IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 130/2021
[2022] NZSC 43

BETWEEN	CHRISTINE MARAMA COWAN First Appellant	
	TE RAHUI JOHN COWAN Second Appellant	
AND	JOHN ARTHUR COWAN First Respondent	
	KURT THOMAS GIBBONS AND 170 QUEENS DRIVE LIMITED Second Respondents	

Hearing:	15 February 2022
Court:	William Young, Glazebrook, O'Regan, Ellen France and Williams JJ
Counsel:	J Mason for Appellants R C Laurenson and C D Batt for First Respondent D M Salmon QC and M R C Wolff for Second Respondents
Judgment:	12 April 2022

JUDGMENT OF THE COURT

A The appeal is dismissed.

B Costs are reserved.

REASONS
(Given by William Young J)

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Introduction

[1] Under the land transfer system, registered title to an interest in land is indefeasible. Indefeasibility means that, subject to limited exceptions, a registered owner takes title free from any unregistered interests.[1] Such unregistered interests can, however, be protected by caveats. Section 138 of the Land Transfer Act 2017 (the Act) provides that a person who claims to have an interest in land may lodge a caveat. Such a caveat, while extant, prevents the registration or recording on the register of any instrument or matter adversely affecting the claimed interest.[2]

[2] There are statutory mechanisms for the removal and lapse of caveats (ss 142 and 143 of the Act). Where a caveat has been removed or has lapsed, a second caveat protecting the same interest may not be lodged without the permission of the High Court (s 146).

[3] If the caveator's claim to an interest is disputed, the existence or otherwise of the interest is usually determined in separate substantive proceedings brought by the

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1 Land Transfer Act 2017, s 51(2).
2 Section 140(1).

caveator. In this situation, the effect of the caveat (if neither removed nor lapsed) is to maintain the status quo pending substantive determination of the dispute in the separate proceedings.

[4] Preserving the status quo can be disadvantageous to a registered owner. Some protection is provided by s 148 of the Act, which imposes liability to pay compensation for lodging a caveat without reasonable cause.[3] This protection, however, is limited. For this reason, a registered owner may argue that maintenance of the status quo by caveat should be made conditional on the caveator undertaking to pay damages for any losses caused by the caveat.

A brief outline of the dispute

[5] This case primarily involves a dispute between the first respondent, John Cowan, and two of his children, Christine and Te Rahui Cowan. They are the appellants. For ease of discussion, we will refer to John, Christine, Te Rahui and other family members by their first names. The case is about a house in Lyall Bay, Wellington (the Lyall Bay property), which, for many years, has been the Cowan family home.

[6] John is the widower of Marama Cowan. They married on 20 September 1969 and had three children, Christine, Te Rahui and their younger brother Elvis. John is Pākehā and Marama was Māori. In 1974, with loan assistance from the Māori and Island Affairs Department, they acquired the Lyall Bay property. It was a joint family home and, on Marama's death on 19 March 2019, registered title passed to John by survivorship. The other major asset John and Marama came to own was a property in Carterton (the Carterton property),[4] which was also held jointly and so, with Marama's death, it too passed by survivorship to John. At some point after Marama's death, John instructed a solicitor to vest title to both the Lyall Bay and Carterton properties in his sole name.

[7] On 19 August 2020, John entered into an agreement to sell the Lyall Bay property for $1.1 million. The purchaser was Kurt Gibbons and/or his nominee.

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3 The section is set out below at [20].

4 This property was purchased from Te Rahui in 2004.

Mr Gibbons has nominated 170 Queens Drive Ltd (the developer). They are the second respondents. The developer plans to construct 30 townhouses on the Lyall Bay property and five neighbouring sections which it has also acquired. All 30 townhouses have been pre-sold and work is currently underway on the project, although not on the Lyall Bay property.

[8] John informed Christine of the sale around the time it happened. Christine says that she passed that information on to Te Rahui. Not long afterward, probably in September 2020, Christine met the developer's contractors. This was closely followed by an interaction Te Rahui had with Mr Gibbons on the street outside the Lyall Bay property. On 16 November 2020, Christine and Te Rahui lodged a caveat against the titles to the Lyall Bay and Carterton properties, claiming an interest in the properties "[b]y virtue of an implied trust". The caveat against the title to the Carterton property has lapsed and the property has since been sold by John. There is thus no occasion to discuss the basis on which an interest in it was claimed.

