THE HIGH COURT

[2024] IEHC 217

Record No: 2021 / 162 SP

IN THE MATTER OF THE SUCCESSION ACT 1965

-AND -

IN THE MATTER OF THE ESTATE OF AB

-AND-

IN THE MATTER OF AN APPLICATION UNDER S. 117 AND S. 121 OF THE SUCCESSION ACT 1965

BETWEEN:

CB

Applicant

-AND-

PP AND JJ

Respondents

AND

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Record No: 2021 / 163 SP

IN THE MATTER OF THE SUCCESSION ACT 1965

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IN THE MATTER OF AN APPLICATION UNDER S. 117 AND S. 121 OF THE SUCCESSION ACT 1965

BETWEEN:

DB (A PERSON OF UNSOUND MIND NOT SO FOUND) SUING BY

HER NEXT FRIEND EB

Applicant

-AND-

PP AND JJ

Respondents

Judgment of Mr. Justice Dignam delivered on the 16th day of April 2024.

Introduction

1. This judgment is given in two separate, but related, sets of proceedings under section 117 and 121 of the Succession Act 1965. The same considerations apply to both sets of proceedings.

2. The defendants, who are the personal representatives under the relevant will, apply to have a beneficiary under the will joined as a defendant to the proceedings. The application is opposed by the plaintiffs.

3. A central issue is the operation of the *in camera* rules under section 119 and 122 of the 1965 Act.

4. The background is as follows. As section 117 proceedings must be heard *in camera*, and as the identities of the parties are not relevant to the issues to be decided, I have anonymised the judgment.

5. The deceased ("AB") was married to Ms. BB. They had four children, including the plaintiffs in these sets of proceedings. The deceased and Ms. BB separated (it seems a number of decades ago) and, it appears, divorced some time after that and the deceased married Ms. FCB. This divorce and subsequent marriage appear to be in issue or at least are, at this stage, not admitted by the plaintiffs. The deceased and Ms. FCB had one child, ZB. The deceased also had another child by another relationship.

6. The deceased died in 2019 leaving a will. The estate is of a considerable value. In summary, in that will the deceased declared that he had made proper provision for each of his children in accordance with his means during the course of his life and therefore was not making any provision for them in his will and left almost the entirety of his estate to Ms. FCB, save for a legacy of €12,000 in favour of Ms. BB and a discretionary wish that Ms. BB be paid an annual sum of €12,000 by Ms. FCB. The defendants were named as joint executors and extracted a grant of probate issued on the 24th March 2021. They are not members of the deceased's family. Both defendants are solicitors. They state that they are strangers to a lot of the information contained in the grounding affidavits but accept that they "*did act for the Deceased for many years and…thus had a good awareness of his family, business and financial circumstances."* Indeed, the first-named defendant was also a trustee of a trust established by the deceased for the benefit of DB.

7. The plaintiffs issued these proceedings under section 117 of the 1965 Act against the personal representatives claiming that the deceased failed to make proper provision for them. While there is also a claim under section 121, the main substance of the proceedings are the section 117 claims. In those circumstances, for ease of discussion, I will refer to the proceedings as "section 117 proceedings" and to the *in camera* rule under section 119 but my decision also applies to the claim under section 121 and the *in camera* rule under section 122

8. By letters dated the 1st December 2021, the 15th December 2021 and the 6th January 2022, solicitors acting for the defendants, wrote to the plaintiffs' solicitors seeking the joinder of Ms. FCB, solicitors on her behalf having written to the defendants' solicitors seeking her joinder.

9. The solicitors acting for the plaintiffs replied by letter of the 21st January 2022 indicating that no good reason had been advanced for the plaintiffs to consent to Ms. FCB's joinder and that her joinder would serve no purpose and would simply lead to additional costs. That led to an exchange of letters (the defendants' solicitors replied on the 10th February 2022 and the plaintiffs' solicitors wrote on the 14th February 2022) in which the parties' respective positions and arguments were set out. I do not propose to set out the contents of these letters at this stage as the arguments were rehearsed during the course of this application and I refer to them in detail below. There is a difference between the letter sent by the defendants' solicitors in the CB case and that sent in the DB case as CB, in his affidavit in the substantive proceedings, reserved his position in relation to the question of his parents' divorce, but it is not necessary to address this at this stage.

