THE HIGH COURT

[2002 No. 22SP]

IN THE MATTER OF THE ESTATE OF M. K. DECEASED

AND

IN THE MATTER OF SECTION 117 OF THE SUCCESSION ACT 1965

BETWEEN

A., B., AND C. (A PERSON OF UNSOUND MIND NOT SO FOUND BY INQUISITION) SUING BY HER MOTHER AND NEXT FRIEND, M.
PLAINTIFFS

AND

T.D., F.D. AND P.

DEFENDANTS

Judgment of Miss Justice Laffoy delivered on the 16th day of April, 2010.

Background

1. M.K. (the testator) died testate on 30th December, 1999. By his will dated 16th September, 1997 he had appointed the first and second defendants (the personal representatives) to be executors and trustees thereof. On 22nd November, 2001 the grant of probate of the will of the testator issued to the personal representatives.

2. The testator was survived by two sons A. and B., and one daughter, C., who are the plaintiffs in these proceedings. All of the plaintiffs were of full age at the date of the testator's death. However, C. has had severe epilepsy since infancy. Dr. Norman Delanty, Consultant Neurologist, has certified that she is a person of unsound mind and incapable of managing her affairs. She lives with her mother, M.

3. The testator and M. had separated prior to the testator's death. Separation proceedings between them were compromised on 11th July, 1996, whereupon M.'s entitlement to any interest in the estate of the testator was extinguished. No issue arises as to M. having a claim against the estate of the testator.

4. The evidence put before the Court by P. is that she was the testator's partner and that she was in a relationship with him since 1983. P. lived with the testator during the last three years of his life. P.'s evidence is that the deceased had two strokes in 1997, as a result of which she took time off work and ultimately left work to take care of him on a full-time basis.

Testator's assets and provisions of his will in relation thereto

5. For the purposes of the issue now before the Court I consider it sufficient to outline the testator's assets and the provision he made for them in his will under four broad headings as follows:

> (a) The testator devised a house site on his lands to P. for her absolute use and benefit. Subsequent to the making of his will, on 14th November, 1997, the testator transferred a house site to himself and P. as joint tenants and subsequently a house was built on that site in which the testator and P. resided. On the death of the testator P. became solely entitled to the house, which was subject to a mortgage to secure a home loan, by right of survivorship.
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> (b) The testator was the owner of approximately eleven acres of agricultural land. Prior to his death he had entered into a contract to sell a site comprising approximately a half an acre to a third party. The sale was completed after his death. By his will the testator devised a house site of half an acre out of the agricultural land to each of his sons A. and B., together with all necessary easements for the enjoyment of the sites for private dwelling houses. However, he expressly provided that the devise was to be subject to his sons procuring planning permission for the erection of one private dwelling house, with out-offices if required, on each site within twenty four months of the date of his death. While there was a complicated planning history in relation to the sites on the agricultural land after the testator's death, suffice it to say for present purposes that the planning permission stipulated by the testator has not been obtained. The testator devised the agricultural land, which he described as his "field" to P. absolutely, subject to all necessary rights of way or other easements for the enjoyment of the sites.
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> (c) The testator was the owner of three commercial units and a yard. In his will he devised this property, which he described as his "commercial yard", to his sons, A. and B., his daughter C., and P. in equal shares absolutely.
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> (d) The testator's residuary estate consisted of household contents and machinery and tools of fairly nominal value and money, including the proceeds of the sale of the site, which was eventually completed. There were debts, primarily, an overdraft on a current account with AIB and a term loan with AIB, both accounts being in the joint names of the testator and P., both being jointly and severally liable to AIB on the accounts. The testator devised the residue of his estate "be the same real or personal and wheresoever situate" to P.

The proceedings

6. These proceedings were initiated by special summons which issued on 17th January, 2002. Initially, the plaintiffs' claim was under s. 117 of the Succession Act 1965 (the Act of 1965) solely. However, subsequently, by order dated 13th May, 2002 made by Smyth

J., the plaintiffs were given liberty to amend the special summons by including a claim under s. 121 of the Act of 1965 for an order that the transfer of the house to P. be deemed to be a devise or bequest made by the testator by will and to form part of its estate. Subsequently, by order of 26th October, 2005 made by the Master of the High Court, P. was joined as a co-defendant, the time for doing so being subsequently extended by a further order of the Master made on 21st March, 2006. While there is some dispute about this, I am of the view that the purpose of joining P. as a co-defendant in the proceedings was to afford her the opportunity to answer the claim under s. 121.

