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[675].

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

**CIV-2013-404-4840
[2015] NZHC 1218**

IN THE MATTER OF	The Hugh Green Trust and the Hugh Green Property Trust
UNDER	Part 18 of the High Court Rules and section 51 of the Trustee Act 1956
BETWEEN	MARYANNE GREEN Plaintiff
AND	JOHN PATRICK GREEN First Defendant
	MICHAEL JOHN FISHER Second Defendant
	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 Trust, settled by deed dated 7 June 1968) Third Defendants
	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

IN THE MATTER OF the ESTATE OF HUGH GREEN, and the
 grant of probate of a will dated 26 April
 2012 by the High Court at Auckland under
 CIV-2012-404-004791 on 21 August 2012

UNDER Part 27 and Rule 27.34 of the High Court
 Rules

BETWEEN MARYANNE GREEN
 Plaintiff

AND MICHAEL FISHER, JOHN PATRICK
 GREEN, FRANCES KATHLEEN
 GREEN AND ROBERT NAREV
 Defendants

Hearing: 12-15, 18-22, 25-29 August 2014
 1-5, 15-17 September 2014
 25-26 November 2014

Appearances: V Bruton, G Harley, P A Brown for plaintiff
 SBW Grieve QC for first defendant in CIV-2013-404-4840
 R B Stewart QC, R B Lange, J Ryan for all defendants in
 CIV-2013-404-4840
 H Waalkens QC for defendants in probate proceeding
 CIV-2013-404-3676
 S Hunter, S Ambler for Ms Piper

Judgment: 3 June 2015

JUDGMENT OF WINKELMANN J

This judgment was delivered by me on 3 June 2015 at 4.30 pm pursuant to
Rule 11.5 of the High Court Rules.

Registrar/ Deputy Registrar

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1. Introduction

[1] The Green family are the owners of a complex group of companies and trusts which, taken together, hold assets worth hundreds of millions of dollars.¹ Mr Hugh Green was the founder of this group. Hugh was born in Ireland in 1931 and immigrated to New Zealand in 1951. Although he arrived in the country with nothing, over the next 60 years he accumulated considerable wealth, working initially with fellow Irishman, Bernard McCahill (together they operated a company Green & McCahill Ltd) and then after the termination of that business relationship, on his own account through various entities.

[2] Hugh had a passion for cattle farming and in particular cattle trading, but it was largely through land dealings that the Green family wealth was generated. Hugh was also a family man, and during the course of a long marriage to Moira they had four children, John, the eldest, the plaintiff Maryanne and younger children Frances and Eamonn Green. They also adopted a nephew, Gerard.²

[3] In 2010 Hugh was diagnosed with a terminal illness, and with that diagnosis came the need to settle upon a plan for who would control the Green Group after Hugh's death. Although some of Hugh's children had roles in the Green Group over the years, the plaintiff, Maryanne, was the only one who worked there constantly for any length of time. She was also the one who had a measure of control over the Green Group, although always working alongside her father.

[4] With his diagnosis Hugh began to express a wish that his other children John and Frances have more of a role within the Green Group. Tensions quickly built within the family as plans for this were formulated, debated, argued over and reformulated. Over a period of months, Hugh signed a number of documents the combined effect of which was to completely remove his daughter Maryanne from control of any aspect of the Green Group and to put others in control, namely John, Frances, and a lawyer, Mr Michael Fisher.

¹ Referred to as the Green Group in this judgment.

² Because of the number of members of the Green family involved in this proceeding I refer to them by their first names in this judgment to avoid confusion and prolixity.

[5] In these two sets of proceedings Maryanne challenges the validity of her father's actions in the last nine months of his life, to the extent that those actions effected this change in control of the Green Group and the Green family's interests in it. She is supported in these challenges by her daughter, Alice Piper who as a beneficiary under trusts settled by Hugh is a party served in these proceedings.³

[6] In the probate proceedings, Maryanne seeks the recall of the grant of probate of a will dated 26 April 2012. The only change in this will of any significance from Hugh's earlier will is that Mr Fisher, John and Frances were added as executors and trustees of the will while Moira was removed from that role.⁴ This small change has considerable significance for control of the Green Group. It is the executors of the will who have the power of appointment of trustees for the various trusts while the estate is in the administration phase.⁵ The trusts have control of the entire Green Group. Maryanne argues that the will is invalid because Hugh lacked testamentary capacity when he executed it, and also because he was subject to undue influence exercised by his son John and by Mr Fisher.

[7] In the other set of proceedings (the trust proceedings) Maryanne and Alice challenge Hugh's exercise of the power of appointment to appoint John and Frances, and also Mr Fisher as trustees of the various trusts, and the exercise of his power of removal to remove Maryanne as trustee. She also challenges the exercise of his power as a trustee shareholder to appoint John, Frances and Michael Fisher as directors of the main trust owned companies, and to remove Maryanne as director of those same companies. The challenges are advanced on the following bases:

- (a) Hugh did not have the capacity to understand the effects and implications of his exercise of each power.
- (b) The exercise of each power was not the exercise of Hugh's free will, and was caused by the undue influence of John and/or Mr Fisher.

³ Alice is Maryanne's adopted daughter. During the course of this proceeding an issue arose as to Alice's status as a beneficiary of the Hugh Green Trust, and that issue is now being investigated.

⁴ Hugh's earlier will was executed on 1 November 2011.

⁵ Once the administration phase is complete, the power of appointment passes to the surviving or continuing trustees.

- (c) The exercise of each power was the improper exercise of a fiduciary power by Hugh.

[8] Maryanne argues as an alternative that even if she was validly removed as a trustee, she was nevertheless reappointed by Hugh and so remains a trustee.

[9] Finally, as a further or alternative cause of action Maryanne claims that some of the existing trustees should be removed and replaced because of misconduct in the administration of the trusts, or because they are unsuitable, conflicted, hostile and/or incapable of acting even-handedly towards Maryanne and Alice.

[10] The defendants in the probate proceedings are the executors and trustees of Hugh, under a will dated 26 April 2012.⁶ They deny that the will was executed by Hugh when he lacked testamentary capacity, or was subject to undue influence. The defendants in the trust proceedings are trustees of the Hugh Green Trust, and of the Hugh Green Property Trust.⁷ The trustee defendants say that although Hugh had a terminal illness at the time he made the challenged decisions he exercised all of the powers with full capacity, of his own free will (there was no undue influence), and in accordance with his fiduciary obligations. The trustee defendants say that to the extent the decisions involved the removal of Maryanne as a trustee and director, they were hard decisions for Hugh to make, and upsetting for him, but they were his decisions. Because of Maryanne's refusal to accept the appointments of John and Frances as trustees and directors, her removal became necessary to ensure that the trusts and the Green Group could be governed and managed without continual conflict.

[11] The trustee defendants say that as trustees they have acted competently and that they have and will continue to exercise their powers, functions and duties as trustees in good faith, for proper purposes and in the interests of the beneficiaries of the trusts. There is no real case that the interests or welfare of Maryanne or Alice as beneficiaries are likely to be in any way prejudiced under the status quo. They point out that it is the wish of all beneficiaries of the trust with the exception of Maryanne

⁶ Mr Fisher, John Green, Frances Green and Mr Narev.

⁷ John Green, Mr Fisher, Frances Green and Mr John Gosney.

and Alice that they remain as trustees of the trusts and that in all the circumstances there is no proper basis to remove any of the current trustees.

2. Factual Background

2.1 *The legal entities*

[12] The Green Group is divided between a business arm and a charity arm. The wealth is controlled through three entities, the Hugh Green Trust, the Hugh Green Property Trust, and the Hugh Green Foundation (previously the Hugh Green Charitable Trust).

[13] The Hugh Green Trust and the Hugh Green Property Trust are on the business side. The Hugh Green Trust was settled in 1968. After Hugh's death the beneficiaries of the Hugh Green Trust are Moira, and the children and grandchildren of Hugh Green. The Hugh Green Property Trust was settled in 1989. The beneficiaries include Moira, the children and grandchildren. There are also a large number of companies formed for various business activities. One or more of the Hugh Green Trust and the Hugh Green Property Trust hold the shares in those companies and as shareholders have the power to appoint and remove directors.

[14] The Hugh Green Foundation was established in 1998, and is as its name suggests, on the charitable side of the Green family's interests.

[15] Prior to Hugh's death the Moira Green Property Trust also held and controlled part of the Green family wealth. It was settled at the same time as the Hugh Green Property Trust, and as the settlor of that trust, Moira had power of appointment of trustees. However, shortly before Hugh's death it was proposed that this trust be resettled upon the Hugh Green Property Trust. Hugh recorded his agreement to this in writing, although the resettlement was not implemented until after his death. This resettlement had the effect of further shifting control of Green family assets away from Maryanne, and toward John, Frances and Mr Fisher.

2.2 *The people*

[16] In 2010, prior to his diagnosis with terminal cancer, two of Hugh's children were involved in the family business. Maryanne joined her father's business in 1987, initially as the Manager of Kilmacrennan Livestock Limited (Kilmacrennan), the entity through which Hugh conducted his cattle trading business. Maryanne rose to become Chief Executive Officer of Green & McCahill and later, following the split of Hugh and Mr McCahill's business interests, she was Chief Executive of the Green Group from 1997 to 2012. It is not disputed that, like her father, she lived and breathed the business, working very closely with her father on a daily basis. By 2010 she was trustee of all of the trusts and director of all Green Group companies. She was also executor of Hugh's will.

[17] Maryanne's evidence was that at the time of her father's diagnosis her plan, which she had told her father and other trustees, was over time to move aside from the role of Chief Executive Officer but remain as a hands on working director on the property side of the business. The property aspect of the business was her interest.

[18] John started working in the family business about the same time as Maryanne, but left in the mid 1990s, not rejoining until 2009. In the early 1990s John worked on a part time basis as a cattle agent for Kilmacrennan and from 1989 to 1994 was also a trustee of the Hugh Green Trust, alongside Maryanne and Hugh. He resigned from both positions in 1994 and from then on lived mainly in Australia. However in August 2009 he began working as a part time administrator for the Hugh Green Foundation.

[19] There have long been tensions in the relationship between Maryanne and John. These stem in part from their very different personalities, but also from the circumstances surrounding John's departure from the Green Group in 1994 and his resignation as trustee at that time. These resignations followed on from an investigation into cattle trading by John when he was working at Kilmacrennan. That investigation found irregularities in a significant number of transactions which

he had committed Kilmacrennan to. Maryanne believes, and alleges in these proceedings that these transactions involved dishonesty on the part of John.⁸

[20] Hugh was a man well known for both the strength of his character and his opinions but he appreciated the value of good advice and valued debate. His work style was to gather around him a small group of trusted advisers and employees. Over many years he sought the advice and assistance of two men in particular in connection with business matters, Mr Robert Narev and Mr Robert Carter.

[21] Mr Narev is a solicitor with extensive commercial and legal experience. He knew and worked with Hugh for over 30 years. During Hugh's life Mr Narev was a trustee of each of the three principal trusts referred to above and a director of many of the principal Green Group companies. He is an executor under the challenged will and also under the previous will. In the context of this family conflict Mr Narev is unique amongst the many that have been drawn into it, because he has retained the trust of both sides.

[22] Mr Carter joined Green & McCahill as Company Secretary (performing the role of Chief Financial Officer) and later was the Managing Director of the Green & McCahill Group. After the division of the Green & McCahill business interests Mr Carter remained as a non-executive director of the Green Group companies and continued as a close confidant and business adviser to Hugh, adding accounting and technical knowledge to Hugh's business skills. He resigned most directorships in the latter part of the last decade due to health reasons. However he continued to act as adviser and confidant to Hugh and continued as a trustee of the Hugh Green Foundation and as a director of Hugh Green Charitable Trust Limited until his resignation in December 2013.

[23] Hugh also sought advice from Ms Kathryn Roberts, who was at the time, a partner at PWC. She provided accounting, taxation and advisory services to the Green Group, and also acted as a trust adviser, attending trust meetings from 2006. She had been asked by Maryanne and Hugh to be a trustee but partnership rules

⁸ Amended statement of claim in the trust proceedings at [2.5] – [2.9] and [5.4].

precluded her from taking on such a role. Until 2012 she regularly attended trust meetings.

[24] From time to time Hugh also instructed Mr Fisher to represent the interests of the Green Group. Initially he was instructed in respect of litigation, but in 2006 Hugh asked him to represent the interests of the Green Group by serving as a director on the board of a company in which the Green family had a substantial investment, Dorchester Pacific Limited.

[25] The business also had a number of long standing employees who played some role in the events that have given rise to these proceedings. Ms Jane Porter is the Chief Financial Officer of the Green Group. She has held various roles within the Green Group since the early 1990s. Mr Seamus Brennan joined the Green Group in 1997 and was someone trusted by both Hugh and Maryanne. Ultimately Mr Brennan took over from Maryanne as Chief Executive Officer, and continues in that role today.

[26] Maryanne's account of how the business was run prior to Hugh's final diagnosis was that she oversaw the property side, which Hugh left to her to a significant extent. Hugh oversaw the cattle and share market investments. Mr Carter worked closely with Ms Porter on the finance and investment and Hugh and Maryanne worked closely on charitable giving.⁹ At a more general level, Hugh was the one who set the vision for the business and made the strategic decisions. Maryanne's role was to ensure execution of those plans.¹⁰

[27] All of these people, with the exception of Mr Brennan, gave evidence in these proceedings.

2.3 Events leading up to the challenged decisions

[28] Much is in dispute in these proceedings as to how events came to occur and as to what motivated the various participants in those events. There is however little dispute as to the key chronology. Resolution of the issues between the parties

⁹ Affidavit of Maryanne Green at [68].

¹⁰ CBD at 683-684.

necessarily turns upon close analysis of this chronology of events as established through contemporaneous documents and through evidence in these proceedings, as well as upon a weighing up of competing accounts of events. This is a complex task given the number of actions challenged, and the time frame within which they occur. I have found that it means an unavoidably large judgment. To assist in the comprehension of this volume of material I believe it is helpful at this point to set out a basic narrative of events.

[29] The critical chain of events commences with the diagnosis in February 2010 that Hugh, then aged 78, had a recurrence of a cancer for which he had previously been treated, and that he was now terminally ill. At that time Hugh was already dealing with a number of chronic ailments [redacted material]. He was nevertheless well, alert and active. He continued to be well for some time after the diagnosis and remained the driving force in the Green Group. It may be for this reason that the issue of how the Green Group and the Green family interests would be controlled after Hugh's death was not initially focused upon by the family.

[30] Some very small steps toward succession planning were taken when in June 2010 Hugh prepared a memorandum of wishes for the trustees of the Hugh Green Trust. He recorded his wish that the business continue, and that there should be equality amongst the primary family beneficiaries, his children.

[31] The next significant event in terms of succession planning occurred on Friday 27 May 2011, when a meeting took place between Hugh, Moira, and Mr Narev, with Mr Carter attending by phone. Following that meeting Mr Narev prepared a memorandum of matters agreed at the meeting including that John was confirmed as head of distribution for the Foundation, and was to have signing authority and that Maryanne's involvement in the Foundation would be limited to that of trustee. As to the Green Group, the memo recorded:¹¹

Hugh to speak to [Seamus] with a view to appointing him as General Manager of Operations (but not as a director at this stage), responsible for construction, leasing and subdivision development but not for other activities such as share portfolio and financing, which will remain the responsibility of

¹¹ CBD at 621.

Jane Porter. Both [Seamus] and Jane will report to Maryanne. If this is acceptable to [Seamus], Hugh will then clear with Maryanne.

[32] As to the distribution from the trusts to his children the memorandum recorded:

At this stage, all children are to receive as soon as possible [redacted material]. Gerard might receive the Helensville property for his share. John [redacted material]. and Frances [redacted material] ?. are to bring those amounts to account as part of such allocations.

[33] Mr Narev circulated the memorandum to Hugh and Moira. Moira made a handwritten addendum to it, recording that Maryanne was to get an [redacted material]. Moira said in her evidence that she assumed that Maryanne was to receive an [redacted material] in recognition of the work she had done for the business over many years.¹²

[34] The plan recorded in this memorandum is consistent with Maryanne's evidence that Hugh's long term plan for the Green Group was that it would be Maryanne who would look after the family's interest in it, and that she should have a good team of executives to help her with this. It is evidence corroborated by documents and statements made at the time, and I accept that as at this date at least, that was Hugh's intention.¹³

[35] Maryanne had not attended the 27 May meeting, and so was not party to the agreement that John should be a cheque signatory for the Foundation. She was at this time a trustee of the Foundation. Maryanne did not agree that John should be given signing authority and told her father so. Her evidence is that she reminded Hugh that they had previously agreed that John would not have signing authority. Maryanne says that her father responded "Well, it is just of the charitable trust, that will be okay won't it?"¹⁴ Maryanne says that she took no further steps to put in place the authority for John, and her father did not press the issue. She did however speak to Mr Brennan about his taking on the role of General Manager Operations.

¹² First affidavit of Moira Green at [54].

¹³ See for example CBD at 686, NOE Robert Carter at 1328-1330, Transcript interview with Paul Little at 379.

¹⁴ Affidavit of Maryanne Green at [145].

[36] Around this time Hugh and Maryanne together were giving further consideration to additional trustees and directors for the Green Group. Various names were discussed. Maryanne's evidence was that both their preferences were for Ms Roberts, and Mr Narev's son Ian Narev to be appointed additional trustees. However neither was able to accept the role because of restrictions placed upon them by the organisations they worked for. There was nevertheless a plan to bring Mr Carter into the trusts and to appoint Mr Narev as a director of the main Green Group companies. In pursuance of this plan Mr Carter was appointed trustee of the Hugh Green Trust, the Hugh Green Property Trust and the Hugh Green Charitable Trust in mid June. One thing was clear, Hugh wanted these two men to be involved in the future of the Green Group after his death. It is not disputed that he placed great store in their judgment and experience.

[37] Hugh was well for some time following his diagnosis. Although the cancer continued to progress, he remained under the care of his initial treating surgeon, Dr Jonathan Masters. However by June 2011 Dr Masters had formed the opinion that although Hugh was still feeling well in himself, the medication regime with which he was treating Hugh was beginning to lose its effectiveness, and he referred Hugh to a specialist oncologist Dr Fritha Hanning.¹⁵

[38] There had been discussions of John becoming a director in early 2011. Mr Carter refers to Maryanne telling him of this in March 2011.¹⁶ However Maryanne says it was in June of 2011 that Hugh told her that he wanted John to be a director and that John and Maryanne should run the business together. Maryanne's evidence was that she queried with Hugh how that would work and that his reply was that he did not know but that they should just get on and do it.¹⁷

[39] Maryanne was reluctant to be in a position of joint responsibility with John and expressed these views to her father and to Mr Narev and Mr Carter. She believed him to be dishonest, and in her mind his dealings in 1994 were evidence of this. She also thought he had poor business skills, a view based on her assessment that many of his previous business ventures had failed and that on more than one

¹⁵ Affidavit of Jonathan Masters at [19]

¹⁶ Affidavit of Robert Carter at [6.7].

¹⁷ Affidavit of Maryanne Green at [150].

occasion he had needed to be bailed out by his father. Finally she believed that their work styles were irreconcilable. Maryanne administered the Green Group with precision, employing extensive procedures; procedures she was relentless in requiring those who worked with her to comply with. It is not in dispute that John has a radically different business style, according little respect to process and of course, in context, this meant paying little regard to Maryanne's processes.

[40] After this discussion with her father Maryanne prepared a number of letters addressed to Hugh proposing various solutions which would give both John and Maryanne a role within the Green Group. The principal options were either that John continue on the charity side or that the Green Group farming and cattle trading operations be separated off and run by John, leaving Maryanne to run the remaining business. The proposals included a "Family Board" overseeing the business made up of John, Frances and Moira.

[41] When Maryanne followed up on these letters with her father, he told her that he was thinking about her proposals. She told him that if he wanted her to go as trustee, director and Chief Executive Officer he only had to say and she would go, and that it would not affect their relationship as father and daughter. Hugh replied that he did not want that.¹⁸ It seems that Hugh never engaged with these detailed proposals.

[42] Family relations took a turn for the worse following a meeting at Hugh and Moira's home on 29 June 2011. Moira obviously anticipated that the meeting was going to be difficult. She came armed with a strategy to keep the discussion orderly. She told her family she would pass a hat around and only the person wearing the hat could speak. Although there are different accounts as to the exact tone of the meeting it is not in dispute that the principal agenda items were the future of the Green Group, whether it was to continue in family ownership, and if so, the role the various family members were to have in the business. Views were divided about whether the family should continue its involvement in the business. Hugh said that he wanted the business to keep running while Moira and Frances initially said they thought it should be sold. John and Gerard said they wanted whatever Hugh wanted.

¹⁸ Affidavit of Maryanne Green at [157].

Maryanne's evidence was that she said she wanted the business kept running but that Kilmacrennan should be sold if it could not be run profitably.

[43] On this last point Maryanne's evidence conflicts with that of John. John's evidence is that at the meeting Maryanne said she wanted Kilmacrennan sold, with no qualification added. The significance of this difference is that the Kilmacrennan business was the aspect of the Green Group closest to Hugh's heart. John, Frances and Moira all say that everybody else agreed to do what Hugh wanted, with the exception of Maryanne. She wanted to discuss her proposed plans for the business contained in the letters she had given her father. Hugh did not want to be drawn into that.

[44] The other item for discussion was who in the family would run the business following Hugh's death. Hugh said he wanted John and Maryanne to run the business together and that Frances should have a role as non-executive director.¹⁹ Frances' evidence is that Maryanne was dismissive of Hugh's desire that Frances be involved, and that Maryanne said something to the effect that over the years they had had the chance to be involved in the business but had declined.²⁰

[45] To the extent that there is a conflict of evidence between the witnesses as to the events at this meeting, I prefer Maryanne's version of events. She had taken notes of the meeting which confirm her account from which she was able to refresh her memory. Her evidence is also consistent with documents created at that time. The plans for the future of the Green Group contemplated an ongoing cattle trading and farming operation. They also reiterated a commitment on Maryanne's part to carry on the business as her father wished.

[46] It is nevertheless clear that the meeting was fraught. Maryanne may well have angered her father and others with the insistent way she put forward her point of view. It became plain to me through the course of the hearing that she is not someone easily diverted from ensuring that her point of view is heard, and has little sense that the honest expression of her views and opinion may be offensive to others.

¹⁹ First affidavit of Frances Green at [21].

²⁰ At [23].

[47] However, in considering this meeting I have reminded myself that at that time Maryanne had joint control of the business with her father. They were working together at the office on the day to day business of the Green Group. Hugh had told her he wanted something to happen, that she and John should run the business together. She not only doubted the wisdom of that course of action, she could not understand what exactly her father meant by it. She knew that there is necessary detail to what it means to run a business together, particularly one as complex as that of the Green Group. Maryanne had put together various proposals to make this work, but it seems no-one was interested in engaging with the detail of those proposals.

[48] Around 11 July Mr Narev received two instructions from Hugh, both in Moira's handwriting. One was an instruction for his funeral. He wanted to be cremated. In the other, he instructed Mr Narev to prepare a codicil to his will which would remove Maryanne as one of the executors of his will and replace her with Moira (Moira and Mr Narev would then be the executors).²¹ Maryanne's evidence is that Hugh told her he made the change because John was concerned that Maryanne had too much control,²² although John disputes he said this.²³ The change to the will was made by way of codicil on 24 July 2011.

[49] By July 2011 Hugh remained well enough to travel to Ireland. This was a trip of great importance to Hugh who had retained a love of his birthplace, and was very proud of his Irish blood. He was accompanied on the trip by his daughter Frances.

[50] In Hugh's absence there were meetings of the trustees for the various trusts. The trustees of the Hugh Green Foundation resolved to give cheque signing authority for the Foundation to John, Frances and Moira. Maryanne remained opposed to John having this authority and abstained from voting. Following the meeting she wrote to Mr Narev to tell him that she could not continue as a trustee of the Foundation, and that she wished to resign. She formally resigned on 24 August after Hugh's return from Ireland.

²¹ Affidavit of Robert Narev at [37] – [38].

²² Affidavit of Maryanne Green at [174].

²³ Affidavit of John Green at [97].

[51] According to Maryanne, the trip to Ireland was a turning point in terms of Hugh's well being. On his return on the 17th of August he was much depleted, both physically and mentally, and it is from this point on that his deterioration accelerated. Moira, Frances and John however say that although tired from his travels, Hugh returned very much his old self, in good condition for a 79 year old man - mentally vital and physically well. It is the evidence of Moira, John and Frances that Hugh retained full mental faculties right until the end of his life, and in this they are supported by a number of medical professionals who looked after Hugh during his illness, and by a number of friends and work colleagues.

[52] Following Hugh's return from Ireland the whole issue of control of the Green Group and the family's interest in it revived and intensified. Maryanne continued to press for a solution which would have John working on the Foundation side, with her involvement being limited to the business side. There were two further family meetings (25 August and 1 September) which were attended by Ms Roberts at Maryanne's request. At those meetings Maryanne put forward a solution which involved John having responsibility for the Foundation, and her, the business. The detail proposed was that Maryanne would be Chief Executive Officer to whom staff in the Green Group would report, and John, and possibly Frances, would be non-executive directors. John would be responsible for the Foundation.

[53] Maryanne's evidence was that she was firm in her view that she could not be in a position of joint responsibility with John because of what she saw as his past dishonesty, his poor financial position, what she viewed as his less than professional business approach and his attempts to undermine her as Chief Executive Officer.

[54] The last she based on emails she read as part of an on-going audit of the use of work email by all within the Foundation and Green Group. It was Maryanne's practice to scan employees' emails to check they were not misusing the Green Group's system. She included John in this form of audit, and continued to do this right through until after her departure as Chief Executive Officer in 2012, when John directed that the facility that enabled her to do this be effectively unplugged. Although checking emails sent from a business is an entirely conventional, and even

prudent practice, in this context this was clearly not something likely to engender good family relations.

[55] Maryanne thought that her proposal that John work on the Foundation side, and she work on the business side, had been agreed to at the second of the meetings, although she accepts it was also agreed that John would attend management meetings to learn about the business. As events transpired, there was no agreement to the solution she hoped for, or at least no agreement which lasted beyond the meeting.

[56] On 13 September John emailed Maryanne resolutions appointing John a director of four of the key Green Group companies. The resolution was signed by Hugh but not by any of the other trustees, Maryanne, Mr Carter and Mr Narev. John's appointment as director required a trustees' resolution as the trustees had to exercise their powers as shareholders to appoint, or if the issue arose, remove directors.

[57] Maryanne's evidence was that she was surprised to receive these documents from John. She accepts that there had been discussion of non-executive director roles for John, but claims that no final decisions had been made to carry this into effect. Moreover Hugh had not told her he was going to do this. He does not seem to have discussed these proposed resolutions with Mr Narev and Mr Carter. In any case the resolutions were not passed at that time, although it was around this time that the trustees appointed Mr Narev a director of the principal Green Group companies.²⁴

[58] A trustees' meeting was convened by Hugh for 30 September 2011.²⁵ The Green Group Company Secretary, Ms Porter circulated an agenda in advance of the meeting. The items for discussion were the appointment of John as trustee of the Hugh Green Trust, the Hugh Green Property Trust and the Moira Green Property Trust, and executive roles within the Green Group. Maryanne's evidence was that this was the first time she had heard mention of the possibility of appointing John a

²⁴ Affidavit of Maryanne Green at [215] – [218].

²⁵ For the Hugh Green Trust, the Hugh Green Property Trust and the Moira Green Property Trust.

trustee of the principal business trusts. The role of trustee is significant within the Green Group because it is through the trusts that all Green Group companies are controlled, because the trusts own the shares in the companies.

[59] The meeting was attended by Mr Narev, Mr Carter, Hugh and Maryanne. At the meeting Maryanne spoke out against John's appointment. Maryanne explained her view that it was not in the interests of the beneficiaries for John to be appointed a trustee in light of what she characterised as his past dishonesty. She referred to the events in 1994 which she regarded as evidence that John had stolen from the company. Mr Carter's notes record the following note of what Maryanne said:²⁶

JG stolen on 1994-as he has stolen from COY he is not fit to be a trustee or director.....How do trustees know that JG has changed? Risky.

[60] Maryanne told the meeting that she had obtained legal advice from a Queen's Counsel that John was not a fit person to be a trustee. The evidence is that by this time Maryanne had engaged Mr Tony Molloy QC to advise her in connection with her responsibilities as a trustee.

[61] Mr Narev's evidence is that the view he expressed during the meeting was that he could see no reason why John could not be a trustee, as he would be only one of many and could not make binding decisions.

[62] Maryanne suggested to the other trustees that if they could not agree they could seek the Court's directions. Hugh responded that if she did that, "she and him were finished." There was more talk about the issue, and Hugh said that he was prepared to take the risk of appointing John a trustee. Maryanne's response was that she would need to take further legal advice. Hugh again said that if she did that they were finished.

[63] Mr Narev's evidence was that the meeting ended without resolution but that Hugh remained committed to appointing John. Maryanne's view of where things were left was that Hugh had not finally resolved upon appointing John a trustee.

²⁶ CBD at 896.

[64] On the day following the meeting Mr Carter travelled up from Tauranga to meet with Hugh. He told Hugh that he was questioning why he should remain as a trustee in circumstances of what appeared likely to become an increasingly acrimonious family dispute in which he had no vested interest.²⁷ Hugh was able to persuade him not to resign but Hugh blamed Maryanne for Mr Carter's concern, and was angry with her. When Hugh and Maryanne spoke on the telephone about it, Hugh told Maryanne to pack her bags and get out of the office. For a few days Maryanne worked from home, but on the 6th of October Hugh phoned her and asked her to come into the office. When she did he acted like nothing had happened and they continued to work together.

[65] Hugh executed a further will on 1 November 2011. It confirmed Mr Narev and Moira as executors.

[66] There was subsequently another meeting, in early November, this time attended by Mr Narev, and Ms Roberts, but not Mr Carter as he was on leave following surgery. Maryanne was also on leave from the business, for the period 31 October to 2 December 2011. Her foster son had been killed the previous year, and she and her family wished to take time to attend the trial of the man accused of his murder and then to deal with the aftermath. Hugh had contacted Maryanne during this period of leave and asked if she could attend a meeting. Following some toing and froing, a date for the meeting was set for 1 November 2011.

[67] Before the meeting Maryanne emailed to Mr Narev and Ms Roberts a document which detailed the reasons for her objections to John's appointment as trustee and director. This material included details of the events around 1994 and of business activities she characterised as failed.²⁸ It also contained the allegation that John had been banned as a horse trainer in New Zealand for drugging horses. Maryanne now accepts that her allegations in relation to John's activities as a horse trainer are wrong.²⁹ Maryanne also provided them with her summary of the advice she had received from Mr Molloy.

²⁷ Affidavit of Robert Carter at [6.20].

²⁸ CBD at 965.

²⁹ NOE Maryanne Green at 68.

[68] On the day of the meeting she met with Mr Narev and Ms Roberts before Hugh joined them for the formal meeting. She had brought with her further material which she said was contributing to her opposition to John's involvement in the business. She had the Kilmacrennan cheques and other documents she says evidenced John's dishonesty in 1994. She also had bank statements for the Hugh Green and Moira Green Property Trusts showing internet transactions for expenditure on horse training fees and travel associated with John's horse training business. Maryanne saw these as suggesting unauthorised dealings by John as Hugh and Moira did not do internet banking and the expenses were not of the type that should have been charged to the trusts. I note at this point that Moira's evidence was that she and Hugh had authorised these transactions.³⁰ Maryanne also produced copies of emails that John had sent on behalf of the Foundation as evidence that he was not taking a businesslike approach to these tasks.

[69] The point of all of this material was obviously to show that John had been and continued to be dishonest, and that he conducted himself poorly in business, including through his work at the Foundation. He was not, Maryanne argued, an appropriate person to be a director or trustee.

[70] Hugh then joined the meeting. There are some differences in the accounts given of what was then said at the meeting. However Mr Narev agrees that he said to Hugh that it might be premature to appoint John as a director or trustee. He had only been working at the Foundation for about six months and Mr Narev thought that he should prove himself in that setting before being appointed a director or trustee. Mr Narev's account was that Hugh nevertheless remained determined to appoint him. Ms Roberts says that most of the discussion was in connection with appointing John as a director and that both she and Mr Narev opposed that. Maryanne of course remained opposed to either step.

[71] Mr Carter says that on 9 November Hugh called him and wanted to know if he was happy for John to be appointed a director. He replied no, because it needed to be discussed first by the trustees. He said his concern was that the terms of his

³⁰ First affidavit of Moira Green at [72].

appointment needed to be properly considered and approved by all trustees as the shareholders of the relevant companies.³¹

2.4 First challenged decision: appointment of John and Frances as trustees of three trusts on 8 November 2011

[72] On 8 November Hugh executed documents appointing John and Frances as trustees of the Hugh Green Trust, and the Hugh Green Property Trust. At the same time Moira appointed them as trustees of the Moira Green Property Trust. These documents had been drafted by Mr Fisher, and the execution of them was witnessed by Mr Hickson, a sole practitioner Mr Fisher had organised to attend upon the Greens for this purpose.

2.5 Second challenged decision: appointment of John and Frances as directors of the main companies in the Green Group on 5 December 2011

[73] A meeting of the trustees of the Hugh Green Trust, the Hugh Green Property Trust and the Moira Green Property Trust was called for 5 December. The agenda for the meeting was the appointment of John and Frances as directors to 13 Green Group companies owned by the Hugh Green Trust and 27 subsidiaries and 11 Green Group companies owned by the Hugh Green Property Trust and the Moira Green Property Trust. Attendees were the trustees Hugh, Maryanne, Mr Narev, John and Frances, as well as Ms Roberts and Moira. The meeting proceeded on the basis that John and Frances had been appointed trustees although Maryanne said during the course of the meeting that she did not consider their appointment valid. The resolution to appoint John and Frances directors was put. Hugh, John and Frances voted in favour and Mr Narev abstained. Mr Carter did not attend and did not provide a proxy. I address later an argument that the required majority to pass these resolutions was not achieved.

2.6 Third challenged decision: removal of Maryanne as a trustee on 20 December 2011

[74] Following the 5 December meeting there was some uncertainty as to what further steps were required to implement the resolutions appointing John and Frances

³¹ Affidavit of Robert Carter at [6.27].

as directors. On 16 December Maryanne was delivered an ultimatum that she immediately sign resolutions to implement the trustees' earlier decision appointing John and Frances directors to various companies. When she failed to do so, on 20 December 2011 she was removed as a trustee of the Hugh Green Trust and the Hugh Green Property Trust by deeds of removal, drafted by Mr Fisher, and executed by Hugh.

[75] Maryanne and her husband Mr Mark Owens visited Hugh at home on the 21st of December. The purpose of the visit was for Maryanne to tell Hugh that she was resigning as CEO of the Green Group. Moira was present for at least part of the visit. Just what was said at this meeting is at issue in this proceeding. It is Maryanne's case that her removal as trustee of those trusts was cancelled by Hugh at that time, or alternatively that Hugh reappointed her.

2.7 Fourth Challenged Decision: appointment of Mr Fisher as trustee on 29 March 2012

[76] Hugh was admitted to hospital on the 29th of March 2012 to have a blood transfusion. John and Mr Fisher say that on 28 March Hugh asked Mr Fisher to be a trustee of the Hugh Green Trust and Hugh Green Property Trust. Mr Fisher prepared the necessary documentation and on 29 March asked Mr Hickson to attend upon Hugh to see to the execution of the documents. Mr Hickson visited Hugh in hospital and while Hugh was having the transfusion, witnessed Hugh signing the document appointing Mr Fisher as trustee of the Hugh Green Trust and the Hugh Green Property Trust.

2.8 Fifth and sixth challenged decisions: appointment of Mr Fisher as director of all trust owned companies on 2 April 2012, and the removal of Maryanne as a director of all trust owned companies on 2 April and 19 April 2012

[77] A meeting of trustees of the Hugh Green Trust was convened for 2 April 2012. Maryanne did not receive notice of the meeting. The business of the meeting was to appoint Mr Fisher as director of all trust owned companies and to remove Maryanne as a director of all companies where the trustees held a majority of shares. The trustees also resolved to authorise the taking of immediate steps to remove

Maryanne as a director of all other companies in the Green Group.³² Mr Narev and Mr Carter were not able to attend the meeting but they were aware of the agenda items. They did not vote by proxy.

[78] On 3 April Maryanne received an email from Ms Porter advising her that she had been removed as director of a list of companies.

[79] On 19 April Maryanne was removed as a director of a further 27 companies.

2.9 Seventh Challenged Decision: Hugh's execution of a new will on 26 April 2012 appointing Mr Fisher, John and Frances (together with Mr Narev) his executors and trustees

[80] On 26 April 2012 Hugh signed his last will. He had contacted Mr Narev asking him to prepare a new will for him which replaced Moira as executor of the will with Mr Fisher, John and Frances (with Mr Narev continuing as executor). Hugh told Mr Narev that the background to this change was that Moira no longer wished to be an executor.

[81] Mr Narev passed these instructions on to his partner Mr Norman Cahill. Mr Cahill prepared the new will, and visited Hugh at his home to witness the execution of the will.

2.10 Events after the execution of Hugh's last will

[82] Maryanne was away from New Zealand on holiday during the last week of April through until late June. By late April matters were proceeding on the basis that her only remaining role in the business was through her role as trustee of the Moira Green Property Trust and as a director of some companies controlled by that trust.

[83] Hugh died on 13 July 2012. Following his death Mr Fisher was appointed as a trustee of the Foundation and as a director of the remaining Green Group companies. In late August Mr Narev and Mr Carter both resigned as trustees and directors of the trusts and Green Group companies.

³² CBD at 1851.

[84] Mr Gosney, a friend and business associate of Mr Fisher, was appointed a director of various Green Group companies in early September 2012.

[85] On 20 September 2012, the trustees of the Moira Green Property Trust (who by this time included Mr Fisher) voted to resettle the assets of that trust on the Hugh Green Property Trust. This was a response to Moira's expressed wish not to have involvement as a trustee or as the executor of Hugh's will. She expressed this wish at a meeting with Mr Fisher, Hugh and some family members on 16 April 2012. The resettlement of the Moira Green Property Trust on the Hugh Green Property Trust had the effect of removing Maryanne as a trustee of the Moira Green Property Trust.

[86] On Friday 21 September Mr Gosney was appointed as a trustee of the Hugh Green Trust and the Hugh Green Property Trust.

[87] On Tuesday 25 September Maryanne was removed as a director from the final 10 companies in the Green Group of which she had remained a director.

3. The issues raised in this proceeding

[88] I have approached the multiplicity of issues raised by the plaintiff's allegations in the following order:

- (a) What are the principles governing the challenge to Hugh's capacity to have exercised the various powers and to execute his last will?
- (b) What are the principles governing the challenge based on undue influence?
- (c) What does the evidence in relation to Hugh's capacity establish generally?
- (d) Were the various decisions (in respect of appointments, removals, testamentary instruments) vitiated either by lack of capacity or undue influence?
- (e) In any case, if Maryanne was validly removed as a trustee was she reappointed or alternatively, was her removal cancelled?

- (f) Were the various removals of Maryanne as trustee, and the various appointments of John, Frances and Mr Fisher invalid because Hugh exercised these powers in breach of fiduciary duty?
- (g) Should I exercise this Court's jurisdiction to substitute new trustees for the existing trustee defendants on the grounds of their past conduct and on-going hostility to Maryanne and her daughter Alice?

4. What are the principles governing the challenge to Hugh's capacity to have exercised the various powers and to execute his last will?

[89] The parties agree the following principles apply to the enquiry as to Hugh's capacity:

- (a) Capacity must be assessed in relation to the specific decision or act that is questioned.³³
- (b) For Hugh to have had the capacity to make the various decisions that are now challenged he needed to have the capacity to understand the nature of the particular act and its effects.³⁴
- (c) In respect of testamentary capacity, to that must be added the capacity to understand the extent of the property that Hugh was disposing of, and to comprehend and appreciate the claims to which he ought to give effect.³⁵
- (d) The enquiry in all cases is into Hugh's *capacity* to understand rather than his actual understanding. As the English Court of Appeal has stated:³⁶

³³ *Gibbons v Wright* (1954) 91 CLR 423 at 437; *Masterman-Lister v Brutton & Co* (Nos 1 and 2) [2002] EWCA Civ 1889, [2003] 1 WLR 1511 at [58]; *Hoff v Atherton* [2004] EWCA Civ 1554 at [35].

³⁴ *Masterman-Lister v Brutton & Co* (Nos 1 and 2) above n 33, at [60]; *Banks v Goodfellow* (1870) LR 5 QB 549 (QB) at 565; *Gibbons v Wright* above n 33 at 438-439.

³⁵ *Banks v Goodfellow*, above n 34 at 565.

³⁶ See *Hoff v Atherton*, above n 33 at [33] – [34]; see also *Simon v Byford* [2014] EWCA Civ 280 at [39] – [41].

If there is evidence of actual understanding, then that would prove the requisite capacity, but there will often be no such evidence, and the court must then look at all the evidence to see what inferences can properly be drawn as to capacity. Such evidence may relate to the execution of the Will but it may also relate to prior or subsequent events. It would be absurd for the law to insist in every case on proof of actual understanding at the time of execution.

