-Fi v Gehl*⁶ where Mahoney JA, delivering the judgment of the Court held that "*omission* in the previous s. 42(b) RPA involved two things: "that something not be there and that it was so because something which should have been done was not done"⁷.

¹ *Williams v Papworth* [1900] AC 563 at 568

² *Finucane v Registrar of Titles* [1902] St R Qd 75 at 94

³ See also CA1 [274] (AB358)

⁴ (1991) 174 CLR 407 at 424 per Mason CJ, Dawson and McHugh JJ

⁵ That purpose being that the Register should "reveal all about the title": *Queensland Premier Mines Pty Ltd v French* (2007) 235 CLR 81 at 90

⁶ [1979] 2 NSWLR 618

⁷ At 622

8. In *Dobbie* the Court instead held that an “omission” requires only the first component of the decision in *Gehl*, that is: “something not there”.
9. In *Dobbie*, Priestly JA examined the construction of “omission” in three separate ways: the context of the word in the *RPA*; the meaning word was originally thought to have; and its separate interpretation in the case law. The second of these comprise the major part of his Honour’s judgment. It is worth noting that none of the cases referred to by Priestly JA concerned an easement that was extinguished as a result of a deliberate determination by the Registrar General.
- 10 10. In *Dobbie*, Kirby P considered a number of matters: the dictionary definition; the purposive approach to interpretation and the prior practice of the Registrar General. Consideration of the purposive approach to interpretation did not take into account a situation in which the Registrar General makes a deliberate determination to extinguish an easement.
11. RS1 17: While the CA said that there was nothing to suggest that “omission” should be construed differently in *RPA* ss.12(1)(d) and 42(1)(a)⁸, no regard was had to “omission” in s. 129(1)(a) and (c) *RPA*. In s. 129(1)(a) there is a distinction between “act” and “omission”. In that section, at least, it appears that “omission” would not include a deliberate, but erroneous extinguishment of an easement by the Registrar General. Such an action would be an “act”.
20 This distinction is consistent with the construction for which the Registrar General contends.
12. RS1 29: The words “a person dissatisfied” in s. 121 *RPA*, in circumstances where the section is a control mechanism for review of the decisions of the Registrar General and where the section is sought to be used as a gateway to an exception to indefeasibility of title, should be strictly construed⁹. To do otherwise would be to provide to an undetermined class of people the opportunity to challenge deliberate decisions of the Registrar General, when those people have no interest in the decision at the time that the decision

⁸ See also CA1 [274] (AB358)

⁹ See *Leros Pty Ltd v Terara Pty Ltd* (1991) 174 CLR 407

was made. The construction of those words contended for by Sahab would have the result in the possibility of challenges, unlimited by time. That construction is at odds with the primary purpose of the *RPA*. The fact that the *RPA* provides limited exceptions to indefeasibility of title, not limited in time, does not justify an expansive construction of the class of people entitled to seek a review of the Registrar General's deliberate determination, even if the particular determination is erroneous.

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