

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

**CIV-2013-404-3676
CIV-2013-404-4840
[2014] NZHC 1991**

UNDER PART 18 OF THE HIGH COURT RULES
AND SECTION 51 OF THE TRUSTEE
ACT 1956

IN THE MATTER OF the Hugh Green Trust and the Hugh Green
Property Trust

BETWEEN MARYANNE GREEN
Plaintiff

AND JOHN PATRICK GREEN
First Defendant

AND MICHAEL JOHN FISHER
Second Defendant

AND JOHN PATRICK GREEN, MICHAEL
JOHN FISHER, FRANCES KATHLEEN
GREEN AND JOHN JAMES GOSNEY
GOSNEY (as presently named trustees of
a trust known as the Hugh Green Trust,
settled by deed dated 7 June 1968)
Third Defendants

AND JOHN PATRICK GREEN, MICHAEL
JOHN FISHER, FRANCES KATHLEEN
GREEN AND JOHN JAMES GOSNEY
(as presently named trustees of a trust
known as the Hugh Green Property Trust,
settled by deed dated 20 March 1989)
Fourth Defendants

Hearing: 12 August 2014

Appearances: Ms Bruton, Mr Harley, Ms Brown for plaintiff
Mr Grieve QC for first defendant in CIV-2013-404-4840
Mr Stewart QC & Mr Lange & Mr Ryan for all defendants in
CIV-2013-404-4840
Mr Waalkens QC for defendants in probate proceeding CIV-
2013-404-3676
Mr Hunter, Ms Ambler for Ms Piper

Judgment: 12 August 2014

Reasons: 21 August 2014

JUDGMENT OF WINKELMANN J
[in relation to evidence relating to issues of capacity and undue influence]

This reasons judgment was delivered by me on 21 August 2014 at 4.30 pursuant to Rule 11.5 of the High Court Rules.

Registrar/ Deputy Registrar

[1] These proceedings concern challenges to the validity of a will and to the validity of the exercise of certain powers of removal and appointment. The challenges are made on two principal bases.¹ First, it is alleged that the late Mr Hugh Green lacked capacity at the relevant time: both testamentary capacity and the capacity to exercise powers as settlor or trustee. Secondly, it is alleged that he was subject to the undue influence of two of his children and a lawyer who was working with them.

[2] Objection has been made to the admissibility of various opinions contained in affidavit evidence filed by the defendants for the hearing. In broad terms, this evidence contains statements of opinion concerning Mr Green's mental functioning and susceptibility to influence in the last months of his life. These are opinions expressed by people who had contact with Mr Green in that time period. They are, in large part, his friends. The plaintiff objected to the admissibility of parts of that evidence, on the grounds that it is opinion evidence and inadmissible. This objection did not extend to the opinion evidence contained in the affidavits of medical professionals who are to be called by the defendants.

[3] Objection has also been made to other passages on the grounds that they are argumentative, or speculative. At the end of the hearing I heard argument, and issued rulings. I now set out the reasons for those rulings.

Relevant principles

[4] Sections 7 and 8 of the Evidence Act 2006 are the legislative gateway to admissibility, and provide:

7 Fundamental principle that relevant evidence admissible

- (1) All relevant evidence is admissible in a proceeding except evidence that is—
 - (a) inadmissible under this Act or any other Act; or
 - (b) excluded under this Act or any other Act.
- (2) Evidence that is not relevant is not admissible in a proceeding.

¹ There are additional grounds of challenge, but the issues addressed in this judgment arise out of challenges based on lack of capacity and undue influence.

- (3) Evidence is relevant in a proceeding if it has a tendency to prove or disprove anything that is of consequence to the determination of the proceeding.

8 General exclusion

- (1) In any proceeding, the Judge must exclude evidence if its probative value is outweighed by the risk that the evidence will—
- (a) have an unfairly prejudicial effect on the proceeding; or
 - (b) needlessly prolong the proceeding.

...

