

**IN THE COURT OF APPEAL OF NEW ZEALAND**

**I TE KŌTI PĪRA O AOTEAROA**

**CA207/2020  
[2022] NZCA 331**

BETWEEN

STEVEN REX POLLOCK  
Appellant

AND

CHERYL LINDA POLLOCK AND PETER  
EDMOND WASHER AS EXECUTORS  
AND ADMINISTRATORS OF THE  
ESTATE OF REX DAVID POLLOCK  
First Respondents

CHERYL LINDA POLLOCK  
Second Respondent

CHERYL LINDA POLLOCK AND CLM  
TRUSTEES LIMITED AS TRUSTEES OF  
THE JUDEA VALLEY TRUST  
Third Respondents

Hearing: 22 and 23 September 2021

Court: Brown, Clifford and Courtney JJ

Counsel: D M Fraundorfer, T J Conder and S A Stretton for Appellant  
P J Morgan QC and M L Jepson for C L Pollock  
S T Scott for P E Washer and CLM Trustees Ltd

Judgment: 25 July 2022 at 10.30 am

---

**JUDGMENT OF THE COURT**

---

**The appeal is dismissed.**

---

## Table of Contents

	Para no
<b>Introduction</b>	[1]
<b>Factual background</b>	[4]
<i>Family connections</i>	[4]
<i>Rex's business interests</i>	[7]
<i>Rex's estate planning from 1993 to 2012</i>	[10]
<i>Steven's participation in Rex's businesses</i>	[16]
<i>Rex's reaction to Steven's resignation</i>	[22]
<i>Rex's illness and subsequent events</i>	[25]
<b>The High Court judgment</b>	[32]
<i>Steven's claims</i>	[32]
<i>The statutory causes of action</i>	[33]
<i>Undue influence by Cheryl over Rex</i>	[36]
<i>Alleged unjust enrichment of the JVT and Cheryl</i>	[40]
<i>Breaches of duties by Steven's removal as a beneficiary</i>	[41]
<b>Issues</b>	[42]
<b>Undue influence</b>	[43]
<i>Did the Judge err in his statement of the relevant principles?</i>	[43]
<i>Did the relationship between Rex and Cheryl give rise to an evidential presumption of undue influence?</i>	[48]
<i>Alleged instances of actual undue influence</i>	[65]
<b>Unjust enrichment</b>	[76]
<i>Was the claim reshaped from that advanced in the High Court?</i>	[76]
<i>Recognition of a new category of unjust enrichment?</i>	[81]
<b>Removal of Steven as a beneficiary: a breach of fiduciary duty?</b>	[93]
<i>Did the trustees owe a fiduciary duty to Steven in exercising the power of removal?</i>	[93]
<i>Was Steven's removal as a beneficiary wrongful?</i>	[102]
<b>Result</b>	[114]

## REASONS OF THE COURT

(Given by Brown J)

### Introduction

[1] Steven Pollock's claim under the Family Protection Act 1955 against the estate of his father, Rex Pollock, was defeated because the cupboard was intentionally bare. With the object of frustrating such claims, prior to his death Rex had gifted substantial assets to Cheryl Pollock, his second wife, and to the Judea Valley Trust (the JVT) that would otherwise have formed part of his estate. Although Steven was originally a final and discretionary beneficiary of the JVT and, as such, may have benefited from

Rex's gift to the JVT, at Rex's request the trustees had contemporaneously removed Steven as a beneficiary of the JVT.

[2] Unlike other legislation,<sup>1</sup> the Family Protection Act does not contain a provision empowering the court to set aside dispositions made with the intention to defeat statutory claims. Consequently, with a view to restoring assets to Rex's estate, Steven resorted to equity. He claimed that Rex's gifts were made as a result of the undue influence of Cheryl, and that Cheryl and the JVT had been unjustly enriched by reason of the gifts. In addition, he contended that his removal as a beneficiary of the JVT was in breach of a fiduciary duty owed by the trustees.

[3] Those equitable claims were rejected in the High Court.<sup>2</sup> Steven now appeals on those three issues.

## **Factual background**

### *Family connections*

[4] In 1969 Rex married his first wife, Pauline, with whom he had three children: Steven, Nathan and Letitia. In the early 1990s Rex and Pauline separated. Rex commenced a relationship with Cheryl who had three children from a prior marriage: Wayne, Thomas and Casandra Slater. Rex and Cheryl married on 29 September 1995.

[5] In May 1992 Rex's mother settled the original Judea Valley Trust (the original JVT). The assets of the original JVT comprised Rex and Pauline's real property rather than their business interests. The final beneficiaries were Rex, Steven, Nathan and Letitia. Discretionary beneficiaries included the final beneficiaries and any child or spouse of the final beneficiaries. In June 2005 Rex, Cheryl and CLM Trustees Ltd were appointed trustees to replace retiring trustees.

---

<sup>1</sup> See Property (Relationships) Act 1976, s 44; Property Law Act 2007, pt 6 subpt 6; and Child Support Act 1991, s 201. There are pull-back provisions applying in the context of insolvency law, however these operate irrespective of whether the disposition was made with an intent to defeat a statutory claim: see ss 291A–296D and 299 of the Companies Act 1993, and ss 206–207 of the Insolvency Act 2006.

<sup>2</sup> *Pollock v Pollock* [2020] NZHC 648 [High Court judgment].

[6] In July 2007 Rex, as settlor, established the new JVT with himself, Cheryl and CLM Trustees as the trustees. The final beneficiaries of the JVT were Steven, Nathan and Letitia Pollock and Wayne, Thomas and Casandra Slater. The discretionary beneficiaries of the JVT were the final beneficiaries, any child or remoter issue of the final beneficiaries, Rex and Cheryl. The assets of the original JVT, namely commercial and residential properties acquired by Rex and Cheryl during the course of their marriage, were resettled on the new JVT.

*Rex's business interests*

[7] Rex's successful career in business included property development, road haulage and a sizeable crane hire business that operated in Tauranga, Hamilton and Auckland, through a number of separate companies<sup>3</sup> which were owned 100 per cent by Todd and Pollock Group Ltd.

[8] In February 2006 Rex sold the Todd and Pollock operating companies<sup>4</sup> to New Zealand Crane Hire Ltd for some \$18 million. The proceeds of sale after repayment of outstanding debt of \$12 million were held in Todd and Pollock Group, renamed TP Group, which also held various property assets. Rex entered into a restraint of trade for a two-year period and in effect retired.

[9] When that restraint expired Rex re-entered the crane business. On 7 March 2008 a new company, Pollock & Sons Crane Hire Ltd (Pollock & Sons), was incorporated. Rex and Cheryl were the directors and each held 50 per cent of the A and B class shares in the company. It proved to be very successful and grew more quickly than initially anticipated.

*Rex's estate planning from 1993 to 2012*

[10] Rex made several wills. Following his separation from Pauline, in a will dated 24 November 1993, Rex directed his executors and trustees (who included Steven) to hold his residuary estate in equal shares for the Pollock children until they reached the

---

<sup>3</sup> Todd and Pollock Builders Ltd, Todd and Pollock Scaffold Hire Ltd, Todd and Pollock Haulage Ltd, and Todd and Pollock Crane Hire Ltd.

<sup>4</sup> Except for Todd and Pollock Builders Ltd, which had already been sold.

age of 30. However a new will made on 2 October 1995, a few days after Rex's marriage to Cheryl, made no direct provision for any of the Pollock children from his personal estate being, in large part, his interests in the crane business.

[11] A further will dated 11 December 2002 appointed Cheryl and Peter Washer, a partner in a Tauranga law practice, as executors and trustees. The will bequeathed 80 per cent of Rex's shareholding in the Todd and Pollock companies to Cheryl, and the remaining 20 per cent to the trustees of the original JVT.<sup>5</sup> Again no specific provision was made for any of the Pollock children.

[12] Rex and Cheryl executed new wills in July 2007, June 2009 and February 2012, the contents of which, where relevant, are noted in the context of discussing the various trusts below.

[13] On 31 July 2007 Rex executed a number of documents rearranging his affairs. This included the establishment of the new JVT.<sup>6</sup> A notable feature of the arrangements was the fact of provision for the Slater children as well as the Pollock children. In addition to executing a new will, Rex made a new memorandum of wishes for the trustees of the JVT with specific directions to be followed upon his death in respect of both the Pollock children and Slater children. Steven was to be paid \$1,000,000. Rex also expressed the wish that the trustees give consideration to paying income from the JVT to Cheryl and other beneficiaries as the trustees saw fit, but specifically directed the trustees to exercise caution in distributing funds to "my three children" and to consider the needs of his grandchildren.

[14] At some point, probably in the first part of 2009, Rex transferred 50 per cent of his shares in TP Group to Cheryl.<sup>7</sup> Rex's will of 4 June 2009 did not make any specific provision for the balance of his shares in TP Group, but provided that his estate would be given on trust to the trustees of the JVT. A new memorandum of wishes for the trustees of the JVT contained no directions for cash to be given to any

---

<sup>5</sup> These dispositions of Rex's shareholding in the Todd and Pollock companies included the proceeds of any sale of that shareholding.

<sup>6</sup> Discussed at [6] above.

<sup>7</sup> There was no evidence to establish when Cheryl became a shareholder in TP Group, but it is apparent from the will executed by Cheryl on 4 June 2009 that by then she held shares in the company.

of the Pollock or Slater children. However specified properties and one-third shares in Rex's launch "Reflections" were to go to separate trusts to be set up for each of Steven, Wayne and Thomas.<sup>8</sup>

[15] Rex's will of 7 February 2012 was in all significant respects the same as his 4 June 2009 will, save that it removed Steven as default executor and trustee if Cheryl predeceased Rex. Rather, the alternate trustees and executors were Wayne Slater, Mr Washer, and Kathleen Ross. In a memorandum of wishes concerning the JVT, Rex repeated the importance of maintaining the capital of the trust fund but not to the extent of denying beneficiaries access to funds when of most use to them and their families. He also directed other dispositions of property to go to the separate trusts for Steven, Wayne and Thomas — although the properties to go to Steven differed from those in the memorandum of 4 June 2009.

