Neutral Citation Number: [2008] IEHC 389

THE HIGH COURT

2006 No. 1784 P

BETWEEN

THE MOTOR INSURERS BUREAU OF IRELAND

PLAINITFF

AND

PAULA STANBRIDGE, AUSTIN STANBRIDGE, LORRAINE STANBRIDGE AND KEVIN STANBRIDGE

DEFENDANTS

Judgment of Miss Justice Laffoy delivered on the 8th day of December, 2008.

Factual Background

1. The following outline of the factual background to these proceedings is based on the facts admitted or proved at the hearing.

Catherine Stanbridge (the deceased) was the wife of the second defendant and the mother of the first, third and fourth defendants. She suffered serious multiple injuries in a road traffic accident on 12th April, 1991 while a passenger in a car driven by the second defendant and owned by the third defendant. At the time of the accident there was no valid insurance in place for the car.

2. In 1993 proceedings were initiated entitled "Catherine Stanbridge (a person of unsound mind not so found), suing by her sister and next friend, Olive Barry, plaintiff and Austin Stanbridge, Lorraine Stanbridge and the Motor Insurers Bureau of Ireland, defendants" (Record No. 1993/7354P) (the 1993 proceedings) in which damages were claimed by the deceased for personal injuries against the defendants as a result of the negligence and breach of duty, including breach of statutory duty, of the second defendant and the third defendant. The second defendant and the third defendant did not enter an appearance to the 1993 proceedings. Judgment in default of appearance was given by order of Johnson J., as he then was, on 27th June, 1994, against the second defendant and the third defendant. As is usual, the judgment was for such amount as the court might assess in respect of the deceased's claim for damages and costs, the assessment "to be had before a Judge sitting alone and set down for hearing accordingly".

3. The action was set down and was listed for hearing on 7th November, 2000. The deceased's claim was compromised by the third defendant to the 1993 proceedings, which is the plaintiff in these proceedings and which I will refer to as "the Bureau". By order made on 7th November, 2000, Johnson J., having been told that an application would be made to have the deceased made a ward of court, approved the settlement and ordered that –

> "the Plaintiff do recover against the Defendants the sum of £917,000.00 and costs of this action when taxed and ascertained to include the costs of assessment against the first and second Defendants and the costs of the Wardship application".

4. It was further provided in the order as follows:-

> "And the Court as a term of the settlement between the Plaintiff and the 3rd named Defendant approves of the assignment to the said third named Defendant of the benefit of the Judgments obtained by the Plaintiff herein as against the First and Second named Defendants on 27th day of June, 1994".

5. The Bureau duly paid the sum of £917,000.00 into court in accordance with the order of 7th November, 2000. Subsequently on 19th September, 2001, the deceased was admitted to wardship. The order of 19th September, 2001, which was made by Butler J., directed that the funds standing to the credit of the 1993 proceedings be carried over to the wardship side to be invested and administered in accordance with the directions of the Registrar of Wards of Court.

6. The deceased died on 9th August, 2005. She died intestate and was survived by her husband, the second defendant, and her three children, the first, third and fourth defendants. On her death, by virtue of the provisions of s. 67 of the Succession Act 1965 (the Act of 1965), the second defendant became entitled to two thirds of her estate and her three children became entitled to the remaining one third equally between them, so that each became entitled to a one ninth share. Letters of administration in the estate of the deceased issued to the first defendant on 13th April, 2006, the second defendant having renounced his right.

7. The only asset of the deceased was the amount standing to her credit in this Court, which, at the date of death, was in the region of €1.064 million. Following the death of the deceased, the solicitor on record in these proceedings for the first and fourth defendants wrote to the Office of Wards of Court by letter dated 16th August, 2005, stating that she acted for the deceased's husband, the second defendant, and her two daughters, the first defendant and the third defendant, and seeking various information, including details of the deceased's assets and liabilities, and asking for a note of the proofs required for "payment out" in the deceased's estate. It was stated that the deceased left no will and the solicitor proposed to take out a grant of administration intestate on behalf of the first defendant.

8. The Bureau learned of the death of the deceased some time prior to 24th August, 2005. Its solicitors, by two letters dated 24th August, 2005, to the solicitors on record for the first and fourth defendants, sought details of the proposed administrators of the estate of the deceased and of the parties entitled to benefit in the estate. The response, which was dated 25th August, 2005, stated that the solicitor was acting on behalf of the first named defendant, one of the daughters of the deceased, and the proposed administratrix of her estate.

9. On the same day, 25th August, 2005, an ex parte application was made to this Court in the 1993 proceedings for a stop order pursuant to O.46, r.14 of the Rules of the Superior Courts 1986 (the Rules). The order was made ex parte and it was grounded on the affidavit of the Bureau's solicitor. On foot of that application, an order was made pursuant to O.46, r.14 that the transfer, payment out or other disposition of the funds standing in court to the credit of the deceased be stayed pending further order. That order is still in being. There is currently in court to the credit of the deceased a sum in the region of €1.16 million.

