IN THE COURT OF APPEAL OF NEW ZEALAND

CA604/2012
[2015] NZCA 470

BETWEEN	M HAYES Appellant
AND	FAMILY COURT First Respondent
	JUDITH GUERIN Second Respondent

Hearing:	10 June 2015
Court:	Randerson, Wild and Cooper JJ
Counsel:	Appellant in person No appearance for Respondents
Judgment:	2 October 2015 at 3 pm

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellant must pay costs to the second respondent in the sum of $500.

REASONS OF THE COURT

(Given by Cooper J)

[1] The appellant, Ms M Hayes, appeals a judgment of Dobson J in the High Court at Gisborne striking out her application for judicial review of a decision of the Family Court.[1]

[2] In her application for review the principal claim advanced by Ms Hayes was that the Family Court acted without jurisdiction when it determined a claim by the appellant's half sister, Mrs Judith Guerin, under the Family Protection Act 1955 (the FPA) against the estate of their mother, Elizabeth Hayes. The Family Court awarded Mrs Guerin the sum of $80,000.[2] Ms Hayes also claimed in the proceeding that is the subject of this appeal that the Family Court wrongly declined the appellant's application for the transfer of the proceeding to the High Court.

[3] The jurisdictional challenge to the Family Court's decision was advanced for the first time in the present proceeding, which was commenced in the High Court in February 2012. Ms Hayes says the Family Court lacked jurisdiction because proceedings relating to the estate had previously been commenced in the High Court. She invokes s 3A(2) of the FPA, which provides that the Family Court does not have jurisdiction in respect of an application under the FPA if, at the date of filing the application, "proceedings relating to the same matter have already been commenced in the High Court."

[4] Mrs Guerin, who was the second respondent in the High Court, applied to strike out the application for review, claiming the allegation that the Family Court lacked jurisdiction was not reasonably arguable, or alternatively was an abuse of process, in terms respectively of r 15.1(1)(a) and (d) of the High Court Rules. Dobson J granted Mrs Guerin's application, and the present appeal has followed.

[5] The first respondent abides this Court's decision. Although she was represented and successful in the High Court, the second respondent Mrs Guerin has not taken part in the hearing in this Court following assurances given by Ms Hayes that the relief she now seeks is not intended to disturb the award made to Mrs Guerin out of the estate.

---

1 *Hayes v Family Court* [2012] NZHC 2088 [Judgment under appeal].
2 *JH v MH* FC Gisborne FAM-2008-016-88, 12 December 2008.

[6] Before dealing with the substantive issues, it is appropriate to set out, briefly, some of the history of this long-running dispute. The following account is based largely on a summary given by Miller J in *Hayes v Guerin* and on various relevant minutes of the High Court.[3]

Procedural history

Probate proceedings

[7] The late Elizabeth Hayes had two children, to two different partners: Mrs Guerin, born on 31 May 1943, and Ms Hayes, the appellant, on 12 March 1947. In 2001 she made a will appointing Ms Hayes her executor and dividing her estate equally between Ms Hayes and Mrs Guerin. However, on 6 May 2005 she made a new will appointing Ms Hayes executor and sole beneficiary of her estate (the 2005 will). Elizabeth left a note with the Public Trust, which had prepared the will. The note stated the provisions of the FPA had been explained to her and said she had not included Mrs Guerin in the will because she had adequate resources for her support. Elizabeth was therefore able to help other members of the family.

[8] Elizabeth suffered a stroke on 13 July 2005. Subsequently, she went to live with Mrs Guerin and her husband. In August 2005, she granted power of attorney to Mrs Guerin, and revoked Ms Hayes' power of attorney. Ms Hayes raised issues about Elizabeth's care after she moved to live with Mrs Guerin and also complained that Mrs Guerin had taken money and property belonging to Elizabeth. Mrs Guerin disputed Ms Hayes' allegations. Subsequently, both sisters applied for Family Court orders appointing a property manager and welfare guardian for Elizabeth whose competence was assessed by various medical practitioners.

[9] In January 2006, Mrs Guerin sold a property situated at Seddon Crescent, Gisborne, which had been bought with contributions made by both Elizabeth and Mrs Guerin as tenants in common with, respectively, 42 and 58 per cent shares. At the time of sale, Ms Hayes had challenged Mrs Guerin's power of attorney. In a Family Court judgment of 17 March 2006, Judge Rogers described Mrs Guerin's decision to sell the property as "precipitous and ill-considered", but she did not

---

3 *Hayes v Guerin* HC Gisborne CIV-2009-410-10, 19 June 2009 [Judgment of Miller J].

intervene in the sale because of the impact on third parties.[4] Subsequently, on 14 June 2006 Ms Hayes' application to revoke Mrs Guerin's power of attorney was dismissed. The Judge refused to appoint a welfare guardian and property manager and costs of $8,000 were awarded against Ms Hayes.

