IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

No. A.132/82

28/9

No Special Consideration

Appeal reported

604

BETWEEN G MAGSON
Plaintiff

A N D M MAGSON
Defendant

A N D

No. A.221/82

IN THE MATTER of the Trustee Act 1956

A N D

IN THE MATTER of the estate of H MAGSON late of Welburn, Farmer, deceased

BETWEEN THE NEW ZEALAND INSURANCE COMPANY LIMITED
Plaintiff

A N D M MAGSON
First Defendant

A N D G MAGSON
Second Defendant

Hearing: 14 September 1983

Counsel:

Judgment: 20-9-83

JUDGMENT OF HOLLAND, J.

There is before the Court a writ of summons brought by G Magson, son of the deceased, seeking an order removing his mother, M Magson, as trustee of his father's estate. There is a notice of motion by Mrs Magson for

an order appointing a new trustee to act in her place, with the New Zealand Insurance Company Limited as trustee of the estate. There is an originating summons brought by the New Zealand Insurance Company Limited as one of the trustees seeking directions under the provisions of s.66 of the Trustee Act 1956. There had earlier been before the Court a notice of motion for leave to bring a claim under the Family Protection Act 1955 by the widow out of time and a notice of motion for leave to bring proceedings under the Matrimonial Property Act out of time. Those applications were heard by Casey J. on 5 November 1982. Leave was refused both applications on 9 December 1982. The widow appealed to the Court of Appeal but the Court dismissed the appeal in each instance.

On 15 April 1983 Hardie Boys J. made an order in the proceedings brought by the New Zealand Insurance Company Limited by way of originating summons that a fixture be granted on a date as soon as practicable after the Court of Appeal had given judgment in the two matters referred to above. The Judge also directed that the writ of summons brought by the son was to be heard together with the originating summons.

The deceased, H Magson, died on 1974 leaving him surviving his widow and six children, five of whom were daughters and one of whom was a son. Probate of the will was granted to the New Zealand Insurance Company Limited and Mrs Magson on 1969 and up until the date of hearing they have continued to act as trustees under the will. The balance sheet of the estate as at 30 June 1982 shows an excess of assets over liabilities of $286,108.96. Practically the sole asset in the estate at that stage was a farm property near Rakaia shown in the balance sheet at its 1980 Government valuation of $325,000 subject to a mortgage to the New Zealand Insurance Company Limited of

$43,000. The only other asset of substance was a debt owing by the son of $13,247.70 in respect of the total sale price of the stock and plant in the estate which had earlier been sold to him. In general the will of the testator provided that the widow should receive his personal effects and chattels other than those used principally in the farming business, a legacy of $2,000 and an annuity of $1,560 with a proviso that if the trustees should at any time consider that the annuity is insufficient for her adequate maintenance and support, bearing in mind the standard of living to which she was accustomed before his death and taking into account other benefits and income to which she may be entitled, the trustees were empowered to pay her such greater sum or sums as the trustees shall from time to time in their discretion think sufficient for her adequate maintenance. The widow was also given the right to occupy the homestead on the farm property free of charge until her death or remarriage or sale of the farm. The trustees were empowered to purchase a house or ownership flat and to permit the widow to reside therein free of charge during her life until remarriage with a power also in the event of any such house being sold either to purchase another or to invest the proceeds and pay the nett annual income to her during her life or remarriage. Subject to the foregoing, the residue of the estate was to be held as to one half for the testator's son and the other half for such of the daughters as shall survive and attain 25 years in equal shares as tenants in common with a provision for substitution of children in the event of death before obtaining a vested interest.

Clause 11 of the will reads as follows:

> "11. UPON my son G MAGSON attaining the age of twenty-five years I DIRECT my trustees to offer to him by way of sale the farming property I hold at the date of my death or any farming property they may have purchased in substitution therefor together with the stock and plant

> thereof at a price equal to the fair value thereof such value being determined in such manner as my trustees shall think fit and on such terms and conditions as my trustees shall consider fair AND I EMPOWER my trustees to leave such part of the purchase money as they see fit secured by mortgage of the farm and stock and plant or part thereof notwithstanding that the mortgage is not a security authorised by law for the investment of trust funds AND I DIRECT my trustees to allow my son one year in which to accept or refuse the offer and on the refusal or lapse of the offer to sell the farm and the stock and plant thereof."

