[1999–00 Gib LR 81]

CONWAY (Trustee in Bankruptcy of BRENNAN) v. STG VALMET TRUSTEES LIMITED

SUPREME COURT (Schofield, C.J.): March 18th, 1999

Bankruptcy and Insolvency—fraudulent dispositions—setting aside—Fraudulent Conveyances Act 1571 inapplicable to set aside disposition of assets governed by foreign law outside jurisdiction—applies only to assets against which execution possible in Gibraltar by plaintiff if had been creditor at time of disposition

Bankruptcy and Insolvency—fraudulent dispositions—registration of disposition—no common law duty owed by trustee to settlor's creditors to ensure settlor solvent, when registering disposition to trust under Bankruptcy (Registration of Dispositions) Regulations, 1990—if insolvent, settlor's protection under Bankruptcy Ordinance, s.42A(1) against creditor's challenge to disposition lost but no action by creditor for damages against trustee

The plaintiff, a trustee in bankruptcy, applied for various orders relating to the validity of three trusts of which the defendant was trustee.

The settlor established three Gibraltar trusts to benefit himself, his family, and a charitable foundation. Each was established with an initial fund paid into a Guernsey bank account by a cheque drawn on a US bank account. Further substantial sums were subsequently paid into the trusts in the form of a transfer from a US account, a promissory note issued by a US company and assigned to the defendant by the settlor, and US bonds.

A year after the last of the trusts was established, the settlor petitioned for voluntary bankruptcy in the United States. The plaintiff, as trustee in bankruptcy, commenced proceedings here against the defendant trustee alleging that the trusts had been established with the intent to defraud the

settlor's creditors, since the settlor had been aware of major legal proceedings against him in the United States at the time he established the trusts. He applied, *inter alia*, for declarations that the trusts were therefore void under the Fraudulent Conveyances Act 1571 and an injunction preventing dissipation of the assets. Alternatively, he claimed damages against the defendant for breach of statutory duty or negligence in failing to ensure that the settlor was solvent when the dispositions to the trusts were registered under the Bankruptcy Ordinance, s.42A, and/or knowing assistance in fraudulently procuring such registration. He also applied for an order setting aside the registrations.

The defendant maintained that the settlor had been solvent at the time he made the transfers of assets to the trust and held assets substantially in excess of his liabilities.

The defendant applied to strike out the statement of claim under O.18, r.19 of the Rules of the Supreme Court. It submitted that (a) the court had no power to set aside the trusts themselves, rather than the dispositions to them, under the 1571 Act; (b) the Act did not confer jurisdiction over dispositions of property made outside Gibraltar by persons who were not amenable to the court's jurisdiction; (c) nor did the Act enable the court to set aside a disposition of property which could not have been the subject of execution at the date of its disposition if the plaintiff had then been a creditor; (d) no breach of statutory duty or negligence arose from its failure to establish the settlor's solvency before registering the disposition under the Bankruptcy (Register of Dispositions) Regulations, 1990, since the only consequence of non-compliance with the regulations was the loss of the protection that registration offered, under s.42A of the Ordinance, against a challenge by a creditor or the trustee in bankruptcy.

Held, making the following orders:

(1) The plaintiff could not rely on the 1571 Act in seeking to set aside the dispositions of assets to the three trusts, since the plaintiff could not have levied execution against those assets in Gibraltar if it had been a creditor at the time of the dispositions. The Act did not apply, since the money transfers to the trusts had been made and the promissory note had been assigned in the United States, by persons who were neither resident nor domiciled in Gibraltar, to bank accounts in Guernsey. Nevertheless, if it could be shown that the dispositions were fraudulent according to US law, as the law governing the disponents when the dispositions were made, the Supreme Court could act against the defendant as the recipient amenable to its *in personam* jurisdiction. Accordingly, the reference to the 1571 Act would be struck from the statement of claim but the plaintiff would be invited to seek leave to amend his claim to plead that the dispositions were unlawful under US law (paras. 16–20; para. 30).

