Court of Appeal - appeal against decision of the Royal Court Judgment [2023] JRC 115

[2024]JCA197

ROYAL COURT
(Probate)

9 October 2024

Before : Clare Montgomery KC; President;
Jonathan Crow CVO, KC
The Rt Hon James Wolffe KC

Between	**Aidan Mauger**	**Plaintiff / Appellant**
	and	
	Pisamai Mauger	**Defendant / Respondent**

Advocate C. F. D. Sorensen, for the Appellant

Advocate D. S. Steenson, for the Respondent

JUDGMENT

CROW JA AND WOLFFE JA:

Introduction

1. This is the judgment of the court on an appeal against a reserved judgment of the Royal Court, Probate Division (Sir William Bailhache, Commissioner), dated 6 July 2023 (**"the Judgment below"**), following an oral hearing on 1 June 2023. In summary, the Royal Court held that the Defendant (now Respondent) may rest on her advances, notwithstanding that the *inter vivos* gifts received by her exceed the disposable third (the *partie disponible*) of the movable estate of her late husband, Ralph Cyril Mauger (**"the Deceased"**).

2. There are two Grounds of Appeal:

(i) First, the Plaintiff (now Appellant) submits that the Royal Court erred in rejecting his argument that it is an established principle of Jersey customary law that an heir cannot rest upon their advances in circumstances where the advances exceed the *partie disponible* of the deceased's movable estate ("**Ground 1**").

(ii) Second, the Appellant submits that, even if no such principle of customary law is clearly reflected in authority, the Royal Court should have held that the right of an heir to rest on their advances is limited to the *partie disponible* of the deceased's movable estate as being consistent with the restrictions against disinheritance that exist in Jersey law, as embodied in the right of *légitime*, and that any decision to depart from such long-held principles is only for the legislature (**"Ground 2"**).

3. There is also a separate issue between the parties, which is not the subject matter of this appeal – namely, whether the *avances* in question were gifts or remuneration ("**the Remuneration Issue**"). If the Appellant is successful in this appeal, he asks that the matter be remitted to the Royal Court for the Remuneration Issue to be determined there.

The Background

4. The Respondent is the Deceased's widow. They married in April 2012. The Appellant and his brother Craig (who is not a party) are the sons of the Deceased by an earlier marriage.

5. The Deceased made a will of his personal property dated 22 May 2012 ("**the Will**") leaving the entirety of his net movable estate to the Respondent. He died domiciled in Jersey on 26 July 2021. The reasons why the Deceased left nothing under the Will to his sons do not matter for the purpose of this appeal.

6. It is unclear whether the estate is solvent. The answer to that question is again not material to the legal issues in this appeal.

7. The Appellant alleges that various lifetime gifts were made by the Deceased to the Respondent and that these exceed the *partie disponible*. On that basis, he seeks a *rapport à la masse* so that the moveable property of the estate can be distributed according to his and his brother's entitlement. As part of that process, he seeks an order requiring the Respondent to provide a comprehensive list of the lifetime gifts she received, including any property transferred by the Deceased into their joint names which accrued to the Respondent by survivorship on his death.

For her part, the Respondent submits that she is entitled to rest on the advances she has received, and accordingly cannot be required to account for them to the estate.

8. On 17 December 2021, the Royal Court ordered that the Will be reduced *ad legitimum modum*. On 13 June 2022, the Master gave directions for the trial of a preliminary issue "to determine whether the Defendant may or may not *rester [sic] sur ses avances* in circumstances where the value of the *avances* exceed [sic] the *partie disponible"*. It was the trial of that issue which led to the Judgment below.

Ground 1

Introduction

9. The doctrine of *légitime* is part of the customary law of Jersey. The relevant entitlement for present purposes (i.e. where a person has died testate leaving a spouse and issue) is now defined by Article 7(2)(b) of the Wills and Successions (Jersey) Law 1993 ("**the 1993 Law**"): the surviving spouse is entitled to claim the household effects and one-third of the rest of the net movable estate, and the issue are entitled to claim one-third of the rest of the net movable estate. The testator accordingly retains full testamentary power in relation to the remaining one-third of the net movable estate.

10. The legislation defines the scope of a person's entitlement to claim *légitime* in relation to a deceased's estate, but it does not prescribe the property that is to be treated as part of that estate. Although the effect of the 1993 Law is (as its recital states) to "amend the law" and to abolish "certain rules of customary law" (emphasis added), it otherwise leaves the existing customary law untouched. Ground 1 of the appeal accordingly turns on the content of the customary law.

11. As a matter of customary law, an heir entitled to *légitime* is able to require any other heir entitled to *légitime* to bring back into the personal estate lifetime gifts of movables which that heir may have received from the deceased (*rapporter à la masse de la successions les avances de biens meubles qu'il a reçues*). Jersey law recognises that an heir who is called on to bring back into account lifetime gifts may opt to retain the gifts (*rester sur ses avances*) and abandon the right of succession to the moveable estate of the deceased. The issue before us is whether this option is available where the lifetime gifts of movables exceeded the *partie disponible* – i.e. the one-third part of the movable estate in respect of which the testator retained testamentary freedom.

Commentaries on Customary Law

12. In §5 of the Judgment below, the Royal Court said that "the heart of the argument lies in two cases", namely *Valpy dit Janvrin* v. *Valpy dit Janvrin* (1716) 1 CR 66, (1718) Ex 86, and Le Cornu v. Falle [1917] 299 Ex 533. Before examining those decisions and the other relevant case-law, it is convenient to consider more generally the purpose and content of the relevant rules. In that endeavour, we are indebted to the Commissioner for his detailed review of the historical position and the commentaries which he quotes or cites in §10, §15 – 25, §38 and §42 of the Judgment below. We will not repeat all of that material here, but we note the following features of the customary law as it appears from those texts.

