IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA369/2018
[2019] NZCA 202

BETWEEN	ROSALIE MAY YOZIN AND HELEN JEAN MENZIES Appellant
AND	NEW ZEALAND GUARDIAN TRUST COMPANY LIMITED First Respondent
	MAURICE BRUCE YOZIN Second Respondent
	NORMA HAZEL YOZIN-SMITH Third Respondent

Hearing:	26 February 2019
Court:	Clifford, Mallon and Whata JJ
Counsel:	W G C Templeton for Appellants No appearance for First Respondent S J McCarthy for Second Respondent S-J Telford and M Karlsen for Third Respondent
Judgment:	4 June 2019 at 3 pm

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellants must pay the second and third respondents' costs for a standard appeal on a band A basis and usual disbursements.

REASONS OF THE COURT

(Given by Mallon J)

Introduction

[1] The appellants (Rosalie and Helen) and the second and third respondents (Maurice and Norma) are the children of Milan and Zorka Yozin. Milan and Zorka are now deceased. This appeal concerns the administration of Milan's estate. The estate's sole asset is a four-hectare block of land in Swanson, Auckland. Under Milan's will, the children are each entitled to a 25 per cent share of the residue of the estate.

[2] Rosalie and Helen wish to have the Court make a partition order over that land so that a portion of it may be transferred to them in part satisfaction of their entitlement in the estate. Initially Maurice and Norma were not opposed to this, providing agreement could be reached on the price for that portion of the land. However, no agreement has been reached and Maurice and Norma now wish that the estate be administered in accordance with the terms of Milan's will.

[3] In the High Court, Rosalie and Helen's claims were under the Law Reform (Testamentary Promises) Act 1949 and for rectification of the will. The claim for a partition was added, unopposed, at the end of the trial.[1] The High Court dismissed all three claims. On appeal, Rosalie and Helen pursue only the partition claim. They say the Judge was wrong to find that the grounds for ordering a partition, as set out in s 14(6B) of the Trustee Act 1956, did not apply.

[4] The principal issue in this appeal is whether Rosalie and Helen are "parties interested therein" in the partition of the real estate of a deceased person such that the jurisdiction under s 14(6B) of the Trustee Act is available. If they are "parties interested therein" the other issues are whether a partition would be "advantageous" to those parties and whether there is appropriate valuation evidence before the Court to determine that.

[5] The first respondent (NZGT) is the present executor and trustee of the estate. It abides the Court's decision.

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1 *Yozin v New Zealand Guardian Trust Co Ltd* [2018] NZHC 1390 at [6].

The facts

The family

[6] Milan was born in Yugoslavia in 1910. He emigrated to New Zealand in 1926. He married Zorka in 1945, when he was 35 and she was 20 or 21 years old. They had four children, Helen born in 1946, Norma in 1948, Rosalie in 1951 and Maurice in 1953.[2]

[7] Milan purchased the land in 1937. He initially planted fruit trees on the land. He continued this enterprise with Zorka. They also operated a market garden and, later, a vineyard and winemaking business. The children assisted in these enterprises when they were old enough to do so.

[8] Milan made his will on 6 May 1954. He made codicils in 1957 and 1966 to change his executors. He died in 1975, aged 65.

[9] Zorka was 51 when Milan died. She was living in the family home with Norma, Rosalie and Maurice at this time. Helen was married with two children and living in the United Kingdom. At this time, Maurice took over the management of the property and business (he had begun assisting his father with this in 1974 when his father was unwell).

[10] Zorka did not remarry and remained in the family home until her death in 2014 when she was 90 years old or thereabouts. Apart from a short period in 1985–1986, Rosalie lived in the family home with Zorka. Rosalie ceased full time employment in 1990 and assumed management of the property from that time. She looked after Zorka for several years before her death, when Zorka had become unwell. Norma and Maurice had both married and left the family home many years earlier.

[11] Following Zorka's death, Rosalie has continued to live in the family home. She does not pay rent but does pay the rates and other outgoings. She is now aged 68. Helen now lives in Auckland. She is around 72 or 73 years old. She has been afflicted with several illnesses in recent years. Norma has lived in England since about 1985.

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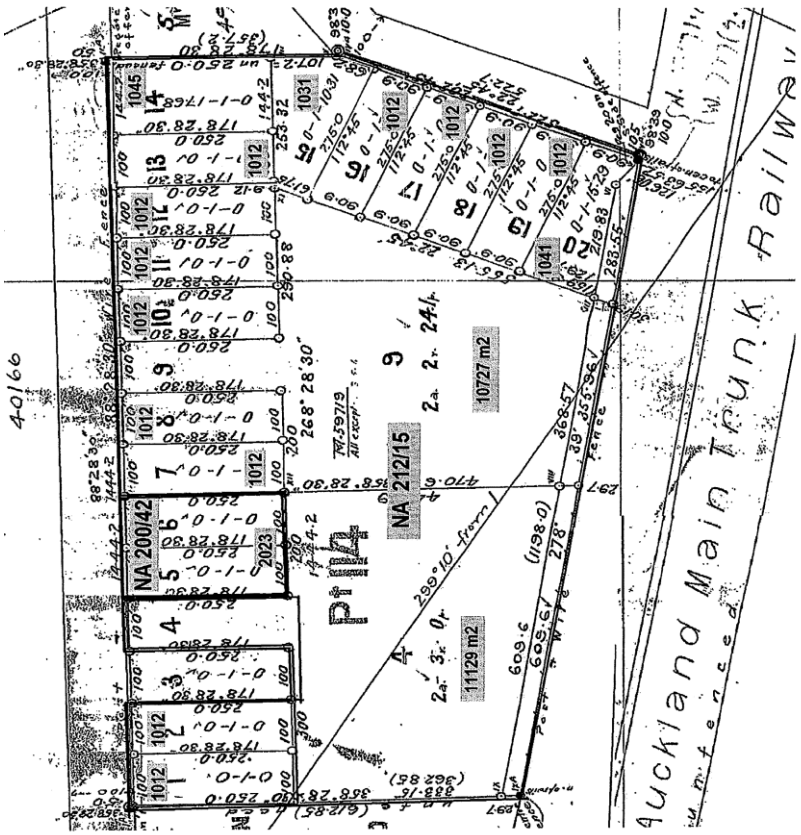
[2] The High Court judgment mistakenly states Rosalie's date of birth as 1957.

