THE HIGH COURT

[2024] IEHC 153

[Record No. 2023/2159P]

BETWEEN

JACQUELINE BYRNE AND PATRICIA HYSLOP

AND KATHLEEN KERRIGAN

PLAINTIFFS

AND

ANNE GRANT ARNOLD

DEFENDANT

JUDGMENT of Mr Justice Kennedy delivered on the 19th day of March 2024.

1. These proceedings concern the Plaintiffs' claim to an interest in the proceeds of their former family home. This judgment does not determine the merits of the claim or defences but addresses two issues: (a) the Defendant's application to dismiss the proceedings pursuant to the Court's inherent jurisdiction and/or under Order 19, rule 28 of the Rules of the Superior Courts ("the RSC"); and (b) the Plaintiff's application for an order to prevent the Defendant from dissipating assets.

2. The three Plaintiffs claim an equitable interest in the proceeds of their former family home ("the Property"). Its sale by the Defendant, their sister, triggered these proceedings. The Property had been owned by their late father, Patrick Grant. As he died intestate, the four sisters (and a brother who is not involved in the litigation)

automatically each became entitled to a one fifteenth share of the estate. However, as is explained below, their mother, Mary Grant, and, eventually, the Defendant became the Property's owner. The Plaintiffs say that the latter's title was procured fraudulently and that they retain an equitable interest. The Defendant says that there is no basis for the claim and that it is statute barred in any event. The issues include: (a) whether the Plaintiffs disclaimed their interest in their father's estate; (b) whether the claim is statute barred; (c) whether, when Mary Grant became the owner, she held the Plaintiffs' interest on trust; (d) whether Mary Grant obtained title through adverse possession; and (e) the balance of convenience, including the undertaking as to damages.

Background

3. It is common ground that: (a) the Property was the Grant family's home, and Patrick Grant was its owner; (b) he died in 1990; (c) his five children were collectively entitled to a one third interest in his intestate estate; (d) Mary, his widow and their mother, was his personal representative, and she obtained a grant of administration on 11 October 1999 and was registered as the owner of the Property on 28 April 2000; (e) on 16 April 2007, she transferred it into the Defendant's name (jointly with her own); (f) Mary's 6 July 2017 will explained her rationale and her wish that the Defendant would inherit the Property; and (h) on 10 August 2018, Mary transferred the Property into the Defendant's sole name. She died on 2 June 2021, at the Defendant's UK home.

The Disclaimers

4. Whether the Plaintiffs disclaimed any interest in their father's estate is fundamental to both sides' position (though there is an independent limitation plea). Two key issues arise as to the disclaimers – their authenticity and their validity (if

genuine). As to the first issue, when the Defendant and her solicitors (eventually) responded to the Plaintiffs' increasingly agitated enquiries, they insisted that the Plaintiffs had disclaimed any interest in their father's estate. The correspondence and affidavits on the Defendant's behalf invoked the disclaimers as a complete answer to the claim. For example, the Defendant's 18 May 2023 affidavit stated:

> "*I dispute entirely that the Plaintiffs did not execute disclaimers. They did in fact execute same.… I refer to copy disclaimers … addressed to the Revenue Commissioners, executed by myself, Paul Grant and the Plaintiffs upon which… I have signed my name thereon prior to the swearing hereof*."

5. The Plaintiffs always denied signing disclaimers. They retained a handwriting expert. Although the Defendant's solicitors doubted the appropriateness of such a step, the value of such expertise was immediately confirmed. The expert concluded that it was: (a) probable that the Second Plaintiff **had not** signed "her" one; and (b) strongly probable that the Third Plaintiff **had** executed "hers". He could not conclude in respect of the First Plaintiff's disclaimer.

6. Each Plaintiff rejected the Defendant's initial assertion that the solicitor dealing with their father's estate corresponded with them and also rejected the suggestion that the siblings disclaimed their interest. None of the Plaintiffs accept that they disclaimed their interest. They say that the disclaimers were either forged (in the case of the Second Plaintiff, at least) or that, in any event, none of them "knowingly" executed the disclaimers. In terms of their individual positions following the expert report: (a) the First Plaintiff stated that she did not knowingly execute the document attributed to her and would not have done so. Her address is misspelt in the document, a misspelling which, the First Plaintiff avers, can be seen in a letter from the Defendant of 25 April 2019; (b) the Second Plaintiff confirmed that she did not execute the document attributed to her, which she described as a forgery bearing no similarity to her signature.

She had been living in Australia since 1991 and only learnt of the disclaimer attributed to her when it was referenced in Ms Gallogly's affidavit. She says that she did not and would not have executed such a disclaimer; and (c) the Third Plaintiff acknowledged that the signature on "her" disclaimer looked like her writing but denied knowingly executing any such document. However, she had a vague memory of signing something at her mother's request, having been told that the document was required to allow windows to be replaced and to get the garage door at the family home fixed. She noted that "her" disclaimer was not witnessed, and she was unaware that she had any rights in respect of her father's estate until after her mother's death. The Third Plaintiff says that if she executed the document she did not do so knowingly, and the nature and effect of the document were misrepresented to her.

7. Prior to the handwriting report, the Defendant and her solicitors were trenchant, emphasising (in correspondence and on affidavit) that all Plaintiffs executed disclaimers. She appeared to suggest that the disclaimers were executed independently of her and at the instigation of the solicitor handling her father's estate for her mother. This appeared from letters from her solicitors and from affidavits sworn by her and her solicitor. However, her position changed after the expert report. While still maintaining that two Plaintiffs signed their disclaimers, she now recollected that she herself had completed the disclaimer attributed to the Second Plaintiff (mistakenly referred to as the "*Third Defendant*"), signing in her name. She claimed to have been authorised by the Second Plaintiff to sign in her name because the latter was in Australia. The Defendant's second affidavit stated that:

> "*My recollection from 25 years or more ago is that there was urgency to provide the disclaimers to the Revenue Commissioners and I printed her name on it at her direction and upon her instruction*".

8. The Second Plaintiff denies giving the Defendant any authority to sign any such document. In any event, the Defendant acknowledged that:

> "*I should have been clearer about this on the affidavit sworn to date, it did occur 25 years ago and I have been attempting to obtain documents urgently in respect of this transaction. It's clear on the document that her name is printed in block type*".