10. Through October, 2005 the solicitor for the Bureau pursued with the solicitor for the first and fourth defendants the request for information as to the beneficiaries of the estate of the deceased. The response, which was dated 8th November, 2005, identified the first defendant and the fourth defendant as the beneficiaries. What had happened was that the second defendant and the third defendant, who had, apparently, changed solicitors to be represented by the solicitors who are on record for them in these proceedings, had each executed a disclaimer on 14th October, 2005. Each disclaimer was in writing and was signed and witnessed by a solicitor in the firm which is on record for the second and third defendants in these proceedings. The second defendant in the

disclaimer signed by him, disclaimed "all benefit to which I may be entitled on the death intestate" of the deceased. The disclaimer signed by the third defendant was in similar terms. Each of the defendants subsequently executed a more formal form of disclaimer under seal on 5th December, 2005, in which each irrevocably disclaimed absolutely a right to the share which he or she would otherwise have been entitled to on the intestacy of the deceased. Each disclaimer contained a statement that independent legal advice had been taken prior to the execution of the disclaimer and an acknowledgement that on the execution of the disclaimer each would lose "any rights to any share in the deceased's estate". The execution of the disclaimers was witnessed by the solicitor, who had witnessed execution of the early disclaimers of 28th October, 2005.

11. By notice of motion dated the 9th November, 2005, which was returnable for 5th December, 2005, brought by the Bureau in the 1993 proceedings, the Bureau sought, *inter alia*, an order directing the accountant of this Court to pay the balance of the sums which were paid into court in the 1993 proceedings to the Bureau. As I understand the position, that motion was adjourned generally with liberty to re-enter by Johnson J. on 27th February, 2006. I will refer to that motion as the 2005 motion.

12. These proceedings were initiated by a plenary summons which issued on 25th April, 2006. The 2005 motion was listed for hearing with these proceedings. Accordingly, I will deal with the substantive issue in these proceedings and with the 2005 motion in this judgment.

13. The Bureau has not recovered from the second defendant or the third defendant any part of what is due by them to the deceased on foot of the judgment obtained by the deceased on 27th June, 1994 and assigned to the Bureau by the order of 7th November, 2000.

14. No evidence was tendered at the hearing of the substantive action on behalf of the defendants other than documents, such as the disclaimer and correspondence, which were admitted in evidence. In particular, no evidence was adduced as to the purpose or motivation of the second defendant or the third defendant in disclaiming their respective shares of the deceased's estate to which they became entitled on her death. Nor was any evidence adduced as to whether either the second defendant or the third defendant has any other assets to which the Bureau could have recourse to satisfy the judgment assigned to it by the order of 7th November, 2000.

The plaintiff's claim

15. The primary relief sought by the Bureau in these proceedings are declarations –

> (i) that the disclaimers "purportedly" executed by the second defendant and the third defendant were executed with the full knowledge of the assignment to the Bureau of the judgment against them by the deceased and with the intention of delaying, hindering, defrauding and defeating the claim, rights and entitlements of the Bureau, and, as such, are null and void, and
>
> (ii) that the purported disclaimers constituted a fraudulent conveyance, disposition or preference, that they are void and have no effect in law and that the estate of the deceased should be administered as if they did not exist.

16. An alternative claim by the Bureau is for an order that the remaining beneficiaries of the estate of the deceased (namely the first defendant, in her personal capacity, and fourth defendant) would be unjustly enriched to the extent of the shares of the second defendant and the third defendant, if the disclaimers were allowed to stand and an order declaring that the first defendant (as personal representative of the deceased) holds the shares of the estate to which the second defendant and the third defendant are entitled on a constructive or resulting trust for the Bureau.

17. The Bureau's claim is founded on the assignment to it of the deceased's judgment against the second defendant and the third defendant. It is not based on any special status of the Bureau in the 1993 proceedings or otherwise.

18. Essentially, the Bureau seeks the relief claimed on two alternative bases. The claim for the primary relief is founded on the proposition that the disclaimers executed by the second defendant and the third defendant are void by virtue of the provisions of s. 10 of the Irish Statute of Fraudulent Conveyances 1634 (10 Chas. 1 sess. 2, c. 3) (the Act of 1634), which is commonly referred to as the Conveyancing Act (Ireland) 1634.

19. The claim for the alternative relief is founded on the proposition that the court should find that there exists what has come to be known as a "remedial constructive trust" in relation to the seven ninth shares of the funds in court to which the second defendant and the third defendant became entitled on the death of the deceased in favour of the Bureau.

20. Before analysing those claims, I think it is instructive to consider how the funds in court to the credit of the deceased devolved and how they would be distributed on her death in accordance with the law but for the existence of these proceedings.