Her husband has passed away. She is around 70 years old. Maurice is around 65 or 66 years old and lives in Auckland.[3]

The land

[12] The land is an approximately 4 ha rectangular block in Swanson. At the time Milan died, it was comprised of 20 lots. Each lot has access either to Swanson Road or O'Neills Road. Lots 1 to 14 run along Swanson Road. Lots 15–20 run along O'Neills Road. Each of these lots, except Lots 4 and 9, are small, largely rectangular blocks. Lots 4 and 9 are partly small rectangular blocks (with road access on to Swanson Road), but also partly much larger blocks of land that extend behind all the other lots (without road access except through the Swanson Road access just mentioned).

[13] The following plan shows this configuration:



[3] The evidence provides only the years of birth of Rosalie, Helen, Norma and Maurice.

[14] Lot 1 is a garden that attaches to the family homestead. The family homestead is on Lot 2. The building in which the winery business operates is on the small rectangular part of Lot 4. There are no other buildings on the land. There is a "Heritage B" designation over Lots 1 to 3, part Lot 4 and an adjoining 3 or 4 metre-wide strip of Lot 5.

[15] Lot 3 was purchased from the estate by Rosalie and Maurice in 1975 for $7,600. Following that purchase, the land is now on three separate titles: (1) Lots 1, 2, 4, 7–20; (2) Lot 3; and (3) Lots 5–6.

[16] Rosalie and Helen wish to have Lots 1, 2 and part Lot 4 (the small rectangular piece that fronts onto Swanson Road) partitioned from the balance of the land (the rest of Lot 4 and Lots 7–20) in the relevant title. Rosalie has obtained a certificate from the Council under s 226 of the Resource Management Act 1991 to subdivide Lots 1 and 2. She commenced the process of applying to subdivide part Lot 4. The Council's response suggested it had no objection to this in principle, but the remainder of Lot 4 would need access arrangements.

The will

[17] The relevant clauses in Milan's will are as follows:

> 3. I GIVE AND BEQUEATH unto my said wife ZORKA MILIKA YOZIN absolutely:
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> (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.
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> 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 conveyances 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 outgoings 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 thereof 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.

[18] In short, Milan gifted £1000 and household furniture and effects to Zorka (cl 3). Subject to those gifts, all of Milan's property was bequeathed to the trustees to "sell and convert into money" and to "stand possessed of the proceeds", after payment of debts, funeral expenses and other costs, upon trust to invest in authorised investments (cls 4 and 5).

[19] The Trustees were directed (cl 6):

(a) to pay the annual net income from the investments to Zorka during her lifetime and while she was a widow;

(b) at the Trustees' discretion, to apply a portion of the capital of the trust funds to maintain and support Zorka and the children in reasonable comfort;

(c) at Zorka's request, to purchase from the trust fund a home suitable for her requirements to use and occupy rent-free; and

(d) upon Zorka's death or remarriage, the trust fund capital and investments were to be divided between the surviving children in equal shares once they reached 21 years of age.

[20] The Trustees also had the power to postpone the sale of any of the property, to let or lease any of the property, to carry on the farming operations of the property, to apply the income of the fund or raise capital for the maintenance or education of a minor who may have actually, presumptively or contingently been entitled to such and to delegate the management of the property to Zorka or any other person (cl 7).

The dispute over value

[21] Norma and Maurice were not initially opposed to Rosalie and Helen purchasing Lots 1, 2 and part Lot 4 at market value. They were unable to agree on how market value was to be determined.

[22] Rosalie and Helen filed expert valuation evidence from Michael Sprague. That evidence addressed specific questions that had been put to him. It did not provide a market value of the land as a whole, nor of Lots 1, 2 and part Lot 4, and nor of the balance of the land without those Lots.

[23] Maurice filed expert valuation evidence from David Walker. Mr Walker provided his expert opinion of the market values of Lot 1, Lot 2, and the notional new lot comprising part Lot 4. He explained that the market value of the balance of the land was not an appropriate basis on which to value Lots 1, 2 and part Lot 4.

[24] Norma filed expert valuation evidence from Ian Colcord. Mr Colcord also provided his expert opinion of the market values of Lot 1, Lot 2 and the notional new lot comprising part Lot 4. These values were not identical to the market values as assessed by Mr Walker.

[25] The valuers held a joint conference. At this conference they agreed the most reliable method for valuing the whole of the land and the balance of the land was a combination of the sales comparison method and the development budget approach. They also agreed there was a difference in market value between the property including Lots 1, 2 and part Lot 4 and the property without those Lots. They agreed it was debateable whether the balance of the land was more marketable to most developers if free of Lots 1, 2 and part Lot 4. Mr Colcord and Mr Walker also agreed as to the market value of Lots 1, 2 and part Lot 4 (being a value between their respective values). Mr Sprague did not give his views on these values.

[26] Rosalie and Helen filed expert planning evidence from James Hook. He gave evidence that a subdivision of Lots 1, 2 and part Lot 4 would likely be granted. He also gave evidence that the balance of the land would likely be more attractive with this

subdivision because of the heritage overlay on Lots 1, 2 and 4 and that there were possible contamination and asbestos issues with the winery building.