[9] An application having been made under s 143 of the Act for the lapse of the caveat, Christine and Te Rahui applied to the High Court for an order that the caveat against the Lyall Bay property not lapse. This was on 15 January 2021. That application was set down for a hearing on 16 February 2021. Although Christine and Te Rahui obtained an interim order that the caveat not lapse pending determination of their substantive application, they did not give notice of this order to the Registrar-General of Land (the Registrar). Under the s 143 procedure, which we discuss in more detail later, this failure to give notice meant that the caveat had lapsed prior to the commencement of the hearing on 16 February 2021. Not realising that the caveat had already lapsed, Associate Judge Johnston released a judgment on 19 February 2021, dismissing the application for an order that the caveat not lapse.[5]

[10] Christine and Te Rahui appealed to the Court of Appeal. By the time the appeal was heard (on 24 February 2021), it was appreciated that the caveat had lapsed. By then, there was considerable time pressure as settlement under the sale and purchase agreement for the Lyall Bay property was to take place the next day.

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5 *Cowan v Cowan* [2021] NZHC 208, (2021) 21 NZCPR 902 [first HC judgment].

Counsel for Christine and Te Rahui sought the permission of the Court under s 146 of the Act to lodge a second caveat. The Court of Appeal granted permission to do so (the first Court of Appeal judgment).[6] Importantly, however, this was subject to (inter alia) Christine and Te Rahui filing an undertaking as to damages.[7]

[11] Christine and Te Rahui lodged a second caveat and filed an undertaking as to damages. Soon afterwards, John applied to the High Court under s 142 of the Act for an order that the caveat be removed. This application was heard on 21 May 2021 by Associate Judge Lester. He was of the view that an undertaking as to damages should be "accompanied … by evidence that the undertaking is of value".[8] The Associate Judge held that what had been provided was an undertaking in form but not substance.[9] He concluded that the caveat should be removed but directed that the net proceeds of sale be held on interest bearing deposit in a solicitor's trust account, not to be disbursed without a court order or written agreement from the parties.[10]

[12] An appeal to the Court of Appeal against this judgment was dismissed (the second Court of Appeal judgment).[11]

[13] This dispute touches on important issues as to the principles that apply to undertakings as to damages. The present appeal, however, is from the second Court of Appeal judgment.[12] It was confirmed to us at the hearing of the appeal that Christine and Te Rahui did not wish to apply for leave to appeal out of time against the first Court of Appeal judgment. This means that we must deal with the appeal on the basis that the first Court of Appeal judgment is correct and that the undertaking as to damages was properly required.

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6 *Cowan v Cowan* [2021] NZCA 31 [first CA judgment].
7 At [14].
8 *Cowan v Cowan* [2021] NZHC 1291 [second HC judgment] at [24] (footnote omitted).
9 At [30].
10 At [61].
11 *Cowan v Cowan* [2021] NZCA 463 (French, Mander and Palmer JJ) [second CA judgment].
12 *Cowan v Cowan* [2021] NZSC 185.

The legal principles

The statutory provisions

[14] As explained, a caveat can be lodged against the registered title to an interest in land by any person claiming an interest in that land. Lodging a caveat is a straight-forward process.

[15] Section 142 of the Act provides:

> **142 Removal of caveat against dealings**
>
> The court may, on application by a person who has an estate or interest affected by a caveat against dealings, order that the caveat is removed.

[16] Under s 143, the registered proprietor of the interest affected by a caveat or someone who wishes to register an instrument that affects the interest protected by the caveat may apply to the Registrar for the lapse of the caveat. The effect of such an application is that the caveat lapses unless:

(a) the caveator, within 10 working days after being notified of the application, gives notice to the Registrar that an application has been made to the High Court for an order that the caveat not lapse; and

(b) within 20 working days subsequent to that notice, notice of an order of the kind specified in s 143(4) is served on the Registrar.

The orders specified in s 143(4) are orders either that the caveat not lapse or adjourning the application by the caveator.

[17] The hearing before Associate Judge Johnston was under s 143. As explained, Christine and Te Rahui had obtained an interim order that the caveat not lapse but did not notify the Registrar of this. The application dealt with by Associate Judge Lester (to remove the caveat) was under s 142. In these reasons we use the expression "sustain a caveat" (or similar language) to refer to successful (a) applications under s 143 for an order that a caveat not lapse and (b) opposition to applications for removal under s 142.

