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

SC 130/2021
[2021] NZSC Trans 23

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

AND **JOHN ARTHUR COWAN**
First Respondent

AND **KURT THOMAS GIBBONS**
and
170 QUEENS DRIVE LIMITED
Second Respondents

Hearing: 15 December 2021

Coram: O'Regan J
Ellen France J
Williams J

Appearances: J Mason for the Appellants
R C Laurenson and C D Batt for the First Respondent
C T Gudsell QC and M R C Wolff for the Second Respondents

CIVIL ORAL LEAVE HEARING

MS MASON:

Tēnā koutou ngā rangatira o te Kōti Mana Nui. Ko Janet Mason, tōku ingoa. Counsel acts for the appellants in this proceeding, thank you.

O'REGAN J:

Tēnā koe.

MR LAURENSON:

May it please your Honours, Laurenson with my learned friend Ms Batt for the first respondent. May it please your Honours.

O'REGAN J:

Tēnā korua.

MR GUDSELL QC:

May it please your Honour. Chris Gudsell here for the second respondent with Mr Wolff, and I have my clerk Richard Suther in my room with me.

O'REGAN J:

Thank you Mr Gudsell. Ms Mason?

MS MASON:

Submissions were filed on the 8th of November, and counsel suggests that with the factual background that I not wade through that and just skip straight through to the points on appeal.

O'REGAN J:

We've read the material. To focus you that question is, should leave be granted, rather than should the appeal be allowed, because there isn't an appeal yet.

MS MASON:

Thank you Sir. At a very fundamental level, the proposition that sit behinds the application for appeal is that impecuniosity should not be used to stifle a worthy case, and this case has a complicated and lengthy history. The principal point in the appeal application relates to an undertaking that was made in relation to a property that the appellants claim equitable interest in. A decision was made by the Court of Appeal that –

O'REGAN J:

We do know the background, we've read this. I think you can cut to the chase of what is the offer you're making and why should the Court give leave to appeal against the Court of Appeal's second decision.

MS MASON:

Thank you Sir. The problem with the High Court decision, and the Court of Appeal decision that followed it, was that there wasn't any analysis around the submission that a discretion should have been exercised in terms of the value of the undertaking that the appellants were required to provide evidence of. So the appellants do not challenge the fact that there was an undertaking in the first place, but what they do say, is that there was a discretion for the Court to exercise in weighing up a number of different factors, and then making a decision about what value should be shown. There seems to have been an implication –

O'REGAN J:

If you accept that there should have been an undertaking, and it should have had value, what do you say the Court of Appeal should have done?

MS MASON:

They should have accepted the factors in the submissions that have been put forward and agreed that $10,000 would have been sufficient. But there was never a weighing up exercise that occurred in the first place.

O'REGAN J:

Was there evidence before the Court of Appeal that the $10,000 was available?

MS MASON:

No affidavits had been given, but the submissions that with the first Court of Appeal decision, a decision was made and then the applicants were given some time to adhere to the other conditions, and so the same kind of approach could have been given with this. One of the problems was that there was no really any engagement or discussion about what that value should be. There was an assumption that because the undertaking had been ordered, that whatever the extent of the damages should be, that that's what the appellants should have come up with, so that exercise of weighing up what factors should be taken into consideration, whether they should be economic only, and whether there were any other parties who were responsible for this, was never undertaken, and so –

WILLIAMS J:

Did you raise the issue initially? How did the issue of undertaking arise in the earlier proceeding>

MS MASON:

So it arose as a result of the High Court decision of Associate Judge Lester. So evidence had been provided by the respondents that they were incurring all of these costs.

WILLIAMS J:

Of course, but how did you engage with the undertaking issue, either in the first Court of Appeal, or earlier.

MS MASON:

So we engaged by relying on the Supreme Court case of *Reekie v Attorney-General* [2014] NZSC 63; 1 NZLR 737 and the case of *Nikau Holdings Ltd v BNZ* (1992) 5 PRNZ 430 which –

WILLIAMS J:

So your engagement was there shouldn't be one, at that stage?

