Neutral Citation Number: [2011] IEHC 186

THE HIGH COURT

2005 2901 P

BETWEEN

ORLAGH MULCAHY AND SUSAN KEATON

PLAINTIFFS

AND

KIERAN MULCAHY

DEFENDANT

Judgment of Miss Justice Laffoy delivered on 6th day of May, 2011.

1. The parties

1.1 The plaintiffs and the defendant are siblings and they are three of the four children of Cathal Mulcahy deceased (the Testator) and Hilda Mulcahy deceased (the Executrix). The children of the Testator and the Executrix, in order of age, are the defendant (Kieran), the second plaintiff (Susan), Anna McDonald (Anna), and the first plaintiff (Orlagh), who is the youngest. The Testator died testate on 25th March, 1982 and probate of his last will, which was dated 25th March, 1982, was granted to his widow, the Executrix, on 14th April, 1983. The Executrix died after these proceedings were commenced on 18th January, 2006.

1.2 Orlagh was nineteen years of age at the date of the Testator's death. At the time she was studying Fine Arts at third level. Between 1987 and 1997 she lived full-time in London, first studying for a post-graduate qualification at the Slade and, subsequently, working. Anna, who, although she is not a party to these proceedings testified on behalf of the plaintiffs, was finishing third level education when the Testator died. From 1984 onwards she lived outside Ireland, first in South Africa and subsequently in London and from June 2004 in Hong Kong. Although she has retired, she formerly worked as a stockbroker. Susan, who has a Masters Degree in Economics, had left Ireland for the United States of America before her father's death. At all material times she resided in the United States, where for a time she carried on her own retail business and subsequently worked in banking. I am satisfied, having heard their testimony, that each of the daughters of the Testator and the Executrix was capable of understanding the manner in which the estate of the Testator was being administered after the death of the Testator, to the extent to which she was informed of what was happening, which was very limited. Indeed, Anna and Susan, having regard to their education and business experience, in my view, had capacity beyond the norm for a person without legal training to understand what was proposed, and, in general terms, what happened, in relation to the administration of the estate of the Testator, although they would not necessarily have understood the mechanics of a conveyancing transaction. I make those observations because, although this case concerns claims by Susan and Orlagh to have Conveyances of their respective one undivided eight shares of a property which passed under the will of the Testator set aside or rectified, the issues in this case have become wholly enmeshed in the administration of the Testator's estate.

1.3 The defendant is a chartered accountant by profession. His wife, Rowena Mulcahy (Mrs. Mulcahy) is a solicitor in the firm of Mulcahy Robinson which was originally on record for the defendant in these proceedings.

2. The will of the Testator

2.1 The will of the Testator, which was incorrectly referred to as "the purported" will in the statement of claim, was made on the day the Testator died, that is to say, 25th March, 1982. It was drawn up by Mrs. Mulcahy. In it the Testator appointed the Executrix to be sole executrix thereof. He devised the family home to the Executrix for her own absolute use and benefit. He devised the residue of his estate to his four children, Kieran, Susan, Anna and Orlagh, in equal shares for their own absolute use and benefit. It is clear on the evidence that the Testator was aware that he was terminally ill when he made the will. Indeed, prior to making the will he had been arranging his affairs. At the time, inheritances between spouses were not wholly exempt from capital acquisitions tax. If the Testator had devised and bequeathed all his property to the Executrix, a substantial liability to capital acquisitions tax would have arisen. It is common case that the manner in which the Testator disposed of his assets was designed to obviate that eventuality.

2.2 Following the Testator's death, there was an understanding between the Executrix and her four children that the Executrix would have the benefit of the residuary estate of the Testator for her lifetime. However, there is a conflict on the evidence between Kieran, on the one hand, and his sisters, on the other hand, as to the basis of that understanding. I will return to that conflict, having outlined how the estate of the Testator was administered.

3. Administration of the estate of the Testator

3.1 An Inland Revenue Affidavit sworn by the Executrix on 17th February, 1983 disclosed that the assets of the Testator had a net value of IR£295,271.29. The family home, which I assume was vested in the Executrix in the course of administration of the estate, because it was subsequently sold by her, was shown as having a value of IR£90,000. The Testator's undivided moiety of the property in dispute in these proceedings, No. 26 Temple Road, Rathmines in the City of Dublin (No. 26), was shown as having a value of IR£90,000. The remainder of the assets comprised primarily cash, shares quoted on the Irish and London Stock Exchanges and life policies.

3.2 The Testator's title to his interest in No. 26 was derived from a Conveyance dated 14th July, 1981 made between Isaac Elkinson of the one part and the Testator and the Executrix of the other part. While on the face of that conveyance the Testatrix and the Executrix acquired No. 26 in fee simple as joint tenants, it was always accepted by the Executrix that she and the Testator acquired

No. 26 as tenants in common and that half a share in the property passed under the residuary clause in the Testator's will, so that each of the residuary beneficiaries, Kieran, Susan, Anna and Orlagh, acquired one undivided eight share in the premises. That is consistent with the execution by the Executrix of an Assent dated 9th January, 1986 (the Assent) in her capacity as personal representative of the Testator assenting to the vesting of "the undivided one half moiety of" the Testator in No. 26 in Kieran, Susan, Anna and Orlagh as tenants in common in equal shares in fee simple. The Assent was registered in the Registry of Deeds on 8th April, 1986. Notwithstanding the execution of the Assent, Mrs. Mulcahy continued to receive the entirety of the rent payable out of No. 26 which, at the time, was subject to a commercial lease and two residential tenancies. That she did so was in accordance with the understanding of the residuary beneficiaries.

3.3 Notwithstanding that following the death of the Testator the Testatrix was in receipt, with the approbation of the residuary beneficiaries, of the income from the residuary estate, including the half share of the rent from No. 26, that income was not accounted for to the Revenue Commissioners until September 1988 when the tax amnesty was availed of. At that stage, the Executrix, with the assistance of Kieran, paid the outstanding tax due in respect of the interests of her daughters, and subsequently, at the request of the Revenue Commissioners, furnished the outstanding tax returns in their names. For instance, in the case of Susan, a total of IR£7,353.37 in respect of income tax and health levies was lodged with the Revenue on 30th September, 1988. Susan's address in the United States was given on the tax lodgment form and her Irish address was shown as "c/o" the new home address (Heidelberg) of the Executrix. In each post-amnesty fiscal year up to and including the year ended 5th April, 1997, the Executrix continued to make tax returns in respect of the respective shares of Susan and Orlagh in the residuary estate of the Testator and to pay the exigible tax. For instance, on 26th January, 1998 the Executrix made a return in Susan's name for the 1996/1997 tax year. She signed the return and gave the capacity of the signatory as "parent". Susan's address was given as Heidelberg. The income returned was one eight share of the rent from No. 26 and a small sum in respect of interest.

3.4 The genesis of the process whereby the Conveyances by Susan and Orlagh of their respective interests in No. 26 which are in issue in these proceedings came into being is to be found in a letter dated 5th August, 1996 from Kieran to Anna. While I have come to the conclusion that it is probable, contrary to Kieran's evidence, that neither Susan nor Orlagh was furnished with a copy of this letter by Kieran, and that, as she testified, Susan did not become aware of its contents until late 1999 or early 2000, this letter is significant because there is so little contemporaneous documentation as to the interaction between the Executrix and the residuary beneficiaries and among the residuary beneficiaries *inter se* and because I believe it is illustrative of Kieran's objectives at the time. In the letter, having referred to the capital acquisitions tax implications if the Testator had devised his entire estate to the Executrix, Kieran stated:

> "[The Testator] left the balance of his estate to his four children on the understanding that it would be used for Mum's benefit during her lifetime."

The assets of the Testator's estate at the date of death, by reference to the Inland Revenue affidavit, were outlined. The issue of income tax was then addressed. It was stated that there is generally an obligation on an executor to make tax returns in respect of the income arising on undistributed assets and, when the assets are finally distributed to the beneficiaries, the prior year tax computations are reopened. It was then stated:

> "With a view to avoiding unnecessary work, I advised the Inspector of Taxes that rather than Hilda, as executrix, paying the tax we would account for the income arising to the executrix and would pay the tax as beneficiaries thereby obviating the necessity to re-open prior years tax returns at some time in the future. I have made returns of income on this basis on behalf of each of us in respect of the income from Dad's estate for the past fourteen years and the obligation to pay tax in Ireland in respect of Dad's estate has been fully discharged."

That disclosure puts beyond doubt Kieran's role as prime mover in regularising the taxation liabilities in relation to the Testator's estate.

3.5 The letter of 5th August, 1996 then set out the groundwork for Kieran's proposal to Anna. First, Kieran set out his calculation of the gross value of the residue of the Testator's estate in August 1996, which he put at IR£422,473.65. What is of significance for present purposes is that he valued No. 26 at IR£270,000. Secondly, on that basis he calculated that he and each of his siblings was entitled to a quarter of the value of the assets, namely, IR£105,618.41. Thirdly, he recorded that advances had been made to Susan and Orlagh: IR£10,000 in the case of Susan and IR£75,000 in the case of Orlagh. Fourthly, he disclosed that monies, which should have been lodged in the executor's account which had been opened by the Executrix in ICC Bank (subsequently Bank of Scotland Ireland) in the amount of IR£97,070.92 were in the personal accounts of the Executrix. Before outlining the reasons why that had to be addressed, and before stating that the Executrix had advised him that she wished to transfer the money into the executor's account, Kieran stated: "… we all recognise that this money is for Mum's benefit".

