IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA288/2024
[2025] NZCA 528

BETWEEN	LYNETTE JOCELYN GIBSON Appellant
AND	SIMON REDDING MAKGILL First Respondent
	ROBERT ERNEST WAIT, WENDY THERESE WAIT AND GAYLENE ANNE CHRISTIE WAIT Second Respondents

Hearing:	25 August 2025
Court:	Whata, Downs and Isac JJ
Counsel:	E Telle and S Lye for Appellant S Hui for First Respondent S Moore and N J M Devery for Second Respondents
Judgment:	9 October 2025 at 11:00 am

JUDGMENT OF THE COURT

A The applications to adduce further evidence are granted in part.

B The appeal is dismissed.

C The appellant must pay the second respondents costs for a standard appeal on a band A basis, together with usual disbursements.

REASONS OF THE COURT

(Given by Whata J)

[1] This is an appeal by Lynette Gibson against a decision of Campbell J in the High Court refusing leave to commence proceedings under the Family Protection Act 1955 (FPA).[1]

Background

[2] The background to this matter is helpfully set out by Campbell J as follows:

> [2] Lewis Wait was married to Nellie Wait. Mr and Mrs Wait had three children. It will be convenient if I refer to the children by their first names. They are Gaylene (who was 73 at the time of the hearing), the applicant Lynette (72) and Robert (68).
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> [3] Mr Wait died on 8 March 1976, aged 55, having lost a battle with cancer. The bulk of his estate consisted of a half-share in a farm in Cambridge. The other half-share in the farm was owned by Mrs Wait.
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> [4] Mr Wait had become ill with cancer while Robert was at university. Robert put his studies on hold to assist Mr Wait with running the farm. Robert then gave his studies up altogether to take over the running of the farm shortly before Mr Wait died.
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> [5] Mr Wait made a will dated 4 September 1975, under which he left Mrs Wait a life interest in his estate, with the estate to pass (on Mrs Wait's death) to Robert, subject to Robert paying to Gaylene and Lynette, in equal shares, a sum equal to one-sixth of the value of the estate as at the date of Mrs Wait's death. By a codicil dated 27 January 1976, Mr Wait changed the date for valuing the one-sixth share of the estate from the date of Mrs Wait's death to the date of Mr Wait's death.
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> [6] During his lifetime, Mr Wait settled the LH Wait Family Trust. The beneficiaries of the LH Wait Family Trust include Mr Wait's children and grandchildren.
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> [7] On 5 May 1986, about ten years after Mr Wait died, a Deed of Family Arrangement was signed by Mrs Wait, Robert, Gaylene and Lynette. The Deed was entered into to give effect to an arrangement under which Robert would start sharemilking on the farm. The Deed recorded the essential terms of Mr Wait's will. It provided that Mrs Wait would surrender her life interest in the farm's livestock, and that Robert would pay $1,309 to each of Gaylene and Lynette for their one-twelfth shares in the livestock.
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> [8] In 2016, Mrs Wait sold her half-share in the farm to the Wait Farm Trust (a trust that was settled by Robert and his wife Wendy for their benefit and for that of their children). Mrs Wait retained her life interest in the half-share that had been bequeathed to her by Mr Wait. The purchase price of Mrs Wait's half-share was $4,543,958.50 plus GST. The Wait Farm Trust was to satisfy this by signing an acknowledgement of debt of $400,000 and taking over Mrs Wait's half-share of all current and non-current liabilities (recorded

[1] *Gibson v Makgill* [2024] NZHC 781 [judgment under appeal].

> as about $605,000, though Robert said the actual amount was higher). Mrs Wait gifted the balance of the purchase price to the Wait Farm Trust.
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> [9] In 2021, the LH Wait Family Trust made a capital distribution of $520,000 to each of Gaylene and Lynette.
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> [10] In August 2022, Lynette applied for an extension of time to bring a claim under the FPA against Mr Wait's estate. At that time, Mrs Wait was still alive. Mrs Wait was 99 years old at the time of the hearing. She passed away not long afterwards.
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> [11] Lynette proposes to make a claim under the FPA against her father's estate for such provision as will see her receive an equal share (with Gaylene and Robert) of her father's estate.
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> [12] Lynette says she did not make this FPA claim earlier because her father promised her that on the passing of Mrs Wait there would be a re-adjustment so that all of the children would receive a roughly equal share of the combined estates. She says that until recently she reasonably expected that she would be a beneficiary of her mother's estate and that that estate would still own the other half of the farm. In 2021, she learnt that her mother had (in 2016) transferred her half-share in the farm to Robert. Lynette says it was only upon learning of that transfer that she realised that any bequest from, or FPA claim against, her mother's estate would not achieve the roughly equal sharing that she says she was promised.
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> [13] The respondent, Mr Makgill, is the sole executor of Mr Wait's estate. He was appointed executor only in 2003 and had no first-hand knowledge of the events surrounding the drafting of Mr Wait's will and codicil. Mr Makgill abided the decision of the Court. He made an affidavit to assist the Court.
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> [14] Robert and Wendy opposed Lynette's application. They made affidavits. Gaylene made an affidavit in support of Robert and Wendy's opposition, but she did not file a notice of opposition herself.

