

its judgment dated 28 November 2017. The Court of Appeal allowed an appeal by the Plaintiffs and Appellants in the judgment which is the subject of the present application and awarded damages, including legal fees incurred by the Plaintiffs and Appellants.

3. The Act of Court following the judgment of the Court of Appeal was dated 27 June 2018 and was in the following terms:

- “1. Allowed ground 1 of the appeal and made no determination in respect of grounds 2 and 5.
2. Dismissed grounds 3 and 4 of the appeal.
3. Ordered that the Respondents pay the Appellants damages in the sum of £21,733.74 within 28 days hereof.
4. Ordered that the Respondents pay such additional sum in damages in respect of the fees of Carey Olsen as claimed at paragraph 11(b) of the Cause as may be agreed within 21 days failing which that issue to be remitted to the Royal Court for determination.
5. Ordered that the Appellants be awarded costs at the recoverable rate in respect of the appeal and the proceedings before the Royal Court.”

It is not necessary to refer in detail to the grounds of appeal which were addressed in the Act save to note that ground 1 was the substantive ground upon which the appeal was allowed. In summary, it was submitted in ground 1 that the Deputy Bailiff had wrongly found as a question of construction of the relevant conveyances that the Defect did not exist. In ground 2, it was submitted that the finding made by the Jurats that no Defect existed was perverse.

4. The Defendants and Respondents wish to appeal to Her Majesty in Council against paragraphs 1, 3, 4 and 5 of the Act of Court.

The legislative position

5. The jurisdiction of the Judicial Committee of the Privy Council is described in Section 2 of Practice Direction 1 of the Judicial Committee. In particular, that provides:

“2.1 An appeal lies from the countries listed at paragraph 2.2... and from... Crown Dependencies as follows:

1. By leave of the local Court of Appeal. The circumstances in which leave can be granted will depend on the law of the country or territory concerned. Leave can usually be obtained as of right from final judgments in civil disputes whether the value of the dispute is more than a stated amount...
2. By special leave of Her Majesty in Council. The Judicial Committee has complete discretion whether to grant leave... it is sometimes granted in civil cases where the local Court of Appeal has for any reason refused leave.”

The Crown Dependency of Guernsey is one of those listed in paragraph 2.2.

6. The procedure which applies in Guernsey to an appeal from a decision of the Court of Appeal to the Judicial Committee of the Privy Council is provided in section 16 of the Court of Appeal (Guernsey) Law 1961 (“the 1961 Law”). The meaning and effect of section 16 were addressed in the decision of the Board of the Judicial Committee of the Privy Council in A v R [2018]

UKPC 4. In his judgment on this issue, and insofar as material for the purposes of this judgment, Lord Hodge said:

- “2. This application raises an important question as to the circumstances in which an applicant needs permission to appeal to the Board from a judgment of the Guernsey Court of Appeal...
3. There appears to be uncertainty in Guernsey about when an appellant needs leave to appeal to the Board from the Court of Appeal of Guernsey in civil matters. As a result, the Board invited written and oral submissions on whether special leave was required in this appeal and whether it should be granted.
4. Section 16 of the Court of Appeal (Guernsey) Law 1961 provides:

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

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

5. ...
7. Section 16 of the 1961 Law provides for an appeal as of right. The section begins with a general rule prohibiting an appeal to the Board from the Court of Appeal without leave of the Court of Appeal or special leave of the Board. But it then goes on to exclude from that prohibition judgments where the value of the matter in dispute is £500 or more. In relation to such decisions the 1961 Law gives an appeal as of right; and it is beyond the power of the courts to contradict that legislation. The Board therefore agrees with counsel for both A and R that the *Emerald Bay* and *Investec* cases were wrongly decided.
8. An appellant's appeal as of right does not mean that the Court of Appeal has no control over the appeal. Orders in Council in many jurisdictions with appeals as of right to the Board provide for the appellate court to grant final leave to appeal only after the appellant has provided security for costs and complied with other prescribed procedural conditions, such as the preparation of the record of proceedings. More generally, a court of appeal has power to make sure that there is a genuinely disputable issue within the category of cases which are given an appeal as of right. Thus in *Alleyne-Forte v Attorney General of Trinidad and Tobago* [1998] 1 WLR 68 Lord Nicholls of Birkenhead, delivering the judgment of the Board, stated (p 73):

