A v R
Court of Appeal
21st April 2017

JUDGMENT
23/2017

Appeal against a decision of the Royal Court, itself acting in an appellate capacity, by which it dismissed two appeals brought by the Appellant against orders of the Court of the Seneschal of Sark.

IN THE COURT OF APPEAL OF GUERNSEY

ON APPEAL FROM THE ROYAL COURT OF GUERNSEY
(ORDINARY DIVISION CIVIL APPEAL No. 469)

6th February 2017

BEFORE:

John Martin QC Presiding
Sir David Calvert-Smith
George Bompas QC

BETWEEN:

A **Appellant**

v

R **Respondent**

Judgment handed down: 21st April 2017

The Appellant and the Respondent were in person
Advocate Simon Hodgett as amicus curiae

JUDGMENT

MARTIN, J A:

Introduction

1. This is an appeal against a decision dated 13 June 2016 of the Royal Court (the Deputy Bailiff, sitting alone), itself acting in an appellate capacity, by which it dismissed two appeals brought by the Appellant ("the Father") against orders of the Court of the Seneschal of Sark dated 5 March 2015 and 9 July 2015. Those orders concerned awards of maintenance made in favour of the Respondent ("the Mother"), in respect of a child ("the Child") of whom she and the Father are the parents.

2. The Father now appeals to this court. Both he and the Mother have represented themselves. The Father is, however, qualified as an advocate in Guernsey and the Mother had the assistance of a McKenzie friend. Advocate Hodgett appeared at our request as amicus curiae, and we are grateful for the help he gave us.

3. The Father and the Mother, who are both German nationals, have never married. With the Child (who was born outside Sark) they lived together in Sark until February 2012, when the Mother and the child moved to Austria. Shortly thereafter the relationship between the Father and the Mother broke down. Early in 2013, the Father started proceedings in Austria. While these were pending, the Mother returned to Sark, and on 28 January 2013 she commenced proceedings in the Court of the Seneschal seeking a maintenance order and a sole care and control order in respect of the Child. The expressed basis of her claim was the inherent jurisdiction of the Court of the Seneschal.

4. Since then the Father and the Mother have been locked in almost continuous litigation over the future of the Child. This litigation has been conducted chiefly before the Court of the Seneschal and the Royal Court (which is of course the first instance appeal court from the Court of the Seneschal). As explained below, although from time to time notices of appeal have been given by the Father to appeal decisions of the Royal Court to this Court, the present are the first appeals to this Court which have been pursued by him to a hearing and decision: the remainder have been abandoned.

Procedural history

5. In summary, the procedural history of the litigation up to Royal Court's decisions now under appeal is as follows.

6. On 30 May 2013 the Seneschal ruled that he had jurisdiction to entertain the proceedings. He declined to stay the proceedings on the ground of forum non conveniens in favour of the Austrian courts. The Father gave notice of appeal against that decision on 1 July 2013, but he has not pursued that appeal.

7. On 26 July 2013 the Mother issued an application for interim maintenance. On 14 August 2013 the Seneschal made an order for interim maintenance of £1037 per month.

8. On 4 October 2013 the Seneschal made an order, in the absence of the Mother, that the Child was legitimate according to the law of his domicile (which was held to be Germany); that under the law of Sark sole and exclusive custody, care and control of a legitimate child was accorded to the father; and that in the circumstances the Sark Court had no power to entertain the Mother's application for maintenance and care and control. The interim maintenance order made on 14 August 2013 was revoked.

9. On 25 November 2013, the Royal Court allowed the Mother's appeal against the Seneschal's order of 4 October 2013 and discharged that order. That had the effect of reinstating the Seneschal's interim maintenance order of 14 August 2013.

10. On a date in 2013, the Father gave notice of appeal against the Royal Court's decision of 25 November 2013. Apart from an interlocutory hearing referred to in the next paragraph, the Father has not pursued that appeal.

11. On 19 December 2013 the Royal Court made an order, in the context of the Father's appeal against the order of 25 November 2013, for (among other things) payment of interim maintenance amounting in aggregate to £2100 per month. The Father gave notice of appeal to this Court against that order, but again he has not pursued that appeal.

