COURT: SUPREME COURT OF TASMANIA (FULL COURT)

CITATION: *Olympus Superannuation Fund (Tas) Pty Ltd v Recorder of Titles* [2023] TASFC 6

PARTIES: OLYMPUS SUPERANNUATION FUND (TAS) PTY LTD as trustee for the Olympus Superannuation Fund
v
RECORDER OF TITLES
BLUEHOUSE CORNER PTY LTD

FILE NO: 707/2022

JUDGMENT APPEALED FROM: *Olympus Superannuation Fund (Tas) Pty Ltd v Recorder of Titles* [2022] TASSC 16

DELIVERED ON: 8 December 2023

DELIVERED AT: Hobart

HEARING DATE: 6 June 2022

JUDGMENT OF: Wood J, Pearce J, Brett J

CATCHWORDS:

Real Property – Torrens title – Amendment or variation of title record – Extent of Recorder's power – Whether Recorder authorised under s139 to correct an error resulting from an earlier correction – Recorder may exercise the power under s 139 from time to time as occasion may require.
Aust Dig Real Property [1236]

Real Property – Torrens title – Indefeasibility of Title – Generally – Effect of registration of benefit of easement on the title of the dominant tenement – Interest of the registered proprietor of the dominant tenement conclusive provided that an estate or interest in the land is described in the folio – What is described in the folio is determined by the endorsement on the title and any underlying instrument which forms part of the Register.
Aust Dig Real Property [1239]

Legislation:
Land Titles Act 1980 (Tas), ss 39, 40, 139, 144.
Acts Interpretation Act 1931 (Tas), s 20 (a).

Authorities referred to:
Allesch v Maunz [2000] 203 CLR 172
Breskvar v Wall (1971) 126 CLR 376
Bursill Enterprises Pty Ltd v Berger Bros Trading Co Pty Ltd [1971] 124 CLR 73

Calvert v Badenach [2015] TASFC 8
Castle Constructions Pty Ltd v Sahab Holdings Pty Ltd and Another [2013] HCA 11, (2013) 247 CLR 149
Day v Hunter [1964] Vic Rep 109 [1964] VR 845
Deguisa v Lynn [2020] HCA 39; (2020) 268 CLR 638
DM & Longbow Pty Ltd v Registrar-General of NSW [2016] NSWSC 1844
Fox v Percy [2003] HCA 22; (2003) 214 CLR 118
Gapes v Fish [1927] VLR 88
Hillpalm Pty Ltd v Heaven's Door Pty Ltd [2004] HCA 59, 220 CLR 472
Hogan v Australian Crime Commission [2010] HCA 21; (2010) 240 CLR 651
McCarthy v Xiong [1993] TASSC 48, 2 Tas R 290.
Minister for Immigration and Border Protection v SZVFW [2018] HCA 30
Nightingale v Recorder of Titles [2018] TASSC 56
Parramore v Duggan [1995] HCA 21, (1995) 183 CLR 633
Pirie v Registrar-General [1962] HCA 58; (1962)109 CLR 619
Project Blue Sky Inc v Australian Broadcasting Authority [1998] HCA 28,194 CLR 355
Purton v Jackson [2012] TASFC 2, 21 Tas R 310
Sahab Holdings Pty Ltd v Registrar-General [2011] NSWCA 395
Sahab Holdings Pty Ltd v Registrar-General and *Sahade v Owners Corporation SP 62022*
Sahade v Owners Corporation SP 62022 [2013] NSWSC 1791
State Bank of New South Wales v Berowra Waters Holdings Pty Ltd (1986) 4 NSWLR 398
Swancare Group Inc v Commissioner for Consumer Protection [2014] WASC 80
Taylor v The Owners – Strata Plan No 11564 [2014] HCA 9, (2014) 253 CLR 531
Warren v Coombes [1979] HCA 9; (1979) 142 CLR 531
Westfield Management Ltd v Perpetual Trustee Co Ltd [2007] HCA 45, (2007) CLR 528
Wolfson v. Registrar-General (N.S.W.) [1934] HCA 29; (1934) 51 CLR 300

REPRESENTATION:

***Counsel*:**

Appellant:	G L Sealy SC, M Rapley
First Respondent:	P Turner SC
Second Respondent:	A Spence SC

Solicitors:

Appellant:	Butler McIntyre & Butler
First Respondent:	Solicitor-General
Second Respondent:	Page Seager

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Number of paragraphs:	108

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REASONS FOR JUDGMENT

FULL COURT
WOOD J
PEARCE J
BRETT J
8 December 2023

Orders of the Court:

1 The appeal is allowed.
2 The order of the primary judge dismissing the originating application is set aside.
3 The originating application is to be reheard by the primary judge.

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OLYMPUS SUPERANNUATION FUND v RECORDER OF TITLES and BLUEHOUSE CORNER PTY LTD

REASONS FOR JUDGMENT

FULL COURT
WOOD J
8 December 2023

1 I have had the opportunity to read the reasons for judgment of Brett J. I agree with those reasons and the conclusion reached by his Honour about the orders that should be made.

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REASONS FOR JUDGMENT

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2 I agree with Brett J.

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REASONS FOR JUDGMENT

FULL COURT
BRETT J
8 December 2023

3 This appeal is from a decision of Blow CJ in respect of relief sought by the appellant pursuant to s 144 of the *Land Titles Act* 1980 (the Act). The issue concerns a determination by the Recorder of Titles to record the benefit of a purported easement on titles to the second respondent's land, which is adjacent to the appellant's land. The easement was purportedly created by the reservation of a right of way over the appellant's land in favour of the then owners of the second respondent's land when they sold the land to the appellant's predecessor in title in 1915. Both parcels of land were then subject to the general law system. The burden of the easement was recorded on the appellant's land when that land was brought under the Act in 1989. However, when the second respondent's land was brought under the Torrens system in 1923, the benefit of the easement was not recorded on the titles issued at that time. That remained the case until 2019, when the Recorder did so, relying on his power under s 139 to correct errors and supply omissions in the Register. The appellant then requested the Recorder to reverse this decision and remove the recording of the easement from the Register, claiming that the instrument in question did not identify a dominant tenement, and hence was not an easement, but merely granted a personal licence to the individuals named in it. The Recorder refused to remove the recording, and the appellant then applied to the Supreme Court for relief pursuant to s 144.

4 The learned primary judge concluded that the originating application was confined to the question of whether the Recorder could subsequently revisit and reverse this decision under s 139. His Honour determined that the recording of the benefit of the easement pursuant to the original determination was protected by the indefeasibility provisions of s 40 and that this prevented the Recorder from acting under s 139 in any way which was inconsistent with that protection. Accordingly, the Recorder was not entitled to vary or reverse that decision, and the application was dismissed. His Honour found it unnecessary to determine any other question raised in the proceedings, including whether the original reservation of land created an easement over the appellant's land for the benefit of the second respondent's land, or merely created a personal licence.

5 The primary question raised on the appeal is whether the primary judge correctly concluded that the recording of the benefit of the easement on the second respondent's titles was protected by indefeasibility arising under s 40 of the Act. This will require consideration of the definition and operation of the principle of indefeasibility, and its application to the recording of an estate or interest in land by the Recorder when utilising the power of correction arising under s 139. It will also be necessary to consider the effect of recording the benefit of an easement on the title of the dominant tenement, and the relevance to that question of the provisions of the Act which implement the Torrens system of land registration.

The Evidence

6 The evidence before the learned primary judge consisted of several affidavits, which annexed a substantial volume of documents. The documentary evidence includes many of the documents relevant to the historical transactions pertaining to the land which is the subject of this appeal. An affidavit by the Recorder, in particular, annexes the general law documents taken from records held by the Land Titles Office upon which he relied when making the decision to record the benefit of the easement on the titles of the second respondent's land.

7 At the outset of the hearing before the learned primary judge, his Honour was informed by senior counsel for the appellant, Mr Sealy SC, that there had been an agreement between the parties "that the convenient course for your Honour… is that that material goes in de bene esse, and after your Honour's had an opportunity to consider the law and reach a determination about that, your Honour can make a determination about what evidence you can have regard to and what evidence you can't have regard to." Counsel was in fact referring to an issue concerning the use by the Court of extrinsic evidence to determine whether words in a deed of conveyance amounted to an easement or some other form of legal right, perhaps falling short of an estate or interest in land. However, the primary judge took this as a general agreement that all of the evidentiary material would "once it's read……come in de bene esse". There was no argument to the contrary by any party, and all the relevant material was placed before his Honour on that basis. The admissibility of the evidence was not revisited by the primary judge during the hearing or in his decision. Indeed, as will be seen, his Honour did not take a path of reasoning which required him to determine the issue which had apparently prompted the original agreement between the parties about the evidence being received de bene esse, the use of extrinsic evidence. The status of the evidence was not raised by any party again during the hearing. However, on this appeal, it became clear that the parties have not reached an agreement about that question, and the status of the evidence remains in issue. In particular, senior counsel for the second respondent, Mr Spence SC, submitted that "the evidence at first instance was taken de bene esse, so if the appeal was to be upheld, it would need to be remitted to the learned Chief Justice". There was no further submission or discussion about the power of this Court to "remit" to the primary judge nor the nature of such a disposition.

8 The difficulty in principle arising from this unresolved issue concerns the task of this Court on the appeal. The appeal is by way of rehearing, *Supreme Court Civil Procedure Act* 1932, s 40 and *Supreme Court Rules* 2000, r 657(1)(a). It is well established that an appeal of this nature, to be successful, requires the appellate court to identify error on the part of the primary decision-maker. See *Allesch v Maunz* [2000] 203 CLR 172, *Calvert v Badenach* [2015] TASFC 8, Porter J at 46. This requirement was explained by Gageler J in *Minister for Immigration and Border Protection v SZVFW* [2018] HCA 30 at par 30:

> "Like an appeal in the strict sense, of which an appeal to the High Court under s 73 of the Constitution is the prime example, an appeal by way of rehearing is a procedure under which the appellate court is permitted and, unless the appellate court dismisses the appeal or remits the matter for rehearing, required to 'give the judgment which in its opinion ought to have been given in the first instance'. And like an appeal in the strict sense, an appeal by way of rehearing is a procedure for the correction of error. '[T]he existence of an error, whether of law or fact, on the part of the court at first instance is an indispensable condition of a successful appeal.'"

