

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

**CIV-2013-404-4840
[2015] NZHC 1526**

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 GHREEN, 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

CIV-2013-404-3676

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

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
Defendant

Hearing: 18 June 2015

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: 2 July 2015

JUDGMENT OF WINKELMANN J

This judgment was delivered by me on 2 July 2015 at 4.30 pm pursuant to
Rule 11.5 of the High Court Rules.

Registrar/ Deputy Registrar

[1] In a judgment dated 3 June 2015 I found that Hugh Green exercised various powers subject to the undue influence of his son, John Green.¹ I also ordered the recall of the grant of probate for Hugh Green's will dated 26 April 2012 on the basis that Hugh had been subject to undue influence when he executed that will. I sought submissions on the appropriate relief in light of those findings.² At a hearing on 18 June 2015 I heard counsel in relation to the issue of relief. Most orders are able to be made on a consent basis, although I record that the defendants reserve their rights in respect of all issues determined in the proceedings. Their consent to any orders is not a waiver of any appeal rights they have.

Status of Maryanne Green as a trustee of the Hugh Green Trust and the Hugh Green Property Trust

[2] In the judgment of 3 June 2015 I found that Maryanne Green had not been validly removed as a trustee of these trusts, and in any case had been validly reappointed. The parties agree that a declaration should issue that Maryanne Green is a trustee of the Hugh Green Trust and the Hugh Green Property Trust. However in advance of the hearing the defendants proposed that Maryanne's trusteeship be stayed pending an appeal. I return to this issue shortly.

Removal of trustees

[3] In the judgment of 3 June 2015 I found that when Hugh appointed Mr Fisher a trustee, Hugh was subject to undue influence. I sought submissions as to the appropriate relief in those circumstances. All counsel are in agreement that it flows from this finding that the decision appointing Mr Fisher a trustee is void. I am satisfied that is so.³ A declaration should therefore issue that Mr Fisher was not validly appointed a trustee of the Hugh Green Trust and the Hugh Green Property Trust on 29 March 2012 or at any other time.

[4] I expressed the provisional view in my judgment that a consequence of the recall of the grant of probate for the will dated 26 April 2012 was that the appointment of Mr Gosney as a trustee was invalid. This was because he had been appointed by the executors of a will I found to be the product of undue influence. It is now common ground that the appropriate relief in light of that finding is that I

¹ *Green v Green* [2015] NZHC 1218.

² At [670].

³ *Futter v Commissioners for Her Majesty's Revenue and Customs* [2013] UKSC 26; *Harris v Rothery* [2013] NSWSC 1275, at [172].

issue a declaration that Mr Gosney was not validly appointed a trustee of the Hugh Green Trust or the Hugh Green Property Trust on 21 September 2012 or at any other time.

[5] In the judgment I also made findings that there were grounds for the removal of John and Frances Green namely that the level of hostility they feel and exhibit towards Maryanne and Maryanne's daughter Alice, is sufficient to undermine the execution of the trusts for the benefit of all beneficiaries. Counsel are in agreement that the appropriate orders in the light of those findings are that Frances and John be removed as trustees of the Hugh Green Trust and the Hugh Green Property Trust.

Directorships

[6] In the judgment I found that when Hugh voted to remove Maryanne as a director he was subject to undue influence. At the hearing on 18 June counsel for the plaintiff submitted that in light of that finding a declaration should issue that Maryanne is a director of all group companies from which she was removed as a director from 2 April 2012 onwards ("the Companies"). Counsel for the defendants initially submitted that the declaration should be limited to the invalidity of Hugh's votes, but that the issue of Maryanne's ongoing tenure should be left to the interim trustees. However, counsel subsequently agreed that the suggested declaration was appropriate.

[7] I record that the expression "the Companies" does not include Hugh Green Charitable Trust Ltd, a company from which Maryanne resigned as a director.

[8] It was common ground that a declaration should issue that Maryanne Green is not liable as a director for any directors' decisions and actions between 2 April 2012 and the date of this judgment.

