REDACTED VERSION

NOTE: HIGH COURT ORDER PROHIBITING PUBLICATION OF SPECIFIED DETAILS, INCLUDING THOSE RELATING TO MOIRA GREEN SET OUT AT [61] OF THIS JUDGMENT, REMAINS IN FORCE.

IN THE COURT OF APPEAL OF NEW ZEALAND

CA365/2015
CA411/2015
[2016] NZCA 486

BETWEEN	JOHN PATRICK GREEN, MICHAEL JOHN FISHER, FRANCES KATHLEEN GREEN AND ROBERT NAREV (AS EXECUTORS AND TRUSTEES OF THE ESTATE OF HUGH GREEN UNDER A WILL DATED 26 APRIL 2012) First Appellants
	JOHN PATRICK GREEN, MICHAEL JOHN FISHER, FRANCES KATHLEEN GREEN AND JOHN JAMES GOSNEY (AS TRUSTEES OF THE HUGH GREEN TRUST AND THE HUGH GREEN PROPERTY TRUST Second Appellants
	JOHN PATRICK GREEN Third Appellant
AND	MARYANNE GREEN Respondent

Hearing:	25–26 July 2016
Court:	Kós P, Harrison and French JJ
Counsel:	A H Waalkens QC for First Appellants M D O'Brien QC for Second Appellants J A Farmer QC and J D Ryan for Third Appellant V T M Bruton QC and I Rosic for Respondent S M Hunter and S H Ambler for Interested Party
Judgment:	7 October 2016 at 10.00 am

JUDGMENT OF THE COURT

A **The application made by the respondent and Alice Piper dated 22 April 2016 for leave to adduce further evidence is granted in relation to the two reports of the interim trustees but declined in respect of the affidavits of Maryanne Green sworn 26 March 2015, 27 March 2015, 31 March 2015 and 26 August 2015.**

B **The second application made by the respondent and Alice Piper dated 9 May 2016 for leave to adduce further evidence is declined.**

C **The appeals in CA365/2015 and CA411/2015 are dismissed.**

D **There is no order as to costs.**

REASONS OF THE COURT

(Given by French J)

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Introduction

[1] Mr Hugh Green (Hugh)[1] was an extraordinarily successful businessman. During his lifetime he founded and operated a group of companies worth hundreds of millions of dollars (the Green Group). The shares in the companies are owned by trusts so that whoever controls the trusts also controls the companies.

[2] Hugh and his wife Moira had five children: John, Maryanne, Frances, Eamon and Gerard.[2] Maryanne was the only one of the children to work closely with Hugh in the business for any length of time. She first started working for her father in 1987. As at February 2010 she held the position of CEO of the Green Group and was a trustee and director of the main trusts and companies. The two most important trusts were and are the Hugh Green Trust and the Hugh Green Property Trust.[3]

[3] Hugh and Moira's children and grandchildren, as well as Moira herself, are beneficiaries of both the Hugh Green Trust and the Hugh Green Property Trust.[4] Under the relevant trust deeds Hugh had the sole power of appointment and removal of trustees during his lifetime. The trust deeds also provided that on Hugh's death the power of appointment would vest in the executors and trustees of his estate.

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1 To avoid confusion, we refer to members of the Green family by their first name.

2 For reasons that will become relevant at [149] below, we note Gerard was adopted by Hugh and Moira.

3 The assets of a further trust, the Moira Green Property Trust, were resettled on the Hugh Green Property Trust on 20 September 2012. It was not suggested anything turned on the resettlement of the Trust.

4 Moira's sister and certain charities are also beneficiaries of the Hugh Green Property Trust. As mentioned in [149], there is an issue as to whether adopted children and grandchildren are beneficiaries of the Hugh Green Property Trust.

[4] In February 2010 Hugh was diagnosed with terminal cancer. That prompted discussion about succession planning. Previously the understanding was that Maryanne would take over from Hugh. However, from around March 2011 Hugh began to express the wish that John and Frances should also become more involved in the business. Maryanne was strongly opposed to John having any significant role because of his past dishonest conduct and because his business practices were so different from her own. Maryanne did not believe John was a fit person to be either a director or a trustee.

[5] Tensions arose within the family as various proposals were mooted and debated. Over a period of nine months Hugh made a number of decisions, the combined effect of which was to remove Maryanne completely from control of any aspect of the Green Group and to put John and Frances and a lawyer, Michael Fisher, in charge. Hugh appointed Frances and John trustees on 8 November 2011 and directors of certain Green Group companies on 5 December 2011; removed Maryanne as trustee on 20 December 2011 and director on 2 April 2012; appointed Mr Fisher as trustee on 29 March 2012 and director on 2 April 2012; then on 26 April 2012 executed a new will appointing John, Frances and Mr Fisher as executors and trustees of his estate.

[6] Hugh died on 13 July 2012. In September 2012, on the recommendation of Mr Fisher, another lawyer, Mr Gosney, was appointed a trustee and director.

[7] Maryanne then issued proceedings in the High Court challenging the validity of seven of Hugh's decisions on the grounds inter alia of lack of capacity and/or undue influence.[5] She was supported by her daughter, Alice Piper, who was joined to the proceedings as an interested party.

[8] The impugned documents included the will signed by Hugh on 26 April 2012 making changes to his executors and trustees. The will retained one of Hugh's oldest and most trusted advisers — a Mr Narev — as an executor, but removed Moira from

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5 The other causes of action were: that Hugh had improperly exercised his fiduciary power of appointment and removal of trustees; that the Court should exercise its power under the Trustee Act 1956 to appoint new trustees; and that the removal of Maryanne as a trustee was invalid or that she had been subsequently reappointed by Hugh.

that role and added Frances, John and Mr Fisher. This was a significant change. As mentioned, the trust deeds of the Hugh Green and Hugh Green Property Trusts provided that on Hugh's death the power of appointment and removal of trustees would vest in his testamentary executors and trustees. The April 2012 will had been granted probate before Maryanne issued her proceedings and one of the remedies she sought was a recall of that grant.

[9] The case was heard by Winkelmann J. In a judgment dated 3 June 2015 (the substantive judgment) the Judge made the following key findings:[6]

(a) In so far as there was a conflict between the evidence of Maryanne and the main witnesses called by the appellants, the Judge preferred the evidence of Maryanne. The Judge found Maryanne to be a truthful and reliable witness whose evidence was corroborated by contemporaneous documentation. The Judge did not find John a credible and reliable witness.

(b) At the time Hugh made all of the impugned decisions he had capacity in the sense that he knew and understood the effect of what he was endorsing.

(c) Hugh's appointment of John and Frances as trustees of the Hugh Green Trust and Hugh Green Property Trust on 8 November 2011 was not the product of undue influence.

(d) The appointment of John and Frances as directors of the main companies in the Green Group on 5 December 2011 was not the product of undue influence, but it was invalid because the resolution was not passed by a sufficient number of trustees, as required under the relevant trust deeds.

(e) Four decisions made by Hugh between 20 December 2011 and 26 April 2012, involving the removal of Maryanne as trustee and

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6 *Green v Green* [2015] NZHC 1218 [Substantive judgment].

director, the appointment of Mr Fisher as director and trustee, and the signing of the April 2012 will, were the result of pressure exerted on Hugh by John amounting to undue influence.

(f) Mr Fisher did not himself consciously apply pressure on Hugh but assisted John to do so.

(g) On 21 December 2011 Hugh unconditionally reinstated Maryanne as trustee of the Hugh Green Trust and the Hugh Green Property Trust and she was not estopped from asserting otherwise.

[10] After delivering the substantive judgment, Winkelmann J gave the parties a further opportunity to be heard on what relief should flow from the findings. In a subsequent relief decision Winkelmann J made various declarations and orders, including the removal of John and Frances as trustees and the appointment of independent interim trustees.[7]

[11] Dissatisfied with that outcome, John, the other trustees and executors appointed under the April 2012 will and the other trustees of the Hugh Green and Hugh Green Property Trusts then filed appeals against both the substantive judgment (CA365/2015) and the relief decision (CA411/2015).

[12] There is no cross-appeal by Maryanne against the finding of capacity.