*Steven's participation in Rex's businesses*

[16] Steven commenced work in his teenage years at Todd and Pollock Builders Ltd (Todd and Pollock), Rex's original business venture which was later restructured to establish separate companies owned 100 per cent by TP Group. From the age of 15 he was employed on a full-time basis. Steven left Todd and Pollock in February 1999 and set up his own haulage company, Kiwi Haulage (Tauranga) Ltd. The High Court judgment described the circumstances of his departure in this way:<sup>9</sup>

[49] ... Rex had learned that Steven had been having an affair with a woman working in the Todd and Pollock office. Steven initially denied the affair but later acknowledged it when told by Rex that Steven's involvement with the woman was apparent from the company's phone records, which Cheryl had scrutinised. Steven says Cheryl gave Rex an ultimatum that either Steven had to go or she would. Cheryl says Rex fired Steven after he had made disparaging remarks about her after she had challenged Steven on his behaviour. In any event, it is apparent that Rex told Steven to leave the company and Steven did so. A short time later, Rex learned that the woman with whom Steven had been having an affair had been stealing money from the company. Whether or not Steven knew of the theft, the episode caused considerable unhappiness within the family.

---

<sup>8</sup> Rex also executed a separate memorandum of wishes on 4 June 2009, in which he stated that he had not made any provision in his will or his trusts for Nathan because of Nathan's lack of contribution to the family, his very limited contact with Rex and his lifestyle, "particularly his use of drugs".

<sup>9</sup> High Court judgment, above n 2.

[17] Sometime in 2001 Rex invited Steven to return to Todd and Pollock, which had been experiencing a considerable period of expansion, particularly in its haulage and cranes division. Steven agreed to return and was given the title of Operations Manager with responsibility for despatching and fielding inquiries in relation to the company's trucks and cranes. Steven claimed that he played a major part in the company's continued expansion during this period.

[18] However after about a year, Steven left Todd and Pollock, the apparent cause being his addiction to methamphetamine. For a number of years he had no further contact with Rex and Cheryl.

[19] When the idea of the new company Pollock & Sons was conceived, Rex proposed that Steven, Wayne and Thomas should join in its establishment. According to Cheryl it was her and Rex's intention to coach the three boys on how to operate the company. If it became successful they would step back and allow the boys to run it. Although Cheryl denied that any promises were made of directorships or shareholdings, Steven maintained that Rex had promised him that he would be made a director and shareholder of Pollock & Sons after working at the company for five years. According to Steven, this claim was supported by a 2012 article in *Truck & Driver Magazine*, entitled "Crane Clan's Comeback", which documented the origins and growth of Pollock & Sons.

[20] At a meeting on 9 September 2013 Rex and Cheryl advised the three boys that although Wayne was to be made a director, Steven and Thomas needed to get up to speed before being considered for directorship. Steven, who had been experiencing difficulties at work, was extremely disappointed at this turn of events. Wayne proposed that Steven take on a lesser role such as driving cranes but, according to Wayne, Steven's response was that if he had to drive cranes he would leave. There was talk of legal action and Steven threatened to set up in competition with Pollock & Sons.

[21] On 30 October 2013 Steven and Rex signed a letter prepared by Cheryl that recorded Steven's resignation from Pollock & Sons and the terms of Steven's final pay.

*Rex's reaction to Steven's resignation*

[22] On 11 November 2013 Rex, Cheryl and CLM Trustees as trustees of the JVT signed a deed deleting Steven as a final and discretionary beneficiary.

[23] That same day Rex signed a memorandum to his trustees stating that he had not made any provision for Steven in his will or his trusts because Steven no longer wished to work in the Pollock & Sons business. He also signed a new memorandum of wishes in relation to the JVT directing his trustees to exercise caution in distributing funds to his children and to consider the needs of his grandchildren.

[24] On 20 November 2013 Rex's solicitors registered a number of companies for the purpose of preventing use of the Pollock name by Steven in any new crane operation he might establish.

*Rex's illness and subsequent events*

[25] In January 2014 Rex was diagnosed with mesothelioma and commenced treatment which continued for several months. On 29 January 2014 Steven sent a letter to Rex indicating that he would like to hear from him and expressing regret for past events. Rex did not reply.

[26] However on either 14 or 15 April 2014 Rex signed a document headed "Record Of Events I have endured with my son Steven Rex Pollock" which concluded that Steven's "journeys in life" had cost a lot to Rex, who had given him financial support and many opportunities, while Steven had never been there for Rex in his hard or bad times. The document stated that because of the heartache, stress and Steven's selfish ways, Rex's wishes were that Steven would receive nothing from Rex's estate or trusts "because in the past he has had plenty and got nothing to show for it". Mr Washer's evidence was that this document was prepared at his suggestion against the possibility that Steven might seek to challenge Rex's will.

[27] Following a share valuation, on 15 April 2014 both Rex and Cheryl executed deeds gifting their shares in TP Group to the trustees of the JVT. The deeds recorded the parties' acknowledgment that the shares had a present value of \$37 per share and

that the total value of each parcel of shares was \$5,550,000. The consequence of Rex's gift was that his shares in TP Group were no longer part of his estate.

[28] By October 2014 Rex had become a hospice out-patient. On 12 November 2014 Cheryl sent an email to Mr Washer requesting a meeting because "Rex has had a change of plan regarding his will, The Trust and our Power of Attorneys". At the meeting the following day Rex and Cheryl handed over a paper headed "13<sup>th</sup> November, 2014 – Instructions provided by Rex and Cheryl Pollock", beneath which was the statement that:

Rex and Cheryl are trying to prevent legal challenges by family members and unnecessary legal fees in the future.

[29] On 27 November 2014 Rex gifted his shares in Pollock & Sons to Cheryl. The deed of gift recorded the value of the A shares as \$39,000 and of the B shares as \$29,000. On the same day Rex and Cheryl assigned to Cheryl the debt of \$2,609,000 owed to them by Pollock & Sons. As a consequence neither the shares in Pollock & Sons nor the debt owed by Pollock & Sons formed part of Rex's estate.

[30] Also on 27 November 2014 Rex made his final will and a final memorandum of wishes concerning the JVT. Rex appointed Cheryl and Mr Washer as his executors and trustees, gave all his chattels and bank accounts to Cheryl, made Cheryl the appointor under cl 13 of the JVT deed, and gave the remainder of the estate to his trustees for transfer to the trustees of the JVT after payment of debts, duty, executorship and administration expenses. The final JVT memorandum had a simplified direction in the event of Rex's death: the trustees were to give consideration to paying income from the JVT to Cheryl and other named beneficiaries as the trustees saw fit.

[31] Rex died on 8 February 2015 at the age of 70.

## **The High Court judgment**

### *Steven's claims*

[32] In May 2017 Steven commenced proceedings pleading five causes of actions:

- (a) A claim under the Family Protection Act against Cheryl and Mr Washer (as executors and trustees of Rex's estate) alleging a failure to recognise Rex's moral duty to Steven having regard to the years Steven had dedicated to the family businesses and to promises Rex had made to Steven.
- (b) A claim against Cheryl and Mr Washer (as trustees and executors of Rex's estate) under the Law Reform (Testamentary Promises) Act 1949 (the Testamentary Promises Act) asserting that Rex promised Steven that if he worked for the family business he would inherit it and become a director and shareholder of Rex's companies.
- (c) A claim alleging that Steven was excluded from Rex's estate because of undue influence exercised by Cheryl who, together with her children, stood to benefit materially from Steven's exclusion. It was asserted that Cheryl and the trustees of the JVT held Steven's entitlement to Rex's estate on constructive trust for Steven's benefit or, in the alternative, that Steven's reasonable expectation to share in Rex's assets had been materially altered to Steven's detriment because of Cheryl's influence over Rex.
- (d) A claim of an unjust enrichment of Cheryl and the JVT on the premise that Steven's work at Todd and Pollock had contributed to the increased value of the shares in Todd and Pollock and in related companies which had been established and sold, and hence to the value of the TP Group shares, in addition to the value of the Pollock & Sons shares. It was alleged that Cheryl, aware of Rex's promise that Steven would inherit and become a shareholder of Todd and Pollock, and become a shareholder and director of Pollock & Sons, took active steps to ensure that Steven did not receive the benefit of the promise.
- (e) A claim that the trustees of the JVT owed fiduciary duties to Steven as a final and discretionary beneficiary of the JVT, which duties were breached by the removal of Steven as a final and discretionary

beneficiary of the JVT. It was further asserted that CLM Trustees had professional obligations as a trustee company to protect the interests of the beneficiaries of the JVT and the assets of the Trust, which had also been breached.

*The statutory causes of action*

[33] Because van Boheman J did not accept that Steven's efforts added to the value of either Todd and Pollock or Pollock & Sons, in ways that were unrewarded by the wages and salary he received, the Judge rejected Steven's claim under the Testamentary Promises Act.<sup>10</sup> However the Judge found that Rex bore significant responsibility for the breakdown of his relationship with Steven. The Judge did not accept that by that breakdown Rex was absolved of his moral duty to provide maintenance and support for Steven, even if there should be an adjustment of the amount of any award to reflect the loosening of the bonds between Rex and Steven in October 2013.<sup>11</sup> Consequently he found that provision should be made for Steven under the Family Protection Act but, in the absence of any assets in Rex's estate, the Judge was unable to make any award.<sup>12</sup>

[34] The Judge recognised that the transfers of the shares in TP Group to the JVT and of the shares in Pollock & Sons to Cheryl by gift, rather than through Rex's estate, prevented the value of those shares being available to satisfy the claims under the Family Protection Act. He observed that the fact that Rex chose that mechanism to transfer the shares in order to frustrate such a claim might reflect poorly on the reputation of a man who was well known in the Tauranga community.<sup>13</sup>

[35] However, the Judge recognised that that choice was not unlawful. It did not mean that Cheryl, either as a trustee or personally, was the recipient of benefits that the JVT and Cheryl should not otherwise have received.<sup>14</sup> As the Judge explained:

[330] Because the transfers were made by gift rather than through Rex's estate, the Court is not able to reduce the value of the transfers by ordering

---

<sup>10</sup> High Court judgment, above n 2, at [212]–[213].

