

**IN THE DISTRICT COURT
AT KAIKOHE**

**CIV-2016-027-000044
[2016] NZDC 9162**

BETWEEN PHILLIP SALEH
Appellant

AND JEREMY PYLE
Respondent

Decision: 10 May 2016

Appearances: Mr Saleh in person
Ms Coutts for the Respondent

Reasons: 26 May 2016

REASONS FOR JUDGMENT OF JUDGE K B de RIDDER

[1] On 10 May 2016 I dismissed an appeal by Mr Saleh against the decision of the Tenancy Tribunal given on 2 March 2016. I indicated that I would give my reasons later. These are now my reasons.

Background

[2] Mr Saleh owned a property at [address deleted]. It was subject to a mortgage to the Bank of New Zealand.

[3] The Bank exercised its power of sale under the terms of the mortgage when Mr Saleh defaulted on his mortgage. The respondent Mr Pyle purchased the property from the Bank.

[4] After settlement of the purchase Mr Saleh remained in occupation of the property. He did not pay rent or move out of the property. Accordingly Mr Pyle filed an application in the Tenancy Tribunal seeking an order for possession of the property.

[5] His application was dealt with at two hearings on 26 February 2016 and 2 March 2016. At the second hearing the Tribunal granted Mr Pyle's application, terminated the occupancy of Mr Saleh, and granted possession to Mr Pyle. It is against that decision that Mr Saleh appeals.

Approach

[6] It is well established that an appeal from a decision of the Tenancy Tribunal to this Court proceeds by way of a re-hearing (see *Housing New Zealand Corporation v Salt*¹).

[7] Mr Saleh sought to rely upon the evidence heard by the Tribunal, but also gave brief further evidence himself and called a Ms Prosser as a witness. Much of Mr Saleh's evidence was in reality further submissions on the grounds of his appeal all of which were already well articulated in his appeal notices. He also produced charging documents under the Criminal Procedure Act 2011 which he apparently intends to file in the District Court charging Mr Pyle with offences under the Crimes Act of perjury, fabricating evidence and obtaining by deception.

[8] Ms Prosser is a solicitor. As I understood her evidence the firm for which she works was involved in the legal work required to register the mortgage securing the loan advanced to Mr Saleh by BNZ. However, I was forced to prevent many of Mr Saleh's questions as they simply amounted to cross examination of his own witness.

[9] Mr Pyle did not seek to call any further evidence.

Grounds of appeal

[10] Mr Saleh filed two appeal notices dated 8 March 2016 and 9 March 2016. I have taken both notices into account in considering his appeal.

[11] It is not necessary to repeat in detail all of the grounds of appeal advanced but they can be summarised as follows:

¹ [2008] DCR 697

- (a) The Tribunal had no jurisdiction;
- (b) Mr Pyle's purchase of the property was done fraudulently, by either the Bank of New Zealand, or lawyers, or Mr Pyle, or the Registrar of Land;
- (c) There was no evidence of a mortgagee sale or a valid mortgage instrument.
- (d) Mr Pyle was represented by a lawyer in breach of the provisions of the Residential Tenancies Act 1986;
- (e) That he was not a tenant, and nor was he a squatter on his own land;
- (f) That the Tribunal Order was procured by "fraud and other dishonest conduct";
- (g) That Mr Saleh had not been heard at the hearing and that amounted to a breach of due process, natural justice "and a complete miscarriage of justice".

[12] Ms Coutts for the Respondent filed written submissions and briefly summarised those in her oral submissions.

Discussion

[13] I turn then to the various grounds of appeal advanced by Mr Saleh.

Mr Saleh not heard

[14] The first point of concern is that Mr Saleh was not present at the hearing on 2 March when the order was made. It appears from his affidavit filed in support of both the appeal and his application for a stay of execution of the order that there was a mix up both as to the time at which, and the courtroom in which, the hearing was to take place in the Kaikohe District Court. It is clear that Mr Saleh intended to

appear, and may have been present in another part of the Court building. It is a fundamental principle that a party to a proceeding is entitled to be heard, and if he is not, then that would constitute strong grounds for an appeal to succeed.

