HIGH COURT OF AUSTRALIA

HAYNE, CRENNAN, KIEFEL, BELL AND GAGELER JJ

CASTLE CONSTRUCTIONS PTY LIMITED APPELLANT

AND

SAHAB HOLDINGS PTY LTD & ANOR RESPONDENTS

Castle Constructions Pty Limited v Sahab Holdings Pty Ltd
[2013] HCA 11
10 April 2013
S263/2012

ORDER

1. *Appeal allowed.*

2. *Application for special leave to cross-appeal refused.*

3. *The first respondent pay the appellant and the second respondent the costs of the appeal and of the application for special leave to cross-appeal.*

4. *Set aside the orders of the Court of Appeal of the Supreme Court of New South Wales made on 5 April 2012 and, in their place, order that the appeal to that Court be dismissed with costs.*

On appeal from the Supreme Court of New South Wales

Representation

M L D Einfield QC with J Horowitz for the appellant (instructed by Domain Legal Pty Limited)

G K Burton SC for the first respondent (instructed by Kanjian & Company)

P B Walsh with L Walsh for the second respondent (instructed by Land and Property Information)

CATCHWORDS

Castle Constructions Pty Limited v Sahab Holdings Pty Ltd

Real property – Torrens system land – Easements – Registered proprietor of servient tenement requested Registrar-General remove easement from Register – Easement removed from Register without objection from registered proprietors of dominant tenement – Subsequent purchaser of dominant tenement requested that Registrar-General restore easement to Register – Registrar-General refused – Whether deliberate removal of easement from Register "omission" within meaning of s 42(1)(a1) of *Real Property Act* 1900 (NSW) ("Act") – Whether subsequent purchaser of dominant tenement barred from action against Registrar-General under s 12A(3) of Act for removal of easement – Whether subsequent purchaser "person who is dissatisfied" with Registrar-General's decision under s 122 of Act.

Words and phrases – "in the case of the omission", "omission", "person who is dissatisfied".

Real Property Act 1900 (NSW), ss 12(1)(d), 12A, 32(6), 41, 42(1), 42(1)(a1), 122, 136, 138.

1 HAYNE, CRENNAN, KIEFEL AND BELL JJ. This appeal concerns two pieces of land in Northbridge, Sydney. The rear boundary of the piece known as 69 Strathallen Avenue ("the Strathallen land") abuts part of the western boundary of the other piece, known as 134 Sailors Bay Road ("the Sailors Bay land"). Each piece of land is, and at all times relevant to these proceedings was, subject to the provisions of the *Real Property Act* 1900 (NSW) ("the RPA"). Although many issues were touched on in argument in this Court, the determinative issue in the appeal can be stated briefly.

2 The RPA provides[1] that a registered proprietor holds the estate or interest in land recorded in a folio of the Register subject only to other estates and interests recorded in that folio. An exception[2] is "in the case of the omission" of an easement validly created under the RPA. After giving notice to the then dominant tenement holders, and without objection, the Registrar-General removed an easement from the folios of both the dominant and the servient tenements in exercise of a power under the RPA. The current dominant tenement holder now says that the Registrar-General erred. Is this "the case of the omission" of an easement?

3 These reasons will show that this was not such a case. There was no "omission" of the easement.

Facts and course of proceedings

4 In 1921, the Strathallen land and the Sailors Bay land each formed part of a larger piece of land owned by Mr and Mrs Middleton. In that year, the Middletons sold the Strathallen land to Mr Davis. The instrument of transfer ("the 1921 transfer") created an easement of way over the western boundary of the land the Middletons retained in favour of the land they sold. The easement provided access from Sailors Bay Road to the rear of the land the Middletons sold. The 1921 transfer also included some covenants about the fencing of the boundary between the land sold and the land retained, the use of the easement and the use of the land that was sold. In 1958, part of the land retained by the Middletons was subdivided and, as a result, the covenants and the easement burdened the land which became known as 134 Sailors Bay Road.

5 In June 2001, the appellant (Castle Constructions Pty Limited – "Castle") bought the Sailors Bay land. In September 2001, Castle asked the

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1 s 42(1).

2 s 42(1)(a1).

Registrar-General to remove the easement over its land from the Register maintained[3] for the purposes of the RPA. A statutory declaration was filed in support of the application, which asserted that the easement, according to its terms, subsisted only for so long as Mr Davis (or his successors other than on sale) owned the Strathallen land. As will later appear, the correctness of this assertion is disputed but need not be decided.

6 The Registrar-General notified the then owners of the Strathallen land, Mr and Mrs Howard, that he intended to remove the easement from the Register. They did not object to this proposed course of action and, in November 2001, the Registrar-General removed the easement from the folios of the Register relating to the Sailors Bay land (which had been the servient tenement) and the Strathallen land (which had been the dominant tenement).

