Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of The Municipal Council of Sydney v. *Frederica Sarah Fleay and others, from the Supreme Court of New South Wales; delivered the 4th April* 1911.

PRESENT AT THE HEARING:

LORD MACNAGHTEN.
LORD ROBSON.
SIR ARTHUR WILSON.

[DELIVERED BY LORD MACNAGHTEN.]

The question involved in this Appeal is of some consequence to the Municipal Council of Sydney and to the ratepayers of that city. It is of no general importance whatever. It turns simply on the construction of a local Act of Parliament—the Moore Street Improvement Act, 1890—which has already come under the consideration of this Board.

The Municipal Council of Sydney was constituted by the Sydney Corporation Act of 1879. That Act, among other things, authorised the Council to make street improvements. But its provisions were cumbrous and of little or no practical use. So when improvements in Moore Street were in contemplation, the Act of 1890 was obtained in order to enable the Council to carry them out on a better system.

The cost of the proposed work was to be divided between the whole body of ratepayers (upon whom a rate was to be levied, called the Special Street Improvement Rate) and the ratepaying owners of property within the improvement area.

Before commencing the work the Council was directed to publish in the Gazette and in two daily newspapers in Sydney during four successive weeks a Notification setting forth the nature of the improvement, and stating that a plan shewing the extent and position of the improvement area within which the owners of property liable to the City rate would be contributors to the Special Street Improvement rate, together with a list of the names of such owners so far as the same could be ascertained, had been deposited with the Town Clerk for inspection by any person interested. This notification was to furnish a detailed estimate of the cost of the improvement, the amounts and dates of the repayments necessary to defray the whole cost thereof, with interest not exceeding 4 per cent. per annum. It was also to specify the period, which was not to exceed a hundred years and not to be less than fifty years in any case, over which such repayments would be spread, and the respective proportions (subject to an Appeal as in the Act provided) in which the whole cost of the improvement was to be divided between the owners of property within the improvement area and the Special Street Improvement rate.

Section 6 provided that within thirty days of the aforesaid notification the Council should cause to be made and deposited with the Town Clerk an assessment book, in which should be specified the amount which every owner of property within the improvement area would be required to pay in respect of his property as his share of the aggregate amount of the contributions of all such owners. In determining such share regard was to be had to the position of every such property and the degree of permanent enhancement in its capital or annual value which the improvement might reasonably be expected

to produce. During three successive weeks the Council was to publish in the Gazette and in two daily newspapers in Sydney a notice that the assessment book had been so deposited and was open to the inspection without fee of all persons interested therein. And then within thirty days after the last publication of that notice any owner of property assessed in such assessment book, or his attorney or agent, was to be at liberty to give notice in writing to the Town Clerk of his intention to appeal to the Supreme Court against (1) the inclusion of his property in the improvement area, or (2) the proportion of chargeability as between the Street Improvement rate and the body of special contributors, or (3) the amount of his assessment.

It will be observed that Section 6 does not require the Council to enter in the assessment book the names of the several owners of the properties specially assessed, or to give any notice to such owners other than the notification in the Gazette and two newspapers published in Sydney. Section 4 does require the Council to enter the names of the owners "so far as the same can be ascertained," but it does not require any notice to be served upon owners individually.

The Council proceeded to carry out the Moore Street Improvement Scheme. The property to which this suit relates was included in the improvement area. It consisted of two lots shown on the deposited plan. One was marked 55, 55A ; the other 8.

The lot marked 55, 55A, was No. 30, Castlereagh Street. The owner was a Mr. Augustus Timewell Fleay. It was let to Benjamin Backhouse and Samuel Lyons. In the City Rate Book Benjamin Backhouse appeared as owner.

The lot marked 8 consisted of two houses, Nos. 20 and 22, Castlereagh Street. In the City

Rate Book Mr. Fleay was entered as owner of both houses. Mrs. Fleay, his wife, was interested in both. They were held under different titles upon trust for Mrs. Fleay for life. Mrs. Fleay survived her husband. On her death, which happened on the 16th of November 1906, her only children, who are the first four Respondents, became entitled to both houses as tenants in common in fee. They also obtained letters of administration with the will annexed to the estate of their mother.

No. 30, Castlereagh Street, was transferred by Mr. Fleay to his wife in fee simple. It was not disposed of by her will, and on her death it passed to the first four Respondents, her sole next of kin, as tenants in common in fee.

Mr. Backhouse wrote to the Town Clerk in June, and again in July 1891, stating that he was only a leaseholder and not the owner of No. 30, Castlereagh Street, which belonged to Mr. Fleay. But he paid the annual amounts payable under the assessment until the surrender of his lease on the 1st of January 1901.

Mr. Fleay also wrote to the Town Clerk stating that he was not the owner of the property, 20 and 22, Castlereagh Street, and on the 15th of August 1891 he gave notice to the Town Clerk of his intention to appeal against the assessment on behalf of himself and also on behalf of the two sets of trustees in whom the two houses were respectively vested, on the ground that he was not the freeholder, and that the two houses ought to have been assessed separately. This appeal, however, was not prosecuted.

