



Supreme Court of New Zealand | Te Kōti Mana Nui o Aotearoa

12 April 2022

**MEDIA RELEASE**

COWAN v COWAN

(SC 130/2021) [2022] NZSC 43

**PRESS SUMMARY**

This summary is provided to assist in the understanding of the Court’s judgment. It does not comprise part of the reasons for that judgment. The full judgment with reasons is the only authoritative document. The full text of the judgment and reasons can be found at Judicial Decisions of Public Interest: [www.courtsofnz.govt.nz](http://www.courtsofnz.govt.nz).

**Background**

In August 2020, John Cowan entered into an agreement to sell a family home in Lyall Bay, Wellington for \$1.1 million. The purchaser was 170 Queens Drive Ltd (the developer). The developer plans to construct 30 presold townhouses on the Lyall Bay property and five neighbouring sections, which it has also acquired.

The property had been purchased in 1974 by John and his late wife, Marama Cowan, who died in March 2019. Marama’s intention was for the Lyall Bay property to be preserved for Christine Cowan, one of her three children, and the wider family. This intention was the premise of an agreement entered with John in 2002 and a relationship property agreement, drafted shortly before her death. The latter agreement was signed by Marama but not by John.

In November 2020, Christine and Te Rahui Cowan (another of the Cowan children) lodged a caveat against the title to the Lyall Bay property in response to the August 2020 sale, claiming an interest in the property “[b]y virtue of an implied trust”.

**Lower Court judgments**

In January 2021, Christine and Te Rahui applied for an order that the caveat against the Lyall Bay property not lapse. Unaware that the caveat had already lapsed due to a procedural omission, Associate Judge Johnston in the High Court dismissed Christine and Te Rahui’s application. On appeal, the Court of Appeal granted Christine and Te Rahui permission to lodge a second caveat. Importantly, this was subject to the condition that Christine and Te Rahui file an undertaking as to damages to protect John should their substantive claim to

the Lyall Bay property fail. Shortly afterwards, Christine and Te Rahui filed an undertaking as to damages.

John then applied to the High Court for an order that the second caveat be removed. One the grounds argued in support of this application was that Christine and Te Rahui would not be able to honour their undertaking if called on to do so. Associate Judge Lester held that the undertaking as to damages was required to be of substance and that what had been provided was merely an undertaking in form. Accordingly, he ordered that the caveat be removed. The Court of Appeal upheld Associate Judge Lester's judgment. The Supreme Court granted Christine and Te Rahui leave to appeal. The approved question was whether the Court of Appeal was correct to dismiss the appeal.

## **Decision**

The Supreme Court has unanimously dismissed the appeal.

It acknowledged that there was 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. However, counsel for Christine and Te Rahui confirmed at the substantive hearing in February 2022 that Christine and Te Rahui were not applying for leave to appeal out of time against the first Court of Appeal judgment. That meant the Court had to deal with the appeal on the basis that the first Court of Appeal judgment was correct and that the undertaking as to damages was properly required.

The undertaking as to damages was required to be sufficiently substantial to provide material protection for John. Even supported, as it came to be, by \$10,000 raised by Christine, it did not provide that level of protection. On any plausible approach, John's exposure to financial loss by reason of the second caveat was many times greater than \$10,000.

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. This did not happen in the present case, resulting in an unsatisfactory delay. This delay meant that John's financial exposure is significantly greater than it was when the requirement for an undertaking was first imposed 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 for John was not provided. There was no basis for departing from the approach taken by the Court of Appeal in its second judgment. The Court acknowledged that tikanga principles about the importance of whenua and kāinga (home) were potentially relevant to Christine and Te Rahui's substantive claim. They were not, however, relevant to the consequences of Christine and Te Rahui's breach of the requirement to provide an undertaking which had substance. While this result meant that Christine and Te Rahui were unable to pursue a claim for what was most important to them, the future of the Lyall Bay property, the fact that there was no appeal against the first Court of Appeal judgment and fairness to John were also significant factors.

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