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

9. The Board's Practice Direction 1 para 2.1 recognises the right of local courts of appeal to grant leave in appeals as of right and thus to police the application for leave as the Board envisaged in *Alleyne-Forte* . This practice was upheld by the Board in

Ross v Bank of Commerce (Saint Kitts and Nevis) Trust and Savings Association Ltd (in liquidation) [2011] 1 WLR 125 in which, in its advice delivered by Lord Mance, it was stated (para 5) that the purpose of seeking leave from the local court of appeal was to "confirm that the appeal was as of right, and to impose such limited conditions as might be permitted by the local Constitution and law."

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

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

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

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

11. The Board, when considering an application for special leave to appeal in a case in which there is an appeal as of right but the local court has erroneously refused leave, has only a limited discretion to refuse such special leave or to impose additional conditions. In Crawford v Financial Services Institutions Ltd [2003] 1 WLR 2147, para 23, the Board recognised that its discretion was limited and stated that it would refuse permission for an appeal as of right, for example, "where it was clear that the appeal was wholly devoid of merit and was bound to fail".
12. In the Board's view the limits of the discretion to refuse leave to appeal in a case where an appeal as of right has been wrongly refused by the local court may be stated thus: the Board may refuse permission to an application to appeal, if the appeal is devoid of merit and has no prospect of success (viz Crawford para 23; Ross para 6), and also if the appeal is an abuse of process, such as might arise in the hypothetical example given by Southwell JA. Another example of an abuse of process could, depending on the circumstances, be where the local Court of Appeal had refused an appeal to itself or where the proposed appeal raises questions of fact which have not been raised in that court.
13. The Board adopts this approach in its consideration of the application for leave to appeal in this case..."

7. I begin my consideration in light of A v R by noting that the amount of damages sought by the Plaintiffs and Appellants, and the amount awarded in paragraph 3 of the Act of Court following the judgment of the Court of Appeal, both exceed £500 sterling. This means that this case falls

within the exception provided in section 16 whereby no leave of the Court of Appeal, nor special leave of the Privy Council, is stated to be required.

8. The first thing to note about what is described in the judgment of Lord Hodge is that in a situation where no leave to appeal is required, the control which may be exercised by a local court of appeal is not the same as the control which may be exercised by the Judicial Committee, and that is reflected in sub-paragraphs 1 and 2 of paragraph 2.1 of the Practice Direction referred to above. In the case of the local court of appeal, there are four aspects to the control which it may exercise. The local court of appeal may determine “that there is a genuinely disputable issue within the category of cases which are given an appeal as of right”: Lord Hodge at paragraph 8 under reference to the judgment of the Board given by Lord Nicholls in Alleyne-Forte. The local court of appeal may “confirm that the appeal was of right” and it may “impose such limited conditions as might be permitted by the local Constitution and law”: Lord Hodge at paragraph 9 under reference to the Practice Direction 1, paragraph 2.1, and quoting Lord Mance in Ross v Bank of Commerce. The local court of appeal may determine that an appeal is an abuse of process: Lord Hodge at paragraph 10 under reference the judgment of Southwell JA in Ross Pirito v Curth.
9. In a situation where the local court of appeal has “erroneously refused leave” (presumably on one or more of the aspects just identified), the Judicial Committee “has only a limited discretion to refuse... special leave”. The extent of that discretion is described by Lord Hodge in paragraphs 11 and 12 as being that the Board may refuse permission for an appeal to proceed “if the appeal is devoid of merit and has no prospect of success” (by reference to the decision of the Board in Crawford) and where the appeal is an abuse of process (by reference again to include the example given by Southwell JA in Ross Pirito).
10. It is clear that the opportunity to decide that an appeal is devoid of merit and has no prospect of success is exclusively an opportunity available to the Judicial Committee and is not available to the local court of appeal. It will arise only if the local court of appeal has erroneously purported to refuse to allow the appeal to proceed and the applicant has then applied to the Judicial Committee. All that the local court of appeal can do in the first instance is to determine the four aspects outlined in paragraph 8 above.
11. In considering the four aspects of the control over an appeal as of right which may be exercised by the Court of Appeal as the local court of appeal, and adopting the expressions approved of by Lord Hodge as just described, it appears to me that they fall logically into the following order. The first is to confirm that “the appeal [is] of right”. The second is to confirm “that there is a genuinely disputable issue within the category of cases which are given an appeal as of right”. The third is to decide whether the appeal would be an abuse of process. If each of these elements of control is satisfied in the case of a particular appeal, then the Court of Appeal should indicate that the appeal may proceed. In that situation, the fourth element of control is that the Court of Appeal may “impose such limited conditions as might be permitted by the local Constitution and law”.
12. In the circumstances of the present Application for Leave to Appeal by the Defendants and Respondents, I turn to consider each of these four elements of control.