9. Notwithstanding the *volte face* and the extraordinary nature of this assertion in its own right, minimal detail (and no documentation) was provided to explain the basis on which the Defendant says she was authorised to sign in her sister's name. Nor did she explain the urgency (since her father died nine years earlier). She did not suggest that the solicitor handling the estate (who is now himself deceased) knew that she signed for her sister. Nor did she explain her actions in previously, and incorrectly, exhibiting:

> "*copy disclaimers …executed by … the Plaintiffs…*".

10. Also, whereas the Defendant now admitted that she had prepared all five disclaimers for execution, her earlier affidavit gave the impression that they were prepared by or at the instigation of the solicitor dealing with the estate and that he had corresponded with the siblings to secure their agreement. It stated that she had:

> "*found* [*the disclaimers*] *amongst my late mother's effects. I was not acting in the administration of our late father's estate*".

She added that, if the Plaintiffs were claiming that the disclaimers were forgeries, then this would imply that the solicitor handling the estate:

> "*partook in the counterfeiting of disclaimers and then raised a bill of costs which referenced correspondence with (siblings) sic regarding disclaimers*".

11. Her first affidavit also referenced an invoice from her mother's solicitor, interpreting it as showing that the solicitor was corresponding directly with the siblings about the disclaimers. However, it seems to me that that document may have been

referring to the solicitor's communications with the Defendant or her mother about securing the siblings' agreement, rather than to direct communications with the latter. In any event, averments and assertions by or for the Defendant rest uncomfortably with her later testimony.

12. The circumstances outlined by the Defendant's solicitors in their initial correspondence are also inconsistent with the position subsequently acknowledged by the Defendant. For example, in response to an enquiry as to the circumstances in which the disclaimers were executed – who drafted them and on whose instructions, who witnessed them and what discussions took place with each sibling – their 17 May 2023 letter confirmed that their client did not have the originals and had no personal knowledge of the circumstances of their execution. However, the Defendant's second affidavit dated 21 June 2023 stated, at paragraphs 8 – 9, that:

> "*The disclaimers were drafted by me on foot of what Mr McGonagle advised. I beg to refer to a copy of a post it note where he indicated that* [*sic*] *the language should be ...*
> *I say that I wrote to the other siblings (other than the Third Plaintiff as myself and my mother had to personally travel to Derry)*…"

13. Although the Defendant exhibited the post-it note, she did not confirm whether that document was handwritten by the solicitor or by her. She still provided minimal detail as to the circumstances of the disclaimers. Nor did she sufficiently explain her change of stance, the failure of previous correspondence and affidavits to exhibit the belatedly produced documentation, her role in drafting all five disclaimers, or her admission that she completed the disclaimer which she and her solicitor had previously attributed to the Second Plaintiff.

14. In response to the Third Plaintiff's denial that she "*knowingly*" executed a disclaimer, the Defendant's second affidavit belatedly volunteered that she

accompanied her mother to Derry to visit the Third Plaintiff and that she was present when the disclaimer was signed. She did not furnish details of the meeting, how and why it was arranged, or how the document was explained to the Third Plaintiff. There was no reference to independent legal advice.

15. The Defendant's second affidavit did not explain the gulf between what the solicitor recommended and what the Defendant communicated to her siblings. The solicitor's letter (Exhibit "AG6") dated 8 September 1998 had advised Mary Grant that, because her husband had died intestate, his estate fell to be divided:

"*two thirds to you and one third between the children*".

The letter noted the need for a deed:

"*... for your children to agree that a Deed of Assent will be made with their consent vesting the entire interest in the property in yourself.... From our discussion I understand that there will be no difficulty in obtaining the signatures of your daughters, Anne, Patricia and your sons, Paul and Robert* [*sic*].

You have told me that Kathleen Grant in Derry may prove a little more difficult but it will be necessary to obtain her signature so that you can get a clear title to the property.

I would therefore suggest that either you or Anne make contact with Kathleen to tell her what is envisaged, and to seek her consent to the document which I will then send to her for her signature."

16. It seems from the letter (and from the incorrect description of the children) that the solicitor was not corresponding with the siblings directly. The letter outlined what was required and the basis for the request and this should have been relayed to the siblings. Unfortunately, the Defendant's communication of 22 September 1999 put the matter differently:

> "*... Mum is in the process of tidying up her personal matters and as previously discussed on the phone she is getting her house in order too. I have typed up letters, which have to be returned to the Stamps Adjudication Office Dublin Castle a.s.a.p. in order to save Mum paying tax duty in the sum of £350.00.*
> *As I am the one with a lot of free time at the moment I have taken on the task of doing this for Mum and avoiding legal charges for her. I've enclosed an envelope for you and please send the signed letter back to Mum by express post.*"

17. Even in her second affidavit, the Defendant did not explain her own role in meetings or communications with the lawyer handling her father's estate. Although she previously denied any involvement, she now admitted that she drafted the disclaimers, apparently along the lines of the post-it note. She did not explain why the First Plaintiff (who lived close by) did not also attend the meetings with the solicitor handling the estate. Curiously, the solicitor did not even seem to know that there were two daughters in Dublin. The First Plaintiff is understandably suspicious and draws inference from her apparent exclusion. While such assumptions are speculative, the apparent lack of transparency does beg questions.

18. There is a conflict (which I cannot resolve) as to whether the First and Second Plaintiffs ever received the letter which the Defendant now says she drafted. The First Plaintiff notes that such a letter would have been strange as she lived a few houses away from the Defendant. The Second Plaintiff denies discussing her share of her father's estate with the Defendant and also denies instructing the Defendant to sign on her behalf. The Plaintiffs say that the Defendant has admitted to making a false instrument to induce the solicitor and the Revenue Commissioners to accept it as genuine, which, they say, constitutes fraud in terms of the statutory definition of that offence. However, the Defendant denies any intention to mislead, submitting that the Second Plaintiff's "*manuscript signature is in block text, and was never an intent to simulate the manuscript signature of the Second Defendant* [*sic*]".

