

**IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY**

CIV-2008-435-000068

IN THE MATTER OF the Land Transfer Act 1952

AND

IN THE MATTER OF the Estate of EDWARD WILLIAM
PAYTON

Hearing: 5 February 2009

Counsel: A G Parker and K A van Wijngaarden for Applicants

Judgment: 5 February 2009

Reasons: 10 February 2009

In accordance with r 540(4) I direct the Registrar to endorse the Reasons for Judgment with the delivery time of 9.30am on the 10th day of February 2009.

REASONS FOR JUDGMENT OF GENDALL J

[1] In the early 1900s settlers in the Opaki District, north of Masterton and adjacent to Mount Bruce, wanted a community hall. As was common in rural New Zealand in those times, such halls were designed for public meetings, social and family gatherings. A farmer in the region, Hugh Campbell, gifted a small piece of land from his farm holding with the intention that a public hall be built upon it. The land was vested in the names of two farmers, Edward William Payton and William Oliver Riddell. They executed a Declaration of Trust on 24 October 1914 in which they declared the land and hall was to be held by them as trustees “for the use and benefit of the inhabitants of the Upper Opaki District”. The hall was named “The Upper Opaki Settlers Hall”.

[2] The land is contained in CT 229/187 (Wellington Registry) and Messrs Payton and Riddell remain as registered proprietors with the title containing the endorsement “no survivorship”. The registered proprietors and some of their immediate descendants have died.

[3] The application seeks the removal of the endorsement “no survivorship” from the title and registration of the current applicants, Ms Nola Lottie Caldwell and Roderick Arnold Oakly, as registered proprietors. Those applicants are the executors of the last surviving executor of William Hume, the executor of the estate of Edward William Payton who died in 1964.

[4] Of the original two registered proprietors Mr Riddell died in January 1940. Because of the provisions of the words “no survivorship” the joint tenancy could not end so as to enable Mr Payton to take as the surviving proprietor. Mr Riddell’s interest should then have been registered in the name of his executors. That never happened and after Mr Payton died his executor Mr William Hume, likewise, did not apply for transmission to him as executor of Mr Payton’s interest. When Mr Hume died, his two executors took no action in respect of the title, no doubt because no one thought of it. Those executors have also died and the current applicants, as I have said, are the executors of the last surviving executor of Mr Hume.

[5] An order sanctioning the transfer of the property into the names of the applicants, and removal of the endorsement “no survivorship” is sought because of developments in respect of the hall. Those developments are that the hall was relocated from the land contained in CT 229/187 to another piece of land so as to avoid traffic hazards on State Highway 2. The land upon which the hall is currently situated is to be the subject of a swap between the owners of that land (the Ratanui Trust) and the proprietors of the original land in CT 229/187. The hall is administered and managed now by the Mount Bruce Hall Society Incorporated and it is intended that that body become the registered proprietor of the new piece of land upon which the hall is situated.

Discussion

[6] Without the removal of “no survivorship” from the title, there can be no transmission to the current applicants. Nor could they transfer that land to the Ratanui Trust. The applicants’ entitlement derives from the original interest of Mr Payton as a joint tenant, but he had not been able to take the entire interest by survivorship on the death of Mr Riddell.

[7] Under s 130 of the Land Transfer Act 1952 a transferor of any land may insert in a transfer or other instrument the words “no survivorship” and this is to be noted on the register. The effect of that entry, in terms of s 132, is that:

“...it shall not be lawful for any less number of joint proprietors than the number then registered to transfer or otherwise deal with the land, estate, or interest without obtaining the sanction of the High Court.”

[8] Those sections are contained within the provisions of the Land Transfer Act 1952 as they relate to Trusts and are clearly designed to protect Trust interests without entering notice of a Trust on the register. So owners holding as trustees hold as joint tenants and the determination of that joint tenancy would not occur on the death of one of them, the aim of the sections being to minimise the risk to beneficiaries from acts of a surviving sole trustee. The sections are:

“based on a sound rule of human conduct that, although one trustee may prove unfaithful to his trust, it is less likely that all trustees would be guilty of such moral turpitude.” *In re Bayly* (1985) 2 NZCPR 363, 366 per Barker J.

[9] The words “no survivorship” do not themselves prevent the operation of the rules of law by which title may be lost or acquired, and although their presence does not convert a joint tenancy into a tenancy in common,

“[the] only way to give full effect to the intention of [the section] is to hold that it prevents, without sanction of the Court, any registration to give effect to any acquirement of title by operation of law or by contract or otherwise within the meaning of the words “to transfer or otherwise deal”. *In re Denniston and Hudson* [1940] NZLR 255, 258 per Smith J.

