IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA391/2021
[2021] NZCA 463

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:	26 August 2021
Court:	French, Mander and Palmer JJ
Counsel:	J Mason for Appellants R C Laurenson and C D Batt for First Respondent C T Gudsell QC and M R C Wolff for Second Respondents
Judgment:	10 September 2021 at 10 am

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellants must pay costs to both the first and second respondents for a standard appeal on a band A basis, with usual disbursements.

REASONS OF THE COURT

(Given by Mander J)

[1] The appellants, Christine and Te Rahui Cowan, are the children of the first respondent, John Cowan. They are in dispute over the ownership of a property situated at Lyall Bay, Wellington (the property) that John has agreed to sell to a developer. After appealing to this Court, they obtained a caveat over the property.[1] A condition of the order permitting them to lodge a caveat required them to provide an undertaking as to damages, to protect John should their claim to the property fail.[2]

[2] An undertaking was filed. However, John applied to the High Court to remove the caveat on the basis the undertaking was without worth.[3] Associate Judge Lester accepted Christine and Te Rahui had failed to provide evidence their undertaking was of value.[4] As a result, he held the condition had not been satisfied and the caveat should be removed.[5] It is against that decision that Christine and Te Rahui now appeal.

Background

[3] In 1974, the Lyall Bay property was purchased by John and his wife, Marama Cowan. It was settled under the Joint Family Homes Act 1964. Despite difficulties in their relationship, the couple remained married for almost 50 years until Marama died in March 2019. The couple also purchased a property in Carterton that they held as joint tenants.

[4] In the late 1990s, John became indebted to the Inland Revenue Department. It is said Marama had to sell a property she owned to discharge this tax debt. The couple's relationship became strained and on at least one occasion they temporarily separated. These marriage difficulties appear to have been the catalyst for an agreement they entered into in 2002 regarding the property (the 2002 agreement).

[5] The 2002 agreement is of some importance because it is central to Christine's claim that she is the beneficial owner of the property and has a caveatable interest in it. The 2002 agreement records that John "sells and gifts his share" of the "joint family

1 *Cowan v Cowan* [2021] NZCA 31.
2 At [14].
3 Also before the High Court was an application by the developer for specific performance of the sale and purchase agreement for the Lyall Bay property.
4 *Cowan v Cowan* [2021] NZHC 1291 [Decision under appeal] at [24]–[33].
5 At [34] and [57]–[61].

home" to Christine. The status and effect of the 2002 agreement is in issue. John accepts he signed the agreement but maintains he did so without the benefit of legal advice and that no steps were ever taken in furtherance of the agreement. Christine and Te Rahui, who were present when it was signed, dispute that the 2002 agreement had been abandoned by their parents.

[6] In March 2019, four days before Marama's death, she instructed her solicitors to prepare a relationship property agreement which provided for the division of her property between John and the children. The document provided that notwithstanding the Carterton and Lyall Bay properties being jointly owned, and that they would otherwise pass to John's sole ownership under the doctrine of survivorship, the Lyall Bay property was to become Marama's separate property and to be held on trust for the children. The Carterton property was to be John's separate property. Marama signed the agreement and had it certified by a solicitor, as required by the Property (Relationships) Act 1976.[6] However, while there was some contested evidence that John orally agreed to its terms, he did not sign the document nor obtain independent legal advice.

[7] After Marama's death, John became the registered proprietor of the Lyall Bay property. In late 2020 he entered into an agreement to sell it to the developer. Settlement of that sale was to take place on 25 February 2021. When Christine and Te Rahui became aware of the sale, they lodged caveats against the Lyall Bay and Carterton properties, claiming proprietary interests in both.

