De la Haye v Walton

Jurisdiction:	Jersey
Judge:	Bailiff
Judgment Date:	28 January 2013
Neutral Citation:	[2013] JRC 21
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Text

[2013] JRC 21

ROYAL COURT

(Samedi)

Before:

Sir Michael Birt, Bailiff **and** Jurats Kerley **and** Nicolle.

Between
Leonard George de la Haye
Plaintiff
and
Lucita Angeleve Walton
Defendant

Advocate N. S. H. Benest **for the Plaintiff**

Advocate M. H. D. Taylor **for the Defendant**.

Authorities

Selby v Romeril [1996] JLR 210.

Traité du Droit Contumier Le Gros.

Valpy v Janvrin [1716] 1 CR 66.

Amy v Amy [1968] JJ 981.

Re Vincent [1869] Ex Juillet 5.

Ottley v de Gruchy [1958] 251 Ex 256.

Channing v Harrison [1967] JJ 845.

Basnage, Commentaires sur la Coutume Reformée (1681 edition) Tome II.

Estate — action by the Plaintiff seeking an order that the defendant should rapporte à la masse' the 'avances de succession'.

Bailiff

THE

1 This is an action by the plaintiff seeking an order that the defendant should ' *rapporte à la masse*' the ' *avances de succession*' that the defendant received from their mother during the mother's lifetime.

Background

2 The essential factual background is not in dispute and can be briefly stated before turning to the nature of the dispute between the parties

3 The plaintiff and the defendant are two of the four children of John Amy de la Haye and Evelyn de la Haye née Axup ("the deceased"). The other two children have played no part in these proceedings, although reference will be made later to one of the other brothers, namely Lawrence.

4 The property known as Les Vaux Farm, St Saviour had been in the de la Haye family for generations. John Amy de la Haye died in 1977 and his widow, the deceased, inherited the

property on his death. The defendant is the youngest of the four children. At the date of Mr de la Haye's death, she was aged 16 and was the only one still living at home.

5 Les Vaux Farm had not been actively farmed by the family for many years and both John Amy de la Haye and, after his death, the deceased had attempted to obtain planning permission for various of the outbuildings, which were not in a particularly good state. Eventually planning permission was obtained by the deceased and the farmhouse, together with outbuildings, was sold in 1985 for £100,000. However, the deceased retained ownership of the fields surrounding the farm which continued to provide her with an income. The deceased and the defendant moved into rented accommodation for a while whilst looking for a replacement property.

6 On 15th July 1986 the deceased and the defendant purchased the property known as Gardone, Holmfield Drive, St Brelade ("Gardone") as owners in common. The contract passed before the Royal Court specified that the property was owned as to 7/10ths by the deceased and 3/10ths by the defendant.

7 This percentage ownership split reflected the respective contributions of the deceased and the defendant. The total purchase price was £135,000. The deceased's share was funded by cash derived from the sale of Les Vaux Farm. The defendant's 30% interest was funded by way of a mortgage in the sum of £42,600 from Charterhouse Bank (Jersey) Limited, where she was employed at the time and from whom she could therefore obtain a loan on advantageous staff terms. The bank took a judicial hypothec over the property in the sum of £42,600. Although, in order to secure the bank's position, the loan was to the deceased and the defendant jointly, the contract of purchase passed before the Royal Court recorded that, as between the deceased and the defendant, all obligations under the mortgage were to be the sole responsibility of the defendant and she indemnified the deceased against any claim in respect thereof.

8 On 20th May 1994, the deceased sold the fields adjoining Les Vaux Farm which she had retained in 1985 for a total consideration of £95,000.

9 A few weeks later, on 15th July 1994, by contract passed before the Royal Court, the deceased purchased the defendant's 3/10ths interest in Gardone for a stated consideration of £72,000, which was expressed in the usual way to be payable 10 days after passing contract. On 27th September 1994 the judicial hypothec was cancelled by Charterhouse Bank, from which it is clear that the loan in the sum of £42,600 had been repaid.

10 Until 1994 the defendant continued to live at Gardone with the deceased. Indeed, the man she was to marry, Mr Miles Walton, was also living there for a while until their marriage. The defendant married Mr Walton in October 1994 and they moved out. On 21st March 1997 the defendant and Mr Walton purchased jointly a property called Aldenways, St Peter for £275,000. Although in evidence the defendant thought this had been purchased with a

mortgage, a title check carried out by Advocate Benest over the luncheon adjournment during the hearing showed no hypothec at that time.