[27] Norma and Maurice filed expert planning evidence from, principally, Karl Cook. He agreed Lots 1, 2 and part Lot 4 could be subdivided but had a different view about the timeframe for this and the costs. He also disagreed with Mr Hook about the impact on the balance of the land from such a subdivision. John Brown also provided evidence concerning consent requirements.

[28] At a conference between Mr Hook and Mr Cook they agreed that a timeframe for the subdivision would be in the order of 12 to 22 weeks. They also agreed a range of the costs likely to be involved, which depending partly on whether the subdivision proceeded as indicated in earlier meetings with the Council. Mr Hook considered separating Lots 1, 2 and part Lot 4 from the balance of the land would appeal to the greatest proportion of potential purchasers. Mr Cook did not disagree with this but considered it would reduce the flexibility and opportunities for subdivision and hence would potentially also reduce the price.

[29] Rosalie and Helen contend the market value should be determined by the actual sale price achieved for the balance of the land. The average per square metre achieved from that sale would be applied to Lots 1, 2 and part Lot 4. This was also their position in the Hight Court. As an alternative, Rosalie and Helen say the market value of those lots could be determined by a tender process on two bases: one as to the whole of the land; the other without Lots 1, 2 and part Lot 4. As a further alternative, they say the value could be determined by the Trustee pursuant to s 28 of the Trustee Act as a condition of the partition.

[30] Norma and Maurice have provided expert evidence of the value of Lots 1, 2 and part Lot 4. They say Rosalie and Helen have had the opportunity to provide this evidence but have not done so. They say the expert evidence is that the average per square metre of the balance of the land does not provide the market value of Lots 1, 2 and part Lot 4. Their expert evidence is that Lots 1, 2 and part Lot 4 have a higher square metre value than the balance of the land.

The High Court decision

[31] Following the unopposed leave granted to Rosalie and Helen to amend their claim, they sought a partition order under s 14(6B) of the Trustee Act. That section 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.

[32] The High Court Judge held that s 14(6B) was intended to allow the court to order a partition of land gifted in specie (meaning gifted in that form, rather than selling the land and gifting the cash proceeds) to two or more beneficiaries to share.[4] The children were not gifted the land in specie. Rather, under cl 6 of the will, the beneficiaries were interested in the net proceeds of the sale of the land. They were therefore not "interested" in the land as that term was used in s 14(6B).

[33] The Judge further held that even if they were "interested", a partition would not be "advantageous".[5] The Judge considered the only relevant ground on which this could be made out was if the sale of Lots 1, 2 and part Lot 4 to Rosalie and Helen would achieve the highest price for the land. This had not been proven. The evidence from the valuers was that the highest and best use of the land was as a residential subdivision and a developer purchasing the land might or might not want to acquire the lots which Rosalie and Helen wished to purchase.[6]

[34] The Judge further held that a partition order was not required in order for Rosalie and Helen to buy Lots 1, 2 and part Lot 4.[7] It remained open to the

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4 *Yozin v New Zealand Guardian Trust Co Ltd*, above n 1, at [65].
5 At [66]–[68].
6 At [69].
7 At [70].

beneficiaries to agree to this. It was also open to the Trustee to determine that the best price was likely to be achieved by offering some of the Lots for sale independently of the balance and it was for the Trustee to determine the method of sale absent agreement from the beneficiaries.

The submissions on appeal

[35] Rosalie and Helen contend the Judge took an overly narrow interpretation of who qualified as "parties interested therein" under s 14(6B). The Trustee Act does not define "interested parties" to mean only those with legal or equitable interests. Relying on comments in *Livingston* and *Schultz*, Rosalie and Helen say that "interested" does not mean that the beneficiary must have an "equitable interest" in the land.[8] They say the phrase "parties interested therein" in s 14(6B) covers a wide range of parties interested in the real estate. For example, it includes creditors of the estate.[9] They say they have an ongoing interest in the totality of the assets of the estate during its administration and that interest is sufficient.

[36] Rosalie and Helen also contend the Judge took too narrow an approach to whether a partition would be "advantageous" and made factual errors in her assessment of the valuation evidence. They say "advantageous" is a broad term. They say a partition would be advantageous here because the expert evidence before the Court was that separating the Lots with the heritage designation from the other Lots would appeal to the greatest proportion of purchasers. They say there would be no disadvantage from the subdivision because Rosalie and Helen would pay for the costs of the subdivision and there would be no further delay because the Council had agreed to the subdivision in principle.

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8 *Commissioner of Stamp Duties (Queensland) v Livingston* [1965] AC 694 (PC); and *Official Receiver in Bankruptcy v Schultz* (1990) 170 CLR 306.

9 Rosalie and Helen made a further submission relying on s 15(1)(j) of the Trustee Act 1956. The argument was that a trustee has the power to appropriate property towards satisfaction of any legacy and the Court has the power to vary the appropriation notice. As we understand it, it was contended that this was another way by which Rosalie and Helen could obtain the part of the property they seek. We do not consider it further because, even if it were available in the circumstances here, it is a different route by which the land might be transferred to beneficiaries than the pleaded route of s 14(6B).

[37] The respondents contend s 14(6B) does not apply to real estate held by executors under a will in an unadministered estate. Rather it only applies once the residue of the estate has been ascertained, and the assets are held on trust until distribution and the executor is treated as a trustee. They say that the Judge found that the estate was in the executorship phase. The respondents also contend "interested therein" should be interpreted narrowly so that the executors of an estate can efficiently administer their duties independent of the individual wishes of the residuary beneficiaries whose entitlements are not clear until the estate is administered.

[38] The respondents suggest "parties interested therein" under s 14(6B) means a legal or equitable interest in the real estate only. They say *Livingston* and *Schultz* support their position. They say Rosalie and Helen do not have such an interest because they are residuary beneficiaries of an unadministered estate. Their interest is limited to a chose in action against NZGT if the administered estate is not properly administered.