(2) The alternative claims for damages on the basis of negligence and breach of statutory duty would be struck out. Section 42A of the

Bankruptcy Ordinance provided additional protection against challenges by creditors, to the maker of a disposition who procured its registration having fulfilled certain conditions. If, contrary to s.42A(1)(c), the settlor had been insolvent at the time of the disposition, the registration would be invalid and no such protection would exist. The Ordinance conferred a privilege on the settlor if complied with but did not impose a duty on the defendant. Furthermore, a breach of the Bankruptcy (Register of Dispositions) Regulations, 1990 in obtaining registration could attract a criminal penalty under the regulations, but would not give rise to a cause of action for breach of statutory duty. The defendant trustee owed the plaintiff no common law duty of care as a creditor or contingent creditor to ensure that the settlor was solvent when making a disposition, and therefore the plaintiff could not claim damages for negligence or default in the performance of that duty. Nor had the plaintiff sustained any loss as a result of the defendant's failure to enquire into the settlor's solvency, since the Ordinance offered no protection if the settlor were insolvent (paras. 24–28; para. 30).

(3) For the same reasons, the application to set aside the registrations was unnecessary, and in any event, should not have been made without joining the Financial and Development Secretary in the proceedings (para. 26).

(4) If the plaintiff's claims of knowing assistance were proved at trial, the defendant might then be liable to account as a constructive trustee for the funds fraudulently disposed of. The defendant could not be liable in *damages* for knowingly assisting in procuring the registrations. The plaintiff would be given an opportunity to amend his statement of claim with respect to that allegation (paras. 29–30).

Cases cited:

(1) *Caparo Indus. PLC* v. *Dickman*, [1990] 2 A.C. 605; [1990] 1 All E.R. 568, *dicta* of Lord Bridge of Harwich applied.

(2) *Chellaram* v. *Chellaram*, [1985] Ch. 409; [1985] 1 All E.R. 1043, followed.

(3) *Grant* v. *Australian Knitting Mills Ltd*., [1936] A.C. 85; (1935), 105 L.J.P.C. 6, applied.

(4) *Hess* v. *Line Trust Corp. Ltd.*, 1997–98 Gib LR 270, applied.

(5) *X (Minors)* v. *Bedfordshire County Council*, [1995] 2 A.C. 633; [1995] 3 All E.R. 353, applied.

Legislation construed:

Bankruptcy Ordinance (1984 Edition), s.42A, as added by the Bankruptcy (Amendment) Ordinance 1990 (No. 12 of 1990), s.2: The relevant terms of this section are set out at para. 22.

Fraudulent Conveyances Act 1571 (13 Eliz. I, c.5), s.1: The relevant terms of this section are set out at para. 14.

J.E. Triay, Q.C. and *J.E. Triay* for the plaintiff;
T.R. Mowschenson, Q.C. and *G. Licudi* for the defendant.

1 **SCHOFIELD, C.J.:** The defendant is the trustee of three trusts settled by Robert F. Brennan, who has a colourful history, it seems, in the American finance industry. The three trusts are basically in the same terms and are stated to be governed by the laws of Gibraltar and are subject to Gibraltar's exclusive jurisdiction. By each trust a trust fund was settled upon the trustee subject to the terms of the settlement. The trustee is empowered, but not obliged, to make distributions from the income and capital of the trust fund for the benefit of such beneficiary or beneficiaries as it deems advisable in its sole discretion. Mr. Brennan retained the power, in conjunction with the trustee, to add to or subtract from the class of beneficiaries under the trust.

2 Each trust was set up for an initial period of 10 years from the date of the settlement or until Mr. Brennan's death if this occurred within that period. At the end of the 10-year period, if Mr. Brennan is alive, the trust will terminate and the trust fund will revert to Mr. Brennan. If he dies within the 10-year period there is provision for distribution of the assets either absolutely or by way of trust to his former wife and children.

3 The trusts are called the Seton Trust, the Benedictine Trust and the Cardinal Trust. The Seton Trust was created on January 25th, 1993, and the initial beneficiaries were Mr. Brennan's former wife, his three children and the Robert E. Brennan Foundation, a charitable foundation based in New York City. The Seton Trust was established with an initial trust fund of US$100 deposited in cash into an account maintained by the trustee with Credit Suisse (Guernsey) Ltd. in Guernsey. A further sum of US$3m. was transferred from an account in the United States to the same account in Guernsey.