11 Some 12 years later, on 25th May 2007 the deceased sold Gardone to a third party for a total consideration of £750,000. In substitution, she bought a property known as 80 Rose Mews, St Peter on 29th June 2007 for £224,999. The balance of the funds available after these two transactions and their associated expenses was deposited into a savings account in the deceased's sole name with Barclays Bank on 20th June, i.e. a few days before the second transaction. The opening balance was £509,516.

12 A few days after the opening of the account, the sum of £359,000 was paid on 26th June 2007 from that account into a similar savings account with Barclays but this time in the joint names of the deceased and the defendant. Although we have not been shown the mandate for that account, all parties agreed that it was a joint account which would accrue to the survivor and that each party had full signing rights on the account without the need for counter signature by the other account holder.

13 Six minor payments were subsequently made out of that account to or for the benefit of the defendant. These totalled £10,960. The only major payment was on 17th November 2009 when £150,000 was paid to an account in the BVI, where the defendant and her family had been living since 2002. We shall return to the identity of the payee of that sum in due course at paragraph 52 below. No payments were made to the deceased out of the joint account.

14 On 12th November 2008 the deceased executed her last will of personal estate. After minor bequests of household effects, the residue of her estate was divided equally between the plaintiff and the defendant. The defendant was named as the executrix. Her will of immovable estate left 80 Rose Mews to the plaintiff, the defendant and Lawrence in equal shares.

15 The deceased died on 3rd April 2011. Probate was subsequently granted to Mr Malcolm Le Boutillier of Le Gallais and Luce as special attorney of the defendant on 20th April.

16 Following the death of the deceased, the joint account with Barclays referred to earlier was transferred into the sole name of the defendant in accordance with the right of survivorship. At the date of the deceased's death, the balance in the account was £225,259.08.

17 The net value of the residuary personal estate to be divided between the plaintiff and the defendant under the will is £169,222.90, the bulk of which is represented by the balance remaining in the savings account held by the deceased with Barclays referred to at paragraph 11 above. Indeed, it appears that, apart from the £359,000 paid to the joint account on 26th June 2007, the deceased had not touched this account or taken any income from it between its establishment in June 2007 and her death in April 2011. That is

consistent with the evidence of both the plaintiff and the defendant that the deceased was a woman who lived extremely frugally and did not like spending any money unnecessarily, albeit that she liked a flutter on the horses.

18 The only other assets of note, as appears from the interim accounts of the deceased's moveable estate, were two accounts with Lloyds TSB Bank. One was described as an Instant Access Account and the other as a Cheque Account. The former seems to have been a form of savings account which received interest and a pension and from which periodic transfers were made to the Cheque Account. The latter seems to have been in effect a current account from which she met her regular expenditure and which also received her Jersey Old Age Pension.

19 The first statement sheet produced to us for the Instant Access Account is numbered 72 which suggests that the account had been in existence for many years. It showed a balance on 23rd April 2007 of £14,564. The first sheet for the Cheque Account is number 79, showing a balance of £4,858 on 1st May 2007 i.e. £19,422 in total.

20 At the end of February 2011 (i.e. shortly before her death), which is the last statement produced to us, there were balances of £12,827 and £6,886 respectively on the two accounts i.e. £19,713 in total. It appears therefore that she was living on her income, given that she had not touched her Barclays saving account nor had the amounts in the Lloyds TSB accounts declined.

The nature of the dispute

21 On the basis of the documentary evidence, the defendant's interest in Gardone was extinguished in July 1994 when she sold that interest to the deceased. The documents disclose no obligation on the part of the deceased towards the defendant which would explain the payment of £359,000 in 2007. It is therefore contended by the plaintiff that it was a gift and that, to the extent that any of the £359,000 has accrued to or for the benefit of the defendant during the deceased's life or by survivorship upon her death, it is an ‘ *avance de succession*’ which must be brought back into account.

22 The defendant, on the other hand, asserts that there was a verbal agreement between her and her mother that, on the sale of Gardone, she (the defendant) would be entitled to a further sum representing her interest and that the £359,000 was settlement by the deceased of that obligation. It was not therefore a gift and accordingly is not an ‘ *avance de succession’*.