[39] The respondents further say that the evidence does not establish that a higher price would be achieved by the estate if the partition occurred. They say all the expert valuers agreed that a higher price per square metre would be obtained if the estate land was sold as a whole. They therefore say the Judge correctly decided that a partition would not be "advantageous" even if Rosalie and Helen qualified as "parties interested" in the real estate.

The law

Section 14(6B)

[40] Rosalie and Helen seek a partition under s 14(6B), set out above at [31].

[41] Section 14 is found in pt 3 of the Trustee Act. That Part concerns the general powers and indemnities of trustees. Section 14(1) gives the trustee powers to sell, exchange, concur in a partition, postpone the sale of, and sublet or lease trust property, whether real or personal. The power to concur in a partition is stated in these terms:

> **14 Powers to sell, exchange, partition, postpone, lease, purchase, etc**
>
> (1) Subject to the provisions of this section, every trustee may exercise the following powers in respect of any property for the time being vested in him:
>
> …
>
> (b) dispose of the property by way of exchange for other property in New Zealand of a like nature and a like or better tenure, or, where the property vested in him consists of an undivided share, concur in the partition of the property in which the share is held, and give or take any property by way of equality of exchange or partition.

[42] Sections 14(2), (2A) and (2B) give trustees further powers to deal with the land, namely: the power to purchase land; the power to erect a dwellinghouse on trust land; and the power to acquire a flat or apartment and to enter into arrangements for its occupancy, where the trustee has the power to acquire a home for any person. Sections 14(3), (4) and (5) are concerned with powers associated with leasing, subleasing or selling property. Sections 14(6) and (7) provide circumstances in which a trustee is not liable in relation to exchanging land or postponing the sale of any land.

[43] Section 14(6B) was inserted into the Trustee Act 1956 on 15 November 1968 by s 6(2) of the Trustee Amendment Act 1968. Prior to this amendment, the provision was contained in the Administration Act 1952. The effect of this amendment was to transfer the provision to the Trustee Act (without any material alteration) and repeal the provision from the Administration Act. Counsel did not find any commentary, in Hansard or elsewhere, as to why it was decided that the provision should be in the Trustee Act rather than in the Administration Act.

[44] For reasons that we shall discuss, the reason for the transfer of the provision to the Trustee Act, and more importantly the meaning of "parties interested" in s 14(6B), are informed by the history of this provision.

The partition remedy

[45] Historically, at common law the court had no jurisdiction to divide land that was held in co-ownership.[10] This jurisdiction was conferred under the Partition Acts 1539 and 1540.[11] Under this legislation a joint tenant or a tenant in common could insist on a division and the court had no jurisdiction to refuse it.[12] A partition order was, therefore, an order which divided the land held in co-ownership. It destroyed "the unity of possession by physical division of the land held in co-ownership into parts to be held by the former co-owners in separate ownership".[13] As both joint tenancies and tenancies in common had unity of possession, either of these forms of ownership could be the subject of a partition order.[14]

[46] The law was inflexible because a court had no jurisdiction to refuse a partition order if sought by a co-owner. This inflexibility changed in New Zealand with the enactment of the Partition Act 1870. This legislation conferred on the court the jurisdiction to order a sale of the land and division of the proceeds instead of physical division of the land.[15]

[47] This jurisdiction arose "in a suit for partition" where it appeared to the court that a sale of the property and a distribution of the proceeds "would be more beneficial for the parties interested than a division of the property between or among them".[16] Any party "interested in the property" could seek the exercise of the court's power to order a sale.[17] To be "interested in the property" under this legislation it was necessary to have a legal interest in the land, an equitable interest which entitled the person to

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10 DW McMorland and others *Hinde McMorland & Sim Land Law in New Zealand* (online ed, LexisNexis) at [13.020]; citing historical summaries provided in *Patel v Premabhai* [1954] AC 35 (PC) at 41–43 and *Fleming v Hargreaves* [1976] 1 NZLR 123 (CA) at 127.

11 Partition Act 1539 (Eng) 31 Hen VIII c 1 and Partition Act 1540 (Eng) 32 Hen VIII c 32. As noted in *Fleming v Hargreaves*, above n 10, at 127, these statutes were still in force in 1976.

12 As discussed in *Fleming v Hargreaves*, above n 10, at 127, the original jurisdiction was confined to "coparceners but was extended to joint tenants and tenants in common by the Statute of Partition in 1539, and then to joint tenants and tenants in common for a term of years or for life by the Statute of Partitions 1540".

13 *Hinde McMorland & Sim Land Law in New Zealand*, above n 10, at [13.018] (footnote omitted).

14 DW McMorland and others, above n 10, at [13.018].

15 At [13.020].

16 Partition Act 1870, s 3. The section applied where parties "to the extent of one moiety or upwards" requested a sale: s 4.

17 See ss 4–6.

call for the conveyance of the land, or be a mortgagee entitled to exercise a power of sale.[18]

[48] The Property Law Act 1952 consolidated and amended legislation relating to property. Under this Act, the court's power to order a sale instead of a partition remained in essentially the same terms as under the Partition Act 1870. Specifically, under s 140 the court's power to order a sale arose in "an action for partition" and the exercise of that power could be sought by any party or parties "interested" in the land.[19]

[49] The question of what constituted an "interest" in land, for the purposes of s 140, was considered by the Court of Appeal in *Fleming v Hargreaves*.[20] The Court held that an equitable interest in land was a sufficient interest to invoke the section. The case involved a property owned by the appellant and her husband as joint tenants. The husband had executed a deed of assignment in favour of his employers of all his interest in the property. This deed was entered into because his employers had discovered fraud by the husband. The husband went to prison for the fraud. The employers sought an order for sale of the property and division of the proceeds as between them and the husband's wife under s 140.