19. There is no evidence that the Defendant informed the solicitor that she signed one disclaimer in her sister's name or how the disclaimers had been put to the Plaintiffs. Although the Plaintiffs deny receiving the letter of 22 September 1999, they also say that it would have been deficient in any event because it did not explain the document to be signed or identify the entitlements which they would forgo. The Plaintiffs claim that the transfers were effected in a disingenuous way for the Defendant's ultimate benefit – there was no clarity that they were being asked to forgo a claim on the estate, nor any disclosure that the transfers would or could be for her benefit. The evidence offers no insight as to whether, when the Property was transferred into the mother's name, it was already anticipated by her and/or by the Defendant that the latter would inherit it to the exclusion of her siblings. This may well be an issue at trial. The Plaintiffs' affidavits also highlight inconsistencies in the Defendant's testimony and assert that she procured her interest in the Property by forgery or deception.

Limitation and Related Defences

20. The Defendant emphasises her limitation and related defences. She contended that the proceedings were statute barred, irrespective of whether the cause of action accrues from the date of the father's death or when administration was granted. She notes that the Plaintiffs' affidavits did not explain whether they expected to receive a share of the house from their father's estate, and, if so, why they failed to do anything about it at the time of the administration of his estate. She asserted that, in 1998/1999, the siblings were happy for their mother to be vested with the family home and that, "everyone" was aware of and happy with the transfers, which she characterises as "normal". She did not substantiate these claims. Nor did she confirm how or when the

Plaintiffs learnt of those developments. The document which she apparently sent to the Plaintiffs to secure the disclaimer did not reference any such understanding.

21. The Plaintiffs made clear that they would be alleging fraudulent concealment and equitable doctrines to override any limitation defence. They say, without providing much context, that they only learnt in:

> (i) 2018 that Mary Grant had: (a) become the full legal owner of the property on 28 April 2000; and (b) transferred it into the Defendant's and her own joint names on 16 April 2007; and
>
> (ii) 2021 that the Property was put into the Defendant's sole name on 10 August 2018 (with a right of residence for Mary Grant).

22. There are other episodic references to the Plaintiffs' awareness of the transfers. For example, the Second Plaintiff says that, as their mother's health deteriorated, she suggested selling the house to provide nursing home care, but the Defendant resisted, insisting that the Second Plaintiff should return from Australia (where she has three children) to join a family roster to care for their mother. At one level, such discussions resemble the dilemmas negotiated by many siblings dealing with a parent's declining health. However, the Second Plaintiff says that the Defendant did not disclose that the house was already in her name (and it is plausible that the views of the other siblings as to ongoing responsibilities might have been coloured by that information).

23. The Second Plaintiff confirmed that she would never have confronted her mother about the ownership of the house but says that she did confront the Defendant, with the latter denying any knowledge of the transfer of the Property. Unfortunately, neither party confirms where and when the "confrontation" took place - it may be the discussion referenced in an email of 23 October 2019, from the Second Plaintiff to the solicitor representing the Defendant and their mother on the transfer of the Property

into their joint names (from the mother's sole name) – being a different solicitor to the one who had dealt with the father's estate. The Second Plaintiff also complained to the Legal Services Regulatory Authority ("the LSRA") in 2021 about said solicitor's role in the transfer of the Property to the Defendant in 2007 and the execution of their mother's will, a complaint understood by the Defendant to have been rejected by the LSRA. The Defendant relies on the complaint as demonstrating the Second Plaintiff's awareness of the transfer because the latter stated in the email of 23 October 2019:

> "*…that Mum made Anne joint owner of the family home (without other family members knowing) in 2007 via a title search. When I discussed this with Anne she denied all knowledge and still does.*"

While rejecting the suggestion that she denied knowledge of the transfer, the Defendant relies on the correspondence as showing that the Plaintiffs:

> "*were aware at the latest 2019 that I was a joint owner of the property, and therefore by definition that our late father's estate had been administered and the property therefore vested in our mother initially*".

24. The Defendant also notes that the Second Plaintiff's 8 September 2021 LSRA complaint did not raise any objection regarding the vesting of the property in their mother's name in 1999. Rather, the complaint seemed to be with the subsequent transactions (it appears from the exhibits that the Second Plaintiff challenged the independence of the solicitor who dealt with the transfers on behalf of both the Defendant and their mother, alleging that the mother said after the event that she had been "*forced*" to sign over the house, expressing regret for having done so and seeking to reverse the transaction, but it is not clear what, if any, substance there may be to such claims. I have disregarded these suggestions for present purposes. Nor do I do attach any weight to the email of 23 October 2019, which I regard as "cherry-picking" and certainly hearsay. If the solicitor's evidence were to be relied upon on such an issue, it

should be furnished directly by the solicitor, on oath and with full disclosure from the Defendant and from the solicitor as to the context, including the other relevant communications between all stakeholders and the detail of the contemporaneous transactions). The broader issue of waiver of privilege may also need to be resolved if a party selectively references such material.

Lack of clarity as to basis for claim

25. The Defendant criticised the evolution of the claim and the lack of clarity as to its basis. She identified inconsistencies in the Plaintiffs' positions. For example, their initial letter to the estate agent alleged that the Property was part of their *mother's* estate, whereas the current basis of the claim is against their *father's* estate.

***Inter Partes* Correspondence**

26. There were unsatisfactory aspects to the communications (or lack of them) between the parties at the outset of the proceedings, particularly those forthcoming (or not forthcoming) from the Defendant or her representatives. After the Defendant placed the Property on the market, the Second Plaintiff emailed the estate agent in August 2022, stating that it was part of Mary Grant's estate and subject to probate. In fact, this was inconsistent with the author's awareness that the Property had previously been transferred to the Defendant and it is also inconsistent with the current basis for the Plaintiffs' claim. However, it did highlight to the estate agent that at least one sibling had concerns about the sale of the Property. It deserved a substantive response, but none was forthcoming.