The son, G Magson attained the age of 25 years on The trustees sold the stock and plant to him at or about that time and the amount of purchase price owing by him in this regard is $13,247.70. The two trustees were unable to agree in November 1981, and ever since, as to the terms on which the farm property should be offered to G in compliance with the obligations specified in Clause 11. The New Zealand Insurance Company Limited proposed to offer the property to G for $458,000 on terms that he pay by way of cash the sum of $163,250 with the balance of the purchase price including stock, $308,000, secured by way of second mortgage to the trustees for a term of seven years at an interest rate of 7½% per annum in the first two years, 9% for the third year and thereafter to be reviewed by the trustees. The New Zealand Insurance Company Limited proposed that it would be a condition of the offer that the purchaser satisfy the trustees that he be able to meet his commitments.

Mrs Magson agreed to the offer being made at $458,000 with a cash payment $163,250 but considered that the balance of $308,000 should be at 15% per annum for the first two years of the seven year term and thereafter to bear interest "at the current rates which shall be subject to annual reviews". She also wished to impose a condition that the purchaser satisfy the trustees that he is able to meet his commitments and that he

enter into a deed of covenant not to sell the farm property at less than its market value within ten years of the date of settlement and that in the event of a sale prior to the expiry of ten years, the difference between the sale price and $462,000 was to be shared as to 50% by the purchaser G and 50% by the other residuary beneficiaries.

Following the inability of the trustees to agree the widow then applied to the Court for leave out of time to claim under the Family Protection Act and under the Matrimonial Property Act. In the meantime the farm was let to at a rental of $15,000 per annum.

The widow very responsibly took the view that although she did not wish to retire as trustee, because of the conflict between herself and the co-trustee with a consequent conflict between herself and her son, she should resign as trustee, but she would only resign if she was satisfied that a new trustee was appointed in her place acceptable to her. In this regard she was supported by her five daughters. She had proposed that a Mr M.R. Barnett, a prominent farmer residing not far distant from the farm property, should be appointed a trustee. Mr Barnett was not in any way related to any member of the family and appeared to be eminently suited to be appointed as a co-trustee if a co-trustee is to be appointed.

At the commencement of the hearing counsel for the son submitted that the son wished his mother to be removed as trustee and that either the New Zealand Insurance Company Limited should remain as sole trustee or a new trustee could be appointed by the continuing trustee. Counsel for the New Zealand Insurance Company Limited submitted that that company felt competent to continue as trustee without a co-trustee but did not wish to take an active part in the dispute. I indicated that six of the seven

beneficiaries in the estate wished a co-trustee to be appointed and the testator had chosen to have two trustees. In the event of my finding that grounds existed for removing Mrs Magson it appeared almost inevitable that a new trustee would be appointed. In the event of no grounds being established to remove Mrs Magson there would be a stalemate and either that would continue or it may be necessary for the Court to remove one or other or both trustees and appoint others.

In the light of that intimation and after obtaining instructions, counsel for the son indicated that he did not wish to proceed with the writ seeking an order removing his mother as trustee and that the son would consent to the appointment of Mr Barnett. I am satisfied within the meaning of s.51 of the Trustee Act 1956 that it is expedient to appoint a new trustee in substitution for Mrs Magson and that the assistance of the Court is required. I was accordingly pleased that by consent I could make an order removing Mrs Magson as trustee and appointing in her place M Barnett of Dunsandel, Farmer, and an order was made accordingly. In consenting to such an order I accept that the widow was acting reasonably to enable the estate to be properly and adequately administered and was not making any admission that she had committed any breach of trust or that any grounds existed for the Court to remove her other than that a stalemate had been reached between her and her co-trustee. That order was made in Action No. A.132/82. I then proceeded to hear argument on the Originating Summons. I recognise the validity of the submission made by counsel for the son that I had appointed a new trustee and then was proceeding to deprive him of the right of exercising his discretion. I am satisfied that these proceedings have been delayed long enough and that it is the Court's duty to rule on the application brought by the New Zealand Insurance

Company Limited for directions notwithstanding that the views of the new trustee were not known. It may be helpful to both trustees and to the beneficiaries for the new trustee to separate his obligations from the unfortunate past, a matter of history with which he is not directly connected.