[9] It was also common ground that the consequence of my various findings in relation to undue influence and in relation to the lack of requisite majority for some of the trustees' decisions is that John Green, Frances Green, Mr Fisher and Mr Gosney have not been validly appointed and were not and are not directors of the Companies. It was agreed there should be a declaration to that effect. At the hearing

counsel for the trustee defendants, Mr Stewart, expressly disavowed a suggestion that these defendants should continue as directors.⁴

[10] There was also an issue as to whether Mr John Wilson, a current director of some Green Group companies was validly appointed. All parties agreed that it was in the interests of the Green Group that he continue as a director and that it should be left to the interim trustees to make a determination as to Mr Wilson's status as a director. An initial submission that his appointment was invalid was retracted by counsel for the plaintiff.

Interim trustees

[11] The 3 June 2015 judgment contemplates the appointment of interim trustees; a necessity because of the removal of all existing trustees except Maryanne.

[12] The parties have filed their proposals as to who are appropriate interim trustees. The defendants have proposed Mr David Harding Randell, chartered accountant and company director of Auckland. The plaintiff initially proposed Mr Christopher Darlow and Ms Kathryn Roberts. Prior to the hearing the plaintiff also proposed Mr Peter Mahoney, a property consultant and company director, as a possible alternative if the Court was not prepared to appoint Ms Roberts. All four have signalled their consent to act. Mr Darlow and Mr Randell have no previous association with the Green Group. However Ms Roberts is proposed as a trustee by Maryanne on the basis that Ms Roberts has extensive knowledge of the companies and trusts, their assets and the overall business plan for the group. Mr Mahoney also had a history of involvement with Hugh Green and management personnel within the Hugh Green Group.

[13] During discussion with counsel I indicated my view that the interim trustees should have had no previous involvement in the subject matter of this dispute. It is important that the interim trustees have the confidence of all beneficiaries and that there be no perception that they will favour one side or the other. In short, it is important that there be a period of stability if that is possible.

[14] The defendants oppose the appointment of Ms Roberts on the basis that she has been Maryanne's confidant for some time and has over that time built up a close

⁴ Memorandum of counsel for defendants dated 11 June 2015 at [31].

relationship with Maryanne. This causes them concern that she will be affected in her ability to act in a non partisan manner.

[15] Although Ms Roberts has impressed me as a skilled professional able to rise above partisan interests in this proceeding, the extent of the defendants' opposition means that it would be an unwise course to appoint her as one of the interim trustees.

[16] The defendants also oppose the appointment of Mr Mahoney. They have a similar perception that he is in Maryanne's "camp". There was no detailed evidence provided of this opposition. However, as I have indicated, my view is that it is desirable that the interim trustees be as independent as possible. Perceptions, whether they are justified or not, that a proposed trustee might not act impartially between the beneficiaries, undermine the aim of achieving stability during this period.

Maryanne's ongoing position as a trustee

[17] In relation to Maryanne, the defendants say that all of the beneficiaries other than Maryanne and her daughter Alice oppose her continuing as a trustee and propose to make an application for her removal. In advance of the hearing they filed an application for a stay of the judgment. Although it was expressed in broad terms, the defendants' submissions clarified that the defendants only sought to stay the judgment insofar as it had the effect of re-instating Maryanne as a trustee.

[18] I have previously expressed concern that Maryanne's active participation as trustee is a further recipe for discord and litigation. I proposed to the parties that only the interim trustees should be charged with decision making in respect of the trusts and that Maryanne should stand aside, at least for the time being.

[19] Maryanne is of course a trustee, and the assets of the trust vest in her by virtue of that fact. There is currently no application to remove her before the Court. I cannot stay the effect of a declaration that she is a trustee, as the declaration merely formally states the true position, it does not bring it into being. In any case following discussion it was agreed that consent orders could be made that until further order of the Court Maryanne will not exercise her powers to vote as a trustee, and will not attend meetings of the trustees, unless invited to do so by the interim trustees. She will however receive all information available to other trustees.