Grounds of appeal

[13] The principal submission advanced on behalf of the appellants is that there was no direct evidence of undue influence and no justification on the evidence for inferring it. Hugh wanted his children to run the business together, but Maryanne would have none of it. She remained obdurate and eventually Hugh lost patience with her. That being the evidence, the appellants say the inference the Judge should have drawn was that Maryanne was the author of her own misfortune. Her removal was the result of her refusal to co-operate, not undue influence. All that John and Mr Fisher did was implement Hugh's wishes, which never altered. In their

7 *Green v Green* [2015] NZHC 1526 [Relief judgment].

submission, there was no qualitative difference between the decisions the Judge found were the product of undue influence and those she found were not.

[14] The appellants further contend the Judge erred in law by failing to correctly identify all the elements of undue influence Maryanne was required to prove.

[15] As regards the Judge's relief decision, the appellants submit there was no proper basis for the order removing Frances and John as trustees.

[16] It was a central theme of the appellants' submissions in relation to both appeals that "it was not about the money" but about wanting Hugh's wishes respected.

Applications to adduce further evidence

[17] Maryanne filed two applications seeking leave to adduce further evidence on appeal. Both applications were opposed.

[18] The first item of contested further evidence consists of two reports from the interim trustees dated 20 August 2015 and 4 November 2015. The appellants say the reports are not relevant. We disagree. The reports were filed in the High Court pursuant to an order made by Winkelmann J directing the interim trustees to report to the Court on the management of the trusts. They are in the nature of updating evidence. They are credible and bear on issues raised by the appeal against the relief decision. We consider it entirely appropriate and desirable that we have information relating to the workability of the Judge's interim orders.

[19] The next item consists of three affidavits sworn and filed by Maryanne in the High Court in support of an application she made for interim orders restraining the appellants from taking further steps as trustees and executors pending final judgment. The affidavits contain evidence that in early 2015 the appellant trustees had refused to make a small distribution of $149.50 to Alice for medical insurance costs, having three months earlier made a distribution of $4.5m to Moira and having asked the latter to indemnify them in relation to claims by beneficiaries.

[20] The appellants oppose the admission of the evidence on the ground it is not fresh. They also contend that, while they formally opposed the application for interim orders in the High Court, the application was ultimately resolved by an agreed form of undertaking and they deliberately did not engage with all the factual matters now sought to be adduced as further evidence. It does not appear this evidence was considered by Winkelmann J.

[21] In all those circumstances we agree it would be wrong for it to be admitted on appeal.

[22] The third item is evidence of invoices of legal fees issued by Mr Fisher for work done relating to the Green family, trusts and companies. The evidence is fresh in the sense that Maryanne only obtained the information after the High Court hearing. Justice Winkelmann had found that Mr Fisher should have advised Hugh he (Mr Fisher) stood to gain a personal benefit from being appointed a trustee. Maryanne says it is accordingly important this Court have accurate figures, the invoices showing the total fees charged by Mr Fisher were significantly more than he stated in evidence.

[23] The Judge's finding was based inter alia on evidence of fees of $600,000.[8] We do not consider the finding turns on whether the fees were significantly more or not. The invoices are of peripheral relevance and accordingly we decline leave they be admitted.

[24] The final item of evidence is evidence relating to the resignation of a Mr Scott as trustee of the Hugh Green Trust and Hugh Green Property Trust in March 2015. He was appointed an independent trustee by the appellants and resigned over differences between him and the other trustees — Mr Fisher in particular — on governance structures. Mr Scott wanted to be a director as well as a trustee, whereas Mr Fisher considered it was desirable to have someone who was solely a trustee. Maryanne contends this evidence is relevant because it shows the appellants were unable to work with the sole independent professional trustee, which

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8 Substantive judgment, above n 6, at [625].

in turn is relevant to their contention that the Court of Appeal should quash Winkelmann J's orders and reinstate them.

[25] We consider this evidence raises collateral issues outside the proper scope of the appeal. We accordingly decline to admit it.

The scope of appellate review

[26] As will be apparent, this appeal is intensely fact-based. The primary challenges are challenges to factual findings, including findings of credibility and the drawing of inferences. They were made by a Judge in a 197-page judgment after a five-week hearing, during which she saw and heard the key witnesses.

[27] Much of the appellants' written synopses consisted of lengthy and somewhat selective restatements of the evidence without identifying the error or errors allegedly made by the trial Judge, as if we were conducting a retrial in the absence of a primary judgment. That approach does not assist us. Unfortunately, it is an approach that is becoming all too common and may result from a misunderstanding about the proper role of an appellate court and the important decision of *Austin, Nichols & Co Inc v Stichting Lodestar*.[9] In those circumstances we consider it appropriate to restate the relevant principles.

[28] As the Supreme Court held in *Austin, Nichols*, those exercising general rights of appeal are entitled to judgment in accordance with the independent opinion of the appellate court.[10] That is so even where that opinion is an assessment of fact and degree and entails a value judgment. If the appellate court's opinion is different from the conclusion of the court below, the appeal must be allowed even if it was a conclusion on which reasonable minds might differ.

[29] *Austin, Nichols* reaffirmed the appellate court's obligation to form its own independent judgment on the merits of an appeal by way of rehearing. But two fundamentals remain constant.[11]

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9 *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141.
10 At [16].
11 See, for example, *Simon v Wright* [2013] NZHC 1809 at [22]–[23].

[30] First, it is still axiomatic that the appellant bears the onus of persuading the appellate court to reach a different conclusion. Of necessity, in discharging that onus the appellant must identify the respects in which the judgment under appeal is said to be in error.

[31] Second, it is also axiomatic that in determining whether the judgment was wrong the appellate court will take into account any particular advantages enjoyed by the trial court. The advantages possessed by a trial judge in determining questions of fact are obvious, especially where assessments of credibility and reliability are involved. The trial judge gets to see and hear the witnesses, and is able to evaluate the strength of the evidence as it progressively unfolds within the context of the trial as a whole. As this Court pointed out in *Rae v International Insurance Brokers (Nelson Marlborough) Ltd*:[12]

> As the evidence unfolds the trial Judge gains an impression from the evidence which is not necessarily or usually apparent from the cold typeface of the transcript of that evidence on appeal. The Judge forms a perception of the facts in issue from which he or she adds or subtracts further facts as witnesses give their evidence, and so obtains as complete a picture as is possible of the events in issue. The Judge perceives first hand the probabilities inherent in the circumstances traversed in the evidence and can obtain a superior impression of those probabilities as a result.

[32] It was for those reasons the Supreme Court in *Austin, Nichols* expressly stated an appellate court should exercise caution in considering challenges to findings of credibility.[13]

[33] As mentioned, Winkelmann J heard evidence from a number of witnesses in a closely contested trial lasting six weeks. We must recognise that reality and the special advantage she enjoyed over an appellate court. That factor does not, of course, justify inappropriate deference to her findings or exempt us from conducting our own independent analysis of the evidence, which we have undertaken. It does, however, underscore the importance of the trial judge's function and an appellant's obligation to show material error or errors and particularise the grounds in support.

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[12] *Rae v International Insurance Brokers (Nelson Marlborough) Ltd* [1998] 3 NZLR 190 (CA) at 199.

[13] *Austin, Nichols & Co Inc v Stichting Lodestar*, above n 9, at [13].

[34] Mr O'Brien QC sought to neutralise the effect of these principles by submitting that critical findings made by the Judge were inferences drawn from primary facts; and that we should thus be more willing to depart from those findings than we would findings based on evaluations of witnesses. We note that most judgments in trials on contested facts depend to some degree on the judicial process of drawing inferences. This decision was no different. However, the primary inference drawn by the Judge — that four decisions made by Hugh were the result of undue influence exercised by John — was founded squarely upon critical factual findings about the credibility and reliability of certain witnesses. We do not accept the appellants can rely on the distinction between direct evidence and inferences to circumvent the settled principles applying to an appeal against a fact-based judgment.

The law relating to undue influence

[35] In her substantive judgment Winkelmann J stated the applicable legal principles relating to undue influence in the following terms:[14]

> (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.
>
> (c) The person asserting undue influence must show the alleged influence led to the making of the impugned transaction, and 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.
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> (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
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> (i) the person said to have been subject to undue influence placed trust and confidence in the other; and
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> (ii) the transaction called for an explanation.

