A v R
Royal Court
13th June 2016

JUDGMENT
27/2016

In the matter of an appeal from the court of the Seneschal of Sark

IN THE ROYAL COURT OF GUERNSEY

(ORDINARY DIVISION)

IN THE MATTER OF AN APPEAL FROM THE COURT OF THE SENESCHAL OF SARK

Between	**A**	**Appellant**
	-v-	
	R	**Respondent**

Judgment handed down: 13th June 2016

Before: Richard James McMahon, Esq., Deputy Bailiff

Cases, Texts & Legislation referred to:
European Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd 8969)
Ogier, *The Government and Law of Guernsey* (2nd ed.)
Havet, *Les Cours Royales des îles Normandes*
Order in Council of 24 April 1583
de Carteret and Ewan, *The Fief of Sark*
Order in Council of 19 May 1675
L'Approbation des Lois, Coutumes, et Usages de l'Ile de Guernesey
Order in Council of 27 October 1583
Terrien, *Commentaires du Droict Civil tant public que privé Observé au Pays & Duché de Normandie*
Morton v Paint (1996) 21.GLJ.61
The Reform (Sark) Law, 2008
The Reform (Sark) Law, 1951
The Island of Sark Constitution Order in Council (registered 15 July 1922)
The Court of the Seneschal (Increase of Jurisdiction) Law, 1954
Ordonnance portant Règlement quant à la Juridiction de la Cour de Serk, 1931
Ordonnance Des Biens Meubles et Immeubles, 1852
The Reform (Guernsey) Law, 1948
The Interpretation (Guernsey) Law, 1948
Matthews and Woodward v R.G. Falla Limited [2000-02] GLR 53
R (on the application of Sir David Barclay) v Secretary of State for Justice [2015] 1 AC 276
Angenent v Pring [2005-06] GLR 1
Mayo Associates SA v Cantrade Private Bank Switzerland (CI) Limited 1998 JLR 173

Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corporation Ltd [1981] AC 909

Jacob, *The Inherent Jurisdiction of the Court* in *Current Legal Problems* (1970), 23

Al-Rawi v The Security Service [2011] UKSC 34

Moore v Assignment Courier Ltd [1977] 1 WLR 638

Re B (A Child) (Habitual Residence: Inherent Jurisdiction) [2016] 1 FLR 561

Silver v United Kingdom (1983) 5 EHRR 347

Murray v United Kingdom (1994) 19 EHRR 193

C (a minor) v Director of Public Prosecutions [1996] 1 AC 1

The Human Rights (Bailiwick of Guernsey) Law, 2000

Beyeler v Italy (Application no. 33202/96, 5 January 2000)

Kuznetsov v Ukraine (Application no. 39042/97, 29 April 2003)

Introduction

1. I am delivering this part of the judgment in these appeal proceedings in public because issues of general importance in respect of the Court of the Seneschal of Sark have been raised and because I can do so without referring to the parties otherwise than in a way that does not identify them and in circumstances where I do not need to refer to the matters in dispute between them. In order to give the case some identification for the purpose of citation, I will use A for the Appellant and R for the Respondent.

2. An issue arose in respect of one element of the appeal proceedings that questions the lawfulness of a party invoking the inherent jurisdiction of the Court of the Seneschal in respect of the relief sought. Amongst the grounds of appeal advanced by the Appellant is a set of grounds based on the argument that the Court of the Seneschal is a subordinate court and a creature of statute so that, in the absence of any power conferred on it to grant relief of the type sought by, and granted to, the Respondent, that Court lacked jurisdiction to adjudicate on the matters in dispute between the parties. The proceedings leading to the judgments from which appeal is made should, therefore, be regarded as a nullity. Further, the Respondent had failed to identify adequately the legal basis for the relief sought in such a manner as to meet the requirements of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd 8969) that an interference with one of the rights on which the Appellant relies is "*in accordance with the law*" or "*provided for by law*".

3. Because of the potential far-reaching significance of this issue, I sought assistance from the Law Officers and Advocate Sewards was nominated in the capacity of amicus curiae and I am grateful to him for his assistance to the Court.

The parties' positions

4. The submissions of the Appellant can be summarised briefly in the following way. History shows that a new Court was established in Sark in the 16th century by an Order in Council and that this was done under the auspices of the Royal Court of Guernsey. Accordingly, when that Court (subsequently renamed as the Court of the Seneschal) was established, it was and remains subordinate to the Royal Court. Further, the jurisdiction of the Court of the Seneschal is determined by legislation made by the Royal Court, which demonstrates that the extent of its jurisdiction is prescribed by statute. It is, therefore, a creature of statute, adopting that term as it is used elsewhere, and so the Court has no inherent jurisdiction available for any party to invoke.

5. In the alternative, if the Court is not minded to accept that primary submission, the Appellant suggests that if the Court of the Seneschal is regarded as having some inherent jurisdiction capable of being invoked in general, that jurisdiction does not extend so as to encompass the relief sought in the present proceedings. Any inherent jurisdiction does not enable a court to

invent new substantive remedies because it is generally regarded as a means to deal with procedural matters. The creation of new remedies is something properly left to the legislature. In any event, the uncertainty surrounding what the Respondent had sought through invoking the inherent jurisdiction of the Court of the Seneschal offends against the Appellant's Convention rights and so must be disallowed.

6. The Respondent, on the other hand, does not accept that the Court of the Seneschal is solely a creature of statute, distinguishing between the origins of justice in the Island of Sark and the manner in which statute has supplemented the ancient customary law position. As such, unless there are limitations on the Court's jurisdiction imposed by statute, it is still open in principle to the Court to permit the customary law to evolve and develop. The type of relief sought by the Respondent in the present proceedings is not novel. Because the Court has previously permitted its inherent jurisdiction to be relied upon in similar situations, this demonstrates that Sark has acknowledged that the type of primary remedy relied on by the Respondent is available. This historical position also shows that there has been no violation of the Appellant's Convention rights because the customary law offers adequate certainty to meet the requirements of being "*in accordance with the law*" or "*provided for by law*".

7. In the submissions of Advocate Sewards, he has identified various commentaries about the origins of justice in Sark. He highlights the difference between the provisions relating to the Court of the Seneschal and those establishing a court like Guernsey's Magistrate's Court and the various tribunals created by statute in Guernsey. In those circumstances, it cannot be said that the Court of the Seneschal is of subordinate jurisdiction as the court of justice in Sark.