7 In April 2007, well after the Registrar-General had taken these steps, the first respondent (Sahab Holdings Pty Ltd – "Sahab") became the registered proprietor of the Strathallen land. In September 2008, Sahab asked the Registrar-General to restore the easement to the Register but the Registrar-General refused to do so. Sahab brought proceedings in the Supreme Court of New South Wales against the Registrar-General seeking a declaration that the easement had been wrongly extinguished and an order requiring the Registrar-General to restore the easement to the Register. On its application, Castle was joined as a party to those proceedings. In October 2009, the primary judge (Slattery J) decided[4] that the Registrar-General was bound to give Sahab reasons for the 2001 decision to remove the easement from the Register and ordered the Registrar-General to do so.

8 In accordance with these orders, the Registrar-General provided to Sahab a copy of the Registrar-General's minute papers relating to the removal of the easement. Those minute papers relevantly recorded[5] "[n]o objection received to the applications. Applications granted." The letter from the Registrar-General which enclosed the copy minute papers said that:

> "For the sake of further clarity I advise that 'objection' referred to any objection to the Registrar General's notice of 8 October 2001 to the

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3 s 31B(1).

4 *Sahab Holdings Pty Ltd v Registrar-General* (2009) 75 NSWLR 629.

5 The minute papers also set out some identifying folio numbers and like details.

owners of the dominant tenement giving them notice of intention to cancel the recording of the easement and restrictive covenant.

The notice was sent because the Registrar General agreed with the applicant of Request 7924028, that the easement and covenant had expired by virtue of its own terms."

9 On 8 March 2010, Slattery J published[6] reasons for decision holding that Sahab was not entitled to the orders which it had sought to compel the Registrar-General to restore the easement to the Register. On 5 May 2010, Slattery J made[7] final orders dismissing Sahab's claim.

10 Sahab appealed to the Court of Appeal. The Court of Appeal (McColl and Campbell JJA and Tobias AJA) determined[8] that Sahab's appeal should be allowed. Castle applied to have the Court of Appeal withdraw or reconsider its reasons but the Court dismissed[9] that application and subsequently made orders[10] requiring the Registrar-General to restore the easement to the Register.

11 By special leave, Castle appealed to this Court against the Court of Appeal's final orders. Sahab sought special leave to cross-appeal to allege that, contrary to the conclusion reached by the Court of Appeal[11], the easement was no longer subject to the covenants affecting the easement that had been set out in the 1921 transfer.

Issues

12 As noted at the outset of these reasons, the determinative issue in the appeal is whether Castle's title to the Sailors Bay land is subject to the easement which the Registrar-General intentionally removed from the Register. The answer to this issue turns upon s 42(1)(a1) of the RPA. Section 42(1) provided

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6 *Sahab Holdings Pty Ltd v Registrar-General (No 2)* (2010) 14 BPR 27,459.

7 *Sahab Holdings Pty Ltd v Registrar-General [No 3]* [2010] NSWSC 403.

8 *Sahab Holdings Pty Ltd v Registrar-General* (2011) 15 BPR 29,627.

9 *Sahab Holdings Pty Ltd v Registrar-General (No 2)* (2012) 16 BPR 30,353.

10 *Sahab Holdings Pty Ltd v Registrar-General (No 3)* (2012) 16 BPR 30,353.

11 (2011) 15 BPR 29,627 at 29,648 [75]-[78].

that, except in the case of fraud, the registered proprietor holds the "estate or interest in land recorded in a folio of the Register" subject to such other estates and interests recorded in that folio "but absolutely free from all other estates and interests that are not so recorded except" in five listed circumstances. One listed circumstance, in s 42(1)(a1), was "in the case of the omission ... of an easement ... validly created at or after [the time the land was brought under the provisions of the RPA] under this or any other Act or a Commonwealth Act".

13 Sahab submitted that "omission" means no more than is "not there". It was said that this meaning accords with both ordinary English usage and the Court of Appeal's previous decision in *Dobbie v Davidson*[12]. It followed, so it was submitted, that this was a "case of the omission ... of an easement" because the easement Sahab claimed is not recorded on the Register.

14 The parties sought to agitate many other questions about the construction and application of several provisions of the RPA. Argument traversed the operation of (and in some instances the interaction between) s 12(1)(d) (which gave power to the Registrar-General to correct errors or omissions in the Register), s 12A(3) (which provided that no action by certain persons lies against the Registrar-General for taking action that alters the Register), s 122 (which provided for review of certain decisions of the Registrar-General by the Supreme Court), s 136 (which gave power to the Registrar-General to require persons to deliver up a certificate of title for correction) and s 138 (which provided for a court to order the Registrar-General to amend a folio of the Register).