<sup>11</sup> At [190]–[192].

<sup>12</sup> At [193], [327] and [331(c)].

<sup>13</sup> At [328].

<sup>14</sup> At [329].

awards to ... Steven under the Family Protection Act. That may seem unjust. However, it would be pushing the boundaries of trust law as it has developed in New Zealand to hold that transfers of assets to a trust can be set aside to enable satisfaction of claims under the Family Protection Act and that was not the basis on which the [claim] for ... Steven [was] advanced.

*Undue influence by Cheryl over Rex*

[36] Steven's claim was advanced on the alternative bases that:

- the nature of the marriage between Rex and Cheryl, together with their personalities, resulted in a relationship of trust and confidence giving rise to an evidential presumption of influence;<sup>15</sup> and/or
- as a matter of fact Cheryl exercised actual undue influence over Rex.

The undue influence was alleged to have been exercised throughout their marriage, but particularly in the final year of Rex's life.

[37] The Judge accepted that the evidence established that Rex and Cheryl had a very close personal and business relationship<sup>16</sup> and that Rex was heavily dependent on Cheryl in the administration of his business and probably his personal affairs.<sup>17</sup> However the Judge did not accept that the evidence established there was a substantive dependency on the one hand or that Cheryl had ascendancy, domination or control over Rex on the other.<sup>18</sup> While recognising that Cheryl may have had a significant influence on Rex's decisions on a wide range of matters, and that he may have been reluctant to disagree with her or do things which did not meet her approval, that did not amount to Rex being reliant or dependent on Cheryl for advice in the sense discussed in the authorities cited by the Judge.<sup>19</sup>

[38] The Judge concluded that it would be strongly against the weight of evidence to find that Rex was so dependent on Cheryl that she owed an obligation of candour

---

<sup>15</sup> It was acknowledged that there was no presumption that a husband and wife relationship was one of trust and confidence for the purposes of establishing undue influence.

<sup>16</sup> At [231].

<sup>17</sup> At [232].

<sup>18</sup> At [233].

<sup>19</sup> At [235], citing *Royal Bank of Scotland v Etridge (No 2)* [2001] UKHL 44, [2002] 2 AC 773 at [9]–[11] and *Green v Green* [2015] NZHC 1218, (2015) 4 NZTR 25-017 at [100].

and protection to Rex such as to give rise to the evidential presumption for the purposes of establishing undue influence,<sup>20</sup> including during the period of Rex's illness.<sup>21</sup> Having so found, the Judge did not turn to consider whether the several transactions in question called for an explanation.

[39] The Judge then proceeded to address and reject the proposition that Cheryl exercised actual undue influence over Rex with respect to the five transactions challenged by Steven:

- (a) Steven's deletion as a beneficiary from the JVT and from another trust known as the Caribbean Trust;<sup>22</sup>
- (b) the transfer of the TP Group shares to the JVT;<sup>23</sup>
- (c) the transfer of the Pollock & Sons shares to Cheryl;<sup>24</sup>
- (d) the appointment of Cheryl as appointor under the JVT and the Caribbean Trust;<sup>25</sup> and
- (e) Steven's exclusion from Rex's estate.<sup>26</sup>

*Alleged unjust enrichment of the JVT and Cheryl*

[40] Steven's claim of unjust enrichment premised on non-performance of a promise that he would inherit the business from Rex was disposed of by the Judge's conclusion in respect of the Testamentary Promises Act claim.<sup>27</sup> An alternative formulation of the claim, advanced in submissions based on enrichment which the defendants were said to have enjoyed as a result of Steven's unpaid labour at Todd and

---

<sup>20</sup> High Court judgment, above n 2, at [236].

<sup>21</sup> At [244]–[245].

<sup>22</sup> At [246]–[255].

<sup>23</sup> At [256]–[261].

<sup>24</sup> At [262]–[267].

<sup>25</sup> At [268]–[271].

<sup>26</sup> At [272]–[276].

<sup>27</sup> At [288].

Pollock and Pollock & Sons, was likewise rejected as not being supported on the evidence.<sup>28</sup>

*Breaches of duties by Steven's removal as a beneficiary*

[41] The Judge rejected the proposition that the trustees owed fiduciary duties to Steven when exercising the power to remove him as a beneficiary.<sup>29</sup> He proceeded to hold that, even if he had found the trustees had limited fiduciary responsibilities of the kind recognised in *McLaren v McLaren*,<sup>30</sup> the reasons for Steven's removal, namely Steven having let Rex down for a third time, turning away from Rex's business for a third time and threatening to use the Pollock name in competition with Pollock & Sons, were neither irrational nor disproportionate.<sup>31</sup>

**Issues**

[42] The parties were unable to agree on the formulation of the issues for determination on this appeal. From the submissions advanced we identify the following issues:

*Undue influence*

- (a) Did the Judge err in his statement of the relevant principles?
- (b) Did the Judge err in finding that:
  - (i) the relationship between Rex and Cheryl was not a special relationship of trust and confidence giving rise to an evidential presumption of undue influence?
  - (ii) Cheryl did not exercise undue influence in fact over Rex in respect of:

---

<sup>28</sup> At [289]–[291].

<sup>29</sup> At [299].

<sup>30</sup> *McLaren v McLaren* [2017] NZHC 161, (2017) 4 NZTR 27-004.

<sup>31</sup> High Court judgment, above n 2, at [300]–[301].

- Rex's gift of his TP Group shareholding to the JVT;
- Rex's gift of his Pollock & Sons shareholding to Cheryl; and/or
- Rex's decision to remove Steven as a beneficiary of the JVT?

*Unjust enrichment*

- (c) Was the basis of the claim reshaped from that advanced in the High Court?
- (d) Should a new category of unjust enrichment be recognised?

*Removal of Steven as a beneficiary: a breach of fiduciary duty?*

- (e) Did the Judge err in finding that:
- (i) Rex, Cheryl or Peter Washer (on behalf of CLM Trustees) did not owe a fiduciary duty to Steven when exercising the power to remove him as a beneficiary of the JVT?
- (ii) the removal of Steven as a beneficiary of the JVT was not wrongful?

**Undue influence**

*Did the Judge err in his statement of the relevant principles?*

[43] The Judge identified the applicable principles of law as those stated by Winkelmann J in *Green v Green*,<sup>32</sup> which were adopted from the decision of

---

<sup>32</sup> *Green v Green*, above n 19, at [100], as confirmed on appeal in *Green v Green* [2016] NZCA 486, [2017] 2 NZLR 321 at [48].

the House of Lords in *Royal Bank of Scotland v Etridge (No 2)*.<sup>33</sup> The Judge set out the principles as follows:<sup>34</sup>

- (a) The overall burden of proof rests on the person seeking to establish undue influence ...
- (b) The burden of proof is on the balance of probabilities.
- (c) Those who assert undue influence ... must show that the alleged influence led to the making of the impugned transactions, and that the influence 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 (Rex).
- (d) The question of whether a transaction was brought about [under] any undue influence is a question of fact; a party can succeed in establishing this either directly by proving “actual undue influence” or [by] recourse to an evidential presumption which arises where it is established that:
  - (i) The person said to have been subject to undue influence (Rex) placed trust and confidence in the other (Cheryl); and
  - (ii) The transaction called for an explanation.
- (e) Whether there is a relationship of trust and confidence can either be established factually or by reference to a class of special relationships such as lawyer-client, parent-child, doctor-patient. In the latter category, the law presumes irrebuttably that one party had influence over the other. The presumption is only as to proof of influence. The person alleging undue influence still needs to establish a transaction calling for an explanation.
- (f) Whether a transaction calls for an explanation depends on the circumstances of the case. The question is simply whether failing proof to the contrary, the transaction is explicable only on the basis that undue influence had been exercised to procure it.
- (g) Once the persons claiming undue influence ... have established both the relationship of trust and confidence and a transaction calling for explanation, the evidential burden shifts to the person seeking to uphold the transaction (Cheryl) to show that the transaction was not the result of undue influence. However, the overall burden of proof remains on the persons alleging undue influence ...
- (h) The presence of independent advice is a factor 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

---

<sup>33</sup> *Royal Bank of Scotland v Etridge (No 2)*, above n 19.

<sup>34</sup> High Court judgment, above n 2, at [217].

understood the act is not the same as establishing that the act was not brought about by undue influence. A person can fully understand and act and still be subject to undue influence.

- (i) Allegations of undue influence may succeed in relation to the exercise of powers not just the transfer of property.

[44] Mr Fraundorfer, who advanced this aspect of Steven’s case, contended that the Judge erred in the standard applied at (d)(i) of those principles.<sup>35</sup> In particular he drew attention to the Judge’s conclusion at [236]:

[236] The relationship may well have been one of trust and confidence in the general meaning of those terms, with each having trust and confidence in the other. But trust in this context has a more specific meaning, one connoting reliance and responsibility, or as Lord Nicholls put it in *Etridge*, where one party owes the other an obligation of candour and protection. It would be strongly against the weight of evidence to find that Rex was so dependent on Cheryl that Cheryl owed an obligation of candour and protection to Rex such as to give rise to the evidential presumption for the purposes of establishing undue influence.

Mr Fraundorfer submitted that a duty of “candour and protection” imported too strict a standard. He emphasised that the court may examine a range of markers, drawing attention to several expressions identified in *Etridge* and noting Lord Nicholls’ observation there that none of them is perfect or all embracing. Mr Fraundorfer submitted that there is “no shorthand” for where such a relationship exists. The Judge was said to have erred in adopting a single epithet as his yardstick.

[45] We do not consider that is a fair characterisation of the Judge’s approach. First, the quoted paragraph was part of the conclusion to the section of the judgment addressing the question of whether the relationship between Rex and Cheryl was “one of trust and confidence”.<sup>36</sup> The Judge had earlier discussed *Etridge* in this manner:

[223] As Lord Nicholls said in *Etridge*, the law has long recognised the need to prevent abuse of influence in cases where there is a relationship where one party owes the other an obligation of candour and protection, despite the absence of evidence of overt acts of persuasive conduct. Lord Nicholls also said the types of relationship in which this principle falls to be applied cannot be listed exhaustively because relationships are infinitely various. Referring to earlier authorities, he noted that the question is whether one party has

---

<sup>35</sup> He also contended that there was error in the approach reflected in (f): discussed below at [63]–[64].

