IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE

CIV-2021-485-137
[2021] NZHC 1291

UNDER	Section 142 of the Land Transfer Act 2007 and Rule 19.2(1) High Court Rules 2016
BETWEEN	JOHN ARTHUR COWAN Applicant
AND	TE RAHUI JOHN COWAN and CHRISTINE MARAMA COWAN Respondents

CIV-2021-485-153

BETWEEN	KURT THOMAS GIBBONS First Plaintiff
AND	170 QUEENS DRIVE LIMITED Second Plaintiff
AND	JOHN ARTHUR COWAN Defendant

Hearing: 21 May 2021
(AVL from Wellington)

Appearances: J D Mason and S H Roper for Christine Cowan and Te Rahui Cowan
R C Laurenson and C D Batt for John Cowan
C T Gudsell QC and M R C Woolf for Plaintiffs in CIV-2021-485-153

Judgment: 2 June 2021

JUDGMENT OF ASSOCIATE JUDGE LESTER

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[1] This is an application by John Cowan (John) to remove a caveat registered by the respondents, Christine Cowan (Christine) and Te Rahui Cowan (Te Rahui), over a property in Lyall Bay, Wellington.

[1] John is the father of Christine and Te Rahui. John is the registered proprietor of the property subject to the caveat. He became the sole registered proprietor by survivorship following the death of his late wife, Marama Cowan, who died on 19 March 2019.

[2] This application is the third time the parties have been before the senior courts in the last three months or so. On 19 February 2021, Associate Judge Johnston declined Christine and Te Rahui's application to sustain earlier caveats over the Lyall Bay property and another property at Carterton. I will refer to his Honour's judgment for a summary of the background.[1]

[3] With Associate Judge Johnston declining the application to sustain the caveats, an appeal was heard as a matter of urgency by the Court of Appeal on 24 February 2021. The appeal was allowed and leave given to Christine and Te Rahui to lodge a second caveat over the Wellington property.[2] That order was subject to conditions which I will also refer to below.

[4] There was a degree of urgency in dealing with the original application as John has entered into an agreement to sell the Wellington property to a third party. Settlement of that sale was due on 25 February 2021. The purchaser under that agreement has filed submissions in support of the application before me. The purchasers' application for summary judgment against John Cowan was heard alongside the application by John to remove the caveat.

[5] Associate Judge Johnston's summary of the facts records that John and Marama were married for nearly 50 years. Their marriage had its ups and downs, like most long term relationships, but they remained married until Marama's death. The couple apparently acquired the Lyall Bay property, which was the family home,

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1 *Cowan v Cowan* [2021] NZHC 208.
2 *Cowan v Cowan* [2021] NZCA 31.

relatively early in their marriage. Both the Lyall Bay and the Carterton property were held by John and Marama as joint tenants.

[6] Associate Judge Johnston identified from Christine and Te Rahui's affidavits that they were critical of John's financial contribution to the family. In the second half of the 1990s the Inland Revenue Department commenced a claim against John for unpaid taxes and in order to discharge that indebtedness it is said that Marama sold a property she owned. As a result it is said John and Marama's relationship became strained and they separated temporarily on at least one occasion.

[7] In March 2002, John and Marama had a discussion about their family's financial affairs. Christine and Te Rahui were both present. Following that discussion, a short agreement (the 2002 Agreement) was prepared in the following terms:

> March 2002
>
> 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.
>
> (d) THAT any other properties or assets purchased within the marriage remain the property of the person to whose name is stated as the owner should our marriage end in separation or divorce.
>
> (e) NOTE: THAT John have no entitlement to Marama's Maori land interests but that they be transferred equally to our children and mokopuna on her death.
>
> Signed …… Date …… Witness ……
> John Arthur Cowan
> Signed …… Date …… Witness ……
> Marama Cowan

[8] While the 2002 Agreement was not signed straight away, it was signed by both John and Marama on 21 May 2002. Shortly before the 2002 Agreement was signed, Marama wrote to John urging him to: "do what was agreed at our meeting at home with Christine and Te Rahui our two adult children".