Progress of the proceedings

7. The proceedings made slow progress during the seven years from the beginning of 2002 to the end of 2008. This Court's involvement commenced in December 2008. On 17th December, 2008, P. applied in these proceedings for an order directing or permitting the personal representatives to pay out of monies belonging to the estate of the testator €15,000 to P. on the basis that she required the money for her ongoing needs. P. had been unemployed since August 2008 and was in receipt of a weekly social welfare payment. The Court refused that application on the basis that it did not have jurisdiction to make the order. However, the Court underlined the necessity of the case being heard as soon as possible and, in view of the escalating costs, that it be case managed.

8. The case management process was tortuous, but was delayed to some extent by the death of the solicitor for the plaintiffs, who was a sole practitioner, and obtaining the assistance of the Law Society. The principal issues which emerged were as follows:

> (a) Where liability lay for the amounts due to AIB on the joint current account and the joint term loan, neither of which had been discharged or serviced since the death of the testator. The amounts due to the bank had grown exponentially since the death of the testator. As of July 2009 the amount due to AIB on the current account had grown from around €6,000 at the date of the death of the testator to over €37,000, and the debit balance on the term loan had grown from approximately €25,000 to just short of €120,000. Where liability lay for those debts was complicated by a number of facts. First, the liability on the term loan was supported by a charge created by an undertaking given in 1998 by the solicitors acting for the testator to hold the title deeds to the agricultural land in trust for AIB. Secondly, dealings of which the personal representatives were aware between P. and AIB complicated matters. The personal representatives succeeded in negotiating a settlement of both accounts with AIB. On 28th July, 2009 the Court made an order approving the settlement by the personal representatives of the indebtedness to the bank on foot of the current account and the term loan for the sum of €95,000 "all-in" without expressing any view on the liability of the estate of the testator and P. *inter se* in relation to that indebtedness. The position subsequently adopted by the personal representatives was that P. is liable for a contribution of half of that amount to the estate of the testator.
>
> (b) Whether the plaintiffs proposed to maintain or withdraw a claim under s. 121. The prospect of withdrawal was mooted early in 2009. Eventually, on 13th October, 2009 the solicitors for the plaintiffs wrote to the solicitors for P. withdrawing the claim under s. 121, inviting P. to negotiations and informing them of the issue of a motion to remit the s. 117 proceedings to the Circuit Court. No formal order has yet been made striking out the claim under s. 121. I propose to make that order following this judgment.
>
> (c) Whether the application under s. 117 should be remitted to the Circuit Court on foot of the application brought on behalf of the plaintiffs. That application has been left in abeyance pending the outcome of this application.
>
> (d) Whether C. should be made a ward of court.
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> That issue was raised by the Court on most occasions on which the matter was before the Court and it was made clear that the Court considered that she should be made a ward of court. As I understand it, that has yet to happen.

9. During the many case management sessions throughout 2009, three legal teams appeared: for the personal representatives, who appropriately took most of the initiatives; for the plaintiffs; and for P. The three legal teams represent all of the parties who have an interest in the estate of the testator. Concern was expressed as to the escalation of legal costs and this was a concern shared by the Court. An attempt to settle the s. 117 application, subject, of course, to the settlement of C.'s claim being approved by the President of the High Court, involving all parties interested, including P., was unsuccessful. On 29th October, 2009, the Court was informed by counsel for the personal representatives that settlement terms, which had been proposed on behalf of the plaintiffs, were acceptable to the personal representatives who proposed, with the Court's permission, to bring an application seeking a direction as to whether or not the proposal ought to be accepted. On that occasion the Court gave the personal representatives leave to bring the motion, although expressing reservations as to whether it was an appropriate approach. The application was to be on notice to the plaintiffs and to P., although the status of P. on the application was not decided. This judgment is concerned with the application which was brought by the personal representatives.

The application

10. The application is brought on foot of a notice of motion dated the 25th November, 2009 in which the personal representatives seek directions in relation to the administration of the estate of the testator and, in particular, the Court's approval of the settlement of the proceedings, subject to ruling in respect of the settlement of C.'s claim by the President, in the terms set out as follows:

> (a) that the personal representatives abandon any claim or intended claim against P. for a contribution arising out of the settlement with AIB;
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> (b) that non-cash assets be sold, that is to say, the agricultural land and the commercial units;
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> (c) that the net estate be divided in the following shares: 50% to C; 20% to P; and 15% each to A. and B;
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> (d) the costs of all parties, including reserved costs, be paid out of the estate of the testator, to be taxed in default of agreement on the executor's scale in the case of the personal representatives and as solicitor and own client costs in the case of the remaining parties, but on the basis that both the plaintiffs' costs and the personal representatives' costs be taxed in default of agreement on the Circuit Court scale.