The Application for Leave by the Defendants and Respondents

13. The parties were agreed before the Royal Court that the first issue to be determined was whether the Defect existed and that the primary case for the Plaintiffs and Appellants was that the existence of the Defect could be established by reference to the descriptions contained, and the plan referred to, in a particular conveyance granted in 1968. The Deputy Bailiff determined that that was a question of law for him to determine and that if it was determined in favour of the Plaintiffs and Appellants then they would succeed and there would be nothing thereafter for the Jurats to resolve. These propositions are stated in paragraphs 70 and 71 of the judgment of the Royal Court under the heading of “The Defect as a matter of law”. Having considered the

arguments presented, the Deputy Bailiff then went on at paragraph 81 of the judgment to reject the submission for the Plaintiffs and Appellants that the Defect could be established just by construing the particular conveyance or even the series of conveyances which applied to the property.

14. Commencing at paragraph 82 of the judgment, the Royal Court then proceeded under the heading of “The Defect on the facts” to consider the question of where the boundary marks referred to in the conveyances had been on the ground and stated that that was a matter for determination by the Jurats. At paragraph 90, it was stated that the Jurats had concluded that the facts did not support the case advanced by the Plaintiffs and Appellants and as a result the action was dismissed.
15. The Court of Appeal allowed the appeal by the Plaintiffs and Appellants against the finding of the Deputy Bailiff that the Defect could not be established as a matter of law based upon construing the series of conveyances: see the judgment concluding at paragraphs 150 to 152. The Court of Appeal found that the existence of the Defect as averred by the Plaintiffs and Appellants had been established as a matter of law and it allowed ground of appeal 1 as stated in the Act of Court. The Court of Appeal then stated that ground of appeal 2, which concerned matters of fact judged by the Jurats, did not arise and it made no determination in respect of that ground in the Act of Court: see the judgment at paragraphs 153 to 155. The Court of Appeal also made no finding in respect of ground 5 which related to the costs awarded by the Royal Court: see the judgment at paragraph 180.
16. In their Application for Leave to Appeal, the Defendants and Respondents seek leave to appeal against paragraphs 1, 3, 4 and 5 of the Act of Court. In their Submissions in support of the granting of leave, the Defendants and Respondents rely upon the decision in A v R and they refer to the passage in the judgment of Lord Hodge quoted above. They refer to the grounds set out in their draft Notice of Appeal and then state:

“The value of the dispute exceeds £500, and it is submitted that that the grounds demonstrate that the appeal is not devoid of merit and cannot be said to have no prospect of success. Further, no abuse of process argument arises.”
17. In the draft Section 5 of their draft Notice of Appeal to the Judicial Committee, the Defendants and Respondents claim that the Court of Appeal erred in that it did not determine the extent of the driveway which was alleged to be subject to the Defect but rather it purported to determine the extent of land sold: see paragraph 19. The Defendants and Respondents then support their position by reference to evidence which was heard by the Royal Court and the findings of the Jurats relating in particular to what they had seen on site during a *vue du justice*. They also refer to concessions said to have been made as a matter of fact by the Plaintiffs and Appellants at trial. At paragraph 43, they submit that the Court of Appeal “erred in that it acted in disregard of the findings made by the Royal Court.” In section 6 of the draft Notice of Appeal, the Defendants and Respondents submit that the Court of Appeal should have carried out its own *vue du justice*. They submit that it disregarded the principle set out in Boyle v Highfield Country Apartments Association [2017] JCR 157 that “The extent of a person’s ownership of immovable property is ascertained both by the description contained in the conveyance... and by application of that description of the site.” They contend that the Court of Appeal did not take sufficient account of the findings in fact made by the Jurats and it erred in substituting its own view of the evidence.
18. The Plaintiffs and Appellants have filed Submissions in response in which they contend that “the appeal is devoid of merit and has no prospects of success and that therefore the application is an abuse of process”. The Plaintiffs and Appellants refer to the fact that the Court of Appeal reached its conclusions purely on the basis of construing the conveyances and that having correctly applied the relevant principles and having received no request to carry out its own site visit, the findings of the Jurats were not relevant and any concession made at trial could not have affected the position.