[18] Once a caveat has been removed or has lapsed, a second caveat protecting the same interest may not be lodged other than by court order. This is pursuant to s 146. When the appeal against Associate Judge Johnston's decision came before the Court of Appeal, that Court dealt with the dispute under s 146 and gave its permission for a second caveat to be lodged.[13]

[19] Sections 142, 143 and 146 do not identify the criteria to which the courts are to have regard when applying them.

[20] The only other provision to which we need to refer is s 148. Section 148 provides that:

> **148 Compensation for lodging of improper caveat against dealings**
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> (1) A person, including the agent of a person, who lodges a caveat against dealings without reasonable cause is liable to pay compensation to a person who suffers loss or damage as a result.
>
> (2) A claim for compensation must be heard and determined by the court.
>
> …

[21] Most of the cases concerning caveats involve earlier legislation, such as the Land Transfer Act 1952 (the 1952 Act). There are some differences in structure and language between the current provisions and their predecessors. For example, the current mechanism by which the lapsing of a caveat is initiated is not the same as it was under the 1952 Act as first enacted. We do not see this and the other differences as precluding the use of the older case law to interpret the 2017 Act.

The general principles which apply to the application of ss 142 and 143

[22] To sustain a caveat (whether under s 142 or s 143), a caveator must show that there is a reasonably arguable case for the claimed interest.[14] Where such an arguable case has been shown, the usual practice is for the court to sustain the caveat

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13 First CA judgment, above n 6, at [16].

14 *Holt v Anchorage Management Ltd* [1987] 1 NZLR 108 (CA) at 115 per McMullin J, 117 per Somers J and 124 per Casey J (in relation to an application for an order that a caveat not lapse); and *Sims v Lowe* [1988] 1 NZLR 656 (CA) at 660 per Somers J (on an application to remove a caveat).

pending determination in separate substantive proceedings of the validity of the claimed interest. Conceivably, circumstances may permit summary determination of the validity of the claimed interest (for instance, if all that is in dispute is the construction of a particular document). Such circumstances are rare.[15]

Undertakings as to damages

[23] As noted above, we must deal with this appeal on the basis that the Court of Appeal in its first judgment appropriately imposed the requirement for an undertaking for damages as a condition of the authorisation to lodge a second caveat. There are a number of cases which deal with the perhaps slightly different, although closely related, question of whether such an undertaking can be required as a condition of sustaining a caveat.[16] Questions which are relevant to this issue include whether an order sustaining a caveat is interlocutory within the meaning of r 1.3(1) of the High Court Rules 2016 (thereby engaging r 7.45, which provides (inter alia) that an interlocutory order may be conditional on an undertaking)[17] and also whether requiring an undertaking unacceptably cuts across the operation and policy of s 148.[18]

Impecunious caveators

[24] Although there is never an absolute right to specific performance (or equivalent relief),[19] the courts do not regard real property as fungible.[20] In disputes concerning real property, damages will often not be an adequate remedy.[21] This is particularly so in respect of family homes. For Christine and Te Rahui, the purpose of the litigation is to retain the Lyall Bay property for the family. If the result of this appeal is that their inability to provide a substantial undertaking leads to the caveat

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15 *Sims*, above n 14, at 659–660 per Somers J.

16 See, for example, *Holt*, above n 14, at 120 per Somers J; *Holmes v Australasian Holdings Ltd* [1988] 2 NZLR 303 (HC) at 312–314; *BP Oil New Zealand Ltd v Van Beers Motors Ltd* [1992] 1 NZLR 211 (HC) at 214–218; and *Raiser Developments Ltd v Trefoil Properties Ltd* [2008] NZCA 73.

17 See, for example, *Raiser Developments Ltd*, above n 16, at [42] (considering an earlier but similar rule).

18 A view to this effect was expressed by Casey J in *Holt*, above n 14, at 123 in relation to s 146 of the Land Transfer Act 1952, being a predecessor to s 148 of the Land Transfer Act 2017.

19 *Attorney-General for England and Wales v R* [2002] 2 NZLR 91 (CA) at [94] per Tipping J.

20 See, for example, *Proprietors of Wakatū v Attorney-General* [2017] NZSC 17, [2017] 1 NZLR 423 at [579] per Glazebrook J.

21 *Holt*, above n 14, at 120 per Somers J.

being removed and the sale of the Lyall Bay property proceeding, their comparative impecuniosity will have cost them the ability to pursue at trial the relief they seek. It is not a complete barrier to relief; this because they would still be able to prosecute their claim in relation to the proceeds of sale. But this partial barrier to relief is significant given the emotional and cultural connection they have with the Lyall Bay property.