The Council took no notice of the information given them by Mr. Backhouse and Mr. Fleay. And for some reason which is not explained they did not at any time collect, or attempt to collect,

the assessment due in respect of Nos. 20 and 22, Castlereagh Street. Nor did they collect the assessment due in respect of No. 30, Castlereagh Street, after the surrender of Backhouse's lease.

In 1907 the Municipal Council brought this suit against Mr. Fleay's four children, claiming a charge on Nos. 20 and 22, Castlereagh Street, and on No. 30, Castlereagh Street, respectively, for the arrears accrued and unpaid in respect of the amounts assessed upon those properties, and also a declaration that the Respondents and the estate of Mrs. Fleay were liable for the amounts of the assessments which had accrued due during the respective periods during which Mrs. Fleay and her children were in possession of the respective properties. They also asked for a reference to ascertain the amounts due, and, if necessary, for the administration of Mrs. Fleay's estate.

The suit came on to be heard in the Supreme Court before Street, J., on the 24th of November 1909. The learned Judge dismissed the suit, with costs. He held that the Appellants were not entitled to recover contributions in respect of No. 20 or No. 22, Castlereagh Street, on the ground that a separate assessment ought to have been made in respect of each of the two houses. He dismissed the claim in respect to No. 30, Castlereagh Street, on the ground that as the Council deliberately persisted in treating Mr. Backhouse as the owner, and in assessing him as such, they could not turn round and sue the successors in title of an owner who was never assessed.

Their Lordships are unable to adopt the conclusion at which the learned Judge arrived, or to follow the reasoning of the Judgment under review.

It cannot be contended that the Municipal Council failed to comply with the requirements

of either Section 4 or Section 6. They took the list of owners of property within the improvement area from the City Rate Book. There as already stated Backhouse was entered as owner of No. 30, Castlereagh Street, and Mr. Fleay as owner of Nos. 20 and 22, Castlereagh Street, which are adjoining houses, and apparently similar in every respect. Mr. Gorden, the officer specially appointed to carry out the Moore Street Improvement, states that before making up the list of owners he visited each property and saw each owner or agent, and obtained whatever information he thought was necessary. Mr. Fleay, he says, returned himself as owner of No. 8, that is Nos. 20 and 22, Castlereagh Street. It is difficult to see what more the Council could have done to comply with the requirements of the Act before commencing to carry out the improvement.

It cannot be suggested that anybody was misled or prejudiced by anything done or omitted to be done by the Council before the improvement was commenced. There was no breach of any condition precedent. The Council were not required to assess each house separately. They were to assess properties, not houses. They may have been culpably negligent or even perverse in omitting to correct inaccuracies in the list of owners when their attention was called to them. But, after all, the ratepayers are the persons who have suffered, not the owner of No. 30 or the owners of Nos. 20 and 22, Castlereagh Street. Mr. Fleay was the owner of No. 30; he had his office there, or somewhere within the improvement area. He must have known all about the assessment of his own property. It is plain from the notice which he gave of intention to appeal that everybody interested in Nos. 20 and 22 knew all about the assessment of that property. The Council had nothing to do with the constitution of the Court of Appeal as the learned Judge

seems to think. Nor had they any concern with an appeal so long as it was non-effective. It is difficult to see how the conduct of the Municipal Council, after the improvement was duly commenced and the assessment on owners of property within the improvement area duly completed, can have the effect of discharging any owner for the time being at the expense of his fellow ratepayers from a statutory liability attaching in respect of his property.

There is no difficulty about recovering arrears in the present case, as the first four Respondents admit assets and are ready to pay whatever may be properly found due. But their Lordships are not prepared, as at present advised, to assent to the view expressed by the learned Judge in the Court below, to the effect that under no circumstances can arrears be recovered from the property assessed.

There might have been a question of some difficulty as to the period during which arrears are recoverable. But the learned Counsel for the Appellants at the Bar very properly limited the claim to the period of three years before the institution of the suit.

As regards costs, the whole trouble seems to have been caused by the omission of the Municipal Council to collect the assessments due from the owners of the properties assessed. Their long continued inaction is unexplained and apparently inexplicable. Moreover, they seem to have brought this suit without any previous communication with the present owners or any attempt to arrive at a settlement without litigation. In these circumstances it appears to their Lordships that there ought to be no costs of these proceedings either here or below.

Their Lordships will therefore humbly advise His Majesty that the Appeal ought to be allowed, the Order appealed from discharged without costs,

any costs paid under that Order being repaid, and an Order made for payment of the amount due, limited to three years arrears before the institution of the suit. The amount if agreed may be inserted in the order.

There will be no costs of the Appeal.

If the parties so desire the Order may provide for the division of the assessment on No. 8 in the deposited plan between the two houses comprised in that property.

In the Privy Council.

THE MUNICIPAL COUNCIL OF SYDNEY

v.

FREDERICA SARAH FLEAY AND OTHERS.

LONDON:
PRINTED BY EYRE AND SPOTTISWOODE, LTD.
PRINTERS TO THE KING'S MOST EXCELLENT MAJESTY.

1911.