

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

**CIV-2009-404-0391**

UNDER Section 145A of the Land Transfer Act  
1952

BETWEEN ATHENA PROFESSIONAL TRUSTEES  
LIMITED AND BASSETT TRUSTEES 2  
LIMITED  
Applicants

AND FOUNDATION CUSTODIANS LIMITED  
Respondent

Hearing: 13 August 2009

Counsel: No appearance for Athena Professional Trustees Limited (in  
liquidation)  
R B Hucker for Bassett Trustees 2 Limited  
E M Cox for Respondent

Judgment: 5 October 2009 at 4.30 pm

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**RESERVED JUDGEMENT OF ASSOCIATE JUDGE H SARGISSON  
(Application for caveat not lapse)**

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*This judgment was delivered by me on 5 October 2009 at 4.30 pm pursuant to  
Rule 11.5 of the High Court Rules*

*Registrar/Deputy Registrar*

*Date .....*

*Solicitors:*

*Hucker & Associates, PO Box 3843, Shortland Street, Auckland 1140  
Gibson Sheat, Private Bag 31 905, Lower Hutt*

[1] This is an application for an order that a caveat not lapse. The application states it is made in reliance on s 145A of the Land Transfer Act 1952, but it is plain on its face and the supporting affidavit evidence that it is made in reliance on s 145(1). I deal with the application on that basis.

[2] Section 145(1) states:

**145 Lapse of caveat against dealings**

- (1) Every caveat under section 137, upon the expiration of the first prescribed period after notice is given to the caveator that an application has been made for the registration of any instrument affecting the land, estate, or interest protected by the caveat, is deemed to have lapsed as to that land, estate, or interest, or so much of it as is referred to in the notice, unless -
  - (a) notice is, within the first prescribed period, given to the Registrar that an application for an order to the contrary has been made to the High Court; and
  - (b) such an order is made and served on the Registrar within the second prescribed period.

[3] The caveat is caveat no. 7647498.1 lodged against the property at 703A Remuera Road, being the property comprised in composite computer register identifier (certificate of title) NA116C/941. Athena Professional Trustees Ltd, the first named applicant, lodged the caveat on 7 December 2007. At that time Athena remained registered proprietor of the property holding its interest in the property as trustee for the CBD Properties Trust, but it had entered into an agreement for sale and purchase in which it had agreed to sell the property to Greenwich Pacific Ltd. The transfer of Athena's interest in the property to Greenwich Pacific was registered five days later on 12 December 2007.

[4] In early December the property was sold again, this time to a company related to Athena called Pro Kerb Ltd, who granted a mortgage security over it to the respondent, Foundation Custodians Ltd. The relevant transfer and mortgage were registered later on the same day as the transfer to Greenwich Pacific, in circumstances that have not been explained, but where Athena's caveat remained noted on the title to the property.

[5] Foundation Custodians recently took steps to trigger the operation of s 145 with a view to securing the removal of the caveat. As a consequence the District Land Registrar gave notice to Athena that application had been made for the registration of an instrument affecting the interest said to be protected by the caveat, and that the caveat would lapse if an order were not obtained under s 145. When served with the notice, Athena sought an order to the contrary and for that purpose took the steps required under s 145(1)(a) and (b). The Court made an interim order on Athena's application on 13 February 2009 directing that the caveat not lapse, and the order was duly served in time on the Registrar.

[6] Athena has since been placed into liquidation, and the second named applicant, Bassett Trustees 2 Limited, now seeks the continuation of the interim order. Bassett Trustees is Athena's co-trustee and it claims to have succeeded to all of Athena's interest in the property and the application. As such, it claims the right to protect that interest by retention of Athena's caveat.

[7] The interest Bassett Trustees claims as caveator, as explained by its counsel at the hearing, is that of an equitable mortgagee under an agreement to mortgage granted to Athena by Pro Kerb under a deed of acknowledgement of debt to which both became parties on 3 December 2007.