15 Sahab submitted that some or all of ss 12, 122, 136 and 138 of the RPA permitted it to challenge the Registrar-General's decision to remove an easement and to obtain restoration of that easement. In particular, Sahab submitted that if it showed that the Registrar-General should not have removed the easement from the Register, there was an "error" or "omission" (within the meaning of s 12(1)(d)) which entitled Sahab to relief under one or other of ss 122 and 138 and that there was accordingly[13] a "case of the omission ... of an easement" within s 42(1)(a1). Sahab did not dispute that, on this understanding of the RPA, a registered proprietor could only be confident of having an indefeasible title when any statutory mechanisms to review the Registrar-General's decision to alter the Register had been exhausted in favour of the Registrar-General.

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12 (1991) 23 NSWLR 625.

13 cf *Registrar of Titles (WA) v Franzon* (1975) 132 CLR 611 at 618 per Mason J; [1975] HCA 41.

Indefeasibility of title would be contingent upon the exhaustion of these review mechanisms.

The Court of Appeal

16 In the Court of Appeal, the joint reasons of Campbell JA and Tobias AJA (with which McColl JA agreed) identified the first question as being[14] "the appropriate construction of the grant of the right of way and the attendant covenants to determine whether the grant continued in operation". They concluded[15] that "[t]he correct view ... is that the right of way was subsisting at the time of the 2001 decision" to remove the easement from the Register. That conclusion depended, at least in part, upon the Court of Appeal's preferred construction[16] of the 1921 transfer, which set out the terms of the easement and attendant covenants. It is not necessary to examine these questions of construction. For present purposes, it is enough to notice that the Court of Appeal found[17] that the grant of the easement and the operation of the attendant covenants were permanent whereas the statutory declaration which Castle had submitted to the Registrar-General in support of its application for removal of the easement had asserted that they subsisted only for so long as Mr Davis (or his successors other than on sale) owned the Strathallen land.

17 The Court of Appeal then examined in detail the operation of s 12 of the RPA (which Sahab submitted allowed the Registrar-General to reverse the decision to remove the easement) and ss 122, 136 and 138 (which Sahab submitted allowed the Court to grant the relief it sought). Only after considering these questions of remedial powers did the Court of Appeal turn to consider questions of indefeasibility and the operation of s 42(1).

18 The Court of Appeal held[18] that the easement had "been omitted within the meaning of s 42(1)(a1)" because "omission" in that provision (and s 12(1)(d)) meant no more than that the easement was "not there". As was said[19] in the joint

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14 (2011) 15 BPR 29,627 at 29,633 [5(1)].

15 (2011) 15 BPR 29,627 at 29,677 [224].

16 (2011) 15 BPR 29,627 at 29,648 [75].

17 (2011) 15 BPR 29,627 at 29,648 [78].

18 (2011) 15 BPR 29,627 at 29,684 [274].

19 (2011) 15 BPR 29,627 at 29,683 [267].

reasons, "if one looks at the register and the easement is not there but should be, it follows that it has been omitted. The reason for its omission or why it is 'not there' is irrelevant." That omitted means no more than "not there" was held[20] to have been established by the Court of Appeal's previous decision in *Dobbie*[21]. And it followed from the fact of omission, so the Court of Appeal held[22], that "the Registrar-General was empowered to correct that omission in 2008 when requested [by Sahab] to do so".

The correct starting point

19 The Court of Appeal began by asking whether the easement, and its attendant covenants, "continued in operation" and concluded that, on its proper construction, the 1921 transfer had created rights and obligations which were not limited in the manner which Castle had asserted when it sought removal of the easement from the Register. But both the question and the answer were directed to what interest in land the 1921 transfer would have given under general real property principles. Neither the question nor the answer was directed to the separate, and only relevant, inquiry: what interests in land did the RPA give to Castle and Sahab? That inquiry must begin by examining s 42(1)(a1) and deciding what is an "omission" of an easement and that examination must be made against the background of some basic principles.

Basic principles

20 It is of fundamental importance to recognise that the Torrens system of registered title, of which the RPA is a form, "is not a system of registration of title but a system of title by registration"[23]. "Together with the information appearing on the relevant folio, the registration of dealings manifests the scheme

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20 (2011) 15 BPR 29,627 at 29,681-29,683 [254]-[268].

21 (1991) 23 NSWLR 625.

22 (2011) 15 BPR 29,627 at 29,684 [274].