[50] The wife contended that the assignment operated only as a charge and did not transfer the estate or interest charged. The Court of Appeal rejected this. The assignment was absolute and "it operated in equity to vest [the husband's] interest in the property in the [employers]".[21] As the same time, it severed the joint tenancy and the legal estate was subject to the employers' equitable right to a one-half share as

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18 That is to be co-owner of the land. As explained in *Halsbury's Laws of England* (1st ed, 1912) vol 21 Partition at [1570]–[1575], this covered coparceners (where two or more persons, by common law or custom, inherited the same title), tenants in common, joint tenants, lessees, tenants for life and some other forms of tenancy recognised at that time. An action for partition, or sale in lieu of partition, could not be brought by a reversioner (someone who disposed of part of their interest in the land, for example, a life interest in the land, and to whom the interest would return after the determination of the life interest) as it was necessary to have an estate in possession. This edition of *Halsbury's* is referred to in *Fleming v Hargreaves*, above n 10, at 127 where the Court of Appeal stated that the New Zealand law as to partition is substantially the same as the law in England as it stood prior to 1925.

19 Property Law Act 1952, s 140.

20 *Fleming v Hargreaves*, above n 10, at 126–127.

21 At 126.

tenant in common.[22] This meant that, on the employers' application under s 140, the Court had the power to order a sale (a partition was impracticable).

[51] The High Court's decision in *Cook v Hitchens* considered the meaning of the words "in an action for partition".[23] The case concerned property held in the name of the defendant on trust, initially for the plaintiff, the defendant and a third party. Later, the third party agreed to assign his interest to the defendant. The defendant had refused to register the plaintiff's name on the title. She sought a vesting order of her share under s 52 of the Trustee Act 1956. The defendant counterclaimed seeking an order for sale under s 140(1) of the Property Law Act.

[52] The High Court held that the defendant was able to seek an order under s 140(1) despite there being no claim for a partition.[24] The words "in an action for partition" meant an action in which the Court has jurisdiction to consider a division of the land. The Court had that jurisdiction when an application for sale was made under s 140 regardless of whether a division was sought by any party.[25]

[53] The High Court further held that the defendant had a sufficient share of the property so as to be entitled to a sale under s 140(1). In doing so, consistent with *Fleming v Hargreaves*, it recognised that the defendant's share was comprised of his original share together with the assignment from the third party of that party's equitable share.

[54] In *Hancock v Gibson* the High Court further explained the nature of the interest necessary for the purposes of s 140 as follows:[26]

> In my view, the purpose of s 140 as a whole, is to resolve issues arising in cases of multiple ownership, giving the Court power to direct a sale. Each of the subsections deals with a different situation, but in each the jurisdiction is dependent upon the applicant having an interest in the land. While for the purposes of the section that interest will generally be a legal interest, such cases as *Fleming v Hargreaves*, make it clear that an equitable interest is not necessarily disregarded even when an application is brought within the mandatory terms of s 140(1).

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22 At 126.
23 *Cook v Hitchens* (1982) 1 NZCPR 438 (HC).
24 At 447.
25 At 442.
26 *Hancock v Gibson* [1996] NZFLR 289 at 298.

[55] *Tanner v New Zealand Guardian Trust* concerned a will which made special provision for the testator's real estate and separate provision for his residue.[27] Under the will the "real estate" was gifted upon trust to the testator's son for and during his lifetime and, upon the son's death, "to hold [his] real estate upon trust for the sons of [his] said son … and if more than one then as tenants in common in equal shares".[28] When the testator died, his real estate comprised a farm and he had one son and two grandsons. One of the grandsons died before the son. On the son's death, the question was whether the deceased grandson had obtained a vested interest in the farm or whether he would have only obtained such an interest when his father (the deceased's son) died and if he had survived his father.

[56] The Court held this was a matter of construction of the will.[29] The Court considered that under the will the only qualifying requirement was that they be grandsons in existence at the date of the testator's death or born subsequently during the life of the son (the life tenant). If they met this requirement, they obtained a vested interest in the farm, the enjoyment of which was postponed until the death of the life tenant.[30] Because the deceased grandson had obtained a vested interest before the son (his father) died it was a transmissible interest which devolved to his executor under his estate. Accordingly, and contrary to the declaration which the surviving grandson had sought, the Court declared that the real estate of the grandfather vested in the surviving grandson and the executor of the deceased grandson in equal shares.[31]

[57] The executor of the deceased grandson was his daughter. She was also his sole beneficiary. Following the above decision, she and the surviving grandson called for the executor under the original grandfather's will, in whom the farm was still registered, to transfer the farm to them as tenants in equal shares. That conveyance had not occurred when the daughter subsequently brought a claim under s 140 for partition of the farm. The High Court held she was a party "interested" in the farm

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27 *Tanner v New Zealand Guardian Trust Co Ltd* [1992] 1 NZLR 57 (HC). An appeal to the Court of Appeal was dismissed: *Tanner v New Zealand Guardian Trust Co Ltd* [1992] 3 NZLR 74 (CA).