- (e) In relation to the challenge to the will, as the will is rational on its face Maryanne must establish a tenable case that Hugh lacked capacity. If she can do this then the onus shifts to the defendants to show that Hugh had capacity.³⁷
- (f) However, where a will has been professionally prepared and the lawyer has formed the view that the will maker has capacity, the Courts should not too readily overturn that view, particularly on the basis of expert evidence, where the expert did not interact with the testator. As the English Court of Appeal said in *Hawes v Burgess*:³⁸

[60] My concern is that the courts should not too readily upset, on the grounds of lack of mental capacity, a will that has been drafted by an experienced independent lawyer. If, as here, an experienced lawyer has been instructed and has formed the opinion from a meeting or meetings that the testatrix understands what she is doing, the will so drafted and executed should only be set aside on the clearest evidence of lack of mental capacity. The court should be cautious about acting on the basis of evidence of lack of capacity given by a medical expert after the event, particularly when that expert has neither met nor medically examined the testatrix, and particularly in circumstances when that expert accepts that the testatrix understood that she was making a will and also understood the extent of her property.

- (g) In relation to the other challenged decisions the onus of proof lies on Maryanne.³⁹ It does not shift as it does with testamentary capacity.

[90] I proceed on the basis that these principles govern the plaintiff's various challenges based upon lack of capacity.

³⁷ *Bishop v O'Dea* (1999) 18 FRNZ 492 (CA).

³⁸ *Hawes v Burgess* [2013] EWCA Civ 94. See further *Revie v Druitt* [2005] NSWSC 902 at [34].

³⁹ *Masterman-Lister v Brutton & Co* (Nos 1 and 2) above n 33, at [17].

[91] Many of these principles as they relate to testamentary capacity were helpfully elucidated by the Court of Appeal in *Woodward v Smith* as follows:⁴⁰

[19] The celebrated judgment of the Court of Cockburn CJ in the Queen's Bench (Cockburn CJ, Blackburn, Mellor and Hannen JJ) in *Banks v Goodfellow* (1870) LR 5 QB 549 remains the leading authority on testamentary capacity. We paraphrase and number the propositions stated in that case at 565-8:

- (1) Because it involves moral responsibility, the possession of the intellectual and moral faculties common to our nature is essential to the validity of a will
- (2) It is essential to the exercise of such a power that a testator:
 - [i] understands the nature of the act and its effects; and also the extent of the property of which he is disposing;
 - [ii] is able to comprehend and appreciate the claims to which he ought to give effect;
 - [iii] be free of any disorder of the mind which would poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties; that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made.
- (3) Unsoundness of mind arising from want of intelligence caused by defective organization, or by supervening physical infirmity or the decay of advancing age, as distinguished from mental derangement is equally cause of incapacity. But
 - [i] though the mental power may be reduced below the ordinary standard, yet if there be sufficient intelligence to understand and appreciate the testamentary act in its different bearings, the power to make a will remains.
 - [ii] It is enough if the mental faculties retain sufficient strength fully to comprehend the testamentary act about to be done.
- (4) It is not necessary that the testator should view his will with the eye of a lawyer, and comprehend its provisions in their legal form. It is sufficient if he has such a mind and memory as will enable him to understand the elements of which it is composed, and the disposition of his property in its simple forms.

⁴⁰ *Woodward v Smith* [2009] NZCA 215.

- (5) In deciding upon the capacity of the testator to make his will, it is the soundness of the mind, and not the particular state of the bodily health, that is to be attended to. The latter may be in a state of extreme weakness, feebleness or debility and yet he may have enough understanding to direct how his property shall be disposed of; his capacity may be perfect to dispose of his property by will, and yet very inadequate to the management of other business, as, for instance, to make contracts for the purchase or sale of property.
- (6) A testator who has reflected over the years on how his property should be disposed of by will is likely to find it less difficult to express his testamentary intentions than to understand some new business.
- (7) Testamentary capacity does not require a sound and disposing mind and memory in the highest degree; otherwise, very few could make testaments at all;
- (8) Nor must the testator possess such capacity to the same extent as previously. His mind may have been in some degree weakened, his memory may have become in some degree enfeebled; and yet there may be enough left clearly to understand and make a sound assessment of all those things, and all those circumstances, which enter into the nature of a rational, fair, and just testament.
- (9) But if that standard is not met, he will lack capacity.

4.1 Understands the nature of the act and its effects

[92] The parties do differ as to what it means to understand the nature of the act and its effects. Maryanne argues in substance that in order for Hugh to have the capacity to understand the nature and effect of each decision he had to have the capacity to understand the implications of the decision for other legal and family relationships. I take as an example the testamentary decision to appoint new executors. Maryanne argues that Hugh needed to be able to understand the impact of the appointment of those executors upon the control of the Green Group, the welfare of the Green Group, the trusts, and the beneficiaries, particularly in light of the working relations between the various trustees and beneficiaries. Ms Bruton for the plaintiff describes this as “the general nature, broad operation, and wider effect of the exercise of each challenged power”.

[93] The defendants’ position is that the relevant capacity is simply the capacity to understand the nature of the decisions and not the wider implications of the

decisions, certainly not the interplay of each decision with the human dynamics of the family situation.

[94] As to the “effects” of the action, I agree with the defendants’ contention that it is not necessary for the appointor/testator to have the capacity to understand the collateral consequences of the disposition, appointment or removal. A case which throws some light on this proposition is the case of *Simon v Byford* a case concerning a testator who had previously left all of her shares in her deceased husband’s company to one of her children.⁴¹ She had done this to avoid a potential deadlock if all of the children were given equal shares in the company. However, in a later will she gave the shares to each of her children equally, and did not appear to have considered the reasons which had earlier caused her to give all of the shares to one child. Lewison LJ considered that this did not indicate a lack of testamentary capacity, because the law did not require a testator to understand the significance of assets to other people.⁴²

[95] It is clear however that the effects referred to in *Banks* that the person expressing a power or executing a will must have the capacity to understand, are more than understanding the nature of the act or decision itself. It must encompass the immediate effect of the decision, for example that the effect of appointing an executor is to give the executor control over an estate.⁴³ In this case it would encompass the fact that the executors have the power of appointment of trustees and through that, control over the Green Group.

[96] Maryanne relies upon the case of *Gibbons v Wright* as authority for the proposition that the effect of the acts encompasses both direct and indirect effects.⁴⁴ That case concerned a claim to establish title to a piece of land as the last remaining joint tenant. The other two tenants had purported to sever the joint tenancy to create

⁴¹ *Simon v Byford*, above n 36.

⁴² At [44]–[46].

⁴³ For examples of the need to understand the effect of the decision see *Re Beaney* [1978] 1 WLR 770 (Ch) and *Re K, Re F* [1988] Ch 310 (Court of Protection) at 316, cited in *Masterman-Lister v Brutton*, above n 33 at [61].

⁴⁴ *Gibbons v Wright*, above n 33.

a tenancy in common in equal shares. The plaintiff claimed that the acts of the other two were void for want of capacity. The High Court of Australia held that.⁴⁵

The mental capacity required by law in respect of any instrument is relative to the particular transaction which is being effected by means of the instrument, and may be described as the capacity to understand the nature of the transaction when it is explained...

Ordinarily the nature of the transaction means in this connection the broad operation, the “general purport” of the instrument; but in some cases it may mean the effect of the wider transaction which the instrument is a means of carrying out...

In the present case, it was necessary, we think, that the two sisters should have been capable of understanding, if the matter had been explained to them, that by executing the mortgages and the memorandum of transfer they would be altering the character of their interests in the properties concerned, so that instead of the last survivor of the three joint tenants becoming entitled to the whole, each of them would be entitled to a one-third share which would pass to her estate if she still owned it at her death. This is apparently not what the learned Chief Justice put to the jury. It was the direct effect of the instruments according to their terms, and not the resultant severance of the joint tenancy, that seems to have been referred to by the expression “the effect of the deed”, in the questions ultimately formulated. But a jury which found the sisters incapable of understanding the direct effect of the deeds could hardly have found them capable of understanding the indirect effect of the deeds in severing the joint tenancy.

[97] That case does not seem to me to stand as authority for the very broad concept of “effects” that is argued for. The Court held that sisters executing documents which together had the effect of severing the joint tenancy had to have the capacity to understand that was the effect of that document when operating together with other documents. It was in fact, the legal consequence of the operation of the instruments. This is a long way removed from requiring of Hugh that he have capacity to understand the effects of his decisions upon the well being of the various entities, and his beneficiary children and grandchildren.

[98] At the other end of the spectrum, the defendants argue that where a decision is on its face, fair and rational only a small amount of capacity will be required. The case they rely upon for this proposition is *Re Austin*.⁴⁶ In that case Gendall J considered that only a small amount of testamentary capacity is required where the change to the will is fair. On the facts of that case there was very little difference

⁴⁵ At 438–439.

⁴⁶ *Re Austin* [2013] NZHC 2374.

between the challenged will and the previous will. The plaintiff was bringing the case on a point of principle only. Gendall J relied on several cases for this proposition, including *Re Rhodes*, where Hammond J stated:⁴⁷

[40] Finally there is (as in this case) the question of the terms of the will itself. Where property is disposed of fairly, and in accordance with moral dictates, then only a very small amount of capacity is needed. But with abrupt and unfair changes, fuller and clearer evidence of capacity is required. (See, for instance, *Brown v McEnroe* (1890) 11 NSW Eq 134).

[99] I do not accept that the law is that a fair and rational decision requires less capacity than one that on its face is unfair or apparently irrational. The nature of the decision will clearly be one of the factors, part of the evidence, that a court takes into account in assessing the issue of capacity. As the principles stated above recognise, an apparently irrational decision may in certain circumstances make the case that there was no capacity. Similarly, the rationality or consistency of the decision is reassuring as to capacity. It does not follow however that less capacity is required to make an apparently fair or rational will than one which is apparently irrational. This point was made by Tipping J in *Bishop v O'Dea* as follows:⁴⁸

[21] Irrationality of a will on its face, either as to content or as to expression, is often an *indication of greater or lesser force that the will maker lacked capacity*. But the rationality of a will on its face does not necessarily provide much evidence of capacity, especially if the will is professionally drawn, in which case one can expect it to be at least rationally expressed. There was in this case a rational reason for Mr Byrne wishing to benefit the Bishop family; thus the will certainly could not be described as irrational on its face. *Its ex facie rationality was simply one of a number of factors which the Judge had to consider*. That the will was rational on its face was clearly apparent. In the circumstances of the present case and in particular in the light of the medical evidence we do not consider there is any force in Mr Matheson's contention that the Judge failed to give any or sufficient weight to this factor. (Emphasis added)

5. What are the principles governing the challenge based on undue influence?

[100] The principles I apply as to the law of undue influence are as follows:⁴⁹

⁴⁷ *Re Rhodes* HC Wellington CP25/02, 7 March 2002.

⁴⁸ *Bishop v O'Dea*, above n 37.

⁴⁹ I adopt here principles from the House of Lords in *Royal Bank of Scotland v Etridge* [2002] 2 AC 773 (HL), approved by the Court of Appeal in *Hogan v Commercial Factors Ltd* [2006] 3 NZLR 618 (CA) at [36].

- (a) The overall burden of proof rests on the person seeking to establish undue influence.
- (b) The burden of proof is the balance of probabilities. I accept Mr Waalkens' submission (counsel for the defendant in the probate proceedings) that where the allegation made is serious (such as an allegation of dishonesty or criminal offending), the Court will require strong evidence to be satisfied on the balance of probabilities that that occurred.⁵⁰
- (c) The person asserting undue influence must show that the alleged influence led to the making of the impugned transaction, and that the influence was undue in the sense that the transaction was not the result of the free exercise of an independent will on the part of the person at whose expense the transaction was made.
- (d) The question of whether a transaction was brought about by undue influence is a question of fact. A party can succeed in establishing this either directly by proving "actual undue influence" or recourse to an evidential presumption which arises where it is established that:
 - (i) the person said to have been subject to undue influence placed trust and confidence in the other; and
 - (ii) the transaction called for explanation.
- (e) Whether there is a relationship of trust and confidence can either be established factually or by reference to a class of specific relationships such as lawyer/client; parent/child; doctor/patient. In the latter category the law presumes irrebutably that one party had influence over the other. The presumption is only as to proof of influence. The person alleging undue influence will still need to establish a transaction calling for an explanation.

⁵⁰ *Re H (Minors)* [1996] AC 563 (HL); *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1.

- (f) Whether a transaction calls for an explanation depends on the circumstances of the case. The question is simply whether “failing proof to the contrary, [the transaction] was explicable only on the basis that undue influence had been exercised to procure it”.⁵¹
- (g) Once the person claiming undue influence has established both the relationship of trust and confidence and a transaction calling for explanation, the evidential burden shifts to the person seeking to uphold the transaction to show that the transaction was not the result of undue influence. This however should not obscure the position that the overall burden of proof will always rest on the person alleging undue influence.
- (h) The presence of independent advice is one of many factors that may be taken into account in determining whether undue influence is proved. Whether the independent advice helps to establish that the transaction was the result of a person’s free will depends on the facts of the case. Independent advice can help establish that a person understood the decision they were making. But establishing that a person fully understood the act is not the same as establishing that the act was not brought about by undue influence. A person can fully understand an act and still be subject to undue influence.
- (i) Allegations of undue influence may succeed in relation to the exercise of powers not just the transfer of property.⁵²

[101] In relation to the alleged undue influence in the making of a new will I recognise the following additional points:

- (a) In relation to the alleged undue influence in the making of a new will, the burden of proof rests upon the plaintiff. There is no evidential presumption that Maryanne can rely upon.⁵³

⁵¹ *National Westminster Bank Plc v Morgan* [1985] AC 686 (HL) at 704, cited in *Royal Bank of Scotland v Etridge (No 2)*, above n 49 at [25].

⁵² *Harris v Rothery* [2013] NSWSC 1275.

- (b) Pressure of whatever character can amount to undue influence if it overbears the will of the testator. As Sir JP Wilde recognised:⁵⁴

To make a good will a man must be a free agent. But all influences are not unlawful. Persuasion, appeals to the affections or ties of kindred, to a sentiment of gratitude for past services, or pity for future destitution, or the like, — these are all legitimate, and may be fairly pressed on a testator. On the other hand, pressure of whatever character, whether acting on the fears or the hopes, if so exerted as to overpower the volition without convincing the judgment, is a species of restraint under which no valid will can be made. Importunity or threats, such as the testator has not the courage to resist, moral command asserted and yielded to for the sake of peace and quiet, or of escaping from distress of mind or social discomfort, these, if carried to a degree in which the free play of the testator's judgment, discretion or wishes, is overborne, will constitute undue influence, though no force is either used or threatened. In a word, a testator may be led but not driven; and his will must be the offspring of his own volition, and not the record of some one else's.

- (c) It is not necessary to provide direct evidence of undue influence, circumstantial evidence is sufficient. However, as Fisher J observed in *Hayden v Simeiti*:⁵⁵

...it is not enough to show that others had the means and opportunity to unduly influence the deceased and that there has been a recent testamentary disposition in their favour. The Court must be satisfied both that the power was exercised and that the will would not have resulted but for that exercise.

[102] This first of the additional points in relation to the will was disputed by Maryanne. Her counsel argued that where someone is instrumental in obtaining a will and takes for his or her benefit, that person must establish that the will was not caused by undue influence.⁵⁶ I do not accept that this is a correct proposition. The obligation on a person claiming under the will to show “the righteousness of the transaction” arises in cases where it is alleged that the testator did not know and

⁵³ See *Silbery v Silbery-Dee*, HC Wellington CIV-2005-485-2499, 22 August 2007 at [67] – [68] and *Puru v Puru* HC Auckland CIV-2007-404-3881, 5 November 2008 at [79] – [80].

⁵⁴ *Hall v Hall* (1868) LR 1 P&D 481 (Court of Probate and Divorce) at 482.

⁵⁵ *Hayden v Simeiti* HC Auckland P1042/92, 14 May 1993 at 12.

⁵⁶ Relying on *Fulton v Andrew* (1875) LR 7 JL 448, *Re Austin*, above n 46 and *Harrison v Harrison* (2007) 26 FRNZ 532 (HC).

approve of the contents of the will. That is not the allegation made in this case. This distinction is helpfully explained by Wylie J in *Puru v Puru* as follows.⁵⁷

[79] The issue of knowledge and approval has often been raised in the context of undue influence, and there has on occasion been confusion as to who bears the onus of proof and in relation to which issue. For example in the LexisNexis text *Wills and Succession* (Loose leaf) at para 3.12, it is suggested that although undue influence must usually be proved by the person alleging it, the onus shifts if the person propounding the will is the principal beneficiary, especially if the beneficiary prepared the will. *Tanner* is cited as authority for this proposition. However, in my view *Tanner* is not a case of undue influence at all: see *Tanner* at [71]. Rather it is a case where suspicious circumstances called into question whether the will-maker knew and approved of the contents of the will. The Court held that the onus was on the propounder/beneficiaries to remove the suspicion and to show the “righteousness of the transaction”.

[80] More recently, the view has been expressed in the United Kingdom, that “righteousness of the transaction” is perhaps an unfortunate term: see *Fuller v Strum* [2002] 1 WLR 1097 at [22]. The Court stated that what is involved is simply satisfaction of the test of knowledge and approval. Where suspicion exists, it must be more clearly shown that the deceased knew and approved the contents of the will so that the suspicion is dispelled, and so that the Court can be satisfied that the will represents the wishes of the deceased.

[103] Accordingly the onus remains upon Maryanne to prove the allegation she makes of undue influence.

6. Evidence relating to Hugh’s capacity

[104] There are several sources of evidence available as to Hugh’s well being and capacity as follows:

- (a) The evidence of several expert witnesses as to likely issues in relation to the cognitive capacity of someone with Hugh’s age and medical profile.
- (b) The evidence of family and friends who saw Hugh on a frequent basis.
- (c) The evidence of people who did business with Hugh. These overlap to some extent with the previous category.

⁵⁷ *Puru v Puru*, above n 53.

- (d) The evidence of medical professionals who attended upon Hugh.
- (e) Any light the particular events throw on Hugh's capacity.

[105] The basic narrative of Hugh's physical condition is not really in dispute from the time of the diagnosis of terminal cancer in 2010, until his death in July 2012.

[106] It is common ground that Hugh's physical condition began to deteriorate after his return from Ireland in August 2011. From that time on Hugh began to suffer from significant fatigue. By September he developed a recurrent problem with bleeding and persistent anaemia.

[107] The hospice became involved in Hugh's care from October 2011, with regular visits by nursing staff. Hugh was however able to attend his 80th birthday celebrations in late October, although there are different accounts as to how alert he was at the party.

[108] On 8 November Hugh visited urologist Dr Masters with persistent bleeding. Hospice notes around this time record he was fatigued and sleeping more. On 11 November Hugh had surgery under general anaesthetic to address the bleeding. He saw his oncologist Dr Hanning in late November. She records that Hugh had low energy levels, and that he was spending a lot of time in bed. A similar picture emerges from Dr Masters' report of a visit by Hugh to his rooms on 15 December 2011.

[109] Fatigue remained Hugh's biggest problem into the New Year. By early March 2012 when Dr Hanning saw Hugh, he had deteriorated from his previous visit. She recorded that he was sleeping more.

[110] On 8 March she recorded a telephone call from Frances in which Frances told her that Hugh had really deteriorated. He was comfortable in bed but was getting up less and less frequently.

[111] The period of time between February and March 2012 seems to have been a very low point for Hugh, although he still had good periods amongst the low times.

By February/March his family generally tried to ensure that he was not in the house on his own.

[112] On 29 March 2012 Hugh had a blood transfusion. Following that he seems to have bounced back a little. He was able to attend some meetings held at his home, and he attended a wake in April. Hugh died in July 2012.

[113] The plaintiff and defendants called expert evidence on the issue of capacity in general and Hugh's capacity in particular. The latter category of evidence was based upon a reconstruction of the medical records, and in some cases, the observations of family members made in 2011 and 2012. This reconstruction was necessary as no medical assessment of Hugh's capacity was undertaken. The evidence was that there are tests regularly used by medical professionals which test various functions relevant to cognition and the ability to process information, and it is common ground that these tests were not performed on Hugh.⁵⁸

6.1 Expert medical evidence

[114] The plaintiff called three expert witnesses to give evidence as to factors they identified as relevant to Hugh's capacity. Dr Bede McIvor is a consultant psychiatrist and psychogeriatrician. Dr Jane Casey is a consultant psychiatrist specialising in old age psychiatry. Dr Ian Goodwin is a consultant psychiatrist. Each of them was asked to express various opinions including an opinion as to whether, having reviewed a wide array of documents sent to them, there was evidence, from a medical viewpoint, raising concerns as to Hugh's capacity to exercise the various powers the subject of challenge.

[115] These experts were cross-examined extensively as to the process followed to brief them. This process involved the provision of a letter of instruction, a volume of written material (medical records and affidavits in the proceeding) and a briefing in person by the plaintiff. I am satisfied that the in-person briefing included Maryanne's particular take on events. The point of the cross-examination was to

⁵⁸ NOE Dr McIvor at 459- 460.

establish that this briefing had tainted these experts so that their evidence was not impartial.

[116] I agree with the defendants that Maryanne followed an unsatisfactory process for briefing the experts. The material provided was not complete. She should also not have met with them to give them her take on the case. The plaintiff's legal representatives should have more closely defined the questions to be addressed and ensured that they did not invite the experts to venture upon the expression of views as to the merits of the plaintiff's various allegations. Nevertheless I think that these unsatisfactory aspects had no significant impact on the evidence that Dr McIvor and Dr Casey gave. They quite properly largely limited the material they based their opinions upon to the medical records. In fact each of them seemed quite bemused as to what they could have done with the other material.⁵⁹

[117] The situation in respect of Dr Goodwin is more difficult. The unorthodox and undesirable approach taken to briefing him undoubtedly tempted Dr Goodwin into areas that should have been left to me (weighing evidence, and expressing views as to what it establishes). On reviewing his evidence-in-chief I have found it so intertwined with Maryanne's particular view of the facts, that it is prudent to put it to one side. I do not criticise Dr Goodwin for this. The difficulty lies in how he was instructed. I was however assisted by the evidence he gave under cross-examination.

[118] There were some common themes that emerged from the evidence of these expert witnesses which I have found useful in considering the wealth of evidence I received on the issue of Hugh's capacity. These are:

- (a) The assessment of family and those close to Hugh is the best evidence of his mental functioning.⁶⁰
- (b) The assessment of medical professionals attending upon Hugh during his terminal illness is also very important in forming a view as to Hugh's capacity, but not determinative.⁶¹ As Dr Goodwin put it:⁶²

⁵⁹ NOE Dr McIvor at 448; NOE Dr Casey at 851-852.

⁶⁰ NOE Dr Goodwin at 705-706.

⁶¹ NOE Dr McIvor at 456.

⁶² NOE Dr Goodwin at 718.

It's to a degree reassuring, as I said earlier sometimes as doctors we're not necessarily looking for the subtle impairments in decision making, such as ability to hold competing ideas in your head, how you come to one conclusion rather than another. We tend to be concerned with much more basic kind of things, such as capacity to consent to treatment, and capacity to engage and continue with treatment. So unless those kind of things come up, we tend not to notice really.

- (c) Hugh's terminal illness, particularly when added to his other chronic conditions was a marker for vulnerability to cognitive impairment. In addition to the cancer, he suffered from [redacted material]. It is very likely that such a burden of disease would have affected cognitive function and other higher faculties. As Dr Goodwin put it:⁶³

... we all know that when we're tired and fatigued we don't concentrate as well. We know that people who are anaemic have a very, have a much shorter span of attention. We know that when you're really sick and you have a high, what we call, cancer load or cancer burden, that people's abilities to concentrate for long periods can be significantly impaired just because of the physiological demands and sometimes the distraction of pain.

- (d) Fatigue in particular can have an effect upon capacity.
- (e) Even so, it was accepted by the plaintiff's expert witnesses that some people can be in a very advanced state of terminal illness without any significant impairment of their capacity.
- (f) If the family express concern about cognitive functioning (such as concerns about memory and decisiveness) the person should be tested for capacity before executing important documents.
- (g) Sudden changes in personality, or in behaviour can indicate cognitive impairment.⁶⁴
- (h) Other things are reassuring of an absence of cognitive impairment, including consistency in choices over a period of time. Dr Casey said:⁶⁵

⁶³ NOE Dr Goodwin at 753.

⁶⁴ NOE Dr McIvor at 457-458.

⁶⁵ Affidavit of Dr Jane Casey at [24].

The notion of internal consistency is when a person makes the same choice over time. A person who is mentally compromised may make different choices when asked the same thing on different occasions.

- (i) It is also reassuring if personality remains intact.⁶⁶ So too if the person is able to continue to conduct business and to read periodicals and magazines if they show when they do that they are processing the information they have received.⁶⁷ Dr Goodwin added the following caveat when asked if a person's involvement in high level business meetings and discussion of financial reports was a good indication that the person's cognitive functioning was impaired:⁶⁸

It can be. The reason I'm being a bit cautious about that is that if people are used to doing what they normally do, you can actually get away with keeping on doing it even though you've got a significant degree of cognitive impairment. It's certainly, you know I guess the idea of you could do it with your eyes shut or blindfolded. You know if people have been doing the same thing forever you can carry on with it and give you the semblance that you're doing it just as well as you ever did. But when you go to test it and you look at other components you find deficits.

[119] Dr Simcock was the expert called for the defence. In his evidence-in-chief he expressed the view that Hugh did have capacity to make the various decisions that he did. His evidence contained some of the features which the plaintiff's experts were criticised for in cross examination, and in particular the expression of opinions based upon weighing of the evidence. Just as with Dr Goodwin, Dr Simcock's opinion expressed in evidence-in-chief turned upon a particular view of the facts.⁶⁹

[120] It was inevitable that Dr Simcock's evidence-in-chief did not include some of the evidence elicited in cross-examination. Ms Porter's evidence that on occasions Hugh's short term memory could be bad was put to him. He said:⁷⁰

⁶⁶ NOE Dr Goodwin at 735.

⁶⁷ NOE Dr McIvor at 461.

⁶⁸ NOE Dr Goodwin at 704-705.

⁶⁹ For example, he assumed that the explanation that John gave for an email expressing concern about his father's confusion, that Hugh had been drinking, was true. This is an explanation I have rejected. He also seems to have discounted Maryanne's evidence that her father told her "you are still my trustee" on 21 December as irrelevant for his purposes as "one of the possible explanations is that he was not going to have a confrontation with anyone and he was just taking the easy way out". NOE Dr Simcock at 1747.

⁷⁰ NOE Dr Simcock at 1745.

..... it seems to me that at times he had capacity and that his cognitive function was really quite good on the evidence of, you know these incidents that were reported and at other times, that he wasn't good, and that I interpreted that as being that at times his concentration was impaired and would not be able to sort of participate as well, or perform as well as he would at other times.

[121] When the hospice nurse Ms Caldwell's opinion that a capacity assessment ought to have been obtained was put to him, he accepted that if it was known that Hugh was going to be making major decisions an opinion as to capacity should have been asked for.⁷¹

[122] Dr Simcock's evidence was helpful on the relevance of fatigue to capacity which was also dealt with by Drs McIvor and Goodwin. I set out the following question and answer:⁷²

Q. If something occurs when you are fatigued and that impacts upon your ability to lay down memories, that means that the thing that occurs when you are fatigued may not be captured in your short term memory?

A. Yes.

Q. So it will not be carried forward?

A. Yes.

Q. And informed subsequent thinking or actions that you take?

A. Yes exactly.

6.2 Family and friends

Credibility issues

[123] Consideration of the evidence in this area involves the resolution of conflicts in the oral evidence given. It is therefore convenient to set out my general views of the credibility and reliability of the key witnesses – Maryanne, Mr Owens (Maryanne's husband), John, Frances and Moira. These general findings are supported by findings in relation to conflicts of evidence made throughout the course of the judgment.

⁷¹ NOE Dr Simcock at 1746-1747.

⁷² NOE Dr Simcock at 1753-1754.

[124] Maryanne's credibility was subject to quite sustained attack. Her account of her father's decline was attacked on cross-examination on the basis that it was self serving. It was noted that she had not expressed concerns to any medical professional at the time about her father's mental capacity. It was emphasised that during the time she says Hugh was struggling mentally she was happy to accept a gift of [redacted material] for an overseas trip in April 2012. It was put to her that although she seemed to be a compulsive note taker, she had not taken notes of some of the exchanges with her father she relied upon. The defence case was that her actions then and her evidence at trial were motivated by an irrationally negative view of her brother, and of his role in events.

[125] Having watched Maryanne give evidence and having carefully reviewed that evidence against the contemporaneous record, I have concluded that the evidence she gave was truthful and largely reliable. Frances accepted that she had said of Maryanne that she cannot lie to save herself.⁷³ My impression is that she is compulsively truthful, to the extent that she is prepared to strain family relations to the point of breaking them, in pursuit of the truth. She is completely without guile in how she recounts events. She is ready to admit to things that do not cast her in a positive light.⁷⁴ I do not say that she is one hundred per cent reliable. At times her impressions may have been off or she may have failed to recall events entirely accurately. I accept Frances' assessment that Maryanne does have her own particular take on events. But I have no doubt that she attempted to recount events honestly and with the detail she recorded at the time and recalled at hearing. It is inevitable that her evidence is affected by the fact she is recalling events occurring in such emotionally charged circumstances.

[126] I do not attach any weight to the fact that on occasion she did not have notes, or that she accepted a gift from her father at a time she says her father was struggling mentally. The gift was large, but it occurred in the context of a family worth hundreds of millions of dollars. Fundamentally Maryanne's account of events and

⁷³ NOE Frances Green at 994.

⁷⁴ Such as entering John's house without permission, and reading John's emails after she had left the Green Group.

her evidence about her father are corroborated by the documentary record created at the time and by the events as they occurred.

[127] Counsel for John, Mr Grieve, submitted that a conflict between Maryanne's and Ms Porter's evidence regarding a trip to John's house in 1993 (the Mangatangi trip) undermined her evidence. However to the extent there was conflict between Maryanne's and Ms Porter's evidence, I prefer the evidence of Maryanne, for reasons I give later.

[128] Mr Grieve also submitted that the Mangatangi trip and other incidents (such as the 'dossier' she provided for the 1 November 2011 meeting) showed the lengths Maryanne was prepared to go to in order to undermine John. The events counsel refers to are separated by 18 years. They do not establish the existence of a campaign against John. I do accept however that Maryanne is insistent that those around her be honest, and is ruthless when it comes to holding to account those she considers to have been dishonest. There was ample evidence of that. Maryanne accepted that on the Mangatangi trip she went into her brother's house to collect account books from his office without his permission. This was in pursuit of proof of his dishonesty. She made no attempt to conceal this. This is evidence that she is an unusual person, no doubt a difficult person, but it is not evidence that undermines her credibility.

[129] Maryanne's evidence on some key points is also corroborated by her husband, Mr Owens. The defence suggested that his evidence was coloured by his desire to support his wife, but I was satisfied that he was a truthful witness. His evidence stood up well when measured against the contemporaneous record. On one point where it did materially conflict with that of another witness, Ms Porter, I prefer Mr Owens' evidence, as I come to. I do not regard the conflict between Mr Owens' and Ms Doran's evidence as material.

[130] I did not find John's evidence to be credible or reliable on those points where it conflicted with the evidence of other witnesses, or where it conflicted with what the documentary evidence tended to show. I have found his recount of events to be

self serving. He has shown a facility for coming up with explanations for events which, while suiting the defendants' case in these proceedings, are implausible.

[131] I found Moira to be truthful witness, but I consider that she was mistaken in aspects of her evidence. Moira's evidence was limited by the fact that she seems to have no recollection of events independent of her affidavits. [redacted material].⁷⁵ I had reservations about the reliability of some of her evidence as it seemed to be coloured by her desire to see this family dispute resolved decisively in favour of the status quo, and to protect her son John. Given the nature of this dispute, and the allegations made in these proceedings, these are both easily understood instincts. Nevertheless, I consider that they affected the reliability of some of the evidence given by Moira.

[132] As to Frances, I found her evidence to be coloured by the desire to see this dispute resolved in favour of the status quo. Frances was very close to Hugh in the last months of his life. It seems that she worked tirelessly to give support to Hugh and her mother. Maryanne did not share in this care giving role. Frances was in a good position to observe Hugh. For whatever reason the evidence she gave in relation to Hugh's physical and mental condition was out of step with the contemporaneous record. She tended to paint a more positive picture of his condition than is reflected in those records or in what his family was saying at the time.

The evidence of family and friends as to capacity

[133] Maryanne's evidence was that Hugh was not the same after he returned from Ireland in August. From then on his ability to participate in discussion was limited. His comments were consistently simpler, of the nature of "yes", "no", "I don't know" or "I don't know why". He was unable or unwilling to communicate reasons for his decisions or why he had signed documents. At times he did not even seem to realise that he had signed them.⁷⁶ He was often confused about events and had difficulty

⁷⁵ NOE Moira Green at 942.

⁷⁶ For example, see Affidavit of Maryanne Green at [305]-[307].

understanding concepts that were once second nature to him, such as the difference between trustees and directors.⁷⁷ He also had difficulty remembering events.⁷⁸

[134] Maryanne also claims that Hugh's personality changed. Moira told her that he became more childlike. Moira agreed on cross-examination that around this time she described Hugh as becoming childlike, by which she said she meant being "clingy and he wanted his family around him."⁷⁹ Maryanne considered that he also did things which were out of character, such as directing that he be cremated when the long term plan had been for burial, and accepting an honour from the Queen, when he was fiercely anti-royalist due to his Irish heritage.⁸⁰

[135] Alice Piper described seeing her grandfather at a Father's Day lunch in September 2011 and observed that when she talked to him he seemed unable to follow conversation.

[136] Ms Leanda Childs is a former Green Group employee. She gave evidence as to her impressions of Hugh. She said that he did not often come into the office in the latter part of 2011, and:⁸¹

[w]hen he did, it was sad. I would see him struggle to come up the stairs. I would see him sitting in his chair in the boardroom, staring into space. After an hour or two, someone would take him home.

[137] The evidence of Maryanne, Alice and Ms Childs contrasts with that of most of the witnesses called by the defendants who gave evidence as to Hugh's mental capacity. There were many such witnesses. Each of Frances, Moira and John gave evidence that they noticed very little difference in their father's mental capacity and that he remained mentally sharp and active right up until he died. Frances and Moira said that he was less communicative with Maryanne because he didn't want to waste time arguing with her, and that telling Maryanne he didn't know that something had happened or why it had happened was another useful strategy toward the same end. John said that although his father did have brief lapses in his short term memory,

⁷⁷ Affidavit of Maryanne Green at [286] referring to her meeting with Hugh on 12 December when Maryanne says Hugh told her that trustees and directors were the same thing.

⁷⁸ Ibid.

⁷⁹ NOE Moira Green at 917.

⁸⁰ Affidavit of Maryanne Green at [363].

⁸¹ Affidavit of Leanda Childs at [10].

overall he remained sharp, and he was always conscious that he was having a short term memory lapse.

[138] It was a theme of the defendant's case that in the absence of a formal medical assessment of Hugh's capacity it is the family views of a person's capacity that are the most telling. In this they had the support of the medical experts called for the plaintiff and defendants. The general theme of the medical evidence was that because family spend the most time with the person they are able to observe the finer detail of reactions and interactions and any changes in behaviour, and in particular mental functioning. This is a level of detail and observation not able to be achieved by medical professionals in their brief interactions, or by friends and associates in periodic visits.

[139] Another point made by the defendants is equally cogent; that the views expressed by family now need to be approached with some care, when they are parties to proceedings such as these.⁸² The evidence that some family members gave at trial was at odds with views they expressed at the time with which these proceedings are concerned. In contrast to the evidence Frances gave at trial as to her father's functioning, in the initial meeting with hospice staff in early October 2011, Frances is recorded as saying "Main issues from her perspective are memory-short term is diminished." I note that this note was not put to Frances in cross-examination although her account that her father's mental functioning was undiminished was tested. This notation should have been put to Frances so that she had the opportunity to comment upon it. The failure to put this record to Frances does diminish the weight that can be placed the evidence of that record, nevertheless I also weigh that Frances was not alone in her view that her father had short term memory problems. On Friday 21 October 2011, John emailed Mr Narev as follows:⁸³

I think you should give Hugh a ring. He said last week he was waiting to talk to you before making any decisions although he said he now wants to appoint Jane, Seamus and me as directors and Seamus as CEO and he thinks Maryanne is open to the idea. However his short term memory is deteriorating[sic] and he is becoming more indecisive.

⁸² To be fair to the defendants, this point was made in connection with Maryanne rather than the defendants, but I consider the argument cannot validly be limited in that way.

⁸³ CBD at 936.

If he is well enough after his 80th next week him and Mum are going to go to the Gold Coast for a week or so and Maryanne has sent an e-mail to the office saying she is having November off so I think some decisions need to be made this week. She has only been here on rare occasions in the last 5 weeks.

[140] A few days later John emailed Mr Narev as follows:⁸⁴

Dad rang me three times last night to ask the same questions so his short term memory seems to be declining quickly. I wondered if perhaps Frances should also attend as an observer to record what takes place for Mum and the family as Dad wont[sic] remember all of what is said and decided.

[141] John was asked about these emails during his evidence in chief. He said that he did not have day to day contact with his father at the time, and that these concerns arose out of phone calls. He said that he spoke to his mother after the three phone call incident and she said that his father had visitors that night and had been drinking. He later spoke to his father about it, and they had laughed about the incident.

[142] I understood John's evidence to be that any short term memory deficit he observed in his father was the kind many people experience, where they cannot call something to mind but are conscious of it. He said he was not concerned about his father's memory or decisiveness at this time or indeed at any time. The emails came about because of an isolated incident which was adequately explained to him.

[143] I find this explanation implausible, even though it was supported by Moira. These two emails were separated by days. John's explanation simply does not fit the facts. Moreover, this was not an isolated occasion. John continued to raise his father's ability to take part in decision making into 2012 and I discuss those documents in detail later.⁸⁵ Having heard all of the oral evidence and weighed it against the contemporaneous documents I have concluded that by that time, late October 2011, Hugh had become forgetful (his short term memory was deteriorating) and indecisive. For whatever reason, John now expresses different views as to Hugh's mental functioning than he was expressing at the time.

⁸⁴ CBD at 947.

⁸⁵ CBD at 1381-1385, 1476 and 1489.

[144] In contrast, Maryanne's views as expressed at the time, chime with her evidence. In an email on 25 October 2011 to Mr Narev she says.⁸⁶

I have just received a phone call from Hugh just now asking if I can be at a meeting at his house on Thursday morning at 9:30 am.

I asked what the meeting was for.

Hugh said to have a talk.

I said to have a talk about what.

Hugh said he did not know and then added just a talk.

I said what was on the agenda.

He called out to Moira and said what is on the agenda.

He then said to me he didn't know what was on the agenda.

[145] The defendants' case is that this conversation was simply an instance of Hugh trying to avoid conflict with Maryanne or at least a lengthy conversation. Maryanne says that is not how her father dealt with her, that they always talked things through and Hugh welcomed her testing his thinking and plans.⁸⁷ There is ample to corroborate Maryanne's account that this was how she and Hugh used to interact, but Hugh was now sick and would have been aware of the limited time left to him. In that context it is easy to imagine him avoiding engaging in debate with Maryanne. Maryanne has very particular personality. She focuses intensely on issues, and I have gained the impression that she can be quite rigid in her thinking. She is also very focused on detail, which was her great strength within the Green Group and what her father relied upon her for. The negative side of this however is that she finds things difficult to let go of.

[146] However Hugh clearly valued these aspects of her character and personality. He relied upon her relentless focus on detail in keeping a complex business afloat, and in ensuring that those who dealt with the Green Group did what they undertook to do. Prior to his last illness at least Hugh was himself obviously not your average person. He was capable of real intensity of thought and clearly had extraordinary determination. Even while very ill, Hugh showed that he was prepared to say hard things to Maryanne if he thought it necessary. For example, he threatened her that if

⁸⁶ CBD at 949.

⁸⁷ NOE Maryanne Green at 15.

she went to court to seek directions over the appointment of John as trustee, “that will be you and me finished.”

[147] Moreover, the conversation in relation to the proposed meeting recorded by Maryanne in typically detailed form, does not sound as if Hugh were employing the strategy the defendants suggest. If he were, why ask Moira for the detail? The email reads like the record of a conversation with someone who either never knew what the meeting was about, or had forgotten.

[148] One aspect of Maryanne’s case on this point I did not find convincing was the notion that Hugh had undergone a sudden personality change because he was becoming more “childlike”, because he changed his position on his funeral arrangements and because he accepted an honour in recognition of his charity work. It is to be expected that a person, no matter how independent and dynamic when well, will want his family around him as he approaches death. Death can also cause a re-visiting of values or firmly held beliefs, such that even a lifelong anti-royalist is delighted to accept an honour from the Queen.

[149] Non-family members also gave evidence about their interactions with Hugh. This list included Ms Joanne Kriletich, Ms Susanne Hansen, Ms Karen McAuley, Ms Lucille Lawless and Mr Kevin Morris. These people were friends or associates who saw Hugh in a social context, some of them right through until his death. They said his mind was sharp.⁸⁸ They describe a man who was still engaged in business, talking on the phone and cattle trading, even attending cattle sales in 2012.⁸⁹ They recount events that demonstrate a good short term memory,⁹⁰ an interest in current events,⁹¹ as well as Hugh dominating conversations and cracking jokes.