[14] Substantive judgment, above n 6, at [100].

> [We interpolate that on the facts of this case Maryanne conceded she could not rely on any evidential presumption but had to prove actual undue influence.]
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> …
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> (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.
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> (i) Allegations of undue influence may succeed in relation to the exercise of powers not just the transfer of property.

[36] In respect of undue influence alleged in the context of the making of a will, her Honour observed:[15]

> (a) …
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> (b) … pressure of whatever character can amount to undue influence if it overbears the will of the testator. As Sir JP Wilde recognised:
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> > 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

[15] Substantive judgment, above n 6, at [101].

> 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 Simeti*:
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> > … 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.
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> (Footnotes omitted.)

[37] On appeal, the appellants argued that while the Judge's statement of the relevant principles was "broadly accurate", it was deficient in two important respects.

Requirement of unconscionable conduct

[38] The first alleged deficiency was that the Judge failed to recognise undue influence can only be made out if there is impropriety or unconscionability on the part of the person allegedly exerting the undue influence, in this case John. Counsel submitted the Judge's failure to recognise this requirement was critical because, although Winkelmann J found that John had overborne Hugh's will, she also found John genuinely believed it was in the interests of all for Maryanne to be removed from any position of control. Had the Judge correctly directed herself on the law, this latter finding, which amounted to a finding of absence of bad faith or impropriety, should have precluded any finding of undue influence.

[39] We agree the doctrine of undue influence is founded on unconscionability in the sense that equity considers it inherently unconscionable for a person to rely on a transaction that has been procured by overbearing another's will. References to unconscionability in some of the cases need to be understood in that context.[16] However, we do not agree with the wider proposition advanced by the appellants that as a matter of law impropriety is a prerequisite of undue influence and that

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[16] John McGhee *Snell's Equity* (33rd ed, Sweet & Maxwell, London, 2015) at [8-018].

accordingly the conduct or motives of the person applying the pressure must for some additional reason (that is, other than the fact of applying pressure) be wrongful or improper.

[40] Such a submission is, in our view, contrary to the weight of New Zealand authority and general principle.[17] The essence of the undue influence doctrine is impairment of free will. It is the overbearing of the will that makes the influence "undue". The focus is thus on the mind of the person consenting to the impugned transaction, not the motives of the person exerting the pressure or influence. This was expressly reaffirmed by this Court in *Carey v Norton*.[18] As stated in Butler, "an act of wrongdoing is not and never has been a prerequisite of undue influence", and "[t]he doctrine affords a remedy even where no criticism can be made of the defendant in relation to the transaction".[19]

[41] On behalf of all appellants, Mr O'Brien submitted the law as stated in *Carey v Norton* had changed following the later decision of the House of Lords in *Royal Bank of Scotland v Etridge (No 2)*.[20] In support of that submission, he relied in particular on statements by Lord Nicholls that "undue influence has a connotation of impropriety" and that the doctrine applies where an intention to enter into the impugned transaction is "produced by unacceptable means".[21]

[42] We acknowledge the principles articulated in *Etridge* have been endorsed by both the Privy Council[22] and this Court.[23] However, what was said in *Etridge* is, in our view, consistent with *Carey v Norton*. There is no suggestion in the *Etridge* decision that malevolent intent or unconscionable conduct is a separate and distinct requirement to impairment of the will. The statements relied on from the speech of

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17 *Allcard v Skinner* (1857) 36 Ch D 145 (CA) at 171; *Norton v Carey* HC Auckland M191/95, 1 July 1996 at 53; *Carey v Norton* [1998] 1 NZLR 661 (CA); *Royal Bank of Scotland v Etridge* [2002] 2 AC 773 (HL) at [8]; Andrew Butler (ed) *Equity and Trusts* (2nd ed, Thomson Reuters, Wellington, 2009) 679 at [22.4.1](1) and [22.4.5]; G E Dal Pont *Equity and Trusts in Australia* (6th ed, Thomson Reuters, Sydney, 2015) at [7.05]; McGhee, above n 16, at [8-018]; Edwin Peel (ed) *Treitel – The Law of Contract* (14th ed, Sweet & Maxwell, London, 2015) at [10-014].

18 *Carey v Norton*, above n 17.

19 Butler, above n 17, at [22.4.1](1) and [22.4.5].

20 *Royal Bank of Scotland v Etridge (No 2)*, above n 17.

21 At [32] and [7], respectively.

22 *Attorney-General for England and Wales v R* [2003] UKPC 22, [2004] 2 NZLR 577 at [21].

23 *Hogan v Commercial Factors Ltd* [2006] 3 NZLR 618 (CA).

Lord Nicholls have, in our view, been misconstrued by the appellants and taken out of context. The full passage in the speech concerning "unacceptable means" reads:[24]

> If the intention was produced by an unacceptable means, the law will not permit the transaction to stand. The means used is regarded as an exercise of improper or 'undue' influence, and hence unacceptable, whenever the consent thus produced ought not fairly to be treated as the expression of a person's free will. It is impossible to be more precise or definitive.

[43] As for his Lordship's comment that the doctrine has a connotation of impropriety, that was said in the context of what he described as a "cautionary note" relating to cases about a wife's guarantee of her husband's bank overdraft.[25] The comment does not detract from the general principles on which we rely.

[44] It follows we do not accept that in this case Maryanne was required to demonstrate unconscionability or impropriety on the part of John in order to establish undue influence.

Threshold for finding probate undue influence

[45] The second alleged error in the Judge's statement of the relevant principles relates to what the Judge said about probate undue influence. Mr O'Brien contended that in cases involving wills undue influence can only be found if the circumstances surrounding the making of the will are inconsistent with any other hypothesis. To put it another way, the argument is that undue influence must be the only possible hypothesis on the evidence. The Judge's failure to advert to this requirement is said to be a significant omission because Maryanne would not have been able to exclude all other hypotheses.

[46] In support of this "no other possible hypothesis" proposition, Mr O'Brien referred us to a 19th century Australian decision *Boyse v Rossborough*[26] and a 1920 decision of the Privy Council in *Craig v Lamoureux*.[27]

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24 *Royal Bank of Scotland v Etridge (No 2)*, above n 17, at [7].
25 *Royal Bank of Scotland v Etridge (No 2)*, above n 17, at [32]–[33].
26 *Boyse v Rossborough* [1843-60] All ER Rep 610 (HL) at 615.
27 *Craig v Lamoureux* [1920] AC 349 (PC) at 357.

[47] The interpretation of those cases is problematic. However, even if they are authority for the proposition cited by Mr O'Brien, we do not accept they represent the current law. In our view, the correct position is as stated in more recent Australian authorities,[28] namely that before the court can be satisfied undue influence has been proved, it must be satisfied the circumstances raise a more probable inference in favour of what is alleged than not, after the evidence on the question has been evaluated as a whole. That is consistent with the approach taken by the High Court of New Zealand in such cases as *Re Dudley (deceased),*[29] *Mahon v Mahon*,[30] and *Re Keast*.[31] It is an approach that still allows appropriate recognition for the special status of formally executed wills without imposing such a demanding standard on those alleging undue influence as to render the doctrine of little or no value in the testamentary context.

[48] We conclude the Judge correctly stated the relevant legal principles.

[49] The appellants, of course, argue that even if the Judge got the law right, her analysis of the evidence was flawed. We now turn to consider the appellants' challenges to the Judge's findings of fact.

Findings of fact

[50] The Judge found 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. Hugh was vulnerable and once John became a trustee and director, he felt empowered to act.[32] He set the stage for Maryanne's removal in every sense and his conduct overbore his father's will. It was not Hugh but John, with the assistance of Mr Fisher, who was driving the agenda and causing things to happen.

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28 *Nicholson v Knaggs* [2009] VSC 64 at [127] and [150]; *Brown v Wade* [2010] WASC 367 at [334]; *Tobin v Ezekiel* [2011] NSWSC 81 at [43]; *Petrovski v Nasev; Estate of Janakievska* [2011] NSWSC 1275 at [270]; *Coppola v Nobile (No 2)* [2012] SASC 129 at [15]; *Birt v The Public Trustee of Queensland* [2013] QSC 13 at [97] and [99]; *Brown v Guss* [2014] VSC 251 at [18] and [390]–[393].

