THE COURT OF APPEAL

Neutral Citation Number: [2019] IECA 58

Record No. 2014/659

Whelan J.
McGovern J.
Baker J.

IN THE MATTER OF THE ESTATE OF M.B., DECEASED AND,
IN THE MATTER OF SECTION 117 OF THE SUCCCESSION ACT, 1965

BETWEEN/

W. B. AND Jo. B.

FIRST PLAINTIFF/RESPONDENT

- AND -
Ja. B. AND S. B.

DEFENDANTS/APPELLANTS

JUDGMENT of Ms. Justice Máire Whelan delivered on the 28th day of February 2019

Background

1. The parties to this appeal are brothers. This is an appeal against the judgment and orders of Mr. Justice Murphy of 3rd July, 2012. He determined that the testatrix, their mother, M.B., had failed in her moral duty within the meaning of s.117 of the Succession Act, 1965 to make proper provision for her son, the Respondent, W.B. (hereinafter W.), in accordance with her means. The orders appealed against include consequential orders made pursuant to s.117 providing for W. out of her estate.

2. The testatrix was born circa 1918 and died on the 17th April, 2001 aged eighty-three years. At the time of her death she was a widow. Her husband, J.B., a publican, predeceased her having died on the 10th January, 1992. Five of her six children survived her. Apart from some savings, the primary asset in her estate was a 75% shareholding in J.B. Limited, a private family company. The said company was incorporated in 1932 and holds the title to the family business, a public house premises together with the seven day on licence.

Terms of last will

3. On the 7th April, 1993 the testatrix, then aged of 75, executed her last will, approximately eight years prior to her death. She appointed the Appellant Ja.B. (hereinafter J.) and another son, a solicitor, as her executors and trustees. It contains the following specific devise:-

> "I give devise and bequeath to my said son, [J.]., all my right title estate and interest howsoever arising in the licenced premises dwelling, out offices, stores and garden …. owned by [J.B. Limited] together with any shares which I own in the company, [J.B. Limited], or any other Company having an interest in the said licensed premises and together with the licence and the goodwill of the business carried on therein and together with all stocks, equipment, furniture and the contents of the dwelling house together with the benefit of any business debts due to me or to the said Company and subject to the liability to pay and discharge any debts or liabilities of the business."

Codicil

4. More than two and a half years later, on the 3rd January, 1996, the testatrix, who by then was aged seventy-eight years, executed a codicil to her will. It provided as follows: -

> "I hereby declare that the bequest of any interest to my son, [J.]., in the licenced premises, dwelling, out offices, stores and gardens …. or in the company, [J.B. Limited], shall be subject to a liability to pay and discharge any debts due by me or by my estate for any hospital or medical treatment or nursing treatment, or maintenance or other charges in any nursing home or dwelling in which I may reside at or prior to my death."

It is common case that the testatrix resided in a nursing home for about fourteen months prior to her death.

The proceedings

5. The proceedings were instituted by way of Special Summons on the 13th December, 2004, over three years and eight months following the death of the testatrix. The Defendants were sued in their capacity as executors.

6. A Grant of Probate issued forth of the Probate Registry to the executors on the 25th January 2010, almost ten years subsequent to the date of death of the testatrix, and over five years after the institution of the within proceedings. There were considerable delays in the matter progressing to trial.

Position of Second Plaintiff

7. The said will included a pecuniary bequest to the testatrix's son Jo. B., the Second Plaintiff. Along with W., he was also one of four residuary legatees named in the will. Initially, he also pursued a s.117 claim against the estate of his deceased mother. However, this Court was informed that prior to the hearing in the High Court he had abandoned his claim pursuant to s.117 of the Succession Act, 1965. He is not a party to this appeal.

The hearing

8. The claim was heard before the High Court in two parts. Firstly, on 2nd November, 2011 the court considered the affidavit evidence and legal arguments and made a determination that the testatrix had failed in her moral duty to make proper provision for her son, W. in accordance with her means. Subsequently, on the 24th April, 2012, the High Court heard further argument and evidence, including a cross examination of J. on his affidavits, for the purpose of a consideration of argument as to the consequent provision that should be made for W. Judgment was delivered on the 3rd July, 2012, over eleven years after the date of death of the testatrix. The court made consequential orders which purported to make provision for W. by directing J. to pay to him a sum of €315,000 out of his share in the estate of the deceased.

9. J. has appealed the said determination and orders by notice of appeal dated the 20th November, 2012.

The claims of the Respondent

10. W. was over fifty-four years old at the date of death of his mother in April 2001. He was an autonomous, independent married man who worked in a managerial position abroad. He resided in his own home, which he held jointly with his wife subject to a mortgage. His wife was an employed nurse. He had two dependent children. His dependency on his parents had ceased thirty-seven years prior, when at the age of seventeen years he had left home in 1964 to pursue his chosen path in life.

11. In the Special Summons at para. 10 of the Special Indorsement of Claim, it is pleaded:-

> "The deceased, by leaving the vast bulk of the estate to just one of her sons, namely the first named defendant herein, which said legacy amounts to over 95% of the entirety of her estate, the bulk of which estate was bequeathed to her by her husband, [J.B.], has failed to make any or any proper provision for the Plaintiffs' herein in accordance with her means, and further has failed entirely to respect the clearly expressed wishes of her late husband who by his last will and testament provided that over 50% of his estate was divided amongst her four children other than the first named defendant herein."

12. The 50% shareholding in the family company beneficially owned by her husband at the date of his death in 1992 came to vest in the testatrix under the terms of his will. The failure of the testatrix to respect "the clearly express wishes of her late husband" was a recurring theme on the part of W. in support of his contention that she failed in her moral duty towards him and will be considered hereafter.

Circumstances of the Respondent, W

13. In his first affidavit sworn on the 8th December, 2004, W. deposes that the only provision made for him in the will was an entitlement to an equal quarter share in the residue. He indicated that the approximate valuation of this bequest was IR£10,000 (€12,697.38). He deposed that the value of the assets comprised in the private family company was IR£2m. (€2,539,476.10), of which J. was left "a 75% shareholding by the deceased".

14. With regard to his involvement in the family business, W. deposed that whilst he and his siblings were growing up, their father was at one time the owner of two public houses one of which was later disposed of. From a relatively young age he worked in one of the pubs, including in the yard and outhouse; washing bottles and bottling stout, ale and beer. In an affidavit sworn by Jo.B., the Second Plaintiff, on the 2nd December, 2004, he deposed that many of the children began to work in the business from around the age of twelve years and that W., along with his siblings, helped out in both pubs in return for pocket money. They worked at weekends, nights and during school holidays. In his affidavit sworn on the 27th April 2005, J. deposes that W. worked away from the family business for a publican in Bray during his summer holidays from the age of fifteen years.

Departure from home at age 17

15. W. was born in November 1946. In 1964, when he was seventeen years of age, he made a decision to pursue a vocation with a religious order. He departed home and never resided there again. Between 1964 and 1971 he pursued his studies under the aegis of the religious order in question. He was ordained a priest in April 1971. Thereafter, he remained with the order for a further twelve years or so. He obtained a third-level degree and qualifications during that time. He spent four years with the order in India. Thereafter, he spent five years in Indonesia; returning to Europe in 1978 where he remained ever since.