Discussion

8. The origins of Sark's Court are described in Ogier, *The Government and Law of Guernsey* (2nd ed.) (at page 200):

> "*The island was granted by the Royal Commissioners appointed in May 1563 to Helier de Carteret of Jersey. This award was confirmed by a Royal Charter of 1565, which amongst much else allowed the Seigneur (de Carteret and his successors) the right to a manorial Court. This appears to have functioned until 1579, when a short lived Bailiff's Court, operating according to the usages of Jersey, was set up. An Order in Council of 24 April 1583 then provided for a Court of five Jurats, with the senior member acting as judge, but this was not brought into effect until 1594, with the manorial Court apparently serving in the meantime. In 1675, the existing Seneschal's Court was established. It presently operates under The Reform (Sark) Law, 2008, as amended.*"

9. Further helpful background is contained in Chapter 8 of *Les Cours Royales des îles Normandes* by Julien Havet. It is notable that "*un prévôt royal de Serk*" is mentioned in the early 14th century. However, Sark became depopulated before the grant of it as a fief de haubert to Helier de Carteret by the letters patent of 1565. In my view, some significance should be attached to the fact that the Island was, and since that time has been, held directly from the Crown rather than through Guernsey somehow being interposed in that relationship. Indeed, because the new inhabitants of Sark in the 16th century were Jerseymen, it is unsurprising that they chose to govern themselves in a manner with which they were familiar rather than having regard to Guernsey. At page 177, Havet writes:

> "*Le 27 octobre 1579, quatorze ans après la premiere concession de l'île, la colonisation étant achevée, les habitants de l'île s'assemblèrent en présence du fils du seigneur, Philippe de Carteret, et, d'un commun accord, ils établirent une «cour et juridiction», «pour et afin que les lois, coutumes et usages, d'ancienneté gardés et observés en l'île de Jersey, fussent dorenavant entretenus, gardés et observés en ladite île de Serk en chaque point». On créa un bailli de l'île, douze jurés, un «procureur de la majesté de la reine et aussi du dit seigneur en la dite île de Serk»,*

un «sergent de l'épée» (dénonciateur), un sergent ordinaire, un connétable, un centenier, deux vingteniers; tous ces officiers furent assermentés séance tenante.

La cour royale de Guernesey laissa faire pendant deux ans, puis s'émut tout à coup. Le 2 octobre 1581, «est ordonné qu'il sera signifié a Hellier de Cartheret, fermier (sic) de l'île de Serk, par le Prevost de la Majesté, de comparoystre en cette isle par devant la Justice, pour cognoystre de quelle autorité Jurez-Justiciers et autres Officiers ont été establis en la dite isle». En mai 1582, la cour envoie à Serk une commission composée du bailli et de quatre jurés; ceux-ci, à leur retour, rapportent «qu'en la dite Isle de Serk un nomé Édouard de Cartheret estoyt Baillif, et onze autres des habitants estoyent Jurés, le douzième estant puis naguèrres decedé; ... et qu'ils usoient des lois et coûtumes de l'Ile de Gerzey, et des poys et mesures d'icelle, et mesme que s'il advenoyt aucune cause d'importance entr'eux, qu'ils auroyent sur ce l'advis et conseil des Jurés et autres gens ssavants de l'Isle de Gerzey; ... sur quoy a esté ordonné que le dit Édouard de Cartheret, et deux de ceux qui estoyent establis pour Jurés, viendroyent presentement par devant la Justice de l'Isle de Guernezey ... rendre raison de quelle autorité ils avoyent erigé icelle jurisdiction, rejettant la Cour Royale de la dite Majesté en l'Isle de Guernezey, et s'attribuer (sic) l'autorité d'icelle, et en partie la transporter et differer en l'Isle de Gerzey"."

The consequence, according to Havet, was that: "*Ainsi fut abolie la première cour royale de Serk. Il en fut bientôt créé une autre.*" This was achieved by the Order in Council of 24 April 1583, which referred to "*qu'il y ait cinq jurés choisis par les habitants de Serk, à moins que l'accroissement de la population ne rende nécessaire d'en avoir un plus grand nombre, auquel cas ils seront, par un ordre de S. M., portés à sept; et que le plus ancien des dits jurés prononce les sentences comme il est d'usage à Auregny; que ces jurés tiennent les plaids et excercent la juridiction à Serk, comme il est d'usage à Auregny; et qu'il y ait appel en toutes causes de Serk à Guernesey, comme à la justice supérieure, ainsi qu'il est d'usage à Auregny*". Havet adds that "*La cour créée alors existe encore, mais l'organisation en a été modifiée.*"

10. The translation of the Order in Council of 24 April 1583 found in de Carteret and Ewan, *The Fief of Sark* (at page 144), explains that:

    "*For the administration of Justice, the said Jurats shall apply the laws and customs approved and established by the authority of Her Majesty in the said Island of Guernsey, which conforms with the laws and customs of Normandy and with the local customs of the said Island of Guernsey, which have been approved, differing from the laws and customs of Normandy.*

    The said Jurats shall judge all civil cases concerning personalty and realty and all matters and actions of forfeit, excesses and wrongs where the sentences of imprisonment or fines do not exceed the sum of 60 sous and one denier tournois provided that no crime is involved; in which case the said Jurats shall be bound to send the Prévôt of the said Island with the Accused and the details of the case to the Justice of Her Majesty in the said Island of Guernsey in order that the case may be dealt with appropriately. They must also make and keep a faithful record of all matters which pass before them.

    In all sentences and judgements of the said Jurats exceeding the sum of ten livres tournois in cases relating to personalty in all cases concerning realty the parties shall be free to appeal to the Royal Court of Guernsey."

11. The Court as constituted by the 1583 Order in Council survived for approximately 80 years. However, as recorded in an Order in Council of 19 May 1675 (as set out at page 153 of de Carteret and Ewan's book), the Jurats of Sark "*refused to take the oaths and subscribe to the declaration and receive the sacrament of the Lord's Supper in such a manner as by law*

directed", which led to the Island remaining for more than a year and a day without any administration of civil justice. Consequently, that Order in Council ordered and directed:

> "*... that you the Bailiff and Jurats of our said Court of Guernsey do give oath to a Seneschal and establish such other Officers as shall be requisite for the administration of the Civil Justice there and who shall be named by the said Sir Philippe de Carteret in like manner as the said Sir Philippe doth at St. Ouen in Jersey and other Lords of the Island of Jersey and Guernsey do appoint in their respective Manors and Fees in the said Isles and for so doing this shall be your warrant ...*".

Creature of statute

12. The Appellant has referred to this historical position as a means of showing that what is now the Court of the Seneschal was created by these Orders in Council and should be treated in the same way as other bodies to which the style "*creature of statute*" can be applied. The Appellant further points out that the role played by the Royal Court of Guernsey in the re-establishment of the Court in Sark indicates that the Court is subordinate to the Royal Court.

13. I recognise that the materials to which I have just referred are capable of being construed in this manner. The type of court permitted to the Seigneur of Sark is referred to as being a manorial court. Such manorial courts existed then, and continue to exist now, in Jersey and Guernsey. They are different from the Royal Courts in both Islands. In particular, they do not share the same extensive jurisdictions as both Royal Courts clearly enjoy. It would be possible, therefore, to regard the Court of the Seneschal as having been afforded only a limited jurisdiction and as being somehow an inferior court because of the role played by the Royal Court of Guernsey in administering oaths to those appointed to serve in it. However, I am not persuaded that this factor is a complete answer to the question I have to address. The choice of Seneschal at the time of the 1675 Order in Council establishing that office did not vest in the Royal Court, but in the Seigneur. The jurisdiction remained unchanged from that described in the 1583 Order in Council. In civil cases relating to personalty and realty, which I consider to be broadly drawn, there are no limitations. An appeal was (and remains) available from the Court of the Seneschal to the Royal Court, but that fact of itself does not make the court from which the appeal lies necessarily a subordinate court in the jurisdiction concerned. Unless Sark falls to be treated as part of the jurisdiction of Guernsey, which I do not consider that it can be for these purposes, it is the sole court of justice at first instance in Sark with the Royal Court of Guernsey (and thereafter the Privy Council, at least until the creation of the Guernsey Court of Appeal) being the appeal courts for Sark. The physical location of those courts is not a factor pointing towards the Court of the Seneschal of Sark being a subordinate court for the jurisdiction of Sark.