23 *Breskvar v Wall* (1971) 126 CLR 376 at 385 per Barwick CJ; [1971] HCA 70. See also *Halloran v Minister Administering National Parks and Wildlife Act 1974* (2006) 229 CLR 545 at 559-560 [35]; [2006] HCA 3; *Black v Garnock* (2007) 230 CLR 438 at 443 [10]; [2007] HCA 31; *Westfield Management Ltd v Perpetual Trustee Co Ltd* (2007) 233 CLR 528 at 531 [5], 539 [38]; [2007] HCA 45.

of the Torrens system to provide third parties with the information necessary to comprehend the extent or state of the registered title to the land in question."[24]

21 The easement and attendant covenants at issue in these proceedings were created by the registration of the 1921 transfer from the Middletons to Mr Davis. Until registered, the 1921 transfer was not "effectual to pass any estate or interest in any land" under the provisions of the RPA[25]. Upon registration of the instrument of transfer, "the estate or interest specified in such instrument" passed and the land became "subject to the covenants, conditions, and contingencies set forth and specified in such instrument"[26]. In its then form, s 47 obliged the Registrar-General to "enter a memorial of the instrument creating such easement or incorporeal right upon the folium of the register-book, constituted by the existing grant or certificate of title" of the land benefited by the easement.

"Omission" of an easement

22 No doubt it is important to recognise that the primary definition of "omission" is[27] "[t]he action of omitting or leaving out, or fact of being omitted; failure or forbearance to insert or include; also, an instance of this" and that the primary definition of "omit" is[28] "[t]o leave out, not to insert or include". Each definition directs attention only to the action described; neither directs attention to how or why the action of omitting or leaving out occurred.

23 As the reasons of Priestley JA in *Dobbie* demonstrate[29], the history of Torrens title legislation and the treatment of cases of "omission" of *unregistered* easements point to reading "omission", in the collocation "case of the omission or misdescription of an easement", as according with these dictionary definitions

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24 *Westfield Management* (2007) 233 CLR 528 at 531 [5].

25 s 41(1).

26 s 41(1).

27 *The Oxford English Dictionary*, 2nd ed (1989), vol X at 786, "omission", meaning 1.

28 *The Oxford English Dictionary*, 2nd ed (1989), vol X at 786, "omit", meaning 1.

29 (1991) 23 NSWLR 625 at 647-660.

and meaning[30] no more than "left out" or "not there". Hence, in *Dobbie*, where an easement existing before the land was brought under the RPA was not recorded on the Register when the land was first brought under the RPA, the Court of Appeal rightly held that it was a "case of the omission" of an easement regardless of what had brought about the absence of the easement from the Register.

24 On this understanding of "omission", s 42(1)(a1) both presupposes the continued existence and provides for the continued effect of that which has been omitted notwithstanding it does not appear on the relevant folio of the Register. It is an understanding capable of ready application to an easement created under a Commonwealth Act or under a State Act other than the RPA. The presupposition for applying s 42(1)(a1) (that the easement continues to exist) is accurate. Section 42(1)(a1) then provides for its continued effect in respect of the land. It is an understanding which is also capable of application to easements created under the RPA, at least in the case of an easement created by registration[31] of the relevant dealing under the RPA but not recorded on the folio relating to the servient tenement. The easement in that case continues to exist because it has been registered and not removed from the Register. Section 42(1)(a1) then provides for its continued effect in respect of the land.

25 Other considerations intrude when an easement created under the RPA by registration of a dealing has later been *removed* by the Registrar-General. When an easement has been previously recorded on the Register, but is no longer recorded because it has been deliberately removed from the Register, it could be said that the easement was "not there". It is more accurate, however, to say that the easement is "no longer there because it has been removed". The significance to be given to the fact of the easement's removal from the Register requires attention to fundamental principles. The relevant exception to the paramountcy of the registered proprietor's title is "in the case of the omission" of an easement (where the hypothesis is that the easement continues to exist but is not recorded). Because the RPA provided for title by registration, the deliberate removal from the Register of an easement *created by registration* cannot be treated as a "case of the omission ... of an easement" for the purposes of s 42(1)(a1). The

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30 (1991) 23 NSWLR 625 at 635 per Kirby P, 660 per Priestley JA (Handley JA agreeing).

31 Section 36(6A) provided that registration occurs "when the Registrar-General has made such recording in the Register with respect to the dealing as the Registrar-General thinks fit".

presupposition for the operation of s 42(1)(a1), that the easement continues to exist, is not valid. The easement has been removed from the Register.

The RPA's provisions for the alteration of the Register

26 Section 32(6) of the RPA gave[32] the Registrar-General power "to cancel in such manner as the Registrar-General considers proper any recording in the Register that the Registrar-General is satisfied does not affect the land to which the recording purports to relate". If the Registrar-General was satisfied that the easement no longer subsisted, s 32(6) empowered cancellation of the recording of the easement on the folios relating to both the dominant and the servient tenements. The RPA gave the Registrar-General other powers in respect of the recording of easements, including power under s 49(1) to cancel the recording of abandoned easements, but the ambit of those other powers need not be examined.

