Mauger v Mauger

Jurisdiction:	Jersey
Judge:	David Michael Cadin
Judgment Date:	13 March 2024
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Court:	Royal Court

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Text

Between
Aidan Mauger
Plaintiff
and
Pisamai Mauger (née Sriring (formerly Holliday))
Defendant

[2024]JRC057

Before:

Advocate David Michael Cadin, Master of the Royal Court.

ROYAL COURT

(Samedi)

Probate — application to amend Particulars of Claim; functus officio.

Authorities

Mauger v Mauger [2023] JRC 115.

Cunningham v Cunningham [2009] JLR 227.

Royal Court Rules 2004

Financial Technology Ventures II (Q) LP and Ors v ETFS Capital Limited and Tuckwell [2020] JRC 152.

Bagus Investments Limited v Kastening [2010] JLR 355.

Freeman v Ansbacher (Jersey) Limited [2009] JRC 003.

Neal v Kelleher [2014] JRC 233.

Alhamrani v Alhamrani [2007] JLR 44.

Chiron Corporation and Others v Organon Teknika Limited and others (No.4) [1994] F.S.R. 252.

Jersey Evening Post Limited v Al Thani [2002] JLR 542

Corbin v Dorynek and Flath [2022] JRC 238.

Carry v Liston [2019] JRC 085

Trico Ltd v Buckingham [2019] JRC 163.

Quah Su-Ling v Goldman Sachs International [2015] EWHC 759 (Comm).

Robertson v Lazard Trustee Company Limited [1994] JLR 103.

Goed v Begg [2020] JCA 245A.

Foster v AG [1992] JLR 6.

De la Haye v Walton [2013] JLR 117

Advocate C. F. D. Sorenson **for the Plaintiff**.

Advocate N. Mière **the Defendant**.

THE MASTER:

Introduction

1 This is my judgment in relation to the Plaintiff's application to re-amend his Particulars of Claim in the light of the Court's decision on a preliminary issue (reported at *Mauger v Mauger* [2023] JRC 115).

Background

2 Ralph Cyril Mauger (the “Deceased”) was married to the Defendant in April 2012 and died, domiciled in Jersey, on 26 July 2021. The Plaintiff is the eldest of his two surviving sons by an earlier marriage.

3 From about 2012, the relationship between the Deceased and the Plaintiff came under significant pressure. The Deceased left the entirety of his net movable estate to the Defendant pursuant to his Will of personal estate dated 22 May 2012. By a codicil dated 18 September 2014, the Deceased named the Defendant as executrix, and following his death, she appointed Ogier Executor and Trustee Company Limited to obtain probate on her behalf pursuant to a Special Power of Attorney. Probate was granted on 31 August 2021.

4 In December 2021, a summons was issued by the Plaintiff to reduce the Will *ad legitimum modum* and the Royal Court made an order to that effect on 17 December 2021, appointed the Judicial Greffier as arbitrator and directed that the parties provide affidavits setting out the lifetime gifts each had received.

5 The Plaintiff filed Particulars of Claim on 11 March 2022, alleging that the Defendant had received lifetime gifts which she had not disclosed, and seeking an order that she bring such gifts back into the estate (and thereby make *rapport à la masse*) on the basis that:

> *“27. It is understood that the value of the Gifts exceeds the value of the Estate and therefore the Defendant cannot rester sur ses avances.”*

6 A Defence was filed on 6 April 2022 noting that the Defendant wished to *rester sur ses avances* and on 17 May 2022, the Plaintiff issued a summons for directions seeking, amongst other things, discovery and an exchange of witness statements and expert evidence. In response, Master Thompson enquired of the parties as to what the issue was between them as in his view, without the pleadings being amended, there was nothing to be determined by the Royal Court (as the Defendant had elected to *rester sur ses avances* which she was entitled so to do).