[10] On 11 July 2006, Elizabeth made a further will (the 2006 will). In it she appointed Mrs Guerin as executor and divided the estate equally between Ms Hayes and Mrs Guerin.

[11] Elizabeth died on 13 January 2007.

[12] Ms Hayes applied for a grant of probate in common form on 15 January 2007. Her affidavit sworn on that day exhibited the 2005 will. Potter J subsequently referred to the application and affidavit as the originating documents in the proceeding.[5] Ms Hayes also lodged a caveat under s 60(1) of the Administration Act 1969 against any application by Mrs Guerin for probate of the 2006 will.

[13] However, before her application for probate of the 2005 will was dealt with, it was necessary for issues concerning the 2006 will to be determined. Because of the caveat lodged by Ms Hayes it was necessary for Mrs Guerin to apply for an order nisi under s 61(a)(ii) of the Administration Act for the grant of administration to her under the 2006 will. Mr Bunbury, who had been Mrs Guerin's counsel, had attended on Elizabeth for the purposes of the 2006 will and had to swear an affidavit as to the circumstances of its execution. Consequently he had to withdraw as counsel. Neither party was then represented and Mr R J Collins of Elvidge and Partners, Napier was appointed as amicus curiae.

[14] An order nisi was duly made and resulted in a hearing under s 61(d) of the Administration Act before Venning J on 31 July and 1 August 2007 to enable Ms Hayes to show cause why the order nisi should not be made absolute. In respect of that hearing Mr Collins assisted the Court by arranging witnesses, leading their

---

4 *Hayes v Hayes* FC Gisborne FAM-2005-016-348, 17 March 2006 at [9].

5 A file was then opened "In the Matter of the Estate of Elizabeth Hanson Hayes" under CIV-2007-416-7 in the High Court at Gisborne.

evidence, cross-examining some witnesses and making submissions on the relevant law.

[15] In his judgment of 10 August, having reviewed medical and other evidence, Venning J held Ms Hayes had shown a seriously arguable question about the validity of the 2006 will on grounds of testamentary capacity and undue influence.[6] It appears that when the 2006 will was made, Elizabeth was not able to read because of poor sight, and also had difficulty hearing. She suffered what was described as "expressive dysphasia", which affected her ability to understand what she was saying or what others were saying to her.[7] Further, it was possible she had made decisions about her will on the basis of suggestions made to her by Mrs Guerin with whom she was living when the will was executed.

[16] In the circumstances, Venning J directed that Mrs Guerin should apply for probate of the 2006 will in solemn form. He said he anticipated, in those proceedings, that Ms Hayes would bring a counter-claim for probate of the 2005 will in solemn form, so all issues could be resolved in the one proceeding.[8]

[17] Allan J conducted a settlement conference on 12 December 2007. Mr Collins was again present as amicus curiae.[9] In his minute of that day the Judge noted that by then Ms Hayes had filed a statement of claim seeking the grant of probate of the 2005 will in solemn form. He directed that if Mrs Guerin wished to defend the proceeding, she was to file a statement of defence within the time prescribed by the High Court Rules. The Judge also directed her to file and serve a statement of claim on or before 8 February 2008 if she wished to pursue her application for probate of the 2006 will.

[18] The matter next came before Potter J on 5 February 2008. On that day, Mrs Guerin was represented by Mr Bunbury but there was no appearance by Ms Hayes. Potter J recorded in a minute that Mr Bunbury had filed a memorandum recording Mrs Guerin's consent to probate of the 2005 will being granted to

---

6 *Hayes v Hayes* HC Gisborne CIV-2007-416-7, 10 August 2007.
7 At [42].
8 At [50].
9 Allan J recorded that his appointment expired at the conclusion of the settlement conference, and further appointment may be necessary.

Ms Hayes, on certain conditions. The conditions required the assets of the estate to be preserved until she could bring an application under the FPA, which Mr Bunbury advised the Judge could be promptly filed. Other conditions sought that provision be made out of the estate for the costs of Mr Collins, and for Elizabeth's funeral expenses of almost $4,000.

[19] Potter J recorded that Ms Hayes had filed a memorandum dated 4 February 2008 in which she agreed to probate of the 2005 will being granted to her, but opposed the other orders sought by Mrs Guerin.