MS MASON:

Engagement was that, they had accepted. So in the first Court of Appeal, when the undertaking was put on, my clients had accepted that undertaking. They had not challenged it. By the time that it came to be that people were putting out figures of 100,000 or 80,000, it was too late, they were beyond the date for appealing that. So they accepted the undertaking but they didn't have the funding required, or not required, the 80 to 90 to 100 and then later to $300,000 –

ELLEN FRANCE J:

Just going back then. When you were before the Court of Appeal the first time around, was there any discussion before the Court about the giving of an undertaking?

MS MASON:

Yes, and they had accepted that, but there had been no discussion about what that would mean, or what the value of that would be, and I'd have to say that at that time there were three conditions that were put in place. One of them was that one of the appellants had to vacate the home that he had been living in, in Carterton, and there was a lot of stress for them in doing that, obviously, they'd been there for a long time, and so the attention had been on adhering to that particular requirement, and it wasn't until later that the discussion around the value of the undertaking, and the submission is that there was never really any exercise weighing up whether there was a discretion in terms of the value of the undertaking. There was an assumption that the undertaking would have to equate to the full amount of what penalty interest and then later what any other damages might be. So there was never an engagement.

WILLIAMS J:

When you say there was an assumption, no doubt the other side had that assumption. Why did you not…

MS MASON:

It just appeared to me that the Courts had that assumption to, and there was not an engagement. We put forward a lot of submissions in relation to the proposition that, yes, with a registered caveat the Court does have a discretion to impose an undertaking, because there had been previous case law *Re Dick's Caveat* [1985] 2 NZLR 641 that actually the Court couldn't do that, so there was some discussion around that, and then as a corollary of that proposition we had said, well, there is also a discretion as to the value of that undertaking, but that was rejected.

WILLIAMS J:

Yes, but you said in the first Court of Appeal hearing you did not argue value.

MS MASON:

No Sir we didn't.

WILLIAMS J:

You accept undertaking, you did not argue value. The default position, the other side will say, was always going to be actual likely damages, not any lesser figure. Did that occur to you?

MS MASON:

What my feeling was at the time was that there would then be submissions and discussions on how to weigh up that undertaking and what that value would be.

WILLIAMS J:

You thought you'd have another crack at that later on?

MS MASON:

Yes, because there'd been no decision on what the value would be and even now it's not clear.

WILLIAMS J:

Well there isn't usually. You see, once an undertaking for damages was required, it's the actual damages that you're up for unless there's some other decision. That's the standard process.

O'REGAN J:

I think the words used by the Court of Appeal were "an undertaking to protect the respondents' against the loss, if your clients' case failed" and that, on the face of it, seems to mean the loss, not some portion of it.

MS MASON:

We have made submissions in the latest Court of Appeal hearing based on cases such as *Paugra Holdings Ltd (in liq) v Harvestfield Holdings Ltd* [2013] NZHC 2200 where the Court had held that the value of the undertaking – that the undertaking itself is discretionary and that the value of the undertaking could – well, I'll just, Sir, if you like, just read this. So in *Paugra* the Court posited their exercise of discretion by asking whether it was proper to require an undertaking as a form of interim protection. The task for the Court is to assess the damage that could ensue for the party or parties affected by the extension to the caveat. However, while that may be an issue, it may be only one of the matters considered and may not be pivotal. So the feeling at the time was that there was still a discussion to be had about the way that that undertaking looked and the requirements that they would have to put forward, and so then the attempt was made relying on *Nikau* and other cases to say that in determining the value of that undertaking there were other non-economic considerations that –

O'REGAN J:

But the fact is the second Court of Appeal was only considering whether there had been compliance with the first Court of Appeal decision, whereas what

you seem to be saying is you want to now appeal to this Court against the first Court of Appeal decision.

