Elleonerd Dawn Millard, née Bosworth (former wife of Michael Royston Bosworth) v Annette Stone, née Cox (wife of Timothy Stone)

Jurisdiction:	Jersey
Judge:	Matthew John Thompson
Judgment Date:	30 November 2022
Neutral Citation:	[2022] JRC 262
Court:	Royal Court

vLex Document Id: VLEX-919042981

Link: https://justis.vlex.com/vid/elleonerd-dawn-millard-nee-919042981

Text

Between
Elleonerd Dawn Millard, née Bosworth (former wife of Michael Royston Bosworth)
Plaintiff
and
Annette Stone, née Cox (wife of Timothy Stone)
First Defendant
Timothy Stone
Second Defendant
Marcus Kraig Stone
Third Defendant
Bois Executors Limited
Fourth Defendant

[2022] JRC 262

Before:

Advocate Matthew John Thompson, Master of the Royal Court.

ROYAL COURT

(Samedi)

Estate — application by the plaintiff to amend her order of justice

Authorities

Millard v Cox and Ors [2022] JRC 023.

Trico v Buckingham [2019] JRC 163.

Trico v Buckingham [2019] JRC 095.

Patel & Ors v JTC Trust Company Limited & Ors [2022] JRC 150.

Royal Court Rules 2004.

Roberts v Gill & Co [2010] UKSC 22.

Hayim Citibank NA [1987] AC 730.

Basnage, Commentaires sur law Coutume de Normandie 3rd Edition.

De La Haye v Walton [2013] JRC 021.

Advocate P.C. Sinel **for the Plaintiff**.

Advocate M. P. Boothman **for the First and Second Defendants**.

Advocate H. Sharp, **K.C. for the Third Defendant**.

Advocate S. J. Young **as a Director of the Fourth Defendant**

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THE MASTER:

Introduction

1 This judgment contains my decision in relation to an application by the plaintiff to amend her order of justice.

Background

2 The background to the present proceedings is set out in my previous judgment in this matter reported at *Millard v Cox and Ors* [2022] JRC 023 dated 27 th January 2022. I adopt paragraphs 2 to 11 of that judgment which sets out the issues currently between the parties.

3 My previous judgment contained my reasons for refusing various applications for specific discovery made by the plaintiff (who was then represented by Advocate A. P. Begg) and ordering general discovery.

4 That same judgment recorded the procedural history up to January 2022. The main part of the general discussion related to a discovery order I had made on 25 th August 2021 which required the parties to make discovery on a number of documents including “a. any documents relevant to the Deceased's instructions and capacity to make Wills in February 2015 and July 2017…” I have referred to this because the pleadings as presently drafted do not refer to the 2015 Will. Yet, if the Wills made in 2017 are set aside as the plaintiff alleges, then in relation to the moveable estate of the deceased the 2015 Will is likely to take effect unless that too is found to remain revoked. One of the amendments sought makes that application.

5 As a result of my previous judgment on 5 th January 2022 I made a general discovery order which included the following order at paragraph 5 as follows:-

"5. the Plaintiff and the First to Third Defendants shall make discovery of all relevant documents to each other by provision of a list of documents verified by affidavit by 5:00 p.m. Friday, 11th February 2022, such general discovery to include:-

a. all documents sufficient to provide a full explanation of the terms of the sale of 3 Parcq du Rivage and the purchase of Les Quatre Saisons;

b. the Third Defendant's dealing with the affairs of Annie May Bosworth (née Goulding) ("the deceased") from 2007 onwards; and

c. any records held in respect of Qu-Vib Limited."

6 Subsequent to this order the parties have all sworn affidavits of discovery.

7 In the same Act of Court I also ordered discovery to take place by 11 th February 2022, and allowed the plaintiff until 4 th March 2022 to file a draft amended order of justice. These time limits were subsequently extended by Acts of Court dated 10 th March 2022 and 27 th April 2022.

8 In respect of the Act of Court of 27 th April 2022 I also directed the plaintiff to arrange a date fix appointment in respect of any specific discovery application she wished to bring.

9 The summons currently issued by the plaintiff seeking to amend her order of justice also contains applications for specific discovery. Ultimately, I decided to proceed with the application to amend first before dealing with any specific discovery issues.

10 In relation to the amendments the plaintiff now seeks, four different versions of the draft amended order of justice have been provided by the plaintiff to the defendants. While the present application mainly focuses on the final version provided, I have referred to previous versions because criticisms were made by the first, second and third defendants of allegations made in earlier drafts which were then not pursued.

11 In relation to the present application, it is also right to note that in response to the second amended draft produced by the plaintiff, the third defendant swore an affidavit in response to the plaintiff's application to amend as formulated in the draft supplied at that time. I refer to this affidavit later in this decision.

12 The draft amended order of justice identities specific discovery documents sought as a result of the proposed amendments runs to some 59 pages. The original order of justice was 31 pages in length. Rather than set out the amendments in full, I have endeavoured to categorise them as follows:-

(i) Amendments relating to the challenges to set aside the 2017 Wills and extending the challenges to the 2015 Will;

(ii) A claim requiring the first, second and third defendants to account for their dealings with the assets of the deceased during her lifetime. Insofar as the amendments seek to require the first, second and third defendants to account for their dealings with the assets of the deceased, the pleading also seeks to bring a derivative claim on behalf of the deceased's estate;

(iii) Amendments relating to the plaintiff's claim requiring the defendants in particular the third defendant to account for lifetime gifts by way of application of the doctrine of “Rapport a la Masse”;

(iv) minor amendments relating to existing factual matters already pleaded; and

(v) amendments to the relief sought.