[150] In assessing this evidence I bear in mind that these people were seeing Hugh in a social context, in which his personality and charm could very well carry him through. The evidence of his conducting business, making situation appropriate

⁸⁸ Affidavit of Joanne Kriletich at [6]; Affidavit of Susanne Hansen at [14]; Affidavit of Karen McAuley at [4]; Affidavit of Kevin Morris at [8].

⁸⁹ Affidavit of Joanne Kriletich at [3];

⁹⁰ NOE Susanne Hansen at 1043.

⁹¹ Affidavit of Lucille Lawless at [4].

jokes, and of processing and discussing current events is nevertheless reassuring to an extent as to his cognitive functioning.

6.3 *Lawyers and business associates*

[151] The narrative of events I set out earlier involves Hugh calling for and organising a meeting in early November. It is apparent from the various accounts of the meeting that Hugh at least firmly voiced his view that he wanted John appointed to a role within the Green Group, although there is some difference in the evidence as to whether the role discussed was as a trustee or director.⁹² Moreover, Hugh attended a meeting of trustees on 5 December where he was able to articulate the reasons why he wished John and Frances to be involved alongside Maryanne in the business.

[152] People who did business with Hugh were called to give evidence. Mr Narev gave the following evidence in connection with Hugh's mental functioning in the months leading up to his death.⁹³

91. I had been dealing with Hugh for more than 30 years at the time of the disputed events in this case, which occurred during 2011 through to mid-2012. The last occasions on which his capacity was relevant to my dealings with him were in relation to the will instructions which I have already described, a few days before 26 April 2012, and the meeting of the trustees of MGPT at Hugh's Mt Albert home on Friday 4 May 2012. Hugh was present at this meeting and actively participated, voting on resolutions and discussing the business at hand in a normal manner.

92. I was closely acquainted with Hugh and dealt with him frequently over many years and I did not discern any changes in his demeanour on that occasion, or in his comprehension, his ability to articulate issues or understand legal and commercial concepts, or his speech and alertness generally. This is also consistent with my observations of him at the time of the earlier events, such as meetings he attended with me, which I have described in this affidavit.

93. In all my dealings with Hugh over the last two years or so prior to his death, whether we discussed matters relating to the family business or his personal affairs, he was lucid, present-minded, and throughout appeared to be readily capable of understanding detail and commercial and legal concepts.

⁹² Affidavit of Robert Narev at [45]; Affidavit of Kathryn Roberts at [48].

⁹³ Affidavit of Robert Narev at [91] – [93].

[153] Mr Narev also said that Hugh's usual way of doing business was to only speak when he wished to make a point.⁹⁴ Mr Narev said that he remembered receiving emails from John regarding his father's loss of short term memory, and indecisiveness and bore that in mind when dealing with Hugh.⁹⁵ However I note that Mr Cahill, who was instructed by Mr Narev to attend to the making of a new will in April of 2012 was not informed by Mr Narev that there were concerns on the part of the family about Hugh's memory and ability to make decisions.

[154] After the 1 November meeting Mr Narev had very limited contact with Hugh over the critical period of time; from 8 November 2011 until late April 2012. He accepted under cross examination that during that time he saw Hugh only at a lunch on 11 January, and at a board meeting on 4 May 2012, although he did speak with him on the telephone from time to time.

[155] Mr Narev had limited opportunity to assess Hugh's functioning in business in 2012. Given Hugh's standard way of participating in meetings as recounted by Mr Narev, any such assessment would have been difficult. The minutes of the 4 May meeting do not record any contribution from Hugh.

[156] Mr Carter gave evidence that during his dealings with Hugh in 2011 and 2012 he was alert and clear minded, much the same as he was as a younger man. He said he could not discern any significant decline in his comprehension. He described meetings on 14 March and 4 May 2012, at which he said Hugh was alert, actively participated in the discussion and had full comprehension of the discussion.⁹⁶

[157] In assessing Mr Carter's evidence on capacity I bear in mind that like Mr Narev he did not have much contact with Hugh over the relevant period. He saw Hugh in October 2011, but then went on sick leave. He next saw him on 14 March and then at the trustees' meeting on 4 May 2012, the same meeting Mr Narev referred to.⁹⁷ Mr Carter's ability to observe Hugh was therefore limited.

⁹⁴ Affidavit of Robert Narev at [54].

⁹⁵ NOE Robert Narev at 1649.

⁹⁶ Affidavit of Robert Carter at [8.1].

⁹⁷ NOE Robert Carter at 1357, although he did have some contact with Hugh over the telephone, see NOE Robert Carter at 1386-1388.

[158] As to his description of Hugh, I am satisfied that his evidence in chief tended to exaggerate the contribution that Hugh made to discussions. I have already referred to the 4 May meeting. When Ms Porter's evidence was put to him that Hugh did not contribute to any great extent in the 14 March meeting and left near the end of it, he said of Hugh's participation "he was cognitive of what was being discussed and I know that he was in favour of the broad thrust of the proposals we were making."⁹⁸

[159] My impression of Mr Carter's evidence was that he displayed hostility toward Maryanne and toward her case. He was not prepared to accept propositions put to him by counsel, if they favoured Maryanne in any way, even when, in one case it was a proposition based on an earlier statement he had made.⁹⁹ It was put to him that his evidence was affected by his concern to avoid being sued, and I consider that the tone of his evidence bears that out as do his own actions in 2011.¹⁰⁰ In late 2011 Maryanne's threat of "bringing in the lawyers" caused Mr Carter to consider resigning his role as trustee.

[160] Also relevant is the evidence of Mr Graham Coghlan, a farm manager for the Green Group who had worked for Hugh for about 35 years, most of the time managing the agricultural division. He said that throughout 2011 and 2012 he met with Hugh at least once a week and also spoke with him on the phone sometimes as often as six times a day, although over the last few months of his lifetime, at a lesser rate. He said that Hugh's mind remained active and alert and although he was physically frail his mental functioning appeared to him to be more than adequate. He gave as an example a meeting in early to mid June 2012 at which he and Hugh undertook an overview of the various farming operations in which Hugh had interests. The meeting lasted about an hour. Mr Coghlan said that Hugh was totally involved in the meeting making inquiries and contributing his own views.

[161] Mr Michael Dwyer gave evidence to similar effect about his business dealings with Hugh. He said he visited him in late November 2011, March and May 2012. They discussed business matters, including plans Mr Dwyer was thinking

⁹⁸ NOE Robert Carter at 1365.

⁹⁹ NOE Robert Carter at 1328-1330.

¹⁰⁰ NOE Robert Carter at 1370.

through to acquire shares in a company in receivership, and general livestock business interests.

[162] Ms Porter's evidence in chief was that Hugh remained well functioning mentally throughout. She said that although she observed significant physical decline from late 2011, Hugh retained a tremendous interest in the business, right up until his death, and that he fully understood everything that was going on. "This extended to his understanding of decisions and documents relating to the appointment/removal of trustees/directors".

[163] I am satisfied that Ms Porter was very partisan in the way that she gave her evidence. I found her unable to isolate her loyalty to the trustee defendants from her account of past facts and observations. As an employee of a group under the effective control of the trustee defendants, it was undoubtedly difficult for Ms Porter to come and give evidence in the middle of an acrimonious family dispute. The extent to which she was forced to change her evidence when confronted with her own and John's 2011 and 2012 emails is one indication of the extent to which that loyalty, at least initially, affected her evidence. When the October emails from John and other later emails in a similar vein were put to her, she conceded that Hugh did have short term memory problems from around the time of his return from Ireland. She went on to say, that at other times, he would bounce right back and be like his old self. She also agreed that he was indecisive at times, although clarified that to say he remained decisive about the things he wanted to be decisive about.¹⁰¹ When comments she had made to Maryanne at the time were put to her, she agreed that at times Hugh appeared not to be able to grasp conversations and did not pick up the full extent of what she was saying to him. She agreed that she had to repeat herself to him.

[164] Mr Fisher also gave evidence that on the occasions he met with Hugh in late 2011 and 2012, Hugh fully understood the matters under discussion. This included the implications of removing Maryanne as a trustee. His description of Hugh is of a man who was calling the shots and fully engaged. I did not however find Mr Fisher a reliable witness. As I come to, his conduct in connection with the subject matter of

¹⁰¹ NOE Jane Porter at 1160-1163.

these proceedings was unsatisfactory in a number of respects. I have found that his contact with Hugh through the relevant period was less extensive than he has claimed. I consider that his recollection is coloured by a desire to bridge the gap between what he did and what he should have done. I do not say he is lying, but rather that his recollections are naturally affected by the circumstances I have outlined.

[165] Also relevant to the issue of Hugh's engagement in business, is the evidence of Ms Payne, who gave expert evidence for the plaintiff. Ms Payne is a forensic accountant and electronic forensic investigator. One aspect of her evidence addressed Hugh's telephone usage from February 2010 until July 2012. Her analysis covers both the number of calls and the duration of all calls made from Hugh's cellphone and landline.

[166] Ms Payne produced a graph showing the trend in phone usage over this period. The graph shows a clear and steady decline in phone usage from September 2011.¹⁰²

[167] As I understand Ms Payne's analysis it only covers calls made from Hugh's numbers and does not cover calls made to him. Although, it shows a pattern of declining phone use, I do not place much weight upon the evidence as it produces only a snapshot of a particular activity divorced from context.

6.4 *Medical professionals involved in Hugh's care*

[168] Dr Masters was called by the plaintiff to give evidence. He had extensive involvement in Hugh's care from his initial diagnosis with cancer, until he saw him for the last time in December 2011. His evidence was that he observed a significant deterioration in Hugh following his return from his trip to Ireland in August 2011, although Hugh still remained upbeat and "perky". He said that when he saw him in September 2011 it was clear that the burden of the cancer was starting to take hold. He did not have the vigour and quick wit he had observed at earlier meetings. He suspected that his haemoglobin was low and recommended a transfusion.

¹⁰² Exhibit 8.

[169] Dr Masters was the medical professional who saw Hugh on the date closest to the events with which the first challenge is concerned, on 8 November, the day he executed the documents. He said that Hugh was not at all well and had been suffering from bleeding caused by his cancer for several days (at least from the previous week). He and Hugh determined upon a surgical intervention although noting that Hugh would probably need a transfusion and that “we just need to make certain that the anaesthetist is happy with regard Hugh’s general health”.

[170] He operated on Hugh on 11 November, with the principal purpose of stopping the bleeding. He noted that Hugh was very low following the surgery although accepted these were his observations of an elderly man immediately following surgery.

[171] His evidence was that from a medical standpoint he would have been concerned about Hugh’s capacity to make complex business and family decisions following his last return from Ireland without appropriate testing.

[172] On cross-examination it was put to Dr Masters that he was now placing a negative spin on Hugh’s medical condition, quite out of step with what was recorded in the medical records and his reports to Dr Schoonbee. Dr Masters accepted that he was expressing concern about Hugh’s mental capacity that he did not expressly communicate at the time, and that he had not himself suggested that Hugh’s capacity be tested. He maintained however that his concern was with Hugh’s physical condition, and that the physical and mental condition are connected.

[173] Having reviewed Dr Masters’ evidence and his notes I am satisfied that he gave his evidence in a fair and unbiased way. I do not accept the notion that he was consciously or unconsciously shaping his evidence to assist the plaintiff. I consider that his evidence fairly describes his observations of Hugh’s physical state, and makes explicit that his concerns regarding Hugh’s mental capacity are connected to that. I particularly bear in mind that when Dr Masters first told Hugh that his cancer would be terminal, he also told him to sort out his affairs, before he became too ill. This is consistent with his view that mental functioning is linked to the overall wellness of a patient

[174] I have no hesitation in accepting Dr Masters' evidence that Hugh was very unwell by the 8 November. In a sense, the facts speak for themselves. His physical condition was such that he required a blood transfusion, and even though he was terminally ill, surgery was assessed to be worthwhile to address his symptoms. I also accept Dr Masters' view, which was supported by all of the expert witnesses, that a person's physical condition can have a bearing upon capacity, although I add to that the rider that although it is a red flag in terms of capacity, each case must be determined on its own facts.

[175] Dr Masters saw Hugh at some particularly low points when surgical intervention was warranted. There is other evidence that Hugh's condition continued to fluctuate, and that he experienced periods of time during which he regained some strength and other periods during which he was so low that his family thought him near death. Ultimately however, Hugh did not die for another 8 months after the surgery.

[176] The defendants called other medical professionals who were involved in Hugh's care after his diagnosis of terminal cancer. These witnesses were his general practitioner Dr Matthew Schoonbee, his oncologist, Dr Fritha Hanning, the endocrinologist Hugh saw for treatment for his diabetes, Dr Richard Cutfield, and Ms Jane Caldwell a hospice nurse who helped care for Hugh from 22 November 2011 until 29 May 2012 (when she went on leave). The evidence of each of these medical professionals was that on the occasions they met with Hugh he appeared to have very good mental capacity to comprehend things and to understand what was going on with matters affecting his interests. Most described a man who was a live wire, who they looked forward to seeing. All confirmed that the family did not raise with them concerns as to lack of capacity and so they did not initiate or undertake any capacity assessments at any point.

[177] The defendants say that the absence of any observation, detection, note or any cue whatsoever on the part of the health providers of issues concerning cognitive/mental health functioning is very significant and reassuring that Hugh did indeed have capacity.

[178] Dr Schoonbee saw Hugh at his practice in October 2011 in connection with the renewal of his driver's licence, and recorded that he was functioning well mentally. He did not see him again until February 2012 and at that point had a discussion with him about his wills and trusts. He said he raised this with him because it was apparent that Hugh's physical condition was deteriorating as his cancer progressed. He considered it was prudent to make sure he had his affairs in order, and he was left with the impression that they were. The February consultation was the only consultation he had with him during the period of time under challenge. He did however do a home visit with Hugh on 28 May. He said that whilst it was apparent that Hugh's physical condition was continuing to show a steady decline, his mental faculties were fine. He had no difficulty communicating with him and engaging with discussion with him on how to manage his on-going health.

[179] During cross-examination various emails from John (in which he expresses concern as to Hugh's memory and ability to make decisions) were put to Dr Schoonbee. I set out a relevant passage of evidence:¹⁰³

Q. If you knew about family concerns such as this and you knew that Mr Green was about to start making complex succession decisions, you would have referred him on to a psychogeriatrician, wouldn't you?

A. I would have certainly had that discussion with Hugh or with the family, or with Hugh and if I'd had concerns that Hugh didn't have the ability to process what we were talking about I would try and involve the family. So I saw Hugh on his own, I think in, I don't know how many consultations during that time period.

Q. We've established it's one, haven't we?

A. One during that period, but I mean I think there are more consultations involved in this process and I never felt the need to get a parallel history or another support person for Hugh during our consultation, which I think indicates to me at the time that I was quite happy that Hugh was processing and understanding what we were talking about from a medical perspective and he was able to stick to a plan that we were formulating.

Q. But you'd accept that what you were talking about from a medical perspective in sticking to a plan, is quite a different thing from making complex succession planning decisions isn't it?

¹⁰³ NOE Dr Schoonbee at 1201-1202.

A. Yes it is not specific to legal issues, but I think, my impression, and certainly it's my impression and I'm not a psychogeriatrician but I was certainly forming an opinion that was moulded around some framework of understanding of what capacity requires and it was clear from my consultations with him that he was retaining information very well, he was attentive, he was understanding issues and he could process that information to come up with a plan for his medical issues and I think, I suppose some of those mental tools are generic to any mental capacity assessment. However I, you know, I've got no vested interests in this case at all obviously, I'm just trying to help you guys come to the right decision here and my impression is that he, when I saw him certainly, he had the tools required to make, to provide the mental capacity to make decisions, in other words, it really struck me that he had a very good short term memory, he was able to process information, he was able to remain on task and communicate his decisions, medically.

Q. So to make his medical decisions?

A. Yes that's right.

[180] Dr Hanning's view was similar. She had consultations with Hugh during the period June 2011 to March 2012. She said she did not detect any problems with Hugh's mental health or mental functioning, although she keeps an eye out for such issues when consulting patients. None of Hugh's family suggested that he did not have capacity or may not have been able to make sound decisions. She said:¹⁰⁴

To the contrary...they were often present at the consultations I had with him and yet it was Mr Green who made the decisions about his ongoing health management.

[181] As to her own impressions of him she said:¹⁰⁵

What I can say is that each consultation with Hugh was able to start from the point of leaving off from the previous consultation, in that we did not have to go back over things which had been discussed previously and from that I would feel that he is able to remember and to have understood the things that were taken previously and to have laid them down in short term and medium term memory.

[182] However on cross-examination she confirmed that if the family concerns regarding Hugh's memory and decision-making had been brought to her attention she would have organised for a psycho-geriatrician to assess Hugh.

¹⁰⁴ Affidavit of Dr Fritha Hanning at [18].

¹⁰⁵ NOE Dr Fritha Hanning at 1130.

[183] Dr Cutfield said that he consulted with Hugh on 5 occasions in 2011 the last of which was 18 October. His last consultation with him was on 17 January 2012. Whenever he saw Hugh he was talkative and communicating well. He was appropriately engaged in terms of being able to communicate and articulate his thoughts. He was able to answer all questions regarding his health clearly and coherently.

[184] The hospice nurse, Ms Jane Caldwell, said that Hugh kept his sense of humour throughout his illness, and his formidable determination. She described him as a man who knew his own mind and what he wanted, a view echoed by other witnesses. She considered him to have a sound mind throughout the time that she was engaged in his care. She said he remained engaged in business throughout. As an example she refers to her notes of 22 November 2011, where she refers to his fatigue as his biggest problem but that he “does business by phone”.

[185] Each of these witnesses confirmed on cross-examination that they were not advised of any concerns on the part of the family about Hugh’s decision-making abilities, they did not know about the significant decisions he was making in that period, and they knew little if anything about the complexity of his affairs.

[186] As noted earlier, the medical evidence suggests that fatigue and persistent bleeding were Hugh’s principal difficulties right up until his death. Nausea and pain were generally well managed with medication.

6.5 Analysis

[187] The defendants’ witnesses’ evidence-in-chief created a strong impression of Hugh as a man who though physically declining, remained fully engaged in his business throughout and undiminished in his ability to engage and comprehend, whether it be socially or in complex matters of business. However when that evidence was tested against what some of these witnesses were saying at the time of the challenged decision, a more mixed picture emerged.

[188] Hugh was very ill and suffering from fatigue. At times he found conversations difficult to follow and was suffering short term memory issues. He

was beginning to withdraw from the main business of the Green Group, focusing instead on one of the passions of his life, cattle trading. Although cattle trading was a great passion, it was also something that came as naturally to him as breathing, and so was well within his capacity. In the other part of his business life, Hugh seems to have been withdrawing. He seldom went into the office, and by November his son John was expressing concerns about his ability to make decisions, and people at work were observing a much reduced Hugh.

[189] I consider that the evidence taken as a whole establishes that Hugh had fluctuating cognitive ability and it follows capacity. The evidence establishes that he was prone to short term memory lapses and that at times found business matters which had once been easy and enjoyable for him, stressful and confusing. This change in his ability explains the indecisiveness which John remarks upon in his emails around this time, and which in any case is apparent from Hugh's conduct in connection with sorting out the succession issues that he had sadly delayed. The persistence of concerns expressed about his memory and his decision-making in contemporaneous documents generated by the family suggests that his condition did not improve but rather over time, worsened. The evidence suggests that from at the latest early November 2011, Hugh was losing his energy, his focus and his decisiveness. His involvement in the business reduced as did his ability to follow complex matters.

[190] The fluctuations in capacity I refer to were probably linked to the progress of his terminal illness, with the consequent anaemia and fatigue exacerbating the situation. However other factors such as age and underlying medical conditions could have played a part. It would clearly have been prudent, as most of the medical witnesses conceded, to have organised an assessment of Hugh's capacity before he executed any document with legal effect. That was not done, but that in itself does not make out Maryanne's case. The issue is whether Hugh had capacity, not what was the proper procedure to have followed in connection with the execution.¹⁰⁶

¹⁰⁶ See *Woodward v Smith* [2009] above n 40.

7. First challenged decision - capacity: appointment of John and Frances as trustees on 8 November 2011

[191] On 8 November Hugh executed documents appointing John and Frances as trustees of the Hugh Green Trust, and the Hugh Green Property Trust at the same time as Moira appointed them as trustees of the Moira Green Property Trust. These documents had been drafted by Mr Fisher, and the execution of them witnessed by Mr Hickson, a sole practitioner who Mr Fisher organised to attend upon the Greens for this purpose.

[192] As is apparent from the earlier chronology this event occurred after several months of wrangling between Maryanne and Hugh as to what role John should have within the group. Much of that discussion and argument focused upon whether John should be a trustee and director, with Maryanne firm, I think it could be fairly said resolved, that he was not a fit person to be either a trustee or a director.

[193] The evidence was that on the same day as Hugh executed these documents, Hugh visited the urologist Dr Masters – the visit referred to earlier which led to surgical intervention the following week.

[194] Maryanne points to the following as indicating something irrational about this exercise of the power and calling into question Hugh's capacity:

- (a) The decisions of 8 November 2011 were a departure from the long established plan that she would look after the family interests in the business.
- (b) The appointment of Frances as trustee had not previously been tabled.
- (c) Whilst the personal issues between John and Maryanne remained unresolved, John's appointment as trustee to serve alongside Maryanne was a recipe for disaster.
- (d) Mr Narev, the long standing trust and personal adviser of Hugh did not act on the appointments, Mr Fisher did. The change of legal representative was surprising. Mr Narev was Hugh's closest and most

trusted adviser on trust matters over the years. This changed at this point.

- (e) Hugh was by this time very unwell, was at times confused, and was suffering from short term memory loss.
- (f) The nature and effect of the appointments was not explained to Hugh before he made them.

7.1 Appointment ill advised, and contrary to long standing plan as evidence of lack of capacity?

[195] I accept that until around June of 2011 the plan had been for Maryanne to look after the family's interest in the Green Group after Hugh had stepped down from that role. That was Maryanne's evidence.¹⁰⁷ In an interview for his autobiography Hugh said that when he was not around, she was in charge. The plan was that Maryanne would look after the business with John involved in the charity. However, it is equally clear that from at least June Hugh had been insistent that he wanted John involved in running the business with Maryanne, and that some time later he also began to speak of Frances having a role in the charity and then the business. John and Frances were appointed trustees of the Hugh Green Foundation (on the charity side) in September 2011.¹⁰⁸ The evidence therefore is that Hugh raised the issue of an increased role for both John and Frances before Maryanne alleges that he suffered any loss of capacity. However the evidence also supports the conclusion that the idea that Frances should be appointed a trustee or a director on the business side of things was not discussed with the other trustees or Frances, prior to her appointment as trustee in November.¹⁰⁹

[196] The evidence also establishes that Maryanne told Hugh that she could not work with John as a fellow trustee or director. There was a history behind this issue of which Hugh was aware - the events in 1994. I return to these events later in this judgment. Hugh should have known that Maryanne's opposition to John's appointment was deeply felt, and that Maryanne was right that she and John had very

¹⁰⁷ Affidavit of Maryanne Green at [19].

¹⁰⁸ CBD at 857.

¹⁰⁹ NOE Frances Green at 1000-1001.

different work styles which would be an obstacle to them working together. I do not however see this as evidence of irrationality on Hugh's part. Hugh would not have been the first parent to hope that his children would find a way to get along, and he could reasonably have expected a significant effort in this regard given that these discussions were occurring against the background that Hugh was dying. It is also important not to apply a hindsight analysis to the situation. The complete breakdown of relations between John and Maryanne was yet to occur, and they seem to have got on as brother and sister and even, at least prior to mid 2011, to have worked together quite well.

7.2 *Mr Fisher's involvement*

[197] John's evidence is that around 7 November, his father told him that he had decided to appoint John and Frances as trustees of the Hugh Green Trust and the Hugh Green Property Trust and that his mother was also going to appoint them as trustees of Moira Green Property Trust. Hugh asked him to make contact with Mr Fisher to prepare the necessary documents. John speculated that Hugh wanted Mr Fisher to prepare the documents because he felt he would conscientiously carry out his wishes. He said that his mother told him that the invoices for the attendances should be addressed to her.

[198] John says that he did not tell Mr Fisher of any concerns about his father's short term memory loss and indecisiveness, because he did not have any such concerns.¹¹⁰

[199] Mr Fisher's evidence was that he was involved in these issues for the first time on 7 November when he received a telephone call from John. John told him that Hugh wanted to appoint Frances and John as trustees of the Hugh Green Trust, the Hugh Green Property Trust and the Moira Green Property Trust. Mr Fisher asked John to bring the trust deeds and related documents to his chambers. He had never seen the documents before and knew nothing about the trusts or about the succession planning processes that had been going on within the family or within the Green Group.

¹¹⁰ NOE John Green at 1484.

[200] Mr Fisher said that when he delivered the documents, John explained that Hugh had been trying to appoint John a trustee of the trusts and a director of Green Group companies but Maryanne had been fighting him for months. He said that Hugh had since decided to appoint Frances as well. He explained that Maryanne had threatened to bring legal action to stop the appointments and that Hugh was very unhappy about that. John told Mr Fisher that Maryanne had accused him of being a thief in relation to cattle dealing he had done for Hugh about 20 years ago, an allegation John denied.

[201] John explained that Hugh and Moira did not want these events discussed outside of the family or amongst staff at the Green Group. He also said his parents did not use a computer or have access to email and therefore all documents should be sent to him at his personal email address. He would print them for Hugh and Moira.

[202] Mr Fisher's involvement in these transactions was irregular. He was not the usual lawyer acting for the trusts. He is a barrister, practising in the area of civil litigation. His explanation for why he was being called upon to act in connection with a trust issue, in the middle of a family dispute involving a complex group of trusts and companies was as follows:¹¹¹

I had a great relationship with Hugh, of trust and confidence. He used to tell me that he'd much prefer dealing with me because I could explain things to him, so it didn't surprise me at all that on a difficult issue he would contact me and want me to deal with the issue.

[203] This was Mr Fisher's assumption. There is no suggestion however that Mr Fisher sought any clarification as to why he was being asked to act in respect of issues with which he had no previous involvement. There is the additional point that he was receiving Hugh's instructions from John when John arguably stood to benefit from the carrying into effect of the instruction. Although on cross-examination Mr Fisher refused to accept that was so, it clearly was, as the documents he was instructed to prepare would make John a trustee, and hence confer a degree of control upon him. Mr Fisher was also asked to invoice someone other than the person he was acting for, and he was asked to send the documents to someone other than the person he was told he was acting for.

¹¹¹ NOE Michael Fisher at 1809.

[204] The circumstances as outlined clearly indicated a need to proceed with caution and in that regard, a need for Mr Fisher to be clear who was instructing him, and to confirm those instructions in a letter of engagement. Mr Fisher did not exercise caution. Instead, in breach of his professional obligations, he proceeded to draft the documents without completing a letter of engagement.¹¹² He also acted without an instructing solicitor, even though as a barrister, he was required to have one.¹¹³

[205] Mr Fisher said on cross-examination that he called Hugh to confirm the instruction. However he has no file record of that discussion. His time records also make no mention of it, although they do record a meeting and telephone discussions with John. Mr Fisher's explanation for the absence of any time record of this attendance is as follows:¹¹⁴

Well it wasn't my habit except in rare cases of lengthy telephone calls on one matter to charge Hugh for telephone attendances. The reason for that was early on I became aware that Hugh thought lawyers charged too much and I got the impression that he wouldn't have thought too much about being charged for telephone calls, particularly any short ones. Not that it's ever my habit to charge for telephone attendances that are under a few minutes. And the other thing was that I did enjoy my conversations with Hugh and I never wanted him to feel that, you know, the privilege of talking to him was something for which he had to pay. So it just wasn't my habit to charge him.

[206] To corroborate this explanation, Mr Fisher referred to other matters on which he had acted for the Green Group where he also had no time records of telephone conversations with Hugh.

[207] Mr Fisher's phone records were put to him. They did not contain evidence of any telephone discussions with Hugh. He explained that this was because he would call Hugh on his home line, and his phone records only record calls to mobile numbers, not landlines.

[208] It was put to Mr Fisher on cross-examination that without any note of the conversation he could not really recall a single telephone conversation so long ago.

¹¹² As required by the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r 3.4.

¹¹³ Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r 14.4.

¹¹⁴ NOE Michael Fisher at 1788.

It seemed to me that the answer to this question was equivocal. He did not say that he could, but did assert that the whole situation was memorable.

[209] I consider that it is unlikely that the telephone call to Hugh to check on this instruction took place. Although Mr Fisher says it did, he has no record to corroborate this assertion, and does not claim to have a clear memory of the conversation. His evidence of the conversation is suspiciously scant. All he can say of the conversation is “I called Hugh to confirm his instructions before drafting the necessary documents”. This is in contrast to the detail he provides of the instructions and background information he received from John. Mr Fisher’s approach to this work was casual and it would be consistent with that approach that he would not have called to check instructions. It can be said in his favour that John had not mentioned concerns about his father’s memory and decision-making so that there may not have seemed a pressing need to check that the instructions were Hugh’s. The old Hugh, the Hugh Mr Fisher was familiar with from his previous dealings, would not sign a document he was not happy with.

[210] Nevertheless, no matter how irregular the arrangements in connection with Mr Fisher’s role, if John was conveying Hugh’s instructions to Mr Fisher, and Hugh had the capacity to exercise the power at the time he purported to do so, Maryanne’s challenge based on lack of testamentary capacity will fail. There was evidence that Hugh was a man who liked to delegate to others the task of communicating with his professional advisers.

[211] After sending the documents to John, Mr Fisher told him that a formal process had to be followed when deeds were executed, and suggested that he use a lawyer to make sure it was done correctly. He recommended that he contact Mr Hickson. Mr Hickson was a litigation solicitor with more than 20 years of experience. He was well known to Mr Fisher as he had worked for Mr Fisher as a staff solicitor for many years prior to Mr Fisher going to the bar. Since that time, on several occasions (although not on this occasion), Mr Hickson had acted as Mr Fisher’s instructing solicitor. Mr Fisher knew that Mr Hickson lived and worked near Mr Albert, and that he had done work for the Green Group in the past. He

therefore gave John Mr Hickson's contact details and it was John who made arrangements for Mr Hickson to attend at the Grande Avenue house, that same day.

7.3 *Circumstances surrounding the execution of the documents*

[212] Mr Hickson's evidence was that he spent between 15 and 30 minutes at the house. He explained the legal effect of the deeds to Moira and Hugh as follows:¹¹⁵

I explained the legal effect of the document with reference to the contents of the document itself. I just explained to him that by this deed, he was exercising his powers under the Deed of Trust to appoint respectively Frances Kathleen Green and John Patrick Green as trustees of the Hugh Green Trust and that it was to take effect as of the date of the deed of appointment and that her appointment would continue – his and her appointments would continue until they were removed by Mr Green or until they resigned as trustees by notice in writing to Hugh Green. And I explained, and I would also have explained to him that as trustees of the trust, they would hold all assets of the trust on ownership for the beneficiaries of the trust with a duty to act in the best interests of the beneficiaries.

[213] He confirmed under cross-examination that his explanation was no more wide ranging than that. He did not for instance, explain the nature of the assets the trust controlled, he did not explain that the trustees exercised effective control of the Green Group through their ability to appoint and remove directors of Green Group companies. He did not explain the possible impact of the appointments, on wider family relationships. Given the manner and nature of Mr Hickson's instruction he did not have adequate information to enter into this kind of detail even had he wished to.

[214] Mr Hickson was in no doubt that Hugh understood the explanation he gave and that he had capacity to execute the documents. He said of his observations:¹¹⁶

Yes, it was based on, as it could only be, it was based on my observations of him at that meeting and the exchange that I had with him, and he came across to me as a very, you know, lucid, intelligent person and in fact, I mean he just had a real presence about him, a real sort of air of authority. And that really impressed me. I mean he looked to be a man who was completely in control of what was happening and completely aware of what he was doing.

¹¹⁵ NOE Douglas Hickson at 1691.

¹¹⁶ NOE Douglas Hickson at 1693.

[215] Moira Green said in her evidence that she remembered Mr Hickson making a particular point of asking Hugh questions to satisfy himself that Hugh knew what he was doing. However Mr Hickson said he did not remember doing this.

7.4 Analysis

[216] The onus is upon Maryanne to prove that Hugh lacked capacity when he executed these deeds. The issue is whether Hugh had capacity to understand the nature and effect of these appointments – that John and Frances would be trustees, and as such, would join other trustees in controlling the assets of the trust for the best interest of the beneficiaries. I consider he needed to have the capacity to understand that the trusts controlled the family's interests in the Green Group. This follows from the principles set out earlier that "nature and effects" include the direct effect of an action or decision but do not include the impact of the appointments on family relations, or the workability of the governance arrangements thereby achieved.

[217] The evidence is that around 8 November Hugh was quite unwell. The evidence from contemporaneous documents and Ms Porter suggests he had issues with his short term memory and at times, had difficulty following conversation on business matters. But against this is the evidence of Mr Hickson who attended at Grande Avenue. His evidence was that he did not know that Hugh was ill, and that Hugh was alert during the meeting. He did explain the nature of the changes, although he did not explain, and so could not assess Hugh's comprehension of the role of a trustee within the Green Group.

[218] I note that John's account that his father had asked him to instruct Mr Fisher was corroborated to some extent by other evidence that Hugh used other people to pass on legal instructions. For instance he used Moira to pass on instructions for a July 2011 codicil to his will. I also weigh that the decision to appoint John was consistent with intentions that Hugh had been expressing for some time, certainly prior to his trip to Ireland, that John should be more involved in the business. The idea of appointing Frances a trustee on the business side seems to have been a new one, but it was not out of step with his wish to see them both more involved in the

business. He had also earlier appointed Frances and John as trustees of the Hugh Green Foundation.

[219] What to make of this mixed picture? I proceed on the basis that Hugh's capacity fluctuated. Nevertheless Mr Hickson's evidence surrounding the execution of this document is adequately reassuring that at the time he executed the documents on 8 November Hugh did have sufficient capacity to understand that he was appointing John and Frances as trustees to the Hugh Green Trust and the Hugh Green Property Trust and that as trustees they would have control over extensive assets. It is also reassuring that the appointments were broadly consistent with what Hugh had been saying he wanted to do for many months.

[220] Mr Hickson's account of Hugh was that he was coherent, not obviously ill or tired, and able to converse normally. There is no evidence Hugh was confused on that day or that he could not call to mind the relevant information. I weigh that the process Mr Hickson followed did not involve checking fully that Hugh understood the nature and effects of these appointments as defined. But these documents were not highly complex. The trusts were entities that Hugh had been wheeling and dealing with over decades. This was familiar territory to him, just as the cattle dealing was. The concepts he had to grasp would not have been difficult for him. I am therefore satisfied that at the time he executed the deeds he had the capacity to understand fully the nature and effect of the decision he was making on this occasion.

8. First Challenged Decision - undue influence: appointment of John and Frances as trustees on 8 November 2011

[221] The allegation is that Mr Fisher and John were complicit in a scheme to achieve the removal of Maryanne from any position of authority within the Green Group, and in connection with the family's interests in the Green Group, and in turn deliver that control to John, Frances and Mr Fisher. The nature of the scheme was that it carried on being implemented after Hugh's death, although the critical parts of it had been achieved by manipulating Hugh into various decisions during this life.

[222] The scheme was first pleaded in the statement of claim in the probate proceeding as follows:¹¹⁷

The 26 April 2012 Will was part and parcel of a plan engineered by John and Mr Fisher, with the support of Frances, to remove the plaintiff from her positions as trustee, director and CEO of the Hugh Green Group, and from family occasions and place themselves in control...

[223] The allegation is repeated in the trust proceedings as part of the undue influence cause of action as follows:¹¹⁸

John and Mr Fisher designed and implemented a scheme to achieve the outcomes specified in Mr Fisher's letter to family members dated Friday 28 September 2012

[224] The letter of 28 September was sent by Mr Fisher on behalf of the trustees. It reported on the implementation of the resettlement of the Moira Green Property Trust on the Hugh Green Property Trust and a number of appointments and resignations which had the effect of finally placing all control of the Green Group and family entities in the hands of Mr Fisher, John, Frances and Mr John Gosney and removing the last vestiges of control from Maryanne. The constituent elements of the scheme are pleaded as follows:¹¹⁹

4.3 The constituent elements of the Scheme were:

- (a) causing Hugh to ostensibly exercise his power of appointment of trustees to appoint John and Frances trustees of the Hugh Green Trust and the Hugh Green Property Trust on Tuesday, 8 November 2011;
- (b) causing Moira to ostensibly exercise her power of appointment of trustees to appoint John and Frances trustees of the Moira Green Property Trust on Tuesday, 8 November 2011;
- (c) causing Hugh to sign the document setting out his ostensible "wishes", dated Tuesday, 15 November 2011;
- (d) on Friday, 18 November 2011, causing Hugh to sign a notice calling a meeting of the trustees of the Hugh Green Trust on 29 November 2011 (which meeting ended up taking place on Monday, 5 December 2011);

¹¹⁷ Statement of claim in CIV-2013-404-3676 at [14].

¹¹⁸ Amended statement of claim in CIV-2013-404-4840 at [4.1].

¹¹⁹ Amended statement of claim in CIV-2013-404-4840 at [4.3].

- (e) on Friday, 25 November 2011, causing Hugh to sign a notice of meeting of the trustees of the Hugh Green Trust, Hugh Green Property Trust and Moira Green Property Trust on 5 December 2011;
- (f) ostensible exercise of Hugh, John, and Frances' power as ostensible shareholder trustees to appoint John and Frances directors of all Group companies, starting from Monday, 5 December 2011;
- (g) causing Hugh to sign the letter threatening to remove Maryanne as trustee, dated Friday, 16 December 2011;
- (h) causing Hugh to ostensibly exercise his power of removal of trustees to remove Maryanne as a trustee of the Hugh Green Trust and the Hugh Green Property Trust on Tuesday, 20 December 2011;
- (i) causing Hugh to sign the letter to Maryanne, dated Thursday, 22 December 2011;
- (j) causing Hugh to sign other notices calling meetings of the Group boards of directors and trustees, for the trustee and board meetings which took place on 18 January 2012, 20 March 2012, 28 March 2012 and 2 April 2012, and on other dates presently unknown to Maryanne;
- (k) causing Hugh to ostensibly exercise his power of appointment of trustees to appoint Mr Fisher a trustee of the Hugh Green Trust and the Hugh Green Property Trust on Thursday, 29 March 2012;
- (l) exercise of Hugh, John, Frances and Mr Fisher's power as ostensible shareholder trustees to appoint Mr Fisher a director of the Group companies, starting from Monday, 2 April 2012;
- (m) ostensible exercise of Hugh, John, Frances and/or Mr Fisher's power as ostensible shareholder trustees to appoint and remove directors of the Group companies to remove Maryanne as a director of all companies in the Group, starting from Monday, 2 April 2012;
- (n) preparation of the draft memorandum Green Family "aspirations" dated Monday, 16 April 2012;
- (o) causing Hugh to ostensibly exercise his power to make a new will on Thursday, 26 April 2012 appointing John, Frances, Mr Fisher and Mr Narev the executors and trustees of Hugh's estate;
- (p) causing Hugh to sign the notice of meeting of trustees of the Moira Green Property Trust dated 2 May 2012 proposing resolutions to appoint John, Frances Mr Narev and Mr Fisher as directors of 10 Group companies;
- (q) causing Hugh to sign the letter to the trustees of the Hugh Green Property Trust on Friday, 22 June 2012, stating that he would like the Moira Green Property Trust resettled on the Hugh Green Property Trust;

- (r) causing Moira to ostensibly exercise her power of appointment of trustees to appoint Mr Fisher a trustee of the Moira Green Property Trust on Wednesday, 11 July 2012;
- (s) following Hugh's death on Friday, 13 July 2012, exercise of John, Frances and Mr Fisher's power as ostensible shareholder trustees to appoint Mr Gosney director of Group companies starting on 5 September 2012;
- (t) ostensible exercise of the power of resettlement of John, Frances, Mr Fisher and Moira as ostensible trustees of the Moira Green Property Trust to resettle the assets of that trust on the Hugh Green Property Trust, and end Maryanne's position as trustee and director of the 10 companies 50% owned by the Moira Green Property Trust on Thursday, 20 September 2012;
- (u) exercise of the ostensible power of the executors and trustees of Hugh's estate to appoint Mr Gosney as a trustee on 21 September 2012; and
- (v) preparation and signing by various beneficiaries of the document containing their "views and wishes" on an unspecified date in September 2012.

[225] The scheme is also referred to in the third cause of action (breach of fiduciary duty by Hugh in exercise of power of appointment) as follows:

- 5.7 John is hostile towards Maryanne and designed and implemented the Scheme.
- ...
- 5.15 Frances is hostile towards Maryanne and assisted in the design and implementation of the Scheme.
- ...
- 5.28 Mr Fisher planned and was actively involved in implementation of the steps to remove Maryanne as trustee and director, and to overturn the long-standing succession plan which Hugh had put in place since 1987, over 24 years.
- 5.29 Mr Fisher stood to profit personally from his appointment as a trustee, director and legal adviser.

[226] The scheme is also referred to in the fourth cause of action which asks the Court to remove existing trustees and appoint new trustees in their place. It is put forward as evidence of misconduct, one of the reasons that John, Frances and Mr Fisher should not be permitted to continue as trustees.