[8] There is no real dispute (at least for present purposes) that Bassett Trustees is entitled to stand in Athena's shoes as applicant, and that it has, via Athena, an arguable interest in the property as an equitable mortgagee, which it derived from Pro Kerb. However the express interest Athena relied on in the caveat is as unpaid vendor under the agreement for sale and purchase between itself and Greenwich Pacific, and not its interest as Pro Kerb's equitable mortgagee.

[9] It is chiefly on the basis that the caveat does not rely expressly on the equitable mortgage arising under Pro Kerb's deed of acknowledgement of debt that Foundation Custodians opposes the continuation of the caveat. It contends that the caveat does not comply with key statutory requirements in s 137 because the caveat refers to the interest arising from the agreement for sale and purchase between Athena and Greenwich Pacific. It points out that the two interests are not the same,

and that they derive from quite different instruments involving different debtors. It contends that the current caveat must therefore be discharged and a fresh caveat lodged if Bassett wishes to protect the claimed interest created by the agreement to mortgage.

[10] Bassett Trustees on the other hand contends that notwithstanding the description in the caveat of the interest claimed, and the absence in that description of any express reference to Pro Kerb's agreement to mortgage, there is sufficient compliance with s 137. In the alternative it contends that the court has jurisdiction to amend the caveat to bring it into compliance.

### **Issues**

[11] As there is no dispute (at least for present purposes) that Bassett Trustees has an equitable interest in the property arising from Pro Kerb's agreement to mortgage, the primary issues raised for determination in the application are limited. They are limited to:

- a) Whether there is sufficient certainty in the description of the claimed interest in the caveat to ensure compliance with s 137; or if not
- b) Whether the court has jurisdiction to amend the interest claimed in the caveat and, assuming such jurisdiction, whether in view of the acknowledged interest, the caveat should be amended in the court's discretion.

[12] Before coming to these issues, it is necessary to refer to the background in a little more detail and to the principles that apply to an application of the present kind.

### **Background**

[13] Athena lodged the caveat on 7 December 2008. Effectively, it caveated its own title as it remained registered proprietor of the property at that time, holding the property as trustee for CBD Properties Trust.

[14] A short time before lodging the caveat Athena entered into an agreement for sale and purchase with Greenwich Pacific in which the latter agreed to purchase the property. A copy of that agreement has not been produced but there is evidence that these parties signed the agreement for sale and purchase on 20 November 2007. There is also evidence that on the same date they entered in to an agreement called a Deed of Agreement, in which they agreed to Greenwich Pacific's satisfying a portion of the purchase price by an acknowledgement of debt, which has also not been produced.

[15] Subsequently, Pro Kerb Ltd agreed to acquire the property. Counsel for Bassett Trustees submitted that the acquisition was effected by Greenwich Pacific's nominating Pro Kerb to complete its purchase. However, the evidence suggests that Greenwich Pacific actually completed its own purchase from Athena and on-sold the property by way of a separate sale to Pro Kerb. This is supported by the title identifier, which shows a transfer to Greenwich Pacific and a separate transfer to Pro Kerb. In any event Athena agreed to facilitate Pro Kerb's purchase and on 3 December 2007 the pair entered into their own deed of acknowledgement of debt in which Athena agreed to advance \$195,000 to Pro Kerb for that purpose. This particular deed, which has been produced in evidence, contains at clause 8 Pro Kerb's covenant to grant a mortgage to Athena over its future interest as owner of the property for an advance of \$195,000. Clause 8 states:

**Agreement to mortgage**

8 **THE Borrower, who will be the owner at the property** described in the Schedule **following settlement hereby agrees to grant a mortgage to the Lender** with repayment of the principal sum and will if called upon by the Lender execute in favour of the Lender a registrable mortgage over the property securing repayment of the principal sum. **The mortgage will** include all the standard provisions contained in the current edition of the Auckland District Law Society form of all Obligations Mortgage and **to reflect the terms originally agreed by the Lender and Greenwich Pacific Ltd under the Deed of Agreement dated 20 November 2007, a copy of which is attached hereto.**

[Emphasis added]

[16] As the clause notes, the mortgage that Pro Kerb agreed to grant to Athena was to reflect the terms originally agreed in the Deed of Agreement of 20 November 2007 between Athena and Greenwich Pacific. Counsel for Bassett Trustees made clear its terms contained no agreement to mortgage and nor did the agreement for sale and purchase between the parties. He advised that there is no suggestion advanced that Greenwich Pacific ever gave an agreement to mortgage.