The legal principles on an application to amend

13 There was no dispute between the parties on the applicable legal principles on an application to amend. I considered these in *Trico v Buckingham* [2019] JRC163 at paragraphs 35 to 38 as follows:-

> ***“35. In respect of the Jersey position, I was referred to*** *MacFirbisigh v C.I. Trustees an Executors Limited and Others* [2014] (1) JLR 244 ***where I summarised the applicable legal principles on an application to amend at paragraphs 27 to 30 including citing the decision of*** *Cunningham v Cunningham* [2009] JLR 227. ***In summary, the principle was covered by paragraph 21 of Cunningham as follows:-***
>
> ***“21 Where there is a late application for an amendment to the order of justice (or to the answer or reply) the Jersey courts have to strike a balance which is primarily between the parties to the instant case.*** The burden on the applicant is a heavy one to show, for example, (1) why the matters now sought to be pleaded were not pleaded before; (2) what is the strength of the new case; (3) why an adjournment should be granted, if one is necessary; (4) how any adverse effects on the other party including the effects of any adjournment, any additional discovery, witness statements or experts reports, or other preparation for trial can be remedied; and (5) why the balance of justice should come down in favour of the party seeking to change its case at a late stage of the proceedings .
>
> ***36. My decision in MacFirbisigh however was prior to the introduction of the overriding objective into the Royal Court Rules in June 2017. The current approach in England to late applications to amend therefore goes further than the approach in MacFirbisigh and other previous decisions on applications to amend. In*** *Quah Su-Ling v Goldman Sachs International*

[2015] EWHC 759 (Comm), ***Ms Justice Carr DBE summarised these principles at paragraphs 36 to 38 as follows:-***

"36. An application to amend will be refused if it is clear that the proposed amendment has no real prospect of success. The test to be applied is the same as that for summary judgment under CPR Part 24. Thus, the applicant has to have a case which is better than merely arguable. The court may reject an amendment seeking to raise a version of the facts of the case, which is inherently implausible, self-contradictory or is not supported by contemporaneous documentation. (Underlining Added)

37. Beyond that, the relevant principles applying to very late applications to amend are well known. I have been referred to a number of authorities : *Swain-Mason v Mills & Reeve* [2011] 1 WLR 2735 ***(at paras. 69 to 72, 85 and 106)***; *Worldwide Corporation Ltd v GPT Ltd* ***[CA Transcript No 1835] 2 December 1988***; *Hague Plant Limited v Hague* [2014] EWCA Civ 1609 ***(at paras. 27 to 33)***; *Dany Lions Ltd v Bristol Cars Ltd* [2014] EWHC 928 (QB) ***(at paras. 4 to 7 and 29)***; *Durley House Ltd v Firmdale Hotels plc* [2014] EWHC 2608 (Ch) ***(at paras. 31 and 32);*** *Mitchell v News Group Newspapers* [2013] EWCA Civ 1537.

38. Drawing these authorities together, the relevant principles can be stated simply as follows:

a) whether to allow an amendment is a matter for the discretion of the court. In exercising that discretion, the overriding objective is of the greatest importance. Applications always involve the court striking a balance between injustice to the applicant if the amendment is refused, and injustice to the opposing party and other litigants in general, if the amendment is permitted;

b) where a very late application to amend is made the correct approach is not that the amendments ought, in general, to be allowed so that the real dispute between the parties can be adjudicated upon. Rather, a heavy burden lies on a party seeking a very late amendment to show the strength of the new case and why justice to him, his opponent and other court users requires him to be able to pursue it. The risk to a trial date may mean that the ***lateness of the application to amend will of itself cause the balance to be loaded heavily against the grant of permission;***

c) a very late amendment is one made when the trial date has been fixed and where permitting the amendments would cause the trial date to be lost. Parties and the court have a legitimate expectation that trial fixtures will be kept;

d) lateness is not an absolute, but a relative concept. It depends on a review of the nature of the proposed amendment, the quality of the explanation for its timing, and a fair appreciation of the consequences in terms of work wasted and consequential work to be done;

e) gone are the days when it was sufficient for the amending party to argue that no prejudice had been suffered, save as to costs. In the modern era it is more readily recognised that the payment of costs may not be adequate compensation;

f) it is incumbent on a party seeking the indulgence of the court to be allowed to raise a late claim to provide a good explanation for the delay;

g) a much stricter view is taken nowadays of non-compliance with the Civil Procedure Rules and directions of the Court. The achievement of justice means something different now. Parties can no longer expect indulgence if they fail to comply with their procedural obligations because those obligations not only serve the purpose of ensuring that they conduct the litigation proportionately in order to ensure their own costs are kept within proportionate bounds but also the wider public interest of ensuring that other litigants can obtain justice efficiently and proportionately, and that the courts enable them to do so."