3.6 Against that background, Kieran stated that the residue of the estate should have been distributed "in legal terms long ago" and that the Executrix wished to do so without further delay. In broad terms, the proposal put forward by Kieran was that his inheritance, that is to say, his share of the residue, would be taken in the form of an interest in No. 26 and the share of Anna, and the respective shares of Susan and Orlagh after taking account of what had been advanced to them, would be satisfied out of the other assets forming part of the residue. What was proposed was as follows:

> (a) that Anna would be paid IR£105,618.41 at the time in cash, provided that she paid to the Executrix an agreed annual sum equivalent to the after tax income which the Executrix would forgo by parting with the money, which amount was calculated at IR£4,900 p.a., which it was envisaged would come from an non-resident deposit account in Anna's name;
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> (b) that IR£65,000 would be transferred to Susan, bringing the amount advanced to her from the Testator's estate up to IR£75,000, the same amount as had been advanced to Orlagh;
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> (c) that the balance of the entitlement of Susan and Orlagh to the residue, IR£30,618.41 each, would be invested in two portfolios, which Anna was invited to manage, the income from each portfolio going to a non-resident deposit account in the name of Susan or Orlagh, as the case may be, and that the Executrix would have recourse to the monies in the accounts if she had need of it "but ultimately the amount accumulated would go to Susan or Orlagh as appropriate"; and
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> (d) that the portion of the rent attributable to Kieran's share of No. 26 would be paid into a deposit account, the monies in which, after payment of the tax payable on that portion of the rent, the Executrix would have recourse to.

It was stated that should the Executrix have need of the monies in the individual accounts of her children, she would use the funds in all four accounts on an equal basis. It was further suggested that there would be a tax advantage to Anna, Susan and Orlagh if the

proposal was implemented, because no tax would be payable in this jurisdiction on monies paid into the non-resident accounts in their names.

3.7 With the letter of 5th August, 1996 Kieran sent Anna a copy of a valuation of No. 26 which had been carried out by Palmer McCormack and Partners, Property Consultants and Surveyors, in November 1995, which put the then current open market value of the property subject to and with the benefit of the existing lettings therein, at a figure in the order of £250,000/£265,000. Kieran stated that he had put a valuation of £270,000 on No. 26 for ease of calculation when formulating the proposal.

3.8 In the penultimate paragraph of the letter it was reiterated that the Executrix wished to distribute the residue of the estate in the manner outlined and it was stated that Kieran would like to get the agreement of Anna and also of Susan and Orlagh to the proposal before implementing it. Anna's evidence was that she did not respond to the letter in writing but she spoke to Kieran and she told him that she was not "interested in selling", that if she got money she would just have to find something else to put it into, so she might as well leave it "in the property". She had not sought any revenue from it, she testified.

3.9 There are a number of features in relation to Kieran's proposal, insofar as it affected him, on which it is necessary to comment. First, he recognised in the letter of 5th August, 1996 that his share of the residue would not entitle him to the entirety of the Testator's interest in No. 26, that is to say, a half share but would only entitle him to a fractional interest in that half share, which, on my calculations, would have been in the region of 78%. That being the case, his proposal involved the Executrix purchasing the remaining 22% at a price equivalent to the difference between the value of his share of the residue (IR£105,618.41) and the market value of the half share in No. 26, €135,000, that is to say,€29,381.59. In general, assuming that the valuations Kieran used were correct, his proposal was objectively reasonable. Secondly, how the conveyancing aspects of what was envisaged in relation to No. 26 were to be implemented was not addressed. However, I think it is reasonable to infer that, when he was making the proposal, Kieran overlooked the fact that the Testator's half share in No. 26 had already been vested in the four residuary beneficiaries in 1986 by virtue of the Assent. Thirdly, in the light of what happened subsequently, another feature of the proposal which it is necessary to comment on is that nowhere in the very complicated seven and a half page letter to Anna is there even the remotest suggestion that it was contemplated that Kieran and Mrs. Mulcahy and their children and the Executrix might seek to get vacant possession of No. 26 and go and reside there together.

3.10 Another feature of the letter of 5th August, 1996 which was the subject of much controversy at the hearing of these proceedings was the suggestion in it that there had been an advance of IR£75,000 out of the residuary estate of the Testator to Orlagh. It is appropriate to record that there was a degree of equivocation in the letter in relation to that, in that it was stated that the basis of the advance of IR£75,000 made to Orlagh some years previously would have to be clarified as having formed part of Orlagh's "inheritance" from her father, rather than a gift from the Executrix. I will return to that aspect of the matter later.

3.11 Before considering how the Conveyances in issue in these proceedings came into existence, I propose outlining the subsequent contacts in relation to No. 26 between Kieran and the Executrix, on the one hand, and Anna, on the other hand, in relation to what Anna perceived as a proposal for the sale of her one undivided eight share in No. 26 to Kieran or the Executrix.

3.12 Following a visit to London in early March 1997, when he met Anna and her husband and children, Kieran wrote to Anna on 15th March, 1997. I attach significance to that letter because it is illustrative of Kieran's objectives at the time. Once again, in the letter Kieran stated that, in making his will, it was the Testator's intention that Anna, Susan, Orlagh and he "would hold the bulk of the estate for Mum". In the letter, concern was expressed as to whether the Executrix could continue to live on her own into the future. The suggestion was made that using No. 26 as a home for Kieran and his family and for the Executrix had advantages, which were set out. At that stage, the Conveyances, which are the subject of these proceedings, had been executed and Kieran told Anna that Orlagh and Susan had already sold their respective one-eight interests in No. 26 to him. He indicated that he wished to acquire Anna's one-eight interest, so that the Executrix could live with him, Mrs. Mulcahy and their children in the property. He enclosed a deed of conveyance for execution by her under which Anna would convey her one-eight interest in No. 26 to him for IR£33,750 (that is to say one-eight of IR£270,000). He stated that the purchase consideration would be lodged to a "non residents account" in her name, as had already been done in the case of Susan and Orlagh, and he enclosed the relevant documentation to open such an account. There was no suggestion that the sale to Anna was to be conditional on the tenants vacating No. 26 and vacant possession being available, so that Kieran, his family and the Executrix could move in.

3.13 At the end of the letter of 15th March, 1997, there was a fairly long postscript written by the Executrix, in manuscript, to Anna, in which she recorded that she had told Anna during the previous October, that is to say, October 1996 that she wished to move into No. 26 and that Anna had told her that she had no objection to her doing so. However, the Executrix intimated that she did not wish to live there on her own; that she wished to live there with Kieran and his family. She ended the letter stating that she hoped that Anna would agree to sell her interest in No. 26 to Kieran.

3.14 In the letter of 15th March, 1997, Kieran had invited Anna to seek an individual valuation of No. 26, if she had any concerns regarding the market value of her interest in it. Subsequently, in May 1997 two valuations were obtained. The first, which was dated 6th May, 1997, and was addressed to Mrs. Mulcahy at Mulcahy Robinson, was from Hamilton Osborne King. It put an open market value of IR£325,000 on No. 26 subject to the existing lease and tenancies, which were then yielding IR£26,401 per annum. The commercial lease in favour of Brady Shipman Martin, under which most of the property was demised, had created a term of thirty five years from 1st December, 1982 and was then yielding a rent of IR£23,460 per annum. The second, which was dated 16th May, 1997, was from Colliers Jackson-Stops. It was addressed to the Executrix and Anna and valued No. 26 at IR£300,000. Subsequently, at Anna's request, Colliers Jackson-Stops wrote to Anna informing her that in their opinion the property might be worth in the order of IR£450,000 "with full vacant possession". It was pointed out that if it were possible to obtain vacant possession, it could only be achieved by negotiation and would certainly require time, patience and considerable outlay, and that, considering the very different nature of the three tenants, it could be a difficult exercise with no guarantees. It was stated that the figure which had been given in their valuation (IR£300,000) represented "the true value of the property as it stands taking into account some additional 'hope' value".

3.15 Following that, by a manuscript letter of 21st June, 1997, which, on the evidence, was based on a draft written out by Mrs. Mulcahy, the Executrix wrote to Anna recording that, when they met in London after the previous Easter, Anna had agreed to sell her one-eight interest in No. 26 to the Executrix on the basis of a purchase price fixed by reference to the market value. Referring to the two valuations, the Executrix suggested that the purchase price should be one eight of IR£312,500, a figure midway between the figures of IR£300,000 and IR£325,000 put on the property in the valuations which had been obtained. The Executrix enclosed with the letter a deed under which Anna would convey her one-eight interest to the Executrix at the price of IR£39,062.50. It was stated that, as the one-eight interest in the property represented Anna's share of the Testator's estate, she proposed placing the purchase price of IR£39,062.50 in a non-resident account in Anna's name. At the end of the letter, the Executrix stated that she was lonely living on her own and that she wished to move into No. 26 with Kieran and his family, where she could be looked after in her old age.

3.16 Anna did not execute the deed which was furnished with the letter of 21st June, 1997. However, as a letter from her to the Executrix dated 17th November, 1997 evidences, she was agreeable to selling to the Executrix her interest in No. 26 for IR£56,200, which represented one-eight of the open market value put on the premises by Colliers Jackson-Stops, but she required a "full update" of the outstanding residue of the Testator's estate before she would finally sign "on the dotted line". That, apparently, was not forthcoming. Anna remains the owner of one undivided eight share of No. 26.

4. The Conveyances in issue

4.1 Both Susan and Orlagh spent Christmas 1996 in Dublin with the Executrix; Anna did not. The issue of the Executrix being lonely living alone in Heidelberg came up and was discussed in the context of a suggestion that the Executrix move to No. 26 with Kieran and his family. There was a meeting between the Executrix, Kieran, Susan and Orlagh in relation to the matter. An agreement was reached, but there is a serious factual controversy as to what in fact was agreed.