The originating summons seeks the directions of the Court in answer to the following questions:

"(a) whether the trustees should now offer to G Magson the farming property held by the testator Ha Magson at the date of his death; or whether they should offer that property to him at some other time, and if so at what time;

(b) whether the trustees should offer the farming property to G Magson on the following terms, or on some other terms and if so on what terms:

(i) Purchase price $458,000;

(ii) Purchase price to be satisfied as to $150,000 in cash, the balance of $308,000 to be secured by a second mortgage of the farming property in favour of the trustees, for a term of seven years at 7.5% per annum for the first two years and 9% for the third year, the rate to be reviewed at the end of three years, and for the remaining four years to be such as the trustees may determine;

(iii) The offer to be conditional on G Magson producing to the trustees such evidence as they may reasonably require of his ability to carry out his obligations under the contract for sale and purchase and the second mortgage;

and for such further relief as in the circumstances may be just."

I do not propose to deal with the questions in precisely the form in which they are set out in the originating summons. Since the pleadings were prepared the attitude of the parties has changed somewhat and the removal of Mrs Magson as trustee and the substitution of Mr Barnett changes the situation. I am, however, clearly of the view that the Court must give directions to the trustee as to what is to be done in respect of Clause 11 of the will. The direction is absolute and clearly the

trustees have been under an obligation to offer the land to the son from the time of his attaining the age of 25 years. The only matters requiring decision by the trustees are the price and the terms and conditions of the sale and what part, if any, of the purchase money should be left owing as secured by mortgage. Mr Erber submitted that three questions arose. One, what is the date of determination of the fair value in terms of paragraph 11; two, what is meant by the term fair value in the clause; and three, what are the terms and conditions which the trustees should consider fair under the clause. He acknowledged there was however a fourth and subsidiary question as to whether the trustees may reasonably impose a condition of the offer that they must be satisfied as to the son's ability to meet his obligations under the offer.

Had the trustees been able to agree, undoubtedly the date for assessment of the fair value would have been the date on which the son attained the age of 25 years or a reasonable time thereafter. The trustees obtained advice from two reputable valuers who valued the property at $462,000 as its "present fair sale value". They allowed $6,500 of this sum as being lessee's improvements, but the trustees considered on grounds which are not challenged that the total amount of this sum was not appropriate for lessee's improvements and an appropriate figure would be $4,000. Both trustees agreed on the price of $458,000. Counsel for the son submits that the fair value should be assessed at the date of the offer. He has, two days before the hearing, filed an affidavit from a valuer valuing the property as at 8 September 1983 at $421,000 allowing $7,750 for lessee's improvements. That valuation was made by a valuer who had been earlier engaged by Mr G Magson and who had produced a budget indicating that from the productivity of the land the only amount

available for mortgage interest servicing and taxation was $9,770. That budget was clearly related to the proposal to offer him the right to purchase the farm for $458,000. The delay in the making of the offer by the trustees cannot be blamed on the son. It may be that the values of farm properties have decreased since 1981 but the evidence does not satisfy me that such is the case. The local manager of the New Zealand Insurance Company Limited indicated that he preferred to rely on the advice the trustees had received from the two independent valuers. If there has been any decrease in value of the farm property I do not consider that the son is to be prejudiced by it. I am accordingly of the view that the fair value of the farm should be the value of the farm at or about the time the offer is made. The trustees should accordingly obtain a further valuation from the two valuers earlier retained by them. In the event of the valuers considering that there has been a decrease in value then subject to what I say later about the fair value, the trustees should rely on the valuation of these two valuers. If the value of the farm has increased since the earlier valuation I am of the view that the trustees should offer the farm to the son at the earlier valuation, namely $458,000. The trustees are in breach of their duty to the son, although no blame is to be attached to any individual trustee in not having made the offer to the son shortly after he attained the age of 25 years. I have not overlooked that the rental paid by the son is substantially less than the interest he would pay on the purchase price but I am satisfied that in order to comply with Clause 11 of the testator's will the fair value should be as at the date of the offer if that value is less than the value in November 1981. If the value of the farm has increased since that date the offer should be at the same figure as it would have been if the offer had been made then.

It is significant that the testator did not say fair market value but merely used the term fair value. However, the term is used in a clause in the will giving the son an option to purchase. He is not obliged to accept the offer and he has a year to make up his mind. Subject to the annuity and other provisions for the widow the son receives half the estate whereas each of his sisters receive only one tenth. It was clearly the intention of the testator that the son should have the right to buy but considering the clause as a whole and the expression "at a price equal to the fair value thereof" I am satisfied that the testator meant the price which the trustees considered was approximately the same as the actual market value. Counsel for the son submitted that the trustees in considering the fair value were obliged to consider the circumstances of the parties including in particular the circumstances of the son. I cannot conceive of any circumstance relating to the son that should have influenced the trustees in assessing the fair value. There may possibly be some such circumstances but I am quite clear that no such circumstance has been demonstrated in this case and the duty of the trustees was to do as they did and to ascertain from those qualified to advise "the present fair sale value".