[8] On 19 February, Associate Judge Johnston declined Christine and Te Rahui's application to sustain the caveats.[7] That decision resulted in an urgent appeal to this Court that was heard five days later. Contrary to the view taken by the Associate Judge, this Court considered it arguable that Christine had a caveatable interest in the Lyall Bay property as the beneficial owner.[8] This Court found:

> [11] The status in law of the 2019 agreement as between John and the children, or Marama's estate, is plainly contestable, but what matters for present purposes is that we think it arguable that the 2002 agreement subsisted

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6 Section 21F(5).
7 *Cowan v Cowan* [2021] NZHC 208.
8 *Cowan v Cowan*, above n 1, at [4].

> unless and until replaced by the 2019 one, and both envisage that John will hold the Lyall Bay property in trust for Christine. That would suffice to give her a caveatable interest as beneficial owner.

[9] Leave was granted to Christine and Te Rahui to lodge a second caveat over the property as the first caveat had lapsed by the time of the appeal. It was not considered that either appellant had a caveatable interest in the Carterton property. In granting leave to lodge a second caveat, a number of conditions were imposed, including that Christine and Te Rahui file an undertaking as to damages. In respect of that requirement, the Court stated:

> [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.

[10] The second caveat was therefore dependent on Christine and Te Rahui filing an undertaking by the stipulated date. A further condition required them to file proceedings in the High Court to establish their claim to the property.[9] The need to bring the proceeding on with urgency was noted and a direction made that any party, including the developer, could apply to the High Court on notice to discharge the caveat.[10]

[11] An undertaking as to damages was filed and proceedings were issued against John to establish Christine and Te Rahui's claim to the property. This was followed by John's application seeking the removal of the second caveat. The grounds for that application included that Christine and Te Rahui had not provided a valid undertaking because they had failed to provide accompanying evidence of its value.

The Associate Judge's decision

[12] Associate Judge Lester had no difficulty in concluding that an undertaking as to damages should, as a matter of course, be accompanied by evidence that the

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[9] At [17].
[10] At [18].

undertaking is of value.[11] No evidence in support of the undertakings had been filed, nor had any evidence in response to John's evidence that the undertakings were without value been offered in reply. As a result, the Associate Judge was satisfied the condition imposed by this Court had not been substantially complied with and an order was made removing the second caveat.[12] That order was subject to the net proceeds of the sale of the property being held on deposit in a solicitor's trust account. The funds were not to be disbursed without the agreement of the parties or further order of the Court.[13]

The appeal

[13] The prime ground advanced on behalf of the appellants was that the Associate Judge erred in his assessment of whether the undertaking had value by failing to take into account Christine's beneficial interest in the Lyall Bay property, which it was submitted was sufficient to support the undertaking. Ms Mason, on behalf of Christine and Te Rahui, maintained the arguable beneficial interest in the Lyall Bay property could be used as evidence of the ability of the caveator to sustain the undertaking.

[14] Ms Mason further argued that the Court must consider all the circumstances of the case as a whole and all relevant factors. In that regard, she submitted the Associate Judge erred by not taking into account tikanga principles and the probability that the appellants' impecuniosity had been caused by the acts of John, against whom their claim was being made. In support of the argument that Christine's beneficial interest in the Lyall Bay property would be sufficient to sustain the undertaking, Ms Mason submitted the Court should have had regard to the merits of Christine's claim and the overall justice of the case.

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11 Decision under appeal, above n 4, at [24], citing *Jireh Holdings Ltd v Porchester Ltd* HC Auckland M1466/02, 18 December 2002 at [32]; *Sanson v Energy Products Ltd* HC Auckland CIV-2009-404-5464, 4 December 2009 at [40]; and *Yang v DH and PM Ltd* [2019] NZHC 953 at [23].

12 At [30] and [61].

13 At [61]. The Court also, at [67]–[68], granted the developer's application for specific performance of the sale of the Lyall Bay property. That order was to lie in Court pending final determination of any appeal against the removal of the caveat.

