IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV 2016-404-1502
[2018] NZHC 1390

UNDER	s 3 Law Reform (Testamentary Promises) Act 1949 and s 14(6B) Trustee Act 1956
IN THE MATTER	of the Estate of M Babic Yozin
BETWEEN	ROSALIE MAY YOZIN AND HELEN JEAN MENZIES Plaintiffs
AND	NEW ZEALAND GUARDIAN TRUST COMPANY LIMITED Defendant

Hearing: 30 - 31 October, 1, 2 and 7 November 2017

Appearances: S A Grant and J A Zwi for Plaintiffs
S J McCarthy for M B Yozin
S Telford for N H Yozin-Smith

Judgment: 12 June 2018

JUDGMENT OF PETERS J

This judgment was delivered by Justice Peters on 12 June 2018 at 4.30 pm
pursuant to r 11.5 of the High Court Rules

Registrar/Deputy Registrar

Date: .....

Solicitors: Vicki Ammundsen Trust Law, Auckland
Patrick Molloy, Auckland
Morgan Coakle, Auckland

Counsel: S A Grant, Auckland
J A Zwi, Auckland
S J McCarthy, Auckland

Background

[1] The plaintiffs, Rosalie Yozin and Helen Yozin, and their siblings, Norma Yozin-Smith and Maurice Yozin (together the "beneficiaries" and individually by their Christian names), are each entitled to a 25 per cent share of the residue of the estate of their father, Milan Babic Yozin ("estate" and "Mr Yozin"). Mr Yozin died in April 1975.

[2] The defendant ("NZGT") is the executor and trustee of the estate. It abides the decision of the Court.

[3] The estate's sole asset is a four-hectare block of land in Swanson, West Auckland ("land").

[4] Rosalie wishes to have transferred to her what are referred to as Lots 1 and 2 ("Lots 1 and 2"), and she and Helen together wish to have what is referred to as part Lot 4 ("part Lot 4"), in part satisfaction of their 25 per cent entitlements. What was the family home is situated on Lot 2 with an adjoining garden on Lot 1. A shed and "winery building" ("shed") are situated on part Lot 4.

[5] Although Norma and Maurice have previously expressed a willingness to accommodate the plaintiffs' wishes, no agreement has been reached on the value that should be attributed to the Lots. Given that, Norma and Maurice submit that NZGT must sell the land, distribute the net proceeds of sale and wind up the estate.

Pleadings

[6] The plaintiffs' three alternative causes of action are for provision under s 3(1) Law Reform (Testamentary Promises) Act 1949 ("TPA"); for rectification of the will; and for an order for partition of the land and a direction to NZGT to transfer the Lots in issue to the plaintiffs.[1] This third cause of action was the subject of an unopposed addition to the statement of claim at the end of the trial.

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1 Trustee Act 1956, s 14(6B).

[7] For the reasons set out below, there are fundamental difficulties with the plaintiffs' claim and for that reason it is unnecessary for me to address the affirmative defences that were pleaded or every point made in the evidence in the proceeding, much of which I regret to say was irrelevant or submission.

Background

[8] Mr Yozin was born in Yugoslavia in 1910, immigrated to New Zealand in 1926, and purchased the land in 1937. Mr and Mrs Yozin married in 1945, when he was 35 and she was 20 or 21. No doubt Mr Yozin had already commenced planting fruit trees on the land and he and Mrs Yozin continued that enterprise. They operated a market garden and, later, having planted vines, a wine making business.

[9] Helen was born in 1946, Norma in 1948, Rosalie in 1957 and Maurice in 1953.

[10] There is no doubt that Mr and Mrs Yozin worked extremely hard in these enterprises, and that they were assisted by their children when they were old enough to do so.

[11] Mr Yozin made his will on 6 May 1954 ("will"). The executors were Mrs Yozin and family friends, Mr William Weaver and Mr Dan Urlich. Mr Yozin made codicils in 1957 and 1966 changing his executors.

[12] Mr Yozin was diagnosed with lung cancer in 1972. He died in 1975, aged 65. Probate of the will and codicils was granted in July 1975 to Mrs Yozin, Mr Weavers (who died in 1986) and Mr Peter Babich.