Devolution/Distribution of funds in accordance with law

21. It is important to emphasise that the funds in court were the absolute property of the deceased at the date of her death. The fact that the Bureau was the original source of the funds is as immaterial as if they represented her life savings or an inheritance or a win in the lottery. The Bureau has no claim against the estate of the deceased and has no claim against the first defendant as her personal representative.

22. The devolution of the funds in court on the death of the deceased is governed by s. 10 and s. 13 of the Act of 1965. Section 10 provides that the real and personal estate of a deceased person shall on his death devolve on and become vested in his personal representatives and that the personal representatives shall hold the estate as trustees for the persons by law entitled thereto. The term personal representative is defined in s. 3 as meaning the executor or administrator for the time being of the deceased person. In the case of an intestacy, s. 13 provides that, until administration is granted in respect thereof, the real and personal estate of the deceased person shall vest in the President of the High Court.

23. I have already referred to s. 67 of the Act of 1965, which is one of the provisions of that Act dealing with distribution on intestacy. It mandates that, where the intestate dies leaving a spouse and issue, the surviving spouse "shall take" two thirds and the issue, if all in equal degree of relationship to the intestate, the remaining one third in equal shares.

24. Section 72A of the Act of 1965, which was inserted by s. 6 of the Family Law (Miscellaneous Provisions) Act 1997, provides as follows:-

> "Where the estate, or part of the estate, as to which a person dies intestate is disclaimed after the passing of the *Family*

Law (Miscellaneous Provisions) Act 1997 (otherwise than under section 73 of this Act), the estate or part, as the case may be, shall be distributed in accordance with this Part –

(a) as if the person disclaiming had died immediately before the death of the intestate, and

(b) if that person is not the spouse or a direct lineal ancestor of the intestate, as if that person had died without leaving issue".

25. Section 72A puts beyond "yea or nay" how the estate of an intestate is to be distributed in the event of a disclaimer in every conceivable circumstance, including the circumstance which was considered by the Chancery Division of the English High Court in *Re Scott (deceased)* [1975] 2 All E.R. 1033, where all the members of the class entitled had disclaimed their interests on intestacy and an issue arose as to whether the undisposed of property would pass to the Crown as *bona vacantia*. The effect of s. 72A is that, in every conceivable situation, one applies the provisions of ss. 67 to 72 inclusive of the Act of 1965 on the basis of the hypotheses set out in paras. (a) and (b) of s. 72A. If the result is that there is no person to take the estate, then it devolves to the State as ultimate intestate successor under s. 73. There is no dispute between the parties in this case as to the operation of s. 72A. If the disclaimers by the second defendant and the third defendant were valid, the effect is that the estate of the deceased must be distributed between the first defendant and the fourth defendant in equal shares, so that they get one half share each.

26. The defendants relied heavily on s. 72A in support of their submission that the disclaimers are not void by virtue of s. 10 of the Act of 1634. Such reliance is misplaced. Section 72A merely deals with the consequences of an effective disclaimer in the case of an intestacy and lays down where the disclaimed property is to go. But like any other fiduciary, a personal representative can act only on a valid disclaimer. Section 72A is of some significance for present purposes in that it ensures that the party disclaiming knows with certainty the ultimate destination of the benefit disclaimed.

27. Counsel for the defendants also attached significance to s. 12 of the Capital Acquisitions Tax Consolidation Act 2003 (the Act of 2003), which was originally contained in the Capital Acquisitions Tax Act 1976. Insofar as it is relevant for present purposes s. 12(1) provides:-

"If –

(a) (i) a benefit under … an intestacy …

is disclaimed;

…

any liability to tax in respect of such benefit … shall cease as if such benefit …had not existed."

28. Sub-section (2) of s. 12 provides that a disclaimer of a benefit under intestacy "is not a disposition for the purposes of this Act". What s. 12 does is that it recognises that the inheritance which takes effect in consequence of the disclaimer is the inheritance on which inheritance tax should be exigible and the disclaimer is deemed not to be a disposition for tax purposes, which seems fair and sensible. I do not see that s. 12 assists the defendants in countering the Bureau's claim. On the contrary, the mere fact that s. 12 exists would tend to suggest that, if it did not exist, a liability to tax would arise in relation to the disclaimed benefit and that the disclaimer would be a disposition for the purposes of the Act of 2003. The manner in which the estate duty regime, which was replaced by the capital acquisitions tax regime in 1976, treated a disclaimer, to which I will refer later, bears this out.

Locus standi

29. When it emerged at the hearing that the Bureau is relying on the order of 7th November, 2000, as effecting the assignment of the benefit of the judgment obtained by the deceased against the second defendant and the third defendant, it was submitted on behalf of the second defendant and third defendant that the order merely contained an approval of the assignment and that there should have been a formal assignment by the deceased, acting by her committee, once she was taken into wardship to enable the Bureau to rely on the judgment. In the absence of such a formal assignment, it was submitted, the Bureau does not have *locus standi* to bring these proceedings.