[227] The defendants argue that an aspect of the scheme as pleaded is the deliberate manipulation of Hugh (to the extent that his will was overborne) to achieve the ends desired. I accept that this is so. It is pleaded that the scheme involved causing Hugh to take these various actions, and it is pleaded in support of the undue influence cause of action. I consider that this involves an allegation of unconscionable conduct.

[228] One of the core allegations is that Mr Fisher and John designed and implemented the scheme. To make out this allegation it is not enough to show that these various events happened or even that one or other of the alleged conspirators had that plan in mind. What is alleged against Mr Fisher and John is a meeting of minds on the point, as that is a necessary element of designing a plan which is then carried into effect.

[229] Although the plaintiff maintains the allegation of a scheme as pleaded, little energy was directed during the evidence, or in closing, to making out the allegation that John and Mr Fisher acted together to design a scheme at the beginning of these events with a particular end destination in mind. When Mr Fisher was cross-examined this allegation was not put to him. When he was challenged in connection with his conduct the focus was upon his failure to meet proper standards of professional conduct, the adequacy of the advice he gave Hugh and the extent to which he had contact with Hugh. It was not put to him that:

- (a) He and John designed and implemented a scheme to achieve the objectives of removing Maryanne from any position of control within the Green Group or in connection with family entities, and instead placing themselves and Frances in control.
- (b) That the scheme included causing Hugh to make the various decisions necessary to carry the scheme into effect.

[230] Given the failure to put these allegations to Mr Fisher I cannot conclude that he was party to such a scheme. Such an allegation needed to be squarely put to him. It was not. There is as a consequence no proper evidentiary basis upon which I could infer that he was party to a scheme.

[231] This does not however preclude me from considering the allegation that John unduly influenced his father in connection with the making of each of the challenged decisions, and that he deliberately did so to achieve the change in control outlined. Those allegations are included in the pleading. Counsel for John argues that these propositions were not adequately put to John, particularly in light of the seriousness of the allegations. He says that the fact of John's involvement in some of the "constituent elements" of the scheme as pleaded is largely a matter of written record and not in dispute. John's position is that he was at all times acting on his father's wishes. Maryanne disputes that he did act on his father's instructions, and says that he acted deliberately and in a pre-conceived manner to gain control of the Green Group and shut her out. Those propositions should have been put to him.

[232] Section 92 of the Evidence Act 2006 requires that a party must cross-examine witnesses on certain key points – matters that are significant in the proceeding, relevant and that contradict the evidence of the witness. The section requires that the witness be questioned about the contradictory evidence and given a chance to explain it.

[233] It was not put to John that he and Mr Fisher together devised a plan. I consider that is an allegation that should have been squarely put to John, just as it should have been put to Mr Fisher. However John was questioned extensively about each of the challenged acts. Evidence which contradicted his account that he was merely acting to implement his father's instructions was put to him. He was given the opportunity to explain each piece of evidence which contradicted that account. There are numerous occasions where he was provided with the opportunity to comment upon this aspect of Maryanne's case.¹²⁰ I am satisfied that there was no unfairness to John in the way in which the plaintiff's case was put. He was provided with the opportunity to answer the case against him that it was he, and not his father, calling the shots at this time.

[234] The essence of Maryanne's case on undue influence is that Hugh was susceptible to influence during the relevant period, because of his terminal illness, the progression of the cancer, medication, declining memory and loss of spirit. John

¹²⁰ NOE John Green at 1485, 1489, 1471 and 1493 to name just a few.

had the capacity to influence Hugh by virtue of their relationship, and their proximity over the months prior to Hugh's death. So too did Mr Fisher. She says the evidence that they exercised this influence to cause Hugh to make the various decisions exists in the nature of the decisions themselves (they are decisions calling for an explanation). She also points to the extent to which the decisions reflected what John wanted, and conflicted with what Hugh was telling others he wanted.

[235] Maryanne says that Hugh did not receive any independent legal advice which could negate this influence as Mr Fisher was not independent. He was one of the influencers. Moreover, Mr Fisher stood to gain "considerable financial benefit from the design and implementation of the Scheme" and was also subject to other conflicts of interest, including that he had at various times acted as personal lawyer for each of Hugh, Moira and John, and as lawyer for the Green Group. Mr Hickson did not purport to provide independent legal advice. He simply attended upon execution.

[236] The relationship between Hugh and Mr Fisher falls within the category of relationships where the presumption of influence applies, as a relationship between lawyer and client. Mr Stewart accepted this in his submissions. The relationship between John and his father does not fall into the category of presumed influence, as the presumptive influence only flows parent to child in the parent/child relationship.¹²¹ However as I come to shortly, I consider that John did have influence over Hugh.

[237] The trustee defendants' position is that in any case there is nothing in the appointment of John and Frances as trustees that calls for explanation. The appointment of his children as trustees is a conventional and easily explicable act. Moreover the decisions Hugh took on 8 November flowed naturally from his determination, even in the face of Maryanne's intractable opposition, to have them involved in the Green Group business, just as Maryanne herself was. For these reasons, the trustee defendants say, the evidential burden does not shift to them. Maryanne must prove actual undue influence and has failed to do so.

¹²¹ *Hogan v Commercial Factors*, above n 49 at [39].

[238] The trustee defendants say it is implausible that Hugh was subject to undue influence given the consistency of Hugh's actions with his long stated wishes. They say that Hugh was not vulnerable, his mental functioning was undiminished and he was still a man who knew his own mind. Nobody could make him do what he did not want to do. John did not have, and did not exercise influence over Hugh. Moreover, John's evidence was that he was reticent to take on these roles, so would hardly be manipulating Hugh into giving them to him.

8.1 Analysis

[239] There are at least 3 alternative views of what occurred on 7 and 8 November. The first is that Hugh did want John and Frances to be his trustees, but in the face of Mr Narev's reservations, decided to use another lawyer to assist him with the documentation. As Mr Stewart submitted for the trustee defendants, by this means he kept Mr Narev out of the family dispute, and allowed him to stay neutral. Mr Fisher was already well known to him as someone who had done some work for the Green Group and was therefore the natural choice.

[240] The second view is that Hugh was "wobbling" on whether or not he should appoint John, and John helped persuade him he should, just as Maryanne had been persuading him he shouldn't. John just won the argument so far as his father was concerned. Hugh acted because he was persuaded by argument but acted of his own free will.

[241] The third scenario, the one that Maryanne contends for is that when John couldn't persuade Hugh to appoint him as director and trustee in the face of Mr Narev's reservations and Maryanne's opposition, he "wheeled" in Mr Fisher, using him for his own purposes to isolate Hugh from his usual adviser, and by this means bend him to his will.

[242] The first issue is whether Hugh was vulnerable to influence. There were many witnesses who said that Hugh remained a man whose will could not be overborne, but that is a sweeping statement to which I attach little weight. I consider that the evidence establishes that Hugh was vulnerable. He was coming toward the end of his life. He wanted to do right by his family, and provide for them after his

death. His wife Moira described him as clingy. None of these things are remarkable, but rather what one would expect of a family man facing death and the parting from family that brings.

[243] But to that must be added that he was tired, often to the point of fatigue and very unwell. His mental state was variable. It is clear he was suffering from short term memory loss, and was at times confused. He was finding it difficult to make decisions yet there were many important decisions he had to make. He clearly had lost either the ability or the will to engage with the detail of business decisions. Maryanne's proposals did offer viable options that could have been discussed, which could have formed the basis for John and Frances' involvement in the business. But Hugh would not engage in this detail.

[244] There is also evidence that John was aware of aspects of his father's vulnerability. It was he who wrote the emails in which he described his father as having short term memory problems and as being indecisive.

[245] I am satisfied that Hugh was vulnerable to influence. Was he vulnerable to John's influence? John was his eldest son with whom he clearly had strong emotional bonds. John's own evidence suggests that from November 2011 on John was in close contact with Hugh. Certainly he spent far more time with Hugh than did Maryanne. For a variety of reasons Maryanne took herself out of the picture. I am satisfied that John had influence over Hugh. The issue therefore turns to whether the appointment of John and Frances was a transaction calling for an explanation in the sense that expression is used in the authorities. If it was, the evidential burden shifts to the trustee defendants to show that there was no undue influence.

[246] Was this a decision that called for explanation? As I have found, until mid 2011 Hugh's plans for the Green Group remained that Maryanne would succeed him as the controlling force behind the Group.

[247] However the evidence establishes that from even before he went to Ireland Hugh wanted John more involved in the business. Possibly as early as March 2011 Hugh mentioned the possibility of John being a director and as early as June 2011

expressed the view that he should run the business with Maryanne. In conventional terms running a business is quite a different proposition from controlling a business. John did not need the trusteeship to run the business. However from descriptions of him it seems that Hugh did not think in conventional terms when it came to his business, probably in light of the fact that this was a family owned business empire. It is quite possible that Hugh equated running the business with controlling the business. After all, Maryanne as CEO was running the business, but was also a trustee and director.

[248] There is also evidence to support Maryanne's proposition that Hugh was not finally resolved on granting John the measure of control that directorship or trusteeship involves. John's email to Mr Narev of 17 October 2011, discussed above, refers to Hugh's desire to talk to Mr Narev before making any decisions about directorships, and notes that Hugh was becoming indecisive. When Hugh did talk to Mr Narev about the directorships and trustee appointments he was gently counselled against them. However Mr Narev's evidence was that when he received notice of the appointments he was not surprised by them in light of the meetings that had occurred in late September and early November 2011. Although the meetings had not expressly discussed the involvement of Frances, he regarded that as consistent with Hugh's wish to involve more than one member of the family.

[249] On balance, I do not consider that these were appointments that called for explanation given the length of time that Hugh had been proposing involving other family and in particular John in the business, and in light of the meetings that Mr Narev refers to.

[250] However that is not the end of the matter. Although Maryanne cannot make out her case by reference to the evidential presumption, she has also pointed to other evidence to support her argument that the appointments were what John wanted, and that he bent Hugh to his will to achieve this.

[251] Were John's evidence that he was reticent to take these roles accepted Maryanne's allegation would necessarily be implausible. However I consider that the contemporaneous evidence does not support John's account of indifference to the

various appointments. As early as the family meeting in June 2011 John was claiming superior skills to Maryanne to run the business. Maryanne's evidence was that he said:¹²²

... that most people would leave when Hugh was not there, they had confidence in Hugh but not me, people didn't like me and would not work with me, I didn't know how to run a business, whereas he had 40 years business experience, people didn't like my rules and procedures, I wouldn't be able to make the money, everyone liked John and he was good with people, and I was not, and everyone was scared of me and only put up with me because I did their reviews.

[252] This evidence conflicts with John's account of the meeting. John denied that he said those things beyond a remark that people held Hugh in high regard. To the extent that there is conflict between these accounts of the meeting I prefer Maryanne's evidence. Maryanne was able to refresh her memory from a note of the meeting completed shortly after it.¹²³ Moreover these various statements echo through other documents and statements in evidence in this proceeding. There are a number of documents in which John is dismissive, on occasion mocking, of Maryanne's business style and skills and performance.¹²⁴

[253] Mr Carter confirmed that a file note produced in evidence was a note of a conversation he had with John on 3 October 2011 in which John said he could provide a list of people "desperate to give info about [Maryanne]". By this time feelings were running high. Harsh words had been spoken. Maryanne had raised John's unsuitability based on alleged dishonesty by him 20 years before with people outside the family, Mr Narev and Mr Carter. Within the context of a close family that would have been extremely difficult, particularly for John. Nevertheless there is strong evidence that John very much desired a role within the Green Group, and that at the same time, doubted Maryanne's ability to lead the Green Group.

[254] There are other indications that John did have emotional investment in Hugh appointing him to positions within the group. On 12 September it was John who emailed Maryanne proposed resolutions appointing him a director. It was John who pursued Mr Narev regarding organising the November meeting so that Hugh could

¹²² Affidavit of Maryanne Green at [166].

¹²³ CBD at 712.

¹²⁴ CBD at 1412, 1441 and 1544.

make the necessary decisions. From the email exchange it appears he was managing other family members in connection with that meeting.¹²⁵ As I come to, as events progressed John became increasingly assertive and took control.¹²⁶

[255] There is something in Maryanne's point that Mr Fisher's involvement in these appointments was irregular in several respects. I have discussed this earlier in the judgment. Early on in the proceeding she suggested that Mr Fisher and John were good friends. However in her closing submissions she seemed to have abandoned that contention. She was right to do so. The evidence did not bear out a case that they were close friends, and I accept John's evidence that they are unlikely friends given their very different interests and personalities. Nevertheless there was evidence that around the time of the events the subject of these proceedings, there was a level of closeness, with John involving Mr Fisher in plans for charity golf games, playing the occasional game of golf, and spending quite some time with him in discussion regarding the issues and events around the control of the Green Group.

[256] The involvement of Mr Fisher has caused me concern, particularly given the almost secretarial approach I consider that he took to the task he was asked to do. He seems to have acted at John's direction. It has caused me concern because if a son were wishing to place effective pressure upon his vulnerable father to do something he had declined to do to that point, then an obvious strategy would be to cut him off from his usual advisers. Those are advisers who know the full range of issues, and are urging caution. Rather provide him with a new adviser who knows nothing of the context and is happy to help. On the evidence before me however I am not prepared to conclude that John "wheeled" Mr Fisher in with a plan in mind to pressure his father. Mr Fisher was known to Hugh. Hugh does seem to have had confidence in him. His usual advisor was not supporting him in what he wanted to do, appoint John and Frances as trustees.

[257] I accept Maryanne's argument that the circumstances of the execution of the document were unsatisfactory. Mr Hickson did not know that Hugh was sick let alone that there were concerns that he was having difficulty with his short term

¹²⁵ CBD at 936 and 947.

¹²⁶ For example, see CBD at 1412 and 1441.

memory and suffering periods of confusion. Mr Fisher could not tell him of that of course, because he in turn had not been told of these concerns by John.

[258] It cannot be said that Hugh received legal advice in respect of these deeds. I have found that Mr Fisher did not contact him to confirm the instruction, and there is no suggestion that Mr Fisher gave him any advice in relation to the effect of the deed. Mr Hickson did no more than explain what the deed did. If there had been undue influence operating, Mr Hickson's attendance was no antidote for it.

[259] Even so, weighing all of these matters, I consider that Maryanne has not proved that the decision to appoint John and Frances as trustees was the result of John's exercising undue influence over his father. What is decisive for me is the closeness of Hugh's decision to appoint to what he had been discussing with others for so long. In reaching this view I have also taken into account events that occurred after 8 November, where those events clearly involved Hugh. I have concluded that the second scenario I earlier identified applied – Hugh was “wobbling” on whether to appoint John and Frances in the face of Maryanne's opposition, but John persuaded him he should. His action in appointing them trustees was still the result of Hugh's free and independent exercise of his own will. As I come to, the meeting of 5 December in particular supports the conclusion that Hugh did want John and Frances involved as trustees, and as directors.

9. Second challenged decision - capacity: appointment of John and Frances as directors of the main Green Group companies on 5 December 2011

[260] The appointment occurred at a meeting held on 5 December attended by trustees of the Hugh Green Trust, the Hugh Green Property Trust and the Moira Green Property Trust.

[261] Some background to the meeting is necessary. On the 15th of November Maryanne received a copy of a document entitled “Hugh's final wishes”. Mr Narev also received a copy in advance of the meeting. His evidence was that he had no involvement in preparation of the document or input into its contents but said:¹²⁷

¹²⁷ Affidavit of Robert Narev at [50].

It is consistent with my observations of Hugh at the time, and my dealings with him, in which his intention to involve the next generation of the family in positions of responsibility was made clear.

[262] The evidence is that Mr Fisher had assisted in the preparation of this document, working to some extent at least with John. In the document, Hugh expressed various wishes including that:

- (a) John, Maryanne and Frances should be trustees of the Hugh Green and Hugh Green Property Trusts. He said “I consider John, Maryanne and Frances to be capable, reliable and trustworthy and I am confident that they will perform their duty as trustees in the best interests of the beneficiaries of the trusts”.
- (b) John, Maryanne and Frances should be directors of the companies in the Hugh Green Group. He said “I believe that will enable each of them to be fully informed about and to participate in the decision-making processes concerning the business affairs of the companies ultimately owned by the Hugh Green Trust. I would like the farming operations to continue and Graham Coghlan to continue in his role for as long as the business remains profitable.”
- (c) That the Hugh Green Foundation should remain part of the Green Group and have access to its resources.

[263] The notices calling the 5 December meeting were dated 25 November 2011 and were signed by Hugh.¹²⁸ The minutes of the 5 December meeting record that Hugh explained his reasons for the proposed resolutions, including his wish that the family “pulled together and handled things as they go, and that there will be no division”, that the “business is for the whole family” and that he wanted the business to continue. Maryanne opposed the formal resolutions concerning the holding of trust property by all trustees including John and Frances, and the share transfers and directorship appointments reflecting the trusteeships of John and Frances. Mr Narev abstained from voting because, to use his words, of his “firm belief, which I

¹²⁸ CBD at 1170.

explained at the time, that these were distinctly family matters for the family to decide for itself”.¹²⁹

9.1 Evidence relating to capacity

[264] The meeting was held at the Green Group offices. Mr Narev’s evidence is that Hugh participated in the meeting as he usually did, only speaking when he wished to make a point. He said that he had no reason to doubt that Hugh knew exactly what was going on and what he wanted to achieve from the meeting.¹³⁰

[265] Maryanne’s evidence was that Hugh needed help getting up the stairs, walked very slowly, looked worn out and did not say much at the meeting. She says that when she asked him why he wanted to appoint Frances he said he did not need any basis for it.¹³¹

[266] Moira also described a meeting that she attended with Hugh where he sat in the boardroom “looking dopey”. Although she could not remember the date of it, the people she remembers attending that meeting chime with the 5 December meeting and I am prepared to accept that this was the meeting she referred to.

[267] As to Hugh’s medical condition, I have already found that he was suffering from short term memory loss, and periodic confusion in the sense that at times he had difficulty following what was going on at least in a business context. He is recorded in hospice notes as being fatigued, and that certainly squares with the observations of Maryanne on that day. Moreover, following his consultation with Hugh on 15 December Dr Masters described him as follows:¹³²

This is a man who’s struggling, he’s dying of [...] cancer. He’s on medication that leaves him exhausted, he’s got a ..[symptom]..[that] is hard work physically and mentally to cope with...His global functioning, his overall functioning is different from what it had been a year previously when he also had [cancer] ...but was well.

¹²⁹ Affidavit of Robert Narev at [52].

¹³⁰ At [53].

¹³¹ Affidavit of Maryanne Green at [282] – [283].

¹³² NOE Dr Jonathan Masters at 553-554.

As mentioned before, Dr Masters saw Hugh's physical condition and mental functioning as connected.

[268] Nevertheless, none of this is sufficient to raise a serious question as to Hugh's capacity when placed in the context of his attendance and participation in the discussions that day. However low energy and brief his contribution was, Hugh was able to give an account of why he wished to appoint John and Frances as directors. This indicates that he understood the nature of the act and its effect. Through voting to appoint John and Frances as directors he was delivering to them a measure of control of the Green Group and of the family's interest in it, as the business was "for the whole family".

10. Second challenged decision - undue influence: appointment of John and Frances as directors of the main Green Group companies on 5 December 2011

[269] Maryanne claims that following the successful appointment of John and Frances as trustees, John with the assistance of Mr Fisher, then manipulated Hugh into these further appointments. She points to both the circumstances of the creation of the 15 November memorandum and to a meeting that John and Mr Fisher had in advance of the 5 December meeting as evidence that undue influence was applied to Hugh.

[270] The evidence in connection with these events was as follows. Maryanne received a copy of the 15 November memorandum from John in an email. John's evidence is that after 8 November he was the "go between" between Hugh and Mr Fisher regarding arrangements to implement Hugh's further decisions regarding the future governance of the trusts and the Green Group. Hugh was not a user of email so it was often easier for documents to be emailed to John so he could print them off and give them to Hugh.

[271] John's evidence was that on 14 November Mr Fisher spoke to him and Hugh about Hugh's wishes and what needed to be done to implement them. Mr Fisher took the necessary instructions from Hugh for this. Then later on that day John said he received a draft of the Notice to Trustees of meeting of trustees of the Hugh Green Trust and a draft letter of wishes of Hugh Green addressed to Moira and the

children in an email from Mr Fisher. Although Mr Fisher said in the covering email, “John, you will need to talk to me about these”, John says that all communications were ultimately with or on behalf of Hugh.

[272] There were further drafts flowing between John and Mr Fisher but he says “[o]bviously I was well aware of the content of the documents, and had discussed their content with Dad. However, the documents were only reflective of Dad’s wishes and instructions”. Finally his father approved the revised letter of intentions and signed it.

[273] It is unusual that Mr Fisher was involved in the preparation of these documents when this was traditionally Mr Narev’s domain. Indeed Mr Narev had already prepared an earlier memorandum of wishes.

[274] Mr Fisher’s evidence was that he drafted the notice of meeting of trustees of the Hugh Green Trust and the letter of wishes following discussions with John and then with Hugh. The letter of wishes was his idea. He thought it would be good if Hugh set out his wishes for the family. He did the first draft from his understanding but in the expectation that Hugh and the family would discuss the draft. That is why he said in his email “John, you will need to talk to me about these”. He explained this as follows:¹³³

..... so I wanted to tell John that what he needed to do was to go and sit down with Hugh and work out exactly what he wanted to include in addition to those matters.

[275] He said the changes that were subsequently made to the draft followed discussions with Hugh in which he asked that Maryanne’s involvement should be clarified:¹³⁴

the changes between the initial draft that I had sent through and this one were brought about following the discussion with Hugh when he had said that he wanted to make it clear that he wanted Maryanne to understand that she also was to be included. And I hadn’t initially included her because she was already a trustee and director and I hadn’t thought of the fact that it was a good idea to make it clear that that was also Hugh’s wishes.

¹³³ NOE Michael Fisher at 1819.

¹³⁴ NOE Michael Fisher at 1793.

[276] Mr Fisher's attendance records for 14 November 2011 record that he spent 5 hours in "Discussions with John Green, review deeds and constitution of companies, drafting proposed notices and letters", and then on 15 November he spent a further 3.5 hours. There is no record of any attendance upon Hugh and nor does Mr Fisher have a file note of any discussions. Mr Fisher said that from when he was first engaged in these matters until Hugh passed away, he always confirmed the instructions that John had passed on to him with Hugh.

[277] I consider that the extent of Mr Fisher's attendance upon John in respect of these matters is not consistent with John acting as a mere conduit between Mr Fisher and Hugh. I am satisfied from this that the contact between Mr Fisher and John in connection with these matters was extensive, and far more extensive than any contact between Hugh and Mr Fisher. It is improbable that there would be no notation of contact with Hugh if Mr Fisher's dealings with him had been for significant periods of time. Mr Fisher says he was coy about recording attendances with Hugh, fearing complaint that he was billing him for telephone conversation. This explanation only holds water if the contact with Hugh was brief. If this was genuinely a three-way interaction, as Mr Fisher characterised it in his evidence, it would have been a simple matter to add Hugh's name to the narration. On the other hand I accept Mr Fisher's evidence that his dealings over this time period were not to the exclusion of Hugh. It is clear from the amendment to the letter of wishes that they were amended to include material Hugh had stipulated for.

[278] Maryanne's evidence is that she asked her father about these wishes when visiting him on 21 November. She questioned him about the document and he said he didn't know what was in it. When she gave it to him to read he said "well they look alright don't they?" She asked him who had written them. He couldn't say.

[279] I also accept Maryanne's evidence of this interaction with her father, as further evidence of confusion and short term memory loss. It may well be that Hugh did not know who had written the document given the limited contact he had with Mr Fisher over it. Nevertheless the amendment to the memorandum suggests he engaged with its contents and adopted them.

[280] By this point in time the evidence establishes that Mr Fisher and John were working intensely together to implement plans to give John and Frances some degree of control of the Green Group, and that Mr Fisher had limited contact with Hugh. Maryanne had no role in this interaction. The intensely close relationship between Maryanne and her father in connection with the affairs of the Green Group had been replaced by the relationship between John and Hugh. Maryanne had to a large part taken herself out of the picture, as she concentrated on the trial of the man accused of her foster son's murder to the exclusion of all else. She had also angered her father and alienated her family with the strength of her opposition to John's appointment as trustee and to a lesser extent, to Frances' appointment. John clearly stepped into the role she had hitherto performed in the family.

[281] The next series of events pointed to by Maryanne concerns those leading up to the 5 December meeting. After formulation of the documents for the trustees' meeting to appoint John and Frances directors, it was necessary to convene the meeting. The evidence was that John emailed the notice of meeting to Mr Narev and asked him to nominate a suitable date, and Ms Porter then circulated the notice for a meeting on the 29 November. Maryanne asked that it be rescheduled to 2 December. On 29 November she was still on the leave she had taken to attend her foster son's murder trial. John sent an email to Mr Narev, copied to Frances and Ms Porter, in which he said the meeting should still go ahead as planned as Hugh did not want to adjourn it. He also said that:¹³⁵

I rang our lawyer for advise [sic] and he said...been [sic] on leave from her job is not a valid reason for not attending...

The lawyer he referred to was Mr Fisher. However Mr Narev said the meeting was to be adjourned to accommodate Maryanne and Hugh agreed with him.

[282] On 25 November Mr Fisher then went on a charity golfing weekend in Queenstown with John and others in John's group of friends. Immediately following that weekend, on 28 November there was a meeting between John and Mr Fisher at Mr Fisher's chambers. The meeting was impromptu and followed on from an email from John to Mr Fisher on the morning of the 28th asking if he could drop in to his

¹³⁵ CBD at 1116.

chambers later that day “to discuss tactics for next week and I can grab the stuff I left behind last time.”¹³⁶

[283] In cross-examination John was asked why it was necessary to discuss tactics for what should be a very straightforward meeting. The following question and answer occurred:¹³⁷

- Q. And we’ve agreed that the issues for next week which are just a simple vote at a trustees meeting, not particularly complicated, why did you need to meet with Mr Fisher to discuss tactics?
- A. Well because at that stage I didn’t actually know the complexities of voting for the trusts and things like that. I’d never been involved in it before so I wanted to find out how it proceeded and what was involved.
- Q. That’s exactly right, isn’t it? You wanted to find out from Mr Fisher because really Mr Fisher’s providing you with advice on tactics to get yourself appointed. That’s correct, isn’t it?
- A. No it was to gather information to tell – in the first place, Dad said, “Go to Fisher, find out what needs to be done to remove your sister and put you on,” so that’s what I did. I was the intermediary.
- Q. You say that but at this stage, in November 2011, the possibility of removing Maryanne has never come up has it?
- A. It hadn’t come up officially but Dad had spoken about it, because Maryanne wouldn’t carry out what he wanted.

[284] It is implausible that John had already been tasked by his father with finding what needed to be done to remove Maryanne as a trustee. This is out of step with the evidence that Hugh had amended his letter of wishes to ensure it reflected his desire that Maryanne continue to be involved in the Green Group.

[285] Mr Fisher says that when they met, John told him that Maryanne would be opposing the appointments so he needed to understand the meeting procedures and to know what he could do and say in order to make sure the appointments were approved and explain it all to Hugh and Frances. It was a discussion as to the tactics of getting the resolutions approved in the face of Maryanne’s opposition. Mr Fisher’s evidence was that this was the first time that he knew that Maryanne was

¹³⁶ CBD at 1188.

¹³⁷ NOE John Green at 1492.

likely to oppose the appointments. It was not put to Mr Fisher that John and he discussed removing Maryanne. While that may have been in John's mind as early as 28 November I proceed on the basis that he did not make his intentions in that regard known to Mr Fisher at the meeting.

[286] There is nothing wrong with Mr Fisher assisting John with matters of meeting procedure, but John at least had in his mind they would be talking tactics to deal with Maryanne's opposition. The discussion indicates that by this point at least, Mr Fisher was involved in assisting John achieve what he wanted in the face of Maryanne's opposition. Although he had good reason to believe that John's wishes coincided with Hugh's wishes, Mr Fisher now knew that there were "camps" operating within the family, and that he was a member of John's, and he thought, Hugh's camp. The opposition camp was Maryanne. Although Mr Fisher may have been brought in by Hugh to implement his decision to appoint John and Frances, I think it likely that John quickly discovered that Mr Fisher had a poor opinion of Maryanne, a point I return to later. John clearly regarded Mr Fisher as his ally against Maryanne.

[287] None of this carries Maryanne to the point of proof that the appointment of John and Frances was the result of Hugh's will being overborne by John. Again, the decision taken by Hugh to vote in support of the appointments was consistent with steps he had clearly been indicating he wished to take for some time. There is very little gap between what Hugh had been saying he wanted to do and what he now did. He remained constant in his wish to have this carried into effect-he did not waver on the point. I therefore find that Hugh's vote to appoint John and Frances as directors was not caused by undue influence.

10.1 Were the resolutions validly passed?

[288] It is convenient at this point to deal with an issue raised in connection with the vote taken at the 5 December meeting. It is alleged that the resolutions appointing Frances and John directors of Hugh Green Group companies were not validly passed.

[289] The trustee defendants argue that the allegation in the statement of claim is limited to the meeting of the Hugh Green Trust on 5 December 2011.¹³⁸ I do not regard the pleading to be so limited. In any case determination of the relevant legal issue applies with equal force to resolutions of the Hugh Green Property Trust and the Moira Green Property Trust held on the same day. The issue raised by Maryanne is whether the resolutions were passed with a sufficient majority of trustees.

[290] The trust deeds of the Hugh Green Trust, the Hugh Green Property Trust and the Moira Green Property Trust all allow for majority decision making. The Hugh Green Trust deed provides:

11. IF there are at any time more than two Trustees then the decision of a majority of them shall bind all of them and be final.

[291] The Hugh Green Property Trust and the Moira Green Property Trust both provide:

MAJORITY DECISIONS

23. IF there are at any time more than two Trustees then the decision of sixty percent or more of them shall bind all of them and be final.

[292] The evidence is that in relation to the Hugh Green Trust, Hugh, John and Frances voted for the appointment of John and Frances as directors, with Maryanne voting against, Mr Narev abstaining and Mr Carter absent and not voting. In relation to the Hugh Green Property Trust and the Moira Green Property Trust the relevant meeting was held at the same time and the minutes record Hugh, John, Frances and Moira voting for the appointment of John and Frances as directors, Maryanne voting against, Mr Narev abstaining and Mr Carter absent and not voting. Moira was not a trustee of the Hugh Green Property Trust, but the minutes do not make this distinction. In relation to the Moira Green Property Trust, John, Frances, Hugh and Moira voted for the appointments, Maryanne voted against, Mr Narev abstained and Mr Carter was absent and did not vote.

[293] Counsel for the trustee defendants, Mr Stewart submitted that these votes were sufficient to be effective decisions of the trustees. His submission was that the

¹³⁸ Amended statement of claim at [6.13](d) (i).

word majority should be interpreted to mean either a majority of those present, or a majority of those present and voting.

[294] I do not accept either of these interpretations. The trust deeds refer to a majority of the Trustees. The plain meaning of those words must be a majority of all trustees, not just those present or present and voting.

[295] As Mr Stewart accepted the authorities he relied on in support of his argument that where it is not defined the word “majority” means the majority of those present or present and voting are all authorities about the decisions of incorporated bodies rather than trustees. The situation in relation to trustees is different. The default position is that trustees must act unanimously unless the trust deed provides otherwise. That is because of the personal liability trustees assume in connection with decisions of the trust. Express wording is therefore needed to depart from the unanimity rule.

[296] The deeds provide for a departure from the unanimity rule here. Nevertheless the trustees remain personally liable for the resolutions of the trustees. It is not therefore appropriate to expansively interpret the expression “majority of trustees” as Mr Stewart suggests, so that decisions could be made by either a majority of those present or a majority of those present and voting.¹³⁹ The words should be given their natural and ordinary meaning. If support for this interpretation were needed, it exists in the absence of a quorum for meetings of trustees for any of these trusts. The trustees can meet in any number. They surely cannot pass resolutions in any number.

[297] I also note that this is the interpretation that Mr Fisher took in relation to the majority required in a later trustees meeting, where he stated:¹⁴⁰

Four of the six trustees are present. If all four vote in favour of the resolutions, they will be carried by a majority vote.

[298] That being so, Maryanne is correct that the resolutions of the Hugh Green Trust appointing John and Frances directors were not validly passed as only 3 out of

¹³⁹ See *Re Butlin's Settlement Trusts* (1974) 118 SJ 757(Ch D) for the proposition that as the general rule is that trustees must act unanimously clear wording is needed to empower majority decision making.

¹⁴⁰ CBD at 1813.

6 voted in favour of the resolution. A majority was required. This was not a majority.

[299] A sixty percent majority was required for the Hugh Green Property Trust. Only Hugh, John and Frances voted in favour, again, 3 out of 6. This did not reach the required threshold.

[300] A sixty percent majority was required for the Moira Green Property Trust. Only John, Frances, Hugh and Moira voted in favour – 4 out of 7. This did not reach the required threshold.

[301] Mr Stewart argued that even if the required majority was not reached the decision was ratified by the subsequent actions of Mr Narev and Mr Carter voting to implement these decisions. The actions relied on as the ratifying acts were:

- (a) A meeting of the board of the Hugh Green Group on 28 March 2012 where Mr Narev and Mr Carter both voted to appoint John and Frances as directors.¹⁴¹
- (b) A meeting of the board of the Hugh Green Group on 26 April 2012 where Mr Narev and Mr Carter both voted in favour of the preparation of a notice to be signed by the shareholders of Greerton Holdings Ltd to appoint John and Frances as directors of the company.¹⁴²
- (c) A meeting of the trustees of the Moira Green Property Trust on 4 May 2012 where Mr Narev and Mr Carter voted in favour of appointing John and Frances as directors of Hugh Green Group companies in which the Moira Green Property Trust had a shareholding.¹⁴³

[302] All of these purported acts of ratification proceed upon the assumption that the acts of the trustees on 5 December had been effective, in the sense that they are actions taken to implement a decision believed to already been made. The actions do

¹⁴¹ See minutes, CBD at 1721.

¹⁴² See minutes, CBD at 1889.

¹⁴³ See minutes, CBD at 1940.

not involve the conscious application of the discretion that both Mr Narev and Mr Carter have as trustees to the question of whether Frances and John should be appointed as directors, rather they show them taking steps to implement a decision that they considered had already been validly made by the other trustees.

[303] Further, the first two of the actions relied on were actions carried out by Mr Carter and Mr Narev in their capacity as directors of the Hugh Green Group rather than as trustees of the trusts. I consider that this poses an additional barrier to regarding their actions as ratifying acts.

11. Third challenged decision - capacity: removal of Maryanne as trustee on 20 December 2011

11.1 Events leading up to execution of deeds

[304] Events moved quickly following the meeting of 5 December 2011. Ms Porter was uncertain about whether the resolutions had been validly passed. Ms Porter's evidence was that she had a telephone conversation with John and Mr Fisher on 15 December. In her handwritten note of that conversation she has recorded "legal majority" for resolutions. Mr Fisher had no memory of having advised her as to whether the resolutions on 5 December had been validly passed, but did accept that was his understanding.¹⁴⁴ There was a reasonably extensive discussion concerning how the resolutions were to be implemented, with John apparently attempting to drive the implementation forward.¹⁴⁵

[305] There was an additional issue. The resolutions passed on 5 December had not followed the format that Mr Fisher had proposed. Although Hugh, John and Frances had approved the appointment of John and Frances as directors of relevant Green Group companies, the shareholder meetings contemplated by the resolutions to effect the appointments had not taken place.¹⁴⁶ Mr Fisher anticipated in his documents that those meetings would occur at the same time as the meetings of trustees.

¹⁴⁴ CBD at 1253-1254, and NOE Michael Fisher at 1838.

¹⁴⁵ CBD at 1216 and 1231.

¹⁴⁶ NOE Michael Fisher at 1830-1834.

[306] Maryanne visited Hugh at home on 12 December to discuss with him his decision to appoint Frances and John as directors and trustees. It is clear that at this stage Maryanne still did not accept the appointments, and raised this with him. Her evidence was that during their discussion her father responded to her that trustees and directors are the same thing. She saw this as evidence of confusion because this was a distinction he had always previously understood. The distinction in terms of ultimate control of the Green Group was of course significant.

[307] John says that Maryanne refused to co-operate to implement the decisions made at the trustee meetings on 5 December to Hugh's increasing frustration. Because of this Hugh had John contact Mr Fisher so that Hugh could discuss with Mr Fisher how to get Maryanne to sign the documents required to implement the 5 December 2011 resolutions of the trustees.

[308] Mr Fisher said that on 15 December 2011 he received a telephone call from John saying that Hugh wanted to meet with him as he had reached the point where he felt he had no choice other than to remove Maryanne as a trustee and director because she was refusing to cooperate. John said that Hugh had wondered whether Mr Fisher would consider being a director. Mr Fisher said that he told John he did not wish to be a director. He explained in evidence that he had found his existing directorship of Dorchester Pacific Limited very demanding and poorly remunerated for the level of effort involved. He agreed to meet Hugh at Grande Avenue later that day.

[309] John was present when Mr Fisher met with Hugh. Mr Fisher's evidence was that Hugh told Mr Fisher that he felt he had no choice but to remove Maryanne as that was the only way to stop the endless squabbling. Mr Fisher said that he explained to Hugh that as the trustees had resolved to appoint John and Frances as directors, Maryanne's stance in not cooperating was a breach of her obligations as a trustee.¹⁴⁷ He could not recall the detail of the conversation but the "upshot" of the meeting was that Hugh instructed him to draft a letter for him to send to Maryanne to give her one last opportunity. After he left the meeting he drafted the letter and emailed it to John.

¹⁴⁷ Affidavit of Michael Fisher at [55]

[310] The letter ultimately delivered to Maryanne read as follows:

Maryanne

As you know, on 5 December 2011 the Trustees of the Hugh Green Trust resolved to appoint John and Frances as directors to the companies and subsidiary companies in the Hugh Green Group.

All the Trustees, including you, need to sign documents to implement the Trust's resolutions. As part of the process, I have signed the attached resolutions for the main companies and I want you to sign them today.

If you do not sign and return them today, you will be acting contrary to a decision of the Trust, to your obligations as a Trustee, and, most importantly, to my wishes.

I want you to be a Trustee and to work constructively with John and Frances. But, if you are not prepared to sign and return the attached resolutions today, you will give me no choice other than to remove you as a Trustee.

I have asked Leanda to wait for you to sign the resolutions so that she can bring them back with her.

[311] John said that his father did not threaten Maryanne lightly but he was very troubled by Maryanne's attitude and felt she had forced him to take the step. Moira's evidence was that Hugh told her some time later that he had decided to send the letter to Maryanne because she had declined to sign documents he had asked her to sign.

[312] Mr Fisher was cross-examined as to why he did not fax the letter to Hugh. It was clear from evidence given by various witnesses during the course of the trial that Hugh had a fax machine set up at his home, and regularly received business documents there. In fact he seemed to relish it, getting up from his chair when he heard the fax machine's distinctive ping. Mr Fisher said that he was instructed by John to email the documents. He could see the sense in that as these were draft documents and they could then be amended by John.¹⁴⁸

[313] Frances' evidence was that her father asked her to call Maryanne's personal assistant Leanda Sunde and ask her to pick up a letter to take to Maryanne's home. She was to wait for Maryanne to sign the letter and then bring it back to Grande Avenue.

¹⁴⁸ NOE Michael Fisher at 1840-1842.

[314] Ms Sunde, duly hand-delivered the letter to Maryanne at her home. She told Maryanne that Frances had said that Maryanne had to sign the letter so that Leanda could bring the letter back to Frances. Maryanne did not sign the letter, but rather asked Leanda to leave it with her. Frances said that when Hugh heard about this he was angry.

[315] Maryanne's evidence was that Hugh had taught her never to be rushed in signing legal documents.¹⁴⁹ I think it is fair to say that anyone who had even the briefest acquaintance with Maryanne would know that she is not the type of person to sign documents with legal effect in such circumstances. On cross-examination Frances accepted that she knew that about Maryanne, although she remained firmly of the view that in these circumstances, where something had been at issue for weeks she should have been able to sign the letter on this occasion. However no witness could explain why the letter needed to be signed and returned in this manner. I understand from Mr Fisher's evidence that the idea for this requirement was his, and he took the view that there was nothing for Maryanne to think over.¹⁵⁰

[316] I have already referred to the telephone conference between Ms Porter, John and Mr Fisher. Mr Fisher says that although he cannot recall he thinks the discussion with Ms Porter occurred after the meeting with Hugh. The plaintiff asks me to infer otherwise, but I have no basis to do so. Ms Porter's record of the discussion notes "Trust has decided it is over." It also appears to record advice from Mr Fisher that Maryanne's refusal to sign resolutions or vote as a director of subsidiaries to enable further resolutions implementing the appointments to be passed was acting contrary to the wishes of the trust and was an "irreconcilable conflict". Ms Porter said that she was just noting down words said, but given the parallels between this advice and what Mr Fisher said he told Hugh, I infer that this is at least a reasonably accurate note of what was said in the conversation.

[317] John's evidence was that even though Hugh hoped that Maryanne would sign and return the requested documents Hugh also instructed Mr Fisher to draft deeds to remove Maryanne as trustee in case that became necessary. On Saturday

¹⁴⁹ NOE Maryanne Green at 171.
¹⁵⁰ NOE Michael Fisher at 1840.