[13] Mrs Yozin was 51 at the date of Mr Yozin's death and the beneficiaries in their 20s. Helen was married with two children, living in Balmoral and she and her husband had a clothing business. Norma, Rosalie and Maurice were living at home. Norma was working as a legal secretary; Rosalie was also a secretary and training to become a legal executive; and Maurice, who had been training to become an engineer, had left his cadetship in 1974 to assist his father. Maurice took over the management of the property and the business after Mr Yozin's death.

[14] Mrs Yozin did not remarry. She remained in the family home until her death on 12 October 2014, when she was aged 90 or thereabouts.

[15] Helen has been afflicted with several serious illnesses in recent years and is retired. Norma has lived in England since 1985 if not earlier. She too has a child or children and is recently widowed. Maurice is married with children. Excluding a short period in 1985/1986, Rosalie remained living in the family home with Mrs Yozin. Rosalie ceased full time employment in 1990, assumed the management of the land and looked after Mrs Yozin when she became unwell several years before her death. Rosalie continues to live in the house, rent free, although has paid the rates and other outgoings.

Land

[16] The land is a large, rectangular shaped block in Swanson. It comprises Lots 1 to 20 (but excluding Lot 3) DP 7651, and is 4.0149 ha. Lots 1, 2 and part Lot 4 comprise approximately 3,475 m^2. The balance of the land excluding those lots is 36,674 m^2.

[17] Each Lot has direct access either to Swanson Road or O'Neills Road. The balance of the land at the rear of the site is in Lots 4 and 9 which are each more than 1 ha.

[18] Rosalie and Maurice purchased Lot 3 from the estate for $7,600 in late 1975, early 1976 to enable the estate to pay death duties. Rosalie relies on this acquisition as evidencing the beneficiaries' acceptance of a wish by Mr Yozin that the land remain in the family's ownership. Rosalie also contends that the sale was at less than market value and established a "precedent" that land would be exchanged within the family at a discount. Both contentions are disputed. Regardless, the circumstances relating to the sale and purchase of Lot 3 are of little if any relevance to the issues before me.

[19] Rosalie has obtained a "s 226 certificate" to subdivide Lots 1 and 2 and, as I understand it, has commenced the process of applying to subdivide part Lot 4.[2] The

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[2] Resource Management Act 1991, s 226.

Council's response to Rosalie's enquiries suggest that, in principle, the Council has no objection to a subdivision of part Lot 4 from the remainder. However, this latter subdivision would deprive the remainder of Lot 4 from its direct access to Swanson Road and so some alternative access arrangements would have to be made.

[20] Lots 1 to 3, part Lot 4 and an adjoining 3 or 4-metre-wide strip of Lot 5 are subject to a "Heritage B" designation. The Council or its predecessor initially proposed to designate a much larger area but, as a result of submissions by Rosalie, the final designation covers only 45 per cent of the area originally proposed.

[21] The home on Lot 2 and the shed are the only buildings on the land. Various issues may arise in respect of the shed, including the possibility of "contamination" and earthquake strengthening.

[22] The valuers were agreed that Lots 1 and 2 are readily saleable, and part Lot 4 less so. Lot 1 might be subdivided, subject to Council consent given the heritage designation.

Proceedings

[23] Differences arose between the parties after Mrs Yozin's death as to whether all the land should be sold or whether the plaintiffs might acquire the Lots they wished. The plaintiffs came to believe that Mr Babich, the sole surviving executor and trustee of the will, was not impartial and that he favoured Maurice who wished to sell promptly.

[24] In mid-2016 the plaintiffs commenced this proceeding to appoint NZGT in place of Mr Babich, and seeking other directions including as to "the method of realisation of the [land]". Ultimately, it was agreed that Mr Babich would resign, without any acknowledgement that there were grounds for removal. There is an issue as to Mr Babich's legal costs which I determine at the end of the judgment.

[25] In August 2017, the plaintiffs amended their pleading to seek relief under s 3 TPA and rectification of the will. Then, towards the end of the trial, the plaintiffs made the amendment referred to in [7] above.

