IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 12/2020
[2020] NZSC 63

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

Court:	William Young, O'Regan and Williams JJ
Counsel:	J P Kahukiwa for Applicant S J McCarthy for Second Respondent S Telford for Third Respondent
Judgment:	8 July 2020

JUDGMENT OF THE COURT

A The application for an extension of time is dismissed.

B The applicant must pay costs of $1,500 to each of the second and third respondents.

REASONS

Introduction

[1] The applicant applies for leave to appeal and for an extension of time in which to do so. The proceeding arises out of a dispute between siblings over the handling of their late father's estate.

[2] The applicant, Rosalie Yozin, is one of four siblings each entitled to a 25 per cent share of the residue of the estate. The second and third respondents, Maurice Yozin and Norma Yozin-Smith, are two of the other three siblings. The first respondent, New Zealand Guardian Trust (Guardian Trust), is the executor of the estate and abides the decision of the Court. The remaining sibling, Helen Menzies, was a plaintiff and appellant along with Rosalie in the Courts below but is not a party to this application.

Facts

[3] Helen, Norma, Rosalie and Maurice are (in order of birth) the children of Milan and Zorka Yozin. Milan was born in Yugoslavia in 1910 and emigrated to New Zealand in 1926. He married Zorka in 1945, and they had the four children between 1946 and 1953.

[4] In 1937 Milan bought a four-hectare block of land in what is now Swanson, Auckland (for ease of reference, we will refer to the whole four-hectare block as "the land"). Milan initially planted fruit trees on the land, and later with Zorka, the couple operated a market garden, a vineyard and a winemaking business. The children all grew up there.

[5] Milan made his will in 1954. By cl 3, he bequeathed £1,000 and household furniture and effects to Zorka. By cl 4, the remainder of Milan's real and personal property was, subject to the remaining provisions of the will, to be vested in the trustees "to sell and convert into money". Clause 5 directed the trustees to pay Milan's debts, funeral costs, estate duties and other expenses, and then to "stand possessed of the proceeds" on trust to invest in authorised trustee investments. Clause 6 directed the trustees to:

(a) pay the annual net income from those investments to Zorka, until her death or remarriage;

(b) at their discretion, apply such of the capital as may be necessary to maintain and support Zorka and the children;

(c) if Zorka so requested in writing, "purchase from out of" the trust fund a home suitable for her requirements to occupy rent-free; and

(d) on Zorka's death or remarriage, divide the remainder of the estate equally between the surviving children when they reached 21 years of age.

[6] Clause 7 gave the trustees the discretion to postpone the sale of any of the trust property, to lease or farm the land, to apply any income or raise capital for the maintenance or education of a minor with actual, presumptive or contingent entitlement, and to delegate management of the trust property to Zorka or any other person.

[7] Milan died in 1975, aged 65. Zorka was then 51. She stayed in the family home on the land with Rosalie, Maurice and Norma. Helen, the oldest, was by then married with two children and living in the United Kingdom. Maurice took over the management of the land and business.