12. There then occurred five hearings before the Court of the Seneschal, resulting in orders dated 29 May 2014, 28 July 2014, 12 September 2014, 6 October 2014, and 9 February 2015. These hearings were conducted by Lieutenant Seneschal Merrien. The combined effect of his judgments was that the Child was illegitimate according to the law of Sark; that even if German law applied, the child was illegitimate by that law; that both parents had the opportunity to apply to the Court of the Seneschal in relation to custody; that the Mother was entitled to judgment for the interim maintenance awarded to her by the Seneschal's order of 14 August 2013 and part of the interim maintenance awarded to her by the Royal Court's order of 19 December 2013; and that she was entitled to summary judgment for £2193.71 arrears of maintenance and interest outstanding at the date of the last of those hearings.

13. On 5 March 2015 the Lieutenant Seneschal made an order in favour of the Mother for permanent maintenance of £1800 per month until the child was 18 or ceased to be in full-time education.

14. On 14 April 2015 the Father gave notice of appeal against the order of 5 March 2015. This was the first of the Father's live appeals to the Royal Court.

15. On 9 July 2015 the Lieutenant Seneschal gave judgment in favour of the Mother for arrears of maintenance in the sum of £28,317. The arrears were amounts unpaid in respect of maintenance ordered by the Seneschal's order of 14 August 2013 and by the Royal Court's order of 19 December 2013.

16. On 18 August 2015 the Father gave notice of appeal against the order of 9 July 2015. This was the second of the Father's live appeals to the Royal Court.

17. On 4 January 2016 the Royal Court stayed the order of 9 July 2015 pending the appeals, but not the order of 5 March 2015; and, as explained at the outset of this Judgment, on 13 June 2016 the Royal Court dismissed both of the Father's appeals.

The Royal Court's judgments

18. The reasoning supporting the Royal Court's decision was set out in two clear and comprehensive judgments.

    a. One of these dealt with arguments made by the Father that the Court of the Seneschal was a subordinate court created by statute and lacked any jurisdiction in relation to children, and that the relief granted was not "provided for by law" as required by the European Convention on Human Rights. This judgment was intended to be accessible to the public.
    b. The second of the judgments expanded on certain aspects of the reasoning in the public judgment, and resolved the issues between the parties, but at the same time gave details from which the Child would be capable of being identified. This judgment was given in private.

19. The Deputy Bailiff expressed his conclusion in the public judgment as follows:

> "... 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."

20. His conclusion in the private judgment was expressed in the following terms:

> "100. For the reasons I have given in this judgment, incorporating the specific reasons set out in the separate judgment which is being delivered in public, I am quite clear that the Court of the Seneschal had jurisdiction to make an order for the payment of £1,800 per month by the Appellant to the Respondent in respect of [the Child].
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> 101. In order to try to avoid having to pay a fair amount in respect of his son, among the numerous grounds of appeal pleaded, the Appellant has mounted a challenge going to the heart of that Court's jurisdiction as the sole court of justice in Sark. His submissions raise difficult questions about the history of that Court and its relationship with the Royal Court of Guernsey, which had not been addressed before the Court of the Seneschal itself, as well as how to regard the customary law of Sark in light of the requirements of the European Convention on Human Rights. I have rejected his submissions because, in a modern, rights-based society, which is the effect of the Human Rights Law as it applies in Sark, I regard it as unconscionable that a parent in Sark would have no remedy before a Court in Sark in the circumstances in which the members of the parties' family find themselves. Put simply, it offends against my notion of the extent of justice that should be available, and so is available, in a British jurisdiction. In reaching that conclusion, I am conscious that the limitations of jurisdiction for which the Appellant has contended in respect of the Court of the Seneschal are accepted by him not to apply to the Royal Court. Consequently, it seems that he is arguing that the Respondent's proceedings could only have been commenced before the Royal Court and that this Court, exercising its original jurisdiction, could have been invited to determine the matters raised by the Respondent's application of 28 January 2013. However, this was not the position he took on being served with the original summons. It is an argument that has only fully crystallised very late in the day. I could have dismissed these grounds of his appeal without more ado on the basis that the Appellant had submitted to the jurisdiction of the Court of the Seneschal for the purpose of obtaining relief from it and so cannot now resile from that position. I have instead addressed the various submissions made to me on this question because my view on them may be helpful if the matter proceeds to another Court.
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> 102. Having dismissed the main jurisdictional and legal certainty grounds of appeal, I was satisfied that the Lieutenant Seneschal had not made any factual findings that were perverse and that his overall approach resulted in an order that was rational. He had not misdirected himself on the law and the more appropriate remedy for the Appellant is to do as he has done, namely to apply to vary the award on the basis of changed circumstances. The appeal against the maintenance order of March [2013] is, therefore, dismissed."