[25] This aspect of the case raises access to justice considerations which are not substantially addressed in the decisions of the Courts below. In view of this and the constricted way in which the case came before us (which we discuss later in these reasons), this appeal does not provide an appropriate occasion for review of the relevant principles.

The factual background in more detail

[26] The marriage between John and Marama had its ups and downs and there were periods of time when they lived apart. In 2002—at a time when they were living apart—John and Marama entered into a written agreement. It was in this form:

> This is a mutual financial agreement between John Arthur Cowan and Marama Cowan (husband and wife) of Wellington. We hereby agree and declare:
>
> (a) THAT John Arthur Cowan sells and gifts his share of our joint family home at 170 Queens Drive, Lyall Bay, Wellington, to our [daughter] Christine Marama Cowan[.]
>
> (b) THAT it will be John's full and final claim to the house and land should there in the future be a marriage separation, divorce or death between us.
>
> (c) THAT should there be any balance of monies remaining from the inheritance monies we received separately through Public Trust, Wellington as beneficiaries of our friend Raymond Harry Baker's estate will be our individual property should our marriage end in a separation, divorce or death between us [sic].
>
> (d) THAT any other properties or assets purchased within the marriage remain the property of the person … whose name is stated as the owner should our marriage end in separation or divorce.

(e) NOTE: THAT John [has] no entitlement to Marama's Māori land interests but that they be transferred equally to our children and mokopuna on her death.

[27] The agreement was drafted in March 2002. Not entirely clear is the extent to which Christine and Te Rahui were involved in any associated discussion, although based on our appreciation of the family dynamics, it is likely that they were. The agreement appears to have been signed by John on 21 May 2002. He claims that he was induced to do so by duress and undue influence. The formalities required under s 21F of the Property (Relationships) Act 1976 for a valid contracting-out agreement were not met, albeit material made available on the eve of the hearing before us appears to show that John received legal advice about the agreement. This was to the effect that he should not sign it.

[28] John and Marama ultimately resumed living together and they were living together in the Lyall Bay property when Marama was diagnosed with terminal cancer. This was in January 2019. Shortly before her death, Marama signed a will and a relationship property agreement. The latter was never signed by John, but for ease of discussion we will refer to it as the "relationship property agreement". The relationship property agreement provided that:

2.3 Notwithstanding that the properties are jointly owned, and that under the doctrine of survivorship, John would become the sole legal owner of both properties, the parties have agreed:

a) The Lyall Bay property will be Marama's separate property from the date of this agreement. It is to be held on trust by the parties, and by John, for the benefit of the parties' two younger children, namely Christine Marama Cowan, and Elvis Te Rangi Jackson Cowan.

b) John shall have a life interest in the Lyall Bay property, and, in particular, the right to occupy the property provided that he ensures the mortgage, rates and insurance in respect of the property are paid, and the property is maintained.

c) John has or will prepare a will which gives effect to this agreement, and, in particular, which leaves the Lyall Bay property to Christine and to Elvis as tenants in common in equal shares, provided that Christine will have the first option to purchase the property from Elvis at current market value should she wish to exercise that right.

d) The Carterton property is to be the separate property of John.

[29] Christine's evidence is that John agreed to the terms of the relationship property agreement. John denies this.

[30] The will appointed Christine as the sole executor and provided for her to inherit the residue of Marama's estate.

[31] As discussed, the Lyall Bay property is of considerable significance to Christine, Te Rahui and Elvis. Indeed, Christine has lived there most of her life. When Marama went to hospital in late February 2019, Christine and her immediate family moved back into the Lyall Bay property. She has remained there ever since. It is also clear that it was Marama's intention that the Lyall Bay property be preserved for Christine and the family—an intention that was the premise of the 2002 agreement and the relationship property agreement.

[32] After Marama's death, John continued to live in the Lyall Bay property along with Christine and her family for a time. Relationships deteriorated. John's position in his affidavits is that he was eventually driven out of the Lyall Bay property, a narrative which is disputed by Christine and Te Rahui.

[33] The Lyall Bay and Carterton properties are the primary assets making up what were treated as the relationship property of John and Marama in the relationship property agreement. Their combined value, as measured by the prices agreed for their sale, is $1,505,000.

[34] On John's case, he became the sole owner of both properties by survivorship and is entitled to the proceeds of their sale free from any claims by his children.