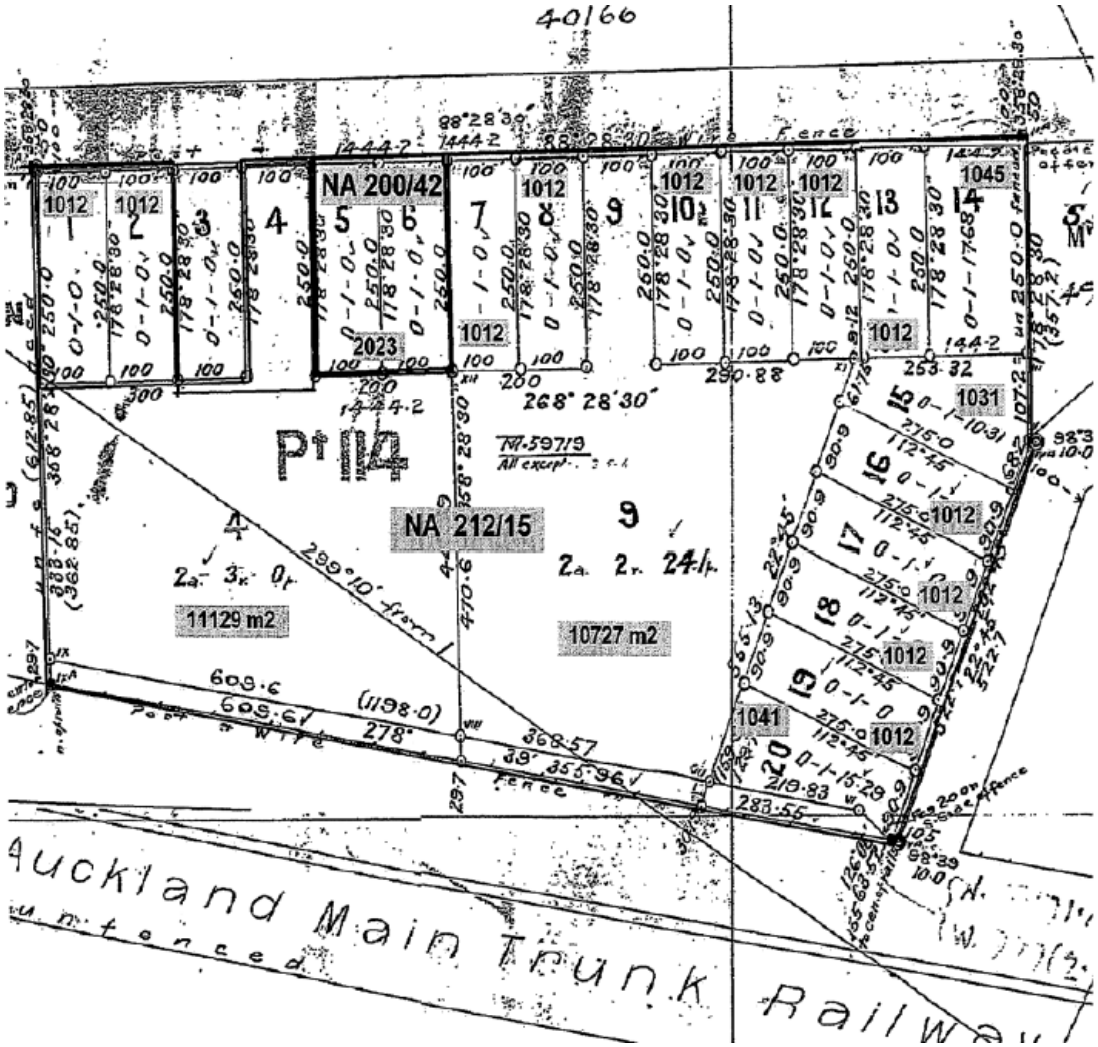
[8] Zorka did not remarry and remained in the family home until her death in 2014. By this time, Maurice and Norma had both married and left home. Rosalie did not leave. In 1990, Rosalie ceased full-time employment and took over the management of the land. She also cared for Zorka for several years before her death.

[9] Since Zorka's death, Rosalie has continued to live in the family home. She does not pay rent but pays the rates and other expenses. She is now 69. Maurice lives in Auckland and is 66. Norma lives in the United Kingdom and is nearly 72. Helen now also lives in Auckland and is around 73.

[10] The dispute is over the land. It comprises 20 lots, all but three of them traditional quarter-acre sections. Lots 4 and 9 are somewhat more than a hectare each. Lots 5 and 6 appear to have been amalgamated into a single half acre title.

[11] The family home where Rosalie lives is on Lot 2. Lot 1 is a garden adjoining the home. The buildings associated with the winery business are on the panhandle of the one-hectare Lot 4 ("Part 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 strip of Lot 5. The following plan shows the configuration of the land:



[12] In 1975, after Milan died, Rosalie and Maurice bought Lot 3 and the purchase price was applied to meet the estate's death duties. All other lots are still owned by the estate.

High Court proceedings

[13] After Zorka's death, differences arose as to whether Rosalie and Helen could acquire Lots 1 and 2 and Part Lot 4, or whether all the land should be sold, and the proceeds divided equally. Rosalie and Helen sought High Court orders that:[1]

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1 *Yozin v New Zealand Guardian Trust Co Ltd* [2018] NZHC 1390 (Peters J) at [26].

(a) Lots 1 and 2 be transferred to Rosalie in one title;

(b) Part Lot 4 be transferred to Rosalie and Helen; and

(c) Rosalie and Helen's shares in the estate be modified to account for the value of the land they receive, calculated based on the per square metre sale price for the rest of the land and less an allowance for the heritage designation and possible contamination of the building on Lot 4.

[14] They initially pleaded three causes of action.[2] But by the time the matter came before the Court of Appeal, the case had narrowed to the single issue of whether Rosalie and Helen were entitled to an order for partition of the lots in which they claimed an interest.

