THE BOARD ORDERED that no one shall publish or reveal the name or address of the child who is the subject of these proceedings or publish or reveal any information which would be likely to lead to the identification of the child or any member of his family in connection with these proceedings.

Hilary Term

[2018] UKPC 4

Privy Council Appeal No 0064 of 2017

JUDGMENT

A (Appellant) v R (Respondent) (Guernsey)

From the Court of Appeal of Guernsey

before

Lady Hale

Lord Mance

Lord Wilson

Lord Hodge

Lady Black

JUDGMENT GIVEN ON

5 March 2018

Heard on 15, 16 and 17 January 2018

Appellant	Respondent
Victoria Wakefield	Caoilfhionn Gallagher QC
	Sam Jacobs
(Instructed by SG Law)	(Instructed by ABT (Ashton Barnes Tee))

LORD HODGE:

1.
An application of this nature is, fortunately, unusual; but it is most unfortunate. It concerns an interim award made against a father to pay maintenance for his son to the child's mother made by the Court of the Seneschal of Sark on 14 August 2013 and orders for payment of arrears of maintenance and a maintenance order made by that court on 9 February, 5 March and 9 July 2015. Since then, the father has appealed those orders to the Royal Court of Guernsey and the Court of Appeal of Guernsey. The

Court of Appeal refused him leave to appeal on 13 July 2017. He now seeks special leave to appeal to the Board. In the meantime, the outstanding questions of the custody and care of the child, who is now eight years old, have not been determined after five years of litigation. Those questions include the determination of the country in which he will live, as his parents are both German citizens, and in the meantime he is required by court order to remain in Sark. It is imperative that, following the promulgation of this judgment, the courts act promptly in the best interests of the child to resolve those questions.

2.
This application raises an important question as to the circumstances in which an applicant needs permission to appeal to the Board from a judgment of the Guernsey Court of Appeal. It also raises questions about (a) the extent of the jurisdiction of the Seneschal of Sark and (b) the scope for judicial development of the common law or customary law in Sark and more widely in the Bailiwick of Guernsey. The Board addresses each in turn.

Appeals from the Court of Appeal of Guernsey

3.
There appears to be uncertainty in Guernsey about when an appellant needs leave to appeal to the Board from the Court of Appeal of Guernsey in civil matters. As a result, the Board invited written and oral submissions on whether special leave was required in this appeal and whether it should be granted.

4.
Section 16 of the Court of Appeal (Guernsey) Law 1961 provides:

“No appeal shall lie from a decision of the Court of Appeal under this Part of this Law without the special leave of Her Majesty in Council or the leave of the Court of Appeal except where the value of the matter in dispute is equal to, or exceeds, the sum of five hundred pounds sterling.” (Emphasis added)

The emphasised words are clear in their exclusion of the need for leave when the monetary value of the claim is or exceeds £500. This is an anachronistic provision and the Court of Appeal has, understandably, sought to reform the regime for permission to appeal by refusing to grant permission unless the appeal raised an arguable point of law of general public importance, thereby bringing appeals from Guernsey into line with the practice in the jurisdictions of the United Kingdom: Emerald Bay Worldwide Ltd v Barclays Wealth Directors (Guernsey) Ltd (judgment 2/2014) (unreported), given on 9 January 2014, and Investec Trust (Guernsey) Ltd v Glenalla Properties Ltd (judgment 55/2015) (unreported) given on 22 December 2015.

5.
In Emerald Bay McNeill JA drew an analogy with appeals to the Supreme Court from Scotland, which at that time allowed for an appeal without leave and (in the Supreme Court Practice Direction 1.2.25) required only that two counsel certify the appeal as reasonable. Addressing such appeals, the House of Lords in Wilson v Jaymarke Estates Ltd 2007 SC (HL) 135 and the Supreme Court in Uprichard v Scottish Ministers 2013 SC (UKSC) 219 had stated that it was contrary to the public interest for the time of the Supreme Court to be taken up on appeals which do not raise an arguable question of general public importance. The Court of Appeal of Guernsey in Emerald Bay considered that it should bear in mind those statements and should refuse leave if an appeal did not raise an arguable point of general public importance, thereby allowing the Board to decide whether to grant special leave.

6.
The Board does not consider that the Scottish practice at that time, which since 2015 has been superseded by the statutory introduction of a test of an arguable point of law of general public importance in the Courts Reform (Scotland) Act 2014, section 117, is a sufficiently close analogy to support the introduction of a general public importance test in the face of the words of exception in section 16 of the 1961 Law which the Board has emphasised. In Uprichard Lord Reed (para 63) invited counsel to bear in mind the court's statements as to the public interest when considering whether an appeal was reasonable. The House in Wilson and the court in Uprichard did not suggest that any appeal which did not pass the general public importance test was necessarily an abuse of process.