7 The Plaintiff's Advocate replied in the following terms:

> *“I can confirm that the issue between the parties is whether [the Defendant] is entitled to “rester sur ses avances” where she has received movable assets the value of which, it is understood, exceeds the disposable third.”*

8 Accordingly, on 13 June 2022, Master Thompson gave the Plaintiff permission to amend the Particulars of Claim to add, amongst other things, a new paragraph (ii) to the prayer that

"the Defendant may not rester sur ses avances as she has received lifetime gifts of moveable property which value is in excess of the "partie disponible"" and sent that question for trial by way of a preliminary issue.

9 That preliminary issue came before the Court in June 2023 and in a detailed judgment, Commissioner Bailhache concluded that:

> ***"70….I hold that the principle of Valpy dit Janvrin, namely that a donee can rest on the advances he or she has received from the deceased during his or her lifetime, repudiating any claim to the estate of the deceased, is not restricted by the fact that the advances received may exceed the tiers disponible, whether that is calculated by bringing the gift back into account or by taking the value of the estate at the date of death without the value of the gift."***

10 The Act of Court dated 6 July 2023 reflected that decision, and the Court did not make any further orders.

11 In the course of his closely reasoned judgment, Commissioner Bailhache noted that, for example:

> ***"3…In passing, I note that no argument has yet been made that, having taken out a grant of probate as executrix, the Defendant has therefore approved the Will as an acte d'heritier, is under an obligation in that capacity to act in the best interests of the estate by seeking to recover gifts made by the Deceased and is not permitted to attack the will…***
>
> ***53. I also add that, while I have not been addressed on it, there is in my judgment at least a possibility that, in some circumstances, a claim that arrangements should be struck down as a fraud on the legitime can be sustained. Regrettably, there is little authority in Jersey directly on that point, but there is perhaps a nod given to the possibility in Article 9(3) of the Trusts (Jersey) Law 1984, as amended. It would take a case to be argued out to determine the extent to which, if at all, such a doctrine might apply…***
>
> ***72. In reaching this conclusion, I wish to make it plain that I do not intend by this judgment to decide any questions concerning the merits of an action for setting aside a gift, or of claims based on the obligations of the Defendant as having proved the Will through her attorney, or an action against a donee on the basis that the gift amounts to a fraud on the legitime or breached the rule that donner et retenir ne vaut. On all of these potential points, I have received no significant submissions as they were not within the remit of the preliminary issue."***

12 In August 2023, the Plaintiff's advocates notified the Defendant's advocates that they were considering an application to amend to include the matters raised *en passant* by Commissioner Bailhache in his judgment. A summons was issued in October 2023 seeking permission to amend and that summons eventually came before me.

13 The proposed amendments can be categorised as:

(i) Minor narrative amendments (at paragraphs 4 to 23, 25 and 29) which stand or fall with the substantive amendments below;

(ii) An amendment at paragraph 24 to allege that, if the Deceased did in fact render himself impecunious, it represented an unconscionable attempt to defeat the Plaintiff's entitlement to *legitime*, and this is further expanded in a new paragraph 33 which pleads that:

> *"… the conduct of the Deceased in bequeathing his entire Estate to the Defendant and subsequently executing the 2014 Share Transfer (and such other Gifts as may subsequently come to light) represented unconscionable conduct by the Deceased designed to defeat the entitlement that Jersey law confers upon the Plaintiff in respect of the Estate by way of legitime.* This constituted a fraude on the légitime by the Deceased rendering it inequitable for the Defendant to rester sur ses avances and the Defendant must make rapport à la masse of all the Gifts (including those placed into joint names) received by the Defendant from the Deceased. Alternatively, the Defendant must make restitution to the Plaintiff in a sum representing the difference between the value of the Plaintiff's share of the Estate absent the Defendant being required to make rapport à la masse and the value to which he would be entitled were she required to do so, or such other sum as the Court may deem fit."

(together the "fraude on the legitime amendments")

(iii) The insertion of new paragraphs 30 to 32, alleging that the Defendant cannot *rester sur ses avances* because the estate is insolvent and/or because she has carried out *actes d'heritier*;

(iv) The insertion of a new paragraph 34 alleging that:

> *"34. Further or alternatively, as a result of the conduct of the Deceased as pleaded herein the Defendant has been unjustly enriched at the expense of the Plaintiff rendering it inequitable for the Defendant to rester sur ses avances and the Defendant must make rapport à la masse of all the Gifts (including those placed into joint names) received by the Defendant from the Deceased. Alternatively, the Defendant must make restitution to the Plaintiff in a sum representing the difference between the value of the Plaintiff's share of the Estate absent the Defendant being required to make rapport à la masse and the value to which he would be entitled were she*

required to do so, or such other sum as the Court may deem fit."