4 The Benedictine Trust was created on the same day, and its beneficiaries were initially the same as the Seton Trust. It was established with a trust fund of US$100 in cash and a promissory note for US$13,750,000. The US$100 was paid into an account with Credit Suisse (Guernsey) Ltd. by cheque drawn on a US bank. The promissory note was issued on November 1st, 1992 by a New Jersey corporation called What's Your Racquet Inc. to Mr. Brennan. The note is governed by the laws of the State of New Jersey. The promissory note has been assigned by Mr. Brennan to the trustee, and notice of assignment has been given to What's Your Racquet Inc.

5 The Cardinal Trust was established on July 13th, 1994. The beneficiaries were initially the same as under the Seton and Benedictine Trusts, save that Mr. Brennan's former wife was not included. It was established

with a trust fund of US$100, paid by a cheque drawn on a US bank to the account held by Credit Suisse (Guernsey) Ltd. In about July 1994, New York City bonds with a face value of US$5,400,000 were transferred by Mr. Brennan to the trustee. At the time of transfer the bonds were held in London and at no time were the certificates relating to the bonds located in Gibraltar.

6 A little over a year after the creation of the Cardinal Trust, on August 7th, 1995, Mr. Brennan filed a voluntary petition for relief pursuant to Chapter 11 of the US Bankruptcy Code. On June 10th, 1997 the US Bankruptcy Court for the District of New Jersey approved the appointment of the plaintiff as trustee for the estate of Mr. Brennan.

7 On May 13th, 1998 the plaintiff commenced proceedings in the US court against Mr. Brennan and the beneficiaries of the Seton, Benedictine and Cardinal Trusts, seeking, *inter alia*, declarations that Mr. Brennan was insolvent at the time he established the three trusts and orders that the dispositions to them be avoided as fraudulent conveyances made with intent to delay, hinder or defraud creditors.

8 Prior to the commencement of those proceedings, on April 28th, 1998, the present action was commenced by writ. In this action the plaintiff seeks:

> "(a) a declaration that each of the three trusts has been established with intent to delay, hinder or defraud the creditors of Mr. Brennan, and that they are void under the Fraudulent Conveyances Act 1571 ('the Statute of Elizabeth');
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> (b) a declaration that the interests of Mr. Brennan reserved under the three deeds of settlement are available to creditors and an injunction against the dissipation of capital or income until the creditors of Mr. Brennan have been paid and discharged from the trust funds or otherwise;
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> (c) a vesting order in respect of each trust fund in favour of the plaintiff;
>
> (d) further or in the alternative, damages against the trustee."

9 Orders are also sought preventing the trustee from alienating, disposing of or otherwise divesting itself of the trust funds until further order of the court and that the registration of each trust pursuant to s.42A of the Bankruptcy Ordinance be set aside. A further claim for a declaration, pursuant to s.42 of the Bankruptcy Ordinance, that each of the three trusts is void is not being proceeded with.

10 The basis of these claims is an allegation that Mr. Brennan, when he settled the Seton, Benedictine and Cardinal Trusts, knew he could not

meet his creditors' claims. In particular, he knew of several class actions which had been commenced by the US Securities & Exchange Commission in 1992 in which he had been named as a defendant and in which it was alleged that he had used his dominant position in various companies fraudulently to manipulate the sale price of securities and thereby to generate illicit profit for himself at the expense of and with intent to defraud the general public.

11 That action was opened on June 4th, 1994 with a demand for US$78m. and it alleged that Mr. Brennan knew that claims were being made against him from as early as 1992 for very substantial sums. Indeed, by the time the three trusts were created, the Securities & Exchange Commission had made an offer to Mr. Brennan to settle for US$41m., which offer was rejected by Mr. Brennan. I understand that the action was settled by the plaintiff in March 1998 for a figure of US$55m.

12 I should say, for the sake of completeness, that the trustee on the other hand maintains that Mr. Brennan was solvent when the dispositions to the three trust funds were made and that he had assets which substantially exceeded his liabilities.