Unfortunately, that settlement was reached against the background of the value of the agricultural land and the commercial units having decreased and the proceeds of the sale of the site and the rents from the agricultural land and the commercial units having been eaten into by the extent to which the liability to AIB had mushroomed by the time it was compromised.

11. The application was contested on behalf of P. on the basis that the personal representatives do not have jurisdiction to settle the

plaintiffs' s. 117 application to the detriment and contrary to the wishes of P. as a beneficiary and the Court does not have jurisdiction to approve of such a settlement. I have interpreted the case made on behalf of P. as being that the Court lacks jurisdiction because of the detriment which giving effect to the settlement would have on P. contrary to her wishes, because it seems to me that there can be no doubt but that the personal representatives have jurisdiction to settle a s. 117 application with applicants who are of full age and have capacity with the concurrence of a beneficiary affected who is of full age and has capacity. That is in accordance with the so-called rule in *Saunders v. Vautier*.

12. In replying to the application, in her affidavit sworn on 2nd December, 2009, P. stated that she had no objection to the s. 117 proceedings being settled on the basis of a submission which she put before the Court on 29th October, 2009 or, alternatively, on an alternative basis set out in her affidavit, both of which involved P. forgoing some of her entitlement under the will to the commercial units to the advantage of C. As I stated on 29th October, 2009, it is not the Court's function to mediate a settlement between the parties. The application raised a very fundamental issue as to the powers of personal representatives to settle a s. 117 application and the Court's function to approve of such a settlement, which, apparently, has not been considered previously. The focus of this judgment is on those issues.

Statutory provisions invoked by the personal representatives
13. Section 10 of the Act of 1965 provides that the real and personal estate of a deceased person shall on his death, notwithstanding any testamentary disposition, devolve on and become vested in his personal representatives (subs. (1)), who shall hold the estate as trustees for the persons by law entitled thereto (subs. (3)).

14. The provision on which the personal representatives primarily rely as giving them power to settle the plaintiffs' application is subs. (8) of s. 60. Section 60 is contained in Part V of the Act of 1965, which deals with administration of assets. The sections in Part V which precede s. 60 give personal representatives powers, for example, s. 50 gives a personal representative a power to sell the whole or any part of the estate of the deceased person. Section 60 also confers powers on personal representatives. For instance, subs. (1) of s. 60 provides that the personal representatives "in addition to any other powers conferred on them" by the Act of 1965 may create leases. Sub-section (3) provides that they may raise money by way of mortgage or charge for the payment of expenses and suchlike. Although it is paragraph (e) of subs. (8) on which the personal representatives rely, it is instructive to consider subs. (8) in its entirety. It provides as follows:

> "The personal representatives of a deceased person may—
>
> (a) accept any property before the time at which it is transferable or payable;
>
> (b) pay or allow any debt or claim on any evidence they may reasonably deem sufficient;
>
> (c) accept any composition or security for any debt or property claimed;
>
> (d) allow time for payment of any debt;
>
> (e) compromise, compound, abandon, submit to arbitration, or otherwise settle, any debt, account, dispute, claim or other matter relating to the estate of the deceased;
>
> (f) settle and fix reasonable terms of remuneration for any trust corporation appointed by them under section 57 to act as trustee of any property and authorise such trust corporation to charge and retain such remuneration out of that property,
>
> and for any of those purposes may enter into such agreements or arrangements and execute such documents as seem to them expedient, without being personally responsible for any loss occasioned by any act or thing so done by them in good faith."

Section 60(8), as regards personal representatives, re-enacts and enlarges the powers conferred on executors and trustees by s. 21 of the Trustee Act 1893. Apart from the introduction of the word "dispute", the powers conferred by paragraph (e) are to be found in subs. (2) of s. 21 and similar absolution of the personal representatives from responsibility is to be found in that sub-section, save that the word "personally" does not appear in the earlier provision.

15. The provisions of s. 117 which are crucial to the determination of the jurisdiction of both the personal representatives to settle a claim thereunder and the jurisdiction of the Court to approve such settlement are subs. (1) and (2). Sub-section (1) provides:

> "Where, on application by or on behalf of a child of a testator, 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, whether by his will or otherwise, the court may order that such provision shall be made for the child out of the estate as the court thinks just."