27. Follow-up communications still did not elicit meaningful engagement from the Defendant or her representatives. The Plaintiffs and their solicitor repeatedly expressed

their concern about the Property being placed on the market through emails, letters and telephone calls to the estate agent, and to the Defendant herself as well as to her former solicitor. However, the Property remained on the market and no substantive response was forthcoming. The Plaintiffs' concerns naturally mounted as the agent's website proclaimed "*Sale Agreed*", while they still had not received a substantive response to the concerns they had repeatedly expressed. Bizarrely, the estate agent even refused to confirm which solicitors were handling the sale.

28. In view of the lack of engagement, it is understandable that the Plaintiffs should have concluded that the Defendant was seeking to close the sale and remove the proceeds of sale from the jurisdiction and that it was necessary to seek injunctive relief. The Defendant says that she only learnt of the Plaintiffs' claim on 8 May 2023 and that the February 2023 correspondence from the Plaintiffs never reached her, possibly due to a slight error in the postcode on the letter or to a postal strike around that time. No independent evidence was advanced to support those explanations or to explain the nonreceipt of any of the other communications *via* her agents. In any event, her explanation still leaves questions begging. For example, her estate agent and her former solicitor promised to forward the Plaintiffs' solicitor's correspondence to their client, but the Defendant denies receiving such notifications. Nor has she explained the agent's refusal to identify the solicitor handling the sale of the property. The Defendant only started to engage on 8 May 2023 after the Plaintiffs' solicitors wrote to the Defendant and the solicitors who they believed might be representing her, informing them that these proceedings were being issued.

29. There were also concerns with the correspondence on the Plaintiffs' behalf. For example, the Plaintiffs' solicitor's letter dated 10 May 2023 stated that legal proceedings had already issued (which seems to have been premature, although they

may have been in train). While it is not surprising that the Plaintiffs and their solicitors should have been concerned by the Defendant's failure to engage earlier, any inaccuracy as to whether proceedings had issued is unsatisfactory, particularly as it prevented engagement (and a mediation declaration issue noted below may also be relevant in this regard). However, the greater concerns arise from the inaccurate statements on the Defendant's behalf in respect of the disclaimers and the delay in engaging with the Plaintiffs. The Defendant finally telephoned the Plaintiffs' solicitor on 8 May 2023. On the basis of the Plaintiffs' solicitor's account of that call, aspects of the position adopted by the Defendant appear inconsistent, but it is neither necessary nor appropriate for me to resolve those issues, save to note that the Plaintiffs' perceptions of the Defendant's credibility will not have been enhanced by the unsatisfactory initial engagement.

The Law

30. The key legal principles are as follows:

Dismissal Application

31. The principles governing the power to strike out proceedings (whether under Order 19, rule 28 RSC or pursuant to the Court's inherent jurisdiction) are very well established, in authorities such as *Barry v Buckley* [1981] IR 306 and *Lopes v Minister for Justice* [2014] 2 IR 301, and were not disputed. Accordingly, I do not propose to summarise or to add to those legal principles, save to note that the jurisdiction is to be exercised sparingly and in clearcut cases.

Constructive Trusts

32. In *Motor Insurers Bureau of Ireland v Stanbridge & Ors.* [2011] 2 IR 78, disclaimers were struck down as fraudulent conveyances. Laffoy J. approved the summary of the law in relation to constructive trusts which was provided by Delany in *Equity and the Law of Trusts in Ireland* (4th edn., 2007) 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*".

Injunctions Generally

33. I need not recite uncontroversial and well-established principles with regard to the criteria for dealing with applications for interlocutory injunctions. I have relied, in particular, on the helpful synthesises of the authorities by O'Donnell J. (as he was) in *Merck Sharp & Dohme Corp. v Clonmel Healthcare Ltd* [2020] 2 IR 1 ("*Merck*") as well as its Irish and international predecessors. In the interests of brevity, I will confine myself to also noting the remarks of Collins J. in respect of the balance of convenience/least risk of injustice concept in *Betty Martin Financial Services Ltd v EBS DAC* [2019] IECA 327. Noting that establishing a "*serious issue to be tried*" was a necessary (but not sufficient) condition for injunctive relief, Collins J. observed (at para. 34) that:

> "*the decision to grant or refuse thereafter becomes a matter of overall assessment of where the balance of justice lies, though with particular (and, in many cases, decisive) weight being given to the adequacy of damages within that overall assessment.... there are likely to be multiple considerations to be weighed in the balance, pointing in different directions, none of which are likely to be decisive in itself.*"

Mareva Injunctions (Freezing Orders)

34. Orders "freezing" assets pending trial are a draconian remedy which will only be granted in limited circumstances. In *Third Chandris Shipping Corporation v Unimarine SA* [1979] QB 645, at pp. 668-669, Lord Denning M.R. listed criteria to be satisfied by plaintiffs seeking such relief, an analysis endorsed by the Supreme Court in *O'Mahony v Horgan* [1995] 2 IR 411 ("*Horgan*"). In brief, the plaintiff must: (i) disclose all material facts within his knowledge; (ii) particularise his claim, stating the grounds of claim and the amount, and fairly stating the points made against the claim by the defendant; (iii) explain the basis for believing that there are assets in the jurisdiction; (iv) establish a risk of the assets being removed before the judgment is satisfied (the mere fact of a foreign defendant is not sufficient); and (v) give an undertaking as to damages.

35. The Irish courts lay particular emphasis on the fourth criterion (likelihood of fraudulent dissipation). As Hamilton C.J. observed in *Horgan* (at p. 418):

> "*a Mareva injunction will only be granted if there is a combination of two circumstances established by the plaintiff i.e. (i) that he has an arguable case that he will succeed in the action, and (ii) the anticipated disposal of a defendant's assets is for the purpose of preventing a plaintiff from recovering damages and not merely for the purpose of carrying on a business or discharging lawful debts*".

The need for evidence of risk of dissipation was reiterated by Clarke J. (as he then was) in *Tracey v Bowen* [2005] 2 IR 528. Clarke J. cited the observation of O'Sullivan J., in *Bennett Enterprises Inc v Lipton* [1999] 2 IR 221, at p. 228, that the risk of a dissipation of assets in the ordinary course of business would not justify the granting of a Mareva injunction – the concern is to prevent the defendant seeking to evade his obligations. While direct evidence of intention to dissipate will rarely be available:

> "*the court is entitled to take into account all the circumstances of the case which can include, in an appropriate case, an inference drawn from the nature of the wrongdoing alleged which if fraudulent or unconscionable may lead to the establishment of a risk that further fraudulent or unconscionable actions will be taken so as to place any assets of the defendant outside the jurisdiction of the court*" (at p. 532).