23 Clearly, if any payment by the deceased to the defendant was made in pursuance of a legal obligation, it would not amount to a gift and would indeed therefore not be an ‘ *avance de succession’*. We must therefore turn to consider the — very limited — evidence which was presented to us concerning the nature of the transfer of £359,000 from the deceased

into the joint names of herself and the defendant in June 2007.

The evidence

24 The sole witness for the plaintiff was the plaintiff himself. As with the defendant, we do not propose to summarise all the evidence he gave, only those parts which seem to us to be necessary for the purposes of explaining our decision.

25 The plaintiff is 61. He said that he left Jersey in about 1985 to pursue his career as an airline pilot. He lived for a short while in Wales and then Holland before spending 10 years in Bahrain, since when he has resided in Mauritius. During the relevant years, he frequently flew to London or Paris and would have a 'lay-over' of a few days during which he would invariably return to Jersey and stay with his mother. He felt that he had a close relationship with her. He said that she was very frugal. She herself said to him that whilst others said she was hard, she felt that she had a hard shell with a soft interior. When he was over they would chat about things which had happened and she would bring him up to date with events in Jersey.

26 He said that his mother told him that she had got development approval for the outbuildings at Les Vaux Farm. She had been made an offer and she had decided to sell. The plaintiff himself was sad as the farm had been in the family for generations.

27 In 1986 she told him on one of his visits that she and the defendant had bought a property together. The deceased had put up the cash and the defendant had taken out a loan to cover her share. She told him at the time that the defendant had a 3/10ths share. His mother did not have enough money to purchase the property on her own. This conversation was after the purchase had taken place. The deceased had not told him about the purchase before it happened.

28 In relation to the 1994 transfer the plaintiff said that, during a conversation in the conservatory at Gardone, the deceased had told him that she had bought out the defendant's 3/10ths share in Gardone. She said that she had had to sell the fields in order to raise the necessary money and she was upset about this. The defendant was getting married and the deceased told the plaintiff that the defendant wished to buy a house of her own with her husband. The plaintiff said that he specifically asked whether this meant that the defendant had nothing more to do with Gardone and the deceased confirmed that she had bought the defendant out entirely. She said that the mortgage had been settled. She was upset because she was losing the rental from the fields.

29 The deceased sold Gardone in May 2007 for £750,000. She was allowed by the purchaser to stay on for a month or so after completion and the plaintiff came over at about that time. There was some evidence given by both the plaintiff and the defendant about furniture (and a sideboard in particular) but we do not think that this takes us any further. The deceased

did not say anything to the plaintiff at that stage — or indeed at any other stage — about an arrangement or agreement with the defendant nor did she disclose the payment of £359,000 to the joint account. The first that the plaintiff heard was from his brother Lawrence about a year before the deceased's death. Lawrence said merely that he thought the deceased had given a large portion of the estate to the defendant.

30 The plaintiff was not in the Island at the time of the deceased's death. We heard conflicting evidence from the plaintiff and the defendant as to the circumstances in which he was not here but we do not consider it necessary to resolve this difference, not least because communication with the plaintiff appears to have been through Lawrence who was not called to give evidence.

31 The plaintiff gave evidence that, on 12th April, the day after the funeral, he met the defendant at Lawrence's house and during a discussion asked her about the monies that had been transferred to her. He said the defendant told him that the money transferred was a gift. He said that he gave her written information about the law of ' *Rapport à la masse'*.

32 In support of this evidence, the plaintiff sought to rely upon a note in a journal which he said he had made later the same day. However, this journal was not disclosed until the day before the trial despite clearly being a relevant document which should have been the subject of discovery. Advocate Taylor did not formally object to the copy of the journal note being read out, but he extracted from the plaintiff in cross-examination the fact that the plaintiff had appreciated that the journal entry was relevant but had deliberately chosen not to disclose it because he considered it personal to himself. Although the plaintiff was in possession of the original journal in the witness box, the only page disclosed was that which concerned the entry for 12th April 2011.

33 We think it would be unfair to place any weight on this document. It should have been disclosed but was not. Furthermore, the defendant and her advocate did not have the opportunity to inspect the rest of the document in order to assess it. In all the circumstances we have decided to place no weight on the document and indeed to place no weight on the competing versions of what was said between the plaintiff and defendant about the transfer following the deceased's death.