17 December John emailed Mr Fisher reminding him to “send letter for Hugh to sign tomorrow”.

[318] Mr Fisher’s account is slightly different. He does not say that Hugh instructed him to draft the removal documents at the same time as he instructed him to draft the letter of the 16th. His time records for 16 December record discussions with John. Mr Fisher’s attendance schedule for Sunday 18 December records “drafting document for removal of trustee”. He emailed the deeds removing Maryanne as trustee of the Hugh Green Trust and the Hugh Green Property Trust to John on Sunday 18 December.

[319] In his evidence in chief Mr Fisher said that John had phoned him to say that Maryanne had refused to sign the relevant documents and that Hugh wanted him to go ahead and prepare the necessary documents for her removal. On cross-examination he said that he definitely got instructions from Hugh to prepare these documents, even though he had no record of receiving those instructions, and did not mention it in his evidence in chief.¹⁵¹ He said that he kept a lot out of his affidavit in an endeavour to keep it within a reasonable proportion. I find it unlikely that Mr Fisher’s memory improved upon cross-examination, or that he would have left out the conversation with Hugh if it did indeed occur, given the nature of the matters alleged against him in this proceeding. I find that the conversation Mr Fisher refers to in his cross-examination did not occur.

[320] Maryanne met with Hugh on 19 December. She told him that the procedure with the letter was not the right way to go about things, as she had visited him the previous day and he had said nothing of the letter to her. She couldn’t be asked to sign something immediately as she needed time to consider it. She reminded him that they had discussed appointing independent directors if Frances and John were to be directors. Hugh agreed to give this some thought and they agreed to meet at 11 am the next day.

[321] John also gave evidence in connection with this meeting. He said that he arrived at Grande Avenue to find Hugh quite distressed as a result of a visit from

¹⁵¹ NOE Michael Fisher at 1845.

Maryanne. He says that Hugh told him that Maryanne was to visit him at 11 am the next day. John asked him if he wanted him to be there, and Hugh replied that it might be as well.

[322] Alice, Maryanne's daughter, was present at Grande Avenue on the same day. She said that she arrived at Grande Avenue while Maryanne was there and saw John outside the property, and a little along the road. He came into the house shortly after Maryanne left. He appeared to her to be very agitated and angry. He went into the lounge where Hugh was and said "I need to know what is happening, have you got news for me?" John left after only about 2 minutes without saying goodbye to her or Moira, and Alice said that he appeared to be in a huff.

[323] John disagreed that he was angry, in a huff or that he had been outside the house waiting for Maryanne to leave. He described Alice's account as bizarre. However I am inclined to accept Alice's account of what happened inside Grande Avenue. On John's own evidence he was likely to have been angered by his sister, and it is likely he did appear to be in a "huff".

[324] The next day's meeting (20 December) took place although Maryanne's evidence is that John entered the room shortly after it commenced cutting the meeting short. Before he had come in she had been discussing with Hugh the possibility of independent appointments and also the various structures she had previously proposed to him. Maryanne took notes of the meeting. Her account recorded in those notes is that John interrupted the meeting aggressively. John asked her if she had brought the papers with her and said that they should sort it out now. Maryanne asked him to leave but he said no. When she asked him to leave so she could continue talking to her father, he said "Well we will be proceeding ahead and getting it sorted".¹⁵² Maryanne said that as she was leaving her father said to her "It is no good running away".

[325] Mr Fisher then received a telephone call and spoke to John. He said Hugh wanted to discuss Maryanne's removal and asked him to visit. He went to Grande Avenue and spent about half an hour with John and Hugh discussing the implications

¹⁵² CBD at 1291-1295.

of proceeding to remove Maryanne as trustee. He said it was simply a case of “Hugh telling me what to do.”¹⁵³

[326] At 4:35 pm that day Maryanne received documents signed by Hugh removing her as a trustee of the Hugh Green Trust and the Hugh Green Property Trust. Hugh’s signature had again been witnessed by Doug Hickson. The documents were emailed to her by Ms Porter.

[327] On that same day Ms Porter faxed through to Mr Fisher a draft letter from Hugh to the trustees of the Hugh Green Trust.¹⁵⁴ That letter deals with the appointment of John and Frances to the various directorships but continues:

It is my desire at this time that Maryanne Green is removed as a Director of Hugh Green Investments Limited, Hugh Green Industries Limited, Hugh Green Capital Limited and Hugh Green Properties Limited. Please sign the attached Notice To The Company removing Maryanne Green as Director from these four companies.

[328] Ms Porter’s evidence was that Hugh did not instruct her to remove Maryanne as a director, but that Mr Fisher had spoken to her about that. Although Mr Fisher said he had no recollection of discussing Maryanne’s removal as a director around this time, he thought it possible that the discussion about removing Maryanne as a director came from the context of discussions he was having with John and Hugh, which led to Hugh deciding to remove Maryanne as a trustee. He said:¹⁵⁵

And so I, at that time I had thought it inevitable that the very next step was that Hugh would call a meeting of the directors and propose a resolution removing Maryanne.

11.2 Background to execution of the deeds

[329] Mr Hickson gave evidence that he was contacted by Mr Fisher and asked to attend to Hugh’s execution of certain documents. Mr Hickson said he understood his role to be to attend to the execution of the document and when doing so, satisfy himself that Hugh knew exactly what he was doing. When there he briefly explained the legal effect of the documents before Hugh signed them. He told him that the

¹⁵³ Affidavit of Michael Fisher at [58], NOE Michael Fisher at 1846.

¹⁵⁴ CBD at 1296.

¹⁵⁵ NOE Michael Fisher at 1848.

effect of the documents was to remove Maryanne as trustee and that meant that she would no longer have any say in the running of the trust and would no longer be holding the assets of the trust for the beneficiaries. He did not explain the wider implications for the family, because he simply was not aware of them.¹⁵⁶

[330] He said he had no reason to doubt from his interaction with Hugh that he was in full command of his faculties and he was satisfied he knew what he was doing.¹⁵⁷ He thought that it was either at that meeting or his earlier meeting on 8 November that Hugh had asked him about his impressions of another lawyer. He said that it was only later that he realised that the Green Group had business dealings with the lawyer and Mr Hickson said he was then struck by how “clever and tactful Mr Green had been in raising the matter in so casual a manner without disclosing his or his company’s involvement”.¹⁵⁸

[331] Mr Hickson confirmed that John and Frances were present in the room throughout the time he spent with Hugh. He said they were not doing anything and did not take an active role in what was happening. He thought that John was the person who met him at the door every time he went there, and he thought he might have met him once before at Mr Fisher’s office.¹⁵⁹ He confirmed that Moira was not present when he visited Grande Avenue. However Moira said that Hugh talked to her that night and that he was very clear that unless and until Maryanne was willing to co-operate, there was no other choice than removing her.

11.3 Other evidence relevant to capacity

[332] Maryanne relies upon the evidence of Dr Masters referred to earlier that by this time Hugh was much depleted and that overall from a medical viewpoint he would be concerned about Hugh’s capacity.¹⁶⁰ The hospice notes for 20 December record Hugh as being lethargic, but alert.¹⁶¹

¹⁵⁶ NOE Douglas Hickson at 1695.

¹⁵⁷ NOE Douglas Hickson at 1697.

¹⁵⁸ Affidavit of Douglas Hickson at [8].

¹⁵⁹ NOE Douglas Hickson at 1698.

¹⁶⁰ NOE Dr Masters at 553.

¹⁶¹ Medical documents at 267.

[333] It is clear that the family regarded Hugh as being very unwell at this time. John saw implementing the decisions to appoint him and Frances directors as urgent because of Hugh's health.¹⁶²

[334] Maryanne also points to the evidence of her husband Mr Owens as to his interaction with Hugh on the evening of 20 December. Mr Owens evidence was that when Maryanne showed him the fax she had received from Ms Porter which informed Maryanne that she had been removed as a trustee, he decided to visit Hugh. He thought that things were getting out of hand. When he saw Hugh he asked him how he could fire Maryanne as a trustee when she had worked so hard for him. Hugh replied "I don't know". Mr Owens said that he reminded Hugh that Maryanne had asked Hugh to stop sending her lawyer's letters by email and if he had bad news to tell her directly. Hugh replied that it was not a lawyer's letter. When Mr Owens insisted it was a lawyer's letter Hugh said he did not know who wrote it and remained adamant he did not know who had written the letter or why it had been written. Mr Owens said his strong impression was that this was true. He said that as he was leaving Hugh said that he would call Maryanne.¹⁶³

[335] Moira gives a slightly different account of the meeting. She said that Mr Owens went around there fired up and demanded to see Hugh.¹⁶⁴ Mr Owens denied he was fired up, noting that he had phoned ahead to tell Hugh and Moira he was visiting and said that he had waited in the lounge for Hugh.

[336] It was put to Mr Owens on cross-examination that Hugh was merely fobbing him off in the remarks he made. Moira's evidence was that Hugh did not say much in response to Mr Owens and that he replied "I don't know" or "I don't know why" simply to avoid confrontation.¹⁶⁵ Mr Owens replied that although he initially thought the same, because it was incomprehensible that Hugh did not know he had sent a letter earlier that day, as the argument went on, he realised that Hugh really

¹⁶² CBD at 1215-1216.

¹⁶³ Affidavit of Mark Owens at [41] – [49].

¹⁶⁴ First affidavit of Moira Green at [91].

¹⁶⁵ First affidavit of Moira Green at [93].

didn't know. He also said that it would not be Hugh's style to fob him off, they got on well and Hugh probably would have just told him if he wanted to.¹⁶⁶

[337] This meeting led on to the meeting of the 21st of December. Maryanne's evidence is that she visited Grande Ave to resign as CEO and had her credit card, work keys and other work related items to hand over. Hugh would not accept her resignation and asked her why she was resigning as trustee. Maryanne told him that she must resign as CEO because he had removed her as a trustee. Maryanne's evidence is that Hugh denied that she had been removed as trustee. When she showed him the document removing her he said "that is not right, you are still my trustee. You are to carry on being one".

[338] Mr Owens corroborated Maryanne's account of the meeting. He said that Hugh, Maryanne and he sat at the kitchen table and Moira was in the kitchen with them, but not seated at the table. Hugh was warm and welcoming. He thought that Hugh seemed upset to find out that Maryanne had been removed as a trustee.

[339] Moira disagrees that Hugh told Maryanne she was still his trustee.¹⁶⁷

[340] Moira and Maryanne agree that it was Moira who then asked Hugh if he would like her to get the deeds of removal returned to him from the Green Group offices, and he said he would. Moira then phoned Ms Porter to organise this.

[341] The removal of the deeds from the trust minute books and their return to Grande Avenue is corroborated by Ms Porter and the staff member who delivered them, Ms Childs. Ms Porter said that although it was Moira she spoke to on the phone, she understood Moira to be acting on Hugh's instructions in requesting the return of the removal deeds. Ms Porter confirmed that the originals are no longer in the minute books of the trusts.

[342] Maryanne's evidence is that when the deeds were returned to Grande Avenue, Hugh handed Maryanne the removal deeds saying to her "You are my trustee".

¹⁶⁶ NOE Mark Owens at 521.

¹⁶⁷ First affidavit of Moira Green at [96].

[343] Moira said that she suggested that there be a trial period during which Maryanne would work with John and Frances. Under cross-examination she expanded this to say that it was on this basis that Hugh was prepared to re-appoint Maryanne. Her evidence was that Hugh said “you can still be my trustee as long as you co-operate”. Moira said she had suggested 6 months but Maryanne was prepared to agree to only 3 months, and even then remained reluctant about working with John and Frances.

[344] Maryanne and Mr Owens say there was no such condition and that it was only after Hugh had handed back the deeds and reiterated that Maryanne was his trustee that the discussion about cooperation arose. Moira was cross-examined in connection with an affidavit she had sworn in November 2012. In that affidavit she made no mention of having heard Maryanne’s discussions with Hugh. She also made clear that her own understanding of what happened between Hugh and Maryanne was based on what she had been told by Hugh about the meeting.¹⁶⁸ Moira’s account of the events of that day seems to have changed over time from an affidavit sworn in November 2012 in which she was only able to recount Hugh’s report to her of the meeting, to her evidence-in-chief in which she described the meeting, including an account of what was said, and finally to her evidence under cross-examination that Hugh’s offer to reappoint was conditional.

[345] To the extent that there is any difference between Moira’s evidence on the one hand and the evidence of Maryanne and Mr Owens on the other in connection with this meeting, I prefer the evidence of Maryanne and Mr Owens. I consider that Moira was prone to error in her recollections [redacted material]. There is some indication in the narrative set out above that she mixes up what others have told her with her own recollection of events. I also consider that her evidence is affected by a desire to bring an end to this dispute. She clearly was involved in what happened at Grande Avenue on that day, but equally clearly now has no recollection of these events.

¹⁶⁸ NOE Moira Green at 946–947.

11.4 Analysis

[346] The onus is again on Maryanne to establish lack of capacity. Maryanne points to the fact that shortly before these documents were executed, on her account Hugh was struggling with the concepts of directorship and trusteeship. I do not attach much weight to this. There was potential for considerable misunderstanding on this point. As Maryanne said in evidence, the Green Group normally had the same people both as directors and trustees.

[347] The evidence of Mr Owens and Maryanne regarding Hugh's confusion in connection with her removal is of more concern. This is evidence of the type of inconsistency that Dr Casey spoke of. Hugh had no memory he had removed Maryanne and apparently no desire to do so. There was no formal assessment of capacity, and the lawyer witnessing the documents, Mr Hickson was not advised of the concerns some family members had as to Hugh's memory and decision making.

[348] Nevertheless even if Hugh later forgot he had executed the deeds, the issue is his capacity at the time he executed the particular documents, not at other times. Mr Hickson spent time with Hugh and explained to him the effect of the deeds he was signing and the direct effects that removing Maryanne would have- she would no longer have any say in the running of the trust and no longer hold the trust assets for the beneficiaries.¹⁶⁹ Mr Hickson did not observe any confusion or forgetfulness on Hugh's part, and thought him in full command of his faculties.

[349] Again I have not found this issue straightforward. However having weighed the evidence I have concluded that Maryanne has not proved that Hugh lacked capacity at the time he executed these documents.

12. Third challenged decision – undue influence: removal of Maryanne as trustee on 20 December 2011

[350] Again this is not a case where the evidentiary presumption of undue influence arises. I do not consider that it is a transaction calling for an explanation when placed in the context of the narrative I have set out. Nevertheless I consider that

¹⁶⁹ NOE Douglas Hickson at 1695.

there is strong evidence that the documents were executed by Hugh without free and independent exercise of his own judgment; that they were executed because of pressure applied by John to his father. I do not consider that Mr Fisher consciously played a part in the application of this pressure but I do consider the role he played assisted John in applying pressure to his father. My reasons for this finding are as follows.

[351] Hugh was undoubtedly vulnerable at this time, for the reasons outlined above. As at 20 December he was fatigued, sleeping a lot, and largely staying around his house. He had critical decisions to make about the future of the Green Group and the family interests, but had become indecisive. He wanted everybody to work together and get along, but he was caught between two powerful and each in their own way, driving personalities, Maryanne and John.

[352] His short term memory issues were by this time acute. Maryanne and Mr Owens' evidence shows that he had no clear recollection of or at least was confused about the deeds of removal. He was not able to carry that detail forward from one day to the next. The fact of Maryanne's removal was as new to him on the 20th, the very day he signed the deeds, as it was to him on the 21st when he had to have explained to him again that he had removed Maryanne.

[353] The defendants say that Hugh wasn't confused and had good recall, and was merely fobbing Mr Owens and Maryanne off. I reject that explanation of events as implausible. The evidence suggests that when Hugh had been better he had no difficulty telling Maryanne what he wanted, and confronting her when she got in his way. Just a few months earlier he had told Maryanne that if she involved lawyers, that would be them finished. Moreover a strategy of denying events to avoid confrontation was fatally flawed if it was true that those were events Hugh had himself set up and intended to carry into effect.

[354] The picture of Hugh painted by the evidence of Maryanne and Mr Owens as to the events of 20 and 21 December is consistent with the fact that Hugh's involvement in the business was fading. As I read through the documents in chronological order a clear picture emerges of Hugh receding from view in terms of

the transition issues, and of John taking over. Even in the evidence called at the hearing there is little sense of Hugh's "voice" in these events. The last time Hugh's intention is recorded in any detail it is to the effect that Maryanne is to be involved and the family is to pull together.¹⁷⁰ Removing Maryanne was hardly consistent with this.

[355] Hugh had traditionally taken advice from Mr Narev in connection with the family's control of the Green Group. He was a valued adviser. Mr Narev, a very modest man, was prepared to accept that he was Hugh's closest and most trusted adviser on trust matters over the years.¹⁷¹ Mr Narev had counselled caution in promoting John so quickly. He was also keen to try and find ways to bring the family together. But by this point in time Hugh was largely cut off from Mr Narev as Mr Fisher was drafting the documents and advising Hugh in connection with these events. It is a troubling aspect of this case that at a time when Hugh most needed his long standing advisers he did not receive their advice.

[356] By this time I consider that John had strong feelings toward Maryanne of anger, which were probably explicable by Maryanne's failure to let go of the events in the early 1990s. The extent of his hostility was apparent in the June 2011 meeting and becomes clearer still in events I shortly come to.

[357] John was now making the running in many of the events as they occurred. Mr Fisher was content to take his instructions from John, and did not have a practice of checking instructions with Hugh. When he did speak to Hugh, John was present. Mr Fisher also used John as a post box for documents intended for Hugh and Moira.

[358] Mr Fisher's role in these events was itself not satisfactory. There were deficiencies in his record keeping. With matters as important as these issues were and given the size of the assets the control of which was at stake, his practise is fairly described as sloppy. Mr Fisher says he was involved in advising Hugh that Maryanne was in breach of her duty as a trustee. This advice was given as part of the lead up to removing Maryanne and was one of the reasons that the letter of

¹⁷⁰ CBD at 1038 and 1205-1210.

¹⁷¹ NOE Robert Narev at 1641.

16 December was sent. In giving this advice the picture Mr Fisher helped to paint for Hugh was that Maryanne was unreasonable, in breach of her duties and unless she reformed her ways, had to go.

[359] This advice was not confirmed in writing. It is not clear how Mr Fisher, a barrister not apparently specialising in trust matters and without a full understanding of the facts was qualified to give this advice. He accepted under cross-examination that he did not know the detail of just how Maryanne's refusal to cooperate manifested itself.¹⁷² He thought it might be because Maryanne had refused to sign resolutions giving effect to the appointment of John and Frances as directors. He also accepted that given the existing trust resolutions, it was not necessary for Maryanne to sign the documents.¹⁷³ It is remarkable that Mr Fisher gave this advice so casually. Maryanne was at the time the CEO of the Green Group, and with her father had run the Green Group with Hugh for many years. The Green Group was a family controlled group worth hundreds of millions of dollars. This advice would have implications not only for that group but also for the family relations.

[360] By this time Mr Fisher was aware that there was conflict within the family. He had also clearly aligned himself with John. He had already had a meeting to discuss "tactics". He had been on a golf weekend with John. He acted on instructions relayed by John to appoint John to positions that he then acted to remove Maryanne from. It is clear from the evidence I come to later that Mr Fisher had a strong personal antipathy toward Maryanne and perhaps this clouded his better judgment.

[361] Mr Fisher said that the letter of 16 December was his suggestion.¹⁷⁴ It was a letter they knew was almost guaranteed to provoke the response that it did. It was sent on the basis of advice from Mr Fisher that was incorrect - that Maryanne needed to sign additional resolutions to give effect to the trusts' resolutions, and that if she did not she would be in breach of trust.

¹⁷² NOE Michael Fisher at 1834 and 1836.

¹⁷³ NOE Michael Fisher at 1832 – 1840.

¹⁷⁴ NOE Michael Fisher at 1838.

[362] There is evidence that suggests that there was concurrently the thought to remove Maryanne as director. That was not carried through. If it was Hugh who had truly decided to act decisively, there is no reason for the failure to carry through on her removal as a director. However in order to do this the other trustees would have to be involved, including Mr Narev, who of course had been counselling caution.

[363] I have considered the obvious counter narrative. Hugh had earlier threatened Maryanne in connection with these events that if she took certain steps (bringing in the lawyers) “she and him were through.” I have considered whether this was Hugh acting on his own free will but out of desperation to bring the arguing to an end.

[364] Every act taken around the removal of Maryanne seems to have been instigated by someone other than Hugh. Instructions to Mr Fisher to attend at Grande Avenue, the letter of 16 December, the instructions to go ahead with preparation of the removal deeds. Even events after Maryanne’s removal were initiated by Moira, the return of the deeds of removal, and the notion of Maryanne co-operating for a trial period. By December the point seems to have been reached that Hugh was a passive figure when it came to the big decisions. This is not to say that the old Hugh personality was not present when people visited, or that he was no longer capable of conducting the kind of routine business he had been doing all his life, such as cattle trading. But when it came to the big decisions that needed to be taken in relation to control of the Green Group, he was indecisive. He was struggling to remember events from day to day. He was weak and tired. He was trying to pull his family together but they were pulling him and themselves apart. He was trapped between the stridently expressed demands of two powerful personalities, but one of them, John, was more powerful and skilful in managing the situation.

[365] The counter narrative that these were Hugh’s wishes is further undermined by Hugh’s conversations with Mr Owens and Maryanne on 20 and 21 December. On each occasion Hugh did not understand that he had removed Maryanne. He believed that she was still his trustee. Hugh was confused and forgetful. This of course is inconsistent with the picture John’s evidence painted of an in charge and decisive Hugh. Later events that I now come to corroborate Maryanne’s case that it was

John, and not his father, calling the shots. I am satisfied that John's determination to have a role in the Green Group, and to free himself of Maryanne's continued opposition and criticism, caused him to pressure his father to remove Maryanne. Now that John was a trustee and director he felt empowered to act. He set the stage for Maryanne's removal in every sense, and his conduct over bore his father's will.

[366] I do not consider that this conclusion is inconsistent with my finding that Hugh had capacity to remove Maryanne. The issue with capacity is his ability to understand and recall relevant facts at the point in time he executed the documents. A person who is forgetful and even a person who is confused from time to time can have capacity.

13. Fourth challenged decision: appointment of Mr Fisher as trustee on 29 March 2012

13.1 Events leading up to appointment

Letter of 22 December 2011

[367] The day after the meeting at Grande Avenue between Hugh, Maryanne and Mr Owens, a letter was emailed to Maryanne by Ms Porter.¹⁷⁵ The letter read:

Maryanne

Hugh has requested that this letter be sent to you.

Regards,

Jane

I am pleased that you have changed your mind and that you have now agreed to work constructively with John and Frances as directors of companies in the Hugh Green Group.

In light of your decision, I would like you to acknowledge the following understanding:

You will immediately sign and return the documents Leanda gave you on Friday 16 December 2011 formally appointing John and Frances as directors and as joint shareholders.

You will undertake that, in relation to the appointment of John and Frances as trustees of the Hugh Green Trust and Hugh Green Property Trust and as directors of the companies in that group, you will not take or procure any

¹⁷⁵ CBD at 1346.

legal action to be taken challenging the validity of their appointments or their suitability or competence to act as directors or trustees.

You will agree that each director of the companies is entitled to attend any meeting relating to the business affairs of the companies and in particular will be given notice of all meeting proposed relating to governance and appointment of Senior staff so that the directors can decide whether they wish to attend such meetings.

Hugh Green

Maryanne Green

[368] Mr Fisher said the sending of the letter was again his idea.¹⁷⁶ John's evidence was that he suggested the letter and his father agreed it was a good idea. He said he spoke to Mr Fisher on his father's behalf. Mr Fisher said that although John phoned him, he also spoke with Hugh on the phone. He was challenged on this point in cross-examination and said that he thought he had spoken to Hugh but then in further questioning firmed up on that and said that he recalled speaking to Hugh about it and during that conversation he made the suggestion to him about the letter.¹⁷⁷ Mr Fisher does not claim to have been checking on an instruction received but rather that the idea of the letter sprang up during his discussion with Hugh. He agreed that it was John who collected the draft letter from his office.

[369] As usual Mr Fisher has nothing in his records to reflect any discussion with Hugh. It may be that Mr Fisher spoke to Hugh about the letter, but what is clear is that the idea to write formally to Maryanne in this way was not Hugh's.

[370] The content of the letter was out of step with the tone of the discussion between Hugh and Maryanne, which had plainly been conciliatory. It was not the type of letter a father would usually send a daughter, certainly not a daughter he had worked alongside on a daily basis for more than 20 years. It was also a letter which again would produce a predictable response from Maryanne.

[371] Mr Fisher said in his evidence that he did not know at this point that Maryanne had been reappointed a trustee. He believed that she would be if she took the steps requested of her in the letter. But that account is improbable in light of the content of the letter. It made no sense for Maryanne to be required to sign the

¹⁷⁶ NOE Michael Fisher at 1851.

¹⁷⁷ NOE Michael Fisher at 1853 and 1855.

various documents unless she had already been reappointed a trustee. Mr Fisher ascribed this to a “flaw in the logic of the letter”, but I am satisfied that he is now misremembering events as they occurred at that time.¹⁷⁸ These were detailed events, and because of his file keeping practises he has no notes to assist him with refreshing his memory.

[372] Maryanne did not deal with the letter at that point, and the next day left for a family holiday in Queenstown, not returning until 15 January.

Steps to remove Maryanne in January 2012

[373] On 9 January on John’s instructions an employee of the Green Group, sent an email to Mr Narev and Mr Carter, stating that John wanted to hold a trustees’ meeting the following week, that Hugh would be available and that John would organise an agenda by the end of the week. The evidence of John and Mr Fisher is that they understood from their discussions with Hugh that he wanted steps to be taken to implement the appointment of John and Frances as directors and the removal of Maryanne as a director. On 12 January 2012 Mr Fisher emailed John draft notices for meetings for the Hugh Green Property Trust and the Hugh Green Trust.¹⁷⁹ The covering sheet included the following:

I have confined the steps required to be taken to those that are of immediate attention.

A front page agenda will need to be prepared. It can be based on the Agenda Bob Narev prepared for the last meeting.

[374] Mr Fisher’s evidence in chief was that he had telephone discussions with Hugh and John around 9 January, and was told that Maryanne had not signed the 22 December letter and that Hugh now wanted to get John and Frances appointed as directors of the Green Group companies and remove Maryanne as director.

[375] Mr Fisher’s evidence on this point was challenged in cross-examination. An email chain between John and Mr Narev dated 13 and 14 January was put to him. The email chain begins with John sending Mr Narev agendas for meetings of the

¹⁷⁸ NOE Michael Fisher at 1851-1852.

¹⁷⁹ CBD at 1364-1367.

Hugh Green Trust and Hugh Green Property Trust, together with proposed resolutions:¹⁸⁰

- (a) delegating to Hugh the authority to sign notices appointing John and Frances directors of the companies dealt with at the 5 December meeting;
- (b) effecting the removal of Maryanne as director, and
- (c) amending share registers to reflect her removal as trustee.

[376] In this email exchange, Mr Narev appears perplexed by what is proposed. He says that when he had seen Hugh and Moira earlier in the week “neither of them seemed to know anything about the purpose of the meeting, let alone that Hugh was proposing resolutions”. He referred to “conflicting messages from you and your parents as to Maryanne’s status”, and said “[i]n relation to the position of Maryanne as Trustee, both Hugh and Moira were quite specific to me that she was to be reinstated and in fact both thought that this had been achieved”.¹⁸¹

[377] When it was put to Mr Fisher that the documents had been prepared on John’s instructions, and not after speaking to Hugh, he was prepared to accept the logic of that, but then reiterated that he thought he had spoken to Hugh although he couldn’t recall the content of the conversation. In any case he said that he thought that at all times John was giving effect to Hugh’s instructions and when he checked with Hugh from time to time that proved correct.¹⁸²

[378] It is clear against this background that no such telephone conversation with Hugh took place. These instructions were from John, a conclusion further corroborated by Mr Fisher’s time sheets which refer to discussions with John on 12 and 18 January.

[379] It is equally clear that it was John and not Hugh who was pushing for the meeting and proposing the resolutions. John’s response to Mr Narev’s advice to him that his mother and father were in the dark about the meetings was to say that he was

¹⁸⁰ CBD at 1377-1378.

¹⁸¹ CBD at 1381-1385.

¹⁸² NOE Michael Fisher at 1862-1864.

trying to keep this detail from Moira, but Mr Narev responded that Moira seemed very keen to know. As to Hugh, John said that on several occasions his father discussed with Mr Fisher and him what they needed to do to bring resolution to the situation “and he has since asked several times to remind him what the meeting is about including this morning”.

[380] These statements made at the time are out of step with John’s evidence in this proceeding that Hugh remained mentally undiminished at this point. I consider that Hugh was by this time confused, but I also consider it very likely that his confusion was at its most acute in respect of matters where John had seized the agenda. He did not for example have any difficulty remembering that he had reinstated Maryanne as his trustee.

[381] On 14 January John forwarded this email chain on to Frances. He says, referring to the agenda and resolutions “Bob doesn’t want anyone to see below until he approves it!! I don’t think he will approve it”. Consideration of what Hugh wants is nowhere to be seen in this exchange.¹⁸³ The 17 January meeting did not proceed. Nor did John’s plans to remove Maryanne as a director. This was the effect of Mr Narev’s intervention. Instead Mr Narev initiated discussions with John and Maryanne to try and sort things out.

[382] On 16 January, Maryanne met with Mr Narev and Mr Carter and was told by them that the plan was that both she and John would have non-executive roles in the Green Group after Hugh’s death. Maryanne pointed out that this was a change of plan as the plan had been that while Seamus would be CEO she would have a hands-on role in the Green Group just as Hugh and Mr Carter had. However she told Mr Narev that she accepted the appointment of John and Frances as directors.

[383] On 18 January there was to be a meeting between John, Maryanne, Mr Narev and Ms Roberts. Prior to the start of the meeting Mr Narev told Maryanne that in his view she had not been re-appointed a trustee, as that had to be done in writing, a view he had already expressed to Hugh, (it is now common ground that this advice

¹⁸³ CBD at 1380.

was wrong, and that an oral appointment could be effective given the particular terms of the trust deeds which did not require appointments to be in writing).

[384] The meeting was constructive and agreement was reached for certain steps to be taken. It was agreed:

- (a) that Mr Narev would attend to the necessary documentation to re-appoint Maryanne as trustee;
- (b) share transfers should be completed to record new and continuing shareholders on share registers;
- (c) Maryanne would sign documents to have John and Frances appointed directors;
- (d) Maryanne would meet with Mr Brennan to effect the transfer of her role of CEO to him; and
- (e) a review by PWC of governance arrangements for the Green Group would be progressed.

[385] There is a difference between Mr Narev and Maryanne's account of this meeting in one respect. Both agree that these various steps were seen as connected. Maryanne says that she insisted that the steps be documented and dealt with at the same time because she did not want the situation to arise that she had not been re-appointed but had signed the other documents. Mr Narev said that it was intended that the document re-appointing her be held in escrow until all other matters had been attended to. Maryanne's account must plainly be correct since the other documents could not be executed until Maryanne was a trustee. These staging issues were therefore to protect Maryanne against any failure to carry through the documentation of her trusteeship and not the result of a condition that she do various things before she could resume that role.

[386] Following the meeting, Maryanne met with Mr Brennan to begin the transfer of the role of CEO to him. On 24 January Maryanne and her husband Mr Owens

visited Hugh at home and advised him that she was resigning as CEO. That same day Mr Brennan was appointed.

[387] The trustee defendants say that through this period John was attempting to resolve things so that he and Maryanne could work together in the Green Group but Maryanne continued to cause trouble and remained uncooperative. On the trustee defendants' case this made her removal from all positions within the Green Group inevitable. However, the documentary record at the time does not paint a picture of a conciliatory John. There are also indications that by this time John was taking strong positions on the future role of family members within the Green Group.

[388] On 19 January in an email to Mr Narev (copied to Mr Carter and Frances) John said that Hugh, Frances and he would not agree to Maryanne having a role in the property department because Mr Brennan needed to be given freedom.¹⁸⁴ There is no independent corroboration of John's statement that this was Hugh's view.

[389] In the same email John continued:

I am not giving up on trying to resolve this amicably but I think if we have a board meeting in early Feb and things have not been resolved to her satisfaction and she refuses to co-operate and keeps trying to delay things then I will not be prepared to keep biting my tongue and I will be putting forward a resolution to remove her as CEO and Director which in any normally run business would have happened already for her lack of performance.

[390] This last comment shows John assuming a driving role within the Green Group, a role that would once have been fulfilled by his father. Hugh is hardly visible in the documentary record, and even in the witnesses' evidence of events around this time.

Working together in February and March 2012

[391] Meanwhile, the evidence does suggest that Maryanne was engaging with John and Frances as trustees and directors. There were a number of issues that the trustees and directors dealt with at this time where Maryanne participated in discussions and attended meetings. These issues included whether the Green Group

¹⁸⁴ CBD at 1412.

should put further cash into a company called [redacted material], whether to take up a rights issue in respect of a company called [redacted material], and an issue in connection with whether the Green Group should participate in the [redacted material] dividend reinvestment plan. There was a further issue as to whether [redacted material] of the Green Group's profits should be passed over to charity.

[392] Maryanne's view on each of these issues was that the Green Group should keep cash on hand. In the case of the [redacted material] donation to charity she explained her view that the Green Group was going into a difficult time in terms of governance, at the same time as facing an economic downturn. This was a somewhat conventional viewpoint, but it was not conventionally expressed. She described how she and Hugh, the two hands on directors, were now effectively sidelined from executive roles. She noted the age of the "two Bobs" (mid 70s) and that Mr Carter had to take 3 months leave due to poor health. She concluded the point with the following:¹⁸⁵

It is my view that John and Frances do not have the expertise, work or business experience that companies expect from their directors.

She also raised a query, on the basis of legal advice she had received, as to whether the Green Group had capacity to make the donation.

[393] These points were probably accurate, but nevertheless in context, were provocative.

[394] Maryanne's view in respect of [redacted material] was that they should take the dividend rather than reinvest it. In an email copied to all directors she said that in difficult times they should maintain a strong cash position. John's reply, copied to all directors) was hostile. It included the statement:¹⁸⁶

Maryanne's comment that our number one priority is for the Group to achieve a debt free position is clearly ridiculous and ill informed.

[395] There was a directors' meeting on 14 March at Grande Avenue which Hugh attended. The principal item of business was consideration of putting further cash

¹⁸⁵ CBD at 1510-1513.

¹⁸⁶ CBD at 1544.

into [redacted material]. Maryanne's view was also that they should put no further cash into it. Mr Carter spoke in favour of the investment, although he had also privately invested in [redacted material]. Maryanne pointed out the existence of his conflict of interest. John considered she was rude to him. He said Hugh left the meeting early, he thought because of that. John sent an email on the issue, copied to everyone on 15 March. He said:¹⁸⁷

Bob Carter's opinions on exit strategy are far more rational than Maryanne's and I see no reason why he should not be allowed to vote on this.

Bob has less of a vested interest than Hugh or HGG.

Mr Carter however quite correctly considered himself conflicted and did not vote on the issue.

[396] Ultimately the directors were able to reach consensus on all points. John's evidence is that issues Maryanne raised angered Hugh. It is quite possible that they did. The donation was important to Hugh, and disputes between directors were not what he wanted to see. It is clear however that the issues angered John.

[397] Around this time Hugh was particularly unwell. In early March John was expressing concern about Hugh's capacity to make business decisions. In one email he said of the need to make a decision on the [redacted material] "Hugh is no longer capable of making these decisions as he was in the past so I don't think a decision should be based on whether he would like to participate".¹⁸⁸ In an email on 9 March he said that Hugh was not capable of making these decisions anymore, and in reference to a directors' meeting on the 28th says, "[i]n fact I doubt he will be alive then."¹⁸⁹

[398] John's evidence was that Hugh was very unwell in early March but that he rallied after he received a blood transfusion. He said in evidence that he only intended to refer to Hugh's physical frailty, and not to suggest that he was not mentally capable. He also said that he wanted to protect his father. I am satisfied that John's emails around early to mid March recorded real concerns he had as to his

¹⁸⁷ CBD at 1626.

¹⁸⁸ CBD at 1476.

¹⁸⁹ CBD at 1489.

father's capacity to make decisions at this time, although I accept that Hugh's condition would have varied from day to day.¹⁹⁰

[399] Notwithstanding the agreement regarding Maryanne's reappointment, by March the documents that Mr Narev said were necessary to reappoint Maryanne as trustee had still not been executed. Nor as a consequence, did Maryanne sign the documents appointing John and Frances as directors, and effecting the change in shareholders on the register.

[400] In fact, while Maryanne was engaging in these issues with the other trustees and directors, further steps to remove her were being initiated. Mr Fisher said that on 13 March John telephoned Mr Fisher and told him that attempts to resolve things with Maryanne had failed and Hugh now wanted to get John and Frances appointed to the boards and to remove Maryanne. Mr Fisher said that he drafted documents for a trustees' meeting at which resolutions were to be put removing Maryanne as a trustee and director, and appointing John and Frances as directors. He said that he emailed these documents as directed.¹⁹¹ That was to John. The meeting date proposed was 20 March.

[401] John's evidence-in-chief on this point was simply to the effect that advice was obtained for the trustees (not Hugh) from Mr Fisher as to how her removal as a director could be effected. On cross-examination he said:¹⁹²

Presumably I was the conduit between dad and him [Mr Fisher] in respect of these issues.

[402] Ms Porter's evidence was that on 13 March, she was advised on a conference call with Mr Fisher and John that the removal of Maryanne as trustee stood so that the share register of the companies needed to be updated and the Companies Office notified. She said that "[a]t this time I was also made aware that the other trustees were considering the removal of Maryanne as a director of the HGG companies".¹⁹³ There is no evidence that Mr Carter or Mr Narev were involved in this.

¹⁹⁰ See for example CBD at 1667.

¹⁹¹ Affidavit of Michael Fisher at [65].

¹⁹² NOE John Green at 1542.

¹⁹³ Affidavit of Jane Porter at [57].

[403] Maryanne became aware of these steps to remove her as a director through her practice of checking workplace emails. I accept the trustee defendants' point that she had stepped down as CEO by that point in time and so had no legitimate business purpose for accessing these emails.

[404] Mr Fisher prepared notices for a meeting of trustees on the 20 March. The business for the meeting included removing Maryanne as a director and taking various steps to implement the removal of Maryanne as a trustee. Mr Fisher mistakenly dated her removal for those purposes as having occurred on 16 December 2011.¹⁹⁴

[405] On 20 March Mr Fisher attended a meeting at the Green Group's offices at Mr Narev's request. This was the date scheduled for the trustees' meeting but Mr Fisher believes the meeting couldn't happen that day because not everyone could be there. This seems unusual since all of the trustees (as they regarded them) did in fact attend the meeting other than Hugh. Mr Narev and Mr Carter were both present, along with John and Frances.¹⁹⁵ Mr Fisher said Mr Narev suggested they hold the meeting because he wanted Mr Fisher to explain Hugh's position in relation to the proposed meeting "that had, that was being called to remove Maryanne as a trustee and to appoint John and Frances to the boards."¹⁹⁶

[406] Mr Fisher said that he explained to Mr Carter and Mr Narev what he understood to be Hugh's position, that he wanted those resolutions dealt with. He said that the two men told him there was no need for resolutions for either step as Maryanne was no longer a trustee and since the resolutions to appoint John and Frances directors had been passed in December, there was no need for a meeting to implement those decisions.¹⁹⁷ This makes sense to a limited extent only, since the proposal had been to also consider resolutions to remove Maryanne as a director.

[407] Mr Fisher accepted that the instruction regarding the preparation of the documents proposing the removal of Maryanne as trustee and director and resolving

¹⁹⁴ CBD at 1593-1594.

¹⁹⁵ Affidavit of Maryanne Green at [350]; NOE Michael Fisher at 1880.

¹⁹⁶ NOE Michael Fisher at 1879.

¹⁹⁷ NOE Michael Fisher at 1880-1881.

as shareholders to appoint John and Frances as directors came to him from John. He claimed that the instruction accorded with what Hugh had told him in a meeting on 16 February. I do not believe that Mr Fisher ever received this instruction from Hugh and nor did he check it with him. He has no clear recollection of having done so and can say no more than that his habit was to check things with Hugh.¹⁹⁸ All that he claims is that what he was instructed to do was consistent with a discussion he had with Hugh almost a month earlier.¹⁹⁹ There is no file note of that discussion. There is no mention of it in his evidence in chief. If he did talk with Hugh in mid February, I do not believe it was on this topic. The notion that Hugh instructed him to implement Maryanne's removal as trustee in February makes no sense in terms of the chronology. There had been no event to trigger such discussion, and it followed very shortly after Hugh's insistence that Maryanne was his trustee. Maryanne had agreed to support John and Frances as trustees and directors, had begun working with them in those roles, had stood aside as CEO and had briefed Mr Brennan to step into her role.

[408] There is evidence that dealings between directors became fractious in mid March, but that was well after the discussion Mr Fisher says he can recall. John did not describe any discussion he had with his father to re-initiate Maryanne's removal. He said only that "presumably" he was passing on those instructions.

[409] Mr Narev and Mr Carter did not discuss these issues with Hugh during this period. They were being told by Mr Fisher about what Hugh wanted.

