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IN THE SUPREME COURT OF NEW ZEALAND
I TE KŌTI MANA NUI

SC 130/2021
[2022] NZSC Trans 3

BETWEEN **CHRISTINE MARAMA COWAN**
TE RAHUI JOHN COWAN
Appellants

AND **JOHN ARTHUR COWAN**
KURT THOMAS GIBBONS
170 QUEENS DRIVE LIMITED
Respondents

Hearing:	15 February 2022
Coram:	William Young J Glazebrook J O'Regan J Ellen France J Williams J
Appearances:	J Mason for the Appellant (via AVL) R C Laurenson and C D Batt for the Respondent Cowan (via AVL) D M Salmon QC and M R C Wolff for the Respondents Gibbons and 170 Queens Drive Limited (via AVL)

CIVIL APPEAL

WILLIAM YOUNG J:

Tēnā korua. Mr Laurenson, you're for the first respondent?

MR LAURENSON:

Yes your Honour. May it please your Honour. I appear with Christine Batt, my learned junior.

WILLIAM YOUNG J:

Thank you Mr Laurenson. And Mr Salmon, you're for the second respondent?

MR SALMON QC:

Yes sir, with Mr Michael Wolff.

WILLIAM YOUNG J:

Thank you Mr Salmon. Ms Mason, we'll take your submissions.

MS MASON:

Sir, I'll refer to the submissions dated the 26th of January 2022. Just generally the case for the appellants is that the undertaking should have been considered after the Court of Appeal had already determined that there would be an undertaking. That issue has been a further step and that further step should have required the consideration of a number of relevant factors in effect amounting to the whole of the circumstances of the case, and a decision ought to have been made at the end of that process on what was fair and just in the circumstances.

WILLIAM YOUNG J:

Are you talking about the decision of the Court of Appeal in September last year?

MS MASON:

Yes Sir, so after that decision there ought to have been another decision after consideration of the relevant factors, which are set out in the submissions, as to what the amount should be set at, and the objection, essentially going to the heart of it, is that it is unfair to proceed in the way that matters proceeded with an assumption that whatever the developer said, his costs would be that's where they should be set. There was no process around considering the impecuniosity of the appellants, and nor their access to justice issues, and nor any tikanga matters.

GLAZEBROOK J:

Can I just check with you. What do you say the amount should have been set at?

MS MASON:

We got through to the end and said the amount should have been set at whatever the appellants, in the circumstances, could have afforded, and that's the 10,000 that they have now put into a trust account.

GLAZEBROOK J:

So you say the amount should have been set at 10,000?

MS MASON:

Yes Ma'am. So, which is –

GLAZEBROOK J:

Can I just check, what the respondents are saying is that, in fact, you are attacking the first Court of Appeal decision and not the second Court of Appeal decision in that you're effectively saying that either no undertaking or no full undertaking as to damages should have been offered.

Now I understand at the leave hearing it was suggested that you might need to apply for leave to appeal out of time against that first Court of Appeal decision. Now you haven't done that and there'd be some difficulty, I suspect, in you

doing that now, but can I just check you are not seeking leave to appeal out of time against that first Court of Appeal decision despite the suggestion that that was the proper course open to you at the leave hearing? I wasn't at the leave hearing so I can't be certain that was what was put to you.

MS MASON:
I'd just like to say that I didn't understand that that was a suggestion. That was a question asked and the response at the time, I recall, was that we were out of time and, in any event, whichever pathway which was taken to get to where we are, the essential matters remain the same and that issue is around what the undertaking should be set at and whether other relevant factors should have been considered.

Can I just say, it has always been the case of the appellants that they wanted to give an undertaking for what they could give. So one issue is that they have agreed to an amount, and they did agree tentatively to an amount at the beginning, and the amount was linked to all they could come up with. The other point that I'd really like to make is that Christine Cowan, she's employed, she has a salary and a future and the consequences of her signing an undertaking without coming up with some funding to substantiate that undertaking are still quite harsh for her. So, of course, she is an individual and not a company and she could be facing bankruptcy. So it's not as though it is an undertaking without any consequence or meaning whatsoever, and so I'd just like to make those two points but also to say that whichever path was taken that we'd still be at this situation where the argument for the appellants is that all of the factors in the case should have been considered in determining what the value of that undertaking should be, if any.

GLAZEBROOK J:
Well, are you or are you not now wishing to apply out of time to appeal against the first Court of Appeal decision?

MS MASON:
We have not done that.

GLAZEBROOK J:

So you don't intend to do that now?

MS MASON:

We didn't. Well, firstly, I'll just go back. We didn't take from the leave to appeal hearing –

GLAZEBROOK J:

I just need a "yes" or "no". Are you applying or are you not?

MS MASON:

No, we are not applying.

GLAZEBROOK J:

Okay, thank you.

MS MASON:

If I can just address that point further, the decision to apply, to take this route, so if we look at what the respondents are arguing, they're arguing that technically and procedurally the wrong – the appellant had taken the wrong approach and the wrong journey or pathway has been embarked upon. Now at the time that the decision came out, that first High Court decision of Associate Judge Lester, the time period for appealing the first decision had already gone past and at that High Court hearing of Justice Lester there had been some discussion about the process and whether it was appropriate to go back to the Court of Appeal or to have the High Court hear this matter, and we had expected that there would be a second process and that process would have been weighing up all of the factors in the circumstances of this case and the Court making a decision setting what the value of the undertaking should be, and that didn't occur and instead the High Court's decision was based on an idea that because the appellants didn't come up with a sum of money, then they couldn't proceed, well the caveat couldn't remain, and the appellants' submission, response to that is that they had expected that there would be a process considering all of the factors and setting a value and the fact that that

didn't occur just really let to a conclusion that the only interest that were considered were the commercial interests of the developer in securing an amount that, the highest amount that could be set as damages.

WILLIAM YOUNG J:

Well it's not really the developer that is so much at issue here, it's your clients father, because it's the question whether he's in a lose/lose situation because without an undertaking if you win the case, he loses, if he wins the case he loses because he'll be liable for very substantial damages to the developer anyway.

MS MASON:

Yes Sir, and in going to the next step after that, if he isn't able to pay those damages, and there is not the appellants, then we presume that the developer at the end of the day would be the one losing out.

WILLIAM YOUNG J:

Well your clients' father does have some money, presumably he has the proceeds of sale of the Carterton property which would be available, and as well whatever interest he has in the Lyall Bay property would also be up for grabs. I mean we're assuming, assuming he wins the case against your clients, the Lyall Bay property is his, but that'll all go in damages to the developer. So he's at the moment in a lose/lose situation.

MS MASON:

Sir, the response from the appellants to this is the appellants have requested mediation on a number of occasions, and that has just been rejected, so whilst there would have been and still are all these possibilities for minimising whatever the costs might be to the parties and trying to resolve this litigation right from the outset this has been on the table and the appellants have approached the first respondent on a number of occasions and they have just been rejected, their advances. So there's really not much else they could have done about this. They've acted in good faith throughout and their efforts to try to resolve this in a way that would be sensible have been rejected. Including

not just approaches, but they have gone so far as to find someone who was able to mediate in a tikanga manner and that just, again, was rejected.

WILLIAM YOUNG J:

The respondent doesn't have to negotiate. I mean the position at the end of the day, is there an answer to an proposition that he's in a lose/lose situation without an undertaking?

MS MASON:

Sir he is, but the response to that proposition is that it is his own conduct that has put everyone in this position and so it is just and right that he bears the large part of that burden.

WILLIAM YOUNG J:

But even, that assumes that you're right and, that your clients are right and he's wrong, but if we just make the assumption that the case hasn't yet been determined, that either side may win at trial, then he is in a lose/lose situation because on the basis that he's right, that he is the true owner of the Lyall Bay property, it was always his to dispose of, then effectively he's lost the case simply because of the time it takes to get to trial.

MS MASON:

So the response from the appellants on that would be that that's all well and good if he did think that, and was certain of that. He should have informed the appellants at the time that he wished to sell the property. He instead told them that he wasn't going to sell it. So if he had done that, if he was so certain that he was the owner, then he should have told them and he shouldn't have involved the developer in a sale knowing that there was likely to be a challenge to this.

WILLIAM YOUNG J:

Well, I think, if I understand this, I've read the affidavits and some of them are a bit of a blur in my mind, but I understand his position is that he didn't think that he was facing a claim from your clients.

MS MASON:

Well, Sir, that just seems quite improbable because you would then have to assume that he thought that the entirety of the relationship property should be his, and that seems extraordinary given that he knew full well that his wife wanted her share of the property, whatever that may be, to have gone to the children. He knew that.

WILLIAM YOUNG J:

Okay. Well, I agree he knew that. But it can go in different ways though, can't it?

WILLIAMS J:

Part of the answer might be whether if the father knew there would be a fight did the developer know, because if the developer knew, the level of damages in any downstream litigation might well be mitigated.

MS MASON:

Sir, that issue is covered in our submissions from paragraph 104 onwards and the evidence that has been filed suggests that the developer didn't know until September 2020 at the earliest and November 2020 at the latest. So if, Sir, you go to page 108 of our submissions we say there that the – so there's a range of subsections, subparagraphs there, that in September 2020 the appellants told the developer's contractors that the appellants disputed the sale. So in talking about how much actually the quantum would be in terms of costs that might be payable to the developer, the submission for the appellants has been that certainly after the developer had notice that there was going to be a problem with the sale, that any costs he incurred after that time are to be borne at his own risk.

WILLIAM YOUNG J:

You mean as against Mr Cowan?

MS MASON:

As against, yes, either Mr Cowan or the appellants, whatever it is.

WILLIAM YOUNG J:

Just pause there. As against Mr Cowan the developer's got a contract under which Mr Cowan is to deliver vacant possession of the property, what basis would there be for damages for non-performance being reduced because after the contract was formed he learnt there was a problem?

MS MASON:

Sir, I'm not really certain but there could be a case where the Court decides that it's partially owned by the appellants and they –

WILLIAM YOUNG J:

That's assuming you're right. We're assuming for a moment that you're wrong and that the contract's okay although disputed and Mr Cowan has to pay damages for holding up the development for a couple of years. At least for the moment I can't see what Mr Cowan's answer to a claim for damages would be, and on the face of it they'd be quite substantial damages, or likely to be quite substantial damages.

MS MASON:

Yes, Sir, I presume Mr Cowan Snr could have the same response and that is that the costs that were incurred after notification to the developer wouldn't be payable but that the costs before that would be.

WILLIAM YOUNG J:

Well, you see, at the moment I'm unable to see a legal basis upon which the proposition you're being advanced could be sustained. If he's promised to do something, he doesn't do it, he's got to put the developer in the same position economically as he would have been if he'd done it. Now that's pretty elementary.

MS MASON:

Yes Sir. The submissions by the appellants is that that's not their responsibility and that's why conduct, the conduct of the first respondent is important.

WILLIAM YOUNG J:

But it will be if the appellants lose the trial, lose at trial. This is the contingency that the undertaking is there to address. That they're not in the right, but they're in the wrong, they lose, Mr Cowan's has won the case but he's still ruined because of the damages resulting from the delay to settlement.

MS MASON:

Sir, in which case their response will be that that should rightly fall on him because of his conduct, and it should not be for them to pay the consequences because the options are they, if they win they get, they don't get what they want anyway because they want the property. If they lose their father has to pay a substantial amount of damages, but they say his conduct has led this this situation. That he knew that they would have a case and it is quite incredulous to think that they wouldn't, but he proceeded anyway. It would have been simple enough for him to have told them he wanted to sell, or that he was going to sell, and that would have been what anyone would have expected, but not only did he not do that, he told the appellants on numerous occasions that he wasn't going to sell, and there is a note attached to one of the affidavits of Ms Christine Cowan, a handwritten note, in which he says "I'm not going to sell the property" and that was well after his wife had died.

So there is an acknowledgement that there will be costs, and the appellants say to that firstly that they have tried on many occasions to try to get the parties to the table, that's the first thing they would say to that, and the second thing that they would say to that was whatever costs arise out of this, they were not responsible for and he was solely responsible, so he should rightly and justly bear those consequences.

I'd like to just go to the beginning of our submissions and this is the access to justice point, and these points are premised on the submission that the undertaking for a caveat, there was a discretion to impose the undertaking. The first Court of Appeal did that. The decision of the first Court of Appeal is not being appealed, but what is being submitted is that the next step for the High Court ought to have been to consider all of the circumstances of the case

and to have made a decision about what the amount of the undertaking should be, and that wasn't done.

