

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

**CA64/2022
[2022] NZCA 568**

BETWEEN

DAVID LEWIS HINGSTON
First Appellant

DAVID LEWIS HINGSTON AS TRUSTEE
OF THE HINGSTON HOUSE TRUST
Second Appellant

ANTHONY MURRAY RICHARDSON AS
TRUSTEE OF THE HINGSTON HOUSE
TRUST
Third Appellant

AND

KEITH HAMILTON HINGSTON
Respondent

Hearing: 18 August 2022
Court: Dobson, Duffy and Edwards JJ
Counsel: C J Griggs and J J Pietras for the Appellants
J W Howell for the Respondent
Judgment: 22 November 2022 at 11.30 am

JUDGMENT OF THE COURT

- A The appeal is allowed.**
- B The judgment on the undue influence cause of action is set aside.**
- C The appellants' counterclaim is remitted to the High Court for determination.**
- D The respondent must pay the appellants costs for a standard appeal on a band A basis and usual disbursements. No allowance for second counsel.**
-

REASONS OF THE COURT

(Given by Edwards J)

Table of contents

	Para No
Introduction	[1]
Relevant background	[4]
High Court judgment	[28]
Undue influence: relevant legal principles	[47]
Does the transaction call for an explanation?	[49]
Is the transaction the result of undue influence?	[54]
<i>Sale price</i>	[55]
<i>Debt of \$115,729</i>	[62]
<i>Transfer of other assets and superannuation</i>	[65]
<i>Lack of certainty in the Agreement to Occupy</i>	[70]
<i>Independent legal advice</i>	[73]
<i>Keith's understanding of the transaction</i>	[77]
<i>Evidence of pressure</i>	[86]
<i>Conclusion</i>	[88]
Counterclaim	[94]
Result	[102]

Introduction

[1] Keith Hingston and his son, David Hingston, have been embroiled in a dispute since 2010.¹ The dispute concerns a transaction between the parties on 19 October 2009. That transaction provided for the sale and occupation of Keith's house, and the transfer of his assets and superannuation payments to a trust associated with David (the Hingston House Trust).

[2] The High Court found that the transaction was a result of David's undue influence over Keith, and that David and the Trust had breached its terms.²

¹ For ease of reference we will refer to each of the parties by their first names. We mean no disrespect in doing so.

² *Hingston v Hingston* [2021] NZHC 3621 [High Court judgment].

[3] David and the other trustee of the Trust appeal that judgment on two grounds:

- (a) First, they challenge the finding of undue influence. They say the High Court erred in finding that the transaction called for an explanation and that the independent legal advice Keith received on the transaction was deficient.
- (b) Second, they say that the High Court failed to give judgment on their counterclaim.

Relevant background

[4] The house at the centre of this dispute is in Welcome Bay, Tauranga (the House). It was designed and built by Keith. Keith had a strong attachment to the House and wished to remain living there for the rest of his life.

[5] In 2007, Keith, who was then in his early 70s, was separating from his second wife, Shona. The House was relationship property. It had been valued at \$580,000 in September 2007.

[6] Pursuant to a consent order of the Family Court dated 2 October 2008, Keith was required to pay Shona \$306,000 by a specified date, failing which the House was to be sold and Shona's entitlement was to be paid out of the sale proceeds. Keith was to retain the chattels.

[7] In mid-2007, Keith had reconciled with his first wife, Gwen. She began living in the House. Keith and Gwen are the parents of David and his brother Guy. David is in his 60s and has been a medical practitioner for some 35 years.

[8] Keith attempted to borrow money to pay the amount owing to Shona but was unable to do so. He turned to David for assistance. David considered the consent order was unfair to Keith, and he took steps on Keith's behalf to have the consent order set aside. Keith authorised David to act on his behalf and signed two enduring powers of attorney in relation to property, and personal care and welfare, on 13 October 2008 to allow that to occur.

[9] The House was valued at \$530,000 in an updated valuation dated 15 September 2008. A further valuation obtained in March 2009 assigned a market value to the House of \$505,000, and a forced sale valuation of \$430,000.

[10] David engaged new lawyers on Keith's behalf to challenge the Family Court consent order. A variation to the Family Court consent order was granted on 8 September 2009. Keith was required to pay Shona \$295,000 on or before 23 October 2009, failing which the House was to be sold and Shona paid the sum of \$295,000 from the proceeds of sale.

[11] Keith was still unable to raise the money to pay Shona her entitlement under the varied consent order. It was agreed that David would assist Keith by purchasing the House from which the proceeds of sale could be used to pay Shona. On 15 October 2009 David settled the Trust for that purpose.

[12] There are two trustees of the Trust, David is one of them. The principal discretionary beneficiaries are David, his partner Wendy, and their daughter.

[13] On 19 October 2009, Keith and the Trust executed three documents:

- (a) An agreement for sale of the House to the Trust for the price of \$375,000.
- (b) An agreement to occupy the House (Agreement to Occupy).
- (c) A deed of acknowledgement of debt in the sum of \$115,729.00 (Deed of Acknowledgement of Debt).