[17] What Greenwich Pacific did however was to provide a guarantee of Athena's advance to Pro Kerb, and for that purpose it signed the Pro Kerb deed of acknowledgement of debt as guarantor, as did a Mr Paul Aitken and Pro Kerb itself. The advance, according to Mr Skudder, the sole director of Athena, was for the portion of the purchase price that "remains unpaid" under Athena and Greenwich Pacific's agreement for sale and purchase. However, quite what the status of Athena's earlier vendor advance to Greenwich Pacific now is, has not been adequately disclosed in any of the evidence. Whether Greenwich Pacific was itself released from liability on settlement of its agreement for sale and purchase or on provision of Pro Kerb's acknowledgement of debt, or whether Greenwich Pacific's debt was assigned or there was some other arrangement is unclear. The settlement statement for the sale to Greenwich Pacific, together with Pro Kerb's deed of acknowledgement of debt, and the two separate transfers registered on the title to the property, suggest that Greenwich Pacific's debt was paid on settlement and that Athena made a separate fresh advance to Pro Kerb.

[18] In any event, when Athena lodged its caveat on 7 December the interest it claimed in the property and its derivation of that interest from the registered proprietor (in this case itself) was based expressly on its interest as unpaid vendor under the agreement for sale and purchase with Greenwich Pacific. The interest was described in the following extract of the caveat:

**Estate or interest claimed, grounds on which claim founded, and derivation from registered proprietor.**

Pursuant to an agreement for sale and purchase between the vendors/registered proprietor (caveator abovenamed) and the purchaser (Greenwich Pacific Ltd) where the vendor has been unpaid.

[19] The words in bold text in the extract were part of the standard printed text of the caveat, with the remainder being in handwriting. It is clear on that face of the caveat that the hand-written words were substituted for earlier typed text that has been struck out. The struck out typed text states:

Pursuant to a Deed of Acknowledgement of Debt signed by Athena Professional Trustees Ltd as Lender and Pro Kerb (NZ) Ltd, being the registered proprietor of the land, as Borrower signed on 3 December 2007.

[20] By 12 December 2007 it is clear that settlement of the two sales had taken place and Pro Kerb had mortgaged its interest in the newly acquired property to Foundation Custodians to secure additional funding for its purchase. As the title identifier for the property shows, on that day Athena registered its transfer to Greenwich Pacific and there followed, approximately an hour later, simultaneous registration of:

- a) Greenwich Pacific's transfer to Pro Kerb; and
- b) The mortgage to Foundation Custodians.

[21] While the caveat continued in existence despite these dealings, the basis on which Athena was able to retain it is unclear and neither side has offered any explanation in evidence. It appears it was however almost a year later that Foundation Custodians first took issue with the continued existence of the caveat. Its solicitors wrote to the solicitors named in the caveat as the solicitors for Athena, Campbell Law. They expressed no surprise about the continued existence of the caveat, but they invited that firm to justify the interest claimed by Athena's caveat and indicated their view that the caveat was unlikely to survive a court challenge. Subsequently, in November 2008, the solicitors for the Foundation Custodians wrote again to Athena's solicitors along the same lines. They wrote again in December advising that if they did not receive a satisfactory explanation supported by relevant

documentation by 23 December they would take steps to have the caveat removed. They also advised that Foundation Custodians wished to undertake a mortgagee sale and did not share the view of Campbell Law that Athena's interest should be accounted for first at the time of any mortgagee sale.