13 Injunctions are in place preventing the trustee from removing the assets of the Seton and Benedictine Trusts from the jurisdiction. The trustee resigned as trustee of the Cardinal Trust on April 5th, 1997 and new trustees were appointed in Mauritius. It seems that the Cardinal Trust has since moved on from Mauritius to Nevis. We do not know the whereabouts of the assets of the Cardinal Trust.

14 In this application the defendant seeks to strike out the plaintiff's statement of claim under the Rules of the Supreme Court, O.18, r.19 or under the inherent jurisdiction of the court. The prayer in the statement of claim for a declaration that the three trusts were established with intent to delay, hinder, or defraud the creditors of Mr. Brennan is stated to be based on the Statute of Elizabeth 1571. This provides:

> "For the avoiding and abolishing of feigned, covinous and fraudulent feoffments, gifts, grants, alienations, conveyances, bonds, suits, judgments and executions, as well of lands and tenements as of goods and chattels, more commonly used and practised in these days than hath been seen or heard of heretofore: which feoffments, gifts, grants, alienations, conveyances, bonds, suits, judgments and executions, have been and are devised and contrived of malice, fraud, covin, collusion or guile, to the end, purpose and intent, to delay, hinder or defraud creditors and others of their just and lawful actions, suits, debts, accounts, damages, penalties, forfeitures, heriots, mortuaries and reliefs, not only to the let or hindrance of the due course and execution of law justice, but also to the overthrow of

all true and plain dealing, bargaining, and chevisance between man and man, without the which no commonwealth or civil society can be maintained or continued:

II Be it therefore declared, ordained and enacted by the authority of this present parliament, That all and every feoffment, gift, grant, alienation, bargain and conveyance of lands, tenements, hereditaments, goods and chattels, or of any of them, or of any lease, rent, common or other profit or charge out of the same lands, tenements, hereditaments, goods and chattels, or any of them, by writing or otherwise, and all and every bond, suit, judgment and execution, at any time had or made sithence the beginning of the Queen's Majesty's reign that now is, or at any time hereafter to be had or made, to or for any intent or purpose before declared and expressed, shall be from henceforth deemed and taken (only as against that person or persons, his or their heirs, successors, executors, administrators and assigns, and every of them, whose actions, suits, debts, accounts, damages, penalties, forfeitures, heriots, mortuaries and reliefs, by such guileful, covinous or fraudulent devices and practices, as is aforesaid, are, shall or might be in any wise disturbed, hindered, delayed or defrauded) to be clearly and utterly void, frustrate and of none effect; any pretence, colour, feigned consideration expressing of use, or any other matter or thing to the contrary notwithstanding."

15 It is argued for the trustee that the court is not empowered to set aside the trusts under this enactment. If anything may be set aside, it is the dispositions to the trusts and not the trusts themselves. Furthermore, it is argued that this court has no jurisdiction to set aside dispositions of property situated overseas which were made outside the jurisdiction by a person who is not amenable to the jurisdiction. Further still, it is submitted that the Statute of Elizabeth can only be applied at the request of a trustee in bankruptcy to set aside settlements of property which could have been taken in execution by the trustees had they been creditors at the date of disposition. The creditors must show that the property could have been the subject of execution as at the date of the disposition.

16 The Gibraltar authority cited in support of these propositions is *Hess* v. *Line Trust Corp. Ltd.* (4). In that case an estranged wife was seeking to have set aside certain dispositions made by her husband to a trust fund settled in Gibraltar. The wife lived in New Mexico and the husband divided his time between England and the United States. It was argued by the wife that the trust was created to defeat her claim for maintenance and a financial settlement, and she prayed in aid the Statute of Elizabeth. The trust assets were shares in a company registered in Switzerland. The Court of Appeal found as follows (1997–98 Gib LR at 280–281):