[3] The Judge rejected the application on the following grounds. First, he found that the 45-year delay was inexcusable. The Judge noted:[2]

> [30] Lynette was therefore content to wait and see whether Mrs Wait would level matters up on her death. Whether that happened depended on at least two things. The first was the size of Mrs Wait's estate. Lynette realised that she was at risk in this respect, as her case is that it was reasonable for her to expect that Mrs Wait would still own a half-interest in the farm at her death. The second was whether Mrs Wait's will gave effect to the alleged promise of a levelling up. This remains unknown. But, in any event, Lynette knew she was also at risk in that respect.
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> [31] Lynette has been content to take these two risks for 45 years. That was her choice. It does not excuse her delay in making an FPA claim. To the

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2 Footnote omitted.

> contrary, it means that she has been content, for 45 years, to proceed on the basis that, instead of challenging her father's will, she will rely on an alleged promise of levelling up, and take whatever action may be available to her if her mother, for whatever reason, did not meet that promise.

[4] The Judge identified two reasons for the delay. First, Lynette deposes to a promise by her father that he and her mother had agreed that on her mother's death she would divide her share of the farm so that the children would receive equal shares overall.[3] Second, Lynette deposes that she did not have knowledge of the second codicil to Mr Wait's will dated 27 January 1976 (Second Codicil) until 2014. The Judge noted that Lynette still did not make a claim following this discovery as she believed that Mrs Wait would have sufficient shares in the farm to "level up" the allocations to herself and Gaylene.[4] It was not until mid-2021 that Lynette says she learned Mrs Wait had transferred her share of the farm to Robert.[5]

[5] The Judge also found that Lynette's proposed FPA claim, while not completely without merit, appeared weak.[6] In reaching that conclusion the Judge acknowledged that the distribution under Mr Wait's will meant that Robert's payments to Gaylene and Lynette were likely to be much less as a result of the Second Codicil — only one-sixth of the value of Mr Wait's estate as assessed at 1976 (rather than its current value). The Judge also accepted that any distribution to Lynette and Gaylene was unequal, regardless of the date of valuation, being only a small fraction of the total estate.[7]

[6] But the Judge concluded that "it [was] far from clear that this inequality of treatment constituted breach of moral duty by Mr Wait towards Lynnette".[8] He noted a disparity of treatment is by itself insufficient to establish a breach of moral duty.[9]

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3 At [21].
4 At [24].
5 At [25].
6 At [41].
7 At [35].
8 At [36].
9 At [36], citing *Williams v Aucutt* [2000] 2 NZLR 479 (CA) at [48], [50] and [70].

[7] The Judge also found that granting the extension of time would have a prejudicial effect on Robert.[10] In particular, he found:

> [43] Robert has spent more than 45 years ordering his life on the basis of the bequest made to him in his father's will. He was only 21 when his father died. By then, he had already sacrificed his university studies to help his father run the farm. After his father's death, he ran the farm in partnership with Mrs Wait until she sold her half-interest to him in 2016. This meant he did not pursue an alternative occupation or profession. Throughout that time, and since, Robert has invested in the farm's maintenance and improvement. It is plain that he chose to do these things in reliance on the bequest that was made to him in his father's will.
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> [45] Robert would also be significantly prejudiced, were an extension granted, because of the evidential difficulties he would face in opposing Lynette's claim. More than 45 years have passed since Lynette should have made a claim. Memories have faded. Several potential witnesses (including some who would have been independent of the children) have died. Documentary evidence is no longer available.