34 The defendant also gave evidence. She is the youngest of the four children and is now 52. She explained how, following her father's death, she continued to live with the deceased until her marriage in 1994. She and her husband moved to the British Virgin Islands in July 2002 where they remain living with their children. She said that she was not aware of the deceased's income whilst living with her. The deceased kept her affairs very much to herself.

35 Following the sale of Les Vaux Farm in 1985 for £100,000, she lived in a rented apartment with the deceased whilst they looked for a suitable property. In due course they decided to

purchase Gardone in joint names for £135,000. She was working for Charterhouse Bank (Jersey) and was entitled to a staff loan on advantageous terms. She contributed £42,600 by way of this loan and the deceased contributed the rest by way of cash from the sale of Les Vaux Farm. She agreed that the contract recorded their respective interests as 3/10ths and 7/10ths and that this reflected the respective amounts which they had each put in to the purchase.

36 She said that the 1994 transfer took place because the deceased was concerned that the defendant's marriage would be a ‘five minute wonder’. Her two older brothers (not the plaintiff) had already been divorced by this time. She said that the deceased was concerned that, in the event of the defendant getting divorced, Gardone would have to be sold in order to realise the defendant's 3/10ths interest as part of any divorce settlement. The deceased wanted to protect herself against that possibility. It was therefore agreed that the defendant would transfer her 3/10ths interest to the deceased. She left it entirely to the deceased to deal with the transfer. The defendant said that she had no say in the matter. She accepted that the documents showed that the mortgage in the sum of £42,600 was settled shortly after the contract but she did not know how this had happened. She did not settle it. Furthermore she did not recall receiving the sum of £72,000 and she was sure that she would remember receiving a substantial sum. She had not been able to obtain her bank statements for the period because she had rung up the call centre at RBS (who had taken over Charterhouse) and they had said that they did not keep records going back that far. She had not made any further enquiries, nor had she made enquires of Ogier and Le Cornu who had acted in relation to the 1994 transfer.

37 She said that although Gardone had been transferred into the deceased's sole name, she and the deceased had a verbal agreement that the defendant would have an interest in the future proceeds of sale to take account of her contribution to the property and to the deceased's well being over 8 years. She said that the deceased was keen that the defendant's entitlement should be acknowledged but it was never put down in writing as there was no reason for the deceased or the defendant to consider that either of them would renege on the agreement. She said that no percentage or amount was agreed, it was simply that the defendant would receive a benefit.

38 Following the sale of Gardone in 2007, the deceased suggested the opening of a joint account in order to settle her obligation. There was no discussion as to the amount or the percentage and it was the deceased alone who selected the sum of £359,000. The defendant said that there were two reasons for the money being paid into a joint account rather than to the defendant alone. First there would be security in the event of the defendant getting divorced because only 50% of the account would be attributed to the defendant. Secondly, it would provide security for the deceased if money were ever needed for her care. Either party could sign on the account without the need for a counter signature.

39 The account records from Barclays showed that no money was paid out of the joint account until July 2009. Thereafter there are some payments out to ‘staff current’ (which the defendant said was an expression used by the bank for her account because she had been

a member of staff) and to a joint account in the name of her and her husband.

40 Apart from these, the only payment out was a sum of £150,000 on 17th November 2009. She said that this was a payment to her husband's account with First Caribbean International Bank in the Caribbean. This was to provide a deposit for a house in the BVI.

41 As to events after the deceased's death, the defendant disputed that there was a meeting on 12th April. She said that the day before the funeral, which was on 11th April, the plaintiff came for lunch. He printed off a lot of paperwork about ' *Rapport à la masse'*. She denied saying she had received a gift from the deceased. She told the plaintiff that it was neither the time nor place for such a discussion as her mother had not yet been buried. She was very upset at the plaintiff's conduct.

42 In cross-examination, she repeated that the verbal agreement in 1994 was that she would receive a benefit later. She assumed it might be in the deceased's will. She confirmed that no amount or percentage was specified and she did not know how much she would receive. There was an agreement but no agreement on a figure or a percentage interest in the property. When the £359,000 was transferred she assumed this was the deceased's fulfilment of the agreement.