7.
Section 16 of the 1961 Law provides for an appeal as of right. The section begins with a general rule prohibiting an appeal to the Board from the Court of Appeal without leave of the Court of Appeal or special leave of the Board. But it then goes on to exclude from that prohibition judgments where the value of the matter in dispute is £500 or more. In relation to such decisions the 1961 Law gives an appeal as of right; and it is beyond the power of the courts to contradict that legislation. The Board therefore agrees with counsel for both A and R that the Emerald Bay and Investec cases were wrongly decided.

8.
An appellant's appeal as of right does not mean that the Court of Appeal has no control over the appeal. Orders in Council in many jurisdictions with appeals as of right to the Board provide for the appellate court to grant final leave to appeal only after the appellant has provided security for costs and complied with other prescribed procedural conditions, such as the preparation of the record of proceedings. More generally, a court of appeal has power to make sure that there is a genuinely disputable issue within the category of cases which are given an appeal as of right. Thus in Alleyne-Forte v Attorney General of Trinidad and Tobago [1998] 1 WLR 68 Lord Nicholls of Birkenhead, delivering the judgment of the Board, stated (p 73):

"An appeal as of right, by definition, means that the Court of Appeal has no discretion to exercise. All that is required, but this is required, is that the proposed appeal raises a genuinely disputable issue in the prescribed category of case."

9.
The Board's Practice Direction 1 para 2.1 recognises the right of local courts of appeal to grant leave in appeals as of right and thus to police the application for leave as the Board envisaged in Alleyne-Forte. This practice was upheld by the Board in Ross v Bank of Commerce (Saint Kitts and Nevis) Trust and Savings Association Ltd (in liquidation) [2011] 1 WLR 125 in which, in its advice delivered by Lord Mance, it was stated (para 5) that the purpose of seeking leave from the local court of appeal was to "confirm that the appeal was as of right, and to impose such limited conditions as might be permitted by the local Constitution and law."

10.
Returning to Guernsey, in Pirito v Curth [2005-06] GLR 34, Southwell JA in delivering the judgment of the Court of Appeal recognised the power of the court to refuse leave to an appeal which fell within the exception in section 16 of the 1961 Law if the appeal was an abuse of process. He gave the following hypothetical example:

“35. There is no time limit in the 1961 Law or elsewhere within which an appellant has to seek leave to appeal. Suppose that the proposed appellant had allowed the decision of the Court of Appeal to remain unappealed for a considerable time, and the decision had been acted upon and the necessary steps taken to give it effect, before any application under section 16 for leave was made. In such a case, in our judgment, it would be essential, if serious abuse were to be prevented, for this court to have the inherent power to refuse leave. Such a power would be necessary to prevent the appeal process being carried forward and the whole basis on which the civil dispute had been resolved as between the parties being overturned ex post facto.

36. In our judgment, therefore, … the existence of such a residual inherent power is necessary in the exceptional circumstance that pursuit of an appeal to the Judicial Committee would involve a serious abuse.”

The Board agrees that the Court of Appeal has such a power. The exercise of that power would, nonetheless, leave it open to the applicant to apply to the Board for special leave and to attempt to persuade the Board that an appeal would involve no abuse.

11.
The Board, when considering an application for special leave to appeal in a case in which there is an appeal as of right but the local court has erroneously refused leave, has only a limited discretion to refuse such special leave or to impose additional conditions. In Crawford v Financial Services Institutions Ltd [2003] 1 WLR 2147, para 23, the Board recognised that its discretion was limited and stated that it would refuse permission for an appeal as of right, for example, “where it was clear that the appeal was wholly devoid of merit and was bound to fail”.

12.
In the Board’s view the limits of the discretion to refuse leave to appeal in a case where an appeal as of right has been wrongly refused by the local court may be stated thus: the Board may refuse permission to an application to appeal, if the appeal is devoid of merit and has no prospect of success (viz Crawford para 23; Ross para 6), and also if the appeal is an abuse of process, such as might arise in the hypothetical example given by Southwell JA. Another example of an abuse of process could, depending on the circumstances, be where the local Court of Appeal had refused an appeal to itself or where the proposed appeal raises questions of fact which have not been raised in that court.