[26] The relief sought in each cause of action is as follows:[3]

> A. Orders that:
>
> (a) Lots 1 and 2 be transferred to Rosalie in one title;
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> (b) Part Lot 4 be transferred to [the plaintiffs];
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> (c) [The plaintiffs'] shares in the estate be modified to account for the receipt of the above land as part of their inheritance in the following way;
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> (iii) The balance of the land is to be sold as one parcel;
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> (iv) The value of the land transferred to [the plaintiffs] is to be assessed by applying the same pro rata value per square metre as is ascertainable from the price paid by the purchaser of the balance of the land less an allowance for the heritage component and contamination.

Construction of the will

[27] Up until the end of the trial, the parties proceeded on the basis that the will required NZGT to sell the land and that the beneficiaries entitlement was to the net proceeds of sale. However, Mrs Grant, counsel for the plaintiffs (and instructed when the proceedings were well advanced), submitted that in fact the terms of the will require NZGT to vest the land itself in the beneficiaries. If that is correct, the first two causes of action at least would fall away.

[28] I shall put the terms of the will in a schedule to this judgment but in summary Mr Yozin:

(a) gifted a sum of money and his household effects to Mrs Yozin – clause 3;

(b) devised and bequeathed his real and personal property on trust to his executors to "sell, call in and convert" the same into money – clause 4;

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[3] Second Amended Statement of Claim dated 8 November 2017 at 9.

(c) directed his executors to pay his testamentary debts etc from the proceeds of sale and to invest the balance in authorised investments – clause 5;

(d) thereafter directed his trustees to hold the "trust fund", defined as the investments referred to in clause 5, "and such portion of the estate as should for the time being be unconverted". The trustees were to pay the net annual income therefrom to Mrs Yozin (whilst she remained Mr Yozin's widow, that is until she remarried or died) and were empowered to apply the capital of the trust fund for certain purposes including for Mrs Yozin's maintenance and support and, if she requested, the purchase of a suitable home – clause 6;

(e) directed that, on Mrs Yozin's remarriage or death, the trustees were to stand possessed of the "corpus of the said trust fund or the balance thereof … and/or the investments for the time being representing the same for such of my children as shall survive me and attain the age of [21] and if more than one in equal shares" – clause 6;

(f) authorised his trustees in their discretion to, amongst other things, postpone the sale, calling in and conversion of any of Mr Yozin's real property or any part or share thereof for as long as they in their uncontrolled discretion thought fit – clause 7.

[29] Mrs Grant submitted that the "corpus of the trust fund" of which NZGT "stands possessed" is the land and it is that which NZGT must transfer to the beneficiaries in equal shares. Mrs Grant did not refer me to any authority on the point but rather submitted that this conclusion follows on the construction of the will.

[30] It is correct that the land has not yet been sold and converted into money. Mrs Yozin wished to remain living in the family home and the beneficiaries did not object to postponement of a sale whilst she was alive.

[31] However, there is nothing in the terms of the will to suggest that the direction to sell the land expired on Mrs Yozin's death or remarriage, which might have occurred at any time. Indeed, on Mrs Grant's argument, whether the beneficiaries were entitled to land or money would depend on the state of affairs prevailing at Mrs Yozin's death (and she might have predeceased Mr Yozin) or remarriage.

[32] For the sake of completeness, *The Commissioner of Stamps v Jillett* and *Seng v Tuang* are two cases concerning the construction of similar provisions to those in the will.[4] These authorities are of some peripheral assistance but ultimately the issue is one of construction.

First cause of action – s 3 Law Reform (Testamentary Promises) Act 1949

[33] The plaintiffs' claim under s 3(1) is unusual in that they do not dispute the extent of the provision Mr Yozin made for them. Rather, they are asking the Court to substitute an interest in land, ie the Lots in issue, in lieu of part of their entitlement.

[34] The plaintiffs' claim concerns events that occurred prior to Mr Yozin's death, and so more than 40 years ago. Claims brought so late face the difficulty that the sheer passage of time inevitably affects the quality and quantity of the evidence available. In this case, I am not satisfied that the plaintiffs' evidence can be relied on as accurate, because of that lapse of time.