30. It is clear on the face of the order dated the 7th November, 2000, which approved the settlement of the deceased's action as between the deceased acting by her next friend, and the Bureau, that it was a term of the settlement that the deceased would assign the benefit of the judgment against the second defendant and the third defendant to the Bureau. The court approved the settlement in its entirety and expressly approved the assignment of the benefit of the judgment. In my view, that was sufficient to establish the Bureau's entitlement to the benefit of the judgment. I am satisfied that the Bureau has *locus standi* to pursue the claim in these proceedings as the assignee of the benefit of the judgment.

The Act of 1634

31. Section 10 of the Act of 1634 declares that certain transactions in relation to land and goods and chattels made "to the end, purpose and intent to delay, hinder or defraud creditors and others" as against any person prejudiced shall be "clearly and utterly void, and of none effect". Although in s. 10 the transaction is declared to be void, it is well settled that, in the context of the section, void means voidable. Section 14 of the Act of 1634 excludes from the operation of the Act any conveyance or assurance of property made upon good consideration and *bona fide* and without notice of the fraud.

32. The Act of 1634 was the statute of the Parliament of Ireland, which corresponded to an earlier English statute, 13 Eliz. 1, c. 5. Counsel for the Bureau emphasised that there is authority for the proposition that both statutes were merely declaratory of the common law, which is correct, in the context of referring the Court to the following passage from May on *The Law on Fraudulent and Voluntary Conveyances* (3rd Ed., 1908) at p. 3, which it was urged should influence the court's approach to the construction of s. 10:-

"If simplicity was the striking feature of the common law, it was, in an almost equal degree, the chief feature of the statutes of Elizabeth, which are couched in very general terms, so as to include, and allow their application by the courts to, any fraudulent contrivances to which the fertility of man's imagination might have resorted, as a means of eluding a more precise and inflexible law. …

[T]he simplicity of the enactment and – if the expression may be allowed – its expansiveness, have enabled the judges to bring within its scope, and extend its operations to, almost every kind of transaction resorted to by debtors to the

prejudice of their creditors".

33. The two crucial questions in determining whether the disclaimers of the second defendant and the third defendant are void by virtue of s. 10 of the Act of 1634 are, first, whether the disclaimers constitute transactions of the type to which s. 10 applies and, secondly, if they do, whether they were made with intent to defraud the Bureau.

Disclaimers within section 10?

34. In paraphrasing the effect of s. 10, I have used the word "transactions" as shorthand for the range of methods of alienating and encumbering property mentioned in s. 10: "feoffment, gift, grant, alienation, bargain and conveyance … by writing or otherwise, and … bond, suit, judgment and execution …". The parties have used the expression "disposition" in addressing the applicability of s. 10. What is of importance is the nature of the act on the part of the debtor which comes within s. 10, not the label which is attached to it.

35. Before considering what was offered by counsel for the parties by way of text book guidance and precedent, I propose analysing the position of the second defendant and the third defendant following the death of the deceased and before the execution of the disclaimers in relation to two third shares of the net estate of the deceased, in the case of the second defendant, and one ninth share, in the case of the third defendant. I will do so by reference to the legislation, to which I have already referred, which governed the vesting and distribution of the estate of the deceased.

36. During the entirety of that period, the estate of the deceased was vested in the President of the High Court and it was so vested on trust for the persons by law entitled to it. The second defendant and the third defendant were entitled to two third shares and one ninth share respectively of the net estate after payment of debts and such like. Each had a benefit and it was a benefit each could either accept or reject. Rejection of the benefits by disclaimer was an act the consequence of which was that the benefits went to somebody else and were forgone by the second defendant and the third defendant. The fact that the persons to whom the benefits went was determined by law, by s. 72A, does not prevent the disclaimer being an act which put the benefits beyond the grasp of the Bureau as a creditor by assignment of the second defendant and the third defendant. In any event, as I have already stated, both of these defendants knew with absolute certainty where their respective benefits would go on disclaimer.

37. Counsel for the first defendant and the fourth defendant referred, in their written submissions, to the decision of the Supreme Court in *Gleeson v. Feehan* [1997] 1 I.L.R.M. 522. The *ratio decidendi* of that decision was that, until the extent of the estate of an intestate has been ascertained and the personal representative is in a position to vest it in the next of kin, the next of kin are not the owners in equity of the specific items forming part of the estate, nor, in the case of land, do they have a right to possession enforceable against the personal representative. The observations of Keane J., as he then was, which led to that conclusion, are consistent with the view I have expressed above, in that he stated (at p. 536):-

> "It is obvious that, using the word in a loose and imprecise sense, the next of kin of the intestate owner of property have at least an *interest* in ensuring that the administration of his property is carried out in accordance with law by the administrator. They have indeed more than a mere *interest* of that nature: they have a right, in the nature of a chose in action, to payment to them of the balance of the estate after the debts have been discharged, a right which can be enforced against the personal representative".