MS MASON:

Well, not necessarily. The two propositions: one, that there is an undertaking. So that's not being questioned because it's too late to appeal that. We ran out of time. And then the second point –

O'REGAN J:

Well, it's a bit more than that, isn't it? It's an undertaking to protect the respondents against your clients being unsuccessful, the loss that's caused to them. So it's not just an undertaking without any discretion at all.

MS MASON:

Yes, and the submission would be that in determining, because there has to be a determination of what the value of that would look like and whether it would be penalty interest or anything else and what factors would be considered, and the submission is that in that exercise matters of tikanga should have been factored in.

Sir, I'd really like to, at this point, refer to *Reekie v Attorney-General* and I know that that is a case which was about security for costs but the submission is that the underlying principles are the same.

O'REGAN J:

Well, are they? Why are they the same? They're completely different, aren't they?

MS MASON:

Because these would both bar a litigant from taking the case, and so fundamentally the issue becomes about if a litigant doesn't have the money to proceed and they have a worthy case, how much should they be asked to come up with, and that's really the fundamental –

O'REGAN J:

Well, except *Reekie's* about the cost of the actual case whereas this is about the loss caused by the delay in determining the rights and wrongs of the interest that you say should be protected by the caveat.

MS MASON:

Well, the submission would be that underlying these principles are access to justice issues and that the principles that have been expounded in *Reekie* are relevant here because, at the end of the day, these litigants, because they don't have any money except for $10,000, would be barred from pursuing their case and *Reekie* did say that an analysis of the costs and benefits, so if you accept there's a discretion, if you then accept the next proposition that there is a discretion to be exercised in determining what they should come up with, then the submission is that the Court needs to look at all of these issues and underlying it is an access to justice issue.

WILLIAMS J:

For myself anyway I think the point is well made. The question is when you have to do that. That seems to me the only relevant question. Were you too late? You have to argue before us, or establish before us, that you weren't.

MS MASON:

We had expected to do that in the High Court and this case around *Nikau* and the weighing up of these various factors was put before the High Court at the time that the challenge was made about the undertaking having no substance, and the argument was made again at the Supreme Court, and when the arguments –

WILLIAMS J:

Do you mean at the Court of Appeal?

MS MASON:

At the Court of Appeal sorry. And when the arguments were made there was just a resistance to engage, and there was just a blanket, you have no

evidence, you have this funding, or this money, so that's it, and the submission Sir is that that was just too black and white in this case. There's clearly a responsibility that Mr Cowan senior has to accept for his conduct in these proceedings, and there is clearly an issue of ethnicity and cultural value of the land that would not be heard otherwise. So in terms of are we too late, the expectation was that, yes, there would be the signing of an undertaking, and then that discussion around what factors would be weighted, what value would this be set at, would be had later.

WILLIAMS J:
Can I just clarify one question of detail. When you said the question of $10,000 was raised, that was at the second appeal?

MS MASON:
Yes Sir.

WILLIAMS J:
And what about the first appeal?

MS MASON:
At the first appeal there was some suggestion that they could raise some funding by going out to other whānau, but there was no concrete amount that they had.

WILLIAMS J:
You put no concrete amount up?

MS MASON:
No.

WILLIAMS J:
And made no submission to the Court about affordability?

MS MASON:

Sir, I don't recall that, but there was just some discussion – what I had put up to the Court was that there had been no engagement about what the actual amount should be.

WILLIAMS J:

Right.

O'REGAN J:

I'm going to have to stop you soon, but I just want to establish with you exactly what the substantive dispute, where that it is up to, and when it is likely to be resolved.

MS MASON:

The substantive dispute, one of the conditions of the caveat remaining was that the appellants file a claim in the High Court, which they have since done, and that's basically been put on hold because of these proceedings. So the evidence has been filed and we are awaiting a hearing date.

