

De Young v Rewita

High Court Rotorua
28 August 2017
Heath J

CIV-2017-463-34; [2017] NZHC 2064

Land Transfer Act — Lost instrument of transfer — Leasehold interest — Application for investigation of right to be registered as proprietors of leasehold estate — Interest in property never registered — Declaration that entitled to be registered — Land Transfer Act 1952, ss 56, 57 and 57(1).

During 2005, Mr and Mrs De Young became aware that a leasehold interest in a property located in Waitahanui was to be sold at mortgagee sale. Ultimately, Mr and Mrs De Young purchased the leasehold interest, subject to consent of the trustees of Tauhara Middle 14 Trust, as owners of the property. That consent was given and the amount required to settle was paid to the mortgagee. Although the solicitors for the mortgagee provided an executed transfer and the lease to Mr and Mrs De Young, their interest in the property had never been registered. It was not until 2016, when Mr and Mrs De Young wished to sell the lease that they became aware of this problem.

Mr and Mrs De Young applied for orders under ss 56 and 57 of the Land Transfer Act 1952 (the Act) for investigation of their right to be registered as proprietors of the leasehold estate by virtue of a lost instrument, and declaring that they were entitled to be registered as such. The trustees of Tauhara Middle 14 Trust consented to an order. The first respondents, who were the previous leaseholders, had been served but had taken no steps.

Held: (granting the application)

Having regard to the circumstances described in the affidavit of Mrs De Young, the solicitor who acted on the purchase of the lease, and the consent of the registered proprietor of the property to an order, for the purposes of s 56 of the Act, Mr and Mrs De Young were entitled to be registered as proprietors of the leasehold estate and orders should be made under s 57 to give effect to that finding (see [6]).

Cases mentioned in judgment

Hodge Trustee Services Ltd v Huang HC Wellington CIV-2007-485-2001,
8 July 2008.

Application

The applicants applied for orders under ss 56 and 57 of the Land Transfer Act 1952 for investigation of their right to be registered as proprietors of the leasehold estate by virtue of a lost instrument.

P Cornége for the applicants.

HEATH J. [1] During 2005, Mr and Mrs De Young became aware that a leasehold interest in a property located at 5 Paora Rokino Place, Waitahanui, was to be sold at mortgagee sale. Mrs De Young undertook negotiations with the solicitors for the mortgagee. Ultimately, Mr and Mrs De Young purchased the leasehold interest on 1 November 2005 for \$30,000, subject to consent of the trustees of Tauhara Middle 14 Trust, as owners of the property. That consent was given on 15 November 2005, and the amount required to settle was paid to the mortgagee on 22 December 2005.

[2] Although the solicitors for the mortgagee provided an executed transfer and the lease to Mr and Mrs De Young, their interest in the property has never been registered. It was not until 2016, when Mr and Mrs De Young wished to sell the lease that they became aware of this problem.

[3] Mr and Mrs De Young apply for orders under ss 56 and 57 of the Land Transfer Act 1952 (the Act) for investigation of their right to be registered as proprietors of the leasehold estate by virtue of a lost instrument, and declaring that they are entitled to be registered as such. The trustees of Tauhara Middle 14 Trust consent to an order. The first respondents, who were the previous leaseholders, have been served but have taken no steps. Leave to bring the proceeding by originating application was granted on 24 July 2017.

[4] Sections 56 and 57 of the Act provide:

56 High Court may investigate cases of lost instruments

In case of the loss or destruction before registration thereof of any instrument executed by a registered proprietor for the purpose of creating, transferring, or otherwise dealing with any estate or interest in land under this Act, or any mortgage or encumbrance affecting land under this Act, the person claiming to be entitled to be registered as proprietor of any estate or interest by virtue of the lost instrument may make application to the High Court to have his claim investigated and declared.

57 Court may order claimant to be registered as proprietor

- (1) Upon proof to the satisfaction of the court of the fact of such loss or destruction as aforesaid, and that such instrument as aforesaid has not been wilfully destroyed by or with the connivance of the applicant, and that the applicant is entitled to be registered as aforesaid, and that due notice of the application has been given to the registered proprietor of the land, estate, or interest intended to be affected, and to all other necessary parties, the court may make an order defining and declaring the estate or interest of the applicant under the instrument, and requiring the Registrar to register him as proprietor thereof, and the Registrar shall obey the order.
- (2) Every such registration shall have the same effect as from the date thereof as if the original instrument had been duly registered; and that

instrument shall for the purposes of this Act be deemed and taken to have been in the terms or to the effect set forth in the order.

- (3) The court shall, in hearing and deciding upon any case under this section and the last preceding section, be guided by the real justice of the case, and shall direct itself by such evidence as may seem to it most suitable to the circumstances of the case.

[5] There is little authority on the circumstances in which applications of this type will be granted. Mr Cornegé, for Mr and Mrs De Young, referred me to a decision of Warwick Gendall J, in *Hodge Trustee Services Ltd v Huang*,¹ in which, after inquiring into the relevant circumstances, the Judge made an order. The terms on which the order was made are helpful because it dealt specifically with the E-dealing method of registration that was not in place when the Act was passed.

[6] Having regard to the circumstances described in the affidavit of Mrs De Young, the solicitor who acted on the purchase of the lease, Mr Cargill, and the consent of the registered proprietor of the property to an order, I am satisfied that, for the purposes of s 56, Mr and Mrs De Young are entitled to be registered as proprietors of the leasehold estate and that orders should be made under s 57 to give effect to that finding. The declaration that I propose to make is based on those crafted by Gendall J in *Hodge Trustee Services Ltd*.

[7] For those reasons, I order that:

- (a) The loss of the transfer executed by The Home Mortgage Co Ltd (as mortgagee under mortgage B566580.4. South Auckland registry, of which the first respondents were mortgagors) be investigated under s 56 of the Land Transfer Act 1952.
- (b) Pursuant to s 57 of the Land Transfer Act 1952, the Court defines and declares the applicants' estate or interest in the property located at 5 Paora-Tokino Place, Waitahanui, comprising all that parcel of land containing 970 sq m more or less, being on lot 15 Deposited Plan South Auckland 55375, and more particularly described in Certificate of Title SA44B/356, South Auckland Land Registration District (the property), to be the leaseholder of lease B129233.1 registered in the names of the first respondents (the leasehold).
- (c) Angelo Papageorgiou and the firm Papageorgiou Law Offices, Wellington, are authorised to carry out the registration of this order by E-dealing on behalf of both the applicants and the first respondents, and the Registrar is required to register the applicants as the proprietor of the leasehold so as to comply with s 57(1) of the Land Transfer Act 1952.

[8] No order as to costs.

Reported by: Rachel Marr, Barrister and Solicitor

1 *Hodge Trustee Services Ltd v Huang* HC Wellington CIV-2007-485-2001, 8 July 2008.