38. In this case, the benefit which was disclaimed by each of the second defendant and the third defendant was an interest of that nature. The issue is whether in each case the disclaimer of the relevant interest comes within, and can be avoided at the suit of the Bureau by virtue of, the provisions of s. 10 of the Act of 1634. In my view, the act of disclaiming a share on intestacy is an act which comes within s. 10. Counsel for the Bureau did not point to any authority in support of their contention that a disclaimer of intestacy is captured by s. 10 but relied on the following passage from May (*op. cit.*) (at p. 20). Having referred to the various types of transaction mentioned in s. 10, May stated:-

> "The jurisdiction of the Court, however, is not strictly confined by the words of the Statute. In whatever way the disposition of property be effected, it will be held within the meaning of the Statute, which is general, for the suppression of fraud; and a man will not be allowed to do in one way that which he cannot do in another".

39. Counsel for the second defendant and the third defendant relied on a passage from *Halsbury's Laws of England*, 4th Ed., Volume 50, at para. 442, to the effect that a disclaimer does not operate as a disposition of property but as a non-acceptance of it. There is one sentence in para. 442, which precedes that passage, which, in my view, is of relevance to the issue with which the court is concerned. It states:-

> "A disclaimer puts a donee, as regards his liabilities, burdens and rights, in the same position as if no gift had been made to him, but does not necessarily render the gift void in regard to all persons and for all purposes …".

40. As authority for that proposition the editors of Halsbury cite *Mallott v. Wilson* [1903] 2 Ch. 494 at 501. They also note that the "gift formerly attracted estate duty", citing *Re Stratton's Deed of Disclaimer, Stratton v. I.R.C.* [1957] 2 All E.R. 594, which will become relevant later in understanding an authority relied on by counsel for the first defendant and the fourth defendant.

41. For completeness, I think it appropriate to refer to the passage in *Mallott v. Wilson* cited by the editors of Halsbury. Byrne J. was there grappling with the concept of a refusal by disclaimer of a grant being void *ab initio*. He explained the true meaning of the concept as follows (at p. 501):-

> "… I am satisfied now that the true meaning is that, not in regard to all persons and for all purposes is the case to be treated as though the legal estate had never passed, but that as regards the trustee and the person to whom the grant was made, he is, in respect of his liabilities, his burdens, and his rights, in exactly the same position as though no conveyance had ever been made to him."

42. The issue in that case was whether the disclaimer by a trustee of a settlement, which reserved no power of revocation to the settlor, rendered the settlement inoperative. It was held that it did not; the trust was imposed on the settlor.

43. All of the defendants relied on the oft-cited judgments in *Townson v. Tickell* (1819) 3 B. & Ald. 31 in support of the contention that a disclaimer is not a disposition. The judgment of Abbott C.J. has for almost two centuries been cited as authority for the proposition that a person cannot be forced to take an estate against his will and may disclaim or renounce. Abbott C.J. also found that renunciation by deed was effective and it was not necessary that renunciation should take place in a court of record. Bayley J. was of the same opinion. Having noted that the renunciation in that case was by a most solemn act, by deed, he went on to say:-

> "It seems to me, that the effect of that is, that the estate never was in him at all. For I consider the devise to be nothing more than an offer which the devisee may accept or refuse, and if he refuses, he is in the same situation as if the offer never had been made; and that being so, I am of opinion, that the disclaimer, in this case, was sufficient …".

44. Although disclaimer has been consistently characterised in the authorities as refusal to accept an interest, that has generally occurred in the context of determining the necessary formalities for, or the consequences of, the disclaimer. In this connection all of the defendants rely on the judgment of Walton J. in *Re Scott* (at p. 1044 and p. 1045), to which I have referred earlier, where the context was what was the effect of refusal of part of the estate of a deceased person and the answer was that it remained part of the estate. Counsel for the first defendant and the fourth defendant also relied on the decision of the Court of Appeal in *Re Paradise Motor Company Limited* [1968] 1 W.L.R. 1125. There the issue was one of the form of the disclaimer. In his judgment Danckwerts L.J., who delivered the judgment of the court, in addressing an argument as to whether a gift of shares in a company could be disclaimed verbally and without writing, stated as follows (at p. 1143):-

> "We think that the short answer to this is that a disclaimer operates by way of avoidance and not by way of disposition. For the general characteristics of disclaimer we refer briefly to the discussion in In *Re Stratton's Deed of Disclaimer* …".