9 The Court is obliged to conduct a real review of the evidence and draw its own conclusions. See *Warren v Coombes* [1979] HCA 9; (1979) 142 CLR 531; *Fox v Percy* [2003] HCA 22; (2003) 214 CLR 118. Clearly, this Court's capacity to perform the task required of it becomes difficult where there is uncertainty about the status of the evidence before the court of first instance. Having said that, there was little factual dispute which affected the arguments presented on the appeal. All the material placed before the primary judge was included in the appeal book, and we were referred to various aspects of it without objection. To the extent that there may be factual dispute, it largely arises from inferences to be drawn from the contents of historical documents. There did not seem to be any objection to the authenticity or even admissibility of those documents. Further, as I will explain shortly, there is a related question concerning the scope of the appeal, in the sense of the issues before the primary judge, which are properly the subject of this appeal, and that question also affects the extent of factual dispute.

10 There is no question that this is an unsatisfactory situation. However, given the manner in which this case was argued by the parties and the conclusions I have reached concerning the scope of the appeal, I am of the view that the appropriate way to proceed is that this Court should regard all of the evidence presented to the trial judge as constituting the record for the purpose of determining the appeal.

This means that the court will consider it all and draw its own conclusions on the facts, including inferences arising from that evidence. Of course, any question which may arise from proceeding in this way may become relevant to the disposition of the appeal in the event that the appellant is successful. I intend to proceed accordingly.

Factual Background

11 The land in question consists of two adjoining parcels which are located on the corner of Gladstone Street and Salamanca Place in Hobart. The first parcel, is owned by the second respondent and is located at 21-23 Salamanca Place. It consists of two lots, contained in Certificate of Title Vol 67868, Folios 1 and 2. It is owned by the second respondent and currently contains the hospitality business known as Irish Murphy's. I will refer to those two lots as the "second respondents land". The second parcel is owned by the appellant and consists of one lot recorded in Certificate of Title Vol 41654 Folio 1. This lot sits at the back of Irish Murphy's, shares a common boundary with one lot of the second respondent's land, that is contained in CT 67868 Folio 1, and provides a means of access from that land to Gladstone Street. It is, in fact, part of a larger parcel consisting of two other lots which together form a property adjacent to Irish Murphy's, 25 Salamanca Place. I will refer to the single lot described in Certificate of Title Vol 41654 Folio 1, as "the appellant's land".

12 Until 1915, the five lots were in common ownership as part of a much larger parcel of land in the adjacent area. The owners at that time were the executors of the original owner, George Adams. Mr Adams had purchased the land in 1902 and died in 1904. There were four executors, William Joseph Adams (W.J Adams), Gerald Joseph Barry, David Hastie Harvey and William Alexander Finlay. The three lots comprising 25 Salamanca Place, all now owned by the appellant, were sold in 1915, as part of the sale of a larger parcel of the land owned by the executors, to the same purchaser, the Tasmanian Rosella Processing Company Limited. The appellant came into ownership of 25 Salamanca Place in 2011. When the land was sold in 1915, the executors retained the ownership of the land not included in the sale, including the two lots comprising 21-23 Salamanca Place. The second respondent purchased that land on 23 June 2016.

13 The transfer which gave effect to the sale of the lots which constituted the parcel of land which became 25 Salamanca Place, including the lot relevant to this appeal, was contained in a deed of conveyance. At the time of the sale, neither the appellant's land nor the second respondent's land was subject to the *Real Property Act* 1862, and was accordingly, subject to general law. The deed was registered with and recorded by the Registrar of Deeds as conveyance no 13/7548. The conveyance included the reservation of land which is central to this case, and according to the respondents, created the easement which is said to benefit the second respondent's land. The relevant words in the deed of conveyance are as follows:

> ".. .. reserving nevertheless, to the Vendors their heirs executors administrators and assigns and all persons authorised by them at all times hereafter by day or by night and for all purposes with or without horses, carts carriages or wagons laden or unladen to go pass and repass and to drive cattle sheep and other animals along over and upon ALL that piece of land shown in the said plan and therein surrounded by brown boundary lines being the land secondly hereinbefore described."

14 It is common ground that the final words of this reservation relate to the lot in question.

15 The appellant's land remained subject to the general law system until 1989. The Recorder's affidavit annexes a series of documents of conveyance relating to transactions subsequent to the 1915 sale, commencing in 1943 when the land was sold by the Tasmanian Rosella Processing Company Limited. There are three further sales, with the last being documented by an indenture of conveyance dated 30 September 1988. This conveyance was registered as No 64/7974. On 2 November 1989, the purchasers of the land made a successful application to bring the land under the *Land Titles Act*. In

accordance with s 12(1) and s 33(7), this was achieved by creating a folio for the land in the Register. The folio in question was Vol 4611 folio 15. The lot is described in the folio as "the land secondly described in Conveyance No 64/7974 and shown as Lot No 1 on Sketch Diagram No 41654". As already noted, the land is now contained in Certificate of Title 41654 Folio 1.

16 In his reasons for the decision to record the benefit of the easement purportedly created by the reservation contained in the conveyance relevant to the 1915 sale, no 13/7548, on the second respondent's land, the Recorder said:

> "The burden of the Easement was carried forward to the Burdened Land when the title constituting the Burdened Land was brought under the *Land Titles Act* 1980 on conversion and remains registered on the title to the Burdened Land".

17 All parties have proceeded, both at first instance and on this appeal on the basis that this statement is accurate. However, the documentary evidence reveals a slightly more nuanced position. It is true that in each of the subsequent conveyances, the reservation is repeated in substance, albeit in slightly different terms. The principle difference is that the reference to the "Vendors" is replaced by the words "W. J Adams and others". The reservation is recorded on the original title after conversion, Vol 4611 folio 15, in the Second Schedule in these terms:

> "35/834 CONVEYANCE - Burdening Easement: Right to pass and repass (For W J Adams) over the said land within described."

18 This reference is repeated in the same terms in the current title, Vol 41654 Folio 1. The instrument referred to in the Schedule as 35/834 is the registered number of the Memorial of Conveyance relating to the sale of the land on 11 February 1963 from J Walch & Sons Pty Ltd to W H Ikin and Son Pty Ltd. That company held the land until it was sold in 1985. Conveyance No 35/835 contains the reservation to "W J Adams and others". I am unable to determine an explanation as to why titles created upon conversion to the Torrens system in 1989 carry through the reservation contained in the conveyance in 1963, albeit in terms which do not seem to accurately reflect the contents of that document.

19 The second respondent's land was brought under the *Real Property Act* 1862 in 1923, pursuant to a conversion application by the remaining executors (W J Adams had passed away by then). The two lots in question were recorded in Certificate of Title Vol 329 Folio 79. The conversion application did not refer to the reservation of land, either as an easement or in any other way, and the benefit thereof was not recorded on the title. This remained the case when the land was brought under the *Land Titles Act,* and recorded in Certificates of Title Vol 67868 Folios 1 and 2.

20 In 2016, a solicitor acting for the second respondent requested the then Recorder to "register the right to pass and repass" over the appellant's land on the folios relating to the second respondent's land. The letter containing the request relied on the original reservation of land, and referred to conveyance 35/834. The letter did not refer to s 139 or any other provision of the Act to support the Recorder's power to act in accordance with the request. The Recorder refused the request, noting that the reservation had not been included in the 1925 conversion application, had not been registered on the titles issued pursuant to it and that she could find "no authority under legislation giving" the Recorder power to " bring the reserved rights" onto the relevant folios of the Register.

21 On 15 August 2019, different solicitors for the second respondent wrote to the Recorder to request that the benefit of "the easement described in Indenture No 13/7548" be recorded on Vol 41654 Folio 1, which is the only lot which shares a common boundary with the appellant's land. The request relied on the power of the Recorder to correct errors or supply omissions in the Register pursuant to s 139 of the *Land Titles Act.* It also referred to and relied upon my decision in *Nightingale v Recorder of Titles* [2018] TASSC 56, in which I discussed the proper operation and power conferred by that section.

22 On 11 December 2019, the Recorder wrote to the solicitors for the second respondent advising that he intended to exercise his powers pursuant to that section to record the easement on the title. The Recorder also wrote on that day to the appellant advising that he had made that decision. That letter was described as "a courtesy letter". It spoke of the decision in retrospect and did not invite submissions.

23 On 18 December 2019, the solicitors for the appellant wrote to the Recorder asking him to withdraw his determination and making arguments in support of that request. However, on 20 December 2019, without any further correspondence, the Recorder recorded the benefit of the purported easement on both titles comprising the second respondent's land. This was done by recording in Schedule 2 on each title, a reference to 13/7548, followed by a description in the following terms:

> "13/7548 Conveyance: Benefiting Easement: The right for William Joseph Adams, Gerald Joseph Barry, David Hastie Harvey, William Alexander Finlay their heirs executors administrators and assigns and all persons authorised by them at all times hereafter by day or by night and for all purposes with or without horses carts carriages or waggons laden or unladen to go pass repass and to drive cattle sheep and other animals along over and upon ALL that piece of land shown in the said plan and therein surrounded by brown boundary lines being the land secondly hereinbefore described (and as also set forth in Conveyance 35/834 and being the whole of that land now comprised in Lot 1 on D41654)"

24 The Recorder then wrote to the appellant's solicitors advising that the easement had been recorded and stating his reasons for doing so.

25 On 18 February 2020, the appellant's solicitors wrote to the Recorder submitting that there had been no omission in the Register and it was not appropriate for the Recorder to act under s 139. The letter requested "the Recorder reconsider his earlier determination and reverse the 'corrections' made to the titles" constituting the second respondent's land. It then set out detailed submissions in support of this position.

26 Some further submissions were made in a letter forwarded on 2 March 2020.

27 The Recorder responded to both letters in correspondence dated 19 May 2020. It is clear from that letter that the Recorder did not regard the letters from the appellant's solicitors as invoking jurisdiction under s 139(2) to reconsider his decision to record the benefit of the easements on the appellant's title. In particular, the letter said:

> "You have not lodged an application under section 139 for determination that the earlier decision to supply an omission has now created an error in the Register.
>
> While it is open to you to make a fresh section 139 application, it is noted that in reaching the earlier decision, the Office of the Recorder has not relied upon extrinsic materials or purported facts and circumstances. To conduct an examination extending beyond the Register as you have submitted, is a matter for the Court."

