

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 [No 2]

[2013] HCA 44

30 October 2013

S263/2012

ORDER

1. *Application dismissed.*
2. *The first respondent pay the appellant and the second respondent the costs of the application.*

On appeal from the Supreme Court of New South Wales

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Castle Constructions Pty Limited v Sahab Holdings Pty Ltd [No 2]

Practice and procedure – Judgments and orders – Power to vacate orders not yet entered – Whether Court should exercise power and withdraw published reasons.

1 HAYNE, CRENNAN, KIEFEL, BELL AND GAGELER JJ. The first respondent (Sahab Holdings Pty Ltd – "Sahab") seeks orders that the Court withdraw its reasons for judgment published¹ on 10 April 2013, reconsider its reasons having regard to a number of identified matters and, if the decision of the Court is affirmed, reconsider that part of its reasons requiring Sahab to pay the costs of the second respondent (the Registrar-General).

2 Sahab's application should be refused. The orders which the Court made on 10 April 2013 should stand. Those orders allowed the appeal to this Court by Castle Constructions Pty Limited ("Castle"); dismissed Sahab's application for special leave to cross-appeal; ordered Sahab to pay Castle and the Registrar-General the costs of the appeal and of the application for special leave to cross-appeal; and 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, ordered that the appeal to that Court be dismissed with costs.

3 The facts and circumstances which gave rise to litigation between Castle, Sahab and the Registrar-General at first instance and on appeal in the Supreme Court of New South Wales, and on appeal and application for special leave to cross-appeal to this Court, are described in the reasons published on 10 April 2013. Put shortly, Sahab is the registered proprietor of land abutting land of which Castle is the registered proprietor. In September 2001, before Sahab became the registered proprietor of its land, Castle had asked the Registrar-General to remove an easement over its land from the Register maintained for the purposes of the *Real Property Act* 1900 (NSW) ("the RPA"). Having first notified Sahab's predecessors in title (the owners of what was then the dominant tenement) of his intention to do so, the Registrar-General removed the easement from the folios of the Register relating to both the dominant and the servient tenements. In April 2007, Sahab became the registered proprietor of what had been the dominant tenement. In September 2008, Sahab sought to have the easement restored to the Register. The Registrar-General refused to do so and there followed the litigation that culminated in the proceedings in this Court.

4 Sahab now alleges that the joint reasons delivered by Hayne, Crennan, Kiefel and Bell JJ misapprehended a number of matters. In particular, it alleges that those reasons reveal misapprehension of:

1 *Castle Constructions Pty Ltd v Sahab Holdings Pty Ltd* (2013) 247 CLR 149; [2013] HCA 11.

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Crennan J
Kiefel J
Bell J
Gageler J

2.

- (a) Sahab's submissions about the effect of the provisions (described as "remedial provisions") of ss 12, 122, 136 and 138 of the RPA;
- (b) the evidence about service of a notice under s 12A of the RPA on the former registered proprietors of Sahab's land;
- (c) the findings of the Court of Appeal about Sahab's standing under s 122 of the RPA to seek review of the Registrar-General's 2001 decision to cancel the easement; and
- (d) the legal character of the Registrar-General's 2001 decision and of the Registrar-General's 2008 decision not to restore the easement to the Register. The former decision was said to be affected by "an error in law and a jurisdictional error rendering [it] a nullity". The latter decision was said to be "a failure by the Registrar-General to perform a statutory duty to correct the error made in the 2001 decision".

5 Sahab further submits that the separate reasons of Gageler J were founded upon misapprehension of the evidence about service of a notice under s 12A of the RPA on the former registered proprietors of Sahab's land and the effect to be given to such a notice.

6 Although Sahab's complaints are directed to the reasons given on 10 April 2013, and Sahab expressly seeks only the recalling of those reasons, the application must be treated as seeking recall of the orders pronounced when the reasons were published and seeking to reopen generally both Castle's appeal and Sahab's application for special leave to cross-appeal.

7 The orders which the Court made on 10 April 2013 have not been perfected. There is no doubt that the Court has power to recall those orders and make other orders in their place². The precise bounds of that power may be controversial³ but, for the purposes of this case, it is not necessary to resolve that controversy.

2 See, for example, *Wentworth v Woollahra Municipal Council* (1982) 149 CLR 672; [1982] HCA 41; *State Rail Authority of NSW v Codelfa Construction Pty Ltd* (1982) 150 CLR 29; [1982] HCA 51; *Autodesk Inc v Dyason [No 2]* (1993) 176 CLR 300; [1993] HCA 6.

3 *Autodesk [No 2]* (1993) 176 CLR 300.

3.

8 The parties were directed to file and serve written submissions about
Sahab's application to reopen the appeal and any application made by Sahab to
advance oral argument in support of its application to reopen. Each party has
now filed and served its written submissions.