"I can summarize the argument on behalf of Line Trust very shortly by reference to the written submissions with which the court has been provided. It was contended (i) that Mr. Hess had never been resident or domiciled in Gibraltar; (ii) that all the documents relating to the creation of the HF Trust were signed by Mr. Hess in London; (iii) that at all material times the shares had been treated as assets which were located in Switzerland; (iv) that the law governing the question whether Mr. Hess had effectively disposed of the shares was Swiss law; (v) that it was not, never had been and indeed never would be open to Mrs. Hess to levy execution on the shares in Gibraltar, as the shares are in a Swiss company and the share register is kept in Switzerland (we were referred to the definition of the securities which may be charged by a charging order in Gibraltar which is contained in s.2(1) of the Charging Orders Ordinance, 1988 and we were also referred to s.4(2)(b)); (vi) that it would not be open to Mrs. Hess to levy execution on the shares in reliance upon any judgment of the New Mexico court, because execution is only available in respect of a judgment of the Gibraltar court, and Mrs. Hess could not levy execution in Gibraltar on any judgment of the New Mexico court: counsel referred us to the decision of the Court of Appeal in England in *Perry* v. *Zissis* . . . ; (vii) that the 1571 Act only applied to dispositions of property where the property could be taken in execution in Gibraltar; and (viii) that it was not open even to a creditor to seek a declaration as to the nature or extent of the assets of an alleged debtor—counsel referred us to the decision in *Lister & Co.* v. *Stubbs* . . . and the position was even clearer in the case of a person who was not and could not be treated as a creditor in Gibraltar.

For my part, I see no answer to the submissions advanced on behalf of Line Trust. It is to be remembered that the primary claim by Mrs. Hess against Mr. Hess is being brought in New Mexico, where she is seeking alimony and other matrimonial relief. Her proceedings in this jurisdiction are aimed at increasing the size of the assets with which the court in New Mexico can deal. I have come to the conclusion, however, that the Gibraltar proceedings are fundamentally flawed.

It is common ground that the only dispositions of property which can be affected by the 1571 Act (which was replaced in England by s.172 of the Law of Property Act 1925) are dispositions of property which can be reached by execution. Execution is a local process. The decision in *Perry* v. *Zissis* underlines the fact that in the absence of reciprocal provisions for the enforcement of judgments, the judgment of a court in country *A* cannot be enforced by execution in country *B* unless and until a judgment based on the earlier judgment has been

> obtained in country *B.* But Mrs. Hess faces many other difficulties which seem to me to be insuperable. Even now she is not a creditor of Mr. Hess. She has no money judgment against him. She could not levy execution in Gibraltar against the shares in Switzerland and could not have done so at the date of the relevant disposition.
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> To put the matter shortly, Mrs. Hess is, in my view, in the wrong forum. It may be that in the divorce proceedings in New Mexico Judge Vigil will wish to question the propriety of the arrangements made by Mr. Hess in September 1994. I am quite satisfied that, certainly at this stage, however, Mrs. Hess cannot challenge the transfer and the creation of the HF Trust by recourse to the 1571 Act, which was designed for the protection of creditors and others who had existing and quantifiable claims against the fraudulent person at the time when the proceedings to impugn the relevant conveyance were started."

17 It seems to me that although the heart of the decision of the Court of Appeal was the narrow and fundamental point that Mrs. Hess could not invoke the provisions of the Statute of Elizabeth because she was not and never had been a creditor of her husband, the Court of Appeal was accepting the submissions of Line Trust in their entirety. It had been argued on behalf of Mrs. Hess that the property disposed of could be reached by execution within this jurisdiction and that earlier limits on the property that could be taken in execution had been removed. That argument, which was also advanced on behalf of the plaintiff in this case, did not seem to find favour with the court.

18 In the present case the money dispositions were made in the United States by a person neither resident nor domiciled in Gibraltar to bank accounts in Guernsey. The promissory note, which was governed by the law of New Jersey, was assigned in New Jersey. Following *Hess* (4), it appears to me that the plaintiff cannot challenge the dispositions by invoking the Statute of Elizabeth.

19 This finding does not mean that the court cannot interfere with dispositions made overseas to trustees within the jurisdiction. The extent to which the court will exercise an *in personam* jurisdiction over trustees was employed in *Chellaram* v. *Chellaram* (2). If it can be shown that the dispositions were fraudulent according to the law governing the disponent at the time when he made such dispositions, then this court will move against trustees who are amenable to its jurisdiction. And it seems from the nature of the proceedings issued in New York that such dispositions could well be fraudulent and unlawful under New York law.