The Appellant's contentions

21. In the private judgment, the Deputy Bailiff commented on the fact that the Father's notice of appeal against the March 2015 order contained 47 separate paragraphs, and the notice of

appeal against the July 2015 order contained 78 paragraphs. He said that he had struggled at times to understand exactly what it was the Father was complaining about and how it possibly affected the lawfulness of the two decisions. This message was plainly lost on the Father, since his notice of appeal to this court contained no fewer than 242 paragraphs, each advanced as a separate ground of appeal. This is unacceptable from any litigant, and particularly so from an Advocate of the Royal Court (as the Father is). We invited the Father to identify no more than ten questions that he contended needed to be resolved by us. We have based our consideration of the Father's case on the document he produced in response to this invitation and on his oral submissions to us: these embraced the core of his complaints about the disposition of his appeals to the Royal Court.

22. We should mention also that after we had concluded the hearing we received further written submissions from the Father; but, since he had not indicated that he might seek to file these submissions, or sought permission to do so, and as neither the Mother nor the amicus had had an opportunity to comment on them, we have had no regard to them.

23. The ten questions identified by the Father, with their many sub-questions, are as follows:

    1) What is the jurisdiction and inherent Jurisdiction (if any) of the Court of the Seneschal and where is it derived from?
        a) Has the Court of the Seneschal been set up by statute / Order in Council / Ordinance?
        b) Is the Royal Court of Guernsey the superior court to the Court of the Seneschal (which is an inferior court or subordinate court)?
        c) The extent of the Sark Court's jurisdiction (e.g. is it a court of limited or general jurisdiction; does it include divorce, judicial review etc.) and what is its inherent jurisdiction (if any)?
        d) Does the inherent jurisdiction cover the whole subject matter of the application of 28 January 2013 and the application for interim maintenance (see Angenent v Pring) and / or the parens patriae jurisdiction (for any child and specifically a child which never was found to be at risk or in need)?
        e) Can the inherent jurisdiction be lawfully exercised in accordance with the Rule of Law (see Lord Bingham at para 12 of the grounds of appeal– tab 2) and the European Convention of Human Rights when such exercise would interfere with the Human Rights of the Father and / or his property rights (Entick v Carrington)?
        f) Should in the current circumstances the inherent jurisdiction (if any) have been exercised in the way it was by the Sark Court in respect of the interim and / or final maintenance?

    2) Does the Sark Court have jurisdiction in respect of a child which was
        a) not born in Sark;
        b) is not domiciled in Sark;
        c) was not present in Sark at the time the Summons was signed on the morning of 28 Jan 2013 or at any time during the previous 11 months; and
        d) where (according to para 6 of the Mother's chronology) both parents have agreed that the child would live in Austria? Was it lawful for the Mother to move the child various times between Austria and Sark without knowledge or consent of the father or the Sark court;
        e) where the mother was not classified as resident in Sark during the previous year (and returned to Austria during the proceedings (30 August 2013) with no intention of returning to the Bailiwick); and

f) *the father was habitually resident elsewhere (in Malta) at the time the Summons was signed (and EU regulations require service within the EU); and*

g) *should the Sark Court have declared that it does not have jurisdiction and / or declared Sark to be forum non-conveniens?*

3) *Is it the Mother's burden of proof at the outset of the proceeding in the Court of first instance to provide the legal basis for her claim and the remedy sought (i.e. periodical payments from the father to the mother for the maintenance of the child in a situation where the father is willing to look after the child (and shared residence is now in place based on the Order of 19 December 2013)? If not, when does the law (to be applied to the specific facts) need to be stated to ensure a fair trial?*

4) *Which law should be applied by the Sark Court to the application of the Mother dated 28 Jan 2013, Sark Law or the law of domicile (Austria or Germany)?*

5) *What (if any) is the exact law which the Court of the Seneschal must apply to the facts of this case in accordance with the legislation which governs the Sark Court (can it apply anything other than statute as approved by Her Majesty, does it have jurisdiction to deal with persons rather than only movables and immovables); and Is the interference of the Court based "on a law which could be described as sufficiently accessible and precise to avoid any risk of an arbitrary decision." (see ECtHR in Faure v France (tab 82)) and otherwise complies with Silver v UK (tab 61) and what are the conditions on which the public authority is allowed to interfere and which are the factors and formula to be considered (e.g. shared residence, number of minor siblings)?*

   Can the exact law governing the obligations of one citizen to pay child maintenance be different from the law governing a different citizen based on whether that citizen is – say - a lawyer or - say - a medical doctor?