(i) The broad structure of the rules on *légitime* has been in place for centuries, allowing, in a case where the deceased left a surviving spouse and children, testamentary freedom in relation to one-third of the movable property (*the partie disponible*), but requiring one-third of the movable estate to be left to a surviving spouse, and one-third to the issue: Terrien, *Commentaires du Droict Civil*, 1574, p. 215; Le Geyt, *Privileges, Loix et Coustumes de L'Ile de Jersey, Des Testamens*, Article 4.

(ii) The rules governing *légitime* originally formed part of a wider body of rules restricting testamentary freedom imposed by Norman customary law in relation to both movable and immovable property. The principal object of that body of law was *la conservation des biens dans la famille*. The customary law of Normandy also required equality between the children of a deceased male, and it was not open to a parent to confer an advantage on one child at the expense of the others. The obligation was to leave the estate equally among the children, or at least among the sons. Pothier*, Des donations faites entre vifs,* says this at §69: *"Le père et la mère doivent, par le droit naturel, à leurs enfants, une part de leurs biens qu'on appelle légitime"*.

(iii) The rule is stated in the commentaries in absolute terms. Terrien, at p. 211, says of a father with more than one son: *"il ne peut faire de son heritage l'un meilleur que l'autre"* (emphasis added). Berault, *La Coustume Reformée du Pays et Duché de Normandie* (6th ed., 1660), describes, at p. 492, the rationale for "*Cette prohibition d'avantage"* in terms of ensuring family harmony. Pesnelle, *Coutume de Normandie* (1771), says, at p. 551, that direct lineal descendants *"sont incapables de recevoir aucune donation de meubles ou d'immeubles de leurs ascendans, au prejudice les uns des autres"* (emphasis added).

(iv) The corollary is that the children have, at the death of their parent, a legal right to a share of the movable estate. *Les Lois et Coutumes de l'Isle de Jersey* by Jean Poingdestre,

Lieutenant Bailiff 1669 – 1676 (p. 139 of the printed edition of 1907), stated that a testator's children *"n'ont pas seullement une esperance en ceste portion la, mais aussy un droict de bien fondé"* (emphasis added). Furthermore, the children's right is legally enforceable *"ce qu'il ne pourroit faire si c'estoit seullement un droict en l'air, et qui ne seroit soubstenu par la Loy"* (ibid). Poingdestre fixes the rule, not merely on "*les Coustumes qui ont eu cours chez nous plusieurs Centaines d'années"* but also on "*les Lois naturelles … et divines … et encore plus les Lois humaines".*

(v) Consistently with the overall object and scheme of these rules, a lifetime gift to one of the heirs was treated as an advance against that person's right of succession. Berault, *op. cit.*, says, at p. 483, that a person aged over twenty was free to make lifetime gifts of up to one-third of their estate (including *acquêts*, conquests or) *propres* to anyone he thought fit *"pourvu que le donataire ne soit pas héritier immédiate du donateur ou descendant de lui en droite ligne".* The same point is made in Pesnelle, *op. cit.,* at p. 551: *"toutes les donations faites aux descendants, sont réputées avancements de succession"*. So too in Basnage, *Oeuvres* (1681), at p. 283: *"toutes donations faites par les péres ou mère [sic] sont réputées avancement d'hoirie"* and *"tout ces dons étant des partages anticipés de leur succession".*

(vi) In order to give practical effect to the rule, any lifetime gifts of movables to any of the heirs otherwise entitled to *légitime* had, on the testator's death, to be *"rapportées, pour être partagées suivant la Coutume, entre les donataires & leurs cohéritiers"*: Pesnelle, *op. cit.* at p. 551; De Geyt, *Priviléges Loix et Coustumes de L'Ile de Jersey* (c. 1698), Article 13; De La Haye v. Walton [2013] JRC 021, at §54. As Pothier explains (§76): "*un enfant peut bien retenir ce qui lui a été donné en renonçant à la succession … sauf la légitime des autres enfans: mais s'il se porte héritier du donateur, s'il vient à la sucession, il doit rapporter au partage de la succession tout ce qui lui a été donné"*. Similarly, Basnage says this (*op. cit.,* p. 284*): "la renonciation d'un enfant dan la vue de profiter de l'avantage qui lui a été fait ne le dispense point de rapporter ce qui lui q été donnée en cas qu'il excède la portion héréditaire".* This passage was cited with approval in Flaust, *Explication de la coutume et la jurisprudence de Normandie* (Rouen, 1781) at p. 698. Basnage, *op. cit.,* at p. 283 observed: *"soit qu'ils renoncent ou qu'ils viennent à la succession, la rapport de ce qu'ils ont eu est toujours necessaire et forcé"*. The *rapport* was accordingly a mechanism for making good the general policy of the customary law and for giving effect to the obligations and rights to which we have referred.

(vii) It was not disputed before us that the rules in relation to *rapport à la masse* apply to a deceased's spouse as they do to the deceased's children: see Ottley v. de Gruchy (1958) 251 Ex 256.

