

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

**CIV 2009-419-000672**

UNDER the Land Transfer Act 1952

IN THE MATTER OF an application to remove caveat  
no.8076626.1 pursuant to s143 of the Land  
Transfer Act 1952

BETWEEN WESTPAC NEW ZEALAND LIMITED  
Applicant

AND TAPAERURANGI HAPU INC  
First Respondent

AND BRENDON JAMES HOLMES  
Second Respondent

Hearing: 8 June 2009

Counsel: Mr Holm-Hansen for applicant

Appearance: BJ Holmes, second respondent  
No appearance for first respondent (other than through Mr Holmes)

Judgment: 8 June 2009

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**JUDGMENT OF ASSOCIATE JUDGE FAIRE  
[on application to remove caveat]**

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Solicitors: Simpson Grierson, Private Bag 92 518 Auckland for applicant

[1] The applicant applies to remove a caveat. The application is made in reliance of s143 of the Land Transfer Act 1952.

[2] The circumstances are similar to those which are recorded in an oral judgment I gave on 8 April 2009 in *Mortgage Holding Trust Company Ltd v Ngä Uri Whakatipurunga O Ngarae (Inc)*, CIV 2009-404-001876.

[3] From the applicant's perspective, the caveat appears to have been lodged on behalf of a non-existent entity. The applicant has carried out an extensive search through all appropriate registers and cannot find evidence of the existence of the respondent. The caveat is purportedly executed under seal. The person who allegedly witnessed the fixing of the seal is the second respondent.

[4] There is, in fact, no need to investigate the status issue regarding the party which has lodged the caveat, for a reason which I will now set out.

[5] The caveat seeks to protect an agreement for sale and purchase made on 20 January 2009 between Malcolm R. Tahere and Nora J. Tahere, proprietors, vendor and the caveator as purchaser.

[6] The applicant holds a registered mortgage. The mortgage was registered against the title of the mortgaged property as a first mortgage on 11 October 1999. The applicant has now exercised its power of sale following a default having been made by the registered proprietors. The applicant is anxious to register, as a result of the exercise of the power of sale, a transfer to the purchaser. Settlement of that transaction is due to take place on 23 June 2009.

[7] In my judgment in *Mortgage Holding Trust Company Ltd v Ngä Uri Whakatipurunga O Ngarae (Inc)* (supra) I set out the relevant principles. For the sake of this judgment I re-state para [6] and [7] of that judgment as follows:

[6] The registered mortgagee's title is paramount. That includes the mortgagee's right to exercise its power of sale: *Congregational Christian Church of Samoa Henderson Trust Board v Broadlands Finance Ltd* [1984] 2 NZLR 704.

[7] Section 105 of the Land Transfer Act 1952 provides:

**105      Transfer by mortgagee**

Upon the registration of any transfer executed by a mortgagee for the purpose of [exercising a power of sale over any land], the estate or interest of the mortgagor therein expressed to be transferred shall pass to and vest in the purchaser, freed and discharged from all liability on account of the mortgage, or of any estate or interest except an estate or interest created by any instrument which has priority over the mortgage or which by reason of the consent of the mortgagee is binding on him.

[8]      As I stated in the earlier case, the interest claimed in this caveat has no priority and is entitled to no protection in respect of the registration of any transfer executed by a mortgagee for the purpose of the exercise of the mortgagee's power of sale over the land. In short, the registered proprietor's interest in the land ends with the transfer by the mortgagee to the mortgagee's purchaser. From that point in time, nothing will support a caveat. When that position is taken into account, the appropriate exercise of jurisdiction under s143 of the Land Transfer Act 1952 is to make an order which provides for the lapsing of the caveat and its removal from the title upon the registration of a transfer by the mortgagee to the mortgagee's purchaser, pursuant to the power of sale.

[9]      Mr Holmes, who filed no papers, indicated that the real challenge here was made on behalf of the registered proprietors. There is no factual foundation before me for his submission. In any event, if in fact there was some justification or complaint, the correct approach would be for the registered proprietor to apply for interim relief by way of an injunction to prevent the completion, or for that matter the exercise of the power of sale by the mortgagee. It is not appropriate in this caveat application, where no foundation for the submission is contained, for such a course to be followed. If in fact the registered proprietors wished to pursue such an application, that is a matter for them.

[10]     Having said that, it is appropriate that I now deal with the instant application. The applicant is entitled to an order which provides for the lapsing of the caveat and its formal removal from the title upon the registration of a transfer by the mortgagee to the mortgagee's purchaser pursuant to the power of sale. I order accordingly.

[11] In respect of the other orders sought in the application, I note that Mr Holmes is currently a bankrupt. Any application requiring him to pay money is covered by s76 of the Insolvency Act 2006 and is, of course, specifically halted by that section because of his status as a bankrupt. Accordingly, at this point in time, it is not appropriate that I make an order for compensation pursuant to s146 against him. Nor do I consider it appropriate at this stage that an order for costs be made.

[12] There is also, in the application, a request that an order be made requiring the second respondent to name members of the first respondent. I consider that Mr Holmes should have the opportunity of taking legal advice in relation to this matter. Although technically he has had time before this hearing to do so, he reported circumstances to me which caused him to have to leave New Zealand to attend his grandfather's funeral. There is no particular urgency in the order which is sought in relation to this matter by the applicant. The matter can best be covered by my adjourning this part of the application to the summary judgment list at 12.00 noon on 20 July 2009. That will give Mr Holmes the opportunity, should he wish to avail himself of it, of obtaining legal advice.

[13] Accordingly, I adjourn that part of the application which seeks orders in terms of paragraph 1(b) of the application to 12.00 noon on 20 July 2009.

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J.A. Faire  
Associate Judge