Sub-section (2) provides:

> "The court shall consider the application from the point of view of a prudent and just parent, taking into account the position of each of the children of the testator and any other circumstances which the court may consider of assistance in arriving at a decision that will be as fair as possible to the child to whom the application relates and to the other children."

Jurisprudence on s. 117
16. As Kearns J., as he then was, pointed out in his judgment *in X. C. v. R. T.* (*Succession: Proper provision)* [2003] 2 I.R. 250, a significant body of jurisprudence exists in relation to s. 117. He then set out what both sides in that case had agreed were the relevant legal principles in relation to the application of s. 117. Although the Court has not been asked to adjudicate on s. 117 claims on this application, in my view, it is pertinent to consider those principles, even in the abstract, insofar as they are relevant to the claims made by the plaintiffs. The relevant principles, as set out by Kearns J., are the following (at p. 262-264):

> "(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 mindful of their duties in that area.
>
> (b) What has to be determined is whether the testator, at the time of his death, owes any moral obligation to the

children 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, itself and without regard to other circumstances, create a moral duty to leave anything by will to the child.

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

(h) …

(i) …

(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 moral obligations, *e.g*. to aged and infirm 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) …

(n) Another example of special circumstances might be a child who had a long illness or …

(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 a 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.

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

Having regard to the principles outlined at (k) and (l) above, it is open to P. to contend that the testator had moral obligations to her, his partner, although he referred to her in his will as his "friend", and that that is a factor to which the Court should have regard in determining the claim of the plaintiffs.

17. The crucial question, in my view, is whether, in the light of the manner in which the Court's statutory obligation under s. 117 must be performed, a claim by a child under s. 117 can be regarded as a "claim or other matter relating to the estate of the testator" which may be compromised by the executors in accordance with s. 60(8)(e).

Claim under s. 117 is within s. 60(8)(e) – the arguments of the personal representatives

18. In submitting that personal representatives have power to compromise a claim under s. 117, counsel for the personal representatives relied on a decision of the Court of Appeal of England and Wales in a case on the application of s. 15(1)(f) of the Trustee Act 1925, which, when the case was decided, was in substantially the same terms as s. 60(8) of the Act of 1965. The issue in the case, In *Re Earl of Strafford, Decd*. [1980] 1 Ch. 28, was whether certain valuable chattels (pictures and furniture) were part of the estate of the Earl of Strafford, who predeceased his wife by a few months, or were part of her estate. The Earl's executor and trustee, Royal Bank of Scotland Limited, issued a summons for directions as to whether to proceed against the third and fourth defendants, who inherited some of the chattels from the Earl's wife. The third and fourth defendants, who were also beneficiaries under the Earl's will, offered to compromise on terms which would involve them surrendering their life interest in certain chattels, thus accelerating the life interest of the first defendant, who was a son of the third defendant and a nephew of the fourth defendant. The first defendant took a preliminary point that the trustee was not empowered under s. 15 of the Act of 1925 to accept the compromise. At first instance, Sir Robert Megarry V.-C. held that, on the true construction of s. 15, the trustee (and since it had surrendered its discretion, the court) had power to accept a compromise if satisfied that it was desirable and fair to all the beneficiaries and that it was not necessary for the beneficiaries to consent before the trustee accepted the compromise. In his judgment (at p. 32), the Vice Chancellor made a distinction, which is of some significance in the light of the submission made on behalf of P. that all of the authorities from the United Kingdom relied on by the personal representatives are distinguishable as debt compromise cases. He said:

> "I think that it has to be borne in mind that s. 15 is concerned with what may be called external disputes, or cases in which there is some issue between the trustees on behalf of the trust as a whole and the outside world. It is not concerned with internal disputes, where one beneficiary under the trusts is at issue with another beneficiary under the trusts. It is in this latter territory that the learning associated with *Chapman v. Chapman* [1954] A.C. 429 is particularly concerned. Where there is an external dispute, *prima facie*, that learning plays no part. The question is whether the trustees are properly exercising the powers which s. 15 confers upon them."