<sup>36</sup> The Judge set out his conclusions on the nature of the relationship at [231]–[245].

reposed sufficient trust and confidence in the other but also said that even this [test] is not comprehensive, and that the principle can apply to cases where a vulnerable person has been exploited. Lord Nicholls observed:

Indeed, there is no single touchstone for determining whether the principle is applicable. Several expressions have been used in an endeavour to encapsulate the essence: trust and confidence, reliance, dependence or vulnerability on the one hand and ascendancy, domination or control on the other. None is all embracing. Each has its proper place.

(Footnote omitted.)

[46] A few paragraphs earlier Lord Nicholls had identified a second form of unacceptable conduct<sup>37</sup> arising out of a relationship between two persons where one has acquired over another a measure of influence, or ascendancy, of which the ascendent person takes unfair advantage. He explained:

[9] In cases of this latter nature the influence one person has over another provides scope for misuse without any specific overt acts of persuasion. The relationship between two individuals may be such that, without more, one of them is disposed to agree [to] a course of action proposed by the other. Typically this occurs when one person places trust in another to look after his affairs and interests, and the latter betrays this trust by preferring his own interests. He abuses the influence he has acquired. In *Allcard v Skinner* (1887) 36 Ch D 145, a case well known to every law student, Lindley LJ, at p 181, described this class of cases as those in which it was the duty of one party to advise the other or to manage his property for him. In *Zamet v Hyman* [1961] 1 WLR 1442, 1444–1445 Lord Evershed MR referred to relationships where one party owed the other an obligation of candour and protection.

[47] In any case it is evident that the Judge did not confine himself to an analysis tied solely to the candour and protection marker. When he turned to consider Rex's state of health in 2014, the Judge reviewed the medical evidence given by several practitioners.<sup>38</sup> In particular, the Judge viewed as less than persuasive the opinion of Dr Tan, a psychiatrist who gave evidence for Steven, that Rex would have been more susceptible to influence in his final year. It is noteworthy that the Judge's reasons for this view included the observation that such susceptibility fell well short of establishing Rex was in the kind of relationship discussed by Lord Nicholls in *Etridge*. The Judge went on to observe that susceptibility to influence does not establish there was dependency, reliance or vulnerability on the one hand and

---

<sup>37</sup> The first comprised overt acts of improper pressure or coercion such as unlawful threats: *Royal Bank of Scotland v Etridge (No 2)*, above n 19, at [8].

<sup>38</sup> High Court judgment, above n 2, at [237]–[243].

ascendency, determination or control on the other.<sup>39</sup> Thus it is apparent that the Judge's analysis was not limited to a single marker.

*Did the relationship between Rex and Cheryl give rise to an evidential presumption of undue influence?*

[48] The High Court judgment records Mr Fraundorfer's acknowledgment that there is no presumption that a husband and wife relationship is one of trust and confidence for the purposes of establishing undue influence.<sup>40</sup> That acknowledgment was properly made. After describing and providing examples of relationships where the law presumes irrebuttably that one party had influence over another, Lord Nicholls stated in *Etridge* that it is now well established that the relationship between husband and wife is not one of those relationships. He observed that there is nothing unusual or strange in a wife, from motives of affection or for other reasons, conferring substantial financial benefits on her husband. While there is no presumption, he recognised that the court will nevertheless note, as a matter of fact, the opportunities for abuse which flow from a wife's confidence in her husband and will take this into account with all the other evidence in the case.<sup>41</sup>

[49] Lord Scott's judgment in *Etridge* elaborated on the circumstances where undue influence in the context of the relationship between husband and wife may nevertheless be identified:

[160] There are, of course, cases where a husband does abuse that trust and confidence. He may do so by expressions of quite unjustified over-optimistic enthusiasm about the prospects of success of his business enterprises. He may do so by positive misrepresentation of his business intentions, or of the nature of the security he is asking his wife to grant his creditors, or of some other material matter. He may do so by subjecting her to excessive pressure, emotional blackmail or bullying in order to persuade her to sign. But none of these things should, in my opinion, be presumed merely from the fact of the relationship of general trust and confidence. More is needed before the stage is reached at which, in the absence of any other evidence, an inference of undue influence can properly be drawn or a presumption of the existence of undue influence can be said to arise.

---

<sup>39</sup> At [244].

<sup>40</sup> At [221].

<sup>41</sup> *Royal Bank of Scotland v Etridge (No 2)*, above n 18, at [18]–[19].

[50] It was Steven's contention that something "more" existed in this case on account of the particular nature of the marriage relationship which Rex and Cheryl shared, their individual personalities, and Rex's state of health in the last year of his life. The argument drew on the following propositions:

- (a) Rex and Cheryl had a conspicuously close relationship.
- (b) Rex was dependent on Cheryl to write and send emails and mail on his behalf, she also served as his notebook, diary and typist.
- (c) Cheryl was closely involved [in] Rex's decisions around his estate.
- (d) Cheryl organised the implementation of the [d]ecision [to disinherit Steven].
- (e) Rex was almost wholly dependent on Cheryl for emotional support and validation, and was averse to confrontation.
- (f) Rex was known to sign documents on the basis he trusted the people who gave them to him. Especially in 2014, [h]e would sign documents prepared by Cheryl following minimal discussion.
- (g) In this regard and by contrast to Rex, during the relationship Cheryl was methodical, detailed, and exacting and insist[ed] on having input on major decisions affecting her.
- (h) Cheryl was the "gate keeper" to attendance of family events. She also controlled visitors to Rex including when he was dying, and communicated with his children on his behalf.
- (i) Cheryl displayed control over the children: including in their own asset planning, salaries, and even in their diet and smoking.
- (j) Cheryl used [her] influence over Rex, and her dignitas in the community to remove people from Rex's life.
- (k) Cheryl issued Rex with ultimatums; forcing him to choose between her and his family. She placed similar pressure on others, and would use violence to get her way in confrontations. Rex was forced to sneak out to see family members and offer secret gifts. By her own proudful admission, she was confrontational in contrast to Rex's passive nature.
- (l) Cheryl was the primary author of Steven's departure from both Todd and Pollock and ultimately Pollock & Sons.
- (m) Cheryl's influence resulted in a change in Rex's relationship with his children and grandchildren, even from the first year they lived together - a fact even outsiders observed.
- (n) Cheryl took it upon herself to explain Rex's relationship with his children to others.

(Footnotes omitted.)

[51] Cheryl's level of influence over Rex was said to have increased as his health declined from January 2014 when, it was contended, he became increasingly dependent on her and unable to express his own will. That Cheryl's influence extended to ascendancy and control by the time of Rex's death was said to be established by the following:

- (a) He grew vulnerable, experiencing increasing fatigue, low mood, anxiety and depression, along with medication side effects.
- (b) Until the final month of his life, Cheryl was Rex's sole carer. In this position, she exercised control over physical access to him.
- (c) Once he entered care, Cheryl was responsible for managing all communications with Rex's medical and palliative care team.
- (d) Cheryl also managed who in the family could see Rex in [the] hospice.
- (e) Cheryl managed communication with Rex's advisers, even mailing and instructing on Rex's behalf without consulting him.
- (f) From July 2014, Cheryl was his sole transport.
- (g) By the end of his life, Rex had become so completely dependent on Cheryl that he refused to allow her out of his sight.

(Footnotes omitted.)

[52] The Judge ultimately concluded that there was no relationship of trust and confidence beyond that which existed between a loving couple who worked together in the conduct of their affairs.<sup>42</sup> This conclusion was reached with the benefit of evidence from 11 witnesses in support of the claim and 27 witnesses for the respondents in the course of a trial spanning three weeks. Save for a small number of witnesses who gave evidence solely by affidavit or who were not required to give oral evidence, the Judge had the advantage of seeing and hearing the witnesses. He also had the benefit of considering all the evidence, some of which is not included in the case on appeal. However from the written record available to us it is apparent that there was ample evidence to support the Judge's conclusion on the issue of undue influence.

[53] We are of the view that it is particularly instructive to consider the evidence of persons who were not protagonists in the dispute and whom we infer were likely to

---

<sup>42</sup> High Court judgment, above n 2, at [231]–[236].

have been more objective in their assessments. A useful insight was provided by Gary Guernier who, in his capacity as manager of PlaceMakers in Tauranga, first met Rex in early 1992. He explained that as their business relationship grew, he and his wife came to socialise with Rex and Cheryl and travelled with them overseas on a number of occasions. He said:

10. I was aware that Cheryl was an integral part of the business. I often used to joke that the company was the Rex and Cheryl show. Rex involved Cheryl in his decision making as there were never to be any surprises. This was a real partnership, both in business and in their private life. Cheryl was astute and brought a nice balance to Rex who was the practical side of the partnership. Cheryl to my mind [complemented] Rex. She had a good business mind and there was certainly no pulling the wool over her eyes.
11. In making a decision I am aware that Rex would listen to and take advice when necessary from others but if he felt strongly he would back his own judgment and then take responsibility for the decision he had made.

[54] In a similar vein was the evidence of Tony Longhurst who, until his retirement in July 2016, was the national key account manager for the building supply merchant Carters. Having first met Rex in 1988, Mr Longhurst and his wife also developed a personal relationship with Rex and Cheryl, whom he described as follows:

22. Rex and Cheryl had a strong marriage and a very effective working relationship. They were good together and while they were different in many respects, they shared the same values, and both had an incredible work ethic.
23. Like Rex, Cheryl worked very hard and was a good business woman. She put her heart and soul into the Todd and Pollock Group of companies. From my observations, Cheryl was very involved in the administration of the various businesses. She was highly organised, and I found her to be efficient.
24. From what I observed Cheryl did not call all the shots in respect of the direction of the companies, but she was very involved in the day to day running of the businesses and was an integral part of [their] success.
25. From my perspective, Rex was definitely the decision maker, but Cheryl was always on side with those decisions. Rex's vision for the companies, was also Cheryl's. They were both committed to the company's growth and to improving and growing the Pollock brand, as well as its reputation.