13. Against that background, it might fairly be said that the outcome for which the Respondent contends in this appeal would subvert the underlying purpose of the rules on *légitime*. If a lifetime gift to a surviving spouse (or to a child entitled to *légitime*) does not have to be brought back into account through a *rapport à la masse* even if the lifetime gift exceeds the *partie disponible*, then the entitlement of the other heirs to *légitime* would to that extent be diminished. The function of the rule in controlling a testator's power to disinherit their heirs, and in ensuring that heirs receive the share of the estate which the law allocates to them, would be frustrated *pro tanto*. The anti-avoidance function of the *rapport à la masse* would be thwarted. In other words, the testator would have been able to do what Terrien says *"il ne peut faire"* and the favoured heirs would be able to keep those gifts which, according to Pesnelle, they are *"incapables de recevoir".*

14. Another way of putting the same point is to say that it would be inconsistent with the view that lifetime gifts to heirs fall to be treated as *avancements de succession* if lifetime gifts in excess of the *partie disponible* were to be left out of account when conducting a *rapport à la masse*. The whole concept of an *avancement* is that it is an advance payment in respect of a future entitlement. The extent of the *donee's* future entitlement to a share of the deceased's movable estate is constrained by their co-heirs' respective entitlements to *légitime*. As such, it would be incompatible with the very nature of an *avancement* if lifetime gifts in excess of the *partie disponible* did not require to be brought into account for the purpose of the *rapport à la masse*. That would involve treating a mere *avancement* as having the substantive effect of altering the parties' respective entitlements in the estate.

15. For these reasons, before turning to consider whether the case-law answers the specific issue in this appeal, we start from the position that the Appellant's argument is more consistent than that of the Respondent with the purpose and general structure of the rules on *légitime.*

Jersey case-law

16. With this analysis in mind, we turn to the chronologically first decision, *Valpy dit Janvrin*. It is difficult to discern with clarity from the available materials either the facts or the outcome of this case, let alone the ratio of the decision. What is clear is that two of the heirs had received lifetime gifts, and they declared that they were content with these *"avences … pour tout partage succession mobilaires".* We make the following observations on this decision:

    (i) The report does not disclose whether the lifetime gifts in that case exceeded the *partie disponible*. As such, it cannot be regarded as an authority which expressly supports either the Appellant's or the Respondent's argument.

(ii) The decision has been treated as reflecting a rule that an heir may rest on advances received during the testator's lifetime, and thereby not participate in any distribution of the net movable estate to which they would otherwise be entitled: see De La Haye v. Walton, at §55; Le Gros, *Traité du Droit Coutumier de l'Ile de Jersey* (1943), pp. 61 and 69; and Professor Thomas, Testate and Intestate Succession Study Guide 2021-22, para. 21.18. That rule (assuming it is correctly stated) does not directly answer the specific question in dispute in this appeal.

(iii) Nevertheless, as noted above, the concept of an 'advance' only makes sense if it represents no more than the amount to which the donee would be entitled on the testator's death. The language used in *Valpy dit Janvrin*, referring to the donees being content with the *avances* which they had received as their share of the succession, is, on that view, consistent with the Appellant's position. Had they received more than their ultimate entitlement, the lifetime gifts would have exceeded what could properly have been characterised as an 'advance' on that entitlement.

(iv) There is a well-established principle of Jersey customary law that no one can be made an heir against their will – *nul n'est héritier qui ne veut*. The approach taken in *Valpy dit Janvrin* may perhaps be regarded as an illustration of that rule in operation: in other words, the donee was choosing not to participate in the distribution of the net movable estate beyond that which had already been given to them during the testator's lifetime, even though by doing so they may have been disclaiming a greater share of the estate than they would otherwise have been entitled to receive under the rules of *légitime*.

17. For these reasons, whilst the decision in *Valpy dit Janvrin* provides no express support for either party's argument, it is consistent with the provisional view which we have taken from the commentaries on customary law about the effect of the rules on *légitime*, which favours the Appellant's case.

18. The next decision is Gavey v. Gavey (1731) 1 OC 176. Once again, on its face, this decision does not advance either side's case (as the Commissioner rightly observed, in §35 of the Judgment below). The outcome of the appeal to the Privy Council is apparent from the report, but neither the factual basis nor the legal ratio for the decision can be clearly discerned. It is, however, worth noting that the testator specifically declared that the lifetime gifts had been made out of the disposable third. There would have been no need for him to make that declaration if it was not thought that he was free to make marital gifts only to the extent that they did not exceed that proportion (*the partie disponible*) of his moveable estate. This appears to be the basis on which the case was understood by Le Gros, at p. 60, where he quotes the donor's declaration

that the advances "should be deemed to issue out of the said Edwards [sic] third part of his own Moveable Effects which he by the Law and Usage of Jersey had a Right to dispose of even by Will in Favour of whomsoever he should think fit". In other words, since the lifetime gifts were made out of (and were presumably less than) the *partie disponible*, they did not have to be brought back into account on the testator's death. Furthermore, irrespective of whether that is the true ratio of the judgment in Gavey, we consider it of some significance that Le Gros appears to have treated this as the explanation of the basis on which the decision was taken. He presumably did so because he regarded it as a correct reflection of Jersey customary law. That analysis too adds support to the contention advanced by the Appellant.

19. The third decision is Le Cornu v. Falle. It concerned a dispute between three siblings over their late mother's will. Various lifetime gifts had been made to the son, Sir Bertram. The will named one of the sisters, Albina, as "*légataire universelle"*. A claim was brought on behalf of the other sister, Rozel: (i) challenging the will on the basis that it was contrary to the law and standard practice "which prevent fathers or mothers having children from disposing through testament of more than one third of their movable goods to the detriment of their legitimate heirs"; (ii) seeking a direction requiring Sir Bertram "to contribute … the advances received"; and (iii) on that basis, seeking an order for the parties' respective entitlements under the succession to be settled by the court. For his part, Sir Bertram "declared himself content with his advances, for all parts of the moveable succession of his late mother". In response, Rozel recognised as a matter of principle that the court could accept her brother's declaration that he was content to rest on the advances he had received, but only if they were less than the *partie disponible*; and she contended that the parties should first be required to disclose on oath exactly what they had received before the court could determine whether the advances exceeded the disposable third. Sir Bertram's argument in answer was that *Valpy dit Janvrin* stood as authority for the proposition that a parent could make lifetime gifts exceeding the *partie disponible*, and since he (as the donee) had declared himself content with the lifetime gifts he had received, he should be dismissed from the action irrespective of the value of those gifts as a proportion of the testator's total movable assets. Without prejudice to that argument, he also offered to transfer to Rozel "the portion to which she would have had the right had the [lifetime gifts to Sir Bertram] formed part of his mother's succession" (although the offer was conditional on Rozel and her husband immediately obtaining a separation of goods). It is apparent from the terms of his offer that Sir Bertram recognised that the lifetime gifts he had received did in fact exceed the *partie disponible*.