[410] The trustee defendants say that the explanation for these events is that Hugh was angered by Maryanne's conduct in March. As she was not cooperating she had to go. But this explanation for events is undermined by Maryanne's evidence that in April 2012 Hugh was still telling her she was his trustee.

[411] To conclude up to this point, I consider that the instructions to implement the decision to remove Maryanne as trustee and to initiate the steps to remove her as a director of the Green Group companies at this stage came from John. It was not

¹⁹⁸ NOE Michael Fisher at 1882.

¹⁹⁹ NOE Michael Fisher at 1877.

Hugh who set the ball rolling to remove Maryanne as director and implement her removal as trustee.

28 March board meeting

[412] On Wednesday 28 March there was to be a directors' meeting for the Green Group. The agenda listed various items including confirmation of appointment of Frances, John and Mr Narev as directors of the Green Group companies.

[413] The meeting of the 28th of March took place. The directors attending were Mr Narev, Mr Carter, Maryanne, John and Frances. Moira, Ms Roberts, Mr Brennan and Ms Porter also attended. Hugh was not well enough to attend.

[414] At the beginning of the meeting John and Frances asked that Mr Fisher be allowed to attend, but Mr Carter, Mr Narev and Maryanne all voted "no" on the grounds that Mr Fisher had no standing to be there. Under cross-examination Mr Fisher's evidence was that it was Hugh who had asked him to be there, and that he had said "I need you in the room to make things happen".²⁰⁰

[415] Again I have difficulty accepting Mr Fisher's evidence on this point. In his evidence in chief Mr Fisher only described a conversation with John in which he was told that family members wanted him to attend the Green Group board meeting to make it clear to all the directors that they wanted Hugh's wishes to be acted on. It seems likely that the indication that this was Hugh's wish was conveyed by John.

[416] John's evidence was that Hugh wanted Mr Fisher to attend the meeting. Ms Porter also said that she received a telephone call from Hugh asking that she send an email to the Directors of the Board recording Hugh's request that Mr Fisher attend. Hugh also told Maryanne he wanted Mr Fisher there. She challenged him on this and he responded "I am so confused, I don't know if I am coming or going".²⁰¹

²⁰⁰ NOE Michael Fisher at 1884.

²⁰¹ Affidavit of Maryanne Green at [353], a remark she recorded in a contemporaneous file note CBD at 1677-1682.

[417] There was also an issue at the beginning of the 28 March meeting as to whether Moira should attend. Maryanne's file note of the meeting records that Moira's attendance was explained on the basis that she was there as Hugh's ear-piece. In cross-examination it was put to John that if his mother went to the office to attend it was because Hugh had asked her to. John did not accept that. He said that there was a lot of tension and that his mother's intention in attending was to make things more peaceful.²⁰²

[418] During the course of the hearing Ms Porter located additional documents. These included a note signed by Hugh which read "I vote for Moira Green not to attend".²⁰³ Ms Porter said that Frances handed this note to her. The note was put to John in cross-examination, but he denied he had seen it before. This seems unlikely as the evidence suggests that John and Frances were in very regular contact regarding the family turmoil at this point. It was also put to John in cross-examination that Hugh had signed the note because John had asked him to.²⁰⁴ John denied this. It is clear in any event that John both wanted Mr Fisher to attend, and did not want his mother to attend. That is how he voted. The notion that it was Hugh's wish that Moira not attend is undermined by the evidence that Moira attended as Hugh's "ear-piece". It is simply implausible that if Hugh (operating independently of John's influence) did not want Moira to attend she would not know of this, or that he would allow her to find this fact out from the tabling of a document at the meeting.

[419] At the meeting John and Frances were appointed directors of the companies directly owned by the Hugh Green Trust, although Maryanne voted against the motion.

The instruction to appoint Mr Fisher as trustee

[420] In his evidence in chief, John said that he recalled being at meetings between Hugh and Mr Fisher in December 2011 and March 2012 when Hugh asked Mr Fisher if he would be interested in becoming a director of Green Group

²⁰² NOE John Green at 1553.

²⁰³ Exhibit K.

²⁰⁴ NOE John Green at 1554.

companies. Both John and Mr Fisher say that Mr Fisher was reluctant to accept such an appointment because of his experience with Dorchester Pacific. John said that after the 28 March board meeting he was present when Hugh asked Mr Fisher if he would be prepared to be both a trustee and director. He understood that Mr Fisher agreed to accept the appointments following his exclusion from that meeting.²⁰⁵

[421] Mr Fisher's account is that on the morning of the 29th of March John telephoned him and told him that Hugh wanted to appoint him a trustee and director. Hugh then came on the phone. Mr Fisher says that this was the first time that Hugh had asked him to be not only a director but also a trustee. Mr Fisher told him that in light of what had happened the previous day he was prepared to be a trustee and director if that was what he wanted. Hugh told him he did and asked him to get the documents prepared for him to sign that day and to set up a trustee meeting early the following week. Hugh then handed the phone back to John.

[422] John had obviously remained nearby as he returned to the phone. John told Mr Fisher that Hugh was at Mercy Hospital for a medical procedure and so he would have to sign the documents there. Mr Fisher drafted the notices to appoint himself a trustee of both the Hugh Green Trust and the Hugh Green Property Trust and emailed the documents through to Mr Hickson and spoke to him on the phone. He relayed to Mr Hickson the information that Hugh was at Mercy Hospital and told him that he would need to check it was appropriate for Hugh to sign the documents.²⁰⁶

[423] Again Mr Fisher's involvement in this further development was irregular. He kept no note of the instruction. By this point he was emotionally entangled in what was occurring. He was clearly in John's camp in the family feud that was developing, and I infer he was personally affronted by being kept from the meeting of directors. There is no suggestion that Hugh received independent advice in respect of this appointment and there is no suggestion that Mr Fisher told Hugh that as a professional trustee he would be entitled to charge, yet his own evidence is that Hugh was very sensitive to professional charges. Moreover Mr Fisher accepted this

²⁰⁵ Affidavit John Green at [171] – [172].

²⁰⁶ Affidavit Michael Fisher at [71] – [72].

as an urgent instruction, and organised for the document to be executed by Hugh the same day whilst in hospital to receive a blood transfusion.

Circumstances of execution

[424] Mr Hickson said that on the morning of 29 March he was told by Mr Fisher that Hugh would like him to witness his signing of documents to appoint Mr Fisher as a trustee to his trusts. Mr Fisher suggested to him that as Hugh was undergoing a medical procedure in hospital that day he should satisfy himself that Hugh was in full command of his mental faculties before witnessing his execution of the deeds of appointment. Mr Fisher made suggestions to him as to the procedure he should follow and Mr Hickson's evidence was that he followed those suggestions when he met with Hugh.²⁰⁷ He was provided with John's mobile phone number so he could call John to locate Hugh inside the hospital. Mr Fisher then immediately emailed the documents to Mr Hickson.

[425] Mr Hickson said that during the time he was with Hugh that day, John, Frances and Moira were also present. He thought Hugh was extremely alert and that he cracked a joke. In order to satisfy himself that Hugh had full command of his mental faculties he engaged him in conversation and asked him if he understood what was going on, and "he plainly did".²⁰⁸ He said "[s]ave for the fact that he was receiving a blood transfusion, he was no different from how he had been on the other occasions that I had met him."²⁰⁹ He said that Hugh even made a joke about the blood transfusion. Mr Hickson briefly explained the effect of the documents to Hugh before asking Hugh to sign them. He accepted that he did not point out to Hugh that as a result of his appointment Mr Fisher would be a professional trustee, and entitled to charge for the work he did, nor did he discuss Mr Fisher's suitability to be a trustee or the impact of that appointment on the conflict within the family at the time.²¹⁰

²⁰⁷ NOE Douglas Hickson at 1685-1686.

²⁰⁸ NOE Douglas Hickson at 1702.

²⁰⁹ Affidavit of Douglas Hickson at [11].

²¹⁰ NOE Douglas Hickson at 1703 - 1704.

13.2 Evidence as to Capacity

[426] It is for Maryanne to establish that Hugh did not have capacity to understand the nature and effect of appointing Mr Fisher a trustee. This required her to show that Hugh was unable to understand the powers Mr Fisher would have as a trustee and the role that Mr Fisher would have in controlling the Green Group through this appointment. As I discussed earlier, I do not consider that Hugh needed to be capable of fully appreciating the effect this appointment would have on family dynamics, or the voting behaviour of the trustees.

[427] To draw the evidence together to this point. The evidence establishes that by 29 March Hugh was physically frail, that he was suffering from fatigue, anaemia, confusion, short term memory loss and that members of his family, including John, doubted his ability to make decisions. He was increasingly disengaged from the mainstream of his business, leaving this to others. So too with the succession issues that continued to plague the family. In early March John had thought him near death but there are indications he rallied after the middle of the month. On 29 March he required a blood transfusion. Nevertheless Hugh's personality remained intact. He was capable of banter and of telling jokes. He retained his interest in business, and in particular the cattle trade.

[428] Notwithstanding Hugh's medical condition, and the cognitive deficits I consider that the evidence of Mr Hickson of his engagement with Hugh and their discussion is sufficiently reassuring to conclude that when he executed the documents he had the required capacity to appoint Mr Fisher a trustee.

13.3 Undue Influence

[429] I have however concluded that when Hugh executed the deeds appointing Mr Fisher as trustee he was subject to influence from John to such an extent that his will was overborne, causing him to execute these documents. In reaching this view I have taken into account the following.

[430] As discussed earlier, Hugh was vulnerable, and vulnerable to influence by John. He is presumed to be vulnerable to influence by Mr Fisher.

[431] I am satisfied that John had reached the point that he wanted Maryanne gone as a trustee and director. John was openly hostile to Maryanne. From late 2011 John was increasingly equating what he wanted with what Hugh wanted. As with the other occasions, there is no direct evidence that John told Hugh what to do. However I am satisfied that there is sufficient evidence from which it is possible to infer that it was John's wish to have Mr Fisher appointed that caused Hugh to act, and that when Hugh did so his will was overborne.

[432] There is evidence that when John purported to speak on behalf of Hugh he did not have authority to do so, and that it was in fact John who was driving the agenda and causing things to happen. That evidence is discussed in detail above but to summarise to this point:

- (a) Events in January make it clear that John was pressing ahead to implement Maryanne's removal as trustee, and effect her removal as director, at a time Hugh was telling others he thought she was his trustee.
- (b) It was John, not Hugh, who in March again initiated steps to have her removed.
- (c) John attempted to control aspects of the attendance of others at the 28 March meeting. John says this was in accordance with Hugh's wishes but the evidence suggests that at least in respect of Moira, these wishes were not Hugh's wishes but his own.
- (d) Hugh's voice was increasingly absent from any discussion about decisions to be taken in the business and concerning the family's interest in it. John was conducting himself as if he were in control.
- (e) Hugh's closest advisers were receiving information about Hugh's views on critical issues from Mr Fisher. Mr Fisher was passing on to them what John had told him.

- (f) John saw Mr Fisher as an ally against Maryanne. They shared the same view of Maryanne. It was again John who initiated the contact with Mr Fisher on this occasion.

[433] The involvement of lawyers was an opportunity to insulate Hugh from that influence, and so ensure that his actions were his own. However Mr Fisher's role facilitated rather than neutralised John's influence. I have found that Mr Fisher was careless about checking that the instructions he received through John were in fact Hugh's. Even on his own account, John was present on the few occasions Mr Fisher did speak to Hugh. He was present when Hugh told Mr Fisher he wanted him to be his trustee, just as he had been present when he instructed Mr Fisher to remove Maryanne as trustee in December. The various steps Mr Fisher took as Hugh's lawyer would also have created an illusion in the mind of others that these were Hugh's instructions, as Mr Fisher was purporting to act for Hugh, even though his instructions came from John.

[434] Mr Fisher's involvement also had the natural tendency to isolate Hugh from his traditional advisers, Mr Narev and Mr Carter. Mr Narev confirmed that he did not see Hugh between the lunch on 11 January 2012 and a board meeting on 4 May 2012. They even gained their understanding of what Hugh's wishes were around this time from Mr Fisher.²¹¹ It is also of note that neither of these men were informed about the proposed appointment of Mr Fisher. Mr Narev said he was surprised not to be told of the proposed appointment.²¹² In his evidence-in-chief Mr Carter initially said that he had been asked by Hugh for his opinion on appointing Mr Fisher. However on cross-examination Ms Porter's note of a conversation she had with Mr Carter was put to him. She recorded that Mr Carter took the same position as Mr Narev, that he had difficulty with not being informed about the appointment of Mr Fisher. Mr Carter then accepted it was most probably the case he did not know of the proposed appointment.²¹³ Hugh's failure to tell Mr Narev and Mr Carter about his proposal to appoint Mr Fisher was indeed surprising given their role as trustees and as Hugh's longstanding advisers.

²¹¹ I refer here to the meeting they had with Mr Fisher on 20 March 2015.

²¹² NOE Robert Narev at 1668.

²¹³ NOE Robert Carter at 1369-1370.

[435] To the extent he had contact with Hugh, that contact tended to reinforce John's influence. Mr Fisher shared John's views of Maryanne and his opinion about what needed to happen.

[436] Mr Hickson's involvement was not sufficient to insulate Hugh from John's influence. Mr Hickson simply witnessed the execution. He did not provide independent advice to Hugh. John stayed in the room as Mr Hickson attended to the execution. Mr Hickson of course had no reason to suppose that John's influence was an issue for him to address.

[437] Why would John wish to have Mr Fisher appointed? I am satisfied that this was because he knew he could count on Mr Fisher's support. With Mr Fisher a trustee and with Maryanne gone he had the necessary majority to pass resolutions. Without him, he had to depend upon Hugh who was increasingly unwell and would soon not be there. Moreover Hugh had not proved very resolute in removing Maryanne as trustee. The meeting of 28 March had demonstrated that although Mr Narev and Mr Carter would generally act in accordance with what they understood to be Hugh's wishes, they were not taking sides between John and Maryanne. With Mr Fisher as trustee, and based on his previous dealings with him, John would have felt confident about passing the necessary resolutions to remove Maryanne as a director. I think it is no coincidence that it was after Mr Fisher's appointment that the removal of Maryanne as a director was once again on the agenda.

14. Fifth and sixth challenged decisions - capacity: appointment of Mr Fisher as a director and removal of Maryanne as a director on 2 April 2012

[438] Mr Fisher's evidence is that the day after his appointment as trustee he had a game of golf with John. Mr Fisher accepted they probably discussed the need to remove Maryanne as a director.²¹⁴ He also met with Hugh on 30 March, and 1 April. Mr Fisher said they agreed to call a meeting of the trustees on 2 April 2012 to effect Mr Fisher's appointment as a director of the main companies in the Green Group and to remove Maryanne as a director of those companies. He accepted that no notice of that meeting was given. Nevertheless Mr Fisher did brief Mr Narev and Mr Carter

²¹⁴ NOE Michael Fisher at 1905.

as to “the background, the relevant issues and the need for matters to be dealt with promptly as that was Hugh’s firm instruction.”²¹⁵

[439] All trustees (with the exception of Maryanne who was now regarded by John and Mr Fisher, Mr Narev and Mr Carter as having been removed and not reappointed) were aware of the meeting. Mr Narev spoke to Mr Fisher and John in advance of the meeting in connection with the agenda items.²¹⁶ In his evidence-in-chief Mr Narev said that he was aware that the other trustees felt that the trusts’ business activities had become unmanageable with Maryanne because of her persistent opposition to the appointment of John and to a lesser extent, Frances.²¹⁷ It seems that Mr Narev’s information in that regard came from Mr Fisher and John.

[440] The three meetings form three out of the five occasions Mr Fisher’s time records record any contact with Hugh over these issues from early November 2011 to early April 2012.

[441] Mr Fisher said that he arranged for Mr Hickson to attend the 2 April meeting and to take minutes. Mr Hickson’s evidence was that he thought he was there in a secretarial function and he didn’t really know why he was required to take the minutes.²¹⁸

[442] The minutes reflect that Mr Fisher chaired the meeting.²¹⁹ Mr Fisher said in evidence that he thought that Hugh had asked him to do this. Mr Narev was not present at the meeting, he had a prior commitment, and nor was Mr Carter. Both had declined to vote in favour of Maryanne’s removal saying that was a matter for the family. Mr Fisher accepted on cross-examination that he had the floor for the meeting.²²⁰ It was also put to him that although Hugh was present the minutes reflect that it was Mr Fisher who was clear about the need to remove Maryanne as a director, and that Hugh said very little. Again Mr Fisher rejected this. He said that he, Hugh, John and Frances had fully discussed the issues in advance of the meeting.

²¹⁵ Affidavit of Michael Fisher at [75].

²¹⁶ Affidavit of Robert Narev at [74].

²¹⁷ Affidavit of Robert Narev at [79].

²¹⁸ NOE Douglas Hickson at 1706 - 1707.

²¹⁹ CBD at 1851.

²²⁰ NOE Michael Fisher at 1909.

[443] The meeting resolved to appoint Mr Fisher to sign the notices to remove Maryanne as director. It was put to Mr Fisher that this was because they could not be confident that Hugh would sign the documents. He rejected that and said that the trustees did this because they didn't want Hugh to have to do something which would further damage his relationship with Maryanne.

[444] Mr Hickson described the meeting. In his evidence in chief he said that Hugh actively participated in the meeting and that he had no reason to doubt that he was in full command of his mental faculties. He said that although Hugh did not say a lot he was a powerful presence in the room that day, and that "there was this aura about him and there was a lot of respect shown to him and it was quite clear who was in command of the room, and it certainly wasn't Mr Fisher".²²¹ This was a theme he returned to several times, with remarks such as "he just oozed authority".²²²

[445] Notwithstanding Mr Hickson's confidence in Hugh's control of the meeting, the minutes tell a different story. They record that Hugh spoke just 14 words. Even when confronted with that stark fact, Mr Hickson's response was that "[h]e didn't have a lot to say but boy what he said was listened to."²²³ His interpretation of who was in control of the meeting provides little comfort. The way people were treating Hugh could have many and even mixed reasons, and I was left with the very strong impression that Mr Hickson was somewhat star struck by Hugh. It is difficult to go past the fact that Hugh seldom uttered more than one word at a time, and a total of 14 in the whole meeting at which such important issues were at stake.

[446] Nevertheless, I do not consider that Maryanne has discharged the onus to show that Hugh lacked capacity to exercise his vote as a shareholder. This is for essentially the same reasons as I have given in connection with the appointment decision on 29 March. Maryanne has not established that Hugh was unable to understand the nature and effect of the act of voting as a shareholder trustee to appoint Mr Fisher a director and remove Maryanne as a director of the Green Group companies.

²²¹ NOE Douglas Hickson at 1707.

²²² NOE Douglas Hickson at 1709.

²²³ NOE Douglas Hickson at 1709.

15. Fifth and sixth challenged decisions - undue influence: appointment of Mr Fisher as a director and removal of Maryanne as a director on 2 April 2012

[447] Having reviewed the evidence I have concluded that these steps were what John wanted. They did not reflect Hugh's wishes. Hugh did not tell either Mr Narev or Mr Carter his closest advisers, why he was taking these steps. They heard the reasons from Mr Fisher. The evidence again suggests that Mr Fisher and John were making the running on the issue.

[448] In the absence of Mr Carter and Mr Narev there was no independent voice at the meeting to put a view contrary to that being expressed by Mr Fisher. Although Mr Carter and Mr Narev had said they would go along with the family's wishes, this was against the background that they had been effectively sidelined by Mr Fisher. They had no access to Hugh to discuss the issues. John and Mr Fisher held sway. The influence that John was exercising over his father, with the unknowing assistance of Mr Fisher, hopelessly infected this decision. John had decided Maryanne had to go, and go from everything. I have concluded that the exercise by Hugh of his power as a shareholder to remove Maryanne as a director and to appoint Mr Fisher a director was on each occasion the result of undue influence.

16. Seventh challenged decision - capacity: execution of a new will on 26 April 2012

16.1 The new will

[449] On 26 April 2012 Hugh executed a new will. The change from the previous will was only in respect of the executors. Whereas under the 1 November 2011 will the executors had been Mr Narev and Moira, now they were to be Mr Narev, Frances, John and Mr Fisher.

16.2 Events leading up to the new will

[450] Mr Fisher provides the background to how this change came about. He said that as a new trustee he considered it important to get a full understanding of Hugh's wishes in relation to the companies and the trusts, and of the views of other family members. He therefore arranged a meeting at Grande Avenue on 16 April. Hugh,

Moira, John, Frances and Mr Fisher attended the meeting. Mr Fisher said that the meeting lasted several hours, and that toward the end of it, Moira said she wanted a sum of money to go to each child on Hugh's death. Hugh made a comment that he wouldn't make distributions to the children if it were up to him but he would go along with Moira's wishes. Mr Fisher also recalled Moira saying she didn't want any more to do with the trusts or to be an executor of Hugh's will. As to this he said:²²⁴

I explained to everyone present that the trustees and executors under Hugh's will would have the power of appointment of new trustees after Hugh died and that this would effectively give them control of the affairs of the trusts. Hugh acknowledged that he understood that and said he wanted John, Frances and me to be executors and trustees with Mr Narev and that he would organise this with Glaister Ennor.

[451] Following the meeting Mr Fisher drafted a memorandum entitled "*Green Family Aspirations for Hugh Green Group and Family*".²²⁵ The memorandum included some high level plans for various assets and businesses, and an aspiration that the farming operations continue as long as they were not losing money operationally. It was recorded that John and Graeme Coghlan were to be responsible for the farming operations. John was to have the authority to make decisions on a daily basis, with Graeme reporting to John and John reporting to Mr Brennan. This arrangement was rather different to what Maryanne had been told in January, that neither she nor John were to have executive roles within the Green Group. The memorandum ended with the record, "Moira to be removed as trustee of HGPT and MGPT. Moira to be removed as an executor of Hugh's estate."

[452] Following the meeting Mr Fisher also suggested that a solution to Moira's desire to step away from the Moira Green Property Trust was to transfer all the assets to the Hugh Green Property Trust. The evidence is that it was a solicitor specialising in trust matters rather than Mr Fisher who gave this proposal the proper legal form of a resettlement of the Moira Green Property Trust on the Hugh Green Property Trust. Maryanne says that Mr Fisher was motivated in this by his desire to remove her from all positions of control. However, I have held that the notice of the pleaded scheme was not put to Mr Fisher, and so I do not proceed to consider this issue further.

²²⁴ Affidavit of Michel Fisher at [77].

²²⁵ CBD at 1821-1823.

The instruction

[453] Mr Narev said that he received the instructions to prepare the new will in the following circumstances. A few days before 26 April he received a call from either Frances or Moira with advice that Hugh wanted to make a new will. He told them he could not take instructions for a will from anyone other than Hugh. Hugh then came to the phone. Hugh wanted to change the executors of his will and said that he now wanted John, Frances, Mr Fisher and him to perform that role. There were no other changes he wished to make.

[454] Mr Narev said that the change was no surprise to him as Moira had previously told him that she did not want to be an executor. He said that Hugh was clear in the instructions, both as to his intentions and the manner in which he expressed them. He gave no cause for concern about his state of mind. Mr Narev said:²²⁶

This was much like innumerable calls I had received from him over the years which were characterised by a forthright and slightly gruff manner, the absence of any small talk, and prompt termination once the business was done.

16.3 *The execution of the new will*

[455] Mr Cahill said that he prepared the new will on Mr Narev's instructions. Although Mr Narev was aware of the concerns that John had raised with him about his father's memory and decision making, concerns that were obviously relevant to capacity, Mr Narev did not signal to Mr Cahill any concerns about Hugh's testamentary capacity. Mr Narev told Mr Cahill that the instructions had come from Hugh personally following a conversation earlier in the week.²²⁷

[456] Mr Cahill said that he and his personal assistant went to Grande Avenue to attend upon the execution of the will. He understood that Maryanne and her husband were visiting that day before going overseas. Mr Owens met them at the door. Moira then showed them into the dining room where they met with Hugh alone.

²²⁶ Affidavit of Robert Narev at [89].

²²⁷ Affidavit of Norman Cahill at [11].

[457] As to the procedure Mr Cahill followed, he said he laid the two wills side by side. He outlined the instructions he had received to prepare the new will. He also explained that he understood that Moira had expressed her preference that she no longer be an executor and as a consequence Mr Narev had been instructed by Hugh to prepare a fresh will. Hugh confirmed those were his instructions. Mr Cahill took Hugh through the new will emphasising the relevant change. He referred him to the remaining provisions of the will, advising that they remained as provided for in his previous will. He said he recalled Hugh reading through the provisions and satisfying himself that was the case. Hugh confirmed to him that these were his instructions and that there were no other issues he wished to raise. He proceeded to sign the will.²²⁸

[458] Mr Cahill described Hugh as neatly dressed. He engaged him in conversation for some time, including discussion regarding his private audience the weekend before where he had been invested with the Queen's Service Medal. Mr Cahill said that it is his practice to have a chat with his clients, and he finds that particularly useful when taking a will instruction or completing the signing of a will. This enables him to satisfy himself that the person appears to be functioning mentally in an appropriate manner. He said Hugh was alert, and there was no evidence that he was tired or that his mind was wandering. He did not have to repeat himself and Hugh seemed to have no trouble understanding him. He said "... he spoke clearly when he spoke. There wasn't long speeches or anything but he spoke clearly and was easily able to be understood."²²⁹

[459] When it came time for them to leave, Hugh walked them to the front door where they stopped and admired the garden. As Frances and Moira had gone out for lunch while he was there, Mr Cahill understood Hugh would be alone in the house when they left.

[460] Mr Cahill's evidence was that he was in no doubt that Hugh had sufficient mental faculties to execute the will.

²²⁸ Affidavit of Norman Cahill at [20] – [21].

²²⁹ NOE Norman Cahill at 1678.

[461] Maryanne saw Hugh shortly before Mr Cahill. She says that part way through her visit Hugh had to go and lie down as he was tired. When lying down, he dozed in and out of sleep. At some point Moira came into the bedroom and told Hugh that he had to get up and get dressed as a lawyer was coming to see him. Maryanne says that Hugh didn't look like he knew what was happening, and that her mother had to help him get dressed. She said that he sat on the bed for Moira to dress him, and could hardly put his arms out for her to put his shirt on. Maryanne says that Moira told her that Hugh needed help getting dressed now.²³⁰

[462] Moira denies that these events occurred as Maryanne suggests. While she may have helped Hugh getting dressed that was because he liked being fussed over, not because he needed help getting dressed. She says that Maryanne's description of Hugh being exhausted is an exaggeration.²³¹

[463] I accept Maryanne's evidence to the extent it conflicts with her mother's. It is clear from the medical evidence at this time that Hugh was fatigued. Maryanne is describing Hugh when he had just woken from a doze. He was elderly and very ill. There is nothing remarkable at all in the fact that he needed assistance getting dressed. I also note that Maryanne's evidence is not inconsistent with that of Mr Cahill's. Hugh may have been confused as he woke, but by the time Mr Cahill saw him he did not present as such.

16.4 Analysis

[464] This challenged decision sits in a different category to the others because a will is a testamentary instrument. As such, if the evidence raises a tenable issue as to the capacity of the testator then the onus falls upon those propounding the will to show that Hugh had capacity at the time that he executed it.²³²

[465] I consider that there is sufficient evidence to raise lack of capacity as a tenable issue. By this stage Hugh was having problems with his short term memory. On occasion he had no recollection of events he was involved in. There had been

²³⁰ Affidavit of Maryanne Green at [370].

²³¹ First affidavit of Moira Green at [114].

²³² *Bishop v O'Dea*, above n 37.

several instances where John had expressed concern as to Hugh's capacity to make decisions. Hugh had at times displayed confusion when operating in the business context. Making the issue still more complex was that friends who socialised with him did not pick up on these red flags, so he clearly remained quite competent in a social context.

[466] There were strong indications that a formal test should have been undertaken before Hugh was asked to execute the will. Mr Narev was aware of some of these cues for such a test but not all of them. He had only been told about the memory loss, and the difficulties Hugh had with decision making, whatever that meant. He did not know of the concerns that Hugh was at times confused, and that he had difficulty following conversation when matters of business were being discussed. Mr Narev may well have had an overly positive view of Hugh's functioning as he had heard a lot of what Hugh wanted through Mr Fisher and John in a way that may have led him to believe that Hugh was still very much in charge. In any case, Mr Narev did not pass on to Mr Cahill the concerns he was aware of. No formal assessment was carried out.

[467] In light of this evidence the onus falls on the defendants to satisfy me that Hugh had sufficient capacity at the time he executed the will.

[468] Mr Cahill's account of the process he adopted provides reassurance that Hugh was not confused as they spoke and that he was able to follow what he was told. Mr Cahill ensured that Hugh understood that he was changing the executors but he did not draw to Hugh's attention and ensure he understood the extent of the powers the executors of his will had - that they had the means to affect the control of the Green Group. Evidence that Hugh did understand is the best evidence that he had the capacity to understand. While such evidence may not be available on the day of execution, Mr Fisher's evidence was that when he and Hugh discussed the change to the will on 16 April Mr Fisher explained that aspect of the executors' powers. He said that Hugh had understood his explanation. This also provides some reassurance as to capacity. Finally the change is rational in the context that Moira did not want to be an executor and needed to be replaced.

[469] The evidence suggests that Hugh had intermittent cognitive deficits, so that it is necessary to pay close regard to the time when the execution of the will takes place. I have done that. I am satisfied that when he executed the will Hugh had the capacity to understand both the nature of the change he was making and its effects.

17. Seventh challenged decision - undue influence: execution of a new will on 26 April 2012

[470] Hugh was undoubtedly vulnerable. At the 16 April meeting Hugh was surrounded and supported by those who had decided that the solution to the family turmoil was for John and Frances to take control of the family's interest in the Green Group, and for Maryanne to be removed from all positions of control. Mr Fisher, John and Frances were party to the discussion in which it was decided that they should replace Moira as executor. Mr Fisher was there in the place of Mr Narev fulfilling the traditional role in this family of trusted adviser. Mr Fisher was hostile to Maryanne, and thought she had to go from all positions of control within the Green Group. It is of note that although Mr Fisher said the purpose of the meeting was to understand the family's wishes, he did not invite all of the family. Gerard, Eamonn and Maryanne were not included in the meeting.

[471] The decision to appoint John and Frances in place of Moira would have flowed naturally from all that had gone before in terms of manipulating and pressuring Hugh. The conditions I identified earlier continued to apply. The context for how Hugh viewed these succession issues had been created by John, with the help of Mr Fisher. Maryanne was unreasonable and had to go. There was no thought of any further attempt at reconciliation. Hugh did not appoint one person as Moira's replacement, but rather the three people who were now in control of the group through the trusts. They were also three of the people in the room with him at the time he named the proposed executors. They were the three people John wanted in control and I have concluded, made clear to his father should be in control

[472] It is not suggested that anyone provided a contrary point of view. There was no-one present at the 16 April meeting, or when Hugh executed the will, to put forward alternative solutions. Mr Cahill did not have a sufficient briefing to allow him to identify the significance of the change in executors. He saw Hugh on his

own, but this was a brief visit. It was no antidote to the events that had already unfolded. Mr Cahill did not understand Hugh's vulnerability or the need to ensure that he was exercising his own free will when handing ongoing control to John, Frances and Mr Fisher. I have concluded that Hugh's decision to amend his will to replace Moira as executor with John, Frances and Mr Fisher was the product of undue influence exercised by John over him.

18. Fifth cause of action: was Maryanne re-appointed trustee on 21 December 2011?

[473] On 20 December 2011 Maryanne received advice from Ms Porter that she had been removed as a trustee of the Hugh Green Trust and Hugh Green Property Trust. In the 5th cause of action Maryanne pleads that as a consequence of events occurring on 21 December:

- (a) Hugh cancelled the deeds with the intention that they have no effect (intended that they be void); or alternatively
- (b) Hugh exercised his power to orally reappoint Maryanne as a trustee.

[474] The defendants agree that a deed of removal, like any deed, may be orally cancelled, but say that this needs to be done by mutual consent. Here there was insufficient certainty as to what was legally intended on 21 December to establish either oral cancellation or oral appointment. Was it a revocation of the removal or an appointment? Moreover, when was it to take effect and how was it to be implemented? The defendants say that although Hugh may have wanted Maryanne to be reinstated as a trustee what was unclear, and required resolution, was when and how this was to be achieved.

[475] This uncertainty, they argue, is evident from the fact that Maryanne has pleaded both scenarios in the alternative. As to the events relied upon by Maryanne and Alice, they say that it is not clear what Hugh meant as to Maryanne's future status as trustee. The most plausible interpretation is that on 21 December neither Hugh nor Maryanne had any regard at all to whether they were agreeing to a cancellation of the removal deeds or to a reappointment of Maryanne as trustee. The meeting was obviously an emotional one and the handing of the deeds to Maryanne

no more than a symbolic gesture, recognising that there was to be an attempt to resolve matters. It was not intended to have legal effect then and there. They say that the documentary evidence supports this interpretation, both the contemporaneous documentation and that relating to the parties' subsequent conduct. They therefore say that:

- (a) There was no cancellation of the removal deeds or reappointment of Maryanne by Hugh on 21 December 2011.
- (b) Rather, Hugh made an offer of reappointment which was conditional. Maryanne had to agree to work cooperatively with John and Frances for 3 months. Because she did not put in place the necessary steps to comply with the condition Maryanne did not accept that offer.
- (c) Even if cancellation or reappointment occurred, Maryanne is estopped (by convention) from either relying on the cancellation or reappointment, or denying that her reappointment was required to be effected by execution of formal deeds of appointment.
- (d) The defendants also argue that this cause of action is inconsistent with the other causes of action. Mr Stewart described it as ironically inconsistent.

[476] The defendants sought leave to file an amended statement of defence pleading estoppel by convention. That leave is granted. The 5th cause of action was not added until 13 August 2014, part way through the hearing, and the interests of justice require that the defendants be given leave to respond to that pleading. The defendants plead that if Maryanne was effectively reappointed or her removal cancelled, she is nevertheless estopped from arguing that she remains a trustee because she and the other trustees proceeded on the assumption she was not until the hearing of this proceeding.

[477] Pursuant to clause 10(a) of the Hugh Green Trust Deed, the power of appointment could be exercised orally but the power of removal had to be exercised "by writing under [Hugh's] hand". Pursuant to clause 13.3(a) of the Hugh Green Property Trust Deed, both the power of appointment and removal could be exercised

orally. The defendants accept that the power of appointment in respect of both deeds could be exercised orally and that the deeds of removal could be orally cancelled. That is the basis upon which I proceed. The first critical issue is therefore what occurred on 21 December.

[478] Maryanne relies upon the events as recounted in her evidence of the meeting with Hugh on 21 December. This is the visit she made to Grande Avenue with Mr Owens after she had been told she had been removed as trustee.

[479] Hugh's actions in having the removal deeds taken out of the minute books, handing them to Maryanne and saying to her, "You are still my trustee", provides clear evidence that his intention was that Maryanne should henceforth be his trustee. In light of the conversation that preceded that action, I think it more likely than not that this was a cancellation of the deeds of removal. But in any case I see little in the defendants' point that the fact that cancellation of the deeds or reappointment of Maryanne is pleaded in the alternative somehow evidences that there was no clear intent to do either. What I must determine is what Hugh intended, and it is clear that at that point in time, he intended to undo the effect of the deeds of removal so that Maryanne would continue as trustee of the two trusts. If it was not a cancellation of the deeds of removal, it was certainly a reappointment.

[480] The defendants also argue that what occurred was a conditional offer of reappointment, and because Maryanne did not sign the letter of 22 December and the enclosed documents, she did not fulfil the condition. It follows that she was not reappointed.

[481] The defendants' case on this point depends upon Moira's evidence that Hugh said that Maryanne could be his trustee again *if* she agreed to co-operate with John and Frances as trustees and directors, and the coincidence of that evidence with the sending of the letter the next day requiring Maryanne to take certain actions to demonstrate that she was now cooperating. I have already found that Moira's evidence on this point is unreliable.

[482] As to the significance of the 22 December letter, as accepted by Mr Fisher, the evidence of Mr Narev's discussion with Hugh in early January suggests that Hugh did not regard Maryanne's failure to sign and return the letter and accompanying documents as an obstacle to her trusteeships. He also believed that she had been reappointed. I note that when Mr Narev proposed recording the reappointment in writing, the discussion he had with Maryanne was that they needed a written note which would record Hugh's "decisions re-appointing Maryanne as Trustee with effect from immediately after the date of the Deeds of Removal..."²³³

[483] In any case, as I have found, Maryanne did co-operate with John and Frances in their new roles. They may have found the way she expressed her views uncomfortable, but there was nothing unreasonable in her conduct, such as to constitute a failure to co-operate. That co-operation persisted until the time John and Mr Fisher recommenced the steps to implement the removal of Maryanne as a trustee and to effect her removal as director.

18.1 Defence of estoppel by convention

[484] The defendants say that if the events of 21 December did result in Maryanne continuing in the role of trustee, or being reappointed to it, she is nevertheless estopped from relying on the cancellation or reappointment or denying that her reappointment was required to be effected by the execution of formal deeds of reappointment by Hugh. They rely upon the doctrine of estoppel by convention.

[485] In *Republic of India v India Steamship Co Limited* Lord Steyn described that doctrine as follows:²³⁴

... it is settled that an estoppel by convention may arise where parties to a transaction act on an assumed state of facts or law, the assumption being either shared by them both or made by one and acquiesced in by the other. The effect of an estoppel by convention is to preclude a party from denying the assumed facts or law if it would be unjust to allow him to go back on the assumption...it is not enough that each of the two parties acts on an assumption not communicated to the other. But it was rightly accepted by counsel for both parties that a concluded agreement is not a requirement for an estoppel by convention.

²³³ CBD at 1416.

²³⁴ *Republic of India v India Steamship Co Limited* [1998] AC 878 (HL) at 913.

[486] The nature of the doctrine was discussed by the New Zealand Court of Appeal in *National Westminster Finance NZ Limited v National Bank of NZ Limited*.²³⁵ The judgment of the Court was delivered by Tipping J who described the doctrine as follows:

Put at its simplest, parties may for the purposes of a particular transaction agree either expressly or implicitly that black shall mean white and vice versa. Although both know that their assumption is in truth, erroneous they will be held to if the remaining indicia of convention estoppels are present. Knowledge of the falsity in fact of the assumption does not prevent the estoppel, if for their purposes the parties have nevertheless accepted the assumption as being true. A fortiori therefore the fact that one or both parties may have doubts about the correctness of the assumption will not of itself prevent an estoppel, provided always of course that the parties have clearly accepted the assumption, for their purposes, as being true. The authorities show that for an estoppel by convention to arise the following points must be established by the party claiming the benefit of the estoppel (the proponent):

- (1) The parties have proceeded on the basis of an underlying assumption of fact, law, or both, of sufficient certainty to be enforceable (the assumption).
- (2) Each party has, to the knowledge of the other, expressly or by implication accepted the assumption as being true for the purposes of the transaction.
- (3) Such acceptance was intended to affect their legal relations in the sense that it was intended to govern the legal position between them.
- (4) The proponent was entitled to act and has, as the other party knew or intended, acted in reliance upon the assumption being regarded as true or binding.
- (5) The proponent would suffer detriment if the other party were allowed to resile or depart from the assumption.
- (6) In all the circumstances it would be unconscionable to allow the other party to resile or depart from the assumption.

[487] The defendants say that:

- (a) At least from 20 January the parties proceeded on the assumption that Hugh was legally required to execute a formal appointment document to reinstate Maryanne as a trustee, and on the factual assumption that Maryanne would not be reappointed as a trustee until this had occurred *and* all other matters relating to her on-going role had been

²³⁵ *National Westminster Finance Limited v National Bank of NZ Limited* [1996] 1 NZLR 548 (CA) at 550.

agreed to her satisfaction. The 20th of January is selected as that is the date of an email from Mr Narev to Ms Roberts, copied to Maryanne, John and Frances and Mr Carter, in which Mr Narev recorded that formal reappointment documents were required and those would be held in escrow until all other matters had been sorted out.²³⁶

- (b) Notwithstanding any doubts Maryanne may have had about the correctness of the legal assumption about what was required to reappoint her as a trustee, she and all of the other parties proceeded on the assumption it was correct and that she was not a trustee. These assumptions were clear in their terms and intended to govern the future legal status of Maryanne as a trustee. Maryanne did not attend trustee meetings and did not press for payment of fees.
- (c) But for this assumption Hugh would have removed Maryanne as a trustee in April of 2012 when he removed her as a director.
- (d) It would be unjust or unconscionable to allow Maryanne to go back on the assumptions at this stage, as this would place in doubt the status of all trust decisions since 21 December 2011.

[488] Maryanne says that the first element of an estoppel by convention is not made out because she did not accept that she had not been validly reappointed. Mr Narev agreed that “from Maryanne’s perspective her father’s actions ... had achieved her reappointment.”²³⁷ John also agreed that in early 2012 Maryanne assumed she was a trustee.²³⁸ Maryanne says that the fact that she was excluded from meetings of trustees by the others cannot be characterised as an acceptance by her that she had been validly removed.

[489] Maryanne also argues that the element of unconscionability required for an estoppel by convention to arise is lacking because the only detriment suffered by the trustee defendants is the potential that there will need to be an enquiry into the consequences of trust decisions made since 21 December 2011. This is not unconscionable because:

²³⁶ CBD at 1416.