The situation is, however, different when it comes to consider the obligation to determine the "terms and conditions as they shall consider fair".

Counsel have referred me to a number of cases where the words "fair value" and "fair" have been judicially interpreted. In most of those cases the words were used in contracts between strangers. The term must be interpreted in the context of this particular will. I have already indicated that when the testator used the expression "at a price equal to the fair value thereof" he meant the price approximately the same as the actual market value.

In regard to the phrase "on such terms and conditions as my trustees shall consider fair" it is not so easy to define in a simple manner the testator's intentions. By his will he provided certain provisions from income for his widow but provided that the capital, subject to the provisions for the widow, and the residue of the income, should go half to his son and the other half to his five daughters. The testator clearly wished the son to have the right to purchase the farm on his attaining 25 years of age. But apart from that clearly expressed desire, there is no expressed intention that the son should acquire the farm on favourable terms at the expense of the interest of his sisters and possibly his mother. I am satisfied that the testator intended the trustees to select terms and conditions which were fair having regard to the rights of the other beneficiaries as well as his desire to enable his son to purchase the farm. It was clearly contemplated by the testator that the son may not be able to pay the full purchase price in cash or from loans from third parties. Had the situation of the son been such that there would be no substantial difficulty in his paying commercial interest rates and obtaining mortgages to pay the full purchase price it would not have been unfair to have required the full purchase price to be paid in cash.

The son has a vested interest in half the farm subject to the income provisions for his mother, but it is obvious that he would be unable to borrow the full purchase price of the farm from an outside source and that was no doubt obvious to the testator. Even assuming that more than half the purchase price had to be left owing on mortgage there would be nothing unfair in requiring the son to pay commercial rates of interest on that mortgage if the facts showed that he could do so without unnecessary hardship. It was no doubt obvious to the trustees in

1981, and still is obvious that the son could not, from the income to be earned from the farm, pay a commercial interest rate on a second mortgage of $308,000 even although he would receive a refund or a rebate in respect of half of the interest over and above the amount of income received by the trustees and applied in respect of their duties to the widow.

The trustees were bound to give the son the right to purchase the farm. In the circumstances they were and are bound to balance the ability of the son to meet interest payments on any necessary mortgage in the light of the testator's expressed wish that he should buy the farm as against the obligation of the trustees to obtain a proper income for the remaining beneficiaries. These are in general the competing claims which the trustees are required to consider in determining what are fair terms and conditions. Obviously some compromise is required to be reached between the two claims, but it may still be that in order to achieve "fairness" the terms and conditions might have to be more onerous from the son's point of view than he regards or even the trustees regard as being viable commercial reality. Nevertheless the trustees are bound to make that offer to the son and he may decide to accept or reject.

The widow as a trustee had suggested a condition which prohibited him from selling the farm at a lesser value than the purchase price for a named period and being required to account to the other beneficiaries for any surplus over the purchase price in the event of a sale within ten years. I do not consider that to have been a fair term or condition in the circumstances within the meaning of the testator's direction. The direction shows a clear intention for the son to buy the farm and once he has done so he should be entitled to any losses or gains that follow therefrom and should not be in any way prevented

from selling the farm. This is a material matter because in imposing the terms and conditions that are fair the trustees must recognise that once the son has exercised the option he can sell the farm and it may well be that he would wish to do so, particularly if by doing so he could obtain some equity which would enable him to purchase another property.

I am satisfied that the proposal made by the New Zealand Insurance Company Limited in so far as terms and conditions were concerned was influenced almost solely by the estimated ability of the son to meet the payments under the mortgage and without sufficient regard to the rights of the other beneficiaries. The evidence discloses that mortgage finance would be available from the Rural Bank and that would probably be at about 9% per annum. Although I have no doubt that it was reasonable and fair to impose a term that $163,250 should be paid in cash and this was agreed by the widow, it is obvious that the son should be encouraged to obtain the maximum possible loan from the Rural Bank.