In relation to the Bill of Rights issue, the submission is the steps involved are section 27(1), which sets out the rights of natural justice, and then following on from that access to ones case, the right to have ones case be heard, comes out of that. Section 3 provides that the legislative, executive and judicial branches of government, that the provisions in the Act apply, and then there's some discussion about whether that's only procedural or substantive. The appellants say that the substantive approach is preferred. Then the appellants go on to say that the decisions of the United Nations Human Rights Committee in relation to access to justice are relevant to the Court's consideration of this matter, and then there's a quote from Justice Cooke in *Tavita v Minister for Immigration* [1994] 2 NZLR 257 at paragraph 15 about the decisions of the, and the operation of the UNHRC in a sense being a part of this country's judicial structure.

Then from paragraph 17 onwards there are some quotes from some decisions of the UNHCR, in particular emphasising that where costs in a civil case are prohibited then that becomes an Article 14 access to justice matter. I'll just not go through all of them but just point out one comment which was to do with a Finnish case that's set out in paragraph 18 where the Committee considered that the imposition of the Court of Appeal of substantial costs awards without the discretion to consider its implications for the particular authors or its effect on access to court of other similarly situated claimants, constitutes a violation of the authors' rights under Article 14.

So the appellants say that these matters around access to justice should have informed the High Court's decision and the Court of Appeal's decision, and the appellants go on to say that at the surface level this is about compliance with an undertaking and conditions around an undertaking, but at its core it's about access to justice. Throughout these proceedings, they have been procedurally difficult precisely because, firstly, the appellants are impecunious, so they didn't have amounts of money available to them that they could draw on to say: "Well,

here it is," and they were in a position of wanting to have a consideration of all of the factors and the Court setting out an amount and then going to institutions to see if they could borrow that amount, and that's the reality of the situation they were in. Procedurally, the Court, the High Court and the Court of Appeal later, said: "No, we're not going to get involved in that. You haven't come up with any evidence about what funds you have," which, of course, they couldn't, "and so because of that the caveat will be removed." So the appellants say that that procedurally was unjust and unfair and should not have occurred in that way.

GLAZEBROOK J:
Why do you say that it was not up to you to come up with a proposition at the hearing? It seems odd because normally one would expect that would be done rather than have yet another hearing.

MS MASON:
Procedurally they had expected to have another hearing because –

GLAZEBROOK J:
But why would they have expected that? This was the hearing about the undertaking.

MS MASON:
I'll just go back to the first Court of Appeal decision and the circumstances, and the circumstances have a bearing on what then went on later.

So the decision of the High Court, the first decision, came out on a Friday afternoon and on the following Thursday, on the 24th of February, was the settlement date for the property. So there was a lot of running around because of the urgency and on the Monday morning an application for appeal to the Court of Appeal was filed, and the hearing was on the Wednesday.

So all parties had very little time to prepare and to run arguments, and in that process what was important was the caveat at the time, or shortly before.

Everyone thought it was the retention of the caveat, not realising that the caveat had lapsed, and so it was an application, a further application, for a second caveat is what it turned out to be. But at that discussion there wasn't – at that hearing there was not really a lot of discussion about the undertaking. So the Court had said: "Do your clients," or: "Do the appellants agree to an undertaking?" Their response had been tentatively "yes" because they had not really any idea of how much that would be, and there were other conditions put in place and then the matter was then administratively managed, so to speak, by the High Court. So then the other processes that took place were all around the High Court.

So the appellants' way of addressing this was to view the High Court as the body that would make a decision setting the value of the undertaking, and so that's why that decision wasn't made and those submissions weren't made at the Court of Appeal because of the urgency and the nature in which everything unfolded, and then when they got to the High Court the appellants – there had been some discussion of whether this matter of the undertaking should go back to the Court of Appeal or whether the matter should be determined by the High Court. So that was the – the appellants' view was that the matters around the undertaking and what level the value should be set at had not occurred because of the urgency and it was appropriate then for the High Court to call for submissions even if they were on the papers and to then determine what the level should be.

Now I note that in the second respondent's submissions, at the end of those submissions, he suggests a process which centres around going back to the High Court to have exactly this sort of hearing, and the appellants' view is that this is actually a matter of such importance that it did deserve extra submissions and from looking at the cases around undertakings many of these relate to commercial interests and the circumstances around this particular case are quite different in that you've got individuals and two of them who are impecunious, who don't have the funds that, say, a large company or even a small company would have access to, and so because of the particular and peculiar circumstances in this case that a separate interlocutory hearing was

warranted or even submissions about this point on the papers, and those submissions were made at the hearing, the High Court hearing.

ELLEN FRANCE J:

Ms Mason, just in terms of that, at paragraph 41 of your submissions in reference to the High Court case *Paugra Holdings Ltd (in liq) v Harvestfield Holdings Ltd* CIV-2021-404-6336 [2013] NZHC 2200 you note that the Court there said that assessing the damages that might ensue may be an issue but may be only one of the matters considered and may not be pivotal. Are there other cases in the caveat context where the Court looks at a broader range of matters?

MS MASON:

Yes, there are. So as well as *Paugra* there is *Leather v Church of the Nazarene* [1984] 1 NZLR 544 and there is also *Holmes v Australasian Holdings* [1988] 2 NZLR 303 (HC).

So in *Leather* the Court says that where a caveator has shown that he has an arguable case the Court should ordinarily extend the caveat until the conflicting claims were determined in an action brought for that purpose, and again there's the issue of the imposition of an undertaking in relation to a caveat as a discretion.

ELLEN FRANCE J:

Yes, but my question was as to the sort of factors that are then considered, because if you look at *Leather* what the Court talks about there is the other persons who suffer loss in those circumstances shouldn't be left to bear it themselves, et cetera.

MS MASON:

In terms of cases around consideration of non-pecuniary issues, if I take that's what the question is.

ELLEN FRANCE J:
Yes, yes.

MS MASON:
There was the case of the *ANZ National Bank Ltd v Uruamo (No 2)* [2012] NZHC 1914 and that was a caveat and undertaking, and in that case there were issues in relation to wāhi tapu sites and in that case they didn't get into all of that because what they ultimately decided was that if the appeal could be heard promptly then there was no need for an undertaking.

But in terms of non-pecuniary, we had just relied on other security for costs cases like *Reekie v Attorney-General* [2014] NZSC 63 where the Supreme Court said in considering whether costs requirements should oust access to justice requirements, that non-monetary considerations were relevant.

ELLEN FRANCE J:
Right, thanks.

MS MASON:
So that was the authority that we used for that but more generally we used the application of tikanga and the requirement to take that into account as measuring or having to weigh up the effect on the appellants and the prejudice to them which really wasn't considered all in this case.

WILLIAMS J:
One way of interpreting what happened when it was made very clear to you in the Court of Appeal that an undertaking was going to be necessary or you weren't going to get what you wanted was that, is that if you raised the prospect of a limitation on that undertaking you would not have got what you wanted. It was in your interests to stay silent at that point when it would have been better to discuss the limitations that your clients were operating under and to argue why those limitations would not be fatal. What do you say to that take on how this played out?

MS MASON:

So what I'd say to that is that the appellants at the time were of the belief that they could raise some money, so they did think they could raise some money, and at the time they wanted to do what it is that was what they were required to do. So in signing the undertaking there was discussion around how much, what that would mean, how much money they'd have to come up with, and the appellants had said: "We'll do what we can. We'll see if we can raise money." So they did want to honour that undertaking but it became very difficult when there was no real process or discussion about how much that should be set at because they've always thought that they were in this position because of the conduct of their father and they did not see that they should bear the brunt of the litigation in what –

WILLIAM YOUNG J:

So here's the situation. You would presumably have been aware that the potential damages in the context of a development like this if your clients lost were going to be significant, wouldn't you? You would have known that at the time?

MS MASON:

Yes.

WILLIAMS J:

Did you know that anything significant was going to be beyond your clients at the time?

MS MASON:

No Sir, I didn't.

WILLIAMS J:

All right, weren't you applying for legal aid?

MS MASON:

Yes Sir, we were, but when they said we will have access, or we might have access to others who could be able to help us, I saw that that was a possibility.

WILLIAMS J:

I see.

MS MASON:

Because sometimes that does happen. Sir, the other thing is that I had expected that in particular the conduct of the parties would be a matter that would be considered, that they would not be responsible for coming up with 100% of what it was that would be penalty interest. And, as you can see Sir, it's not just on the table, it's not just penalty interest, is what other damages the developer would have suffered, and so the amount, I think the latest amount was in excess of a million dollars, so there had to be some sort of discussion about what the relevant amount should be set at, and this is the appellants' fundamental argument, is that that should have happened and it didn't and it was completely unfair to expect that whatever amount the developer wanted, that's what it should be set at, and they should be responsible for the full 100% of that.

The appellants, and related to that submission is one of the things that really caused them a lot of grievance, really, is the fact that they thought they had been the innocent parties here, and there was very little discussion about what the effect would be on them from the sale of the house, on them as individuals, on their children and on their wider whānau, and one the spiritual and cultural wellbeing from, in terms of the way that their mother's wishes had been so disrespected. There was no discussion about that at all, and in fact when tikanga hui arguments were put forward, they were just dismissed as not relevant, and they felt particularly aggrieved at that, yet there was so much discussion about the damages that their father could or would be incurring. So there was a predisposition, because of the cases I suppose which are heavily weighted in terms of commercial interests, and are usually cases of one company against the other, that undertakings had to be followed up by sums of

money, and so that was really what the discussion, and that then goes back to this complaint about access to justice and how there's very little in terms of the ordinary person's interests, and how that should be taken into account in a process like this.

Now I'd just really like to turn to this issue of undertakings and the decision of the High Court. Now at paragraph 29 of Associate Justice Lester's decision, which is page 201.0021. There's a discussion there about what was going to happen and what the Court of Appeal envisaged, it's paragraph 29, and that's been just goes back to the point made earlier about how the appellants envisaged these matters would play out, and at paragraph 28 the decision says: "During the course of argument, it was noted the condition imposed by the Court of Appeal required the undertaking to be filed in the Court of Appeal. That raised the question of whether non-compliance with the conditions would require a challenge to the caveat on that ground to be made to that Court. I am satisfied that is not what the Court of Appeal envisaged. An application was made to the Court of Appeal seeking an extension of time for compliance with the condition that John be given possession of the Carterton property. In a minute issued on 4 March 2021, the Court said it was not prepared to alter the condition and said at [3] that '[b]reach of the conditions would permit John to seek an order in the High Court removing the caveat over the Lyall Bay property.'"

So the idea really that's been put forward here is that all of the detail around the caveat, and what that would look like, would be managed administratively, in a sense, by proceedings in the High Court. So the expectation was that this issue of what value should be given to the undertaking was something that would be embarked up on by the High Court, and it wasn't, and I'd just like to go to a little bit earlier in paragraph 24. So just on the previous page, and there it talks about an undertaking as to damages should be accompanied by evidence that the undertaking is of value, and there are some cases referred to there. Now all of these cases that are referred to concern interim injunctions. So they are not actually caveat cases.

WILLIAM YOUNG J:

But I understood in the Court of Appeal you didn't challenge the proposition that the undertaking implied an ability to meet it.

MS MASON:

Well we challenged generally that the undertaking, there was a lot more discretion and that the Court had a discretion as to what it did with that undertaking, but –

WILLIAM YOUNG J:

I'm looking at paragraph 15 of the Court of Appeal judgment, page 201.0009. "An initial ground of appeal that the Associate Judge had erred in determining that an undertaking as to damages needed to be of value was not pursued. That was a proper concession." So are you now pursuing that argument?

MS MASON:

No. We weren't pursuing it, and we're not pursuing it now. What we are saying is that it needed to be of a value to be set. There was a second step. The first step was, should there be an undertaking. The second step should be, what should be the value of that undertaking, and what the appellants are saying is that procedure and that process around determining what that value should be, was jus skewed towards the importance to the developer, and to John, of their commercial interests, and there was no real consideration given to the wider circumstances and to the situation that the appellants found themselves in. So that's the distinction and just on that point of the importance given to the commercial interests of the respondents versus the cultural and spiritual and health interests of the appellants, and I'd just like to go back to that 24 and those cases, and those cases are all cases that relate to injunctions, and the point I'd really like to make about this is that injunctions are quite different from a caveat undertaking. Under High Court rule 7.54 injunctions are mandatory, and the other point about this is the threshold for gaining an injunction is a lot higher than the threshold for registering a caveat. So it's –

WILLIAM YOUNG J:

But not necessarily for maintaining a caveat. The Court's looking for an arguable case in terms of an injunction and in terms of maintaining a caveat, isn't it?