[20] The Judge's minute also included the following:

> [6] I have indicated to Mr Bunbury this morning that I consider a sensible way forward would be to make the orders [Mrs Guerin] seeks subject to strict timetable orders to ensure that the family protection proceedings are filed and diligently prosecuted, because beyond all else, finalisation of the issues between [Ms Hayes] and [Mrs Guerin] relating to the estate [of] their mother, require determination.

[21] She concluded by reappointing Mr Collins as amicus curiae to advise the Court as to the appropriateness of orders proposed by Mr Bunbury.

[22] It appears Ms Hayes filed two further memoranda, dated 7 and 12 February respectively. A Mr Gordon Webb had also filed a memorandum on behalf of Ms Hayes. Both Mr Bunbury and Mr Webb appeared before Potter J on 13 February. Potter J's minute issued on that day recorded:

> [4] [Mrs Guerin] consents to probate of the will dated 6 May 2005 being granted to [Ms Hayes]. However, she seeks that the assets of the estate are preserved until a Family Protection Act claim can be filed and determined in the Family Court.
>
> [5] If probate is granted to [Ms Hayes] it would avoid the necessity for the procedure detailed by Venning J in his judgment of 10 August 2007, for applications for probate in solemn form to be made respectively by [Mrs Guerin] and [Ms Hayes] in relation to the wills dated 11 July 2006 and 6 May 2005.
>
> [6] Rule 661 of the High Court Rules requires that a grant of probate on an application under r 634 must be in common form, while a grant on an application under r 636 must be made in solemn form. [Ms Hayes] has filed applications for a grant of probate of the will dated 6 May 2005 in both common form and solemn form, although as noted at [10] of the judgment of Venning J, the application for grant of probate in solemn form was premature

as the necessity for such an application had not been determined by the Court.

[7] [Ms Hayes's] application for grant of probate in common form dated 15 January 2007, together with an affidavit to lead grant of probate sworn by [Ms Hayes] on the same date which exhibited the original will dated 6 May 2005, were duly filed on 15 January 2007 in the Gisborne High Court as the originating documents in this proceeding.

Grant

[8] I grant the application by [Ms Hayes] dated 15 January 2007 for a grant of probate in her favour of the will of Elizabeth Hanson Hayes dated 6 May 2005. A grant in form 57 of the High Court Rules will need to be promptly filed by [Ms Hayes's] solicitors on the record (Nolans, Mr Gordon Webb). The Court may then release the grant to those solicitors.

[23] The Judge made the following further orders at [9] of her minute:

a) [Mrs Guerin] shall forthwith and not later than Friday 29 February 2008 file in the Family Court proceedings under the Family Protection Act and shall diligently pursue such proceedings until final determination of her claim under that Act.

b) Neither [Mrs Guerin] nor [Ms Hayes] may dispose of any funds, chattels or other property forming part of the assets of the estate of the deceased until further order of the Family Court or this Court permitting disposal of those assets.

…

[24] Other orders required payment into the Court of funds representing the proceeds of sale of the Seddon Street property held in the account of Mrs Guerin's solicitors Egan & Kite, together with a statement of account showing receipts and disbursements in relation to those proceeds; directed Mrs Guerin and Ms Hayes not to dispose of any funds or assets forming part of the assets of the deceased estate; and directed that the costs of Mr Collins as amicus curiae and Elizabeth's funeral expenses be met out of the estate, with the balance held on interest bearing deposit pending further order of the Court "for the respective rights and interests of the parties."

[25] Ms Hayes and Mr Bunbury appeared again before Potter J on 21 May 2008. In a minute issued on that day Potter J referred to an affidavit recently filed by Ms Hayes, in support of an ex parte application she had filed on 11 December 2007 "for an order of liability of person fraudulently obtaining or retaining estate of

deceased". Both the original affidavit and the amended affidavit sworn on 12 May 2008 included matters that in Potter J's view were not admissible as evidence. The Judge continued:

> … In the interim [Ms Hayes] has been appointed executor of the will of the deceased which will is dated 6 May 2005. [Ms Hayes's] application was made by her in her capacity as a daughter of the deceased. She is now the executrix. The application needs to be brought into an appropriate form and re-filed by her as executrix of the estate, it being her legal obligation as executrix to realise the assets of the estate, to meet the debts of the estate, and to distribute the assets in accordance with the will, subject of course to the outcome of the Family Protection Act proceedings filed by [Mrs Guerin] to which I shall shortly refer. The application must be on notice.