[5] Sections 23 to 25 of the Evidence Act 2006 address the admissibility of opinion evidence. The scheme created by those provisions is that opinion evidence is not admissible, subject to only two exceptions. These exceptions apply where:

- (i) the expression of the opinion is necessary for the witness to communicate what they saw, heard or otherwise perceived, or
- (ii) if it is expert evidence, admissible under s 25 of the Act.

[6] The defendants do not say that this is expert evidence. Rather they say that it is the expression of opinion necessary for the witness to communicate what they saw or heard or otherwise perceived. They say that the plaintiffs have also adduced similar evidence as to Mr Green's mental and emotional state (although they do not object to the admissibility of that evidence). In arguing for the admissibility of this evidence, the defendants rely upon s 24 of the Evidence Act which provides:

A witness may state an opinion in evidence in a proceeding if that opinion is necessary to enable the witness to communicate, or the fact-finder to understand, what the witness saw, heard, or otherwise perceived.

[7] Section 24 captures the common law approach to admissibility of non-expert opinion evidence.² For evidence to be admitted under s 24:³

... the statement of opinion must fulfil two basic criteria. First, opinion must be the only way in which to effectively communicate the information to the

² R Mahoney and ors *The Evidence Act 2006: Act and Analysis* (3rd ed, Thomson Reuters, Wellington, 2014) at 103–104.

³ At 103–104.

finder of fact (and therefore the information must be something that the finder of fact cannot infer without the statement of opinion) ... Secondly, the witness must be stating an opinion (be it conclusion, inference, etc) for something personally perceived, and therefore the experiences upon which the opinion is based must be described by the witness as far as possible.

Analysis

[8] I have considered the balance of the affidavits that are the subject of admissibility objection. It is relevant in my consideration of the s 24 threshold that all of the affidavits contain evidence from the relevant deponent describing their interactions with Mr Green and their observations of him. Those observations bear upon the issue of his mental functioning. They are in unobjectionable form and are not objected to.

[9] I am satisfied that the deponents can usually adequately convey their observations of Mr Green's mental state without conclusionary and in my view unhelpful generalised assertions as to his mental functioning or capacity, such as that it was reasonable or fine. Such loosely expressed opinions raise more questions than they answer; what is fine or reasonable? And measured against what? This is particularly so given the admitted absence of expertise of these deponents. I therefore consider each objection in turn.

Suzanne Hansen

[10] Suzanne Hansen was a close family friend of the Greens. For approximately the last 18 months of Mr Green's life she delivered Hugh a pile of newspapers and publications to read four or five times per week. She would routinely spend 15 or 20 minutes talking to him. She spent time with him in the three days before his death.

[11] Objection was taken to the following passage in paragraph 10:

What was very clear to me however, right up until a couple of days before he died, was that his mental health and mental functioning were fine.

[12] That statement on its own says little, if anything, of probative value. There is however material within the rest of the affidavit which is helpful on the issue of Mr Green's mental state at the relevant time. This includes detail of Mr Green's

ability to converse and engage in discussion. This evidence is adequately conveyed without the objected to passage of evidence containing the opinion. I therefore ruled the passage in paragraph 10 inadmissible.

[13] Objection was taken to the following passage in paragraph 10:

I was throughout the above time in no doubt that Hugh had full mental capacity and appropriate mental functioning. His mind was sharp and adequate. Certainly I was at no time under any apprehension that he may not have had full cognitive functioning.

[14] For the same reasons I ruled the first sentence inadmissible. However the description of Mr Green's "mind" in the second sentence is helpful. It is information which cannot adequately be conveyed in any other way. As to the third sentence of the material the subject of the objection, there is some probative value in the fact that Ms Hansen did not detect any deficiency. Again I consider that this evidence cannot be conveyed without the expression of opinion explicit in it.

[15] Objection is taken to the following passage in paragraph 17:

I am very surprised at the suggestion that he was in some way improperly influenced by John and/or Frances or others including the barrister.