10. These applications were then made on behalf of the defendants. The substantive relief sought is an Order pursuant to Order 15 Rule 13 of the Rules of the Superior Courts joining Ms. FCB as a defendant "*on the basis that she ought to have been joined, and/or on the basis that her presence before this Honourable Court is necessary in order to enable this Honourable Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter.*"

11. Notwithstanding that the Notices of Motion state that Ms. FCB "*ought to have been joined*", no complaint was made about the proceedings being issued against the personal representatives. This seems to me to be correct as, under Order 19 Rule 8 they are, in the first instance, the correct defendants. The real basis for the application is that Ms. FCB's presence is necessary in order to enable the Court to effectually and adjudicate upon and settle all the questions involved.

Relevant provisions

12. Section 119 of the Succession Act provides that section 117 proceedings "*shall be heard in chambers*". The parties were agreed that this means that they are to be heard *in camera*. They were also agreed that one effect of the rule is that non-parties will not be permitted to hear or read the evidence. They were not in agreement as to whether the Court has a discretion to lift the *in camera* rule, i.e. to make an exception to the application of the rule.

13. Order 15 Rule 8 of the Rules of the Superior Courts provides:

"Trustees, executors, and administrators may sue and be sued on behalf of or as representing the property or estate of which they are trustees or representatives, without joining any of the persons beneficially interested in the trust or estate, and shall be considered as representing such persons; but the Court may, at any stage of the proceedings, order any such persons to be made parties either in addition to or in lieu of the previously existing parties. This rule shall apply to trustees, executors and administrators sued in proceedings to enforce a security by sale or otherwise."

14. Order 15 Rule 13 provides:

"No cause or matter shall be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every cause or matter deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the names of any parties improperly joined, whether as plaintiffs or as defendants, be struck out and that the names of any parties, whether plaintiffs or defendants, who ought to have been joined, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all questions involved in the cause or matter, be added. No person shall be added as a plaintiff suing without a next friend, or as the next friend of a plaintiff under any disability, without his own consent in writing thereto. Every party whose name is so added as defendant shall be served with a summons or notice in manner hereinafter mentioned, or in such other manner as the Court may direct, and the proceeding as against such party shall be deemed to have begun only on the making of the order adding such party."

The positions of the parties

Defendants' position

15. The applicants'/defendants' position is that the applicable rule of court is Order 15 Rule 13.

16. They submit that under that rule a person may be joined as a defendant against the wishes of the plaintiff in exceptional circumstances where the proposed defendant's presence will, as a matter of probability, be necessary in order to enable the Court to effectively and completely adjudicate and settle all questions involved in the cause or matter including where a party's proprietary, pecuniary or legal rights or interests may be directly affected by the outcome of the proceedings.

17. It was submitted that as surviving spouse and residuary legatee and devisee of the estate, Ms. FCB has a *"direct interest"* in the subject matter of the litigation, and that her *"proprietary and pecuniary rights"* are directly affected by the proceedings, *"financially and legally*".

18. It was also submitted that the effect of Twomey J's judgment in in *D v B [2021] IEHC 407* is that the Court does not have a discretion to allow a non-party to attend the hearing or see the papers; Ms. FCB, whose interests are directly affected, would therefore encounter possibly insurmountable hurdles to her ability to hear the evidence or read the affidavit evidence and this would disadvantage the executors in the defence of the proceedings because, as professional executors, they will not be as familiar with the precise relevant circumstances but could not take instructions from Ms. FCB and would make it very difficult for the defendants to settle the proceedings because Ms. FCB's consent would be required.

19. Furthermore, it was submitted that the plaintiffs do not accept the status of Ms. FCB as the surviving spouse of the deceased but one of the fundamental principles in section 117 proceedings is to take account of the amount left to the surviving spouse and therefore Ms. FCB's status as the surviving spouse is a live and central issue. This also gives rise to a further issue; namely, that if the plaintiffs do successfully dispute her status, then her legal, financial and tax status as surviving spouse could be affected.

Plaintiffs' position

20. The plaintiffs do not disagree that Ms. FCB is the principal beneficiary and residual legatee or devisee and the person most affected by any Order the Court might make in the section 117 proceedings. They also agree that in proceedings to which Order 15 Rule 13 applies a direct effect on a party's pecuniary or proprietary rights may be grounds for joinder. However, they take the position that Order 15 Rule 13 is of no application and

that Order 15 Rule 8 is the only applicable provision. They submit, therefore, that whether proprietary or pecuniary rights are directly affected is not the test for joinder in section 117 proceedings because there will always be beneficiaries in section 117 proceedings and Order 15 Rule 8 provides that the personal representatives represent their interests in the absence of any conflict.