[9] Shortly before her death, Marama engaged her solicitors to prepare a relationship property agreement (the 2019 Agreement). Had that agreement been signed, it would have advanced the interests of her children. The document records that John and Marama owned the Wellington and Carterton properties as joint tenants and, on Marama's death, title to the properties would pass to John. Under the 2019 Agreement, the Wellington property was to become Marama's separate property and the Carterton property was to become John's property. Although Marama signed the agreement, it was never signed by John. Christine and Te Rahui assert that John agreed to its terms but he denies that. I deal with the question of John's agreement to the 2019 Agreement in more detail below.

[10] Before Associate Judge Johnston, Christine and Te Rahui also claimed to have made significant contributions to the Wellington and the Carterton properties, respectively, but the evidence in that regard was limited.

[11] Ultimately, Associate Judge Johnston concluded that the 2002 Agreement had, in effect, been abandoned by John and Marama. That was not the term used by the Judge, who concluded that John and Marama must have changed their minds over the years. As to that, the Judge noted John and Marama had taken no steps to implement the 2002 Agreement and that the 2019 agreement expressly accepted that John and Marama were the joint owners of both properties, contemplating a different outcome from the 2002 Agreement. His Honour reiterated his conclusion that the parties had changed their minds in respect of the 2002 Agreement and that it was, in effect, of no relevance, meaning there was not found to be an arguable case the joint tenancy in relation to the Wellington property was severed.

[12] The appeal was heard on the third working day after the release of Associate Judge Johnston's decision, and the judgment was delivered the same day. The Court of Appeal concluded:[3]

> Contrary to the view taken by the Associate Judge, it seems to us arguable that the first applicant, Christine Cowan, has a caveatable interest in the Lyall Bay property.

[13] Further on in the judgment the Court recorded: "It is plainly arguable that Christine is the beneficial owner; further, that John knew that when he agreed to sell the property to a developer."[4]

[14] In relation to the 2002 Agreement and its relationship with the 2019 agreement, the Court said:[5]

> 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 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.

[15] Leave was given for the applicants to lodge a second caveat over the Lyall Bay property as the first caveat had lapsed by the time of the appeal. That leave was granted subject to conditions. Leave to lodge a second caveat would lapse at 1.00 pm on 25 February 2021 if by that time the applicants had not filed an undertaking as to damages in the Court of Appeal. It was a further condition of the order that John be permitted to enjoy sole occupancy of the Carterton property and that it be made available to him by Thursday 4 March 2021. A further condition was that by 4 March 2021 the applicants file proceedings in the High Court to establish their claim to the Lyall Bay property.

[16] The penultimate paragraph of the Court of Appeal decision records that Christina and Te Rahui's proceedings must be brought on with urgency and "[t]o

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3 *Cowan v Cowan*, above n 2, at [4].
4 Above n 2, at [12].
5 Above n 2, at [11].

secure that, we direct that any party, including the developer, may apply to the High Court on notice to discharge the caveat."[6]

Grounds of challenge to second caveat

[17] The application seeking the removal of the second caveat is brought by John on the grounds Christine and Te Rahui are in breach or in substantial breach of the conditions imposed by the Court of Appeal in relation to John's right of sole occupation of the Carterton property and in relation to the filing of proceedings.

[18] The application also says: "In all the circumstances now existing including the balance of convenience and the absence of worth of the respondents' undertaking as to damages, the caveat should be removed."

[19] In the submissions filed in support of the application, John's counsel submitted a further ground for the removal of the caveat was that John could not, by virtue of the 2002 Agreement, have granted an interest in the property to the respondents as such was prohibited by s 9(2)(c) of the Joint Family Homes Act 1964, it being common ground that the Lyall Bay property was a joint family home at the time of the 2002 Agreement.

[20] In submissions filed for the purchaser, as interested party, the Joint Family Homes Act argument was also raised, along with an argument under the Property (Relationships) Act 1976 (PRA) that the 2002 Agreement falls within the scope of s 21 of the PRA and is therefore void under the contracting out provisions of that Act.