16. W. deposed that he left the priesthood in June of 1983, about nineteen years after first joining the order. He did so as autonomous master of his own choices. At that time he was thirty-six years of age. He deposed to having received the sum of IR£1,000 from his mother in the year 1995. His father, J.B., had died on the 10th January, 1992 and probate of his last will and testament issued to the testatrix, his lawful widow, on the 17th May, 1993. Apparently, following the death of his father, the testatrix discovered that a gift of IR£500 which had been sent by his father to W. had not reached him and the sum of IR£1,000 was paid by her "by way of recompense" in the year 1995. The money was apparently applied by him to discharge a motoring fine.

17. W. had married in April 1984. His children are now aged thirty-two and twenty-seven respectively. At the date of death of his mother they were dependent children. In his grounding affidavit sworn on the 8th December, 2004, he deposed that his then current salary was GBP£28,000 with a net monthly income of GBP£1,800. Of the said sum, the family was paying GBP£1,200 per month towards mortgage repayments on his dwelling house. At that time, it was valued at GBP£200,000 and was subject to a mortgage in the sum of GBP£155,000. His wife is a nurse and at the time she was working part time in two nursing homes earning GBP£20,000 per annum. There was a significant dearth of probative information regarding his precise financial and personal circumstances as at the actual date of death of the testatrix on the 17th April, 2001. In the affidavits he references outstanding loans with Lloyds Bank and credit and store cards debts totalling GBP£46,500 in respect of which he was paying off GBP£500 per month. It is by no means clear which elements of these debts, if any, existed at the date of death of the testatrix.

Will of the Father

18. W. contends that, by the terms of his will, his father provided a prime exemplar for the discharge of a moral duty by a parent to

an adult child. Under the terms of his last will and testament dated the 27th November, 1990, the father appointed his wife his executrix and his universal legatee and devisee, provided she survived him by one calendar month. In the event that his wife should predecease him, the contingent devises and bequests included a cash legacy of IR£25,000 to his son, W., the Respondent. Pecuniary bequests to his other children and one grandchild were also provided. The residue was devised to his son, J., the Appellant, for his own use and benefit, and he was also appointed residuary legatee.

19. W. made reference in his grounding affidavit to the said will of his father as follows:-

> "I say in particular that I was not aware of the fact that in the event of the deceased predeceasing my father that monies which equated to over 50% of the net value of his estate at the time of his death were to be divided between myself, my brothers, [Jo.] and [S.] and my sister, [M.]. I was further unaware that had my mother predeceased my father that the value of the share of my late father's estate to be left to my brother, [J.], the first defendant herein, was to represent less than 50% of the value of his estate at the time of his death…"

20. This contention that the will of his father, the testatrix's late husband, provided in effect some kind of palimpsest which in turn defined or informed the ambit of her moral duty under s.117 is reiterated in the later affidavits of W. The inexorable thrust of this argument is that the contingent devises and bequests in her husband's will, which never became operative by reason that she survived him and took the entire estate, required her, in turn, to replicate the provisions of his will in order to make "proper provision" for her children. This thesis that she was morally obliged to adhere to and follow the overall scheme of the contingent provisions in her husband's will in the distribution of her estate under the terms of her own will, was posited by W.'s counsel and was also advanced in the affidavit of the Second Plaintiff, whose s.117 claim was abandoned as heretofore outlined.

21. He continues at para. 14:-

> "I say that throughout their lives my parents never treated any of their offspring any differently from the rest and in particular that they never favoured any one offspring over the other."

22. In his affidavits W. reiterates the salience to his claim, from his perspective, of the terms of the contingent devises and bequests in the will of his late father which he holds up as a paradigm for the discharge of the moral duty of a parent to make proper provision for his children in accordance with his means. The terms of the testatrix's will are compared unfavourably to it. By such adverse comparison W. seeks to imbue his claim with moral righteousness. In an affidavit sworn on the 12th January, 2006, he reiterates para. 18 of his earlier affidavit of the 8th December, 2004 stating:-

> "…It was my late father's intention that the first named defendant herein would only inherit such a portion of his estate as would amount to less than 50% of the value of his estate at the time of his death."

23. At para. 3 he deposes:-

> "…It was never the understanding between my father and the deceased that whoever survived the other was to bequeath their entire interest and title in the company known as ("J.B. Limited") to the first named defendant. Nowhere in the will of my late father is such an intention evinced, and further, the specific terms of my father's will in the event of the deceased pre-deceasing my late father evince an intention for a division of his estate which is diametrically opposite to any such intention as set out in paragraph 13 of the affidavit of the first named defendant."

24. At para. 4 he continues:-

> "I say that my late father, while being of the opinion that it was better that the business be under the control and management of just one of his children, was firmly of the opinion that the value and benefit of the business, which he had established over the years, should be shared out equally amongst all his children in the event of the deceased predeceasing him. To that end he provided that myself and my sister were to inherit the sums of IR£25,000 each from his estate. I say that each of these bequests amounts to IR£107,000, which said sum represented over 50% of the value of my late father's estate at the time when he executed his will in November 1990."

25. W. had disputed the contention of J. that it had been the wish of both parents that:-

> "my late father's business be left to only one of their children and that it was somehow never their intention to share it out."

W. deposed at para. 7:-

> "…I say that even if it was the intention of my parents that the first defendant herein inherit the licenced premises in its entirety, I say that the substantial increase in the value of the said premises in the time since my parents executed their wills, which said premises the first defendant would receive under the terms of the deceased's will, would render any such arrangement inequitable in the context of the respective assets of your deponents herein."

26. At para. 13 of his replying affidavit dated the 12th January, 2006, W. deposed:-

> "I say that in leaving the vast portion of her estate to just one of her children, the deceased failed to make proper provision for each of her children, including your deponent herein, whose special circumstances have been averred to in my affidavit sworn in the herein proceedings on the 8th December 2004. I reiterate that my belief that the deceased could not have made her will with due regard to all of her children if the effect of same was to bequeath the vast bulk of the estate to just one of her children."

27. At para. 14 he deposes:-

> "…It was not the intention of my late father that his business be left to just one of his children to the detriment of the others. By leaving the vast portion of her estate to just one of her children, namely the first named defendant herein, the deceased has acted totally contrary to the wishes expressed in the will of my late father. I say and believe and am duly advised that given my own particular circumstances, and the circumstances of my other siblings other than the first named defendant, it is neither proper and right that all of the estate of my late parents should now be vested in just one of their children, and I reject absolutely the 'justification' for such a course of events outlined by the first named

defendant in paragraph 22 of his affidavit."

Circumstances of the Appellant , J.