21. They also reject the submission that Ms. FCB will encounter an insurmountable hurdle in attending the hearing or reading the affidavits unless she is a party to the proceedings due to the operation of the in camera rule and the decision in *D v B*. It is their position that *D v B* does not preclude the Court's discretion to permit Ms. FCB to see the papers or attend the hearing and therefore it is not necessary to join her as a party. The plaintiffs express concern about the increase in costs that would be caused by joinder and emphasise that they have indicated on affidavit that they have no objection to Ms. FCB being present at the hearing. They also make a point about the application being made by the defendants rather than Ms. FCB but I do not feel it necessary to deal with this.

Discussion and Conclusion

22. The defendants' position is that Order 15 Rule 13 is applicable. The plaintiffs' position is that Order 15 Rule 8 is the only applicable provision and that it is mandatory in nature and to apply Rule 13 to the types of proceedings referred to in Rule 8 would be nonsensical and render Rule 8 redundant because beneficiaries under a will or trust will always have a pecuniary interest. They accept that in some authorities beneficiaries were joined (for example *Payne v Parker (1866) LR 1 Ch App 327* and *Re Stanley's Estate [2016] IEHC 8*) but they were instances where there were adverse interests as between the trustees and the beneficiaries.

23. There are two limbs to Rule 8. The first part deals with who may sue and be sued. The second part expressly provides for the joinder of other parties.

24. The submission by the plaintiffs that Rule 8 is mandatory in nature must relate to the first limb. In making that case, they rely on the words "*…executors…may sue and be sued…without joining any of the persons beneficially interested in the…estate, and shall be considered as representing such persons…*" [emphasis added, reflecting emphasis in paragraph 10 of the plaintiff's written submissions] and on Macken J's statement in *O'Hagan v Grogan [2013] IR 462* where she said:

"In the case of an administration, of course, several other non-possessing next of kin (as ultimate beneficiaries) may well be parties against whom a defendant sets up a claim to adverse possession. In the case of an intestate estate, as here, the administrator when bringing proceedings or defending an adverse possession claim, is deemed to act in the interest of all those ultimate beneficiaries otherwise entitled to the property but for the adverse possession claimed. Because of this, and to avoid unnecessary depletion of the estate, those parties do not have a right to be joined as parties separate to the administrator. This is both straightforward and sensible and should not create complexity, whatever the eventual outcome of any such proceedings, since it is undesirable that a myriad of persons having the same interests being protected by the administrator should be joined separately in proceedings. It is only where, in special circumstances, on an application to court, a separate party might be joined in such proceedings. Order 15, Rule 8 of the Rules of the Superior Courts provides accordingly."

25. I am not convinced that the first limb of Rule 8 is mandatory in circumstances where this part of Macken J's judgment is obiter and where the language in the first part of Rule 8 is more permissive rather than directory in nature but I do not believe that I need to resolve this issue because both parties adopted the position that in the type of action to which Rule 8 applies (such as a section 117 claim) only the executor should be sued and the joinder of any other person is a matter for the Court. In any event, even if Rule 8 is not mandatory, the starting point or default position must be that only the executor(s) should be sued and that they defend the action on behalf of the estate/beneficiaries. This follows from the logic and rationale of Rule 8 described by Macken J. It is not necessary to institute proceedings against any other party in light of the terms of Rule 8 and, while, if it is not mandatory, a plaintiff may do so, that may well have costs consequences for the plaintiff who unnecessarily joined/sued the unnecessary defendant.

26. The second limb of Rule 8 is of much more direct importance in the context of this case. It permits the joinder by the Court of other parties. It was submitted on behalf of the plaintiffs that this is a standalone "joinder" provision and that it and it alone applies in cases encompassed by Rule 8. The submission was that Rule 13 is a general rule but that as Rule 8 is a specific rule the general rule does not apply. In my view, Rule 8 and Rule 13 must be read together. All Rule 8 does is permit the Court to join other parties. It gives no guidance as to the circumstances in which the Court might order such joinder. For that, one must turn to the provisions of Rule 13 which provides that the Court may join other parties "…*who ought to have been joined, or whose presence before the Court may be*

necessary in order to enable the Court effectually and completely to adjudicate upon and settle all questions involved in the cause or matter, be added." The first element of this, ie. parties "*who ought to have been joined*" can not apply in section 117 cases (or other cases encompassed by Rule 8) because under the provisions of Rule 8 there are no parties who ought to have been joined other than the executor. However, the second part does seem to me to apply to the exercise of the Court's discretion to order the joinder of parties where an executor is sued. Thus, the Court, when considering whether to join another party in the exercise of its discretion under Rule 8 must consider whether the joinder is necessary "*in order to enable the Court effectually and completely to adjudicate upon and settle all questions involved in the cause or matter…*".