43 She was pressed on what she thought was happening in relation to the deed passed before the Royal Court in 1994, which stated that her 3/10ths interest was being sold in consideration of the sum of £72,000. She confirmed she was aware that the document said she was selling her 3/10ths interest for £72,000 but she had no idea why this figure had been fixed or why the transfer was not described as a gift. She left everything to the deceased. She simply did as she was told. She accepted that it must have been the deceased who reimbursed the mortgage. She said she had no idea why the deceased had sold the fields in 1994. The deceased was very secretive about her affairs and very frugal. She managed everything and discussed nothing with the defendant. The defendant agreed that she was responsible for the mortgage under the deed of purchase and that therefore she had benefitted by its reimbursement. She suspected that the deceased must have used the proceeds of the sale of the fields to pay off the mortgage. She also agreed that 3/10ths represented the proportion which she had contributed by means of the mortgage.

44 She was shown the purchase document in relation to Aldenways showing that she and her husband had purchased it jointly for £275,000 on 21st March 1997. She said that her husband had paid the deposit and she had taken out a mortgage. She was unable to explain the result of the search carried out by Advocate Benest over the luncheon adjournment showing no mortgage to which Mr Walton was party at that time. She said they did not have sufficient capital to have bought it without a mortgage.

45 She was taken to the wire transfer credit advice from First Caribbean International Bank concerning the payment of £150,000 (US$348,057.50) on 17th November 2009, and in

particular to the fact that there appeared to be a blanked out passage between ' *Mr M C'* and the word ' *Walton*' and a partial covering of the letters ' *vi*' on the next line, which suggested that this was a photocopy of a document part of which had been blanked or tippexed out. The same point was made in relation to the name of the account on the next page of the document. It was suggested to her that the blanked out parts showed that this was in fact a joint account in the name of her and her husband but that references to her had been removed. She denied that this was the case and said that the account was definitely in the sole name of her husband. It was further put to her by Advocate Benest that this suggestion had been raised in correspondence before the trial and better copies of the documents had been requested. The defendant confirmed that this was the case but said that Caribbean banks do not produce duplicate statements. She said that she had thought of getting a letter from the First Caribbean National Bank confirming that it was an account in her husband's sole name but thought that this was too late as it would take time to do and that producing a letter to that effect at the trial would not be sufficient. She had not therefore approached them.

46 In summary she asserted that there was a verbal agreement between her and her mother in 1994 that she would subsequently receive a benefit in respect of her interest in Gardone but there had been no quantification of this agreement either in terms of an amount or a percentage interest. She accepted that the sum of £359,000 did not relate to a 3/10ths interest but she said that this sum was paid in fulfilment of the deceased's obligation under the verbal agreement.

Findings

47 The Court has had the opportunity of seeing and hearing the plaintiff and the defendant give evidence. The Court has to say that, on the material aspects of this case, it did not find the defendant to be a convincing witness. When pressed she resorted repeatedly to asserting that she knew nothing of what had happened in 1994, that she left everything to her mother and that she simply did as she was told. We found this hard to accept given the fact that, by 1994, she was aged 34, had been working in the finance sector for a number of years and was about to get married. She did not strike us as someone who would passively leave everything to her mother and take no interest in a matter which involved something as important as a 3/10ths interest in a property and a mortgage which she had committed to pay in the sum of £42,600. We found her assertion that she had no idea why the deceased had sold the fields in 1994 to be incapable of belief.

48 We find that, on the balance of probabilities, the deceased paid the £72,000 in 1994 out of the sale proceeds of the fields and that this was applied as to £42,600 to clear the mortgage and the balance (of just under £30,000) was paid to the defendant. No doubt the exact figures may have been slightly different to take account of costs etc but the key finding is that the deceased cleared the mortgage and paid the difference between that and the £72,000 to the defendant. In accordance with the contract passed before the Royal Court, the defendant's one third interest in Gardone was extinguished at that time.

49 We have reached that conclusion for the following reasons:–

(i) As stated already, we did not find the defendant to be a convincing witness.

(ii) One starts from the position that legal documents mean what they say. The 1994 transfer passed before the Royal Court could not be clearer. The defendant was to be paid £72,000 (from which she would need to clear the mortgage as it was accepted that this was her sole responsibility) in exchange for which she would have no further interest in Gardone. We are in no doubt — and the defendant conceded in evidence that this must be so — that the mortgage was repaid out of money provided by the deceased in 1994.