6) *Is it lawful for the Court of the Seneschal to deliver a final judgment in respect of Maintenance prior to delivering a judgment on custody, care and control and shared residence when all applications originate from the same Summons dated 28 January 2013 and when a number of applications have not yet been dealt with (e.g. accounting for funds received by the Mother from the Father, removal of false allegations from the internet, application for contempt of court)?*

7) *Was the Sark Court bound by the authorities of a) Angenent v Pring (stating that there shall not be any interim judgments without express authorisation in statute) b) Woodward v Falla (declaring that the Royal Court of Guernsey has in all matters concurrent jurisdiction with the Court of the Seneschal and should deal with complicated matters) and c) Morton v Paint?*

8) *Is a determination that the factual conditions of Morton v Paint are not met a determination of fact (which the Royal Court as an appeal court should not set aside) and / or is the Royal Court right that the conditions met?*

9) *Is the Sark Court entitled to grant summary judgment without existing substantive law and / or adopting civil procedure governing summary judgments?*

10) *Is the Royal Court acting on appeal and without a formal application on 19 December 2013 entitled to order additional maintenance covering Austrian*

expenses (incl. substantial rent in Austria for which there was no ongoing obligation and where the Mother and the child were not registered) without hearing evidence and legal submissions when a maintenance of £1,037 / month was already applicable and the father was looking after the child 50% of the time)?

24. Some of these questions seek to raise issues that the Father is not entitled to pursue on this appeal. Question 2 concerns questions of jurisdiction that were decided against the Father by the Seneschal on 30 May 2013. Question 4 raises an issue about the applicable law that on 31 July 2014 the Lieutenant Seneschal decided made no difference to the outcome. Question 10 challenges one aspect of the Royal Court's decision dated 25 November 2013. The Father instituted appeals against all these decisions, but has not pursued them. It is now far too late to resurrect them; and in the case of the appeals against the Deputy Bailiff's decisions of 25 November and 19 December 2013 the Father is deemed to have abandoned his appeals by virtue of rule 9 of the Court of Appeal (Civil Division) (Guernsey) Rules 1964.

25. As a footnote to this, we reject the argument made by the Father that this result could be affected by any expressions of encouragement made from time to time by the Royal Court to the parties to "step back from the procedural morass into which all these proceedings in respect of [the Child] are sinking and to concentrate on getting some certainty in [the Child's] life" (paragraph 22 of the Deputy Bailiff's judgment of 19 December 2013). To date there is no sign that these expressions have been heeded.

26. The issues raised by the remaining questions appear to us to boil down to three questions: (a) does the Court of the Seneschal have any jurisdiction in matters concerning children? (b) if so, does that jurisdiction extend to the award of maintenance? and (c) if so, is the law relating to that jurisdiction sufficiently accessible and precise? We deal with these issues in turn.

27. Question (a), as it has been argued before us, is primarily directed at the scope of the powers of the Court of the Seneschal, as a court, rather than at the substantive laws of Sark as applicable in relation to this case. It is question (b) which is concerned with the law applicable in Sark, where the Father, the Mother and the Child all reside at present. As to this, the relevant Sark law, other than in the case of certain Bailiwick-wide legislation, is not necessarily the same as the law of Guernsey or Alderney

28. Since the Royal Court's orders now under appeal the Children (Sark) Law, 2016 has come into effect. It may be expected that in the future such cases as the present will normally be resolved under that Law.

Jurisdiction concerning children

29. The Father's principal argument was that the Court of the Seneschal was an inferior court with no inherent jurisdiction and an ability to deal only with matters where jurisdiction had been expressly conferred on it by legislation or by ordinance of the Guernsey Royal Court.