Applications to adduce further evidence

[8] The appellant, Lynette, filed lengthy affidavit evidence in support of her appeal. It was met with additional evidence filed by the second respondents. Lynette now seeks leave to file still more evidence before us by way of applications dated 9 July 2024, 6 August 2024 and 20 August 2024. We considered these applications immediately prior to the hearing.

[9] By way of brief summary, leave was sought to file three briefs of evidence:

(a) The first proposed brief refers to the last will and testament of Mrs Wait and Lynette's beliefs about various surrounding matters.

(b) The second proposed brief of evidence refers to Robert's recent dealings with the farm and Lynette's beliefs about the significance of those dealings and Mrs Wait's estate, together with correspondence between lawyers about the estate and other matters.

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10 Judgment under appeal, above n 1, at [42].

(c) The third proposed brief of evidence refers to a photograph purporting to show that one of the sections of the farm is now for sale.

[10] To be admissible, evidence must be fresh, credible and cogent.[11]

[11] Dealing with the first proposed brief, Mrs Wait's will could have been obtained prior to the High Court hearing. An application for its production was mooted but not actioned in the High Court. Nevertheless, we accept the will forms part of the factual matrix underpinning Lynette's claim of breach of moral duty. It therefore has some cogency. We also note that Robert indicated he would abide the decision of the High Court on any application to produce the will. On that basis we were content to have Mrs Wait's will admitted into evidence. The balance of the evidence offered in the first brief is largely inadmissible opinion evidence and, on our reading, much of it is speculative. We declined to admit it.

[12] The second and third briefs of evidence, while technically fresh, are not sufficiently cogent to warrant admission. Robert's dealings with the farm in 2025 tell us nothing about the reasons for the delay or whether Mr Wait discharged his moral duty in 1976. Mr Telle, for Lynette, emphasised that it showed that there was never a commitment to intergenerational farming of the property. But the potential for on-sale after 47 years adds little, if anything, in terms of whether at the time of the testator's death there was such a commitment.

[13] Save in respect of the will, the applications to adduce further evidence were declined accordingly.

Grounds for appeal

[14] The grounds for appeal are, in summary:

(a) The Judge erred in finding that the appellant's delay was inexcusable.

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[11] *Erceg v Balenia Ltd* [2008] NZCA 535 at [15].

(b) The Judge erred in finding that the appellant was content to wait and see whether Mrs Wait would level matters up and while she was aware of the risks of doing so, she reasonably expected that Mrs Wait's estate would at least include a half-share of the farm and that there would be other funds available from her estate.

(c) The Judge erred in finding that if there was any breach of moral duty, it was by Mrs Wait, not Mr Wait.

(d) The Judge erred in concluding that Lynette's proposed claim appeared weak.

(e) The Judge erred in finding that Robert would be significantly prejudiced if there was a grant of an extension of time to make an FPA claim against Mr Wait's estate.

[15] Before we address each of the grounds in turn it is useful to set out the principles governing leave to commence FPA proceedings.

Applications for extensions of time under the FPA

[16] Claims under the FPA must generally be brought within 12 months from the date of the grant of administration of the deceased's estate.[12] The Court may extend that period, provided the application is made prior to final distribution of the estate.[13]

[17] It is common ground that relevant factors in determining whether an extension should be granted include the length of delay, the extent to which it is excusable, the strength of the claim of breach of moral duty, and the extent of any prejudicial effect on the beneficiaries who have ordered their lives in reliance on the will.[14]

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12 Family Protection Act 1955, s 9(2)(b).
13 Section 9(1).
14 *Re Magson* [1983] NZLR 592 (CA) at 598.

An excusable delay?

[18] Lynette became eligible to make a claim when her father died in March 1976. The application for an extension of time to commence proceedings was filed in August 2022, more than 45 years after the last date for filing without leave. To explain the delay in bringing her claim, Lynette attests to the fact that her father called a family meeting in September 1975 and explained that he was leaving the greater share of the farm to Robert to "give him a good start" and that, on Mrs Wait's death, she would divide her share in the farm so that the children would all receive equal shares. Lynette understood from this that Robert would be able to use the assets to obtain funding and would be able to secure the future of the farm until their mother passed away, following which there would be equal division of the estate.

[19] Lynette also says that she only learned about the Second Codicil in 2014 but decided not to pursue it further at that time because she was unwell and family relations were "at an all-time low". However, it was only when she discovered in 2021 that her mother had transferred all of her interests in the farm to Robert in 2016, that she realised her father's promise had proved false. Hence she sought leave to commence proceedings in August 2022.