(iii) We do not accept that the transfer in 1994 was made at the suggestion of the deceased in order to protect her interest in Gardone in the event of the defendant getting divorced. This seems very far fetched. We think it far more likely that it was the defendant who wished to realise her interest so that she and her husband would be in a position to put down money towards a property of their own. Furthermore we note that the deceased had retained the fields at Les Vaux on the sale of the farmhouse and we accept the evidence of the plaintiff that she had been somewhat reluctant to sell those fields. We do not think she would have done so for the somewhat intangible benefit of protecting herself against any future divorce. Conversely, we think she would have been willing to do so to help her daughter as she set out on married life.

(iv) From what we have heard about the deceased from both the plaintiff and the defendant, she does not strike us as being the sort of person who would have passed a contract before the Royal Court saying one thing when she intended the true position to be something completely different.

(v) It seems overwhelmingly likely that the deceased sold the fields in order to raise the money necessary to buy out the defendant. She had no other assets with which to do so. The fields were sold for £95,000. If, as the defendant suggests, the maximum payment which the deceased made was to discharge the mortgage of £42,600, this would leave some £52,400 (less transaction expenses) in her hands. Yet, as described at paragraphs 18–20 above it is clear that by 2007 she only had some £19,422 left (apart from her interest in Gardone). Given her frugality and the fact that she lived entirely within her income between 2007 and her death, we think it highly unlikely that she would have got through some £33,000 between 1994 and 2007. Conversely, if all she retained after 1994 was the difference between £95,000 and £72,000 (i.e. £23,000 less transaction expenses) we can well understand that this could have reduced marginally to £19,422 by 2007.

(vi) It seems to us that, if it is to be said that the true position was very different from that recorded in the contract passed before the Royal Court, the onus lies upon the defendant to produce evidence to show that, for example, she never received any sale proceeds. However, her efforts in this respect can only be described as lackadaisical. She confined herself to a telephone call to a call centre at RBS to enquire about whether her bank statements from 1994 could be obtained. We would

have expected a concerted effort through lawyers to establish formally from the bank that it really was impossible to retrieve such records. We would also have expected contact to be made with Ogier and Le Cornu (now Ogier), the firm who acted in relation to the 1994 transaction. Somebody must have taken instructions from the deceased and/or the defendant on the transaction and there may be file notes, completion statements, client account bank statements or other documents which would help establish the position. It seems highly likely that Ogier and Le Cornu must have forwarded the necessary money to the bank to clear the mortgage and this might well be established one way or the other. Yet no enquiries have been made and we are left without such evidence. The best we are left with is that the defendant does not recall receiving a sum representing all or part of the sale proceeds into her account. But we do not find this a satisfactory basis upon which to conclude that the legal contracts do not mean what they say.

50 We further find that there was no agreement which imposed an obligation upon the deceased to pay any further sum. In the first place, on our finding, she had already paid in full in 1994. Secondly, even if she had only paid the mortgage, the only legal obligation would be to pay the defendant the balance of £29,400. Thirdly, it is not possible to have trusts of immovable property and therefore, having transferred her 3/10ths interest in 1994 by contract passed before the Royal Court, the defendant had no interest in Gardone. Fourthly, even if the deceased did say to her daughter that she would give her further funds upon the sale of Gardone, this did not constitute a legal obligation to do so. The defendant could never have sued on it if the deceased failed to deliver. This is because the deceased would not be acquiring anything for such a payment because she already had full ownership of Gardone. Furthermore, there was simply no certainty as to what the deceased had said she would do. Even on the defendant's case, there was no certainty as to the amount which would be forthcoming or whether it represented any particular share in the property. As *Selby v Romeril* [1996] JLR 210 makes clear, (at 218–219) the *objet* of a contract must be sufficiently certain. It must be capable of enforcement. In this case there was insufficient certainty about what the deceased had said she would do to give rise to any contractual obligation.

51 It follows that, when the deceased transferred £359,000 to the joint account in 2007, she was under no legal obligation to do so. She did so voluntarily. It follows that in law, the payment was a gift.