WILLIAMS J:

Have you applied for a priority fixture?

MS MASON:

No Sir, we haven't, because these proceedings could have knocked them out, and the –

WILLIAMS J:

Well it might have assisted you in these proceedings if you had.

MS MASON:

Mmm. So one of the issues was whether they had a beneficial issue in the property, and then the next issue was did that interest defeat the interests of the developers. So that's where that's up to.

O'REGAN J:

The potential loss keeps growing as the days go by, doesn't it?

MS MASON:

Yes Sir, it does. It does. We've had difficulties with legal aid and so they are clients that don't have any funding, and a lot of this work has been done without any funding whatsoever and that, I have to say, has been a problem as well.

ELLEN FRANCE J:

Sorry could I just check. In terms of the idea that there's some discretion about the value to be attached to an undertaking, is the case you mentioned the best one for that?

MS MASON:

Ma'am, there are a number of cases in that regard, and one is *Holmes v Australasian Holdings Ltd* [1988] 2 NZLR 303 (HC), then there's *Paugra Holdings v Harvestfield*. There's *ANZ National Bank Ltd v Uruamo (No 2)* [2012] NZHC 1914, and that case actually the Court declined to order the undertaking so that was about whether you put an undertaking on or not, and the rest –

WILLIAMS J:

Was that a caveat case *Uruamo*?

MS MASON:

Yes Sir. Yes. But the clearest one was *Paugra* where the idea was that while the damages to the other party might be a problem, but it wasn't the only one, and then, Ma'am, we really then again relied on *Reekie* about the analysis that this should not be confined just to money, and that's where all the tikanga points come in, because if it is accepted that there is a discretion, then in weighing that up, the value of this land to this whānau is quite important.

And I'll just very briefly, Sir, talk about an affidavit that was filed yesterday and that referred to a case with the same developer in Auckland in which –

O'REGAN J:
Did you file it?

MS MASON:
Yes, Sir. So there was a memorandum and it was in response to a memorandum from my friend, Mr Gudsell, setting out the costs that had been incurred, and this decision essentially said that the developer at its own risk had decided to proceed with a development when he knew that there were challenges and so any costs that were borne because of that ought to be his responsibility. It was a similar situation; it was a town-house development and, as I say, the same developer.

O'REGAN J:
So are you saying the developer here also knew of the issues between your clients and their father?

MS MASON:
Yes, Sir. The evidence is that they knew in September last year.

O'REGAN J:
What evidence?

MS MASON:
Ms Cowan's affidavit that was filed yesterday.

WILLIAMS J:
Was there evidence about that in the Courts below?

MS MASON:
Yes, yes, and also evidence of the caveat filed. So the caveat was filed on the 16th of November and the property was due for settlement on the 24th of February, and the resource consent for the development was not

actually applied for until the 22nd of January, and that evidence is attached to Ms Cowan's affidavit, and then the surrounding properties were not settled until the 9th of March. So the developer was on notice since November that there were ownership issues with this property and if he proceeded then the submission is that that's his commercial risk to bear.

O'REGAN J:
Okay. Well, I think we probably just – have you said what you need to say?

MS MASON:
Yes, thank you, Sir.

O'REGAN J:
Thank you, Ms Mason. Mr Laurenson.

MR LAURENSON:
Your Honours, you asked the question earlier this morning why is it, what is the basis on which leave should be given to appeal. On behalf of Mr Cowan, I understand that although the onus is on my learned friend's clients to establish that, it is usual to say or submit why leave should not be granted.

Now this issue today involves an undertaking that was ordered by the Court of Appeal in the first hearing. It arose, the matter of an undertaking, arose the day before or thereabouts, I think it was the day before, of the hearing when Justice Miller of the Court of Appeal issued a minute to counsel. Now I arranged for that minute to be provided yesterday and in that minute Justice Miller states, third paragraph: "Were an injunction to be granted the applicants would have to give an undertaking as to damages by, at latest, close of business today." So the matter of an undertaking was centre stage so far as possible conditions for, were relief to be given to the appellants in that first Court of Appeal hearing.