Relevant principles

[21] There was no dispute as to the applicable principles to securing an order sustaining a caveat which were summarised by Associate Judge Johnston as follows:[7]

> (a) the applicant has the burden of demonstrating that he, she or it has a proprietary interest in the land sufficient to support the caveat, but they need not establish that definitively;

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6 Above n 2, at [18].

7 *Cowan v Cowan*, above n 1, at [26], citing *Philpott v Noble Investments Ltd* [2015] NZCA 342 at [26].

(b) what the applicant must establish is that he, she or it has an arguable case for such an interest;

(c) applications to sustain caveats are summary processes and the Court will not resolve genuine factual disputes;

(d) the Court will only order the removal of a caveat if it is "patently clear" the claimant cannot succeed in establishing a proprietary interest of the sort claimed;

(e) even if the applicant can discharge the burden of establishing an arguable case the Court has a residual discretion to refuse to make an order sustaining the same, but this must be exercised cautiously and will generally only be exercised where the applicant will not be prejudiced.

Non-compliance with Court of Appeal conditions

[22] The respondents have issued proceedings under CIV-2021-435-3 against John and the file discloses they were filed on 4 March 2021, as required by the Court of Appeal condition. While there is criticism of the causes of action as pleaded, this is not the context in which to run a quasi-strike-out application. The condition as to the issue of proceedings was satisfied.

[23] As to the condition that John be permitted to enjoy sole occupancy of the Carterton property, it is said that was not complied with because furniture was left at the Carterton property. I do not consider this a matter of substance. It is not suggested that the presence of furniture at the property prevented John being able to occupy the property. In any event, Te Rahui gives evidence that some of the furniture left went with the property.

Undertaking as to damages

[24] This is a matter of more substance. An undertaking as to damages should be accompanied, as a matter of course, by evidence that the undertaking is of value.[8]

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8 *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].

[25] No evidence in support of the undertaking has been filed. John's evidence is that the undertakings that have been provided are not of value. That evidence has not been replied to.

[26] Reinforcing the absence of evidence as to the value of the undertaking is that Christine and Te Rahui are in receipt of legal aid for the substantive proceedings brought to meet the condition imposed by the Court of Appeal. It is not clear if they are in receipt of legal aid for this proceeding.

[27] In an affidavit of Ms Forrest, Wellington counsel who assisted Marama with the 2019 Agreement, she describes Te Rahui's circumstances which, without further explanation, would indicate his undertaking in damages could not be considered to be of substance.

[28] During the course of argument, it was noted the condition imposed by the Court of Appeal required the undertaking to be filed in the Court of Appeal. That raised the question of whether non-compliance with the conditions would require a challenge to the caveat on that ground to be made to that Court.

[29] I am satisfied that is not what the Court of Appeal envisaged. An application was made to the Court of Appeal seeking an extension of time for compliance with the condition that John be given possession of the Carterton property. In a Minute issued on 4 March 2021, the Court said it was not prepared to alter the condition and said at [3] that "[b]reach of the conditions would permit John to seek an order in the High Court removing the caveat over the Lyall Bay property."

[30] Accordingly, I am satisfied that the Court of Appeal contemplated that a challenge to the caveat for non-compliance with the conditions would be made to this Court. The Court of Appeal's warning that breaches of the conditions would found a challenge to the second caveat shows the significance of the conditions. I accept the submissions of Mr Gudsell QC, counsel for the purchaser, that a mere undertaking is insufficient. The undertaking must be supplied in substance and not merely in form. The reality is only an undertaking in form has been given. I am satisfied that the condition imposed by the Court of Appeal has not been substantially complied with.

[31] Ms Mason, counsel for the respondents, said that she had not addressed this point as no notice had been given to her of the likely level of damages that the undertaking may need to address. That point may have carried weight if some evidence as to ability to meet the undertaking had been given and it was only at the hearing that the applicant's position was that the level of likely damages was such that the undertaking was insufficient. However, in both the application to set aside the second caveat and in John's affidavit, it was put in issue that the undertakings lacked substance with John explaining why he held that view. That evidence was not replied to.