37. The Court of Appeal in *Nesbit Law Group LLP v Acasta European Insurance Company Limited* [2018] EWCA Civ 268 ***endorsed this approach at paragraph 41 as follows:-***

"41. The principles relating to the grant of permission to amend are set out in Swain-Mason and in a series of recent authorities. The parties referred particularly to Mrs Justice Carr's summary in *Quah Su-Ling v. Goldman Sachs International* [2015] EWHC 759 (Comm) ***at paragraphs 36–38 of her judgment. In essence, the court must, taking account of the overriding objective, balance the injustice to the party seeking to amend if it is refused permission, against the need for finality in litigation and the injustice to the other parties and other litigants, if the amendment is permitted. There is a heavy burden on the party seeking a late amendment to justify the lateness of the application and to show the strength of the new case and why justice requires him to be able to pursue it. These principles apply with even greater rigour to an amendment made after the trial and in the course of an appeal." (Underlining Added)***

38. In my judgment, the approach now taken in England should be reflected in this jurisdiction and therefore greater emphasis should be given to the overriding objective compared to the approach taken in MacFirbisigh and other decisions in Jersey. I stress however this is a change of emphasis rather than a marked departure from the previous approach because some of the factors in MacFirbisigh overlap with those now relied upon before the English Court. Nevertheless that change of emphasis giving greater emphasis to the overriding objective is one that in the future I consider should be taken in this jurisdiction."

14 These are the principles I have applied.

15 In relation to the application, it is not late in the sense that it is close to trial. However, this is an action that started in August 2021 and has suffered from various delays. It is therefore right to say that it has taken a lot longer than anticipated for the plaintiff to produce the amendments she now seeks as can be seen from the number of different drafts circulated to the parties and how long it took to provide those drafts. For what started out as a family dispute about who should inherit, this delay is not in the interests of justice or of the parties and is unacceptable.

16 In relation to the present application, of particular importance to my decision is the approach taken in England, summarised at paragraph 36 of *Trico* that an application to amend will be refused if it is clear that the proposed amendment has no real prospect of success and that in exercising the discretion vested in me the overriding objective must be taken into account. I also have had regard to the fact that applications to amend always involve striking a balance between injustice to the applicant if proposed amendments are refused and injustice to the opposing parties if amendments are permitted.

17 Advocate Sharp also reminded me of the applicable principles in relation to fraud and dishonesty which I considered in *Trico v Buckingham* [2019] JRC 095 at paragraphs 42 to 53. and in *Patel & Ors v JTC Trust Company Limited & Ors* [2022] JRC 150 at paragraphs 92 to 95. While I am familiar with these principles and have regard to them, for the reasons set out below it is not necessary for me to have applied them in relation to this case because of the approach I have taken in relation to the plaintiff's application to amend.

18 I now turn to deal with each of the categories of applications brought by the plaintiff.

Amendments relating to the claims to set aside the 2017 Wills and the 2015 Wills

19 In relation to the application to plead that the 2015 Will should be set aside, there was no objection to this from counsel for the defendants and therefore I allowed these amendments. They are set out at paragraphs 23I to 23L of the draft amended order of justice. I also allowed the amendments at paragraphs 23M and 23O because they relate to the allegations of undue influence and the lack of capacity made in relation to the 2015 and 2017 Wills. For the same reason I have allowed the amendments at paragraph 27 subject to my decision below concerning paragraphs 26 and 27 of the order of justice. The amendment at paragraph 27A is therefore approved as are the amendments in paragraph 40. Paragraph 27A relates to the making of the 2017 Wills and paragraph 40 relates to the existing allegations of undue influence or a lack of capacity.

20 I am not however prepared to approve the amendments set out at paragraphs 20A and 20B of the draft provided. These amendments concern a will of personalty made by the deceased in July 2004. However, this amendment is irrelevant because the existing claim made by the plaintiff is that the division of the deceased's movable estate should be

governed by her 2007 Will. The fact that the deceased made an earlier will which was later revoked does not have any bearing on allegations made in respect of the 2015 Will and the 2017 Will. No party, if the 2015 or 2017 Wills are set aside, has made any assertion that the 2007 Wills should be set aside. There is therefore no need to go back further in time than 2007.

Claims requiring an account

21 The amendments made relate to potential claims against either the first and second defendants or the third defendant requiring them to account for how monies of the deceased have been spent. In this judgment I analyse each of these claims by reference to the material before me to consider whether or not applying the principles in *Trico* set out above in particular whether the claim is *"better than merely arguable"* and how by exercising the overriding objective and the discretion vested in me I should strike a balance between injustice to the plaintiff if the amendments are refused and injustice to the first, second and third defendants if the amendments are permitted. In this case this also requires me to consider whether the material before me shows a case which would entitle the plaintiff to bring a derivative action. Compared to most applications to amend this present application is more complex and requires a consideration of each of these issues.

A claim against the first and second defendants

22 The specific allegation made against the first and second defendants is found within the amendments at paragraph 23E where the following is asserted:-

> *"The pattern of spending, at a time when the Deceased was physically under the control of the First and Second Defendants and financially under the control of the Second and Third Defendants shows numerous transactions on Amazon, cash withdrawals (circa £2,000 pcm) and other expenditure not for the benefit of the Deceased including debits both on and after the date of her death.* Correspondence between the Second and Third Defendants during this period makes reference to the Second and Third Defendants' need for cash and the Third Defendant's on-going impecuniosity."

23 No further particulars are provided in the draft concerning this specific allegation. However, Advocate Sinel did provide a chronology (which was not agreed). The point he highlighted from this chronology was that prior to the purchase of Les Quatres Saisons in April 2018, the monthly figure paid to either clear or reduce any balance on the deceased's credit card issued by Lloyds Bank (called *Duo Avios* or *Avios*) in most months ranged between £700 and £2,000 starting from January 2017 until April 2018 apart from May 2017 when the monthly payment was £3,830.34.

24 From April 2018 onwards when the first and second defendants and the deceased were all

residing in Les Quatres Saisons, the chronology identifies monthly transfers to the credit card increasing to around £2,000 per month. From May 2019 the credits appear to increase significantly to amounts ranging between £3,000 and £7,000 per month.