[20] Robert says that his father asked him to "pledge an oath" to look after Mrs Wait and the farm and had mapped out a succession plan to ensure their mother's maintenance. He denies that their father called a family meeting in September 1975 or said that the shares in the farm would be levelled up by their mother. He also refers to the Second Codicil and the deed of family arrangement signed by Lynette in 1986 (the Family Deed). He points out that the Family Deed referred to his obligations under the Second Codicil, which he says provided that Lynette and Gaylene would each receive a one-twelfth share of the farm valued at the date of their father's death. Gaylene supports Robert's account. She does not recall a family meeting but does recall her mother telling her that their father had made the will so that Robert had a step up for the farm and that he had asked their mother to work it out for Lynette and Gaylene.

[21] Mr Telle submits that taking into account the fact Lynette had no knowledge that there was virtually nothing left for her in either Mr Wait's or Mrs Wait's estates until mid-2021, the delay, while long, was excusable. Mr Telle submits that these facts are very similar to the facts in *Re Antunovich (dec'd)*, which involved a disputed agreement to equalise the estate at the end of a life interest and a 20-year delay.[15] Significantly, in that case, he says, the Court held that the delay was excusable as the applicants were reluctant to do anything to upset the party that held the life interest and there had been no material change in circumstances.[16] Given this, Mr Telle submits that the time to bring proceedings under the FPA should start to run from mid-2021.

[22] Mr Telle also refers to Gaylene's evidence that while she did not recall that there was a family meeting, she remembered Mrs Wait telling her after Mr Wait had died that he had asked her to "balance the situation out later or with her [w]ill". Conversely, Mr Telle notes that it is odd Robert states he had no knowledge of this, given from mid-1975 onwards Robert lived with his mother.

[23] Mr Moore, for the second respondents, supports the High Court decision. He says Robert was left the lion's share of the farm so that he would stay and farm it, as he has done for nearly 47 years. He also says Lynnette was clearly aware of the risks, having sought legal advice in 2014. He also submits that the evidence shows Lynette knew about the Second Codicil from as early as 1986, given that she was a signatory to the Family Deed that confirms the details of the Second Codicil and the valuation date of the one-twelfth share of the farm. Finally, he says that the majority of the evidence does not support Lynette's claim that there was an agreement that Mrs Wait would level up the shares.

Assessment

[24] The High Court assessed the delay at over 45 years given that Lynette knew from the date of her father's death what she was going to receive under his will and there was always a risk that Mrs Wait would not level up the shares in the farm.[17] The

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15 *Re Antunovich (dec'd)* [1995] NZFLR 942 (HC).
16 At 949.
17 Judgment under appeal, above n 1, at [27].

Judge considered, in those circumstances, Lynette's supposed lack of knowledge of the Second Codicil until 2014 to be of little moment.[18]

[25] We agree with the Judge that Lynette must have appreciated that there was a risk Mrs Wait might not leave her share in the farm to her daughters. Put simply, whatever Mr Wait's promise, she must have appreciated that she was relying on her mother's largess and capacity to make the promised distribution. That is a very strong factor bearing on the reasonableness of the delay.

[26] But we think that the alleged lack of knowledge of the Second Codicil is a relevant factor. If Lynnette did not learn about the Second Codicil until August 2014, she could not have been aware of the potentially significant impact that would have on the value of her entitlement under Mr Wait's will. It appears the parties accept that this value was effectively locked in time by the Second Codicil. Late discovery of that fact is relevant to the assessment of whether there was a reasonable excuse for the delay.

[27] However, as Mr Moore submits, the Deed stated very clearly the basis upon which Mr Wait's share in the farm would be valued. Lynette responds by stating in evidence that she signed the Family Deed in haste and did not appreciate the significance of the clause. We cannot resolve whether Lynette is truthful about this without cross-examination. But she cannot claim to have been deceived by Robert or Mrs Wait, and they can rightly say that they were clear about the basis upon which her share in Mr Wait's farm would be valued. Therefore, while Lynette may have overlooked the significance of the Family Deed, Robert was entitled to proceed, and order his affairs, on the basis that she was given proper notice of the effect of the Second Codicil. Conversely, we consider Lynette's oversight to be unreasonable, and it cannot provide a proper basis for her delay in commencing proceedings.

[28] Aggravating matters in terms of the delay, Lynette did not commence proceedings in 2014 when it appears that she received legal advice about her entitlements. Lynette has refused to waive privilege in respect of this advice. It is therefore available to us to infer that the advice made clear the effect of the

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[18] At [28].