27. It does not follow, however, that the same principles or approach as apply in determining whether to join parties in other, inter partes litigation, will apply to the exercise of the Court's discretion in a suit encompassed by Rule 8. I was referred to a number of cases in which the courts had to consider the joinder of defendants against the wishes of the plaintiff (*BUPA Ireland Ltd v Health Insurance Authority [2006] 1 IR 201*, *Persona Digital Telephony Ltd v Minister for Public Enterprise [2014] IEHC 78*, *McDonagh v Ward [2017] IEHC 513* and *Fitzpatrick v FK [2007] 2 IR 406*). It is well-established that the grounds for the joinder of another defendant include where that party's "*proprietary or pecuniary rights are or may be directly affected by the proceedings either legally or financially.*" As noted above, the plaintiffs do not dispute these principles in cases where Rule 13 applies. These authorities can not apply in the same way in the context of litigation to which Rule 8 applies and in particular to section 117 proceedings because very often, if not invariably, the proprietary or pecuniary rights of some or all beneficiaries will be affected by the outcome of section 117 proceedings. To simply apply those principles would render the first part of Rule 8 redundant and meaningless. It is therefore not sufficient for a joinder to proceedings encompassed by Rule 8 that a proposed new defendant's proprietary or pecuniary rights are or may be affected. Something more is required for the Court to conclude that the joinder of a proposed additional defendant is necessary in order to enable the Court to effectually and completely adjudicate upon and settle all questions.

28. That will depend on the particular circumstances of each case. It may include such factors as the existence of a conflict of interest, as pointed out by the plaintiffs (*Payne v Parker (1866) LR 1 Ch App 327* and *Re Stanley's Estate [2016] IEHC 8*) (but I would not go so far as saying that it must be limited to such cases). It seems to me that the particular constellation of circumstances in this case could be sufficient to require the joinder of Ms. FCB but central to this consideration is the operation and effect of section 119, ie., the *in camera* rule. I return to the other particular circumstances below but in short it seems to

me that in those particular circumstances if the effect of the *in camera* rule is to preclude the disclosure of any information at all to Ms. FCB unless she is joined as a party then the Court could conclude that her joinder is necessary.

29. Thus, the operation of the *in camera* rule and the extent to which it precludes the disclosure of information or, more particularly, the extent to which it precludes the Court from permitting the disclosure of information, is of central importance.

30. Barr J considered the operation of an *in camera* rule in *Eastern Health Board v Fitness to Practice Committee (Unreported, Barr J, 3rd April 1998)*. He held that it did not act as an absolute embargo on disclosure of evidence in all circumstances. The Fitness to Practice Committee was carrying out an Inquiry arising out of complaints against a medical practitioner who had come to the conclusion that children had been sexually abused by a relative and these conclusions had led to proceedings which were *in camera* proceedings. The Fitness to Practice Committee directed the Eastern Health Board to produce medical records which included records which were the subject of those *in camera* proceedings. The Eastern Health Board took the view that it was precluded from complying with the Committee's order directing production of such records and that insofar as the Committee already had records it was precluded from availing of them if they were introduced in evidence in *in camera* proceedings even if they did not originate in those proceedings.

31. Barr J reviewed the position under the Constitution (it is, of course, always important to recall the constitutional imperative that justice be administered in public subject to "*such special and limited cases as may be prescribed by law*") and considered a large number of authorities, including a significant number of English authorities. Barr J, having carried out that review concluded, inter alia:

> "*In my judgment the following conclusions emerge from a review of Article 34(1) of the Constitution; the judgments of the Supreme Court in Re R Limited and Barry v The Medical Council; Budd J in the High Court in P.S.S. v J.A.S and Independent Newspapers (Ireland) Limited and the foregoing English authorities:-*
>
> 1. *…*
>
> 2. *…*
>
> 3. *A statutory imperative that proceedings of a particular nature be held in private (as provided, for example, by Section 5 of the Punishment of Incest Act, 1908) does not imply that there is an absolute embargo on disclosure of evidence in all circumstances. Such an embargo requires specific statutory authority to displace judicial discretion at common law*