20. Having considered the parties' arguments, the court (chaired by the Bailiff, Sir William Venables Vernon) gave the ruling which is quoted in full, both in French and in English translation in §32 of the Judgment below. The material features of what the court said, and did not say, are these:

(i) The court held that it was part of the customary law of Jersey that every co-heir is entitled not to take part in a succession to movable property, and to rest instead on the lifetime advances made by the testator. The court did not say expressly whether a donee was thereby entitled to hold onto gifts made in excess of the *partie disponible* and not to bring any such excess into account for the purpose of the rapport. As such, the language used in the ruling does not expressly determine the issue which is before us.

(ii) Nevertheless, having received Sir Bertram's declaration that he rested on the advances he had received, the court then stated that the will was reduced to the disposable portion, and the parties were sent before the Greffier to establish *"les forces de ladite succession"* according to law. Sir Bertram sought to appeal that ruling to the greater number. There is no record of any such appeal subsequently being heard, but the fact that Sir Bertram sought to appeal strongly suggests that the court rejected his claim to be entitled to retain lifetime gifts in excess of the *partie disponible*. If the court had accepted his argument, he would have been dismissed from the proceedings (which was the order he sought), and he would have had nothing to appeal against. As it is, he was clearly one of the parties sent before the Greffier. The only reason for making such an order, and for Sir Bertram to appeal against it, would be if the court considered that he should be required to bring into account lifetime gifts where those exceeded the *partie disponible.*

21. Our understanding of Le Cornu v. Falle is accordingly that it proceeds on the basis of the very rule for which the Appellant contends in this appeal. Our analysis of the case to that effect is consistent with the way in which it has been understood by modern academic commentators. Matthews & Nicolle, Jersey Property Law (1991), para. 8.39, in discussing *rapport à la masse*, state: "So far as concerns movables *[a rapport]* could be avoided by an heir who renounced his right to participate in the succession (*Valpy dit Janvrin* …) *provided that the "avance" does not exceed the "partie disponible"* (Le Cornu v Falle …)" (emphasis added). Likewise, Professor Meryl Thomas, in Testate and Intestate Succession Study Guide 2021-22 states (para. 21.18): "By choosing to rest on his advances, [the heir] elects not to participate in the succession. See Le Cornu v. Falle where it was stated that the heir can only *rester* where the advance does not exceed the *partie disponible*".

22. Our attention has been drawn to a passage Le Gros, at p. 70. Adopting the learned Commissioner's translation in §43 of the Judgment below, Le Gros says this:

> *"It seems superfluous to remark that the jurisprudence which allows the right of a child to rest on the gifts he has received wounds the equality which must govern between the children in the division of the property of their parent. We must*

conclude that this jurisprudence is justified by the continuing variations in the fortune of the parent or by the desire of the parent to help his child in his businesses. But it does rightly oblige the child who wishes to take part in the division of the succession to bring back into the estate the property given to him, or take less" (emphasis added).

23. In our judgment, this passage does not assist on the point in issue. The underlined wording is ambiguous: it may be doing nothing more than pointing out the obvious fact that an heir who rests on their advances cannot share in the succession, and to that extent will "take less" than might otherwise have been the case. But that does not assist in answering the question whether the advances on which the heir rests can properly exceed, or must remain less than, the *partie disponible*. As the Commissioner observed, in §44 of the Judgment below, a rule which allows an heir to rest on their advances "will create inequality between the heirs one way or another", irrespective of whether the advances were made out of the *partie disponible*, and equality is only achieved where the donee "brings the gift back into hotchpot and shares in the estate". The passage from Le Gros can be understood as an acknowledgment that if a donee rests on their advances that necessarily involves the donee in accepting less than they would otherwise have received.

24. For the reasons discussed above, we do not consider that any of the case-law supports the Respondent's argument. Although there is no clearly-stated ratio which directly upholds the proposition advanced by the Appellant, the case-law is, for the reasons which we have set out above, consistent with that argument, and also with the overall structure and purpose of the rules on *légitime* which we have discussed earlier in this judgment.

French law

25. In Fogarty v. St Martin's Cottage Ltd [2016] JCA 180, para. 83, this court observed that:

> ***"where a principle of customary law has been incorporated in the Code Civil and remains part of modern French law, it is appropriate to look not only at the customary authorities but also at modern French authorities to see how the customary principles have evolved and are to be applied in modern Jersey law. To do so is no different from looking to the development of English common law in those areas where Jersey law has followed those developments."***

26. Recent academic writing has emphasised that the *réserve héréditaire* of the French Civil Code (which, like *légitime* in Jersey law, entitles heirs to a share of the deceased's estate) "took many of its concepts from the 'old' (pre-Revolutionary) law" including the laws of the *pays de droit coutumier*: Thomas & Dowrick, The future of *légitime: vive la difference* (2013) Jersey and Guernsey Law Review, §12 – 13; see also M. Peguera Poch, Aux Origines de la Réserve Héréditaire du Code Civil: La Légitime en Pays de Coutûmes XVIe – XVIIIe Siècles (2009). We accordingly invited the parties to address us on whether or not French law provided any assistance on the issue which we have to decide.