This is inadmissible. It is argumentative and has no probative value.

[16] Objection is also taken to the following passage in paragraph 17:

Indeed, as I have said, Hugh was simply not a person who was able to be prevailed upon or influenced against his will.

This too is inadmissible. It is repetitive of other admissible material and is opinion evidence. There are other ways to communicate the relevant material, for instance a description of Mr Green's general approach to decision making and his personality as observed by Ms Hansen.

Karen McAuley

[17] Karen McAuley was Mr and Mrs Green's neighbour for about 29 years. She regularly visited with the Greens, often on a Friday evening and usually on about a

monthly basis. These visits occurred right through until Mr Green's death in July 2012. In her affidavit she describes her visits to Mr Green in helpful detail. Objection is taken to the last sentence in paragraph 6:

However, that did not, in my opinion at least, affect his mental functioning.

[18] I ruled this inadmissible. It is an expression of opinion that does not meet the first requirement for admissibility under s 24. The rest of the affidavit contains ample material which adequately conveys Ms McAuley's observations as to Mr Green's mental functioning.

[19] Objection is taken to the following passage in paragraph 11, which responds to a recitation of the allegation that Mr Green lacked capacity to exercise certain challenged powers:

I completely reject this as far as I am able to say. Hugh Green's mind appeared to be as it always had been – active and very communicative right through into the late stages of his life in 2012.

[20] I ruled the first sentence inadmissible. It is argumentative and has no probative value. The balance of the paragraph is helpful. Ms McAuley's statement that she saw no change in Mr Green's mental functioning is probative, and cannot adequately be conveyed in any other way.

[21] Paragraph 10 is also inadmissible. It has no probative value in light of the removal of the first sentence in paragraph 11.

Patrick McAllister

[22] Mr McAllister was a friend and business acquaintance of Mr Hugh Green for about 35 years. The two of them would speak on the telephone frequently and at least once per week right up until the time that Mr Green died in July 2012. Mr McAllister also visited Mr Green about three weeks before he died.

[23] Objection was taken to the statement in paragraph 5 that "he was mentally astute". I ruled this admissible, as it meets the first ground of admissibility under s 24.

[24] Objection was taken to the first sentence of paragraph 7 which reads “those allegations on the part of Maryanne are not at all correct”. I ruled that sentence inadmissible as argumentative. It follows that paragraph 6 should also be struck out. It is a recital of allegations to which this sentence responds.

Graeme Coghlan

[25] Mr Coghlan was the farm manager of the Hugh Green group. He worked for the group for about 35 years, most of that time managing the agricultural division. In that capacity he had significant contact with Mr Green, meeting him at least once per week and also speaking to him on the telephone sometimes often as six times a day. In the last few months of Mr Green’s life, Mr Coghlan and he would speak not less than three or four times a week. They would speak about auctions and generally about cattle trading matters. In his affidavit Mr Coghlan describes Mr Green’s engagement with him in relation to cattle trading in the time shortly before Mr Green’s death.

[26] Objection was taken to paragraphs 11 and 12:

[11] I understand it is being suggested by the plaintiff, Maryanne Green, that when Hugh signed his last will (which I am told was on 26 April 2012) he lacked sufficient mental capacity or function to do so. I am also told that she has challenged her father’s mental capacity/function when he made or participated in various decisions involving the appointment of directors of his various company interests and the appointment of trustees of the trusts which he established during his lifetime. I gather Maryanne is also challenging her father’s mental capacity/function with respect to his decisions removing her from various positions, including directorships in companies in which Hugh Green had an interest and also as trustee of trusts that he had established. I am told these various actions or conduct of Hugh Green cover the period from November 2011 through until late April 2012.

[12] I am very surprised to hear it said of Hugh that he may have lacked sufficient mental capacity or function during the above period and for my part do not accept that this would be so.