28 The Recorder went on to state that, in any event, the information supplied by the appellant's solicitors did not support the existence of an error created by the recording of the benefit of the easement on the titles of the second respondent's land.

29 On 6 August 2020, the appellant's solicitors wrote to the Land Titles Office requesting the Recorder to regard the letters dated 18 December 2019, 18 February 2020 and 2 March 2020 "as being a 'requirement' for the purpose of s 144(1) of the *Land Titles Act* 1980 (Tas) for the Recorder to state in writing the grounds for his decision as detailed in his original correspondence dated 11 December 2019."

30 By letter dated 16 October 2020, the Recorder responded to the appellant's request as follows:

> "Your formal request in your letter of 6 August 2020, pursuant to section 144(1) was made outside of the usual 3 month period within which any such requirement under section 144(1) was required to be lodged with me. I am also empowered to allow a longer period within which to make a request under section 144(1).
>
> Given the Earlier Letters were sent to me within 3 months after my decision and noting that I responded to the submissions and queries in those letters, I have determined to accept the Earlier Letters as your formal request (now stated in those terms to be made under section 144(1)) , as having been made within time.
>
> Your request under section 144(1) requires me to state in writing the grounds for my decision to record the benefit of an omitted easement on folios of the Register Volume 67868 Folios I & 2."

31 The letter then goes on to provide reasons for the original decision in considerable detail. The recording of the easement remains on both titles constituting the second respondent's land.

The proceedings at first instance

32 On 2 March 2021, the appellant commenced the proceedings to which this appeal relates by filing an originating application against the first respondent. The second respondent became a party to the proceedings after commencement.

33 The application clearly purported to invoke the jurisdiction of the Court pursuant to s 144(2). I will consider this section in more detail later in these reasons, but for the time being it is sufficient to note that the section provides the Supreme Court with a general power to review a decision by the Recorder to refuse to do an act which he is required or empowered to do under the Act, or where he gives a direction or makes an order while exercising his powers under the Act.

34 Despite the last two pieces of correspondence which had passed between the appellant's solicitor and the Recorder, the application did not directly relate to or seek relief in respect of the Recorder's original decision to record the benefit of the easement on the titles of the second respondent's land. Rather, the application sought orders in the following terms:

> "That the Recorder justify his decision to:
>
> (a) refuse to reverse his decision, made on or shortly before 11 December 2019, to record the benefit of an omitted easement on the titles comprised in folio of the Register Volume 67868 Folios 1 & 2.
>
> (b) to affirm his decision made on or shortly before 16 October 2020, to record the benefit of an omitted easement on the titles comprised in folio of the Register Volume 67868 Folios 1 & 2."

35 The attempt by this application to activate jurisdiction under s 144 in respect of decisions of the Recorder subsequent to the original 2019 decision to record the easement on the second respondent's titles, and the failure to directly seek the review of that decision, was apparent to the learned primary judge. In respect to subpar (b), his Honour said this:

> "It can be seen at once that subpar (b) of the originating application was misconceived. That subparagraph referred to a decision of the Recorder 'made on or shortly before 16 October 2020, to record the benefit of an omitted easement on the titles ...'. The Recorder did not make a decision on or shortly before 16 October 2020. He wrote a letter explaining why he had caused the benefit of the easement to be recorded on the two titles some ten months previously."

36 Clearly, his Honour was of the view that subpar (b) did not give rise to jurisdiction under s 144, and he made no further reference to it in his judgment. The balance of the judgment deals with the matter raised in subpar (a) which the primary judge characterised as referring to a subsequent decision

by the Recorder to refuse to reverse the original decision, by removing the record of the benefit of the purported easement from the applicant's titles pursuant to his power under s 139 to correct the error in the Register arising from the recording of the easement in 2019. His Honour determined that although the authority of *Purton v Jackson* [2012] TASFC 2, 21 Tas R 310, makes it clear that "Subject to any indication in the relevant legislation to the contrary, the primary position in Tasmania is that a statutory authority or decision-maker has the power to vary or reverse a statutory decision", the principle of indefeasibility contained in s 40 of the *Land Titles Act* was applicable to the Register as altered by the Recorder in 2019 and, accordingly, the Recorder did not have power to reverse "the recording of the benefit of the easement on the titles of that company." His Honour noted that by virtue of s 139(2)(c), upon alteration, the Register "has the same validity and effect as it would have had if the error or omission had not occurred", and concluded that the general power to act under s 139 to correct errors in the title is not an exception to the principle of indefeasibility. Accordingly, the appellant was not entitled to institute a proceeding under s 144(2) because the Recorder had not refused to do an act which he was "required or empowered to do under" the Act.

37 Despite the nature of the relief sought in the originating application, it is abundantly clear that the appellant's position at the hearing before the primary judge was to have his Honour determine whether the Recorder's decision made on or about 11 December 2019 to record the benefit of the purported easement on the second respondent's titles was justified, and if not, to invoke the jurisdiction of the court to order the Recorder to remove the record of the easement from those titles. This is apparent from the first paragraph of the written submissions filed by the appellant in respect of the hearing at first instance.

> "This is an Application pursuant to Section 144 of the *Land Titles Act 1980 (Tas) (the Act)* for Recorder of Titles (the Recorder) to justify his decision made on or about 11 December 2019, pursuant to section 139 of the Act, to "record [the benefit of] an omitted easement on folios of the Register, volume 67868 Folios 1 & 2".

38 This was reinforced in the hearing at first instance by Mr Sealy during the course of oral submissions:

> "MR SEALY SC: - So, your Honour, this application is made pursuant to s 144 of the Land Titles Act and calls upon the Recorder to justify his decision. The application itself refers to two decisions, but in truth, one is the decision – the positive decision and the other decision complained of is the failure to
>
> HIS HONOUR: Make the opposite decision –
>
> MR SEALY SC: – make the opposite decision –
>
> HIS HONOUR: Yes.
>
> MR SEALY SC: – yeah, but nothing much, in our respectful submission, turns upon that. We're content to say that this is a challenge to the decision to record the benefit of the easements on 21 and 23 Salamanca Place."

39 The issue concerning the identification of the decision relevant to the originating application was not again re-agitated by the appellant's counsel nor the primary judge. The first respondent seems to have proceeded on the basis that it was the original decision in 2019 to record the benefit of the easement which was under attack, but argued that the procedure under s 144 did not apply to that decision. One of the reasons advanced for this position was that the exercise of power under s 139 did not amount to a "refusal, direction or order" within the meaning of s 144(2). The second respondent argued that the Recorder had no power to revisit the original decision under s 139, for reasons which included the indefeasibility attaching to the recording on the title in 2019, and that therefore, as the primary judge accepted, jurisdiction to review the decision did not arise under s 144.

40 Ultimately, the identification of the relevant basis for jurisdiction under s 144 invoked by the application was critical to the primary judge's decision. The appellant seems to have assumed that subpar (b) of the originating decision directed consideration to the merits of the 2019 decision. However, his Honour's decision about the effect of the wording of that claim for relief, rendered that decision irrelevant, at least with respect to the jurisdiction arising under s 144. Hence, the focus of his Honour's consideration was on the power to reverse or alter that decision under s 139, and his Honour's decision concerning indefeasibility was determinative of that question. As will be seen, this has implications for the scope of the appeal to this Court. However, before moving on to that question, I would make the point that it is somewhat difficult to understand the disconnect between the obvious intention of the appellant, to seek relief concerning the 2019 decision, and the way in which the application was framed. The decision to focus on subsequent decisions may well simply be a concession to the points raised by the first respondent concerning the restrictions imposed by the use of the words "refusal, direction or order" in s 144(1)(b). However, it is clear enough that both at the first instance hearing and before this Court, the appellant's focus continued to be on the merits of the original decision. Further, the purpose of the appellant's letter to the Recorder of 6 August 2020, requesting the Recorder to treat the earlier correspondence as, in fact, being a requirement to state the grounds of the original decision, was clearly intended to provide a jurisdictional basis for the forthcoming s 144(2) application. The primary judge considered this letter to make "an inappropriate request" because the three letters referred to in the 6 August letter had not sought reasons for that decision, and noted that the effect of the earlier letters had been to ask for the decision "to be reversed, not explained". His Honour did note, however, that in the response of 16 October 2020, the Recorder had agreed to the request. In my view, the Recorder went well beyond this. As can be seen from the passages set out above, the Recorder accepted the request contained in the letter dated 6 August 2020 as the requirement to state the grounds of the original decision for the purposes of s 144(1), noting that such a request was therefore made outside the time limit of 90 days provided by s 144(1A). However, then, as the Recorder is entitled to do, he allowed an appropriate extension of time to overcome the time limit problem. The Recorder then responded to the request by giving detailed grounds. The real intention of subpar (b) of the originating application seems to have been to invoke the jurisdiction of the Supreme Court under s 144(2) in respect of the original decision by relying upon the requirement to justify that original decision made in the letter of 6 August 2020. However, this is not what was actually sought by subpar (b). That subparagraph refers to a later decision, made "on or shortly before 16 October 2020, to record the benefit of an omitted easement on" the relevant titles. This was unnecessary because the Recorder had accepted that the reasons related to the original decision, with an appropriate extension of time. By taking these steps, the Recorder had removed any impediment to a direct attack on the 2019 decision by review under s144. However, no application was made to the primary judge to amend the orders sought in the originating application, and the primary judge was therefore correct to restrict the ambit of the case before him. His Honour's approach has not been the subject of challenge in this appeal.

The scope of the appeal

41 Notwithstanding the failure to challenge the primary judge's approach to the issues raised by the originating application, the appellant's arguments in the appeal before this Court again focused on the merits of the original decision made by the Recorder in 2019. There was no attempt by the appellant to deal with the problems described above arising from the terms of the originating application, either through the grounds of appeal to this Court nor through argument.

42 The grounds of appeal are as follows:

> 1 "The Court erred in holding or finding that the Recorder of Titles did not have the power to reverse the recording of the benefit of the easement on folios of the Register volume 67868 folios 1 and 2.

> 2 The Court erred in holding or finding that the provisions of s 40 of the *Land Titles Act* 1980 operate to extinguish, nullify, or otherwise wholly override the provisions of s 139(1) of the said Act.
>
> 3 The Court erred in failing to hold or find that, on their true construction, the provisions of s 139 of the *Land Titles Act* 1980 constitute and operate as an exception to the provisions of s 40(2) of the said Act.
>
> 4 The Court erred at law in finding that when the benefit of the easement was recorded on folios of the Register volume 67868 folios 1 and 2, 'in December 2019, the registered owners acquired an indefeasible title to the easement pursuant to s 40(2) of the Act.'"