(the "unjust enrichment amendment")

The Relevant Law

14 The parties were largely agreed on the applicable law which was set out by Birt D.B., in *Cunningham v Cunningham* [2009] JLR 227 and succinctly summarised by Clyde-Smith Comr. in *Financial Technology Ventures II (Q) LP and Ors v ETFS Capital Limited and Tuckwell* [2020] JRC 152 (at paragraph 11) as follows:

> ***"(i) The general position is that all matters in dispute between parties should be resolved so far as possible before the Court at trial.*** Leave to amend should, therefore, be given if there is no prejudice to the other side which cannot be compensated for by costs (at paragraph 15) .
>
> ***(ii) Amendments will not be permitted which infringe the rules of pleading or introduce a claim which is so hopeless that it would be liable to be struck out (at paragraph 19)*** .
>
> ***(iii) More stringent considerations apply where an application to amend is late (at paragraph 17) and if (and only if) the Court considers that an amendment is 'late' it may then consider (at paragraph 21):***
>
> ***(a) why the amendment material could not have been pleaded earlier;***
>
> ***(b) the strength of the new case;***
>
> ***(c) whether and why an adjournment ought to be granted;***
>
> ***(d) how to remedy any adverse effects attendant upon the amendment being granted; and***
>
> ***(e) why the balance of justice favours the party seeking to amend at a late stage."***

15 Insofar as the proposed amendments relate to claims that are arguably prescribed, in *Bagus Investments Limited v Kastening* [2010] JLR 355, Birt B. held that:

> ***"16…The parties are agreed on the relevant test, namely that the court will not permit amendments to introduce a new cause of action which is arguably prescribed at the date of amendment, unless the claim arises from the same or substantially the same facts as the claim already pleaded…A plaintiff seeking leave to introduce a new cause of action in such circumstances has to surmount the high hurdle of establishing at the hearing of the application for leave to amend that the defendant has no reasonable prospect of success on the prescription argument.*** If leave to amend is refused, a plaintiff's alternative course is then to institute a separate

fresh action in which a defendant would of course be free to argue the prescription point on its merits."

16 That simple statement was further expanded in *Freeman v Ansbacher (Jersey) Limited* [2009] JRC 003, where in the context of determining whether adding a plea for gross negligence to a pleading alleging simple negligence amounts to adding a new cause of action, Birt B. held that:

> ***"58. How does one determine what constitutes a cause of action? I was referred to two cases which assist in this respect. In Paragon Millett LJ said this at 406:***
>
> ***"The classic definition of a cause of action was given by Brett J in*** *Cooke v Gill* (1873) LR 8 CP 107 ***at 116; "'cause of action' has been held from the earliest time to mean every fact which is material to be proved to entitle the plaintiff to succeed, — every fact which the defendant would have a right to traverse."*** (My emphasis) In the Thakerar case Chadwick J cited the more recent definition offered by Diplock LJ in *Letang v Cooper* [1964] 2 All ER 929 ***at 934*** , [1965] 1 QB 232 ***at 242–243, and approved in*** *Steamship Mutual Underwriting Association Limited v Trollope & Colls Limited* (1986) 6 Con LR 11 ***at 30; 'A cause of action is simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person.'*** I do not think that Diplock LJ was intending a different definition from that of ***Brett J.*** However it is formulated, only those facts which are material to be proved are to be taken into account. The pleading of unnecessary allegations or addition of further instances or better particulars do not amount to a distinct cause of action. The selection of the material facts to define the cause of action must be made at the highest level of abstraction."
>
> ***59. The observations of Brett J and Diplock LJ were also referred to by Park J in*** *Hoechst UK Limited v Inland Revenue Commissioners* [2004] STC 1486. ***He expressed the matter this way at paragraph 24 of the judgment:-***
>
> ***"Two critical concepts which feature in the foregoing formulations of the legal position are those of cause of action and of the limitation period.*** A cause of action in this context is not so much the label attaching to a claimant's claim (for example 'breach of statutory duty' or 'money paid under a mistake of law). Rather, it is the set of facts which entitles the claimant to relief …."