13.
The Board adopts this approach in its consideration of the application for leave to appeal in this case. Before so doing and addressing the substance of the appeal, the Board observes that there is merit in achieving what the Court of Appeal sought to do in Emerald Bay and Investec. It notes that the States of Jersey by the Court of Appeal (Amendment No 8) (Jersey) Law 2008 repealed similar words of exception (with a higher monetary limit) in section 14 of the Court of Appeal (Jersey) Law 1961. An applicant must obtain leave of the Court of Appeal or special leave of the Board for all appeals to the Board from the Court of Appeal of Jersey. Were the exception to be repealed in the 1961 Law in Guernsey, the Court of Appeal would be able to address the appropriate test for the grant of leave to appeal.

The jurisdiction of the Seneschal of Sark

14.
The father advances a stark proposition, that the jurisdiction of the Seneschal of Sark is confined to ordering the payment of liquidated sums due as debts and making orders in relation to immoveable

property. This submission contradicts the established understanding in the Bailiwick of Guernsey. To demonstrate that the submission is wrong it is necessary to summarise the development of the law in Sark.

15.
The island of Sark has a population of about 600. It is part of the Bailiwick of Guernsey, which comprises Guernsey, Alderney and Sark. It has its own legislature, the Chief Pleas, but it has limited resources to draft and enact legislation. The chief judge of the island is the Seneschal. There is an appeal from his court to the Royal Court of Guernsey and appeals from the Royal Court lie to the Court of Appeal of Guernsey, and from that court to the Board.

16.
In R (Barclay) v Lord Chancellor (No 2) [2015] AC 276, Baroness Hale of Richmond, in a judgment with which the other Justices agreed, set out the history of the constitutional relationship between the Channel Islands, the Crown and the United Kingdom. In para 9 of her judgment she referred to the loss by King John of continental Normandy in 1204, the English Crown's subsequent surrender of the title of Duke of Normandy and the Crown's retention of the Channel Islands. She stated:

"The States of Guernsey told the Kilbrandon Commission, Cmnd 5460, para 1349, that, after the ducal title was surrendered,

'the King of England continued to rule the Islands as though he were Duke of Normandy, observing their laws and customs and liberties; and these were later confirmed by the charters of successive sovereigns which secured for them their own judiciaries and freedom from process of English courts and other important privileges of which the Islands were justly proud and which have always been respected.'"

She continued (para 10):

"The Charter granted by Queen Elizabeth I to the people of Guernsey, Alderney and Sark in 1560, for example, granted to the:

'bailiff and jurats, and all other magistrates and officers of justice … full and absolute authority, power, and faculty to have the cognisance, jurisdiction, and judgment concerning and touching all and all sorts of pleas, processes, lawsuits, actions, quarrels and causes arising within the islands and maritime places aforesaid': clause 5."

17.
Queen Elizabeth I also confirmed the grant of the island of Sark as a Royal Fief to Helier de Carteret, a Jerseyman who became the first Seigneur, by letters patent in 1565, which allowed the Seigneur and his successors the right to a manorial court. In his public judgment in this case in the Royal Court dated 13 June 2016 (paras 8-11), the Deputy Bailiff set out the origins of the present court in Sark, drawing on Darryl Ogier, The Government and Law of Guernsey (2nd ed) (p 200) and Julien Havet, Les Cours Royales des îles Normandes (chapter 8). The Court of Appeal of Guernsey also addressed this matter in their judgment of 21 April 2017 (paras 30-40). In short, Sark had become depopulated by the 16th century and, following the grant of the Royal Fief, was repopulated by people from Jersey. In 1579 the inhabitants of Sark established a court on the island which applied the laws and customs of Jersey. The Royal Court of Guernsey did not take the attempted introduction of Jersey law into the Bailiwick lying down. In 1581 and 1582 the Royal Court challenged the legality of both the adoption of Jersey law and the establishment of the court. The dispute was resolved by an Order in Council on 24

April 1583. In article 2nd the Order provided that there be five Jurats chosen by the inhabitants of Sark (or seven if the population increased). Article 3rd provided:

“These Jurats to hold Pleas and use jurisdiction in Sark, in all causes, as is used in Alderney; and appeals likewise to be from Sark to Guernsey, as to superior Justice, in all causes as is used in Alderney.” (Emphasis added)

Article 7th excluded ecclesiastical causes, which fell under the jurisdiction of the Bishop of Winchester. That jurisdiction apart, the Sark court was given jurisdiction over all civil causes. In article 15th, to which the Board will return when addressing customary law, the Order provided that the inhabitants of Sark were to observe “the ancient laws and customs confirmed, to be established by Her Majesty, as in Alderney”.