19. An appeal against the decision of the Vice Chancellor by the first and second defendants in the *Earl of Strafford* case was dismissed. The Court of Appeal held that there was nothing in the language of s.15 to restrict the scope of its power which gave

trustees a wide discretion in exercising their duties; that the surrender of a limited interest did not of itself vary the trusts of the settlement; that the proposed compromise did not involve any inadmissible variation of the trusts of the settlement; and that accordingly it was within the power of the trustee under s. 15 to enter the proposed or similar compromise which the Court could approve in the exercise of the discretion surrendered to it. The passage from the judgment of Buckley L. J. to which counsel for the personal representatives drew the Court's attention dealt with an argument made on behalf of the appellants that the trustee could not without the consent of all the beneficiaries bind any of them under s. 15 by a compromise under which what would be recovered as part of the capital of the trust fund was less in value than the measure of the trustee's prospect of success in its claim against the third and fourth defendants to recover all the disputed chattels because, by compromising for less than its prospect of success, the trustee would be effecting a variation of the trusts of the settlement. The answer of Buckley L.J. to that argument was as follows:

> "In my judgment this argument, ingenious as it is, proceeds upon too narrow an interpretation of s. 15 and a misapplication of the principle enunciated in *Chapman v. Chapman* …. The language of s. 15 is, it appears to me, very wide. It would, I think, be undesirable to seek to restrict its operation in any way unless legal principles required this, for it seems to me to be advantageous that trustees should enjoy wide and flexible powers of compromising and settling disputes, always bearing in mind that such a power, however wide, must be exercised with due regard for the interests of those whose interests it is the duty of the trustees to protect. I see nothing in the language of the section to restrict the scope of the power. Accordingly, any restriction must be found if anywhere, in the general law."

Buckley L. J. went on to hold that the proposed compromise did not conflict in any way with any principle enunciated in *Chapman v. Chapman* or otherwise established. The surrender of a limited interest under the settlement did not of itself have the effect of varying the trusts of that settlement; it eliminated a pre-existing interest under the settlement but left the trusts intact. Buckley L. J. pointed out that a trustee cannot control or prohibit dealings by competent beneficiaries with their interests under the settlement so that, if the owner of a limited interest proposes to put an end to it by surrendering it, the trustee cannot prevent him from doing so and is only concerned to see that the rights that could rise or are advanced in consequence of the surrender are given proper effect.

20. The kernel of the decision in the *Earl of Strafford* case was that the compromise did not involve any variation of the trusts. To illustrate a court's equitable jurisdiction to vary trusts, it is worth recording what the House of Lords held in *Chapman v. Chapman*. That authority established that a court has not unlimited inherent jurisdiction to modify or vary trusts provided only that:

> (a) all persons interested who are *sui juris* consent and
>
> (b) the modification or variation is clearly shown to be for the benefit of all persons interested who are not *sui juris* (including unborn persons).

On the contrary, a court's jurisdiction in relation to the variation of a trust where there are unborn or minor beneficiaries who cannot consent extends only to cases in which the court –

> (i) effects changes in the nature of an infant's property, or
>
> (ii) allows trustees of settled property to enter into some business transaction which was not authorised by the settlement (the so-called "salvage" cases), or
>
> (iii) allows maintenance out of income directed to be accumulated, or
>
> (iv) approves a compromise on behalf of infants and possible after born beneficiaries, but a compromise in that connection means an agreement relating to disputed rights.

In the *Chapman* case it was held there was no dispute as to rights and, therefore, the Court had no jurisdiction to sanction the scheme proposed on behalf of infants and unborn persons. Since that decision, in the United Kingdom the power to vary trusts has been put on a statutory basis, but there has been no corresponding change in this jurisdiction.

21. Counsel for the personal representatives submitted that, in addition to the express statutory power conferred by s. 60(8)(e), the personal representatives have power at common law to compromise. It is undoubtedly the case that the decision in *Re Houghton, Hawley v. Blake* [1904] 1 Ch. 622 is authority for that proposition. Indeed, in that case, Kekewich J., obviously speaking of s. 21 of the Act of 1893, stated that the statutory authority really added nothing to the common law powers. That case was a case of a compromise of an external claim by a testator's widow, who was a co-executrix of the will, to a large sum of money which she alleged belonged to her but was represented by securities apparently belonging to her husband. The compromise was upheld as being valid and binding on the residuary legatees.

22. Whether the personal representatives have power to compromise a s. 117 claim to the detriment and against the wishes of a beneficiary turns principally on the proper construction of s. 117, which I will consider later. However, it is convenient at this juncture to consider the other authorities relied on by counsel for the personal representatives, although they were relied on as illustrating the Court's jurisdiction to give directions to trustees rather than to the issue of the jurisdiction of trustees or personal representatives to do certain acts. I propose considering the authorities chronologically.