WILLIAMS J:
So when you say “by the close of business today”, that’s the day before the hearing?

MR LAURENSON:
Correct.

WILLIAMS J:
Is that attached to a memorandum or something?

MR LAURENSON:
That is the…

ELLEN FRANCE J:
It’s just a separate page.

MR LAURENSON:
It was filed yesterday. I do have another copy if you wish to –

WILLIAMS J:
Okay, no, that’s fine.

MR LAURENSON:
No, in fact, the minute was issued on the morning of the hearing in the Court of Appeal. It was at 8.37 am, in the morning of the hearing, and then if you turn to the judgment of the Court of Appeal itself, the passages I refer to are paragraphs 11 and 12 where the Court finds that the appellant, Christine Cowan, has a caveatable interest as a beneficial owner – I’m sorry, has a plainly arguable case that she is a beneficial owner. So that is arrived at at paragraph 12, and then at paragraph 14 this is said: “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.” That is the claim that they are making that she has an equitable interest. That is the arguable caveatable interest, and at paragraph 14, it goes on: “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."

So it was also in the contemplation of the Court of Appeal that there would be losses accruing to the developer, and in my respectful submission it's also useful to look at the conditions that were imposed by the Court of Appeal at paragraph 17 where the Court says: "It is a condition of the order that John be permitted to enjoy sole occupancy," and then next sentence: "It is also a condition of the order that by 4 March the applicants file proceedings in the High Court to establish their claim to the Lyall :Bay property." Paragraph 18: "The proceeding must be brought on with urgency. To secure that, we direct that any party, including the developer, may apply to the High Court on notice to discharge the caveat." So the commercial consequences in respect of the developer were also, by reference to the developer also being able to apply to discharge the caveat. were clearly in the forefront of the Court of Appeal's mind.

So an undertaking is issued and the question has then been, since it was imposed, are the appellants good to make good the undertaking to meet a loss, and that's what they have not established.

Before Associate Judge Lester in the second High Court hearing, that is the application brought by my client to remove the caveat, it was stated by the Bar that there might be monies from the wider whānau. It was certainly stated before Associate Judge Lester but no evidence. Now we have a position that the undertaking should be limited to a figure of $10,000 but, with the utmost respect, that is misconstruing what the purpose of the undertaking is. It's not to be limited to an amount, and that some sort of warrant or amount be provided as if a security for costs or something like that. What is required is evidence that in the event of the sort of commercial losses that could be envisaged in this case, the appellants are good to make good that loss. The figure of $10,000 was mentioned from the Bar on the morning of the second Court of Appeal hearing. But in my respectful submission, and there has been no evidence of it. I have seen the affidavit that was filed last night.

There is some talk that $10,000 is sought to be borrowed, or has been borrowed, I hope it has not already been borrowed from a financer, or from a, in simple terms, if I refer to it, from a finance company. But the issue is not whether $10,000 meets it. It's simply not enough. But what we do require is evidence that the appellants are good to make good the undertaking to meet damages for loss.

WILLIAMS J:

It's a rather unpalatable proposition that impecunious litigants should be prevented from seeking justice in which an earlier court has said they have a decent case to run because they're impecunious. It's rather inconsistent with our general values in the law in this country. So how do you deal with that. How do you address that?

MR LAURENSON:

Well first of all I submit that at the moment we have only got an arguable case. That is –

WILLIAMS J:

That's the point I made. That the Court of Appeal has said, this is a case that can be run, it has enough merit to be run, and therefore to support a caveat. They clearly have no money because they're on legal aid. Your proposition is given that they have no money, they shouldn't have access to justice. So that's one way of putting it, that's the way Ms Mason put it. What's your response to that?