[14] The Agreement to Occupy stipulates Keith's right to continue to occupy the House. Clauses 2 to 5 of the Agreement to Occupy provide:

2. There shall be no rental payable in respect of the Agreement, however, consideration for this Agreement is provided as follows:

- 2.1 The transfer of the [House] to the Trust.

- 2.2 A payment of \$115,729.00 being made in respect of [Keith's] right to occupy the [House] for life as recorded in the Agreement.
- 2.3 A Deed of Acknowledgement of Debt for \$115,729.00 being entered into by Keith in favour of the Trust.
- 2.4 The transfer (or sale proceeds thereof) of Keith's Isuzu Journey motor home to the Trust.
- 2.5 The transfer (or sale proceeds thereof) of Keith's Stabicraft boat, outboard motor and trailer to the Trust.
- 2.6 The transfer of Keith's current and all future Jacques Martin superannuation entitlement (to a bank account nominated by the Trust) to the Trust.
- 2.7 The transfer of (or sale proceeds thereof) of the following assets (at the agreed value) to the Trust:

(a)	Small outboard boat, fishing gear	\$500.00
(b)	Suzuki Vitara	\$10,000.00
(c)	Trailer	\$400.00
(d)	Tools and Workshop items	\$1,000.00
(e)	Kitchen and household furniture	\$5,000.00
(f)	Home appliances	\$1,000.00
(g)	Electronic items and TVs etc	\$2,000.00
(h)	Garden tools	\$500.00
	Total	\$20,400.00

- 3. Keith will be jointly responsible with Gwen for all maintenance and upkeep of the [House] together with any associated costs.
- 4. Any capital works are to be approved by the Trust in advance; capital works being any alteration of the grounds and/or building located on the [p]roperty.
- 5. Keith together with Gwen will be responsible for the following payments in respect of the [House]:
 - 5.1 All insurance policies
 - 5.2 Rates
 - 5.3 Utilities (including power and phone).

The costs incurred in respect of clauses 5.1 and 5.2 are to be paid directly by Keith and Gwen to a Bank account nominated by the Trust who will pay these costs on Keith and Gwen's behalf.

[15] The term of the Agreement to Occupy was 30 years or until such time as the agreement was dissolved or Keith died. The Trust retained the right to sell the House at any time at its sole discretion but acknowledged that it had to provide suitable alternative accommodation (excluding full time rest home and/or medical care requirements for Keith).

[16] Clause 12 of the Agreement to Occupy governed what was to happen if there was a breakdown in the relationship between Keith and Gwen. That clause provides:

12. Keith acknowledges that should Gwen's behaviour impact adversely upon his cohabitation with Gwen that the Trust shall be entitled to review and alter the terms of the Agreement on its own account. Further, Keith agrees that should his behaviour impact adversely upon their cohabitation that the Trust shall be entitled to review and alter the terms of the Agreement on its own account.

[17] The Deed of Acknowledgement of Debt recorded Keith as owing the sum of \$115,729.00 for the right to occupy. The principal sum was repayable on demand. Interest was charged at 4.25 per cent per annum commencing on 23 October 2009. Penalty interest accrued at 6 per cent per annum. Interest was to be paid on 1 January of each year if demanded by the Trust on 30 November of the previous year.

[18] Gwen also signed an agreement to occupy. The provisions of that agreement were substantially the same as the agreement entered into with Keith except for the provision as to consideration for Gwen's occupation. The relevant terms of that agreement provide:

2. There shall be no rental payable in respect of the Agreement, however, consideration for this Agreement is provided as follows:
 - 2.1 The transfer of \$158,989.50 from Gwen to the Trust.
 - 2.2 A payment of \$147,195.00 being made in respect of her right to occupy the Property for her life as recorded in the Agreement.

- 2.3 A Deed of Acknowledgment of Debt for \$11,787.50 being entered into by Gwen in favour of her.
- 2.4 The transfer of fifty percent of Gwen's current and all future full Jacques Martin superannuation entitlement (to a bank account nominated by the Trust) to the Trust.

[19] Gwen's payment of \$147,195 for the occupation right was discharged by setting off a debt owed by David to Gwen, with a credit back to Gwen in the sum of \$11,787.50. A deed of acknowledgement of debt for this sum was executed by the Trust and Gwen.

[20] Keith and Gwen also executed a contracting out agreement pursuant to s 21 of the Property (Relationships) Act 1976. That agreement included a clause whereby they each acknowledged that their respective agreements to occupy the House were separate property and any value attached to those agreements would lapse on their death. The agreement also included a clause acknowledging that each had received independent legal advice regarding the terms and effect of the agreement.

[21] The sale and purchase of the House settled on 23 October 2009. On that date, Shona was paid \$295,000 and the Sentinel loan of \$34,368.31 which was secured against the House was repaid.