[22] The solicitors had some discussion about Pro Kerb's agreement to mortgage as the possible basis for the interest Athena claimed. Foundation Custodians' solicitors pointed out in correspondence that the caveat did not refer to any agreement to mortgage with Pro Kerb but to an agreement for sale and purchase between Athena and Greenwich Pacific in which Athena remained unpaid. They also indicated a willingness to hold the net proceeds of sale in trust for Athena after payment of Foundation Custodians' mortgage and the costs of sale pending agreement between Athena and Pro Kerb, or a court order outlining how the funds should be disbursed.

[23] Athena, through its solicitors, was not willing to accede to that request. It maintained it had a prior interest just as Foundation Custodians considered it had the prior interest.

[24] The events giving rise to this application and Athena's liquidation followed. Counsel for Bassett Trustees who was previously counsel for Athena in respect of the application advised at the hearing that the liquidator, the Official Assignee, abides the court's decision.

### **Relevant Legal Principles**

[25] By s 141 a caveat operates, with certain statutory exceptions, as a prohibition on the Registrar's registering any dealing that might have the effect of charging or transferring or otherwise affecting the claimed estate or interest of the caveator.

[26] An application under s 145 (and the former corresponding provisions) seeking that a caveat not lapse essentially seeks retention of the prohibition.



[27] The principles applicable in considering such an application were summarised in *Ball v Fawcett* [1997] 1 NZLR 743, at 746 and need not be repeated in detail. Suffice it to note the following key principles referred to in that case:

- a) The courts have long held that the caveator must have a specific legal or equitable interest in the land caveated: *Holt v Anchorage Management Ltd* [1987] 1 NZLR 108 at 114 (CA);
- b) The onus is on the caveator to show that it has an arguable case for the claimed interest in land. Once the onus is satisfied the balance of convenience will in the normal course and in the absence of any special consideration be in favour of leaving the caveat in existence until the proceedings to enforce the interest claimed are tried: see *Castle Hill Run Ltd v NZI Finance* [1985] 2 NZLR 104, 106;
- c) An order for removal of a caveat will not be made unless it is particularly clear that the caveat cannot be maintained either because there is no valid ground for lodging it or because the valid ground for lodging it no longer exists: *Sim v Lowe* [1988] 1 NZLR 656, 659-660.

[28] In *Zhong v Wang* (2006) 5 NZConvC 194, 308 the Court of Appeal described the purpose of the caveat procedure as follows:

The caveat procedure has been described as an interim measure, “designed to freeze the position until an opportunity has been given to a person claiming” a caveatable right to regularise the situation by registering the interest claimed: *Miller v Minister of Mines* [1963] NZLR 560 (PC) at 569. We agree with the view endorsed in Hinde, McMorland and Sim, *Land Law in New Zealand* (1997) at [2.145] that Miller should be regarded as authority for the proposition that the caveat should remain until the interest claimed becomes capable of registration.

[29] Arguably, caveats can also protect those equitable estates or interest that are not capable of being perfected in due course by the registration of instruments: see Hinde, McMorland & Sim, *Land Law in New Zealand* at [10.006] 121 – 122.

[30] The caveat must describe the interest claimed with sufficient certainty and explain how the caveator has derived the interest from the registered proprietor: see s 137, the relevant parts of which state:

- (1) Any person may lodge with the Registrar a caveat in the prescribed form against dealings in any land or estate or interest under this Act if the person-
  - (a) claims to be entitled to, or to be beneficially interested, in any land or estate or interest by virtue of any unregistered agreement or other instrument or transmission, or of any trust expressed or implied, or otherwise; or
  - (b) ...
- (2) A caveat under this section must contain the following information:
  - (a) the name of the caveator; and
  - (b) **the nature of the land or estate or interest claimed by the caveator, which must be stated with sufficient certainty;** and
  - (c) how the land or estate or interest claimed is derived from the registered proprietor.