MR LAURENSON:

Well, first of all I still repeat that all they have established is an arguable case, and that –

WILLIAMS J:

You don't need to repeat that, I agree. But what do you say?

MR LAURENSON:

Well, there are – in the end access to justice does require a balancing of circumstances, and we have here on the other side of the argument that you are collecting from my learned friend, on the other side we have first of all an offer to retain the proceeds until all issues between children and father are resolved. Secondly, there must not be forgotten the real claims that the first respondent has to this property. He, after all, has been with his late wife, been the joint owner of this property since 1974, or thereabouts. He has been a husband for nearly 40 years on her death. He's been –

WILLIAMS J:

I don't think we're talking – we're not talking about the merits of this case.

MR LAURENSON:

No, but the –

WILLIAMS J:

There's just agreement that the Cowan children have an argument and no doubt their father has an argument too, so…

MR LAURENSON:

Okay, well, you have to balance those. You have to balance those. You can't give too much credence to one particular argument and one of the issues that come out of that therefore is where do you draw the line? Do you, because there is an arguable case by impecunious persons, do you collapse everything in favour of that or do you look at the wider circumstances and say there is a very – there are existing claims? There is probably a prior claim from Mr Cowan to this property from the start. He, in his later years, should be entitled to or enable to enjoy the product of that property. Therefore, if one party – and the third matter is that there is an offer to hold the proceeds in trust until issues between the parties are determined. If you weigh up those against the lack of or the impecuniosity of the claimants, the balance falls in getting on with a sale and determining the interests. That's how I would answer that. The other thing I would also submit is a matter that Associate

Judge Lester touched on in the latter part of his judgment. But the arguable claim that exists here will always be affected by Mr Cowan's claims to his, in respect of his late wife's estate, and in the end it will be inevitable that this property be sold to meet the competing established claims of the appellants. There's an inevitability, in my respectful submission, that the property will have to be sold.

O'REGAN J:
All right, I should stop you unless you've got anything you wanted to sum up.

MR LAURENSON:
No. Is there anything I can be of further assistance to your Honours?

O'REGAN J:
I don't think so. Thank you, Mr Laurenson.

MR LAURENSON:
As your Honours please.

O'REGAN J:
Go ahead, Mr Gudsell. You can hear and see us clearly?

MR GUDSELL:
I can do both, thank you, your Honour. It's probably a matter of building on what's gone forward in discussion because at the end of the day the submission that is address in paragraph 11 of my written submissions encapsulates, in my view, where we have arrived at here. The Court of Appeal exercised a discretion to require an undertaking to be put in place as a condition of the second caveat being lodged. Now the appellants didn't challenge that and haven't challenged the decision by the High Court and the Court of Appeal, second Court of Appeal finding that the undertaking does not have substance, nor is there any challenge to the issue of the first respondent's potential exposure to the second respondent and there is no evidence before the Court that the undertaking has substance.

So we're left in a situation of where's the error? What is it that the appellant asks this Court to craft as a question arising from the Court of Appeal's decision such that leave should be granted, and what's arisen in discussion is the question of impecuniosity, but the issue surrounds neither the High Court or the Court of Appeal saying they had any discretion here. That's the issue that the High Court and Court of Appeal determined, that they didn't have that discretion, and in my submission they did not, and there's nothing in the submissions that have been advanced, in writing or orally, that squarely addresses that issue to create a point such that leave should be granted.

ELLEN FRANCE J:

I'm not quite sure I understand what you're saying when you say they didn't have that discretion.

MR GUDSELL QC:

The discretion was exercised by the first Court of Appeal decision in requiring an undertaking and the High Court said it needed to consider whether the condition requiring the undertaking to be met had been complied with i.e. an undertaking with substance, and that was the narrow issue that the High Court considered, and also the narrow issue that the Court of Appeal, second Court of Appeal considered.

WILLIAMS J:

So you're saying to the extent there was a discretion, that was discretion to be exercised by the first Court of Appeal, and it did.