29 *Re Dudley (deceased)* HC Auckland P1042/92, 14 May 1993 at 11.

30 *Mahon v Mahon* [2015] NZHC 2143 at [28].

31 *Re Keast* [2015] NZHC 1072 at [7].

32 Substantive judgment, above n 6, at [365].

[51] The appellants strongly dispute those core findings, which they say are speculative and not supported by the evidence. They contend the evidence established or was at least equally consistent with the inference it was Hugh that was calling the shots throughout and that John was simply implementing his father's wishes. What happened between 20 December 2011 and 26 April 2012 was, they say, the natural consequence of earlier decisions firmly made and held. How, they ask, can a person be exercising their free will one day and then suddenly only a short time later be subject to undue influence?

[52] In support of that general submission, the appellants identified the following flaws in the Judge's analysis, which they submit resulted in her drawing the wrong inference:

(a) finding Hugh was vulnerable when that was against the weight of evidence;

(b) failing to have proper regard to Moira's evidence;

(c) wrongly relying on Mr Fisher's imprudence as evidence of undue influence by John;

(d) failing to give due weight to the evidence of other lawyers who attended on Hugh's execution of some of the impugned documents;

(e) failing to address or address adequately the evidence of Maryanne's campaign of opposition to John and Frances;

(f) overlooking the significance of a codicil executed in July 2011;

(g) failing to take into account that Maryanne only raised the allegation of undue influence in November 2012.

Vulnerability and Moira

[53] We will address the first two points together.

[54] The Judge found that Hugh became particularly vulnerable to undue influence from December 2011 onwards as his physical and mental health deteriorated.[33]

[55] On appeal, the appellants argued this finding of heightened susceptibility was contrary to the weight of the evidence and was inconsistent with the Judge's other finding that Hugh had capacity in respect of all the impugned decisions, including those made after 20 December 2011. The appellants accepted that capacity and undue influence are distinct concepts and not co-extensive, but argued that on the special facts of this case there was an inconsistency.

[56] In support of these submissions for all appellants, Mr Waalkens QC pointed to evidence from health professionals, Moira and family friends regarding Hugh's cognitive functioning and the determination and strength of will he displayed right up to the very end. Mr Waalkens argued that Winkelmann J was too dismissive of this evidence.

[57] We disagree. Some of Mr Waalkens' submissions contradicted the appellants' own concession that Hugh suffered from intermittent mental lapses. He had become forgetful and was at times confused. Emails written by John himself between October 2011 and March 2012 contain statements that Hugh's memory was failing, that he was becoming indecisive, that he was not remembering all that was said and that he was not capable of making decisions anymore.

[58] The submissions also overlook that the Judge's finding on vulnerability was based on several factors.[34] Those factors included Hugh's declining memory and variable mental state but they were not limited to those aspects. The Judge also relied on evidence that Hugh was "clingy" and emotional, tired to the point of exhaustion, very unwell, and increasingly so. He was finding it difficult to make the big decisions and had lost either the ability or the will to engage with the detail of business decisions.

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33 Substantive judgment, above n 6, at [351].
34 At [242]–[245].

[59] We also do not agree that Winkelmann J was too dismissive of the evidence from friends who visited Hugh in the last months. The Judge accepted that the forceful Hugh of old may well have been present when people visited and also accepted he may have been capable of conducting the kind of routine business he had been doing all his life, such as cattle trading.[35] But when it came to the big decisions that needed to be made in relation to the control of the Green Group, he was indecisive. He struggled 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. There was ample evidence to support that assessment and we agree with it.

[60] As regards the evidence of Hugh's wife Moira, Mr O'Brien argued in effect that it should have been given decisive weight. He emphasised the length of the marriage (57 years), the closeness of their relationship and the fact it was Moira who was living on a day-to-day basis with Hugh during the critical period. Mr O'Brien contended that if anyone knew Hugh's wishes, intentions and state of mind it was Moira. She was also the person most likely to have witnessed improper pressure by John and its impact had it existed. Yet her evidence did not support a finding of vulnerability or undue influence. According to Moira, Hugh made it very clear to her in their various discussions that he did not want Maryanne to be involved if she would not work with her siblings.

[61] The Judge was, however, cognisant of all those points. She considered Moira to be a truthful witness but had reservations about her reliability.[36] [Redacted material.[37]] The Judge also considered Moira's evidence was coloured by an understandable desire to protect her son John and to bring the family dispute to an end in favour of the status quo. We agree with Ms Bruton QC that those findings were clearly available on the evidence and we see no reason to depart from them. We would not attach to Moira's evidence the weight the appellants sought to attach.

[62] Another argument advanced by Mr Waalkens was that because Hugh was able to withstand the pressure exerted on him by Maryanne that demonstrated he

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35 Substantive judgment, above n 6, at [364].
36 At [131].
37 At [344]–[345].

could not have been vulnerable. We do not consider that logically follows. The fact one person is unable to overbear another person's will does not mean no one else can. As Winkelmann J graphically put it, Hugh was trapped between the stridently expressed demands of two forceful personalities but one of them — John — was more powerful and skilful in managing the situation.[38] We note too that from mid December 2011 Maryanne very rarely had audience with her father on her own without John being there. For various reasons Maryanne was also absent for relatively long periods of time whereas John was on the scene throughout.

[63] We also find it significant, as did Winkelmann J, that every contested act taken around the removal of Maryanne appears to have been instigated by someone other than Hugh.[39]

The role of Mr Fisher and John

[64] From 7 November 2011 onwards Mr Fisher purported to act as Hugh's primary legal adviser. He played a central role in the events at issue. It was Mr Fisher who advised Hugh that Maryanne was in breach of her duty as a trustee for refusing to co-operate even though he did not know the detail of just how Maryanne's refusal to co-operate had manifested itself. It was Mr Fisher who suggested and then drafted a letter from Hugh purporting to put Maryanne on notice that she was at risk of being removed. And it was Mr Fisher who was responsible for drafting the formal documents effecting Maryanne's removal and his own appointment as trustee and director. He organised critical meetings, expressed strong antipathy to Maryanne and generally aligned himself with John.

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38 Substantive judgment, above n 6, at [364].
39 At [364].

[65] As the Judge noted, Mr Fisher's involvement was irregular from the outset.[40] Although he had acted from time to time for the family and their interests, he was not the usual lawyer acting for the trusts. He was a barrister specialising in civil litigation. He had no instructing solicitor and he did not obtain a letter of engagement.

[66] Another irregular feature of Mr Fisher's involvement was that most of his instructions, including the initial instruction to act, came not from Hugh but from John. John and Mr Fisher had known each other since teenage years and played golf together. In addition to taking his instructions from John, Mr Fisher also used John as a post box for documents he had prepared for signing by Hugh and Moira.

[67] John claimed in evidence that when instructing Mr Fisher he was simply passing on Hugh's instructions. John further claimed that Mr Fisher "always" confirmed with Hugh the instructions he had received from John.

[68] The Judge did not, however, accept John's claims and we consider with good reason. Mr Fisher did not have any file notes of discussions with Hugh. His phone records did not contain evidence of any telephone discussions with Hugh. Nor did his time sheets, apart from two or three entries. In contrast his records showed extensive contact with John. The communications between the two include a very telling email in which John asks Mr Fisher to meet to discuss "tactics".

[69] Another troubling feature of Mr Fisher's conduct is that he acted at John's direction even when it was John (and indeed Mr Fisher himself) who stood to benefit personally from those directions.

[70] On appeal, Mr O'Brien conceded it was imprudent of Mr Fisher to align himself with John. He also conceded it would have been better had Mr Fisher had greater contact with Hugh. However, he said the fact remained there was some contact, and also evidence that on those occasions when Mr Fisher did check with Hugh, he was able to confirm that the instructions he had received from John were consistent with Hugh's wishes.

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[40] Substantive judgment, above n 6, at [202].

[71] Mr O'Brien emphasised there was no direct evidence of undue influence, the Judge did not find Mr Fisher had personally pressured Hugh and although Mr Fisher may have been imprudent it did not mean what he was doing did not represent Hugh's wishes.