[35] On the case advanced by Christine and Te Rahui, John's entitlement is confined to the proceeds of sale from the Carterton property. On this basis, he has no interest at all in the Lyall Bay property.

[36] The view expressed in the two Court of Appeal judgments is that Christine's substantive claim of beneficial ownership is arguable.[22] Because of the way the

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[22] First CA judgment, above n 6, at [12]; and second CA judgment, above n 11, at [25].

appeal was argued before us, neither of the respondents directly challenged this proposition.

Tikanga

[37] We have no difficulty accepting that Christine and Te Rahui are particularly attached to the Lyall Bay property and that this attachment is for reasons that include cultural and tikanga considerations.

[38] Principles of tikanga about the importance of whenua and kāinga (home) in this instance accord with equity's reluctance to treat damages as an adequate remedy in land disputes (as already discussed) and thus may provide support for Christine and Te Rahui's claim at trial.[23] We will come back later in these reasons to whether tikanga is material to the outcome of this appeal.

The losses that the lodging of the second caveat may cause

[39] John has an unconditional obligation to pass title to the Lyall Bay property to the developer. The developer is in the process of carrying out what, if the Lyall Bay property is included, will be a 30 townhouse development. Without the Lyall Bay property, only 21 townhouses can be constructed.

[40] There are three respects in which John might suffer loss by reason of the caveat:

(a) Loss of bargain damages in the event that the developer cancels the sale and purchase agreement by reason of John's inability to settle. This could come ahead of the determination of the substantive proceedings. An orthodox approach to loss of bargain damages would be to compensate the developer for the difference between the expected profit on the planned 30 townhouse development less the actual profit on the constructed 21 townhouse development. The developer would thus be placed by damages in the same economic

[23] As to this, our assumption is that the transfer to the developer will be registered as a consequence of the outcome of this appeal, thus confining Christine and Te Rahui, if successful at trial, to monetary relief.

situation as it would have been in if John had performed the contract. On this scenario, John might also conceivably suffer additional loss if he is not able to later sell the Lyall Bay property for as much as the $1.1 million that the developer has agreed to pay. Assuming that the result of the appeal results in settlement of the agreement for sale and purchase, there will be no cancellation and thus no need to assess damages on this basis. That said, this scenario is material to the likely extent of John's exposure to loss on the hypothesis that the caveat remains in place and, for this reason, is relevant to the question of whether the undertaking is appropriately substantial.

(b) Damages for the disruption to the development caused by the delay in settlement. This assumes that the developer does not cancel and John is able to settle eventually with the developer. For reasons given by Mr Gibbons in an affidavit, such damages could be substantial, reflecting the costs and losses associated with working around the Lyall Bay property and the delay more generally. Damages against John on this basis would compensate the developer for the diminution in the profitability of the development caused by the delay and disruption.

(c) Penalty interest under the sale and purchase agreement. The interest rate for late settlement under the agreement is 10 per cent per annum. The settlement date was 25 February 2021. Given that the purchase price for the Lyall Bay property was $1.1 million, penalty interest of approximately $120,000 appears to have already accumulated.

[41] Ms Mason for Christine and Te Rahui submitted that these approaches to calculating loss were inappropriate. For instance, she suggested that the developer could not recover against John for losses incurred or accrued after the developer was on notice that the sale was in dispute (probably in as early as September 2020 when Christine met the developer's contractors). Counsel was not, however, able to advance a legal basis for why financial claims by the developer against John should not be assessed on normal principles.

[42] Property development is an inherently uncertain business. Material costs can increase and markets change in other ways. Anticipated profits do not always materialise. Given this, there is inevitable uncertainty as to the likely extent of John's liability to the developer for damages.[24] What is less open to dispute, however, is his liability to pay penalty interest.

The primarily relevant decisions of the Courts below

Preliminary comments

[43] The decision of Associate Judge Johnston has been overtaken by events, leaving the first Court of Appeal judgment, the decision of Associate Judge Lester and the second Court of Appeal judgment as the primarily relevant decisions.

The first Court of Appeal judgment

[44] From the point of view of Christine and Te Rahui, the context in which the appeal against Associate Judge Johnston's decision came before the Court of Appeal on 24 February 2021 was not auspicious. The failure to give notice to the Registrar of the interim order that the caveat not lapse was of no, or at most limited, materiality to whether a second caveat should be permitted. It was, however, a procedural infelicity which may have put Christine and Te Rahui on the backfoot. Furthermore, as previously mentioned, settlement of the sale and purchase agreement for the Lyall Bay property was due the next day, creating time pressure.