MR GUDSELL QC:

Correct.

WILLIAMS J:

After that it was game over, on that issue?

MR GUDSELL QC:

On that issue? The issue then was had that condition been met and it's clear from the second Court of Appeal's decision, at paragraph 18 of that decision, that there was no support for that undertaking provided at any time. So faced with that being a pre-condition to the lodging of a second caveat, it had not been met.

ELLEN FRANCE J:

Just so I understand what you're saying about the scope of the discretion, if, for example, there had been evidence of some greater sum than $10,000, let's say $50,000, is it your position that that wouldn't suffice. In other words that what you're looking for is something that would be reflective of potential actual loss, damages.

MR GUDSELL QC:

My submission is that the undertaking in the circumstances of this case needed to have substance, and there doesn't seem to be any dispute in terms of principle that that's what it should have, in the circumstances of this case, and Associate Judge Lester addressed that, as did the Court of Appeal, and in my submission principles around the difference between security for costs, impecuniosity issues, and the provision of an undertaking, are separate matters.

O'REGAN J:

The question is, are you saying that the undertaking has to be sufficient to meet the entirety of the loss?

MR GUDSELL QC:

Well whether it's the entirety of the loss, because that's unquantified at the moment, but certainly the figures that were discussed before Associate Judge Lester were aired, and the Court of Appeal took the view there was nothing to suggest that they were erroneous in any respect, but the point your Honour made earlier with respect to every day that passes the losses grow. So at the time that the provision of the undertaking was given, it

needed to have substance, and quite clearly it did not, and there's no evidence before the Court to say, from the Bar, that is evidence, that there is anything of substance then or now.

WILLIAMS J:
I think there's an affidavit now.

MR GUDSELL:
The affidavit that was filed yesterday talks about the – your Honour, it refers to the $10,000. "In addition I have had to borrow $10,000 from a finance company." So that's the evidence of Ms Cowan as filed yesterday in paragraph 8 of her affidavit. So there's no appending – I'm not sure whether there were appending documents, I'm sorry. I may stand to be corrected there. There's no reference in the affidavit to any annexures reflecting the lending, but that is her deposed evidence.

WILLIAMS J:
Yes, that's evidence.

MR GUDSELL:
In my submission, that doesn't, if you like, it doesn't change the discretionary point that is the narrow point that arose from the High Court and Court of Appeal. The High Court said I'm effectively stymied here. The Court of Appeal has said an undertaking is required to be given. It needs to be of value, substance. The appellant agrees with that, didn't dispute that, doesn't dispute it now. The Court of Appeal said: "We agree with the High Court that that is the case. It needs to be of substance. So let's see whether that's provided." It wasn't. As you will have noted in the Court of Appeal decision it was referenced on the day of the hearing to some lending from KiwiSaver from Christine Cowan whose affidavit evidence is she's an employed teacher, but nothing came of that by way of any evidence. The best position we're in really, your Honour, is one you've pointed out already of the $10,000.

WILLIAMS J:

So I think the position is a little more subtle than as you've put it in the sense that you say that, let's call it CA1, and the High Court decisions, have not been challenged although in substance the arguments that are run by Ms Mason challenge the practical effect of a full undertaking, and it could well have been open to her on behalf of her clients to apply for leave to appeal CA1 out of time in order to address that.