27. The *Code Civil* of 1804 contained a section headed *"Des Rapports"*, which includes the following provisions:

> ***"843.***
>
> ***Tout héritier, même bénéficiaire, venant à une succession, doit rapporter à ses cohéritiers tout ce qu'il a reçu du défunt, par donation entre-vifs, directement ou indirectement: il ne peut retenir les dons ni réclamer les legs à lui faits par le défunt, à moins que les dons et legs ne lui aient été faits expressément par préciput et hors part, ou avec dispense du rapport.***
>
> ***844.***
>
> ***Dans le cas même où les dons et legs auraient été faits par préciput ou avec dispense du rapport, l'héritier venant à partage ne peut les retenir que jusqu'à concurrence de la quotité disponible: l'excédant est sujet à rapport.***
>
> ***845.***
>
> ***L'héritier qui renonce à la succession, peut cependant retenir le don entre-vifs, ou réclamer le legs à lui fait, jusqu'à concurrence de la portion disponible."***

28. We were provided with an English translation of these provisions, published in 1827, which renders the heading *"Des Rapports"* as *"Of Restitutions"* and translates Articles 843 to 845 as follows:

> ***"843.***

Every heir, even beneficiary, coming to a succession, must restore to his co-heirs, all he has received from the deceased by donation during life directly or indirectly; he cannot retain such gift nor claim a legacy left him by the deceased, unless such gifts and legacies have been given him expressly in addition and not subject to partition, or with a dispensation of restitution.

844.

In the case even where gifts and legacies shall have been made in addition and with dispensation of restitution, the heir coming to distribution cannot retain them except to the amount of the disposable portion; the excess is subject to restitution.

845.

The heir who renounces a succession may nevertheless retain a donation made during life, or retain a legacy given him, to the amount of his disposable proportion."

29. We note that in the French original, Article 845 simply refers to *"la portion disponible"* (emphasis added). The important point, for present purposes, is that the heir who renounces a succession may nevertheless retain a lifetime gift or legacy to the amount of the disposable portion.

30. Notwithstanding the terms of Article 845, certain nineteenth century French court decisions held that a child of the deceased who had renounced the succession could attribute a lifetime gift from the deceased in the first instance to their share of the *reserve héréditaire* and any balance to the *quotité disponible*. These decisions (which, in effect, allowed the child to retain a lifetime gift up to the aggregate amount of the child's share of the reserve and the *quotité disponible*) gave rise to what has been described (in H. Capitant, *Les Grands Arrets de la Jurisprudence* (9e ed., 1991), pp. 1085 – 1088) as "*une des plus célèbres controverses qu'ait suscitées l'interpretation du code civil".* That controversy was resolved only by a decision of the combined Chambers of the Cour de Cassation of 27 November 1863 ("**the decision of 1863**"), which re-established the orthodox position that, as Article 845 provides, an heir who renounces the succession may retain a lifetime gift only to the extent that it does not exceed the *quotité disponible*.

31. In the contemporary French Civil Code, Articles 843 to 845 now appear in a section titled "Du Rapport des Liberalités", rendered in English, in a bilingual version of the Code which we were shown, as *"Collation of Liberalities"*:

"843

Tout héritier, même ayant accepté à concurrence de l'actif, venant à une succession doit rapporter à ses cohéritiers tout ce qu'il a reçu du défunt, par donations entre vifs, directement ou indirectement; il ne peut retenir les dons à lui faits par le défunt, à moins qu'ils ne lui aient été faits expressément hors part successorale.

Les legs faits à un héritier sont réputés faits hors part successorale, à moins que le testateur n'ait exprimé la volonté contraire, auquel cas le légataire ne peut réclamer son legs qu'en moins pregnant.

844

Les dons faits hors part successorale ne peuvent être retenus ni les legs réclamés par l'héritier venant à partage que jusqu'à concurrence de la quotité disponible; l'excédant est sujet à réduction.

845

L'héritier qui renonce à la succession peut cependant retenir le don entre vifs ou réclamer le legs à lui fait jusqu'à concurrent de la portion disponible à moins que le disposant ait expressement exigé en cas de renunciation.

Dans ce cas, le rapport se fait en valeur.

Lorsque la valeur rapportée exceed les droits qu'il aurant dû avoir dans le partage s'il y avait participé, l'héritier renonçant indemnise les héritiers acceptants à concurrence de cet excédant."

32. We observe that the basic rule, expressed in Article 845 (but now subject to qualification) remains that an heir who renounces the succession may retain lifetime gifts only up to the level of the *"portion disponible".*

33. Advocate Steenson, for the Respondent, invited us to conclude that French law was not of assistance in deciding the issue before us. He drew our attention to differences of terminology – noting in particular the use of the words "restitution" and "collation" in the English translations of

the heading of the section to which we have referred – as well as the extent to which French law contains more extensive provision on particular issues, such as interest and depreciation, and significant differences – for example, providing (in Article 847) that a father coming to the succession is not bound to bring lifetime gifts into account.

34. The fact that slightly different terminology is used in the English translations of the Code is not, in our view, a factor of any weight. Of more significance is the fact that the relevant section of the Code, in French, is concerned explicitly with *"rapport"*. That term, which is of course familiar in Jersey law, was only loosely and inaccurately translated into English in 1827 as "restitution". Equally, the word "collation" used in the modern translation of the current Code refers to the Roman law doctrine requiring heirs to bring lifetime gifts into account so as to equalise the position between them. It is the substantive provisions of the Code which are of interest rather than the language used by the translators of the Code into English.

35. We agree with Advocate Steenson that a degree of caution is required in the use to be made of French law. It would be wrong to assume, uncritically, that specific rules applicable to the *réserve héréditaire* in the Code Civil should be read across into Jersey law. Notably, for example, the protection given to the rights of heirs in French law (both in the 1804 Code Civil and in contemporary French law) is such that lifetime gifts by the deceased to third parties (and not only gifts to those entitled to a share of the *réserve*) fall to be brought into account in order to determine the *masse de calcul* and may be reduced if they exceed the *quotité disponible*. It might be said that, to that extent, the decision of 1863 simply placed the heir who renounced the succession in the same position as a third-party donee.