27 Where the Registrar-General removes an easement from the Register after giving notice under s 12A(1) to the owner of the dominant tenement, that owner would not have an action against the Registrar-General in respect of that removal. Section 12A(3) provided that where a person given a notice under s 12A(1) did not serve on the Registrar-General (or give the Registrar-General notice of) an order of the Supreme Court restraining the Registrar-General from taking the proposed action altering the Register, "no action by that person or by any person claiming through or under that person shall lie against the Registrar-General in respect of the taking of the action specified in the notice". Section 12A(3) would bar a claim by the owner of the dominant tenement for any relief against the Registrar-General in respect of the removal of the easement, including any form of relief that would compel the Registrar-General to restore the easement to the Register.

28 Whether s 12A(3) would also bar a subsequent purchaser of the dominant tenement from bringing an action against the Registrar-General to compel the Registrar-General to restore the easement to the Register turns on whether the subsequent purchaser was "claiming through or under" the former owner of the dominant tenement who receives notice under s 12A(1). That question need not be considered in this appeal because there is a more fundamental reason why the subsequent purchaser cannot compel the Registrar-General to restore the

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32 Power of this kind was first given to the Registrar-General by s 37(b) of the *Conveyancing (Amendment) Act* 1930 (NSW), which inserted s 32(3) into the RPA. The inserted provision deemed the Registrar-General always to have had the power.

easement. The interest which the former owner of the dominant tenement transferred was the interest as registered proprietor of land which by then did not have the benefit of any registered easement. Because it is a system of title by registration, the subsequent purchaser only acquired that interest shorn as it then was of any recorded easement.

29 If the Registrar-General removed an easement from the Register without giving notice under s 12A(1) to the owner of the dominant tenement, that owner would readily be seen to be a "person who is dissatisfied" with the Registrar-General's decision to remove the easement and so have standing to apply to the Supreme Court for review of that decision under s 122(1) of the RPA. On review of the Registrar-General's exercise of power under s 32(6), it would be open for the owner to submit that the Registrar-General could not have been "satisfied" that the easement no longer affected the land. But this course would not be open to the purchaser who accepted a transfer of that dominant tenement. The decision to remove which the subsequent purchaser would seek to challenge did not relate to land in which that purchaser had any interest at the time the decision was made. That purchaser would not be a "person who is dissatisfied" with that decision.

This appeal

30 At the behest of Castle, as registered proprietor of the servient tenement, the Registrar-General removed the easement from both the folio relating to the Strathallen land and the folio relating to the Sailors Bay land. At trial it was found, and in the Court of Appeal it was common ground, that a notice of intention to remove the easement was given to Mr and Mrs Howard as the then registered proprietors of the dominant tenement. The notice was not in evidence at trial or in the Court of Appeal and Sahab submitted that, contrary to the undisturbed finding that notice was given, this Court should find that no notice was given. Sahab offered no satisfactory basis for overturning the finding. The Registrar-General's minute papers recorded that no objection had been received to the application for removal and the inference that notice of the application was given to the Howards is irresistible. It may also be inferred that the notice accorded with s 12A and told the Howards that the Registrar-General would remove the easement at or after the expiration of a stated period unless restrained by an order of the Supreme Court from doing so.

31 The Howards made no objection to the removal of the easement. The Howards having made no objection and obtained no order restraining the Registrar-General from proceeding, s 12A(3) would have barred them from bringing an action against the Registrar-General to compel the restoration of the easement to the Register. Of course, if the Howards could have established some

personal claim against Castle, they could have pursued that claim[33]. But unless and until the Howards, by personal action, compelled Castle to procure restoration of the easement to the Register, the title the Howards held to the Strathallen land after the removal of the easement was a title which did not include any easement over the Sailors Bay land. That is, the interest which the Howards sold and transferred to Sahab was their interest as registered proprietors of land which, at that time, did not have the benefit of any registered easement over Castle's land. The Howards therefore did not transfer (and could not have transferred) to Sahab any easement over Castle's land. And unless Sahab could establish some personal claim against Castle to compel it to procure restoration of the easement to the Register (a claim that Sahab has not made), it follows that Sahab does not have the easement which it claimed in this appeal.

32 The easement created by the 1921 transfer was not "omitted" from the folio relating to either piece of land. The easement had been removed from the Register and the fact of its removal was apparent from the Register before Sahab bought the Strathallen land.

33 Four further points should be made.

34 First, it is to be noted that Sahab's case was that deliberate alteration of the Register worked no change in the interests to which Castle's title was subject. Sahab alleged that Castle's title remained subject to an interest which had once been recorded in the Register but which had since been removed from the Register in accordance with procedures provided by the RPA, even though Sahab's predecessor in title (the Howards) would have been barred from asserting the interest Sahab claimed. This result is properly described as odd or surprising. It is a result which points firmly against construing the RPA in the way Sahab urged.