[26] The Judge next recorded she had "strongly" urged Ms Hayes to take legal advice in respect of that application, and to present it in a form that would enable it to be "properly advanced".

The Family Protection Act claim

[27] Potter J recorded in the same minute that the Family Protection proceeding had been commenced by Mrs Guerin on 28 February 2008, and the Family Court had ordered service on Elizabeth's three grandsons, as well as Ms Hayes. There was an issue about service on Ms Hayes, who claimed she had not received any documents. Mr Bunbury undertook to forward documents to a postal address in Christchurch provided by Ms Hayes and recorded by Potter J in her minute.

[28] The Family Court proceeding came before Judge O'Donovan at the Gisborne Family Court on 12 December 2008.[10] Ms Hayes then applied for the transfer of the proceeding to the High Court, in reliance on s 3A(3) of the FPA. That provision authorises a Family Court judge to refer proceedings to the High Court if he or she is of the opinion that any proceedings under the FPA or any question in any such proceeding "would be more appropriately dealt with in the High Court". The Judge recorded Ms Hayes' submission that an important question of law arose in the proceeding that was more appropriately dealt with in the High Court. However, he said the material submitted by her in support of the application did not reveal any such important question of law. He then said:

---

10 *JH v MH*, above n 2.

> [3] This court, however, is well versed in dealing with proceedings of this nature. These sorts of proceedings form the bread and butter business of this Court. I see no issue in this case, which cannot be properly dealt with in this Court.
>
> [4] The respondent says that another reason for transfer is that there are unresolved proceedings in the High Court relating to the same issues, which arise in this case, in the sense that there are proceedings in that Court relating to the property in this Estate. Mr Bunbury assures me that that is not so. I have no knowledge of any such proceedings. In any case, it seems to me that the existence of same, would not prevent this Court dealing with the current application.

[29] On this basis, the Judge declined the application to transfer. As noted earlier, this decision was challenged in the application for review giving rise to the present appeal.[11]

[30] Judge O'Donovan then proceeded to deal with the merits and delivered an oral judgment in which he ordered that the 2005 will was to be varied to provide a bequest in favour of Mrs Guerin in the sum of $80,000, with the balance of the estate given to Ms Hayes.

[31] Ms Hayes appealed to the High Court. In a judgment of 19 June 2009, Miller J dismissed the appeal.[12]

The Administration Act claim

[32] In the same judgment, Miller J dealt with what he referred to as the "Administration Act claim", by which Ms Hayes sought under s 52 of the Administration Act to recover assets allegedly fraudulently obtained or retained by Mrs Guerin out of Elizabeth's estate. This was the claim that Potter J, in a minute dated 21 May 2008, said needed to be brought into an "appropriate form and re-filed" by Ms Hayes as executor of the estate.

[33] Miller J noted Potter J's observations had apparently prompted Ms Hayes to file a document dated 22 December 2008, which was described as an "amended interlocutory on notice application for order on liability of person fraudulently obtaining or retaining assets of deceased according to directions of Potter J 21 May

---

11 Judgment under appeal, above n 1.
12 Judgment of Miller J, above n 3.

2008."[13] The application sought an order under s 52 of the Administration Act that Mrs Guerin be charged to the extent of the estate coming into her hands, valued at approximately $260,000.

[34] Miller J dealt with the claim under s 52 essentially by holding Mrs Guerin could not retain certain assets currently in her possession. Disputed items had by the time of delivery of the judgment been returned to the Registrar and Miller J directed they should be sold under the supervision of the Registrar if necessary to satisfy Mrs Guerin's entitlement to $80,000 out of the estate. Some other adjustments were made of a comparatively minor nature and it was confirmed the balance of the estate should be distributed to Ms Hayes. Overall the Judge held there should be a modest award of costs in Mrs Guerin's favour, deductible from the balance of the estate funds held by the Registrar.

Applications for leave to appeal

[35] Ms Hayes sought leave to appeal to this Court from the part of Miller J's decision dealing with the FPA appeal. Miller J refused leave.[14] Ms Hayes then applied to this Court for leave, which was declined by this Court.[15]

[36] Subsequently Ms Hayes sought an extension of time to appeal against the decision of Miller J insofar as it related to the claim made under s 52 of the Administration Act. This Court declined the application for an extension of time.[16]

[37] Ms Hayes then sought leave to appeal to the Supreme Court against this Court's refusal to extend the time for appealing against Miller J's decision on the Administration Act claim. Her application was dismissed on 3 August 2011.[17]

The judgment under appeal

[38] The proceeding to which the present appeal relates was commenced in the High Court in February 2012.[18] As noted it was primarily based on an assertion the

---

13 See judgment of Miller J, above n 3, at [23].
14 *Hayes v Guerin* HC Gisborne CIV-2009-410-10, 5 March 2010.
15 *Hayes v Guerin* [2010] NZCA 148.
16 *Hayes v Guerin* [2010] NZCA 592.
17 *Hayes v Guerin* [2011] NZSC 80.
18 Judgment under appeal, above n 1.