[45] The Court of Appeal judges dealt with the appeal as if it were an application to them, as High Court judges, for permission to lodge a second caveat. In the course of argument, the possibility of an undertaking as to damages being required was discussed. Ms Mason did not oppose such a requirement being imposed. Ms Batt, who appeared for John at the hearing, sensibly noted that Christine and Te Rahui were on legal aid and that an undertaking by them might not be worth very much. The response from the bench was to the effect that it was important for the parties to get on with the substantive proceedings. The extent of Christine and Te

[24] We emphasise that our discussion of how damages might be calculated is not intended to be indicative of how a future dispute about damages should be resolved.

Rahui's ability to honour an undertaking and the implications of them not being able to do so were not otherwise explored.

[46] In a judgment delivered on the day of the hearing, the Court of Appeal held that Christine had an arguable case in relation to the interest claimed but that an undertaking as to damages was required.[25] This is referred to in the judgment in this way:

> [14] It will be a condition of the order that the applicants must both give an undertaking as to damages, to protect John should their claim fail. There is evidence that the developer may suffer loss if denied access to the property, which the developer apparently intends to demolish to make way for townhouses.

[47] Another condition required substantive proceedings to be filed in the High Court by 4 March 2021.[26] As to this, the Court of Appeal noted that substantive proceedings had to be "brought on with urgency" and "[t]o secure that, we direct that any party, including the developer, may apply to the High Court on notice to discharge the caveat".[27]

[48] It would be unhelpful to speculate about the approach the Court of Appeal might have taken in the first appeal if there had been substantial contest as to whether an undertaking should be required and, if so, whether such an undertaking should be uncapped.

The judgment of Associate Judge Lester

[49] Before Associate Judge Lester, counsel for John noted that no evidence as to the substance of the undertaking had been provided and was able to point to some evidence suggesting that it would not be able to be honoured. Christine and Te Rahui did not directly engage with the challenge to their ability to meet the undertaking. Rather, their argument was that they did not have to do so until there was greater clarity as to the likely level of damages to which John was exposed. Ms Mason also suggested that Christine and Te Rahui had a network from which it might be possible to fund an undertaking. The Associate Judge did not see much

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25 First CA judgment, above n 6, at [12] and [14].
26 At [17].
27 At [18].

merit in these arguments given that questions as to their ability to meet the undertaking had been raised in the removal application and in an affidavit and no steps had been taken by Christine and Te Rahui prior to the hearing to put any arrangements in place.[28]

[50] The Associate Judge was of the view that an undertaking as to damages must have substance.[29] He noted that as John was in default under the sale and purchase agreement, the potential for significant loss was great:

> [32] The sale price for the Lyall Bay property, the settlement date and the interest rate for late settlement are all known so a calculation based on assumptions around a hearing date can be made. If a hearing were not available until towards the end of this year then penalty interest of around $80,000 to $90,000 would be payable by the registered proprietor for late settlement. If, as may well be the case, a three or four day hearing could not be accommodated until the New Year then the penalty interest would be in excess of $100,000. Of course, this assumes the registered proprietor's exposure is only to penalty interest. If the contract were to be cancelled, given the Lyall Bay property is one of a number of properties acquired with the intention to allow the construction of a block of apartments, all of which sold off the plans, then the registered proprietor's exposure to damages could be significantly higher.

[51] Given that (a) an undertaking had been required as a condition of the order authorising the lodging of a second caveat and (b) the undertaking provided did not, in substance, satisfy that condition, the Associate Judge saw himself as having little choice but to remove the caveat which is what he did.[30]

[52] The Associate Judge dealt with tikanga arguments in this way:[31]

> [59] There are paragraphs in the evidence as to the cultural significance of the land to the caveators but no evidence as to the aspects of tikanga said to be relied on. In exercising the discretion to remove a caveat, even when a caveatable interest has been established, the caveator's tikanga connection to the whenua may well be a relevant consideration. Here, because the caveat

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28 Second HC judgment, above n 8, at [31] and [33].

29 At [30].

30 At [68]. The formal orders made were in reasonably complex form. Their effect was that there was an order for specific performance in favour of the second respondents against John but with that order to lie in court pending final determination of any appeal in relation to the removal of the caveat, with the removal itself likewise not to take effect pending final determination of any such appeal. The Court also agreed that the net proceeds of sale should be held on interest bearing deposit in a solicitor's trust account, not to be disbursed without a court order or written agreement from the parties.