26. While Rex was clearly the driver behind the businesses and was responsible for the overall decisions, Cheryl supported and helped implement those decisions as one would expect from their partner.

[55] Lisa-Jane Saltiel knew Rex and Cheryl for 29 years during which time they became friends, often visiting each other's homes. Ms Saltiel worked for Todd and Pollock for four years in the 1990s and returned to work for Pollock & Sons in 2013. During both periods of employment her perception was that Rex and Cheryl worked very much as a team. On her return in 2013 she described their mode of working in this way:

22. Personally Rex had not changed at all from when I first met him. Rex was still what I would describe as computer illiterate. He still worked with handwritten notes on scraps of paper. He still did not do emails. These were left to Cheryl. He was still on top of the company and its affairs and its finances. Each day he would always check the dockets and then file them away.
23. Rex and Cheryl continued to work together as a team, much the same as before but still at the end of the day if it concerned the business, then Rex's opinion if strongly held would prevail.

[56] Several witnesses testified about the time when Rex became unwell, a period which was a focus of Steven's case. Brian Hamilton, an Anglican vicar based in Tauranga, was contacted by Cheryl in early 2014 following Rex's diagnosis and he subsequently developed a pastoral relationship with Rex. Rev Hamilton's perception was:

16. Rex and Cheryl had a close and loving relationship based on mutual respect. Cheryl provided loving care to Rex throughout his illness and Rex was very accepting and thankful for that. Whenever I visited Rex during his illness Cheryl would ensure Rex was comfortable, pain free and not too tired. She was doing her very best to look after and care for someone she clearly loved and who was dying.

[57] He also expressed the opinion that from the time of Rex's diagnosis in 2014 until his death in February 2015, Rex was of sound mind and had "absolutely no brain fade". He always made complete sense and was capable of making, and did make, his own decisions. That evidence needs to be seen in the context that Rev Hamilton was also a registered Justice of the Peace who explained his understanding that when witnessing a document it was necessary to ensure that the deponent appeared to be of sound mind.

[58] Robert Carden, a director of Hamilton engineering company Tidd Ross Todd Ltd, also gave evidence of his close working relationship with Rex. He explained that towards the end of 2014 Rex was confined to a wheelchair with oxygen but still participated in the day-to-day affairs of the business at its Tauranga yard. The only difference which he noticed was that Rex's physique was deteriorating and that he was having difficulty with his breathing. However mentally he was as sharp as ever. It was Mr Carden's perception that Rex drove himself on as he wanted to ensure that the business and his name lived on after his death.

[59] Finally we refer to the evidence of one of Rex's professional advisers. Timothy Cooney, an accountant for Rex's businesses, explained that right up until his death Rex was very much the man in charge of what took place. Whilst he would listen to advice and sometimes act on it, the final decision was always his. If he wanted to do something, it would happen, but if he did not think it was a good idea, then it would not happen. Mr Cooney agreed with Mr Fraundorfer's proposition in cross-examination that Rex was the man doing the deals and Cheryl was doing the paperwork. In all Mr Cooney's dealings with Rex he never saw any sign that Rex was influenced by anything other than his own decision making.

[60] We recognise that there was some evidence critical of Cheryl. For example Richard Monk, who had once worked at Todd and Pollock, described Cheryl as a "Jekyll and Hyde" character, and expressed the view that the wealth passing out of the Pollock family to Cheryl and her family was the biggest corporate theft in Tauranga's history. A significant part of Mr Monk's first affidavit was under the heading "[t]he influence Cheryl exercised over Rex" and he cited as an example of this influence a meeting with Rex and Cheryl in 2008, when they endeavoured to persuade him to work for Pollock & Sons.

[61] Mr Monk was taxed in cross-examination about his description of that meeting as "Cheryl holding sway over Rex". He recanted and apologised for the statement, explaining that he meant to say that Cheryl did most of the talking at the meeting. However this description was unsurprising. The evidence was clear that Rex was quiet and thoughtful while Cheryl was chatty and expressive. His concession was

significant because there is a very substantial difference between loquaciousness and undue influence.

[62] Although as noted earlier we do not have the same advantage as the trial Judge of viewing the witnesses, our conclusion from our review of the evidence accords entirely with the Judge's summation:

[231] I accept that the evidence establishes that Rex and Cheryl had a very close personal and business relationship. Indeed, the evidence is that Rex and Cheryl did not distinguish much between home and work and that, particularly for Rex, his work was his life. Part of this would have stemmed from the fact they met at the office and that, except for the period between the sale of the Todd and Pollock companies and the establishment of Pollock & Sons, their working relationship continued throughout the marriage. But underlying that closeness was a love for each other and a mutual commitment to hard work and success.

[232] I also accept that Cheryl carried out many administrative tasks for Rex such as receiving and replying to Rex's email and to text messages and generally acting as Rex's notebook and diary. To that extent, the evidence establishes that Rex was heavily dependent on Cheryl in the administration of the business and probably of his personal affairs. I also accept that Cheryl was very closely involved in the business decisions that Rex made with respect to Todd and Pollock and then Pollock & Sons and to the decisions he made regarding his wills and trusts. I also accept that Rex was very dependent on Cheryl for emotional support at home and at work.

[233] However, I do not accept that the evidence establishes that there was substantive dependency on the one hand or that Cheryl had ascendancy, domination or control over Rex on the other as discussed by Lord Nicholls. As already noted, a number of the witnesses referred to Rex and Cheryl operating as a team. As in most teams, each had their established roles. The evidence is that Rex was the one who made the business decisions and Cheryl was the one who helped him carry them out. Cheryl provided support services, to Rex. That did not mean Rex was dependent on Cheryl for his substantive decisions.

[234] A number of witnesses, including Mr Washer, former employees of Todd and Pollock, and Rex's former bank manager, referred to Rex as being the one who was in control, the decision maker, the one who called the shots. That evidence is reinforced by the evidence of Rex's character as being a man with a reputation for integrity and honesty and whose word and hand shake could be relied upon. Such a reputation would have been unlikely if Rex was in a relationship of substantive dependence on his wife in his business and personal dealings. I reach that conclusion notwithstanding the evidence that Rex was a reserved man who did not like confrontation and that, by contrast, Cheryl was prepared to play "bad cop" to Rex's "good cop".

[235] I accept that Cheryl has a strong personality and was driven to secure outcomes favourable to her and her family. She may have had a significant influence on Rex's decisions on a wide range of matters. He may have been

reluctant to disagree with her or to do things which did not meet with her approval. In those respects, he may have been deferential to her. But that does not amount to Rex being reliant or dependent on Cheryl for advice in the sense discussed by Lord Nicholls in *Etridge* or of having his will overborn as discussed by Winkelmann J in *Green v Green*.

We find no error in the Judge's conclusion that the relationship between Rex and Cheryl did not give rise to a presumption of undue influence.

[63] Consequently, like the trial Judge, we find it unnecessary to address the question of whether the impugned transactions called for an explanation. We should mention, however, that it was in the context of that question that Steven mounted his second attack on the Judge's statement of the relevant principles governing undue influence. The notice of appeal formulated the challenge in this way:

Furthermore, respectfully, the binding Court of Appeal decision of *Green v Green* was wrongly decided to the extent that it affirmed the High Court[']s gloss that undue influence could only exist where the transaction cannot be explained other than by undue influence. Counsel respectfully submits that this is too narrow and reverses the burden of proof.

(Footnote omitted.)

[64] Although Mr Fraundorfer framed the argument as a criticism of what he described as the Judge's adoption of the phrase "no other possible hypothesis", it does not appear to us that the Judge so expressed himself. In any event there could be no criticism of the Judge in directing himself by reference to the formulation in *Green v Green*,<sup>43</sup> by which he was bound. As the issue is not live, consequent on our finding above we do not consider it appropriate in the present appeal to take up the invitation to revisit *Green v Green*.

#### *Alleged instances of actual undue influence*

[65] Steven contended that three of Rex's decisions were the result of the actual undue influence of Cheryl:<sup>44</sup>

---

<sup>43</sup> *Green v Green*, above n 19.

<sup>44</sup> Paragraph 1.4 of the notice of appeal stated that the Judge erred in finding that Rex was not unduly influenced by Cheryl to make the JVT Gift and the Personal Gift (together, the Gifts), or in removing Steven as a beneficiary of the JVT.

- (a) the gift of his TP Group shareholding to the JVT on 15 April 2014 (the JVT Gift);<sup>45</sup>
- (b) the gift to Cheryl of his shares in Pollock & Sons on 27 November 2014 (the Personal Gift);<sup>46</sup> and
- (c) his decision to remove Steven as a beneficiary of the JVT.

[66] The evidence concerning each of these transactions was scrutinised in detail by the Judge. With reference to the JVT Gift, the Judge accepted that the share transfer was part of a long established plan on Rex's part and that the transfer decision was taken in January 2014, well before the rigours of the cancer and Rex's treatment had set in.<sup>47</sup> The Judge considered that the evidence of Mr Washer made clear that the purpose of the instructions which Rex gave at a meeting on 20 January 2014 was to ensure that his and Cheryl's affairs were in order and, in particular, that after his death Cheryl would be appropriately protected and would be able to continue to run Pollock & Sons and TP Group.<sup>48</sup>

[67] With reference to the Personal Gift the Judge considered that the idea of transferring Rex's shares to Cheryl arose in November 2014 and was at the instigation of Mr Washer, rather than Rex or Cheryl. The Judge drew attention to Mr Washer's email of 17 November 2014 which clearly showed that his purpose was to protect them from any claim which might be made under the Family Protection Act.<sup>49</sup>

[68] So far as the decision to remove Steven as a beneficiary was concerned, the Judge considered that the likely reason was Rex's deep disappointment that the child he had been closest to, and to whom he had given considerably more attention and financial support than his other children, had let him down for a third time and was threatening to set up in competition with him.<sup>50</sup>

---

<sup>45</sup> See [27] above.

<sup>46</sup> See [29] above.

<sup>47</sup> High Court judgment, above n 2, at [257]–[259].

<sup>48</sup> At [260].

<sup>49</sup> At [265].

<sup>50</sup> At [250].