Family Court did not have jurisdiction to deal with the Family Protection proceeding because proceedings had already been commenced in relation to the same matter in the High Court. The proceeding on which Ms Hayes relied for this purpose was the claim made under s 52 of the Administration Act.

[39] Addressing the proper interpretation of s 3A(2) of the FPA, Dobson J held the phrase "proceedings relating to the same matter" in s 3A(2) should not be restricted to proceedings commenced under the FPA. But he rejected Ms Hayes' submission that the subsection prevented the Family Court from considering any application under the FPA where any matter relating to the estate was already before the High Court.

[40] He considered the likely legislative purpose of s 3A(2) was to prevent different claimants having competing or overlapping claims considered in different jurisdictions. On this approach, "proceedings relating to the same matter" would include all claims seeking distributions inconsistent with the terms of the will. Other proceedings would not be affected. He considered competing claims for distributions inconsistent with the terms of the will should be distinguished from claims brought against the estate, for example for breach of contract by the deceased, the outcome of which might affect the size of the estate but would not otherwise influence the relative position of claimants for provision out of the estate.

[41] On this basis there were no proceedings extant in the High Court when the Family Court dealt with the Family Protection proceedings, and therefore nothing to prevent the Family Court doing so. This meant the fundamental premise on which Ms Hayes' application for judicial review depended would be untenable, and the second respondent would be entitled to have it struck out.

[42] In case that approach was wrong, the Judge considered another possible interpretation of s 3A(2). On this approach the jurisdictional bar in s 3A(2) should not extend to proceedings brought on behalf of, rather than against, the relevant estate. If the only outcome of any proceedings taken on behalf of the estate in the High Court would be to increase the assets available to meet claims, s 3A(2) would not prevent the Family Court dealing with an FPA claim. On the facts of this case,

this was an alternative basis on which Ms Hayes's claim based on absence of jurisdiction could not succeed.

[43] The Judge also considered whether the claim should be struck out as an abuse of process. He noted Ms Hayes had not proffered any satisfactory explanation as to why the claimed lack of jurisdiction had not been raised in the course of the argument before Miller J. However, referring to this Court's decision in *Morris v Templeton* he doubted the proceeding could be struck out if the bar in s 3A(2) of the FPA applied.[19]

[44] However, other causes of action, not based on the claimed jurisdictional error, were in a different category. These were claims effectively seeking to re-litigate the merits of Mrs Guerin's Family Protection proceedings, including allegations the Family Court decision was irrational and contrary to public policy and offended against the principle of testamentary freedom. Dobson J characterised these claims as an abuse of process and they were struck out accordingly.

The appeal

[45] Ms Hayes has essentially repeated her High Court arguments on appeal. Her notice of appeal and the arguments she addressed at the hearing ranged over a number of issues, including her ability to seek restitution for harm caused by the alleged unlawfulness of the Family Court decision, and claims of procedural impropriety and irrationality.

[46] The statement of claim has remained in its original form throughout. In it, Ms Hayes seeks declarations the Family Court judgment is invalid and void ab initio, and orders setting aside the judgment and requiring the payment to her of $228,370 by Mrs Guerin, Mr Bunbury and the Family Court. Ms Hayes has nevertheless disavowed any intention of seeking relief against Mrs Guerin or Mr Bunbury. She now claims the Crown should be liable because of the errors made by the Family Court in dealing with the Family Protection proceedings.

---

[19] *Morris v Templeton* (2000) 14 PRNZ 397 (CA).

The jurisdiction issue

[47] The principal issue raised by her claims is the extent, and effect in the present case, of the statutory bar in s 3A(2) of the FPA. This provides:

> **3A Courts to have concurrent jurisdiction**
>
> …
>
> (2) A Family Court shall not have jurisdiction in respect of any application under this Act if, at the date of the filing of the application, proceedings relating to the same matter have already been commenced in the High Court.
>
> …

[48] Ms Hayes' primary submission is that the natural and ordinary meaning of "proceedings relating to the same matter" is "proceedings in the High Court relating to the property in the estate". She submitted the purpose of the provision was to ensure no duplication or overlap of proceedings, and the finalisation of the extent, value, control and "will-maker's intended division of" the estate before any claims are decided against it. On this basis, the provision would extend to proceedings relating to the control and division of property in the estate, the whereabouts and composition of the estate and steps necessary to "gather in" the estate such as by ascertaining the liability of persons who might have fraudulently obtained or retained estate property.