18.
On 16 July 1594 the Royal Court of Guernsey made an ordinance to give effect to the Order in Council of 24 April 1583. The Ordinance stated, so far as relevant:

“En administration de justice useront les dites Jurez les loix et coûtumes approuvez et établies d’authorité de Sa Majesté en la dite Isle de Guernsey, tant conformes aux lois et coûtumes de Normandie, et aux coûtumes localles de la dite Isle de Guernsey approuvez, différentes de la coûtume de Normandie.

Jugeront les susdits Jurez de toutes causes civiles, tant en cause de meuble que d’heritage, et de toutes matières et actions de Forfaite, Excez, et Injures par emprisonnements, ou amendes n’excédant la somme de soixante sols et un denier Tournois. …”

19.
The Sark court survived in that form until 1675 when it was replaced by the Court of the Seneschal. It appears from the Order in Council dated 19 May 1675 that the Bailiff and Jurats of Guernsey had removed from office the Jurats of Sark because, being Presbyterians, they had refused to take oaths and comply with the practices of the Church of England, and that the island had been without judges for a year. The Order in Council instructed the Bailiff and Jurats of Guernsey to “give oath to a Seneschall, and establish such others officers as shall be requisite for the administration of the civil justice there …”. The Royal Court gave effect to the Order in Council by an Act dated 15 July 1675 appointing the Seneschal, whom the Seigneur had nominated, “avec même pouvoir et authorité de jurisdiction que les naguères Juges et Juréz de la dite Isle ont eu”. The Seneschal thus inherited the jurisdiction of the former judges and jurats.

20.
The modern statement of the jurisdiction of the Seneschal of Sark comes from an Order in Council relating to the Constitution of Sark in 1922 and an ordinance of the Royal Court of Guernsey dated 5 October 1931 which implemented that Order in Council. Later statutory statements of that jurisdiction in the Reform (Sark) Law 1951 and the Reform (Sark) Law 2008, which replaced it, preserved the pre-existing jurisdiction of the Court of the Seneschal of Sark and stated that the court shall be the sole court of justice in Sark.

21.
Article 13 of the 1922 Order in Council provided:

“The Court of the Seneschal shall be the sole Court of Justice in the Island. There shall be an appeal therefrom to the Royal Court of Guernsey, and the said Royal Court shall determine the jurisdiction to be exercised by the Seneschal’s court in civil and criminal matters.”

The Royal Court’s ordinance in 1931, the Ordonnance portant Règlement quant à la Jurisdiction de la Cour de Serk, provided:

“La Cour de Serk aura le droit d’entendre et de juger de toute cause soit en meubles soit en immeubles, pourvu toutefois qu’il y aura appel de la sentence de la Cour de Serk à la Cour Royale de l’Île de Guernesey par l’une ou l’autre partie.”

22.
This is the jurisdiction which is now preserved by sections 5 and 10 of the 2008 Law; the Court of the Seneschal has the right to hear and adjudicate every action whether in moveables or in immoveables. This does not exclude the possibility of legislation giving exclusive jurisdiction over a specified matter to the Royal Court of Guernsey; but that does not arise in this appeal.

23.
It was submitted on the father’s behalf that the Seneschal’s jurisdiction was severely limited because “moveables” fell to be construed narrowly in Guernsey. The Board was referred to the Royal Court’s Ordinance of 19 January 1852 at the Christmas Chief Pleas entitled “Des Biens Meubles et Immeubles”, which states at item 20: “Sont réputées Meubles, les Obligations et Actions qui ont pour objet des sommes exigibles ou des effets mobiliers.” In the Board’s view this definition, which is one of several in the Ordinance, provides no assistance to the father. Actions which have as their object “payable sums” or “sums which may be demanded” are not confined to actions for already liquidated sums but extend to monetary claims, the amount of which will be determined by the court.

24.
The Board, in agreement with the Deputy Bailiff and the Court of Appeal, confirms that the Court of the Seneschal of Sark has, as Lady Hale stated in R (Barclay) at para 20, “unlimited jurisdiction in civil matters”. This accords with the charter of 1560, the Royal Court’s ordinance of 16 July 1594 and the Royal Court’s ordinance of 1931. It also accords with the understanding of writers on the laws of the Bailiwick of Guernsey: Sir John Loveridge, The Constitution and Law of Guernsey (2nd ed) (1998) p 21; Gordon Dawes, Laws of Guernsey (2003) p 382; and Darryl Ogier (above), p 201.

25.
The Seneschal has jurisdiction in civil matters. But what is the law of Sark that he applies? The Board turns to that question, which is the father’s second challenge.