25 Advocate Sinel was also critical about the lack of records produced by the first and second defendants on discovery despite the second defendant saying in an email dated 22 nd March 2019 to the third defendant that he was " *religiously keeping her and our books on expenditure*" and yet such detailed records had not been produced on discovery.

26 In relation to this increase in credits/transfers I understand why the plaintiff seeks an explanation and if the increases are not justified why she seeks an account. However, the information before me is far from complete. The material before me does not explain the financial arrangements between the deceased and the first and second defendants when they were living in France prior to the deceased's return to Jersey in June 2017. Nor are the arrangements clear between June 2017 and April 2018 when Les Quatres Saisons was purchased. In particular, were the first and second defendants meeting their own expenses or was the deceased paying some of these and why? The nature of any relationship between the first and second defendants and the deceased in relation to how their respective expenditures were managed both when they were in France in 2016 and 2017 and following the deceased's return to Jersey in June 2017 until the purchase of Les Quatre Saisons in April 2018 is therefore not clear. This matters as the nature of the relationship may be the context for any changes in expenditure after April 2018. There may also be explanations for the increase in expenditure in the last few months of the deceased's life. The records kept by the second defendant that he said he was compiling in May 2019 may be relevant to these questions.

27 It is right to note that some explanation has been set out in the first and second defendants' pleading in relation to the point of time while the deceased was in France and returned back to Jersey. It is also right to observe at this stage the fact that I consider that there are appropriate questions to be asked does not mean that any wrongdoing has occurred or that the first or second defendant should be required to account for monies spent from April 2018 onwards. However, what the increase in credit card use does indicate is that an explanation is required. I will deal later in this judgment as to what I consider the correct approach to be for these questions to be evaluated.

Claims against the third defendant

28 I now turn to consider the claims against the third defendant as these allegations are at the heart of the amended order of justice. The amended order of justice contains the following allegations:-

(i) Paragraphs 20C relates to the third defendant owing a " *duty of transparency*" in communications to other board members including the plaintiff in relation to Qu-Vib;

(ii) Paragraph 20D relates to payments made out of Qu-Vib;

(iii) At paragraph 23B of the order of justice the plaintiff seeks an account as to how proceeds of sale of a property in Birmingham were dealt with once paid into the deceased's investment account;

(iv) Paragraphs 23C to 23G seek explanations from the third defendant in relation to certain payments made out of the deceased's bank accounts;

(v) There are particular allegations at paragraph 23F in respect of two payments one of £18,062.50 made to a car company in Germany in 2016 and one of £19,556.33 made to a car company in England in 2018. In respect of the latter payment, the deceased was no longer driving; and

(vi) The same paragraph also seek to recover any loans made to the third defendant. The third defendant in that regard has admitted a loan of £200,000 which he says was written off; the plaintiff suggests that the loan was for £300,000. The plaintiff also challenges the write-off of any loans as being procured by undue influence or alternatively taking place when the deceased did not have capacity to do so.

29 Underpinning the claim for an account is that the deceased had reposed trust and confidence in the third defendant due to his position as an advocate but by virtue of old age and infirmity she was vulnerable to undue influence. In relation to payments after 2016 it is also averred that she lacked capacity.

30 Insofar as any monies were transferred from the deceased to the third defendant, the plaintiff argues that these unexplained payments were *“avances de succession”* capable of being *rapporter à la massè.”*

31 In respect of these claims the plaintiff also seeks to plead that the third defendant was in financial difficulties in support of the allegations that the third defendant should account for how he dealt with the deceased's monies. These allegations are found at paragraphs 23A, 23H, 48A and 49A.

32 In relation to the sale of 3 Parc du Rivage and the purchase of Les Quatres Saisons, the deceased executed a power of attorney in favour of the third defendant's law firm which was used before the Royal Court for the sale and purchase to take place. These allegations in the main are set out at paragraphs, 38A, 44A and 44B. and allege bad faith and conflicts of interest.

33 In response to an earlier version of the order of justice the third defendant filed an affidavit. The affidavit contains the following material points:-

(i) In relation to payments out from Qu-Vib the third defendant explained that all

payments were made to the deceased and stated the following at paragraph 16:

> *"16. The pleaded assertion at paragraph 20D of the OJ — that I have not provided an explanation for these payments — is therefore a false statement. Sinels law firm have received confirmation on three separate occasions from me/my Advocate that the company payments all went to my grandmother. That confirmation has come not just from me but the company accountants."*

(ii) He also explained that company accounts up to 2009 were signed by the deceased;

(iii) The third defendant also responds to the complaints made at paragraphs 23E and 23F of the amended order of justice including identifying certain payments which were challenged in an earlier draft but which had gone to the plaintiff's family. However, in respect of the payments to the German car company and the English car company referred to above, the third defendant has not explained in his affidavit the rationale for these payments;

(iv) his overall position is apart from a loan of £200,000 which he contends was written off in October 2016 he did not benefit from any other payments made. He also denies any undue influence.

34 I have set out this information because there are certain further enquiries that can be made of the third defendant as follows:-

(a) Why credit card payments made after the purchase of Les Quatre Saisons appeared to have increased significantly;

(b) Why payments were made to two car companies in 2016 and 2018;

(c) What was the reason for a transfer of £150,000 to Hatstone's client account (the third defendant's law firm at that time) in June 2014, which transfer Advocate Sinel had questioned the day before the hearing in correspondence; and

(d) whether the third defendant can provide any further explanations in relation to the payments listed at paragraph 23E of the draft insofar as he had not already done so.