to permit disclosure in appropriate circumstances. If an absolute embargo on the publication of evidence adduced in course of 'in camera' proceedings in all circumstances were implied from a mandatory requirement that such proceedings be held in private, then grievous harm could be done to public and private interests and to the pursuit of justice. For example, if in the course of proceedings, it was established that a witness was guilty of perjury or some other crime, the trial judge would be unable to refer the matter to the Director of Public Prosecutions with a view to having a criminal prosecution brought against the wrongdoer. Likewise, if it emerged in evidence protected by the rule that a professional witness, or a lawyer acting in the case, was guilty of professional misconduct, the trial judge would be inhibited in referring the matter to the offender's professional body for investigation. It would also follow if there was an absolute embargo that a child concerned in such proceedings would be spancelled in pursuing claims which he or she might have for damages arising out of evidence protected by the in camera rule, notwithstanding that the primary purpose of the rule in such cases is to protect the minor. A major far-reaching change in the law, which sets aside established practice, could not arise merely by implication derived from a mandatory statutory requirement that certain proceedings shall be held in private but, in my view, would require specific statutory authority.

4. *I have been unable to discover any specific statutory provision in Irish law which provides that there is an absolute embargo in all circumstances on the publication of information deriving from proceedings held in camera.*

5. *There is an established practice at common law recognised in England and in this jurisdiction (see P.S.S. v. Independent Newspapers (Ireland) Ltd. (Unreported, High Court, Budd J., 22nd May, 1995), that the court in proceedings held in camera has a discretion to permit others on such terms as the judge thinks proper to disseminate (and in appropriate cases to disseminate himself/herself) information derived from such proceedings where the judge believes that it is in the interest of justice so to do, due and proper consideration having been given to the interest of the person or persons intended to be protected by the conduct of the proceedings in camera. In given circumstances the judge may find that*

a crucial public interest, such as the prosecution of crime or the protection of vulnerable children, takes precedence over the interest of the protected person in non-disclosure of the information in question.

6. *In considering a conflict between the public interest or the interest of a person seeking disclosure on the one hand, and the interest of an individual in retaining the full benefit of the in camera rule on the other hand, the court is bound by the concept that the paramount consideration is to do justice – see In re R. Ltd. [1989] I.R. 126.*

7. *…*

8. *It is a contempt of court for any person to disseminate information derived from proceedings held in camera without prior judicial authority.*

9. *…*

10. *If justice requires disclosure of information protected by the in camera rule, the court should take all reasonable steps to protect the interest of minors and others who are intended to have the benefit of the rule in the given case. The court has power, as an incidence of its discretion to permit disclosure of protected information, to impose such terms in that regard as it deems necessary in the circumstances…"*

32. Subsequent to this judgment, the Civil Liability and Courts Act 2004 was enacted. Section 40 of that Act provides for a number of exceptions to *in camera* rules in certain statutes. Subsections (3), (3A), (4), and (5) each operate by providing that "*Nothing contained in a relevant enactment shall operate to prohibit…*" and then refer to matters which would normally be precluded by an in camera rule. For example, subsection (3A) provides that "*…nothing contained in a relevant enactment shall operate to prohibit bona fide representatives of the Press from attending proceedings to which the relevant enactment relates.*" "*Relevant enactment*" is defined as meaning any of the provisions which are specified in section 39 (provisions in twelve different statutes).

33. In *D v B [2021] IEHC 407*, Twomey J considered the *in camera* rule under section 199 of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010. Section 199 is a "*relevant enactment*" within the meaning of section 39 of the 2004 Act. Section 199 provides: "*Subject to the provisions of section 40 of the Civil Liability and Courts Act 2004, proceedings under this Part shall be heard otherwise than in public.*" The claim in the proceedings was a claim by the plaintiff under section 194 of the 2010 Act

that provision be made for her from the estate of the deceased on the basis that she was in an "*intimate and committed relationship*" with him prior to his death and was therefore a "*qualified cohabitant*". The claim was opposed by the executor on the basis that the plaintiff was not in an intimate and committed relationship and was therefore not a qualified cohabitant. The executor applied for the adult children of the deceased to be permitted to attend the full hearing including those portions when they would not be giving evidence. This would obviously not be permitted under the in camera rule unless, if the Court had power to do so, it exercised that power to grant such permission. There were similarities between the bases for that application and the bases for the application in this case, ie. the children were the ultimate beneficiaries of the estate and were therefore "personally interested" in the outcome of the claim, and the executor would be prejudiced in his defence of the proceedings if the children were not permitted to attend to listen to the plaintiff's evidence and provide instructions so that the evidence might be disputed.

34. It was accepted by the parties in *D v B* that the *in camera* rule in section 199 of the 2010 Act was subject to section 40 of the 2004 Act but that none of the permitted exceptions in section 40 applied to the circumstances of the case (other than, according to the applicant, section 40(5) of the 2004 Act, which was rejected by Twomey J). In those circumstances, Twomey J had to consider whether the Court had any discretion to make an exception to the *in camera* rule in section 199 outside of what was provided for in section 40 of the 2004 Act.