17 Birt B. then went on to consider whether the claim arose out of the "same facts" or "substantially the same facts":

> ***"67. In this connection Mr Journeaux refers me again to Paragon where the court held that an allegation of intentional wrongdoing did not arise out of the same facts or substantially the same facts as the claims in respect of unintentional wrongdoing such as negligence. He also referred***

me to the observations of Judge Mackie QC sitting in the English High Court in the case of *Berezovsky v Abramovich* [2008] EWHC 1138 (Comm) ***where he said the following at paragraph 15:-***

"Miss Dohmann submits that even if the relevant primary limitation period has expired the claims for breach of trust and breach of fiduciary duty can still be added because they arise out of the 'same facts or substantially the same facts as a claim in respect of which [the Claimant] has already claimed a remedy in the proceedings'. She draws attention to several cases containing helpful observations from the Court of Appeal but I say at once that these seem to me to be 'trumped' by the recent guidance set out in *Society of Lloyds v Henderson* [2007] EWCA Civ 930 ***and*** *Giles v Rhind* [2008] EWCA Civ 118. ***These cases take the matter on from early authorities notably*** *Goode v Martin* [2002] 1 WLR 1828 ***and their effect was helpfully summarised in two paragraphs of Mr Popplewell's skeleton argument as follows:***

(a) A new claim does not arise 'out of the same facts' as those on which the old claim was based 'if, in order to prove it, new facts have to be added.' The basic test therefore is 'whether the plea introduces new facts.' It is not sufficient merely to demonstrate that some or a substantial part of the facts relied on to promote the new claim were relied on to promote the old claim. Moreover, it is not sufficient that certain facts are indirectly relevant, for example by way of background, to the old claim. Rather they have to be facts 'in respect of which" a remedy was originally claimed .

(b) The additional possibility that the new facts are substantially the same as those already relied on is limited to …… something going no further than minor differences likely to be the subject of enquiry but not involving any major investigation and/or differences merely collateral to the main substance of the new claim, proof of which would not necessarily be essential to its success." (taken from Colman J in *P&O Nedlloyd v Arab Metals* [2005] 1 WLR 3733 ***at 3745)."***

18 The decision in *Freeman v Ansbacher (Jersey) Limited* was followed by Master Thompson in *Neal v Kelleher* [2014] JRC 233 where, having noted a potential difference in approach to that set out in *Alhamrani v Alhamrani* [2007] JLR 44, he held that:

"39. In *Alhamrani* ***the approach involved considering whether a defendant would be required to investigate facts and matters completely outside the ambit of or unrelated to those facts which he could reasonably be assumed to have investigated for the purposes of defending the un-amended claim. In*** *Freeman*, ***for the facts to be substantially the same as those relied upon, those facts were limited to minor differences not requiring major investigation or to facts collateral to the main substance of the new claim, proof of which would not necessarily be essential to its success. I consider that the approach in*** *Freeman* ***appears to be slightly***

more restrictive than *Alhamrani* ***because it requires me to consider whether the proposed amendment introduces new facts which have to be proved to establish the amended claim. In light of the fact that*** *Alhamrani* ***was cited to the Royal Court in*** *Freeman*, ***I consider I am required to follow the approach set out in Freeman to consider whether the proposed amendments add a new cause of action and whether or not the new cause of action arises out of the same facts or substantially the same facts as a cause of action already pleaded."***

The Parties' Contentions

19 I have had the benefit of significant written and oral submissions from the parties, which were expanded after the conclusion of the hearing to deal with the question of whether the Court was *functus officio*.