28 At 58.

29 At 59 the Court set out the proper approach to the construction of a will.

30 At 61.

31 At 62.

because she was entitled to have the land vested in her as a tenant in common in equal shares with the surviving grandson pursuant to the earlier Court's decision.[32]

[58] Partition is now governed generally by ss 339–343 of the Property Law Act 2007. This Act restated, reformed and, in part, codified certain aspects of property law.[33] It repealed the Property Law Act 1952 and provided that the Partition Acts of 1539 and 1540 ceased to have effect as part of the New Zealand law.[34] A "partition" is now called a "division of property in kind". The authors of *Hinde McMorland & Sim Land Law in New Zealand* suggest that there was no substantive change in meaning brought about by this change in language.[35]

[59] The Court's jurisdiction to divide or sell the land under the 2007 Act arises in respect of property owned by "co-owners".[36] A co-owner is defined as a tenant in common or a joint tenant.[37] The Court "may" make an order for sale, division or requiring one or more co-owners to purchase the share in the property of one or more other co-owners at a fair and reasonable price.[38] This wide discretion is exercised having regard to certain specified relevant considerations and "any other matters the court considers relevant".[39]

[60] An application can be made by a co-owner of the property, a mortgagee of any property of a co-owner if they have become entitled to exercise a power of sale, and a person with a charging order over any property of a co-owner.[40] The concept of "interested" in the land has not disappeared entirely however. The 2007 Act specifies that an application must be served on every person who is a co-owner, "a person who has an estate or interest in the property that may be affected by the granting of the

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32 *Tanner v Tanner* (1992) 2 NZ ConvC 191,376 (HC).
33 Property Law Act 2007, s 3.
34 Sections 365 and 366.
35 DW McMorland and others, above n 10, at [13.018], n 1.
36 Property Law Act 2007, s 339.
37 Section 4.
38 Section 339.
39 Section 342. The "rigid requirement of the past … has been replaced by a broad discretion, where the relevant considerations are set out in s 342": *Bayly v Hicks* [2012] NZCA 589, [2013] 2 NZLR 401 at [25] per Asher J for the Court.
40 Property Law Act 2007, s 341(1).

application", or "a person claiming to be a party to, or entitled to a benefit under, an instrument relating to the property".[41]

[61] A partition order cannot subdivide the land contrary to the Resource Management Act 1991.[42] In a situation where resource consent is required, the court can make an interim order and provide the parties with the opportunity to obtain the necessary consent.[43]

The parallel Administration Act developments

[62] As noted above, s 14(6B) was transferred from s 19 of the Administration Act 1952 into the Trustee Act. The 1952 provision was not a new provision. It was contained in all previous versions of the Administration Act, in materially similar terms, dating back to at least the Administration Act 1878.[44] Under the 1952 Act and its predecessors, the land of a deceased person vested in the executor or administrator of the estate who had a power to sell the land.[45] Complementing the power of sale, and the comparable provisions under the Partition Act 1870 and the Property Law Act 1952 (which came into force on the same day as the Administration Act 1952), was a specific power for the court to effect a partition if satisfied it would be advantageous to the parties "interested" in the land.[46]

[63] As we have discussed, the power to effect the partition was transferred to the Trustee Act 1956 a few years after the Administration Act 1952 was enacted. The Trustee Act 1956 applies to "the duties incidental to the office of [an administrator]" as well as other trusts.[47] The transfer of the power to effect a

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41 Section 341(2).

42 Property Law Act 2007, s 340.

43 *Bayly v Hicks*, above n 39, at [30]. See also *Del La Varis-Woodcock v Thomaes* [2017] NZHC 1041, (2017) 18 NZCPR 686 at [9].

44 Administration Act 1878, s 11. There was also 1874 legislation that provided for the sale of land of a deceased person who died intestate and allowed the court to order a partition where the court was "satisfied that a partition of the land would be advantageous to the parties interested therein": see s 14 of the Real Estate Descent Act 1874.

45 The extent of the power to sell the land was not the same, although in all cases there was a power to do so to pay duties, fees and administration debts. See, for example, the Administration Act 1878, ss 6 and 7; and the Administration Act 1952, ss 14, 16 and 23.

46 See, for example, the Administration Act 1878, ss 8 and 11 and the Administration Act 1952, s 19.

47 Trustee Act 1956, s 2(1): definitions of "trust" and "personal representative".

partition of the land of a deceased person, to s 14(6B) of the Trustee Act, put s 14(6B) alongside the other provisions that applied to land vested in trustees.[48]

[64] The Administration Act 1969 repealed the Administration Act 1952. The 1969 Act made the connection to the Trustee Act more explicit. Like the 1952 Act it provides that the estate of the deceased person vests in the administrator; the administrator has the power to sell (or lease or mortgage) the real estate of a deceased person to pay duties, fees and the debts of administration; and the administrator also has the power to sell the real estate on an intestacy.[49] However, it further provides that ss 14 to 18 of the Trustee Act 1956 apply to the power of sale or lease.[50]

[65] It can be seen that, under the Property Law Acts, and their predecessors (the Partition Acts), the power of sale was granted as an alternative to a partition. In contrast, under the Administration Act 1952 (and its predecessors), an estate vests in the executor or administrator who already has the power to sell the land and the court has the power to order a partition. Under either route (the Property Law Act or the Administration Act/Trustee Act) the court's jurisdiction to order a partition was dependent on applicants being parties "interested" in the land.

[66] The complementary jurisdictions for a partition indicate that "interested" has the same meaning in each jurisdiction. It follows that an "interest" in the land is a legal or equitable interest in the land. A partition or sale of the land can be sought by a co-owner of the land and any person entitled to a conveyance of a legal interest in the land, and includes a person with an interest in the land by assignment and a mortgagee exercising a power of sale.

The interest held by a beneficiary of a residual estate

[67] The nature of a beneficiary's interest in a residuary estate was discussed by the Privy Council in *Commissioner of Stamp Duties (Queensland) v Livingston*.[51] The case concerned a widow's interest in her late husband's estate.

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48 Like the Administration Act, under the Trustee Act trustees have a power to sell land vested in the them (s 52).

49 Administration Act 1969, ss 24–27.

50 Section 28.

51 *Commissioner of Stamp Duties (Queensland) v Livingston*, above n 8.

Under the husband's will, the widow received a one-third share of the husband's residuary estate. The widow survived her husband by less than two years and at the time of her death administration had not been completed and the residue of the estate had not been ascertained. The issue before the Court was whether the widow's interest in the residue was subject to duty. That depended on whether the widow had a "beneficial interest in property" under the charging statute.