Analysis

[15] An initial ground of appeal that the Associate Judge had erred in determining that an undertaking as to damages needed to be of value was not pursued. That was a proper concession. A mere undertaking only in form will be insufficient. The undertaking must have substance.[14] Because of John's potential liability, it was necessary for Christine and Te Rahui to demonstrate they had the ability to meet their father's costs should they (or at least Christine) lose their claim to the Lyall Bay property. Faced with that requirement, Ms Mason relied on this Court's finding that it was "plainly arguable" that Christine is the beneficial owner of the property.[15]

[16] The appellants' reliance on Christine's arguable equitable interest in the Lyall Bay property to support her undertaking is flawed. The undertaking was imposed to protect John should Christine's claim fail — that is, in the event Christine is found not to have an equitable interest in the property. However, the proposed worth of the undertaking is reliant for its value on Christine being successful. An undertaking based on such an outcome is demonstrably devoid of utility.

[17] Associate Judge Lester was cognisant of this Court's earlier findings that it was reasonably arguable that Christine had a caveatable interest in the property. However, for the purpose of the application before him, he was charged with deciding whether the condition to which the second caveat was subject had been fulfilled. The discretion to impose such a condition was the prerogative of this Court when it decided that Christine had an arguable case that supported a caveatable interest in the property.[16] The Associate Judge had no jurisdiction to waive this requirement or amend the terms of the caveat. Having found the condition had not been satisfied, it was not open to the Associate Judge to exercise his discretion to modify the orders of this Court.

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14 See Decision under appeal, above n 4, at [24]; and D W McMorland and others *Hinde, McMorland & Sim Land Law in New Zealand* (online ed, LexisNexis) at [10.020(f)], citing, inter alia, *Redman v Rocad Industries Ltd* HC Tauranga M72/92, 16 July 1992; and *Noton v Peten Developments Ltd* (1992) 2 NZ ConvC 191,261 (HC).

15 *Cowan v Cowan*, above n 1, at [12].

16 Land Transfer Act 2017, s 146; McMorland and others, above n 16, at [10.021(e)], citing *Muellner v Montagnat* (1986) 2 NZCPR 520 (HC) at 523; and *Merbank Corporation Ltd v Price* (1978) 1 NZCPR 24 (CA) at 28.

[18] No evidence was placed before the High Court to support the appellants' undertakings, nor was any material filed for the appeal to meet the requirement that the undertaking be for value. Ms Mason advised that on the eve of the hearing of the appeal, she received instructions that Christine was willing to apply to withdraw funds from her KiwiSaver account on grounds of financial hardship. Reference was also made to Christine accessing other funds, including drawing down on an existing loan facility. However, no steps had been taken to advance these highly contingent possibilities which were raised from the bar and appeared to us to be speculative and unrealistic. As already noted, no evidence was put before the High Court regarding how Christine and Te Rahui could support their undertakings and, in the nearly three months that have elapsed since Associate Judge Lester's decision, this issue has not been advanced.

[19] There was also some discussion at the hearing of the appeal regarding the required value of the undertaking. Ms Mason, in her oral submissions, made reference to a figure of $100,000 and argued that such a sum was excessive. On the other hand, Mr Laurenson, on behalf of John, submitted that John's liability could possibly exceed $200,000, and could even be as high as $300,000. It is difficult on the information available to us to make any precise estimate but we consider John's potential exposure is significant.

[20] In addressing the same issue, Associate Judge Lester referred to the sale price of the Lyall Bay property ($1.1 million), the settlement date and interest rate for late settlement. Based on a hearing date towards the end of this year, he estimated penalty interest of around $80,000 to $90,000 may accrue as a result of late settlement. In the event a three or four day fixture is required, which would not likely be accommodated until next year, penalty interest could be in excess of $100,000. The Lyall Bay property is one of a number of properties required by the developer to construct a block of apartments, all of which have been sold off the plans. If the contract were to be cancelled, then, as noted by Associate Judge Lester, John's liability for damages would potentially be considerably higher.[17] There is nothing before us to suggest this analysis is unrealistic.