[Emphasis added]

[31] It is the question of compliance with clause (b) of subsection (2) that is particularly in issue in the case.

## **Discussion**

*Is the nature of the interest claimed by the caveat stated with sufficient certainty to comply with s 137(2)(b)?*

[32] The answer to this question is “no”. The nature of the interest Bassett Trustees claims to be entitled to is an interest as equitable mortgagee arising from Pro Kerb’s agreement to mortgage. The interest described in the caveat however is the interest that Athena had as vendor in the (then) unpaid purchase price due on its sale of the property to Greenwich Pacific.

[33] Counsel for Bassett Trustees recognised that the interest that is claimed does not obviously fit within the description of the interest described in the caveat, and

that as a creature of statute, the description of the former must be stated with sufficient certainty in order to comply with s 137. It was necessary therefore that counsel confront the problem that the description contained in the caveat states an interest that is not, on its face, the interest that Bassett Trustees now relies on. He argued in effect that the interest the caveat describes approximates the interest claimed. He submitted as the interest relied on arises from an unpaid part of the purchase price that was in fact secured against the property it is enough that the caveat describes the interest as being pursuant to an agreement for sale and purchase where the vendor has been unpaid.

[34] Counsel also submitted that if too strict an approach were adopted in terms of the detail required in the description of the interest claimed in the caveat, the whole purpose of the caveat regime would be undermined. He relied on *Zhong v Wang* (2006) 5 NZConvC 194, at p308, where the Court of Appeal said an interest described as one arising “cestui que trust of which the registered proprietor... is trustee” was sufficiently certain. He relied too on the statement of Archer J in *Re Peycher’s Caveat* [1954] NZLR 285 that:

Provided...the nature of the interest claimed is described with reasonable certainty, I do not think the caveator is bound by the precise form of words used.

[35] Counsel argued that it needs to be borne in mind that in cases where the courts have adopted a stricter approach they were dealing with the circumstance where there was in reality no caveatable interest. He pointed out that in this case there is an acknowledged interest arising from Pro Kerb’s agreement to mortgage.

[36] Counsel raised other factors in support of his overarching submission that the interest described in the caveat approximates the interest claimed. These included that while it was Pro Kerb that provided the agreement to mortgage, the original purchase by Greenwich Pacific was completed by Pro Kerb, and Pro Kerb’s agreement to mortgage had its origin in Greenwich Pacific’s original debt.

[37] I am unable to accept counsel’s submissions. Not only do I not accept that the interest that Bassett Trustees claims (and indeed appears to have had at the time the caveat was lodged) is the interest described in the caveat; I do not accept that the

latter interest in any way approximates the former. It is not a case of some minor discrepancy in a description that is nevertheless sufficiently certain. The interest described in the caveat is one arising pursuant to the agreement for sale and purchase between Athena and Greenwich Pacific in circumstances where Athena as vendor remains unpaid. A vendor's interest in the unpaid purchase price may give rise to a contingent interest in the equitable estate that passes to the purchaser, but the contingent interest does not survive the transfer of the legal estate to the purchaser. See *Whiteleigh Holdings (New Zealand) Ltd v Whiteleigh Pacific Resources Limited* (1987) ANZ ConvR 480 and *Gordon v Treadwell Stacey Smith* [1996] 3 NZLR 281, at p289. In the absence of something more giving rise to security for the debt over the property, the vendor's interest, following the transfer of the vendor's legal estate, is a simple interest in debt. Plainly the vendor's remaining interest does not approximate an interest in the nature of an agreement to mortgage. It is not an interest in land, and differs in that fundamental respect from an agreement to mortgage.

[38] Furthermore, subject perhaps to a possibility of estoppel by convention which I will come back to, I agree with counsel for Foundation Custodians that a caveator, having identified in the caveat the nature of the interest claimed and the basis of that claim, cannot rely on a different basis to support the caveat:

A caveator cannot sustain a caveat stated to be derived from a specified agreement when the interest derives from a different agreement: See *Re Psychers' Caveat* [1954] NZLR 285.