35 Second, Sahab's case sought to give continued effect to the easement after its removal from the Register even though the easement took effect only upon registration of the 1921 transfer. As already noted, s 41 provided that no instrument, until registered, shall be effectual to pass any estate or interest in land under the RPA. Yet an instrument effective to create rights or interests in the relevant land only on registration of the instrument was alleged to continue in effect despite removal of the interest from the Register. Again, the result urged

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33 *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 at 167-172 [190]-[198]; [2007] HCA 22; *Frazer v Walker* [1967] 1 AC 569 at 585.

by Sahab is odd or surprising and points firmly against construing the RPA in the way Sahab urged.

36 Third, Sahab's argument that some or all of ss 12, 122, 136 and 138 of the RPA provided bases for it not only to challenge the Registrar-General's decision to remove the easement but also to obtain restoration of the easement to the Register assumed that Sahab was a "person who is dissatisfied"[34] with a decision of the Registrar-General. At first instance, in the Court of Appeal and in this Court, Sahab sought to challenge both the 2001 decision to remove the easement and the 2008 decision to refuse to restore the easement. Whether Sahab could challenge the 2001 decision in this Court without amending its notice of contention need not be examined.

37 In relation to the Registrar-General's decision in 2008 to refuse to restore the easement to the Register, there was no omission of the easement. It had been deliberately removed from the Register. Further, Sahab had obtained title by registration of the transfer from the Howards to land which did not at that time have the benefit of a recorded easement. Sahab got what appeared on the Register. In those circumstances, Sahab cannot be dissatisfied with the decision of the Registrar-General not to restore the easement in 2008.

38 In relation to the Registrar-General's decision in 2001 to remove the easement, Sahab alleged that the Registrar-General should not have removed the easement because the Registrar-General could not reasonably have been satisfied that it did not affect the land. But this argument assumed, and did not demonstrate, that Sahab was a "person who is dissatisfied"[35] with the Registrar-General's decision to exercise power under s 32(6) to remove the easement from the Register. The decision to remove which Sahab sought to challenge did not relate to land in which Sahab had any interest at the time the decision was made. Sahab, having acquired the title to the Strathallen land which the Howards had at the time of sale, did not then become a person dissatisfied with the Registrar-General's decision to remove. Section 122 is not reached.

39 Fourth, and most importantly, Sahab's reference to and reliance upon the remedial provisions of the RPA (in particular s 12(1)(d)) depended upon Sahab showing that this was a case of "omission". And Sahab's case in relation to both ss 12(1)(d) and 42(1)(a1) ultimately depended upon reading "omission" in each as including a case where an easement, once registered, had been deliberately

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34 s 122(1).

35 s 122(1).

removed from the Register. As earlier explained, while it may be right to observe that, after its removal, the easement is "not there", this observation provides only a snapshot of the state of the Register. It is more accurate to say that the easement is "no longer there because it was deliberately removed". That is not a case of the omission of an easement.

Conclusion and orders

40 Because Castle's land is no longer subject to the easement created by the 1921 transfer, the covenants which related to the easement no longer apply. The questions which Sahab sought to agitate by cross-appeal are not reached and need not be considered.

41 The appeal to this Court should be allowed. The application for special leave to cross-appeal should be refused. The first respondent should pay the appellant and the second respondent the costs of the appeal and of the application for special leave to cross-appeal. The orders of the Court of Appeal of the Supreme Court of New South Wales made on 5 April 2012 should be set aside and in their place there should be orders that the appeal to that Court is dismissed with costs.

42 GAGELER J. I agree with the orders proposed by Hayne, Crennan, Kiefel and Bell JJ and am content to adopt their statement of facts and their abbreviations. However, I consider the determinative issue to be different.

43 The proceedings in the Supreme Court of New South Wales Sahab brought against the Registrar-General, to which Castle was joined, were in substance for judicial review of two decisions of the Registrar-General. The first was the decision in November 2001 to remove the easement from the Register under s 32(6) of the RPA ("the 2001 decision"). The second was the decision in October 2008 not to restore the easement to the Register under s 12(1)(d) of the RPA ("the 2008 decision"). Sahab's case, shorn of detail, was that the 2001 decision was a nullity because the Registrar-General erred in law in making it and that, in making the 2008 decision, the Registrar-General failed to perform a statutory duty to correct the error made in the 2001 decision. Sahab invoked the jurisdiction of the Supreme Court under each of ss 122 and 138 of the RPA and s 65 of the *Supreme Court Act* 1970 (NSW).