Authorities such as *Fleming v Ranks (Ireland) Limited* [1983] ILRM 541 and *Polly Peck International plc v Nadir* [1992] 4 All ER 769 also show that a Mareva injunction is not intended to provide pre-trial security but only to prevent dissipation (where there is reason to anticipate such dissipation).

Undertaking as to Damages

36. The court's entitlement to consider the substance of an undertaking as to damages has been confirmed in many decisions, including *Hafeez v CPM Consulting Limited* [2020] IEHC 536 ("*Hafeez*"), at paras. 135-137, and *Martin v An Bord Pleanála* [2002] 2 IR 655. In *Hafeez*, the undertaking was no more than "*a pro forma compliance*" with the requirement, because, as Keane J. observed (at paras. 135-136), the plaintiff:

> "*has provided none of the detail concerning his underlying means and income necessary to allow me to assess whether those undertakings have any realistic value. I have already noted Mr Hafeez's complete failure to distinguish between his income and means, on the one hand, and those of the company, on the other, to which I would now add that he has also completely failed to disclose his income and means or – although they are not directly relevant – those of the company.*
> *To take just one example of the fog of confusion that Mr Hafeez has created, at paragraph 49 of his second affidavit, he solemnly avers that he is in a position to discharge any award of damages against him as his other restaurants are operating successfully. Two paragraphs later, he solemnly avers that he is struggling to pay the overheads, including staff wages and electricity, for the*

other two takeaway restaurants he operates. Earlier, at paragraph 42, he avers that the restaurant premises is part of the collection of three takeaway restaurants that he owns, before immediately going on to state that he controls such premises as a director of the company. In those circumstances, I cannot be satisfied that the personal undertakings that Mr Hafeez offers are anything more than a pro forma compliance with the usual requirement of the type that O'Sullivan J found to be fundamentally lacking in Martin v An Bord Pleanála [2002] IEHC 82, (Unreported, High Court, 24 July 2002) (at para 81)."

Statute of Limitations

37. Section 45 of the Statute of Limitations 1957 provides that no action in respect of any claim on intestacy to the estate of a deceased person or to any share or interest in any such estate shall be brought more than six years after the date on which the right to receive the share or interest accrued. *Drohan v Drohan* [1984] IR 311, endorsing *Re Diplock* [1948] Ch. 465, confirmed that the period applies both to claims by a beneficiary against personal representatives or against wrongly paid beneficiaries.

38. However, section 71 may extend the limitation period in the event of fraudulent concealment. This is a complex issue but, for the purposes of the current interlocutory application, it is sufficient to refer to the Court of Appeal decision in *O'Dwyer v Daughters of Charity of St Vincent De Paul & Ors.* [2015] 1 IR 328 ("*O'Dwyer*") which concerned a claim in respect of the unlawful adoption of a child forty years earlier. The claim would be clearly statute barred save that the plaintiff, a mother who had been persuaded to allow her child to be adopted in a procedure which she now understood to be unlawful, alleged fraudulent concealment to counter such a limitation defence. The key point was that, obviously, she had always known the facts of the adoption, but she did not know that she had been induced to participate in an unlawful procedure. The Court rejected the submission that this sufficed for fraudulent concealment. Hogan J. observed (at pp. 342-344) that:

"*…there must be concealment either of wrongful conduct which gives rise to the cause of action or a failure by the defendant or his agent to disclose facts known only to the defendant which, if disclosed, would found a cause of action such that it would be inequitable to permit the defendant to rely upon the Statute of Limitations.*

… the evidence … does not establish that there was concealment by or on behalf of the first named defendant of the wrongful conduct alleged against it in relation to the cause of action pleaded. There is equally no evidence that the first named defendant failed to disclose relevant facts known only to it which, if disclosed, would have founded the cause of action pleaded. ... The facts giving rise to the plaintiff's cause of action … were known to her at the time they occurred.

Counsel for the plaintiff submitted that the first defendant was in a relationship with the plaintiff such that it gave rise to fiduciary obligations … to inform her of her statutory and other legal rights. He further submitted that the first defendant's failure to inform her of the fact that the procedures allegedly followed by them (and others) in relation to the adoption of her son were in breach of her legal rights constitutes concealment by fraud for the purposes of s.71 of the Act of 1957. Whilst the failure to inform the plaintiff of her rights under the Adoption Acts may well have amounted to a breach of duty and, therefore, to give rise to a cause of action, it is not concealment by fraud of the plaintiff's cause of action … in the sense I have just described. There was no concealment either of actions taken by or on behalf of the first defendant or of facts known only to it which if disclosed would demonstrate the existence of a cause of action.

… the plaintiff's real complaint was that at the time she did not realise what was being done at the time was illegal and that no one in authority took any steps to ensure that she was made aware of her legal entitlements. This, however, does not amount to concealed fraud in the sense in which that term is used in s. 71(1)(b) of the Act of 1957, as a failure to disclose the illegality or potential illegality of acts openly taken cannot be considered in itself to amount to the concealment of a right of action…

It would, of course, be different were the conduct in question to be furtive or surreptitious… Different considerations also arise where the defendant commits an intentional tort (such as conversion) and fails to disclose these facts to the plaintiff…

…the fraud must either consist of conduct which is concealed from the plaintiff or of the failure to disclose the existence of facts known only to the defendant which, if disclosed, would found a cause of action. In the present case, the plaintiff knew that she was being asked to give an informal consent to the adoption and … was thus aware of all the critical facts necessary to found the cause of action. It is equally true that the first named defendant did not disclose that its conduct was or might have been illegal, but, for the reasons just stated, this in itself does not amount to fraudulent concealment within the meaning of s. 71(1)(b) of the Act of 1957."

39. *Cunniffe v Cunniffe* [2020] IEHC 241 ("*Cunniffe*") is a recent example of the Court refusing to strike out proceedings because s. 71 could possibly afford a defence to the limitation plea (although it was later determined that claim was, indeed, statute barred).