[39] In *Colin Adams Ltd v Baker* (unreported, Court of Appeal, 178/98, 5 May 1999, Henry Gallen and Doogue JJ) the Court of Appeal stated to similar effect:

...as the Master pointed out, s 137 Land Transfer Act 1958 and Reg. 24 Land Transfer Regulations 1966 require the basis upon which the caveat is sought, to be stated with sufficient certainty. The appellants having chosen to indicate that the basis of their claim was the letter of 22 July 1987, cannot therefore rely upon the subsequent material. ... The Act and Regulations make it clear that a person whose land is affected by any such application is entitled to know the basis on which the claim rests.

[40] Nor do I accept that the caveat describes an interest arising under an agreement for sale and purchase where the vendor has been unpaid and the unpaid part of the purchase price has in fact been secured. The submission to that effect

attempts to treat as one and the same what appear to be two separate debts (one unsecured and one secured) arising under different instruments. The submission also fails to recognise that that Greenwich Pacific's debt was never secured under its agreement for sale and purchase (a fact that counsel conceded at the hearing), and that it was Pro Kerb's debt that was in fact secured. Counsel's submission that the interest claimed arises from an unpaid part of the purchase price that was in fact secured and therefore approximates the interest claimed in the caveat is not tenable. It follows that the interest described in the caveat could not have survived as an interest in land following registration of Athena's transfer on 12 December 2007. There are other problems with the approach counsel advances, including the suggestion that Pro Kerb completed Athena's sale, which appears to contradict what the dealings registered on the title show. It is not however necessary to deal with this and other problems further, given the view I have reached so far.

[41] For the above reasons, I can only conclude that the interest claimed as equitable mortgagee arising under Pro Kerb's deed of acknowledgement of debt is not described in the caveat with the degree of certainty needed for the purpose of compliance with s 137(2)(b). Indeed it is not described at all in the caveat.

[42] That brings me to the second issue.

*Is there jurisdiction to amend the description of interest in the caveat and if so should the description be amended?*

[43] Mr Hucker's alternative submission was that if the caveat does not comply with s 137 it is nevertheless possible to offer protection to the caveator as the court has inherent power to amend the defective caveat instead of ordering its removal or lapse. He relied in this last respect on the discussion in *Hinde McMorland and Sim, Land Law in New Zealand*, at [10.013], where the possibility of an inherent power to amend is discussed. As the learned authors appear to recognise, any such inherent power is not unlimited. They observe in particular that it may not extend to that part of the caveat that defines the interest claimed. For example, see: *Midwarren Estates Pty Ltd v Retek and Stivic* [1975] VR 575 at 577; *Depsun Pty Ltd v Tahore Holdings Pty Ltd* (1990) ANZ ConvR 334 at 338.

[44] I accept the submission made on behalf of Foundation Custodians that the debate about the inherent power to amend that part of the caveat that defines the interest claimed is well settled. A caveat cannot be amended to show as its basis the agreement to mortgage when the interest claimed in the caveat itself is plainly derived from a different agreement: *Colin Adams Limited v Baker*.

[45] Even if I am wrong in the above findings and even assuming there is jurisdiction to amend the definition or description of the interest claimed, I am not persuaded that the caveat should be amended. The radical amendment needed would put paid to the need for even minimal compliance with the requirements of s 137.

## **Result**

[46] Ordinarily, the conclusions to the above questions would be sufficient to dispose of the application. The particular factual circumstances of this case are however unusual in that the caveat remains notwithstanding the registration of the subsequent dealings. Neither side has produced evidence to demonstrate exactly how and for what purpose that occurred. Athena was able to maintain its caveat against the dealings and I consider some explanation is required for several reasons.