28. In his replying affidavit sworn on the 27th April, 2005, J. deposes that he was born in the year 1950. After he finished his Leaving Certificate in the year 1968, he went to work in his father's pub "as he had no one else to run it at the time". The following year he took up a scholarship in horticulture at an Agricultural College. He successfully completed one year of the course. In 1970 his parents persuaded him to abandon his studies "as they needed my assistance to run the pub". The pub where he initially worked was the subject of a CPO and thereafter, he worked in the remaining pub premises. His initial wages were IR£5 to IR£6 per week. He resided at home. He deposes that at that time he worked seven days a week with odd days off and a week's break during the summer. In 1975 he purchased a site and built his own home on that site. He married in 1978 when he was then aged twenty-seven years of age. In 1979 he built his current family home.

The family company

29. In 1975, five years after he had commenced to work full time in the business with his parents, an agreement was entered into between the father, the mother and J., whereby he and his mother each acquired a 25% shareholding in the company which held and ran the family business. Up to that time the company was beneficially owned and controlled by the father. At the time of this agreement J. was aged twenty-four. The following year he purchased a site from the company for consideration of IR£5,000, which he then in turn exchanged for a site with a local convent. Following his marriage, he was in receipt of a wage of IR£400 per month. It appears that J. fell seriously ill in 1981 and the family encountered difficulties at that time resulting in him being forced to mortgage his family home for IR£30,000 in 1985. His wife returned to the work force in that year also. He had two dependent children who in 2001 were aged twenty-one and eighteen respectively.

30. In his affidavit of the 27th April, 2005 at para. 13 he deposes:-

"I say that in November 1990 I was aware that both my parents made wills …I say that my father told me at that time that he and my mother had decided to leave the business and assets to each other. While I held 25% of the shares in the business, my mother also held 25% and my father held 50% and the understanding at that time was that the surviving parent would bequeath their interest and title in [J.B. Limited] to me."

31. He deposed that his parents believed that the family business could only sustain one pension or family and that they "realised and appreciated that it was their responsibility to educate other family members so that they would be employable and independent." With regard to W., he deposed that neither of his parents were happy about him "joining the priesthood as young as he did". He also averred, which is not denied, that whilst in India W. had studied theology at university. Unlike J., all of his surviving siblings are educated to third level.

32. He deposed that the claimants failed to appreciate "that our mother was a partner in the business with our father in all respects." He also deposed that "it was for that reason that my father left the business to her absolutely. Despite the fact that I was working there all my life in the family pub, it was my mother who actually controlled and ran the business up until January 2000 when she retired to a nursing home." He deposes that he was the only one of the children who was involved in the family business on an ongoing basis. None of his siblings had shown any interest or desire to work there. He had effectively worked there all his life and "… given the majority of my time and effort and raising my own family out of it."

First hearing in the High Court

33. The matter was initially heard in the High Court on the 2nd November, 2011, over ten and a half years following the death of the testatrix. There is an agreed counsels' note of the short decision of Mr. Justice Murphy delivered on that date where he expressed concern as to the delay in extracting the grant of probate. In counsel's note of the judgment of the High Court, delivered *ex tempore* on the 2nd November, 2011, the trial judge had noted, *inter alia*, the following:-

> "The plaintiff is not in the position of a child. He is well educated and the court is aware that he has a permanent and pensionable job. Case law on the area is focused on the applicant's age and situation in life. What the court must consider is the position at the date of death of the testator. There is a high onus of proof on the applicant in such cases."

34. The judgment continues:-

> "The affidavit of W.B. indicates he is in constrained circumstances and considering the dicta of Kearns J. the court is of the view that proper provision was not made for him in his mother's will. There is a moral obligation which is not to be taken in isolation."

The trial judge found that there was an inconsistency in the accounts which had been furnished to the court:-

> "The affidavit of W.B. is not contested with regard to the circumstances of his house and mortgage, although details are sketchy."

Having considered the claim of W., the trial judge concluded:-

> "… the Court is of the view that proper provision was not made for him in his mother's will. There is a moral obligation which is not to be taken in isolation."

It is only after the determination that proper provision had not been made by the testatrix for W., he turns, in his *ex tempore* judgment, to consider the position of J.:-

> "The position of the first defendant is that he gave up his studies to work in the business and the court would use the analogy of minding a family farm in respect of the first named defendant's position."

He observed:-

> "At the date of death of the testator the business appeared to be of considerable value. However, a valuation has not been made in taking out the grant of probate and this Court has to have consideration to the present situation and changes in circumstances since the death of M B..."

The resumed hearing – April 2012

35. A resumed hearing, directed towards an assessment of what constituted proper provision for W., came before the High Court on the 24th April, 2012. The trial judge appeared to be significantly exercised by the delays on the part of the executors and in particular, J. in administering the estate of the testatrix and extracting the grant of probate. J. indicated in cross examination that he understood that his co-executor, a solicitor, was extracting the grant of probate and that this explained to a significant extent delays in the administration of the estate. The evidence was that the business of the public house was profitable until about 2006 in which year the town was by passed by a motorway. He asserted that there had been about €98,000 cash in his mother's estate. The court noted that the value of the business on the basis of the Inland Revenue Affidavit was €1,147,000. In cross examination J. had outlined that during the economic crash he had personally borrowed €300,000, of which €100,000 was put into the company business to keep it afloat and €200,000 was applied towards necessary works to and an extension to his own family home.

36. A line of questioning was pursued to the effect that the underlying asset held by the company had depreciated since the economic crash. It was contended on behalf of W. that the underlying asset held in the company was "worth less than a quarter of what it was worth at its peak."

The second judgment

37. The further judgment was delivered on the 3rd July, 2012. The judge outlined the facts and reviewed the affidavits sworn by the parties. At para. 9, p. 13, he reviewed his earlier decision of the 2nd November, 2011 stating:-

> "having considered the evidence on affidavit, the court decided that proper provision had not been made for the First Named Plaintiff in the deceased's will dated the 7th April 1993, by the time of the deceased's death on the 17th April 2001."

38. The judge expressed particular concerns regarding delays in extracting the grant of probate:-

> "This court, on the basis of the circumstances referred to in the aforementioned affidavits…held that the deceased had not made proper provision… and recommended that the matter be referred to mediation for the purpose of an equitable distribution of the estate."

39. The trial judge reviewed the guidelines for proper provision referred to by Kenny J. in *FM v. TAM* [1970]106 ILT 82 at p. 87 and acknowledged that a relatively high onus of proof rested on the claiming child:-

> "In considering the moral duty of a parent, the court has to consider the interests of others to whom the testator has moral obligations.... Section 117 is not about fairness or equality but rather what provision should be made for a child for whom, in all the circumstances, proper provision has not been made. A prudent and just parent may treat his children unequally, according to their needs and circumstances."

40. The judgment continued:-

> "The Court is satisfied that the first plaintiff's particular need was not adequately provided for by the will of the deceased".
>
> "The court is not satisfied, however, that the testamentary disposition of the parties' father should be considered an element in what is to be the proper provision by the deceased for the plaintiffs." (p. 20 of judgment)

41. The judge concluded:-

> "Taking into account the guidelines in *FM v. TAM*, the court is satisfied that the inadequacy of the retirement provisions of the first named plaintiff, given his relatively short paid working life, was a matter that the deceased was, or ought to have been aware (of) and should have taken into account in her testamentary disposition".