35 The third defendant is also in a position to explain whether the loans were written-off or not. I have referred to this because as pleaded at paragraph 49A of the draft order of justice, it is not clear why he is saying in 2019 why he owed monies to the deceased when his case is that the loan made was written-off in October 2016.

36 In relation to the allegation that the third defendant is under a duty of transparency and communication that is owed to other board members, as pleaded at paragraph 20C no authority is cited for this duty arising. It is also material to note that in a previous draft the

normal duties owed by a director to a company were pleaded but the latest draft withdraws those averments. In addition, this is a claim by a beneficiary under a Will, not a derivative claim brought in the name of a company against a director acting in breach of duty. No derivative claim is pleaded against the third defendant to be brought in the name of Qu-Vib Limited.

37 In addition, the relevance of what is set out at paragraphs 20C is to seek an explanation of payments made out of the company as set out in paragraph 20D. The third defendant has provided an explanation that these monies were paid to the deceased. The real issue between the parties is how monies were spent by the deceased once she had received the same. The alleged duty of transparency and communication is not therefore relevant to this issue.

38 Having concluded that there are certain further enquiries that need to be made, I now turn to consider whether these should form the basis of a claim by the plaintiff as the plaintiff wishes or whether the interest of justice requires a different approach to be adopted.

39 It is right to note that there may be limitation questions that arise in relation to any claim for an account, which would depend on the nature of any duties owed, and if any breach is found the nature of that breach.

The derivative claims

40 In relation to seeking to hold the first to third defendants to account, the basis for the plaintiff bringing the claims is pleaded at paragraph 58 of the amended order of justice as follows:-

> *"Given that the Fourth Defendant acts as attorney for the Third Defendant, the Fourth Defendant has a conflict of interest as regards any claims herein by the Deceased's estate against the First and/or Second and/or Third Defendants.* In those circumstances the Plaintiff, as a beneficiary of the Deceased's Personalty, brings such claims by way of derivative action on behalf of the Deceased's estate."

41 In the course of argument Advocate Sinel justified his client continuing to be allowed to bring the claims requiring the first, second and third defendants to account on three grounds:-

(i) That the executor was conflicted as pleaded at paragraph 58;

(ii) There was an overlap between the claims for account and the claims for *rapport* and the plaintiff was entitled to bring a claim of *rapport*; and

(iii) The most practical way to proceed was to have one set of proceedings.

42 I will deal with each of these arguments later in this judgment after consideration of the relevant legal principles for a beneficiary of a will to bring a derivative action. I also wish to make it clear that in this decision I am not deciding whether the plaintiff should be given leave to bring a derivative claim as a beneficiary; this is because leave is required from the Royal Court under Rule 6/39 of the Royal Court Rules 2004, as amended ("the Rules") to continue a claim brought by way of derivative action. The application before me therefore is only to consider whether the pleading shows a case that is better than arguable to plead a derivative claim, leave for which can then be considered by the Royal Court, if the amendment is granted.

A derivative claim by a beneficiary—legal principles

43 No Jersey authority was cited to me on when a beneficiary under a will may bring a claim by way of derivative action. However, I was referred to the Supreme Court decision of *Roberts v Gill & Co* [2010] UKSC 22 which all parties accepted contained the applicable legal principles.

44 The *Roberts* case concerned whether or not the claimant (who was a beneficiary under the will should be permitted to amend proceedings to bring a claim in a representative capacity on behalf of the estate. The claimant had sued the solicitors personally within time, but the representative claim was out of time. The questions that arose in the appeal were summarised at paragraphs 22 and 23 of the judgment as follows:-

> ***"22. Mark Roberts seeks to bring a derivative action in his own name on behalf of the estate against a third party. The action is a derivative action in which the beneficiary stands in the place of the administrator and sues in right of the estate and does not enforce duties owed to him rather than to the administrator, It has often been said that a beneficiary can bring a derivative action only in special circumstances*** : *Hayim v Citibank NA* [1987] AC 730, ***to which it will be necessary to revert***.
>
> ***23. The question on this appeal is whether Mark Roberts should be permitted to amend so as to put his claim as a derivative claim. That involves two further questions. The first question is whether the amendment can be made notwithstanding expiry of the limitation period in respect of his personal claim. The second question is whether, even if the expiry of the limitation period is not a bar to the necessary amendments, the claim is bound to fail because there are no special circumstances justifying a derivative action."***

45 The second question is relevant to the application to amend. All of the members of the Supreme Court were in agreement that this was not a case where special circumstances were justified. The leading judgment was given by Lord Collins in relation to what amounts to special circumstances where he stated the following:-

> ***"46. The cases go back to the eighteenth century, and many of them were reviewed in*** *Hayim v Citibank NA* [1987] AC 730 (PC). ***The special circumstances which were identified in the earliest authorities as justifying a beneficiary's action were fraud on the part of the trustee, or collusion between the trustee and the third party, or the insolvency of the trustee, but it has always been clear that these are merely examples of special circumstances, and that the underlying question is whether the circumstances are sufficiently special to make it just for the beneficiary to have the remedy***: *In re Field, decd* [1971] 1 WLR 555, 560–561, ***per Goff J; cf.*** *Barker v Birch* (1847) 1 De G & Sm 376, 63 ER 1112; ***Daniel's Chancery Practice, 7th ed 1901, p176."*** (Underlining Added)

46 Paragraph 53 is also pertinent where Lord Collins cited observations of Lord Templeman in the case of *Hayim Citibank NA* [1987] AC 730 as follows:-