MS MASON:

But the submission being made is that they are two quite different things and the reason for that is that interests in land are seen as interests of a special and different nature and if somebody does have a caveatable arguable interest then that interest should be protected, much more than if you're applying for an injunction then –

WILLIAM YOUNG J:

No, I'm not really arguing about that. I'm just saying you said the threshold was different. I think the threshold is pretty much the same, isn't it? The threshold for sustaining a caveat.

MS MASON:

Well, the threshold for an injunction is having a real prospect of succeeding and the threshold for a caveat is you have to show that you have an arguable case and those two things are quite different.

WILLIAM YOUNG J:

Are they? I'm not so sure they are.

MS MASON:

Well, to have an arguable case is to be able to say that you can argue that, that you have some prospect, but a real prospect of succeeding is a higher threshold the appellants would argue. So the wider circumstances have to be taken into account, in particular the fact that with a caveat an undertaking is discretionary and the submission is that that shows that, actually, because it's discretion and because there is such a lot of discretion around it, that the imposition of or the amount that should be ordered to sustain that caveat should come from a

decision that's made, taking into account the justice of the case and the wider circumstances.

Then just going back to the access to justice cases and the importance of access to justice, it's just in particular in this case, in the circumstances of this case, and the cultural and spiritual aspects of it, that the appellants, the prospects of what would happen to them if they were successful, they would be deprived of the fruits of litigation in essence because they are not after a sale. They are after things that money can't put a price on, like the mana of their mother.

Then the submissions go on to look at some of the cases. So at paragraph 34 of the submissions there's a reference to another security for costs case and that's *Official Assignee of Harding v Harding (No 2)* [1914] 33 NZLR 1551, and there's a quote there and it was about the impecuniosity of a litigant, and she was not able to come up with security for costs and she was just going to lose her property, and the Court took into account the consequences. So this case is being used to provide authority for the fact that in these sorts of cases the consequences of what would happen are relevant and should be taken into account.

Then there's a section on the cases and we've been through some of those in paragraph 39 and this is about the factors that ought to have been taken in account, assuming that this exercise of discretion was a second step that the High Court, who was, the appellants say, managing or administering that decision of the Court of Appeal, ought to have taken. There's *Paugra* and there's *ANZ* and there's others, those cases in that paragraph 39 are all to do with caveats and undertaking, and I think that really the main point that the appellants make is that it was one decision to put in place an undertaking, and then it should've been a corollary decision to set the value of the undertaking and without setting the value of the undertaking, the assumption is that only the interests of the developers and Mr Cowan senior were to take precedence, and you can see from the cases, and from the transcripts, and from the decision that that's really all that is considered, and there are statements about whether

it should be 100,00 or much more, and when it comes to tikanga interests there are just statements like, this is not relevant because it's an undertaking.

The appellants then rely on the principles that came out of a case called *Nikau Holdings Ltd v BNZ* [1992] 5 PRNZ 430, which was a security for costs case, and those are set out at paragraph 44 there are a lot of principles. The appellants say that they aren't all the principles but they are a starting point and they've given the guidelines and some of the –

GLAZEBROOK J:
Paragraph what sorry?

MS MASON:
Sorry, at paragraph 44 as set out, and they talk about things like the Court being satisfied and that the ordering of costs is discretionary, the course of the proceedings to date, the conduct of the parties, any admissions made in the proceedings and then moving on to the next –

O'REGAN J:
That case is only about costs though, isn't it. It's not about damages caused to the winning party?

MS MASON:
Yes, that is about the costs, and the appellants say that underneath this case, although it's about undertakings, the same issues are engaged, and that issue is about access to justice of impecunious litigants and whether – and how their access to justice needs, rights, can be met, and the appellants say that in these cases that the security for costs cases are comparable, and the principles –

ELLEN FRANCE J:
Sorry, just in terms of the scope of the considerations, at paragraph 14 of the first Court of Appeal judgment, the Court talks there about an undertaking as to damages to protect your clients' father should their claim fail. So is your

argument that that doesn't nonetheless prevent other considerations being taken into account.

MS MASON:

Yes, that in assessing what the value of that undertaking should be, that all of these other considerations do need to be taken into account.

WILLIAM YOUNG J:

But then it wouldn't be an undertaking to protect John. It would an undertaking to give him some protection, or a modicum of protection.

MS MASON:

Yes, and that is the argument, is that the undertaking that there needs to be in the interests of justice an assessment as to what that value of the undertaking should be, that it should not be automatic that whatever the exposure of John is, that that's what the appellants need to come up with –

WILLIAM YOUNG J:

But if you told the Court of Appeal then, well we're not prepared to give an undertaking that provides substantial protection for John, then your prospects of getting leave to file a second caveat would've been pretty limited, wouldn't it?

MS MASON:

Sir, well if that had happened, and firstly we just didn't know that that was the case, and secondly if that had happened, then I presume I would have got instructions to appeal that decision and we'd be in the same place arguing the same things, practically.

WILLIAM YOUNG J:

Might have been. The case of the transaction would probably have settled, wouldn't it? I mean there wasn't a caveat in place. The transaction could have settled and presumably electronically in a matter of minutes, couldn't it?

MS MASON:

We would have applied for a stay of that Court of Appeal decision along with the appeal.

WILLIAM YOUNG J:

You might have been pretty – you might have had to be quick.

MS MASON:

Yes, Sir. Sir, those – yes. I just have to say that the urgency really, the urgency and the background explains a lot why this pathway, why we ended up where we have ended up, but I again have to say that the appellants did want to provide an undertaking. They did think that if they were to blame or if they should be responsible for this exposure then that is something that they should do their best to come up with and they were intending to seek funding from other whānau. Those were the instructions at the first Court of Appeal hearing.

WILLIAMS J:

So should we reframe this issue and the issue that was before the last Court of Appeal as one in which the appellants thought they could meet an undertaking as to damages, have discovered they can't and now wish to argue terms?

MS MASON:

Sir, they always thought they could come up with something.

WILLIAMS J:

Yes, I get that.

MS MASON:

But in that they thought that there would be a weighing. They always thought that it shouldn't be for all of it.

WILLIAMS J:

Yes, I understand that as well, but is what's really happening here you're coming back to court saying: "We can't do the whole thing. Is this enough?"

MS MASON:

Yes, Sir, that is what's happening.

WILLIAMS J:

Is that what you did in the Court of Appeal, when you put up the $10,000 and the Court of Appeal said that's too speculative right now because there was no evidence?

MS MASON:

Yes, that's what it was. They were saying: "In the circumstances of this case, we don't feel," and they do very strongly feel this, "we don't feel we're to blame here, that our father is to blame. He should bear the brunt of a lot of this but we're happy to –

WILLIAMS J:

Yes, I get that. You don't need to repeat all of that. So we should really frame this as a reconsideration given new circumstances, and that's what it should have been in the Court of Appeal the last time it was there?

MS MASON:

Yes, Sir, it can be looked at like that.

WILLIAMS J:

The only problem with that is you didn't have any evidence.

MS MASON:

Yes, Sir, and what we thought was that because it's really – it was very, very – if we go back to because they don't have any money, it's very difficult for them to say: "Well, I've got this much sitting in this account." They'd have to scramble around finding things and so –

WILLIAMS J:

Yes, but you'd think they'd scrabble around finding things before coming to the Court of Appeal for the last time. You'd think they wouldn't need to put their

best feet forward rather than rely on a comment from counsel which itself was probably hopeful at the time even though now you can substantiate it.

MS MASON:

Yes, Sir, they had actually got that $10,000 together before that hearing so –

WILLIAMS J:

I see, because the Court of Appeal said it was speculative.

MS MASON:

No, they had actually and they said it was speculative is all related to evidence from the Bar and so the position was that they had only just received that and it was just too late to provide an affidavit on that.

WILLIAMS J:

See, the problem is that we're put in the position now of really addressing what are quite important questions of principle around conditions on caveats for the first time because there was no evidential base nor any proper argument before it gets here. It puts us in a very difficult position even if we're sympathetic to you.

MS MASON:

Yes, Sir, that point is accepted but we just have to go back to not having, the Courts not having a process in the first place, that that's – that's really what, where the appellants' submission is, the error lay, that there should –

WILLIAMS J:

So you're saying it was the Court of Appeal's fault for not warning you that you needed to put your evidence in and make your submissions at that point?

MS MASON:

No Sir. Going back to the High Court that there ought to have been a process requesting submissions on the value of the undertaking, and that wasn't done, and that was requested.

WILLIAMS J:
Yes, yes.

MS MASON:
And so that in error then was replicated in the Court of Appeal and the response we have to that is that the first Court of Appeal allowed the registering of a new caveat and it's set out in here, these conditions, you have to meet these and then those things were done, and that avenue was open to the second Court of Appeal. So instead of saying that it was speculative, they could have assessed the circumstances and the factors that had been put forward and they could have made a decision saying that if you – the $10,000 should be in this account at this time, and that really was open to them because that's what the first Court of Appeal had done.

Then, Sir, moving on with the submissions. There are a number of tikanga aspects set out there and counsel has already made some submissions about how tikanga just wasn't a factoring in. There are some quotes from cases which we use as authority for tikanga is on par with the introduced common law and aspects of tikanga ought to be taken into account, and that's from *Takamore v Clarke* [2012] NZSC 116 and *Attorney-General v Ngāti Apa* [2003] 3 NZLR 643 (CA), and –

WILLIAMS J:
For myself, I don't think we need to rehearse this material.

MS MASON:
No.

WILLIAMS J:
What's more important is why is it relevant here.

MS MASON:
So it's relevant here because it involves this whānau and the practising of their traditions. So it's relevant –

WILLIAMS J:

Isn't your argument really that in the context of this whānau/family, whatever its racial make-up, this was a family home in which there was deep emotional investment? Why do you need to drag tikanga into this to make your point?

MS MASON:

Yes, Sir, because the attachment to land and I think really the main point is the burial of the placenta and pito in that land gives it a special character.

WILLIAMS J:

Yes, but your basic point is that this land was, is the family homestead in which the children have deep emotional investment, in part shown by the burial of the whenua.

MS MASON:

Yes, Sir.

WILLIAMS J:

Right?

MS MASON:

Yes. So, and –

WILLIAMS J:

Okay. I just don't think it's any more complex than that.

MS MASON:

Yes, so and the wishes of their mother, so the mana of their mother who wanted a certain thing done for cultural purposes, they ran very much an extended family and that's how their whole lives were set up, and when we look at contribution, Ms Christine Cowan, she has spent her life and her life salary with her responsibilities around that extended family social structure and that is – her situation is criticised by the respondents by saying: "Oh, she's this age. She should go out and get her own house." So that's also quite important, the fact

that she has consumed her life with her obligations that her mother passed on to her to her entire whānau which is why her mother has left her the house.

WILLIAM YOUNG J:

Ms Mason, you've had quite a lot of questions, I'm conscious of that, but there was a division of time of an hour for each counsel, each side. Where are we with your submission?

MS MASON:

Sir, most of them we have just traversed in answering the questions and I think that they are written there quite clearly and I can address some further things in my reply submissions. So I'm happy.

WILLIAM YOUNG J:

Of course you can. Okay, all right.

WILLIAMS J:

Can I just ask one question for factual clarification? What do you say to Mr Cowan Snr's suggestion that the Matapouri land was in fact an investment property and it wasn't ancestral land at all?

MS MASON:

That was Marama's property passed on from her whānau, so that was from her father, and she had expected that that would be held there and would be passed on to other generations.

WILLIAMS J:

Yes, but what do you say to the factual proposition that in fact the father and his brothers had purchased the Matapouri land for the purpose of subdivision and sale?

MS MASON:

Well, Sir, there's no – she hasn't provided reply evidence on that or the appellants haven't.

WILLIAMS J:

If you don't know, just say you don't know.

MS MASON:

Yes, I don't know.

WILLIAMS J:

Okay, thank you.

WILLIAM YOUNG J:

All right, thank you, Ms Mason. Mr Laurenson.