36. Nevertheless, we do not accept his submission that French law is of no assistance when considering the specific question before us. It is striking that the 1804 Code Civil contained specific provision dealing with heirs who have received lifetime gifts; that this provision expressly limited the right of a renouncing heir to retain lifetime gifts by reference to the portion disponible; and, indeed, that the portion disponible retains this functional significance in contemporary French law. This feature of the 1804 Civil Code, which, as we have explained, built on the pre-Revolutionary law, adds further support to our conclusion, drawn from the commentaries and the Jersey case-law to which we have referred, that the rule for which the Appellant contends is, indeed, part of the customary law of Jersey.

37. The dispute which arose in the French courts in the nineteenth century, resolved by the decision of 1863, did not question that there should be a limit on the retention of lifetime gifts by a renouncing heir. The issue was what that limit should be; and it is striking that this question was resolved in favour of the *portion disponible*. The decision of 1863 is accordingly consistent with,

and may indeed perhaps be regarded as part of the context for, the decision in Le Cornu v. Falle – a decision of a court which worked in French and was chaired by a Bailiff who, after study (albeit non-legal study) at a French University, was admitted to the Jersey Bar in 1872, just nine years after the decision of 1863. It is perhaps unsurprising to find that the customary law of Jersey is, on this matter, to the same effect as the explicit terms of Article 845 of the Code Civil, an interpretation which had been re-affirmed definitively in the decision of 1863.

Convention rights

38. In Marckx v. Belgium (1979-80) 2 EHRR 330, the European Court of Human Rights ("**the ECtHR**") observed (para. 52) that:

> ***"Matters of intestate succession – and of disposition – between near relatives prove to be intimately connected with family life. Family life does not include only social, moral or cultural relations, for example, in the sphere of children's education. It also comprises interests of a material kind, as is shown by amongst other things, the obligations in respect of maintenance and the position occupied in the domestic legal systems of the majority of the Contracting States by the institution of the reserved portion of an estate (reserve héréditaire). Whilst inheritance rights are not normally exercised until the estate-owner's death, that is at a time when family life undergoes a change or even comes to an end, this does not mean that no issue concerning such rights may arise before the death; the distribution of the estate may be settled, and in practice fairly often is settled by the making of a will or of a gift on account of a future inheritance (avance d'hoirie); it therefore represents a feature of family life that cannot be disregarded."***

39. We accordingly also invited the parties to make submissions on the relevance (if any) of the Convention rights which form part of Jersey law by virtue of the Human Rights (Jersey) Law 2000.

40. Having considered the materials with which we were provided, we are satisfied that the Convention rights do not require us to decide the issue one way or the other. It is open to a legal system, compatibly with Convention rights, to apply the rule for which the Appellant contends (and which is, subject to certain adjustments, a feature of contemporary French law, as noted above); but it would equally be open to a legal system, compatibly with Convention rights, to take the position for which the Respondent contends (and which is, as it happens, consistent with the position in contemporary Scots law).

41. The decision of the ECtHR in Marckx v. Belgium concerned the compatibility with Convention rights of: (i) distinctions drawn by Belgian law between the inheritance rights of legitimate and illegitimate children; and (ii) a restriction which Belgian law imposed on the freedom of testation of an unmarried mother in favour of her child, which was not applied in the case of a married woman. The ECtHR addressed the former issue by reference to Article 8 (right to respect for family life). After making the observations which we have quoted above, it stated:

> ***"53. Nevertheless, it is not a requirement of Article 8 … that a child should be entitled to some share in the estates of his parents or event of other near relatives: in the matter of patrimonial rights also, Article 8 … in principle leaves to the Contracting States the choice of the means calculated to allow everyone to lead a normal family life … and such an entitlement is not indispensable in the pursuit of a normal family life. In consequence the restrictions which the Belgian Civil Code places on [the applicant child's] inheritance rights on intestacy are not of themselves in conflict with the Convention, that is if they are considered independently of the reason underlying them. Similar reasoning is to be applied to the question of voluntary dispositions.***
>
> ***54. On the other hand, the distinction made in these two respects between "illegitimate" and "legitimate" children does raise an issue under Articles 14 and 8 … when they are taken in conjunction."***

42. The court held that the Belgian rules on inheritance rights which drew that distinction were incompatible with Article 14 read with Article 8.

43. The ECtHR addressed the second issue (the restriction on the testamentary freedom of unmarried mothers) by reference to Article 1 of the First Protocol to the Convention (peaceful enjoyment of possessions). It observed:

> ***"63. … the right to dispose of one's property constitutes a traditional and fundamental aspect of the right of property …***
>
> ***64. The second paragraph of Article 1 … nevertheless authorises a Contracting State to 'enforce such laws as it deems necessary to control the use of property in accordance with the general interest'. This paragraph thus sets the Contracting States up as sole judges of the 'necessity' for such a law … As regards 'the general interest', it may in certain cases induce a legislature to 'control the use of property' in the area of dispositions inter vivos or by will.***

In consequence the limitation complained of … is not of itself in conflict with Protocol No. 1.

65. However, the limitation applies only to unmarred and not to married mothers. Like the Commission, the Court considers this distinction … to be discriminatory. In view of Article 14 … of the Convention, the Court fails to see on what 'general interest' or on what 'objective and reasonable justification' a State could rely to limit an unmarried mother's right to make gifts or legacies in favour of her child when, at the same time a married woman is not subject to any similar restriction. … Accordingly, there was on this point breach of Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1."