[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.

[33] Ms Mason also said that her clients had a support network, the implication being the support network might be in a position to provide funding for an undertaking. If there were to be an undertaking in damages, a bond or a guarantee from non-parties then such should have been raised with counsel for the registered proprietor, given the matter was put in issue. The respondents were on notice that the caveat was challenged on this ground so any answer to this challenge had to be before the Court for the hearing of the challenge. The Minute of the Court of Appeal of 4 March 2021 made it clear that non-compliance with a condition would found an application for removal of the caveat.

[34] While I am satisfied that this condition has not been satisfied and as a result the caveat should be removed, I intend to address the arguments so to whether there is a caveatable interest.

A collateral challenge?

[35] Ms Mason's primary objection to the present application was that it was "an attempt to nullify the Court of Appeal decision". Had the registered proprietor sought to simply re-run the arguments raised in the Court of Appeal, then I would have agreed with Ms Mason that such would be a collateral attack on the Court of Appeal judgment and as such should not be entertained.

[36] The challenge to the second caveat for non-compliance with a condition is not caught by this objection. The reality is that the remainder of the present challenge raises grounds not argued before Associate Judge Johnston or the Court of Appeal. It might be said the present arguments could and should have been raised before the Court of Appeal, but that is to ignore the reality of the time pressures that apply to a caveat hearing, and in particular to the hearing of the appeal in this case. In any event, the primary ground for removing the caveat is non-compliance with the undertaking condition but, given the detailed arguments raised by counsel, I now deal with the two-pronged legal challenge to the 2002 Agreement creating a caveatable interest.

The Joint Family Homes Act submission

[37] Section 9(2)(c) of the Joint Family Homes Act 1964 (the Act) provides:

> **9. Effect of registration**
>
> (2) While the settlement under this Act of any property remains uncancelled the following provisions shall apply:
>
> …
>
> (c) the husband and wife or the survivor of them may at any time sell, transfer, mortgage, charge, lease, or otherwise dispose of or deal with the settled property:
>
> provided that, while they are both living, neither of them may sell, transfer, mortgage, charge, lease, or otherwise dispose of

> or deal with his or her undivided estate or interest in the settled property or any part thereof:
>
> … (my emphasis)

[38] Mr Laurenson, counsel for John, submitted that the proviso to s 9(2)(c) prevents the special joint tenancy created by the Act being severable under the ordinary rules of the common law applying to joint tenancies.

[39] Mr Laurenson referred to a number of authorities in support of the proposition that what he described as John's "unilateral actions" could not impact on the joint tenancy or confer rights on Christine under the 2002 Agreement.

[40] The authorities are as follows:

(a) *Henson v Henson* where, having set out provisions relating to the predecessor to the Act, the Court said:[9]

> Up to this point the provisions re-state the normal rights of common-law joint tenants. Thereafter, however, the section introduces modifications of the common-law estate in joint tenancy by prohibiting any dealing by one joint owner with his or her undivided interest or estate in the land while the other is living, and further protects the estate of each joint owner from the normal consequences of bankruptcy and onslaughts of creditors.

Henson also notes that, under the Act, the joint tenants hold a special estate created by the Act rather than a joint tenancy controlled by the common law.[10]

(b) In *Milne v Commissioner of Inland Revenue*, the Court again referred to the joint tenancy under the Act as being a "special form of joint tenancy created by the legislation".[11]

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9 *Henson v Henson* [1958] NZLR 684 (SC) at 687.
10 *Henson v Henson*, above n 7, at 688.
11 *Milne v Commissioner of Inland Revenue* [1959] NZLR 566 (SC) at 572-573.