Second Codicil and that she needed to commence proceedings within one year.[19] We acknowledge that Lynette was concerned about upsetting her mother and that at about this time she had been diagnosed with ovarian cancer. Some additional delay was therefore justified, but a further eight years is a very lengthy period not to take any steps to commence proceedings.

[29] This brings us back to the key reasons advanced by Lynette for the delay. Mr Wait's promise, her desire not to upset her mother and her lack of awareness of the transfer of her mother's interests in the farm to Robert. While these are factors to be weighed in the mix, we agree with the High Court that it was nevertheless unreasonable for Lynette to do nothing to protect her position for a period of 35–45 years. Put simply, she was not ignorant of the key risk that her mother might not level up the distribution of the interests in the farm. The delay in bringing proceedings was simply too long.

[30] For completeness, while every case must be assessed on its own facts, given the emphasis placed by Mr Telle on *Re Antunovich*, we make some brief comments about it. In that case, the plaintiffs (the testator's children from his first marriage) waited 20 years to make their claim. The will left a life interest in the majority of the estate to the testator's second wife, Marija.[20] The application to commence proceedings was made seven months after her passing.[21] The plaintiffs stood to inherit 12 per cent of the residual estate as compared to the primary beneficiary, the testator's son from his second marriage, Johnnie, who was to receive about 39 per cent of the residual estate under the will.[22] Land was a key estate asset.

[31] The plaintiffs claimed that their father breached his moral duty to them, having promised each of his children that they would receive a block of land and that the remainder of the estate would be divided equally among them.[23] In assessing whether the delay in bringing the proceedings was excusable, the Judge identified evidence from a number of sources, including the following:

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19 See *Ithaca (Custodians) Ltd v Perry Corporation* [2004] 1 NZLR 731 (CA) at [153]–[154] per Gault P, Blanchard, Anderson and Glazebrook JJ.
20 *Re Antunovich (dec'd)*, above n 15, at 943.
21 At 947.
22 At 944.
23 At 945.

(a) All of the plaintiffs and the primary beneficiaries made contributions to the farm while growing up and continued to do so after they left home.

(b) The second wife, Marija, had strong Dalmatian beliefs, including that the sons should be preferred over the daughters. She had a strong, even domineering, temperament and the testator tended to give in to her.[24]

(c) The testator had said that all of the children would receive a section of land.[25]

[32] The Judge also observed that the plaintiffs had discovered their father's intention to prefer Johnnie prior to his death but thought there was nothing they could do about it at the time.[26] The Judge identified three other matters to note. First, there was a dispute on the evidence as to whether Johnnie promised to pool his interests with the other children. The Judge found that this conflict on the evidence was a matter in favour of granting leave, in order that this issue could be tested.[27] Second, there had been transfers to some of the children without objection, and Johnnie was bequeathed 7.5 hectares, while the land left to all children was about 62.7 hectares.[28] Third:[29]

> … this is not one of those farming cases brought under the relevant statutes where one of the children, usually a son, has worked the family farm for a considerable period in the expectation of it being bequeathed to him or his being enabled to buy it on favourable terms. As noted, all the members of the family, including the children and [the stepdaughter], appear to have played their part in the running of the farm until the children moved away to pursue their own lives.

[33] In the result the Court found the delay to be excusable. The Judge said that:[30]

> … it is understandable that the family thought that the life interest prevented their taking any action against the estate at the time and also understandable that, given Mrs Marija Antunovich's personality, they were reluctant to do anything which might have upset her.

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24 At 946.
25 At 946–947.
26 At 947.
27 At 948.
28 At 948.
29 At 948.
30 At 949.

[34] While there are similarities to the present case, we also consider that there are several important differences. First, the evidence of a promise in this case to an equal share whereby Mrs Wait would "level up" the shares in the farm is slim. Second, this is a case where the purpose of the bequest was clear and legitimate — that is, to ensure that Robert stayed on the farm so as to provide for Mrs Wait's maintenance. Third, there is no claim that Robert promised to share his inheritance with Lynette. Fourth, it is not suggested that Lynette was unaware of the need to commence proceedings within one year of her father's death. Fifth, the alleged promise related to property that always belonged to Mrs Wait, not the testator. Sixth, there is scant evidence that Mrs Wait agreed to discharge Mr Wait's promise. Illustrative of this, there is no evidence of Mrs Wait expressly promising to leave her share in the farm in equal shares to the children. Seventh, on Lynette's own evidence there was an extended period of separation from, and serious friction between, her and the family, including in relation to her mother. It should have been obvious to Lynette that there was always a risk her mother might favour Robert in her will. In combination, we consider that these important factual differences demand an altogether different response to what is, at best from Lynette's perspective, a delay of 35 years. In short, unlike Williams J in *Re Antunovich*, we do not accept it is understandable that Lynette chose not to commence proceedings for such an extended period.