MR LAURENSON:

Might I commence by saying that a lot of what has been heard this morning, and I refer particularly to the suggestion that there was to be a second step to the ordering of an undertaking, a second step that determined the length and breadth or value of that undertaking, simply is not countenanced by the process of ordering an undertaking and to the extent that there have been submissions this morning that there was an expectation in the High Court, that was before Associate Judge Lester, that there would be some determination of value, it's completely foreign to my recollection of what happened in the High Court and to anything I can recall of the submissions of my learned friend in the High Court where her submissions on value related principally to seeking help from a wider group of people. Now when I say that the process of undertaking doesn't countenance the second step, obviously in the process of requiring a caveating party to give an undertaking a court is reliant upon the applicant to make the assessment of whether or not they are good.

WILLIAM YOUNG J:

Pause there, Mr Laurenson.

THE COURT ADDRESSES MR LAURENSON – TECHNICAL ISSUES (11:13:57)

COURT ADJOURNS: 11.15 AM

COURT RESUMES: 11.35 AM

WILLIAM YOUNG J:
Okay, Mr Laurenson, I hope we can hear you.

MR LAURENSON:
Yes, I've turned my camera off and apparently that allows you to hear me in a more adequate way. Is that the case?

WILLIAM YOUNG J:
Yes, it is.

MR LAURENSON:
What I was submitting before the adjournment is that the submissions that we have heard this morning that there be a second stage to the order of an undertaking, and that is a determination of the value or the worth of the undertaking to be a second step to the order itself described by my learned friend as a corollary hearing or a second-step hearing administered by the High Court, in my respectful submission is simply not countenanced in the process of the determination of whether or not an undertaking will be given and that to the extent my learned friend said it was a matter of argument before Associate Judge Lester, that aspect is completely foreign to my recall of that hearing and the submissions that were made by my learned friend at the hearing, and on that last point her submissions at the hearing were that when this issue of whether value be given for the undertaking had the condition been met, the comment was made by her that they may be seeking assistance from a wider family. Now –

WILLIAM YOUNG J:

Mr Laurenson, I'm just looking at paragraph 31 of Judge Lester's judgment. It's 201.0022. There's a point recorded that's attributed to Ms Mason that's sort of like the point she was advancing. She had not addressed, I think what the point is, the substantiality of the undertaking, "as no notice had been given to her of the likely level of damages that the undertaking may need to address." Now the Judge then deals with that but something along the lines of what she said seems to have been put up to him.

MR LAURENSON:

Yes, well, it's certainly in my recall it wasn't in the – it didn't carry the thrust of the submissions this morning. My recall is what was being said by counsel at that stage was in an endeavour to excuse the failure by her clients to address the level of undertaking, I'm sorry, to address the matter of giving value for an undertaking which became such an important part of that hearing. She had not come to the Court really prepared to argue value for an undertaking, and that comment of Associate Judge Lester should be seen in that light.

WILLIAM YOUNG J:

Okay, thank you.

MR LAURENSON:

I want to go back to the considerations that were made by the first Court of Appeal or the process whereby the undertaking was given. In my submissions for the first respondent there is a fairly lengthy passage of the first Court of Appeal's consideration and that is taken from the transcript of the Court of Appeal which is the document 201.0047. That's the Court of Appeal's transcript, and the passages of my submission are really from paragraph 8 at page 2 through to 14 and then paragraphs 18 through to…

WILLIAM YOUNG J:

Sorry, what do you mean by paragraphs?

MR LAURENSON:
That's in my submissions.

WILLIAM YOUNG J:
I see.

MR LAURENSON:
Paragraphs 18 through to 24 or thereabouts.

Now at the hearing before the first Court of Appeal the possibility of giving an undertaking was very much centre stage. It had been signalled by Justice Miller in the email that had been sent by, on his behalf, the morning of the hearing, that the parties would have to consider argument of an undertaking, and then during the course of the hearing there is the acknowledgement by the counsel for the appellants that it was required as a safeguard. It was to be given as a safeguard.

But at the very end of the hearing, or near the very end of the hearing, there is a comment made by Justice Goddard at – and this is at page 32, line 15 of that transcript. That is the transcript that starts at 201.0047, and I'd ask you to look at page 32 of the transcript where he says at line 15, Justice Goddard to counsel says: "You've only got tentative instructions in relation to an undertaking as to damages. Is that right?" Ms Mason: "Yes, the instructions were prefer some other way however if that's what we have to do, then we'll do that," and then Justice Goddard says: "That's something else you should discuss with your clients, especially if these only relate to Lyall Bay as it would and is essentially for the benefit of Christine."

So at the conclusion for all intents and purposes of that discussion, counsel is told by the Court to discuss the giving of the undertaking with the clients and, in my respectful submission, that would include the matters that we've heard something about this morning that there would be the prospect of significant loss and the undertaking was to cover that if given.

Now that's where it was left in the hearing, and then the next day an undertaking is given by the appellants and the terms of that undertaking is – I'll go to my submission again – the terms of the undertaking is at paragraph 14 of my submission, and it's set out there in full, and it states that the appellants undertake to comply with any, and I emphasise that order, the Court may make for the payment of damages that the respondent may sustain through the granting of the application for an order for a caveat against dealings. Now it's an unqualified undertaking, unqualified outside of its terms itself. Now the inference that has to be drawn, and as I submit in the written submission, instructions were obtained for that, in those terms for that undertaking to be given the next day.

WILLIAM YOUNG J:

Well I mean taking a slightly formal view of it, you say an undertaking shouldn't be given unless they were confident they could discharge it?

MR LAURENSON:

Well, that, but also the suggestion that there should be a second stage hearing to determine the limits of the undertaking, is simply not countenanced in this process.

WILLIAM YOUNG J:

Okay, not consistent with the text of the undertaking, it doesn't say, comply with any order the Court may make for the payment of damages that the respondent may sustain or such lesser sum as maybe fixed by the High Court. That's the point you're making isn't it?

MR LAURENSON:

It is one of the points I'm making. The other point I'm making is that the terms of the, well if you look at that process, the terms of the undertaking were fully cognisant. The responsibilities of the undertaking were fully known by the appellants by the time they gave the undertaking. There was no question of a second or corollary hearing or something of that nature.

GLAZEBROOK J:

Can I just – when you give an undertaking in respect of an injunction, you're giving an undertaking in respect of damages that result from effectively that interim period of injunction that turns out to have restricted you in doing what you wish to do. Is that caveat quite the same beast, if we can put it that way, in that the argument against you is that it should be looked at more in terms of a security for cost like argument, and also that it should take into account the importance of the underlying asset, being land, which is important not just in Māori culture, but under the common law, because after you get specific performance where you don't in relation to other assets, so it's seen as not being something that is just a money issue.

MR LAURENSON:

There's two questions in that. The first is how long does the undertaking last under an injunction, under an interim injunction compared with a caveat. I say they are the same. They are both determined in the end on the determination of the substantive proceedings, whether it be under an injunction or a caveat, as we have got here. So I submit there's no difference by reason for that. In respect of the, does a caveat have more essence or significance than an interim order, on an injunction. In my submission that is answered by the passage in my submissions that are at paragraphs 15, 16, 17 and 18 of my submission, and in summary what I'm seeking to say there is that in the case of an interim injunction you have a rule which says you must give an undertaking. So the starting point on an interim injunction is that you will give an undertaking. In the case of a caveat, there is no requirement in the legislation that you do give an undertaking. Therefore it is very much a creature of the Court's exercise of discretion in a particular case on if a caveat is to be sustained what conditions do we impose, and –

WILLIAM YOUNG J:

Just pausing there, Mr Laurenson. It would have been possible for the appellants to have obtained an interim injunction here to stop the sale proceeding providing they were prepared to give an undertaking as to damages. The Court of Appeal has effectively treated, carried that through to

what they did do, a refusal, an unwillingness to permit a second caveat unless it was accompanied by an undertaking as to damages. Both the caveat and an interim injunction would have had the same effect, that is preventing Mr Cowan doing something that he wanted to do which was to settle the transaction.

MR LAURENSON:
Yes, I fully agree with that, but the point I'm trying to make is that when it came to imposing conditions on the caveat the Court of Appeal in its first hearing was starting from a completely clean sheet, whereas with an injunction the discretion is fettered.

WILLIAM YOUNG J:
Well, it has to be granted in almost all circumstances. But here the issue, an undertaking to pay damages was given, so as I understand it the requirement to give that undertaking is not challenged by Ms Mason because she's not seeking leave to appeal against the first Court of Appeal judgment.

MR LAURENSON:
Correct, and –

GLAZEBROOK J:
It's a different point I'm asking about. I'm asking about what would be the considerations in respect of a caveat as against an interim injunction.

MR LAURENSON:
Well, I'm not sure if they would be different. If an application –

GLAZEBROOK J:
What's said against you is that a caveat is different and should be looked at in the same way as a security for costs application rather than in the same way as an interim injunction.

MR LAURENSON:

Well, I submit that the answer to that is that a case support a caveat is only as good as that case is. Similarly, the case supporting an interim injunction is only as good as the case is, and there is no special penumbra or significance you give to a claim to an interest in land because it is land any more than –

GLAZEBROOK J:

That isn't the view the common law takes of land because it does give specific performance. It doesn't treat it merely as money.

MR LAURENSON:

Well, in the end I come back to the fact that the Court of Appeal had in mind a whole range of issues, well, a whole range of considerations which in determining whether on the grant of an indulgence of the second caveat they imposed conditions, and this undertaking in unqualified terms was one that they required.

GLAZEBROOK J:

Right, so you said they did take into account all of the considerations that the appellant says should have been taken into account or that they didn't have to. So which of those is it?

MR LAURENSON:

I say that they took into account the range of circumstances that my learned friend is now advancing and, for instance, in respect of the attachment to the land, there is a long submission by my learned friend to the Court of Appeal that was made on that and that appears in the transcript of the Court of Appeal hearing, if they could find that again.

GLAZEBROOK J:

I'm fine about the submission, where is it dealt with in the judgment?

WILLIAM YOUNG J:

It was probably by consent, wasn't it, because the proposal was made and it was agreed to, wasn't it? Is that right, or not?

GLAZEBROOK J:

In terms of the undertaking, yes, I think so.

WILLIAM YOUNG J:

Yes.

GLAZEBROOK J:

I was just trying to get the answer to whether the Court of Appeal took into account those range of circumstances, or whether they didn't, which really means you look at the judgment, I think, rather than the submissions made.

WILLIAM YOUNG J:

Presumably they may not have if it wasn't opposed.

GLAZEBROOK J:

Well possibly not but if they should have done then…

WILLIAM YOUNG J:

It may not matter unless, that judgment's not under attack.

GLAZEBROOK J:

Well I'm looking at both judgments actually, because the argument is that they should've taken it into account in quantum.

WILLIAM YOUNG J:

On the second time round.

GLAZEBROOK J:

That we have at the moment because we do not have a challenge to the first judgment, but obviously if they took it into account in the first judgment, then that has a bearing on the second judgment.

WILLIAM YOUNG J:

Or you can say about quantum is that it was expressed in the first judgment to be an undertaking that would provide, that would protect John, and that's about as explicit as it gets, I think, isn't it Mr Laurenson?

MR LAURENSON:

Well there is in respect the link to the land, paragraph 6 of the first Court of Appeal judgment, where there is the statement: "In an agreement dated 21 May 2002 between John and his wife he agreed that he would 'sells and gifts his share' of the 'joint family home' at Lyall Bay to Christine. This agreement is in evidence. He admits it but says it was entered at an unhappy time and – "

WILLIAM YOUNG J:

Yes, but this is a slightly different point Mr Laurenson. In terms of what was contemplated by the undertaking, all there really is paragraph 14, isn't there?

MR LAURENSON:

Yes, but one of the considerations that the Court had in arriving at its range of conditions, was the fact that Christine has said in paragraph 6, he's long lived at the property with the family and still does. So there is there, given the circumstances of the hearing which was under urgency, there is a recognition of the attachment to the property in that sentence.

WILLIAM YOUNG J:

Yes.

MR LAURENSON:

And that, I submit, would answer the question that her Honour has just asked me.

WILLIAM YOUNG J:

Can I just ask you one question, put one proposition to you. Ia substantial element of the case is that in the current situation your client is in a lose/lose situation. He either loses the case against his children, in which case he loses

it, or he wins the case against his children, but the value of the property is swallowed up by claim for damages by the developer. That's very much the heart of your argument, isn't it?

MR LAURENSON:
Correct.

WILLIAM YOUNG J:
As I understood Ms Mason's response, it was broadly along the lines that if this is so it's your client's fault because first, he must have known that an attempt by him to sell the property would be resisted by his children. Secondly, he told them he would not sell the property and then thirdly, he sold the property without telling them. Can we just go through those components? He accepts he sold the property without telling them he was going to?