[49] Clearly, this argument was designed to have application to the steps taken by Ms Hayes in the High Court, including her filing of a caveat and the application she purportedly made under s 52 of the Administration Act.

[50] There is no relevant authority on the extent of the bar contained in s 3A(2) of the FPA nor on the equivalent provision set out in s 5(2) of the Law Reform (Testamentary Promises) Act 1949. Both provisions were added by amendments enacted in 1991.[20]

---

[20] Respectively by s 3 of the Family Protection Amendment Act 1991 and by s 3 of the Law Reform (Testamentary Promises) Amendment Act 1991.

[51] This is not the case to attempt a definitive statement of the proper interpretation of s 3A(2) of the FPA. While we have the benefit of Dobson J's judgment, we have not heard argument on both sides of the appeal. Although we understand Ms Hayes is legally qualified, she is not a practising solicitor and we mean her no disrespect when we say she has naturally presented an argument intended to advance her interests as the appellant.

[52] Having said that, we do not consider Dobson J was correct when he held the subsection should be limited to excluding claims in the Family Court where there is already a proceeding on foot in the High Court seeking distribution inconsistent with the terms of the will, whether the proceeding was commenced under the FPA, the Law Reform (Testamentary Promises) Act or the Property (Relationships) Act 1976. Nor are we persuaded by the alternative approach that found favour with Dobson J, which would limit the scope of s 3A(2) to proceedings brought against the relevant estate, as opposed to proceedings that might have the result of enlarging it.

[53] However, an unresolved claim by the estate against a third party might have the effect of bringing property into the estate with the consequence that some FPA claims might be able to succeed when otherwise they would not. The question of whether a testator has failed in his or her moral duty under the FPA could well be affected by the size of the estate and the amount of money available for distribution to those properly entitled.

[54] Similar considerations might also apply if there were proceedings potentially having the effect of decreasing the size of the estate. We think the preferable view is that if there are proceedings on foot in the High Court that could have the consequence of either decreasing or increasing the size of an estate, then s 3A(2) will operate to prevent a claim in the Family Court being advanced under the FPA in relation to the estate.[21]

---

[21] Where the Family Court does not have jurisdiction by virtue of s 3A(2), there is no impediment to the lodging of a claim under the FPA in the High Court since (subject to the section) the High Court and the Family Court have concurrent jurisdiction under s 3A(1). Where proceedings under the FPA have properly been commenced in the Family Court, but relevant High Court proceedings are subsequently commenced, a Family Court Judge has a discretion to transfer any claim under the FPA to the High Court under s 3A(3).

[55] We take the same view in respect of a proceeding that raises questions about the validity of a will. In the present case, applications for probate were initially made by both Ms Hayes and Mrs Guerin. The outcome affected not only the identity of the executor, but also the beneficiaries under the will.

[56] Sometimes of course, as a consequence of a challenge made to a will, it is concluded that there is no valid will and the estate must be distributed under the Administration Act as on an intestacy. However, we consider s 3A(2) must be construed as operating when a relevant proceeding has been properly commenced in the High Court, so as to engage that Court's jurisdiction. If the High Court proceeding has not been properly commenced so as to engage that Court's jurisdiction, there could be no issue about "overlapping" jurisdiction. The Family Court would be able to proceed.

[57] In the present case, Potter J was clearly concerned about aspects of the application Ms Hayes had made purporting to make a claim against Mrs Guerin under s 52 of the Administration Act. We have already referred to the observations Potter J made about the application in her minute of 21 May. Those included the fact the application had been made ex parte, and in Ms Hayes's capacity as Elizabeth's daughter. Further, the affidavit that accompanied the application contained much material that was inadmissible and of an argumentative nature. We infer Potter J thought some of the content was inappropriate coming from someone who had subsequently been appointed executor of the will and, in that capacity, had sworn in the oath required to lead the grant of probate, including the undertaking she would faithfully execute the will.