31 Footnote omitted.

> is being removed for non-compliance with the undertaking the residual discretion to remove does not come into play.

[53] Access to justice considerations appear not to have been advanced before the Associate Judge.

The second Court of Appeal judgment

[54] Although Christine and Te Rahui had initially signalled that they were challenging the Associate Judge's conclusion that an undertaking must be of substance, they did not persist with this argument. They did not, however, put forward concrete proposals as to how they might ensure that their undertaking had substance.

[55] The Court rejected a submission that Christine's case was so strong that her interest in the Lyall Bay property was sufficient to ensure that the undertaking could be met and what may have been a more general submission that her chances of success were so great as to meet the requirements of the undertaking.[32] There was a further and overlapping submission that Christine's impecuniosity was the result of John's attempted sale of the Lyall Bay property. These arguments did not address the contingency that Christine might not establish her claimed interest and, for this reason, fail at trial. As the Court noted, this was the contingency that the undertaking was intended to address.[33]

[56] The Court similarly rejected submissions that the cultural significance of the land to Christine and Te Rahui and associated tikanga principles were material to whether the caveat should be removed.[34] The Associate Judge was right that as the caveat was being removed for non-compliance with a condition imposed by the Court of Appeal, there was no discretion to consider such matters.[35]

[57] The Court also considered that the Associate Judge's discussion about John's exposure under the sale and purchase agreement was not "unrealistic".[36]

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32 Second CA judgment, above n 11, at [13], [14], [16] and [21].
33 At [16], [21] and [25].
34 At [22].
35 At [22].
36 At [20].

The progress of the substantive litigation

[58] The case is currently set down for a hearing in late May this year and a seven-day fixture has been allocated.

[59] Ms Mason complained to us that John and the second respondents have delayed the resolution of the substantive proceedings. This contention was advanced largely on the basis of a minute of Associate Judge Johnston, issued on 27 April 2021.[37] At that stage, there were three proceedings before the courts: Christine and Te Rahui's substantive claim, John's application for the removal of the second caveat (scheduled to be heard on 21 May 2021) and a claim by the developer for specific performance of the sale and purchase agreement. Ms Mason sought to have the substantive proceedings heard urgently and before the removal application. As it happened, the 21 May 2021 removal application fixture was retained. The option of timetabling the substantive proceedings while retaining the 21 May 2021 removal application fixture appears not to have been explicitly addressed—something which, at least with the benefit of hindsight, was unfortunate.

[60] Stepping back from the minute of 27 April 2021, there are a number of other matters relevant to the delay in the likely resolution of the dispute. We will revert to these shortly.

The resolution of the appeal

[61] As construed by Associate Judge Lester and in the second Court of Appeal judgment, the undertaking as to damages that was a condition of the first Court of Appeal judgment is required to be substantial.[38] That this is how the condition should be construed was not disputed by Ms Mason at the hearing of the second appeal and likewise was not disputed before us, at least not directly; albeit in argument to us, Ms Mason suggested that the undertaking should be confined to $10,000. Christine has, since the second Court of Appeal judgment, borrowed that amount of money and it is currently held in a solicitor's trust account as security against her liability under the undertaking.

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37 *Cowan v Cowan* HC Masterton CIV-2021-435-3, 27 April 2021.

38 Second HC judgment, above n 8, at [30]; and second CA judgment, above n 11, at [15].

[62] There may have been scope for debate about whether (a) an undertaking should have been required, (b) if required, whether it should have been capped and (c) if so, at what amount. But that debate should have occurred during the first Court of Appeal hearing or in the context of an appeal against that decision. As required, the undertaking was plainly intended to be sufficiently substantial to provide material protection for John. Even supported, as it now is, by the $10,000 raised by Christine, the undertaking does not give that level of protection. This is because on any plausible approach, John's financial exposure is many times greater than $10,000.

[63] Against this background, if we were to allow the appeal against the second Court of Appeal judgment, we would be doing so by setting aside (or at the very least, substantially modifying) a condition imposed in the first Court of Appeal judgment; this despite the first Court of Appeal judgment not having been challenged before us.