9 Should Sahab's application be entered for oral argument?

10 Sahab submitted that the Court, "in considering whether its decision is
affected by misapprehension as to law or fact, [would] be assisted by exchange
between the Court and each counsel in testing the nature of [the] submitted
misapprehensions" and that the parties would be "assisted to understand the
outcome of the application [to reopen] by exploration in oral argument". Castle
submitted that the application should be dismissed without oral argument but
that, if oral argument were permitted, Sahab should pay Castle's costs of the
application. The Registrar-General sought to supplement his written submissions
with oral argument.

11 Whether the Court should hear oral argument in respect of Sahab's
application to reopen must be decided in light of the issues which Sahab seeks to
agitate. They are not issues which warrant entering the application for oral
hearing.

12 It is convenient to identify the nature of those issues by reference to the
division in opinion in *Autodesk Inc v Dyason [No 2]*⁴ about the ambit of this
Court's power to recall orders and reopen an appeal.

13 All members of the Court in *Autodesk [No 2]* accepted⁵ that this Court
may recall orders which it has made disposing of an appeal if those orders were
made against a party who, without fault on the part of that person, has not had an
opportunity to be heard as to why those orders should not be made. More
particularly, it was accepted⁶ that this Court may recall its orders if they were

4 (1993) 176 CLR 300.

5 (1993) 176 CLR 300 at 303 per Mason CJ, 308 per Brennan J, 314 per Deane J,
317 per Dawson J, 322 per Gaudron J.

6 (1993) 176 CLR 300 at 303 per Mason CJ, 308 per Brennan J, 314 per Deane J,
317 per Dawson J, 322 per Gaudron J.

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Bell J
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4.

made on a ground which the person against whom the orders were made had no opportunity to argue⁷.

14 Sahab does not submit that it was not given an opportunity to be heard in respect of the issues which it says have been misapprehended by the Court. Indeed many of the grounds it advances in support of its application to reopen proceed from the premise that Sahab put its arguments on the hearing of the appeal and associated application for special leave but, because the arguments were not accepted, the Court must have misapprehended them.

15 This Court divided in opinion in *Autodesk [No 2]* about whether the jurisdiction to recall this Court's orders extended beyond cases where a party was not given an opportunity to be heard on an issue held to be determinative. Mason CJ took the broadest view of the power to reopen and, with Deane J, dissented as to the outcome in the particular case. Mason CJ said⁸ that the exercise of the jurisdiction to reopen should not be confined "in a way that would inhibit [the Court's] capacity to rectify what it perceives to be an apparent error arising from some miscarriage in its judgment". Nonetheless, Mason CJ emphasised⁹ that the jurisdiction to reopen "is not to be exercised for the purpose of re-agitating arguments already considered by the Court". Rather, Mason CJ concluded¹⁰ that "[w]hat must emerge ... is that the Court has apparently proceeded according to some misapprehension of the facts or the relevant law and that this misapprehension cannot be attributed solely to the neglect or default of the party seeking the rehearing".

16 In this case Sahab asserted, in its written submissions filed in reply to the submissions of Castle and the Registrar-General, that "it has identified relevant misapprehensions of fact and law justifying re-opening". Closer examination of Sahab's submissions reveals, however, that Sahab points to no misapprehension of fact or law. Rather, Sahab seeks to do two things. First, it seeks to reargue the case which was put fully at the original hearing in both its extensive written submissions and the oral submissions made on its behalf. Second, it seeks to advance further evidence.

7 See, for example, *Pantorno v The Queen* (1989) 166 CLR 466; [1989] HCA 18.

8 (1993) 176 CLR 300 at 302.

9 (1993) 176 CLR 300 at 303.

10 (1993) 176 CLR 300 at 303.

5.

17 Neither reargument of the appeal nor the tender of further evidence should
be permitted. It is convenient to deal at once with the question of evidence.

18 The solicitor for Sahab, who is also a director of Sahab, swore two
affidavits in support of Sahab's application to reopen. The first affidavit, sworn
on 23 August 2013, sought to identify Sahab's complaints about the conclusions
which the Court reached. The second affidavit, sworn on 26 August 2013, set
out correspondence and conversations the solicitor had had with the
Registrar-General's office after this Court had delivered judgment and other
correspondence which the solicitor had had with the Registrar-General's office
(in 2007, 2008, 2010 and 2011) about the notice which had been given by the
Registrar-General to Sahab's predecessors in title.

19 The communications with the Registrar-General's office after delivery of
judgment related to the substantive issues considered by the Court. To the extent
to which the affidavit of 26 August 2013 seeks to prove matters not in evidence
before the Court of Appeal, this Court has no jurisdiction to receive the
evidence¹¹. To the extent to which the matters deposed to in either that affidavit
or the earlier affidavit seek to agitate matters available for consideration in the
course of argument in this Court, but not then mentioned, Sahab had ample
opportunity to place the material before the Court.