Leave

[35] The plaintiffs require leave to bring this claim. The claim could only be brought as of right within 12 months of the grant of probate – again, more than 40 years ago. In fact, Mr McCarthy, counsel for Maurice, submitted that I had no jurisdiction to grant leave because the "estate had been finally administered". An estate is so administered at the point in time in which the executor has completed administration of the estate and becomes a trustee.[5]

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4 *The Commissioner of Stamps v Jillett* (1905) 24 NZLR 873 (CA); and *Seng v Tuang* [2012] SGCA 41, [2012] 4 SLR 339. See also JM Lightwood "Trusts for Sale" (1927) 3 CLJ 59.

5 *Lilley v Public Trustee* [1981] 1 NZLR 41 (PC); and Law Reform (Testamentary Promises) Act 1949, s 6.

[36] Final distribution has not occurred in this case. As Mrs Grant submitted, there is no evidence that the legacy due to Mrs Yozin under clause 3 of the will has been paid; the Council is owed an as yet undetermined sum for rates (accrued prior to Mrs Yozin's death); and, on my view of the will, NZGT has still to sell the land.[6] Accordingly, it would be open to me to grant leave but I decline to do so as the claim is bound to fail.

Statutory provision

[37] Turning now to the claim itself, the relevant parts of s 3 provide:

> **3 Estate of deceased person liable to remunerate persons for work done under promise of testamentary provision**
>
> (1) Where in the administration of the estate of any deceased person a claim is made against the estate founded upon the rendering of services to or the performance of work for the deceased in his lifetime, and the claimant proves an express or implied promise by the deceased to reward him for the services or work by making some testamentary provision for the claimant, whether or not the provision was to be of a specified amount or was to relate to specified real or personal property, then, subject to the provisions of this Act, the claim shall, to the extent to which the deceased has failed to make that testamentary provision…be enforceable against the personal representatives of the deceased in the same manner and to the same extent as if the promise of the deceased were a promise for payment by the deceased in his lifetime of such amount as may be reasonable, having regard to all the circumstances of the case, including in particular the circumstances in which the promise was made and the services were rendered or the work was performed, the value of the services or work, the value of the testamentary provision promised, the amount of the estate, and the nature and amounts of the claims of other persons in respect of the estate, whether as creditors, beneficiaries, wife, husband, civil union partner, children, next-of-kin, or otherwise.
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> ...
>
> (3) Where the promise relates to any real or personal property which forms part of the estate of the deceased on his death, the court may in its discretion, instead of awarding to the claimant a reasonable sum as aforesaid,—
>
> (a) make an order vesting the property in the claimant or directing any person to transfer or assign the property to him; or
>
> (b) make an order vesting any part of the property in the claimant or directing any person to transfer or assign any part of the

[6] Report on the Administration of the Estate of Milan Babic Yozin dated 19 October 2017.

> property to him, and awarding to the claimant such amount (if any) as in its opinion is reasonable in the circumstances.

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Services or work

[38] To succeed under s 3(1), a claimant must first prove that he or she rendered services or performed work for the deceased during the deceased's lifetime. The "services" or "work" relied upon must go beyond the normal expectations of family life. As was said in *Re Welch*, "some straining of the scope of the Act is required to bring within the concept of services the natural incidents and consequences of life within a close family group".[7] Similarly, in *Chapman v HP*, the Court said the focus must be on what was expected in the particular family.[8]

[39] In this case, I accept that the beneficiaries were required to assist their parents picking, grading, packing and selling fruit. There is no evidence as to the hours that might have been worked, but I am willing to proceed on the basis that at particular times of the year many hours may have been required.

[40] That, however, is tempered by two considerations. First, Norma's evidence was that the beneficiaries did no more than was expected of them in the context of their family life and, indeed, in many families living in the district undertaking similar enterprises. The Yozin family was certainly not alone in conducting market garden and grape growing enterprises in West Auckland. I am not persuaded that what the plaintiffs were required to do went beyond what was expected in their family.

[41] Secondly, any services or work that the plaintiffs rendered or performed were necessarily limited given their schooling, tertiary education/training thereafter, their subsequent employment, and their relatively young age at the date of Mr Yozin's death. Having regard to those matters, any services rendered or work performed that did exceed what was fairly expected within the family must have been modest.

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7 *Re Welch* [1990] 3 NZLR 1 (PC) at 7.
8 *Chapman v HP* HC Wellington CIV-2007-480-1372, 2 July 2009 at [287].