[68] The Privy Council explained the nature of an interest of a residuary legatee in an unadministered estate as follows:[52]

> The nature of that interest has been conclusively defined by decisions of long-established authority, and its definition no doubt depends upon the peculiar status which the law accorded to an executor for the purposes of carrying out his duties of administration. There were special rules which long prevailed about the devolution of freehold land and its liability for the debts of a deceased, but subject to the working of these rules whatever property came to the executor virtute officii came to him in full ownership, without distinction between legal and equitable interests. The whole property was his. He held it for the purpose of carrying out the functions and duties of administration, not for his own benefit; and those duties would be enforced upon him by the Court of Chancery, if application had to be made for that purpose by a creditor or beneficiary … and in some aspects he was treated by the court as a trustee.
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> … Essentially, they are trusts to preserve the assets, to deal properly with them, and to apply them in [the] due course of administration for the benefit of those interested according to that course … What equity did not do was to recognise or create for residuary legatees a beneficial interest in the assets in the executor's hands during the course of the administration.

[69] The Privy Council went on to explain that if the residuary legatees did have a beneficial interest in the assets, this would conflict with the basic concept of equity that there had to be specific subjects identifiable as the trust fund.[53] An unadministered estate could not satisfy this requirement. The result was that, at the date of the widow's death, there was no trust fund consisting of her husband's residuary estate in which she could be said to have any beneficial interest.[54] Rather, the widow had a chose in

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52 At 707 per Viscount Radcliffe for the Board. We note that these comments are consistent with the Administration Act in its various forms providing for the property of an estate to vest in the administrator and for the administrator to have the power to sell the property to meet the estate's debts.

53 At 708.

54 At 708.

action capable of being invoked for any purpose connected with the proper administration of the estate.[55]

[70] The Privy Council acknowledged that there seemed to have been some reluctance in some authorities to follow this long-established position. This reluctance seemed to have arisen from a feeling that the law should do justice to the "interest" that a residuary legatee possesses in the testator's estate.[56] In this context the Privy Council said that "interest" has a general or popular meaning as well as a more precise meaning. The precise meaning was the correct one in the statute at issue. The Privy Council explained that the residuary legatee's "interest" in the general sense was protected by the Court's power to control the executor in the use of their rights over the assets that come to them in that capacity.[57]

[71] *Livingston* was an appeal from the High Court of Australia. Its effect was later considered by that Court in *Official Receiver in Bankruptcy v Schultz*.[58] The High Court considered that *Livingston*, although concerned with a residuary estate, applied with equal force to a specific bequest or device.[59] It held that neither the legal nor equitable interest vested in a beneficiary at the time of a testator's death. This was because, prior to the administration of the deceased's estate, there was no specific property capable of constituting the subject property of any trust in favour of the beneficiary. It could not be said what part or parts of the testator's property would need to be realised for the purposes of administration. A beneficiary does not have a proprietary interest in each of the assets which are the subject of the devise or bequest such that he or she can say "this is mine". The Court said:[60]

> The right which any beneficiary has in an unadministered estate springs from the duty of the executor to administer the estate, to preserve the assets and to deal with them in the proper manner. Each beneficiary has an interest in seeing that the whole of the assets are treated in accordance with the executor's duties. In that sense, the beneficiaries as a class may be said to have an interest in the entire estate. But it does not follow that each piece of property which goes to make up the estate is held on a particular trust for the beneficiary named as its intended recipient upon completion of administration.

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55 At 717.
56 At 709.
57 At 711–717.
58 *Official Receiver in Bankruptcy v Schultz*, above n 8.
59 At 312.
60 At 313–314.

> Whether or not the estate is held on a trust for the beneficiaries as a class in the usual sense in which the word "trust" is used, so as to confer a specific proprietary interest, as distinct from a general, non-specific interest, upon all beneficiaries, is not something which arises for consideration in this case.
>
> (Citation omitted.)

[72] In *Schultz* this meant that the property bequeathed to an undischarged bankrupt vested in the Official Receiver in Bankruptcy. The undischarged bankrupt was not the legal or equitable owner of the property that was the subject of the bequest. Rather she had a chose in action created by the bequest and an expectation that the assets would pass to her on completion of the administration, subject to their being realised to meet the estate's debts and the costs of administration. The Court held that the chose in action passed to the Official Assignee by operation of law. That transmission encompassed the expected fruits of that chose in action.[61]

[73] In addition to *Livingston* and *Schultz*, counsel referred us to *Gartside v Inland Revenue Commissioners*.[62] The House of Lords discussed the different meanings the word "interest" could have depending on its context. The context in that case was whether estate duty applied to the discretionary beneficiaries of a trust fund. The statute required "an interest" and "an interest in possession".

[74] In this context, Lord Reid said:[63]

> So the first and main question in this appeal is what is the meaning of the word "interest" in this section. … The word "interest," as an ordinary word of the English language, is capable of having many meanings, and it is equally clear that in these provisions its meaning cannot be limited by any technicality of English law. …
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> But that does not mean that everything which the man in the street might call an interest is covered by the word "interest" in these sections. A man might say that a son and heir has an interest in his father's property to which he might reasonably expect to succeed. But one can discard that meaning: the son not only has no right in or over his father's property but he has no right to prevent his father from dissipating it. …

[75] Lord Wilberforce, agreeing with but writing separately from Lord Reid, said:[64]

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61 At 314.
62 *Gartside v Inland Revenue Commissioners* [1968] AC 553 (HL).
63 At 602.
64 At 617–618 (footnote omitted).

