

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Spencer v. The Registrar of Titles, from the Supreme Court of the State of Western Australia; delivered the 24th January 1908.*

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Present at the Hearing :

LORD MACNAGHTEN.

LORD ROBERTSON.

LORD ATKINSON.

LORD COLLINS.

SIR ARTHUR WILSON.

*[Delivered by Lord Atkinson.]*

This case comes before their Lordships for the second time.

The action was originally brought by the Appellant against the then Registrar of Titles under the Transfer of Land Act, 1893, to recover damages for being deprived of a certain parcel of land situate at Perth, in the State of Western Australia, described as Perth Town Lot P. No. 8, of which one Terrence Farrelly had become the registered proprietor, and in respect of which a certificate of title had on the 16th December 1875 been granted to him.

The title to this parcel of land set up by the Plaintiff, and in respect of which he claimed, was as sole surviving trustee of a settlement, dated the 6th October 1846, made on the intermarriage of his father and mother, and also as beneficial owner thereunder, subject to the life estate of his father, who had outlived his mother, and died on the 25th June 1903. A

special case was stated in the action, and the questions which came before their Lordships for consideration on the first occasion were the following :—

(1) Is the contention of the Plaintiff (the Appellant) right? And is he entitled to claim for deprivation of title by reason of the grant of a Certificate of Title to Terrence Farrelly?

(2) Is the Plaintiff's alleged claim barred by Section 211 of the Transfer of Land Act, 1893?

(3) If the answer to the first question be in the affirmative and the answer to the second question in the negative, what is the measure of damages to which the Plaintiff is entitled?

Their Lordships then decided humbly to advise His Majesty that the first of these questions should be answered in the affirmative, the second in the negative, and that all further proceedings in the action should be remitted to the Supreme Court of Western Australia. *See* 1906 A.C. 503.

At p. 510 of the report, the following passage occurs in the judgment, which was delivered by Lord Davey :—

“Their Lordships are further of opinion that the title of the Appellant to commence this action accrued on the death of Spencer, when the trust for sale came into operation. And in that case the learned counsel for the Respondent admitted that the Appellant was not barred by s. 211 of the Transfer of Land Act, 1893.”

The third question so remitted having come on for consideration before the Supreme Court, an issue was raised as to whether in assessing the damages to which the Plaintiff was entitled for the loss and deprivation of his land there ought to be included the value of certain buildings erected upon it between the month of December 1875, when Farrelly became the registered proprietor, and the month of June 1903, when the Plaintiff's beneficial interest would have come into possession. The Supreme

Court decided this issue in favour of the Defendant, and by Order dated the 29th October 1906 directed that the answer to the third question in the special case should be that the measure of damages to which the Plaintiff was entitled was the value of Perth Town Lot P. No. 8 on the 25th June 1903, exclusive of the buildings erected after the 16th December 1875. From this Order the present Appeal to this Board has been taken.

The statute under which the certificate was granted was repealed, and practically re-enacted, by the Transfer of Land Act, 1893. And it is upon the construction of section 207 of the latter statute that the question for decision turns.

This section runs as follows :—

“Any person who shall have sustained or shall hereafter sustain any loss or damage in or by the exercise by the Commissioner of any of the powers conferred on him by ‘The Transfer of Land Act, 1874,’ or by this Act \* \* may \* \* bring an action against the Registrar as nominal Defendant for recovery of damages, and may recover the damages awarded, together with the costs of the action out of the Assurance Fund.”

It is admitted that the Plaintiff has been deprived of his estate and interest in this parcel of land, and has therefore sustained “loss or damage” through the exercise by the Commissioner of his powers under the Act. The question is, how is the loss or damage to be measured? Is it to be measured by reference to the value of the plot of land in the state in which it existed on the 16th December 1875 (the date of the certificate), that is, of course, with any buildings then erected upon it, or by reference to its value on the 25th June 1903, when Henry Spencer, the tenant for life, died, in its then existing state, that is, with the buildings upon it at this latter date? It is obvious that the damages must be measured

with reference to the one or to the other of these standards. There can be no third. This Board has already decided that the Plaintiff's right of action only accrued on the death of the tenant for life, but that must have been because it was considered that he only then sustained the "loss or damage" in respect of which he was by the statute enabled to sue. If that be so, this "loss or damage" must be measured by the value of the land in the state in which it was at the time when he was to be taken to have been deprived of it; that is, of course, with the buildings then upon it. The question, therefore, is, in reality, covered by the former decision of this Board.

Their Lordships are accordingly of opinion that the decision of the Supreme Court is erroneous, and the Order of the 29th October 1906 illogical, in this, that, while it, in effect, awards damages to the Plaintiff in respect of any enhancement of the value of the land which may be due to the progress of events from the 16th December 1875 to the 25th June 1903—thereby recognising that he was at this latter date deprived of his interest and suffered his loss—yet withholds from him all damages in respect of the value of the buildings which had been erected upon it during that period, and which, in law, belong to it.

Their Lordships will therefore humbly advise His Majesty that this Appeal be allowed, and the above-mentioned Order of the 29th October 1906 be varied by striking out therefrom the words "exclusive of the buildings erected after the 16th day of December 1875," and inserting immediately after the words "Perth Town Lot P. No. 8" the words "with the buildings thereon."

The Respondent will pay the costs of this Appeal.

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