MR LAURENSON:
The circumstances that have been set out by my learned friend on this are completely disputed.

WILLIAM YOUNG J:
I understand, perhaps if we can just keep to these propositions. I understand the context is heavily disputed, but just these four features, get to the context in a moment. He did sell the property without telling them, I think that's not challenged, is it?

MR LAURENSON:
Well he had – he informed them of the sale at about the time of the sale. Now that's as best I can give you in terms of that connection.

WILLIAM YOUNG J:
So that's in his main narrative affidavit, is it?

MR LAURENSON:
Correct. The one I'm referring to –

GLAZEBROOK J:

Can you take us to the affidavit, please?

MR LAURENSON:

Yes, it's the affidavit of 19 March, I believe it is. I'll have to find that passage because…

WILLIAM YOUNG J:

This is the affidavit of – what I've got up on the screen is the affidavit of Mr Gibbons.

MR LAURENSON:

It's not that one. It's Mr Cowan's affidavit of 18 March 2021. 301.0449.

WILLIAM YOUNG J:

Do you know whereabouts in the affidavit it is, Mr Laurenson?

MR LAURENSON:

I'm trying to find it. The passage that I'm immediately looking at are paragraphs – it's paragraph 36.

O'REGAN J:

I think, Mr Laurenson, it's 301.0449.

GLAZEBROOK J:

That's the affidavit.

WILLIAM YOUNG J:

That's the affidavit, yes.

MR LAURENSON:

That's the 19th of March affidavit.

GLAZEBROOK J:

And so he's saying paragraph 36. Have we got paragraph 36 there?

MR LAURENSON:

Can that be brought up?

GLAZEBROOK J:

Paragraph 36 of that affidavit, the 18 March one.

MR SALMON QC:

I wonder if it's paragraph 17?

GLAZEBROOK J:

Yes, paragraph 17.

MR LAURENSON:

Yes, there it is. That was what I'd referred to and the –

GLAZEBROOK J:

What does that mean "at the time the contract of sale was entered into" because I think that's disputed, isn't it?

MR LAURENSON:

Well, I believe so but at the time of sale he told them. Now…

ELLEN FRANCE J:

But at the time he'd entered into an agreement for sale and purchase?

MR LAURENSON:

Correct.

WILLIAM YOUNG J:

So broadly it is at least likely that he sold the property without telling them beforehand?

MR LAURENSON:

I'm not conceding that.

WILLIAM YOUNG J:

All right. A second element of the three propositions I put to you was that he told them prior to that that he would not sell the property.

MR LAURENSON:

There are notes, handwritten notes, and matters of that sort but circumstances very much changed and that is set out in the passages that I was trying to refer to earlier –

GLAZEBROOK J:

All right. Does he agree he wrote those handwritten notes?

MR LAURENSON:

Well, I haven't briefed him specifically on that but there is…

WILLIAM YOUNG J:

What does he say about it in his affidavit? What's his narrative about that?

MR LAURENSON:

Well, he says that after his late wife died and they were all living at home there was a campaign of hostility that was mounted against him which led him to change his mind on any previous intentions he had in respect of the property and sell it and get on with his life and get out of an environment that he found unbearable to live in.

WILLIAM YOUNG J:

All right, okay. Well, I understand that's the narrative. We're just putting to you the three elements of what I understood to be the argument of the appellants.

ELLEN FRANCE J:

Because that is consistent with having told them beforehand that he would not sell, isn't it? He's had a –

MR LAURENSON:

Well, it is. That's undeniable. It is consistent, inconsistent.

WILLIAM YOUNG J:

The third proposition is that he must have known that an attempt by him to sell the property would be resisted by his children.

MR LAURENSON:

I don't concede that at all.

WILLIAM YOUNG J:

He does engage with that point in his affidavit if I remember rightly.

MR LAURENSON:

No, and –

WILLIAM YOUNG J:

I think he did actually. I think he does engage with it somewhere. He says that he didn't, from my recollection, that he didn't anticipate that this would be an issue, but I…

GLAZEBROOK J:

Perhaps we can find that.

MR LAURENSON:

It may not be in this affidavit.

GLAZEBROOK J:

Maybe your friends can help you. They probably seem to know the affidavits.

WILLIAM YOUNG J:

Okay, well, just bear those – those are what I think is the argument against you on the unfairness of him being in a lose/lose situation.

MR LAURENSON:

Yes, and the answer that I'd give to this generally is that irrespective of everything that my learned friend can say on behalf of the appellants in respect of this property an equal factor in this case is Mr Cowan's right to deal with the

property as an original purchaser of it back it in 1974, and that if family, its very unhappy family set of circumstances now which have been agitated by the choice of the appellants to mount hostile attacks on him, including as to the fact that he is Pākehā, it is a very unhappy challenge to a father who after all bought this property with his late wife in 1974 and over all the years paid for it, serviced it, I know that there is issues about other people contributing to that, but in the end it is his relationship estate with his wife and it is not, in my respectful submission, in any ways culture to have a family challenging a father in this way, and that is –

GLAZEBROOK J:
That's rhetoric. I don't think it's really helpful. We haven't had the similar rhetoric on the other side so I'm not sure this is helpful now. Can I just check, the appellants also say that there was a resistance to attempts to get this heard early and to resolve the question of ownership. What do you and your clients say about that?

MR LAURENSON:
The same as what the second respondents say. There has been no design to hold things up or make things difficult. The submission that is made by counsel for the appellants arises or is in reference to a minute of Associate Judge Johnston where before him was an issue of whether the specific performance claim by the second respondent should be heard first, (**inaudible** 12:09:49) family, and the family of course made the opposing submission and that was determined by Associate Judge Johnston that the specific performance claim (**inaudible** 12:10:12). Now as it turns out that –

WILLIAM YOUNG J:
Sorry, what did Judge Johnston say? I'm sorry, I can't see what the outcome of the minute…

MR LAURENSON:
We'll have to find that minute.

WILLIAM YOUNG J:
It's up on our screen. He's saying they should be dealt with together, is that right?

MR LAURENSON:
Yes.

WILLIAM YOUNG J:
Well that seems sensible.

MR LAURENSON:
In any way, but what happened was that the specific performance claim at the hearing of Associate Judge Lester (**inaudible** 12:11:07) and since then the substantive litigation in respect of the children's claim has been held up by these series of appeals. There is, that there has been a construct or design, or something of that sort, to delay matters by the respondents (**inaudible** 12:11:35).

WILLIAM YOUNG J:
I'm actually having some difficulty hearing you, I think you are breaking up slightly.

GLAZEBROOK J:
What he said was –

MR LAURENSON:
I've had my video (**inaudible** 12:11:49)

GLAZEBROOK J:
What he said was since that hearing, the actual hearing of the children's' claim isn't held up by these appeals.

WILLIAM YOUNG J:
Why is it held up by these appeals?

MR LAURENSON:

Well, let me say that if there is, if the substantive pleadings have not been pushed ahead it's (**inaudible** 12:12:26) to do so.

WILLIAM YOUNG J:

We are breaking up. I think we'll have to try and do something else. We'll just take an adjournment for a few minutes

COURT ADJOURNS: 12.12 PM

COURT RESUMES: 12.21 PM

WILLIAM YOUNG J:

Mr Laurenson, we've got you again.

MR LAURENSON:

Yes, I'm apparently on the telephone now.

WILLIAM YOUNG J:

Okay. Well, that sounds good anyway.

MR LAURENSON:

I believe the point that I was addressing before that break was if there has been no progress in the appellants' substantive case, that's not at the feet of Mr Cowan and it's the appellants who have not progressed up until this point, and, as I have set out in my submission, in the latter part of my submission, there is a lot of work to be done, in my respectful submission, in respect of the pleadings and there will be no certainty that even a hearing in May of this year will bring any quick result to this dispute and will there –

GLAZEBROOK J:

Can I also check they do say that they tried suggesting mediation and meetings and that those were refused? What do you say about that?

MR LAURENSON:

Well, they were. There have been overtures from both parties or from both sides. One of the difficulties that Mr Cowan has personally about meetings is his safety and what he's likely to encounter, but without disclosing qualified correspondence there has been overtures made on his behalf. One of the difficulties we have is that there is the foundation condition of discussions by the family which is that the house must not be sold.

WILLIAM YOUNG J:

Can I just go back to the proceedings? You've listed at para 57 of your submissions some of the issues. So I take it there is no relationship property application before the Court?

MR LAURENSON:

No.

WILLIAM YOUNG J:

There's no Family Protection claim?

MR LAURENSON:

No.

WILLIAM YOUNG J:

And no testamentary promises claims?

MR LAURENSON:

No.

WILLIAM YOUNG J:

The litigation is likely – how long has the case been set down for?

MR LAURENSON:

Seven days.

WILLIAM YOUNG J:

It's going to be pretty horrible litigation, multifaceted.

MR LAURENSON:

It's going to be dreadful.

WILLIAM YOUNG J:

Leaving aside the underlying family dynamics.

MR LAURENSON:

Yes. It's going to be dreadful litigation.

WILLIAM YOUNG J:

Can I just get back, well just to try and capture what your submission is. I put the three points relied on by Ms Mason to you. You as a respondent as you have, do I take it from what you're saying that your clients fundamental response to the moral case made against him is that he was, in effect, evicted from the house, driven out of the house?

MR LAURENSON:

That would be correct.

WILLIAM YOUNG J:

Is there very much, I mean although the submissions cover a wide range of material and matters, is there very much else we can, you haven't covered in the submissions to date Mr Laurenson?

MR LAURENSON:

Well I hope my submissions are clear enough to make the points, and one always is diffident about closing your case on a matter like this. There are a couple of things I'd like to say. The first is his Honour Justice Williams posed a question that by the time of the second Court of Appeal hearing there was a change in circumstances. I believe I am faithfully or accurately paraphrasing that. In my submission there was no change of circumstances by the time of

the second Court of Appeal. All circumstances that were to be known on the giving of the caveat, or the undertaking by the appellants were known when they gave the undertaking on the 25th of February, and we have in submissions today my learned friend for the appellants saying that they understood loss would be significant and that they were prepared to contribute to that. So I would resist any suggestion that there was a right of review by the time of the second Court of Appeal hearing for reason of a change of circumstances. That's the first matter.

The second matter is that whatever the appellants case it boils down to seeking to avoid their undertaking and now to review the Court of Appeal discretion at that first hearing, the first Court of Appeal hearing, and that is simply not before the Court, and I instance the first exchange with counsel for the appellants at the very beginning of this hearing.

I reiterate that Mr Cowan is prepared to allow the proceeds of the sale to be held in trust until the issues between the family are determined. I would submit, however, that until the caveat and it as a bar to this is dislodged, there will be no resolution in this litigation and it will impoverish all the parties and it, the sheer pragmatics of this matter now require the caveat to be lifted and at least the haemorrhaging be confined only to the dispute within the family.

I think that's about it your Honours.

WILLIAM YOUNG J:
Thank you Mr Laurenson. Do you want to re-join us by AVL or are you…

MR LAURENSON:
I'm going to do that. I can do that now I believe.

WILLIAM YOUNG J:
Thank you, great, we have you. Mr Salmon?

MR SALMON QC:

Yes, thank you, Sir. Very briefly on the position of the second respondents and their position in the transactions, they are, as I think is clear, fully bona fide and fully arm's length purchasers who have purchased and gone unconditional without any notice of any of the issues as between the family members.

It's a point of minor clarification but in noting it I understand some clarification about the chronology is needed generally. I notice that item 21 on the chronology suggests that the second respondents were made aware of the claim on this house in October 2020. That paragraph is footnoted to an affidavit from Mr Gibbons, one of the second respondents, which doesn't support that timing. Not a lot turns on that because on all parties' views the second respondents only became aware of the children's claim after the contract was unconditional, but the footnote to paragraph 21 of the chronology is to a passage in Mr Gibbons' affidavit where he is approached by one of the children when at the house and not told there's a claim against it but rather just asked in a pragmatic way whether it would be possible for the children to move the house before the sale proceeded. So…

WILLIAM YOUNG J:

Can you just take me to that, please? Take us to that?