14. Further, the Orders in Council largely deal with the composition of what had been a long-standing arrangement under which justice in Sark was administered locally. In those circumstances, although the commentators have referred to a court being <u>established</u> in Sark, implying that it was something entirely new, another way of regarding what took place is that the Orders in Council confirmed the existence in Sark of the customary law that had been considered and explained in respect of Guernsey through *L'Approbation des Lois, Coutumes, et Usages de l'Ile de Guernesey* (which was ratified by Her Majesty through an Order in Council of 27 October 1583, where the two measures that same year must, I think, be regarded as inter-connected) and indicated that it was to be applied in the Court in Sark. The coincidence in timing of the work leading to the *Approbation*, which describes the differences between the customs observed in Guernsey and those written down in Terrien's work (*Commentaires du Droict Civil tant public que privé Observé au Pays & Duché de Normandie*), leads me to infer that it was considered opportune to clarify the laws that should properly be recognised as applicable in Sark by the re-constituted court. In doing so, any notion that the laws applicable to the fief of St Ouen in Jersey should be applied in Sark was firmly rejected. Further, although there is reference to applying the laws and customs applying in Guernsey, I do not regard that as being a limitation in the manner suggested by the Appellant. This reference cannot, in my view, be treated as creating the laws to be applied

as if it were a restricted statutory codification. Instead, it amounted to a clarification as to which of the Bailiwick's customary law was applicable as the customary law of Sark.

15. Because the materials to which I have referred do not state expressly that there was a new court being established out of nothing with a jurisdiction entirely conferred upon it by statute, I prefer to treat what happened in the 16th and 17th centuries as being confirmation of what had existed and would exist once again rather than the creation, through statute, of a new court. Modifications took place to the way of constituting the court for the reasons explained and the laws to be applied were clarified. However, I am not persuaded that the way of re-constituting the Court meant that the old court system disappeared completely and was replaced with something else. Accordingly, I do not regard the role to be played by the Royal Court as meaning that the Court of the Seneschal was, within the jurisdiction of Sark, subordinate, in the sense of having a limited jurisdiction derived solely from statute. Despite the Orders in Council referring to the *Approbation*, I consider that it has been widely acknowledged that the customary law applying in Guernsey (and so also in Sark) was not set in aspic but is capable of developing and evolving. If that were not the position, decisions such as *Morton v Paint* (1996) 21.GLJ.61 could not have been reached. In those circumstances, subject to any intervention by the legislature pointing against that provisional conclusion, my analysis of the historical position is that it does not support the Appellant's submission that a Sark Court was created by some legislative measure meaning that it should be regarded as a creature of statute since the 16th or 17th century.

16. The current position is set out in the Reform (Sark) Law, 2008. Section 2 provides:

> "*All judicial functions which may be exercised within Sark are exercisable, except to the extent that any enactment otherwise provides, by the Court of the Seneschal constituted in accordance with Part II.*"

Section 5 of that Law provides that "*The Court of the Seneschal shall be the sole court of justice in Sark and shall be constituted by the Seneschal sitting alone.*" The extent of the Court's civil jurisdiction is dealt with in section 10:

> "*(1) The civil jurisdiction of the Court comprises all matters other than criminal matters –*
>
> *(a) in respect of which the Court had jurisdiction immediately before the commencement of this section,*
>
> *(b) which are assigned to it by this Law or by any other enactment,*
>
> *and in this Law any such matter is referred to as "a civil matter".*
>
> *(2) The jurisdiction of the Court in a civil matter is not limited by reference to any question of value.*"

I also regard section 4 of the 2008 Law as important. It clarifies that:

> "*(1) Her Majesty's prerogative is unaffected by this Law.*
>
> *(2) Except to the extent that their continued existence would be inconsistent with this Law, this Law does not affect –*
>
> *(a) any of the laws or customs of Sark, or*
>
> *(b) the powers, rights or duties of a person exercising public functions in relation to Sark.*"

17. It is clear that the combined effect of these provisions is that the 2008 Law did not create a new Sark Court. The Court that existed in Sark before the 2008 Law entered into force continued, with its civil jurisdiction unchanged. The 2008 Law did not affect the laws or customs of Sark. In other words, had the application that commenced the proceedings leading to the present appeal proceedings been made before 2008, the position would have been no different from what it was when the application was actually made.

18. The 2008 Law repealed and replaced the Reform (Sark) Law, 1951. Section 23(1) of that Law provided:

> "*The Court of the Seneschal shall be the sole Court of Justice in the Island with the same jurisdiction in criminal and civil cases as heretofore. The right of appeal therefrom in criminal causes to the Royal Court of Guernsey and, in civil causes to the said Royal Court sitting as an Ordinary Court, is hereby confirmed.*"

Once again, it is clear that the 1951 Law did not create a new Sark Court and the extent of the jurisdiction of the Court remained unchanged from what it had been previously.

19. The 1951 Law repealed and replaced the 1922 Order in Council relating to the Island of Sark Constitution, Article 13 of which 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.*"

At that time, the Court of the Seneschal was already in existence. Accordingly, I do not consider that the 1922 Order in Council created a new Sark Court. The transition from the 1922 Order in Council to the 1951 Law is also covered in the preamble to the Court of the Seneschal (Increase of Jurisdiction) Law, 1954:

> "*WHEREAS by Article thirteen of the Island of Sark Constitution Order in Council registered on the Records of the Island of Guernsey on the 15th day of July, 1922, the Royal Court of Guernsey was empowered to determine the jurisdiction of the Court of the Seneschal in civil and criminal matters:*
>
> *AND WHEREAS THE Royal Court of Guernsey did determine the said jurisdiction by an Ordinance passed on the 5th day of October, 1931: …*
>
> *AND WHEREAS the said jurisdiction as determined by the Royal Court of Guernsey by the said Ordinance was preserved and confirmed by section twenty-three of the Reform (Sark) Law, 1951:*".