20 Advocate Sorensen for the Plaintiff submits that:

(i) the Royal Court is not functus officio;

(ii) the application to amend is not late in the sense used in the authorities and the more stringent considerations referred to do not apply;

(iii) the proposed amendments raising insolvency and/or actes d'heritier are not new claims or alternatively, arise from the same or substantially the same facts that are already alleged in the Amended Order of Justice;

(iv) the fraude on the legitime amendments and the unjust enrichment amendment cannot be said to be prescribed and are not new claims;

(v) the proposed amendments are all better than merely arguable; and

(vi) the application falls within the general presumption that amendments should be permitted to ensure that all matters in dispute are resolved. It is not late and causes no material prejudice to the Defendant.

21 Advocate Mière for the Defendant submits that, to the contrary, the Royal Court is *functus officio*; the application to amend is late; the amendments relate to new causes of action, some or all of which are prescribed; and that the proposed amendments are " *devoid of merit*."

Is there still a claim to amend?

22 RCR 6/12 provides that:

"(1) The Court may at any stage of the proceedings allow a plaintiff to amend his or her claim, or any party to amend his or her pleading, on such terms as to costs or otherwise as may be just."

23 The phrase " *at any stage in proceedings*" is wide, but it does require there to be proceedings. In this case, having clarified with the parties what the issue between them was, Master Thompson referred the claim for determination of a preliminary issue.

24 RCR 6/30 sets out the procedure to be followed after a decision has been made on a preliminary issue:

"(1) When the Court has given judgment on a preliminary issue, it may direct that the case be restored to the pending list if further pleadings are required, or it may direct that the case remain on the hearing list .

(2) If the Court directs that the case be restored to the pending list, the foregoing provisions of this Part shall, with the necessary modifications, apply to the subsequent steps in the action."

25 In this case, no such orders were made, nor indeed, did either of the parties invite the Court to make any further orders to progress the litigation, possibly because the Court's decision on the preliminary issue had effectively resolved the only matter which the parties had confirmed to be in issue between them.

26 The wording used in RCR 6/12 reflects the wording previously used in England in RSC O.20 r.5 which provided that:

"(1) Subject to Order 15, rules 6, 7 and 8 and the following provisions of this rule, the Court may at any stage of the proceedings allow the plaintiff to amend his writ, or any party to amend his pleading, on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct."

27 In *Chiron Corporation and Others v Organon Teknika Limited and others (No.4)* [1994] F.S.R. 252, the plaintiffs sought to amend their pleadings after judgment but before an Order was made. Aldous J held that RSC O.20 r.5 was " *wide enough to cover the case where amendment is sought after judgment, but before an order is drawn up*", but that *"[t]he position would be different if an order had been drawn up and the court was functus officio"*.

28 This reflects the position in Jersey as set out in *Jersey Evening Post Limited v Al Thani* [2002] JLR 542, where the Court held at paragraph 9 that:

"A court is functus when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it

prevent a judicial change of mind even where a decision has been communicated to the parties. Proceedings are only fully concluded, and the court functus, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its rulings on adjudication must be taken to a higher court if that right is available."

29 The Plaintiff accepts that the Royal Court is *functus officio* in relation to the preliminary issue, namely whether the Defendant may or may not *rester sur ses avances* in circumstances where the value of the *avances* exceed the *partie disponible*. However, Advocate Sorensen submits that the Royal Court is not otherwise *functus officio* given that:

(i) The matter was not set down as a trial of the action, or a trial on liability, but rather for trial of a preliminary issue and the decision on the preliminary issue did not purport to determine the litigation as a whole.

(ii) For the Court to be *functus*, the Defendant would have had to have applied for summary judgment or strike out or for some form of declaratory relief in the light of Commissioner Bailhache's judgment.

(iii) Paragraph (i) of the Prayer (which requires the Defendant to make *rapport à la masse* of all the lifetime gifts of moveable property) is not, and was not, founded solely on the proposition that an heir cannot *rester* if the *avances* exceed the *partie disponible*. Only paragraph (ii) of the Prayer has been determined by the preliminary issue.