[69] In respect of each of these three transactions, the Judge rejected the contention that the decision was not made by Rex or that Rex's will had been overborne by Cheryl's influence.<sup>51</sup>

[70] In the interests of clarity, we note first that in the notice of appeal and in Steven's submissions these transactions were ascribed definitions by way of abbreviation. In addition to the designations for the individual gifts, they were referred to collectively in the notice of appeal as "the Gifts". The making and implementation by Rex of the decisions to remove Steven as a beneficiary of the JVT and to make the Gifts were referred to collectively as "the Decisions".

[71] However, somewhat confusingly, Steven's submissions contained an extended definition of the phrase "the Decision" as comprising "[Rex's] decision to disinherit Steven, together with the various decisions required to implement it and not reverse it". The apparent objective of that definition was to extend the period under consideration beyond the dates of the transactions themselves up until the date of Rex's death. That is most clearly demonstrated in the following passage from Mr Fraundorfer's submissions for Steven under the heading "Timing of Influence":

Nor should the Court confine itself, as van Bohemen J did, to the time when Rex initially decided to move assets to prevent any claim. Given especially Rex's history of changing his mind and reconciling with his son, it is relevant to consider Cheryl's influence when the Decision as a whole (and each separate step/decision) was actually implemented. This includes at the time of the JVT Gift, the time of the Personal Gift, and even later than that as Rex continued not to reverse his decision.

(Footnote omitted.)

[72] By dint of this extended definition Steven was able to frame the submission that:

Even if the Court upholds his Honour's finding that Rex was not subject to undue influence at the outset, it should nevertheless find that by the time of the actual transactions – or by the time they became final, when Rex took no steps to unwind them – this was a result of undue influence.

---

<sup>51</sup> At [254]–[255], [260]–[261] and [266]–[267].

[73] Even if Steven's enduring obligation theory was adopted so as to enable the assessment of undue influence to be extended well beyond the point in time of the actual transactions, the short answer to the actual undue influence argument is to be found in the evidence of Mr Washer. His detailed brief reviewing the various transactions concluded in this way:

78. Rex remained a forthright and strong personality right up to the end. I never had a sense that he had given up or acceded to Cheryl's demands or to anyone else, or that he acted against his will. Rex and Cheryl were very fond of each other and they shared everything.
79. Even when Rex was late in his illness, he retained his understanding of his affairs and his control of them. Even right to the end he made up his own mind and did not appear swayed by anyone else. I did not see him being overborne by Cheryl, or anyone else.

[74] Mr Washer's evidence is of particular significance with reference to Steven's contention that Rex would sign documents on the sole basis that he trusted the people who gave them to him, and in particular that in 2014 he would sign documents prepared by Cheryl following minimal discussion.<sup>52</sup> Mr Morgan QC, counsel for Cheryl, noted that Mr Washer had had involvement in all of the following transactions:

- (a) the deed removing Steven as a beneficiary of the JVT;
- (b) Rex's memorandum to his trustees of 11 November 2013;<sup>53</sup>
- (c) the transfer of his shares in TP Group to the JVT in April 2014;
- (d) the completion of his record of events endured;<sup>54</sup> and
- (e) the transfer of his shares in Pollock & Sons to Cheryl in November 2014.

Mr Morgan emphasised that Mr Washer was a signatory to each of the three relevant documents and that his evidence was entirely at odds with the submission made for

---

<sup>52</sup> See [50(f)] above.

<sup>53</sup> See [23] above.

<sup>54</sup> See [26] above.

Steven on the issue of Cheryl's alleged undue influence. Mr Morgan further observed that, notwithstanding Mr Washer's involvement with all of those transactions, significantly it was not even put to him in cross-examination that Rex signed the documents unknowingly or on the singular basis that the documents were given to him by Cheryl, without further discussion.

[75] It follows, in our view, that the challenge mounted by Steven to the Judge's finding that Cheryl did not exercise actual undue influence over Rex with reference to these three specific transactions must fail.

### **Unjust enrichment**

*Was the claim reshaped from that advanced in the High Court?*

[76] Steven's claim as pleaded was that the "enrichment conduct" (comprising the collective period of time during which he worked for the family entities) contributed to the increased value of the Todd and Pollock and Pollock & Sons shares, and that his employee compensation was not commensurate with the enrichment conduct. He maintained that Rex expressly and impliedly promised him that, in return for the enrichment conduct and the father/son relationship, Steven would inherit and become a shareholder of Todd and Pollock, and would become a shareholder and director of Pollock & Sons. However, he contended that Cheryl and the JVT trustees took active steps to ensure the promise was not fulfilled and that, at his expense, they benefitted by the transfer of the Pollock & Sons shares to Cheryl and the transfer of the TP Group shares to the JVT.

[77] In dismissing that claim, the Judge explained that in the context of the Testamentary Promises Act claim he had already rejected both the proposition that there had been non-performance of an inheritance promise<sup>55</sup> and the contention that Steven had enriched Pollock & Sons in a way which would sustain a claim for unjust enrichment.<sup>56</sup>

---

<sup>55</sup> High Court judgment, above n 2, at [288].

<sup>56</sup> At [291].

[78] On appeal there was only nominal reliance on the pleaded cause of action, which Mr Scott, on behalf of Mr Washer and CLM Trustees, fairly characterised as more properly one of quantum meruit. Steven's argument in this Court placed a much greater focus on the proposition that the gifts to Cheryl and JVT came at the expense of Rex's estate and hence at the expense of Steven's Family Protection Act claim. The proposition was formulated in this way:

Where a transaction, particularly a gift, is a deliberate and unconscionable effort to avoid the effect of the [Family Protection Act] the Court should be prepared to reverse that transaction in the same way that the Court is able to under the Property (Relationships) Act 1976, which power itself originated in an existing remedy granted by the Court in equity.

Mr Morgan objected to this argument as comprising a new case on appeal.

[79] Steven's attack on the judgment under the rubric of unjust enrichment focused on an alleged erroneous conclusion that the Court did not have jurisdiction to reverse or reduce gifts made by Rex to Cheryl and the JVT. This was not an issue addressed in the High Court, either in the analyses of unjust enrichment or unconscionable bargain. Rather it was an observation made in the course of the Judge's concluding comments under the heading "[c]onsequence of findings and general observation", which included the following:

[328] Underlying the claims brought by Letitia and Steven based on undue influence, constructive trust, unconscionable bargain and unjust enrichment is the complaint that the transfers of the shares in TP Group to the JVT and the shares in Pollock & Sons to Cheryl by gift rather than through Rex's estate have prevented the value of those shares being available to satisfy their claims under [the] Family Protection Act. Their frustration and disappointment are understandable and the fact that Rex chose this mechanism to transfer the shares in order to frustrate such a claim by his daughter in particular, to whom he did not pay significant regard during his life, may reflect poorly on the reputation of a man who was well-known in the Tauranga community.

[329] However, that choice was not unlawful and does not mean that Cheryl as trustee and Cheryl personally are recipients of benefits that the JVT and Cheryl should not otherwise have received. The JVT received what it was always intended it should receive – the value of Rex's accumulated wealth as contained in the shares of TP Group. Cheryl received the shares in Pollock & Sons as Rex intended on the understanding they would pass on to the next generation by way of the Mossie Boyz Trust.

[330] Because the transfers were made by gift rather than through Rex's estate, the Court is not able to reduce the value of the transfers by ordering awards to Letitia and Steven under the Family Protection Act. That may

seem unjust. However, it would be pushing the boundaries of trust law as it has developed in New Zealand to hold that transfers of assets to a trust can be set aside to enable satisfaction of claims under the Family Protection Act and that was not the basis on which the claims for Letitia and Steven were advanced.

[80] The Judge's final observation serves to vindicate Mr Morgan's objection to the introduction of this new argument on appeal. The unjust enrichment claim was not pursued in the High Court in the way Steven sought to advance it on appeal. In reply Mr Fraundorfer properly acknowledged that Steven's case on unjust enrichment had shifted and had been reshaped, although contending there was no prejudice arising. In our view the Judge's closing reflections do not legitimise such a reshaping of Steven's case. However, while Mr Morgan's objection is valid, the implications of the proposition advanced on appeal are so profound for traditional estate planning practice in New Zealand that it is desirable for us to address the reshaped argument, albeit briefly.

*Recognition of a new category of unjust enrichment?*

[81] Unjust enrichment refers to an event whereby a defendant is unjustly enriched at the plaintiff's expense, the response to which is restitution of the enrichment to the plaintiff.<sup>57</sup> Butler notes that liability for unjust enrichment does not depend on the commission of a wrong, nor is it concerned with the quality of the defendant's conscience or his conduct. Rather the right to restitution is triggered by the receipt of an enrichment in circumstances that put it within one of the unjust categories. As *Goff & Jones: The Law of Unjust Enrichment* explains:<sup>58</sup>

... unjust enrichment is not an abstract moral principle to which the courts refer when deciding cases; it is an organising concept that groups decided cases on the basis that they share a set of common features, namely that in all of them the defendant has been enriched by the receipt of a benefit gained at the claimant's expense in circumstances that the law deems to be unjust.

(Footnote omitted.)

---

<sup>57</sup> Andrew Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009) at [42.2.2].

<sup>58</sup> Charles Mitchell, Paul Mitchell and Stephen Watterson *Goff & Jones: The Law of Unjust Enrichment* (9th ed, Sweet & Maxwell, London, 2016) at [1-08].

[82] The authors of *Goff & Jones* suggest that the reasons why the courts have held a defendant's enrichment to be unjust vary from one set of cases to another, and for this reason the law of unjust enrichment more closely resembles the law of torts (recognising a variety of reasons why a defendant must compensate a claimant for harm) than it does the law of contract (embodying a single principle that expectations engendered by binding promises must be fulfilled).<sup>59</sup>

[83] However, following a review of several authorities,<sup>60</sup> Mr Conder, who presented this aspect of Steven's argument, valiantly sought to identify a single principle which, as he put it, brought all the divergent examples of unjust enrichment together, namely:

... whether the circumstances in which assets or money are received is such that it is unjust for the recipient to assert legal ownership against the moral entitlement of the claimant.