30. In his public judgment, the Deputy Bailiff dealt extensively and – except in one minor respect – accurately with the evolution of the Court in Sark since 1565. A Royal Charter of that year confirmed the grant of the Fief of Sark to the first Seigneur, Helier de Carteret, Seigneur of St Ouen in Jersey, and gave him the right to hold a manorial Court. In 1579 the inhabitants of the island established a court administering the laws, customs and usages of Jersey, presided over by a Bailiff and with twelve Jurats, a procureur "of her Majesty the Queen and also of the said Seigneur in the said isle of Sark", and other officials. In 1581, and again in 1582, however, the Royal Court of Guernsey called on the Seigneur to explain

by what authority Jurats and other officers had been established in Sark and the law of Guernsey rejected in favour of the law of Jersey. On 24 April 1583 an Order in Council made in response, among other things, to "demands of jurisdiction made by the Bailly and Jurats of Guernsey", appointed laws and usages for Sark, including that there be five (or seven, if the population increased) Jurats chosen by the inhabitants of Sark, "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 the superior Justice, in all causes as is used in Alderney"; and "that, in Sark, the inhabitants shall observe the ancient laws and customs confirmed, to be established by her Majesty, as in Alderney". Ecclesiastical matters were reserved to the jurisdiction of the Bishop of Winchester. The Order in Council also recorded that the Seigneur had petitioned "that there might be a Seal authentical granted by Her Majesty within the said Isle, to serve in causes of common justice arising within the same between party and party", but that petition had been denied "as not expedient to be granted".

31. The Deputy Bailiff then went on, at paragraph 10 of his public judgment, to quote what is described in de Carteret and Ewan, *The Fief of Sark*, as a further part of the 1583 Order in Council, but is in fact on the material available to us an ordinance of the Royal Court made on 16 July 1594 to give effect to the regime prescribed by the Order in Council. The recitals to the Royal Court's ordinance were as follows:

> "Sur ce qu'il a plus à Messeigneurs du très honorable Conseil Privé de Sa Majesté ordonner qu'en l'Isle de Sark, étant membre et relevant de la jurisdiction de la dite Isle de Guernesey, et à laquelle a été annexé temps dont mémoire n'existe du contraire, y auroit une jurisdiction et officiers établis pour l'administration de la justice et police de la dite Isle, comme est porté par l'ordre sur ce fait à Greenwich le 24^{e} Jour d'Avril, 1583 : Nous, pour cet effet, étant assemblez en la dite Isle de Serk, avons posé et établi Cour, jurisdiction et officiers en la dite Isle, lesquels officiers ont été jurez et sermentez à leur dites offices, ainsi qu'à tels cas appartient, étant choisis et approuvez par la généralité des inhabitants de la ditte Isle de Sark."

The Ordinance went on to state the following (among other things):

> "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 Guernesey, tant conformes aux loix et coûtumes de Normandie, et aux coûtumes localles de la ditte lsle de Guernesey approuvez, différentes de la coûtume de Normandie.
> Jugeront les ausdits Jurez de toutes causes civiles, tant en cause de meuble que d'héritage, 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, pourvu qu'il n'y ait matière de crimes, auxquels cas les dits Jurez seront tenus envoyer, par le Prevôt de la dite lle, leurs corps avec la cause, à la Justice de Sa Majésté en la dite Isle de Guernesey, pour y procéder, comme sera expédient. Et de ce qui sera fait et passé devant eux en garderont et donneront fidelles records.
>
> De toutes sentences et jugements des dits Jurez excédant la valeur de dix livres Tournois en meuble et de toute cause en heritage sera libre à un chacun d'en appeller à la Cour Royale de Guernesey."

32. The court so constituted survived until 1675. In that year, the Privy Council intervened again as a result of the refusal of the Jurats of Sark "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"; and the Order in Council dated 19 May 1675 recording that fact went on to order and direct

"… 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".

33. The Deputy Bailiff dealt with the effect of these materials in the following way:

"[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 established 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 prive Observe au Pays & Duche 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."

34. We agree with this analysis. In our judgment, the clear effect of the 1583 Order in Council was to provide for the establishment of a local court in Sark with a jurisdiction exercised by local Jurats equivalent to that of the Jurats of Alderney. From 1585, the Jurats of Alderney were required to administer justice in all civil causes arising in the island according to the law of Guernsey as codified in the *Approbation des Loix*, to refer criminal causes to the Royal Court of Guernsey, and to allow appeals to the Royal Court (see Ogier, *The Government and Law of Guernsey*, second edition, page 194). Despite the absence of a seal, the Court of the Seneschal was – like the Court of Alderney – more than a manorial court. It had full jurisdiction in civil cases, subject to an appeal to the Royal Court.