4.2 Susan's understanding was that she agreed to sell her one undivided eight share in No. 26 to Kieran, but that the sale was conditional on the three sisters, Susan, Orlagh and Anna, agreeing to sell their respective interests, and that it was also conditional on the Executrix and Kieran obtaining vacant possession of the property and moving in to live there together and Kieran paying Susan for her interest from his own funds. I did not understand Susan to dispute that the agreed price for her interest was IR£33,750, that is to say, one-eight of IR£270,000. Orlagh's evidence of her understanding of what was agreed was similar, although expressed differently. She stated that it was "an all or nothing deal". As I understand Orlagh's evidence, her understanding of the deal was that it meant that vacant possession would have to be obtained of No. 26 to allow the Executrix and Kieran and his family to move into it, which was what the Executrix wanted, that the three sisters would have to agree to it and that Kieran would be paying them for their respective interests.

4.3 Kieran's evidence was that the agreement was not conditional. His evidence was that Susan and Orlagh were prepared to sell their respective interests for IR£33,750. As to the manner in which the arrangements were to be given effect, his evidence was that the Executrix indicated that she would distribute "shares in the estate which were being realised to Susan and Orlagh … in satisfaction of [Kieran's] purchase" of their interests in No. 26 and would make further monies available to Susan to bring her distribution in line with that of Orlagh. In other words, as I understand it, Kieran's evidence was that the purchase money going to Susan and Orlagh was to come out of the proceeds of the sale of shares which represented his share of the residuary estate of the Testator. Under cross-examination, Kieran testified that what was discussed at the meeting and what was agreed was, in effect, giving effect to the proposal in the letter of 5th August, 1996 to Anna. Susan was keen to go ahead with the proposal, Orlagh was happy to go ahead with it and the Testator's estate was being tidied up.

4.4 Kieran's evidence was that the issue as to whether the Executrix and Kieran and his family were going to move into No. 26 did not come up until later in the evening, as I understand it, after the deal was done, when Susan stated that she had heard that there was a possibility that Kieran might move into No. 26 and his response was that he did not think that possibility was ever going to arise for the reasons he outlined. At that point in his evidence, Kieran testified that he had already applied for planning permission to extend his own home. Later, he testified that his own plan for looking after his mother in her old age was to extend his own home and that was intended to happen in two phases, in that he first applied for planning permission in the autumn of 1996 and subsequently in 1997 he made a second planning application to build a garage, which was to be converted to a mews. That evidence of his intention is undoubtedly inconsistent with what Kieran wrote to Anna on 15th March, 1997, in that the whole thrust of that letter was that using No. 26 as a home for the Executrix and Kieran and his family would be advantageous because it was big enough to accommodate them all and was situated in the locality where his children attended school. Nothing is stated in that letter about accommodating the Executrix in Kieran's existing home and the only inference which can be drawn from the letter is that it was not an option Kieran considered apprising Anna of.

4.5 What happened after the meeting at Christmas 1996 was that on 21st January, 1997 Kieran sent the engrossed deeds, which were subsequently executed, to Susan in the United States and to Orlagh in London. Photocopies of two handwritten letters from Kieran, both dated 21st January, 1997, one to Orlagh and the other to Susan, were put in evidence. Both Orlagh and Susan denied that they had received the letters and testified that the documents which were sent to them were not accompanied by a letter, merely by a short note. I have come to the conclusion that, as a matter of probability, their recollection is faulty in that regard and that the letters were sent. The substance of the letters was the same. I propose outlining their contents by reference to the letter to Susan. In the letter, Kieran stated that he had sold Bank of Ireland, Smurfit and Abbey shares for over IR£100,000 and that he still had to sell a small number of UK shares. He enclosed "set up forms for your non resident account which have been modified for Hilda to access the account", and stated that Susan should initial the written modification and sign the form at the places marked in pencil. He also requested that she sign the "non residential declaration form" at the place marked in pencil and that she send a photocopy of the details page of her passport. He also enclosed an engrossed deed of conveyance transferring her one-eight interest in No. 26 to him and indicated that it should be signed where marked in pencil and be left undated.

4.6 Susan returned the following documents to Kieran some time in February 1997:

> (a) a Conveyance, which was subsequently dated 19th February,1997, which was executed by her in the presence of a Notary Public in the State of New York;
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> (b) an application form to open what was referred to as "Invest Extra account" with ICC Investment Bank (ICC Bank), which she had signed, and which she had also initialled in the appropriate places, including opposite the authorisation of ICC Bank to act upon the written instructions given by herself "or Mrs. Hilda Mulcahy of … a sample of whose signature is set out below";
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> (c) a declaration headed "Non-Residents" addressed to ICC Bank, which was dated 19th February, 1997 and was signed by her and set out her address in the United States; and
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> (d) a copy of the details page from her passport.

4.7 Orlagh also returned the executed Conveyance and the other documents she had been requested to return. Her execution of the conveyance was witnessed by her au pair at the time. In the replies to notice for particulars, it had been stated that Orlagh had attended a solicitor's office in London and that the solicitor had witnessed her signature but had not inquired into the nature of the document. Orlagh was cross-examined in relation to that reply and her evidence was confused. I think the probability is that she was told by Mrs. Mulcahy, via Kieran, to have her execution of the deed witnessed by a solicitor. However, apparently the solicitor whom she attended was also confused as to his function and that did not happen.

4.8 The Conveyance executed by Orlagh had the date of 15th February, 1997 inserted, presumably, by Mrs. Mulcahy. It was a simple conveyance expressed to be made between Orlagh, as vendor, and Kieran, as purchaser. It merely recited that Orlagh was seised as tenant in common of an undivided one-eight share of No. 26 and had agreed to sell her interest to Kieran for IR£33,750. In the operative part of the deed, she conveyed the one undivided eight share in No. 26 to Kieran in fee simple. That Conveyance was not registered in the Registry of Deeds until 2nd October, 2001. It would appear that it was not lodged for stamping with the Revenue Commissioners until July 2000. In due course it was stamped.

4.9 The Conveyance executed by Susan, on which the date 19th February, 1997 was inserted, was slightly more complicated, in that the Executrix was joined in it to correct an error which appeared in the Assent. In the Assent, Susan had been named as "Susan Keating", rather than "Susan Keaton". Apart from that, the Conveyance executed by Susan was substantially the same as the Conveyance by Orlagh in favour of Kieran, in that Susan was named as the vendor and Kieran was named as the purchaser and there was a straightforward conveyance, in consideration of IR£33,750, from Susan to Kieran of her one undivided eight share in No. 26. The Conveyance executed by Susan was not registered in the Registry of Deeds until October 2001, having been first lodged for stamping, it would appear, in July 2000.

5. The money trail

5.1 The manner in which the Executrix dealt with the monies which were part of the estate of the Testator at his death or which accrued to his estate after his death as the proceeds of life policies, rent, or the proceeds of the sale of shares was to say the least unorthodox. As was disclosed by Kieran in the letter of 5th August, 1996 to Anna, the Executrix had lodged monies belonging to the estate of the Testator in her personal accounts. I am absolutely satisfied that there was nothing sinister about the approach adopted by the Executrix and that in 2004 she took steps to ensure that matters were put right, as will be outlined later. However, in the context of the case pleaded by Susan and Orlagh, it is necessary to see whether they received the consideration provided for in the Conveyances executed by them in February 1997 and, if so, from whom.

5.2 Before doing that, however, I propose addressing another issue which was contentious. That is the question of the so called "advances" made to Orlagh and Susan by the Executrix. The Executrix had opened an account entitled "Hilda Mulcahy Executrix Cathal Mulcahy deceased" with ICC Bank, which was a deposit account, the core element of the account number of which was 39819/01, to which I will refer as the Executor's Account. On 23rd February, 1989, the Executrix wrote to ICC Bank, referring to the Executor's Account, requesting that the sum of US$15,000 be transferred to an account in New York for the account of Susan from that account. In the letter she stated that Susan, who had been resident in the USA since June 1980, was a beneficiary under the will of the Testator and that the sum of US$15,000 represented a portion of the inheritance payable to her on the death of the Testator. It seems to me that that letter unequivocally establishes that the sum of US$15,000 was an advance to Susan of her entitlement under the estate of the Testator.

5.3 On 25th November, 1992, the Executor's Account was debited with a payment of IR£75,000, being the payment which was referred to as an advance to Orlagh in the letter of 5th August, 1996. I have already referred to the equivocation in that letter as to whether the sum in question was part of her inheritance from the Testator or a gift to Orlagh from her mother, the Executrix. Orlagh's evidence was that she understood it to be a gift from her mother to enable her to buy her first flat. According to Orlagh that money came to her via an account in her mother's name in a bank in London. It would appear that IR£50,000 of the sum transferred out had been lodged by the Executrix into the Executor's Account from her own personal deposit account on 24th November, 1992 to facilitate the transfer. I think that it is probable that what the Executrix intended was to make an advance to Orlagh of the sum in Pounds Sterling which eventually passed from her bank account in London to Orlagh in respect of her entitlement under the residuary clause in the Testator's will.