52 There is one other finding of fact which we should deal with. That relates to the transfer of £150,000 out of the joint account on 17th November 2009. Here again, it is disappointing that there is so little supporting evidence. We were informed — and the defendant accepted — that the defence had been put on notice that there were suspicions as to the document relied on (at page 233–234 of the Court bundle). Yet the defendant appears to have made no attempt to obtain better documents or to obtain confirmation that the account with First Caribbean International Bank was indeed in the sole name of her husband. We would have thought that enquiries could also have been made at Barclays in order to see what instructions were given in relation to the payment. We find it hard to believe that Barclays

would not have records in relation to transactions as recently as 2009. We are therefore left with the document itself coupled with the defendant's assertion and her failure to take any step to support her assertion. Doing the best we can on the limited evidence available to us, the Court has concluded on balance that the payment was to an account in the joint names of Mr and Mrs Walton. Looking at document 233 and 234, the most likely explanation for the gaps and omissions pointed out are that somebody has tippexed or placed a piece of paper over the original document where the defendant's initials appeared and it has then been photocopied. No other satisfactory explanation for the gaps and omissions has been presented to us.

53 However, even if the Court is wrong on this finding, we do not think that it alters the outcome for the reasons developed at paragraphs 64–69 below.

***Avancement de succession* and joint accounts**

54 The law concerning *Avancement de succession* and *Rapport à la masse* is well established and is not in dispute between the parties. In short, an *inter vivos* gift by a parent to a child (excluding of course matters of parental obligation such as provision of food, clothing, education, vocational training etc) is described as an ' *Avance de succession'*. On the death of the parent the child may be compelled at the instance of the co-heirs to ' *la rapporter à la masse'* i.e. to bring the gift back into the gross of the estate. The aim of the principle is to prevent one heir benefitting to the prejudice of the others by means of *inter vivos* gifts that are made to him. As Le Gros, *Traité du Droit Contumier*, states at page 70:–

> ***"Le rapport a donc pour but d'établir l'égalité entre les héritiers venant à une même succession."***

55 A child who has received a gift may elect to rest on his advance (' *rester sur ses avances*') and forego any claim to participate in the succession provided that the estate is solvent and he has not committed any ' *act d'héritier*' (*Valpy v Janvrin* [1716] 1 CR 66). Advances are brought back into the estate at their value as at the date of the gift (*Amy v Amy* [1968] JJ 981) and do not carry interest (*Re Vincent* [1869] Ex Juillet 5). The principle also applies to *inter vivos* gifts by a husband to a wife (*Ottley v de Gruchy* [1958] 251 Ex 256).

56 How do these principles apply to a joint bank account under the terms of which the contents of the account at the death of a joint holder accrue to the surviving account holder by survivorship? In *Channing v Harrison* [1967] JJ 845, there was a joint account in the name of the deceased husband and his wife. The Court found specifically that the parties had contributed to the account equally and that it belonged to them in equal shares. The Court held that the husband's half share of the joint account which accrued to the wife by right of survivorship was to be treated as an ' *avance de succession'* (even though it only took effect on his death) and therefore had to be brought back into account.

57 Initially, Advocate Benest sought to argue from *Channing* that the transfer of £359,000 by the deceased to the joint account in 2007 was of itself an *avance* to the defendant. However, in the end she retreated from that position and we think she was right to do so. It seems to us that, where there is a gift by a deceased into a joint account in the name of the deceased and an heir, one has to see how the assets in the account are actually dealt with in order to ascertain whether there has been an *avance* to the heir. It is to be recalled that in this case each party had full signing power over the account. Suppose that, not long after paying in the £359,000, the deceased had transferred £300,000 out of the joint account back into her own name and then died, so that only £59,000 accrued by survivorship to the defendant. In that event, the *avance* to the defendant would only be £59,000; it could not possibly be said to be £359,000.

58 What is correctly said by Advocate Benest is that the facts in this case are very different from those in *Channing*. In that case half of the assets contributed to the joint account already belonged to the wife. Thus the only element of gift (and therefore *avancement*) was the half share belonging to the husband which accrued by survivorship on his death. Here, on the other hand, the Court has found that the entire sum of £359,000 belonged initially to the deceased and she contributed it all by way of gift into the joint account. Suppose that not long after contributing this sum, the deceased had died before the account had been touched, so that the entire sum accrued to the defendant by survivorship. We are in no doubt that the amount of the *avance* in those circumstances would be £359,000.