[72] We agree of itself that might be so. But in drawing the inferences and making the findings she did, the Judge was entitled to look at all the evidence. This included compelling evidence that as Hugh's voice gradually faded from discussions of critical issues, John was increasingly conducting himself as if he were in control; evidence that on the rare occasions when Mr Fisher did meet with Hugh, John was always present; evidence of emails between John and Mr Fisher that contain no hint John is making contact because Hugh has asked him to and that he is faithfully passing on Hugh's wishes; evidence of emails between John and Mr Narev that show John lobbying for Maryanne to be removed and seeking appointments for himself; evidence that in January 2012 without Hugh's instructions John and Mr Fisher were working together to call a meeting proposing resolutions for Maryanne's removal as a director; evidence that it was John not Hugh who initiated steps to have Mr Fisher appointed in March and Maryanne removed in April; evidence it was also John who attempted to control aspects of the attendance of others at a meeting on 28 March.

[73] We note too evidence that within 24 hours of signing the deeds removing Maryanne as trustee, Hugh was both denying having removed Maryanne and giving the impression he really did not know why she had been removed, did not know who had prepared the papers and who had brought them to him to be signed. He caused the deed of removal to be torn out of the trust minute book and handed it to Maryanne, saying "you are my trustee".

[74] Another telling piece of evidence relates to events in January 2012 regarding Maryanne's status as trustee. As mentioned, Hugh had said he wanted her to continue. That was said on 21 December 2011. Yet in January 2012 John was pressing ahead to implement her removal as trustee. On 12 January 2012 Mr Fisher received instructions from John to prepare documents that referred to Maryanne as having been removed as trustee. John's instructions to Mr Fisher were not only at odds with what Hugh had said on 21 December, they were also at odds with what

Hugh had told Mr Narev on 11 January 2012. Hugh had told Mr Narev he assumed Maryanne had been reappointed. Hugh later reiterated to Maryanne on two separate occasions in April 2012 that she remained a trustee.

[75] As the cases show, the presence or absence of independent advice is often a critical factor when deciding whether to draw an inference of undue influence.[41] In this case there was compelling evidence Hugh was not receiving independent advice. His chief adviser throughout the relevant period was a man who was not his usual lawyer, who had minimal contact with him and who was doing the bidding of the person exerting the pressure. In those circumstances we consider the Judge was correct to characterise Mr Fisher's role as facilitating John's influence, instead of neutralising it and protecting Hugh as he should have done.

[76] Mr Fisher's involvement also had the inevitable consequence of isolating Hugh from his traditional advisers (Mr Narev and a Mr Carter) at the very time when Hugh needed them most, when he was in the last stages of a terminal illness and long standing arrangements were being radically changed.

[77] Mr O'Brien claimed the Judge understated the extent of contact that continued between Hugh and his traditional advisers and that they were not largely "cut off" from Hugh, as she found. He also pointed out that Mr Narev and Mr Carter were well aware of what was going on and yet obviously had no suspicions or concerns because otherwise they would have initiated contact with Hugh themselves. They could have called Hugh at any time. It is most unlikely, he submitted, they could have been so deceived.

[78] It may be the Judge has misstated the number of visits made by Mr Narev but not to any significant extent. In our view, it was inevitable, having regard to the dominant role assumed by Mr Fisher, that the role of previous advisers would correspondingly reduce and that increasingly what information those traditional advisers did receive about Hugh's wishes came from Mr Fisher and John. Mr Narev

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41 *Royal Bank of Scotland v Etridge (No 2)*, above n 17, at [20] and [153]; *Hogan v Commercial Factors*, above n 23, at [36]; *Union Fidelity Trustee Co of Australia Ltd v Gibson* [1971] VR 573 (VSC) at [10](d); J D Heydon, M J Leeming and P G Turner *Meagher, Gummow and Lehane's Equity: Doctrine and Remedies* (5th ed, LexisNexis, New South Wales, 2015) at [15-135]–[15-140]; Butler, above n 17, at [22.9.2].

and Mr Carter would naturally have assumed Mr Fisher was discharging his role as Hugh's adviser properly. There is also a sense from the evidence that Mr Carter and Mr Narev felt themselves to be in a very awkward position and sought to distance themselves from the family conflict.

The evidence of Messrs Hickson and Cahill

[79] Mr Hickson was the lawyer who on 20 December 2011 witnessed Hugh's signature to the deeds removing Maryanne as trustee of the Hugh Green Trust and the Hugh Green Property Trust. He had been asked by Mr Fisher to do this. Mr Hickson attended again on Hugh, this time in hospital on 29 March 2012 for the execution of the deed appointing Mr Fisher a trustee. Mr Cahill was the lawyer who attended on the execution of the impugned 26 April 2012 will. The will had been drafted by Mr Cahill on the instructions of Mr Narev.

[80] Neither Mr Hickson nor Mr Cahill felt any cause for concern about Hugh's state of mind and although John was present when the deeds were executed, he was not present when the will was signed. The appellants contend the Judge erred in dismissing or failing to give proper weight to the evidence of the two lawyers.

[81] We disagree. The Judge gave careful consideration to the evidence of both lawyers. Their evidence was an important reason for the Judge's finding that Hugh did not lack capacity when he executed the relevant documents.[42] However, their evidence could not carry the same weight in relation to the issue of undue influence. Neither had sufficient knowledge of the family dynamics and background issues (including the conduct of John and Mr Fisher) that would have alerted them to the possibility of undue influence. Mr Cahill had never met Hugh before and his lack of familiarity with the background was such he did not even appreciate the significance of the change in executors.

Maryanne's refusal to co-operate

[82] According to the appellants, the Judge failed to adequately address the evidence regarding Maryanne's continued defiance of her father's wishes. In their

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[42] Substantive judgment, above n 6, at [348], [428] and [468].

submission, that evidence was critical and in the absence of any direct evidence of undue influence, a much more likely explanation for Hugh's decisions to remove her.

[83] There is a dispute between the parties as to the degree of Maryanne's intransigence, the respondent pointing to evidence of various attempts Maryanne made to work with John and Frances and her attempts to find a compromise solution.

[84] It is not necessary for us to traverse the detail of that evidence because, in our view, the respondent makes a more important point. And that is that, although Hugh undoubtedly wanted to appoint John and Frances as trustees and for the children to work together, it does not logically follow he also wanted to remove Maryanne completely. As Ms Bruton submitted, the contention that Hugh, faced with Maryanne's intransigence, had decided he had no choice but to remove Maryanne cannot explain Hugh's repeated affirmations of her status as trustee. The only explanation the appellants can offer is that Hugh was "fobbing Maryanne off", but that, in our view, is implausible on the evidence.

24 July 2011 codicil and 26 April 2012 will

[85] The impugned April 2012 will was not the first time Hugh had changed his executors. On 24 July 2011 Hugh had executed a codicil, removing Maryanne as one of his executors and replacing her with Moira. The codicil was drafted by Mr Narev and Maryanne has never suggested it was the product of undue influence. Its provisions were reaffirmed by Hugh when he executed a new will on 1 November 2011. This November will was drafted by Mr Narev on instructions from Hugh and again there has never been any suggestion Hugh lacked capacity or was subject to undue influence.

[86] The appellants say the codicil is "highly significant" because it demonstrates Hugh's thinking and his preparedness to remove Maryanne from positions of control in response to her opposition to running the business with John and Frances. As at 24 July 2011 Hugh had made it clear he wanted Frances and John to have greater roles and Maryanne had expressed her opposition to that course of action. That was still the situation on 1 November 2011. Even when Mr Narev queried at a meeting

on 30 September 2011 whether it might be premature to appoint John a trustee or director, Hugh is said to have remained firm.

[87] The evidence about the codicil is not addressed in any depth in Winkelmann J's judgment and we apprehend the appellants to be saying it should have been.

[88] The difficulty with that submission is Maryanne's evidence that Hugh had discussed the codicil with her in advance and that she had agreed to it to placate John and meet his concern she had too much power. We are satisfied that places this removal decision in a different category than the others found to have been the product of undue influence. The fact the codicil was the exercise of free will does not mean the Judge drew the wrong inference in relation to later decisions, including the final will of 26 April 2012 when Moira was replaced as executor by John, Frances and Mr Fisher.