44 In my view, once it was found that the Registrar-General had notified Sahab's predecessors in title in accordance with s 12A(1) of the RPA before making the 2001 decision – a finding that should not now be disturbed – s 12A(3) of the RPA provided the short and complete answer to the whole of Sahab's case.

45 Section 12A of the RPA provides:

> "(1) The Registrar-General may, before taking any action that alters the Register, give notice of the proposed action to any person that the Registrar-General considers should be notified of it.
>
> (2) Where the Registrar-General has given notice pursuant to the powers conferred upon the Registrar-General by subsection (1), the Registrar-General may refuse to take the action until after the expiration of a period specified in the notice and the Registrar-General may proceed to take the action at or after the expiration of the period so specified unless the Registrar-General is first served with, or with written notice of, an order of the Supreme Court restraining the Registrar-General from so doing.
>
> (3) Where a person given notice under subsection (1) does not within the time limited by the notice serve upon the Registrar-General or give the Registrar-General written notice of an order made by the Supreme Court restraining the Registrar-General from taking the action, no action by that person or by any person claiming through or under that person shall lie against the Registrar-General in respect of the taking of the action specified in the notice.

(4) No action shall lie against the Registrar-General for failure to give a notice under subsection (1)."

46 In the form in which s 12A was inserted into the RPA in 1970[36], the only action of the Registrar-General that could be covered by a notice under s 12A(1) was the registration of a "dealing" as defined in s 3. The object of the section was identified at the time of insertion as being[37]:

> "to authorise the Registrar-General temporarily to delay registration of a dealing while he notifies a person whom he considers may contest the dealing that he proposes to register the dealing after the expiration of a specified period and to absolve him from liability for registering the dealing if he is not, before the expiration of that period, restrained by the Court from so doing".

The section was explained as[38]:

> "designed to put a contest where it properly belongs – that is, between the interested parties – and to absolve the Registrar-General and the assurance fund from liability if a person deprived of an interest in land has been afforded, and ignored, an opportunity to safeguard that interest."

The reference in that explanation to the "assurance fund" was to the Torrens Assurance Fund established under s 134 of the RPA. Under s 132 of the RPA, proceedings before a court for the payment of compensation are taken against the Registrar-General as nominal defendant.

47 Section 12A was amended in 1996[39] to take its current form, in which it covers the taking by the Registrar-General of any action that alters the Register. The amendment was described at that time as "thereby extend[ing] this fast and simple process for clarifying rights to all cases, not just those in which a dealing is to be registered"[40].

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36 *Real Property (Amendment) Act* 1970 (NSW), s 4(b).

37 New South Wales, Real Property (Amendment) Bill 1970, Explanatory Note at (e).

38 New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 11 March 1970 at 4106.

39 *Real Property Amendment Act* 1996 (NSW), Sched 1 [4]-[7].

40 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 15 October 1996 at 4798.

48 The legislative declaration in s 12A(3) that "no action … shall lie against the Registrar-General in respect of the taking of the action specified in the notice" by a person given the notice under s 12A(1) "or by any person claiming through or under that person" gives rise to two issues of construction. Both were addressed in the Court of Appeal, in reasons for judgment of Campbell JA and Tobias AJA, with whom McColl JA agreed.

49 One issue is whether a successor in title to a person given notice under s 12A(1) is a "person claiming through or under that person". On that issue, the Court of Appeal held that the word "through" in s 12A(3), as elsewhere in the RPA, involved the idea that[41]:

> "A claims 'through' B if A has acquired title or rights from B, or from someone who has acquired rights from B, and so on through howsoever many intermediary titleholders or holders of rights there might be between A and B."

That construction of the word "through" led to the conclusion that[42]:

> "s 12A(3) prevents anyone who is the successor of a person to whom a notice under s 12A(1) has been given from bringing an 'action' against the Registrar-General in which they assert rights arising from the action taken by the Registrar-General after service of the notice foreshadowing the alteration of the register."

50 The other issue concerns the nature and scope of the legislative declaration that "no action … shall lie against the Registrar-General in respect of the taking of the action specified in the notice". On that issue, the Court of Appeal said that[43]:

> "[i]t is apparent that s 12A(3) operates to prohibit an action against the Registrar-General for altering the register, where otherwise he might be liable for doing so in circumstances which might expose him to an action for damages."

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41 *Sahab Holdings Pty Ltd v Registrar-General (No 2)* (2012) 16 BPR 30,353 at 30,360 [28].

42 (2012) 16 BPR 30,353 at 30,361 [33].

43 (2012) 16 BPR 30,353 at 30,358 [14].

However, it went on to state that[44]:

> "[t]here is no justification … for construing the section as prohibiting the obtaining of relief against the Registrar-General, where other provisions of the Act such as ss 122 and 138 specifically empower the Supreme Court to require him to correct an erroneous alteration to the register."