5.4 I now propose considering what happened in January 1997, following the meeting at Christmas 1996, in relation to the residuary estate of the Testator other than his half share in No. 26. I propose to do so by reference to Susan's position primarily. The following transactions were effected:

> (a) Shares which had been in the name of the Executrix, in that capacity, were transferred into the name of Susan, being shares quoted on the Irish Stock Exchange (Bank of Ireland shares) and shares quoted on the London Stock Exchange (Abbey Plc shares). The shares were then sold via Fexco Stockbroking Ltd. and yielded sums of IR£66,685.77 and IR£2,588.53 in late January and early February 1997. These sums were lodged to a deposit account with ICC Bank, which was in the name of Susan, the core of the account number being 65632/02. That was the account which was subsequently operated on foot of the application form/mandate which Susan signed and returned with the executed Conveyance in February 1997, in which she authorised ICC Bank to act on the instructions of herself or of the Executrix. The proceeds of the shares ended up in that account before the mandate arrived from New York and this was the subject of some debate at the hearing of the proceedings. However, for the purposes of the issues in the proceedings, in my view, that is of no relevance. The address given in the mandate for correspondence was "c/o Mulcahy Robinson" and the address which appeared on the account was "c/o Rowena Mulcahy, Mulcahy Robinson Solicitors".
>
> (b) Up to 19th June, 1998 the only movements on account 65632/02 were crediting of deposit interest. On 19th June, 1998 that account was debited in the sum of IR£71,428.57, which was a transfer to the Executrix's personal deposit account. That sum represented a sum of US$100,000 transferred by the Executrix to Susan in June 1998. Susan's evidence was that she received the money from her mother but that she understood it to be a gift. Susan's evidence was that her mother told her that she had given money to Orlagh as a gift from herself and that she was giving that money to Susan as a gift. The Executrix told her that "she was not going to hold a mortgage for [Susan]", because it would "just cause a tax problem". While I accept that Susan may not have understood this to be the case, I believe that the proper inference to draw is that the Executrix was making an advance to Susan in respect of her share of the estate of the Testator.
>
> (c) There was a small balance left in account 65632/02 (IR£3,578.05), on which further interest accrued up to March 1999. At that stage the then balance was amalgamated with a small balance from another account in Susan's name (account 65632/01), which, on evidence, I am satisfied had nothing whatever to do with the estate of the Testator. Interest continued to accrue on the amalgamated account until July 2000, when the final balance (IR£3,981.90, equivalent to €5,055.96) was transferred to the Executor's Account.
>
> (d) The Executrix effectively closed the Executor's Account No. on 14th July, 2000, having first transferred to it monies from her own personal deposit account (IR£146,249.59). She had also transferred monies from the account which had been set up in the name of Orlagh in January 1997 to receive the proceeds of the sale of the shares which had been

transferred to Orlagh following the agreement at Christmas 1996, namely, shares in Bank of Ireland, which yielded IR£26,568.82, and shares in Smurfit Group, which yielded IR£6,267.42. The Executrix distributed the balance in the Executor's Account to four accounts, an account having been opened in her name and the name of each of her four children, as follows:

Account 415983 with Susan: IR£35,770

Account 415984 with Anna: IR£93,166

Account 415985 with Orlagh: IR£41,574

Account 415986 with Kieran: IR£28,067

That exercise reflected what was proposed by way of distribution of the residue of the estate of the Testator in the letter of 5th August, 1996, save that it took account of the following matters:

(i) that Anna had retained her one undivided eight share in No. 26, as had Kieran, which partially satisfied their respective shares of the residue, and

(ii) that other assets of the residuary estate, which would have otherwise been distributed to Kieran in satisfaction of the remainder of Kieran's share had been transferred to Susan and Orlagh in discharge of the consideration due by Kieran to them under the Conveyances of their respective interests in No. 26.

However, it is absolutely clear on the evidence that neither Susan, Orlagh nor Anna was informed of the opening of the joint accounts at the time they were put in place.

(e) In relation to the joint account in the name of the Executrix and Susan, interest accrued on it until January 2004, although, as Susan pointed out, DIRT was deducted from the interest earned from April 2002 onwards. I accept Susan's evidence that she knew nothing about the existence of this account until the time of her mother's death at the beginning of 2006. Her evidence was that subsequently she withdrew most of the balance which remained in it, which she thought was around €50,000. The position was the same in relation to the joint accounts opened in the names of the Executrix and Orlagh and of the Executrix and Anna; they did not discover the existence of the accounts until years later. The contact address on each of the three joint accounts involving Susan, Anna and Orlagh was the home address of the Executrix, Heidelberg.

5.5 As the foregoing exercise illustrates, as regards the consideration for the Conveyance by Susan of her interest in No. 26 to Kieran, the money trail does lead to Kieran, albeit indirectly, in that assets of the residuary estate to which he was entitled were transferred to Susan. A similar exercise would illustrate that the consideration for the Conveyance by Orlagh came from Kieran in the same way.

6. The dispute

6.1 As I have recorded, Anna never received the "full update of the outstanding residue" of the Testator's estate which she had sought in her letter of 17th November, 1997 to the Executrix. Her evidence was that she and the Executrix drifted apart because her mother had put a lot of pressure on her to sign over her one eight share of No. 26 and, when she did not, her mother was not speaking to her. However, after about two years Anna gave birth to a daughter and at that stage, as she put it, there was a rapprochement with the Executrix. Around the same time, towards the end of 1999, Anna visited Susan in the United States. The information Susan obtained from Anna at that stage and subsequently triggered the dispute which gave rise to these proceedings. Anna had obtained a copy of the Testator's will from the Probate Office in 1997 and became aware of its contents. Subsequently, she sent Susan a copy of the will and a copy of the letter of 5th August, 1996.

6.2 Susan spent Easter 2000 with her mother in Dublin. At that stage, Orlagh had already taken up residence in Dublin. Susan's evidence was that she learned from the Executrix that she was never going to move into No. 26. She asked to meet Kieran to discuss the matter. Present at the meeting were Susan, Orlagh, the Executrix and Kieran. Susan's evidence was that she and Orlagh told Kieran that, as the deal was never going through, they wanted the documents they had signed back, because nothing had happened and nothing was going to happen. Her evidence was that his response was that he was not sure if that could be done but he would revert to her. Orlagh corroborated that version of what happened at the meeting, save that she added that Kieran stated that he had to consider the position from a tax perspective. Kieran's account of what happened at the meeting was that Susan stated that the Executrix wanted to live alone and she and Orlagh wanted to "undo" the transaction, to which Kieran responded that the transaction had been completed and that he had been paying income tax on the rent since 1997 and that he was not going to "undo" it.

6.3 It is clear on the evidence that Kieran took over liability for the tax on the rent accruing from the two undivided eight shares of No. 26 which were conveyed to him by Orlagh and Susan for the tax year 1997/1998 and the subsequent tax years. Kieran and his family and the Executrix never moved into No. 26, which remained tenanted. It is worth recalling that the two Conveyances executed by Orlagh and Susan in February 1997 had not been presented for stamping and had not been registered by Easter 2000. It is probably no coincidence that the Conveyances were lodged for stamping in July 2000, around the same time as the joint accounts in relation to the residue of the Testator's estate, to which I have referred earlier, were opened.

6.4 Although the battle lines between the proponents in these proceedings were signposted, if not drawn, at Easter 2000, very little happened until 2004. In the interim, the Executrix was ill. However, by mid-2004 the Executrix appeared to have aligned with her daughters. Prior to that, she had instructed a firm of solicitors. I would infer that that occurred on the advice of Anna. The firm, John Coffey & Co., by letter dated 21st May, 2001, wrote on her behalf to Kieran in relation to, *inter alia*, No. 26. Two issues were raised in that letter in relation to No. 26. The existence of the Assent dated 9th January, 1986 had obviously come to Anna's attention and confirmation was sought that neither Kieran, Susan, Anna nor Orlagh had disposed of, or agreed to dispose of their respective interests in No. 26. Secondly, reference was made to the lease dated 8th March, 1983 of the bulk of No. 26, that is the lease to Brady Shipman Martin, and confirmation as to the amount of the rent then currently payable in connection with the premises by the tenant was sought. It was Anna who accompanied the Executrix to her meeting with Mr. Coffey. I think the correct inference to draw from the evidence is that the involvement of Mr. Coffey arose from inquiries conducted by Anna in relation to the administration of the estate of the Testator. The letter of 21st May, 2001, which presumably was based on her instructions to the solicitors, would seem to suggest that the Executrix did not have a great understanding of the effect of the execution of the Assent by her, or her involvement in the Conveyance by Susan to Kieran in February 1997 to rectify the Assent, or the share sales in 1997, or what had

transpired in July 2000 in relation to the monies with ICC Bank, which had been part of the residuary estate of the Testator.

6.5 In August 2004 Kieran was sent a letter signed by Susan, Orlagh, Anna and the Executrix. The evidence suggests that the letter was drafted by Anna with an input from Susan and Orlagh. As regards No. 26, the letter stated:

> "On 24th of April 2000, Mummy told you that she had no plans to move into Temple Road and live there with you and your family. She, Susan and Orlagh asked you (*sic*) abort the sale of Susan and Orlagh's shares in Temple Road to you – a transaction for which incidentally, they have not been paid. It was clear at that time that they had only agreed to sell their share to you in 1997, in order to facilitate Mummy's moving into Temple Road with you and the family. Her subsequent decision not to do so, effectively negated the reason for the sale."

There was no suggestion in the letter that the sale by Susan and Orlagh of their respective interests in No. 26 was conditional. On the contrary, the letter recognised that the transactions had to be "undone" and it was suggested that they "could easily have been undone" after Easter 2000, because the Conveyances had not been registered.

6.6 Having raised other issues in relation to the administration of the Testator's estate in the letter of August 2004, it was stated that the authors intended to instigate a full and proper review of what actually happened to the Testator's assets and to distribute them fully. From the tone of the letter, the impression one gets is that it was an expression of the views of Anna, Susan and Orlagh, rather than the views of the Executrix, notwithstanding that it was signed by the Executrix. In any event, Kieran did not respond to Susan, Orlagh or Anna.