> ***"53. Lord Templeman, giving the advice of the Privy Council, said (at 747):***
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> ***"… when a trustee commits a breach of trust or is involved in a conflict of interest and duty or in other exceptional circumstances a beneficiary may be allowed to sue a third party in the place of the trustee.*** But a beneficiary allowed to take proceedings cannot be in a better position than a trustee carrying out his duties in a proper manner .
>
> ***and (at 748) (after citing, among other cases*** , *Travis v Milne*; *Yeatman v Yeatman*; ***and*** *In re Field, decd*)
>
> ***"These authorities demonstrate that a beneficiary has no cause of action against a third party save in special circumstances which embrace a failure, excusable or inexcusable, by the trustees in the performance of the duty owed by the trustees to the beneficiary to protect the trust estate or to protect the interests of the beneficiary in the trust estate.***""

47 Lord Walker also made the following observation at paragraph 110 as follows:-

> ***"110. There is ample authority, comprehensively reviewed in the judgment of Lord Collins, as to the need for special circumstances before the Court will countenance a derivative action. Such actions are now relatively common in cases concerned with mismanaged companies, and in many jurisdictions' actions by or on behalf of minority shareholders are now regulated by a statutory code (for overseas examples see*** *Oates y Consolidated Capital Services Pty Ltd* [2009] NSWCA 183 ***and*** *Waddington Ltd v Chan* [2009] 2 BCLC 82). ***Derivative actions by beneficiaries under inter vivos trusts or wills are less common***, *Hayim v Citibank NA* [1987] AC 730 ***(an appeal to the Privy Council from Hong Kong) and*** *Bradstock Trustee Services Ltd v Nabarro Nathanson* [1995] 1 WLR 1405 ***being modern examples.*** But in all these cases the unifying factor — what has

> to be special about the circumstances — is that the derivative action is needed to avoid injustice: see Goff J in *In re Field, decd* [1971] 1 WLR 555, 561; ***Browne-Wilkinson LJ in*** *Nurcombe v Nurcombe* [1985] 1 WLR 370, 378; ***Pill LJ in the Court of Appeal in this case***, [2009] 1 WLR 531, ***para 59.*** For the reasons given by Pill LJ at paras 58 to 60, reinforced by the further reasons given by Lord Collins, special circumstances are not made out in this case." [Emphasis Added]

Special circumstances

48 I now consider by reference to these principles whether the arguments relied upon by the plaintiff amount to a case that is better than arguable to plead a derivative claim, leave for which can only be considered by the Royal Court.

The Position of the Executor

49 In relation to the position of the fourth defendant, while this is pleaded, Advocate Sinel accepted that he had not sought to replace the fourth defendant with an independent executor. He argued that was a question to be considered on the application for leave. I disagree both as a matter of principle and as a matter of practice.

50 As a matter of principle, if a beneficiary considers that an executor/trustee should be removed based on an allegation of conflict, the first step is to approach that executor to ascertain their position. In the absence of having made that enquiry, the sort of special circumstances in *Roberts* at paragraphs 46 and 53 do not arise.

51 In this case Advocate Young indicated that if the appointment of the fourth defendant was challenged, it would likely step aside. Advocate Sharp, having taking instructions from the third defendant, who was the named executor in the 2017 Will of movables confirmed that his client would have no objection to an independent executor being appointed; Advocate Boothman was not able to speak to his clients but did speak to his clients' other son and felt, albeit without instructions, that the appointment of an independent executor to investigate matters of concern would not be resisted. It therefore appears that a new executor could be appointed by agreement as long as an entity could be found to act.

52 If there was a dispute about whether the fourth defendant should remain that can be dealt with by a standalone application to the Royal Court to remove the fourth defendant on grounds of conflict. The grounds relied upon are known and therefore such an application should not be complex and should not take significant time to determine, if resisted.

53 The other issue to note as a matter of principle is that *prima facie* the claims for an account in relation to how assets of the deceased were dealt with by others on her behalf are vested

in the executor on behalf of the deceased. It is therefore for the executor to review these claims from a neutral standpoint and decide whether or not to pursue them. Something therefore needs to be pleaded to justify a beneficiary exercising those rights. Although the question of conflict has been raised it has not been pursued either by an invitation to resign or by a court application to appoint another executor both of which would address any conflict issue.

54 The executor also has the advantage of having the right to call for documents from the deceased's bankers, the deceased's credit card and in respect of share investments. Advocate Young confirmed that he had received all documents that still existed from each of these entities subject to the query raised by Advocate Sinel the day before the hearing referred to above which Advocate Young agreed to look into. I have referred to this because it is the executor who has the right to call for information from the financial institutions who dealt with the affairs of the deceased to obtain such records as still exist. That information then allows the executor to review as far as the executor is able to do so, the payments challenged by the plaintiff and any other payments of concern that the plaintiff suggest should be reviewed. The third defendant in his affidavit has provided certain explanations as far as he able to recall the same without the benefit of a forensic exercise. It is therefore also a matter for the executor to review these answers and decide whether he accepts them or not and, if he does not, what action he proposes to take. An independent executor can also review any limitation questions that might arise as noted above.

55 It should also not be forgotten that this a dispute essentially where two sides of a family are at loggerheads. The phrase *internecine warfare* has been used in respect of disputes between beneficiaries of trusts. This case at its lowest runs that risk. There is certainly a lack of trust between the parties which is clear from the way allegations have been framed in previous drafts and then not pursued. In that regard Advocate Sharp forcefully suggested that the plaintiff was conflicted as she was seeking to review the affairs of the Stone family but, given assertions previously dropped, she would not review her own family's affairs and yet they had benefitted too. These assertions further confirm the importance of an executor, provided it is independent or seen to be independent, having the advantage of being able to stand above the dispute and review matters impartially.