40. Independently of s. 71, a party may not be permitted to invoke a limitation defence where it would be unconscionable to do so such as where an equitable estoppel arose (see *Murphy v Grealish* [2009] 3 IR 366). Canny's *Limitation of Actions* (3rd edn., 2022) notes at para. 2-24 that:

"*A motion relying on the inherent jurisdiction of the courts to dismiss proceedings that are bound to fail should only be brought if the limitation position is so clear that there is no arguable response whatsoever and the proceedings are very clearly statute-barred*."

Findings

41. As noted above, I am not finally deciding any legal or factual issues. The evidence will be more extensive, and the law will be debated at greater length at trial. I will deal first with certain issues relevant to both applications before focussing on issues particular to the injunction application.

Nature of and Basis for the Plaintiffs' Claim

42. The Statement of Claim should have been delivered months ago. The Plaintiffs' credibility (in terms of showing an arguable case and that it is not statute barred) is diminished in its absence. While it is not unknown for injunction applicants to await the outcome of such applications before taking other steps, the Rules of the Superior Courts do not provide for such inertia, nor was leave sought from the Court to extend the time for the delivery of the pleading. Such a failure to comply with the Rules and to progress the litigation may be relevant (but not necessarily determinative) to many points identified in *Merck* as requiring assessment in determining whether to grant an injunction (such as whether the Plaintiff has established an arguable case, the balance of convenience and the judicial discretion). The Plaintiffs' explanation that they were awaiting the outcome of the dismissal motion before incurring further costs is unsatisfactory and inconsistent with their robust submissions that there was no possible basis for that motion to succeed. As well as allowing the Court to understand the basis of the claim, the pleading also demonstrates the sincerity of the Plaintiff's commitment to progress the litigation. This is also important since interlocutory injunctions are not an end in themselves. They preserve the position pending trial. They do not replace the obligation on plaintiffs to prosecute their claim. If an injunction is sought for tactical reasons, with no genuine intention to prosecute the claim, then that alone is a sufficient reason for refusing relief. I have not reached such a conclusion here, but the failure to deliver a Statement of Claim may invite such a finding in future cases, depending on the circumstances.

43. There is some justification for the Defendant's submission as to the evolution of and lack of clarity as to the basis for the claim. However, the broad terms of the claim seem reasonably clear. While full particulars will be required and it is not for me to

settle the Plaintiffs' case, which will doubtless be more nuanced when fully pleaded, the essence of the (current) claim appears to be that the Plaintiffs had an undeniable right to benefit from their father's estate, that the disclaimers were fraudulently effected to extinguish that right and that this was engineered for the Defendant's ultimate benefit. The Plaintiffs say that the original transfer was fraudulent, tainting subsequent transactions and that, when their mother and, subsequently the Defendant, became the registered owner of the Property, they held the Plaintiffs' respective interests on trust. I consider that such a claim is arguable as matters stand.

Were disclaimers executed by or for the Plaintiffs and, if so, were they valid?

44. The Defendant would be in a much stronger position if she succeeds in establishing that all Plaintiffs executed valid, effective, legally executed disclaimers. The factual position will be probed at trial (and the recollection of the sibling who is not a party to the proceedings could be crucial). Discovery will be needed from all repositories. Further testimony (including more handwriting analysis) will be needed. Factual issues will need to be resolved, such as which disclaimers are genuine, in what circumstances they were executed and the Defendant's entitlement to sign in the Second Plaintiff's name. If the Third Plaintiff was induced to sign under a misapprehension, the principle of "*non est factum*" could apply. As matters stand, there is a serious issue as to which Plaintiffs signed what disclaimers and on what basis. There is an arguable case that disclaimers were not lawfully executed on all Plaintiffs' behalf.

45. Even on the Defendant's case, an issue arises as to whether the disclaimers would be effective. Evidence will be required to establish who knew what, and when. For example, there could be an issue with the adequacy of the Defendant's cover letter of 22 September 1999, whether it sufficiently referenced the fact that the Plaintiffs were

forgoing an actual entitlement. The disclaimer did state "*I wish to disclaim any interest in my father's estate…*", but the Plaintiffs will argue it was not clear that each sibling was being asked to irrevocably waive an actual and unchallengeable entitlement to a one-fifteenth share.

46. Also, and even leaving aside the lack of independent legal advice (a potentially significant issue in itself), the estate's solicitor would have put the matter more clearly if he had communicated with the siblings, thus ensuring informed consent. The Defendant's letter (assuming it was sent) suggested that the documents were needed for tax reasons, which was not the full story. If they were obtained on a misleading basis, then the disclaimers, the administration and related acts may be open to challenge on the basis that it would be unconscionable for the Defendant to ignore the Plaintiffs' interest.

47. Accordingly, it would not be safe to strike out the proceedings to the extent that the motion is premised on the disclaimers, since these issues can only be resolved at trial. I would have been more sympathetic to the application if the facts had remained as outlined in the affidavit originally grounding the Defendant's motion. However, the evidence which subsequently emerged has made it impossible for the Defendant's application to succeed unless the action is clearly statute barred.

Limitation and Related Defences

48. If the siblings only learnt of the key facts giving rise to the cause of action between 2018 and 2021, or later, then the action would not be statute barred, if the cause of action had been fraudulently concealed by the Defendant until then. The Defendant will presumably contend that the Plaintiffs had constructive (if not actual) notice of the grant of administration and both subsequent transfers. This may provide a limitation

defence, unless the Plaintiffs can establish fraudulent concealment of, for example, their entitlement to an interest in the estate or of the issues concerning the procurement of the disclaimers which were used to secure the grant of administration and the transfer to Mary Grant, clearing the ground for the Defendant's benefit. There are issues as to whether sufficient candour was displayed in the Defendant's communications at the time (and even during these proceedings). If the Defendant acted unconscionably, she may be estopped or otherwise unable to invoke a limitation defence.

49. The Defendant argued that, taking the Plaintiffs' assertions at their height, there was no concealment of facts known only to the Defendant required to ground the cause of action. She submitted that the claim was based on the division of the father's estate - the crucial facts of which (such as the transfers) were not concealed. The transfers of the Property were matters of public record and the claim is statute barred because the facts were not concealed. The Plaintiffs counter that there was concealment of an underlying fraud which was the basis on which the transfers were effected.