[22] The relationship between Keith and Gwen did not endure and Gwen moved out of the House in January 2010. Keith began a relationship with Petra, who came to live with him in the House in April 2010.

[23] David considered that the breakdown of Keith and Gwen's relationship, and Petra's moving in, was a breach of the Agreement to Occupy. This appears to be the genesis of the dispute between David and Keith. The Judge referred to a series of events in 2010 and 2011 which are unnecessary to detail here except to note they involved some bizarre behaviour by David, primarily during visits to the property with the police being called on several occasions.

[24] In September 2010, Keith cancelled the automatic payment from his superannuation fund to the Trust.

[25] Attempts to reach a compromise in late 2010 were unsuccessful and on 19 January 2011, David handed Keith a notice evicting Keith and Petra from the House and stating an intention to alter Keith's occupation right pursuant to cl 12 of the Agreement to Occupy.

[26] On 2 February 2011, just under 16 months after the Agreement to Occupy was signed, Keith and Petra left the House and entered into a tenancy for a property in Te Puke. David retained most of the chattels the subject of the Agreement to Occupy but Keith took the motorhome. Keith has remained in rented accommodation or his now partner's house since then.

[27] The Trust sold the Stabicraft boat and Suzuki Vitara vehicle in 2011. The House was sold in September 2015 for \$610,000. Keith retained the motorhome and has since sold it. The Trust received \$9,986.34 of Keith's superannuation before he cancelled the payments in 2010.

High Court judgment

[28] The judgment under appeal determined two sets of proceedings: the substantive claim against David and the Trust; and a proceeding relating to a judicial settlement conference in 2015.

[29] This appeal relates only to the substantive proceeding. Keith challenged the October 2009 transaction in that proceeding. That challenge was made in six causes of action comprising: four claims in equity (undue influence, unconscionable bargain, breach of fiduciary duty and unjust enrichment); breach of contract; and misrepresentation. David asserted three affirmative defences and counterclaimed against Keith for breach of contract.

[30] Gwyn J started with the equitable claims. She considered there to be several factors relevant to each of those claims:³

- (a) Keith was elderly at the time of the transaction (75 years old).
- (b) Keith was stressed given his 10-year relationship with Shona had come to an end, with emotional as well as legal and financial consequences. His attachment to the House, and the prospect of having to sell it, meant he was in a state of high anxiety. Keith had also resumed his relationship with Gwen by this time, and she was unwell.
- (c) There was a disparity between Keith and David in terms of education, intellect, and relevant legal or business experience. Keith was a “blue-collar worker with little formal education”. David was a “well-educated and experienced doctor” who had previously been involved in other unrelated litigation.
- (d) Although it was Keith who suggested the possibility of transferring all his assets to David, by 2009 Keith understood any such arrangement would only involve the House. David had acknowledged in cross-examination that it was his idea that the House and assets be transferred to the Trust.

[31] In approaching the claim for undue influence, the Judge was guided by the principles of undue influence set out by the High Court in *Green v Green* and endorsed by the Court of Appeal.⁴ Those principles are set out at [47] of this judgment. They include an assessment of whether a person said to have been subject to undue influence placed trust and confidence in the other, and whether the transaction calls for an explanation.

³ High Court judgment, above n 2, at [58]–[62].

⁴ *Green v Green* [2015] NZHC 1218 at [100]; and *Green v Green* [2016] NZCA 486, [2017] 2 NZLR 321 at [35].

[32] Applying those principles, the Judge found that Keith had placed trust and confidence in David as his son and believed David would act in his best interests. Keith was therefore vulnerable to David's influence.⁵

[33] The Judge then turned to consider whether the transaction called for an explanation. She considered that the agreement purported to give Keith a right to occupy the House for life, with the price of that occupancy being \$115,729.00. On the face of the agreement, Keith's full payment obligation was satisfied by his Deed of Acknowledgement of Debt.⁶

[34] However, the Judge considered that the Agreement to Occupy could be construed as requiring additional consideration, being the transfer of chattels and current and future superannuation entitlements, from Keith for his occupancy rights.⁷

[35] The Judge also considered it unclear whether the value of the superannuation entitlement was part of the purchase price for Keith's occupancy rights or merely to be paid on an ongoing basis to cover insurance, rates and utilities in terms of cl 5 of the Agreement to Occupy.⁸

[36] The Judge held that the objective effect of the Agreement to Occupy was that:⁹

- (a) Keith was indebted to the Trust for \$115,729.
- (b) Keith was also required to transfer ownership of the chattels and vehicles to the Trust. The chattels listed in the agreement to occupy were valued at [\$20,400], the Stabicraft boat was sold shortly after for \$24,000, and, although the value of the motorhome was hotly contested, it appears it was valued around at least \$40,000; meaning, as well as the value of the house, the agreement to occupy gave the Trust the right to receive approximately \$84,400 in chattels and vehicles.
- (c) In addition, the Trust was to receive Keith's superannuation of \$200 per week (and before he ceased his payments, the Trust received a total of \$9,986.34).