(c) In *Matangi-Paraha v Paraha*, Associate Judge Bell noted that the proviso to s 9(2)(c) bars the registered proprietors from dealing with their interests separately and that the usual rules as to severance do not apply to joint tenancies under the Act.[12]

(d) To similar effect is *Sutherland v Sutherland*, where Turner J said:[13]

> … I find that registration gives a joint family home, and the spouses who own and occupy it, security and stability in the face of three happenings at least:
>
> (a) *the unilateral attempt of either spouse to charge or alienate the property;*
>
> (b) the attacks of creditors; and
>
> (c) the death of either spouse.
>
> (emphasis added)

[41] The theme of these passages, which with respect must be right, is that while under s 9(2)(c) "the husband and wife … may at any time sell, transfer, mortgage, charge, lease, or otherwise dispose of or deal with the settled property", neither of them can do so unilaterally.

[42] However, I do not consider the 2002 Agreement represents John *unilaterally* seeking to deal with his interest in the joint family home as his joint owner, Marama, also signed the 2002 Agreement. Both registered proprietors have consented to the terms of the 2002 Agreement so I do not consider the passages relied on by Mr Laurenson apposite. The 2002 document is not a unilateral act by John – it records the joint position of both owners.

[43] This point is of some significance in respect of Ms Mason's argument in respect of s 9(2)(b) which provides:

> **9 Effect of registration**
>
> (2) While the settlement under this Act of any property remains uncancelled the following provisions shall apply:

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12 *Matangi-Paraha v Paraha* [2018] NZHC 564 at [32], citing *Miah v National Mutual Life Association of Australasia Ltd* [2016] NZLR 241 at [23], fn 9.

13 *Sutherland v Sutherland* [1955] NZLR 689 (SC) at 691.

(a) …

(b) on the death of the husband or wife, whichever first occurs, the settled property shall become the property of the survivor of them, subject to all mortgages, charges, encumbrances, estates, and interests then affecting it:

provided that, notwithstanding anything in any other Act, if the husband and wife die at the same time or in circumstances which give rise to reasonable doubt as to which of them survived the other, the settled property shall devolve as if it were owned by the husband and wife at their deaths as tenants in common in equal shares:

[44] Ms Mason's argument was the 2002 Agreement, at clause (a), confers a benefit on Christine which the Court of Appeal held is capable of conferring a beneficial interest on Christine. That is the starting point. Assuming the 2002 Agreement did not achieve severance of the joint tenancy under the Act (and I will return to that), then on the death of Marama the effect of s 9(2)(b) is that John took the property subject to interests affecting it. The interest arguably held by Christine is such an interest.

[45] In reply, Mr Laurenson sought to meet this submission by saying because the creation of unilateral interests was prohibited no interest was created in 2002 in favour of Christine which could follow from the property vesting in John through survivorship. As I have said, I do not accept the *joint* position of both joint owners reflected in the 2002 Agreement is caught by the proviso to s 9(2)(c). Marama wanted John's agreement to the 2002 Agreement, which he gave by signing it.

Severance

[46] Cancellation of registration under the Act is prescribed by s 10. Under s 10(1)(a) of the Act, the Registrar may cancel any joint family home settlement as to the whole or as to any part where the spouses apply, or the survivor of them applies, in the prescribed manner to the Registrar.

[47] *Hinde McMorland & Sim Land Law in New Zealand* says:[14]

> If, therefore, the joint family home is sold, *or if the spouses declare that they hold it upon trust for some other person,* the settlement may be cancelled under this provision. In *Re Roberts* (1997) 3 NZ ConvC 192, 615, [1997] NZFLR 821, following the separation of the husband and wife, the wife's interest in the property settled as a joint family home was transferred to the husband. The Registrar later refused to cancel the settlement under s 10(1)(c) at the request of the Official Assignee on the husband's bankruptcy, but was directed to do so by the Court. Because s 10(1)(c) does not specify that the husband and wife must continue to hold exclusively as joint tenants, it does not allow the Registrar to cancel the settlement where:
>
> (a) the husband and wife transfer the land to themselves as tenants in common; or
>
> *(b) the husband and wife transfer to themselves and a third party.*
>
> In these situations the Registrar would require the husband and wife to apply under s 10(1)(a) for cancellation of the settlement: *Torrens Talk* (1998); Issue 6, p3, at [2.1].
>
> (emphasis added)

[48] The effect of the 2002 Agreement could be seen as either Marama and John declaring that they hold part of the property on trust for Christine or as an agreement to transfer the property to Christine.