[35] Overall, therefore, we agree with the High Court that the delay of over 45 years (or at least 35 years from the date of the Family Deed) was not reasonably excusable in the circumstances.

Strength of the claim

[36] Robert and Lynette agree that their father left Robert his interest in the farm, less the one-sixth distribution to Lynette and Gaylene, so that the farm could be retained in family hands as a means of supporting their mother. On Lynette's evidence, however, her father always intended that there would be a levelling up by Mrs Wait. She says this did not happen and instead the whole farm was effectively given to Robert.

[37] Robert does not accept that the transfer of Mrs Wait's interests in the farm was a "mere gift". He says that their mother sold her interests in the farm to his family trust (the Wait Farm Trust) in 2016. The price of her interests was recorded as $4,543,958.50 plus GST. The sale was satisfied by an acknowledgement of debt of $400,000 and assumption of the current liabilities of approximately $800,000 plus interest.[31] The balance was, he accepts, a gift. Mrs Wait also forgave $300,000 of that debt in her will. However, he says that Gaylene and Lynette are the sole beneficiaries of their mother's family trust (the LH Wait Family Trust) and refers also to distributions of $520,000 each to Lynette and Gaylene from the sale of the family beach house. There is also a further $50,000 to be paid to each of them from the repayment of the debt. He also says they may benefit from a further approximately $225,000 each (representing a loan from the LH Wait Family Trust to the farm).

[38] Lynette says that Mrs Wait's interests in the farm were sold to the Wait Farm Trust at a gross undervalue. She produced evidence valuing the farm (including the land, plant and chattels) at $8.2 million (plus GST) in 2015, so $4.1 million for Mrs Wait's share. But this did not include the value of shareholdings held by the farm, including Fonterra shares valued at about $546,000 at the time. She also doubts that any sum will be received in relation to the loan by the LH Wait Family Trust to the farm.

[39] Mr Telle submits that the farm worth $10 million was effectively given to Robert, while Lynette will presently only receive about $520,000 from the sale of the beach house. In terms of Mr Wait's bequest, she is only entitled to $16,000 because of the Second Codicil. Given this clear disparity of treatment and Mr Wait's failure to adequately provide for all his children, there is a strong case for a breach of moral duty.

[40] He also submits that there is evidence to support a case of, among other things, lack of testamentary capacity (pointing to Mr Wait's poor health in 1976 when the Second Codicil was signed) and fraudulent calumny in respect of Mrs Wait's estate.

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[31] The sale and purchase agreement for Mrs Wait's share of the farm recorded these debts as totalling $605,111. However, Robert deposes that the debts were significantly more.

All of this underscores the significance of the father's breach of moral duty to provide for all of his children.

[41] Mr Moore urged us to be circumspect about Lynette's reliance on the alleged agreement that occurred in 1975, noting that the focus of the inquiry is on Mr Wait's knowledge at the time of his death rather than evidence of what others may have understood at the time or afterwards. Mr Moore also submits that Lynette's claim is really against Mrs Wait's estate and her disappointment at her mother not leaving any of her interests in the farm to her, which has nothing to do with the claim against Mr Wait's estate. He also submits that the other claims made by Mr Telle are not supported by evidence.

Assessment

[42] The threshold test for FPA claims is well known. As stated by this Court in *Little v Angus*:[32]

> The inquiry is as to whether there has been a breach of moral duty judged by the standards of a wise and just testator or testatrix; and, if so, what is appropriate to remedy that breach. Only to that extent is the will to be disturbed. The size of the estate and any other moral claims on the deceased's bounty are highly relevant. Changing social attitudes must have their influence on the existence and extent of moral duties. Whether there has been a breach of moral duty is customarily tested as at the date of the testator's death; but in deciding how a breach should be remedied regard is had to later events.