[64] Where the existence of a caveat has the potential to cause substantial loss to the registered owner, it is incumbent on the caveator to issue promptly, and prosecute diligently, substantive proceedings to establish the claimed interest. For a number of reasons, this has not happened in the present case. Some of these reasons, when looked at individually, are understandable. But, in their totality, they have resulted in unsatisfactory delay:

(a) Christine and Te Rahui became aware of the sale of the Lyall Bay property in August 2020 and Christine met the developer's contractors in what was probably the next month. On Mr Gibbons' evidence, he visited the property in October 2020 and spoke with Te Rahui and explained the proposed development. We infer that by this stage Christine and Te Rahui knew that the purchaser was a developer. They lodged a caveat on 16 November 2020. Given the likely financial consequences of John not being able to settle with a developer, substantive proceedings should, ideally, have been filed at that time. In saying this, we appreciate that Christine and Te Rahui were not well placed to embark on complex litigation, were perhaps

reluctant to do so given their relationship with their father and may not have fully understood the likely consequences of holding up the settlement of the sale.

(b) At least from when Christine and Te Rahui received notice of the application under s 143 of the Act for the lapse of the caveat, the probability of substantive litigation was obvious. On 15 January 2021, they applied for an order that the caveat not lapse but did not at the same time commence substantive proceedings, as would have accorded with best practice. Indeed, substantive proceedings were not filed until 4 March 2021.

(c) As will be apparent, we have sympathy for the position Christine and Te Rahui faced on 24 February 2021. We also have distinct reservations as to whether an uncapped undertaking ought to have been imposed as a condition of authorising the lodging of the second caveat. That said, Christine and Te Rahui gave an undertaking, under which they promised to pay any damages which a court considered they ought to pay. Although Ms Mason suggested that they thought that there would be a further hearing at which the details of the undertaking would be determined (possibly in terms of a cap), there is nothing in the material we have seen that suggests that this was a reasonable understanding. The most obvious explanation for them giving an undertaking in an unconditional form is that they did not think through its implications.

(d) After John sought removal of the second caveat, it must have soon become apparent that Christine and Te Rahui's inability to provide evidence as to the substance of the undertaking was a significant issue.

(e) Instead of challenging the first Court of Appeal judgment, Christine and Te Rahui have persisted with a litigation strategy that accepted the requirement for an undertaking but unrealistically played down the

extent of their exposure under it and advanced the paradoxical contention that it could be met from their claimed interest in the Lyall Bay property. We say "paradoxical" because the primary purpose of the requirement is to cover the contingency that they are not able to establish such an interest.

(f) In the result, the parties have spent much of the last 10 months litigating the undertaking issue—effort that would have been better applied to resolution of the substantive claim.

[65] Coming to the present, John's exposure to loss is now distinctly greater than it was when the requirement for an undertaking was imposed by the Court of Appeal. So, if the case is looked at through the lens of what is reasonably required for his protection, the need for a substantial undertaking is now greater than it was at the time of the first Court of Appeal judgment.

[66] We appreciate that with the removal of the second caveat, Christine and Te Rahui will be unable to pursue a claim for what is truly most important to them: the right to retain the Lyall Bay property for the future. But while that is a very significant factor, so too is fairness to John.

[67] As is apparent, we accept that tikanga principles about the significance of whenua and kāinga may provide some support for Christine and Te Rahui's claim in the substantive proceedings[39] and thus as to whether the lodging of a second caveat should have been authorised. They may even have been relevant to whether an undertaking could or should have been required. But tikanga principles are not relevant to the consequences of Christine and Te Rahui's breach of the unchallenged requirement to provide an undertaking which has substance.

[68] In these circumstances, there is no basis for departing from the approach taken by the Court of Appeal: permission to lodge a second caveat was conditional on an undertaking being given; this required an undertaking that would provide substantial protection for John; and an undertaking providing substantial protection

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[39] See above at [38].

for John has not been provided. Accordingly, Associate Judge Lester was right to order that the caveat be removed. The position remains that, despite the $10,000 that is now in a trust account by way of security for its performance, Christine and Te Rahui's undertaking does not offer substantial protection for John. Further, as mentioned, John's potential exposure to financial loss is now more substantial than it was at the time of the first Court of Appeal judgment.

[69] In light of all of this and in the absence of an appeal against the first Court of Appeal judgment, fairness dictates that we not revise the requirement for an undertaking imposed in that judgment.

[70] The appeal is dismissed. Christine and Te Rahui were seeking legal aid for these proceedings. If they are successful, there will presumably be no occasion to make a costs order. But because our information as to this is not current, we reserve leave to apply in relation to costs.

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