23. The earliest is a decision by the Chancery Division of the High Court of England and Wales in *Richard v. Mackay* (1987) (11 Tru LI 23) (Trust Law International, Volume 11, 1997). In that case the trustees of a settlement established in 1965, which had U.K. resident trustees and was governed by English law, wished to appoint a sum, not exceeding £1m, to Bermudian resident trustees of a new settlement governed by Bermudian law. The beneficial and administrative provisions of the Bermudian settlement very largely mirrored the trusts upon which, and the powers and provisions subject to which, the funds in question were held pursuant to the 1965 settlement. The beneficial provisions in question were principally accumulation and maintenance trusts for the benefit of the settlors' two existing minor children by his second marriage and certain future born children of the settlor. The trustees sought the directions of the court as to the lawfulness of their proposed action. It was held by Millett J. that the proposed appointment was lawful. It was within the terms of the trustees' powers and was not so inappropriate that no reasonable trustee could entertain it. Millett J. distinguished between a situation in which the court is invited to exercise an original discretion, for example, where the trustees surrender their discretion to the court, and a situation in which the transaction proposed is to be carried out, if at all, by the trustees' own exercise of their own discretions. In the former case the applicants must make out a positive case for the court to exercise discretion as they request. In the latter, the court need only be satisfied that the proposed exercise of the trustees' powers is lawful, if it is to make a declaration to that effect.

24. The second authority is the decision of the Chancery Division of the High Court of England and Wales (Hart J.) in *Public Trustee v. Cooper* [2001] WTLR 901. In that case, the trustee claimants were seeking a declaration that they might properly accept the offer to purchase the shares in a plc which were held by them as trustees of a settlement, the settlor's property having been under the supervision of the Court of Protection when the settlement was made. The declaration sought was granted. The significance attached to that authority by counsel for the personal representatives was the quotation in it by Hart J. of a passage from a judgment given in chambers by Robert Walker J. in 1995, in which he identified four distinct situations in which a Court of Chancery has to adjudicate on a course of action proposed to be or actually taken by trustees. The first category was where the issue was whether some proposed action was within the trustees' powers and that was a matter of construction of the trust instrument or a statute or both. The third category was that of "surrender of discretion properly so called", which might arise where the trustees were deadlocked or disabled as a result of conflict of interest. The fourth was where the trustees had actually taken action which was being attacked as being outside their powers or an improper exercise of their powers. Counsel for the personal representatives submitted that the directions which the personal representatives are seeking on this application come within the second category which Robert Walker J. set out as follows:

> "The second category is where the issue is whether the proposed course of action is a proper exercise of the trustees' power where there is no real doubt as to the nature of the trustees' powers and the trustees have decided how they want to exercise them but, because the decision is particularly momentous, the trustees wish to obtain the blessing of the court for the action on which they have resolved and which is within their powers. Obvious examples of that, which are very familiar in the Chancery Division, are a decision by trustees to sell a family estate or to sell a controlling holding in a family company. In such circumstances there is no doubt at all as to the extent of the trustees' powers nor is there any doubt as to what the trustees want to do but they think it prudent, and the court will give them their costs of doing so, to obtain the court's blessing on a momentous decision. In a case like that, there is no question of surrender of discretion and indeed it is most unlikely that the court will be persuaded in the absence of special circumstances to accept the surrender of discretion on a question of that sort, where the trustees are *prima facie* in a much better position than the court to know what is in the best interests of the beneficiaries."

25. The third authority was another decision of the Chancery Division of the High Court of England and Wales given by Hart J.: *X. v. A.* [2006] 1 WLR 741. The only significance of that authority is that in outlining the jurisdiction which had been invoked in that case, Hart J. stated that the jurisdiction which the Court was being asked to exercise straddled the first two heads of jurisdiction identified by Robert Walker J., which he had quoted *in Public Trustee v. Cooper*, which he summarised as (at p. 748) –

> "(i) the jurisdiction to decide questions of construction as to the ambit of trustees' powers, and
>
> (ii) the jurisdiction to 'bless' a particular transaction proposed by the trustees in relation to which they are not surrendering their discretion to the court."

He quoted from the judgment of Millett J. in Richard v. Mackay as to the function of the Court under the second category (at p. 749) –

> "… to ensure that the proposed exercise of the trustees' powers is lawful and within the power and that it does not infringe the trustees' duty to act as ordinary, reasonable and prudent trustees might act, but it requires only to be satisfied that the trustees can properly form the view that the proposed transaction is for the benefit of beneficiaries or the trust estate."