Terms of late husband's will

42. In his judgment of 3rd July, 2012 the trial judge rejected any suggestion that the contingent devises and bequests provided for in the will of the late husband of the testatrix were of any relevance to the primary issue for determination by the court, namely, whether she had failed in her moral duty to make proper provision in accordance with her means for her son W.

Delay

43. The treatment by the trial judge of the issue of delay is raised by J. in this appeal. The trial judge stated:-

> "The delay occasioned by the first named defendant having been repeatedly called upon to extract a grant of probate and to meet the plaintiff's claim, is inordinate and inexcusable."

44. The court noted that the Special Summons had issued on the 3rd February, 2005:-

> "The delay in a falling market was a further indication of the need for expedition. The Court should not overlook the needs of the first named plaintiff and the moral obligation to process his claim."

The court then proceeded make a further order:-

> "that the proper provision for the first named plaintiff should, in the circumstances of the provisions of the deceased's will and codicil, *and in view of the first named defendant's inordinate and inexcusable delay in extracting the grant of*

> *probate and in view of his failure to consider and/or meet the claims herein*, be funded out of the first named defendant's share of the estate of the deceased." (emphasis added) (p. 22 of judgment)

45. In arriving at the quantum of the provision to be made for W., the court noted:-

> "The task of valuing the assets of the company on the basis of unaudited accounts poses a significant problem." (p. 23)

46. The court reiterated the adverse consequences of delay in extracting the grant. Firstly, that J. had assumed that the 75% interest of the testatrix's share in the family company could be treated as his and his wife's. Secondly, that:-

> "the delay in a declining market, which was acknowledged by the first named defendant as having affected the business of the company, caused an erosion in the value of its assets."

47. The court noted that the accumulated losses of the company in 2010 were €103,000 even after crediting the proceeds of sale of a freehold interest in a separate property. The court observed that between 2006 to 2010, the number of employees fell from sixteen to eight. This included the directors. With regard to valuations the court noted:

> "the evidence before the court is unsatisfactory with regards to what are unaudited accounts. Valuation at cost of the freehold land and buildings of under €27,000 is not verified by any independent valuation. Moreover, there is a serious discrepancy between these valuations and the valuation of €630,000 as of the 20th October 2011 and of €2,500,000 as of 27th January 2007. This discrepancy is not explained."

48. The court noted:-

> "Accordingly, there would seem to be no basis on which the court could safely determine either the asset position of the company or indeed of the valuation of the shares of the company which should have been held by the defendants as personal representatives of their mother's estate." (p. 24/25)

The trial judge concluded:-

> "The Court is of the view that having regard to a finding that the deceased had not made proper provision for the first named plaintiff and, having regard to the relative position of the first named defendant, that he, as personal representative of the deceased is obliged to make provision for the first named plaintiff in the sum of €315,000 being one half of the valuation of the 27th October 2011. Whilst the date is one year and nine months from the date of the grant of probate (25th January 2010), there is no evidence of valuation at the date of the grant."

49. The trial judge continued:-

> "The court having regard to the delay, particularly the first named defendant in extracting the grant and in his dealings with the plaintiff's claim is of the view that the aforementioned provision should, in the circumstances be payable out of the first named defendant's bequest." Orders were made accordingly.

Grounds of Appeal

50. The grounds of appeal include the following: -

(1) The judge erred in finding that the testatrix failed in her moral duty to make proper provision for W. in accordance with her means;

(2) The judge erred in failing to recognise that by ordering a payment of €315,000 out of his share of the estate, the net effect was that J. would receive no sum of money from the estate, since the sale of the testatrix's shares would not be likely to achieve the sum awarded and an inevitable consequence would be the surrender of control of the family business to a stranger;

(3) The judge erred in failing to properly consider whether at the time of her death the testatrix owed any moral obligation to W. and if so, whether a positive failure of that obligation was made out;

(4) The judge erred in failing to consider adequately the policy underlying s.117 and the requirements of s.117(2);

(5) He erred in considering the position of W. in isolation from that of his siblings;

(6) He failed to consider the testatrix' actual means and the nature of her shareholding in the family business and the overall context of her circumstances at the date of her death;

(7) The judge erred in failing to consider the special circumstances giving rise to an overriding moral duty of the testatrix towards J., that his sole means of livelihood was the family company in which he had worked all his life and that any other division of her assets would require a sale of the family business which would leave J. without any livelihood or income;

(8) The judge erred in failing to consider whether the decision of the testatrix to bequeath her shareholding in the family company to J. in the circumstances constituted a breach of moral duty to W. and/or in concluding that it did and;

(9) The judge erred in failing to consider and/or disregarding the presumption that parents know their children better than anyone else in arriving at his conclusions and had effectively rewritten the will of the deceased in a manner which was unfair.

The issues and arguments on appeal

51. A core contention in this appeal on the part of J. was that W. failed to establish the first limb of the s.117 test: that the deceased had failed in her moral duty to make proper provision for him in accordance with her means. It was argued that the trial judge correctly cited the relevant jurisprudence but failed to apply those principles correctly to the facts, since in order to satisfy the court order it would be necessary to sell the shares in the family company where there were no funds in the estate out of which to make the payments which he directed.

Submissions on behalf of the Appellant

52. Senior Counsel for J. characterised the issue between the parties as:-

> "…They have each made life choices which leads them both to their present circumstances. The court is asked to make a judgment upon the actions and wishes of a deceased person. The deceased was faced with the difficult if not impossible task to treat her children fairly. She had an overriding obligation to leave her shares in the public house to the first defendant."

53. The submissions contend that whilst there was an imbalance between the fortunes of the two brothers, the fact that one is in "constrained circumstances is insufficient for the court to declare that the testatrix has failed in her moral duty without considering the means out of which she could provide for her children". It was pointed out that the family pub is the sole livelihood of J. and he owns 25% of the shares. To require a sale of the 75% shareholding would be an impractical proposition and not one that could reasonably have been contemplated by the testatrix. It was argued that in those circumstances, there has been no failure in moral duty.

54. It was contended that the trial judge did not give any reasoned consideration to the means of the deceased and the position of the first defendant. The trial judge had made an adverse inference from the delay in extracting probate and it was submitted that delay should have no bearing on the determination of the issue of the failure or otherwise in her moral duty by the testatrix as such an evaluation was to be made as of the date of death. The submissions argue that the trial judge was heavily influenced by the notional peak value of the pub when what she held was only a 75% interest in the company: -

> "The critical criteria in considering the means of the deceased is the extent to which her assets, notably the shareholding, was divisible or realisable."

55. It was argued that the bequest of her shares to J. was the most natural and logical thing to do:-

> "To subdivide the shareholding or to force a sale of the shares would have severely disadvantaged the first defendant to whom she also owed a moral duty."

56. Counsel for J. relied on *Re ABC decd; XC v RT* [2003] 2 IR 250, a judgment of Kearns J. (as he then was) pertaining to a family farm. J. contended that like principles obtain in his circumstances because the deceased's most substantial asset was her shareholding in the company:-

> "That exceeds by a large margin the total cash available for distribution. However, the value of that asset represented a shareholding in a company which the first named defendant had effectively operated for many years."