20 Sahab alleges that the Court's reasons reveal legal and factual error. Its
first, perhaps principal, complaint is that the plurality's interpretation of ss 41(1)
and 47 of the RPA:

"misapprehended Sahab's submissions that the remedial provisions [ss 12,
122, 136 and 138] too were part of the indefeasibility regime under the
RPA and that in a system of title by registration, while title under the RPA
can be lost by deregistration, it should be capable of being regained by
re-registration subject to the remedial provisions being available and
subject to a third party not taking on the strength of the unamended
Register." (footnote omitted)

21 This proposition is no more than a reformulation of Sahab's submissions
about the question of indefeasibility that lay at the very centre of the dispute
litigated between the parties on the hearing of the appeal and the associated
application for special leave. Sahab's argument on this aspect of the matter was

11 See, for example, *Eastman v The Queen* (2000) 203 CLR 1; [2000] HCA 29.

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Bell J
Gageler J

6.

summarised in the Commonwealth Law Reports. There Sahab is recorded¹² as submitting that:

"Powers under ss 12(1)(d), 122 and 136(1)(a), (b) and (c) are within the regime of indefeasibility, not exceptions to it. Their use is governed by the discretion built into s 122(4)(b) and by s 45 in relation to subsequent registered interests. ... Section 138 applies because there is a recovery of an interest in land within s 42(1)(a1). Jurisdiction is not ousted by s 12A because there was no notice in relation to the 2008 decision, [Sahab] does not claim 'through or under' a preceding interest, and s 12A does not override s 138."

22 At the original hearing in this Court Sahab thus sought to give ss 12, 12A, 122, 136 and 138 of the RPA a position in the scheme of indefeasible title by registration which would have permitted it to have restored to the Register an easement which had been removed from the Register before it became registered proprietor of its land. Four members of the Court, making particular reference to basic principles¹³, rejected this argument. Sahab now seeks simply to reargue the point.

23 Sahab further complains that "the Court's conclusions about the preclusive effect of s 12A(3) [of the RPA] are supported neither by the language of the sub-section nor its underlying legislative intent". Sahab refers, in this respect, to both the joint reasons¹⁴ and the separate reasons of Gageler J¹⁵. Again, Sahab seeks only to reargue matters already fully argued at the original hearing in this Court. Those matters have been decided and should not now be revisited.

24 In conjunction with its argument about the effect of s 12A(3), Sahab submitted that the Court had "misapprehended the evidence about whether the Registrar-General ever served [Sahab's predecessors in title] with a s 12A(1) notice". But again, Sahab seeks only to reargue the point it has already made in this Court. Sahab submitted at the original hearing in this Court that the Court of

¹² (2013) 247 CLR 149 at 154.

¹³ (2013) 247 CLR 149 at 159 [20].

¹⁴ (2013) 247 CLR 149 at 161 [27], 163 [31].

¹⁵ (2013) 247 CLR 149 at 168 [53]-[54], 169 [56].

7.

Appeal was wrong to conclude, as it did¹⁶, that the Registrar-General had notified Sahab's predecessors in title in accordance with s 12A(1) before deciding to remove the easement from the Register. That argument was rejected¹⁷.

25 Finally, Sahab alleges not only that the plurality misapprehended the findings of the Court of Appeal about Sahab's standing under s 122(1) of the RPA to seek review of the Registrar-General's decision to cancel the easement, but also that the decision to cancel the easement was an error in law and a jurisdictional error rendering it a nullity. These allegations are no more than another way of Sahab expressing its argument that the Court's decision does not give the remedial provisions of the RPA the place in the scheme of the RPA which Sahab said they should have. The argument was advanced at the hearing of the appeal. It was dealt with expressly in the joint reasons¹⁸. All that Sahab now seeks to do is to reargue the point.

26 The matters advanced by Sahab in the affidavits of its solicitor and in its written submissions demonstrate no arguable case that this Court misapprehended any question of fact or law. Nor do the affidavits or the written submissions show that Sahab now seeks to advance arguments which it did not advance at the original hearing. All that is shown is that Sahab disagrees with the conclusions reached by this Court and that it seeks a second opportunity to persuade the Court that the view of the construction and application of the relevant provisions of the RPA articulated by the solicitor for Sahab is preferable to the view formed by the Court. That should not be permitted.

27 As for Sahab's alternative argument that it should not have been ordered to pay the Registrar-General's costs, it is enough to say that because Sahab failed to resist the appeal and failed in its application for special leave, it was right to order Sahab to pay the costs of both other parties to the proceedings.

28 Sahab's application to reopen should be dismissed with costs.

16 *Sahab Holdings Pty Ltd v Registrar-General* (2011) 15 BPR 29,627 at 29,639-29,640 [41], 29,644 [57].

17 (2013) 247 CLR 149 at 162 [30], 165 [44].

18 (2013) 247 CLR 149 at 164 [38].