30 In my judgment, dealing with each of these points:

(i) One of the considerations for ordering a preliminary issue is whether " *determination of the preliminary issue would dispose of the case*" (*Corbin v Dorynek and Flath* [2022] JRC 238) and accordingly, there is nothing exceptional or unusual about a claim being brought to an end as a result of the determination of a preliminary issue.

(ii) If the Court finally determines a claim by way of a preliminary issue, it is inappropriate, unnecessary and outwith the Overriding Objective (in particular, the requirement to deal with cases justly and proportionately and/or to allot an appropriate share of the court's resources), to require a party to bring further applications to confirm that which the Court has already determined.

(iii) Whilst paragraph (i) of the prayer is a generic plea to make *rapport*, that plea does not exist in isolation and must be interpreted in accordance with the pleadings:

(a) those pleadings have a very narrow focus and as Master Thompson noted in his email to the parties in May 2022, but for an amendment which he allowed, there would have been nothing on the face of the pleadings for the Royal Court

to determine;

(b) in response to that email from the Master, the Plaintiff confirmed that the issue between the parties related to the whether the Defendant could *rester* when the *avances* exceeded the *partie disponible*; the Plaintiff did not then seek to raise any other issues or to suggest then that the pleadings were sufficiently wide to cover the issues now raised;

(c) the Particulars of Claim were amended accordingly and the only issue on the face of the pleadings was whether the Defendant could *rester* when the avances exceeded the *partie disponible*; it was that issue which was sent for determination by way of a preliminary issue;

(d) there was no express allegation in the pleadings that the Defendant could not *rester* because the estate was insolvent or because the Defendant had carried out *actes d'heritiers*;

(e) having determined the pleaded issue, there was nothing further to be resolved between the parties nor were there any other extant applications or reservations (unlike in *Carry v Liston* [2019] JRC 085);

(f) on issuing the Act of Court in relation to the preliminary issue, the Royal Court had " *performed all its duties in a particular case*" (as required in *Jersey Evening Post Limited v Al Thani*) and became *functus officio*;

(g) once the Royal Court was *functus officio*, it was too late for the Plaintiff to allege that there were other matters which should be determined as part those proceedings and that could be incorporated by way of amendment.

31 Accordingly, I find that the Royal Court is *functus officio* in relation to the proceedings initiated by the Plaintiff by Summons in December 2021 and that there are no extant proceedings which the Plaintiff can amend. The Plaintiff can however bring fresh proceedings for such claims as are not prescribed.

Is the Application Late?

32 If I am wrong in finding that the Royal Court is *functus officio*, I have considered the application to amend in accordance with the usual principles.

33 In *Trico Ltd v Buckingham* [2019] JRC 163, Master Thompson cited with approval, and adopted, the principles summarised by Mrs Justice Carr DBE in the English decision of *Quah Su-Ling v Goldman Sachs International* [2015] EWHC 759 (Comm) where she held that:

"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;"

34 Clyde-Smith Comr. expanded upon this in *Financial Technology Ventures II (Q) LP and Ors v ETFS Capital Limited and Tuckwell* where he held that:

> ***"23. There is no formula that can be applied to the determination of whether an application to amend is late, thus triggering the more stringent considerations set out in*** *Cunningham*. ***It is, as Advocate Williams for the plaintiffs submits, a relative concept which includes consideration of the time at which the amendment is made, both in terms of whether it could have been made earlier and whether it is made at an advanced stage of a proceedings, as well as the consequences of the amendment on the parties and the procedural timetable."***

35 In this case, the application to amend was made after the Particulars of Claim had already been amended, and after judgment had been given on the preliminary issue. Discovery has not yet occurred, witness statements have not been exchanged, and nor has a trial date been fixed. As the authorities make clear, lateness is a relative concept. If there had been other pleaded causes of action in the Particulars of Claim, it is entirely conceivable that any application to amend would not have been described as late. However, in this case, there are no other causes of action and for the reasons set out above, I have found that the Court is *functus officio*. If I am wrong about that, this is an application to amend made at a time when the Court might legitimately have expected that all the issues that fell to be determined between the parties, had in fact been determined. In such circumstances, any application to amend the proceedings is self-evidently a late application such that the more stringent considerations set out in *Cunningham* apply.