6.7 In September 2004 the Executrix instructed a firm of solicitors, Paul O'Sullivan and Co., to advise her. At the same time, an accountant and tax adviser, Mr. Tom O'Sullivan, who was not related to Mr. Paul O'Sullivan, was appointed to prepare a review and report on the assets and income and the taxation of the estate of the Testator. Mr. Tom O'Sullivan's report came to hand in early March 2005. Prior to receipt of the report, Orlagh and Susan had instructed the firm of solicitors who are acting for them in these proceedings, Harris Walsh, now Keith Walsh Solicitors, in relation to their complaints. Harris Walsh wrote to Kieran on 25th February, 2005 and sent a copy of the letter to the Executrix. In that letter Kieran was accused of intermeddling in the estate of the Testator, giving misleading advice to Susan and Orlagh and also to Anna and the Executrix concerning the purport and intention of the Testator in making his will, and securing for himself, as a result of misinformation and misrepresentation of the facts, the execution of the two Conveyances by Susan and Orlagh. In the letter, Kieran was asked to confirm his agreement to a full investigation of the administration of the Testator's estate, a full accounting for its assets and income and the setting aside of the two deeds of Conveyance.

6.8 The solicitors for the Executrix, Paul O'Sullivan & Co., furnished a copy of the report of Mr. Tom O'Sullivan to Harris Walsh on 3rd March, 2005 and stated that the Executrix intended distributing the estate "as per the breakdown in the accounts shortly". That report was not put in evidence. In the letter, the wish of the Executrix that Orlagh, Susan, Anna and Kieran would come together to discuss matters with a view to appreciating each others' point of view and sorting matters out without dragging her, the estate and themselves into costly litigation and further bitterness was set out. It is regrettable that the parties were unable to fulfil their mother's wish, particularly, as these proceedings on their own were at hearing for eleven days, notwithstanding that the only witnesses who testified were the four siblings.

6.9 Subsequently, by letter dated July 2005, Paul O'Sullivan and Co. informed Mulcahy Robinson on behalf of Kieran, Harris Walsh on behalf of Susan and Orlagh and Anna that the Executrix was "unhappy about aspects of the recording, documenting and classification of certain figures in the accounts and that she required the return of documentation pertaining to the estate of the Testator". She was contemplating seeking the directions of the Court in relation to the finalisation of the distribution of the estate. The letter stated that the Executrix was horrified about "the wrangles and bitterness" that had arisen in relation to No. 26. The letter also stated that the Executrix wanted to convene a meeting by early September with all her children and their legal representatives to distribute the estate of the Testator by agreement to end the sorry situation and the disputes in the family if possible. Unusually, the Executrix co-signed that letter to confirm its contents.

6.10 These proceedings were initiated by a plenary summons which issued on 25th August, 2005, but was not served at that time. Kieran was informed of the proceedings in a letter dated 15th November, 2005 from Harris Walsh, which recorded that he had not replied to the letter of 25th February, 2005. He did reply to the letter of 15th November, 2005 by letter dated 25th November, 2005. A matter of some controversy at the hearing was that he stated in the letter that he had not at any time filed tax returns on behalf of Orlagh or Susan and had not undertaken any acts on their behalf. He stated that it was the Executrix who had sole responsibility for the administration of the estate of the Testator and that she had been in sole control of all the estate's assets since the Testator's death. I have absolutely no doubt that, until she instructed Paul O'Sullivan & Co., the Executrix acted in the administration of the estate of the Testator in accordance with guidance from Kieran and that the administrative functions necessary to give effect to that guidance were implemented by Kieran and Mrs. Mulcahy. I so find, although there was clearly an element of interference by Anna from around 2000. Indeed, the Executrix received advice from Kieran in relation to the appointment of an accountant and tax adviser in September 2004, although I have absolutely no doubt that the choice of Mr. Tom O'Sullivan was her choice.

7. The case and the answer to it as pleaded
Statement of claim

7.1 In the statement of claim, which was delivered on 29th May, 2006 after the death of the Executrix, it was alleged that Kieran represented to Orlagh and Susan that the purpose of, and the sole reason for making, the proposal he made at the meeting at Christmas 1996 that Orlagh and Susan should assure their respective interests in No. 26 to him for a consideration based on a valuation which he had obtained, was to enable the Executrix to reside with him and his family in No. 26, that the proposal was what the Executrix wanted and that, if implemented, it would enable him to look after the Executrix as she became older. It was further pleaded that Kieran indicated that the implementation of the proposal would be conditional upon:

> (a) all of his siblings agreeing to the same; and
>
> (b) the tenants of No. 26 vacating the premises.

7.2 It was pleaded, in relation to the manner in which each of Orlagh and Susan executed the Conveyances in issue, that –

> (a) the Executrix and Kieran exerted considerable emotional pressure, which amounted to duress and/or undue influence

on each to agree to the proposal;

(b) Kieran did not suggest that either should seek independent legal or other professional advice; and

(c) each executed the relevant Conveyance without seeking legal advice in relation thereto or an independent valuation of her interest in No. 26 and without understanding the true nature and effect of the Conveyance.

It was further pleaded that by Easter 2000 neither Orlagh nor Susan had received nor was aware of having received payment in respect of the interest each conveyed.

7.3 It was pleaded that both Orlagh and Susan had been induced to execute the relevant Conveyance by misrepresentations made by Kieran as to the reason for executing the same, on the basis that the Executrix had never wanted to move to No. 26. Alternatively, Kieran knew that each executed the relevant Conveyance in the belief that the sole purpose was to enable him to provide a home for the Executrix with his family and, insofar as each was mistaken as to the purpose, it would be unconscionable to allow Kieran to profit from that mistake and retain the benefit conferred by the Conveyances. An alternative plea was that each Conveyance was executed pursuant to an agreement that each was conditional upon No. 26 being used as a home for Kieran and the Executrix for as long as she should live but, as a result of an error, neither conveyance reflected that condition.

7.4 It was also pleaded that each Conveyance constituted an improvident transaction resulting from an inequality of bargaining position and as such should be set aside.

7.5 The reliefs sought were:

(a) an order setting aside each of the Conveyances on the grounds that its execution was procured by misrepresentation and/or undue influence and/or duress;

(b) in the alternative, an order for rectification to incorporate as a condition the requirement that the premises be used by Kieran as a home for his family and for the Executrix for as long as she should live, coupled with either a declaration that the failure to comply with the condition gave rise to a right of re-entry or an entitlement on the part of Orlagh or Susan to her one eight interest conveyed by reverter; or

(c) alternatively, an order setting aside the Conveyances on the grounds that, in the absence of such condition, each constitutes an unconscionable bargain and/or an improvident transaction from the perspective of Orlagh and Susan.

Defence

7.6 In the defence delivered on 14th July, 2006, the various allegations of wrongdoing made against Kieran in the statement of claim were traversed. In particular, it was denied that the transfers by Orlagh and Susan of their respective interests in No. 26 were conditional on all three siblings agreeing to convey or on the tenants vacating No. 26.

7.7 The essence of the defence was that the Conveyances were executed to regularise and provide for the distributive shares of the beneficiaries arising on the death of the Testator, whose estate had remained partially unadministered. In this context, it was pleaded that it was necessary to take account of, *inter alia*, "the need to provide for [the Executrix] who was intended to have available to her the rental from [No. 26]". The arrangement was described as being in the nature of a family arrangement designed to meet the different needs and wishes of the parties and to make adequate provision for the Executrix.

7.8 It was specifically pleaded that it was the substantial change in property prices over the years following 1997 which motivated Orlagh and Susan in seeking to have the Conveyances set aside. In the context of asserting that each of Orlagh and Susan was fully aware of the nature and effect of the transaction, there was a further reference to "the alteration in property values" as motivating these proceedings.

7.9 Unconscionable and unreasonable delay amounting to *laches* was pleaded as a defence to the relief claimed by Orlagh and Susan, insofar as it is equitable relief.

Reply

7.10 The reply, which was delivered on 3rd February, 2010, contained the usual joinder of issue. However, it also introduced the concept of a "Secret Trust", which I assume was provoked by the assertion that provision had to be made for the rental from No. 26 being available to the Executrix. What was pleaded by way of special reply was that the Testator's wishes were not communicated to Orlagh and Susan during the Testator's lifetime and they were not bound by them, but insofar as they had been communicated to Kieran, he was bound by them. The true nature of the arrangement under which the income of the residue was not distributed to the residuary beneficiaries after the death of the Testator is one of the factual controversies which arose on the evidence, which I now propose to explore.

8. Factual controversies: findings

8.1 The nature of the arrangement under which the Executrix received the income of the residue during her lifetime coupled with the understanding of Susan and Orlagh of its nature is of relevance insofar as it throws light on their understanding of their entitlements in February 1997, when they executed the Conveyances in favour of Kieran. Both Susan and Orlagh were adamant that a few days after the Testator's funeral at a meeting at which the Executrix was present they were told that the assets of the Testator's residuary estate were subject to a trust in favour of the Executrix during her life and that, following her death, those assets would be distributed equally amongst the four siblings. Both were adamant that they were told that there was "a trust". Anna's evidence was that her understanding was that the Testator left the bulk of his estate to his four children and the benefit was to be for the Executrix during her life. Her evidence was that she first became aware of the actual contents of the will in 1997, when she obtained a copy from the Probate Office. She expanded on that by stating that her understanding was that effectively the children would be "remaindermen", that the Executrix would have the use of the assets during her lifetime, but when she died the assets would already be in the names of the children and, therefore, they would not be inheriting them a second time. Her understanding was that that was because the Testator "had left it that way" and had wanted the Executrix to have the benefit of the assets. Kieran denied that a meeting, as described by Susan and Orlagh, took place shortly after the Testator's death at which he told his sisters that the assets of the residuary estate were to be held in trust for the Executrix for her life. His evidence was that his understanding of the

situation came from the Executrix who, approximately a week after the Testator's death, explained to him that the Testator had left a will and that what the Testator had wanted was that the benefit of the income of the residuary estate should be made available to her, if she had need of it.