[27] Paragraph 12 is said to be argumentative. If that objection is accepted, paragraph 11 is rendered otiose. I upheld that objection. There is no probative value in Mr Coghlan’s reaction to the allegations.

[28] Objection is taken to the following passage in paragraph 13:

There can be no question that Hugh's mind was active and alert and he appeared to me to have more than reasonable mental capacity.

[29] I ruled the words "there can be no question that Hugh's mind was active and alert" admissible. That conveys something of value as to Mr Coghlan's perception of Mr Green. However, I ruled "and he appeared to me to have more than reasonable mental capacity", inadmissible. This is opinion evidence, and does not meet the first condition for admissibility under s 24. There is ample other evidence provided by Mr Coghlan which adequately conveys his observations as to Mr Green's mental capacity. Moreover, the passage is of doubtful probative value. Just what he means by "more than reasonable mental capacity" is unclear. Exploring that issue would open up a collateral and irrelevant enquiry.

[30] Objection was also made in paragraph 14 to "[i]n fact this was so right up to the end of his life" and "but his mental functioning appeared to be more than adequate". These phrases follow on from the preceding sentence described in paragraph 13. I dismissed both objections to admissibility in respect of paragraph 14. I consider the amendments to paragraph 13 place these passages on the correct side of the line in terms of admissibility. In particular, the expression "appeared to be more than adequate", is sensibly read as referring to adequate for the business discussions that Mr Coghlan was having with him.

[31] In paragraph 16, objection is taken to the following passage:

I am quite sure that Hugh's mental functioning was fine (as best I could tell) throughout the period that I understand this case is focused upon (November 2011 – late April 2012). This was so even for the next couple of months.

[32] I ruled this passage admissible. The balance of paragraph 16 qualifies the expression of opinion, and provides it with some probative value. It adds a little, if only a very little, to the other descriptions by Mr Coghlan's of Mr Green's exchanges with him.

[33] Objection is taken to paragraph 20 of the affidavit which reads:

I am also very surprised to hear this being said of Hugh. Throughout his life, Hugh was not a person who could be unduly influenced or bossed around.

He was a man who certainly knew his own mind and he was forthright in sticking to that and this remained with him until his passing.

This paragraph follows on from a recital of some of the plaintiff's allegations in this proceeding. That appears in paragraph 19. I ruled the first sentence of paragraph 20 inadmissible. Again I am not interested in Mr Coghlan's response to the allegations, but rather concerned with what he could observe in terms of Mr Green's mental capacity. I also ruled inadmissible his expression of opinion in relation to undue influence in the second sentence of the passage. That is a legal concept, and I am not assisted by his views in relation to that issue. Because paragraph 20 is inadmissible, so too is paragraph 19. A recital of an allegation has no probative value.

Lucille Lawless

[34] Ms Lawless met Mr Green toward the end of his life. She visited him on at least three occasions at his home in Auckland, in the last few months of his life. Her affidavit contains details of her exchanges with him. It also contains the following material which is objected to.

[35] Paragraph 8 includes the phrase "... but his mental functioning was sharp and appropriate". I ruled this admissible. Read in the context of the paragraph as a whole, it is descriptive of Mr Green's mental functioning in a way which cannot otherwise be adequately conveyed.

[36] Paragraph 9 is objected to:

I understand that in this proceeding Maryanne Green is suggesting that her father, Hugh, lacked sufficient mental capacity when he made various decisions in the period between November 2011 and April 2012 relating to the position of directors and trustees of his companies and trusts.

This is a statement of the allegations made in the proceeding, and is inadmissible. It has no probative value.

[37] Paragraph 10 is objected to:

I am extremely surprised to hear this said of Hugh. Certainly when I was with him there was nothing apparently wrong or lacking with his mental functioning and capacity. This appeared to remain so right up until

approximately four weeks before his death after which time I cannot comment.

[38] The first sentence is inadmissible. Ms Lawless' reaction to the allegations has no probative value. The rest is opinion.