The Proposed Amendments to Paragraphs 24, 33 and 34

36 These paragraphs contain the *fraude* on the *legitime* and the unjust enrichment amendments.

37 There is an issue in relation to prescription for both of these proposed amendments in that:

(i) the Plaintiff submits that neither claim is " *arguably prescribed*" given that:

(a) in accordance with established authority, the *fraude* claim is imprescriptible or subject to a prescription period of 10 years; and

(b) although the Court has not yet determined the prescription period for unjust enrichment, there is jurisprudence that suggests that the foundation of such a claim is quasi-contractual such that a 10 year prescription period would be applicable, albeit that it is wholly unclear as to when time might start running for the purposes of such a claim (it could be from the date of death, the date of the decision to defeat the *legitime*, the date of divestiture, the date when the amount of the assets divested exceeded the disposable third, or some other date).

(ii) the Defendant submits that both of these claims are, in effect, a challenge to the validity of the will and following *Robertson v Lazard Trustee Company Limited* [1994] JLR 103 must be brought within a year and a day of death on the basis that:

(a) as Commissioner Bailhache noted at paragraph 55 when discussing the fraude on the legitime claim, " *the arrangements giving rise to such a fraud would be set aside*"; and

(b) the unjust enrichment claim would be a modern alternative to the *fraude* on the legitime claim and given that both are directed at the same mischief, they should be subject to the same prescription period.

38 As Commissioner Bailhache recognised, from the perspective of Jersey law, the *fraude* on the *legitime* claim is somewhat embryonic and will require full argument to determine the extent to which, if at all, such a doctrine might apply. So too will any considerations of the inter-relationship between the *fraude* claim and the claim for unjust enrichment and/or the question of prescription. For the purposes of this application, I have not had the benefit of any detailed submissions on the applicable prescription period. In my judgment, this application therefore falls within the principle articulated in *Bagus Investments Limited v Kastening*, and followed in *Neal v Kelleher* and *Goed v Begg* [2020] JCA 245A that if a party seeking to introduce an amendment cannot establish that a defendant has no reasonable prospect of success of raising a prescription defence, then leave to amend should be refused unless the claim arises from the same or substantially the same facts as the claim already pleaded.

39 In this case, that high hurdle in relation to prescription has not been overcome. Advocate Sorensen sought to say that the *fraude* on the *legitime* and the unjust enrichment claims arise out of the same or substantially the same facts as the claim already pleaded. In my judgment, they do not:

(i) the amended Order of Justice pleads that the Deceased died, left his entire estate to the Defendant, and transferred assets to the Defendant during his life, to the prejudice of the Plaintiff, which include the well-known, essential elements of a claim for *rapport*;

(ii) there is little authority in Jersey on *fraude* on the *legitime* which suggests that claims for *rapport* do not, without more, amount to a *fraude* and that some additional

fact or matter is required if the claim is to be established, even if the word " *fraude*" is not being used in the Foster sense (*Foster v AG* [1992] JLR 6);

(iii) similarly, in a claim for unjust enrichment, the Plaintiff must establish that the enrichment was "unjust", not merely that the Defendant gained a benefit at the Plaintiff's expense (as is currently pleaded);

(iv) in the draft Re-Amended Order of Justice the *fraude* and unjust enrichment claims are pleaded on the basis of " *unconscionable conduct by the Deceased designed to defeat the [Plaintiff's] entitlement [to] legitime"* and the categorisation of the Deceased's conduct as " *unconscionable*" and the material facts that underpin that allegation are new; so too are the material facts relating to the Deceased's intention to defeat legitime; they are not " *the same or substantially the same*" as those previously alleged (applying the test in *Freeman* set out above).

40 Accordingly, I would in any event decline permission to amend to raise the *fraude* on the *legitime* and the unjust enrichment claims.

The Proposed Amendments to Paragraphs 30 to 32

41 These proposed amendments allege that the Defendant cannot *rester sur ses avances* because the estate is insolvent and/or because she has carried out *actes d'heritier*. Both parties submitted that these claims were arguably prescribed albeit that Advocate Sorensen asserted that they arose out of the same facts as the claims already made.