[58] Section 52 of the Administration Act provides as follows:

> **52 Liability of person fraudulently obtaining or retaining estate of deceased**
>
> If any person other than the administrator, to the defrauding of creditors or without full valuable consideration, obtains or receives or holds any part of the estate of a deceased person or effects the release of any debt or liability due to the estate of the deceased, he or she shall be charged as executor in his or her own wrong to the extent of the estate received or coming into his or her hands, or the debt or liability released, after deducting—

> (a) any debt for valuable consideration and without fraud due to him or her from the deceased person at the time of his or her death which might properly be retained by an administrator; and
>
> (b) any payment made by him or her which might properly be made by an administrator.

[59] Section 52 does not stipulate who may bring an application under its provisions. Ordinarily, one would expect that the administrator or beneficiary would be the applicant. It is therefore possible that Ms Hayes had the capacity as a beneficiary to bring the application under that section. However, of more importance is the fact that the s 52 claim was commenced ex parte and as an interlocutory application in the context of a proceeding relating to probate of the will.

[60] Section 52 has nothing to do with probate and a claim under s 52 could not properly be advanced in an interlocutory application in the probate proceeding. Further, if Ms Hayes wished to make a claim relying on the section she needed to commence such a claim by a proper originating document. It may be that is what Potter J had in mind when she said the claim would have to be brought into an appropriate form and re-filed, and urged Ms Hayes to take legal advice in respect of the application. Under the High Court Rules in the form they were at the relevant time, r 447 applied the provisions of pt 4 of the Rules to claims in which the relief claimed was solely within the equitable jurisdiction of the Court, and in particular those involving, among other things:

> (i) The determination of any question arising in the administration of any estate or trust, or which it may be necessary or desirable to determine for the protection of the executors, administrators, or trustees.

[61] The claim Ms Hayes sought to advance against Mrs Guerin in reliance on s 52 was clearly within this provision. The proper way for Ms Hayes to proceed was to file a statement of claim and comply with the special requirements of the then pt 4. Mrs Guerin could then have filed a statement of defence under r 458. The evidence could have been by affidavit under r 455(1). It was inappropriate for Ms Hayes simply to file an interlocutory application in the context of the existing application for probate. Her failure to file a statement of claim meant there was no

proceeding properly commenced in the High Court when the Family Court rejected the application for transfer and determined the FPA claim on 12 December 2008.

[62] Ms Hayes complained about the advice Mr Bunbury gave to Judge O'Donovan resulting in the Judge's statement that Mr Bunbury had assured him there were no proceedings in the High Court relating to the property in the estate. The same issue was raised in the High Court, and Dobson J obviously raised the issue with Mr Bunbury. The High Court judgment recorded:[22]

> [16] The rationale for Mr Bunbury's assurance to Judge O'Donovan was that the disputed probate proceedings had been resolved, and that there were no other extant proceedings, given that the inappropriately formulated attempt to make application under s 52 of the [Administration Act] had been rejected by the terms of Potter J's minute on 21 May 2008, and no further steps in relation to that initiative had been taken by or on behalf of Ms Hayes between 21 May 2008 and the hearing on 12 December 2008.

[63] While it is not clear the application had been formally "rejected" by Potter J, it is clear she thought the application was inappropriate for a number of reasons, and needed to be re-filed in proper form. In any event, for the reasons we have given, we consider that when the Family Court proceeded to deal with the matter, there were in fact no proceedings on foot in the High Court relating to the estate.

[64] By then of course the probate issue had been resolved by consent. It is worth emphasising that on 13 February 2008, when Potter J granted Ms Hayes' application for probate and at the same time ordered Mrs Guerin forthwith to file proceedings under the FPA in the Family Court, Ms Hayes was legally represented. There was no suggestion then that the Family Court was an inappropriate forum for the claim. Nor was there any such suggestion when Miller J dealt with the appeal from the Family Court's decision, although we accept Ms Hayes had raised the issue under s 3A(3) (the transfer provision) before Judge O'Donovan.

[65] Ms Hayes did file an amended application in the High Court as directed by Potter J after the Family Court decision was made, and as discussed above, Miller J dealt with it at the same time as the FPA appeal. Ms Hayes told us the application was in fact little changed from the original one criticised by Potter J, and it does

---

[22] Judgment under appeal, above n 1.

appear it remained in the form of an interlocutory application, although now stated to be on notice. It also appears from Miller J's judgment that Mrs Guerin had filed a statement of defence. Miller J evidently decided to deal with the merits of the s 52 claim despite the absence of a proper originating document. However, that cannot alter the fact that when the Family Court dealt with the FPA claim there was no properly commenced High Court proceeding in relation to the estate on foot.