35. The 1594 Ordinance was designed to implement the 1583 Order in Council, not to derogate from it. It correctly recited that Sark came under the jurisdiction of Guernsey; but the powers conferred by it on the Jurats of Sark were broadly equivalent to those available to the Jurats of Alderney, and amounted to an unlimited civil jurisdiction – in translation, "the said Jurats shall judge all civil cases concerning personalty and realty" - with a right of appeal to the Royal Court in all cases concerning realty and in cases concerning personalty above a defined value.

36. There is no suggestion in the 1675 Order in Council that it intended to change the jurisdiction of what became the Court of the Seneschal: the problem that the Order addressed was a problem of personnel, not a problem of jurisdiction. It dealt with it by giving the Seigneur a right of nomination equivalent to that exercised by a Lord of a Manor; but that was a matter of mechanism, and did not imply a reduction in jurisdiction.

37. There was a further development in 1922. In that year, the Order in Council relating to the Constitution of Sark provided (by article 13) that:

> "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".

38. On 5 October 1931 the Royal Court of Guernsey made the *Ordonnance portant Règlement quant à la Jurisdiction de la Cour de Serk*, which provided by Article 1 as follows:

> "La Cour de Serk aura le droit d'entendre et de juger de toute cause soit en meubles soit en immeubles, pourvu toute fois qu'il y aura appel de la sentence de la Cour de Serk à la Cour Royale de l'Ile de Guernesey par l'une ou l'autre partie".

39. The 1922 Order in Council was replaced by the Reform (Sark) Law 1951, which was in turn replaced by the Reform (Sark) Law 2008. Each of these preserved the pre-existing jurisdiction of the Court of the Seneschal and stated that that court should be the sole court of justice in Sark. Thus the jurisdiction of the Court of the Seneschal in civil matters remains that defined by the *Ordonnance portant Règlement quant à la Jurisdiction de la Cour de Serk* made in 1931; and that Ordinance confirmed a position in relation to jurisdiction that had subsisted without change of substance since 1583.

40. The civil jurisdiction of the Court of the Seneschal excluded, initially at least, ecclesiastical matters. There was and is an Ecclesiastical Court in Guernsey, whose jurisdiction (again initially) included the regulation of matrimonial affairs and matters concerning education: see Ogier, op cit, page 23. It did not have a more general jurisdiction in relation to children. In our judgment, it was the Court of the Seneschal, as the sole court of justice in Sark with an unlimited jurisdiction in relation to civil matters, that always in principle had jurisdiction in Sark to regulate the relationship between parents and children as provided by law.

Jurisdiction to award maintenance

41. The 1583 Order in Council had the effect of establishing that the law to be applied in Sark was that set out in the *Approbation*. The Father contended that the law set out in the *Approbation* could only be changed by legislation; but it is clear that the *Approbation* did not define once and for all the state of the customary law of the Bailiwick of Guernsey. The customary law, like the common law of England and Wales, is capable of development to adapt to changing circumstances. As the Deputy Bailiff pointed out, cases such as *Morton v Paint* (1996) 21 GLJ 61 cannot be explained on any other basis. Accordingly, the question is whether material exists from which it can be determined that the customary law of Sark has developed to allow the Court of the Seneschal to award maintenance for children, in particular in this case for illegitimate children.

42. In our judgment, there are two sources of material which demonstrate that the customary law of Sark allows the Court of the Seneschal to award maintenance. The first of those sources is the *Loi relative à l'entretien des Enfants Illégitimes*, registered on 14th March 1868. This Law, which had Bailiwick-wide application, set out a prescription period for an "action pour la garde nourriture et entretien d'un enfant illégitime". The 1868 Law is thus a clear recognition of the existence in the law of the Bailiwick of a right of action for the maintenance of an illegitimate child. Since there appears to be no earlier statute on this issue conferring the right of action, the right can only have been one conferred by the customary law.

43. In 1927 the *Loi relative a l'entretien des Enfants Illégitimes* was enacted in Guernsey. This law provided a statutory basis for the making of maintenance orders in respect of children of unmarried parents. This law was not Bailiwick-wide, however, and did not touch the position in Sark, where existing customary law remained unaffected. Nevertheless, in his private judgment the Deputy Bailiff drew attention to this, and to subsequent changing law and attitudes in a jurisdiction, Guernsey, both neighbouring and important to Sark; and (we think correctly) he drew from this support for the proposition that the customary law was subject to development in line with such changing attitudes.