[49] Having made such a commitment, equity treats as done that which ought to be done and, therefore, it might have been argued that John should be viewed as if cancellation had occurred.

[50] A potential difficulty with this argument is that when cancellation is effected it is not retrospective.[15]

[51] Ultimately, this is an issue that I do not need to resolve because the Court of Appeal has concluded it is reasonably arguable that the 2002 Agreement conferred an interest on Christine. As I have said, I consider it reasonably arguable that Christine continues to have the benefit of that interest because of s 9(2)(b) of the Act.

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[14] DW McMorland and others *Hinde McMorland & Sim Land Law in New Zealand* (online ed, LexisNexis) at [13.044], fn 3.

[15] *Official Assignee v Noonan* [1988] 2 NZLR 252 (CA) at 254.

[52] In short, the fact that the property was not a joint family home was not an answer to the 2002 Agreement. I do not accept that John's commitments under that Agreement were unilateral actions barred by the proviso given they were undertaken with the consent of Marama.

The Relationship Property Agreement

[53] The alternative basis for saying the 2002 Agreement is void is that, as an agreement purporting to deal with relationship property it does not comply with the formalities of s 21F of the PRA.

[54] At one level, this argument is met by recognising that even if the 2002 Agreement was unenforceable as between Marama and John because of non-compliance with the PRA that nonetheless it represents as between John and Christine what amounts to a declaration of trust.

[55] I would not have held that the 2002 Agreement should be treated as if it did not exist. The circumstances in which the 2002 Agreement came to be signed, and issues such as the absence of advice in respect of the 2002 Agreement under s 21F are matters for another day. However, if it was held that John freely agreed to the declaration of trust then it is reasonably arguable that the Court would save at least part of the 2002 Agreement under s 21H of the PRA which provides:

> **21H Court may give effect to agreement in certain circumstances**
>
> (1) Even though an agreement is void for non-compliance with a requirement of section 21F, the court may declare that the agreement has effect, wholly or in part or for any particular purpose, if it is satisfied that the non-compliance has not materially prejudiced the interests of any party to the agreement.
>
> (2) The court may make a declaration under this section in the course of any proceedings under this Act, or on application made for the purpose.

[56] Accordingly, I am not convinced that the application of the PRA means the caveat argument should be approached as if the 2002 Agreement was incapable of having *any* relevance or effect. The trust in favour of Christine might be severed from the balance of the agreement by use of s 21H.

The outcome

[57] I have reached the point where the second caveat, based on the 2002 Agreement, has a reasonably arguable basis but I have determined that the condition for the lodging of the second caveat has not been satisfied.

[58] The registered proprietor offered to place the net sale proceedings of the property on trust pending the outcome of the caveator's substantive proceeding. Such, of course, is a recognised manner of dealing with a caveator's claim. Ms Mason, however, said her instructions were not to agree to this course as her clients had connections to the land based on tikanga principles.

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

[60] Under s 142 of the Land Transfer Act 2017 I am able to impose conditions in respect of the removal of the caveat.

[61] Given I am satisfied that Christine has an arguable interest in the Lyall Bay property and in light of John's offer to hold the net proceeds on interest bearing deposit (which was not withdrawn at the hearing), I am satisfied it is appropriate that the caveat be removed, subject to a condition that the net proceeds of sale under the contract with the interested party be held on interest bearing deposit in a solicitor's trust account not to be disbursed without agreement in writing of the parties or order of the Court.