[89] Significantly, the making of this final will was preceded by a meeting at Hugh and Moira's home on 16 April 2012. The meeting was initiated and organised by Mr Fisher. Although he claimed the purpose of the meeting was to understand the family's wishes, he did not invite all the family. Apart from Hugh and Moira, the only other people present were John, Frances and Mr Fisher. As Winkelmann J noted, Hugh was thus surrounded by those who had already decided John should take control and Maryanne should be removed.[43] Significantly, while one of the reasons for the new will was that Moira no longer wanted to be an executor, there was never any discussion of any other alternatives, that is, other alternatives to replacing her with Frances, John and Mr Fisher — the people whom John wanted in control. It is noteworthy too that Moira was replaced by three people, not just one. We have no doubt on the evidence the appointment of all three was not Hugh's idea.

[90] There was evidence too that when Maryanne visited Hugh that same day, he said he did not know why she had been removed as a director and that she was still his trustee.

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[43] Substantive judgment, above n 6, at [470].

[91] Then on 23 April 2012 Mr Fisher emailed John a memorandum he had drafted entitled Green Family Aspirations for Hugh Green Group and Family. There was no evidence this was requested by Hugh or that the memorandum had been prepared in accordance with his instructions.

[92] The first time anyone independent knew about the new will was shortly before it was executed, when Mr Narev spoke to Hugh over the phone. Even then the phone call was initiated by someone else, Mr Narev thought either Frances or Moira.

[93] We agree with the Judge that the involvement of Mr Narev and then subsequently Mr Cahill was no antidote to the events that had already unfolded. The context for how Hugh viewed these succession issues had already been created by John and Mr Fisher.

[94] As submitted by Ms Bruton, the appointment of the three flowed naturally from all that had gone before in terms of pressuring Hugh and cementing John's complete control. It was the final logical step.

Belated raising of undue influence by Maryanne

[95] The appellants sought to make much of the fact Maryanne never raised undue influence at the time of the decisions even though she was taking legal advice from about 5 October 2011 onwards. The allegation of undue influence only surfaced in November 2012. The delay is not mentioned in the judgment. Yet, according to the appellants, it was highly relevant and casts doubt on the credibility of the claim.[44]

[96] We disagree. When asked why she had not raised any concerns earlier about John and Mr Fisher prevailing on her father, Maryanne said she may have mentioned it to her lawyers before November 2012 but could not recall. More compellingly, she also pointed out it was only afterwards when she was able to look back at the total picture that she could see with greater clarity what had happened. We consider

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[44] The point was only raised as an evidential one. There was no suggestion laches might apply.

that a reasonable explanation and are satisfied any delay does not necessarily mean the factual allegations on which the claim was based are unreliable.

Conclusion on undue influence

[97] Drawing all the threads together, we are satisfied the Judge was fully justified in distinguishing the decisions made from 20 December 2011 onwards from those made on 8 November 2011 and 5 December 2011 for the purposes of the undue influence doctrine, notwithstanding the relatively close proximity of time.

[98] We note the different subject matter of the decisions, it being one thing to promote Frances and John but quite another to remove Maryanne; Hugh's conduct on 20 and 21 December 2011; his repeated affirmations to Maryanne she was still his trustee; the rapid deterioration in his mental and physical health; his fading involvement; the fact the later decisions were all instigated by John and Mr Fisher; John's increasingly aggressive and assertive conduct; and the lack of independent advice at the time when it was needed most. The date 5 December 2011 is logically seen as a turning point because it was on that date that John became (or thought he had become) a director, having already been made a trustee.

[99] We turn now to consider two other findings challenged on appeal.

Invalidity of trustee resolutions on 5 December 2011 appointing Frances and John directors

[100] These were decisions made by Hugh as trustee shareholder together with his co-trustees John and Frances, resolving to appoint John and Frances directors of the main companies in the Green Group. The resolutions were opposed by Maryanne, who was at that time still a trustee. The other trustees were Mr Narev and Mr Carter. Mr Carter did not attend the meeting. Mr Narev was present but abstained from voting.

[101] The Judge found the resolutions were not procured by undue influence but were invalid for another reason, namely that they had been passed by an insufficient number of trustees. Under the relevant trust deeds, there was provision for majority

decision-making.[45] Justice Winkelmann held that a majority meant a majority of the trustees, not a majority of those attending and voting.[46]

[102] The Judge also rejected an argument that even if the required majority was not reached, the decision was ratified by the subsequent conduct of Messrs Narev and Carter voting to implement the decisions. She pointed out that all of the purported acts of ratification proceeded on the assumption the resolution was valid. That is to say, none of them involved Messrs Narev and Carter exercising their discretion as trustees and consciously directing their minds to the issue of whether John and Frances should be appointed directors.[47]

[103] On appeal, the appellants did not challenge the Judge's interpretation of the trust deeds. Nor did they pursue the subsequent ratification argument. However, they raised a new argument of *immediate* ratification, relying on evidence that the reason Mr Narev abstained was because of his belief these were matters for the family to decide for itself. In the appellants' submission, by deferring the decision to the family, Mr Narev immediately ratified the majority decision of the family.

[104] The difficulty with this new argument is that Mr Narev, knowing of the result of the vote to appoint Frances and John, abstained from a later resolution giving effect to it. Mr Narev had also earlier expressed the view that it was premature to appoint John a director. In those circumstances, we are not prepared to hold his abstention amounted to a ratification of whatever the majority of the family wanted.

Did the Judge err in finding that Hugh reinstated Maryanne as trustee effective 21 December 2011?

[105] The Judge found that Hugh's removal of Maryanne as a trustee on 20 December 2011 was the product of undue influence.[48] She went on to consider whether in any event Hugh reinstated Maryanne the following day by cancelling the removal or reappointing her.

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45 Resolutions could be passed by the trustees of the Hugh Green Trust by a simple majority; the Hugh Green Property Trust required a 60 per cent majority.

46 Substantive judgment, above n 6, at [244].

47 At [302]–[303]. A further problem was that two of the purported acts of ratification were done by the two men in their capacity as directors, not trustees.

48 At [365].

[106] At first blush, once the Judge had found the purported removal had been obtained by undue influence, it might be thought not to matter whether Hugh cancelled the removal the next day or not. That would be correct if, as a matter of law, the undue influence had rendered the removal void because that would mean Maryanne never ceased to be a trustee. If, however, the undue influence had only rendered the removal voidable, the events of the next day would determine whether the Court would be required to consider reinstating Maryanne itself or whether the only remedy needed was a declaration.

[107] In the substantive judgment Winkelmann J appears to have considered there was some uncertainty in law as to whether the removal or appointment of a trustee obtained by undue influence is void or voidable. By the time of the relief decision, the parties had agreed the correct position was that it was void.[49] However, despite that agreement, we do not consider ourselves in a position to make any definitive ruling one way or the other. There is no New Zealand authority directly on point and we did not hear argument on the issue. Accordingly, on the assumption the removal of Maryanne was voidable, it is necessary for us, like Winkelmann J, to address the events of 20 and 21 December in more detail.

[108] As already mentioned, on 20 December 2011 Hugh signed deeds removing Maryanne as trustee of the Hugh Green and Hugh Green Property Trusts. The deeds had been drafted by Mr Fisher and followed Maryanne's refusal to sign a resolution of the Hugh Green Trust trustees appointing Frances and John as directors.

[109] Hugh subsequently denied to Maryanne's husband and then Maryanne herself that he had removed her. When on 21 December 2011 she showed him a copy of the deeds, his response was to say "that is not right — you are still my trustee. You are to carry on being one". Hugh then arranged for the original deeds to be taken out from the trust minute books and brought to the house. There he handed the original deeds to her, saying "you are my trustee".

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[49] Relief judgment, above n 7, at [3], in reliance on *Pitt v Holt* [2013] UKSC 26, [2013] 2 AC 108; *Harris v Rothery* [2013] NSWSC 1275, (2013) 10 ASTLR 108 at [172].

[110] The Judge found Hugh's actions and words amounted to either cancellation of the deeds of removal or reappointment of Maryanne with immediate effect.[50]

[111] On appeal, the appellants accepted, as they had in the High Court, that Hugh wanted to reinstate Maryanne. They also accepted a deed of removal can be validly cancelled by oral agreement. They accepted too that a trustee can be appointed verbally. However, they submitted there was insufficient certainty as to what was intended on 21 December by either Maryanne or Hugh.[51] It was unclear, the appellants argued, whether it was a cancellation or a reappointment, when it was to take effect and how it was to be implemented. In their submission, the correct construction of what happened was that the handing of the deeds to Maryanne was no more than a symbolic gesture recognising there was to be an attempt to resolve matters.