[43] Relevantly to this case, Richardson J in *Williams v Aucutt* observed the key issue is whether adequate provision has been made for the proper support and maintenance of the claimant.[33] And:

> [52] … Just what provision will constitute proper support in [recognition of belonging to the family] is a matter of judgment in all the circumstances of the particular case. It may take the form of lifetime gifts or a bequest of family possessions precious to its members and often part of the family history. And where there is no economic need it may also be met by a legacy of a modest amount. On the other hand, where the estate comprises the accumulation of the family assets and is more than sufficient to meet other needs, provision so small as to leave a justifiable sense of exclusion from participation in the family estate might not amount to proper support for a family member.

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32 *Little v Angus* [1981] 1 NZLR 126 (CA) at 127.
33 *Williams v Aucutt*, above n 9, at [52].

[44] The result in *Williams* is also illustrative of the approach taken to cases of this kind, where issues of appropriate recognition are raised. In *Williams* the testator left 95 per cent of her approximately $1 million estate to one daughter, leaving five per cent to the other. The High Court adjusted the distributions to a 75 per cent to 25 per cent split.[34] The Court of Appeal reversed this order. While acknowledging there was a breach of moral duty, the Court resolved that supplementing recognition would have to be a relatively modest amount of $50,000 or an additional approximately five per cent.[35]

[45] Returning to the present facts, we accept that there is an arguable case of a breach of moral duty by Mr Wait. Under his will, the parties agree that Lynette was only entitled to one-twelfth of Mr Wait's interest in the farm valued as at 1976, while Robert was to receive five-sixths valued at the time of distribution (after the expiry of Mrs Wait's life interest). While there is no presumption of equal treatment of children in a testator's will, significantly disparate treatment of siblings like this may attract some scrutiny.[36]

[46] Based on the available evidence, the value of Robert's inherited share of the farm from Mr Wait is about $5 million as compared to Lynette's share of about $16,000. Using the outcome in *Williams* as a proxy, a claim for supplementary recognition might succeed, noting that Mr Wait could not rely on a future discretionary distribution mechanism to discharge his moral duty to his children.[37]

[47] Balanced against this, Mr Wait's objective was to provide for the support and maintenance of his wife. This basic fact is not disputed by Lynette. It was a powerful reason for leaving the lion's share of his interests to Robert. Put another way, Mr Wait can hardly be criticised for structuring his will in a way that takes care of his wife, who was still relatively young at the time of his passing.[38] In addition, the above

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34 At [26].
35 At [55].
36 See, for example, *Williams v Aucutt*, above n 9; and *Fisher v Kirby* [2012] NZCA 310, [2013] NZFLR 463. See also *Wightman v Public Trust* [2014] NZHC 3124, [2015] NZFLR 335 at [77], n 51.
37 *Bosch v Perpetual Trustee Co Ltd* [1938] AC 463 (PC). See also *Wightman v Public Trust*, above n 36, at [75].
38 The duty owed to a surviving spouse has always been paramount: *Re Rush* (1901) 20 NZLR 249 (SC) at 254.

comparison does not take into account Robert's contributions to the farm or the value of the support provided by him to his mother in the intervening 45-year period.

[48] Taking all these factors together, in our view while there is an arguable case of a breach of moral duty by Mr Wait, overall we do not consider that case to be strong. Ultimately, Lynette received about five per cent of the combined estates without assuming the 47-year burden of maintaining the farm or financially supporting Mrs Wait.

[49] We note for completeness that Lynette provides detailed evidence on matters that have little, if any, relevance to the key issue in these proceedings, namely whether in 1976 Mr Wait breached his moral duty to his children. This includes evidence relating to:

(a) dealings with the beach house in 2021;

(b) changes to the family trusts in late 2020;

(c) Robert's (alleged) manipulative, controlling and dominant behaviour in 2021;

(d) dealings with chattels in 2021; and

(e) dealings with Mrs Wait in 2022, and especially in trying to obtain access to her.

[50] It appears that the purpose of this evidence is to show that Robert was controlling of his mother and that this explains why he obtained her share of the farm. Even if that is so, it does not bear on whether Mr Wait discharged his moral duty to his children in 1976.[39] At most it highlights that insofar as Mr Wait and Lynette assumed that Mrs Wait would level up the distributions, it was an unsound assumption.

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[39] See *Little v Angus*, above n 32, at 127.