[10] The position therefore is that the representatives of the last surviving joint tenant are entitled to the estate by operation of the rules of representation, but any

transmission to a surviving joint tenant, or the executors of the last surviving joint tenant, requires the sanction of the Court under s 132. That section provides that the Court may make an order giving directions for the transfer of the estate or interest to any new proprietors:

“...with or in the place of any existing proprietor...and may order the removal of the words ‘no survivorship’ from the ... certificate of title ... or may make such order ... as the Court thinks just for the protection of the persons beneficially interested in the land, estate, or interest, or in the proceeds thereof.

[11] The Court directed that the application be advertised and this occurred on 27 September 2008, so as to advise residents of the Upper Opaki District of the application. No representations have been made.

[12] It was thought that the persons originally beneficially entitled were those described in the Declaration of Trust being “the inhabitants of the Upper Opaki District”. That of course is correct in respect of the hall itself, the Trust being for the purpose of the hall being used for the benefit of those inhabitants. But of course the public hall is now relocated onto another parcel of land, although the hall is still used by residents of the Upper Opaki District. The bare land upon which the hall was originally located and contained in CT 229/187 does not provide any benefit or interest to the residents of the Upper Opaki area.

[13] The Declaration of Trust provides that if the land ceased to be used as a “site for a Public Hall for the benefit of the said Settlers” the trustees were required to hold the land for the executors of the original settlor, Hugh Campbell, who had gifted the property. So, the reality is that the beneficiaries of the Trust, in so far as the realty is concerned, are the successors in title of Hugh Campbell. It appears to me, from the material before the Court, that they must be the registered proprietors of the area of land to be the subject of the swap.

[14] So, the intended transaction indeed ensures two things. First, the now vacant land upon which the hall had originally been erected is to be returned to those successors in title of the original settlor of the Trust. That will occur through the “swap”. Secondly, the Trust itself can continue with the hall, and land upon which it

is now situated being held (by a new trustee) for the benefit of the inhabitants of the Upper Opaki District.

[15] The Court's jurisdiction under the Land Transfer Act is wide and it may make such order as is just for persons beneficially interested. Obviously the inhabitants of the Upper Opaki District were intended to be those beneficially interested not only in the hall but the land upon which it was situated. It is beyond any doubt that the words "no survivorship" should be removed from the title and the Court should make ancillary orders to remedy the position and to also ensure that the title to the land in CT 229/187 is transferred pursuant to the agreement that has been reached by the trustees of the Ratanui Trust and the applicants. Such orders would protect the descendants or successors in title to the settlor and correspondingly would protect the citizens of Upper Opaki in their continued use of the hall and the land upon which it is located. The corporate body Mount Bruce Hall Society Incorporated is the party to the agreement to swap the two pieces of land and it should now be substituted as the trustee, subject to the Declaration of Trust dated 24 October 1914.

Conclusion

[16] I am satisfied the application is properly made. Despite the position becoming complicated through the relocation of the hall, various remedial ancillary orders made by the Court will ensure that the protection of all persons beneficially interested in the land, now and in the past, are protected. Consequently the orders must include a direction that the land in CT 229/187 be transferred to and registered in the name of the trustees of the Ratanui Trust. Accordingly, the Court makes the following orders:

- (1) Pursuant to s 132 of the Land Transfer Act 1952 there will be an order removing the endorsement "no survivorship" from CT 229/187 and the land contained in that title may be dealt with on the following basis.

- (2) An order is made vesting the estate and interest in the land CT 229/187 in the names of the applicants, Nola Lottie Caldwell and Roderick Arnold Oakly.
- (3) Pursuant to s 133 of the Land Transfer Act 1952 the Court orders that those registered proprietors transfer the estate and interest in CT 229/187 to Edward John Campbell, Marilyn Olive Campbell and Selwyn Murray Taylor (the transferees) on condition that they transfer to, and vest in the name of, the Mount Bruce Hall Society Incorporated all that parcel of land containing 2546 m² being Lot 1 DP 31468 in CT 56973 (Wellington Registry).
- (4) Pursuant to s 51 of the Trustee Act 1956 the Court orders the appointment of a new trustee in the Trust created by Hugh Campbell, the subject of a Declaration dated 24 October 1914, to be Mount Bruce Hall Society Incorporated (the new trustee). It is appointed by the Court in substitution for the existing trustees. The new trustee shall hold the land transferred to it and the building erected on it for the use and benefit of the inhabitants of the Upper Opaki District, subject to the same trust as contained in the Declaration of Trust dated 24 October 1914.

J W Gendall J

Solicitors:
Gawith Burridge, Masterton for Applicants