45. In order to ascertain the "characteristics of disclaimer" as understood by the Court of Appeal in that case, and, indeed, Halsbury's citation of it as authority for the statement quoted earlier, it is necessary to look at the Stratton case. That case involved a disclaimer of a specific bequest and devise by a testator's widow. The testator had left his residuary estate to his three sons, who benefited from the disclaimer. The widow died just two years after the disclaimer and the issue which was before the court was whether the disclaimer was caught under the old estate duty regime in that it was to be treated as a voluntary disposition made within five years of the widow's death so as to attract estate duty. It was held that estate duty was payable. What is of interest is the how the Court of Appeal characterised a disclaimer in the context of considering the first question which arose out of the application of the relevant provision of the tax code, namely, whether the widow had a right in respect of the property, the subject of the bequest and devise, during the period between the death of her husband and the execution of the disclaimer. Having considered *Townson v. Tickell* and subsequent authorities, culminating in a decision on a similar estate duty point in (*Re Parsons; Parsons v A–G.* [1942] 2 All E.R. 496, Jenkins L.J. stated (at p. 599):-

> "I think it is clear from that case that a disclaiming legatee or devisee has, between the testator's death and the moment of disclaimer a right in respect of the legacy or devise, in that he, is during that period, entitled to call on the executors to pay or transfer to him the subject matter of the bequest or devise in due course of administration. It is none the less a right because it is defeasible by the beneficiary's own act of disclaimer. That merely means that he is free to choose whether to avail himself of it or not until such time as he has either unequivocally disclaimed or unequivocally accepted the gift. If he disclaims, then he avoids the gift and with it the concomitant right, but that does not alter the fact that down to the moment of disclaimer he did have the right and would still have had it if he had not disclaimed".

46. I am satisfied that the view I have expressed earlier as to the nature of the disclaimers by the second defendant and the third defendant in the context of the legislation in force at the date of the disclaimers is consistent with the authorities when properly understood. Prior to the execution of the disclaimers each of the second defendant and the third defendant had a benefit or right and each deprived himself or herself of that benefit or right on executing the relevant disclaimer. That act, which deprived the creditors of the second defendant and the third defendant of recourse to assets which would otherwise have been available, brings the disclaimers within section 10. Moreover, it is because there was such a benefit and it was forgone that it has been necessary in s. 12 of the Act of 2003 to provide that a disclaimer shall not be deemed to be a disposition for the purpose of that Act.

Intent to defraud?

47. The second question which arises on the application of s. 10 of the Act of 1634 is whether the disclaimers were executed with the intent to delay, hinder or defraud the Bureau. The leading Irish authority on what constitutes intent to delay, hinder or defraud creditors within the meaning of s. 10 is In *Re Moroney* (1887) 21 L.R. Ir. 27. It was a decision of the full Court of Appeal in Ireland on an appeal by Mr. Moroney against a decision disallowing the cause shown against an order adjudicating him bankrupt. The issue was whether Mr. Moroney had committed an act of bankruptcy within s. 21(2) of the Bankruptcy (Ireland) Amendment Act 1872, which provided that it was an act of bankruptcy for a debtor to make "a fraudulent conveyance, gift, delivery, or transfer of his property, or any part thereof". Section 10 of the Act of 1634 came into play because it was argued that to be fraudulent under s. 21(2) the transaction must be fraudulent under s. 10. On the interpretation of s. 10, Palles C.B. stated (at p. 61):-

> "Therefore to bring a conveyance within the statute, first, it must be fraudulent; secondly, the class of fraud must be an intent to delay, hinder or defraud creditors. Whether a particular conveyance be within this description may depend upon an infinite variety of circumstances and considerations. One conveyance, for instance, may be executed with the express intent and object in mind of the party to defeat and delay creditors, and from such an intent the law presumes the conveyance to be fraudulent, and it does not require or allow such fraud to be deduced as an inference of fact. In other cases, no such intention actually exists in the mind of the grantor, but the necessary or probable result of his denuding himself of the property included in the conveyance, for the consideration, and under the circumstances actually existing, is to defeat or delay creditors, and in such a case, … the intent is, as a matter of law, assumed from the necessary or probable consequences of the act done; and in this case also, the conveyance, in point of law, and without any inference of fact being drawn, is fraudulent within the statute. In every case, however, no matter what its nature, before the conveyance can be avoided, fraud, whether expressly proved as a fact, or as an inference of law from other facts proved, must exist".

48. That dictum was followed recently in *McQuillan v. Maguire* [1996] 1 I.L.R.M. 394, in which Costello P. summarised its effect as follows (at p. 399):-

> "The Court need not find that the agreement was motivated by actual fraud – if it can be shown that the necessary or probable result of the agreement was to defeat or delay creditors then it could be avoided …".