[20] I record that in making this order, I do not suggest that Maryanne Green is not fit to be a trustee. Maryanne is prepared to accept the making of the proposed orders, in the interests of attempting to achieve some stability within the trusts and to progress issues between the parties. Her consent to the making of this order is nevertheless on the basis that the defendants' application for her removal as trustee will be promptly heard and determined and on the basis of the making of the other orders outlined.

[21] All parties agree that Maryanne is not liable for trustees' decisions and actions made after 20 December 2011 and whilst the interim restraining orders are in place.

[22] In light of this compromise position, at the 18 June hearing the defendants did not seek to pursue their application for a stay of the judgment.

[23] That leaves the issue of the interim trustees. Mr Randell and Mr Darlow are appointed on the basis of the hourly charge out rates they record in their affidavits. Those costs are to be met from the trusts' assets.

[24] The interim trustees are appointed until further order of the Court. There is to be a further hearing in August, the interim trustees are to report to the Court at that hearing on the management of the trusts, including whether it is necessary to appoint any further interim trustees.

Costs

[25] All parties are in agreement that reasonable costs of current counsel and solicitors in respect of the costs to date, and the beneficiaries' costs in respect of further applications in this proceeding are able to be met out of the trust funds.

Next steps in the proceedings

[26] There is an outstanding issue in connection with the grant of probate. Although I recalled the grant of probate in respect of the will of 26 April, I made no grant of administration in respect of any of Hugh's other testamentary dispositions. All parties agree that issue should not be resolved at this point in time. The defendants have signalled the possibility of an appeal. It is in any case understood that the estate has nearly been wound up and that all there is left to be done is to

resolve the outstanding issue in relation to the “Irish funds” and file a statement of assets and liabilities. In those circumstances, the parties wish to defer the issue of the grant of administration.

[27] There is however the need to deal with the defendants’ application to remove Maryanne as a trustee. I have asked counsel to propose a procedural mechanism in connection with this application. Counsel for the defendants say it is to be in the form of a counterclaim, although it arises in respect of a proceeding where judgment has been issued in respect of the existing claims and counterclaims. Perhaps however, the application for recall can properly be seen as an aspect of the relief phase of the proceeding. In any case if there is a procedural basis for the application to remove Maryanne as a trustee to be dealt with in the context of these proceedings, then I agree with the defendants and the plaintiff that it is desirable that course is followed. I have asked counsel to address the appropriate procedural path in their submissions in support of the application for removal. They should also address whether and how the other beneficiaries are to be represented in connection with that application.

[28] In the meantime I make timetable orders as follows:

- (a) Any pleadings and application for removal of Maryanne and any supporting affidavits to be filed and served within 10 working days of the date of these orders.
- (b) Any pleading in reply by the plaintiff, any notice of opposition and any supporting affidavits to be filed and served within a further 10 working days.

[29] The parties are in agreement that the evidence in this proceeding can be evidence in the new application.

[30] I ask that the registry allocate a hearing date, (in consultation with me) in respect of that application for late August.

Orders

[31] To conclude to this point, I make the following orders:

- (a) It is declared that Maryanne Green is a trustee of the Hugh Green Trust and the Hugh Green Property Trust.
- (b) Maryanne Green is restrained from exercising her power to vote as a trustee pending further order of the Court, and is not to attend trustee meetings unless called upon to do so by the interim trustees, but will receive all information provided to the interim trustees.
- (c) It is declared that Maryanne Green is not liable for trustee decisions and actions made after 20 December 2011 until further order of the Court.
- (d) Christopher Robert Darlow and David Harding Randell are to be appointed interim trustees of the Hugh Green Trust and the Hugh Green Property Trust, those appointments to continue until further order of the Court. They are to be remunerated in accordance with the rates of remuneration as set out in each of their affidavits. That remuneration is to be paid from the assets of the Hugh Green Trust and the Hugh Green Property Trust.
- (e) All trust assets are vested in Mr Darlow, Mr Randell and Maryanne Green with immediate effect.
- (f) It is declared that Michael John Fisher was not validly appointed a trustee of the Hugh Green Trust and the Hugh Green Property Trust on 29 March 2012 or at any other time.
- (g) It is declared that John James Gosney was not validly appointed a trustee of the Hugh Green Trust or the Hugh Green Property Trust on 21 September 2012 or at any other time.
- (h) Frances Kathleen Green is removed as a trustee of the Hugh Green Trust and the Hugh Green Property Trust.