[39] There is one aspect of my ruling I revisit. I consider the balance of the paragraph is admissible as it conveys the fact that Ms Lawless did not observe any defect in Mr Green's mental functioning. That has probative value, and there is no other way to convey that.

Kevin Morris

[40] Mr Morris provided various services to Mr Hugh Green including contractor services to farms owned by him. He was in contact with him right up until Mr Green's death. He would see him at cattle sales. He would regularly call him for "thoughts on various matters". His evidence principally addresses attending the ceremony at Mr Green's house on the occasion that Mr Green received his QSM from the Governor-General. This event occurred fewer than three months before Mr Green's death. He describes Mr Green's behaviour on that day, including his demeanour and his ability to engage with this around him.

[41] There are two objections raised in respect of paragraph 12. The parts objected to are highlighted in italics:

Hugh was no different that day to all other times I had engaged with him, other than he had aged physically. He was full of life and as interesting and engaging as ever. *What was clear to me was that there was nothing wrong with Hugh's mental health* and he retained the traits I had come to expect from him – fiercely business oriented, Irish wit and firmness in his own thoughts and ideas. *I cannot accept that he lacked adequate mental capacity and/or could be unduly influenced by others at that time.*

[42] I ruled the two italicised parts inadmissible. As to the first passage, this is expression of opinion evidence. Mr Morris has been able to convey his impressions of Mr Green's mental functioning, without reference to this broadly expressed opinion. The last sentence is argumentative, and to the extent that it goes beyond the argumentative, it is the expression of his personal opinion. Mr Morris is not qualified as an expert to express that opinion. Moreover, as I have previously said,

the concept of undue influence is a legal concept, and one which Mr Morris is not qualified to express an opinion upon.

Moira Green

[43] Mrs Green was the wife of Mr Hugh Green for more than 55 years. She has provided an affidavit which responds to many of the factual matters covered in Ms Maryanne Green's affidavit, but includes extensive discussion of Mr Green's mental capacity in 2011 to 2012. In approaching the admissibility of the passages in Mrs Green's affidavit, I regarded her as an "expert" on Mr Hugh Green in relation to him. She was with him constantly, and could assess his condition as time progressed.

[44] The following passage at paragraph 5 is objected to:

He retained full mental faculties right through until he went to sleep the night before he died.

[45] Although an expression of opinion, as I indicated to counsel, I exercise my discretion to allow it in. It is Mrs Green's opening remark in respect of her husband. She then goes on to qualify it throughout the rest of her evidence. In exercise of my discretion I consider it should be admitted into evidence.

[46] Objection was taken to the following expression in paragraph 6:

Hugh's mind was as "sharp as a tack".

[47] I ruled that admissible, as it is descriptive of her observations of how Mr Green was able to function mentally. It is hard to imagine how this could otherwise be conveyed.

[48] Objections were taken to the italicised portions of paragraph 14 as follows:

Hugh's mind was certainly active and not compromised in any significant way throughout April when he signed his last will on 26 April 2012. Although his body was by then very much influenced by the effects of his cancer (in particular his physical strength and mobility – which I discuss in further detail below), there can be no doubt whatsoever that his mental capacity and cognitive functioning were more than adequate. As I have said above, right up until the time of his death he was very astute mentally.

[49] I ruled the expression “there can be no doubt whatsoever that his mental capacity and cognitive functioning were more than adequate” inadmissible. It is expressed in argumentative form and is expressed as a broad opinion. There is not the close contextual material to clarify the expression “adequate” that appears in other affidavits. The rest I considered adequately descriptive to fall upon the right side of the admissibility line, when read in the context of the rest of the material.

[50] Objection is taken to the expression “his mind was acute as ever” in the context of paragraph 16. I regard that as admissibility as it is descriptive of what Mrs Green observed and gives a helpful longitudinal view of Mr Green’s mental functioning.

[51] In paragraph 21 Mrs Green responds to an allegation of the plaintiff Ms Maryanne Green as follows:

It is nonsense for Maryanne to suggest that Hugh’s acceptance of this award/honour was a sign that he had lost mental capacity.

