

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Manning v. The Commissioner of Titles, from the Supreme Court of Western Australia; delivered 22nd February 1890.*

---

Present :

LORD WATSON.

LORD HOBHOUSE.

LORD MACNAGHTEN.

LORD MORRIS.

SIR BARNES PEACOCK.

[*Delivered by Lord Hobhouse.*]

1. The Appellant claims that her predecessor in title, L. A. Manning, was in a position which entitled him to call upon the Respondent to register his title under the Transfer of Land Act 1874. The Respondent denies that, and on a special case stated by him under Section 12 of the Act for the opinion of the Supreme Court, judgment has been given in his favour. The Court, consisting of two Judges, was divided in opinion, and the judgment is in accordance with the opinion of the Chief Justice.

2. The question turns on the construction of the 19th and 21st Sections of the Act, which it will be convenient here to set out :—

“ 19. If it shall appear to the Commissioner that any such transaction as aforesaid has been registered, and that all encumbrances affecting the land (excepting such as are hereinafter mentioned as not requiring special notification) have been released, or that the owners thereof have consented to the application, or that any encumbrance (not being a mortgage, the owners whereof shall not have consented to the application)

60490. 100.—2/90.

A

may be specified in the certificate of title, and continue outstanding, the Commissioner shall direct notice of the application to be advertised once at least, in one newspaper, published in the City of Perth, or circulating in the neighbourhood of the land, and to be served on any persons named by him, and shall appoint a time not less than fourteen days, nor more than twelve months from such notice, or from the advertisement, or the first of such advertisements, if more than one, on or after the expiration of which the Registrar shall, unless a caveat shall be served forbidding the same, bring the land under the operation of this Act.

“21. If before the expiration of the time limited in the notice aforesaid for lodging a caveat the Registrar shall not have received a caveat forbidding the bringing of the land in question under the operation of the Act he shall bring such land under this Act by registering in the name of the Applicant, or in the name of such person as may have been directed in that behalf, a certificate of title to such land in the form in the Second Schedule hereto.”

3. The material facts are as follows:—Manning having applied on the 25th July 1887 to be registered as the proprietor of a certain location by virtue of possession, the Commissioner made requisitions on his title which were answered by his solicitors. On the 8th August the Commissioner stated that he considered the title fairly made out, and that he should advertise. He advertised according to Section 19, and fixed the 29th October as the last day for entering caveats. No caveat was entered, but in the language of the special case “on the 24th “ October the Commissioner forwarded to the “ solicitors for the Applicant a declaration and “ certain depositions on oath which he had taken “ without notice to the Applicant, and which “ tended to throw doubt on the Applicant’s “ possession.”

4. On the 28th October the Commissioner formally notified to the solicitors that the application was rejected.

5. The course then taken by the solicitors and the Commissioner is thus stated in the special case:—

“7. The Applicant’s solicitors consider the

“ rejection is beyond the power of the Commis-  
 “ sioner, and contend that the Commissioner  
 “ having once expressed himself satisfied with the  
 “ title as proved by the Applicant, and having  
 “ advertised under Sections 19 and 20 of the  
 “ Act, and no caveat having been entered, his  
 “ power to reject has gone, and it is imperative  
 “ upon the Registrar, under Section 21 and the  
 “ general scope of the Act, to bring the land  
 “ under the Act by registering the same in the  
 “ name of the Applicant.

“ 8. A formal application to the Registrar to  
 “ perform his duty in this respect has been made,  
 “ but he, relying upon the fact ‘ that the appli-  
 “ ‘ cation had been rejected by the Commissioner,  
 “ ‘ who was not prepared to sign a certificate of  
 “ ‘ title,’ refused to register.”

— 6. Upon these facts the Commissioner stated the special case, in which Manning’s solicitors concurred, and which was heard with the result above mentioned. Nothing was stated to show the nature of Manning’s title except that it rested on possession, or the nature of the evidence against it except that it brought the allegation of possession into doubt. The neat question raised by the case, and argued in the Supreme Court and here, is whether on the 8th August 1887 the Commissioner and the Registrar became mere machines for registration in case no caveat should be lodged.

7. It must be admitted that the strict literal construction of the Sections above set forth is in favour of the Appellant’s view. But the whole purview of the Act must be looked at. We find that the Commissioner is to be a lawyer of seven years’ standing and practice, and that, amongst other things, he is to investigate applications for bringing land under the provisions of the Act. And it is very important to see what is the language of the Act with regard to the appli-

cations which the Commissioner is expected to investigate.

8. Section 17 says that land alienated in fee by the Crown before the Act may be brought under the operation of the Act by an application made by, among other persons, the person claiming to be owner of the fee simple either at law or in equity. Section 18 says that the Registrar shall submit the application to the Commissioner for his direction. Then Sections 18 and 19 go on to deal with properties which are found differently circumstanced.

9. If the Commissioner finds that no transaction affecting the land has been registered under any general Act, Section 18 says that "he shall direct the Registrar to bring the land under the operation of this Act by registering a certificate of title." According to the literal force of Sections 17 and 18, any person may appear claiming to be the owner of land alienated in fee by the Crown, and if there has been no previous registration the Commissioner has absolutely nothing to do but to direct the Registrar to enter a certificate of title. It is felt by all that such a conclusion is irrational, and the Appellant's Counsel do not contend for it. They admit that the Commissioner must have some power of inquiry and some discretion to accept or reject an application. But they cannot point to any words of the Act which expressly confer those powers upon him.

10. As regards Section 18 then it is not disputed that the Commissioner is an official bound to exercise his intelligence, and not a mere machine as the literal force of the words would make him. Now when we have once reached the conclusion that such a meaning must be read into Section 18, we cannot refuse to read it into Section 19, and then it is for those who insist on his mechanical action to show at what

point his discretion ceases and his obligation to follow a rigid rule begins.

11. It is not contended that the Act anywhere defines this point, or that it orders the Commissioner to sign a certificate of title except so far as such an order may be implied by the direction to the Registrar in Section 21. The Appellant's Counsel contend that in a case falling within Section 19 the discretion of the Commissioner is at an end when he has decided to advertise and serve notices. By that time, they argue, he must be taken to have completed his investigations, and in fact in this case he did intimate to the Applicant's solicitors that the title had been fairly made out. But it appears to their Lordships that the investigations cannot be complete until it is seen what the notices produce. They may not necessarily produce caveats, for those can only be lodged by persons making claims on their own behalf, but they may produce information showing that registration of the Applicant would not be right. If a certificate of title is issued in error, the Commissioner may, under Section 117, take steps to cancel it. Supposing then that, before certificate, the Commissioner finds, either from fresh information or on reconsideration, that he is in error, what is he to do? The Appellant's Counsel contend that, if he has issued notices and there is no caveat, he must give the certificate and then take steps to cancel it. It seems to their Lordships that such a course is not rational and is not obligatory under the Act, but that the proper course in such a case is to refuse the certificate.

12. The Applicant is not without remedy in such a case. If the Commissioner exercises his discretion wrongfully or erroneously the Applicant may, under Section 120, first require him to set forth his reasons, and then summon him before the Supreme Court to maintain his case.

In that proceeding the whole substance of the case may be thoroughly examined. Here the Applicant has not chosen to take that course, but has preferred to insist that the Commissioner is bound, by the issue of notices on the 8th October and by the non-appearance of any caveat, to register the claim of title. As the Applicant fails in that contention this appeal must be dismissed, and with costs.

Their Lordships will humbly advise Her Majesty in accordance with this opinion.

---