> It can be accepted that "interest" is capable of a very wide and general meaning. But the wide spectrum that it covers makes it all the more necessary, if precise conclusions are to be founded upon its use, to place it in a setting: Viscount Radcliffe, delivering the Board's judgment in *Commissioner of Stamp Duties (Queensland) v Livingston* shows how this word has to do duty in several quite different legal contexts to express rights of very different characters and that to transfer a meaning from one context to another may breed confusion.
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> No doubt in a certain sense a beneficiary under a discretionary trust has an "interest": the nature of it may, sufficiently for the purpose, be spelt out by saying that he has a right to be considered as a potential recipient of benefit by the trustees and a right to have his interest protected by a court of equity. Certainly that is so, and when it is said that he has a right to have the trustees exercise their discretion "fairly" or "reasonably" or "properly" that indicates clearly enough that some objective consideration (not stated explicitly in declaring the discretionary trust, but latent in it) must be applied by the trustees and that the right is more than a mere spes. But that does not mean that he has an interest which is capable of being taxed by reference to its extent in the trust fund's income: it may be a right, with some degree of concreteness or solidity, one which attracts the protection of a court of equity, yet it may still lack the necessary quality of definable extent which must exist before it can be taxed. …

[76] The House of Lords held that a person's right to require the trustees to consider whether from time to time to apply part of the income from a trust fund for his benefit was not an interest in the whole fund or any part of it under the statute.

Our assessment

[77] In our view *Livingston*, *Schultz* and *Gartside* support Rosalie and Helen only insofar as they explain that the meaning of "interest" depends on the context. The present context is s 14(6B) of the Trustee Act. In that context, s 14(6B) does not enable a partition of land on the application of residuary beneficiaries under a will. To have the necessary "interest" in land that forms part of the estate, the beneficiaries must have a right to call for the conveyance of the land under the terms of the will (subject to the trustee's power to sell the land for the payment of duties, fees and administration debts).

[78] Do Rosalie and Helen have such an interest? Their interest arises under the concluding words of cl 6 of the will. Those words refer to a trust for the surviving children "as to the corpus of the said trust fund or the balance thereof as the case may be and/or the investments for the time being representing the same". That is, what is

held on trust for them is what is left of the corpus (that is, the capital) of "the said trust fund" and any investments made from the trust fund.

[79] Here, with the consent of Milan's children, the Trustee postponed the sale of the property and, rather than purchasing another property in which Zorka would have a life interest, Zorka continued to live in the property until her death. This raises the question as to whether this meant that the unsold property formed part of the residue that was gifted to the children. There is some support for this in the definition of the "trust fund" (at the beginning of cl 6). That says the trust fund is "the investments for the time being representing my estate and such portion of my estate as shall for the time being be unconverted".

[80] Accordingly, at any given time, the Trust fund can potentially comprise capital from the conversion of the sale of Milan's real property, investments and real property that has not yet been converted. In our view, however, on a proper construction of the will, ultimately the Trustees are required to sell Milan's real property. Clause 4 gives the property to his Trustees "to sell and convert into money [his] real property". That is subject to a power in cl 7 to "postpone the sale … and conversion of [his] real property … for as long as [his] Trustees in their uncontrolled discretion think fit". The requirement to sell the property remained postponed at the time of Zorka's death. The Trustees could continue to postpone the sale but at some point they must sell it pursuant to cl 4. Once sold it forms the capital which is to be paid to the children once they have reached 21 years old.

[81] On this construction of the will, and as *Livingston* and *Schultz* make clear, Rosalie and Helen do not have an equitable interest in the land. The position is different from *Tanner v New Zealand Guardian Trust*, where the testator's farm was gifted in specie to the grandsons, subject to the son's life interest.[65] Rosalie and Helen's interest is in the proper administration of the estate. The proper administration requires the land to be sold and the net proceeds equally divided between Rosalie, Helen, Norma and Maurice.

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[65] Discussed above at [55]–[57].

[82] It was open to them to agree that the sale of the land would involve, in part, a partition and the purchase of the partitioned land by Rosalie and Helen. But Norma and Maurice were also entitled to insist that any such purchase should not be at their financial detriment or involve unnecessary delay in the realisation of their share of the estate.

[83] We therefore agree with the High Court Judge that the will did not gift the land in specie to the beneficiaries in this case. Milan's children were entitled to the net proceeds of the sale of the land after Zorka's death or remarriage. We also agree with the Judge that this means that Rosalie and Helen are not "parties interested" in the land as required by s 14(6B) of the Trustee Act.

[84] Had we found otherwise, we would have found that a partition would not have been "advantageous" to those interested in the land. We accept the submissions for Norma and Maurice that the approach Rosalie and Helen proposed to determine market value was not appropriate. Norma and Maurice have provided evidence of the market value of Lots 1, 2 and part Lot 4. The appropriate response to this evidence was for Mr Sprague to provide his expert view of the value of those lots. Had that occurred the parties may have been able to reach an agreement.

[85] We acknowledge the result is unfortunate for Rosalie in particular. She has a lifelong connection with the land and wishes to continue it. The dispute and the pursuit of these proceedings has gone on so long that any further significant delay is unfair to Norma and Maurice unless they are willing to bear it. A way forward may be for NZGT to offer the land for sale under alternative proposals: one for the sale of all the land; and the other for the sale of the land in two parts: (1) Lots 1, 2 and part Lot 4; and (2) the balance of the land. The second option would be dependent on resource consent (unless obtained prior to the sale). Rosalie and Helen could bid for Lots 1, 2 and part Lot 4 in that tender. NZGT would then be able to accept whichever option yielded the highest return for Milan's four children. That is a matter for NZGT.

[86] Rosalie and Helen sought an adjustment of the High Court's costs order made against them if they were successful on this appeal. As they have not been successful, this issue falls away.

Result

[87] The appeal is dismissed.

[88] The appellants must pay the second and third respondents' costs for a standard appeal on a band A basis and usual disbursements.

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