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[17] Decision under appeal, above n 4, at [32].

[21] Ms Mason resorted to a submission that Christine's claim was so strong, and the possibility of her not being found to have some equitable interest in the Lyall Bay property so remote, that her likely success was sufficient to meet the requirements of the undertaking. It was further submitted that because John had acted in a unilateral fashion by selling the property he was to blame for Christine's impecuniosity and this should count in favour of maintaining the caveat. Leaving aside that the worth of the undertaking is to be judged against Christine and Te Rahui's financial position should they fail in their claim and not if they succeed, those submissions, as with similar arguments relating to the merits of Christine's claim, continue to ignore the fact the undertaking was not imposed by Associate Judge Lester but by this Court. The Court must be taken as having done so on the basis that it countenanced the possibility Christine's claim could fail. The High Court had no discretion to make its own assessment of the merits of the condition upon which the recognition of an arguable caveatable interest was contingent.

[22] Similarly, the reliance placed on the relevance of tikanga principles is misplaced. The importance of the property to Marama and her whānau and the cultural significance of the land to Christine and Te Rahui, and to future generations was emphasised. This was recognised by Associate Judge Lester when he noted Christine and Te Rahui's stance in response to the proposed placement of the net sale proceeds from the sale of the property in trust pending the outcome of the substantive proceeding. It was argued such a step would not preserve Christine and Te Rahui's connections to the land. The Associate Judge rightly observed a caveator's tikanga connection to the whenua may well be a relevant consideration but that here the caveat was being removed because of non-compliance with the undertaking imposed by this Court. The residual discretion that may otherwise have allowed the Associate Judge to consider such matters was not available to him.[18]

[23] In reaching his decision, Associate Judge Lester engaged with two further arguments made on behalf of John and the developer, based on the contended effect of legislation on the 2002 agreement.[19] The appellants argued the Associate Judge should not have entertained those arguments which, it was submitted, amounted to a

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18 At [59].
19 Joint Family Homes Act 1964; and Property (Relationships) Act 1976.

collateral attack on this Court's finding that Christine had an arguable equitable interest. However, the Associate Judge made it clear that his decision to remove the caveat was based solely on the appellants' failure to fulfil the condition requiring an undertaking as to damages. In any event, he dismissed each of the respondents' arguments in turn.

[24] The Associate Judge also ventured some observations regarding whether he would have ordered the removal of the caveat even had an undertaking of substance been provided.[20] These comments regarding the prospects of Christine securing the entire property had no bearing on the High Court's decision to remove the caveat because of the failure to provide an undertaking of value. It is not necessary for us to comment further on that aspect of the judgment.

Decision

[25] There remains no evidence that the undertakings offered by Christine and Te Rahui are of substance. Christine's arguable beneficial interest in the Lyall Bay property does not support the undertaking which is designed to protect John from significant damages in the event he is unable to settle the sale as a result of this litigation. The undertaking is triggered only in the event Christine is unsuccessful, in which case she will not have established a beneficial interest in the Lyall Bay property and the undertaking will be without worth.

[26] The Associate Judge's decision to remove the caveat was based solely upon Christine and Te Rahui's failure to comply with the condition imposed by this Court when exercising its discretion to grant a second caveat. The Associate Judge was obliged to recognise that requirement when deciding whether to sustain the caveat. Because the caveat was contingent on the condition being met, in the absence of Christine and Te Rahui being able to provide evidence of its value, there was no means available to the Associate Judge to maintain the caveat over the property. He was therefore correct to order its removal. Although not what they are seeking, the

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20 Decision under appeal, above n 4, at [62]–[66].

financial value of the appellants' claim is still protected by the net proceeds of the sale being held in the solicitor's trust account, as ordered by the Associate Judge.[21]

Result

[27] The appeal is dismissed.

Costs

[28] The appellants must pay costs to both the first and second respondents for a standard appeal on a band A basis, with usual disbursements.

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

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21 At [61].