43 It is immediately apparent that the grounds deal exclusively with findings made by the primary judge in respect of subpar (a) of the originating application, that is the failure of the Recorder to subsequently reverse the original decision, and in particular whether the primary judge's finding that such a reversal was precluded by the principle of indefeasibility is correct. Critically, the grounds do not raise the issue that the primary judge erred by failing to consider or determine the merits of the original decision in reliance on the jurisdiction said to arise from subpar (b) of the originating application. This issue was squarely raised by the Court with Mr Sealy, during the course of his submissions, but the discussion did not result in an application to amend the existing grounds of appeal or to add a further ground.

44 Although senior counsel for the first respondent, Mr Turner SC, asked for time to consider the question, it was not further agitated by him in any substantial way. However, the argument was fundamental to the submissions made by the second respondent. For example, the second respondent's outline of written submissions made these points:

> "Olympus has not advanced any grounds of appeal in respect of the learned primary judge's finding the subpar (b) of the originating application was misconceived. Olympus has identified four closely related grounds of appeal, all of which relate to the learned primary judge's finding in respect of subpar (a) of the originating application."

45 The second respondent argued strongly against the proposition that there was any entitlement on the part of the of the Recorder to reverse the original decision utilising the provisions of s 139 and further, sought to uphold the primary judge's ruling that to do so would infringe the indefeasibility of the second respondent's title.

46 Rule 657(4)(b) of the *Supreme Court Rules* provides that the notice of appeal "is to state…specifically and concisely the grounds of appeal." The broad principle underlying this requirement is procedural fairness. Because this appeal is in the nature of a re-hearing, a critical function of the grounds is to identify the error or errors on the part of the primary judge which are the subject of complaint. The link between the grounds of appeal and the identification of error, in an appeal by way of re-hearing, seems to have been accepted as trite by Gageler J in *Minister for Immigration and Border Protection v SZVFW*:

> "To the extent necessary to address the ground or grounds on which an appellant claims that a judgment under appeal is erroneous, an appellate court in an appeal (whether in the strict sense or by way of rehearing) from a final judgment of a judge sitting without a jury 'is obliged to conduct a real review of the trial and ... of [the] judge's reasons'".

47 It is not uncommon, as a matter of practice in this Court, for arguments to be advanced on appeal which are not the subject of a ground of appeal. Because of the need for procedural fairness, the issue is normally addressed with the appellant's counsel by the Court, which often prompts an application for amendment of or addition to the grounds of appeal. This can be done immediately if the argument is anticipated by the respondent. Any claim of prejudice can usually be dealt with by adjournment.

48 In this case, the fundamental argument advanced by the appellant would require this Court to consider an issue which the primary judge found was not properly raised by the originating application, and accordingly, was not considered by him. As has already been demonstrated, the primary judge's decision about this question is not raised in the grounds of appeal. In other words, the appellant has not asserted an error on the part of the primary judge in respect of this question. The issue was squarely raised by the Court with the appellant's counsel, but no attempt was made to expand the grounds of appeal to deal with it. Although both respondents made submissions which respond to the argument advanced by the appellant concerning the merits of the original decision, it is clear, at least in the case of the second respondent, that this was an alternative position, and that the second respondent was not conceding that the argument should be entertained. Further, the primary judge has not considered nor determined the merits of the original decision of the Recorder.

49 I am, therefore, of the view that the scope of the appeal should be confined to the grounds of appeal. However, as will be seen, a consideration of the primary judge's conclusion about indefeasibility may well bring in the need to determine the fundamental issue of whether the original reservation of land in 1915 created an easement which benefits the second respondent's land, in any event. I will return to this issue in due course.

Ground 1 – Power of Recorder to revisit and reverse an act undertaken in accordance with s 139

50 The primary judge's reasoning with respect to the power of the Recorder to reverse the decision to record the benefit of the easement on the second respondent's titles relied upon his Honour's conclusion with respect to the indefeasibility of title, which he held arose pursuant to s 40 of the *Land Titles Act*. While the issue of indefeasibility was critical to his Honour's reasoning, the arguments before this Court extended beyond that question, in particular to the correct operation of s 139, and whether it authorised the Recorder to re-visit an act performed in accordance with that section. The appellant submits that if the original decision creates an error in the Register, then s 139 authorises the correction of that error at a subsequent time. The respondents submit that the omission corrected in 2019 is protected by indefeasibility, and cannot be altered or reversed under s139. The second respondent submits further that, having made the original decision in 2019, the Recorder is *functus officio* in respect of the exercise of power under s139 in respect of that question, and has no authority to revisit the decision by way of a further exercise of power. If this submission is correct, and the Recorder was not authorised to reconsider the decision and to reverse it under s 139 irrespective of the question of indefeasibility, then such a determination will be dispositive of the appeal.

51 Section 139 relevantly provides as follows:

> "(1) Subject to subsection (2) and upon such evidence as appears to the Recorder sufficient, the Recorder may correct errors or supply omissions in the Register or in any instrument or duplicate registered dealing, and may call in any certificate of title, grant, or duplicate registered dealing for that purpose.
>
> (2) When the Recorder makes an alteration pursuant to subsection (1) –
>
> (a) the Recorder shall, except as may be otherwise prescribed, authenticate the alteration and record the date of the alteration, and preserve a record of the matter which has been altered;
>
> (b) the alteration does not prejudice or affect a right accrued from a recording made in the Register pursuant to a dealing lodged before the alteration; and
>
> (c) subject to paragraph (b) , the Register, instrument, or duplicate registered dealing shall, as so altered, have the same validity and effect as it would have had if the error or omission had not occurred."

52 The construction of s 139, as with any statutory provision, begins with consideration of the plain and ordinary meaning of the text of the provision, read in the context of its place in the legislative scheme. See *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28,194 CLR 355, *Taylor v The Owners – Strata Plan No 11564* [2014] HCA 9, (2014) 253 CLR 531 per Gallagher and Keane JJ at 65-66. See also *Acts Interpretation Act* s 8A. In *Nightingale v Recorder of Titles*, I considered the legislative scheme of the *Land Titles Act*, and the role of s 139 within it. I observed that the starting point of this consideration, is, of course, the implementation by the Act of the Torrens system of registered title, and the oft quoted words of Barwick CJ in *Breskvar v Wall* [1971] 126 CLR 376 at 385 that "the Torrens system of registered title of which the Act is a form is not a system of registration of title but a system of title by registration". I went on to note as follows:

> "By s 33, the Recorder is charged with the responsibility of keeping 'a register of title to land which is subject to this Act'. It is necessarily implicit in that obligation, that the Recorder ensure that the Register is accurate. The accuracy of the Register is a fundamental assumption underlying the concept of indefeasibility, and the certainty which is sought to be achieved thereby.
>
> The Act confers substantial and varied powers upon the Recorder. It is clear that an important purpose of this conferral is to ensure that the Recorder has sufficient powers to maintain the accuracy of the Register. These include various powers to amend the Register, which are contained in Pt X of the Act. That Part is entitled 'Amendment of the Register'. Section 139 confers a general power to correct errors or supply omissions 'upon such evidence as appears to (the Recorder) sufficient'".

53 These views are not controversial, and would seem self-evident in any event. Further, the parties in this appeal point out their consistency with higher authority. For example, in *Pirie v Registrar-General* [1962] HCA 58; (1962)109 CLR 619, Kitto J, in respect of comparable provisions under New South Wales legislation, said this at [4]:

> "From the nature of the Torrens system of registration of titles, and in particular from such provisions of the *Real Property Act* as ss. 4, 12(d) and (f), 32, 40, 42 and 43, it is, I think, a necessary conclusion that the Registrar-General, as head of the department authorized to carry the provisions of the Act into execution (s. 4), is under a general duty to keep the register book clear of all notifications save those which are authorized by law: see *Wolfson v. Registrar-General* (N.S.W.) [1934] HCA 29; (1934) 51 CLR 300 . The removal of an unauthorized notification is therefore, in my opinion, an act or duty which by the Act is prescribed to be done or performed by the Registrar-General, within the meaning of s. 121.

54 Windeyer J agreed with these comments as follows:

> "The Torrens system of registered estates and interests, as it exists in New South Wales, has as its main foundation s. 42 of the *Real Property Act*. Once a grant or certificate of title has issued the Registrar-General is, I think, under a duty to permit no entries or notifications to appear on the folium of the register book except such as the law authorizes. Persons claiming equitable interests, or having other claims the notification of which on certificates of title the law does not authorize, may up to a point protect their interests by caveats. But that does not cut across the fundamental principle of the system. It follows, I think, that the Registrar-General whose duty it is to put no unauthorized entries in the register book is under a corresponding duty to remove any that ought not to be there. And that duty can, I think, be enforced by proceedings pursuant to s. 121 of the Act."

55 After considering the text of the provision and the legislative scheme, as well as other judicial views, I concluded in *Nightingale* that s 139 provided the Recorder with a "general power to correct errors in the register or an instrument… irrespective of the source of the error". The power so conferred is to be construed broadly, but is subject to some implied limitation, including the principle of indefeasibility, a point to which I will return in more detail shortly:

> "This section confers a general power of correction upon the Recorder. As both counsel have noted, the corrective power under this provision relates to errors and omissions in the Register, as well as any instrument or duplicate registered dealing. Section 3 defines "instrument" to include a plan. Section 139 is contained within Pt X, which is headed "Amendment of the Register". This Part also contains s 142. The content and structure of the Act containing these provisions, in my view, clearly evinces a legislative intention to provide the Recorder with wide power to correct errors in the Register. I reiterate my earlier point that the accuracy of the Register is a fundamental assumption underpinning the principle of indefeasibility. The powers of correction must be construed in this statutory context.
>
> Of course, the statutory purpose also requires that these powers of correction be subject to appropriate limitation. The authorities reflect judicial concern that the unqualified exercise of the power of correction could undermine and put at risk the principle of indefeasibility. Some cases support the proposition that general powers such as that contained in s 139 should be read down so that the provision applies only to the correction of administrative errors made within the office of the Recorder. However, the cases cited by Mr Sealy, *Swancare Group Inc v Commissioner for Consumer Protection* [2014] WASC 80; *Sahab Holdings Pty Ltd v Registrar-General* [2011] NSWCA 395; *DM & Longbow Pty Ltd v Registrar-General of NSW* [2016] NSWSC 1844, and the application of general principle, persuade me that the relevant provisions of this Act should not be read down in that way. The correct approach is to construe those provisions in accordance with the plain and ordinary meaning of the text, and in the context of the purpose and object of the Act (*Acts Interpretation Act*, s 8A). Applying these principles, I construe s 139 in accordance with its terms, that is that it provides the Recorder with a general power to correct errors in the Register or an instrument, including a plan, irrespective of the source of the error."