Promise to reward for services or work

[42] Next, to obtain the particular relief they seek, the plaintiffs would be required to prove that Mr Yozin promised to reward them for those services or work by making testamentary provision relating to "real … property".[9]

[43] I am not satisfied that Mr Yozin made any promise to reward the plaintiffs by making testamentary provision, let alone provision relating to real property. My reasons are these.

[44] Each of the plaintiffs swore three affidavits. Their first affidavits were principally directed to securing the appointment of NZGT in place of Mr Babich. That said, each gave evidence in their first and their second affidavits that their father intended and said to them that they would be able to have an interest in the land as part of their inheritance if they wished. However, although the plaintiffs swore their second affidavits in support of their claim under the TPA, neither gave evidence that Mr Yozin promised to make testamentary provision as a reward for services or work. It was only in their third affidavits, filed shortly before trial, that the plaintiffs gave evidence of any such promise. Ms Telford, counsel for Norma, submitted that I could infer from the lateness of this evidence that it was given in recognition of what would be required to prove the claim under s 3(1) and that I could not rely on it. I accept that submission. If there were a clear recollection of such a promise, I am satisfied it would have been referred to at a much earlier stage in the proceedings.

[45] I also take into account the evidence of Norma and Maurice. Each stated that they had no recollection of Mr Yozin making any promise to reward for services or work, whether generally or in relation to the land, and they certainly had no recollection of any such promise being made to them. I place particular weight on Norma's evidence. Norma impressed me as being fair and careful in the way she gave her evidence. Norma was also sympathetic to Rosalie and Helen's wish to retain the Lots they seek subject to their doing so on terms which are fair to all concerned. I am satisfied that if Norma recalled a promise to reward, generally or in relation to the land, she would have said so.

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9 Law Reform (Testamentary Promises) Act 1949, s 3(3).

[46] To conclude on this point, I accept that Mr Yozin may well have told his children to "stop complaining" when he required them to work, because "one day it will all be yours" or "you are working for yourselves". Rosalie in particular gave evidence to this effect. As Ms Telford submitted, such a statement has the hallmarks of a father who intends that his children will inherit his estate in due course, as they have done. However, such a statement does not constitute a promise to make testamentary provision as a reward for services or work, as s 3(1) TPA requires. I am not satisfied that Mr Yozin made any such promise.

Reasonable

[47] Lastly, a claim under s 3(1) is enforceable only to the extent of such amount as is "reasonable" having regard to, amongst other things, the value of the services rendered or the work performed. In ascertaining what is a reasonable amount, the Court is required to "net off" benefits received, so that provision is equivalent to the shortfall, if any, between the value of services or work on the one hand and the provision made in fact, on the other.[10]

[48] In this case, an award of any of Lots 1 or 2 or part Lot 4 would vastly exceed the value of the services rendered or work performed, without making any deduction for benefits received. I would not have jurisdiction under s 3(1) to make an award which exceeds what is reasonable, even if the plaintiffs had satisfied the requirements of s 3(1), which they have not.

[49] I decline to grant leave to the plaintiffs to bring their claim under s 3(1) TPA and, if I am wrong in that, I dismiss the claim.

Second cause of action – Rectification

[50] The plaintiffs allege that Mr Yozin did not know or approve the terms of the will "relating to the disposition of the [land]".[11] They also allege that the will does not reflect Mr Yozin's intentions as it does not make express provision for the plaintiffs "to receive part of the [land] of their choosing".

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10 *Powell v Public Trustee* [2003] 1 NZLR 381 (CA).
11 Second Amended Statement of Claim, above n 3, at [28].

[51] This part of the plaintiffs' case proceeds on the basis that Mr Yozin intended the land would stay in the family. They say that Mr Yozin was a "traditional Yugoslavian" who would not intentionally have divested himself or his family of land. The plaintiffs also rely on statements that Mr Yozin is alleged to have made to Mrs Yozin and to them, to the effect that Mrs Yozin and after her death the residuary beneficiaries could determine what would happen to the land.

[52] The plaintiffs accept that Mr Yozin had sufficient English to convey his instructions to his solicitor, Mr Massey, but they say he was not capable of reading his will or approving its legal effect.