44. The second source consists of a record of a case in which the Court of the Seneschal has in the past awarded maintenance, and its ability to do so has not been disputed by the Royal Court. The position was described by Crown Advocate Sewards, who appeared as amicus before the Deputy Bailiff, in the following terms:

> "15. Research of the records of the Court of the Seneschal and of the Royal Court does reveal cases which recognise a jurisdiction to award what is, on any analysis, "maintenance". The handwritten extract from 'Sark Extract Volume C 1565 to 1883' describes a case in which Philippe Guille, the guardian of Jean Guille his minor son, is actioned by George de Carteret, the tuteur of Jenny de Carteret, and also money for the maintenance of the natural child of Jenny de Carteret until that child attains the age of 16. The Seneschal ordered in favour of the applicant.
>
> 16. The same case was subsequently appealed. The attached record shows that the appeal was successful, apparently on the grounds that Jenny de Carteret 'a été publique à plusieurs autres'. Had the Royal Court considered there to be no jurisdiction for the Court of the Seneschal of Sark to award maintenance, one might expect that to have been set out as an additional reason for the successful appeal."

45. It appears, therefore, that the jurisdiction to award maintenance is of long standing; and we have no hesitation in holding that it was available to the Court of the Seneschal when the orders now appealed against were made.

Law sufficiently accessible and precise?

46. The Father contended that the nature and extent of the jurisdiction of the Court of the Seneschal to award maintenance were too unclear to satisfy the requirement that laws should be accessible and precise. He referred us to the decision of the European Court of Human Rights in *Silver v United Kingdom* (1983) 5 EHRR 347, where the Court said this:

> "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.)."

47. In our judgment, the state of the law of Sark relating to maintenance satisfies the requirements of certainty and accessibility. That is particularly so in the light of the 1868 *Loi relative à l'entretien des Enfants Illégitimes*, which as we have said unequivocally indicates the existence of a cause of action for maintenance of illegitimate children. The fact that this statute may not be easy to find does not mean that the law it recognises is inaccessible. The law can be ascertained, if necessary with some research and some assistance. Moreover, as the Deputy Bailiff pointed out, the concept of maintenance for children, legitimate or otherwise, is one which is known to the majority of developed legal systems; and it is difficult to accept that the Father cannot have foreseen that he would be liable to support his child. Indeed, although the history of the litigation may suggest otherwise, he has always maintained that he is willing and ready to provide support, albeit directly rather than through the Mother.

48. The Father also complains that the jurisdiction to award maintenance cannot be regarded as part of any inherent jurisdiction that the Court of the Seneschal may possess; and the Mother's application of 28 January 2013 to that court at the outset of all this litigation had referred to that court's "inherent jurisdiction" as the basis for the orders claimed by the Mother.

49. In our view, the answer to this point is the one given by the Deputy Bailiff in both his judgments, namely that the reference to the inherent jurisdiction was "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" (paragraph 47 of the public judgment). The Father has taken an unnecessarily technical view of the import of the reference to the inherent jurisdiction: on any fair reading of the Mother's application, the Father can have been in no doubt about what she was seeking and why.

Miscellaneous

50. Having considered the three core questions raised by the Father on his appeal, we should refer to a few miscellaneous points. The first concerns the three authorities referred to in the seventh of the Father's questions set out in paragraph 23 above.

51. We could simply say that we consider that the Deputy Bailiff's judgments had sufficiently taken into account these authorities and had reached conclusions with which we agree. We nevertheless explain a little further why we do not accept that the Father can successfully found an appeal on these three authorities.

52. By reference to the case of *Matthews v Monaghan; Wood v R.G. Falla Ltd* [2000-02] GLR 53 it was submitted that the Deputy Bailiff had "erred in not acknowledging ... that there are cases which are too complex to be considered in a court which does not regularly deal with such cases and/or where the judge is a lay person and/or has no or limited professional education, training or experience". The argument appears to be that the Royal Court has a concurrent jurisdiction with the Court of the Seneschal (in addition to its appellate jurisdiction) and that this must be invoked in cases of complexity, meaning that the proceedings before the Court of the Seneschal were somehow invalidated.