8.2 Having regard to the totality of the evidence, I do not think that the recollection of Susan and Orlagh that they were told by Kieran that the residuary estate was subject to a trust in favour of the Executrix is correct. As I have said at the outset, it was common case that the reason the Testator made a will on the day of his death in which he limited the provision made for the Executrix was to minimise her exposure to inheritance tax. I have no doubt that, as an accountant, Kieran would have understood that the imposition of a trust by the Testator (and the concept of a secret trust implies the imposition of the trust by the Testator) under which the Executrix would have a legal entitlement to the income of the residuary estate for her life would have inheritance tax ramifications on her death. I think the probability is that the Executrix conveyed to all of her children what the Testator's objective was in making the will on the day of his death and what he had wished his children would do in relation to the property he had devised to them during the lifetime of the Executrix. I think the children generously agreed that the income of the residuary estate should be available to the Executrix during her life. That is consistent with what happened. The Assent is relation to No. 26 was put in place in 1986. Notwithstanding that, the Executrix received the rental income thereafter. I think the proper construction of what happened is that, insofar as she availed of it, the Executrix was the beneficiary of a gift of the income of the residuary estate from her children, which was in accordance with the Testator's wishes, rather than a beneficiary under a secret trust of the residue imposed by the Testator. Even after she obtained a copy of the will in 1997 and became aware of the existence of the Assent, probably around September 2004, Anna abided by the arrangement which was in place since 1982. This is illustrated by the fact that, when in 2005 she received one-eight of the rent payable in respect of the commercial letting in No. 26 directly from the assignee of Brady Shipman Martin, she forwarded the cheque to the Executrix and requested that it be lodged in the joint account in ICC Bank, which had been opened in July 2000 by the Executrix in the joint names of the Executrix and Anna.

8.3 On the evidence, I think it is probable that Susan and Orlagh were not told that the Assent, which included their respective one undivided eight shares in No. 26, was executed in 1986 and I think it is probable that they were unaware of its existence when they executed the Conveyances in February 1997. While the existence of the Assent would have been obvious to a person with legal training reading the Conveyance which was executed by Susan and dated 19th February, 1997, I am satisfied that, when she executed that Conveyance, Susan had no understanding or appreciation of the title position in relation to the one undivided eight share of No. 26 devised to her in the residuary clause of the Testator's will, save that it was hers to sell. Moreover, I think it is probable that neither Susan nor Orlagh were ever told of the manner in which the rental income of the undivided moiety of No. 26, which passed under the Testator's will, was being accounted for to the Revenue Commissioners up to and including the 1996/1997 fiscal year and I am satisfied that neither had any understanding or appreciation that tax returns in respect of her share were being made in her name. After February 1997, neither was kept informed of how the proceeds of the sale of the shares, of which I am satisfied each was informed in the letters dated 21st January, 1997 from Kieran, were being dealt with, nor given details of the account in her name in ICC Bank.

8.4 While the failure to furnish all of the relevant information to Susan and Orlagh as residuary beneficiaries may not have been deliberate, it did unfortunately result in them being deprived of information to which they were entitled. I have absolutely no doubt that it was Kieran, rather than the Executrix, who assumed responsibility for dealing with the tax amnesty issues, making the tax returns in the name of his siblings, arranging for the opening of the various accounts with ICC Bank in the sole name of Susan and Orlagh in February 1997 and the accounts in the joint names of the Executrix and each of the children in July 2000 and the lodgments into the joint accounts. On the evidence, I am satisfied that the Executrix would not have been capable of dealing with the complexities of those transactions.

8.5 I am satisfied that by August 1996, when he wrote the letter of 5th August, 1996 to Anna, Kieran had decided that he wanted a fractional interest in the undivided moiety of No. 26 which passed under the residuary clause of the Testator's will appropriated to him in satisfaction of his share of the assets of the residuary estate, which would have necessitated the shares of Susan, Orlagh and Anna being satisfied out of the other assets of the residue, namely, cash and shares. As I have already inferred, I believe that when he wrote the letter of 5th August, 1996 he overlooked the fact that the Assent had been executed in 1986. Even though Anna had rejected Kieran's proposal before Christmas of 1996, Kieran was still anxious to acquire the respective shares of Susan and Orlagh. As I have recorded, his evidence was that the proposals put to Susan and Orlagh at the meeting, at which the Executrix was present, at Christmas 1996 reflected the proposal contained in the letter of 5th August, 1996 to Anna. On the basis of the finding I have made, that that letter was probably not copied to Susan and Orlagh, it is understandable that the recollection of Susan and Orlagh did not corroborate that.

8.6 In endeavouring to ascertain what was agreed between Susan and Orlagh, on the one hand, and Kieran, on the other hand, at Christmas 1996 it is necessary to assess the evidence against the case pleaded by the plaintiffs. It has been pleaded that on that occasion it was represented that the sole purpose of the proposal put by Kieran was to enable Kieran and his family and the Executrix to live in No. 26.

The evidence indicates that, after Kieran wrote the letter of 5th August, 1996 to Anna, a new factor entered the consideration of the ultimate destination of the assets of the Testator's residuary estate in October 1996 – the wish of the Executrix to recover possession of No. 26 and to move there with Kieran and his family. I find it impossible to determine to what extent that wish was encouraged by Kieran. However, a selling point in relation to Kieran's proposal to Susan and Orlagh certainly seems to have been that the objective was that Kieran and the Executrix would obtain vacant possession of No. 26 and live together there. Nonetheless, I cannot find that, as a matter of probability, Kieran indicated that the implementation of the proposal would be conditional on Anna's agreement to sell her interest to him or on the tenants of No. 26 vacating the premises. The only finding which is open, in my view, is that the sales were not conditional and that, as Kieran testified, the proposal made by him was that the shares which were held by the Executrix and which were part of the residuary estate of the Testator would be allocated to Susan and Orlagh in satisfaction of the consideration due from Kieran to them in respect of their respective interests in No. 26, but that the shares would be sold and the proceeds lodged to accounts in the name of each and that the Executrix would have recourse to each account during her life if the need arose. I find that that was the proposal which was made to Susan and Orlagh and that was the proposal which they accepted and which gave rise to the agreement which was implemented.

8.7 As to the assertion by Kieran that his proposal in December 1996 reflected the proposal in the letter of 5th August, 1996, because of the existence of the Assent, the existence of which I assume Kieran had become aware, the scheme envisaged in the letter of 5th August, 1996 could not be implemented by way of a distribution of part of the residuary estate of the Testator by the Executrix by appropriating two undivided eight shares in No. 26 to Kieran in satisfaction of his share and shares and cash in an equivalent amount to Susan and Orlagh. Because of the existence of the Assent, in order for Kieran to get title, each of the Conveyances executed in February 1997 was expressed to be a Conveyance for value to Kieran in consideration of IR£33,750. As I have found, it is not the case that Susan and Orlagh did not get the consideration provided for in each Conveyance. While it is true the consideration did not

come directly from Kieran to each of them, it came indirectly in that shares to which Kieran would have otherwise been entitled were transferred to them and the proceeds of the sale of the shares put in the accounts in ICC Bank in their respective names. Accordingly, in my view, the proposal made by Kieran, which was accepted by Susan and Orlagh, was implemented by the execution of the Conveyances in February 1997 by Susan and Orlagh and by the transfer of shares by the Executrix to Susan and Orlagh and the lodgment of the proceeds of the sale of those shares in accounts in the name of Susan and in the name of Orlagh with ICC Bank, in accordance with that was agreed. No circumstances exist which could give rise to the necessity for an order for rectification.

8.8 That leaves the claims that the Conveyances should be set aside on the grounds that they were procured by –

(a) misrepresentation,

(b) undue influence or duress, and

(c) that each constituted an unconscionable bargain or improvident transaction

to be considered. I propose considering each of those grounds in turn.

9. Misrepresentation

9.1 It was submitted on behalf of Susan and Orlagh that the following representations, which were intended to induce them into the transaction, were made to them:

(a) that the executed Conveyances would not be acted upon and would have no legal effect until –

(i) all parties signed, which I take to mean until all three siblings signed over their respective one undivided eight shares to Kieran, and

(ii) until Kieran had made arrangements that vacant possession be obtained, and

(b) that the Executrix would move into No. 26 with the defendant and be provided for there for her lifetime.

I have already found that the agreement entered into was not conditional on the matters referred to at (a). Indeed, in his evidence Kieran indicated that he would not have entered into anything as "nonsensical", because Anna was not going to sell and there was no guarantee that the tenants in No. 26 could be persuaded to sell their interests. As far as Kieran was concerned, the transaction was a straightforward sale of two undivided eight shares in return for cash out of the estate which was due to him as a "tidy up" exercise.

9.2 On the evidence, I do not think it was represented by Kieran that the sole purpose of his proposal was to enable the Executrix to reside with him and his family in No. 26. Kieran's evidence was that the proposal was accepted by Susan and Orlagh for the purpose of tidying up the Testator's estate and the option of No. 26 being used as a home for the Executrix and Kieran and his family only arose later that evening. Notwithstanding that, I am of the view that it is likely that the possibility of that option materialising was used as a selling point by Kieran and, probably, by the Executrix to persuade Susan and Orlagh to agree to the proposal. What happened subsequently is consistent with this. In each of the letters dated 21st January, 1997 from Kieran to Susan and Orlagh there is reference to an incident in the recent past which gave rise to concern on Kieran's part in relation to the Executrix living on her own in Heidelberg. In the letter to Orlagh he stated that the incident had motivated him "to get on with what we discussed over Christmas" and he made a similar remark in the letter to Susan. It is also consistent with what was stated by Kieran in his letter dated 15th March, 1997 to Anna and the postscript thereto added by the Executrix. As I have indicated earlier, Kieran made it quite clear in that letter that he wished to acquire Anna's interest so that the Executrix could live with him, his wife and family in No. 26. Earlier in the letter he had stated that he had discussed the matter in detail with Susan and Orlagh and the Executrix over Christmas and that neither Susan or Orlagh wished to hinder him "in any way in his plans to care for the Executrix".