[15] Section 14(6B) of the Trustee Act 1956 gives the court a discretion to order partition of land of a deceased person if satisfied that it "would be advantageous to the parties interested therein". In the High Court, Peters J held that the sisters were not "interested" in the land in the required sense because they were not entitled to require its conveyance to them under Milan's will.[3]

[16] The Judge considered that, in any event, a partition would not be advantageous to the beneficiaries in terms of s 14(6B).[4] The only issue in that assessment was whether a partition would achieve the highest price for the land, but this had not been established.[5] Finally, the Judge found that the proposed partition would have been unfair to the other beneficiaries.[6] All valuers agreed that Lots 1 and 2 and part Lot 4 would attract a substantially higher price per square metre than the rest of the land.[7]

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2 A claim under s 3(1) of the Law Reform (Testamentary Promises) Act 1949, rectification of the will under s 31 of the Wills Act 2007 and an order for partition of the land pursuant to s 14(6B) of the Trustees Act 1956.

3 At [65].

4 At [67]–[70].

5 At [69].

6 At [72].

7 At [75].

Court of Appeal judgment

[17] On appeal, the principal issue was the meaning of "interested" in s 14(6B) of the Trustee Act. A secondary issue was whether a partition would be "advantageous".[8] The Court of Appeal undertook a careful examination of the history of the partition remedy and concluded it could be granted only where the applicant has a legal or equitable interest in the land.[9] This meant s 14(6B) did not apply to residuary beneficiaries under a will because they generally had no right to call for the conveyance to them of the land under the terms of the will.[10] In this case cl 6 of the will provided that Rosalie and Helen were residuary beneficiaries. Although the "trust fund" was defined to include "such portion of my estate as shall for the time being be unconverted", the Court considered that ultimately the trustees were required to sell the land, even if they had, in their discretion, delayed doing so while Zorka was alive.[11] Rosalie and Helen only had an interest in the proper administration of the estate in accordance with the testamentary instruction that the land be sold and the net proceeds divided equally between the siblings.[12]

[18] Finally, the Court added that like the High Court it would have, in any event, found that a partition would not have been "advantageous".[13]

Events leading to the present application

[19] The Court of Appeal issued its judgment on 4 June 2019. Time to apply for leave to this Court expired on 2 July 2019.[14] This application is therefore almost eight months out of time.

[20] In her affidavit in support of her application for the required extension of time, Rosalie deposed that she relied on "previous legal representation and advice, together with 'advice' (or at least the demeanour) of [Guardian Trust] as trustee". She took this

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8 *Yozin v New Zealand Guardian Trust Co Ltd* [2019] NZCA 202, (2019) 20 NZCPR 426 (Clifford, Mallon and Whata JJ) at [4].
9 At [65]–[66].
10 At [77].
11 At [80].
12 At [81].
13 At [84].
14 Supreme Court Rules 2004, r 11.

to mean there could be a negotiated resolution. She therefore initially decided not to pursue an appeal.

[21] Guardian Trust's "demeanour" appears to refer to its failure to reject a modified proposal Rosalie put to a manager by email following the Court of Appeal's decision. In fact, it does not appear that Guardian Trust responded substantively to the proposal at all. Subsequently valuations were obtained, and Rosalie made firm offers to purchase Lots 1 and 2, but Guardian Trust did not accept them due to opposition from some of the other siblings. Guardian Trust then proposed to proceed with a public tendering process. In about November 2019 Rosalie instructed new counsel. She subsequently applied for orders that a caveat previously lodged by her and Helen not lapse and filed the current application out of time.

Applicant's submissions

[22] Rosalie advances three arguments on the leave application. First, Rosalie submits that her application raises "the right to home", which she says is a matter of general and public importance in accordance with s 74(2)(a) of the Senior Courts Act 2016. Counsel cites sch 1 cl 1(b)(iii) of the Protection of Personal Property Rights Act 1988, s 72E(2)(a) of the Public Works Act 1981 and Magna Carta to support the general importance of this claimed right.

[23] Second, Rosalie submits that there will be a miscarriage of justice if leave is not granted because the Court of Appeal misconstrued Milan's will. It is submitted that the Court erred in holding that the will *required* a sale of the land; rather, it created a residuary trust over the land with a mere power to sell. This, she, submitted is supported by the following:

(a) The words in the will "to sell" are qualified by the words "subject as hereinafter provided", and the definition of "trust fund" contemplates that there will be "unconverted" estate. There is no duty to sell.