56 This approach to the construction of s 139 is consistent with judicial views expressed in respect of similar, but not identical, legislative provisions in other jurisdictions. For example in *Sahab Holdings Pty Ltd v Registrar-General*, the New South Wales Court of Appeal considered a case in which the Registrar-General had in 2001 removed the burden of an easement which provided for a right of way over adjacent land. In 2009, the registered proprietor of the dominant tenement sought to have the Registrar-General restore the right of way to the titles of the servient tenement. The proceedings were unsuccessful at first instance. An issue arose on the appeal as to whether s 12(1)(d) of the *Real Property Act* 1900 (NSW), which confers power on the Registrar-General to " upon such evidence as appears to the Registrar-General sufficient, correct errors and omissions in the Register", authorised the Registrar-General to restore the right of way to the Register. The Court of Appeal held that the earlier removal of the easement had resulted in an omission, for the purpose of this provision and other relevant sections of the legislation. It concluded that s 12(1)(d) did confer power on the Registrar-General to correct the earlier removal of the right of way. In order to arrive at this decision, the Court considered the proper construction and operation of s 12(1)(d), and in particular the suggestion which had arisen in earlier cases that such a power is limited to correction of "clerical or departmental errors", a term drawn from the judgment of Needham J in *State Bank of New South Wales v Berowra Waters Holdings Pty Ltd* (1986) 4 NSWLR 398 at 404. Campbell JA and Tobias AJA, with whom McColl JA agreed, said at [183]-[185]:

> "However, we doubt that it can be decisive of the outcome of the present case whether expungement of the right of way falls within the description of 'departmental errors and omissions'. While that expression has been used in some of the relevant cases, it is not a term that finds any place in the statute. It has been used to explain why some factual situations count as an 'error or omission' within the meaning of s 12(1)(d) while others do not, but those explanations need to be understood in the context of the particular factual situations with which the cases in question were concerned.
>
> Section 12(1)(d) and s 136(1)(b) are expressed in language that taken in isolation and literally, would confer extremely wide powers of correction of the Register, and of calling in for cancellation or correction of certificates of title and duplicate dealings. On a literal reading, there could be an error in the Register if it was inaccurate in any

> respect, regardless of why it was inaccurate, regardless of how long ago the source of the error arose, and regardless of who might be affected by correction of the error.
>
> However, it is impossible for this literal reading of s 12(1)(d) and s 136(1)(b) to coexist with the provisions of the Act that provide for indefeasibility. Enabling an indefeasible title to land to be obtained by registration is a central purpose of the Act. Reading the Act as a whole, and giving it a purposive construction, demands that the literal words of s 12(1)(d) and s 136(1)(b) be read down. The case law has attempted to identify the sorts of errors that can be corrected, consistently with indefeasibility, by describing them collectively as 'departmental errors and omissions'. However, application of that phrase is not a substitute for applying the wording of the statute, construed as a whole and purposively, to the particular fact situation that arises for decision in a particular case."

57 The decision to uphold the appeal was overturned by the High Court in *Castle Constructions Pty Ltd v Sahab Holdings Pty Ltd and Another* [2013] HCA 11, (2013) 247 CLR 149. However, this decision was made on a basis which did not relate to, nor detract from the force of, the reasoning expressed in the passages from the judgment of the Court of Appeal which have been quoted above.

58 In *Sahade v Owners Corporation SP 62022* [2013] NSWSC 1791, Kunc J applied these comments as follows:

> "Instructed by the approach of the Court of Appeal in *Sahab*, s 12(1)(d) operates as follows:
>
> (1) The Registrar-General's exercise of the power under s 12(1)(d) is subject to the balance of s 12. For example, s 12(3) governs the exercise of the power under s 12(1)(d) in ways not relevant to these proceedings.
>
> (2) The Registrar-General is to act 'upon such evidence as appears to the Registrar-General sufficient'. The proper content of that phrase was not a matter before me. However, without attempting to be exhaustive, it is to be expected that the evidence would include an explanation for how the error or omission occurred and, depending on the case, evidence as to how it could be corrected.
>
> (3) The 'errors and omissions' are not confined to errors and omissions attributable to the Registrar-General. If the Registrar-General is satisfied, as a matter of fact, that there is an error or omission in the Register, that error or omission does not lose its character as being capable of correction under s 12(1)(d) depending upon the identity of the person responsible for the error or omission.
>
> (4) Upon its proper construction, the scope of the power of correction is to be ascertained by reference to whether the correction of the error would impinge upon a right to which indefeasibility attached (see *Sahab* at [190]).
>
> (5) While not the subject of argument in these proceedings, I add for completeness my view that 'may' does not denote a discretion in the Registrar-General as that term is sometimes understood. Given the centrality of the register in the scheme of the Act (which reaches its high point in the indefeasibility provisions under s 42 of the Act), it would be an odd construction of s 12(1)(d) that would permit the Registrar-General, having come to the view that there was in fact an error or omission in the register, not to act to correct it (cf. *Pirie v Registrar-General* [1962] HCA 58; (1963) 109 CLR 619 at 623 (per Kitto J) and 644 (per Windeyer J) and, by parity of reasoning, *Hogan v Australian Crime Commission* [2010] HCA 21; (2010) 240 CLR 651 at [32]- [33])."

59 In this case, it is not necessary to go beyond these observations in respect of the operation of s 139. It is enough to observe, as I did in *Nightingale*, that the power of correction is not confined to

administrative and clerical errors or omissions for which the Recorder or his staff are responsible, and the ultimate purpose of the provision is to ensure the accuracy of the Register.

60 As already noted, the second respondent submitted that irrespective of the validity of this approach to the construction of s 139 generally, once the Recorder has exercised power under this provision, he is *functus officio* in respect of the subject matter of that decision, and cannot revisit it subsequently. However, the primary judge seemed to assume that, leaving aside the question of indefeasibility, the Recorder was authorised by s 139 to reverse the original decision:

> "Subject to any indication in the relevant legislation to the contrary, the prima facie position in Tasmania is that a statutory authority or decision-maker has the power to vary or reverse a statutory decision: *Purton v Jackson* (above) at [21]. That is a consequence of s 20(a) of the *Acts Interpretation Act* 1931, which provides as follows:
>
> '**20 Exercise of powers and performance of duties**
>
> Where an Act confers a power or imposes a duty, the power may be exercised and the duty shall be performed –
>
> (a) from time to time as occasion may require ...'".

61 His Honour did not further consider whether the legislative scheme prevented revisitation of the original decision absolutely, because he concluded that any exercise of the powers of the Recorder under s 139 was subject to the principle of indefeasibility, and that principle was determinative of the question in this case.

62 Mr Spence accepts that *Purton v Jackson* [2012] TASFC 2, 21 Tas R 310 is authority for the proposition stated by the primary judge. However, it is further submitted that that case makes clear that the prima facie position must give way to the provisions of the relevant legislation. In that case, it was held that the relevant legislative scheme compelled the conclusion that a decision by the statutory tribunal in question was final and could only be altered on appeal. There was specific provision for appeal from the tribunal's decision in the relevant legislation and this was regarded as a critical aspect informing the legislative intent.

63 The proposition advanced by Mr Spence that the effect of s 20 of the *Acts Interpretation Act* must give way to any contrary legislative intent is clearly correct. In *Nightingale*, I considered this question in relation to other powers conferred on the Recorder by the *Land Titles Act*, in particular, under s 32(4), which permits the Recorder to adjust or add to the description of land which has been brought under the Act, and s 142 which provides a process whereby the Recorder can rectify, among other things, the boundaries of land. In relation to the former, I was satisfied that the legislation permitted the Recorder to better describe the land from time to time but under specified conditions and that this restriction was inconsistent with and excluded the application of s 20(a) of the *Acts Interpretation Act*. I took a similar position in relation to s 142 because of the detailed process set out in that provision, which included a right of appeal to the Supreme Court.

64 However, I am of a different opinion in relation to s 139. As has already been observed, s 139 is a general provision, which provides the Recorder with a broad, but not unlimited, power to correct errors and supply omissions. It is part of the suite of powers provided to the Recorder for the purpose of ensuring the accuracy of the Register, which is critical to the proper operation of the system of registration of title implemented by and fundamental to the legislative purpose. In my view, provided that the provisions of s 139 are properly engaged in the circumstances, there is no reason why the Recorder cannot exercise power under that provision to revisit or vary an earlier decision made under the same section. The broad scope of the provision and its legislative purpose to keep the Register accurate, supports such a conclusion. There is nothing in the text of the legislation which suggests that the prior exercise of power under the provision precludes a later decision which has the effect of

reversing or altering it. There are powers of review that can apply to a decision under s139, for example s144, but these are general provisions which do not apply specifically to s 139, and do not evince an intention inconsistent with s 20(a) of the *Acts Interpretation Act.* Mr Spence submitted that this Court should conclude that a power which permits reversal of an earlier decision is inconsistent with the legislation because as a matter of practicality, it would permit repetitive and unlimited requests for reversal. In other words, it would become unworkable. Counsel submits further that this undesirable practical consequence would be compounded by repetitive court review, if s 144 applies to decisions under s 139. I see little merit in this argument. These consequences flow inevitably from, and are inherent in, the operation of s 20(a) of the *Acts Interpretation Act*. It is a clear legislative choice and there is nothing in the *Land Titles Act* which is inconsistent with it. In any event, I doubt that the practical consequence is as dire as Mr Spence would have it. Repetitive requests for re-consideration without further evidence would undoubtedly be met with the same answer, both by the Recorder and upon review by the Court. The latter's decision would carry costs consequences.