[66] We also reject the suggestion made by Ms Hayes that because there had once been applications in relation to probate, the s 3A(2) bar would operate to deprive the Family Court of jurisdiction even though those claims had been resolved. There is no justification for interpreting the section to have that effect. The risk guarded against is two courts being seized of related issues at the same time: if the High Court proceeding has been resolved there is no sensible reason to suppose the legislature intended an ongoing ouster of the Family Court's jurisdiction.

[67] For these reasons we are satisfied the High Court was right to reject the jurisdiction argument.

Abuse of process

[68] This leads to the second main issue raised by the appeal. As noted, Dobson J struck out as an abuse of process those parts of the claim not based on the Family Court's claimed lack of jurisdiction. We have no doubt he was correct to do so, since the claims dealt with issues already resolved against Ms Hayes by Miller J, whose judgment survived attempts to appeal.[23] The issues raised were clearly res judicata.

[69] However, the Judge did not consider he could strike out the claim as an abuse of process insofar as it related to the point about the jurisdiction of the Family Court. This was because if the jurisdictional bar applied, Ms Hayes's failure to raise the issue at an earlier stage could not have the result of conferring a jurisdiction on the Family Court it did not have. The Judge relied on this Court's decision in *Morris v Templeton*, a second appeal from a District Court decision in which the Judge had purported to exercise the High Court's discretionary power under s 73 of the

---

[23] See above at [35]–[37].

Trustee Act 1956 to excuse the respondent trustee from liability for losses suffered as a result of his breach of trust.[24]

[70] In the first appeal in the High Court, Chisholm J considered the District Court Judge's exercise of discretion and could not see any error in the way it had been exercised. He later declined an application for leave to bring an appeal in this Court. It was only in the course of applying to this Court for leave to appeal that counsel, who had not appeared in the High Court, took the point that the District Court did not have jurisdiction to grant relief under s 73 of the Trustee Act.

[71] This Court agreed the power to grant relief under s 73 was a power given only to the High Court, and held it could not be exercised by the District Court. The absence of power was not something able to be waived. It rejected the respondent's submission it was too late for the issue to be raised, saying:[25]

> While we sympathise with the respondent, it cannot be too late to raise a point of jurisdiction in a case where the original decision is a nullity, especially where the application for leave to appeal is in time. In the circumstances of this case, where there is an application for appeal pending, it is certainly not too late to raise such a fundamental matter as the District Court's jurisdiction.

Leave to appeal was granted, and the appeal was allowed.

[72] Our conclusions that the Family Court had jurisdiction and Ms Hayes' other claims were res judicata makes it unnecessary for us to determine whether the claim based on absence of jurisdiction should also have been struck out as an abuse of process. Clearly, there were important differences between the facts of this case and those in *Morris v Templeton*. Significantly, here the Family Court had power under s 3A(1) of the FPA to deal with the claim unless the High Court was seized of proceedings in relation to the same matter. It was not a case where the Family Court could never have exercised a power under the relevant legislation.

[73] Further, the proceeding was commenced in the Family Court by Mrs Guerin as a result of a High Court order requiring her to do so as part of the settlement

---

[24] *Morris v Templeton*, above n 19.
[25] At [15].

resolving the probate issue in favour of Ms Hayes. Ms Hayes made no protest at the time. Although she later sought the transfer of the proceeding to the High Court under s 3A(3) of the FPA, Ms Hayes did not raise the jurisdictional issue on appeal, choosing rather to engage with the merits of the Family Court decision. It was only when her attempts to overturn the High Court judgment were unsuccessful that she commenced the judicial review proceeding raising the jurisdictional issue. Unlike *Morris v Templeton*, there was no outstanding proceeding at the time the issue was raised: Ms Hayes commenced the application for review to pursue the point after all her other proceedings had been resolved, and a little under three years after the Family Court decision was made.

[74] These very different circumstances may well have justified a different conclusion on the abuse of process issue than arrived at in *Morris v Templeton*. However, the other conclusions we have reached make it unnecessary to decide the point and in the absence of full argument on both sides it is preferable not to do so.

Result

[75] The appeal is dismissed.

[76] The second respondent did not appear at the hearing, and would not have incurred significant costs at the interlocutory stage. However, on 25 May 2015, Mr Bunbury filed helpful written submissions setting out the history of the proceedings and explaining the basis on which Mrs Guerin had decided not to appear on the appeal. In the circumstances, we allow costs in the sum of $500 to be paid by the appellant to the second respondent.

Solicitors:
Crown Law Office, Wellington for First Respondent
Grey Street Legal, Gisborne for Second Respondent