⁵ High Court judgment, above n 2, at [75].

⁶ At [77].

⁷ At [78] and [80].

⁸ At [81].

⁹ At [82].

[37] Further, the Judge considered that the Agreement to Occupy did not provide certainty for Keith in terms of his ongoing occupation of the House — his ability to live in the House was almost entirely dependent on David.¹⁰

[38] Finally, the Judge found that the Trust had purchased the House at an undervalue. The purchase price was \$375,000, which was \$130,000 less than the market valuation obtained seven months prior and \$55,000 less than the forced sale valuation. It was also \$235,000 less than the price achieved by the Trust when it sold the House six years later.¹¹

[39] The Judge found that, “[o]n its face, the transaction plainly calls for an explanation”.¹²

[40] Having made that assessment, the Judge then considered that the evidential burden shifted to David to show that the transaction was not the result of undue influence.¹³

[41] It was here that the independent legal advice received by Keith assumed some prominence. The Judge found that it was not clear from the evidence the nature of the legal advice received by Keith, and whether he fully understood the consequences of the transaction. The Judge held it followed that the independent advice provided to Keith was not sufficient in the circumstances.¹⁴ Those findings were made in reliance on a decision of the High Court in *Sinclair v Sinclair* citing the English High Court in *Paull v Paull*.¹⁵

[42] Drawing on earlier findings of fact, the Judge considered that the stress of Keith’s separation from Shona and the anxiety about potentially losing his home, all the while caring for Gwen (who was ill at the time), would have contributed to making Keith vulnerable.¹⁶

¹⁰ At [83].

¹¹ At [84].

¹² At [85].

¹³ At [86].

¹⁴ At [88].

¹⁵ *Sinclair v Sinclair* [2019] NZHC 2640, citing *Paull v Paull* [2018] EWHC 2520 (Ch).

¹⁶ High Court judgment, above n 2, at [91].

[43] As to Gwen's interests, the Judge expressed sympathy for the fact that David felt a sense of responsibility to ensure his mother was safely housed following her and Keith's separation, but the Judge considered that to be irrelevant to the question of whether the transaction between the Trust and Keith in October 2009 was the result of undue influence.¹⁷

[44] The Judge found the claim of undue influence by David of Keith to be made out.¹⁸

[45] The other equitable claims brought by Keith against David were dismissed by the Judge.¹⁹ However, Keith's claim for breach of the Agreement to Occupy was upheld.²⁰

[46] At the conclusion of her judgment the Judge reiterated that she had found for Keith in respect of the two claims.²¹ She recorded that, at the parties' request, the judgment dealt only with liability.²²

Undue influence: relevant legal principles

[47] In *Green v Green*, Winkelmann J set out the principles, subsequently endorsed on appeal,²³ which apply to an undue influence claim:²⁴

- (a) The overall burden of proof rests on the person seeking to establish undue influence.
- (b) The burden of proof is the balance of probabilities. ... where the allegation made is serious (such as an allegation of dishonesty or criminal offending), the Court will require strong evidence to be satisfied on the balance of probabilities that that occurred.
- (c) The person asserting undue influence must show that the alleged influence led to the making of the impugned transaction, and that the influence was undue in the sense that the transaction was not the result

¹⁷ At [93].

¹⁸ At [94].

¹⁹ At [100], [109] and [113].

²⁰ At [126].

²¹ At [132]. First, that the transaction in 2009 was the result of undue influence by David of Keith. Second, that the Trust was liable for breach of contract in relation to the Agreement to Occupy.

²² At [133].

²³ *Green v Green (CA)*, above n 4, at [35].

²⁴ *Green v Green (HC)*, above n 4, at [100] (footnotes omitted).

of the free exercise of an independent will on the part of the person at whose expense the transaction was made.

- (d) The question of whether a transaction was brought about by undue influence is a question of fact. A party can succeed in establishing this either directly by proving “actual undue influence” or recourse to an evidential presumption which arises where it is established that:
 - (i) the person said to have been subject to undue influence placed trust and confidence in the other; and
 - (ii) the transaction called for an explanation.
- (e) Whether there is a relationship of trust and confidence can either be established factually or by reference to a class of specific relationships such as lawyer/client; parent/child; doctor/patient. In the latter category the law presumes irrebutably that one party had influence over the other. The presumption is only as to proof of influence. The person alleging undue influence will still need to establish a transaction calling for an explanation.
- (f) Whether a transaction calls for an explanation depends on the circumstances of the case. The question is simply whether “failing proof to the contrary, [the transaction] was explicable only on the basis that undue influence had been exercised to procure it”.
- (g) Once the person claiming undue influence has established both the relationship of trust and confidence and a transaction calling for explanation, the evidential burden shifts to the person seeking to uphold the transaction to show that the transaction was not the result of undue influence. This however should not obscure the position that the overall burden of proof will always rest on the person alleging undue influence.
- (h) The presence of independent advice is one of many factors that may be taken into account in determining whether undue influence is proved. Whether the independent advice helps to establish that the transaction was the result of a person’s free will depends on the facts of the case. Independent advice can help establish that a person understood the decision they were making. But establishing that a person fully understood the act is not the same as establishing that the act was not brought about by undue influence. A person can fully understand an act and still be subject to undue influence.
- (i) Allegations of undue influence may succeed in relation to the exercise of powers not just the transfer of property.