65 I conclude, therefore, that having regard to s 20(a) of the *Acts Interpretation Act,* the Recorder may exercise the power under s 139 from time to time "as occasion may require", and is not precluded from doing so because the exercise of power relates to an earlier act performed under that section. However, it must be borne in mind that the further exercise of power is not a review or appeal from the earlier decision. A further exercise of power under s 139 is only authorised if, at the time of exercise, the statutory preconditions provided in that section are met. This is the clear effect of s 20(a) and, in the case of an exercise of power which will reverse or alter an earlier act under that section, is the consequence of s 139(2)(c).

66 This construction of s 139 is consistent with the reasoning of the High Court in *Castle Constructions Pty Ltd v Sahab Holdings Pty Ltd and Another*. The Court held that at the point at which the Registrar-General was being asked to exercise power under s 12(1)(d) to restore the right of way to the title of the servient tenement, it could not be said that the absence of the easement from the title amounted to an "omission" from the Register. It had been deliberately removed by the Recorder some years before, and this act had altered the Register accordingly. Hence, the easement had not been omitted in the sense of being "left out."

67 This reasoning is also consistent with the approach taken by the primary judge in this case. His Honour reasoned that although the Recorder had power to act under s139 in respect of the easement from time to time, at the point that the Recorder was being asked to reverse the decision and remove the record of the benefit of the easement on the second respondent's titles, the principle of indefeasibility, which his Honour found arose under s 40(2), applied and protected the Register as it was at that time.

68 Accordingly, I conclude that this argument, to the extent that it underpins ground 1, has merit. However, the dispositive question which arises under all of the grounds of appeal, including this one, is whether the primary judge was correct in holding that the recording of the benefit of the purported easement on the second respondent's titles was protected by indefeasibility. If so, then this ground, and the appeal generally must fail.

Jurisdiction - Section 144

69 As already discussed, the originating application is based on the jurisdiction of the Supreme Court conferred by s 144(2). Both respondents argue that s 144 is not properly engaged, and accordingly, the court of first instance did not have jurisdiction to entertain the application. Hence, it is argued, although the primary judge proceeded on the assumption that there was jurisdiction, the actual lack of jurisdiction deprives this Court of a jurisdictional basis to consider the appeal, and it should be dismissed as incompetent. Having regard to my conclusions concerning the scope of the appeal, and the capacity of the Recorder to act under s 139 to correct an error in the Register by reversing the original 2019

decision, it is convenient at this point, before moving on to the remaining grounds of appeal, to consider the arguments raised by the respondents with respect to jurisdiction.

70 Section 144 relevantly provides as follows:

> "(1) Subject to subsection (6), if the Recorder –
>
> (a) refuses to do an act which the Recorder is required or empowered to do under this or any other Act; or
>
> (b) gives a direction or makes an order upon the Recorder's own motion or upon an application while exercising the Recorder's powers under this or any other Act –
>
> a person who believes that person to be aggrieved by the refusal, direction, or order may require the Recorder to state in writing the grounds for the Recorder's refusal, direction, or order notwithstanding that the Recorder has acted under a discretionary power.
>
> (2) A person referred to in subsection (1) may proceed against the Recorder by summons in the Supreme Court requiring the Recorder to justify the Recorder's refusal, direction, or order, and the Court may make such order as it thinks fit.
>
> …
>
> (6) This section does not apply where the Recorder has acted pursuant to another Act that provides for an appeal to the Supreme Court."

71 The basis of this Court's jurisdiction is set out in subs (2). Clearly, that jurisdiction is dependent on a "refusal, direction, or order" by the Recorder. There can be no question that those terms refer back to their use in subs (1). Although submissions were made by the respondents concerning what amounts to a direction or order, my determination of the limited scope of the appeal results in that question now being irrelevant. The question is whether the Recorder refused to do an act which he was required or empowered to do under the Act. The only relevant act is the reversal of the order and consequent removal of the record of the easement from the second respondent's titles pursuant to powers under s 139. The primary judge's finding that the Recorder was not empowered to act under that provision because it would infringe the principle of indefeasibility was the basis of his decision that the jurisdictional basis of the summons was not satisfied. If his Honour was correct about the question of indefeasibility, then clearly he was correct about this question as well. I will consider that matter shortly.

72 However, the respondent's raise further arguments in respect of the application of s 144 (2):

- That a precondition of the jurisdiction conferred by that provision is that the Recorder has first been required under subs (1) to state in writing the grounds for the refusal. The second respondent's counsel points out that at no time did the appellant make that requirement of the Recorder in respect of the refusal to reverse the original decision. The letters dated 18 December 2019, 18 February 2020 and 2 March 2020 require the Recorder to reverse the decision, not to state the grounds for not doing so. The correspondence of 6 August 2020 and the Recorder's reply refer to the original decision. This point was made by the primary judge, as I have noted already.

- That in any event, the appellant cannot be considered to be a "person…aggrieved by the refusal".

73 Before considering the detail of these arguments, it is useful to consider the statutory context of s 144. It is clear, in my view, that the section is intended to provide an avenue of redress for persons aggrieved by decisions taken by the Recorder. Such a provision complements the role of the Recorder in discharging his duties under the legislation, and of contextual importance in this case, in ensuring the accuracy of the Register. There are commensurate provisions in other jurisdictions, see for example s 122, *Real Property Act* (NSW). While these provisions are in different terms, their purpose is the same,

to provide a broad reaching avenue for redress of decisions made by the Registrar-General. In my view s 144 should be regarded in this way, that is as a catchall provision for such redress.

74 The general nature of the provision is reinforced both by specific rights of appeal under particular provisions, see for example s 142, and s 144(6) which provides that it will not apply where the Recorder has acted pursuant to "another Act that provides for an appeal to the Supreme Court." This supports the view that the section is intended to provide a general avenue of review except in the specific circumstance provided by subs (6). Mr Spence points out that there are, in fact, other ways in which the original decision to record the easement could be challenged, and accordingly that this should restrict the general application of the provision, and its application in this case. In particular, he submits that the appellant could seek a declaration concerning the validity of the purported easement, or apply for review of the decision under the *Judicial Review Act* 2000 (the JRA). I am not persuaded by this argument. The specific ouster of jurisdiction by s 144(6) does not include either of the alternatives posited by Mr Spence. In any event, the power of review under s 144 would seem to be granted in more general terms than the limited grounds of review available under the suggested alternatives. I note also the provisions of s 13 of the JRA.

75 In *Nightingale*, I did make some comments about the nature of the discretion afforded to the Court by s 144 (2):

> "By virtue of s 144(2), because the Recorder has been required to justify her refusal but has failed to do so, this Court now has the power to make such order as it thinks fit. The only sensible interpretation of this provision, is that it empowers the Court to order the Recorder to do that which she is empowered to do and, in the opinion of the Court, should do. The Court's power, as explained, is clearly discretionary.
>
> Of course, a dispute about the ownership of land may, in some circumstances, be dependent upon the determination of rights in personam, founded on law or equity, and in such a case, it will be necessary for the parties to bring proceedings in court to resolve the question: see *Hillpalm Pty Ltd v Heaven's Door Pty Ltd* [2004] HCA 59, 220 CLR 472. "

76 The case referred to, *Hillpalm Pty Ltd v Heaven's Door Pty Ltd*, is a good example of circumstances in which the court might decline to exercise discretion under s 144. The case related to a claim by the respondent that it was entitled to an easement over the appellant's adjacent land, in order to facilitate access to its property. It was common ground that no easement existed, but the claim was based on a condition of planning approval of the subdivision creating the blocks, which required the creation of the easement. In a decision in which two of the five judges dissented, the majority determined the appeal on the basis that the planning condition was not binding on the appellant. However, it also considered the respondent's claim that the condition created a right to an easement "in rem". The majority observed that if such a right existed, it would have been defeated by the indefeasibility of the title at the time that the appellant became the registered proprietor of the asserted servient tenement. However, the judges concluded that the claim for the easement, if successful, would not have created a right "in rem" but was a personal claim based on rights arising under different statutory provisions, which fell under the general umbrella of a claim in law or equity. Such a claim would not be defeated by indefeasibility, but also would need to be determined by action through the courts outside the system of land registration.:

> "If the consent to the subdivision did create a right in rem, that would be a right or interest in the land not shown on the Computer Folio Certificate. There would then be a real and lively question about how the two statutory schemes (the scheme under the EPAA and the Torrens system for which the Real Property Act provides) were to be reconciled, and questions of implied repeal or amendment might arise. But those questions are not raised by this matter. That is because it was common ground that the appellant's title was not and is not now subject to any interest of the kind which the respondent asserted it was entitled to have the appellant create in its favour. If the respondent has any such right, *it is a right to have an interest in land created and that is said to be a right enforceable by personal action against the appellant, not by any*

> *action or application to rectify the Register maintained under the Real Property Act.* That right, if it exists, is not a right in rem." (the emphasis is mine).
>
> The availability of rights in personam is entirely consistent with the Torrens system of title. The immediate indefeasibility of a title to land under the Torrens system does not deny "the right of a plaintiff to bring against a registered proprietor a claim in personam, founded in law or in equity, for such relief as a court acting in personam may grant" and those proceedings "may have as their terminal point orders binding the registered proprietor to divest himself wholly or partly of the estate or interest vested in him by registration". If the respondent has a right against the appellant, it is a personal right, not a right in rem, and that personal right must be found, if at all, in the relevant statutory provisions."

77 The case before us does not depend on rights to be established or created "in personam" under law or equity. It concerns the effect of past transfers of land, directly subject to registration under the *Land Titles Act*. There is no apparent reason why it would be inappropriate for the Court to make such order under s 144(2) "as it thinks fit".

78 With respect to the arguments raised by the respondents concerning the standing of the appellant to bring the application, I am satisfied that the definition of "a person referred to in subsection 1" refers to "a person who believes that person to be aggrieved by the refusal, direction or order", and has "required the Recorder to state in writing the grounds for the Recorder's refusal, direction or order". However, both aspects of this qualification should be given a broad interpretation, consistent with the general approach to the section. The strict terms of the provision suggest that a subjective and honest belief is sufficient to satisfy the first aspect. Whether this is correct or not, the approach of courts, at least in this State, to the assessment of what is meant by a person aggrieved for the purpose of standing to bring proceedings under relevant legislation has always received a broad interpretation, see *McCarthy v Xiong* [1993] TASSC 48, 2 Tas R 290. In this case I do not think there is any doubt that the appellant falls within the relevant category. Clearly it is "really and directly interested in the proceedings" per Green CJ in *McCarthy v Xiong* quoting *Day v Hunter* [1964] Vic Rep 109 [1964] VR 845.