50. I consider that the factual position (and its legal consequences) is arguable either way. The "*furtive or surreptitious*" conduct/undisclosed "*intentional tort*" exception identified by Hogan J. may or may not be a fair description of the circumstances surrounding the disclaimers and any other aspects which have yet to be explored. Depending on such issues, the trial judge might consider it unconscionable to allow the Defendant to assert a limitation defence. As matters stand, the Plaintiffs' claim is arguable and there is a fair question.

51. In terms of other limitation points raised by the Defendant, she argued that, in 1998/1999, the siblings were happy for their mother to be vested with the family home and that "*everyone*" was aware of the transfers, which she characterises as "*a normal transaction*". That fact, and the context, would need to be established at trial. Nor does

the Defendant confirm how and when the Plaintiffs learnt of each development, although she exhibits an email which suggests that the Second Plaintiff claimed in October 2019 that she and her sisters had only learnt in July/August 2019 that the Defendant had become a joint owner of the family home in 2007 "*without other family members knowing*". The language of the letter, which she says she sent to the Plaintiffs to secure the disclaimers, did not refer to any such understanding.

52. There are public interest reasons for statutory limitation periods generally, and particularly in respect of the administration of estates. Although the cause of action is linked to the events of 1999-2000 rather than to the father's death in 1990, it is undesirable that issues should be litigated long after the event, including after Mary Grant's death. The Second Plaintiff's comment that she would never have challenged her mother is very understandable. However, if a party chooses not to raise an issue at the appropriate time, they may not be able to do so later (even if their reticence was reasonable). That said, the limitation period may be extended if fraudulent concealment is established. Furthermore, equitable doctrines such as estoppel may override such a defence. The Plaintiffs have an arguable position that key facts only became known to them at different stages between 2019-2021. Indeed, the Defendant's controversial role in the disclaimers only emerged during these applications. Accordingly, depending on what emerges at trial, the facts of case may be closer to *Beaman v. ARTS Ltd*. [1949] 1 K.B. 550 ("*Beaman*"), than to *O'Dwyer* (*Beaman* was cited by Hogan J. in *O'Dwyer* as an example of when the period would be extended). Accordingly, the proceedings may not be statute barred. Evidence will be needed to determine these matters, including the discussion of the nursing home proposal (and the Defendant's alleged nondisclosure of the fact that the house had already been transferred to her). Finally, I note that there are

issues with both sides' affidavit evidence as to the events in 2019-2021 but those events would be within a 6-year limitation period in any event.

Defendant's Application to Dismiss

53. Accordingly, it would be premature to conclude at this stage that the claim is vexatious or bound to fail or that the claim is inevitably statute barred. As the Plaintiffs acknowledged, such an application may have more substance at a later stage (in which case, a new application may be brought), but at this stage I am not satisfied that the Plaintiffs' claims should be struck out. That application must be dismissed.

Arguable Cause of Action

54. While the claim faces significant factual and legal obstacles, it meets the initial "arguability*"* bar. I need not adjudicate the Plaintiffs' contention that the Defendant's own evidence shows that she has been guilty of fraud and forgery and has misled the Court. I would not (and could not) exclude the possibility of innocent explanations without live testimony. Given the decades elapsed, it is not completely inconceivable that she had forgotten the detail when she hurriedly swore her first affidavit. Furthermore, while her execution of the disclaimer on her sibling's behalf would be irregular even on her own account, it may be more difficult to characterise that action as fraudulent, if she genuinely believed that she was indeed authorised to sign for her sister. While these issues will certainly require examination at trial, as matters stand, the Plaintiffs have established an arguable case that the Defendant is not entitled to rely on any Statute of Limitations defence by virtue of fraudulent concealment or estoppel or on the basis that it would be unconscionable for her to invoke that defence.

Adverse Possession

55. Although the point was not vigorously pursued in oral argument, the Defendant also suggested that her mother was entitled to claim title by adverse possession. However, the Plaintiffs contended that their mother's continued occupation of the Property until her death was with their consent and any such issue would need to be determined at trial. The Plaintiffs' position is arguable.

Defendant's failure to respond to the Plaintiffs' enquiries

56. Although further testimony may be needed to substantiate the Defendant's claims that she did not receive any communications in respect of the Plaintiffs' claim until May 2023, it is not necessary for me to resolve that issue. It is sufficient to note that the former solicitor and the estate agent were the Defendant's agents and representatives. It is surprising that she only learnt of the Plaintiffs' claim in May 2023 since her current estate agent and her former solicitor were informed as early as August 2022 and February 2023, respectively, and both had undertaken to inform her. The Plaintiffs were entitled to take them at their word. If they failed to do so (and I make no finding either way in that regard), the Defendant must take responsibility. I regard the failure to engage with the Plaintiffs' communications as relevant both to the dissipation risk and to the exercise of my discretion.

Adequacy of Plaintiffs' disclosure

57. The Defendant has not conceded that any of the five factors applicable to applications for Mareva injunctions are satisfied. I consider that it is the fourth requirement (dissipation) which requires particular scrutiny on this application. However, the Defendant also emphasised the first factor, disclosure of all material facts,

which is particularly important in the context of *ex parte* applications but is not limited to such applications. The Defendant submitted that relief should be refused on the basis that the Plaintiffs did not make full and frank disclosure in relation to the disclaimers or the LSRA complaint. There was no disclosure issue which would influence me to refuse relief. Any such points were dwarfed by the concerns regarding the evolution of the Defendant's own evidence.

Risk of Dissipation

58. The Plaintiffs must establish a dissipation risk (other than in the normal course of business, etc). The Plaintiffs had reasonable grounds to fear dissipation when they launched these proceedings, particularly since the Defendant and her representatives had failed to engage with their enquiries, although she has sought to explain that issue. The disclaimer evidence has reinforced concerns. I am satisfied that there is a sufficient dissipation risk to justify limited injunctive relief and that all of the "five factors" applicable to Mareva injunctions are sufficiently established for interlocutory purposes.