[47] The continued existence of the caveat indicates that Greenwich Pacific and Pro Kerb, together with Foundation Custodian as Pro Kerb's mortgagee, had notice of Athena's caveat. It also suggests that registration of their dealings occurred with the consent of Athena, and presumably on terms that their interests were to be taken subject to the continuation of the caveat and priority of the rights they assured were protected by it.

[48] If the assumption was that the caveat was for the purpose of protecting the interest under the equitable mortgage and not merely an interest in the outstanding purchase price (if any) by Greenwich Pacific, that would suggest that the possibility of an estoppel of the kind referred in *New Zealand Lightharness Limited v Linn* (1985) 2 NZCPR 374 arises. In that case, the caveat mistakenly described the caveator's interest as one derived as guarantor whereas the caveator's true interest was, as in this case, that of an equitable mortgagee. The court accepted that the

mandatory requirements of the Act had not been complied with, in that the caveat did not state with sufficient certainty the nature of the estate or interest claimed by the caveator. The court also found that there was no power to amend the caveat following *New Zealand Mortgage Guarantee Co v Pye* [1979] 2 NZLR 188. However that was not an end of the matter. The court found the parties seeking removal of the caveat were not surprised or prejudiced by the caveat. Further, that the earlier request by their solicitors for consent to registration of their mortgage was a clear indication they accepted the caveat as valid leaving the caveator and its solicitors to believe this to be so. In these circumstances, the court considered that the question of estoppel arose and that the situation came within the principle described as estoppel by convention in *Amalgamated Investment and Property Co Ltd v The Texas Commercial International Bank Limited* (1982) 1QB84. There, the court expressed the nature of the estoppel in the following way:

When the parties to a transaction proceed on the basis of an underlying assumption – either of fact or of law – whether due to misrepresentation or mistake makes no difference – on which they have conducted the dealings between them – neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so. If one of them does seek to go back on it, the courts will give the other such remedy as the equity of the case demands.

[49] In this case there would appear to be similarities. It would appear that neither Pro Kerb, the grantor of the equitable mortgage, nor its mortgagee, Foundation Custodians, were surprised or prejudiced by the caveat. Indeed it appears they accepted it because the caveat survived following registration of the transfer to Pro Kerb and registration of Foundation Custodians' mortgage. That would suggest that both consented to the caveat's continued existence and accepted it as valid, leaving the caveator in a situation where it also believed that to be the case, or where its mind was never directed to the possibility that the caveat did not adequately describe the interest in land created by the security given by way of agreement to mortgage for the underlying debt owed by Athena and subsequently by Pro Kerb.

[50] As a consequence I am not yet satisfied that it would be appropriate to finally determine the application, at least not without giving the parties a further opportunity to be heard on the question whether an estoppel by convention arises or arguably arises.

[51] The interim order will therefore continue on the following basis:

- a) Bassett Trustees is to file and serve a further affidavit stating what evidence it has or is able to obtain relating to any consents given by Athena to registration of the subsequent dealings, the terms, if any of such consents. It should at the very least be able to obtain from the District Land Registrar a copy of any relevant written consent. It should also be able to explain why Athena struck out the reference in the caveat to the interest arising from Pro Kerb's acknowledgement of debt and substituted reference to the vendors contingent interest under its agreement of sale and purchase with Greenwich Pacific.
- b) Foundation Custodians is to file a further affidavit in response. It is to disclose in its affidavit what evidence it has touching on the consents if any that Athena gave to allow it to register its mortgage, and any terms attaching to such consents.

[52] Bassett Trustees' affidavit is to be filed and served within **7 working days**. Foundation Custodians' affidavit is to be filed within a further **7 working days**. Supporting memoranda may be filed on the issue of estoppel by convention and the question whether this is a case where the possibility of such an estoppel arises. Counsel are also requested to deal with ss 147 and 147A and their relevance to the facts in this case.

[53] The proceeding is to be listed for further mention in the **caveat list** on **4 November 2009 at 2.15 pm**.

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Associate Judge Sargisson