9.3 It was submitted on behalf of Kieran that a statement of future intention, as distinct from present fact, would only constitute a misrepresentation if the statement of intention was not honestly held at the time the statement was made, citing the commentary in McDermott on *Contract Law* at para. 13.12. The position adopted on behalf of the plaintiffs was that the Executrix and Kieran never moved into No. 26 and, accordingly, the representation made by Kieran was not true, without characterising the representation as either innocent or fraudulent or dishonest. Kieran's evidence was that he did not see the move to No. 26 as being a "big option" because of the difficulty in getting vacant possession from the tenants and the likely cost of refurbishing, so that the move would have been difficult and expensive, but also could have been very long drawn out. The thrust of Kieran's evidence was that it was the Executrix who was keen to move to No. 26. Apart from that, Kieran's evidence, as I have recorded above, was that he had already embarked on obtaining planning permission for the adaptation of his existing home to suit the needs of the Executrix, if it became necessary for her to come to live with him and his family.

9.4 Although, on the evidence, I have come to the conclusion that Kieran used the stated purpose of getting vacant possession of No. 26 and moving his family there to live with the Executrix as a selling point, that neither amounted to a promise that it would be done nor a statement of intention which amounted to a statement of existing fact. In this connection, McDermott (*op. cit*. at para. 13.14) refers to the following passage from the speech of Lord Wilberforce in *British Airways Board v. Taylor* [1976] 1 All E.R. 65 (at p. 68) where it is stated:

> "… the distinction in law between a promise as to future action, which may be broken or kept, and a statement as to existing fact, which may be true or false, is clear enough. There may be inherent in a promise an implied statement as to a fact, and where this is really the case, the court can attach appropriate consequences to any falsity in, or recklessness in the making of, that statement. Everyone is familiar with the proposition that a statement of intention may itself be a statement of fact and so capable of being true or false. But this proposition should not be used as a general solvent to transform the one type of assurance with another; the distinction is a real one and requires to be respected … ."

McDermott observes that the reason for this caution is twofold: it is difficult to be sufficiently sure about a person's intention to reach a conclusion that in many cases will be tantamount to a finding of fraud; and the law starts from the premise that a representation is different from a promise.

9.5 The reality of the situation in relation to No. 26 in 1996 and subsequently, which I have no doubt was fully appreciated by Kieran at all material times, and which was endorsed in stringent terms in the letter of 18th June, 1997 from Colliers Jackson-Stops, was that

Kieran could not promise to move to No. 26 and provide a home there for the Executrix in her old age. Moreover, there could not be inherent in what was discussed at the meeting at Christmas 1996 an implied statement that, as a matter of fact, the move to No. 26 by Kieran and his family with the Executrix would happen.

9.6 Therefore, the claim to set aside the Conveyances, which were completed transactions, based on misrepresentation fails.

10. Undue influence

10.1 It was submitted on behalf of Susan and Orlagh that there was evidence before the Court of actual undue influence exerted by both Kieran and the Executrix on the plaintiffs. On the other hand, it was submitted on behalf of Kieran that there was no evidence before the Court which would support a finding of actual undue influence in accordance with the test laid down in *Contractors Bonding Ltd. v. Snee* [1992] 2 NZLR 157 at 166, under which it would have to be shown that –

> (i) Kieran or the Executrix or both had the capacity to influence Susan and Orlagh,
>
> (ii) the influence was exercised,
>
> (iii) its exercise was undue,
>
> (iv) its exercise brought about the execution of the Conveyances, and
>
> (v) the transaction was to the manifest disadvantage of Susan and Orlagh.

As counsel for Susan and Orlagh pointed out, there is authority which suggests that the last component of that test, the manifest disadvantage requirement, does not apply in the case of actual undue influence (*cf. IBC Mortgages v. Pitt* [1994] 1 AC 200). I find that it is unnecessary to address that controversy. I am not satisfied, on the evidence, that pressure, either emotional or otherwise, was exerted on Susan or Orlagh by either Kieran or the Executrix to execute the Conveyances. I make that finding, notwithstanding that I am satisfied that pressure was subsequently exerted on Anna by both Kieran and the Executrix to sell her interest in No. 26 to Kieran or the Executrix, but she did not succumb.

10.2 However, I am satisfied that the evidence does give rise to a presumption of influence. Counsel for Kieran submitted that inter-sibling relationships do not fall within the category of relationships which give rise to a presumption of undue influence, citing the judgment of Budd J. in *Gregg v. Kidd* [1956] I.R. 183. Budd J. stated (at p. 194):

> "The authorities cited leave no doubt that the principle can be extended to the relationship of brother and sister, where a sister has for one reason or another acquired an influence or dominion over a brother and uses that influence improperly for her own ends. Likewise it can be extended in similar circumstances to the relationship between uncle and nephew. The influence may arise or be acquired in many ways, such as through disparity of age or the mental or physical incapacity of the donor or, indeed, out of a mere dependence upon the kindness and assistance of another. To bring the principle into play it must be shown that the opportunity for the exercise of the influence or ascendancy on the donor existed, as where the parties reside together or meet frequently. While close family relationship creates a situation where influence is readily acquired, mere blood relationship is not sufficient of itself to call the principle into play; it must be shown that the actual relations between the parties give rise to a presumption of influence."

10.3 The last two sentences of that passage were relied on by counsel for Kieran. While it is true that Susan and Orlagh met Kieran infrequently and there was little communication between them, the situation which arose following the death of the Testator in relation to the administration of his residuary estate gave rise to very special circumstances. Susan and Orlagh, as beneficial owners of half of the residuary estate between them, and, following the execution of the Assent, as the legal and beneficial owners of one undivided eight share each of No. 26, effectively relinquished, not merely administration, but also distribution of the income, of their respective interests in the assets of the residuary estate, including No. 26, during the lifetime of the Executrix to the Executrix, who, I am satisfied, relied on Kieran to guide her in such administration and distribution, thus creating, in relation to the residuary estate, circumstances which gave rise to a relationship of influence by the Executrix and Kieran over Susan and Orlagh. It is clear on the evidence that both Susan and Orlagh reposed trust and confidence in the Executrix and Kieran in relation to their respective interests in the residuary estate. In the circumstances, I consider that a relationship giving rise to a presumption of influence by Kieran over Susan and Orlagh has been established in relation to their respective interests in the residuary estate, in particular in relation to their interests in No. 26 of which they were legal, as well as beneficial, owners.

10.4 That being the case, if it has been shown that a "substantial benefit" was obtained by Kieran at their expense, then the onus lies on Kieran to establish that the Conveyances resulted from the "free exercise of the will of Susan and Orlagh". As to the legal situation arising on the existence of such a relationship of influence coupled with a substantial benefit, the Supreme Court in *Carroll v. Carroll* [1999] 4 I.R. 241 (*per* Denham J. at p. 254) adopted part of the following passage from an earlier edition of Delany on *Equity and the Law of Trusts in Ireland* (4th Ed.) (at p. 682) as the law and applied it:

> "As Dixon J. put it in *Johnson v. Buttress*, the evidence must establish that the gift was 'the independent and well-understood act of a man in a position to exercise a free judgment based on information as full as that of the donee'. The manner in which this presumption may be rebutted relates to two main issues; first, the question of whether independent legal advice has been received and secondly, whether it can be shown that the decision to make a gift or transfer was 'a spontaneous and independent act' or that the donor 'acted of his own free will'. Where independent legal advice has been given, it will tend to rebut the presumption of undue influence, even where the donor is in a particularly vulnerable position vis-à-vis the donee. On the other hand, while it would appear that it is not essential that independent legal advice be given in order to rebut the presumption, the complete lack of any such advice may be a decisive factor in determining whether this will be achieved."

10.5 Returning to the question of whether a "substantial benefit" has been shown, as Shanley J. pointed out at first instance in *Carroll v. Carroll* [1998] 2 LRM 218, the law will not concern itself with insignificant transactions. In this case, the presumption of undue influence only requires to be rebutted if Kieran received a substantial benefit in consequence of the execution of the Conveyances in his favour. The case made on behalf of Susan and Orlagh is predicated on Susan and Orlagh not having received the consideration of IR£33,750 mentioned in each Conveyance, or, alternatively, on any consideration actually received by each not having emanated from Kieran. That, in my view, is a false premise. As outlined above, even though they were not apprised of the existence of the accounts which were opened in ICC Bank in their respective names in February 1997, each of Susan and Orlagh

received indirectly from Kieran the equivalent (or in the case of Orlagh the approximate equivalent) of the consideration mentioned in each Conveyance, as a result of the allocation of shares to each, the sale of the shares, and the lodgment of the proceeds of sale of the shares in those accounts. Accordingly, the only issue which can arise in relation to whether Kieran received a substantial benefit from Susan or Orlagh is whether the consideration given by Kieran was adequate consideration for the interests he obtained. In other words, the only issue which can arise is whether the sum of IR£33,750 represented the value of one undivided eight share of No. 26 in February 1997.

10.6 No oral evidence as to valuation was adduced at the hearing. All the Court has is the evidence which may be deduced from the three valuations which were put in evidence:

> (a) the valuation obtained by Kieran from Palmer McCormick in November 1995, which valued No. 26 at IR£250,000/IR£265,000; and
>
> (b) the valuations obtained by the Executrix for the benefit of Anna in May 1997 which valued No. 26 at IR£300,000 (Colliers Jackson Stops) and IR£325,000 (Hamilton Osborne King).