MR SALMON QC:

Yes, paragraph 21 says that when at the property the developer is notified of contested ownership, and footnote 24 then goes to paragraph 17 of his affidavit which in fact says, and I don't know if you have the hyperlinks, it's at 301.0637 where he says at paragraph 17 that he "spoke with a person who I understood to be Mr Cowan's son. I was on the street outside," et cetera. "He asked me what I intended to do with the dwelling. I explained I would be demolishing it for the proposed development. At this time, Mr Cowan's son asked about the possibility of taking the existing dwelling on the property off the site, which I confirmed was acceptable as long as it occurred prior to the settlement date. He said he would be in touch with me before settlement. [He] never mentioned

any intention to lodge a caveat, or otherwise prevent settlement of the property proceeding."

I note this just for completeness really and also should note, and, as the Court will appreciate, my introduction to this is very recent, but I understand that while that chronology was circulated to the respondents, or at least to my instructing solicitors, shortly prior to filing, the time available, it was something like two hours, and so it doesn't represent a fully agreed chronology. I don't know if that means there are other corrections or not but I just want to note that because the Court has asked questions about sequence and timing of the chronology.

The second point in brief to note about the second respondent's position is that their potential losses are very significant and not disputed. Mr Gibbons, in his affidavits in the third volume of the bundle, tabs 34 and 37, sets out in responsible detail, responsible in the sense that he accepts some of the potential losses will be difficult to quantify until damages are fully exploded, but he sets out an array of losses from finance costs, refinancing and legal costs to development costs to the loss of abilities to build the number of buildings he would be entitled to build were the sale to proceed on time or at all. The affidavits have, in my submission, verisimilitude and this is a situation where it seems almost certain that if the sale and purchase agreement with the second respondents is breached, the damages claim against the father will exceed all of his assets on any view thus making an undertaking as to damages quite material.

The second point there is just to deal with a little bit of context for the first Court of Appeal decision. As the Court's aware, that decision was not to sustain a caveat but to have a second caveat put in place because the first one had lapsed and it had lapsed because of defaults within the appellant's camp. So in that context, and our submissions set this out, the principles applying to a second caveat are stricter and stricter in a way that might bear upon Justice Glazebrook's question about whether land is special, stricter in the sense that rather than being entitled to slap a caveat on a title subject to having

a reasonable basis the Court more closely scrutinises the provider of the caveat at that second stage and releases it by reference to a greater merits inquiry at times but also having regard to the losses and vulnerabilities of other parties to loss because of the imposition of a second caveat, and I mention because what is clear from the transcript of submissions in the first Court of Appeal hearing is that the risk of damages was materially before the Court and the subject of discussion with counsel for the appellants, resulting in that very specific requirement that there be an undertaking. So that undertaking was ordered as part of the parcel of obtaining what is really almost an indulgence from the Court in getting a second caveat or leave to file a second caveat. So our submissions set out principles surrounding second caveats but the hurdle is not easy to get leave.

WILLIAM YOUNG J:
It was right on the eve of settlement, wasn't it?

MR SALMON QC:
Yes, it was and while my learned friend is right that the appellants were acting under some urgency, they were doing so in a context where the urgency flowed not from a lack of access to justice or from any underhand dealings by anybody but from their own steps.

WILLIAM YOUNG J:
So the next point that I just note there, and I won't go through again the points my learned friend has gone to where the Court of Appeal have – and it's footnoted in our submissions at paragraph 12 – where the Court of Appeal have directly queried the availability of an undertaking and discussed it with counsel specifically before it was given.

But I'll move then just to deal with the notion that there's an access to justice problem and –

WILLIAMS J:

Well, one interesting point about that is that Ms Batt does say these people have applied for legal aid and any undertaking would be hollow. So the Court is aware about the potential for the undertaking not to be able to match significant losses.

MR SALMON QC:

That it may not but – well, I'm not sure if the Court was told it would be hollow. That doesn't –

WILLIAMS J:

Ms Batt used that word.

MR SALMON QC:

I'd have to check –

GLAZEBROOK J:

Whereabouts is that?

ELLEN FRANCE J:

Can we go back to the transcript?

WILLIAMS J:

0068. So Ms Batt says: "Yes, your Honour, I do wonder –" Justice Miller says: "How much that's worth?" "How much it's worth," she completes the sentence.

MR SALMON QC:

Yes.

WILLIAMS J:

"May indicate that that's a hollow undertaking."

WILLIAM YOUNG J:

So what page, sorry?

GLAZEBROOK J:
We're just coming to it.

O'REGAN J:
069.

WILLIAMS J:
It's 69, is it? I thought it was 68. It's 68, yes, 68, line 18ish, 17, I think.

MR SALMON QC:
Yes, you're right, Sir, that she says it "may indicate that that's a hollow undertaking," but only "may". That's a submission from the respondent's side, of course, Sir, as I read it. I think that's right.

WILLIAMS J:
Yes, that's right.

MR SALMON QC:
So it's a concern it may be hollow. I don't think, and I'm not sure if your Honour was suggesting this, but I don't think it could be read as suggesting that the Court of Appeal was happy for a meaningless undertaking to be given because it is clear from the decision itself, and the discussion through the balance of that, that the Court of Appeal was intending for the undertaking to provide –

GLAZEBROOK J:
Can we scroll down a bit further, sorry? Sorry, I don't mean to interrupt. Just I think your submission was based on the next part of the discussion, wasn't it?

MR SALMON QC:
Yes, although I'm having trouble reading what the Court is seeing on screen, so I'm following separately, my apologies.

WILLIAMS J:
Justice Miller's answer, to be fair, was, well, they'd better hurry up and get on with these proceedings.

MR SALMON QC:
Yes.

WILLIAMS J:
But the Court was obviously aware that there were going to be some issues here.

MR SALMON QC:
Yes, the Court was aware that there were going to be some issues. I guess the stark difference between the appellants and the respondents is the appellants point to the possibility of issues as a reason why what was effectively resolved and not appealed in the first Court of Appeal hearing should be able to be resurrected as a tenable ground in the second ground because it cannot be that the Court of Appeal can be read as intending to have a pointless undertaking. It must have been intended and this is conceded to, has carried with it the requirement that there be heft to the undertaking.

The essential case the appellant is advances is one that says that there should have been a second stage at which the extent of the undertaking, I guess a cap on it, would be considered by reference to means and, given there wasn't, it should be possible to do that on appeal now and –

WILLIAMS J:
So it seems that Ms Mason went and spoke to her clients as directed and the clients said: "Well, we can reach out to some whānau and see if we can get the backing we need." That eventually didn't happen. It became clear it hadn't happened. Isn't that a different circumstance?

MR SALMON QC:
A different circumstance to which, Sir?

WILLIAMS J:
Well, the understanding of counsel and the parties that they would be able to raise these funds came to nought.

MR SALMON QC:

Yes.

WILLIAMS J:

Having come to nought, isn't it appropriate to reconsider for that very reason?

MR SALMON QC:

Respectfully, no, Sir. The procedural and substantive analysis that I would submit applies is that to the extent that it was relevant to consider the capability of paying – and I'll come to that shortly in addressing Justice Glazebrook's question about security for costs and land contracts and whether they're different – the time at which to address whether the undertaking should have had a caveat or a cap was when it was argued before the Court of Appeal. Now that's not to be critical of the extent to which argument did or did not go far enough or instructions did or did not, but that was the time at which the Court was framing the undertakings and –

WILLIAMS J:

But the hearing was over by then it seems.

MR SALMON QC:

The hearing was over by the time the appellants were contemplating to some degree, and this is largely based on evidence from the Bar, but contemplating the extent to which they could meet some or all of an undertaking, but the engagement with the Court about its terms was complete when the Court issued its decision and the remedy, if the appellants on reflection were not happy with that, was to take procedural steps then to overturn the Court of Appeal's decision, and they chose not to, and as my learned friend, Mr Laurenson, has pointed to, they chose to ratify, in effect, the Court of Appeal's approach by filing the undertaking and not appealing, and by filing an undertaking that didn't carry with it some express attempts to cap liabilities but instead led to the opposite impression that it was embracing the liability to pay all damages.

So there are a couple of points to unpack there. One is the procedurally proper approach was to challenge the Court of Appeal's decision. The next is the undertaking as filed embraced the notion that it was a standard undertaking as to damages, and this is how they work. One is effectively volunteering or accepting the liability for all damages that would flow from the Court's indulgence, whether it's in an injunction context, the making of orders, or in this case the allowing of the exceptional second caveat with no party, and certainly not the Court, aware that there was some possibility that at a later stage the appellants would say that the caveat should be, the undertaking should be capped.

WILLIAMS J:
So the likely scenario though is that given the short timeframes, that the Cowan children said: "Give the undertaking and we'll go looking, see what we can find," because this could have been quite a substantial exposure and it wouldn't have been easy to find people who would back them since they didn't have the money.

MR SALMON QC:
Yes –

WILLIAMS J:
It does seem that at some time later they discover that they can't get the backing.

MR SALMON QC:
Yes, or they discovered that they needed to have a backing and hadn't put their minds to it. It's not clear and we need to proceed without quite clarity on that, but I think that may be right. That, of course, Sir, happens all the time, to take the analogy that the appellants would like to apply of security for costs. Routinely the Courts will order security for costs that a plaintiff may or may not ever be able to raise and the fact the plaintiff cannot raise them is never a basis on which to have them changed. The –

GLAZEBROOK J:

No, that's not right.

WILLIAMS J:

Yes, it is. It can be if the position of the one subject to the order changes or is inconsistent with the ends of justice. You'll know that.

MR SALMON QC:

My apologies, yes, yes, that is right, if those things happen, and answering Justice Glazebrook's question I'm going to come to reasons why, in my submission, that context is very different from the undertaking one. But I was going to, and perhaps I was too didactic in the way I've said that, I was going to (**inaudible** 12:46:39) for example, the end of the *Feltex* litigation which came because there were small delays beyond the deadline for providing security for costs and the price of participation was set at a certain level whether or not the plaintiffs could raise the funds. The point I was seeking to make is not as didactic as I made it sound for which I apologise but rather that these sums, security for costs generally, are set without regard for whether the plaintiff can be assured of paying them because they are not solely about the plaintiff's position. Indeed, they are focused on protecting defendants. Now if I can –

GLAZEBROOK J:

Well, they're weighed. The factors are weighed, so that my question was rather should we be looking at a situation where you have effectively almost an automatic view of undertaking for damages which comes with the interim injunction or should you be looking, as the appellants are suggesting, under security for costs where access to justice issues have much more weight?

MR SALMON QC:

Yes, and can I –

GLAZEBROOK J:

And the *Feltex* was probably, you know, by the time you actually get down to that stage with, and, of course, as you understand litigation funder backing in

the *Feltex* litigation, so it wasn't an issue of no access to justice. It was an issue of a litigation funder who could fund the security for costs and should do so.

MR SALMON QC:

Yes. So can I go to that because it seems to be that's an aspect of this that does have some general wider importance in terms of things that the Court will be concerned about? The first proposition from me is that there is a difference between access to justice and justice which is deftly conflated by the appellants. The question of whether damages should be payable and who should pay them raised by an undertaking are fundamentally questions of justice and of damages. They're not discretionary in the way that costs are. Costs are squarely within the sphere of concerns about access to justice which is a very different matter than who should carry damages. So whereas we see costs routinely compromised to reflect an array of factors, including ones of affordability, hence a different approach to security and to costs where a client is legally aided, for example, and as the Court's pulled me up on, a change in circumstances in ability to pay even may bear on security for costs, those concerns which are concerns of access to justice never arise in the damages context, and that's a bright-line distinction, in my submission, between the purpose and reasons for allowing an undertaking as to damages or requiring one and the costs context, such that no analogies can safely be drawn because the concern with damages is a concern that a party who has done no wrong and has suffered a wrong should be made whole and in this case the Court was not engaging with, for example, a security for costs type concern to protect discretionary costs that, as a matter of principle, do embrace access to justice concerns, but rather concerned about the possibility of contractual damages being unrecovered.

GLAZEBROOK J:

But isn't the issue rather, as far as your clients, your clients have that right to damages? There's no – well, at least, assuming, I probably shouldn't be so absolutely clear in respect of that, you would certainly have the right to penalty interest in respect of an unconditional contract, but the question in terms of it is who would be liable for those, is it Mr Cowan or would it be the contribution from

the children because the delay was caused by them and that depends on the underlying issue in terms of who owns that property. So if Mr Cowan didn't have the right to sell it to you then yes, you have damages against Mr Cowan but absolutely no claim against the children. Is it –

WILLIAM YOUNG J:
But you would have a complete claim – if Mr Cowan wins, you have a complete claim for him against all damages sustained.