(b) On Rosalie and Helen's evidence, Milan made "general but persistent statements" about leaving the land for his family, which Maurice and Norma did not contradict.

(c) The fact that Milan's family continued to enjoy the land for some decades after his death is consistent with the suggestion that a trust over the land itself was created with a subordinate power of sale.

(d) Zorka wrote a note in 2012 stating that Milan "always said that when he died he would leave equal shares of [sic] his property orchard in Swanson to his children whether they were daughters or sons".

[24] Third, counsel argues, the above factors mean the Court erred in relying on cases in which the administration of the estates was incomplete.[15] Since Milan's will only gave the trustees a power rather than a duty to sell, administration of the estate was concluded and conveyance of the land to the residuary beneficiaries should properly follow. This argument was not made in the Courts below. Counsel submits this is because previous counsel had mischaracterised the estate as being unadministered in order to advance a case for testamentary promise and to avoid being time-barred.

[25] Finally, on the application for extension of time, counsel submits that although the delay is significant, the "merits of her appeal are strong".[16] Nor, it is argued, does there appear to be any prejudice to Norma or Maurice save for a delay on a potential sale.

[26] Rosalie filed further submissions in reply to the respondents' submissions and two affidavits in reply to those of Maurice and Norma. It is unnecessary for us to address this material further.

[27] As noted, Guardian Trust abides the Court's decision but for completeness we record its position that it has not yet completed administration of the estate as there remain a number of matters to be concluded.

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

16 Citing *Almond v Read* [2017] NZSC 80, [2017] 1 NZLR 801.

Analysis

Extension of time

[28] It is necessary for Rosalie to demonstrate that the interests of justice favour granting an extension of time to apply for leave.[17] Relevant considerations are the length of the delay and the reasons for it, any prejudice to interested parties, the significance of the issues raised and, to a more limited extent, the merits of the case.[18]

[29] The delay is considerable in this case. The reasons Rosalie advanced do not assist her in this application.[19] There is nothing in the evidence to indicate Guardian Trust misled Rosalie into believing it would accept an offer for Lots 1 and 2. The most that can be said is that when Rosalie emailed Guardian Trust proposing to purchase Lots 1 and 2 without going through an ordinary sale process, Guardian Trust did not reject the suggestion outright. It merely responded by thanking Rosalie for "the information". This somewhat cryptic comment was no doubt a reply to Rosalie's further advice in the email that she would not appeal and had paid the High Court costs award. We discern no encouragement to Rosalie from Guardian Trust in this exchange.

[30] There is no proper basis upon which an extension of time could be granted.

Merits of the application for leave

[31] Even if an extension were to be granted, we see no merit in the application for leave to appeal. We do not consider that the appeal raises a matter of general or public importance. While the "right to home" is a novel issue of law, it is not a matter squarely raised in this case. There is no question that Rosalie is entitled to her equal share of the residual estate. Rosalie can use her entitlement to bid for Lot 2. It does not follow from the judgment below that Rosalie will in fact lose her home. On the other hand, in the event that she is unsuccessful in acquiring Lot 2, it will be because she is outbid and that is to her advantage in cash entitlement terms in any case.

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17 Senior Courts Act 2016, s 74(4); and *Thom v Burton* [2007] NZSC 107, (2007) 18 PRNZ 766 at [2].

18 *Almond*, above n 16, at [38] and [39].

19 See above at [20]–[21].

[32] Further, we are not satisfied that a substantial miscarriage of justice may occur unless the appeal is heard. The issue is whether the Court of Appeal's interpretation of Milan's will is so plainly incorrect that it meets the heightened standard for miscarriage in civil appeals.[20] We are not at all satisfied that the Court of Appeal's interpretation of cls 4 and 6 of the will was in error and certainly not to such an extent that it would be repugnant to justice for it to go uncorrected.

[33] Neither of the applicable grounds for the grant of leave to appeal is made out.

Result

[34] The application for an extension of time is dismissed.

[35] The applicant must pay costs of $1,500 to each of the second and third respondents.

Solicitors:
Corban Revell, Auckland for Applicant
Patrick M Molloy, Auckland for Second Respondent
Morgan Coakle, Auckland for Third Respondent

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[20] *Junior Farms Ltd v Hampton Securities Ltd (in liq)* [2006] NZSC 60, (2006) 18 PRNZ 369 at [5]; and *Shell (Petroleum Mining) Company Ltd v Todd Petroleum Mining Company Ltd* [2008] NZSC26, (2008) 18 PRNZ 855 at [4].