[48] Keith relied on the presumption set out in (d) above. There is no challenge to the Judge’s finding that Keith placed trust and confidence in David. The focus of the appeal is on the Judge’s determination that: first, the transaction called for an explanation; and second, David was unable to discharge the evidential onus to show that the transaction was not a result of undue influence.

Does the transaction call for an explanation?

[49] In *Equity and Trusts in New Zealand*, the requirement that the transaction call for an explanation is explained as defining:²⁵

... a modest threshold of scepticism that must be crossed before the onus shifts. All that is required is that the transaction “is not readily explicable by the relationship of the parties.” Something must seem to be amiss, calling for explanation.

[50] We agree with the Judge’s conclusion that on the face of the documents something was amiss with the transaction.

[51] First, at \$375,000 the purchase price paid for the House was less than any other indications of value, including the value accorded to it in a forced sale situation.

[52] Second, as drafted, the terms of the Agreement to Occupy provided that Keith’s house, all his assets and his superannuation were to be transferred to the Trust, and a payment of \$115,729.00 (plus interest) was to be made, as consideration for the right to occupy the House for life. Keith and Gwen also had to pay for the maintenance and upkeep of the property, including payments for insurance, rates and utilities, and their continued occupation was at the discretion of the Trust.

[53] As documented, the transaction appeared completely one-sided and in favour of the Trust. We agree with the Judge that this was clearly a transaction calling for explanation. Having made that finding, the evidential burden then shifted to David and the Trust to show that the transaction was not the result of undue influence.

Is the transaction the result of undue influence?

[54] There are several strands of evidence relied on by David to discharge the evidential onus. We take each of them in turn, starting with a consideration of each component of the transaction in more detail.

²⁵ J Stephen Kós “Undue Influence” in Andrew S Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009) 679 at 696.

Sale price

[55] As the Judge found, the House was sold to the Trust at an undervalue — \$130,000 less than the market value and \$55,000 less than the forced sale value which was assigned in a registered valuation dated March 2009.

[56] However, evidence called at trial suggests that the figure of \$375,000 was fixed by reference to the forced sale valuation, the distressed state of the market, and the fact that sales costs associated with an arms-length transaction had been avoided. These factors provide an objective basis for the sale figure set.

[57] The sale price also reflected Keith's desire to retain the House. To do that he needed to obtain cash urgently in order to satisfy his obligations to Shona. The varied Family Court order provided that if the debt to Shona was not discharged by 23 October 2009, then the House was to be sold. Keith was adamant that this should not occur. However, Keith was unable to obtain funds from anywhere else, and assistance from family to discharge his debts was the only way he was able to remain living in the House.

[58] The quantum of the outstanding debts to be discharged is also relevant to an assessment of the sale price. Keith's debts included payment to Shona of \$295,000; repayment of the Sentinel loan of around \$34,000; and reimbursement of legal and other costs paid by the Trust in respect of Keith's affairs. The outstanding legal costs were not certain at this time but were estimated to be \$45,000. Accordingly, the sale price reflected the quantum of unpaid debts.

[59] The family relationship also provides context for the sale of the House. At the time of the transaction in 2009, it appears that Keith intended to leave his House and assets to his sons, David and Guy, on his death. The effect of the arrangement, therefore, was that David would not have to wait until Keith died to receive his entitlement, and David would obtain all of Keith's assets in return for assisting his father. This factor was evidenced in a diagram drawn by Keith which was included in a letter to David showing the key components of the transaction. Next to the part of the diagram showing the transfer of the House and assets to David, Keith has written "now rather than after I die".

[60] It is also significant that Keith's legal adviser was aware that the sale was at an undervalue but did not appear to take any issue with that. A transcript of a telephone conversation between David and Keith's lawyer on 19 October 2009, the day the agreements were executed, was produced in evidence. It was obvious from that telephone conversation that Keith's legal adviser was aware that the House was being sold below the most recent valuation. In answer to her queries about this, David told her that the figure took into account the savings in terms of real estate fees and costs of sale, and the fact that houses like Keith's house were not selling in the market at that time. The only concern expressed by Keith's lawyer was that there was documentation to prove why the House had been sold at an undervalue in the event the Inland Revenue Department queried the transaction and imposed gift duty on the balance.

[61] While there can be no doubt that the House was sold at an undervalue, we consider the above factors provide some explanation for why that might have been so. These factors go some way to rebutting the presumption that the sale at an undervalue was a result of undue influence.

Debt of \$115,729

[62] The next component of the transaction involved Keith's payment of \$115,729 to the Trust and the execution of a Deed of Acknowledgement of Debt in relation to that sum.