35. Twomey J said in relation to Barr J's judgment in *Eastern Health Board v The Fitness to Practice Committee*:

> *"24. Thirdly and more importantly, Eastern Health Board v. The Fitness to Practice Committee was decided in 1998, when the in camera rule was absolute, i.e. before the Oireachtas legislated for exceptions to the in camera rule in the 2004 Act, including the exception contained in s. 40(5) which we have considered in relation to a person 'accompanying' a party to a hearing, but also including the other exceptions in s. 40 which have no application to the present case, such as s. 40(3) relating to the entitlement of a barrister or solicitor attending for the purposes of preparing a report of proceedings.*
>
> *25.Therefore, when Barr J. considered that the in camera rule was not an 'absolute embargo' on disclosure of evidence, he did so in circumstances where the legislature had not at that stage provided legislative certainty that the rule was not absolute, as they did a number of years later with s. 40 of the 2004 Act.*

…

27. In the absence of legislative exceptions such as this one therefore, Barr J. was obliged in the interest of constitutional justice to depart from the in camera rule and to order the production of the medical records in that case. That is quite different from the present case, to which the provisions introduced in s. 40 of the 2004 Act do *apply. It is clear therefore that this is not a case similar to that decided by Barr J. where the legislature has not given consideration to the exceptions that should apply to the formerly absolute rule that proceedings be 'heard otherwise than in public'."*

36. He said at paragraph 49 of his judgment that:

"*What Mr. B is asking this Court to do, notwithstanding the clear exceptions set out in s.40 of the 2004 Act, is to make an order allowing for a* ***different*** *exception, not envisaged by either the 2004 Act or the 2010 Act, whereby if a litigant can better defend an in camera case by having third parties present, then this Court should permit their attendance in the interests of justice. This Court believes that this would involve it making laws in contravention of the separation of powers."*

37. The provision in question was a "*relevant enactment*" and, given how recent this judgment is, if section 119 of the Succession Act 1965 were a "*relevant enactment*" I would be bound to follow it, but section 119 is not a "*relevant enactment*". The parties take different positions in respect of the effect of section 40 and this judgment in light of the fact that section 119 is not a "*relevant enactment*".

38. The defendants take the position that *D v B* decided that the Oireachtas has determined that the court may only make exceptions to an *in camera* rule in "*relevant enactments*" (in the circumstances specified in sub-sections (3), (3A), (4) and (5)) (and possibly in other enactments in the circumstances in subsection (6) and (7) to which I return) and that means there is no power to make an exception in this case. This is the insurmountable hurdle referred to by the defendants. The plaintiffs submit that *"…the in camera rule in s.119 is not affected by the statutory exceptions in section 40 of the 2004 Act. Section 40 of the 2004 Act does not apply to them. Accordingly, the law as it pertains to the in camera rule pre the 2004 legislation remains the applicable law in relation to in*

camera provisions in statutes which are not 'relevant enactments' under the 2004 Act as amended" and therefore *Eastern Health Board v Fitness to Practice Committee* remains applicable to the within case.

39. I do not accept that the defendants' interpretation of the section or the judgment in this respect is correct. In my view, the correct interpretation is not that exceptions are only permitted in "*relevant enactments*" but that the only exceptions that are permitted in respect of "*relevant enactments*" are those set out in section 40(3), (3A), (4) and (5). (For the reasons set out below, I do not believe that sub-sections (6) and (7) are properly seen as permitted exceptions per se). My view follows from Twomey J's consideration of the judgment of Birmingham J in *Health Service Executive v McAnaspie [2012] 1 IR 548*. In that case, Birmingham J held that the *in camera* rule which was in place under the Child Care Act was not an absolute embargo on the publication of information from the *in camera* proceedings and the Court may permit same. Twomey J distinguished this case in part on the basis that the Child Care Act was not a "*relevant enactment*", thereby proceeding on the basis that the more general discretion continues to apply where the relevant provision is not a "*relevant enactment*". He said in relation to the *McAnaspie* case "*…importantly, the relevant legislation in that case (being the Child Care Act, 1991), was not subject, at least at the time when the case was heard and decided, to the exceptions contained in the Civil Liability and Courts Act 2004, and therefore was not subject to* ***any*** *of the exceptions contained therein...*" This also seems to me to be consistent with what Barr J said in *Eastern Health Board v The Fitness to Practice Committee*, ie. that an absolute embargo on disclosure of evidence in all circumstances requires specific statutory authority.