44. Subsequent ECtHR cases have also addressed the succession rights of children from the perspective of Article 1 of the First Protocol. In Mazurek v. France (2006) 42 EHRR 9, the ECtHR held that a rule of French law, which restricted the inheritance rights of an *"adulterine*" child, was incompatible with Article 14, read with Article 1 of the First Protocol; and, in the recent decision of Jarre v. France, Application 14157/18, 24 June 2024, the ECtHR analysed the effect which a change in the law (effected by judicial decision after the deceased's death) on children's inheritance rights as a restriction on property rights under Article 1 of the First Protocol.

45. In the present case, we are concerned with a legal regime which restricts testamentary freedom and which may therefore, in principle, require to be justified by reference to Article 1 of the First Protocol. Taking that approach, the rules in question are designed to protect the interests of spouses and children in a deceased's estate. That is clearly a legitimate aim. It is one which, as the ECtHR acknowledged in Marckx, is connected with respect for family life. The pursuit of that aim by reserving a fixed portion of the estate to spouses and children is, as the ECtHR noted in Marckx, a feature of the legal systems of many States parties to the Convention. Whilst some systems (notably that of England & Wales) operate in a different way, the case-law to which we have referred gives no basis for concluding that a system which reserves a fixed portion of the deceased's estate to specified relatives would be incompatible with the Convention.

46. A requirement, in the context of such a regime, for an heir to bring into account lifetime gifts may be justified by reference to the same aim, both as an anti-avoidance measure and with a view to securing a measure of equality between those whom the law regards as entitled to inherit a share of the estate. Within the context of a legal system which reserves a fixed portion of the estate to spouses and children, it seems to us that this is an approach to lifetime gifts which is within the State's margin of appreciation. At the same time the approach for which the Respondent contends could be justified, for example on the basis that it promotes legal certainty. Specifically, either of the two rules for which the parties contended in this case could be justified as striking a

fair balance between the freedom of the deceased to dispose of their property (both within life and on death) and the interests of the various members of the deceased's family to receive a share of the estate on death. Neither of those rules draws a distinction which would be objectionable under Article 14 of the Convention, read either with Article 8 or with Article 1 of the First Protocol.

47. We have accordingly concluded that the Human Rights (Jersey) Law 2000 does not compel us to resolve this case in favour of either the Appellant or the Respondent.

The Judgment below

48. The commentaries, the Jersey case-law and the assistance which may be drawn from French law, all lead us to the conclusion that the Appellant's argument is correct. The Royal Court, however, reached a different conclusion. One of its main reasons for doing so was the fact that (as the Commissioner rightly noted in §20 of the Judgment below) there have been significant changes in the legislative and societal framework of contemporary Jersey since the time when the commentators on customary law were writing. That is clearly so. Today, the estates of individuals domiciled in Jersey may include very significant movable assets, of a nature unknown to those commentators. Such individuals may well make significant lifetime gifts to their spouses and heirs, out of benevolence, for tax planning reasons, or otherwise. But the question at this stage of the analysis is not to decide how the law of *légitime* might now be devised in light of contemporary needs, if the courts or the legislature were starting with a blank sheet of paper. Rather, the question is simply to identify the content of the customary law of Jersey.

49. The Commissioner also appears to have been influenced by his view (expressed in §50 of the Judgment below) that the restrictions imposed by *légitime* in relation to movable property were "largely avoidable" because a testator could invest their resources in immovable property. In our judgment, that consideration is of no assistance in deciding what the rules of customary law are. Asking whether a restriction can be avoided in practice does not assist in answering whether the restriction exists in law. Furthermore, this consideration, if it were to be of relevance, would justify the abolition of the rule of *légitime* altogether, a step which the legislature has declined to take. Although not strictly relevant to the ratio of our judgment, we would also observe that a testator's ability to avoid the effect of the rule by investing in real property should not be overstated: there may be any number of good reasons why an individual (particularly a very wealthy individual) would either not wish or not be able to invest a sufficient proportion of their wealth in real property so as to exclude the application of *légitime*.

50. The Commissioner also referred to some difficult questions which will, or may, arise in the application of the rule which we have recognised, such as whether the value of a lifetime gift is to

be taken into account in assessing the overall value of the moveable estate, and hence the amount of the *partie disponible*. Similarly, it has been suggested that the current rule established by Amy v. Amy [1968] JJ 981, pursuant to which the value of a lifetime gift is taken at the date of the gift, rather than at the date of death, may need to be revisited. However, the current understanding of the law, as reflected in the contemporary academic writings, is consistent with the view we have reached, and it has not been suggested that issues such as the ones which we have mentioned have rendered the law unworkable or that these issues would not be capable of being resolved by the courts if and when they arise.

51. The Commissioner also observed (in §64 of the Judgment below) that requiring an heir to bring the value of a gift back into the estate might either risk bankruptcy (if the asset was no longer available and the heir had no other sufficient resources) or might involve a violation of the principle *nul n'est héritier qui ne veut*. We do not find these considerations compelling. As we have explained, lifetime gifts to spouses and children are treated by Jersey law as *avances de succession*. By accepting a lifetime gift, an heir is accepting an advance against their future entitlement to succession and cannot subsequently complain that the operation of the rules on *légitime* require them to respect the entitlements of their co-heirs recognised by Jersey law. If the heir has dissipated the assets, in circumstances where the heir should know that those assets may be required to be brought into account on the death of the donor, the heir must accept the consequences of those actions.