The facts of the X case which concerned the exercise by trustees of a power of appointment under a marriage settlement are of no assistance in determining the issues on this application.

Conclusion on personal representatives' power to compromise s. 117 claim

26. Having considered the submissions made on behalf of the personal representatives and on behalf of P., I am of the view that the trustees do not have power to compromise the plaintiffs' claims under s. 117 in the manner envisaged, either under s. 60(8) of the Act of 1965 or at common law. Further, I am satisfied that the Court has no jurisdiction to give directions in relation to the proposed settlement.

27. The submission made on behalf of the personal representatives based on the proposition that the issue for the Court is of a type which falls within the second category identified by Robert Walker J. is misconceived. The issue is whether the proposed action by the personal representatives is within their powers under the Act of 1965 or at common law. The resolution of that issue involves in the first instance identifying the nature of the claim which the plaintiffs are asserting, which is a claim under s. 117 and turns on the proper construction of that section, and then interpreting s. 60(8)(e) in the light of the conclusion on the first issue.

28. There is an interesting outline of the genesis of s. 117 relief in Spierin and Fallon on *The Succession Act 1965 and Related Legislation* (Butterworths, 2003). Having outlined (at para. 642) the methods which exist in various jurisdictions for providing legal right shares for a testator's family, including a system of *legitima portio*, that is to say, a share fixed by law, and an alternative system under which certain relatives and dependents are given the right to apply to Court, if they choose, and the Court is empowered to award maintenance to and make provision for the dependant out of the estate at its discretion, which system originated in New Zealand in 1908, and operates in Northern Ireland, England and eight of the Canadian provinces, the authors state apropos s. 117 (at para. 698):

> "It differs from the legal right share of the spouse in that the child is not given an absolute right to any part of the testator's estate. An application to the court is necessary and the court may order whatever provision is just to be made out of the estate. The type of family provision is similar to the third system outlined in para. 641, namely, the system which originated in New Zealand …. It is accordingly more flexible than the *legitima portio* system, but has the disadvantage that a court application is necessary to bring it into effect. The legislature at the outset favoured the *legitima portio* system for the children as well as the spouse, but following lengthy debates in both Houses, relinquished to this extent, while insisting on the retention of that system for the surviving spouse."

29. As a matter of construction of s. 117, the discretion as to the determination of whether the testator has failed in his moral duty to make proper provision for the child in accordance with his means is vested in the Court solely. The personal representatives have no discretion in that regard. Similarly, where a finding is made that the testator has failed in his moral duty, the discretion conferred by s. 117 to make just provision for the child out of the estate of the testator is conferred on the Court solely. The personal representatives have no discretion in that regard. When one considers the principles which govern the application of the exercise of the discretion under s. 117, as set out by Kearns J. in *X. C. v. R. T.* it is immediately apparent that their application involves the

exercise of the type of discretion which it would be inappropriate to repose in personal representatives, whose function is to administer the estate in accordance with the testator's wishes, not to override them. Where the Court exercises its discretion in favour of making just provision for a child under s. 117, by doing so it is overriding the testator's wishes.

30. That is not to say that all of the parties affected cannot consensually compromise a claim under s. 117 and have the compromise ruled by the Court. Indeed, it frequently happens that a personal representative, with the approbation of the beneficiaries affected, settles the claim of a s. 117 applicant and then applies to Court to rule the settlement. Invariably, if the applicant is of full age, the Court will rule the settlement. If the applicant is not of full age, the Court will review the facts and will usually wish to hear the views of the next friend on the settlement. However, where the effect of the settlement with the s. 117 applicant is to diminish the share of the estate of another beneficiary and that beneficiary objects, in my view, the personal representative has no jurisdiction to compromise the claim. Only the Court has discretion to make a provision for a child which will interfere with the entitlement of another beneficiary under the will.

31. I consider that the views expressed in the preceding paragraph are in line with the authorities referred to earlier. While I would not go so far as to construe s. 60(8)(e) as being limited to external disputes, insofar as the power extends to internal disputes, that is to say, disputes among the beneficiaries, the personal representatives may not exercise the power in a manner which has the effect of varying the trusts created by the will, so as to adversely affect a beneficiary without his consent. But that does not prevent a beneficiary relinquishing or surrendering a beneficial interest with a view to facilitating a compromise, which was what happened in the *Earl of Strafford* case. The dichotomy identified by Millett J. in *Richard v. Mackey* is of no relevance to the facts of this case, because the personal representatives of the testator have no discretion to compromise a s. 117 claim, as distinct from bringing a settlement which has been agreed by all of the parties, being of full age and capacity, affected to the Court for ruling. In the absence of such consensus, only the Court can exercise the discretion conferred by s. 117 and it must do so in accordance with the principles which have been identified in the jurisprudence to date. In short, given that the discretion under s. 117 is given to the Court solely, s. 60(8)(e), which deals with the powers of the personal representative, has no application to a claim under s. 117.