40. However, it does not necessarily follow that "*the law as it pertains to the in camera rule pre-the 2004 legislation remains the applicable law*" as contended by the plaintiffs because regard must be had to sub-sections (6) and (7). These apply to all enactments and therefore it can not simply be said, as the plaintiffs have sought to do, that the exceptions in section 40 do not apply without considering these sub-sections. While Twomey J refers to sub-section (6) these were not in issue in *D v B.* On one view of the logic of Twomey J's judgment, it could be said that the effect of the inclusion of these sub-sections by the Oireachtas is to limit exceptions which the courts may make to in camera rules in statutes which are not "*relevant enactments*" to the circumstances set out in subsections (6) and (7) subsections. This would support the position contended for by the defendants. In my view that would not be a correct interpretation. Sub-section (6) provides:

"*Nothing contained in an enactment that prohibits proceedings to which the enactment relates from being heard in public shall operate to prohibit the production of a document prepared for the purposes or in contemplation of such proceedings or given in evidence in such proceedings, to -*

(a) a body or other person when it, or he or she, is performing functions under any enactment consisting of the conducting of a hearing, inquiry or investigation in relation to, or adjudicating on, any matter, or

(b) such body or other person as may be prescribed by order made by the Minister, when the body or person concerned is performing functions consisting of the conducting of a hearing, inquiry or investigation in relation to, or adjudicating on, any matter as may be so prescribed."

41. Thus, at first glance, sub-sections (6) and (7) appear to operate in the same way as sub-sections (3), (3A), (4) and (5), but sub-sections (6) and (7) must be read together with sub-section (7A). It provides:

"*The leave of a court shall not be required for –*

(a) the production of a document in accordance with subsection (6), or

(b) *the giving of information or evidence in accordance with subsection (7).*"

42. Thus, sub-sections (6) and (7) are more properly understood as situations where the *in camera* rule does not apply rather than as providing circumstances in which the Court can make an exception to the applicable *in camera* rule. This is to be contrasted with sub-sections (3), (3A), (4) and (5), all of which retain the role of the Court or require a statutory instrument. It also appears to follow from Twomey J's treatment of *McAnaspie* (as discussed above) that he did not view sub-sections (6) or (7) as being the sole permissible exceptions in enactments which are not relevant enactments.

43. Thus, it seems to me that the Court's general discretion as recognised in *Eastern Health Board v The Fitness to Practice Committee* is not removed or curtailed by the 2004 Act in section 117 proceedings.

44. The effect of this is that section 119 does not act as an absolute embargo on the disclosure of evidence and the Court has a discretion to lift the *in camera* rule. That, of

course, should not be done lightly. The Oireachtas has enacted *in camera* rules for a purpose. For example, as noted by Twomey J, the rule was lifted by Birmingham J in *McAnaspie* in very particular circumstances, ie. where there were "*exceptional reasons in the interests of justice that gave discretion to the court to depart from the rule that proceedings be heard otherwise than in public*". Very often, those exceptional circumstances will relate to matters of public interest. For example, Barr J in *Eastern Health Board v The Fitness to Practice Committee* said "*[I]n given circumstances the judge may find that a crucial public interest, such as the prosecution of crime or the protection of vulnerable children, takes precedence over the interest of the protected person in non-disclosure of the information in question.*" However, it is equally clear that the circumstances which may warrant an exception being made are not limited to such matters. Barr J also said that "*[I]n considering a conflict between the public interest or the interest of a person seeking disclosure on the one hand, and the interest of an individual in retaining the full benefit of the in camera rule on the other hand, the court is bound by the concept that the paramount consideration is to do justice…*". The overarching or paramount consideration is the interests of justice.

45. As referred to above, there is a very particular combination of circumstances in this case which in my view require information being provided to Ms. FCB either by her being joined as a party or by her being permitted to see and hear the evidence in the proceedings. These are that she is the principal beneficiary and residuary legatee and devisee under the will; her marital status is in dispute; if she was married to the deceased, the Court must, in deciding the section 117 claim, take account of the amount left to her; the executors are professional executors and, while they have considerable knowledge of the deceased's affairs, they could not be expected to have intimate knowledge of all the deceased's family or personal affairs and therefore may need to obtain information from Ms. FCB in order to discharge their duties; Ms. FCB's consent will be required for the defendants to settle the proceedings; therefore without being able to discuss the evidence with Ms. FCB, their ability to discharge their functions may be seriously undermined. The plaintiffs do not dispute many of these factors and, indeed, have implicitly acknowledged, through their indication on affidavit that they do not object to Ms. FCB being present at the hearing, that there is a need for her to have at least some familiarity with the material.