Prejudice

[51] Robert says that he gave up his university studies to assume responsibility for the farm and to look after his mother, which he did for more than 47 years. A note signed by Mrs Wait in 2015 set out the reasons for the gift to him as part of the sale of her interests in the farm to him, including that Robert:

(a) had been "extremely good" to her;

(b) was nearing retirement age, and still had no assets of his own other than his interest in Mr Wait's estate and livestock he had purchased;

(c) had improved the farm since 1976;

(d) made substantial alternations to the house located on the farm that he lived in out of his own resources; and

(e) borrowed money from the bank and lent it to Mrs Wait to enable the purchase of land next to the farm.

[52] The note accords with Gaylene's recollections. She describes Robert's commitment in these terms:

> I understand that it was Robert's free choice to return from Massey University. Robert only disclosed to me recently that Dad, while so ill and facing death, asked Robert to look after his widow and the Farm. Robert kept these personal requests private. Not once did he ever complain to me that Dad had placed such a burden on him. He fulfilled Dad's death bed request unstintingly since 1976. …
>
> If Robert had not taken on the responsibility of the Farm, it may have gone another way. If the Farm had been sold at Dad's death the value development would not have been witnessed by us. Robert at the age of 20 made the choice to return and farm the land to provide Mum with an income. I was free to make my own way and did not contribute in any way to Mum's financial needs. Nor do I understand did [Lynette]. Robert has not asked me to contribute to Mum's present care costs either.

[53] Lynette has a very different view of Robert's commitment and contributions. She agrees that her father wanted to ensure there was a plan in place so Mrs Wait could continue to live the life she had become accustomed to during her lifetime. But she

disputes any suggestions that her father expected the farm to be held intergenerationally and that, with the transfer of the entire farm to Robert, two of three families would be deprived of the benefits of Mr Wait's estate. She says Robert had a choice whether or not to take the farm and that he ultimately decided to work the farm. She also doubts his claims to have added value to the farm and argues that he has not made a sacrifice, but rather gained a substantial asset for free.

[54] Mr Telle submits that there simply can be no prejudice to Robert because when he took over running the farm, he could not have expected his mother to also gift him the other half of it. He also submits that in reality there is little value in the farm business itself and most of the value is simply in the land. Put simply, Robert could never have had a legitimate expectation of taking virtually all of the family assets — that is, from both Mr and Mrs Wait.

[55] Finally, Mr Telle refers to a range of other matters that he says support the grant of leave. He says there are issues of testamentary capacity, fraudulent calumny and principles of developing the common law to reflect contemporary attitudes. The cogency of these concerns will depend on how the evidence unfolds should there be a trial. While it appears there is at least some evidence to support these claims, they do not presently in our view add much to the core issue, namely whether Mr Wait breached of his moral duty.

Assessment

[56] We consider the case for Robert on the issues of prejudice is compelling. He committed himself to the farm and thereby to supporting his mother from the age of 20. He did so for 45 years on the basis that he would receive five-sixths of Mr Wait's half share in the farm when his mother passed. Contrary to Lynette's claims otherwise, this obviously came at significant personal sacrifice for him and his family. We do not consider that the transfer of Mrs Wait's share in the farm to him affects the present analysis. 40 years had already elapsed since Mr Wait's death when that occurred. To the extent that something has gone wrong with respect to Mrs Wait, and we do not find that it has, it is not material to the present analysis. It is simply too late now to expose Robert to an adverse claim against Mr Wait's estate.

[57] We also agree with the High Court that Robert would be significantly prejudiced, were an extension granted, because of the evidential difficulties he would face in opposing Lynette's claim.

Overall assessment

[58] The High Court was correct to decline leave. The delay is inexcusable. The prejudice of allowing the matter to proceed would be significant to Robert, who has clearly ordered his life in the expectation that his father's will would not be challenged. Whether or not something has gone wrong with Mrs Wait's share in the farm is largely irrelevant. Any case that Lynette may have against Mr Wait's estate is dependent on whether he breached his moral duty to her in 1976. While we accept she may have an arguable case of a breach of moral duty, we are not satisfied it is sufficiently strong to overcome the 35–45-year delay.

Costs

[59] The second respondents seek costs on an indemnity basis. While some of the matters raised by Lynette added unnecessarily to the costs of these proceedings, we are not satisfied that an award of indemnity or even increased costs is warranted.

Result

[60] The applications to adduce further evidence are granted in part.

[61] The appeal is dismissed.

[62] The appellant must pay the second respondents costs for a standard appeal on a band A basis, together with usual disbursements.

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