[112] In support of those contentions, the appellants rely on the sequence of events leading to the meeting, the fact the meeting was emotionally charged, the fact Hugh and Maryanne also talked about her working constructively with John and Frances, as well as evidence of subsequent conduct.

[113] In our view, none of those matters detract from the Judge's findings, which we consider unassailable. It is difficult to conceive of more unequivocal conduct than causing the deeds to be torn from the minute books, handing them personally to the removed trustee and saying in the present tense "you are my trustee". The appellants submitted Hugh and others did not subsequently act consistently with this, but the difficulty the appellants face when relying on later conduct is that it needs to be seen in light of the fact they received incorrect legal advice that an oral cancellation was not legally effective.

[114] An alternative argument raised by the appellants was that, even if the events of 21 December 2011 did result in Maryanne being reappointed, everyone, including Maryanne herself, proceeded on the basis (albeit mistaken) that the reappointment was not effective until confirmed in writing. There was evidence, for example, that

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50 Substantive judgment, above n 6, at [479].

51 The appellants say this was and is their submission rather than a conditional reappointment, also discussed by Winkelmann J.

Maryanne did not protest her exclusion from trust meetings or complain about the non-payment of trustee fees. In those circumstances the appellants contend the doctrine of estoppel by convention applies and Maryanne is estopped from asserting she retained the status of trustee.

[115] Justice Winkelmann rejected those arguments principally on the grounds the trustees of the Hugh Green and Hugh Green Property Trusts lacked standing and had not suffered any detriment rendering it unconscionable for Maryanne to resile from the common assumption.[52] The only detriment the trustees could point to was the need to revisit decisions made in Maryanne's absence. But, as the Judge pointed out, it could hardly be a detriment to require the trustees to comply with their obligations.

[116] On appeal, the appellants say this was an overly technical approach because those reasons only applied as the result of a pleading error. They had pleaded the wrong party asserting the estoppel. The correct parties, which did have standing and had suffered detriment, were the trustees and executors of Hugh's estate, not the trustees of the Hugh Green and Hugh Green Property Trusts.

[117] However, in our view, the outcome must be the same. First, because we are not satisfied there was an assumption shared by Maryanne. There was evidence she told Mr Narev on 18 January 2012 she had been reappointed. And in cross-examination even John agreed that in January 2012 Maryanne assumed she was a trustee.

[118] Second, we do not accept the executors suffered any operative detriment. The appellants say the detriment consists in the fact Hugh lost the opportunity to remove Maryanne. But that assertion is contrary to the evidence he would not have exercised that opportunity. He consistently said he wanted her to remain as his trustee. It can be no answer to say that was only on the understanding she would work constructively and co-operatively with John and Frances. There is absolutely no evidence that at any time Hugh made any statement to the effect it was a good thing the 21 December 2011 reappointment had not been documented because otherwise he would have had to remove Maryanne a second time.

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52 Substantive judgment, above n 6, at [491]–[492].

Conclusion on appeal against substantive judgment — CA365/2015

[119] The High Court judgment contains a thorough and comprehensive analysis of the evidence. In our assessment, there was a solid evidential basis for all the findings and they are findings with which we agree, having ourselves independently reviewed the evidence. The findings are supported not only by Maryanne's narrative, but also importantly by contemporaneous documentation, including John's own written communications.

[120] The Judge did not misapply the law. Nor did she misconstrue the facts.

[121] The appeal against the substantive judgment is dismissed.

Appeal against the relief decision — CA411/2015

[122] In the substantive judgment the Judge made an order recalling the grant of probate for the will dated 26 April 2012. Other relevant orders and declarations were made in the separate relief decision as follows:[53]

(a) a declaration Mr Fisher was not validly appointed a trustee of the Hugh Green Trust or the Hugh Green Property Trust;

(b) a declaration Mr Gosney was not validly appointed a trustee of the Hugh Green Trust or the Hugh Green Property Trust;

(c) an order removing John and Frances as trustees of the Hugh Green Trust and the Hugh Green Property Trust;

(d) a declaration that Maryanne is a director of all group companies from which she was removed as a director from 2 April 2012;[54]

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53 Relief judgment, above n 7.

54 The Judge also issued a declaration that Maryanne should not be liable as a director for any directors' decisions or actions between 2 April 2012 and the date of the relief decision.

(e) a declaration that John, Frances, Mr Fisher and Mr Gosney have not been validly appointed and were and are not directors of any of the companies in the Green Group;

(f) a declaration that Maryanne is a trustee of the Hugh Green Trust and the Hugh Green Property Trust;

(g) an order appointing two independent trustees (Messrs Darlow and Randell) as interim trustees of the Hugh Green Trust and Hugh Green Property Trust until further order of the Court; and

(h) an order restraining Maryanne from exercising her power to vote as a trustee pending further order of the Court and from attending trustee meetings unless called upon to do so by the interim trustees.

[123] The appointments of Messrs Gosney and Fisher were vitiated by undue influence. We do not therefore need to consider their position further. In any event, we were told at the outset of the appeal that, although they are named as appellants, they do not intend to resume office.

Grounds of appeal

[124] The appellants acknowledge the independent trustees appointed by Winkelmann J are doing a good job. We agree. The reports show the interim trustees have put appropriate governance structures in place, are dealing with beneficiaries in a fair and even-handed manner, communicating with them and working well with Maryanne as their co-trustee.

[125] Notwithstanding this, the appellants say they are "devastated" by the High Court decision because the outcome is the very antithesis of what Hugh wanted. Strangers are running the business and the only trustee who is a family member is Maryanne, and she does not enjoy the support of the rest of the family and therefore does not represent their interests. We were told that, apart from Maryanne and Alice, all the other beneficiaries (15 in total) support John and Frances and want the High Court decision quashed.

[126] The appellants claim there was no proper basis for the removal of John and Frances. Their views as to what should happen next have, however, changed over time.

[127] At the hearing before us they sought the reinstatement of either both John and Frances or one of them with the retention of Maryanne and the two independent interim trustees. An alternative and less-favoured option was the removal of Maryanne, leaving the trust to be run solely by the independent trustees.

[128] After the hearing counsel for John and Frances filed a memorandum dated 6 September 2016. The memorandum advised John and Frances wished to withdraw the submission that both or either of them should be trustees together with Maryanne. Removing Maryanne and having the trust operated by independent trustees only was now the preferred option.

[129] This possibility had not been advocated by the appellants at the hearing until it was raised by us. We raised it because of the obvious need for there to be a long term solution and because of concern that Maryanne's continued participation as trustee could fuel yet more discord and more litigation. This concern was shared by Winkelmann J and was the reason the Judge made an order imposing interim limitations on Maryanne's trusteeship.[55]

[130] There is, however, a separate proceeding, as yet undetermined, that has been brought by the appellants in the High Court seeking to remove Maryanne as trustee. Maryanne consented to the interim limitations on the basis the appellants' application for her removal as trustee would be promptly heard and determined. That has not happened.

[131] On further reflection we consider that, quite apart from possible jurisdictional problems, it would be wrong for us to consider removing Maryanne without there having been a proper process where that issue has been directly and fully ventilated. Like Winkelmann J, we also wish to stress that our raising the possibility should not be taken to suggest we think Maryanne is unfit to be a trustee. The interim trustees

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[55] Relief judgment, above n 7, at [17]–[20].

report that Maryanne has demonstrated "a fair-minded, objective and responsible approach to all matters affecting the trusts and the beneficiaries".

[132] We have therefore limited our inquiry to the order removing John and Frances as trustees.

[133] Finally, before turning to our analysis on that issue, we record that Hugh's last will immediately prior to that of the invalid April 2012 will was the will made on 1 November 2011 under which Moira and Mr Narev are the executors and trustees. We were told that will has not yet been admitted to probate but once it is, then the power of appointment and removal of trustees will vest in Moira and Mr Narev. The former at least is closely aligned with John and Frances.