46. None of these individual factors are in themselves determinative of the question of whether the interests of justice or the proper and effectual adjudication of the proceedings require that Ms. FCB be provided with information through some mechanism (either joinder or disclosure) but rather it is the combination of factors which persuades me that it is necessary. If it were not possible for Ms. FCB to see the information and evidence without being a party to the proceedings, I would be satisfied that her joinder would be

appropriate as her presence would be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all questions involved in the case. However, in circumstances where it is open to the Court to permit Ms. FCB to see and hear the evidence it seems to me that this is a more appropriate way of dealing with the matter. In reaching this conclusion I have had regard to a number of factors. Firstly, I must have regard to, and place significant weight on, the fact that the starting point or default position is that only an executor should be sued and thus joinder should only be permitted when it is essential because to do otherwise would risk leading to what Macken J described as "*a myriad of persons having the same interests*" being joined; secondly, there would be significant costs attached to adding a defendant to two (and possibly three) sets of proceedings, thereby risking what Macken J described as the "*unnecessary depletion of the estate*", whereas the disclosure of information or evidence on certain conditions (to which I return), would serve the same interests but without those additional costs; thirdly, the purpose of the *in camera* rule is to protect the privacy of, inter alia, the plaintiffs, and an exception to an *in camera* rule which interferes with that privacy should only be made in limited and exceptional circumstances, and certainly very reluctantly if those parties object to any exception to the rule, but in this case, the plaintiffs have already indicated that they have no objection to Ms. FCB attending the hearing and hearing the evidence - thus the parties whose privacy the rule is intended to protect has already accepted an interference with that privacy (this can not be determinative because ultimately it is a matter for the Court but this is a key factor in my consideration); fourthly, it can not be forgotten that the joinder of Ms. FCB as a defendant would also involve an interference with the plaintiffs' privacy and therefore, as between the two options, it seems to me that the least costly option is the more appropriate one; finally, I have had regard to the fact that in addition to his decision on the scope of the court's discretion, it appears that Twomey J would not have been satisfied to lift the *in camera* rule on many of the same bases as were advanced in this case and as I have held make up the combination of factors requiring the disclosure of material to Ms. FCB. However, I am of the view that the position taken by the plaintiffs that they do not object to Ms. FCB being permitted to attend the hearing is a very significant point of distinction between this case and *D v B*.

47. I have considered whether the attendance by Ms. FCB at the hearing would be sufficient and I am not satisfied that it would be. This would give rise to the very real possibility that an adjournment would have to be sought mid-hearing, thereby adding to the costs and constituting a potential drain on the estate. It seems to me that the appropriate way to deal with the matter is to permit the provision of the pleadings and the affidavits to Ms. FCB and to permit her attendance at the hearing.

48. Of course, this could only be contemplated if the integrity of the *in camera* process is otherwise maintained. It seems to me that if material were provided to Ms. FCB and she were to disclose it to a third party that would amount to a breach of the *in camera* rule. In any event, it is clear from Barr J's judgment in *Eastern Health Board v The Fitness to Practice Committee* that conditions can be attached to any such Order. It therefore seems to me that the Order permitting the disclosure of this material and Ms. FCB's attendance at the hearing should be subject to the express condition that Ms. FCB would not disclose any information the subject of the *in camera* proceedings to any third party and that before any such disclosure can take place, the solicitors for the defendants must obtain Ms. FCB's agreement in writing to comply with such condition. This does not seem to me to be an onerous requirement in circumstances where arguably Ms. FCB would be prohibited from disclosing any such information by the operation of the *in camera* rule anyway and if she were joined as a party she would undoubtedly be subject to that prohibition.

49. I have also considered whether it is appropriate to make such an Order or whether I should simply refuse the relief sought on the basis that the only application made was for an Order joining Ms. FCB. However, it seems to me that in circumstances where the basis of my decision that it is not necessary to join Ms. FCB is that the Court can permit the disclosure of information to her and where the plaintiffs suggested the alternative of permitting her to attend the hearing (which would in itself have required a Court Order) it is therefore appropriate to make such an Order.

50. In all of the circumstances, I will refuse the application to join Ms. FCB and will make an Order permitting the provision of the pleadings and the affidavits to Ms. FCB on condition that she will not disclose them or their contents to any third party and agrees in writing to the defendants' solicitors not to do so in advance of any such disclosure.