I ruled that inadmissible. It is argumentative.

[52] Objection is taken to the italicised phrases in paragraph 25:

There were occasions in late 2011 and 2012 when Hugh went through some rough patches physically. *However, he remained astute and sharp minded throughout. At no stage did anyone suggest that Hugh was not fully in command of his mental faculties, and there were many hundreds who interacted with Hugh during this time, whether in connection with HGG business or socially.*

[53] I ruled the second sentence of the paragraph admissible because it is again descriptive, although repetitive. The last sentence is not helpful. The absence of others observing to Mrs Green that they observe any deficit in Mr Green’s mental functioning is of doubtful probative value, and opens up a collateral enquiry which is best not pursued.

[54] Objection was taken to a statement in paragraph 30 “and what Maryanne claims is utterly unsupportable”. I ruled that inadmissible. It is argumentative.

[55] Objection is taken to the entirety of paragraph 33 and the last sentence in paragraph 34. Those paragraphs read as follows:

[33] The suggestion by Maryanne that Hugh's decisions to remove her from her positions as trustee and director were not his choice or true wish is incorrect. They were very much Hugh's own decisions and not part of a plan engineered by John and Michael Fisher (or supported by Frances) as Maryanne has suggested.

[34] The fact was that Hugh wanted more than one family member involved as a trustee and director so that no one member of the family would have control of HGG and the Trusts. Hugh made his views in this regard very clear from early 2011 and he never wavered on it. Neither John nor Frances asked to be a trustee or a director. It was Hugh who wanted them to take on these appointments and be more actively involved in the business. Initially he proposed just John, but then included Frances as he thought this would be a better combination in conjunction with Maryanne. Hugh had a lot of confidence in Frances. He particularly felt that she would make up her own mind, and not simply side with John or Maryanne. No one put pressure on Hugh to sign anything. He signed the documents he did to give effect to his own decisions.

[56] The objection is taken on the basis that these paragraphs are argumentative. I agree that there is an element of argument in these passages, but I ruled them admissible. As this matter is being considered by a Judge-alone, I am well able to assess the weight to be attached to the argument in the light of the facts to which they are anchored.

[57] Objection was taken to the last sentence in paragraph 36:

Again, the suggestion that Hugh did not know what he was doing when he signed this will is completely wrong.

The defendants consent to the removal of that sentence from the affidavit.

[58] Objection was taken to the italicised portions of paragraphs 96 and 97:

[96] Maryanne and Mark are incorrect to suggest that Hugh said Maryanne was still his trustee when Maryanne asked him about the deeds he had signed removing her as a trustee. *Hugh was acutely aware of the nature of the deeds that he had signed the previous day. What he was saying to Maryanne was that she could still be his trustee provided she was prepared to co-operate with John and Frances.*

[97] Maryanne indicated that she was prepared to work with John and Frances for a trial period of three months (not "*three months or six months*" as Maryanne says in paragraph 310). I suggested six months and Maryanne

said three. It was clear that Maryanne was still very reluctant to work with John and Frances. However, particularly as it was almost Christmas and likely to be Hugh's last Christmas, I was very keen to promote reconciliation if at all possible. Accordingly, I called the HGG office to speak to Jane Porter. I asked Jane Porter to arrange for the deeds removing Maryanne as a trustee to be returned to Grande Avenue which she did. Hugh agreed with this *as he wanted to give Maryanne the chance to prove that she would co-operate.*

[59] I ruled the second and third sentences in paragraph 96 inadmissible. Mrs Green cannot and may not give evidence as to what Mr Green was aware of or interpret what he was saying. In relation to the objection to paragraph 97, again Mrs Green cannot and may not give evidence as to what Mr Green was attempting to achieve by reappointing Ms Green as a trustee. As this evidence is presently expressed, this is no more than speculation.

Winkelmann J