[134] That consideration prompted us to inquire whether it would be open to Moira and Mr Narev to reappoint the removed trustees anyway, regardless of the outcome of this appeal, assuming the 1 November 2011 will becomes operative.

[135] Mr O'Brien assured us this appeal was not academic and that, were we to uphold the High Court orders, his clients could not and would not reinstate those whom a court did not consider fit to be a trustee.

Analysis

[136] As already mentioned, Winkelmann J found that when Hugh appointed Frances and John as trustees on 8 November 2011 he had capacity to make that decision and was not subject to undue influence. The Judge's reasons for nevertheless removing John and Frances were two-fold:[56]

(a) The level of hostility exhibited by Frances and John towards Maryanne and Alice.

(b) In relation to John, his past dishonest conduct at the expense of the family business. In the 1990s he stole money from a trust-owned company while a trustee.

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[56] Substantive judgment, above n 6, at [653]–[654].

[137] In 1989 John was employed as a part-time cattle agent by Kilmacrennan Livestock Ltd (Kilmacrennan), the entity through which Hugh conducted his cattle-trading business. The discovery of an irregular transaction (a cheque made payable to Kilmacrennan banked into the account of John's own company) prompted an internal investigation in 1994 into John's trading activities. This revealed that John's record-keeping was lax and sloppy; that he had raised dockets purporting to record the purchase of cattle from third parties when either there was no purchase or the docket inflated the number of cattle being purchased; the dockets requested the cheques be made payable to cash; and despite not being an authorised signatory, John had signed cheques, including cheques for those inflated amounts made payable to cash, which he then cashed himself.

[138] As well as being an employee of Kilmacrennan — a trust-owned company — John was also at the time a trustee of the Hugh Green Trust. When the irregularities were discovered John resigned from both positions and moved to Australia.

[139] At the hearing in the High Court John denied stealing any money and gave various explanations for the irregular transactions. Justice Winkelmann regarded the explanations as lacking credibility.[57] She found the evidence established that in the early 1990s John was involved in transactions that were dishonest. She found John frequently used Kilmacrennan funds in a manner that was not authorised and on occasion took those funds and kept them for his own purposes. He created documentation that misrepresented the nature of the transactions, resulting in a shortfall of stock that the Judge noted had been valued in October 1994 at $276,463.

[140] John did not challenge those findings on appeal.

[141] As the appellants acknowledged, an appeal against a court order removing a trustee is an appeal against the exercise of a discretion.[58] Accordingly, the appellants must persuade us the Judge made an error of principle, took into account an irrelevant factor, overlooked a relevant factor or was plainly wrong.[59]

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57 Substantive judgment, above n 6, at [578].

58 *Kain v Hutton* [2007] NZCA 199, [2007] 3 NZLR 349 at [266]; *Powell v Powell* [2015] NZCA 133 at [46].

59 *May v May* (1982) 1 NZFLR 165 (CA) at 169–170.

[142] The appellants contend the Judge erred in relying on John's past dishonest conduct as a reason to remove him when at the same time she accepted Hugh was not in breach of his fiduciary duty when appointing John as a trustee in the first place in November 2011. Hugh was well aware of the past dishonesty. However, this criticism overlooks that it was not only the fact of John's past dishonest conduct that was of concern to Winkelmann J but also the evidence he gave in the High Court denying it.

[143] As already mentioned, the Judge found that John's attempts to explain away what was compelling evidence of dishonesty lacked credibility. She said it was clear John did not accept his conduct had been dishonest or was in any way significantly deficient.[60] Nor was there any suggestion he felt he needed to change his business practices. That was of real concern. There was no evidence Hugh knew John denied his wrongdoing and accordingly the Judge said she found herself in a different position than Hugh had been in November 2011.

[144] The Judge also noted that John's fellow trustees (including Frances) had failed to address the implications of his dishonesty for the wellbeing of the trusts and so failed to consider the best interests of the beneficiaries.[61] Instead, they had simply framed the issue in terms of the conflict between John and Maryanne.

[145] In the circumstances, we consider the Judge was entitled to rely on John's past dishonesty as a reason for removing him as trustee.

[146] As regards the second and principal reason the Judge gave for removing John and Frances (their level of hostility towards Alice and Maryanne), the appellants argue the hostility is a two-way street and that in any event friction between a trustee and a beneficiary is not of itself grounds for removal. To be operative, the friction must cause detriment to the administration of the trusts.[62]

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60 Substantive judgment, above n 6, at [609].

61 At [654].

62 *Hunter v Hunter* [1938] NZLR 520 (CA) at 528–529; *Attorney-General v Ngati Karewa and Ngati Tahinga Trust* HC Auckland M2073/99, 5 November 2001; *Kain v Hutton*, above n 58, at [267].

[147] However, Winkelmann J was aware of that requirement. She found not only that hostility existed, but that it was of such intensity it was sufficient to undermine the proper execution of the trusts for the benefit of all beneficiaries.[63] In support of that conclusion, the Judge pointed to evidence of unwillingness on the part of the trustees to communicate directly with Maryanne and Alice, unwillingness to provide them with information and the failure to make any inquiry into Alice's circumstances to establish her needs, despite her being a young mother who had recently separated from her partner. The Judge considered this contrasted sharply with the way the trustees had considered and met the needs of John and Frances' children.[64]

[148] The appellants had explanations for their actions or inaction but these were considered by the Judge. She was not bound to accept them.

[149] Although Winkelmann J did not rely on this, we note too that after Hugh's death an issue was raised about Alice's eligibility as a beneficiary under the Hugh Green Trust on the ground she is adopted. Proceedings have been issued (the interpretation proceedings). If Alice were to be excluded along with Hugh's adopted nephew and the nephew's children, it would mean that most of the wealth Hugh created would ultimately go to the six children of John and Frances.

[150] One might have expected the appellants to deal with the matter by way of a consent court order and a deed of indemnity or family arrangement. However, as at the date of the appeal hearing, the position they were taking was that the High Court must hear the opposing arguments and make a ruling. When we expressed our disquiet about this, the appellants' counsel, Mr Farmer QC, said he would take further instructions.

[151] The appellants' memorandum of 6 September 2016 advises that John, Frances and Moira will agree to consent orders.

[152] We consider the issuing of the interpretation proceedings and the position taken by the appellants until very recently to be significant in two respects. First, it

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63 Substantive judgment, above n 6, at [606]

64 At [653].

reinforces Winkelmann J's view that John and Frances cannot be relied upon as trustees to act in Alice's interests and, second, it sits uneasily with the appellants' claim to be only wanting to honour Hugh's wishes. During his lifetime, Hugh made no distinction between family members who were adopted and those who were not. He treated all equally and in particular made distributions from the Hugh Green Trust to them all, including Alice.

[153] We acknowledge a trustee is not lightly to be removed.[65] However, we consider there are no grounds for interfering with the orders made by Winkelmann J in her relief decision.

A final comment

[154] Hugh Green was a remarkable man who left his family a remarkable legacy. He was generous and it was clear from the evidence that he wanted the wealth he created to be a positive thing and a force for good. During the hearing, both sides professed to know Hugh's wishes. But one thing is beyond all doubt. Hugh would not have wanted to see the children he loved embroiled in wasteful and destructive litigation. There are no fewer than three proceedings on foot, with the prospect of more to come.

[155] The measures put in place by Winkelmann J are working well, but they are only interim stop gap measures. There is a need for a permanent solution, which ultimately can only be achieved by the family itself.

Outcome of the appeal

[156] The application made by the respondent and Alice Piper dated 22 April 2016 for leave to adduce further evidence is granted in relation to the two reports of the interim trustees, but declined in respect of the affidavits of Maryanne Green sworn 26 March 2015, 27 March 2015, 31 March 2015 and 26 August 2015.

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[65] *Guazzini v Pateson* (1918) 18 SR (NSW) 275 (NSWSC) at 294; *Kain v Hutton*, above n 58, at [267].

[157] The second application made by the respondent and Alice Piper dated 9 May 2016 for leave to adduce further evidence is declined.

[158] The appeals in CA365/2015 and CA411/2015 are dismissed.

[159] As regards costs, it was agreed the costs of all parties would be met by trust funds and no order was required.

Solicitors:
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