[15] However, in this case the issues were traversed in some depth at the initial hearing on 26 February which was adjourned by the Tribunal. It appears that the adjournment was purely for the purposes of allowing the parties to supply further information to the Tribunal, and also for them to attend with legal advisors if they wished. Mr Saleh filed detailed submissions for the hearing on 2 March. They are lengthy submissions consisting of 101 paragraphs contained within 16 pages of closely typed submissions. This document was entitled “simplified submission”. The transcript of the proceeding on 2 March makes it clear that the Tribunal had received his submission and that it was before the Tribunal on 2 March. It is clear from the transcript of the proceedings (at page 4, lines 24-27) that the adjudicator has read and taken in to account Mr Saleh’s submissions before reaching his decision. Thus although Mr Saleh himself did not get the opportunity to speak in person, his case was clearly before the Tribunal

[16] Given the view I took of the merits of the appeal, there was no ground to allow it on the basis that Mr Saleh had not been heard. Whilst he was not heard in person, his case was most certainly heard.

No jurisdiction

[17] It is abundantly clear that the Tribunal did have jurisdiction to hear Mr Pyle’s application. Section 65(1) is expressed in mandatory terms requiring it to make a possession order if it “...is satisfied that any other person is in possession of the premises as a squatter or trespasser, or otherwise pursuant to any right of occupation granted to that person by any person having lawful authority to grant that right to that other person...”. The Tribunal is required to make the order “...on the application of any person entitled to possession of any residential premises...”.

[18] Thus the only issues before the Tribunal were whether or not Mr Pyle was a “person entitled to possession” of the premises in question, and whether or not Mr

Saleh was “in possession of the premises as a squatter or trespasser, or otherwise then pursuant to any right of occupation granted...” to him by Mr Pyle.

Fraud

[19] In the Tribunal hearing Mr Pyle produced a copy of the Certificate of Title clearly showing him as the registered proprietor. That document also included an historical search copy which showed that the property was transferred to Mr Saleh and a Ms Cureton-Griffiths on 11 January 2012, and on the same date a mortgage in favour of the Bank of New Zealand was registered. That document further shows that the property was vested in Mr Saleh on 15 October 2015. But most importantly it shows that on 23 December 2015 the property was transferred to Mr Pyle in exercise of the power of sale contained in the mortgage to Bank of New Zealand. That is all consistent with the evidence of Mr Pyle given at the Tribunal hearing to the effect that he purchased the property from the Bank which was acting in accordance with its power of sale contained in the mortgage. Accordingly, Mr Pyle has an indefeasible title, and is the “person entitled to possession” of the property.

[20] One of the exceptions to indefeasibility of title is if the title has been acquired by fraud. Simply put, Mr Saleh is completely unable to establish any fraud on the part of anybody involved in the registration of the mortgage to the Bank of New Zealand when Mr Saleh had title to the property, on the part of the Bank in the exercise of its power of sale under the mortgage, nor on the part of any lawyer involved in completing the transaction and the registration of title in to Mr Pyle’s name. Mr Saleh has made various convoluted, obtuse, and nonsensical arguments in support of his claim that Mr Pyle’s title has been obtained by fraud but they are simply unsustainable.

Evidence of a mortgagee sale

[21] The short answer to that ground of appeal is that the copy of the certificate of title itself clearly records the sale to Mr Pyle by way of the Bank of New Zealand exercising its power of sale.

Legal representation

[22] Section 93 of the Residential Tenancies Act 1986 does not contain an absolute bar on a party being represented by Counsel. Subsection (3) specifically allows the Tribunal to permit representation. In this case, the Tribunal clearly exercised that power, and that decision is not susceptible to appeal.

Not a tenant/squatter

[23] The evidence of Mr Pyle at the Tribunal hearing was clear. He had not granted Mr Saleh the right to occupy the property. Accordingly, Mr Saleh was “in possession of the premises...otherwise than pursuant to any right of occupation granted to...” him by Mr Pyle.

Summary

[24] The two requisite grounds prescribed by s 65 requiring the Tribunal to make a possession order clearly existed in this case. Mr Pyle made the application to the Tribunal. He was the person entitled to possession of the premises. Mr Saleh was in occupation without any authority granted to him by Mr Pyle. In those circumstances the Tribunal was obliged to make the order it made. Accordingly, Mr Saleh’s appeal must fail.

K B de Ridder
District Court Judge