[53] The gist of the plaintiffs' case is that, at the very least, any of the beneficiaries who wished to take their inheritance *in specie* would be able to do so and that those words "*in specie*" have been omitted from the closing words of clause 6 of the will in error. The plaintiffs seek rectification to correct that omission.

[54] In support of their case, the plaintiffs referred me to *Re Jensen*, in which Fisher J stated that the Court had power to rectify a will if it were necessary to do so to give effect to the testator's intentions. [12]

Discussion

[55] I am satisfied that the will as I have construed it reflected Mr Yozin's instructions to his solicitors. I do not consider there was any error as the plaintiffs allege.

[56] As the plaintiffs have accepted, Mr Yozin had sufficient English to communicate his instructions to his solicitors. I accept that he may not have understood the niceties of testamentary language. He would not be alone in that. But I am confident that if Mr Yozin intended the land to be retained he would have communicated the same to his solicitors and they would have drafted a will consistently with those instructions. Mr Yozin plainly gave his solicitors contrary instructions because by his will he directed his executors to sell his real property, invest

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12 *Re Jensen* [1992] 2 NZLR 506 (HC) at 512.

the proceeds, pay the income to Mrs Yozin, gave them power to advance capital, to buy a suitable house etc. These directions are inconsistent with the proposed addition of the words "*in specie*" to clause 6.

[57] Mr Yozin was an intelligent man. He and Mrs Yozin subscribed to two daily newspapers, the New Zealand Herald and the Auckland Star. Mr and Mrs Yozin were founding members of the Swanson Bowling Club. Mr Yozin was a member of the Swanson Primary School committee, was involved in the New Zealand Fruitgrowers Federation and the Viticultural Association, and he held a licence to sell wine. Mr Yozin could have only participated in these activities by communicating in English.

[58] Three other matters are relevant.

[59] The first is that the will was prepared and witnessed by Mr Yozin's solicitor, Mr Frank Massey, of Earl Kent Massey Palmer & Haggitt. Mr Massey also appears to have witnessed each codicil. It is inevitable that, when taking instructions for the preparation of the will, Mr Massey would have made sure of Mr Yozin's testamentary wishes. It also is inevitable that there would have been a discussion between the two when Mr Yozin gave instructions for the preparation of his codicils. On those occasions, Mr Massey would have confirmed that Mr Yozin continued to be satisfied with the terms of his will. And, of course, Mr Yozin confirmed in those codicils that he was so satisfied.

[60] The second point is that the instructions Mr Yozin gave to his executors and trustees, as referred to in [56] are quite sensible given the circumstances that prevailed within the family up to Mr Yozin's death.

[61] The third point is that Rosalie and Norma each confirmed in evidence that, on being confronted with his diagnosis, Mr Yozin confirmed to Mrs Yozin that the will he had made almost 20 years earlier still reflected his wishes.

[62] In those circumstances, the only conclusion to be drawn is that the will did express Mr Yozin's intentions.

[63] I dismiss this second cause of action.

Third cause of action – s 14(6B) Trustee Act 1956

[64] In their third cause of action, the plaintiffs seek an order for partition of the land pursuant to s 14(6B) Trustee Act and orders vesting the Lots in issue in the plaintiffs. Section s 14(6B) gives the Court discretion to order a partition of real estate of a deceased if satisfied it would be "advantageous to the parties interested therein". It provides:

> **14 Powers to sell, exchange, partition, postpone, lease, purchase, etc**
>
> (6B) Where upon inquiry the court is satisfied that a partition of the real estate of a deceased person would be advantageous to the parties interested therein, the court may order a partition or may appoint 1 or more arbitrators to effect a partition, and to exercise in regard thereto, under its directions and control, such powers as it thinks fit; and if the report and final award of the arbitrator are approved by the court, the trustee shall, by conveyance or transfer, give effect to the same accordingly.

[65] The first point to address is whether the beneficiaries are "interested" in the land. I do not consider they are. The effect of clause 6 of the will is that the beneficiaries are interested in the net proceeds of the sale of the land. In my view, s 14(6B) is intended to allow the Court to order a partition of land gifted *in specie* to two or more beneficiaries in shares.