GLAZEBROOK J:
No, no, that's right. I'm…

WILLIAM YOUNG J:
So there's no claim against the children.

GLAZEBROOK J:
Well, he'll have a claim against the children because of the delay, won't he, caused by them?

WILLIAM YOUNG J:
He would have a claim – only claim for damages against the children is either under the undertaking or section –

GLAZEBROOK J:
Or alternatively just because they've delayed?

WILLIAM YOUNG J:
No. He could have a claim under section 146 of the Land Transfer Act for damages direct or he could have a claim against the children under the undertaking but he wouldn't have any other claim for damages against the children.

MR SALMON QC:
That's right in my submission.

GLAZEBROOK J:

Sorry, that's what I meant.

MR SALMON QC:

Yes. I understood that to be what the question meant too. So the distinction I'm seeking to make is that there's access to justice concerns which rightly drive discussions about how extensive proceedings are, how expensive hearings are to access, and costs liability and barriers for costs, including security for costs, do not arise in a damages analysis. They never have and, respectfully, they can't because –

WILLIAMS J:

But doesn't that mean, Mr Salmon, that poor people will never get interim injunctions or caveats?

MR SALMON QC:

No, respectfully, Sir, it won't. If I can take the caveat position, and, sorry, let me break this down partly, Sir. The question as to whether the Court might require an undertaking may well have regard to the ability of a person to give it at the time, but once the undertaking is required it's interpretation will be strict in the sense I'm talking about.

WILLIAMS J:

So you're breaking up now, Mr Salmon. But your point is –

MR SALMON QC:

Am I? My –

WILLIAMS J:

You were. Can I just suggest that your point is that to the extent that impecuniosity was relevant in this case, which you concede will be the case, it's too late now?

MR SALMON QC:

That's right, Sir, and so it's not said, and I don't need to say, that it was not possible for the appellants to raise that issue in front of Justices Miller and Goddard in the first Court of Appeal hearing. Rather that once the Court has ordered an undertaking its meaning does not allow for some arbitrage after the fact or some calibration. So –

GLAZEBROOK J:

Could it have been calibrated – so you say whether it's required or not. Here I think they were prepared to give an undertaking but only up to a certain level. That's what they are saying now.

MR SALMON QC:

That's what they're saying now.

GLAZEBROOK J:

So at the first Court of Appeal hearing could they have asked that there not be an undertaking and also asked for a different value?

MR SALMON QC:

Yes, I think they – in my submission, they could have as a matter of jurisdiction.

GLAZEBROOK J:

So now it's too late, is the submission?

MR SALMON QC:

Yes, well, it's plainly too late to challenge that decision and the submission from me is to the extent that those matters would bear on whether an undertaking is ordered or its terms, they needed to be made then, and for obvious reasons we all have an interest in access to justice generally but I did want to say a couple of other things about it briefly. One is defendants have difficulties with access to justice just like plaintiffs do because every time litigation is expensive or repetitive or there's an issue prolonged or raised for a second time that should have been raised the first time, everybody pays, and that is one of the reasons

why judgments that are not appealed are final and collateral attacks on them are not available.

Another point is that the purpose and availability of the undertaking as to damages is one that was not a blunt object that would defeat any person contending they had an interest in land, and to take the caveat, it's a caveat position rather than the interim injunction one, a caveat can be filed without any undertaking as to damages, or lodged rather, the first time, and so that remains accessible justice. It was done here but not sustained. It lapsed for reasons within the appellants' control. Now there could be all sorts of reasons for those but none of them are a lack of access to lawyers or representation because they had it, and again, at the point of the second caveat, this was not a position where they were unable to be represented or argued, or have the case argued, and nor was it one where they couldn't have raised their impecuniosity, such as it is. It was rather a decision not to raise it and to seek to secure the second caveat, an indulgence and an extreme position, by offering up or agreeing to the provision of an undertaking.

So the point I'm seeking to make is that it's not about access to the process and access to the Court's (**inaudible** 12:56:39). That was obtained on appeal. The hurdle is really a complaint about the finality of judgments and an attack on finality of judgments is in fact an attack on access to justice because it increases the costs of proceedings for all, including plaintiffs.

That, I think, is the heart of the problem the plaintiffs face. They are raising an issue that could and should have been raised before the Court of Appeal and they're now seeking to imply that Court orders from the first Court of Appeal decision and the form of their undertaking had a meaning that neither entertained. On no reading, as my learned friend, Mr Laurenson, submitted, on no reading of the Court of Appeal's decision or that undertaking was it envisaged that it would be subject to limits or caps and, as one of the Bench put to my learned friend for the appellant this morning, had indeed it been said that a valuable undertaking could not be given, or might not be given, then reading that argument it seems very likely the second caveat would not have

been allowed with the result that settlement would have taken place and loss been avoided. That may be very distressing to the appellants with their emotional and other connections to the property but it would have been a lower-cost outcome than we're at now and certainly than one that involves litigating the same point twice.

Another point I wanted to just briefly touch on, and it's not a central issue here, but because from the respondent's perspective the appellants are seeking to relitigate out of time the substance of the first Court of Appeal decision, it's just to note that it's been a working assumption implicit in the appellant's approach to this proceeding and in its submissions that the claim for an equitable interest is strong. I wouldn't want to be taken as agreeing to that for the second respondents at least and it's a point that I make not because it's part of the challengeable issues as the respondents see them today but because the appellants are seeking to re-open the balance struck in the Court of Appeal's discretion in the first Court of Appeal decision. It is worth keeping in mind that the Court of Appeal took a generous approach to or took a positive approach to the strength of that equitable interest claim where, on my reading of it, it's a challenging claim and, very briefly, the reasons for that are that the settled law is that a promise or intention to give some property does not set up a trust, and I think what would have to be said by the appellants is that there was a declaration of trust as such or a contractual obligation to convey the property.

The declaration point I think falls short for various reasons, including the reference to sell and give, but there seems to be a straight problem with the enforceability of the promise to the daughter, if that's what it's said to be, in the 2002 agreement which is that the ability to enforce as a privy under the Contracts and Commercial Law Act allows a privy to enforce as if they were a primary party but the Property (Relationships) Act makes the agreement unenforceable as between the primary parties.

I just note that because the Court of Appeal in a fairly brief way identified there was an arguable case for an equitable interest. It seems, respectfully, quite a difficult case to assert that a spouse (**inaudible** 13:00:29) an unenforceable

agreement per section 21A of the Property (Relationships) Act committed himself to divesting himself of his interest in the matrimonial home. I won't go further on that point unless it will assist the Court but to the extent my learned friend is seeking to characterise this as a strong case, in my submission it's not.

WILLIAMS J:
Unless it was effectively a sale in order to meet or a subsequent transfer in recognition of the payment of either the entire debt in his failed business or his half of it.

MR SALMON QC:
Yes, it couldn't have been a sale to the spouse though because it's unenforceable as between the spouses, dealing as it does with relationship property, which would mean it would need to be –

GLAZEBROOK J:
No, I don't think it's unenforceable because you're allowed to sell property. It's yours to sell, isn't it? It's just that he might still have a claim in respect of the property.

MR SALMON QC:
He's allowed to – yes, correct, your Honour, they are allowed to sell but other parts of the agreement most certainly are within the scope of section 21A, or section 21A through M, of the Property (Relationships) Act, with the result that the agreement per se is unenforceable as between the spouses except to the extent that there's any non-prejudicial component that might subsist under section 21H. So it's not – and, of course, it's prejudicial to divest oneself of the family home in a matrimonial property context. So for it to be a sale to the spouse it would need to have been, I think, in a properly certified section 21A agreement. It cannot be a sale to the daughter because she's not a party, and so the short point I made probably too quickly is for her to enforce as a privy the agreement itself has to be enforceable because privies can only enforce as if they're a primary party and if the primary agreement is not enforceable then it's not enforceable.

So that's a point that's above and beyond the observation made in one of my friend's submissions that the parties treated that agreement as stale and in the past, but it is, respectfully, difficult to see how it could be the basis for an enforceable equitable interest, given it's in an unenforceable section 21 context.

But the overarching submission for the second respondents who suffer ongoing material loss, and I urge the Court to regard the losses set out in the affidavits from the second respondents, is that the balance struck by the Court of Appeal is not open for relitigation now and that it was a balance struck entirely within the discretion of the Court of Appeal and one that granted an indulgence to the plaintiffs that's consistent with giving them access to justice. The shibboleth of access to justice is not a basis on which to upset a carefully settled and now unchallengeable decision to protect parties with an undertaking as to damages nor to reinterpret undertakings as to damages with hindsight. The meaning of the Court of Appeal's decision and the undertaking given are clear and non-compliance with it is fatal to that second caveat.

Unless the Court has any further questions?

WILLIAMS J:
Can you just refer me to authority for your section 21A assessment?

MR SALMON QC:
I'm relying there, Sir, on section 17 of the CCLA, Contract and Commercial Law Act 2017, which is the one that says if a beneficiary, if a privy (**inaudible** 13:04:22) party to a deed –

WILLIAM YOUNG J:
Yes, of course, I understand that part. It's the prior part that – a sale between spouses is unenforceable under 21A I thought you said.

MR SALMON QC:

Well, the sale between spouses in a context covered by 21A. So I'm looking at, for that, Sir, I'm looking at the terms of the agreement which is annexure I to the – it's 301.0237. If it were merely subparagraph (a) of that which says that he sells and gifts his share of the joint family home to the daughter, that would be a different matter. But it then goes –

WILLIAM YOUNG J:

Everything else is relationship property.

MR SALMON QC:

Correct, Sir, and to answer –

WILLIAMS J:

But that fact that it's relationship isn't fatal. I can –

WILLIAM YOUNG J:

I think the point is that it hasn't been certified under section 21.

WILLIAMS J:

Yes, I understand that. Different point.

GLAZEBROOK J:

Well, it's all really irrelevant to what we're doing anyway, so –

WILLIAM YOUNG J:

It's just the strength of the case, that's the point.

GLAZEBROOK J:

There's no point because we certainly won't be making any comments on this because it's for the substantive hearing.

MR SALMON QC:

Certainly, your Honour, and as the Court will appreciate, our primary position is that we cannot challenge that decision today because it's a Court of Appeal decision, we're out of time. The observation is, my learned friend is really seeking to use this hearing as a Trojan horse for an out-of-time appeal while not reopening that decision for any other issue. To the extent I haven't finished answering Justice Williams questions, sections 21S and 21M of that Act related to the unenforceability of the contract.

The only other point in closing I would make is that, as I think the Court's aware, the Court has a discretion where an undertaking is given about the extent of enforcement to be exercised down the track which is a further comfort, I think, to the question from Justice Williams as to the toughness of absolutes. That means the caveat environment is not harsh to plaintiffs, indeed, it's an easier forum in which to get some access to justice and protect rights because caveats can be lodged without filing fees and all the legal costs associated with an interim injunction. Unless the Court has further questions, those are the submissions for the second respondent.

WILLIAM YOUNG J:
All right. Ms Mason, you'll have a few submissions in response I take it?

MS MASON:
Yes, Sir, I do.

WILLIAM YOUNG J:
How long are they likely to take?

MS MASON:
Sir, it shouldn't be too long, I think we've been allocated 15 minutes, it won't be over the 15 minutes.

WILLIAM YOUNG J:
Do it after lunch. We will resume at 2.15.

COURT ADJOURNS: 1.07 PM

COURT RESUMES: 2.17 PM

WILLIAM YOUNG J:
All right, Ms Mason.

MS MASON:
Tēnā koe. There's a point about the mediation that was made and my friend for the first respondent suggested that approaches had been made to the appellants from the first respondent to enter into discussions. That has not occurred at all and my clients refute that completely, and then the attempts that the appellants have made at mediation are the ones that have been refuted, and the references to that are the affidavit of Te Rahui Cowan dated 3rd of March, and that's the case on appeal number 301.0327 at paragraph 4.

WILLIAM YOUNG J:
Can I just, because we had this from Mr Laurenson, your clients' position presumably is the house can't be sold?

MS MASON:
Yes, Sir, that is their position.

WILLIAM YOUNG J:
Well, that's something he can't promise because of the other proceedings. So there's probably, as between your clients and their father, there's no way the case can be settled, is there?

MS MASON:
Well, Sir, they had discussed a number of options and these could have occurred prior to the sale but the point I think is that the discussions would have been useful. So they have the – you know, there are options in terms of one the things that they could have done is built him a so-called granny flat –

WILLIAM YOUNG J:

Yes, I know, but that doesn't get the developer off his back.