57. J. also relied on the decision of *J de B v H de B* [1991] 2 IR 105, Blayney J., where, in relation to a family farm, the said judge found:-

> "The only asset…out of which he could make any provision for his children was the remainder interest in K. and in deciding what to do with it, he had to consider the position of each of children so as to be as fair as possible to each. It seems to me that he had to consider in particular the position of H. He and his family had, at the request of the deceased and his wife, lived in K since 1970. He had no other house and the land was used by him as part of his business ... I consider that the deceased could justifiably have taken the view that in the particular circumstances, he had a moral duty to leave the entire of K. to H. and that that duty took precedence to any duty he might have had towards the plaintiff ... There remains to be considered whether the deceased ought to have made further provisions for the plaintiff by giving him a bigger legacy. That was the only way in which he could have made additional provision for him. But since the deceased had no liquid assets, any additional legacy would have had to be charged on K. Would that have been fair to H.? This has to be looked at in the context of the claims of N. and P. against the deceased's estate."

58. It was argued that submissions advanced to the High Court as to the content of the father's will had been correctly dismissed by the trial judge and that there had been no failure in moral duty to W.

59. The jurisdiction of the judge to order payment of €315,000 out of the share of J. was disputed: -

> "Respectfully, the court has no jurisdiction to make such an order. The court is faced with precisely the dilemma that faced the deceased. Is it possible to benefit the first plaintiff out of her capital holding of 75% of the shares of J B Ltd.?"

60. It was contended that whilst an allocation of some of the shares was a possibility, it was not a practical proposition. It was likely to be disruptive of the very bequest intended. A sale of the shares would be even more disruptive. To charge the transfer of shares to J. with payment of the sum directed by the court placed an intolerable burden upon him:-

> "The problems associated with making a consequential order, to a large extent, support the submissions previously made that the deceased had abided by her moral duty in accordance with her means under the terms of her Will."

61. In conclusion, it was argued that there had been no failure in moral duty by the testatrix established by W. Moreover, that the award of the High Court was not in accordance with the law and any combination of the possible alternatives place an impossible burden on J. and was totally contrary to the wishes of the deceased.

Submissions of the Respondent

62. It was contended on behalf of W. that the High Court decision ought not be disturbed and that the appeal had been brought "not in reality because the judgment was wrongly decided, but rather on the sole ground that they do not agree and they are unhappy with the said decision."

63. W. emphasised the conclusion of the trial judge as to the inadequacy of his retirement provisions as outlined earlier.

64. It was submitted that the trial judge was correct in firstly determining that the deceased had failed in her moral duty to make proper provision for W. and then deciding what provision was to be made for him. It was argued that the court was correct in having regard to the value of the entire estate as at the date of the hearing. Reliance was placed on the decision of Laffoy J. in *A v. C &*

anor. [2007] IEHC 120 (Unreported, High Court) where she noted that:-

> "The requirement that the provision made be just may, having regard to the particular circumstances of a case…any variation in the value of the assets…between the date of the Testator's death and the date of the hearing."

Delay

65. W. argued that delay was an important factor in this case. The conduct of J. in the progressing of the proceedings, and particularly his delay in extracting a grant of probate and the consequences arising from same, especially in light of the initial rise and subsequent crash in property values with the ensuing erosion in the "peak" value of the assets of the deceased was relevant. The underlying asset of the company had greatly diminished in valuation by the time of the hearing of the action and this had been correctly dealt with by the trial judge, it was contended.

66. With regard to the second aspect of the appeal, namely the quantum of the provision made by the trial judge, it was contended that the award made to W. represented 50% of the valuation of the entire company as determined by a valuer in October 2011. The valuation had been submitted to the court and no issue had been raised by either party.

67. W. argued that this approach to valuation by the trial judge was correct. The value, it was argued, represented 50% of:-

> "A much reduced valuation of the company, which said erosion in the value of the assets was noted by the trial judge as one of the direct consequences of the delay of the first defendant in extracting a grant of probate in dealing with the claims of the plaintiffs pursuant to s.117 of the Act of 1965, rather than acting in a timely and fair manner."

68. W. disputed the contention of J. that the bulk of the assets devised being a 75% shareholding in the family company amounted, in effect, to an unrealisable asset from which no monies could be extracted to satisfy the award made to him by the trial judge unless the entire company was sold. It was contended that no evidence had been put before the court by J. to prove conclusively that no monies could be realised by him from the 75% shareholding of the testatrix other than by selling the same in its entirety.

69. It was further argued that no evidence had been adduced of the inability of W. to pay into the estate "assets" to fund the payment of €315,000 awarded to W. by the High Court.

70. It was contended that the order was a "just and fair award". It was disputed that it placed an impossible burden on J.

71. W. disputed that the testatrix had an overriding moral obligation to leave her shares in the public house to J. and submitted that her overriding moral obligation was not to benefit one of her children to the detriment of all the others, but rather, to make proper provision for all of her children in accordance with her means.

72. W. submitted that in making its orders, the court had regard to the conduct of J., and in particular, his "egregious delay in extracting a grant of probate..." It was submitted that the orders were correct in law and no proper basis had been advanced for setting them aside.

It was also contended that a relevant and important factor in the trial judge's determination as noted by him was the conduct of J. in progressing the proceedings and in particular his delay in extracting a grant of probate with a consequence that the value of the assets and the estate of the deceased diminished due to the economic crash.

73. It was asserted that the trial judge correctly outlined the law and further correctly applied the law in his judgment.

The law

74. Section 117(1) provides:-

> "where… the court is of opinion that the testator has failed in his moral duty to make proper provision for the child in accordance with his means… the court may order that such provision shall be made for the child out of the estate as the court thinks just."

Testamentary freedom

75. Historically, from the Statute of Wills (Ireland) 1634 until the coming into operation of the Succession Act of 1965 on the 1st January, 1967, a testator enjoyed substantially unfettered testamentary freedom. J.C.W. Wylie in his text "Irish Land Law" 5th Edition notes at Chapter 16.3 that " This concept of testamentary freedom of disposition remained an absolute principle until very recent times,…" It is clear that the framework of s.117 countenances potentially significant restrictions in testamentary discretion. But as will later appear the manner in which the courts exercise restraint in purporting to rewrite the will of testator is to an extent reflective of the constitutional protection of both testators and beneficiaries.

76. The whole estate of a deceased person devolves upon and vests in the personal representatives by virtue of s.10 of the Succession Act,1965. Beneficiaries however have an interest in the form of a *chose in action* to ensure that the personal representatives duly administer the estate, as was held by the Supreme Court in *Gleeson v Feehan & Anor.* 1997 ILRM 522, at p.537 per Keane J. A successful s.117 claim always results in a re-distribution in whole or in part of the expectations of one or more beneficiary under the disputed will. From a constitutional perspective, as the authors of Kelly, *The Irish Constitution,* 5th edn., point out at 7.8.215:-"Article 43.1.2 refers to, *inter alia*, the right to 'inherit property'…" The authors note that the decision of the Supreme Court in *O'B v. S* [1984] IR 316 is authority for the proposition that the phrase "and inherit property" in Art. 43.1.2 is necessarily related to the exercise of the power to devise and bequeath property by will and that the State had merely guaranteed in Art. 43.1.2 not to pass any law attempting to abolish the general right to inherit property so devised.