Its conclusion was that "[a]n 'action' in s 12A(3) does not extend to proceedings against the Registrar-General permitted by other sections of the Act, either alone or in combination"[45].

51 I agree with the reasoning and conclusion of the Court of Appeal on the first issue of construction. A successor in title to a person given notice in accordance with s 12A(1) is a person claiming "through" that person within the meaning of s 12A(3) and is therefore subject to the legislative declaration in s 12A(3) that "no action … shall lie against the Registrar-General in respect of the taking of the action specified in the notice".

52 However, I am unable to agree with the Court of Appeal on the second issue of construction.

53 In my view, s 12A manifests a legislative choice that a notified alteration of the Register by the Registrar-General should not be legally impugned after the alteration is made[46]. The section ensures that no person notified by the Registrar-General of an intention to alter the Register, and no successor in title to such a person, has any right to challenge that alteration once made if the person has failed to object to that notice. In so doing, the section fulfils its identified legislative purpose of providing a "simple process for clarifying rights"[47] in accordance with which a person who may be deprived of an interest in land by an alteration of the Register by the Registrar-General is given a timely opportunity to safeguard that interest in a "contest … between the interested parties"[48]. The temporal confinement of that process to a period before the Register is altered

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44 (2012) 16 BPR 30,353 at 30,358 [14].

45 (2012) 16 BPR 30,353 at 30,358 [14].

46 Cf *R v Australian Stevedoring Industry Board; Ex parte Melbourne Stevedoring Co Pty Ltd* (1953) 88 CLR 100 at 119; [1953] HCA 22.

47 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 15 October 1996 at 4798.

48 New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 11 March 1970 at 4106.

enhances "indefeasibility of title", a conception "central in the system of registration", in accordance with which "registration once effected must attract the consequences which the [RPA] attaches to registration whether that was regular or otherwise"[49].

54 The expression "no action … shall lie" in s 12A(3) is best read not as a procedural prohibition but as a substantive alteration of legal rights: operating to prevent a notified alteration of the Register by the Registrar-General giving rise to infringement of a legal right or breach of a legal duty in respect of which relief might afterwards be obtained at the suit of the person notified or a successor in title. The word "action" is best read, without limitation, as encompassing any proceeding for the vindication of a legal right or to compel the performance of a legal duty. Amongst other circumstances, an action is "in respect of the taking of the action specified in the notice" insofar as the action directly or indirectly challenges the validity of a notified alteration of the Register.

55 Section 12A so read is not in tension with the jurisdiction of the Supreme Court under s 122 or s 138 of the RPA any more than it is in tension with the jurisdiction of the Supreme Court under s 132 of the RPA. The jurisdiction remains unaffected. The operation of s 12A is rather that there is no infringement of a legal right or breach of a legal duty in respect of which relief might be obtained in an action against the Registrar-General in the exercise of that jurisdiction. Section 12A(3) operates as a plea in bar to any action that might be brought.

56 The result is that Sahab, as successor in title to persons given notice in accordance with s 12A(1), became a person subject to s 12A(3) of the RPA and that s 12A(3) operated as a plea in bar to Sahab's claims in the proceedings Sahab brought against the Registrar-General for judicial review of both the 2001 decision and the 2008 decision. Sahab's claim for judicial review of the 2001 decision was a direct challenge to the validity of the notified alteration of the Register by the Registrar-General. Sahab's claim for judicial review of the 2008 decision was an indirect challenge to the validity of the same notified act of the Registrar-General. It was, in the words of Slattery J, "merely an attempt to reopen the 2001 decision"[50].

57 It is neither necessary nor appropriate for me to address other issues or potential issues raised or sought to be raised in the appeal and cross-appeal. In particular, it is not necessary or appropriate for me to address: the meaning of the

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49 *Frazer v Walker* [1967] 1 AC 569 at 580; *Breskvar v Wall* (1971) 126 CLR 376 at 413; [1971] HCA 70.

50 *Sahab Holdings Pty Ltd v Registrar-General (No 2)* (2010) 14 BPR 27,459 at 27,477 [97].

word "omission" in s 42(1)(a1) of the RPA; the scope of the power, and any attendant duty, of the Registrar-General under s 12(1)(d) of the RPA to "correct errors and omissions in the Register"; whether the proceedings brought by Sahab were "for the recovery of any land" so as to be within s 138 of the RPA; and whether Sahab was a person "dissatisfied" with the 2001 decision within the meaning of s 122 of the RPA (an issue the Court of Appeal found Castle to be estopped from agitating[51]).

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51 *Sahab Holdings Pty Ltd v Registrar-General* (2011) 15 BPR 29,627 at 29,674-29,676 [210]-[219].