In response to the observation that his proposition was broad, Mr Conder submitted that any such principle needs to be reasonably broad in order to encapsulate the range of situations in which unjust enrichment has already been recognised. He contended that the resolution of the competing entitlement of the legal owner as against the moral entitlement of a claimant is to be achieved by the balancing of the equities as discussed in *National Bank of New Zealand Ltd v Waitaki International Processing (NI) Ltd*.<sup>61</sup> He suggested that the moral duty imposed by the Family Protection Act should be recognised as giving rise to an equity to be weighed in the balancing exercise.

[84] We respond to Mr Conder's submission on three levels. First, we do not accept that the various categories of unjust enrichment are capable of absorption in the single broad principle which Mr Conder espouses. As Lord Hoffmann remarked in *Deutsche Morgan Grenfell Group plc v Inland Revenue Commissioners*, the English common law system has no general principle that to retain money paid without any

---

<sup>59</sup> At [1–08].

<sup>60</sup> *National Bank of New Zealand Ltd v Waitaki International Processing (NI) Ltd* [1999] 2 NZLR 211 (CA); *Commissioner of Inland Revenue v Stiassny* [2012] NZCA 93, [2013] 1 NZLR 140; *Roxborough v Rothmans of Pall Mall Australia Ltd* [2001] HCA 68, (2001) 208 CLR 516; *Gillies v Keogh* [1989] 2 NZLR 327 (CA); *Baumgartner v Baumgartner* (1987) 164 CLR 137; and *Barnes v Eastenders Cash & Carry plc* [2014] UKSC 26, [2015] AC 1.

<sup>61</sup> *National Bank of New Zealand Ltd v Waitaki International Processing (NI) Ltd*, above n 61, at 229–232.

legal basis (such as debt, gift, compromise, etc) is unjust enrichment.<sup>62</sup> A claimant has to prove that the circumstances in which the payment was made come within one of the categories which the law recognises as sufficient to make retention by the recipient unjust.<sup>63</sup>

[85] Secondly, while the categories of unjust enrichment cannot be closed,<sup>64</sup> we subscribe to the view that, as in the *Goff & Jones* tortious analogy, such new claims should be close to some established category or factual situation. In the words of Laws LJ in *Gibb v Maidstone and Tunbridge Wells NHS Trust*, clear analogues with other cases are required for the elaboration of any extension of unjust enrichment.<sup>65</sup>

[86] Mr Conder acknowledged that Steven's deployment of unjust enrichment appeared to be novel, there being no other examples of transactions being reversed because they were intended to defeat estate claims. However he sought to find the requisite analogy in the form of a historic claim which he said is now reflected in s 44 of the Property (Relationships) Act 1976.<sup>66</sup>

[87] Accepting for the purposes of argument some similarity in the objectives of the Family Protection Act and the Property (Relationships) Act, the material difference is that the latter provides explicit statutory jurisdiction for the setting aside of dispositions designed to defeat claims under that statute.<sup>67</sup> There is no equivalent jurisdiction under the Family Protection Act. The connection which Mr Conder endeavoured to identify in the pre-statutory practice is tenuous to say the least. In our view it does not provide a principled basis for recognising as a new category of unjust enrichment the scenario of a gift of assets, even if made with the intention of depriving a descendant of a fruitful claim under the Family Protection Act.

---

<sup>62</sup> *Deutsche Morgan Grenfell Group plc v Inland Revenue Commissioners* [2006] UKHL 49, [2007] 1 AC 558 at [21].

<sup>63</sup> Similarly, see Lord Sumption SCJ's judgment in *Patel v Mirza* [2016] UKSC 42, [2017] AC 467 at [246]: "English law does not have a unified theory of restitution".

<sup>64</sup> *Gibb v Maidstone and Tunbridge Wells NHS Trust* [2010] EWCA Civ 678, [2010] IRLR 786 at [26] per Laws LJ.

<sup>65</sup> At [27].

<sup>66</sup> Reference was made to the Fraudulent Conveyances Act 1571 (Eng) 13 Eliz I c 5, and to claims to set aside transactions intended to defeat pending orders for alimony.

<sup>67</sup> Pursuant to s 44.

[88] Finally on this point it is appropriate to acknowledge the cautions sounded by Mr Scott. He asked rhetorically whether, if testators are intent on denuding themselves of all their assets, will the court contemplate a remedy to prevent them doing so during their lifetime? Are such persons to be enjoined from spending their own money? In short his point was that the Family Protection Act, while imperfect, is preferable to the impractical consequence which is the logical extension of Steven's argument.

[89] Thirdly, we do not agree with Mr Conder's analysis of the presence of the unjust enrichment indicia in this case. Mr Conder submitted that there was clear benefit and detriment in that both gifts came at the expense of Rex's estate "and therefore at the expense of Steven's [Family Protection Act] claim". We do not view a potential statutory claimant as in some way subrogated into the shoes of a donor. A gift is made at the expense of a donor, not the range of persons who might after the donor's death wish to bring such a claim against the donor's estate.

[90] Mr Conder then submitted that the crucial final element was whether the benefit was "unconscionable", which was said to be satisfied in the present case because the gifts were an attempt to defeat Steven's entitlement to benefit from Rex's estate. However we do not accept that the issue of whether an enrichment is unjust turns on a general test of unconscionability. We endorse the observations of the Singapore Court of Appeal in *Wee Chiaw Sek Anna v Ng Li-Ann Genevieve*:<sup>68</sup>

Given the myriad circumstances in which the concept of unconscionability is used to express the justification or conclusion of the tests and doctrines applied, we are unable to find that unconscionability can be used as a "catch-all" doctrine which grounds and determines the application of unjust enrichment. Unconscionability is, at best, an overarching rationale which attaches to equitable doctrines, including (where applicable) that of unjust enrichment (which, however, is a doctrine that is recognised in both common law and equity); however, the two are not equivalent. Unjust enrichment has acquired its own shape through the development in the case law, and contains distinct elements which must be met before a claim in unjust enrichment can be established.

(Emphasis omitted.)

---

<sup>68</sup> *Wee Chiaw Sek Anna v Ng Li-Ann Genevieve* [2013] SGCA 36, [2013] 3 SLR 801 at [103].

[91] The Court went on to cite a number of authorities, including the following observation from the judgment of the High Court of Australia in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd*:<sup>69</sup>

... whether enrichment is unjust is not determined by reference to a subjective evaluation of what is unfair or unconscionable: recovery rather depends on the existence of a qualifying or vitiating factor falling into some particular category.

(Footnote omitted.)

There being no such qualifying factor in the instant case, the resort to unconscionability cannot sustain Steven's claim.

[92] For these reasons Steven's ground of appeal based on unjust enrichment is rejected.

### **Removal of Steven as a beneficiary: a breach of fiduciary duty?**

*Did the trustees owe a fiduciary duty to Steven in exercising the power of removal?*

[93] The deed of settlement of the JVT, dated 31 July 2007, made provision for the addition and deletion of beneficiaries in the following terms:

- 32.1 The Trustees may in their absolute and uncontrolled discretion, subject only to obtaining the written consent of the person or persons who for the time being have the power to appoint the Trustees:
- (a) Appoint any person, persons, trust, charity or Body Corporate as additional beneficiaries whether final or discretionary.
  - (b) Delete any beneficiary, whether final or discretionary from the Trust Deed.

[94] Rex's memorandum to his trustees of 11 November 2013 stated:

I, REX DAVID POLLOCK state that I have not made any provision in my Will or my Trusts for my son Steven due to the fact that he no longer wishes to work in the company's business despite my several attempts to rehabilitate him following his lifestyle choices including use of drugs.

---

<sup>69</sup> *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22, (2007) 230 CLR 89 at [150].

[95] A deed of the same date between Rex as settlor and the JVT trustees (namely Rex, Cheryl and CLM Trustees Ltd) recorded:

The Trustees, having obtained the consent of REX DAVID POLLOCK who holds the Power of Appointment to appoint Trustees, by this Deed delete STEVEN REX POLLOCK as discretionary and final beneficiary of the said Trust.

[96] Steven's pleading challenging his removal asserted that the trustees owed him a fiduciary duty with the following incidents:

- (a) A duty to act in good faith towards [Steven];
- (b) A duty to not enter into engagements which give rise, or which might have given rise, to a conflict of interest;
- (c) A duty to not make a profit or benefit;
- (d) A duty to act with loyalty towards [Steven];
- (e) A duty to act in the best interests of [Steven]; and
- (f) Duties pursuant to s 13F of the Trustee Act 1956.

In addition CLM Trustees was said to have overriding professional obligations.

[97] The Judge rejected the proposition that the trustees owed fiduciary duties to Steven when exercising the power of removal, reasoning that:<sup>70</sup>

- (a) Rex's situation as settlor, appointor and trustee was a scenario more analogous to *Clayton v Clayton [Vaughan Road Property Trust]*<sup>71</sup> than *McLaren v McLaren*.<sup>72</sup>
- (b) At the time of Steven's removal the principal assets transferred to the JVT were assets built up by Rex, and subsequently Rex and Cheryl together, and transferred to the original JVT. There was no evidence that Steven contributed at all to those assets which, during the relevant time, did not include the shares in TP Group and thus the value gained from the sale of Todd and Pollock.

---

<sup>70</sup> High Court judgment, above n 2, at [299].

<sup>71</sup> *Clayton v Clayton [Vaughan Road Property Trust]* [2016] NZSC 29, [2016] 1 NZLR 551.

<sup>72</sup> *McLaren v McLaren*, above n 30.

- (c) The JVT was a vehicle established by Rex, funded by Rex, and, in conjunction with the other trustees, operated by Rex. Steven could never have had an expectation to have a say in the administration of the JVT.

[98] Steven's case on appeal was that the trustees owed him either a fiduciary duty in the terms pleaded, or alternatively the limited fiduciary obligations found to exist in *McLaren*. He contended that at a minimum the trustees needed to "act responsibly, with an appropriate level of diligence and prudence, and to avoid taking into account irrelevant, improper or irrational factors ... [and] not to act in bad faith or for an improper motive".<sup>73</sup> The notice of appeal asserted that the trustees made the decision to remove Steven without having sufficient regard to his interests and placed weight on irrelevant and/or improper and/or irrational factors (including his mental health), and acted in bad faith.