52. The Commissioner also noted certain legislative developments which he considered undermine the rationale for *légitime*. He referred in particular to the abolition of the right to recover inherited property after the death of the family member who alienated it under the *Loi (1926) sur les héritages propres*; the ability to leave real estate by will, even inherited property in direct line, under the *Loi (1851) sur les testaments d'immeubles*; the right to *légitime* conferred on a husband under the 1993 Law; and the right of a husband to seek maintenance pending suit under the Matrimonial Causes (Amendment № 5) (Jersey) Law 1985. We do not consider that any of these developments undermines the fundamental principles of *légitime*, acting as it does as a constraint against disinheritance. If anything, the fact that the legislature has had opportunities to curtail or to abolish *légitime*, but has instead preserved and modified it, suggests that, other than so modified, it remains part of Jersey law.

53. In assessing the points to which we have referred, we remind ourselves that contemporary European legal systems contain a variety of succession law regimes. The ECtHR observed in Marckx that the majority of the legal systems of the States party to the Convention provide for a reserve *héréditaire* entitling heirs to a share of the deceased's estate. These systems often require an heir who has received lifetime gifts to bring those gifts back into account with a view to securing some element of equality between heirs. Some legal systems (like that in France) may

indeed require gifts to third parties to be brought into account, at least in some circumstances. With that in mind, it does not seem to us that we could conclude that the rule for which the Appellant contends is so out of step with contemporary conditions, or so unworkable, that we should, notwithstanding the weight of the legal authorities to which we have referred, hold that it is not part of the contemporary law of Jersey.

54. We note that the Legislation Committee of the States presented a Report in 2001 in which it stated that it was minded *inter alia*:

> "(i) To bring a proposition before the States to repeal the laws of Succession so as to allow any person to dispose of movable estate by Will as he/she sees fit, subject to paragraph (ii) below.
>
> (ii) To create a jurisdiction in the Royal Court to make such order as it thinks fit in the administration of the movable estate as provides a proper sum out of the estate for the maintenance and support of the dependants of the deceased."

55. Thus far, as we understand it, no such proposal has been brought forward. Indeed, we were referred to academic literature which suggests that there is a lively debate about the approach which any reform of the law should take: K Dixon, *Légitime*: a Time for Reform? 2002 Jersey Law Review; M Thomas and B Dowrick, The Future of *Légitime: Vive la Différence*! 2013 Jersey and Guernsey Law Review 305; D Dixon, *Légitime* Reform: Where to Go? 2018 Jersey and Guernsey Law Review 119 (Part 1), 343 (Part 2). Having reached the conclusion that the customary law rule for which the Appellant contends is indeed part of the law of Jersey, it would not be appropriate for us to prejudge or comment on that debate.

Conclusion on Ground 1

56. For the reasons set out above, we are satisfied that the Appellant is correct to contend that the Respondent is not entitled to rest on her advances to the extent that those advances exceed the *partie disponible*. We consider that this rule is part of the customary law of Jersey. It is consistent with the underlying purpose and structure of the law, as consistently expressed by the commentaries on customary law. It is a legal rule which is presupposed by the decision in Le Cornu v. Falle. It reflects the contemporary understanding of that case, as stated in modern academic works. And, as we have explained, the French law materials before us provide further support for that conclusion.

Ground 2

57. That being the position, the question advanced by the Appellant under Ground 2 does not arise. That question is predicated on there being no clear answer under customary law. In our judgment, there is a clear answer, and for that reason the court does not need to consider whether customary law ought to be 'developed' as the Appellant contends.

58. In taking this approach, we fully recognise the responsibility of the court to develop customary law: but that responsibility is subject to limits. The rules on succession of any particular legal system are, as the ECtHR recognised in Marckx, closely bound up with that society's views about the family and property rights. There is no intrinsically right balance between the freedom of an individual to dispose of their property *inter vivos* or on death and the interests of that individual's family members to provision. This is an issue which – as the academic literature to which we have referred shows - can prompt divergent and equally reasonable views. If the rule which we have been discussing is considered to be inappropriate to contemporary circumstances in Jersey or to give rise to undesirable consequences, that is, in our judgment, a matter for the legislature.

Consequentials

59. If the parties are unable to agree the necessary consequential orders flowing from this judgment, including as to costs and the further conduct of the Remuneration Issue, we will give directions for determining any outstanding issues in dispute.

Authorities

Wills and Successions (Jersey) Law 1993.

Valpy dit Janvrin v. Valpy dit Janvrin (1716) 1 CR 66, (1718) Ex 86.

Terrien, *Commentaires du Droict Civil.*

Le Geyt, *Privileges, Loix et Coustumes de L'Ile de Jersey.*

Pothier*, Des donations faites entre vifs.*

Berault, *La Coustume Reformée du Pays et Duché de Normandie.*

Pesnelle, *Coutume de Normandie.*

Poingdestre, *Les Lois et Coutumes de l'Isle de Jersey.*

Basnage, *Oeuvres.*

Flaust, *Explication de la coutume et la jurisprudence de Normandie.*

Le Gros, *Traité du Droit Coutumier de l'Ile de Jersey.*

Le Cornu v. Falle [1917] 299 Ex 533.

Fogarty v. St Martin's Cottage Ltd [2016] JCA 180.

The *Code Civil* of 1804.

Arret of the Combined Chambers of the *Cour de Cassation* of 27 November 1863, H. Capitant, *Les Grands Arrets de la Jurisprudence* (9e ed., 1991), pp. 1085 – 1088.

The *Code Civil* (current), Articles 843 to 845.

De La Haye v. Walton [2013] JRC 021.

Ottley v. de Gruchy (1958) 251 Ex 256.

Gavey v. Gavey (1731) 1 OC 176.

Marckx v. Belgium (1979-80) 2 EHRR 330.

Human Rights (Jersey) Law 2000.

Mazurek v. France (2006) 42 EHRR 9.

Jarre v. France, Application 14157/18, 24 June 2024.

Amy v. Amy [1968] JJ 98.

Matrimonial Causes (Amendment № 5) (Jersey) Law 1985.