20. The Ordinance made on 5 October 1931 at the Royal Court's Michaelmas Chief Pleas, the Ordonnance portant Règlement quant à la Juridiction de la Cour de Serk, made the following provision in Article 1:

> "*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.*"

Because of the effect of the 1951 and 2008 Laws, this provision sets out the current extent of the jurisdiction of the Court of the Seneschal. The reference to "*toute cause*" is, in my view, extremely wide. This is unsurprising because the Court of the Seneschal is the sole court of justice in Sark. Guidance on what are meubles and immeubles can, I think, be derived from the Royal Court's Ordinance made on 19 January 1852 at the Christmas Chief Pleas entitled

"*Des Biens Meubles et Immeubles*", which includes at item 20: "*Sont réputées Meubles, les Obligations et Actions qui ont pour objet des sommes exigibles ou des effets mobiliers.*"

21. The strongest argument that the Appellant has relating to the jurisdiction of the Court of the Seneschal being a limited one is the original power in Article 13 of the 1922 Island of Sark Constitution Order in Council empowering the Royal Court to determine the jurisdiction of the Sark Court and the terms of the Ordinance then made under that power. It is unclear why this power was conferred on the Royal Court rather than the Chief Pleas. It is possible, though, that the power was not conferred on the Chief Pleas because of its more limited role of making Ordinances in the same manner as previously "*for the maintenance of good order and for regulating the local affairs of the Island*" (set out in Article 5), which does not sit comfortably with the Ordinance-making power that the Royal Court also had at the time and which might be regarded as extending into the field of justice matters. Of course, the legislative functions of the Royal Court exercisable before 1948 were transferred to the States of Deliberation by Article 63 of the Reform (Guernsey) Law, 1948. I imagine that it would have been unwelcome if the States of Deliberation had seen fit to repeal and replace the 1931 Ordinance before Article 13 of the 1922 Order in Council was repealed by the 1951 Law. In 2016, there is no enabling power under which the terms of the 1931 Ordinance could be changed. As such, any limitations to be placed on the jurisdiction of the Court of the Seneschal would, I think, need to be achieved through primary legislation, ie, a Projet de Loi approved by the Chief Pleas to which Royal Assent is then given and the measure registered on the Records of the Islands. It might be argued that the reference in section 23(1) of the 1951 Law to the Court of the Seneschal having "*the same jurisdiction in criminal and civil causes as heretofore*" itself replaced any reliance there needed to be on the 1931 Ordinance made under powers that were then repealed. However, I do not consider that this would be an attractive stance to adopt because section 30 of the 1951 Law applies the Interpretation (Guernsey) Law, 1948 and section 19 of that 1948 Law provides that the repeal of an enactment does not affect anything done under the repealed enactment, which extends to the making of subordinate legislation, unless the contrary intention appears. Section 27 of the 1951 Law did not repeal the 1931 Ordinance and so I consider that it continued in force, even if only as a reference point, for the time when the 1951 Law was in force and continues to do so in relation to the 2008 Law. As a result, the reference in section 10(1)(a) to the civil jurisdiction of the Court of the Seneschal comprising all matters in respect of which it had jurisdiction immediately before the commencement of section 10 continues, in my view, to include a reference to the terms of the 1931 Ordinance. In reaching that conclusion, I appreciate that I am taking a different approach from that of the then Bailiff in ***Matthews and Woodward v R.G. Falla Limited*** [2000-02] GLR 53. However, in my view, it is the effect of the 1948 Law that means the 1931 Ordinance continues to be effective.

22. The question, therefore, is whether that jurisdiction is so limited that it means the Court of the Seneschal should be treated in the same way as a decision-making body properly described as a creature of statute so that, in the absence of any express conferral of jurisdiction, there is no jurisdiction that a party is able to invoke. In the ***R.G. Falla*** case (*supra*), the Bailiff noted (at para. 10) that the domestic Laws of Sark to which he referred, and to which I have similarly referred, "*only apply to the Island of Sark, … saying nothing more than that the only Court which is recognised as having power to operate on the Island of Sark is the Court of the Seneschal and that Court is given unlimited jurisdiction in civil cases*". Being a "Sark only" Law, it could not fetter the jurisdiction of the Royal Court of Guernsey. Accordingly, he ruled that the effect of the 1951 Law was not to confer of the Court of the Seneschal exclusive jurisdiction to deal with matters pertaining to Sark because the Royal Court has concurrent jurisdiction at first instance. The Bailiff drew a distinction between the Royal Court enjoying some form of residual jurisdiction in cases where proceeding before the Court of the Seneschal (and by analogy before the Court of Alderney) was for a valid reason inappropriate and a more general jurisdiction of the Royal Court as effectively a Bailiwick-wide court of first instance. In ***R (on the application of Sir David Barclay) v Secretary of State for Justice*** [2015] 1 AC 276, the position was similarly expressed (at para. 20) as being;

> "*The court of the Seneschal has unlimited jurisdiction in civil matters, but a more limited jurisdiction in criminal matters. There is an appeal from his court to the Royal Court of Guernsey, which also has concurrent first instance jurisdiction in civil matters and sole jurisdiction over more serious criminal matters.*"

Whether the principle of concurrent jurisdiction is general or limited in any way has not, however, been finally resolved in a manner binding the Court of the Seneschal or the Royal Court and the present appeal is not the occasion on which to attempt to do so. The Appellant relies on this principle, though, for support that the jurisdiction of the Court of the Seneschal can be regarded as a limited one because any gaps it in are capable of being filled through commencing proceedings before the Royal Court as a first instance court.

23. Returning to the terms of the 1931 Ordinance, it is apparent that the Court of the Seneschal has unlimited civil jurisdiction. In this regard, there is a distinction in that its criminal jurisdiction is severely circumscribed. On the basis that there is acknowledged unlimited jurisdiction, invoking the Court's inherent jurisdiction might be treated as being appropriate where there is no statute under which the application is capable of being brought. An action in debt or, as in the ***R.G. Falla*** case, for damages for personal injury is not made pursuant to any statute. It is made because the law of Sark recognises that such relief is available. The remedy sought in such cases is generally a monetary one. It falls within the jurisdiction of the Court of the Seneschal in any event under the 1931 Ordinance. The relief sought by the Respondent against the Appellant in the present proceedings is, in my view, similarly covered by the 1931 Ordinance. In other words, even though there is no statute in Sark under which the Respondent's action could be pleaded, the Court of the Seneschal of Sark had the jurisdiction to entertain and determine it.

24. For these reasons, I reject the Appellant's contention that the Court of the Seneschal is a creature of statute and, for that reason, does not have any inherent jurisdiction. A Sark Court, constituted in different ways until it settled into being the Court of the Seneschal known today, exists because Sark, although part of the Bailiwick of Guernsey, is a separate jurisdiction with its own legislature, executive and judiciary. The 2008 Law confirms that the Court of the Seneschal is the sole court of justice in Sark. The civil jurisdiction of the Court of the Seneschal is, in any event, unlimited. Where the legislature has conferred a route enabling a party to seek relief from that Court, its jurisdiction to hear the case is made abundantly clear. In the absence of express legislative provision conferring such a route, general principles apply, be that a consequence of the customary law of Sark or through reliance on the inherent jurisdiction. I have not been persuaded that the jurisdiction of the Court of the Seneschal is entirely statutory and so reject the Appellant's submissions that the Court's jurisdiction is so limited that it could not hear the Respondent's application.

Inherent jurisdiction

25. In my judgment, it is very significant that the 2008 Law describes the Court of the Seneschal as "*the sole court of justice in Sark*". It is axiomatic that a court in any British jurisdiction must be capable of dispensing justice for the benefit of the people needing to have recourse to it, but especially those who are resident in the jurisdiction. This leads me to consider the concept of the Court's inherent jurisdiction. Because of the reliance on it in the Respondent's original application, I had invited the parties to consider a previous decision of this Court dealing with the principle as it applies in Guernsey (***Angenent v Pring*** [2005-06] GLR 1) and the decision of the Jersey Court of Appeal referred to therein (***Mayo Associates SA v Cantrade Private Bank Switzerland (CI) Limited*** 1998 JLR 173).