The laws and customs of Sark

26.
Each of the Channel Islands has two principal sources of domestic law. Those sources are legislation and their customary law, which is sometimes described as their common law. In Guernsey, the sources of legislation include Royal Charters, Orders in Council, including those which embody Projets de Loi approved by the States of Guernsey, Acts of the United Kingdom Parliament which extend to Guernsey, Ordinances originally by the Royal Court and since 1948 by the States of Guernsey, and statutory instruments made under such legislation. The expressions “customary law” or “common law” are used in two senses. First, there is the ancient customary law which has developed from the unwritten laws of the Duchy of Normandy and such local laws in the islands of the Channel Islands,

arising in each case from customs which were tacitly accepted as binding. Such unwritten laws were over time recorded in unofficial written compilations or coutumiers, which, if given official sanction by Royal ordinance, became coutumes. Secondly, there is the evolving body of case law and practice by which the courts of the islands have developed and continue to develop their non-statutory laws. As will become clear, the father argues that, within the Bailiwick of Guernsey, whatever the position may be in Guernsey itself or in Alderney, the customary law of Sark has been fixed for over 400 years and can be amended only by legislation. The Board disagrees and sets out its reasoning below.

27.
As is shown in recent histories of the laws of the Channel Islands, for example Ogier (above) chapter 6, Stéphanie Nicolle, The origin and development of Jersey Law (5th ed) (2009), and Gordon Dawes (above) chapter 1 and also “A brief history of Guernsey Law” [2006] JL Rev 4, the islands gained their customary laws initially from the unwritten customs of the Duchy of Normandy, of which they were a part, and drew on unofficial written compilations of those customs, including the 13th century Grand Coutumier. In addition, local customs developed within the islands. Although there were repeated editions of the Grand Coutumier published in the late 15th century and during the 16th century, much of the compilation ceased to reflect current usages in both Normandy and the islands by the mid-16th century.

28.
Commentaries on the Grand Coutumier also contributed to the islands’ customary laws. One of the most influential commentators was Guillaume Terrien, whose Commentaires du Droict Civil, tant public que privé, observé au pays et Duché de Normandie, was published in 1574. This work, which sought to organise the law on Roman principles and drew on the Grand Coutumier and other legal sources including the judgments of French courts, has had a considerable influence as an authority on the law of Normandy and Jersey. It has also played a more direct role in the formation of the law of the islands in the Bailiwick of Guernsey in the following way.

29.
In 1578 uncertainty as to the customs and usages of Guernsey in relation to the disposal of stolen goods seized on a pirate vessel caused the Privy Council to initiate an investigation of Guernsey customary law. A Royal Commission was appointed on 27 July 1579 to ascertain the extent to which the laws and customs of Normandy applied in Guernsey. The Privy Council was dissatisfied by the commissioners’ initial investigation of this matter and in 1581 ordered the Bailiff and Jurats, the Governor or his Lieutenant and HM Procureur to set down the laws and customs of Guernsey. The commissioners’ subsequent submission (which was based on the work of the Royal Court and the Governor) principally referred to the commentary of Terrien and commented on the text and its application to and variance from the laws and customs of Guernsey, with the intention of identifying the customary law which applied in the Bailiwick of Guernsey so far as it fell within the scope of Terrien’s writing. The commission’s commentary on Terrien’s Commentaires was approved by the Privy Council and the commentary and approval became a statement of the law of the Bailiwick of Guernsey known as L’Approbation des Loix, Coutumes, et Usages de l’Ile de Guernsey (“L’Approbation”) once ratified by Her Majesty through an Order in Council of 27 October 1583.

30.
It is important to observe both that L’Approbation was not a complete statement of the customary laws of the bailiwick and that after its ratification by the Order in Council the courts in the bailiwick did not cease to look at developments in the law of Normandy as a source of law. Among the sources to which the courts have had regard was the Coutume Réformée, in which the Grand Coutumier was

comprehensively re-written as an official code of the customs of mainland Normandy, removing the many obsolete parts of the outdated compilation. The Coutume Réformée was frequently cited by Laurent Carey in his Essai sur les Institutions, Lois et Coûtumes de l'île de Guernsey, and commentaries on the Coutume Réformée, including the work of the 17th century French commentator, Henri Basnage, to whom the Board will return, have had a significant influence on the development of the law in Guernsey.