20 In the circumstances of this case, in my judgment, it is in the interests of justice to give the plaintiff an opportunity to amend his

statement of claim to delete the reference to reliance on the Statute of Elizabeth and to enable him to plead that the dispositions were fraudulent and unlawful under the law governing them at the time they were made.

21 The three trusts were registered pursuant to s.42A of the Bankruptcy Ordinance. The plaintiff, in his statement of claim, asserts that the trustee is in breach of its statutory duty or acted negligently in failing to ascertain that Mr. Brennan was insolvent when such registration was effected and in failing to bring about a termination of such registration. The plaintiff claims damages for breach of statutory duty or for negligence in this regard and further seeks an order that such registration be set aside.

22 Sub-sections (1) and (2) of s.42A of the Bankruptcy Ordinance read:

> "(1) If:
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> (a) under or by virtue of any disposition made in respect of property the same becomes settled property; and
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> (b) the Settlor is an individual; and
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> (c) the Settlor is not insolvent at the date of the disposition;
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> (d) [the Settlor] does not become insolvent in consequence thereof; and
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> (e) the disposition is registered in accordance with the requirements of any regulations,
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> such disposition shall not be voidable at the instance of or upon application by any creditor of the Settlor.
>
> Provided that this section shall apply only to dispositions made on or after a day to be specified by the Governor by notice in the Gazette.
>
> (2) Without prejudice to the generality of the provisions contained in the preceding sub-section:
>
> (a) notwithstanding the English Law (Application) Ordinance, the Fraudulent Conveyances Act 1571 shall not apply to any disposition to which this section applies;
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> (b) section 42 of the Ordinance shall not apply to any settlement to which, but for this proviso, it would have applied and which is a disposition falling within the provisions of subsection (1) of this section."

Sub-section (3) gives various definitions and sub-s. (4) empowers the Financial and Development Secretary to make regulations for the establishment of a register of dispositions and, *inter alia*, for the conditions which need to be satisfied before a disposition may be entered in the

register and for the information to be provided in respect of a disposition before it may be so entered. It also empowers him to provide for a penalty for contravention of any regulation so made.

23 The Bankruptcy (Register of Dispositions) Regulations, 1990, were made under s.42A(4). Schedule 2 to the Regulations provides the form which must be completed by the trustees on an application for registration of a disposition. Such forms were completed by the trustee on its application for registration of the dispositions to the Seton, Benedictine and Cardinal trusts. I need not go into the details. It is sufficient to say that the plaintiff claims that the trustee registered these dispositions without making proper inquiries or investigations into Mr. Brennan's solvency and, indeed, knowingly assisted Mr. Brennan in fraudulently procuring a registration of the dispositions.

24 I am persuaded by the following submissions made on behalf of the trustee that these claims should be struck out. Section 42A was enacted to provide an additional layer of protection to those who make certain dispositions, in that registered dispositions fulfilling the conditions set out in s.42A(1) cannot be challenged by a creditor or by a trustee in bankruptcy. If that protection was wrongly obtained the sanction is that the layer of protection might be unavailable and criminal liability might be incurred. A breach of the regulations made under s.42A(4) does not give rise to a cause of action for breach of statutory duty. Section 42A does not impose a duty on a person who makes an application for registration of a disposition; it confers a privilege if certain requirements are satisfied. The sanction for a breach of the regulations made under s.42A is loss of the privilege and liability to a criminal penalty.

25 Lord Browne-Wilkinson stated the basic proposition that in the absence of legislative intention to confer a private right of action a breach of statutory duty does not by itself give rise to a private law cause of action. To establish a cause of action for the negligent exercise of statutory duties a common law duty of care has to be established (see *X (Minors)* v. *Bedfordshire County Council* (5) ([1995] 2 A.C. at 731–735)). As will be seen from what follows, I do not consider that the plaintiff has in this case established that the trustee owed a common law duty of care to the creditors. Furthermore, it is difficult to see what loss the creditors have incurred as a result of any breach of the Bankruptcy (Register of Dispositions) Regulations. Whether there has or has not been a registration of the dispositions does not affect the creditor's position. If Mr. Brennan was not insolvent at the date of the disposition the registration stands. If he was so insolvent the registration was invalid and the protection afforded by it falls away.