[66] If I am wrong in that, the grounds on which the plaintiffs submit partition would be advantageous are that partition would have the effect of resolving all disputes; in the absence of orders, NZGT might continue to postpone any sale of the land by the powers vested in it under the will; and the highest price for the land will be achieved if Lots 1, 2 and part Lot 4 are isolated as proposed and transferred to the plaintiffs.

[67] The only one of those grounds that counts with me in this case is the contention that the highest price for the land would be achieved if the Lots were isolated as proposed.

[68] This has not been proved. The plaintiffs and each of Maurice and Norma called evidence from expert valuers in the event it became necessary to consider the relief to be granted to the plaintiffs.

[69] The valuers agreed that the highest and best use of the land is a residential subdivision and that a developer, being the likely purchaser of the land, might or might not wish to acquire the Lots sought by the plaintiffs. Matters to be taken into account would be the disadvantage of the heritage designation and the issues which arise in relation to the shed. On the other hand, a developer might find it easier to obtain resource consent for whatever subdivision and/or development is proposed if they owned all the land.

[70] In any event, the beneficiaries and NZGT do not require an order from the Court to achieve separation. It remains open to the beneficiaries to agree to sell the Lots to the plaintiffs. Apart from that, NZGT itself may decide that the best price is likely to be achieved by offering one or other Lot or Lots for sale independently of the balance of the land. NZGT might seek tenders on different bases. The method of sale is for NZGT to determine absent agreement of the beneficiaries. I do not consider any order of the Court is required to assist in securing the best price.

[71] For these reasons, I dismiss this third cause of action also.

Price for Lots 1, 2 and part Lot 4

[72] In case it assists the parties, had I found for the plaintiffs, I would not have ordered that they acquire Lots 1, 2 and part Lot 4 on the basis they proposed, because it is unfair to the other beneficiaries.

[73] The plaintiffs' proposal was that the price should be calculated by multiplying the area of these Lots by the price per m^2 achieved for the balance of the land and then deducting sums for the effect of the heritage designation, possible contamination and other issues arising on part Lot 4, the saving in real estate commission and the costs of subdivision.

[74] Maurice and Norma opposed this proposal, and submitted that the plaintiffs would have to acquire the Lots at market value and that the plaintiffs' proposal fell well short of that. Both of those submissions are correct.

[75] All the valuers, the plaintiffs' included, agreed that Lots 1 and 2 and part Lot 4 will attract a substantially higher price per m^2 because of the smaller area, the access to Swanson Road and because Lot 1 has subdivision potential, subject to the effect of the heritage designation.

[76] The question of the deductions was less contentious on the evidence but again all the valuers accepted these too were inevitably a matter of conjecture.

[77] For the sake of completeness, I record that I did enquire of the parties whether matters might be resolved by allocating equivalent Lots to Maurice and Norma but all concerned preferred to await this judgment.

Mr Babich's costs

[78] Mr Babich was required to consult solicitors, both in the day to day conduct of the estate and because of the serious differences between the beneficiaries. Mr Babich was not able to charge for the many hours he must have spent on this matter but he did incur legal fees of $99,884.71 including GST.[13]

[79] The beneficiaries have agreed that the estate will pay those costs and I am required to determine whether any beneficiary should bear more than a 25 per cent share.

[80] The plaintiffs seek orders that Maurice should pay 50 per cent of the costs to the extent they were incurred before 10 December 2016, with Rosalie, Helen and Norma bearing the other 50 per cent, and that thereafter Maurice should pay 100 per cent of Mr Babich's costs.

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13 Report on the Administration of the Estate of Milan Babic Yozin, above n 6.

[81] Norma submits that the estate should bear the costs to the point in time at which the plaintiffs commenced the proceedings, and that the plaintiffs should bear Mr Babich's legal costs thereafter, on the grounds that the plaintiffs' claims against Mr Babich were never substantiated.

[82] Maurice considers the estate should bear all of Mr Babich's legal costs.

[83] I am satisfied that each beneficiary should bear an equal proportion of the legal costs, which must be paid as soon as the estate has the funds to do so. I do not propose to enter into the rights and wrongs of the beneficiaries' and their then legal advisers' conduct prior to commencement of the proceedings. There were failings on all sides. More importantly, the sum in dispute is trivial given the value of the estate.

Result

[84] I dismiss the plaintiffs' claims.

