

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

CIV 2009-419-676

BETWEEN ASB BANK LIMITED
Applicant

AND TAPAERURANGI HAPU (INC)
First Respondent

AND BRENDON JAMES HOLMES
Second Respondent

Hearing: 12 June 2009

Counsel: S. Rawcliffe for Applicant
No appearance by First Respondent
No appearance by Second Respondent

Judgment: 12 June 2009

**(ORAL) JUDGMENT OF ASSOCIATE JUDGE FAIRE
[on application to remove caveats]**

Solicitors: Harkness Henry, Private Bag 3077, Hamilton for applicant

[1] The applicant applies to remove two caveats. The application is made on reliance of s143 of the Land Transfer Act 1952.

[2] This application was first called on 8 June 2009. Mr Holmes, the second respondent appeared on 8 June. The application was adjourned until today to allow further affidavit evidence to be filed.

[3] I have now been provided with an affidavit which provides details as to the exercise of the power of sale in respect of the first of the caveats referred to in the application.

[4] 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.

[5] From the applicant's perspective, the caveats appear 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 first respondent. The caveat is purportedly executed under seal. The person who allegedly witnessed the fixing of the seal is the second respondent..

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

[7] The first caveat seeks to protect an agreement for sale and purchase made on 5 January 2009 between Geraldine Rose Toilolo and William Ruresa Toilolo proprietors, vendor and the caveator as purchaser.

[8] The applicant holds a registered mortgage. The mortgage was registered against the title of the mortgaged property as a first mortgage on 13 June 2007. 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 30 June 2009.

[9] 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.

[10] 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.

[11] 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.

[12] 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 first 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.

[13] 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.

[14] 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.

[15] 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.

[16] The application in respect of the second caveat which is in respect of the property at Keystone Avenue is not yet the subject of the exercise by the applicant of

its power of sale. At the applicant's request I adjourn this part of the application to 12.00 noon on 20 July. Leave is granted to the applicant to file and serve an affidavit, annexing any sale and purchase agreement evidencing the exercise of the applicant's power of sale.

J.A. Faire
Associate Judge