[63] The sum of \$115,729 represented the cost of Keith's right to occupy the House for life. It was calculated according to the purchase price of \$375,000 and the tables set out in sch 2 of the Estate and Gift Duties Act 1968. Accordingly, the calculation of what Keith owed was undertaken on an independent and objectively fair basis.

[64] The requirement to pay this sum needs to be considered in context. In order to purchase Keith's house (and discharge his debts), the Trust had to borrow funds. The exact sum borrowed by the Trust was not in evidence, but it was not disputed that the borrowings were in David's name and secured against his personal home. As there was no rental income stream from the House, the Trust had a limited source of funds from which to repay its debt. The payments in return for an occupation right until

death provided a form of security from which the Trust borrowings could be repaid. And, as we explain further below, the transfer of at least some of the assets and Keith's superannuation payments were intended to be applied in reduction of Keith's debt.

Transfer of other assets and superannuation

[65] We have already indicated our agreement with the Judge that, as drafted, the Agreement to Occupy suggests that the transfer of all Keith's assets and superannuation payments was *in addition* to the payment of \$115,729. However, there is evidence which suggests that the transfer of these assets (or sale proceeds) was to be applied in reduction of Keith's debt or as security for the remaining balance.

[66] David says that the proceeds of sale of the Isuzu Journey motorhome and Stabicraft boat were to be used to reduce Keith's debt to the Trust. That is corroborated by a letter from David's accountant which shows an estimated sum for these two assets being deducted from the figure of \$115,729. Keith was attempting to sell both assets at the time and there were telephone discussions between Keith and David about the sale of both assets. The transcripts of those telephone calls also suggest that Keith understood that the sale of these assets was going to be used to reduce the debt due to the Trust.

[67] The superannuation payments were also to be used to defray costs. In his evidence in chief, David said that the superannuation payments would also be used to help fund the maintenance of the House, upkeep, interest and other costs, and help cover risks. However, it is not entirely clear whether all the costs Keith and Gwen had agreed to pay (including insurance and rates) would be covered by the superannuation payments. We accept that it is reasonably arguable that these costs at least were to be paid in addition to the obligation to transfer his superannuation. Importantly, there was no suggestion that the Jacques Martin superannuation payments were Keith's only source of income at the time. It appears that Keith was still working on a contract basis and he received other superannuation payments.

[68] Finally, in terms of Keith's remaining assets, the intention appears to be that while the Trust would retain ownership of them, Keith would remain in possession of

them and continue to have the use of them. In this way, the assets were to act as security for the repayment of the debt due.

[69] The transfer of the assets and superannuation payments in reduction of the debt owed by Keith casts the transaction in a somewhat different light. It provides an alternative explanation to undue influence for this aspect of the transaction.

Lack of certainty in the Agreement to Occupy

[70] The Judge relied on Keith's lack of certainty in terms of his ongoing occupation of the House as another feature of the transaction requiring explanation. The focus of the Judge's concern was cl 12 of the Agreement to Occupy.

[71] We agree with the Judge that there are features of this clause which appear to be difficult to enforce and would otherwise be unworkable. But we do not consider these features necessarily mean it was a result of undue influence.

[72] As the Judge accepted, David was trying to assist both his parents, not just his father. David explained in his evidence in chief that he was initially concerned that his parents' reconciliation was an attempt by his father to exploit his mother for her assets. Despite its inelegant, and perhaps ineffective drafting, the clause is nevertheless explicable by David wanting to protect his mother against that eventuality.

Independent legal advice

[73] There is no dispute in this case that Keith received independent legal advice on the agreements before signing. There was no evidence, however, on the content of that legal advice.

[74] The Judge found that the lack of evidence about what legal advice was given to Keith and whether he understood the transaction meant that the independent advice given to Keith was not sufficient in the circumstances.

[75] We do not consider the absence of evidence about the content of the legal advice means that an adverse inference as to its quality may be drawn. The fact that Keith went ahead with the transaction does not mean the legal advice was inadequate either.

[76] Solicitors are presumed to act competently in giving legal advice unless proved otherwise.²⁶ There is no evidence in this case which suggests that the legal advice was not competent. Accordingly, the fact that Keith received independent legal advice prior to signing the relevant documents is a factor to be weighed in the mix in determining whether undue influence has been proved.

Keith's understanding of the transaction

[77] However, just because Keith received independent legal advice does not mean Keith understood the transaction. And, even if he did understand the transaction, it does not mean that his will was not overborne.²⁷

[78] We acknowledge the Judge's finding that Keith was under stress due to his separation from Shona, the possibility of losing his home, and having to care for Gwen at the time (who had significant health problems). All of those factors contributed to the Judge's finding that Keith was vulnerable. There is no challenge to that determination, and we have no reason to disturb the Judge's findings of fact.