[62] I mention a further matter which, even if an undertaking of substance had been given, would have led to me to order the removal of the caveat with the sale proceeds

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[16] As Associate Judge Johnston recorded in his decision tikanga is law proved as a matter of fact which was why in *Ngāti Whātua Ōrākei Trust v Attorney-General* [2020] NZHC 3120 at [36] expert evidence was produced.

to be held. The substantive proceedings issued by the caveators claim the *entire* Lyall Bay property. It appears to me that Christine's maximum entitlement under clause (a) of the 2002 Agreement would be to half the property. The other half, assuming severance had occurred, would be in Marama's estate. If severance had not occurred, it would belong to John. If severance had occurred then the half share in Marama's estate would be subject to a claim by John under the PRA and/or under the Family Protection Act 1955. Given theirs was a marriage of close to 50 years and Lyall Bay was the family home, John's claim would be a reasonably strong one.

[63] As I have said, given the value of the property and the fact the caveators are legally aided, there would seem no realistic prospect that they could buy out John's interest in Marama's share when ultimately determined. That would lead to the sale of the Lyall Bay property in order to meet John's entitlement.

[64] Ms Mason sought to meet this point by arguing the 2019 unsigned relationship property agreement, if given effect to, would entitle that Christine to the entire beneficial interest in the Lyall Bay property. However, if I had had to decide this application on that point alone, I would not have held there was a reasonably arguable case in that regard. The caveators' own evidence from Marama's lawyer, Ms Forrest, is that when John and Marama discussed the draft relationship property agreement, while John appeared to nod in acquiescence to its terms, it was understood that any agreement was subject to him taking independent legal advice. That advice was not to sign the agreement. There was no unequivocal representation by John that could found the estoppel referred to by Ms Mason. In any event, it seems a doubtful proposition that a spouse could be estopped from relying on the protective provisions in s 21 of the PRA.

[65] The statement of claim in respect of this issue is based on deceit. I do not see how there is anything deceptive in John wishing to have legal advice before signing the agreement. Ms Forrest in her affidavit was aware John would take legal advice. John was entitled (indeed required) under the PRA to take advice, he said he was going to take advise, and he did so.

[66] I do not in any way diminish the caveators' connection to the Lyall Bay property and the orders I have made provide them with security in relation to their claim. However, the reality is I saw no realistic prospect of Christine securing the entire property on the basis John agreed to the 2019 Agreement when Marama's lawyer accepts his agreement to its terms was subject to him getting legal advice.

[67] As noted, the application for specific performance brought by the purchaser against John is also to be dealt with. While John does not resist the application for specific performance, Mr Laurenson, counsel for John, was cautious about consenting to an order for specific performance being made in that proceeding when, if there were an appeal in respect of the order to remove the caveat, that may leave John exposed to an order he could not satisfy.

[68] I indicated to counsel that if the caveat was to be removed, Mr Gudsell and Mr Laurenson should submit the wording of an order in relation to specific performance that addressed Mr Laurenson's concerns. That order has now been received. Accordingly, by consent the following orders are made in CIV-2021-485-153:

(1) The application by the plaintiffs in the proceeding CIV-2021-485-153 for specific performance against John Arthur Cowan is granted in the terms set out in prayer A to the statement of claim and order 1.a in the application for summary judgment in the said proceeding CIV-2021-485-153, provided that this order is to lie in Court and not be enforced pending:

(a) an order of the Court removing caveat 12034340.1, following final determination of any appeal brought in proceeding CIV-2021-485-137; and

(b) subject to the final determination of any appeal brought in the proceeding CIV-2021-485-137 resulting in caveat 12034340.1 being removed, John Arthur Cowan taking all reasonable steps

without delay, to enable settlement of the sale of the property to take place.

(2) All other issues as to the relief sought by the plaintiffs in the proceeding CIV-2021-485-153, including (but not limited to) costs are to be held over for determination by the Court in the proceeding CIV-2021-485-153 if not otherwise agreed between the parties.

Costs

[69] As I said earlier, it is not clear whether the respondents have legal aid for the present application. Ms Mason is to confirm the position to other counsel in that regard. If the respondents are not legally aided then my initial reaction is that costs should follow the event on a 2B basis.

[70] The formal order in respect of costs are that they are reserved.

[71] Leave is reserved generally to apply should any issues arise.

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Associate Judge Lester