26 In my judgment, the plaintiff cannot make a claim for damages based on s.42A of the Bankruptcy Ordinance and those parts of the

statement of claim which refer to such claim must be struck out. I should also say that any claim that the registration pursuant to s.42A be set aside should not be made without bringing the Financial and Development Secretary, whose registration it is, into the proceedings. In any event, if the plaintiff proves that Mr. Brennan was insolvent at the date of registration the protection of s.42A falls away and it appears that an application to set it aside is unnecessary.

27 Interwoven into the statement of claim are claims for damages against the trustee for failing to investigate Mr. Brennan's affairs prior to accepting the office of trustee, for assisting Mr. Brennan in a dishonest scheme to defraud or damage his creditors, and for failing to preserve the assets of the Cardinal Trust for the creditors and transferring the funds in the trust to Mauritius, thus assisting Mr. Brennan in the dishonest attempt to hide and protect funds which should be available to his creditors. Leaving aside the question of whether a right of action lies in the plaintiff or in the creditors personally, for the plaintiff to succeed in a claim in negligence he must show that the trustee owed a duty of care to Mr. Brennan's creditors or contingent creditors (see *Grant* v. *Australian Knitting Mills Ltd*. (3) ([1936] A.C. at 103)).

28 In my judgment, it would not be fair, just or reasonable to impose on trustees a common law duty to ensure that a settlor, when making a disposition, is solvent so as to avoid liability in damages, and I have been shown no authority to persuade me from that view. I have had my attention drawn to the following passage in the speech of Lord Bridge of Harwich in *Caparo Indus. PLC* v. *Dickman* (1) ([1990] 2 A.C. at 617–618):

> "What emerges is that, in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of 'proximity' or 'neighbourhood' and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope upon the one party for the benefit of the other. But it is implicit in the passages referred to that the concepts of proximity and fairness embodied in these additional ingredients are not susceptible of any such precise definition as would be necessary to give them utility as practical tests, but amount in effect to little more than convenient labels to attach to the features of different specific situations which, on a detailed examination of all the circumstances, the law recognises pragmatically as giving rise to a duty of care of a given scope. Whilst recognising, of course, the importance of the underlying general principles common to the whole field of negligence, I think

> the law has now moved in the direction of attaching greater significance to the more traditional categorisation of distinct and recognisable situations as guides to the existence, the scope and the limits of the varied duties of care which the law imposes."

In my judgment there is no relationship between a settlor's creditors and a prospective trustee which can be characterized as one of "proximity" or "neighbourhood." A trustee's duties lie elsewhere than to the settlor's creditors. I find that a claim in negligence does not lie against the trustee in this case.

29 From my understanding of the pleadings, the plaintiff claims more than mere negligence on the part of the trustee. He claims that the trustee knowingly assisted Mr. Brennan in defrauding his creditors, in relation to the setting up of the trusts and in relation to the transfer of the Cardinal Trust to Mauritius. This is not the place to go into the strengths and weaknesses of the allegations. What is important is that they are made. If these allegations are proved the trustee may be liable to account for the funds fraudulently disposed of. The trustee is not liable in damages for knowing assistance. Arguments have been put forward on behalf of the trustee that it cannot be held liable to account as constructive trustee in this regard but I must say that for the purposes of this application I am unpersuaded by them. They may be developed at trial if the trustee persists in making them.

30 The upshot is that I order references to a claim under the Statute of Elizabeth, for breach of statutory duty and for damages in negligence to be struck out of the statement of claim. I do not strike out the claim that the trustee is liable for knowing assistance. The plaintiff may wish to amend his statement of claim in regard to that claim and I will hear him on it. I shall also hear the plaintiff on an application to include a claim that the dispositions were fraudulent in accordance with the law governing them. As the various claims are so interwoven in the existing statement of claim, I shall reserve any directions which may be required on the particular passages to be struck out to the hearing of the application for amendment, in the absence of agreement of the parties in that regard.

Order accordingly.