56 In contrast to a position an independent executor might adopt, Advocate Sinel did not hold back from making it clear that he and his client wanted to review the affairs of the first to third defendants over many years and in some respects long before any questions of capacity or undue influence might arise. The discovery he was seeking confirmed this approach.

57 However, a review by an independent executor allows for an impartial assessment of how far estate assets should be spent on pursuing causes of action to recover monies from family members and avoids the obvious dangers of one side of a family dispute suing another family member. There may be cases where that situation has to occur but the threshold has not been met to plead that this is one of those cases. The raising of a conflict in paragraph 58 alone is not therefore a sustainable case of special circumstances and is

not sufficient to displace the role an executor ordinarily plays in whether or not to hold individuals to account for their dealings with the affairs of a deceased. The plaintiff has a remedy of seeking to replace the fourth defendant which would address the conflict concerns but yet preserves the benefits that a review by an independent executor can bring.

Practicality

58 In relation to the reliance on practicality, practicality is not special circumstances. Practicality also loses the benefit of an independent review of the claims by the person in whom they are vested i.e. the executor. The executor also has the safeguard of being able to go to court for momentous decisions, having carried out a review, for approval of a decision whether or not to commence proceedings if the executor considers that money is owed and seeks protection should the executor wish to take steps to recover such monies or indeed not to do so. This is by analogy the sort of directions the Royal Court is familiar with, where a trustee seeks directions on whether or not to commence litigation, or what stance it should take in relation to claims brought by beneficiaries against the trustee or against other beneficiaries.

59 The powers vested in an executor may therefore lead to a resolution of matters without engaging the full costs and expense of a Royal Court trial. In that regard, I cannot ignore that the plaintiff is seeking a full review of the affairs of the first, second and third defendants going back twenty years or more. Yet the issues where an account is required appear to be more limited in scope and do not justify such an expense.

60 The fact that the plaintiffs may have incurred significant costs to date in reviewing the discovery provided is not a justification to allow the plaintiff to pursue a claim. The benefit of some of that work is also not lost as it can be put to the executor as part of the latter reviewing whether any of the first to third defendants are required to account for how monies of the deceased were spent.

61 The words of Lord Walker emphasized above are particularly apposite to the proposed claim i.e. is the derivative action needed to avoid injustice? In this case the suggestion of practicality that there should be one court action only led by the plaintiff and underpinned by a desire to review the affairs of the defendants over a very long period of time is not a sufficient justification that shows an arguable pleaded case and does not amount to injustice. Rather the plaintiff's concerns can be put to and reviewed by an independent executor. I should add that I consider that the concerns raised by the plaintiff place an onus on the executor to make appropriate enquiries and then review what steps should (or should not be taken) with court approval being sought.

62 This conclusion is not to say that claims may not be made by the executor at some point in the future if the Royal Court gives such permission. However, that is a matter for another

day. It is not a matter for this case at this stage on the grounds the plaintiff seeks to rely on.

An overlap

63 In relation to the argument relied upon by the plaintiff of an overlap between the claim for *rapport* and the claims for an account, this argument does not give rise to a case that is capable of being pleaded as special circumstances.

64 It is clear that the primary claims the plaintiff wishes to bring are for an account. If the responses of the defendants to claims for an account are that what has been paid over or spent were gifts, that can be dealt with by the executor, possibly in consultation with other family members whether the recipient should be required to return any monies found, absent any election to *rester sur ses avances*.

65 Such an outcome however is only a consequence of a claim to account being made. In principle a claim for an account for how a person has spent the monies of a person whose affairs they are looking after and a claim to account for lifetime gifts are separate concepts and causes of action. The fact that a defence to any claim to account for how monies of the deceased were spent might be that money was gifted is not sufficient to amount to plead a case of special circumstances. It is something that the executor is capable of dealing with albeit with court approval if that is felt to be appropriate.

66 For all these reasons I am not satisfied that the plaintiff's pleaded case sets out sufficient circumstances to enable a derivative action claim to be pleaded. Rather the correct approach is for the plaintiff to raise her concerns either with the fourth defendant or an independent executor with all the safeguards that go with the responsibilities of an executor. The present proceedings should not therefore be used to advance such claims at this stage.

67 The plaintiff's approach is also not the most appropriate way to proceed having regard to the overriding objective. This decision does not mean that the plaintiff's concerns are being ignored; that is not the position. Rather the decision is that in respect of requiring the first, second and third defendants to account for how they dealt with the deceased's monies, this issue is a matter for an executor to pursue. The plaintiff's claims seeking an account at paragraphs 6, 20C, 20D, 23A to 23H, 38A, 44A, 44B, 48A and 49A are therefore refused. The refusal in relation to paragraphs 44A and 44B is subject to one clarification which I address later in this judgment.

A claim for Rapport

68 In relation to the claims for *rapport* these are pleaded in the order of justice, the only relevant amendment is at paragraph 60 which is permitted. The third defendant's position in

response, is both that the doctrine of rapport does not apply to him because he is not an heir and, in any event, he is entitled to elect to keep any lifetime gifts.

69 I have permitted the amendment at paragraph 60 because it is part of an existing dispute between the plaintiff and the third defendant as to the extent of the doctrine of *rapport* which is a matter of law which requires determination by the Royal Court. The plaintiff's position is that the duty to account for lifetime gifts by heirs extends to issue of heirs citing an extract from *Basnage, Commentaires sur law Coutume de Normandie* 3 rd Edition page 237.