31.
That notwithstanding, the father founds on the status of L'Approbation as an officially sanctioned coutume. He refers to the judgment of the Board in Snell v Beadle [2001] 2 AC 304, which was an appeal from Jersey, in which Lord Hope, giving the judgment of the majority, said this about an unwritten custom which was the product of generally accepted usage and practice (para 18):

"When the word [custom] is used in that sense, as soon as custom is changed into formal or positive law by judicial decision or statute it ceases to be custom. Authority is given to the law by the decision of the court or by statute. It ceases to evolve or develop by usage and practice. Thus, as Routier [Droit Civil et Coutumier de Normandie (1742)] observed, at p 2, customary law when reduced to writing in this way acquired the status of written law:

'La rédaction par écrit de nos coutumes les a renduës le droit écrit de nos provinces, chacune dans son détroit; elles y dérogent au Droit Romain, mais elles y cédent à l'autorité des Ordonnances de nos rois; qui sont les loix générales du roïaume, quand il y a clause expresse de dérogation.'

As different systems of French customary law became codified by royal authority they acquired the status of coutumes. This meant that they had an official status, so that nothing they contained could be abrogated except by statute."

32.
But L'Approbation forms only part of the customary law of Guernsey. The expression "customary law", as the Board has said, includes the decisions of the courts which have used many sources to assist the development of the island's common law. The law of contract has been strongly influenced by the work of Pothier. More recently, the influence of English law on the development of the common law by the courts can be seen, for example, in the law of trusts, which was imported from English law, the law of torts and also criminal law. An example which was cited to the Board was Morton v Paint [1996] 21 GLJ 61 in which the Guernsey Court of Appeal developed the island's law of negligence to bring its law of occupier's liability into line with the English law which had been reformed in the Occupiers Liability Act 1957. In that case and others the court also had regard to the law in other commonwealth jurisdictions and Jersey law. In areas of law in which Norman influence and, through that, the structure of Roman law can be seen, such as property law and succession, the courts in developing the law have looked to the law of Jersey, the Coutume Réformée and its commentators, jurists like Domat, and, at least for the purposes of comparative law rather than as a source, the French Code Civil and modern French textbooks. In cases relating to property, assistance may also be found in analogous jurisdictions, such as Scotland and South Africa, in which Roman law has had a strong influence on the structure of property law. An example of this is the decision of the Court of Appeal of Jersey in Haas v Duquemin 2002 JLR 27 concerning the law of servitudes.

33.
In the Board's view, L'Approbation has not prevented the judicial development of the common law of Guernsey, including in areas of law which it addressed. Judges in developing the law "interstitially", to use Wendell Holmes's vivid phrase, must take care not to create incongruity in the law when

developing the common law in areas in which the legislature has legislated. See for example the decision of the House of Lords in Johnson v Unisys Ltd [2003] 1 AC 518, in which Lord Hoffmann stated (para 37) that judicial development of the law

“must be consistent with legislative policy as expressed in statutes. The courts may proceed in harmony with Parliament but there should be no discord.”

While the status of L’Approbation as legislation prevents direct abrogation of its provisions by judicial decision, the scope for judicial development of the law around and in addition to its provisions should not suffer the constraints which more modern statutory provisions would impose. It is important to recall that its purpose over 400 years ago was to set down the state of customary law at that time within the fields of law which it addressed. There is no reason to believe that it was intended to prevent the further development of the island’s common law.

34.
The position is no different in Sark. As the Board has mentioned (para 17 above), article 15th of the Order in Council of 24 April 1583 provided “that, in Sark, the inhabitants shall observe the ancient laws and customs confirmed, to be established by Her Majesty, as in Alderney”. It is clear that the reference to Her Majesty’s confirmation and establishment of the laws was a reference to L’Approbation which was then being prepared. But there is nothing to support the view that this article sought to make the laws set out in L’Approbation the definitive statement of the common law of Sark in all time coming. In the context of the dispute between the Jerseymen who repopulated the island and the judicial authorities in Guernsey which sought to preserve the laws of the bailiwick on Sark, it is apparent that the purpose of this provision was to re-establish the laws of Guernsey as Sark’s customary law, as in Alderney. Article 3rd, which directed that appeals from Sark were to go to the courts of Guernsey, as was the usage of Alderney, is consistent with this aim.

35.
It follows therefore that the court in Sark is no more constrained than the courts of Guernsey in developing the law by the status of L’Approbation as legislation. That this is so is clear when one examines the development of the law in relation to the maintenance of children, to which the Board now turns.

The law of Sark on the maintenance of children

36.
In its commentary on chapter 2 of book 2 of Terrien, L’Approbation stated that the father was the legal administrator of the bodies and goods of his (legitimate) children until they were married or had achieved the age of 20 years. It stated that the father had to aliment such children and that if the father failed in his duties, another guardian would be appointed. In Sark there was no directly relevant family legislation to abrogate this rule until the Children (Sark) Law 2016 which created a statutory regime for parental responsibility and family proceedings and, in accordance with international norms, stated the overriding principle that the child’s welfare is the paramount consideration. In the following year, the Affiliation Proceedings (Sark) Law 2017 created for the first time a statutory right of an unmarried woman to obtain a court order against the putative father to pay towards the maintenance of his child.