It is not without significance that the first mortgage at present on the farm to the New Zealand Insurance Company Limited is 17% per annum. Interest rates are at present coming down substantially and to that extent the son may benefit because it could not have been disputed that in November 1981 commercial rates for loans secured by first mortgage on farms from institutions or strangers other than the Rural Bank or banks and life insurance companies would have been between 16% and 18% per annum. This mortgage is a second mortgage. The budget produced in 1981 for the trustees indicated that $30,450 might be available for mortgage payments. If a loan of $200,000 could be obtained from the Rural Bank at 10% per annum there would be only $10,450 available to meet the interest commitment on the

balance of $271,000. That involves an interest rate of 3.8% per annum. If no more than $163,250 can be obtained from the Rural Bank and the interest is 9% per annum as suggested by Mr Tillman there would be left $16,000 to meet the interest on the balance of $308,000. That represents an interest rate of 5.2% per annum. I have omitted from these calculations the rebate to which the son may be entitled. The annuity provided for the widow is meagre indeed in an estate of this size and the trustees may well decide that it is necessary substantially to augment the specified figure. It is unlikely, however, that the widow will need or be entitled to the whole income.

The inadequacy of return to the residuary beneficiaries on the somewhat artificial arithmetic in the preceding paragraph is so great as to make an offer to the son with such a favourable interest rate grossly unfair. There is little evidence but it must be assumed that at present the estate could expect on a first mortgage investment to have a return of 14% per annum. I regard the first mortgage rate as being appropriate because although the son may not be able to borrow the total money from an outside source he has a vested share in a half and there is ample security for the advance that is being made. Nevertheless, it would be grossly unfair to the son and almost entirely negating the testator's wishes to require him to pay that rate.

The trustees have sought the direction of the Court and it is the Court's duty to give the direction. The son as purchaser is entitled to some certainty and there has been no criticism of the proposal that the term of the mortgage be for seven years. There is, however, no need to give a favourable interest rate for the early years of farming as was originally proposed by the New Zealand Insurance Company Limited because

the son has now been farming on his own account for at least two years. On the other hand, interest rates are fluctuating. In the circumstances it is fair that the balance of the purchase price left owing to the estate should be secured by way of second mortgage for a term of seven years on an initial rate of 11% per annum with a right to review the rate of interest at the expiration of each two year period during the seven year period but on the terms that the interest rate is to be reviewed having regard to the initial rate of interest and its relationship to the rate of interest obtained in respect of loans from other financial institutions on first mortgage on farms in Canterbury, at the respective times. Provision should be made that in the event of failure to agree the interest rate should be determined by arbitration. In all other respects the mortgage should be on the usual terms for a second mortgage and in particular with the provision that the total sum shall be repayable in the event of the property being sold.

It will follow from the foregoing and the reasons that I have expressed that it is not appropriate to impose any condition requiring the son to satisfy the trustees that he is able to meet his commitments. The trustees are bound to make the offer and it is up to the son to decide whether he accepts it.

The foregoing has been somewhat discursive and it does not directly answer the questions raised in the originating summons, although it covers all the issues that are raised. The direction of the Court to the trustees is that they should forthwith take steps to ascertain a fair market value of the property. If that market value is less than $462,000 the property should be offered to the son at $4,000 less than that fair market value. If the property is of the same value as it was in November 1982 or has increased in value the property should be offered to the

son at $458,000. The offer should contain a requirement that a minimum cash payment of $163,250 be paid and that the balance of the purchase prices should be secured by way of second mortgage over the farm property for a term of seven years at 11% per annum with a review of interest rates at the expiry of each two years of the term having regard to the initial rate of interest and its relationship to the rate of interest obtained in respect of loans from other financial institutions on first mortgage on farms in Canterbury, at the respective times with provision for arbitration in the event of the parties being unable to agree.

I have earlier referred to the number of Court proceedings. In the end neither of the offers proposed by each trustee has been held to be the appropriate one. It follows from that that proceedings were probably necessary and neither party is to be particularly blamed. It is unfortunate that the son felt it necessary to issue a writ seeking the Court's assistance to remove his mother as trustee but it may have been necessary for him to take this step finally to bring matters to a head. It is appropriate accordingly that each of the parties to the writ under Number A.132/82 and to the originating summons under Number A.221/82 should have their costs and disbursements on a solicitor and client basis out of the residue of the estate. If the parties desire it I will order a taxation but I am willing to consider a memorandum from counsel as to the appropriate costs.

A. D. Holland J.