53. There is nothing in this argument. If indeed the Mother's proceedings could have been initiated and pursued before the Royal Court as a court with concurrent jurisdiction with the

Court of the Seneschal (and we note that in *R (on the application of Sir David Barclay) v Secretary of State for Justice* [2015] 1 AC 276, at [20], the United Kingdom Supreme Court stated that the Royal Court had concurrent first instance jurisdiction in civil matters), it does not follow that the proceedings before the Court of the Seneschal were improperly constituted or resulted in orders which were ineffective. The jurisdiction of the Court of the Seneschal in civil matters is unlimited, and there is no rule of law or practice that the jurisdiction should not be invoked or exercised in complex matters. But in any event the *R.G. Falla* case is unsurprising. Resulting from an accident on Brecqhou proceedings were brought in the Royal Court by the plaintiff workmen against the main contractor. The proceedings could have been brought in the Court of the Seneschal; but there were obvious practical advantages for the plaintiffs in proceeding in Guernsey. The defendant company sought to have the proceedings dismissed for want of jurisdiction. It did not take any point as to service, forum non conveniens or the like. The argument was that the Royal Court could not hear the case because the Court of the Seneschal had, as between the two courts, exclusive jurisdiction. This argument was rejected. The Royal Court (Carey, Bailiff) held that there was no law of Guernsey or Sark which prevented the Royal Court from entertaining an action between parties properly before it, even though the action could have been brought in Sark. The Bailiff did say that as a matter of discretion he would have regarded Sark an unsuitable forum for the particular action, given the complexity of case with its parties, witnesses and lawyers with no connection with Sark. But that case was quite different from the present, as to which purely domestic considerations apply.

54. By reference to *Angenent v Pring* [2005-06] GLR 1 it was submitted that because the Royal Court does not have jurisdiction to award interim payments, the Court of the Seneschal should be found not to have any such jurisdiction, and that therefore the Court of the Seneschal could not have made the orders for interim maintenance payments which founded the Lieutenant Seneschal's judgment of 9 July 2015 for £28,317 for sums ordered but unpaid.

55. In his public judgment the Deputy Bailiff considered and rejected the Father's submissions concerning the impact of *Angenent v Pring*. The latter case concerned the ability of a court to make an order, in the absence of statutory provision, for payment on account of a liability which has yet to be established in pending proceedings. The orders for interim maintenance on the other hand are themselves orders determining the obligation and quantifying the liability of the person ordered to pay the amounts in question on a continuing basis. They are not for payments on account of a future liability.

56. The third case is *Morton v Paint* (1996) 21 GLJ 61. This was referred to by the Deputy Bailiff in both of his judgments (at paragraph 53 of the private judgment and paragraphs 46 to 48 of the public judgment). The case was concerned with the development of the coutume and common law of Guernsey. The Court of Appeal of Guernsey, in the context of a case concerning occupiers liability, looked at the way common law evolves, both in other common law jurisdictions and in Guernsey. The fundamental conclusion was that, notwithstanding comparatively recent legislation in England to change the common law there as regards occupiers liability, it was open to the court in Guernsey to continue the development of the law of Guernsey.

57. In reaching their conclusion in *Morton v Paint* reference was made, in the judgment of Southwell JA, to the five "aids to navigation" identified by Lord Lowry in *C (a minor) v Director of Public Prosecutions* [1996] 1 AC 1 HL(E) at 28. Southwell JA commented that these aids "can and should be applied by the Courts of Guernsey just as much as by the English Courts, but bearing in mind that the development of the civil common law by the Courts is more readily undertaken than that of the criminal common law".

58. Lord Lowry's five aids are as follows: "(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 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."

59. In the present case the Deputy Bailiff had regard to these aids and, for the reasons he gave (at paragraphs 47 and 48 of his public judgment), held that it was in accordance with these aids to find that in Sark the customary law made a parent liable to pay maintenance in respect of the parent's child, and that someone placed as the Mother was could bring a case before the Court of the Seneschal for relief for the welfare of a child.

60. Finally, the Father's grounds of appeal had included challenges to the Deputy Bailiff's rejection of criticisms of factual findings made by the Lieutenant Seneschal in his judgments. An appellate court's powers to interfere with findings of fact are limited. In the event the Father did not develop orally these challenges. As we saw nothing in them, we need say no more about them.

Conclusion

61. For the reasons we have given, we dismiss this appeal. We would add that we entirely agree with the sentiment expressed by the Deputy Bailiff in the postscript to his private judgment, where he points out that the parties owe it to the Child to have the issues between them resolved as quickly as they can be accommodated by the courts. It is the Child's long-term interests that should govern the parties' actions, and the longer they remain locked in litigation the more those interests will be neglected.