37.
But the absence of a statutory regime does not mean that the common law had not developed since 1583; nor does it mean that L’Approbation encompassed the whole law on the maintenance of

children. Thus in the Channel Islands and also in Normandy the customary law extended beyond coutumes which had received royal sanction. So it was in relation to children born outside of marriage. Basnage, in his Commentaires sur la Coutume de Normandie 3rd ed, (1709) recognised that the Coutume Réformée did not address the maintenance of illegitimate children but considered that the law imposed an obligation arising out of nature. He stated in article 275 (p 445):

“Bien que nôtre Coûtume n’ait rien dit pour les alimens des bâtards, par un temperament équitable on oblige les peres ou leurs meres à leur donner quelque chose par forme de pension alimentaire: Ils les doivent élever jusqu à ce qu’ils leur aient donné le moien de gagner leur vie, imitans en cela les autres animaux qui n’abandonnent leurs petits que quand ils peuvent chercher leur pâture. …”

38.
A similar approach has long been adopted in jurisdictions to which the courts within the Bailiwick of Guernsey have looked for persuasive authority by way of comparative law. In England, Blackstone in his Commentaries on the Laws of England (4th ed) (1876) Book I, chapter XVI.I.i, pp 422-423 stated:

“The duty of parents to provide for the maintenance of their children, is a principle of natural law; an obligation laid on them not only by nature herself, but by their own proper act, in bringing them into the world: for they would be in the highest manner injurious to their issue, if they only gave their children life, that they might afterwards see them perish, By begetting them, therefore, they have entered into a voluntary obligation, to endeavour, so far as in them lies, that the life which they have bestowed shall be supported and preserved. And thus the children will have a perfect right of receiving maintenance from their parents.”

At p 424 Blackstone went on to say:

“It is a principle of law, that there is an obligation on every man to provide for those descended from his loins.”

And this obligation was not confined to children born within marriage (p 433):

“Let us next see the duty of parents to their bastard children by our law, which is principally that of maintenance. For, though bastards are not looked upon as children to any civil purposes, yet the ties of nature, of which maintenance is one, are not so easily dissolved. …”

In Scotland the obligation of a parent to aliment a child was also founded on natural law. Stair, Institutions I, 5, 7 in upholding the obligation, quoted from St Paul’s first letter to Timothy: “If any provide not for his own family, he is worse than an infidel.” In enforcing the obligation the court had regard to the ability of the parents and the necessity of the child. Historically, the primary obligation to aliment a legitimate child was on the father, but the child could sue the mother for aliment if the father failed in his duty. Both the father and the mother were under an obligation to aliment an illegitimate child: Erskine, Institute I, 6, 56. The obligation continued as long as the child was not capable of supporting himself or herself: Marjoribanks v Amos (1831) 10 S 79; Pott v Pott (1833) 12 S 183.

39.
In his judgment the Deputy Bailiff prayed in aid the effect of the Human Rights (Bailiwick of Guernsey) Law 2000, and article 8 of the European Convention on Human Rights in support of the development of the customary law to give the mother a legal remedy to obtain maintenance for her child from the child’s father. The United Nations Convention on the Rights of the Child (“UNCRC”) to which the European Court of Human Rights looks when interpreting its own Convention, vouches an

expectation that such a remedy should exist: article 27(2) of the UNCRC. But in the Board's view, it is not necessary to call on the Human Rights Law or persuasive international instruments as the Court of Appeal was correct to hold that there has long existed an action in maintenance at common law in Sark.

40.
In a very small jurisdiction such as Sark, it is unavoidable that case law will be sparse. But as to the existence of a legal obligation on a father to support his child and the existence of an action for maintenance of the child, there is no real doubt. First, there is an early 19th century case of Guille v de Carteret (Sark Extracts Vol C, 1565 - 1883) which concerned claims between the father of a minor boy, Jean Guille, and the father of a minor girl, Jenny de Carteret, concerning liability to provide for both the girl and her illegitimate child. While the short report does not disclose the precise nature of the action, it is consistent with a recognition of a paternal obligation to aliment an illegitimate child.