79 I think the same considerations must apply to the question of whether the appellant's correspondence requested a statement of the grounds of refusal. I note firstly that the requirement relates to "grounds" not full reasons. Although the correspondence was argumentative, it was clearly directed to either compliance or impliedly invited a more complete statement of grounds. This was clearly how it was interpreted by the Recorder. In any event, the Recorder had stated his grounds for the 2019 decision in the original "courtesy" letter sent in 2019, and in the responses to each of the subsequent items of correspondence. Each can only reasonably be interpreted as a ground, not only for the original decision, but also for refusing to alter or revisit that decision. In my view, the appellant clearly has standing to apply to the Court under s 144(2). The respondents' submissions about this are rejected.

80 Accordingly, it follows that I am satisfied that these proceedings are competent, and, subject to the question of indefeasibility, properly engage the Court’s jurisdiction under s 144. Of course, ultimately if the primary judge's determination concerning the question of indefeasibility is correct, then so is his Honour’s related decision on the question of jurisdiction.

Indefeasibility

81 The primary judge's finding in relation to the power of the Recorder to reverse the recording of the benefit of the easement relied on the following propositions:

- That the powers of the Recorder under s 139 are subject to the provisions of the Act which implement the principle of indefeasibility. His Honour relied, in particular, on s 40 (1) and (2) in this regard.

- That upon the Recorder recording on the titles of the second respondent the benefit of the easement, the second respondent "became the registered proprietor of the right of way on 20 December 2019 and its title as such is indefeasible". Again, his Honour relied on s 40(2) to support that proposition.

- That because of this indefeasibility, the Recorder did not have power to reverse the recording of the benefit of the easement on the titles of the second respondent. Accordingly, the appellant "was not a person or entity to whom s 144(1)(a) applied, and was not entitled to institute a proceeding pursuant to 144(2)".

82 Grounds 2, 3 and 4 attack this reasoning in various ways. Firstly, the appellant argues that s 139 should be construed as an exception to indefeasibility, notwithstanding that it is not referred to in the exceptions set out in s 40(3) and (4). It is submitted that the Recorder can act under s 139 to correct errors and supply omissions in the Register notwithstanding the indefeasibility provisions of the Act, although the appellant concedes that the power to do so is limited. This is the argument raised by grounds 2 and 3. Ground 4 challenges the finding that the recording of the benefit on the second respondent's titles resulted in the second respondent acquiring an indefeasible title to the easement. I will consider these questions in turn.

Grounds 2 and 3 – Section 139 and indefeasibility

83 At the outset, I observe that the appellant's arguments concerning the relationship between s 139 and indefeasibility conflate the power to review a decision under s 139 with the question in issue in this case, the further exercise of power under s 139 to reverse or alter an earlier act under that section. The former argument also brings into consideration whether any indefeasibility arising from the original recording in 2019 is subject to or deferred until the completion of such review. Given the scope of the appeal, the 2019 recording and questions relating to it do not arise and I express no view about them.

84 However, the general question of whether and, if so, the extent to which s 139 operates as an exception to indefeasibility is relevant within the context of the issue in this case. The primary decision and the debate in this appeal focussed on the provisions of s 40. As I will explain shortly, the statutory basis of the protection afforded by the Torrens system, as it is constituted under the Act, is wider than that provision. However, insofar as s 40 is relevant, it is not suggested that the primary judge erred in his observation that none of the exceptions to indefeasibility, as it is applied by that section, are relevant to this case. The effect of the appellant's argument is that the legislation should be construed in a way which, in effect, makes those provisions subject to s 139.

85 In this regard, I repeat and endorse what I said in the case of *Nightingale*:

> "However, I also accept that there is implied in s 139 a limitation that the power of correction should not be utilised in a manner which undermines or threatens the principle of indefeasibility. In particular, the relevant sections should not be construed as authorising correction in circumstances in which rights which would otherwise be protected by the principle of indefeasibility are affected. It is not appropriate, in this case, to fully explore the extent of the practical application of that limitation."

86 The conclusion expressed in this passage is consistent with judicial views expressed in other jurisdictions, including in those cases already discussed. I refer, in particular, to the observations quoted above from *Sahab Holdings Pty Ltd v Registrar-General* and *Sahade v Owners Corporation SP 62022,* in respect of the position in New South Wales. Further, as already explained, it is consistent with the reasoning of the High Court in *Castle Constructions Pty Ltd v Sahab Holdings Pty Ltd and Another*.

87 Accordingly, I am satisfied that the primary judge was correct in his conclusion that in determining whether to take action to correct an error under s 139 which may have arisen as a result of the initial decision to record the benefit of the easement on the second respondents titles, the Recorder

was bound by the provisions of the Act which implement the general principles of protection afforded by the Torrens system. It follows that there is no merit in grounds 2 and 3.

Ground 4 - Did the second respondent acquire an indefeasible estate or interest to the benefit of the easement?

88 As already discussed, the critical finding of the primary judge was that the second respondent acquired title to the right of way which became indefeasible upon registration of the easement on its titles. A review of that finding calls for examination of what is meant by indefeasibility under the *Land Titles Act* and the application of that concept to the facts of this case.

89 As the primary judge correctly observed at [15]:

> "Indefeasibility of title is a central and essential feature of the Torrens system of land titles. The Torrens system, of which the *Land Titles Act* is a form, is "not a system of registration of title but a system of title by registration": *Breskvar v Wall* (1971) 126 CLR 376 at 385; *Castle Constructions Pty Ltd v Sahab Holdings Pty Ltd* [2013] HCA 11, 247 CLR 149 at [20]."

90 The words quoted by his Honour from *Breskvar v Wall* were taken from the judgment of Barwick CJ. In that case, the High Court was dealing with relevant legislation in Queensland. Barwick CJ went on to make the point that the application of the Torrens system in a particular jurisdiction arises by virtue of legislative provisions. His Honour noted in respect of the legislative form of the system of registration throughout the Commonwealth, that there was little uniformity in that respect:

> "I have thus referred under the description, the Torrens system, to the various Acts of the States of the Commonwealth which provide for comparable systems of title by registration though these Acts are all not in identical terms and some do contain significant variations. It is I think a matter for regret that complete uniformity of this legislation has not been achieved, particularly as Australians now deal with each other in land transactions from State to State."

91 Hence, although the general intention of the Torrens system is understood, it is critical that it is applied in a particular case according to the relevant legislative provisions applicable in the jurisdiction.

92 The critical elements of the system of "title by registration" was further explained by the High Court, in a joint judgment, in *Deguisa v Lynn* [2020] HCA 39; (2020) 268 CLR 638:

> "As Professor Whalan has explained, the Torrens system is characterised by the guarantee of the State that the title which it produces to a person seeking to take an interest in a parcel of land is an accurate and comprehensive statement of the state of the title to that land, as to both the title of the registered owner and the interests of others in that land. With the benefit of that guarantee, a person dealing with a registered proprietor of land need look no further than the registered title and the interests notified on it in order to ensure that his or her dealing does not miscarry."

93 This passage points out the two essential components of the system. These are firstly the "title of the registered owner" in the land and secondly "the interests of others in that land". The fundamental assumption is that an examination of the Register will identify the nature and extent of the proprietary interest held by the registered proprietor and by those taking an estate or interest in the land, and further will protect the title of the registered proprietor against any claims by others not notified on the Register. In respect of both, the Register will be conclusive and exhaustive. In some Australian jurisdictions, both components are provided for in the same section. However, under the *Land Titles Act,* they are implemented by the combined effect of two sections. Section 39 provides for the conclusive nature of the estate or interest in the land recorded in favour of the registered proprietor or person entitled to a recorded estate or interest, and s 40 protects the interest of the registered proprietor with respect to the

interests of others in the land, by providing that the owners' title is "subject only" to estates or interests recorded on the folio. I set out the relevant parts of these provisions below:

> "39 Folio of the Register conclusive evidence of title, &c.
>
> (1) A folio of the Register is evidence of the particulars recorded in the folio.
>
> (2) Except as otherwise provided in this Act, a folio of the Register is conclusive evidence that –
>
> (a) the person named in the folio as registered proprietor of or as taking an estate or interest in the land described in the folio is entitled to that land for that estate or interest; and
>
> (b) that land has been duly brought under this Act.
>
> 40 Estate of registered proprietor indefeasible
>
> (1) For the purposes of this section *indefeasible*, in relation to the title of a registered proprietor of land, means subject only to such estates and interests as are recorded on the folio of the Register or registered dealing evidencing title to the land.
>
> (2) Subject to subsections (3) and (4) , the title of a registered proprietor of land is indefeasible."

94 The complementary yet distinct effect of these provisions has particular relevance when considering an easement. By definition, an easement must have a dominant tenement, which enjoys the benefit of the easement, and a servient tenement which bears the burden thereof. An easement falls under the definition of "land" contained in s 3 of the *Land Titles Act*, and hence the burden and benefit arising under it runs with the land in each case. It follows from the provisions of s 39(2) that the recording of an easement on the folio of the servient tenement establishes conclusively that the "person named in the folio ... as taking an estate or interest in the land described in the folio is entitled to that land for that estate or interest". It is important to note that the wording of s 39 refers to the person named in the folio "as registered proprietor of" and "as taking an estate or interest in the land described in the folio" disjunctively and separately. In the case of an easement, the interest of the person entitled to the benefit thereof, is protected by the registration of the easement on the title of the servient tenement, by the combined effect of s 39 and 40. This was explained in respect of the servient tenement by Brennan J in *Parramore v Duggan* [1995] HCA 21, (1995) 183 CLR 633:

> "There is a difference between the terms used to describe the subject of conclusive evidence in s 39(2)(a) and the terms used to describe the subject of indefeasibility in s 40(1) and (2). Section 39(2) relates to the entitlement of a 'registered proprietor of or (a person) taking an estate or interest in the land described in the folio'. Section 40 confers indefeasibility on 'the title of a registered proprietor of land' subject to the 'estates and interests ... recorded on the folio ... evidencing title to the land'. Indefeasibility necessarily relates to the title to land which might otherwise be defeated. It is erroneous to regard indefeasibility as relating to an interest which merely confers rights in or over the land of another registered proprietor whose title is indefeasible. A registered proprietor of a dominant tenement has an indefeasible title to the land to which the easement is appurtenant but the easement is not indefeasible. Similarly, where the servient tenement is land to which a registered proprietor has title under the Act, that title is indefeasible. Unless the easement is registered on the certificate of that title, or unless the easement falls within one of the exceptions contained in s 40(3), the unencumbered title of the registered proprietor of the servient tenement is not subject to the easement: see s 40(1). In other words, the registered proprietor of land to which an easement is appurtenant has an indefeasible title to that land but not to the easement, so that the easement cannot be enforced unless the certificate of title of the registered proprietor of the servient tenement states that that title is subject to the easement or unless the easement falls within s 40(3)(e) of the Act."