26. Before turning to those cases, I can helpfully lay the foundation by referring to some classic expositions of the principle. In his speech in ***Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corporation Ltd*** [1981] AC 909, Lord Diplock explained (at page 977) that:

"*The High Court's power to dismiss a pending action for want of prosecution is but an instance of a general power to control its own procedure so as to prevent its being used to achieve injustice. Such a power is inherent in its constitutional function as a court of justice. Every civilised system of government requires that the state should make available to all its citizens a means for the just and peaceful settlement of disputes between them as to their respective legal rights. The means provided are courts of justice to which every citizen has a constitutional right of access in the role of plaintiff to obtain the remedy of which he claims to be entitled in consequence of an alleged breach of his legal or equitable rights by some other citizen, the defendant. Whether or not to avail himself of this right of access to the court lies exclusively within the plaintiff's choice; if he chooses to do so, the defendant has no option in the matter; his subjection to the jurisdiction of the court is compulsory. So, it would stultify the constitutional role of the High Court as a court of justice if it were not armed with power to prevent its process being misused in such a way as to diminish its capability of arriving at a just decision of the dispute.*

The power to dismiss a pending action for want of prosecution in cases where to allow the action to continue would involve a substantial risk that justice could not be done is thus properly described as an "inherent power" the exercise of which is within the "inherent jurisdiction" of the High Court. It would I think be conducive to legal clarity if the use of these two expressions were confined to the doing by the court of acts which it needs must have power to do in order to maintain its character as a court of justice."

27. Another definition frequently cited is that found in Jacob, *The Inherent Jurisdiction of the Court* in *Current Legal Problems* (1970), 23 (at page 27):

> "*... the essential character of a superior court of law necessarily involves that it should be invested with a power to maintain its authority and to prevent its process being obstructed and abused. Such a power is intrinsic in a superior court; it is its very life-blood, its very essence, its immanent attribute. Without such a power, the court would have form but would lack substance. The jurisdiction which is inherent in a superior court is that which enables it to fulfil itself as a court of law. The juridical basis of this jurisdiction is therefore the authority of the judiciary to uphold, to protect and to fulfil the judicial function of administering justice according to law in a regular, orderly and effective manner.*"

This passage was cited in ***Mayo v Cantrade*** (*supra*) and was referred to in Lord Diplock's speech. I happily adopt them as offering definitional guidance for the purposes of Sark law.

28. In the context of Sark, the Appellant submits that it is the Royal Court and not the Court of the Seneschal that is the superior court for these purposes. I disagree. The term "*superior court*", as I understand it, is being used in relation to first instance courts and not appellate courts. In hierarchical terms, because there is an appeal from the Court of the Seneschal to the Royal Court, the Court of the Seneschal is the inferior court when there is an appeal. That does not make the Royal Court the superior court in the way that term is used when describing inherent powers or even an inherent jurisdiction. As the sole court of justice in Sark, the Court of the Seneschal must, in my view, have all the necessary powers for it to function as that court of justice. Even in criminal matters, every case is always able to start in Sark, although more serious cases necessarily have to be transferred to the Royal Court to be determined. If I were to rule that the Court of the Seneschal did not have all the powers associated with being Sark's court of justice, the only way in which a Sark litigant could obtain effective justice in a matter falling outside whatever its more limited, or restricted, jurisdiction is said to be, would be to commence proceedings before the Royal Court. I do not regard that as an attractive outcome. I consider that it is entirely consistent with the constitutional position of Sark that it is to the Court of the Seneschal that everyone who wishes to do so can have recourse. Moreover, on the basis that the Royal Court enjoys concurrent jurisdiction with the Court of the Seneschal, it necessarily follows that the

acknowledged inherent jurisdiction of the Royal Court is similarly available in the Court of the Seneschal. In my judgment, the submission of the Appellant that the Court of the Seneschal is an inferior, or subordinate, court with no inherent jurisdiction is untenable.

29. The Appellant's secondary position is that, if there is some inherent jurisdiction, it is does not extend to the creation of a new remedy or cause of action because the authorities from elsewhere show that it is generally confined to procedural matters. In *Angenent v Pring* (*supra*), the Court cited (at para. 18) what Smith JA had said in *Mayo v Cantrade* (at page 188):

> "*In our view, the vital clue to the nature of the inherent jurisdiction in its procedural setting … is necessity. The court has a particular procedural power because it has to have it to be a court in any meaningful sense. On this basis, the power to require the attendance of witnesses, whether to testify or to produce documents, the power to control abuse of process of the court, the power to dismiss claims for want of prosecution, the power to issue practice directions, the power to decide who may or may not appear before the court, the power to correct errors in its own orders and many other powers may all be recognized as derived from a single pool, not of powers but of power drawn upon as necessity dictates.*
>
> *It will be observed that this approach is antithetical to a definition of inherent jurisdiction based simply on fairness or by reference to what is perceived in a particular situation to be just. If inherent jurisdiction exists to enable a thing to be done, fairness and justice will obviously be major factors to be taken into account when the court is deciding whether or not to exercise its discretion to so order; but the conclusion that it would be fair or just to order that that thing be done does not determine whether there is inherent jurisdiction to order it.*"

The Appellant relies on this statement of principle as support for the contention that any available inherent jurisdiction cannot be so wide that it extends to making available some form of relief that was not previously available.

30. The Appellant has also referred to the limitations on the inherent jurisdiction noted in *Al-Rawi v The Security Service* [2011] UKSC 34 (at para. 21):

> "*But even in an area which is not the subject of statute or statutory procedural rules, there are limits to the court's inherent jurisdiction to regulate how civil and criminal proceedings should be conducted. In my view, there is considerable force in what Professor Martin Dockray said in "The Inherent Jurisdiction to Regulate Civil Proceedings" (1997) 113 LQR 120, 131: "… a matter which is procedural from the position of an applicant may be constitutional in the eyes of the respondent. The fact that procedural law can be described as subordinate or adjectival because it aims to give effect to substantive rules should not conceal the truth that procedures can and do interfere with important human rights, while the means by which a decision is reached may be just as important as the decision which is made in the end. Where procedure is as important as substance, procedural change requires the same degree of political accountability and economic and social foresight as reform of an equivalent rule of substantive law. Major innovations in procedural law should therefore be recognised as an institutional responsibility, not a matter on which individual judges should respond to the pleas of particular litigants. Procedural revolutions should appear first in statutes or in Rules of Court, not in the law reports."*"

31. In *Angenent v Pring*, the Court refused to accept that there was an inherent jurisdiction to make an order for an interim payment in favour of a party to civil proceedings before the court. It was not enough that it would be just and fair to do so. Some express rule was required. The Court adopted the approach that had been taken in *Moore v Assignment*

Courier Ltd [1977] 1 WLR 638, which had dealt with the jurisdiction to award an interim payment in the absence of any express rule. In that case Sir John Pennycuick considered that it "*clearly raises an issue of substantive right*" and, in the absence of any express power, the Court of Appeal found it meant the first instance court did not possess the power to make such an award. By analogy, the Appellant submits that there must be some written measure entitling the Respondent to pursue the relief that has been sought in the proceedings before the Court of the Seneschal before that Court was able to rule on the application.