²³⁷ NOE Robert Narev at 1656.

²³⁸ NOE John Green at 1530.

- (a) It will be necessary if any of the other trustees are found to have been invalidly appointed.
- (b) In any event, the trust deeds only require a majority vote. Recognition of Maryanne as a trustee may not invalidate decisions where a majority would have existed without Maryanne's vote.
- (c) In the context of trusts controlling assets of great value, the need to conduct such an enquiry over a comparatively short time frame is not unreasonable or unconscionably onerous.

[490] There is an argument that from late January 2012 Maryanne and the other trustees of the Hugh Green Trust and the Hugh Green Property Trust proceeded on the basis that Maryanne's reappointment as trustee was not effective until confirmed in writing. As the defendants say, Maryanne took no steps to protest her exclusion from the trustees' meetings or the non-payment of fees. They all proceeded on the basis of a mistaken representation as to the law by one of their number, Mr Narev. Even so I do not consider that this can give rise to an estoppel as the defendants have pleaded it.

[491] The first difficulty with their argument is the issue of standing. What standing do the trustees have to raise such an estoppel against Maryanne? The role the trustees argue that Maryanne is estopped from assuming is a role for the benefit of the beneficiaries, not the other trustees. Each of the trustees has a personal duty to comply with the terms of the trust deed and to act in that regard in the best interests of the beneficiaries. It is not clear to me how asserting such an estoppel is consistent with that duty. The estoppel the trustees plead would prevent Maryanne from assuming her powers and duties as a trustee, but would leave Maryanne liable to the beneficiaries for breach of trust – a not very equitable outcome. As the Court of Appeal said in *Niak v MacDonald*:²³⁹

No representation by one trustee to another can amount to an estoppel relieving a trustee from his or her obligations as trustee. Further, no assumption of powers which are ultra vires of any person can be validated by raising an estoppel.

²³⁹ *Niak v MacDonald* [2001] 3 NZLR 334 (CA) at [21].

[492] I also accept Maryanne's argument that it is not unconscionable for her to assert that she is a trustee, even when she had relied for several years on incorrect legal advice that she was not. The only detriment that the defendants can point to is the need to revisit decisions that were made in her absence. That need arises because, as it transpires, the decisions were made in breach of the requirements of the trust deed. Revisiting the decisions will bring the trustees into compliance with their obligations under the deeds. I therefore find that Maryanne was either reappointed or her removal cancelled, and that she is not estopped from claiming this.

19. Third cause of action: improper exercise of fiduciary powers

[493] Maryanne alleges that Hugh's power of appointment and removal of trustees was a fiduciary power, to be exercised in the best interests and for the overall welfare of all of the beneficiaries. She alleges that he breached his fiduciary duty in appointing John, Frances and Mr Fisher and removing her as trustee.

19.1 Appointment of John and Frances

[494] Maryanne alleges that when, on 8 November 2011, Hugh appointed John a trustee of the Hugh Green Trust and the Hugh Green Property Trust he was not exercising the power in the best interests or for the overall welfare of all the beneficiaries. Maryanne alleges that John:

- (a) Lacks the character to be a trustee, relying in particular upon an allegation that he had acted dishonestly while a cattle agent at Kilmacrennan, and upon his design of the alleged scheme.
- (b) Lacks the skills and experience to be a trustee of these trusts. It is alleged that he has been involved in failed business ventures requiring that he be propped up by the trusts. The trusts had made significant loans to John between 1989 and 2010. The benefit from these loans was fixed by agreement between John and Hugh in 2011 at [redacted material], to be treated as a distribution.
- (c) Had interests which conflicted with those of the other beneficiaries. This arose because of Hugh's indication that John should not receive

any further distributions until the other siblings caught up to his [redacted material].

[495] Finally it is said that the appointment of John as a trustee could not be in the best interests of beneficiaries when it would inevitably lead to dysfunction because of the conflict between John and Maryanne. Hugh knew they could not work together because of the past history and because of their fundamentally different personalities and work styles.

[496] Maryanne alleges that Hugh's power of appointment of Frances as trustee of the Hugh Green Trust and Hugh Green Property Trust was also not exercised by him for the overall welfare and best interests of the beneficiaries. Maryanne alleges that Frances lacks appropriate skills or experience. She also alleges that Frances lacked the impartiality to be a trustee of the Hugh Green Trust and the Hugh Green Property Trust, because she is hostile towards Maryanne, and because like John, her own interests as a beneficiary conflict with those of the other beneficiaries. Maryanne alleges that Frances had already received a [redacted material] distribution, but is now declining to acknowledge that distribution. It was initially also alleged by Maryanne that Frances assisted in the design and implementation of the scheme referred to earlier, but I understand that this allegation was not persisted with.

[497] Maryanne says that Hugh was in a very poor state of health in November 2011 which impacted upon his ability to make these decisions. She adopts what she says is the broad thrust of the trustee defendants' evidence that Hugh was not interested in considering alternatives to his view as to how the trust should operate. In particular, Moira said that Hugh was not interested in the suggestions that Maryanne put forward as to how she and John might both play a role in the business.²⁴⁰ She emphasises that Hugh also disregarded the views of his adviser of many decades, Mr Narev, that John was not ready to be a director and trustee.²⁴¹

[498] Maryanne's evidence was that when she expressed concerns about John's suitability for the role, Hugh responded that he was prepared to take the risk because

²⁴⁰ First affidavit of Moira Green at [58].

²⁴¹ Affidavit of Robert Narev at [45].

Maryanne would be there to watch him.²⁴² But Maryanne had told Hugh on many occasions that she could not work with John. In response to her concerns that John and Frances lacked experience, Moira said that Hugh wanted them both to be able to “give it a go”.²⁴³ Maryanne says that a “take the risk” attitude is the very antithesis of fiduciary responsibility and Hugh’s desire to give John and Frances an opportunity to try their hand at trusteeship was not an appropriate rationale for their appointment, particularly given the value of the trust property.

19.2 Removal of Maryanne as trustee

[499] Maryanne argues that her father did not turn his mind to the best interests of the beneficiaries when acting to remove her if indeed (contrary to her submissions) he did act of his own free will to do so. Evidence of this is that removing her undid all of the succession planning which focused upon Maryanne as Hugh’s successor. It deprived the Green Group of her experience, skill and knowledge. Hugh said he had been prepared to appoint John and Frances because Maryanne would be there to keep an eye on them. If he removed her this was no longer so.

19.3 Appointment of Mr Fisher

[500] Maryanne alleges that the appointment of Mr Fisher was not in the best interests of beneficiaries. He was John’s friend, he was involved in the plan to get rid of Maryanne, he lacked the skills or the impartiality to be a trustee, and he stood to personally benefit from his appointment.

19.4 Trustee defendants’ position

[501] The trustee defendants accept that Hugh’s power of appointment and removal of trustees was a fiduciary power to be exercised in the best interests and for the overall welfare of all beneficiaries of the Hugh Green Trust and the Hugh Green Property Trust. They say however that this fact does not justify a free ranging review of Hugh’s decisions by the Court whereby the Court determines what it thinks should have been done. The trustees emphasise that Courts have traditionally exhibited deference towards the person holding the fiduciary power, on the basis that

²⁴² Affidavit of Maryanne Green at [120].

²⁴³ First affidavit of Moira Green at [131(d)].

the power was given to that person and not to the Court. Accordingly the Court will not interfere with the exercise of fiduciary power merely because it might have exercised the power differently.

[502] The trustee defendants emphasise that the Court must assess the appointor's decision-making as at the date of the relevant exercise of the power. Many of the matters relied upon by Maryanne are not alleged to have been known by Hugh, and indeed could not have been known by Hugh, as they post-date the exercise of the power.

[503] The trustee defendants say that Hugh was acting with due regard to the best interests of the beneficiaries. He wanted the family more fully involved in the business and to pull together. When Maryanne did not accept that, as Mr Fisher and John have said, he acted to put an end to the squabbling. If Maryanne and John could not work together, and if she would not accept him as a trustee and director, then the solution, as Hugh saw it, was to remove Maryanne. She was the one refusing to compromise.

19.5 Relevant principles

[504] The fundamental duty of a fiduciary is to exercise the power conferred upon them in the best interests of, in this case, the beneficiaries. I adopt the following statement of principle of Brewer J in *Harre v Clark*.²⁴⁴

[25] The power of appointment or removal must be exercised in good faith, for a proper purpose, consistent with the object of the power and in the best interests of the beneficiaries as a whole. The Court of Appeal of the Supreme Court of Western Australia noted:

The discretion is to be exercised by reference to the objects and purposes of the trust, having regard to the competing interests of the various potential beneficiaries, and without taking into account improper, irrelevant or irrational considerations.

[26] The use of a power of appointment to achieve a purpose which is not in the best interest of the beneficiaries as a whole will be a fraud on the power and will be set aside by the Court.

²⁴⁴ *Harre v Clark* [2014] NZHC 2533 (footnotes omitted).

[505] The power of appointment cannot therefore be used by the settlor for the purpose of advancing his own personal interests or to pursue some other collateral objective.

[506] The trustee defendants concede that the plaintiffs could succeed in this challenge if it was manifestly obvious at the time of the appointments that the appointments would put trust property at risk, or preclude even handed and fair treatment of all the beneficiaries. That seems a fair concession, since if it was manifestly obvious, it can be inferred that was something known to the settlor at the time that he exercised the power of appointment or removal.

[507] As to the Court's approach to this issue, I consider that the fundamental point is that the issue of fiduciary duty should not be confused with that of the appropriate standards of care. The issue is not the quality of the decision as such. The Court will not enquire into whether it was a good decision or the right decision, and it will not simply substitute its own view for that of the settlor. The issue for the Court is whether the settlor, in exercising the power of appointment, has done so having regard to the best interests of the beneficiaries, and without regard to collateral or irrelevant considerations.

19.6 Analysis

[508] I accept the defendants' submission that in assessing this issue it is necessary to have regard to information available to Hugh at the time. Material which came to light later, or which assumed an unanticipated significance after he exercised his power of appointment is irrelevant. I consider that the following falls into that category:

- (a) The fact that John and perhaps Frances had already received part of their [redacted material] distribution. Time was spent during the course of this hearing in enquiring into whether [redacted material] of money held in Ireland (the Irish funds) was a distribution to Frances, or rather was money which Frances held for her mother. There was also a focus upon whether the trustees were meant to equalise distributions before further distributing trust funds to John and

Frances. These issues are irrelevant to this ground of challenge. Hugh was not to know that this would become an issue when he made the appointments. The fact that John and perhaps Frances had already received some distributions in advance of the other beneficiaries did not otherwise create a conflict of interest. This was not a situation after all where resources were possibly too limited to achieve that equality.

- (b) The same is also true in respect of Frances' supposed hostility toward Maryanne. There is no evidence that Frances expressed anything to Hugh which would have suggested to him that she was hostile toward Maryanne.

[509] I also do not see that there is anything in Maryanne's point in connection with the lack of experience of John and Frances. There was evidence that Hugh's wish to involve John and Frances as trustees and as directors arose out of a strong desire to give a role to those of his children who wished to be involved in the business. In the context of a family trust, such a wish is consistent with having regard to the overall welfare and interests of the beneficiaries. Although Hugh clearly identified that there would be some risk involved in these appointments, at least in terms of lack of experience, he was entitled to take into account that John and Frances would be assisted by professional trustees who could point them in the right direction. At the time he made these appointments he believed that Mr Carter and Mr Narev would be around to guide them. He believed they would also have the assistance of Maryanne who was the most experienced of all. His optimism that they would pull together was not altogether misplaced as Maryanne did for a time try to work with John and Frances.

[510] That disposes of Maryanne's challenge as it relates to Frances' appointment. In relation to John it leaves the following grounds of challenge:

- (a) John was hostile towards Maryanne.

- (b) John lacks good character as evidenced by alleged financial misconduct whilst a trustee of the Hugh Green Trust and working as a cattle agent for Kilmacrennan in the early 1990s.

[511] There is evidence that John was hostile to Maryanne. Some of that I have already referred to. But the extent and persistence of his hostility seems to have only become evident after his appointment as trustee and director. I consider it is likely that John kept from Hugh the true extent of his hostility to Maryanne until after December 2011. I therefore also put that to one side.

[512] The issues in connection with John's dishonesty however require more exploration. When he appointed John, Hugh was aware of the events in the early 1990s which led John to resign from Kilmacrennan and as a trustee.

19.7 Background to the allegations of dishonesty

[513] Maryanne became the manager of Kilmacrennan in 1987. In 1989 Kilmacrennan employed John as a part time cattle agent, working on a commission basis, although at the time John had his own cattle trading company, Letterkenny Lodge. In 1994 there was an internal investigation at Kilmacrennan into John's trading as a cattle agent. The investigation was led by Mr Staub, who was the financial controller of Green & McCahill. Maryanne points to the findings of that investigation in support of her allegation that John had been and is dishonest.

Trip to Mangatangi

[514] There was a great deal of focus during the trial on the events that led up to Mr Staub's investigation. Although the Mangatangi trip is something of a side issue for the purpose of this cause of action, it is relied upon by the defendants to show that Maryanne has had it in for her brother for a long time, and that she is not a credible witness. It is convenient to address this issue at this point in the narrative.

[515] Maryanne's said that through 1993 Ms Porter, Maryanne and the office clerk were frustrated that they could not keep track of John's stock movements and the money in and out. Maryanne said that in early 1994 a cheque made payable to

Kilmcrennan went missing, although they knew it had been presented. Maryanne asked Ms Porter to check if it had been banked to any related account. Ms Porter thought it could have been banked to Letterkenny and suggested that Maryanne go to John's farm at Mangatangi to pick up the accounts for Letterkenny. Ms Porter was able to tell Maryanne exactly where those accounts were, as at that time Ms Porter did the accounts for Letterkenny.

[516] Maryanne said that she travelled to Mangatangi and retrieved the accounting records. Although Maryanne had little memory of the trip, Maryanne's husband Mr Owens gave evidence that it was Ms Porter who accompanied them on the trip to Mangatangi.

[517] Ultimately Maryanne and Ms Porter established that the cheque had been banked to Letterkenny. When they told Hugh he sought an explanation from John, who said that his wife had accidentally banked the cheque. Hugh accepted this explanation.

[518] Maryanne's account is that she and Ms Porter remained suspicious and it was Ms Porter who came up with the idea of requesting cheques back from the bank. The returned cheques showed that John had signed and cashed cheques at racing clubs although he was not a cheque signatory and was not authorised to do this. They took the information to Mr Carter, who asked Mr Staub to look into the matter. Hugh was overseas at the time.

[519] The defendants dispute that events transpired in this way. The defence case is that even in 1993 and 1994 Maryanne was jealous of her brother and competitive with him. It was she alone who drove these events and she did so in an attempt to stir up trouble. Ms Porter's evidence was that none of these investigations were her idea and she did not suggest the trip to Mangatangi. She certainly did not go on it. She had not even started at Kilmacrennan at the time, and when she did, she was a junior employee unlikely to involve herself in such events.

[520] The defendants called Ms Angela Doran, to give evidence that it was she who had accompanied Mr Owens and Maryanne to John's home and that she had done so

because Mr Owens and Maryanne were afraid of John's dogs and one dog in particular. Ms Doran is John and Maryanne's cousin and a former employee of the Green Group.

[521] It was put to Mr Owens that it was Ms Doran who accompanied them on the trip, not Ms Porter. He said that he did not remember Ms Doran's involvement but did remember Ms Porter's. He found it improbable that Ms Doran went with them because of dogs. He has no fear of dogs as he grew up on a farm. His memory was that before they took the trip he told Maryanne and Ms Porter that what they proposed was wrong, but Ms Porter had been reassuring that it was okay to do this because she needed the books to do the accounts and had authority to get them. He thought that it was Ms Porter who went on the trip and that she had gone inside the house with Maryanne.²⁴⁵

[522] Ms Porter's evidence in chief was that she did not join Kilmacrennan until May 1994 and did not meet Maryanne until she interviewed for that job in late April 1994. Prior to that she had worked on a fixed contract for Green & McCahill from February 1993 until August 1994, but this was in a different work place to the Kilmacrennan offices. During this time she also did contract work for Letterkenny. Ms Porter said that when she got to Kilmacrennan in May 1994 she found poor accounting and administration practices and that all agents were poor record keepers, not just John.

[523] It was put to Maryanne on cross examination that Ms Porter was not working at Kilmacrennan in 1993, and Maryanne accepted that could be correct.

[524] If Ms Porter is correct in her recollection of the dates as to her employment then Maryanne must be wrong in her recollection, and so too must Mr Owens. However, I consider Ms Porter's evidence is unreliable on the issue of timing. The affidavit she originally swore stated that she began work at Kilmacrennan in late 1993. When giving her evidence-in-chief she amended that date in the light of what she said she discovered on perusing her husband's diaries. However on cross examination she had to accept that she had previously signed a document that

²⁴⁵ NOE Mark Owens at 502-503.

recorded that she had worked with the Green Group as a contract accountant from February 1993 until 1 April 1996.²⁴⁶ I have no doubt that admitting her involvement in these events was embarrassing and difficult for Ms Porter, given her ongoing role within the Green Group and the present composition of the Boards of Directors, and the identity of the trustees.

[525] I prefer Maryanne and Mr Owens' account of Ms Porter's involvement in these events to Ms Porter's version. I consider it likely that she was involved and interested; including in the trip to Mangatangi. There was at least one other occasion on which she worked with Maryanne, investigating an employee suspected of dishonesty - an investigation which took them both on a car trip to observe the employee's apartment. Moreover Ms Porter was subsequently fully involved in the 1994 investigation of John, which would be strange if she only began at Kilmacrennan in May of 1994.

[526] There is also conflict between the evidence of Mr Owens and Ms Doran as to who accompanied Mr Owens and Maryanne on the trip to Mangatangi; was it Ms Doran or Ms Porter? That conflict of evidence does not require resolution, as any such resolution would not bear upon the credibility of Mr Owens or Maryanne. Maryanne did not claim to have clear recollection of the trip, and Mr Owens said he recalled that it was Ms Porter who accompanied them. He did not recall Ms Doran being with them. Even if he is wrong in his recollection, it is no indication he is lying. Forgetting who was on a car trip after 20 years is also not an indication that he is an unreliable witness.

Mr Staub's investigation

[527] The events in the early 1990s on which Maryanne relies were investigated at the time by Mr Staub, the financial controller of Green & McCahill Ltd. Mr Staub's evidence was that he reported to Mr Carter, who was then the Chief Executive Officer. Although Mr Staub said that he had limited involvement with Kilmacrennan, he was called in on a special project basis in 1994 to investigate the concerns that John was stealing from that company, and to report his findings to

²⁴⁶ Exhibit 27.

Mr Carter. Although Mr Carter asked him to do the work, Mr Staub said that he had no doubt that Hugh was aware of the work.²⁴⁷ He said “I believe Hugh engaged Bob to engage me, because I don’t believe for a second that Bob unilaterally on his own would have engaged me.”²⁴⁸

[528] He worked together with Ms Porter, the Kilmacrennan in-house accountant on the investigation. He said of Ms Porter that her record keeping, accounting skills and the quality of work she generates are second to none.

[529] Mr Staub said that in the course of his investigations he interviewed John and provided him with an opportunity to comment upon various documents. He then prepared a provisional report, dated 12 August 1994 which identified a number of areas of concern and the need for further investigation, including investigating some of the explanations offered by John.²⁴⁹ In that report Mr Staub said that there were 949 stock unaccounted for associated with John’s cattle trades.

[530] Ms Porter and Mr Staub then undertook additional investigations which led to the issue of the final report dated 19 August 1994.²⁵⁰ In that report Mr Staub concluded that 723 head of stock remained unaccounted for. He reported that John’s explanation that part of the shortfall was explained by the transfer of 50 cattle to Hugh had been investigated. Only 13 such transfers had been discovered, and those were yet to be confirmed with Hugh.

[531] The reports of the 12th of August and the 19th of August need to be read together. In both reports Mr Staub identifies a number of irregular transactions initiated or described by John. The conclusions reached in those reports can be summarised as follows:

- (a) John’s stock takes and stock record keeping was lax and sloppy, which made accountability virtually impossible. Mr Staub described a situation in which there were missing cattle, and cattle that had to be searched for and found by third parties because John had no record of

²⁴⁷ NOE Anthony Staub at 561.

²⁴⁸ NOE Anthony Staub at 561.

²⁴⁹ CBD at 182.

²⁵⁰ CBD at 188.

where they were. He cited an example of a cash payment to G Stewart of \$7,500 for the purchase of 10 service bulls. John told him he recalled paying for 4-5 service bulls and keeping some \$3,500 - \$3,750 cash for himself in lieu of wages.

- (b) No attention, care or interest appeared to have been directed by John toward whether his trading on behalf of Kilmacrennan was successful or profitable.
- (c) There were a host of “cash” purchases from supposed non GST registered individuals. Mr Staub concluded at the time that it might be construed that Kilmacrennan was a party to the GST avoidance, noting that payments were often to spouses of GST registered people.
- (d) John had signed cheques including cheques made payable to “cash” “knowing full well that he was not an authorised cheque signatory.”²⁵¹
- (e) It was not uncommon for John to authorise payments to one seller for the purchase of bulls, although the bulls were not supplied for two to three months. Kilmacrennan was effectively providing finance to the seller.
- (f) John was involved in an apparent practice to provide service bulls to clients, but without keeping any records. Mr Staub said it was unclear Kilmacrennan was benefiting from this.
- (g) Kilmacrennan was effectively funding stock purchases by John’s own competitive cattle trading company, Interlaken Livestock Ltd, which was owned 50/50 with another. Kilmacrennan had been reimbursed by Interlaken with a Turners & Growers cheque. John’s co-venturer in Interlaken worked for Turners & Growers.
- (h) John drew cash cheques and cashed them at the Auckland Trotting Club “or such like”. Mr Staub recorded that John admitted to using

²⁵¹ CBD at 182 and 186.

the cash to make money “betting” and then subsequently paying the appropriate party.

[532] Mr Staub concluded the 12 August report recording John’s wishes to sever ties with Kilmacrennan and with the observation that if John were a non-family member he would be fired.

[533] Maryanne’s evidence was that it was following this investigation that Hugh obtained advice as to how to remove John as a trustee and reappoint Maryanne. She had resigned earlier in the year because of her concerns about being a co-trustee with John. She said she and Hugh offered John the opportunity to resign instead of being removed and she wrote a note of resignation which John signed in October 1994.

19.7 Transactions investigated by Ms Payne

[534] Ms Tina Payne is a forensic accountant engaged by Maryanne to give expert evidence in this proceeding. She was provided with documents in connection with the events investigated by Mr Staub in 1994. She was asked to review the documents and provide opinions in relation to the activities undertaken by John.

[535] Ms Payne explained that there was a five step process when a cattle agent purchases cattle for Kilmacrennan. She said that the agent would fill in a document which had the name of the person selling cattle. That would have the number of cattle on it and the price of the cattle. It would be issued to the office. That was step one. Step two was the preparation by the office of a cheque made out to either the seller or to cash, in accordance with the docket.

[536] At step three the office prepared a buyer created invoice, which was a tax invoice with GST registration on it if that was applicable. The office then gave the agent the cheque and a receipt to be completed by the seller. That was step four.

[537] The office would then make an entry into its accounting system which had the number of stock to be purchased, who the seller was, what the price was, and the name of the agent associated with the stock. Those were all put together with a payment voucher stapled together in the file, that was step five.

Cash Cheques signed by John Green

[538] Ms Payne investigated six transactions involving cash cheques signed by John as follows:

- (a) F Pou \$19,600
- (b) Angela Bossche \$5,800
- (c) Mrs Hair \$780
- (d) Cath Stewart \$400
- (e) Rita Overdevest \$1,800
- (f) Sandra Pope \$2,850

[539] Ms Payne said that each of these cheques was issued on the basis of a Kilmacrennan livestock docket issued by John which recorded the purchase of cattle from these various people. The dockets created by John requested that the cheques be made payable to cash. The cheques were all signed by John, although he was not an authorised signatory. Ms Payne observed that all these cheques were cashed to Westpac Penrose on the same day they were issued, with three of them being cashed on 16 December 1993 within minutes of each other.

[540] She said that all the people recorded as sellers had a Pokeno RD1 address, yet the cheques were cashed at Penrose. She observed that none of the Kilmacrennan receipts issued for the seller to sign were received back by the Kilmacrennan office. Ms Payne expressed the opinion that John had signed the cheques without authority and that he used the cheques to obtain cash rather than the purported purchase of livestock.

[541] John says that he simply signed cheques presented to him in respect of dockets he had raised, and in that sense he was authorised by Kilmacrennan to sign them. He did not deny he knew he was not an authorised signatory of the particular

account but says he knew he was an authorised signatory of other Kilmacrennan accounts and thought the cheques must have been for those accounts.

[542] He says he cashed the cheques to pay to sellers, as part of the service he provided. It saved them a trip to the bank.

Cash payment for C Kennedy

[543] On 5 August 1993 a Kilmacrennan cheque was issued made payable to cash for \$3,000. The docket completed by John detailed the purchase of 10 bulls at \$300 each from C Kennedy, Pokeno. The cheque was cashed at the Cambridge Harness Racing Club. No signed receipt was received by the office.

[544] It is apparent from documentation that in 1994 Ms Porter made some enquiries in connection with this. Someone called Bruce from Westpac advised her that the cheque for \$3,000 was cashed at the Cambridge Harness Racing Club.

[545] John accepts he cashed the cheque at the Cambridge Harness Racing Club, but says he then used that cash to pay Mr Kennedy. He says in all likelihood he used it to pay Mr Kennedy at the Cambridge race meeting as he was a person involved in the transportation of horses to race meetings. John said that he was often at race meetings throughout the North Island because of his horse training operations. He would typically have five or six horses racing at each meeting. Because he was well known at various racing clubs they were happy to cash cheques he presented. The meetings were also a convenient location to meet the seller to whom he was making payments.

Cheque cashed at Auckland Trotting Club

[546] On 14 January 1994 a cash cheque for \$2,800 was signed by John. It is stamped as having been deposited by the Auckland Trotting Club. There was no Kilmacrennan docket generated in respect of this cheque. This was one of the transactions Mr Staub looked into at the time. He noted that the cheque butt claimed “10 bulls” but he questioned whether those 10 bulls were ever received.²⁵²

²⁵² CBD at 191.

[547] John's explanation is that he cannot recall the circumstances which gave rise to him writing out and signing the cheque. He said that it is possible that he had been provided with a cheque book over the holiday period while the office was closed. He says although he can no longer recall the detail he notes that the cheque book records 10 bulls and he expects that he cashed the cheque at the Auckland Trotting Club and used the cash to make payment to the seller.

Payment to J W & J M Langdon

[548] In February 1994 a Kilmacrennan Livestock cheque was issued payable to J W & J M Langdon for \$20,000. A docket was received in connection with that cheque completed by John requesting a cheque in payment for the purchase of 40 steers at \$500 each from the Langdons. The cheque was signed by John and it was deposited to the account of J W & J M Langdon. The 40 steers were recorded into the livestock records of Kilmacrennan.

[549] On 2 August 1994 Ms Porter rang Mr Langdon to make enquiry in connection with this transaction and was advised by him that he had only horses, no cattle on his property. In a later phone call, on 4 August 1994, Mr Langdon said that John had actually lent him the \$20,000. On 9 August John Langdon paid a cheque to Kilmacrennan for \$21,000.

[550] There was no document recording this loan. The payment was described by John in documents he created as payment for the purchase of cattle. That was a false docket. John's signature on the cheque was unauthorised.

[551] John accepts that this transaction was incorrectly described as a stock purchase when it was in fact a loan. He says it was always a loan and was immediately repaid with interest when the irregularity was identified. He says that the loan was related to a stock purchase and that he had arranged for the purchase of 150 or more cattle on a 50/50 basis between Kilmacrennan and the Langdons. The Langdons had been helpful in organising a grazing place for the cattle. When it came to pay for the cattle the Langdons were \$20,000 short of available funds and he therefore agreed to a loan on the condition that it would be repaid when the stock was on-sold. On cross-examination he acknowledged that he was not authorised to

make the loan to the Langdons and that he did not tell anyone of it in the Kilmacrennan office.

Cash payment for Overdevest

[552] John completed a docket for the purchase of 12 weiner bulls at \$250 each from Mrs Overdevest of Pokeno. This is different to the cash cheque referred to earlier. The office issued a cash cheque for \$3,000. The original cheque returned by the bank records that the cheque was processed by the BNZ in Palmerston North on 5 April 1994 and that the name J Green is written on the back.

[553] Ms Payne says that invoices have been located which record amounts in relation to John winning stakes at the 1994 Easter racing meetings at Manawatu Harness Racing Club in Palmerston North and the Hawera Racing Club. This is over the time period 1 April to 4 April 1994. Ms Payne's opinion was that John had cashed the cheque at the racing club, and that the racing club had then presented it on a day following the Easter weekend at the local bank. Under cross examination Ms Payne accepted that in light of the notation on the back of the cheque it was likely that John had cashed the cheque in Palmerston North a day after the race meetings. I proceed on the basis that the cash would not have been available to John at the races.

Interlaken Livestock Ltd

[554] In June 1994 a company Interlaken Livestock was incorporated. The shareholders were John and his wife, and a friend of John's. John and the friend were the directors. A Kilmacrennan docket was completed by John in July 1994 which records the sale of 65 stock to Interlaken. A cheque drawn on Turners & Growers Fresh Ltd account dated 4 August 1994 was then used to pay Kilmacrennan for the purchase. At the time of the investigation Mr Staub discussed this transaction with John. He noted that Interlaken was operating in opposition to Kilmacrennan and Mr Staub recorded that John had stated his intention to sever ties with Kilmacrennan and do his own cattle trading.

[555] John's co-venturer was subsequently convicted of offences in connection with the unauthorised drawing of cheques from a Turners & Growers bank account.²⁵³

[556] John denies that he knew that the cheque from Turners & Growers in payment of the debt owing by Interlaken to Kilmacrennan was wrongly drawn. He says it was sent directly to the Kilmacrennan office from the other director and did not come to him. He does however recall having a later discussion with the other director about why the payment to Kilmacrennan was being made with a cheque from Turners & Growers. This occurred before the other director was charged and before he had any knowledge of the alleged offending. At the time he felt the explanation he received was plausible. Under cross-examination he said that he knew his co-director had access to the staff account at Turners & Growers and that he could use that account to hold things over the weekend.

Stock discrepancies

[557] Ms Payne investigated a number of transactions which had been identified by Mr Staub as of concern. Some of these have been identified by Ms Payne as contributing to the stock discrepancy.

[558] She refers to two Kilmacrennan cheques each issued for \$2,100 payable to "T Lowe", raised on 19 May 1994 and 16 June 1994. These were each for the purchase of three cattle at \$700 each, a total of six cattle. It is apparent from Kilmacrennan records that Ms Porter initiated investigations in connection with this in 1994. These established that Mr Lowe (T Lowe) received only one amount of \$1,800 cash delivered to him by Walter Hartley, rather than the \$2,100 in accordance with the payment voucher. Mr Lowe said that he had only sold John "3 steers ever!" Mr Hartley was another Kilmacrennan agent.

[559] During the investigation Mr Hartley said that he had received \$2,000 cash from John and paid Mr Lowe \$1,800, keeping the remaining \$200 towards an outstanding Letterkenny grazing debt.

²⁵³ CBD at 220.

[560] When Mr Staub questioned John he advised that “Trish” (John’s wife) kept the balance of \$100 cash from the first cheque.

[561] John’s response is that although the transactions may have been poorly documented they did occur.

Defence position in connection with these transactions

[562] John says that all of his conduct at the time was authorised by Hugh. When the issues were raised with him by Mr Carter and Mr Staub, he did not want to reveal to them that his father was generally aware of all aspects of his cattle trading. Hugh was in Ireland at the time and he did not want to say too much until he had spoken to him on his return. He was also upset that his father did not openly support him against his sister, although he understood that Hugh was angry with him for having got caught. For those reasons he was not as helpful as he could have been in explaining matters to Mr Staub at the time. His evidence is that it was at his sister’s insistence that his father removed him as a trustee of the Hugh Green Trust.

[563] John accepted that on a limited number of occasions he did invoice for a greater number of stock than he was buying. He did this to generate a cash surplus in lieu of wages. He said that his father was aware of what he was doing and considered it to be part of the cattle trading business so long as he did it within reasonable limits.

[564] John said that one of the reasons he had come to work for his father rather than run his own business was Hugh’s assurance that he would look after him. One of the ways in which Hugh did this was to allow him to enter into stock transactions in a way that enabled him to receive cash. John says that when he started working for his father Kilmacrennan paid for all the livestock he purchased and received all of the income, so his income had to come from elsewhere and this is what led to the irregular transactions. The defence relies upon the evidence of John and Ms Porter that John was not in a partnership relationship with Kilmacrennan on the trades, but rather a “pseudo partnership”. Ms Porter said a pseudo partnership was one where

Kilmacrennan tracked cattle in and out but did not pay out the profit in any proportion.²⁵⁴

[565] The trustee defendants also say that there was no stock shortfall at the time. What had occurred was that Hugh would take cattle from other agents and sell them himself. They rely on the evidence of Ms Porter to support this contention.

[566] The defence to these allegations levelled by Maryanne therefore involves the following propositions:

- (a) John believed he was authorised to sign the cheques he did.
- (b) It was standard procedure for him to cash cheques to pay the farmers in cash rather than deliver a cash cheque.
- (c) When he cashed cheques at the races, that was because he would see the cattle sellers there or at least would pay them later.
- (d) John did not receive profit on cattle sales he entered into for Kilmacrennan. He was not in a true partnership as the other agents were, but rather a pseudo partnership.
- (e) On occasions he did inflate the number of cattle he was purchasing, and did pay Letterkenny costs from Kilmacrennan, but that was pursuant to the arrangement with Hugh, to give John income.
- (f) That in any case the alleged deficiency in animals is attributable to the fact that Hugh was trading other agents' cattle rather than to any true shortfall.

[567] The trustee defendants rely on the evidence of Ms Porter to corroborate John's account. This is rather surprising given that Ms Porter was instrumental in the early investigations in 1994. I found Ms Porter's evidence in this area very problematic. She seemed to be giving evidence as an expert, but there was no clarity as to what questions she had been asked to investigate in connection with these events. She said she had been asked to comment on Mr Staub's two 1994 memorandums. I formed the view that the task she had set herself, if it had not been

²⁵⁴ NOE Jane Porter at 1085.

set for her by counsel, was to see if John's explanations could be corroborated. She produced evidence that John was a signatory on the other accounts. She said that there was no stock shortfall. She also said that John was only paid on a profit share basis from 1 April 1994, and up until that time his income was tracked on a pseudo partnership basis.

[568] This latter evidence conflicts with that of Mr Staub who was clear that John had been paid on a profit share basis. Ms Payne also said that the accounting records showed clearly that he was. When these documents were put to Ms Porter she accepted that she had no documentary basis for her assertion that such a pseudo partnership existed.²⁵⁵ John also could not point to any such evidence. Finally the notion of a pseudo partnership conflicts with a memorandum Maryanne sent to John in March 1993 in which she said:²⁵⁶

From 1 April 1993 all your cattle movements will be monitored from this office on a profit/loss basis as per our other agents.

[569] I also find it improbable and reject the evidence that there was an arrangement with Hugh that John could enter into these irregular transactions to give himself income. It can be assumed that Hugh would have understood that this would immediately cause mayhem in the records of the company. Moreover, if it were true that these dealings were authorised by Hugh, it is simply inexplicable that he let employees within Kilmacrennan continue to investigate this, and call John to account. As Mr Staub said, within the context of that organisation, Hugh must have authorised that investigation. John's own evidence was that Hugh knew of the investigation. Although he claimed that Hugh offered to sort it out for him, I also find that implausible. Allowing the investigation to continue in the circumstances that John claims existed would make no sense.

[570] As to the particular matters I find that John did know that he was not authorised to sign the cheques. Each cheque is clearly marked with the name of the account, and it would have been clear to John that he was signing a cheque from the

²⁵⁵ NOE Ms Porter at 1113.

²⁵⁶ CBD at 83.

particular account. He admitted to Mr Staub in 1994 that he knowingly signed cheques without authority.²⁵⁷

[571] I have found no need to investigate in detail the issue of stock balances. It is plain from John Green's own evidence, that there must have been a stock deficiency if Kilmacrennan's accounts were properly done, since he admits to having inflated the number of cattle purchased. A number of transactions referred to above make clear that this was so. Ms Porter gave detailed evidence which was used by the defendants to attempt to undermine the evidence of Mr Staub and Ms Payne that there had been stock shortfalls. But John was given an opportunity to explain the stock shortfall when this issue arose at the time of the original investigation. He only claimed that 50 of his cattle had been transferred to Hugh. This was investigated and that number reduced to a possible 13. The chance of obtaining accurate information as to stock figures and the causes of any shortfall was far greater then than it is now.

[572] In relation to the cheques which were cashed at the races, I am satisfied that they were cashed for racing purposes, as John admitted in 1994. If that were not the case, why would he cash them there? It seems unlikely that the cattle sellers just happen to be at the races on each occasion. John says that he was being sarcastic in 1994 when he told Mr Staub he was using the money for betting. It is implausible that he would have given Mr Staub incriminating information which was false in an effort to be sarcastic, when it is clear he understood that his transactions were being investigated and that this was his opportunity to provide exculpatory information.

[573] As to whether the funds generated from the cheques cashed at the races were ever paid on to sellers of cattle, it is possible that in some cases they were, even if in the interim they were used for unauthorised purposes. It is possible that the funds from some of the cheques cashed at Pokeno were also paid to sellers. The evidence suggests that some of the transactions related to genuine stock transactions but with the number of cattle purchased overstated, producing excess cash for John.

²⁵⁷ CBD at 186 and NOE Anthony Staub at 567.

[574] The transactions investigated by Ms Payne had a common characteristic. There were no receipts signed by sellers. John said that he would generally give the receipts to the sellers and tell them they were supposed to send them back to the office.²⁵⁸ This is again an improbable account. Why wouldn't he have the sellers sign the receipt when he handed over the cash? If he followed this procedure, why didn't any of the sellers send the signed receipts back in? The explanation is, I am satisfied, that the transactions did not occur as represented in the documents generated by John.

[575] I put to one side the transaction in connection with Interlaken. John was not charged with criminal offending in connection with that dealing, although his co-director was charged in connection with the use of Turners & Growers' cheques.

[576] The Langdons' transaction involved John in the creation of false documentation and in the use of Kilmacrennan funds for an unauthorised purpose.

[577] I note the evidence of Moira that Hugh had on occasions said that John had not done anything that he hadn't done himself. I do not however consider that this is evidence which corroborates John's account of events. I construe those sort of remarks as the type of remark a loving father makes to support a child.

[578] To conclude the evidence establishes that in the early 1990s John was involved in transactions which were dishonest. He frequently used Kilmacrennan funds in a manner which was not authorised, and on occasion he took those funds and kept them for his own purposes. He created documentation which misrepresented the nature of the transactions. Those transactions resulted in a shortfall of stock as against what Kilmacrennan's records disclosed. In a report Mr Staub prepared on 6 October 1994, he recorded the value of missing stock at \$276,463.²⁵⁹ In making these findings I bear in mind the seriousness of the findings for John. I have only made findings which I consider to be supported by very strong evidence.

²⁵⁸ NOE John Green at 1428.

²⁵⁹ Affidavit of Anthony Staub at [8] and CBD at 200-201.

[579] If Hugh's appointment of John as a trustee had followed on shortly after these events, there would be a good case that the power was exercised in breach of fiduciary duty. This would be on the basis that the appointor was fully aware of the circumstances and knew that the trustee had engaged in acts of dishonesty. It would be manifest that appointing him a trustee was exposing the trust assets to risk. But these events occurred almost 20 years before Hugh appointed John a trustee. Is the passage of time sufficient to place this into a different category? After all, John had been working within the Foundation for some time, and Hugh seemed to have developed confidence in him. On the other hand, John continues to deny the wrongdoing and has come up with explanations that I have rejected as not worthy of belief.

[580] Hugh however was not in the position I am. I cannot proceed on the basis that he knew that John continued to deny his wrongdoing. I have concluded that it is not possible to say on this ground that Hugh was in breach of fiduciary duty in appointing John a trustee.

19.8 Allegation that Hugh did not exercise power of removal of Maryanne and appointment of Mr Fisher in the best interests of the beneficiaries

[581] I accept that if the exercise by Hugh of his power to remove Maryanne and subsequently to appoint Mr Fisher was made when his will was overborne by the influence of John then Hugh was also in breach of fiduciary duty. It follows from a finding of undue influence that Hugh did not give consideration to the best interests and overall welfare of the beneficiaries, but simply did what John had asked him to do.

[582] Maryanne has advanced submissions directed toward the alternative scenario, assuming no finding of undue influence. She says that the decision to remove her was made on the basis of incorrect legal advice provided by Mr Fisher that Maryanne was in breach of her obligations as trustee in declining to cooperate with Hugh's decision to appoint John and Frances as trustees and as directors. It was made when Hugh was fatigued and ill, and without the consideration that his fiduciary duty required of him. Further evidence of this is the fact that each of these

decisions was inconsistent with Hugh's longstanding plan for the future control of the Green family's interests in the Green Group.