Potential impact of injunction on the Defendant

59. I doubt that the Defendant would be significantly prejudiced by an injunction or that she would be unable to recoup any such loss from the three Plaintiffs on foot of their undertaking, if necessary. She says that a previous opportunity to buy an Irish property was lost due to the litigation, but the evidence is inconclusive. She could and should have sought approval from the Plaintiffs or, if necessary, the Court for any such investment and it is difficult to see why it would not have been forthcoming.

60. More importantly, since the Defendant has testified as to her determination to use the proceeds of sale to buy further property in Ireland, there is no evidence that she

would be prejudiced by an order which enabled her to do so on appropriate terms. A *bona fide* investment in Irish real estate would not constitute dissipation. Accordingly, any order would need to preserve her ability to engage in any such investment in property in Ireland, keeping assets within the jurisdiction (of course, there could be an investment or market failure risk, but an injunction is intended to guard against dissipation rather than to provide security).

Adequacy of Undertaking as to damages

61. The Defendant challenged whether the Plaintiffs' undertaking as to damages had any substance, since two Plaintiffs live outside the jurisdiction and the other failed to provide a statement of means. I agree that the Plaintiffs should have engaged more constructively with the reasonable enquiries as to the substance underpinning the proffered undertaking (and plaintiffs who fail to do so run the hazard that a court will be less inclined to grant discretionary relief). However, I doubt that it would be difficult for the Defendant to enforce a claim against her three sisters. One lives in Ireland, another in the UK (like the Defendant herself) and the third in Australia. Nor would I describe the undertaking in this case as a *pro forma* undertaking (as in *Hafeez*). The Defendant can seek joint and several recourses against all three Plaintiffs if necessary. All are in common law jurisdictions.

62. The extensive jurisprudence which considers the substance of an undertaking as to damages shows that it is a factor in the exercise of the judicial discretion. However – and depending on the extent of the potential prejudice to the Defendant - it would be going too far to suggest that an applicant must establish a certain level of resources before the Court will grant interlocutory relief. Setting the bar too high could prevent all but the wealthy from taking steps to preserve the *status quo* pending trial, even

though they may have legitimate grounds to do so. The issue goes to the balancing exercise and ties in with the loss, if any, to which the Defendant is likely to be exposed. The greater the potential impact, the more substance the Court might expect in terms of any undertaking. However, as noted above, I doubt that the Defendant would be unduly exposed, if an injunction is granted in terms which preserved her freedom to invest the proceeds of the sale in Irish real estate, as she intends. I also consider that damages would be an adequate remedy for the Defendant, but might not be for the Plaintiffs, because of the greater enforcement risk. Although she, like one of her sisters, could certainly be sued in the United Kingdom, they would have a greater enforcement risk because there would only be one "mark" rather than three.

63. Since the Plaintiffs were not asserting a right of recourse against the entirety of the proceeds of sale, it would be inappropriate for any order to apply to the entire €665,562.40 sale price achieved for the Property. There is an issue, if the three Plaintiffs, or any one of them, are entitled to assert any "undisclaimed" interest, as to whether: (a) a one-third share must be shared between all five siblings, entitling each of the three Plaintiffs to a one-fifteenth share; or (b) if any siblings (including the Defendant herself) did indeed disclaim their claim against their father's estate, then, under Irish probate law, any "non-disclaiming" siblings would share the entire one-third interest between them (as opposed to between the five siblings). That arcane issue will require factual testimony and legal argument at trial. For the present, I consider that the balance of convenience favours the making of an order, but it need not extend to the entire sale proceeds. I think it is sufficient to stipulate a figure of €135,000.00, representing approximately one-fifth of the sale price, notwithstanding that issue.

64. Accordingly, in view of the *Merck* criteria and related jurisprudence, I consider that an order to prevent the dissipation of the entirety of the proceeds of the sale of the

family home is appropriate in terms of the balance of convenience and is least likely to do an injustice to any party. As noted above, the order should not impede the Defendant's ability to proceed with her stated aim of investing in Irish real estate, providing that her unencumbered equity in cash or other assets in the jurisdiction will be at least €135,000. It would not be appropriate to require the Defendant to seek prior approval from the Court (or the Plaintiffs) before investing in property in Ireland and my order will not require her to do so. However, if, as a result of any such investment, the said minimum sum is represented by a real estate asset rather than by cash held by her solicitors, then her solicitors must inform the Plaintiffs' solicitor by letter within 14 days of the relevant investment details (the property's location and purchase price, estimated unencumbered equity, etc), confirming that the Defendant will not take any step with the object or intention of reducing that level of equity by, for example, taking out a second mortgage or failing to make required payments.

Trial of a Preliminary issue

65. I have considered whether to direct a hearing on the limitation issue, the course followed, for example, in *Cunniffe*. While that may be appropriate in many cases, and I am happy to hear submissions on the issue, my provisional view is that it may not be appropriate in this case because the issues giving rise to a s. 71 defence are closely interrelated with the substantive issues and it may be more appropriate (and efficient) for all such issues to be dealt with at trial in the usual way.

Conclusion

66. I intend to dismiss the Defendant's application but to grant the Plaintiffs' relief, albeit not in the precise terms of the Notice of Motion. I will afford the parties 14 days

to engage with each other and to seek to reach agreement in that regard in line with the terms of my judgment, failing which I will settle the precise terms of the order. I propose to list the matter to that end but also for directions in respect of the future conduct of the proceedings and in respect of costs and related issues, including the consequences of a failure to comply with the Mediation Act 2015, whether the proceedings should be transferred to the Circuit Court and any cost implications of such issues. I would also invite submissions, if necessary, as to whether any orders are required to ensure that all parties have fully discharged their obligation to identify and preserve all relevant hard or soft copy documents held by them or by their agents (although I expect that both sides will already have addressed this issue and will have been engaging constructively with each other to that end).

67. I will give the parties leave to file brief (2,500 word) submissions, if necessary, to deal with the matters canvassed in the previous paragraph. Such submissions should be delivered by Thursday 11 April 2024, following which the proceedings will be listed at 10.15am on Thursday 18 April 2024, with a view to determining those issues.