95 It follows in my view that s 40 has little to do with the determination of this case. As Brennan J noted, that section is concerned with the interests of others in the land to which the title of the registered proprietor is subject, and which might otherwise defeat that title. The protection of indefeasibility under that section is therefore concerned with the effect of the registration of the easement on the title of the servient tenement. Further, by s 39, registration of the easement of the title of the servient tenement conclusively establishes that the registered proprietor of the dominant tenement "is entitled to the land for that estate or interest".

96 The question which arises in this case is the effect of registration of the benefit of a purported easement on the folio of the dominant tenement. Such registration is required, see s 105. By s 106, a statement in a folio of the Register to the effect that the land comprised in the folio has the benefit of an easement shall be conclusive evidence that the land has that benefit. In *Parramore v Duggan,* Toohey J explained, with Brennan J's agreement, that this is "an evidentiary provision" which "prevents a collateral attack upon the existence of an easement to which the title refers". His Honour concluded that the provision could not override the indefeasibility afforded by s 40 in respect of the servient tenement, although it would "give force to the respondent's claim …where there was a provision which made all easements exceptions to the indefeasibility provided by the Act…".

97 In any event, it is likely that s 106 does not add much to the effect of s 39. It can be accepted that the benefit of the easement is an estate or interest in the land benefitted, as well as the burdened land. As such, the estate or interest is protected upon registration on the title of the dominant tenement as conclusive by s 39. However, the protection afforded by that section is confined to "the estate or interest described in the folio". The appellant's argument, of course, is founded on the proposition that the reservation of land which was said to create an easement did not actually do so because it did not identify a dominant tenement and conferred at the most a personal right of way in favour of individuals. It did not create "an estate or interest in the land" described in the second respondent's titles. Accordingly, in order to assess the nature of any conclusivity arising from recording the purported easement on the second respondent's titles, it is necessary to examine what was "described in the folio" in order to determine whether it was of "an estate or interest" in the second respondent's land. If so, then it will be protected as conclusive by s 39.

98 This conclusion applies with equal effect to s 106. That provision will only apply where there is "a statement in a folio of the Register to the effect that the land comprised in the folio has the benefit of an easement". Further, s 106(2) provides that:

> "Subsection (1) shall not be construed so as to give effect as an easement to a right which is not recognized as an easement at common law."

99 At common law, the identification of a dominant tenement is an essential requirement of an easement. *Gapes v Fish* [1927] VLR 88.

100 This view is consistent with authorities which establish that the mere recording of an instrument on what is purported to be the dominant tenement is not of itself conclusive of the existence of an easement. These authorities establish that it is necessary to examine what is recorded in the memorial on the title, as well as any instrument referred to in the memorial which forms part of the Register, in order to determine the true nature of the estate or interest protected by provisions, which in this State have the effect of s 39 and 40. In *Bursill Enterprises Pty Ltd v Berger Bros Trading Co Pty Ltd* [1971] 124 CLR 73, the High Court was concerned with an instrument which was notified on the certificate of title as a right of way, but which when the instrument itself was examined, revealed that it was in fact a transfer of land. The case was concerned with Torrens system provisions under *Real Property Act* 1900 (NSW). The critical issue was whether what was notified by the register was limited to the description in the title, which was incorrect and misleading, or included the actual and different nature of the interest as described in the underlying instrument. The instrument had been registered as part of the register book. The majority held that the notification included the underlying registered instrument, and

accordingly, conclusivity and indefeasibility attached to a transfer of land rather than simply an interest described as a right of way. In other words, in order to determine the true nature of the estate or interest protected by the legislative provisions applying the Torrens system, it was necessary to go beyond the memorial on the title, and to examine the terms of the underlying instrument. As Barwick CJ said:

> "It seems to me that it was not intended that the certificate of title alone should provide a purchaser dealing with the registered proprietor with all the information necessary to be known to comprehend the extent or state of that proprietor's title to the land. The dealings once registered became themselves part of the Register Book. It was therefore sufficient that their registration should be by statement of their nature recorded on the certificate of title.
>
> However, the endorsement in this case was not confined to the words I have set out. Both in the endorsement in 1862 and in the endorsement on the present certificate of title a description of what the memorandum of transfer achieved appears. In practical terms this inadequate description cannot be of moment because even to ascertain the nature and extent of the right or rights of way which it is said to have created or extended the memorandum of transfer must be searched and examined.
>
> In affording protection to purchasers of land under the Act against the consequences of failure to search, s. 43A (2) expressly confines the effect of that protection to a failure to search registers not kept under the Act. To my mind, it is inescapable that a person dealing with the registered proprietor in this case would be bound to search the registered dealing of which particulars were endorsed on the relevant certificate of title. Further, s. 42 says that the registered proprietor holds the described interest in land subject only, with the stated exception, to 'notified' encumbrances etc. and s. 43 does not protect a purchaser from the effect of notice of registered interests. In my opinion, no purchaser from the registered proprietor in this case could properly claim to hold the land free of the registered estate or interest created by the memorandum of transfer of 1872."

101 This decision was followed in this respect by the High Court in *Westfield Management Ltd v Perpetual Trustee Co Ltd* [2007] HCA 45, (2007) CLR 528. The case was concerned with an easement duly registered on both dominant and servient tenements. The issue concerned the extent of the benefit afforded by the easement, in particular whether it extended to other land owned by the registered proprietor of the dominant tenement. The High Court concluded that the rights afforded by the easement depended upon the construction of its terms, but excluded consideration of extrinsic evidence, on the basis that to do so would infringe the principles of the Torrens system. The relevant material was that which would be available to a third party searching the register, including both information on the folio and relevant registered instruments:

> "Section 31B of the RP Act requires the Registrar-General to maintain the Register. The Register comprises, among other instruments and records, both folios and dealings registered therein under the RP Act (s 31B(2)). A 'dealing' includes any instrument registrable under the provisions of the RP Act (s 3(1)). Section 96B classifies the Register as a public record and provides for its inspection.
>
> Together with the information appearing on the relevant folio, the registration of dealings manifests the scheme 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. This important element in the Torrens system is discussed by Barwick CJ in *Bursill Enterprises Pty Ltd v Berger Bros Trading Co Pty Ltd*."

102 The passages quoted above from *Bursill* were also quoted with approval, and some explanation, by the High Court in *Deguisa v Lynn*. The court in that case emphasised that it is only registered instruments which inform the nature of the estate or interest protected by the Torrens provisions.

103 By s 33(4) of the *Land Titles Act*, the Register comprises both folios of the Register and "the dealings registered under this Act and any of the Acts specified in Schedule 2". This includes the *Real*

Property Act 1862. It follows that the information necessary to determine the nature of the estate or interest "described in the folio" for the purposes of s 39, will include both the particulars recorded on, and the content of any registered dealing referred to in, the folio.

104 I therefore conclude that although the primary judge correctly considered that the 2019 recording on the second respondent's title attracted the provisions which incorporate the Torrens system of registration, he incorrectly determined that the Recorder was prevented from undertaking an act which had the effect of reversing or altering that recording by the indefeasibility provisions of s 40. The correct question was whether the memorial of the instrument 13/7548 and the description recorded at Schedule 2 of CT Vol 67868 Folio 2 recorded an estate or interest in the land contained in that folio, and was thereby protected as conclusive by the provisions of s 39 and 106. In my view, the answer to this question required an assessment of the effect of the Memorial and, if part of the Register, the underlying instrument. This necessarily required his Honour to assess and rule upon the appellant's arguments in this regard concerning whether these created an easement, and in particular whether there was identification of a dominant tenement. If the reservation in fact created an easement, then the benefit thereof runs with the land of the dominant tenement**.** However, if, as the appellant argues, it did nothing more than confer a personal licence, then neither s 39 nor s 106 will add anything to this, and will not prevent the Recorder acting under s 139 to correct the Register. I am therefore of the view that ground 4 has been made out.

Disposition

105 Although I have concluded that the primary judge erred in this respect, the question is what, if any, practical effect this has on the outcome of the appeal. The reasoning process necessitated by the above provisions of the Act identifies and emphasises that the critical question in this case is whether the original reservation of land created an easement which benefited the second respondent's title or merely resulted in a personal licence. Of course, the question which arises in the case of the latter finding is whether the recording of the instrument constitutes an error in the Register and, if so, whether the Court should exercise its discretion to remove it.

106 Ultimately, however, the practical issue of concern to the parties is whether there is an enforceable easement over the appellant's land which benefits the second respondent's land. The second respondent argues that there are other more appropriate avenues of redress available to the appellant in respect of this question. However, as I have demonstrated, this issue is critical to the resolution of the originating application, and the exercise of the Court's jurisdiction under s 144. Accordingly, the issue should be determined in these proceedings. The question is whether that should occur on a rehearing by the primary judge, or by this Court.

107 In my view, the appropriate order is a rehearing before the primary judge. There are a number of questions still to be determined on the trial. This includes the admissibility of the evidence. Further, the primary argument of the appellant concerns whether the original reservation identifies a dominant tenement. The High Court in *Deguisa v Lynn* emphasised the point that the enquiry concerning the effect of the Register extends only to documents which are actually part of the Register and does not extend to material which is not, notwithstanding that it may be incorporated by reference. While this case was concerned with indefeasibility of the title of the servient tenement of the nature arising under s 40, the same principle in my view applies to the conclusivity of the estate or interest recorded on the title of the asserted dominant tenement. This question is not clear from the material before this Court, and is a matter appropriately resolved on a hearing. Finally, if the Court finds that the recording is not protected by s 39 and s 106, then it will still need to consider what order "it thinks fit", and this may be influenced by other considerations raised by the parties on the evidence. These questions are best determined on a full hearing, and that should occur before the learned primary judge. This will also preserve rights of appeal arising from such a hearing, on questions which have not yet been determined by his Honour.

108 Accordingly, I would allow the appeal and order that there be a rehearing of the originating application.