[583] I have found that the legal advice Mr Fisher gave Hugh in connection with the removal of Maryanne was incorrect. However the fact that Hugh acted on the basis of incorrect legal advice does not bear directly upon whether he exercised the power in the best interests of the beneficiaries.

[584] If Hugh was acting of his own free will to remove Maryanne then, on the trustee defendants' case, Hugh acted to remove Maryanne to put an end to the squabbling. That is easily seen as a step taken in the best interests of the beneficiaries, since conflicting trustees can lead to dysfunction in governance. I also take into account, as I have previously found, that Hugh did not know that John and Frances were hostile to Maryanne, and he believed he could rely upon the independent trustees to provide the experience and business skills required of trustees in control of such a complex and large group of assets.

[585] The removal of Maryanne was a change of plan and did undoubtedly deprive the trusts of the vast amount of institutional knowledge that she had accumulated over the years she had run the Green Group alongside her father. It deprived the trusts of the benefit of her business skills and acumen. At a time when the trusts were about to face the risks and disruption that came with Hugh's death, Maryanne's removal clearly would add to this disruption. These are good arguments that the decision to remove Maryanne was a poor business decision but that does not make it a breach of fiduciary duty.

[586] If the issue of undue influence is put to one side, then Maryanne has also failed to establish that the appointment of Mr Fisher was made in breach of fiduciary duty. Hugh had known Mr Fisher for many years and had instructed him to look after the Green Group's interest in Dorchester Pacific. He clearly had confidence in his skill and judgment. There is no evidence to suggest that Hugh knew that Mr Fisher was hostile toward Maryanne.

[587] If I am wrong that this appointment occurred because of undue influence there is no evidence which suggests that Hugh was acting other than in accordance with his view of what was in the best interests of beneficiaries. In particular there is no evidence to suggest that he was motivated by some purpose collateral to the objects of the trusts. Maryanne points to the evidence of Mr Fisher that he was appointed as a “consequence of what had happened the day before”.²⁶⁰ What had happened the day before was Mr Fisher’s exclusion from the 28 March meeting. Mr Fisher said Hugh had said to Mr Fisher that he wanted him to attend “to make sure that my wishes are heard”.²⁶¹ Maryanne argues that it follows that Hugh’s decision to appoint Mr Fisher was to further his own agenda. If Hugh did think that Mr Fisher would ensure that Hugh’s own wishes were heard at trustees’ meetings, and that factor motivated his appointment, there is nothing wrong in that. Trustees frequently have regard to the settlor’s wishes, and may do so but only in a manner consistent with their overriding duties to act personally, in accordance with the objects of the trust, and in the best interests of the beneficiaries.

20. Fourth cause of action: substitution of new trustees

[588] In closing, counsel for Alice clarified the basis upon which the intervention of the Court is sought to remove the trustee defendants and to replace them with trustees as the Court deems just. The basis for the claim for removal of the trustees is as follows:

- (a) In the case of John, Frances and Mr Fisher, misconduct in respect of Maryanne’s removal as trustee and their own appointment. In John’s case, Alice also points to earlier dishonest conduct.
- (b) In the case of all the trustee defendants, hostility towards Maryanne and Alice and a lack of even-handedness in administering the trusts.
- (c) In the case of Mr Fisher and Frances, conflicts of interest.

[589] It is argued that if John and Mr Fisher did misconduct themselves in respect of Maryanne’s removal and their own appointment, their removal as trustees should follow. The fact that the misconduct relates to a beneficiary means that these

²⁶⁰ NOE Michael Fisher at 1885.

²⁶¹ NOE Michael Fisher at 1885.

defendants cannot be relied upon to meet their fiduciary duties towards the beneficiary group as a whole.

[590] In relation to the second ground, it is submitted that by their actions John, Frances and Mr Fisher have displayed high levels of antipathy towards Maryanne and hostility toward her daughter Alice. This is said to evidence that they are incapable of properly discharging their role as trustees to fairly consider the best interests of Maryanne and Alice as beneficiaries.

[591] Maryanne further says that John and Frances have engaged in conduct in connection with the affairs of the Foundation which is below the standard which should be expected of trustees.

[592] Frances and Mr Fisher are alleged to have unresolved conflicts of interest. It is argued that Frances is unsuitable to serve as a trustee because of the allegedly improper way she dealt with the “Irish Funds” as a trustee of Hugh’s estate. Mr Fisher is said to have conflicts arising from the different capacities in which he acted in connection with his own appointment, and from the fact that he stood and stands to profit personally from his appointment as a trustee, director, executor and legal adviser.

[593] In respect of the final trustee, Mr Gosney, Maryanne says that he brings no independence to the role that he plays, and has acted in breach of his obligation to act personally. He has gone with the flow in respect of dealings with Maryanne and Alice, simply adopting the position taken by the other trustees, and thereby aligning himself with the hostile and confrontational approach taken by those trustees.

[594] The trustee defendants say that to the extent that the cause of action complains of actions on John, Frances and Mr Fisher’s part before each of them became a trustee, such actions were not the exercise of any relevant power held by them. The key complaints are in fact complaints in connection with Hugh’s exercise of powers of appointment and removal.

[595] The trustee defendants dispute the factual premise for the allegations of misconduct levelled against each of John, Frances and Mr Fisher. They also dispute the factual premise for the allegation of conflict of interest levelled against Frances. They say that the Irish funds were never her funds to do with as she pleased.

[596] They deny that any other conflicts of interest existed, or if they did or do, that any such conflict currently affects the security of the trust property, or the efficient execution of the trusts, in a manner that warrants the removal of any of them as trustees.

[597] As to the allegation of hostility the trustee defendants accept that at a personal level, the relationships between John, Frances and Mr Fisher on the one hand, and Maryanne and Alice on the other, are not currently cordial. They accept that in the case of John and Frances, this situation is part of a wider breakdown in family relationships. In the case of Mr Fisher they say there has been no personal contact and no need for it for over two years. The trustee defendants argue that the existence of friction in a relationship does not justify removing the trustees. The evidence shows that to date there has been no detrimental impact on their treatment of Maryanne and Alice as beneficiaries and no such effect is likely in the future. Maryanne and Alice have been dealt with in a fair and impartial manner by the trustees, with due regard to their interests and welfare.

20.1 Principles to be applied

[598] The Court has jurisdiction under s 51 of the Trustee Act 1956 to appoint and substitute trustees, which includes the power to remove by substitution. Section 51 relevantly provides:

51 Power of court to appoint new trustees

- (1) The court may, whenever it is expedient to appoint a new trustee or new trustees, and it is found inexpedient, difficult, or impracticable so to do without the assistance of the court, make an order appointing a new trustee or new trustees, either in substitution for or in addition to any existing trustee or trustees, or although there is no existing trustee.

- (2) In particular and without prejudice to the generality of the foregoing provision, the court may make an order appointing a new trustee in substitution for a trustee who—
- (a) has been held by the court to have misconducted himself in the administration of the trust;

...

[599] There is the suggestion in some texts that the jurisdiction is not available where there is a dispute as to facts or where the trustee is willing and able to continue.²⁶² However there is nothing in the statutory language to suggest such a limitation. The notion that this jurisdiction is so limited may originate from early cases in which the concern was with the proper form of pleading. Those concerns obviously no longer apply here.²⁶³

[600] In any case, the Court also has an inherent jurisdiction to remove trustees as part of its general jurisdiction to supervise the administration of trusts.

[601] When exercising its jurisdiction to remove trustees the Court is guided by the welfare of the beneficiaries. As the Privy Council stated in *Letterstedt v Broers*:²⁶⁴

In exercising so delicate a jurisdiction as that of removing trustees, their Lordships do not venture to lay down any general rule beyond the very broad principle above enunciated, that their main guide must be the welfare of the beneficiaries. Probably it is not possible to lay down any more definite rule in a matter so essentially dependent on details often of great nicety. But they proceed to look carefully into the circumstances of the case.

[602] As well as the welfare of the beneficiaries, the security of trust property and the satisfactory execution of the trusts are recognised as guiding principles in the exercise of the Court's jurisdiction. Dixon J stated in *Miller v Cameron*:²⁶⁵

The jurisdiction to remove a trustee is exercised with a view to the interests of the beneficiaries, to the security of the trust property and to an efficient and satisfactory execution of the trusts and a faithful and sound exercise of the powers conferred upon the trustee. In deciding to remove a trustee the Court forms a judgment based upon considerations, possibly large in number

²⁶² Andrew Butler "Trustees and Beneficiaries" in Andrew Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009) 105 at [5.2.8](3).

²⁶³ For a discussion of this point see G Kelly and C Kelly *Garrow and Kelly Law of Trusts and Trustees* (7th ed, LexisNexis, Wellington, 2013) at [17.52].

²⁶⁴ *Letterstedt v Broers* (1884) 9 App Cas 371 (PC) at 387.

²⁶⁵ *Miller v Cameron* (1936) 54 CLR 572 at 580–581.

and varied in character, which combine to show that the welfare of the beneficiaries is opposed to his continued occupation of the office. Such a judgment must be largely discretionary. A trustee is not to be removed unless circumstances exist which afford ground upon which the jurisdiction may be exercised. But in a case where enough appears to authorize the Court to act, the delicate question whether it should act and proceed to remove the trustee is one upon which the decision of a primary Judge is entitled to especial weight.

[603] As the Court of Appeal recognised in *Medlessohn & Schmid v Centrepoint Community Growth Trust* the settlor's intentions, neutrality between beneficiaries and promotion of the purposes of the trust are also relevant circumstances.²⁶⁶

[604] In considering whether a trustee should be removed it is not necessary to establish that there has been a breach of trust,²⁶⁷ but equally establishing a breach of trust will not necessarily be sufficient to justify the removal of a trustee. Inconsequential mistakes should not be allowed undermine a settlor's intention.²⁶⁸ Nor will a trustee be removed simply because of a position of conflict between duty and interest. Whether or not a position of conflict will justify removal depends on the nature of the conflict and the other circumstances of the case.²⁶⁹

[605] As to incompatibility between trustees and beneficiaries the Court of Appeal in *Kain v Hutton* said:²⁷⁰

...mere incompatibility between trustees and beneficiaries is not enough ... Any incompatibility must be at such a level that the proper administration of the trust is seriously adversely affected and it has become difficult for a trustee to act in the interests of the beneficiary...

[606] What is apparent therefore, is that each or any of the existence of conflicts of interest, misconduct on the part of the trustee, incompatibility or hostility between trustees and beneficiaries can be reasons for removing a trustee, but whether removal is appropriate in a particular case will depend on whether any of those factors are present to a sufficient extent to undermine the satisfactory execution of the trust for the welfare of the beneficiaries.

²⁶⁶ *Medlessohn & Schmid v Centrepoint Community Growth Trust* [1999] 2 NZLR 88 (CA) at 97 describing the approach in *Re Tempest* (1866) LR 1 Ch App 485 (CA)

²⁶⁷ *Hunter v Hunter* [1938] NZLR 520 (CA) at 529, applying *Letterstedt v Broers*, above n 264.

²⁶⁸ *Kain v Hutton* [2007] NZCA 199, [2007] 3 NZLR 349 at [267].

²⁶⁹ *Wales v Wales* [2013] VSC 569 at [43].

²⁷⁰ *Kain v Hutton*, above n 268 at [267].

[607] As to appointment of a replacement trustee, the jurisdiction to appoint a new trustee under s 51 only arises if it is “expedient to do so”, and it is “inexpedience, difficult, or impracticable” to appoint a trustee without the assistance of the Court. In *Attorney-General v Ngati Karewa and Ngati Tahinga Trust*, Randerson J stated:²⁷¹

[68] The Court must be satisfied not only that there are grounds for the exercise of the discretion but also that “it is inexpedient, difficult or impracticable so to do without the assistance of the Court . . .”. That condition may be fulfilled where, for example, there is no or inadequate provision in the trust instrument for the appointment of trustees but may also apply even where such provision does exist. If, for example, the Court were satisfied that the power to appoint new trustees was unlikely to be exercised fairly and objectively having regard to the interests of all beneficiaries (including those who seek to be on the preferential roll of beneficiaries), then that could afford a basis for the Court to conclude that the statutory conditions were fulfilled.

20.2 John Green

Misconduct in the administration of the trusts - fraud on a power

[608] I have held that John did plan for the removal of Maryanne from any position of control within the trusts and the Green Group. I am satisfied that he exercised his vote as trustee for the purpose of continuing to effect the shift in control, voting to appoint Mr Fisher as a director of the Green Group companies from April 2012 and to remove Maryanne as a director of all companies in the Green Group again from April 2012. This finding however is not inconsistent with a finding that he exercised his vote as a trustee with regard to the best interests of the beneficiaries. I have no doubt that John believed that it was best for all that Maryanne be removed from any position of control.

Dishonesty

[609] There is ample evidence that John has been dishonest in the past. I have found some of the evidence he gave in these proceedings not to be credible, including evidence he gave to explain away the transactions investigated by Mr Staub and Ms Payne. It is clear to me that John does not accept that his conduct in the 1990s was dishonest, or indeed in any way significantly deficient. There is no

²⁷¹ *Attorney-General v Ngati Karewa and Ngati Tahinga Trust* High Court Auckland M2073/99, 5 November 2001.

evidence that he acknowledges past wrongdoing. Nor does he claim to have changed his approach to business. It is therefore of concern that John now has executive supervision of the farming operations and that Letterkenny does business with Kilmacrennan.²⁷² To allow John to continue in a supervisory role in the very company where the earlier conduct occurred is not good business practice. I am satisfied that this would not occur if it were not for the present makeup of trustees, as the trustees have effective control of Kilmacrennan through their power as shareholder.

Hostility

[610] John is deeply hostile to Maryanne. The role he played in her removal as trustee and director is evidence of that hostility. So too the numerous documents where he is dismissive of her, and rude to her.

Other conduct

[611] Finally in respect of John, Maryanne points to conduct on his part when working at the Foundation. She refers in particular to some emails he sent.²⁷³ I do not propose to describe the content of the emails or to consider Maryanne's arguments in respect of them. I accept that the content of the emails was not appropriate for business communications. Nevertheless the emails were not sent by John in his capacity as trustee or director. In the context of this proceeding, I regard the issues raised by these emails as peripheral and I do not therefore consider them further.

20.3 Michael Fisher

Misconduct in the administration of the trusts - fraud on a power

[612] I have already held that there is no evidence that Mr Fisher was party to any scheme. It was not put to him that he was. I do not consider this allegation further against him.

²⁷² NOE Graham Coghlan 1763-1765. See also second affidavit of Tina Payne at [26]-[29].

²⁷³ CBD at 615 and 952.

Hostility

[613] Each of John, Frances and Mr Fisher are also hostile toward Maryanne. The defendants concede that relations are not cordial, but I consider that this considerably understates the level of hostility that each of these trustees has exhibited toward Maryanne. This hostility is not just the result of the present proceedings, but pre-dates it.

[614] Mr Fisher's hostility toward Maryanne is of such an intensity that it can fairly be said that he feels antipathy toward Maryanne. He brought a very negative view of Maryanne to bear upon the issues on which he was advising Hugh. For example, he was asked on cross examination whether when discussing with Hugh the Board meeting of 28 March (the meeting Mr Fisher was excluded from) he raised with Hugh that what had happened at the meeting had not been a deadlock but rather that Maryanne had been outvoted. He said:²⁷⁴

Well my view at the time was, my assessment of Maryanne's position, was she was not going to change it and that it was going to le[a]d to dysfunction and my belief at the time, based on my understanding of Maryanne's character and habits and personality, was that that was definitely the most likely outcome and that's in fact what happened.

[615] When asked to explain how he formed that view he said that he had interacted with her over the years and had seen what happened when she is implacably against someone. He called in support of this a matter on which he was instructed to recover about \$100,000. He said that Maryanne insisted he pursue a debt where he felt the claim was hopeless, and then when he obtained a default judgment, insisted that he pursue enforcement of the judgment. He said he felt she behaved rudely and discourteously at times to the person behind the debtor company (I refer to this person as the debtor for convenience) at a settlement conference and he was embarrassed by that. He also felt she was rude when she visited the home of the debtor, and as he described it, rang the doorbell late at night. However the account Maryanne gave to Mr Fisher at the time was that she went to the house at 7pm and rang the intercom. The debtor's wife answered and then hung up. Mr Fisher said that he had no basis for disputing Maryanne's account other than

²⁷⁴ NOE Michael Fisher at 1898.

what he knew of what the debtor's wife had said.²⁷⁵ He still preferred the debtor's wife's version.

[616] When the events of November 2011 through to July 2012 are reviewed it is apparent that Mr Fisher consistently interprets Maryanne's actions in a very adverse light and similarly casts them in that same light when discussing her actions with others.

[617] Although some of this conduct predates Mr Fisher's appointment as a trustee it evidences a pre existing bias against Maryanne. This is accompanied by clear evidence of a close working relationship with John. While their relationship may not have amounted to a friendship, it was nevertheless close enough to spill over into the occasional game of golf.

[618] As a trustee he has followed the same pattern of viewing Maryanne's actions and opinions in a very adverse light. In various documents he has referred to her "destructive mood", her "vitriol", and her "dysfunctional behaviour".²⁷⁶ Having reviewed the evidence in connection with the events to which these comments relate or connect, I am satisfied that they were either gratuitous comments or disproportionate and unbalanced criticisms of her conduct. My point in that regard is not to apportion blame, but rather to observe that Mr Fisher does not have the ability to respond fairly- that is to say in an unbiased manner- to Maryanne's communications or her actions.

[619] Rather than attempt to mend bridges, Mr Fisher seems to have decided that the way to deal with Maryanne is to cut her off from information. His approach toward Maryanne has been that "the less she is told the better", a view which does not seem to have softened over time.²⁷⁷ Some reluctance to openly share information may be natural in the light of the present proceedings but again, this attitude predated the issue of proceedings.

²⁷⁵ NOE Michael Fisher at 1900, 1917-1918.

²⁷⁶ CBD at 1818 and 2153.

²⁷⁷ CBD at 1818.

[620] Mr Fisher is appointed as an independent trustee and acts as the chairman of the trusts, but he will not meet with Maryanne. As the trustee defendants say, he has had no contact with her for over 2 years. Initially he used Mr Narev to act as a go-between. On one occasion he had Mr Narev ask Maryanne to put in writing any issue she wished to raise in respect of companies where she was still a director. This was prior to her removal from all directorships. Maryanne complied with the request. Mr Fisher then circulated the list of issues she had generated to the other directors with the comment “I see Maryanne is purporting to exercise the decision making power to decide what items of business are included in the agenda...”²⁷⁸

[621] Mr Fisher has said that the trustees would meet with Maryanne if she came up with a proposal for them to consider. She has come up with proposals, but no such meeting has taken place. Mr Fisher did organise for an independent trustee to meet with Maryanne, Mr Scott, but he was not permitted to discuss the issues in this proceeding.²⁷⁹

Conflicts of interest

[622] The statement of claim particularises the existence of multiple conflicts of interest for Mr Fisher although few of these allegations were focused upon in closing. Those not addressed in closing submissions are therefore dealt with only briefly in this judgment.

[623] It is alleged that Mr Fisher has been compromised by his multiple roles and conflicts of interest. It is argued that it is not appropriate to have a lawyer who was so extensively involved in Maryanne’s supposed removal, and in securing his own appointment in her place, serving as the chairman to trusts of which Maryanne and her daughter are two of a small number of family beneficiaries. He is strongly aligned with John and his continuing involvement is recipe for on-going dysfunction and is inconsistent with the traditional role of the independent professional trustee.

[624] It seems to me that as expressed in closing, this is simply a reformulation of the argument that the level of antipathy that Mr Fisher feels for Maryanne, and his

²⁷⁸ CBD at 2150-2156.

²⁷⁹ NOE Michael Fisher at 1991.

on-going conduct means that he cannot fulfil his role as trustee. There is however something additional in the point made that the traditional role of the professional trustee is more than to bring their professional knowledge to bear, it is also to bring independence as between beneficiaries. It seems invidious for a trust for the benefit of all beneficiaries, to pay for a professional trustee who represents the interests of only some of the beneficiaries, unless all beneficiaries are given the opportunity to have their interests represented in a similar manner.

[625] Mr Fisher agreed that he has received approximately \$600,000 in fees over the previous “couple” of years from the trusts- a figure which includes trustees’ fees, directors’ fees and consulting fees. As earlier observed, the ability to charge fees is something which Mr Fisher should have drawn to the attention of Hugh when he acted for him in connection with his own appointment as trustee.

[626] However I do not consider that charging a fee for acting as a director or trustee creates a conflict of interest as the trust deeds and, I assume, company constitutions allow for the charging of fees, and it seems these fees were approved by the relevant boards. On the occasions when the trustees or directors retained Mr Fisher as a consultant, a conflict of interest did exist for Mr Fisher between his role as trustee/director on the one hand, and independent consultant on the other. This needed to be dealt with in accordance with the trust deeds and, in the case of the companies, in accordance with the Constitution and with the Companies Act 1993.²⁸⁰ It was not put to Mr Fisher that he had failed to comply with these requirements. I therefore take this point no further.

[627] The evidence did not establish that any of the fees charged by Mr Fisher, legal fees, or trustee and director’s fees were above market. The bulk of the consultancy work charged by Mr Fisher relates to legal services in respect of disputes with third parties. There is no suggestion that this work was done other than competently and cost effectively.

[628] It was also alleged that Mr Fisher’s role in the scheme created a conflict of interest. I have held that there is no evidence that he was party to such a scheme.

²⁸⁰ Companies Act 1993, ss 140 and 189.

20.4 *Frances Green*

Misconduct in the administration of the trusts - fraud on a power

[629] It was not put to Frances that she was part of the alleged scheme. I do not consider this issue further in respect of her.

Hostility

[630] Frances has also demonstrated considerable hostility toward Maryanne since her appointment. She and John have worked closely together in relation to dealing with Maryanne, so that it can safely be said that Frances is regarded by John as his ally against Maryanne.²⁸¹ Frances was clearly aware of John's plan to remove Maryanne quite early on. She sent an email to John on 13 February 2012 in which, when referring to the trusts she said "your sister [Maryanne] and dad are not going to be there long".²⁸²

[631] Although Mr Narev had told Maryanne she would be consulted in connection with the appointment of directors, presumably in light of the fact that she is one of the principal beneficiaries of the trusts, Frances and John both took the attitude that she should not be consulted as it was "none of her business".²⁸³

[632] Again, Frances has been unwilling to meet or talk with Maryanne in connection with trust business. Family relations between them have broken down. There is no contact.

Conflict of interest - Misconduct

[633] Maryanne alleges that Frances is unsuitable to serve as a trustee because of the way she has dealt with money which Hugh had, during his life, deposited in a bank account in Ireland in Frances' name.

²⁸¹ For example CBD at 2251.

²⁸² CBD at 1441.

²⁸³ CBD at 2189-2192, NOE Frances Green at 1026-1027.

[634] This issue relates to two bank accounts in Frances' name.²⁸⁴ I refer to them as the 007 and 704 accounts. The transfer of funds to open both of these accounts was made in August 2011. The payment of [redacted material] to open the 704 account in August 2011 represents the bulk of the monies that are at issue. Maryanne says that this is the [redacted material] referred to in the note prepared by Mr Narev that Frances was to bring to account as a credit against the [redacted material] distribution to Hugh and Moira's children.²⁸⁵ It is common ground that Frances has not brought this to account.

[635] After Hugh's death there were transfers to the 007 account of [redacted material] and [redacted material] resulting from the sale of shares held with a stockbroking firm in Ireland. Maryanne says that these shares were the property of Hugh and should have gone to the estate under Hugh's will. The trustee defendants say that the share investments were previously held jointly in the names of Hugh and Moira. The proceeds of sale were therefore Moira's, and again were not received by Frances beneficially.

[636] Maryanne raised the issue of the ownership of the Irish funds with the executors on 10 May 2013 and again on 11 June 2013.²⁸⁶ On 20 June 2013, the executors said that they were obtaining Counsel's opinion, but as at the date of the hearing that opinion had not been provided.²⁸⁷

[637] The evidence that Maryanne points to support her contention that the [redacted material] plus was distributed to Frances beneficially is as follows:

- (a) Mr Narev's record of the 27 May 2011 meeting.
- (b) The money was held in an account in Frances' name although she held no role in the trusts at the time the accounts were opened.

[638] Frances says that she did not expressly or formally agree anything, but the clear understanding was that she was to look after the money in the 704 account on

²⁸⁴ AIB Euro bank account no. 28277-007 and AIB AUD bank account no, 29832704.

²⁸⁵ CBD at 621.

²⁸⁶ CBD at 2665-2667 and 2703-2704.

²⁸⁷ CBD at 2709-2710.

behalf of Moira. She says that she and Hugh did not directly discuss the matter in respect of these funds with her, but from the time he got sick she heard Hugh and Moira discussing the Irish money, and her father reassuring her mother that the Irish money was hers. Frances said that she has never regarded the Irish money as her own and has not used it for her own purposes. She has drawn funds or made payments from the account as directed by Moira. Moira corroborates Frances' evidence on these matters.²⁸⁸

[639] It was put to Frances on cross examination that the notation in Mr Narev's note suggested that the [redacted material] was hers. She said she could not explain the [redacted material] reference but noted that it had a question mark next to it, and speculated that perhaps her father was thinking of giving the money to her.²⁸⁹

[640] There was no challenge to Frances' explanation for the various payments out of the accounts. Frances' evidence is that they were all payments made at the direction of Moira. Certainly, on the face of things, most of the payments do not appear to be for personal expenditure for Frances. There are cash withdrawals and debits associated with a Visa card connected to the account. Frances's evidence, again not challenged, was that these amounts were applied for the benefit of Moira or at her direction.

[641] Maryanne makes the point that even though these payments have been made at Moira's direction or for her benefit that still leaves a balance in the accounts of more than a million. It was put to Frances that the question mark on Mr Narev's note related to uncertainty as to the amount in the account in light of currency variances, and not to the status of the gift. She rejected that.

[642] I accept the trustee defendants' argument that the evidence corroborates Frances' account that the funds in the 704 account are held by Frances for Moira. That is the evidence of both Moira and Frances and is corroborated by the use to which the funds have been put.

²⁸⁸ First affidavit of Moira Green at [56], and second affidavit of Moira Green.

²⁸⁹ NOE Frances Green at 1059.

[643] In connection with the 007 account, the evidence suggests that the shares were held jointly by Hugh and Moira. I did not receive any evidence as to whether the principle of survivorship would apply in this circumstance in Ireland where the shares were owned by Hugh and Moira. The preparedness of the stockbroker to pay the proceeds of sale at Moira's direction on proof of Hugh's death might suggest that the principle does apply. In any case I do not have sufficient evidence to conclude that the proceeds of sale of those shares are properly to be regarded as an asset of Hugh's estate.

[644] For these reasons I am not satisfied that the Irish funds are Frances' beneficially, and it follows, I am not satisfied she had a conflict of interest arising from this issue.

20.5 Mr Gosney

[645] Maryanne says against Mr Gosney that because he is a longstanding business associate and friend of Mr Fisher, he cannot treat Maryanne and Alice impartially and even handedly. She says this is evidenced by several actions on his part including his refusal to meet with Maryanne and engage in good faith negotiations to find a "workable succession plan, in the best interests of all family members" and an "amicable, negotiated solution to the present disputes and difficulties".²⁹⁰

[646] Mr Gosney and Mr Fisher knew each other at university and according to Mr Gosney had become friends in the 1990s. They continue to play the odd game of golf. I consider that they are friends. Mr Fisher and Mr Gosney have also had an extensive professional association. They served on the Dorchester Pacific Board together. Mr Fisher has represented Mr Gosney in litigation. Because of his association with Mr Fisher, Mr Gosney engaged the law firm Brookfields to represent him when Mr Fisher was still a partner at Brookfields.²⁹¹ Mr Gosney was appointed a director and trustee on Mr Fisher's recommendation without consideration of other applicants.

²⁹⁰ Amended statement of claim at [6.19], [6.22]-[6.26].

²⁹¹ NOE John Gosney at 1285-1289.

[647] The defendants say that Mr Gosney is plainly well qualified to be a trustee and director. I accept that is so. They also say that personal relationships between directors are no unusual, and that there is nothing to suggest that Mr Gosney will not act impartially and even handedly towards Maryanne and Alice.

[648] Mr Gosney was appointed to the trusts and as a director as a replacement for Mr Narev and Mr Carter. He was appointed as an independent trustee. Given the events that led up to this point it was clearly undesirable that the new appointment be a friend of Mr Fisher. A previous association with an existing director is of course not usually a disqualifying factor, but Mr Gosney's appointment needs to be seen in context. The Green family was fractured, and only one side of the family was represented on the trusts and through directorships. The only other independent trustee at that time, Mr Fisher, had been instrumental in the steps to remove Maryanne from positions of control within the Green Group. Mr Fisher felt antipathy toward Maryanne, and the most fair minded observer would describe his relationship with her as broken.

[649] In a family situation such as this the role of independent trustee was critical. Even in the face of litigation, the independent trustees had to ensure that the beneficiaries excluded from the board tables were given fair consideration. The evidence suggests that Mr Gosney has not turned his mind to this aspect of his role. There is little to suggest that he has turned his mind to the interests of Maryanne or Alice.

[650] It is unfortunate that the first act he was called upon to perform was to vote on a resolution to remove Maryanne as a director of various Green Group companies. He voted in support of the motion in reliance upon the information provided to him by the other trustees. He had no knowledge which would have allowed him to form a view as to whether that step was in the best interests of beneficiaries. He did not ask to defer consideration to allow himself time to investigate the issue further. He did not abstain.

[651] Subsequently, as with the other trustees he has failed to take any steps to communicate with Maryanne and Alice in connection with their needs. Again in the

circumstances, it was obvious that the trustees needed to communicate with the estranged part of the family to find out whether they had any needs. Given the family breakdown that independent trustees' role here was vital, yet Mr Gosney has also refused to meet with Maryanne.²⁹² He agreed that he had taken no steps to investigate or inform himself as to Alice's situation although he also accepted that John and Frances could not represent her interests.²⁹³ Indeed Mr Gosney does not seem very engaged with the affairs of the trusts. He apparently was not aware that John was involved in the affairs of the Group (Kilmacrennan) in an executive role.

20.6 Do any of the issues affect the administration of the trust?

[652] I accept Maryanne's argument that were each or any of the trustee defendants to continue as trustees that would undermine the proper administration of the trusts. Of the present trustees, John, Frances and Mr Fisher have all actively taken sides in the family dispute to the extent that I am satisfied that they are incapable of giving consideration to the interests of some of the beneficiaries (Maryanne and Alice) in a fair and impartial manner. For whatever reason, Mr Gosney has gone along with the other trustees in his general approach to the interests of Maryanne and Alice. Notwithstanding the critical role he plays as independent trustee he has made no attempt to step around the family dispute to properly perform his role. He therefore is no check on the partiality of the other three trustees.

[653] The antipathy that John, Frances and Mr Fisher feel toward Maryanne creates more than hypothetical difficulties in the administration of the trust. These trustees have been unwilling to communicate directly with Maryanne or Alice. The trustees have also made no attempts to establish a procedure by which they can receive information as to Alice's needs. The defendants say that it is a mere oversight that prior to the filing of Alice's affidavit in these proceedings they made no inquiry into Alice's circumstances to establish her needs. If it is an oversight it is a surprising one, as to the knowledge of John and Frances, Alice is a young mother who has recently separated from her partner. She might be supposed to have needs. It appears that none of the trustees thought it part of their role to gather this

²⁹² NOE John Gosney at 1310.

²⁹³ NOE John Gosney at 1295-1298.

information. Meanwhile the needs of the grandchildren on the other side of the camp are clearly being considered and met. School fees have been paid, and the trusts have also made loans to John's sons for share investments. The trustees have also been resistant to Maryanne and Alice's requests for information about the trusts, although they have been able to obtain that information through these proceedings.²⁹⁴

[654] The trustees have also failed to address and manage the issues in connection with John's past dishonesty. The evidence in connection with it is compelling yet there is no suggestion that they have reflected upon what that means for the wellbeing of the trusts. They have simply framed the issue in terms of conflict with Maryanne. I consider that by doing so they have failed to address the best interests of the beneficiaries. Given the current make up of the trustees it is doubtful they will ever fully consider this issue.

[655] In the circumstances I consider that grounds exist for the making of orders removing John and Frances as trustees. The effect of my earlier findings is that Mr Fisher and Mr Gosney may not have not been validly appointed as trustees. For Mr Fisher that follows from my finding that his appointment was the result of undue influence. For Mr Gosney it follows from my finding that Hugh's will was not validly executed because of undue influence. I say may follow because I did not receive submissions on the consequences of a finding of undue influence.²⁹⁵ Generally transactions that are subject to undue influence are voidable by the person who has suffered undue influence rather than void.²⁹⁶ However, it may be that a different principle applies in the case of powers that are exercised while subject to undue influence.²⁹⁷ If it is necessary, I will also make orders removing Mr Fisher and Mr Gosney.

[656] Each of the trustees cannot properly discharge the role of trustee to act in the best interests of all beneficiaries because of the personal antipathy all but Mr Gosney feel toward Maryanne, which spills over into their dealings with Alice, and because

²⁹⁴ See for example NOE John Gosney at 1301-1303.

²⁹⁵ I address the need for further submission on this point at the end of this judgment.

²⁹⁶ See *Allcard v Skinner* (1887) 36 Ch D 145 (CA) at 186.

²⁹⁷ See *Harris v Rothery*, above n 52 at [172].

of the dysfunctional relationship they all have with Alice and Maryanne. I include Mr Gosney as a trustee who has a dysfunctional relationship with these beneficiaries. Allowing the trustees to continue in their role will obstruct the proper administration of the trusts.

21. Result

21.1 Probate proceedings

[657] Maryanne has sought a recall of the grant of probate for the will dated 26 April 2012. I have found that Hugh was subject to undue influence when he executed the will of 26 April, so that his will was overborne. It follows that the will is invalid and I therefore order a recall of the grant of probate for the will dated 26 April 2012.

[658] My provisional view is that it follows that the appointment of Mr Gosney was invalid as he was appointed by the executors of the will that I have found to be the product of undue influence. I will hear counsel further on this issue.

[659] Maryanne also sought orders as to which of Hugh's testamentary dispositions is valid and should be the subject of a grant of administration. Given the breadth of the issues traversed in this proceeding it was resolved to defer this issue for further submissions following judgment in the event I ordered a recall of the grant of probate.

21.2 Trust proceedings

[660] Maryanne has failed to establish that Hugh lacked capacity when he exercised powers:

- (a) appointing John and Frances as trustees;
- (b) appointing John and Frances directors of all Green Group companies;
- (c) removing Maryanne as trustee;
- (d) appointing Mr Fisher a trustee;
- (e) appointing Mr Fisher a director of all Green Group companies; and
- (f) removing Maryanne as a director of Green Group companies.

[661] However I have found that when Hugh acted to:

- (a) remove Maryanne as a trustee; and
- (b) appoint Mr Fisher a trustee;
- (c) vote to remove Maryanne as a director; and
- (d) vote to appoint Mr Fisher a director;

he was subject to undue influence exercised by John, such that he was not exercising his own free will when exercising those powers and making those decisions.

[662] Maryanne sought orders that the powers of appointment were invalidly exercised and that the decisions by Hugh to vote to appoint Mr Fisher a director and remove Maryanne as a director were invalid and of no effect. Counsel did not advance submissions on the appropriate relief in the case of a finding of undue influence. Generally transactions that are subject to undue influence are voidable by the person who has suffered undue influence rather than void.²⁹⁸ However, it may be that a different principle applies in the case of powers that are exercised while subject to undue influence.²⁹⁹ My preliminary view is that the appropriate relief is:

- (a) the removal of Mr Fisher as a trustee;
- (b) the reinstatement of Maryanne as a trustee; and
- (c) a declaration that Hugh's votes to remove Maryanne and appoint Mr Fisher as directors should be considered invalid.

However, I will also hear counsel further on this matter.

[663] In any case, I have held in the alternative that the removal of Maryanne as trustee was validly cancelled by Hugh on 21 December 2011, and Maryanne is not estopped from now asserting that she is a trustee. There may nevertheless be good reasons why she should not be a trustee. John and Frances (at least), two of the principal beneficiaries, are very hostile to her. Allowing her to remain a trustee in

²⁹⁸ See *Allcard v Skinner* (1887) 36 Ch D 145 (CA) at 186.

²⁹⁹ See *Harris v Rothery*, above n 52 at [172].

the aftermath of this litigation would be a recipe for further discord and litigation. There is however no application for removal of Maryanne.

[664] I have held that grounds are made out for the removal of Mr Fisher and Mr Gosney as trustees if that is necessary. However, as noted, it may not be necessary to make those orders as, in the case of Mr Gosney, he was appointed by executors of a will I have now found to be the product of undue influence and, in the case of Mr Fisher, he was appointed as a trustee as a result of undue influence.

[665] I have held that the resolutions of the trustees of Hugh Green Trust, the Hugh Green Property Trust and the Moira Green Property Trust purportedly passed on 5 December 2011 appointing John and Frances directors were not validly passed as the resolutions were not passed by the required majority.

[666] I have also held that grounds are made out for the removal of John and Frances as trustees on the grounds that the level of hostility they feel and exhibit toward Maryanne and Alice is sufficient to undermine the execution of the trusts for the benefit of all beneficiaries.

[667] I do not at present make orders removing John, Frances, Mr Gosney and Mr Fisher as trustees. Before I do so it is necessary to put in place interim arrangements. I said at the hearing that I will hear counsel before doing so.

[668] The power of appointment is presently in the executors of Hugh's will. I am satisfied that it is necessary for the Court to make at least an interim appointment of trustees to replace John, Frances, Mr Gosney, Mr Fisher and possibly Maryanne. This is in light of the recall of probate and the consequent uncertainty as to who are the executors. I do not address whether, when probate is granted the Court should exercise its supervisory jurisdiction to supervise the appointment of trustees. That would be addressing a hypothetical at this stage.

[669] Maryanne has also sought an inquiry into the consequences of the Court finding in her favour. This judgment will of course have flow on consequences in terms of decisions taken by trustees and directors who were not validly appointed,

and in the absence of Maryanne, who was not included as a trustee, and it seems possible, if not likely, not validly removed as a director.

21.3 Next steps

[670] I direct that this proceeding be called before me at 10 am on Thursday 18 June to address the following issues:

- (a) Any submissions directed to the appropriate relief in light of the findings of undue influence in [658] and [662] above.
- (b) Orders removing Mr Fisher and Mr Gosney as trustees if necessary.
- (c) Orders removing John and Frances as trustees.
- (d) Appointment of an interim trustee or trustees.
- (e) Any order incidental to matters or directions arising from my judgment including Maryanne's status as trustee, and status of the beneficiaries in the next phase of the proceeding.
- (f) What further steps, if any, are necessary in this proceeding, including in connection with issues of probate.

[671] It is my expectation that counsel will discuss who the interim trustees should be in advance of the hearing on 18 June 2015.

[672] The plaintiff should file written submissions by midday on Monday 15 June and the defendants by midday on Wednesday 17 June.

[673] In the meantime I make orders that the existing trustees John, Frances, Mr Fisher, Mr Gosney and Maryanne are to take no steps as trustees without further order of the Court. If urgent matters arise which require the trustees to act, the parties may ask that this proceeding be called at short notice.

22. Costs

[674] My understanding is that the parties have agreed that there will be no order for costs.

23. Confidentiality

[675] This judgment traverses the detail of a family dispute. It is also a very large judgment. I consider that the parties should have time to read it and consider its contents before it is publicly released. I therefore make orders that there is to be no publication or further distribution of the contents of this judgment or the result, until 5 pm Wednesday 10 June 2015. If there are any applications for ongoing suppression they should be filed by midday on 8 June 2015.

Postscript

[676] Having provided the parties with the opportunity referred to in [675] above, limited applications were made for redaction. These were made to meet what I considered to be legitimate privacy concerns regarding health information, or distributions to members of the family about which there could be no concerns. Having heard the submissions, all of the existing suppression orders are lifted save for the following. I order permanent suppression of the following:

1. Paragraph [29] – the second half of the second sentence, after the words “chronic ailments”.
2. Paragraph [32] – the three monetary values contained in the quote set out there.
3. Paragraph [33] – the last two words in the second sentence. Also, those words where they are repeated in the third sentence.
3. Paragraph [118(c)] – the words that appear after that part of the second sentence which ends “he suffered from”.

4. Paragraph [124] – the monetary amount set out there.
5. Paragraph [131] – the third sentence.
6. Paragraph [345] – that part of the second sentence which follows on after the words “in her recollections”.
7. Paragraph [391] – the names of the three companies referred to in this paragraph (I do not include the reference to the Green Group in this). The monetary amount set out in the last sentence.
8. Paragraph [392] – the monetary amount set out in the second sentence.
9. Paragraph [394] – the name of the company referred to there.
10. Paragraph [395] – the name of the company referred to there.
11. Paragraph [397] – the name of the company listed there.
12. Paragraph [494(b)] – the monetary amount set out there.
13. Paragraph [494(c)] – the monetary amount set out there.
14. Paragraph [496] – the monetary amount set out there.
15. Paragraph [508(a)] – the monetary amounts set out there.
16. Paragraph [634] – the monetary amounts set out there, including the Australian dollar amount.
17. Paragraph [635] – the monetary amounts set out there.
18. Paragraph [637] – the monetary amount set out there.
19. Paragraph [639] – the monetary amounts set out there.