32. My reading, however, of the various materials relating to a court's inherent jurisdiction, or perhaps more accurately the inherent powers it enjoys, does not lead me to conclude that such inherent jurisdiction is necessarily as limited to procedural matters as has been suggested by the Appellant. By way of example, at page 190 in *Mayo v Cantrade* Smith JA further explained:

> "*We now turn to that assortment of powers exercised by courts which have been described as forming part of inherent jurisdiction but which lack a common theme. It is unnecessary for the purpose of this judgment to list those powers, but we mention by way of example the protection of minors and persons incapable of managing their own affairs and the control of inferior courts and tribunals. Sir Jack Jacob thought that inherent jurisdiction was part of procedural and not substantive law (op.cit., at 24). We do not believe that this limitation is tenable: see the judgment of this court in Planning & Environment Cttee. v. Lesquende Ltd., Professor Dockray's article … and the remarks of Megaw, L.J. concerning the word "procedure" in Moore v Assignment Courier ([1977] 1 W.L.R. at 645).*"

Accordingly, I do not accept the submission that the inherent jurisdiction of the Court of the Seneschal is so limited that it extends no further than matters that everyone would recognise as being procedural. Where appropriate, the Court's ability to dispense justice will be engaged in order for the community of Sark to know that there exists an authority capable of resolving disputes. The subject-matter of the dispute must, however, have some foundation in Sark law. Subject to that qualification, I consider it part of the populace's right to access justice that the Court has to have adequate jurisdiction to act as the sole court of justice in that Island.

33. There is further support for the issues that have arisen in the present proceedings by the reference to the generally acknowledged power of a court in protecting minors. In the context of England and Wales, in *Re B (A Child) (Habitual Residence: Inherent Jurisdiction)* [2016] 1 FLR 561, a recent decision of the Supreme Court, Lord Sumption explained succinctly (at para. 87) that "*the inherent jurisdiction exists to enable the English court to exercise the sovereign's protective role in relation to children*". His Lordship's fuller explanation and guidance preceded that summary:

> "*81. The inherent jurisdiction of the High Court with respect to children originated in an age where the civil courts had no statutory family jurisdiction. It is based on the concept of a quasi-parental relationship between the sovereign and a child of British nationality. It enables the courts to make a British child a ward of court, even if the child is outside the jurisdiction when the order is made. The continued existence of an inherent jurisdiction in an age of detailed and comprehensive statutory provision is something of an anomaly. The basis of the jurisdiction is, moreover, difficult to reconcile with the content of statutory rules about jurisdiction. It is based on nationality, whereas the statutory rules are based on habitual residence and presence. Nevertheless, its survival was implicitly recognised by ss 1(1)(d) and 2(3) of the Family Law Act 1986, which prohibited the exercise of the jurisdiction so as to give care of a child to any person or provide for contact with or the education of a child, unless either the court had jurisdiction under BIIA or the 1996 Hague Convention or, if neither of these applied, the child is present or habitually resident in the United Kingdom. Its survival was acknowledged by this court in A v A …*

> *84. First, the jurisdiction is discretionary, and should not be overturned in the absence of some error of principle or misunderstanding of the facts, unless the judge has reached a conclusion that no judge could reasonably have reached. …*
>
> *85. Secondly, the inherent jurisdiction should not be exercised in a manner which cuts across the statutory scheme. …*
>
> *86. Thirdly, if there were grounds for believing the child to be in danger, or some other extreme facts justifying the exercise of the inherent jurisdiction, it would no doubt be possible in the exercise of the court's inherent jurisdiction to direct an independent assessment of the situation of the child …*".

34. A court's jurisdiction in respect of minors has been traced back to its *parens patriae* jurisdiction. The Crown, as *parens patriae*, has a duty to take care of those who are not able to take care of themselves. It is an aspect of the royal prerogative. In that regard, I note that section 4(1) of the 2008 Law expressly provides that "*Her Majesty's prerogative is unaffected by this Law*". Accordingly, whatever *parens patriae* jurisdiction existed before the 2008 Law came into force, it continues. As Lord Sumption's analysis notes, the origins of the inherent jurisdiction in England and Wales pre-dates the time when legislation in these areas existed. I consider it significant that, in those times, the Sovereign of England was also the Sovereign of Sark. It follows, in my view, that the Sovereign's prerogative existed to the same extent in Sark as it did in England and Wales. Consequently, there has always been an inherent jurisdiction vested in what became the Court of the Seneschal to act in a protective role in relation to children.

35. The Appellant has suggested that there is only one Royal Court for the whole of the Bailiwick of Guernsey, and that the powers associated with a court's inherent jurisdiction are available only in that court and not the subordinate courts elsewhere in the Bailiwick. In terms of style, the Appellant is correct because there is only one court described as a Royal Court. However, on closer inspection, I think it is more accurate to describe the Court of the Seneschal as being of similar standing to the Royal Court of Guernsey for the purposes of being able to act on behalf of the Crown. Indeed, Havet treats the Sark Court as one of the royal courts in the Channel Islands. The grant of Sark to Helier de Carteret enabled the Seigneur to establish a court equivalent to a manorial court found in Jersey and Guernsey, but that reference to it being a manorial court is, in my view, misleading, because the position in Sark as a single jurisdiction can be distinguished from the multiple fiefs in Jersey and Guernsey. Sark continues to be held directly from the Crown. Because the Court of the Seneschal has been confirmed in primary legislation as the sole court of justice in Sark and because it has concurrent jurisdiction with the Royal Court, it follows that the extent of inherent jurisdiction that has historically existed is the same in each Island. There is as yet no statutory scheme in Sark that reliance on the inherent jurisdiction would cut across. If there were, naturally the statutory scheme would need to prevail but, even then, it is theoretically possible that some inherent jurisdiction would be capable of being invoked. Because the jurisdiction is discretionary, an appellate court will be cautious about overturning a decision involving its exercise.

36. In the circumstances of the proceedings before the Court of the Seneschal leading to these appeals, I am satisfied that, in the absence of any other reason (and I am just about to deal with the Appellant's submission relating to the Appellant's Convention rights), there existed an inherent jurisdiction in the Court of the Seneschal wide enough to cover the Respondent's original application. That jurisdiction is founded in the *parens patriae* jurisdiction that exists in a British territory with its own court of justice. Moreover, the court system in Sark does not distinguish between different first instance courts. This distinguishes it from Guernsey, where the Magistrate's Court is clearly subordinate to the Royal Court and its existence and jurisdiction depend entirely on statute. In Sark, there is only one court and its jurisdiction, unless constrained by a Law having effect in Sark, is generally as extensive as the Royal Court's.