42 In my judgment:

(i) these pleas can only exist in the context of a claim for *rapport à la masse* which has to be brought within a year and a day of death (*Robertson v Lazard Trustees Company Limited*);

(ii) the claim for *rapport* was summarised by Birt B. in *De la Haye v Walton* [2013] JLR 117 where he held that:

> ***"54…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 a la masse' i.e. to bring the gift back into the gross of the estate…
>
> ***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'heritier'…"***

(iii) the cause of action for *rapport* (or more precisely the set of facts which entitles the claimant to relief) requires a lifetime gift (an avance) and the death of the donor. It does not require proof of insolvency and/or *actes d'heritier* which are both potential responses to a plea by the recipient to *rester sur ses avances*;

(iv) there is no prescription period applicable to a claim by a defendant to *rester sur ses avances*, and nor is there any prescription period applicable to an assertion by a plaintiff that a defendant cannot *rester sur ses avances*; these pleas are dependent on, and consequential to, the claim for *rapport*;

(v) provided that the claim for *rapport* is not prescribed, the ability or inability of a party to raise either of these matters is subject to the Overriding Objective, the Rules of the Royal Court and the rules of pleading but is not otherwise constrained;

(vi) in the absence of any prescription period, neither of these proposed amendments can be " *arguably prescribed*" and nor do they fall to be dealt with under the principles set out in *Freeman v Ansbacher (Jersey) Limited.*

43 Having found that the application to amend is late, I turn to the more stringent conditions set out in *Cunningham*.

44 The first of those considerations is as to why the amendment material could not have been pleaded earlier. The affidavit of Ms Gueno, sworn in support of the Plaintiff's application, notes that:

> *"Prior to the hearing of the Preliminary Issue, Advocate Morley-Kirk filed a skeleton argument which included reference to an heir being unable to rest on advances where they have carried out an acte d'heritier or where the estate is insolvent."*

45 Unlike the *fraude* on the *legitime* and the unjust enrichment amendments, these amendments cannot be said to arise from the decision of Commissioner Bailhache given that the Plaintiff had raised them before that hearing started. However, there is no explanation advanced by the Plaintiff as to why they could not have been pleaded earlier. The proposed amendments are certainly arguable.

46 I do not accept that if the amendments are made, there is unlikely to be any tangible impact on the timetable; there is no timetable set currently and if the amendments are made, these current proceedings will continue. Nor do I accept that any prejudice to the Defendant could necessarily be compensated in costs. The Defendant submits that any prolonging of this litigation will impact directly on her financial security and the arrangements she made with her husband a number of years ago. Until a conclusion is reached, she cannot be certain that what she might now regard as her assets are in fact, her assets. In my judgment, such uncertainty cannot be compensated in costs.

47 However, such uncertainty does not arise solely from the proposed amendments in that even were these amendments to be refused, the Plaintiff may still bring fresh claims for any causes of action that are not prescribed which in turn will prolong any uncertainty.

48 The final criteria is as to why the balance of justice favours the party seeking to amend at a late stage. The Plaintiff says that were I to refuse the amendments, the Plaintiff will be seriously prejudiced; the Defendant submits that she will be prejudiced if I allow them. The reality is that neither is entirely correct in that:

(i) if I allow these amendments, the Defendant will be faced with the continuation of these amended proceedings together with, possibly, fresh proceedings;

(ii) if I refuse these amendments, the Plaintiff still has the option of bring fresh proceedings for the *fraude* on the *legitime* and the unjust enrichment claims.

49 Assuming that I am wrong about the Court being *functus officio*, in the absence of any proper explanation as to why the application to amend is being brought now, and the fact that it is being made after what appeared to be a decisive decision on the preliminary issue bringing an end to the claim for *rapport* between the parties, I think that the balance of justice falls in favour of the Defendant in relation to these amendments. I would therefore refuse permission to amend allege that the Defendant cannot *rester sur ses avances* because the estate is insolvent and/or because she has carried out *actes d'heritier*.