41.
Secondly, the Loi relative à l'entretien des enfants illégitimes 1868 recognised the existence of a jurisdiction to order the provision of maintenance for an illegitimate child. The Loi not only created a limitation period of one year and a day for the action of maintenance of such a child, unless the paternity of the child had been recognised in specified ways, but also provided that such a maintenance order was of no effect once the child attained the age of 14 years. This law applied throughout the Bailiwick of Guernsey and therefore applied in Sark and Alderney as well as in Guernsey.

42.
Thirdly, the Board was referred to other cases in the Court of the Seneschal which showed that the court has exercised a wide jurisdiction on matters of family law, including the award of maintenance. The cases concerned the award of maintenance to a wife on separation from her husband (Maunder v Hotton Court, 22 December 1920), the appointment of a husband and wife as joint guardians of the wife's natural children (Kellet v Kellet, 23 August 1949), an award of custody of children and maintenance on separation to a wife and the two children of the marriage (Bonnefin v Bonnefin, 27 April 1982) and the fixing of custody and access arrangements between the parents of a child born outside of marriage and the award of maintenance payments by the father to the mother for the benefit of the child (William v Martin, 29 June 2007). The Seneschal in his judgment of 30 May 2013 referred to another unreported judgment from 2007, Pointz Baker v Perrée, in which the court awarded maintenance to a child born outside of marriage.

43.
Fourthly, there is statutory recognition of the existence of maintenance orders under the customary law of Sark in section 27 of the Maintenance Orders (Reciprocal Enforcement) (Bailiwick of Guernsey) Law 1984 which provides for a married woman in a convention country to apply to recover maintenance from her husband in Sark in an application "made under and in accordance with the customary law of Sark as applicable to maintenance orders".

44.
The Board is satisfied not only that the obligation of a parent to maintain a child, whether born within or outside of a marriage, is part of the customary law of the Bailiwick of Guernsey, including Sark, but also that Sark has an action for maintenance of that child, which the parent caring for the child can raise when the child is not of an age at which he or she can assert the right to maintenance himself or herself.

45.
The father advanced two further arguments about the nature of the law of Sark which the Board deals with shortly. First, he contended that the enforcement of a maintenance obligation was not “subject to conditions provided for by law” under Article 1 of Protocol No 1 to the European Convention on Human Rights (“A1P1”). This was because the law was not sufficiently accessible and precise to be foreseeable and allow the citizen to regulate his conduct: Silver v United Kingdom (1983) 5 EHRR 347, paras 87-88. On the hypothesis, which the Board does not need to address and does not decide, that A1P1 is relevant to a claim by a mother rather than by the state for the maintenance of a child, there is no basis for this challenge. In a small jurisdiction such as Sark, legal materials, and in particular case law, are not as abundant as they are in larger jurisdictions. But the obligation of a father to support his child born outside of a marriage is vouched in Basnage, which is an established source of customary law for the Channel Islands. The case law to which the Board has referred discloses the court in Sark awarding maintenance in differing circumstances. The quantification of the liability is dependent on the circumstances of the interested parties. In the absence of statutory formulae, the court fixes the level of maintenance by an evaluation of what is reasonable.

46.
Finally, the father argues that the court has no power to make an interim order. The Board disagrees. The court needs no specially conferred power to make an interim order where the legal obligation to maintain the child pre-exists the claim and the court fixes the level of maintenance pending a full hearing on the question.

47.
The statutory regime created by the Laws of 2016 and 2017, which the Board mentioned in para 34 above, is unquestionably an improvement on the common law of Sark by its provision of a modern statement of family law which addresses current international norms. But the common law of Sark empowered the Court of the Seneschal to make the orders challenged in this appeal.

Private international law

48.
The father’s final argument is that the Court of Appeal erred in declining to address the relevant conflicts of law rule to identify the law applicable to the mother’s claim for maintenance for the child. The difficulty with this argument is that the parties did not address the question of the applicable law in relation to the obligation to maintain the child before their case reached the Court of Appeal and did not lead evidence as to habitual residence and domicile which might be relevant to that question. The father first sought to raise the matter by listing it as one of his questions which he wished the Court of Appeal to address. In the Board’s view the question of the applicable law is not the proper subject of an appeal when the question was not raised in the pleadings of either party or adjudicated upon by the fact-finding court and the father only briefly mentioned it as a question in a written submission before the Court of Appeal and did not develop it in his oral submissions. It is therefore a challenge which is not in reality an appeal from the decision of a lower court and, for the reason set out in para 12 above, an appeal on this ground is to be viewed as an abuse of process.

Conclusion

49.
The Board therefore refuses special leave to appeal the issue of the applicable law. Otherwise the Board gives the father special leave to appeal and will humbly recommend to Her Majesty that his appeal should be dismissed.