[79] Nevertheless, the Judge also found that, aged 87 at the time of the hearing, Keith was alert and presented with full cognition (although he did have a hearing impairment).²⁸ There is no suggestion that he was not fully competent at the time the transaction was concluded. And, despite the various stressors in his life, there is evidence that Keith did understand the consequences of the transaction and exercised his independent will to press ahead anyway.

²⁶ *GE Custodians v Bartle* [2010] NZSC 146, [2011] 2 NZLR 31 at [48]; see also *ANZ Bank New Zealand Ltd v Bushline Trustees Ltd* [2020] NZSC 71, [2020] 1 NZLR 145 at [114].

²⁷ See *Green v Green (HC)*, above n 4, at [100(h)].

²⁸ High Court judgment, above n 2, at [91].

[80] That evidence includes a letter dated 10 October 2009, shortly before the transaction was executed, from David to his parents. The letter set out two options:

1. The first is that I arrange finance for Shona's settlement in return for arranging purchasing of assets and for various commitments that will include soaking up most of your future income to cover costs, interest, contingencies as well as some capital contribution / buffer for future events.
2. The second is that Shona is not paid by Labour weekend, the house is marketed and you look to rent or buy a cheaper house somewhere else in this cheaper housing climate. Shona would then be at the mercy of the market, have a delayed payment and significantly, you will not lose all your future income cash that will otherwise be tied up in the first option.

[81] The letter went on to state the significant risks involved with the first option, and that if the House had to be sold it would be better to take option two. David indicated that the purpose of the letter was to give both Keith and Gwen the opportunity to consider their decision again.

[82] Subsequent correspondence between both David and his mother on the one hand, and David and his father on the other, indicates Keith was determined to pursue option one, and option two was not on the table as far as he was concerned. That is consistent with Keith's stubborn determination to remain in the House until, in his words, he was taken out in a "pine box". There is no scope for an inference that he opted for option one on an inadequate understanding of its effect: it was clearly spelt out by David.

[83] A week after this letter was sent there was a further telephone call between David and Keith on 16 October 2009. A transcript of that call was produced in evidence. Keith referred to the agreement which David had sent and there was discussion about some of its terms, namely the transfer of Keith's superannuation, some of the minor assets, and payment of rates and insurance. David explained to Keith that as a consequence of the agreement, Keith's assets would be owned by the Trust, and he reminded him that he would no longer own any significant assets. David also made clear to Keith that the obligation to pay rates and insurance was in addition to the transfer of assets and explained the rationale for that decision. We are satisfied from the tenor and nature of this discussion that Keith understood the key

terms of the transaction. Further, the fact that there were two options put to Keith for him to consider, and he clearly chose one, counters the suggestion of undue influence.

[84] Finally, and as already mentioned, Keith produced a diagram approximately seven months after the transaction was concluded which accurately captured its core terms. This included the fact that he was transferring to David his House and assets (“now rather than after I die”), and that David would pay Shona on Keith’s behalf.

[85] We consider the totality of the evidence points towards Keith knowing and understanding how the transaction was intended to work.

Evidence of pressure

[86] In the course of his cross-examination at trial Keith gave evidence that David was in the room when he signed the documents. Keith said that David leaned across the table and said, “Dad I want you to sign it, we all love you, no way will we ever put [you] out of that house, it’s yours to stay, sign it, one signature, not two”. Keith then said there was further discussion back and forth until his lawyer, who was also present at the time, encouraged him to sign the documents on the back of those statements from David.

[87] There is reason to be sceptical about the accuracy of Keith’s recollection, at least as to when such statements may have been made. The weight of the evidence points to David and Keith being in different rooms, and different cities, at the time the documents were signed. But even if such statements were made (and the Judge accepted Keith’s evidence on this point, although in relation to the misrepresentation cause of action, which was dismissed),²⁹ they must be considered in context. At the time the documents were signed, all parties had an expectation that Keith (and Gwen) would remain living in the house for the rest of their lives. The very purpose of the transaction was to allow that to occur. No doubt it was hoped that the powers in cl 12 of the Agreement to Occupy would not have to be exercised. Given the evidence

²⁹ High Court judgment, above n 2, at [129].

that Keith understood the transaction, and received independent legal advice on it, we do not consider David's statements evidence Keith's will being overborne.

Conclusion

[88] To conclude, we agree with the Judge that the transaction as documented calls for an explanation, and so the evidential onus shifts to David to show that it was not caused by undue influence.

[89] Where we part company with the Judge is on whether that evidential onus can be discharged. We make no comment on the overall fairness of the transaction to either party or whether it was commercially a "good deal". This appeal is solely concerned with undue influence. On that issue, we consider David has produced sufficient evidence to show that it was not a transaction which resulted from undue influence.

[90] We consider there to be a reasonable explanation for the purchase price of the House being fixed at \$375,000, which was otherwise at an undervalue. This reflected the distressed state of the market in 2009, the saving of sales costs and Keith's determination to remain in the House. It also reflected the fact that the transfer of the House was in return for the discharge of Keith's debts, most notably the debt due to Shona. Discharge of that debt allowed him to remain in the House as he was so determined to do. The family context, whereby it was intended that David would inherit Keith's assets upon his death, is also a relevant contextual factor.