I am of the view that the opinion furnished by Colliers Jackson-Stops in June 1997 which valued No. 26 at IR£450,000 with full vacant possession is of no relevance, because the *de facto* position was that the interest of the Executrix and the residuary beneficiaries in No. 26 at all material times was an interest subject to the existing lease and tenancies. It is interesting to note that the valuation in 1995 was based on rents accruing from the premises which aggregated IR£26,350 per annum at the time, whereas the valuations carried out in May 1997 were on the basis of the rents accruing being IR£26,401 per annum. It may be that, if No. 26 had been valued in December 1996 or February 1997, the value ascribed to it would have been higher than IR£270,000. Even if one assumes that a professional valuation in that time frame would have yielded a figure of IR£300,000 or even IR£325,000, the reality is that the figure on which the consideration moving from Kieran to Susan and Anna was based was 90% and 83% respectively of those assumed valuations. On the basis of the evidence available, it is not possible to conclude that Kieran obtained a substantial benefit at the expense of Susan and Orlagh in consequence of the Conveyances.

10.7 While, in the absence of a substantial benefit to Kieran, it is not necessary for Kieran to rebut the presumption of undue influence, for completeness I consider it appropriate to record that I am satisfied that, as pleaded, Kieran did not advise either Susan or Orlagh to obtain independent legal advice nor did either of them obtain such advice. However, even if Susan and Orlagh did not have the capacity to, and did not, engage with the archaic legalistic style of the prose in the Conveyances, I am satisfied that each understood the fundamental nature of the transaction she was implementing – that Kieran was getting her one undivided eight share in No. 26 in return for a money payment of IR£33,750.

10.8 Accordingly, the claims to have the Conveyances set aside based on undue influence fail.

11. Unconscionable/improvident transaction

11.1 In *Carroll v. Carroll*, Denham J. outlined the circumstances in which a party to a transaction who is found to be unequal to the other party is entitled to have the transaction set aside in equity by reference to the judgment of Gavan-Duffy J. in *Grealish v. Murphy* [1946] I.R. 35, in which he stated (at p. 49-50):

> "The issue thus raised brings into play Lord Hatherley's cardinal principle (from which the exceptions are rare) that Equity comes to the rescue whenever the parties to a contract have not met upon equal terms, see Lord Hatherley's judgment (dissenting on facts) in *O'Rorke v. Bolingbroke*; the corollary is that the Court must inquire whether a grantor, shown to be unequal to protecting himself, has had the protection which was his due by reason of his infirmity, and the infirmity may take various forms. The deed here was in law a transaction for value: … ; however tenuous the value may have proved to be in fact, and, of course, a Court must be very much slower to undo a transaction for value; but the fundamental principle to justify radical interference by the Court is the identical principle, whether value be shown or not, and the recorded examples run from gifts and voluntary settlements (including an abortive marriage settlement) to assignments for a money consideration. The principle has been applied to improvident grants, whether the particular disadvantage entailing the need for protection to the grantor were merely low station and surprise (though the grantor's rights were fully explained): … , or age and weak intellect, short of total incapacity, with no fiduciary relation and no 'arts of inducement' to condemn the grantee … . Even the exuberant or ill-considered dispositions of feckless middle-aged women have had to yield to the same principle: … ."

Having set out the conclusion of Gavan-Duffy J. in that case, in which he found, without any regard to any question of undue influence, that the plaintiff by reason of his own weakness of mind coupled the deficiencies in the legal advice under which he acted and his unawareness, was entitled to have the improvident settlement in issue in that case set aside, Denham J. stated that, whilst one might not agree with all of the classifications recognised by Gavan-Duffy J., the legal principle was stated clearly and was applicable to the case before the Supreme Court. `

11.2 In applying, in practice, the well established principle recognised in *Grealish v. Murphy* – that Equity comes to the rescue whenever the parties to a contract have not met on equal terms – it is helpful to have regard to what Delany (*op. cit*. at p. 702) has referred to as one of the most comprehensive statements of the essential preconditions for setting aside a transaction on the grounds of unconscionability. That is the following statement from the judgment of Peter Millet Q.C., as he then was, in *Alec Lobb (Garages) Ltd. v. Total Oil Great Britain Ltd*. [1983] 1 WLR 87 (at p. 94 – 95):

> "First, one party has been at a serious disadvantage to the other, whether through poverty, or ignorance, or lack of advice, or otherwise, so that circumstances existed of which unfair advantage could be taken. Second, this weakness of the one party has been exploited by the other in some morally culpable manner … And third, the resulting transaction has been not merely hard or improvident, but overreaching and oppressive. … In short, there must, in my judgment, be some impropriety, both in the conduct of the stronger party and in the terms of the transaction itself … which in the traditional phrase 'shocks the conscience of the court' and makes it against equity and good conscience for the stronger party to retain the benefit of a transaction he has unfairly obtained."

As I have noted in the past, that passage provides helpful guidance for determining whether a transaction should be set aside on the ground of unconscionability and I have no doubt that, if the requirements outlined therein had been applied to the peculiar facts as recorded by Gavan-Duffy J. in *Grealish v. Murphy*, they would have been met. (*c.f. Keating v. Keating* [2009] IEHC 405).

11.3 It is undoubtedly the case that it would have been the proper course if, at all material times after the death of the Testator, Susan and Orlagh had been kept apprised of the manner in which the estate of the Testator was being administered and had been

furnished with copies of all relevant documentation, for example, the will and probate, the Assent, the tax returns made in their names, the accounts opened in their names in ICC Bank and so forth, and I find it quite extraordinary that that was not done. If it had, it might have obviated the sense of grievance which developed on the part of Susan and Orlagh. Responsibility for what I consider to be a serious omission must rest with Kieran, because he was effectively responsible for implementing the steps taken in the course of the administration. He should have ensured that the Executrix passed the relevant information and documentation to his sisters, or, alternatively, he should have done it himself with the consent of the Executrix. The question which has to be addressed in the context of whether the Conveyances amount to unconscionable transactions is whether, by reason of the deficit of information and documentation in relation to the administration of the Testator's estate given to them, by Christmas 1996 and February 1997 Susan and Orlagh were at such a serious disadvantage that Kieran was able to, and did, exploit them in a morally culpable manner.

11.4 Even though Kieran probably had a better understanding of the mechanics of the proposal made at Christmas 1996, which resulted in the Conveyances, than either Susan or Orlagh, so that he had an advantage over them to that extent, I do not think that they were exploited by him in a morally culpable manner. While I have no doubt that, separate and distinct from the wishes of the Executrix to have a home with Kieran and his family in No. 26, which appears to have been first mooted by her in October 1996, it was Kieran's wish to have his interest in the residuary estate of the Testator satisfied by the vesting in him of an interest in No. 26 equivalent to his share of the residue, as the letter of 5th August, 1996 illustrates, there was nothing morally reprehensible in that. Indeed, there was a common-sense basis for, and obvious advantages to all of the residuary beneficiaries in, what Kieran proposed in that letter and subsequently. On the same basis on which I reached the conclusion that there was not a substantial benefit to Kieran from the Conveyances, it is not possible to find that the Conveyances were overreaching or oppressive.

11.5 As I stated at the outset, the issues as to whether the Conveyances can stand at law or in equity are enmeshed with the administration of the Testator's estate. While the report of Tom O'Sullivan was not put in evidence, and, consequently, the Court can only take a broad view of the overall administration of the estate of the Testator, it does seem to me that the manner in which the four joint accounts were set up on 14th July, 2000 envisaged each of the residuary beneficiaries obtaining what he or she was entitled to having regard to the distributions which had already been made, including what effectively amounted to the reversal of the distribution of the one undivided eight shares in No. 26 to Susan and Orlagh in 1986 by the execution of the Conveyances to Kieran for the consideration which was satisfied by the shares, which were subsequently represented by the proceeds of sale thereof. Therefore, in the context of the overall administration of the estate of the Testator, on the basis of the evidence, I cannot find that the consequences of the Conveyances were overreaching or oppressive. However, nothing in this judgment is to be construed as a finding that the estate has been fully properly administered.

11.6 Accordingly, the claim that the Conveyances be set aside as unconscionable transactions fails.

12. *Restitutio in integrum*

12.1 A submission was made on behalf of Susan and Orlagh that *restitutio in integrum* can be achieved with little difficulty on the basis that the four residuary beneficiaries revert to owning an undivided eight share of No. 26 each in accordance with the will of the Testator. That submission, I assume, is also predicated on the proposition that Susan and Orlagh were not paid by Kieran the consideration which was to be paid to them under the Conveyances. They were paid by Kieran, albeit indirectly. Therefore, the Conveyances could not be set aside without that consideration being repaid to Kieran. Moreover, it is clear on the evidence that Kieran has paid the relevant tax due on the two undivided eight shares of the rent accruing from No. 26 since the tax year 1997/1998 and an adjustment would have to be made for that. Given that I am satisfied that this is not a case in which *restitutio* is impossible, if, contrary to the view I have formed, Susan or Orlagh was entitled to have the relevant Conveyance set aside on the ground of undue influence or unconscionability, restitution would have to be made by that party.

13. *Laches*

13.1 Susan and Orlagh first sought to have the Conveyances "undone" at Easter 2000. Over five years elapsed before these proceedings were initiated. However, notwithstanding that delay, if it were the case that either Susan or Orlagh had established grounds for setting aside the relevant Conveyance, and on the assumption that *restituio in integrum* was possible, in the sense that the relevant party could restore Kieran to his previous position by recompensing him for the consideration he paid and the tax he incurred, I do not think it would be inequitable to allow the Conveyances to be set aside because there would be no obvious inequity to Kieran. Accordingly, the claim would not be defeated by *laches*. However, that does not arise, because neither Susan or Orlagh has established a right to have the relevant Conveyance set aside.

14. Order

14.1 The proceedings will be dismissed.