The two- stage process

77. The correct judicial approach to a s.117 claim is set out in detail in the leading text, Spierin, *Succession Act 1965 and Related Legislation: A Commentary,* 5th edn. at p. 399.

It is well established in the jurisprudence, such as Laffoy J. in *A v C and anor* [2007] IEHC 120, that in applications by a child of the testator, "the court's function in adjudicating on an application under s.117 of the 1965 Act is a two-stage process":

(i) First, the court must determine whether the testatrix has failed in her moral duty to make proper provision for the claimant child.

(ii) Only after the claimant has met the relatively high onus and demonstrated a positive failure in the moral duty owed by the parent to them can the court proceed to enter upon the process of deciding what provision is appropriate to satisfy the moral obligation in question.

78. I propose considering the present appeal with that two-stage process in mind

Moral duty

79. The concept is not defined in the legislation. The Supreme Court in *Re CC & Anor. v WC & Anor* [1990] 2 IR 143 approved the earlier decision of: *FM V. TAM* (1972) 106 ILTR 82 where Kenny J. had set out the elements to be considered when judging whether a moral duty under s.117 to make provision for a child has been discharged.

80. The jurisprudence offers helpful guidelines which are of assistance in approaching the issue whether a testatrix has failed in her moral duty to make proper provision for a claimant child. However, the jurisprudence does not have the force of legislation and each case turns on its own particular facts.

81. In the case *FM v TAM* [1970] 106 ILTR 82 Kenny J. stated:-

> "It seems to me that the existence of a moral duty to make proper provision by will for a child must be judged by the facts existing at the date of death, and must depend upon:-

(a) "…

(b) The number of the testator's children, their ages and their positions in life at the date of the testator's death,

(c) The means of the testator,

(d) The age of the child whose case is being considered and his or her financial position and prospects in life,

(e) Whether the testator has already in his lifetime made proper provision for the child…"

82. As was observed by Kenny J. in *FM v TAM* [1970] 106 ILTR at 87:-

> "…the relationship of parent and child does not of itself, and without regard to other circumstances, create a moral duty to leave anything by will to the child."

83. The approach to evaluating whether a positive failure in the moral duty has occurred, which is a prerequisite to establishing an entitlement to provision under s.117, was considered in detail by the Supreme Court in *Re CC & Anor WC & Anor* [1990] 2 IR 143. Finlay C.J. made clear that whether a moral duty to make proper provision by a will for a child pursuant to s.117 subsists must be determined based on the facts as they exist at the date of death of a testator. The facts must be decided based on objective considerations.

The Supreme Court found that the language in s.117(1) placed a relatively high onus of proof on an applicant for relief under the section:-

> "It is not apparently sufficient from these terms in the section to establish that the provision made for a child was not as great as it might have been, or that compared with generous bequests to other children or beneficiaries in the will, it appears ungenerous. The court should not…make an order under the section merely because it would on the facts proved have formed different testamentary dispositions. A positive failure in moral duty must be established." (p.148)

84. In the instant case, the evidence was that W. was an employed fifty-four-year-old adult living wholly independently of his mother at the date of her death in April 2001.

Did the trial judge err in finding that the testatrix failed to discharge her moral duty to the Respondent?

85. Spierin in his textbook, *Succession Act 1965 and Related Legislation: A Commentary,* 5th edn., references at p.393 *et seq*. the principles succinctly summarised by Kearns J., in the case of *Re ABC decd; XC v RT* [2003] 2 IR 250 at p. 262, as of relevance in approaching the determination as to whether a parent has failed in his or her moral duty to make proper provision for a claimant child. He identified a checklist of factors said to be derived from the s.117 jurisprudence as it then stood:-

(a) the social policy underlying s.117 is primarily directed to protecting those children who are still of an age and situation in life where they might reasonably expect support from their parents against the failure of parents who are unmindful of their duties in that area.

(b) What has to be determined is whether the testator, at the time of his death, owed any moral obligation to the child and if so whether he has failed in that obligation.

(c) There is a high onus of proof placed on an applicant for relief under s.117, which requires the establishment of a positive failure in moral duty.

(d) Before a court can interfere, there must be clear circumstances and a positive failure in moral duty must be established.

(e) The duty created by s.117 is not absolute.

(f) The relationship of parent and child does not of itself and without regard to other circumstances, create a moral duty to leave anything by will to the child.

(g) S.117 does not create an obligation to leave something to each child.

(h) The provision of an expensive education for a child may discharge the moral duty as may other gifts or settlements made during the lifetime of the testator.

(i) Financing a good education so as to give a child the best start in life possible and providing money, which, if properly managed, should afford a degree of financial security for the rest of one's life does amount to making 'proper provision.'

(j) The duty under s.117 is not to make adequate provision but to provide proper provision in accordance with the testator's means.

(k) A just parent must take into account not just his moral obligations to his children and to his wife, but all his moral obligations, e.g. to aged and infirmed parents.

(l) In dealing with a s.117 application, the position of an applicant child is not to be taken in isolation. The court's duty is to consider the entirety of the testator's affairs and to decide upon the application in the overall context. In other words, while the moral claim of a child may require a testator to make a particular provision for him, the moral claims of others may require such provision to be reduced or omitted altogether.

(m) Special circumstances giving rise to a moral duty may arise if a child is induced to believe that by, for example, working on a farm, he will ultimately become the owner of it, thereby causing him to shape his upbringing, training and life accordingly.

(n) Another example of special circumstances might be a child who had a long illness or an exceptional talent which it would be morally wrong not to foster.

(o) Special needs would also include physical or mental disability.

(p) Although the court has very wide powers both as to when to make provision for an applicant child and as to the nature of such provision, such powers must not be construed as giving the court the power to make a new will for the testator.

(q) The test to be applied is not which of the alternative courses open to the testator the court itself would have adopted if confronted with the same situation but rather, whether the decision of the testator to opt for the course he did, of itself and without more, constituted a breach of moral duty to the plaintiff. (*FM v TAM* [1970] 106 ILTR 82 Kenny. J)

(r) The court must not disregard the fact that parents must be presumed to know their children better than anyone else."

86. I respectfully adopt that summary of the guiding principles. On the basis of the available evidence in the instant case the following factors are, to varying degrees, particularly relevant: (b), (c), (d), (e), (f), (g), (j), (k), (l), (m), (p), (q) and (r). The principles are to be considered in the context of other relevant criteria including those articulated by Kenny J. in *FM v TAM* [1970] 106 ILTR 82.