[91] The evidence shows that the transfers of the motorhome and boat (or the proceeds of their sale) were to be applied in reduction of Keith's debt to the Trust, and the superannuation payments were to assist in meeting interest costs on the loan the Trust obtained to fund the purchase price of the House. Although the remaining assets were to be transferred to the Trust, Keith was to retain possession and use of them in the interim and in that sense they were to act as security for Keith's debt. Keith and Gwen were to pay the rates, utilities and insurance in addition. The Trust's wide discretion to terminate the Agreement to Occupy was designed to provide some protection for David's mother, Gwen.

[92] Keith obtained independent legal advice on the documents prior to signing. There is no evidence to suggest this legal advice was inadequate or otherwise incompetent. Despite his vulnerability at the time, there is evidence that Keith understood the terms of the proposed transaction and the alternative options open to him. Armed with that information, the evidence suggests that Keith made an independent decision to press ahead with the transaction even if it was not the most financially prudent option open to him at the time.

[93] We accept the transaction is not fully explained, and there are some features of it which appear to favour David at Keith's expense. However, when the circumstances of this case are looked at in totality, we do not consider this case shows Keith's will being overborne or undue influence being brought to bear on him to sign the agreements. The finding of undue influence cannot be sustained.

Counterclaim

[94] David and the Trust's statement of defence to Keith's third amended statement of claim dated 26 March 2021 included a set-off and counterclaim against Keith.

[95] It was pleaded that Keith had breached the Agreement to Occupy and other arrangements in the following ways:

- (a) instructing Gwen not to return to the House;
- (b) allowing Petra to have occupancy of the Trust's property for an extended period of time without leave, licence or any form of permission from the trustees;
- (c) appropriating and selling the small boat and outboard motor for an undisclosed sum and not accounting for the proceeds;
- (d) wrongfully retaining and using the motorhome; and
- (e) reversing the instructions regarding the Jacques Martin superannuation fund.

[96] It was further pleaded that, as a consequence of these breaches, David was required to make capital payments to Gwen, with David losing the benefits promised to him by his father. In the alternative, David and the Trust claim sums representing the assets retained by Keith or unpaid to the Trust, and a sum equivalent to Gwen's occupancy payment for Petra's occupation of the House.

[97] David and the Trust allege that the Judge failed to address their counterclaim.

[98] It is evident that the Judge was aware of the counterclaim and set-off. She specifically referred to it when summarising David's defences.³⁰

[99] Furthermore, in the course of addressing Keith's claim for breach of contract, the Judge made several factual findings which address aspects of the counterclaim. For example:

- (a) The Judge rejected the claim that by allowing Petra to live in the House, Keith was breaching the Agreement to Occupy.³¹
- (b) The Judge found that the cancellation of the superannuation payments followed inappropriate behaviour by David. The Judge also commented it was arguable that since Keith was no longer living in the House his obligation to pay fell away.³²
- (c) The Judge said that it was not clear that Keith's termination of the sales and listing agreement for the motorhome amounted to a breach the Agreement to Occupy.³³
- (d) As to the claim for relief, the Judge noted that David had submitted records in evidence of the losses he had suffered (for example, lost earnings as a result of the time he had invested in his father's affairs), but counsel conceded that these were not recoverable.³⁴

³⁰ High Court judgment, above n 2, at [55].

³¹ At [123].

³² At [125].

³³ At [124].

³⁴ At [116].

[100] We accept that it is relatively plain from these factual findings, and the entry of judgment on Keith's claim for breach of contract (which is not appealed), that the Judge did not accept many of the claims at the heart of the counterclaim. However, not all of David's allegations of breach have been squarely addressed in the judgment. More importantly, there is no formal order either dismissing or allowing the counterclaim. A counterclaim is an independent proceeding, and it must be separately determined so as to avoid the uncertainty that has arisen in this case.

[101] Given the way the counterclaim was pleaded, and the various issues at trial, we consider it likely that the omission to make a formal order either dismissing or allowing the counterclaim was simply a matter of oversight. In the circumstances, we consider it appropriate to refer the counterclaim back to the High Court for a formal order to be made. We stress that such an order will be based on the evidence and submissions adduced at trial. There is no opportunity for the parties to adduce further evidence or make additional submissions to the Court on the counterclaim.

Result

[102] The appeal is allowed.

[103] The judgment on the undue influence cause of action is set aside.

[104] The appellants' counterclaim is remitted to the High Court for determination.

[105] The respondent must pay the appellants costs for a standard appeal on a band A basis and usual disbursements. Although we were assisted by the submissions made by second counsel, the issues on appeal only warranted a single counsel, and the cost associated with a change of lawyers is not a cost that Keith should have to bear. We allow for one counsel only.

Solicitors:
Thomas Dewar Sziranyi Letts, Lower Hutt for Appellants
Adams Law, Tauranga for Respondent