19. The Defendants and Respondents have filed a Reply to these Submissions which to some extent repeats references to matters of fact and concession at trial which it is not necessary to summarise.
20. In light of these competing contentions, I turn to address the application for leave to appeal having regard to A v R and the four aspects of control described above by reference to what was said by Lord Hodge and in the earlier authorities mentioned.
21. The first aspect is to confirm that the appeal is of right. The effect of the exception stated in section 16 of the 1961 Law has been explained by Lord Hodge and I need say no more about it in the context of an appeal in Guernsey. Advocate Geall for the Defendants and Respondents has issued a certificate confirming that the monetary value of the relief which they are seeking exceeds £500. I am satisfied that there is an appeal as of right in the present case.
22. The second aspect is that there is a “genuinely disputable issue within the category of cases which are given an appeal as of right”. Although there is a difference between the parties about the relevance of findings of fact which were made in the Royal Court, the appeal was determined in the Court of Appeal as a matter of law. It is therefore appropriate in principle for appeal and the existence or otherwise of the Defect is critical to the claim by the Plaintiffs and Appellants in professional negligence. The Court of Appeal reversed the decision of the Deputy Bailiff on the effect of the conveyances. The case involves a claim having a monetary value significantly above the threshold specified in section 16. I am satisfied that it may be said that an appeal would raise a genuinely disputable issue.
23. The third aspect is whether an appeal would amount to an abuse of process. The Plaintiffs and Appellants have contended that it would but they have not provided any detailed justification for that contention. Having regard to the example given by Southwell JA in Ross Pirito v Curth, there has been no delay in seeking to initiate an appeal. With regard to the further example given by Lord Hodge of a case where leave to appeal to the local court of appeal had been refused, that does not arise in the present case because the appeal to the Court of Appeal was an appeal which did not require leave having regard to section 15(d) of the 1961 Law. In addition, I note again that the decision of the Court of Appeal reversed that of the Royal Court and there is no concurrence of judgments.
24. The most significant element of this aspect is that Lord Hodge also referred in paragraph 12 of the judgment in A v R to a situation “where a proposed appeal raises questions of fact which have not been raised in” the local court of appeal. Once again, it is clear that the parties differ on the extent to which matters of fact should feature in any appeal to the Judicial Committee and the Plaintiffs and Appellants have mentioned that the Defendants and Respondents did not submit before the Court of Appeal that it should carry out its own *vue du justice*. Nevertheless, and although questions may be raised about the nature of the grounds of appeal which the Defendants and Respondents now seek to advance, I have concluded that they do not amount to an abuse of process in the sense envisaged in A v R.
25. I am therefore satisfied that the Court of Appeal has no basis to refuse the leave to appeal as of right which is provided by section 16. The only remaining issue is the fourth aspect which is whether the granting of leave should be subject to conditions. In their Submissions, the Plaintiffs and Appellants have referred to no condition which might be imposed as a consequence of statute and they have not applied for the imposition of any such condition. In an earlier email dated 7 August 2018, Advocate Barnes did ask informally for a condition be imposed “that the record in connection with the appeal be dispatched to the [Judicial Committee] within one month”. That submission has not been repeated in the formal Submissions for the Plaintiffs and Appellants although it is mentioned in those for the Defendants and Respondents. In the absence of a formal request for such a condition, and an explanation of the grounds upon which it might be granted, I do not determine it. In any event, I would have been inclined to refuse it because matters of procedure in any such appeal will be subject to the procedures and direction of the Judicial Committee and it does not appear to me,

at least at present, that the Court of Appeal would have any jurisdiction to impose its own continuing requirements.

26. In conclusion, I am satisfied that the Defendants and Respondents should be granted leave to appeal as of right to Her Majesty in Council and that no conditions should be imposed upon the exercise of that right to appeal.