49. Counsel for the second defendant and the third defendant contended that the disclaimers were not fraudulent within the meaning of s. 10 of the Act of 1634 in reliance on a passage from the judgment of Overend J. in *Rose v. Greer* [1945] I.R. 503. The passage in question is to be found at p. 510. After referring to s. 10, Overend J. stated as follows:-

> "I am of opinion that the class of fraud which is contemplated and against which the statute is directed is one in which the debtor attempts to defeat his creditors by bogus or colourable transactions under which the debtor retains a benefit to himself. This was decided 150 years ago in *Holbird v. Anderson* [(1793) 5 T.R. 235] and later again in *Alton v. Harrison* [(1869) L.R. 4 Ch. 622]".

50. It was submitted that, in this case, neither disclaimer is a "colourable transaction" and that, as no benefit was retained by either the second defendant or the third defendant in relation to the relevant disclaimer, the disclaimers do not come within section 10.

51. The passage from the judgment of Overend J., in my view, must be seen in the context of the facts of that case. The plaintiff there, as widow and as administratrix of Mr. Rose and as a creditor of his estate, was seeking to have the assignment of a policy of insurance on his life by the deceased to the defendant set aside under s. 10. The evidence established that the defendant had paid £500 to Mr. Rose before the assignment was executed. Overend J. held (at p. 514) that the assignment of the policy had been for valuable consideration, that the sum of £500 had been paid by the defendant to the deceased as a loan and none of it had been repaid. The analysis of the authorities which follows the passage from the judgment which I have quoted, suggests to me that what the passage was addressing was whether an assignment to secure an existing debt could be regarded as an assignment for valuable consideration so as to take the transaction out of the ambit of the Act of 1634. Immediately before addressing the facts in the case before him, Overend J. quoted from a judgment of Parker J. in *Glegg v. Bromley* [1912] 3 K.B. 474 (at p. 492) the final portion of which reads as follows:-

> "The question therefore is really a question which reduces itself to this: Does a debtor who gives his creditor security with the intention of preferring him to other creditors or another creditor and consequently defeating or delaying such other creditors or creditor, have an illegal intention within the meaning of the statute? In my opinion it is well decided that he has not, and as far as I can gather no distinction has ever been drawn in the cases between a preference given for fresh security and a preference given without fresh security".

52. Reverting to the judgment of Palles C.B. in the *Moroney* case, following the passage which I have quoted earlier, he went on to consider the nature of the fraud which will avoid a conveyance under s. 10 of the Act of 1634. He made the point that the object of s. 10 was to protect the rights of creditors as against the property of their debtor, but that it was no part of its object to regulate the rights of the creditors *inter se* or to entitle them to an equal distribution of that property. He then continued:-

> "One right, however, of the *creditors*, taking them as a whole, was that all the property of the debtor should be applied in payment of the demands of them, or *some of them*, without any portion of it being parted with without consideration, or reserved or retained by the debtor to their prejudice. Now, it follows from this, that security given by a debtor to one creditor upon a portion of or upon all of his property (although the effect of it, or even the intent of the debtor in making it, may be to defeat an expected execution of another creditor) is not a fraud within the statute; because notwithstanding such an act, the entire of the property remains available for the creditors, or some or one of them, and as the statute gives no right to rateable distribution, the right of the creditors by such an act is not invaded or affected".

53. Palles C.B. went on to say that the foregoing was the true ground of the decisions in the two cases referred to by Overend J.: *Holbird v. Anderson* and *Alton v. Harrison*.

54. In this case, there is no evidence of the intent of the second defendant and the third defendant in executing the disclaimers, so that fraud has not been expressly proved as a fact. The question for the court, therefore, is whether an intention on the part of these defendants to delay, hinder or defraud the Bureau as a creditor has been proved as an inference of law from the evidence before the court. In this case, I am satisfied that the necessary or probable result of these defendants disclaiming their respective shares of the estate of the deceased on intestacy was to delay, hinder and defeat the payment of the debt due by them to the Bureau as the assignee of the deceased's judgment against them. Therefore, fraud has been proved.

Conclusion on application of section 10 of the Act of 1634
55. I am satisfied that:

> (a) the disclaimers are actions of the type to which s. 10 of the Act of 1634 applies, and
>
> (b) they were done with the intent to defraud the Bureau.

It follows that the Bureau is entitled to an order declaring that they are void by virtue of the provisions of s. 10 of the Act of 1634.

Remedial Constructive Trust
56. The reliance on the so-called "remedial constructive trust" was a fall back position on the part of the Bureau in the event of the disclaimers not being avoided by virtue of s. 10 of the Act of 1634. As I have found that the disclaimers are void, this alternative argument does not arise. Nonetheless, I think it is appropriate to make the following general observations.