Inherent jurisdiction and legal certainty

37. The next issue (and the final one with which I will deal in this part of the judgment) relates to the Appellant's submissions based on the Human Rights (Bailiwick of Guernsey) Law, 2000. The Appellant refers, in particular, to the way in which the qualified Convention rights to which domestic effect in Sark is given by the 2000 Law include a requirement that any interference be in accordance with the law (eg, Article 8). The Appellant relies on Article 1 of Protocol 1 to the European Convention on Human Rights, which provides:

> "*Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.*
>
> *The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.*"

38. In relation to the phrase "*provided for by law*", the Appellant submits that reliance on an inherent jurisdiction in the manner in which the Respondent's application was put lacks the necessary legal certainty that the European Court of Human Rights has required when considering similar phrases. The Appellant refers to the decision in *Silver v United Kingdom* (1983) 5 EHRR 347 and the principles extracted by the Strasbourg court in that case:

> "*86. A first principle that emerges from [The Sunday Times v United Kingdom, judgment of 26 April 1979, Series A no. 30; (1979) 2 EHRR 245] is that the interference in question must have some basis in domestic law (ibid., p. 30, § 47). …*
>
> *87. A second principle is that "the law must be adequately accessible: the citizen must be able to have an indication that is adequate, in the circumstances, of the legal rules applicable to a given case" (ibid., p. 31, § 49). …*
>
> *88. A third principle is that "a norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail" (ibid.).*
>
> *A law which confers a discretion must indicate the scope of that discretion. However, the Court has already recognised the impossibility of attaining absolute certainty in the framing of laws and the risk that the search for certainty may entail excessive rigidity (ibid.). …*
>
> *In view of the considerations, the Court points out once more that "many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice" (ibid.).*"

39. The Appellant has also drawn attention to passages in two other Strasbourg decisions, neither of which has a direct bearing on the matters in dispute in these appeal proceedings but which confirm the applicable principles. The first of those cases is *Beyeler v Italy* (Application no. 33202/96, 5 January 2000), in which the European Court of Human Rights stated (at para. 107):

> "*In order to be compatible with the general rule set forth in the first sentence of the first paragraph of Article 1, such an interference must strike a "fair balance" between the demands of the general interest of the community and the requirements*

of the protection of the individual's fundamental rights (see Sporrong and Lönnroth judgment cited above, p. 26, § 69). Furthermore, the issue of whether a fair balance has been struck "becomes relevant only once it has been established that the interference in question satisfied the requirement of lawfulness and was not arbitrary" (see Iatridis cited above, § 58)."

This serves as a reminder that there is always going to need to be a pre-condition of establishing lawfulness and the absence of arbitrariness before a court will have to consider where to strike the balance. The judgment continues with guidance on how to meet the requirement of lawfulness:

"*108. The Court reiterates that an essential condition for an interference to be deemed compatible with Article 1 of Protocol No. 1 is that it should be lawful. "[T]he first and most important requirement of Article 1 of Protocol No. 1 is that any interference by a public authority with the peaceful enjoyment of possessions should be lawful" (see Iatridis cited above, § 58). The Court has limited power, however, to review compliance with domestic law (see the Håkansson and Sturesson v. Sweden judgment of 21 February 1990, Series A no. 171-A, p. 16, § 47), especially as there is nothing in the instant case from which it can conclude that the Italian authorities applied the legal provisions in question manifestly erroneously or so as to reach arbitrary conclusions (see, mutatis mutandis, the Tre Traktörer AB, v. Sweden judgment of 7 July 1989, Series A no. 159, pp. 22-23, § 58). ...*

109. However, the principle of lawfulness also presupposes that the applicable provisions of domestic law be sufficiently accessible, precise and foreseeable (see the Hentrich v. France judgment of 22 September 1994, Series A no. 296-A, pp. 19-20, § 42, and the Lithgow and Others judgment cited above, p. 47, § 110). The Court observes that in certain respects the statute lacks clarity, particularly in that it leaves open the time-limit for the exercise of a right of pre-emption in the event of an incomplete declaration without, however, indicating how such an omission can subsequently be rectified. Indeed, this seems to have been implicitly acknowledged by the Court of Cassation in its judgment of 16 November 1995 (see paragraph 63 above). That factor alone cannot, however, lead to the conclusion that the interference in question was unforeseeable or arbitrary and therefore incompatible with the principle of lawfulness.

110. The Court is, nonetheless, required to verify that the manner in which domestic law is interpreted and applied – even where the requirements have been complied with – does not entail consequences at variance with the Convention standards. From that stance, the element of uncertainty in the statute and the considerable latitude it affords the authorities are material considerations to be taken into account in determining whether the measure complained of struck a fair balance."

40. In *Kuznetsov v Ukraine* (Application no. 39042/97, 29 April 2003), where an Instruction being relied upon "*was an internal and unpublished document which was not accessible to the public*" (para. 138), the Court succinctly set out in para. 135 that:

"*The Court must first consider whether the interference was "in accordance with law". This expression requires firstly that the impugned measure should have some basis in domestic law; it also refers to the quality of the law in question, requiring that it should be accessible to the person concerned, who must moreover be able to foresee its consequences for him, and be compatible with the rule of law (see Kruslin v. France and Huvig v. France, judgments of 24 April 1990, Series A no. 176-A, p. 20, § 27, and Series A no. 176-B, p. 52, § 26, respectively).*"

41. In the light of these passages, the Appellant submits that the position in Sark is far from clear enough to meet these requirements. The Appellant suggests that the law was being made up as the proceedings progressed. I have a degree of sympathy with that submission because it is always easier to turn to a statute book or a set of published procedural rules to find the basis for what is happening than it is to have to research what the customary law position is. Indeed, the absence of a full set of law reports covering a longer period than the current series does or even a place where one can turn for the "raw text" of judgments delivered by the Courts, and this is particularly the case in Sark, arguably compounds the problems of judge-made law in the Bailiwick. In those circumstances, I suspect that the answers offered even by members of the Guernsey Bar on the question of what the law is in this area are unlikely to be uniform. However, that in itself is not a reason to conclude that the law lacks certainty. Differences of opinion amongst Advocates can occur on how to construe a statutory provision. The key question, I think, is whether it can be said that there is material available from which an answer can be derived and from which a potential litigant can be given advice.

42. In general, in order to have some basis in domestic law, a party can refer to statute, some other form of written regulation or even to the common law (see, eg, *Murray v United Kingdom* (1994) 19 EHRR 193). It is not the form of the law that dictates whether there is a basis found in domestic law but its quality as law. The underlying rationale is that measures interfering with Convention rights protect against arbitrary interferences. That is why the public must be able to know that such an interference exists and is, therefore, potentially permissible. An authority cannot rely on something secretive because that would constitute an arbitrary interference. There must be an appropriate degree of foreseeability. This has been taken to mean that any common law principle relied upon, and in the context of Sark this can be read equally, in my view, as a reference to the customary law, is sufficiently clear and unambiguous so as to enable a citizen to understand the extent of any legal entitlement or obligation.

43. The customary law of Sark is, as I have stated, founded in *L'Approbation*. In my view, the principle that the customary law is able to evolve applies in Sark in a similar way to how it has been applied in Guernsey. I therefore agree with the judgment of the Court of the Seneschal on this issue. In *Morton v Paint* (*supra*), the Court of Appeal endorsed the aids to navigation given by Lord Lowry in his speech in *C (a minor) v Director of Public Prosecutions* [1996] 1 AC 1 (at page 28):

> "*(1) If the solution is doubtful, the judges should beware of imposing their own remedy. (2) Caution should prevail if Parliament has rejected opportunities of clearing up a known difficulty or has legislated, while leaving the difficulty untouched. (3) Disputed matters of social policy are less suitable areas for judicial intervention than purely legal problems. (4) Fundamental legal doctrines should not be lightly set aside. (5) Judges should not make a change unless they can achieve finality and certainty.*"

The final point relating to certainty is an important one because of the last of the three requirements relating to the qualified Convention rights engaged.