Principles Relevant in present appeal

87. The standard imposed on a parent is that of "a just and prudent parent" which may, and often does, necessitate treating children differently based on their individual circumstances. The share to be given to the applicant child should not be based on that given to the other children, but should make proper provision for that particular child. In *EB v ES* [1998] 4 IR 527, Keane J. stated:-

> "the maxim 'equality is equity' can have no application where the testator has, by dividing all his estate in that manner, disregarded the special needs (arising for example, from physical or mental disability) of one of the children to such an extent that he failed in his moral duty to that child."

88. The jurisprudence makes clear, that whereas a child of any age is entitled to bring a claim pursuant to s.117, however, in the case of a child of who is independent and of full age at the date of death there is a relatively high onus of proof and it is not sufficient merely to assert that provision was not as great as it might have been or that it appears ungenerous when compared to the provision made for another child. It is acknowledged in the case law (such as Keane J. in *E.B. v S.S.* 1998 4 IR 560) that the social policy which informs s.117 is primarily directed towards provision for children of an age and situation in life where they might reasonably expect parental support.

89. A significant part of the affidavit evidence of W. compares his bequest under his mother's will unfavourably to the provision she made for J. Comparisons invite the unveiling of privatised familial grievances but invariably fail to illuminate with any exactitude the judicial exercise required to be undertaken by the terms of s.117. The correct approach is not to make comparisons or thereby seek to achieve a degree of equality but rather to assess the relative needs of each child in issue in the context of an established moral duty.

90. The argument that to discharge her moral duty the testatrix should have drawn a will by reference to the will of her late husband was pursued on behalf of the appellant in this Court. In my view the trial judge was correct in rejecting attempts to claim failure in moral duty by reference to the terms of the said will. Such a proposition subtly subverts the general principle of testamentary freedom and also the principle that the moral duty of a testatrix is to be determined in accordance with s117 primarily based on facts obtaining at the date of death. It is misconceived in law and no persuasive authority was advanced for such a proposition.

91. The degree of the testatrix's conscientiousness and fair-mindedness towards her children, including W., is reflected in the fact that each child is a beneficiary under the terms of her will.

92. In that regard, I consider it to be significant that the testatrix in the codicil executed in January 1996, (as recited at para.4 above) recalibrated the burden she imposed on J. thereby alleviating the residuary estate from the costs of her medical care and enhancing the position of her residuary legatees to share in her estate. The charge she created by the codicil on her bequest to J. could have imposed a significant financial burden for which he was to be solely financially responsible had she lived for many years after taking up residence in a nursing home. It also shows, in my view, that she had conscientious regard to her obligations to all of her children and that she did not wish her cash assets or the residuary estate eroded by the discharge of nursing home liabilities.

93. While in relative terms there was a disparity in the circumstances of the brothers, both W. and his wife did have earning capacity and employment at the date of his mother's death in April, 2001. It was clear that though their home was subject to a mortgage it

was not in negative equity. There was evidence at the hearing that arrangements had been put in place regarding the discharge of W's other debts although there was no evidence as to his exact position regarding any short-term borrowings as at the date of death. It would appear that some debt may have been incurred subsequently.

94. W's adverse pension position arose not by virtue of any act or omission referable to the testatrix but rather from the lifestyle choices he freely made as a young person and pursued for about nineteen years after leaving secondary school. There were no readily accessible funds available in the estate of the testatrix to augment the share W. took in the estate that did not unfairly diminish the respective devises and bequests to the other beneficiaries or jeopardise the family business where J. had worked his entire adult life.

95. There was no evidence offered by W. as to the relative financial circumstances of his siblings his sister M. and brother S. who did not pursue s.117 claims. However, it is noteworthy none pursued a s.117 claim. W. does not assert that the bequests to his two brothers, S. and Jo., and his sister M. or his nephew were unreasonable or unduly generous. The testatrix was confronted with limited options in making her will. The decision she elected for was that her shares in the family business would go to the son who had worked for over thirty years with her in that business – charged with payment of her medical and care liabilities and that the ready cash in her estate be divided amongst her other surviving children and one grandchild. Her testamentary provisions for her family - as evidenced by the will and codicil- were considered and suggest that as a parent she knew her children best.

The nature of the underlying asset in the estate of the testatrix

96. It is relevant that at the date of death there was €95,000 approximately in the estate in the distribution of which W. was intended to share. The only other asset in the estate was the 75% shareholding of the testatrix in the company which owns the public house.

97. A central material fact in the instant case is that the specific devise to J. constituted the testatrix's said shareholding in the private family company through which the public house business was operated. There was no evidence as to the existence of a market for the disposition of her 75% shareholding in a private company. There was no advertence by the trial judge to the tax implications arising from such a disposition of part of the holding in the family company. Since the year 1975 J. himself is beneficially entitled to a 25% shareholding.

98. The trial judge failed to appreciate the limitations placed on the testatrix in light of the nature of the main asset in her estate being a 75% shareholding in a family company and not a beneficial ownership in any specific property. The dicta of the trial judge including his reference to an overall valuation of €630,000 appears to be a gross conflation of the valuation of the estate and of J's own private interest in the company which holds the public house premises. Even if it is not such, the trial judge failed to address the fact that there was no identified mechanism whereby the value ascribed by the court to W.'s claim for proper provision could in the first place be extracted or realised without adversely interfering with J.'s own beneficial interest in the company which he owned since 1975. Further, there was no evidence led of the existence of a market for a 75% shareholding in a rural pub. More relevantly, however, a sale of the business would inevitably result in the loss of J.'s livelihood. A critical fact known to the testatrix when she made her will and subsisting at the date of her death was that the shareholding was held in a manner not readily amenable to realisation.

Special Circumstances

99. Familial solidarity generally connotes a relationship of interdependence constituted through a familial bond and characterised by mutual support. Hence, the central importance of the exercise by the court in a s.117 claim of a process whereby due regard to given to all other moral obligations on the part of a testatrix proven to subsist at the date of death. It is only by an evaluation of the totality of the moral obligations incumbent upon the testatrix, the nature and extent of each antecedent moral obligations established and consideration of the mode of their discharge by her that the court can determine whether there can be said to be any positive failure of a moral duty towards the claimant W. in the first place.

Overriding moral obligation

100. It is clear from the uncontested evidence in this case that a significant moral duty was owed by the testatrix, at the time of her death, to the appellant J. He alone had remained behind to run the family business with his aging parents. The uncontested evidence was that he had foregone a good education to work for and with his father and mother in the business. This continued throughout his entire adult life up to the time of her death. The evidence of J. was that he had been led to understand that ultimately he would inherit the family business.

101. In the instant case it is necessary to consider whether the dispositions to J. in her will – which were subject to the charges in the codicil –were made to discharge an overriding moral obligation which the testatrix owed J. arising from the nature and duration of her relationship with him and the years he had dedicated to faithfully working with her in the family business which was held by the limited liability company. It is necessary to consider with particularity the circumstances of J. given the extent to which from 1970 onwards his life was shaped by that commitment and his employment and business intertwined with that of the testatrix. This approach accords with s.117(2) of the Act and the fundamental principle of fairness.