57. It would appear that the submissions made by counsel for the Bureau on this topic draw heavily on the commentary contained in Delany on *Equity and the Law of Trusts in Ireland* (4th Ed., 2007) (at p. 276 et seq.). Having analysed authorities from various jurisdictions, including the Irish authorities relied on by counsel for the Bureau, Delany, as a preface to examining possible future developments relating to the constructive trust, summarises the current state of the law as follows (at p. 290):-

> "In addition to the traditionally recognised circumstances which may give rise to a constructive trust, it now seems clear from developments in various parts of the common law world that unjust enrichment and unconscionable conduct can also lead to the imposition of a trust".

58. The Bureau's reliance on the new model constructive trust is premised on the disclaimers not being void. What it seeks, on the basis of that premise, is a declaration that the respective shares of the estate of the deceased to which the second defendant and the third defendant would have become entitled, if they had not disclaimed, and to which the first defendant and the fourth defendant would become equally beneficially entitled on disclaimer by virtue of the operation of s. 72A of the Act of 1965, would be held by the first defendant and the fourth defendant upon trust for the Bureau. In that scenario, in my view, there could be no question of unjust enrichment or unconscionable conduct on the part of the first defendant and the fourth defendant in accepting that to which they would be entitled as a matter of law.

59. Accordingly, I consider that the argument based on the concept of remedial constructive trust is wholly misconceived.

The 2005 Motion
60. This part of this judgment relates to the stop order made in the 1993 proceedings and the 2005 motion, which was brought in the 1993 proceedings.

61. Counsel on behalf of the first defendant and the fourth defendant forcibly argued that the application for the stop order was

misconceived, that the 2005 motion should be dismissed, and that the first defendant and the fourth defendant should be paid their costs in respect of the stop order and the 2005 motion. That application was not really resisted by counsel for the Bureau.

62. I agree with the submission made by counsel for the first defendant and the fourth defendant that, when the stop order was applied for on 25th August, 2005, the 1993 proceedings were defunct. Technically, the application should not have been brought in the 1993 proceedings. As the application related to the distribution of the estate of the deceased, the Bureau should have addressed the question of having the estate of the deceased represented, having regard to O. 15, r. 37 of the Rules. The submission on behalf of the first defendant and the fourth defendant that the Bureau did not have a "derivative interest" in the funds in court, which is necessary to ground the court's jurisdiction to make a stop order, is partially correct. The Bureau did have a derivative interest in the seven ninth shares to which the second defendant and the third defendant became entitled on the death of the deceased because, via the assignment to it of the deceased's judgment against the second defendant and the third defendant, it could execute against those shares. The fact that the estate of the deceased remained to be administered and the net estate to be identified, in my view, did not prevent the Bureau having a derivative interest. It did not have a derivative interest in the remaining two ninth shares.

63. It was also submitted that the stop order should not have been made on an *ex parte* application and that all of the defendants were entitled to be on notice of the application. In particular, it was submitted that there was non-compliance with r. 15 of O. 46 which provides:-

> "A stop order may be made on an ex parte application whenever the Court shall be of the opinion that there is not any person interested in the funds or securities who ought as of right to have notice of the application".

64. I think the second defendant and the third defendant should have been put on notice of the application, because they were the real targets of the application. Aside from the requirements of O. 15, r. 37, so also should the first defendant if, at the time the application was made, the solicitor for the Bureau was aware that she intended applying for letters of administration, which, on the basis of the motion papers, I think was not the case.

65. The first defendant and the fourth defendant complain that the stop order has effectively obstructed and defeated the due administration of the estate of the deceased in that the entirety of the funds in court have remained subject to the stop order, and they have been deprived of any distribution notwithstanding that the pleadings disclose no maintainable claim against them. That is correct to a point. However, I am of the view that the first defendant, in her personal capacity, and the fourth defendant were not prejudiced by the making of the stop order when it was made, because its effect was only to stay the payment out of the funds in court, which, I assume, would not have been paid out until a grant of administration had been extracted to the estate of the deceased. They were prejudiced by what happened subsequently. First, the extraction of a grant of administration was delayed because the Bureau lodged a caveat in the Probate Office on 24th August, 2005, which was set aside by order of O'Neill J. made on 27th February, 2006. More importantly, in the 2005 motion, the Bureau sought payment out to it of all of the monies in court, including the two ninth shares to which the first defendant and the fourth defendant became entitled on the death of the deceased. That application was misconceived and should have excluded the two ninths shares in question.

66. I propose discharging the stop order at this juncture because I consider it is no longer necessary. The first defendant, as personal representative of the deceased, is obliged to administer the estate of the deceased on the basis of the finding that the disclaimers are null and void and of no effect.

67. I also propose dismissing the 2005 motion at this juncture.

68. Any order necessitated by the findings I have made in this part of this judgment will be made in these proceedings.

Orders

69. I propose adjourning these proceedings to give the parties an opportunity to consider this judgment. I will hear further submissions as to the form of orders to be made.