

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

**CIV 2009-404-001172**

UNDER the Land Transfer Act 1952

IN THE MATTER OF an application to remove Caveat Nos.  
7865366.1, 7865371.1, 7865371.2 pursuant  
to s 143 of the Land Transfer Act 1952

BETWEEN WESTPAC NEW ZEALAND LTD  
(1763882)  
Applicant

AND NGA URI WHAKATIPURUNGA O  
NGARAE (INC)  
Respondent

Hearing: 16 March 2009

Appearances: E C Gellert for the Applicants  
K W Bluegum, native assessor and shareholder, for the Respondent in  
CIV 2009-404-001172  
B Holmes, native assessor, for the Respondent in CIV 2009-404-  
001152

Judgment: 16 March 2009

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**ORAL JUDGMENT OF ASSOCIATE JUDGE CHRISTIANSEN**

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Solicitors:  
Simpson Grierson, Private Bag 92518, Auckland

K W Bluegum, c/o PO Box 176, Katikati 3177  
B Holmes, c/- PO Box 15615, Dinsdale, Hamilton 3243

UNDER the Land Transfer Act 1952

IN THE MATTER OF an application to remove Caveat Nos. 8050451.1, 8050451.2, 8050451.3 and 8050451.4 pursuant to s 143 of the Land Transfer Act 1952

BETWEEN WESTPAC NEW ZEALAND LTD (1763882) Applicant

AND TAPAEURURANGI HAPU (INC) Respondent

[1] In these two cases, Westpac seeks removal of caveats to enable it to complete settlement of mortgagee sales. In each case the mortgagee sales of the land in question was due for settlement last week or remains due for settlement this week.

[2] These matters were first called before Judge Abbott on 6 March 2009. At that time, and out of an abundance of caution, Judge Abbott adjourned Westpac's applications for removal of caveats to ensure that persons behind the caveats were provided with sufficient notice of the applications to remove those caveats.

[3] Before me, Mr Holmes appeared on behalf of Tapaeururangi Hapu (Inc) and presented an 'Answer and a Counterclaim'. He also presented a 'Motion to Compel' by which he sought an order directing Westpac to produce documents previously requested of it. In essence, he sought proof of the documents by which it is claimed Westpac agreed to advance funds to the registered proprietor, and of the security taken in consideration for the advance.

[4] On behalf of Nga Uri Whakatipuranga O Ngarae (Inc), Mr Bluegum filed an appearance under protest as to jurisdiction. In essence, he submits this Court has no jurisdiction to hear Westpac's claim to an interest in the land.

[5] After hearing from Ms Gellert in support of the applications, and after hearing Mr Holmes and Mr Bluegum in opposition, I made the orders sought by Westpac for removal of the caveats in each case. In particular, and under proceeding CIV 2009-404-001172, I granted the applications sought by Westpac, namely:

- a) That caveat 7865366.1 lodged against Certificate of Title 181080 (North Auckland Registry) be removed pursuant to s 143 of the Land Transfer Act 1952; and
- b) That caveat 7865371.1 lodged against Certificate of Title SA51D/316 (South Auckland Registry) be removed pursuant to s 143 of the Land Transfer Act 1952; and
- c) That caveat 7865371.2 lodged against Certificate of Title SA10B/975 (South Auckland Registry) be removed pursuant to s 143 of the Land Transfer Act 1952.

[6] Under proceeding CIV 2009-404-001152, I made the following orders:

- a) That caveat 8050451.1 lodged against Certificate of Title SA72C/217 (South Auckland Registry) be removed pursuant to s 143 of the Land Transfer Act 1952;
- b) That caveat 8050451.2 lodged against Certificate of Title SA3D/1440 (South Auckland Registry) be removed pursuant to s 143 of the Land Transfer Act 1952;
- c) That caveat 8050451.3 lodged against Certificate of Title SA48A/71 (South Auckland Registry) be removed pursuant to s 143 of the Land Transfer Act 1952; and
- d) That caveat 8050451.4 lodged against Certificate of Title SA57C/967 (South Auckland Registry) be removed pursuant to s 143 of the Land Transfer Act 1952.

[7] Regarding the issue of costs, I have directed that these be dealt with upon memoranda to be filed by the applicants and served upon the party against whom costs are claimed. Thereafter the party claimed against has two weeks to respond thereto. The matter of costs is then to be dealt with on the papers.

### **Brief reasons for judgment**

[8] There is evidence in affidavits filed with the Court that in the instance of each proceeding the registered proprietor of the properties was as mortgagor in default under loan facilities entered into with the applicant, Westpac. First registered mortgages were registered over the title of the properties to secure the loan advances.

[9] Property Law Act notices were served upon the mortgagors. Those expired unremedied and the applicant exercised its power of sale over the properties in question.

[10] Since then the applicant has entered into what are now unconditional agreements for the sale of all of the properties in question. Each is overdue for settlement or is due to be settled within the next few days.

[11] The caveats of the caveators were lodged after the applicant's first priority mortgages were registered.

[12] In each case the caveats claim an interest pursuant to sale and purchase agreements made after the applicant's mortgages were registered. The applicant has not consented to the sale and purchase agreements or to any interest claimed in the properties in priority to its own interest as first registered mortgagee.

[13] The evidence shows that the caveators are not incorporated societies under any statute of New Zealand.

[14] These proceedings have been served upon the caveators at the address for service given in each instance. The caveators were represented in the proceeding before me today.

[15] For their caveats to be sustained, the caveators must establish they have a reasonably arguable case for the interest claimed.

[16] I accept the following submissions:

- a) Unincorporated associations have no separate legal entity and therefore cannot own property other than by virtue of a contract between members.
- b) Quasi-corporate status may arise under statute, and therefore bestow separate legal entity on an association even though it does not have a formal corporate status (e.g. under the Incorporated Societies Act 1908, s 4). Alternatively, in relation to Maori freehold land, a Maori incorporation can be established by Court order pursuant to the Te Ture Whenua Maori Act (Maori Land Act) 1993. A register of Maori incorporations is kept by the Registrar of the Maori Land Court.
- c) The applicant's rights as mortgagee cannot be displaced in the absence of fraud under the Land Transfer Act without the applicant's consent or without conduct that amounts to deferral of priority. Consent requires a positive affirmative act by the mortgagee, such as written acceptance.
- d) When a mortgagee's power of sale has become exercisable, any sale by the mortgagor is not binding on a mortgagee unless the mortgagee consents to it. The interests of a buyer in land that is subject to a mortgagee's power of sale is extinguished by a sale by the mortgagee and any caveats protecting that interest may be removed.

[17] Therein it seems to me that those matters raised by Mr Holmes and by Mr Bluegum are met. Proof exists to a satisfactory standard of the applicant's indefeasible interest as a mortgagee in the fee simple land over which the applicant's interest is registered.

[18] Mr Bluegum has filed an appearance under protest to jurisdiction. But, it is to be noted that the caveat by which his party's interest is recorded has been lodged under the Land Transfer Act, and I accept the submission on point that his protest as to jurisdiction is inconsistent with the legal right asserted under the Land Transfer Act.

[19] In the circumstances, I am satisfied in each case that the land, the subject of these proceedings, is land over which this Court has appropriate jurisdiction to adjudicate upon.

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Associate Judge Christiansen