MS MASON:

No, it doesn't but –

WILLIAM YOUNG J:

Nor is it an answer to a claim for specific performance by the developer.

MS MASON:

Yes, Sir, that's acknowledged, but if they had accepted – say, for instance, he accepts that the 2002 agreement is valid and Christine's contributions and actually she was a beneficial owner of the house, then they could go to the developer and say: "Well, this is our position," and then the developer would sue for specific performance and then the issue would be about whether the developer's caveat interest trumps the interests of Christine, and that would have been far simpler than what we have now.

WILLIAM YOUNG J:

No, that's not the only issue. The issue would be whether the developer could get damages against Mr Cowan.

MS MASON:

Yes, Sir, that would be there as well but it would be far simpler than what we're doing now.

WILLIAM YOUNG J:

Well, maybe. Okay, well, anyway all we know is you say there have been attempts to settle it, Mr Laurenson says there've been approaches, that they've fallen down on the basis that your clients say the property can't be sold. We probably can't go much further than that, can we?

MS MASON:

No, no, and I don't know, I could just read out the references if that would be helpful for the record.

WILLIAM YOUNG J:

They're in the affidavits. I mean we've got one up now.

MS MASON:

All right. Now the other point really in response is that there's a claim that the second appellant has been aggressive towards his father. Mr Te Rahui Cowan has denied that in his affidavits and the point to make in response to that is that doesn't justify refusing to go into mediation because, of course –

WILLIAM YOUNG J:

Well, I think the truth is there's a limit to what we can say about this, isn't there? In the end they're entitled to have the case dealt with on its legal merits. On the face of it, it would be a difficult mediation if it has to proceed on the basis that the property isn't sold. But that's, you know, neither here nor there because the parties haven't agreed. There are conflicting affidavits as to, I guess, the causes of the familial disharmony and what, if any, satisfactory behaviour has occurred. We can't resolve those on the affidavits.

MS MASON:

Yes, Sir. I think the nub of the appellant's case is that in terms of the apportionment of blame and therefore the apportionment of risk in terms of the costs of this litigation, that they have embarked on everything in good faith and they have been innocent parties and so therefore they shouldn't be the ones to bear the consequences. That is really the submission and these points go towards that.

But those are all really that I had to say about the mediation and about their conduct in that regard.

The next point I'd like to move onto is security for costs and the point made by my friend for the second respondents that the comparison with security for costs is not valid, that submission is not accepted and in principle security for costs and undertakings for damages are really about the same thing, that this is put up to protect a party or parties from bearing the costs of litigation and the appellants say that there should always be a balancing exercise and that in this instance that balancing exercise has to involve the conduct and assessment of the conduct of the parties and there has to be –

WILLIAM YOUNG J:
How can we assess that on the affidavits? You say, and on the face of it it looks as though it's right, that Mr Cowan sold the property without giving the children notice and having earlier said that he wouldn't. His response, as I understand it, is sort of accepts that but says: "Well, that was then and this is now and in the meantime I've been chased out of my house." Now how can we resolve that?

MS MASON:
Well, Sir, the appellants say that he wasn't chased out of his house and –

WILLIAM YOUNG J:
I know that.

MS MASON:
– and that doesn't excuse not informing them that he wanted to sell the property, knowing that they, and at the very least his deceased wife, had an interest in the property that she had very clearly said she wanted to pass to the children, and that all the arrangements that were being made prior to her death were to do with getting over the survivorship rule. So the argument, which was an equitable argument of the first Court of Appeal hearing, was that really at equity it was very clear that she had an interest and this is this first respondent trying to defeat that interest by relying in a very technical way on rules of survivorship without acknowledging the underlying factual circumstance which was that his

wife had made very clear that her share, however you worked that out, was to go to the children.

Then the issue around the property being sold without knowledge. I think it's clear that it was sold without their knowledge. The only evidence that the first respondent has put forward is, well, he says he informed Christine at the time the contract for sale was entered into, now that cannot be interpreted as before, so the argument is that prior to, no knowledge was given.

Then the point about enforceability raised by my friend for the second respondents. Yesterday an affidavit was filed by Christine Cowan which attached a letter from a lawyer to Mr Cowan senior advising him not to sign the 2002 agreement. And I acknowledge that the Court when these issues were made about the chances of success did say this wasn't very relevant at this point, but for the record counsel would just like to make the submission that in the appellant's view that the problems that have been identified in terms of section 21F aren't as black and white as they make out and that there is evidence that legal advised was received and that legal advice was that the agreement should not be signed and Mr Cowan went ahead and signed it anyway.

WILLIAM YOUNG J:
I understand that and it's taking inferences from the appearance of the letter and estate that that advice was given before he signed it on the 21st of May, even though this letter was presumably received after the document was signed.

MS MASON:
So, it also says: "As we discussed –

WILLIAM YOUNG J:
Yes, that's right, I'm drawing the inference from the letter rather more than the date. It's still not compliant with section 26 though, is it? I mean that's the point.

MS MASON:

Yes, but then, and there's a section 21H ability to go back to the Court –

WILLIAM YOUNG J:

Sorry, section 21, I meant.

MS MASON:

Yes, and so there's a section 21H ability to go back to the Court.

WILLIAM YOUNG J:

Well, it's invalid unless the Court validates it, isn't it?

MS MASON:

Under equity it's arguable that it is valid.

WILLIAM YOUNG J:

Is it? In the teeth of what the Relationship Property Act says?

MS MASON:

Well, part of the discussion, and I think the Court of Appeal says this in the transcript, that at equity the intention is clear that they both signed the 2002 agreement, that that's really what was going to happen, and then after that agreement there was Christine Cowan's contributions, financial contributions –

WILLIAM YOUNG J:

Look, I agree, I mean, it's common ground the case is arguable. Well I don't know if it's common ground, but that's the basis we've got to deal with it.

MS MASON:

And then the final point to make is this issue of the process. Why was the first Court of Appeal decision not challenged, and the position for the appellants is that they'd already signed the undertaking and they signed that in good faith in the knowledge that there would be an amount set. They had a genuine belief that the undertaking would be discussed and a value set. When the High Court

decided on the undertaking issue, so against them, the date for filing or appealing the first Court of Appeal decision had passed and if they had embarked on that process they would have had to have challenged the High Court decision. They also would have had to have challenged the Court of Appeal decision, so two decisions and it all would've been very messy, and the fact remains that they did accept that they should sign an undertaking and what was at issue was the value to be given to that undertaking or the terms of that undertaking and that's really why they continued with this process because it really, it might've been difficult in terms of the cases that have been decided in the past and the cases have been, you have an undertaking or you don't.

The other issue in relation to comparisons with security for costs, well, security for costs are normally set at an amount and then there's argument about whether that's appropriate or not. That was never done here and the submission is that it should have been.

In relation, really the final point, to all of this is that, yes, there are costs to litigation, as my friends have pointed out, but there also a very fundamental right of access to justice for the parties. And it just seems unjust to say that if they didn't follow a certain process, then there was no way that their interests could have been, their interests could have been considered later. That does not seem correct and that just seems like basing an argument on a very narrow technical point which really shouldn't be what the Court does here. In balancing up the very, the interests, the problem for Christine is that if she does win it will be a bit of a Pyrrhic victory because she won't get what she actually wants. She will be deprived of that. If –

WILLIAM YOUNG J:
Why do you say that? If she wins she gets the house, doesn't she?

MS MASON:
Well, no, Sir, not if the caveat isn't granted.

WILLIAM YOUNG J:

If she wins the case, and is held to be entitled to the house and the caveat's sustained, then she wins hands down. She's not liable on an undertaking as to damages.

O'REGAN J:

No, but she's assuming the caveat isn't sustained.

WILLIAM YOUNG J:

But that's, then that means she didn't have the entitlement she's claimed?

MS MASON:

Well, Sir, if the caveat isn't sustained and she wins –

WILLIAM YOUNG J:

How can she win, sorry, how can she –

MS MASON:

– she will get the money.

WILLIAM YOUNG J:

I see, sorry, so she doesn't have the caveat sustained but she goes to the hearing and wins and the money is held to be hers.

MS MASON:

Yes, so if she wins and the house is, it's found that actually the house was hers all along, she doesn't get anything that she wants anyway.

WILLIAM YOUNG J:

Does she not want the money? She wanted the house more than the money? She wants the house more than the money?

MS MASON:

She just wants the house, Sir, and this comes back to when people are talking about the costs, the cost to her are cultural, spiritual, emotional and much, maybe the developer looks as that as not very much, but she looks at the developer costs as not very much in like way. And so that's what has to be balanced against, well, if John wins he's got 100,000 of it taken out because of –

WILLIAM YOUNG J:
I bet it will be a bit more than that. It would be rather more than that, it could be a million.

MS MASON:
Well, Sir, actually the arguments that we have put out in our submissions point to a High Court case in Auckland against the same developer –

WILLIAM YOUNG J:
No, well, I don't, come on. You're not suggesting, arguing the developer knew about the contract before, the interests your client claims before he signed the agreement?

MS MASON:
No Sir, what I am arguing is that he didn't have the resource consent at the time that he found out, so when he found out the development had not progressed to the state where the costs that he is saying that he is weathering now were approved, so it must be taken at the time that he knew which is really only penalty interest. He knew in November and resource consent wasn't granted until, I think it was March. So it really, that should be put in perspective so that if it's penalty interest, if the matter is decided early this year or mid this year, it will be in the vicinity of $100,000 so what John will lose is the 1.1 million less the 100,000 and he already has all of the proceeds from the Carterton sale. So when balancing those two things up, it seems clear that it's the appellants who will be really hard done by if they are found to be the ones who are the rightful owners of this property.

So if we just go back to this point about the conduct, he knew his wife was entitled to half of that and he knew that she wanted her part of the estate to go to her children.

WILLIAMS J:
So the resource consent point really hinges on how contingent that resource consent was. I guess you don't have any details about that?

MS MASON:
No Sir, but we do know that the other properties also were not settled. So there were a number of properties that were bought together in the area and the settlement of the surrounding properties didn't occur until 9 March, and that's in our submissions at paragraph 108(e) with the reference to the affidavit of Mr Gibbons. So a lot of the costs that are claimed now hadn't been incurred last year.

So the other point that we make is that we did ask for this to be heard urgently. We did put to the High Court that the substantive hearing should progress and the effort should be on that and both of the respondents opposed that. So there is not much else in terms of conduct really that the appellants could have done.

WILLIAMS J:
Where in the record is the respondent's opposition to your attempt to go fast?

MS MASON:
So, Sir, that was…

WILLIAM YOUNG J:
Is that the minute of Judge Johnston?

MS MASON:
We set it out at paragraph 87 of our submissions, and that's a paragraph from Judge Johnston's minute where we had said that the proceeding should be

accorded priority and set down for hearing as a matter of urgency with truncated pre-trial directions, and then the next paragraph, and again this is the minute: "Mr Laurenson for John Cowan submitted that, on the contrary, it was the contractual proceeding that was the key to the resolution of the issues between the parties. His contention was that if it could be established in the proceeding that Kurt Gibbons was a bona fide purchaser for value from the legal owner of the Wellington property, John Cowan, without notice of any proprietary claim by Christine and Te Rahui, then, whatever that meant for their claim against their father, they could not defeat Mr Gibbons' interest, and a conclusion to that effect would therefore leave Christine…with a claim for damages against John Cowan," and then –

WILLIAM YOUNG J:

I thought this was an argument about the order in which the proceedings would be heard, whether the caveat, that your clients' claim would be heard before Mr Gibbons' claim and the end result was that they're to be heard together.

MS MASON:

There were three proceedings. So there was the substantive claim which my clients had taken. There was also the specific performance proceedings which the developer had taken against Mr Cowan and then there was the caveat proceeding.

WILLIAM YOUNG J:

Yes, the caveat proceedings don't really matter. They're off to the side on this.

MS MASON:

Well, the decision was made that the caveat proceedings should be what should have priority.

WILLIAM YOUNG J:

But you can go down two lines of activity at once. You can prosecute the appeal in relation to caveat and at the same time press on with the claim in the High Court.

MS MASON:

Yes, Sir, and we had sought directions for urgent timetabling and they just weren't issued.

Those are the appellants' reply submissions, so that closes the case for the appellants.

WILLIAM YOUNG J:

Okay, thank you, Ms Mason. We'll take time to consider our decision and deliver it in writing in due course.

COURT ADJOURNS: 2.39 PM