59 In our judgment, where a deceased contributes all the money paid into a joint account in the name of the deceased and an heir by way of gift, there is a form of contingent or potential *avance*. There will be an actual *avance* to the extent that money is paid out of the joint account to or for the benefit of the heir during the life of the deceased or accrues to the heir by survivorship on the death of the deceased.

Decision

60 We turn to apply these principles to the facts of this case.

61 We have already found that the transfer by the deceased of £359,000 to the joint account in 2007 was a gift. None of that money belonged to the defendant prior to that time and the deceased was under no legal obligation to make the transfer. To the extent that monies were subsequently paid out of the joint account to or for the benefit of the defendant or accrued to her by survivorship, they became *avances* which have to be brought back into account. In our judgment, payment to a joint account in the name of the defendant and her husband is to be treated as a payment made to or for the defendant's benefit and Advocate Taylor did not seek to argue otherwise.

62 On this basis, there is no dispute that the minor payments made out of the joint account and the amount which accrued to the defendant on her mother's death would amount to

avances. The sole dispute relates to the sum of £150,000 paid out on 17th November 2009.

63 On the basis of the Court's finding of fact at paragraph 52 above, namely that the sum was paid to a joint account in the name of the defendant and her husband, we hold that that is to be treated as a payment to or for her benefit and accordingly is to be treated as an *avance*.

64 However, in case we are wrong in our finding and the sum of £150,000 was in fact paid to an account in the sole name of the husband, we go on to consider how such a payment should be treated.

65 The principle of *rapport à la masse* is not restricted to gifts made by the parent directly to the heir. Thus, where a parent pays a creditor to whom the heir is indebted, this will be treated as an *avance* which has to be brought back into account. See *Basnage, Commentaires sur la Coutume Reformée* (1681 edition) Tome II at 289 where he says:–

> ***"Si le père ou la mère ont acquitté les dettes de l'un des leurs enfans il en est comptable à ses co-héritiers"***

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 à 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.

68 In this case, the only information that we have is that the sum of £150,000 was intended to pay a deposit on a property in the Caribbean. The defendant has brought no more evidence concerning the point. In our judgment, in the absence of any such evidence, the Court should infer that the defendant has benefitted from this payment in that a property has been purchased which benefits her and her family.

69 We therefore find that, even if the payment of £150,000 was made to an account in Mr Walton's sole name rather than to an account in the joint names of Mr Walton and the defendant, this should be treated as a payment made for the benefit of the defendant and accordingly it falls to be brought back into account.

70 The total amount paid out of the joint account to or for the benefit of the defendant was therefore as follows:–

(i) Six small payments	£10,960.00
(ii) Transfer for a property in the BVI	£150,000.00
(iii) Balance accruing by survivorship	£225,259.08
Total	£386,219.08

71 The difference between that figure and the initial sum of £359,000 paid into the joint account is explained by interest earned on the joint account between its creation in June 2007 and the death of the deceased in April 2011. The question arises as to whether this difference is also to be treated as an *avance*.

72 In our judgment it is. As stated at paragraph 55, an *avance* does not include any interest earned on the *avance* by the heir. Thus, any interest earned by the defendant on the sum of £150,000 or the sum of £10,960 after transfer out of the joint account is not included and is not to be brought into account. But it seems to us that interest earned on the joint account falls to be treated somewhat differently. Suppose that a deceased contributes £100,000 to a joint account in the name of the deceased and an heir and the joint account subsequently remains completely untouched except to earn interest of, say, £50,000 between the date of the original transfer into the joint account and the deceased's death, so that the joint account by then contains £150,000. It seems to us that the amount of the *avance* is £150,000 as that is the amount which has been received by the heir from the deceased and which would otherwise have fallen into the estate.

73 Applying that principle to the facts of this case, there was in our judgment a total *avance* of £386,219.08, being the total amount which has been paid out of the joint account to or for the benefit of the defendant, whether by way of small distribution, transfer of the £150,000 or the balance remaining in the account at death and accruing by survivorship. It follows that the order of the Court is that this sum should be brought back into the movable estate of the deceased and distributed in accordance with the deceased's will of movable estate.