102. All of the surviving children, apart from J. had the benefit of third level education and qualifications. Whilst this education in the case of W., was paid for by a religious order rather than his parents nevertheless it was made possible by his parents facilitating his wish to depart from the family business to avail of the opportunities he wished to pursue at the age of 17. The loss of educational opportunity by J. brought about by the need to assist his parents in and of itself was an important factor which a just and prudent parent would bear in mind when considering what provision should be made for J. under the terms of her will. His lack of training or qualification outside the pub business rendered him less well equipped than his siblings to find a new career. That disadvantage flowed directly from his agreement to abandon his studies in 1970 to help his parents run the family business

103. In coming to make her will the testatrix was confronted by two central considerations:-

(i) The fact that she had prevailed upon her son J. in 1970 to abandon his studies to work in the family business and that he had abided by his commitment to her and the business throughout the ensuing years and;

(ii) The fact that that her shareholding in the family company was not readily or easily realisable without loss of the very substratum upon which J. relied for his livelihood, namely the family business. The assets in the estate were her shareholding together with a sum of approximately €92,000.

104. The devise of her shares to J. is consistent with his claim that his parents had promised him that the survivor of them would devise the family business to him. Whether or not such a promise was formally or expressly made, the facts and conduct of J. demonstrate that at the date of death of his mother she owed him a moral duty antecedent and ranking in priority to all her other moral duties to ensure that the shareholding in the family business which was his life's work and his livelihood and of which he was a part-owner would securely continue in his ownership into the future. It was implicit from the conduct of J. over time, coupled with the grant of a 25% interest in the business to him a quarter of a century prior to the death of the testatrix that the dedication by J. of his entire life to the business was based on a mutual understanding that after the lives of his parents he would come to own the family company in its entirety. The terms of her will offer acknowledgment of the testatrix' understanding of her obligations in that regard.

105. The role played by J. in running the business from 1970 onwards imposed on the testatrix a moral duty to ensure that her shareholding in the business devolved to him. That role had vested in him a moral claim to her shares in the family business. The obligations discharged by J. over time clearly established special circumstances and an overriding moral obligation owed by the testatrix to him which continued to subsist at the date of her death. The unbroken duration of that commitment – a period of over thirty years - is not insignificant. He had performed the obligations assumed by him in 1970 without input from any other sibling. Thus, the devise of her shares to J. were consistent with the testatrix discharging an overriding moral obligation to J. which as a prudent and just parent she was obliged to do.

Delay

106. The trial judge erred insofar as he attached any weight or relevance to the delays that undoubtedly existed in connection the administration of the estate in reaching his determination on the first issue *viz.* whether the testatrix had failed in her moral duty to make proper provision for W. in accordance with her means. The grant of probate did not issue until the 20th September, 2010, over nine years following her death. Whether J. as one of the executors named in the will had some culpability in connection with the delay is wholly distinct from and not material to the exercise to be carried out by a judge making a determination on foot of a claim pursuant to s.117.

Relevance of erosion in the value of the assets

107. The court acknowledged that "The evidence before the court is unsatisfactory with regard to what are unaudited accounts" (p. 24 of judgment) and further "…there would seem to be no basis on which the court could safely determine either the asset position of the company or …the valuation of the shares of the company which should have been held by the defendants as personal representatives of their mother's estate." Nevertheless, the trial judge was of the view that delays in extracting the grant of probate caused erosion in the value of the assets of the company by reason of the economic crash.

108. This approach erroneously assumed that the notional valuation of the company's underlying asset, measured in retrospect as at the height of a property bubble, could ever be of relevance in determining either the existence of a moral duty pursuant to s.117 or the satisfaction of such a duty if it were established. The notional value of the main asset in the company increased and ebbed between the death of the testatrix and the hearing of the action for reasons wholly extraneous to J. He was not responsible for the collapse of the property market that occurred post-2008.

109. Whilst the statement of the relevant legal principles by the trial judge in both the *ex tempore* decision of 2nd November, 2011 and in the judgment of 3rd July, 2012 are correct, the approach adopted in applying those principles to the facts of this case was erroneous insofar as it failed to weigh appropriately in the balance the demonstrable overriding moral obligation owed by the testatrix to J. and his special circumstances. Further, the finding of a failure in moral duty by the deceased towards W. is not supported by the evidence and is erroneous in law and contrary to authority.

110. The judgment of the 3rd July, 2012 at p.19 sets out in detail the principles cited by Kenny J. in *FM v TAM* [1970]106 ILT 82 which requires the court in determining whether there has been a failure of moral duty on the part of a parent to evaluate and consider the interest of others to whom they had moral obligations. The trial judge failed in applying the said principles to take proper account of the significant obligations assumed by J. in relation to the running and operation of the family business and the extent of the resulting moral obligations owed by the testatrix to him at the date of her death.

111. In the exercise of determining whether the testatrix failed in her moral duty to make proper provision for W. the court failed to attach appropriate weight to the extent and duration of J.'s dedication of his entire working lifetime to the family business, which was his livelihood and out of which he supported his family.

112. No sufficient consideration was given to the complexities of realisation of the shareholding of the testatrix in the business.

113. It does appear that in reaching a conclusion that there was a failure of moral duty on the part of the testatrix *vis á vis* her son W., the trial judge was unduly influenced by the notional "property bubble" valuation of the company's main asset at its height. However, this approach disregarded the fact that the asset devised and bequeathed to J. was not the property but rather a 75% shareholding in the company. There was no evidence that her shareholding was realisable on the basis of the underlying assumptions adopted by the judge in the course of his judgment. In adopting the approach which he did, the trial judge disregarded the special circumstances that gave rise to a pre-eminent and supervening moral duty on the part of the testatrix *vis á vis* J.

114. Neither did the trial judge have adequate regard to the nature of the deceased's estate which was held in shares and not in real property and the particular challenges that presented to her at the time she made her will and codicil.

115. Whilst J. had received a 25% shareholding in the family company from his father in the year 1975, a separate assessment was called for in regard to his subsequent conduct and the obligations discharged by him particularly following the death of his father in 1992. It is not contested that the testatrix and J. operated the business together in harmony for over thirty years. Thus, the case fell squarely into the category of cases dealing with family farms and family businesses. There was no evidence that any other family member undertook or discharged like obligations towards the parents or the family business.

116. The testatrix's moral obligation to J. took precedence over all other moral obligations which subsisted at the date of her death. On the evidence, that moral obligation could only be satisfied by devising to J. the 75% shareholding she held in the family company.

117. As Spierin in *Succession Act 1965 and Related Legislation: A Commentary*, 5th edn.at p. 417 points out, in light of the decision of the Supreme Court in *Re IAC* [1990] 2 IR 143, a mature applicant such as W. "will have a heavy onus to discharge" to prove failure of moral duty. W. has failed to discharge the high onus of proof on him that, given her circumstances, his mother positively failed in

her moral duty towards him. The pecuniary bequest to him was proportionate and fair in all the circumstances as obtained at the date of her death. W. has failed to establish that the decision of the testatrix to opt for the course she did, of itself and without more, constituted a breach of moral duty to the plaintiff.

118. I would allow the appeal and set aside the order of the High Court. Accordingly, it is unnecessary to proceed to the second stage of the two-fold test under s.117.