MR GUDSELL:

Yes, whether that, I think you've posed that question to her, your Honour, about whether there was any consideration of that, or Justice O'Regan did, but the fact is that an undertaking was sought on this interim relief basis before Justice Miller and Justice Goddard and at the end of that process the following day an undertaking was provided. In the face of a decision by the Court of Appeal, the first Court of Appeal, that clearly reflected – I think, Justice O'Regan, you mentioned that, I think it's paragraph 8 of the first Court of Appeal decision, where you talked about protection for John in the event that it was unsuccessful – at paragraph 14, my apologies, where the – "It will be a condition of the order that the applicants must both give an undertaking as to damages," both appellants, "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 demolish to make way for townhouses." So that's a decision of the 24th of February. Now faced with that position on the 25th of February an undertaking was provided, so that it is apparent, in my submission, that the potential commercial enormity of providing an undertaking was dealt with in a way that perhaps at the end of the day and on reflection was rather casual. It was an undertaking as to in form and not in substance, but that's not a matter for, it's a matter for the applicants to determine in the face of those remarks whether they could stand behind it, and what they knew is, and this is reflected in Justice Goddard's decision on the registry review for security, what they knew is that the development was going ahead, it was going to be significant, and they needed to comply with that in order to lodge their protected second caveat, and they did so, and it's unfortunate in a human

perspective that this has come to bear, but there are consequences for provision of an undertaking to meet it, to meet that requirement. They did it and things have moved on since then.

Your Honour I took our point at the outset that you've read the submissions and that I'm not going to repeat those. My submission is that, well I have mentioned one other matter, and that is at the end of the day Associate Judge Lester went further in respect of whether he would have actually removed the caveat anyway, and I've mentioned that in my submissions at the conclusion of them, that he would have done so.

So by way of meeting the criteria under s 74, my submission is that there is, they have not been met, and that leave should not be granted.

O'REGAN J:
Thank you Mr Gudsell.

MR GUDSELL QC:
Thank you your Honour.

O'REGAN J:
In reply Ms Mason?

MS MASON:
I'd just like to make a couple of points in reply. One is that the proposition that was advanced earlier, that the first Court of Appeal decision for an undertaking didn't necessarily mean that the appellants had to come up with the entirety of any penalty interest and any damages, and that their expectation that there would be further submissions and a discussion about how that undertaking was meant, was reasonable. The second point is about the impecuniosity.

WILLIAMS J:

Sorry, just on the first point, are you really saying that was a misapprehension on your part, that that's what would happen?

MS MASON:

Not so much a misapprehension but there was a reasonable expectation that the detail of that would be worked out between the parties.

WILLIAMS J:

Well that's not what happens.

MS MASON:

No, and no figure –

WILLIAMS J:

My point is, did you think that was what was going to happen, in your judgement?

MS MASON:

Yes Sir, because the order had not mentioned any amount, and it could have been $10,000 and it could have been $300,000, but in between those figures there was not an amount that was ever mentioned.

ELLEN FRANCE J:

So do you say that the phrase "to protect John should their claim fail" doesn't mean necessarily protect John fully?

MS MASON:

Yes, there was an expectation because of the very unusual circumstances of this case that he had, he would have some liability in any costs, regardless of whether they won or not because of his conduct. That none of this would have happened if he had actually said to them "this is what I'm going to do" because then the developer would not have entered into an agreement for sale and purchase, and so when it came time to think about even if they lost,

who would be awarded costs and who would be responsible, it wasn't necessarily 100% guaranteed that they would have to bear the burden of that.

The other point I'd like to make is that, that Ms Christina Cowan had, since 1995, along with her mother, contributed to the payment of the mortgage and the insurance and the rates, so her whole life had been invested in this property. She didn't have anything else because her commitments had been to her mother and her whānau, and that house they hold there had many visitors. There were a lot of obligations of manaaki, and her whole salary went into all of those. So this idea that, well, the fact of their impecuniosity is directly related to all that she has invested into that house.

Then the final point that I'd like to respond to is that it's not necessarily inevitable that the house was lost. For them the value in the house is the value of the amount that she's invested, the memories of their mother, the promises that have been made to her for many, many years, and as reflected in the early 2002 agreement, and the fact of the burial of her children's pito and whenua in the land, means that it's imbued with some very, very weighty tapu and sacred significance.

O'REGAN J:
Thank you. We'll reserve our decision and release it in writing in due course.

COURT ADJOURNS: 10.56 AM