[99] Mr Morgan supported the finding that no fiduciary duty was owed, submitting that the Judge's reasoning should not be faulted. Mr Scott's position was more nuanced. He accepted that there was a duty not to act capriciously but submitted that any fiduciary duty, if it existed, was of limited scope. Counsel advised that they were unaware of any authority which had considered a removal provision of the precise structure of cl 32.1.

[100] Although the clause recognises a role for the person empowered to appoint the trustees, the requirement for that person's consent is in the nature of a pre-condition. The removal power itself is to be exercised by the trustees. Furthermore the JVT deed provides that decisions of the trustees must be unanimous, subject to any express provision in the deed to the contrary. Given the requirement for unanimity and the fact that Rex was himself a trustee at the material time, we do not consider that the fact of the pre-condition is influential on the issue or content of the obligations of the trustees in exercising this particular power. Even if the Judge was correct in viewing Rex's overall situation as analogous to that of Mr Clayton,<sup>74</sup> we do not consider that it follows that the power of removal, although expressed to be unfettered, did not

---

<sup>73</sup> This proposition was quoted from *McLaren v McLaren*, above n 30, at [65].

<sup>74</sup> The settlor of the trust in *Clayton v Clayton*, above n 72.

impose some obligations on the trustees of a fiduciary nature. Consequently we disagree with the Judge's conclusion that the trustees did not owe Steven a duty of any kind.

[101] However we consider that the trustees' obligations fall well short of the standard urged by Steven.<sup>75</sup> Such an obligation would be the antithesis of the express power of removal. Just as Associate Judge Osborne observed in *Penson v Forbes*, in the context of an asserted obligation on the part of trustees to act even-handedly as between beneficiaries,<sup>76</sup> nothing in the JVT deed indicates that the scope of the power of removal was intended to be so limited. We agree with the Associate Judge's statement that it is not for the court to limit a power beyond the limits recognised in the line of authority to which *Re Manisty's Settlement* belongs.<sup>77</sup> In our view the trustees' obligations in the present case, including those of CLM Trustees, could be no higher than those in *McLaren*.

*Was Steven's removal as a beneficiary wrongful?*

[102] The Judge proceeded to consider whether there was a breach by the trustees of the limited duties recognised in *McLaren*. He rejected the contention that the reasons for the removal of Steven were either irrational or disproportionate, stating:<sup>78</sup>

As discussed already, I consider that the motivating factors in Rex's decision to remove Steven were Steven letting Rex down for a third time, turning away from Rex's business for a third time and the threat to use the Pollock name in competition with Pollock & Sons. Whether those considerations justified Rex's decision, it cannot be said that the decision was disproportionate to the point of irrationality, that is, of being perverse, arbitrary or capricious.

[103] The Judge's reference back to previous discussion was to the actual undue influence analysis, which included the following conclusions:

[252] I consider that Steven's threat to use the Pollock name, which Steven did not deny and which was confirmed by the evidence of Nicola Watkins, who registered four company names using the Pollock name, Crane Hire or Crane Services, would have been particularly hurtful to Rex, given the many

---

<sup>75</sup> Discussed at [96] above.

<sup>76</sup> *Penson v Forbes* [2014] NZHC 2160, (2014) 3 NZTR 24-026 at [39]. This case is discussed in the High Court judgment, above n 2, at [295].

<sup>77</sup> *Penson v Forbes*, above n 77, at [39]; and *Re Manisty's Settlement* [1974] Ch 17 (Ch) at 26, where Templeman J observed that the Court will intervene if the trustees act "capriciously".

<sup>78</sup> High Court judgment, above n 2, at [302].

years he had spent establishing his reputation and his close, personal identification with the company. Even if Steven may not have posed a serious economic challenge to the Pollock & Sons brand, it is clear from Steven's actions and those of Rex that they both attached emotional significance to Steven's threat. It is evident that Rex identified closely with his companies and was committed to preserving the integrity of the Pollock & Sons brand, as well as to continuing his legacy, as is apparent from his heavy investment in new cranes in the months before he died and from his self-organised funeral procession.

[104] The only reference to Steven's mental health in the Judge's consideration of a breach of the trustees' duties was in the context of Mr Washer's state of knowledge. In the course of his cross-examination by Mr Fraundorfer, Mr Washer said he had no knowledge of Steven having any mental health issues. He said there was no evidence of such and he had no reason to turn his mind to the point. The Judge accepted that evidence, stating that Mr Washer did not have a duty to enquire about Steven's mental health if he had no reason to suspect it was an issue.<sup>79</sup>

[105] However Steven's mental health was at the forefront of his appeal on this issue. His submissions on appeal asserted that he had suffered a mental breakdown and that he was removed from the JVT "effectively because of his mental illness". Mr Conder argued that the decision to do so was entirely at odds with the duties of the trustees and one which no trustee acting rationally could ever have reached. Reliance was placed on the following observations made by the Judge:

[191] It appears that, at that time, Steven was physically unwell and suffering from depression. He was not coping at work and his personal life had fallen apart. Whether or not he was back on drugs, as Rex suspected but Cheryl doubted, Rex could have been more understanding and supportive of his son, particularly when, according to the email Cheryl sent Mr Washer on 30 October 2013, Rex and Cheryl believed Steven may have been experiencing mental health difficulties.

Steven challenged as untenable the proposition that he was removed because he would compete with the family business. He maintained that his venture was little more than a means of sustaining himself through sole trading and that he was not in direct competition with Pollock & Sons.

---

<sup>79</sup> At [304].

[106] The respondents viewed Steven's argument on appeal as a further attempt to reshape his case. Mr Scott submitted that the proposition that Steven was excluded from the JVT as a consequence of a mental breakdown was not pleaded and was not the basis on which Steven's case was opened or closed in the High Court.

[107] Mr Morgan echoed the reshaping criticism, drawing attention to the fact that paragraph [191] of the High Court judgment, upon which Steven placed reliance, was simply an expression of the Judge's view that Rex was not absolved from his moral duty under the Family Protection Act to provide maintenance and support for Steven. It followed the observation in the previous paragraph that Steven was not solely responsible for the breakdown in their relationship.<sup>80</sup> Mr Morgan noted that the Judge touched on this theme again in the following paragraph, when discussing whether Cheryl had exercised actual undue influence in relation to Rex's decision to remove Steven as a beneficiary:

[254] I have already recorded my view Rex could and should have been more understanding of his son's condition in October when Rex believed Steven was having mental health issues. But just because Rex ought to have been more understanding of Steven's circumstances does not provide a basis for inferring that Rex was acting under Cheryl's influence when he made the decision to remove Steven as a beneficiary. Cheryl may well have supported and encouraged Rex in his decision. However, the evidence does not support a conclusion that the decision was not Rex's or that Rex's will had been overborne by Cheryl's influence.

[108] Mr Morgan contended that the significance of Steven's mental illness to his removal from the trust had been overstated, and that the Judge was entirely justified in concluding that the trustees' decision to remove Steven was in response to the factors identified by the Judge.<sup>81</sup>

[109] Plainly Rex and Cheryl had some perception that Steven was unwell. That is evident for example from the email which Cheryl sent to Mr Washer on 30 October 2013 concerning company names and potential changes to their wills:

---

<sup>80</sup> At [190].

<sup>81</sup> See [102] above.

Good Morning Peter

Unfortunately Steve is not in a good space and has left Pollock Cranes and now threatening to start up in opposition; he is also threatening legal action if we don't give him a decent pay-out!

He is drug free but he could be heading in the same direction health wise as his mother... We're not too sure what the problem is but he is definitely mentally unstable.

[110] Among the instructions to Mr Washer was the urgent securing of the company names Pollock Crane Hire Ltd and Pollock Cranes Ltd. That step was responsive to the information which Rex and Cheryl had received from Nicola Watkins.<sup>82</sup> Mr Washer met with Rex and Cheryl two days later. He recalled they were both particularly concerned that Steven was intending to start up in competition with Pollock & Sons Crane Hire Ltd using a similar name.

[111] Mr Washer deposed that Rex was of the view that it was untenable for Steven to remain as a beneficiary of the JVT when he had become a competitor with the family business. He explained his own approach in this way:

I agreed to support Rex and Cheryl's decision to remove Steven from the Trust because I was satisfied that their reasons were valid in terms of the ongoing viability of the business and the Trust because the business borrowings and the Trust borrowings were interwoven. I considered Steven's actions in setting up in competition to potentially be putting at risk the success of the family business and the assets of the Trust.

[112] As his reasoning makes clear,<sup>83</sup> the Judge did not embark on an evaluation of the merits of the trustees' reasons but instead considered whether the more limited *McLaren* duties had been discharged. There was no error in that approach. The Court does not act in an appellate manner and substitute its own decision for that reached by the trustees. Rather it looks to see how the trustees' decision was reached.<sup>84</sup> The Judge applied the correct standard in reaching the conclusion that the removal decision was not disproportionate and hence irrational. Plainly the Judge considered that the decision was made in good faith.

---

<sup>82</sup> See [103] above.

<sup>83</sup> See High Court judgment, above n 2, at [252] and [301]–[302].

<sup>84</sup> *Wong v Burt* [2003] 3 NZLR 526 (HC) at [18]; and *Wong v Burt* [2005] 1 NZLR 91 (CA) at [16].

[113] We are not persuaded by Steven's argument that the real motivation for the trustees' decision was his mental state and that the trustees' apprehension and anxiety about his intention to compete with the family business was a smokescreen. As Mr Washer pointed out in the course of his cross-examination, Steven had set up his own business on a previous occasion. His present intentions were clear, irrespective of his state of health. The trustees could not be expected to engage in a finely grained analysis of his prospects of making inroads into the family business. The evidence does not suggest that there was any proper basis for the contention that the trustees' decision was made in bad faith. Consequently this ground of appeal also fails.

### **Result**

[114] The appeal is dismissed.

[115] As Steven is legally aided there is no order for costs.

Solicitors:

Holland Beckett Law, Tauranga for Appellant

Gurnell Harrison Stanley Lawyers, Hamilton for C L Pollock

Rejthar Stuart Law, Tauranga for P E Washer and CLM Trustees Ltd