[85] Costs and disbursements up to Mr Babich's resignation are to lie where they fall. The estate is to bear any costs and disbursements Mr Babich incurred in the proceeding that fall outside the $99,884.71 above.

[86] For the period after Mr Babich's resignation, in accordance with the usual rules, the plaintiffs as the unsuccessful parties are to pay the defendants' costs and reasonable disbursements. Costs are to be on a 2B basis unless some very compelling submission to the contrary is made forthwith. Any disputes as to quantum are to be determined by the Registrar.

Peters J

ADDENDUM

RELEVANT CLAUSES OF THE WILL

3. I GIVE AND BEQUEATH unto my said wife ZORKA MILIKA YOZIN absolutely:

(a) The sum of £1000

(b) All the household furniture silver plate linen glass china pictures and other articles of household use or ornament of which I shall die possessed.

4. SUBJECT thereto I GIVE DEVISE AND BEQUEATH all the property real and personal whatsoever and wheresoever situate of which I have power to dispose by this my will unto my Trustees UPON TRUST subject as hereinafter provided to sell and convert into money my real property and to sell call in and convert into money my personal property with power to effect any such sale either by public auction or private contract either together or in parcels either at one time or from time to time and subject to all such conditions and terms as to my Trustees seem expedient and to make execute and do all such conveyance assurances writings and things as may be necessary for effectuating any such sale.

5. I DIRECT my Trustees to stand possessed of the proceeds of such sale and conversion after payment thereout of my just debts funeral graveyard and testamentary expenses and the costs and expenses of such sale and conversion and all estate and succession duties payable in connection with my dutiable estate UPON TRUST to invest the same in any of the modes of investment authorised by the law in force for the time being in New Zealand for the investment of trust moneys.

6. I DIRECT my Trustees to stand possessed of the investments for the time being representing my estate and of such portion of my estate as shall for the time being be unconverted (hereinafter collectively referred to as and included in the term "the said trust fund") UPON TRUST to pay the net annual income arising therefrom to my said wife during her life whilst she remains my widow she thereout maintaining and educating my infant children with power to my Trustees to apply to and use from time to time at their discretion such portion of the capital of the said trust fund as may be necessary for the maintenance and support of my said wife and infant children in reasonable comfort. AND I ALSO EMPOWER my Trustees at the request in writing of my said wife to purchase from out of the said trust fund a home suitable for her requirements and to hold the same UPON TRUST to permit and allow my said wife and children to personally use occupy and enjoy the same during her life whilst she remains my widow free of rent and without impeachment of waste my Trustees paying all rates taxes insurance premiums and other charges and out goings and keeping the said property in good order and repair AND upon the death or re-marriage of my said wife whichever event shall first occur UPON TRUST as to the corpus of the said Trust fund or the balance therefore as the case may be and/or the investments for the time being representing the same for such of my children as

shall survive me and attain the age of twenty one years and if more than one in equal shares.

7. I AUTHORISE my Trustees to do all or any of the following acts in their discretion:

(a) To postpone the sale calling in and conversion of my real and personal property or any part or share thereof from time to time for so long as my Trustees shall in their uncontrolled discretion think fit.

(b) To apply the whole or such part or parts as my Trustees shall think fit of the income and to raise and apply such part or parts not exceeding one half as my Trustees shall think fit of the capital of the share or property to which any minor may be actually presumptively or contingently entitled hereunder for the benefit maintenance or education of the minor or at their discretion to pay the same to any person acting with or without authority as guardian of the minor the receipt of such guardian being a sufficient discharge to my Trustees.

(c) To let or lease all or any portion of my estate for such period and upon and subject to such terms and conditions as they shall in their absolute discretion think fit and to re-enter and determine leases and tenancies.

(d) To carry on farming operations of any nature upon any property which I may own and to employ in and about the conduct and carrying on of such operations all stock and capital that may be used and employed therein by me or that may in the opinion of my trustees be necessary for the purpose with power also to my Trustees to delegate all or any of the powers of management and other powers relating to the carrying on of such operations to my said wife or any other person or persons whom they may think fit and so that my Trustees shall be free from all responsibility and shall be indemnified in respect of any loss arising in relation to the management and carrying on of the said farming operations.