- (i) John Patrick Green is removed as a trustee of the Hugh Green Trust and the Hugh Green Property Trust.
- (j) It is declared that Maryanne is a director of all group companies from which she was removed as a director from 2 April 2012 onwards (the Companies).
- (k) Maryanne Green is not liable for any directors' decisions and actions between 2 April 2012 and the date of these orders.
- (l) It is declared that John Green, Frances Green, Michael Fisher and John Gosney were not validly appointed as and are not directors of the Companies.
- (m) The trustees of the Hugh Green Trust and the Hugh Green Property Trust may not exercise any power to appoint or remove trustees or to resettle trust assets without notice to the beneficiaries and without consent of the Court.
- (n) The interim trustees are authorised to pay the reasonable costs of current counsel/solicitors in respect of all parties' costs to date and the beneficiaries' costs in respect of further applications in this proceeding, but not in respect of any appeal. The payment of any beneficiaries' costs not covered by this order will be a matter for the interim trustees or the Court.
- (o) Leave is reserved to any party to apply in connection with the implementation of these orders. Leave is reserved to Mr Darlow and Mr Randell to apply in connection with these orders or for any directions they seek.
- (p) The interim trustees are to report to the Court at the August hearing on the management of the trusts, including whether it is necessary to appoint any further interim trustees.

Postscript

[32] Several days after the hearing, but before issue of this judgment, counsel for the defendants filed a memorandum seeking to revive the application for a stay, but this time staying the judgment as it impacts upon the directorships rather than the trustees. I convened a telephone conference to address whether I should consider these submissions. Shortly before the telephone conference the defendants filed two affidavits, one from Mr Gosney describing his view of the impact on the Hugh Green Group were Maryanne to be a director, and one from a staff member describing a conversation with Maryanne. I understand the defendants rely upon these affidavits to show that Maryanne is already causing difficulty in the company.

[33] I decline to receive the affidavits as evidence to be taken into account for the remedy hearing. That hearing concluded on 18 June 2015. Leave to file additional evidence was therefore required. Mr Gosney could have filed evidence if he wished to, in advance of that hearing. There is no adequate explanation for his delay. If I receive Mr Gosney's affidavit, then Maryanne and Alice will have to have an opportunity to reply. I do not consider that course is desirable for reasons I come to shortly.

[34] The other affidavit, of Mr Humphrey, was strongly objected to by counsel for Ms Piper, Mr Hunter. He said he had instructions that the deponent now wishes to retract the affidavit. When this was raised with Mr Waalkens he then read an email his instructing solicitor had received from the deponent in which he qualified if not retracted the contents of the affidavit. The contents of that affidavit are clearly unreliable.

[35] As I remarked during the conference, the circumstances in which this issue has come back before me are also unusual. Although Mr Waalkens disputes anything irregular the facts are that Mr Stewart acted as counsel for the defendant trustees in the hearing last year, and in the hearing on 18 June 2015. Mr Waalkens has throughout appeared as counsel for the defendants in the probate proceeding. Now Mr Waalkens appears as counsel for the defendant trustees without explanation for the change of counsel, picking up an argument which had wisely been previously abandoned by their counsel, Mr Stewart.

[36] As I made clear at the hearing, I consider the best approach to governance issues is to appoint the interim trustees. They will be able to make decisions about

the governance of the group in the best interests of the company. I cannot stay the effect of findings already made.

[37] I therefore decline to consider the renewed application for stay. The defendants elected not to proceed with it at the 18 June hearing and there is no explanation for the change in position other than second thought. To allow them to revive it now would require a re-opening of the issues, requiring time to be allowed for Maryanne to respond. The delay occasioned by that is in no-one's interest. In any case, I consider the application has no merit.

“Winkelmann J”