70 The first, second and third defendants rely on the summary of the principles of *rapport* contained in *De La Haye v Walton* [2013] JRC 021 which are summarised at paragraphs 54 and 55. Advocate Boothman also drew to my attention paragraph 66 and 67 which provide as follows:-

> ***"66. The principle therefore must be that a gift made for the benefit of an heir counts as an avance. Accordingly, where a payment is ostensibly made to a person other than the heir, the question for the Court is whether that payment is in reality made for the benefit of the heir*** .
>
> ***67. Where a payment is made to the spouse of an heir, it seems to us that the onus lies on the heir to show that such a payment was not made for his or her benefit. If this were not the case, it would be too easy for the doctrine of rapport a la masse to be circumvented by a parent making a payment to the spouse of an heir even though clearly intending that the payment should benefit the heir. One starts, in our judgment, from a presumption that a payment made to a spouse where the spouse and the heir are still married is likely to be for the benefit of the spouse."***

71 The argument he therefore raised was that, if gifts to spouses of an heir as a starting point are for the benefit of the spouse, the same logic applies to gifts to issue of an heir unless it could be shown that the gift was in fact for the benefit of an heir. He also argued that there are important policy considerations in allowing grandparents to benefit grandchildren without the doctrine of *rapport* applying.

72 There are also other complications if the doctrine did apply to the issue of heirs, as to who is required to account for the gift; is it the issue or is it the heir?

73 These are not straightforward questions and they do not appear to have been considered in the way they are now put and, as I have stated, they are therefore appropriate for determination by the Royal Court.

Other miscellaneous amendments

74 These are found at paragraphs 4, 7, 9, 10, 13, 42 and 43 of the draft I was asked to approve. While these amendments were not objected to and therefore, I will allow the same, it is right to observe that no relief is sought in respect of the averments at paragraph 9, 10 and 13. While therefore I have allowed the same so that the plaintiff may tell the story she wishes to tell, the factual averments made do not appear, on the basis of the material before me, to be probative of any issue the court is being asked to determine notwithstanding that I have allowed the amendments. This may be relevant when I am addressed on any discovery issues.

75 In that regard while I am not prepared to allow the amendments at paragraphs 44A and 44B, in so far as they concern a claim for an account from the third defendant which is vested in the executor, the matters at paragraphs 44A and 44B, apart from the final sentence of paragraph 44A, are also relevant to the allegations that the sale of 3 Parcq du Rivage and purchase of Les Quatre Saisons were procured without the informed consent of the deceased or on the basis of undue influence.

76 In relation to this allegation, it is right to note that this claim is also one that *prima facie* vests in the estate although the claim was brought by the plaintiff and therefore appears to be a further derivative claim. This claim is holding the defendants to account as to how they are said to have dealt with the plaintiff's property. The plaintiff and the fourth defendant and/or an independent executor therefore also need to consider whether the plaintiff should be permitted to continue to bring this claim. If the plaintiff is to bring this claim, leave needs to be sought from the Royal Court to do so and the relevant special circumstances identified. If leave is given then paragraph 44A apart from the final sentence and 44B can be added to the amended order of justice. If leave is not given then, subject to further argument as I was not addressed on this issue, the allegations that the sale of Parcq du Rivage and the purchase of Les Quatre Saisons were procured without the informed consent of the deceased or on the basis of undue influence will have to be removed from the order of justice. This issue needs to be addressed quickly as, until it is, how these proceedings might be progressed by the plaintiffs cannot be determined.

Any other issues

77 In relation to paragraphs 26, 27 and the amendment at paragraph 27A, the issue with this part of the plaintiff's pleading is that the defendants have produced records from Condor showing that the deceased returned from France to Jersey on 7 th June 2017. However, paragraph 26 in particular appears to be making an allegation that the deceased suffered a stroke in France. What is clear from the medical records is that the deceased was seen in person by Dr Parris on 3 rd July 2017 at 11:52 at the Island Medical Centre; he referred her to the Rapid Access Clinic where she was seen on Friday, 7 th July 2017. The plaintiff therefore needs to clarify her case, notwithstanding the ferry records, to set out why she alleges that the deceased was in France when the deceased suffered her stroke and when she says the deceased was brought back to Jersey to be able to see Dr Parris in the morning of 3 rd July. Rule 6/15 of the Royal Court Rules 2004, as amended, allows me to

require a party to make their case clear of their own motion. At present paragraph 26 is lacking sufficient particularity to say why the plaintiff asserts that the stroke took place while the deceased was in France given the records that have been produced. The amendments permitted in respect of paragraphs 26 and 27 are therefore subject to the plaintiff providing this information.

Allegations of dishonesty

78 In so far as the amendments proposed made allegations of dishonesty, these allegations were part of requiring the first, second and third defendants to account for how they had dealt with the assets of the deceased. It is therefore a matter for the executor to investigate these assertions. Accordingly, it is not necessary for me to consider whether the amendments meet the requisite test in *Trico*.

The prayer

79 In relation to the amendments to the proposed prayer, the amendments at paragraph (g) (i) – (g)(vi) inclusive and (h) are refused because they all relate to the claims for an account. The amendment to the claim for interest in sub-paragraph (i) is refused for the same reason.

Postscript

1 Subsequent to an earlier version of this judgment being handed down, the fourth defendant chose voluntarily to resign as executor. I have therefore referred to the Royal Court the question of who should act as executor.