44. The Appellant suggests that the Respondent's reliance on the inherent jurisdiction of the Court of the Seneschal as the foundation for the relief sought is misconceived because it invited the Court to invent a new cause of action. Moreover, it involves invoking an entitlement that was acknowledged many centuries ago not to exist in English common law. However, I am not persuaded that what has taken place related to the invention of a new cause of action and that, in the absence of statutory intervention, the customary law position in relation to the type of relief sought in these proceedings is capable of meeting the aids to navigation anyway.

45. This is particularly the case since the entry into force of the Human Rights (Bailiwick of Guernsey) Law, 2000. Although it may not have been spelt out as explicitly as it might have been in the judgment of the Court of the Seneschal, the underlying tenor of the reasoning is

that the Court appreciated, as it was obliged to, that it is a public authority for the purposes of that Law and so has obligations imposed upon it not to act in violation of any person's Convention rights. If there are competing Convention rights, the Court is obliged to assess which of those rights should prevail. Any development to the customary law of Sark must respect the Convention rights that are to be engaged. If that principle were to be ignored, the Court developing the customary law would itself be acting unlawfully.

46. Simply by stating the position in that form in 2016 shows that the approach described in *Morton v Paint* (*supra*) needs to be modified slightly to take into account the Human Rights Law. It is worth remembering that the possibility of a Human Rights Law clearly post-dates that case, having had its origins indirectly in the manifesto promise of the Labour government that came to power in the United Kingdom in 1997. One of the key Convention rights engaged is Article 8 relating to the right to respect for private and family life. Because of the intervention of statute in other jurisdictions, the courts elsewhere have not had to consider how, if at all, to develop the common law (or customary law) position. In particular, no other court has had to consider what impact, if any, there is as a result of the Human Rights Law giving domestic effect to Convention rights and imposing obligations on a Court as a public authority not to act unlawfully. In my view, these differences are why the older commentaries on the position elsewhere to which the Appellant has referred cannot simply be adopted as reflecting Sark's customary law position today. Instead, it is necessary to look for a Convention-compliant solution, which is what has happened before the Court of the Seneschal.

47. When the Respondent's application said it was brought under the Court of the Seneschal's inherent jurisdiction, I regard this as a shorthand way of saying that there was no statutory provision that could be pleaded. In other words, the Respondent was relying on the customary law of Sark. Customary law can evolve, but its evolution is now subject to the principles derived from the Strasbourg jurisprudence and still needing to be sufficiently clear and unambiguous. If that were found not to be the case, such a development of the customary law would not be Convention-compliant. I therefore reject the Appellant's submissions that rely on there having been no similar developments elsewhere, because this involves making a comparison between different situations. The developments that have occurred elsewhere actually lend support, as in *Morton v Paint*, to a conclusion that the customary law is capable of reflecting those developments. As I have indicated, it is part of the Court's *parens patriae* jurisdiction to entertain cases relating to the protection of children. In my judgment, it would be an unsatisfactory state of affairs if the Respondent could not bring a case before the Court of the Seneschal in the circumstances in which these parties found themselves. *L'Approbation* did not crystallise the law so that only those matters that are mentioned in it can be pursued to the exclusion of all others. Statute has intervened in many areas. However, in those areas where Sark's statutory regime is less developed than other jurisdictions, judge-made law can compensate for the absence of legislative intervention, as happened here.

48. I am also satisfied that the aids to navigation apply anyway. The solution is not a doubtful one. There are many jurisdictions close to Sark in which the type of primary remedy sought by the Respondent is available. The basis on which a court approaches such an application is reasonably well settled. This is not an area where the Chief Pleas have rejected the opportunity to legislate. Indeed, it is widely known that the Chief Pleas had agreed in principle some years ago to have legislation dealing with children drafted and, had such legislation already been enacted, as it could have been had the project progressed more swiftly, there would potentially have been some statutory foundation for the Respondent's application in any event. Given the impetus that already existed to introduce a statutory framework, I do not regard the area as being one of disputed social policy. Indeed, there can be said to be recognition in Sark of the desirability of codifying the position in respect of remedies of the type sought in the present proceedings. Even so, there may still be occasions when the subject-matter of a case of this type is not contained within the legislation and the Court's inherent jurisdiction will be prayed in aid instead. I am not persuaded that there is any fundamental legal doctrine being set aside in a case such as this. Instead, I consider that

the Court of the Seneschal has acknowledged the importance of focusing on the protection of children through the exercise of its *parens patriae* jurisdiction to do so.

49. Turning to the principles set out in the ***Silver*** case, adopting similar reasoning, there is a basis in Sark's domestic law for the judgments made against the Appellant. The issue of accessibility is more borderline because of the nature of the type of case under consideration. Normally, the common law of England and Wales develops through published judicial decisions. In an area where the proceedings are usually held in private, it inevitably means that decisions of the Court are not made publicly available in the same way. A restricted reading of these principles could lead to the conclusion that the principles to be applied in a case such as that faced by the Appellant were not adequately accessible (and so also not adequately precise to enable the Appellant to appreciate what the consequences would be of acting or not acting in any particular way). However, to adopt such a restricted reading would, in my view, lead to the conclusion that the parties' Convention rights are left inappropriately imbalanced, whereas I am satisfied that the proper balance to strike is in recognising that the Appellant understood from the outset the basis on which the Respondent's application was made and, as a result, there is no question but that the Appellant, with the benefit of advice from an Advocate, understood sufficiently clearly what that application sought and the principles that would be applied by the Court of the Seneschal. Accordingly, I find that the Appellant was adequately aware of the approach that the Court of the Seneschal of Sark would take to the Respondent's application so that the Appellant's Convention right in Article 1 of Protocol 1 (and, to the extent necessary, the right also in Article 8) has not been violated.

Conclusion

50. For the reasons I have given, in places necessarily only in outline form so as to preserve the parties' identities, I reject the various grounds of appeal advanced by the Appellant in which it is argued that the Court of the Seneschal lacked the jurisdiction to grant the relief sought by the Respondent against the Appellant. In doing so, I find that the Court of the Seneschal is not a creature of statute in the sense of enjoying only the jurisdiction expressly conferred upon it by the measures relating to it. As a consequence, there is available to those seeking access to the Court of the Seneschal some form of inherent jurisdiction that can be prayed in aid to ensure that the Court is able to function properly as a Court. In particular, there is a *parens patriae* jurisdiction available because, if there were not, the people of Sark would be forced to make use of the equivalent jurisdiction of the Royal Court of Guernsey. In my view, that is an unacceptable outcome where the people of Sark are entitled to have recourse to the only court of justice in their Island. In the particular circumstances of these parties, I am also satisfied that there has been no violation of the Convention rights of the Appellant.