32. Accordingly, I am satisfied that the application of the personal representatives must be dismissed.

Status of P. in the proceedings

33. As I have already indicated, P. was joined as a defendant in the proceedings following the amendment of the proceedings to include a claim under s. 121 of the Act of 1965. That claim has now been withdrawn and, as I have already indicated, I propose that an order be perfected recording that fact. P. was heard on this application through her counsel. Having regard to the decision I have come to on the application, I think it was appropriate that she was heard because, as the only person who would be adversely affected by the order proposed by the personal representatives, she was the proper *legitimus contradictor* on the application.

34. Counsel for P. submitted that she should continue to be a defendant in the proceedings up to the final disposal by the Court of the s. 117 application on the basis that she is the beneficiary affected and that she is more than a beneficiary, in that, it was submitted, she is a person to whom the testator owed a moral duty at the date of his death. By virtue of the provisions of s. 10 of the Act of 1965, to which I have referred earlier, the personal representatives constitute statutory trustees and must discharge their duties as such. They must at all times act *bona fide*. As it happens, because of the amendment of the proceedings and the joinder of P. as a defendant, P.'s position has been put by her fully before the Court on affidavit. In her most recent affidavit, sworn on 2nd December, 2009, P. has set out her "submissions as regarding the upholding of the terms of the will" and has asserted that –

> (a) in making his will, the testator provided legally and morally in a most adequate and prudent manner for his children and partner,
>
> (b) in his goodness and kindness, the testator must have felt a civil and moral duty to provide for her in his will for the good care she took of him when he was ill and, as she asserts, his family failed in their moral duty to care for him,
>
> (c) no great importance seems to have been given to P., presumably by the personal representatives, as she had to give up a permanent and pensionable job in AIB to look after the testator when he got ill, but the testator looked after her in a moral manner to the best of his ability and she has never questioned the terms of the will,
>
> (d) prior to making the will, the testator took professional advice from his financial broker so that he could comply with the provisions of the Act of 1965, and
>
> (e) she wishes that the valid will of the testator be administered in a correct and legal manner and that her constitutional rights be fully adhered to.

The foregoing "submissions" indicate, as has been apparent to the Court since its involvement commenced, that P. is refusing to take on board the nature of the jurisdiction conferred on the Court by s. 117, although I have absolutely no doubt that P.'s legal team have explained the nature of the jurisdiction to her.

35. On a review of the affidavits filed on the substantive applications under s. 117 and s. 121 and the responses thereto, it seems to me that there is very little by way of factual dispute, particularly, as the position of C. has been clarified in the most recent affidavit sworn by M. on 26th November, 2009. I think the most expeditious and cost efficient way of concluding these proceedings would be for the matter to be heard on affidavit evidence in the High Court, rather than to remit the matter to the Circuit Court. Whether to allow cross-examination of a deponent of an affidavit would be a matter for the trial Judge.

36. That leaves the question of whether P. should remain as a party in the proceedings. Having regard to the course of these proceedings, I think there is a high degree of probability that P. will harbour a grievance if she is not heard by the Court, and, having regard to the approach adopted by the personal representatives in relation to the compromise, objectively there may be justification for such an attitude. However, a question may arise at the conclusion of the proceedings as to whether, by reason of her insistence on her remaining a party in the proceedings, P. should be awarded the future legal costs of the proceedings out of the estate of the testator. That would be a matter for the trial judge.

Orders

37. I propose making the following orders:

> (a) an order recording the withdrawal of the claim under s. 121 by the plaintiffs;
>
> (b) an order dismissing the personal representatives application on foot of the notice of motion of 25th November, 2009;

(c) an order refusing the plaintiffs' application to remit to the Circuit Court;

(d) an order directing M. to take immediate steps to have C. taken into wardship; and

(e) an order reserving to the trial Judge the costs of the application on foot of the notice of motion on 25th November, 2009 and the motion to remit.

Finally, I would recommend that the parties let the matter go forward for hearing on the affidavits already filed, but in so recommending it is important to make clear that I am not attempting to encroach on the trial judge's discretion in any way.