

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

**SC 33/2022
[2022] NZSC 54**

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

Court: O'Regan, Ellen France and Williams JJ

Counsel: J Mason for Applicants
R C Laurenson for First Respondent
C T Gudsell QC and D M Abricossow for Second Respondents

Judgment: 6 May 2022

JUDGMENT OF THE COURT

- A The application for an extension of time to apply for leave to appeal against the first Court of Appeal judgment is dismissed.**
- B Costs are reserved.**
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REASONS

[1] On 12 April 2022, this Court issued its judgment dealing with an appeal involving the same parties to the present application (the appeal judgment).¹

¹ *Cowan v Cowan* [2022] NZSC 43 [SC judgment].

Facts

[2] The factual background is set out in detail in the appeal judgment and we will not repeat it here.² The following brief summary suffices for present purposes:

- (a) The applicants claim an interest in a residential property (the property) that was registered in the name of the first respondent (their father) and their late mother.
- (b) The first respondent entered into an agreement to sell the property to 170 Queens Drive Ltd (the developer), which plans a significant residential development on the site of the property and a number of adjoining sites it purchased.³
- (c) The applicants lodged a caveat against the title to the property to protect their claimed interest.
- (d) When an application was made for the lapse of the caveat, the applicants applied to the High Court for an order that the caveat not lapse. This was unsuccessful.⁴
- (e) The applicants then appealed to the Court of Appeal. It turned out that the caveat had in fact lapsed prior to the High Court hearing. However, the applicants were successful on the merits and the Court of Appeal issued a judgment in which it granted permission under s 146 of the Land Transfer Act 2017 for a second caveat to be lodged. (We refer to this as the first Court of Appeal judgment).⁵ Importantly, however, the Court of Appeal's permission to register a second caveat was subject to a condition that the applicants file an undertaking as to damages to protect the first respondent should the applicants' substantive claim to the property fail.

² At [5]–[13] and [26]–[36].

³ Mr Gibbons is the sole director and a shareholder of 170 Queens Drive Ltd. The purchaser named in the agreement was Mr Gibbons “or nominee” and he nominated 170 Queens Drive Ltd.

⁴ *Cowan v Cowan* [2021] NZHC 208, (2021) 21 NZCPR 902.

⁵ *Cowan v Cowan* [2021] NZCA 31 (Miller and Goddard JJ).

- (f) The applicants then lodged a second caveat and filed the required undertaking.
- (g) The first respondent then applied to the High Court for an order that the caveat be removed. This application was successful: Associate Judge Lester considered that the undertaking that was provided was an undertaking in form but not in substance, as there was no evidence that the undertaking was of value.⁶
- (h) The applicants appealed to the Court of Appeal, but their appeal was dismissed. (We will call the Court of Appeal's judgment in relation to this appeal the second Court of Appeal judgment).⁷
- (i) The applicants then applied for leave to appeal to this Court against the second Court of Appeal judgment. Leave was granted after an oral hearing.⁸

This Court's appeal judgment

[3] As the second Court of Appeal judgment was concerned only with the adequacy of the undertaking, the scope of the appeal to this Court against the second Court of Appeal judgment was also confined to that issue. During the hearing of the appeal, counsel for the applicants was asked whether the applicants wished to appeal against the first Court of Appeal judgment. If leave had been given to appeal against that judgment, that would have widened the scope of the issues before this Court to include the question as to whether an undertaking should have been required as a condition of the permission given to file a second caveat in the first Court of Appeal judgment and, if so, whether it should have provided for a capped maximum liability. Counsel confirmed that the applicants were not seeking to appeal against the first Court of Appeal judgment.

⁶ *Cowan v Cowan* [2021] NZHC 1291 at [24] and [30].

⁷ *Cowan v Cowan* [2021] NZCA 463 (French, Mander and Palmer JJ).

⁸ *Cowan v Cowan* [2021] NZSC 185.

[4] This Court dismissed the applicants' appeal against the second Court of Appeal judgment.⁹ The Court found that the undertaking needed to be sufficiently substantial to provide material protection for the first respondent in the event that the applicants' claim to an interest in the property failed. It was clear that the amount raised by the applicants to support the undertaking (\$10,000) was insufficient given the possible exposure faced by the first respondent to penalty interest and damages caused by the delay in the settlement of the sale and purchase agreement by reason of the lodging of a second caveat. The evidence before the Court was that the delay in settlement of the sale of the property and the consequent delay in the development to be undertaken by the developer had led to considerable costs.

[5] This Court noted in the appeal judgment that the appeal was confined to an appeal against the second Court of Appeal judgment and that this meant that the appeal had to be dealt with on the basis that the first Court of Appeal judgment was correct and that the undertaking as to damages was properly required.¹⁰ The Court noted that there may be scope for debate about whether an undertaking should have been required, and if so, whether the maximum liability should have been capped, but these were issues that would have arisen only in an appeal against the first Court of Appeal judgment.¹¹ The Court added:

[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.

The present applications

[6] Two days after the release of the appeal judgment, the applicants filed the present application for both an extension of time to apply for leave to appeal and for leave to appeal against the first Court of Appeal judgment. As the first Court of Appeal judgment was dated 24 February 2021, the extension of time required by the applicants is well over a year. The applicants also sought a stay of this Court's judgment, the

⁹ SC judgment, above n 1.

¹⁰ At [13], [48] and [69].

¹¹ At [62].

second Court of Appeal judgment and Associate Judge Lester's decision in the High Court, but not of the first Court of Appeal judgment.

Respondents' position

[7] The application for an extension of time, the application for leave (in the event that the extension is given) and the application for a stay are all strongly opposed by the respondents.

[8] The second respondents have filed a further affidavit from Mr Gibbons, the principal of the developer. He indicates that progress on the development has been substantially impeded because of the present litigation and that this has caused very significant losses, including increased building costs and interest on the money borrowed to buy the other land on which the development is proposed to be undertaken. In addition, the delay has put at jeopardy the pre-sale contracts for units in the development which allow for cancellation in certain circumstances.

[9] The respondents point out that the applicants made a conscious decision not to appeal against the first Court of Appeal judgment, and so this is not a matter of a delay caused by an inadvertent mistake. They argue that the applicants adopted a strategy which argued about the extent of the undertaking rather than pursuing the resolution of the underlying dispute between the applicants and the first respondent. They say that given those factors and the extent of the delay, an extension of time should be refused.

Decision

[10] We are not prepared to grant the extension of time sought by the applicants to apply for leave to appeal against the first Court of Appeal judgment. The delay of over a year is considerable. The fact that the decision not to seek to challenge the first Court of Appeal judgment was a deliberate decision (one confirmed at the hearing of the appeal against the second Court of Appeal judgment in this Court) and the litigation strategy adopted by the applicants are factors counting against the grant of an extension of time. The exposure of the first respondent to loss as a result of the delays in the settlement of the sale of the property are now even greater than they were at the

time of the hearing of the appeal against the second Court of Appeal judgment. In those circumstances we consider that the interests of the first respondent outweigh those of the applicants.

[11] As the extension of time is refused, it is not necessary for us to deal separately with the application for a stay.

Result

[12] We dismiss the application for an extension of time to apply for leave to appeal against the first Court of Appeal judgment.

Costs

[13] We are unsure of the applicants' legal aid status and in those circumstances, we reserve costs. The respondents have leave to apply for costs in the event that the applicants are not legally aided.

Solicitors:
Phoenix Law Ltd, Wellington for Applicants
Batt Law, Masterton for First Respondent
Morrison Kent, Wellington for Second Respondents