

Appeal from the Court of Alderney, on the grounds that the Court was wrong in law to conclude that prescription in Alderney for personal actions was six years rather than thirty years and second, that the Court wrongly decided that the claim had not been brought within six years of the cause of action arising namely, within six years of the Respondent's alleged breach of an implied term that the claim by the Appellant would be settled within a reasonable time.

[2022]GRC014

IN THE ROYAL COURT OF GUERNSEY
ON APPEAL FROM THE COURT OF ALDERNEY
(ORDINARY DIVISION)

Between:

ADRIAN JOHN LEOPARD

Appellant

-v-

NFU MUTUAL INSURANCE SOCIETY LTD

First Respondent

-and-

**BEAUMONT STRUCTURAL
CONSULTANTS LTD**

**Second
Respondent**

Date of hearing: 13 September 2021

Decision handed down: 21 April 2022

Before: Jessica E Roland, Deputy Bailiff

Counsel for the Appellant: Advocate N J Barnes

Counsel for the First Respondent: Advocate S R Geall

The Second Respondent did not appear.

Legislation referred to:

Court of Alderney (Appeals) Law 1969

Order in Council of 27th October 1583 ratifying *L'Approbation des Lois, Coutumes, et Usages de L'Iles de Guernsey*

Article X of the Rules and Regulations of the Royal Commissioners 1585 Report

Order in Council 1844 *Prescription Mobilière*

Order in Council 1847 *Loi relatif aux Prescriptions*

Order in Council 1889 *Loi relatif aux Prescriptions*
Order in Council 1852 *De la Prescription Immobilière*
1848 “*Jurisdiction Criminelle d’Isle d’Auregny*”
Order in Council 1909 *Loi relative de la Prescription Immobilière*
Loi Relative a la Peremption d’ Instance Aux Retraits et a la Prescription of 1941
Confirmation of Laws (Guernsey) Law 1945

Cases referred to:

Le Mesurier v Barbenson et al Royal Court 1813
Vaudin v Hamon Privy Council Appeal No. 29 of 1970
Smith v Harvey 14 May 1981
Laughton v Main Court of Alderney 24 February 1994
Laughton v Main 20 October 1994
Morton v Paint (1996) 21 GLJ 61
Jersey Fishermen’s Association and others v States of Guernsey Privy Council Appeal No. 62 of 2005
Musa Holdings Limited v Newmarket Holdings (Guernsey) Limited GCA Judgment 14/2014
A (Appellant) v R (Respondent) [2018] UKPC Appeal number 0064 of 2017
Callaghan v Dominion Insurance Co [1997] 2 Lloyds Rep 541
Sprung v Royal Insurance (UK) Ltd [1999] Lloyd’s Rep I.R. 111
Bankstown Football Club Ltd v CIC Insurance Ltd (unreported December 16 1993 BC9302335 at 44-50

Texts & Reports referred to:

Jacob: *Annals of some of the British Norman Isles constituting the Bailiwick of Guernsey* 1830
Second Report of the Commissioners appointed to inquire into the State of the Criminal Law in the Channel Islands (1848)
Edgar MacCulloch and W.P. Métiévier: *A Report on the Nature and Extent of the jurisdiction of the Royal Court of Guernsey over the Island of Alderney* (1853) (published in 1938)
1925 Conference and the Agreement
Ogier: *The Government and Law of Guernsey*
Terrien Commentaire de droit Civil, tant public que privé, observé au pays et Duché de Normandie at p.338
Le Marchant: *Remarques et animadversions sur l’Approbation des Lois* at p.393
Laurent Carey: *Institutions, Lois et Coutumes de L’Isle de Guernsey* at p.207

Introduction

1. This is a matter on appeal from the Court of Alderney.
2. The Appellant Mr Leopard commenced proceedings against the Respondents on 16 July 2020 based on complaints in relation to an insurance claim made by him to the First Respondent with respect to damage to his property in Alderney. The First Respondent was notified of the loss on the 1 April 2009. The claims against the Second Respondent are in connection with the supervision of the work undertaken on the Appellant's property on the repairs which were the subject of the insurance claim. Defences were filed by the First Respondent on 5 November 2020 and contained *exceptions de fond*.
3. By agreement of all the parties, the exceptions were treated as two preliminary issues in the Court of Alderney. The first preliminary issue was whether or not the laws and customs of Alderney in relation to personal actions are prescribed by the lapse of six years or thirty years. The second preliminary issue was that if the Court should determine that, in accordance with the laws and customs of Alderney, personal actions are prescribed by the lapse of six years, was the claim by the Appellant prescribed against the First Respondent? The Second Respondent was neutral as to the outcome of the preliminary issues and played no role in the appeal.
4. In a judgment dated 21 April 2021, the Court of Alderney concluded that prescription in Alderney for personal actions is six years and that the Court, having not been persuaded that an implied term existed as pleaded by the Appellant, found that the Appellant had failed to commence proceedings against the First Respondent within the relevant period thus the Appellant failed on both preliminary issues.
5. The grounds of appeal to this Court are first, that the Court of Alderney was wrong in law to conclude that prescription in Alderney for personal actions was six years rather than thirty years and second, that the Court of Alderney wrongly decided that the claim had not been brought within six years of the cause of action arising, namely, within six years of the Respondent's alleged breach of an implied term that the claim by the Appellant would be settled within a reasonable time.
6. Advocate Barnes and Advocate Geall on behalf of the Appellant and First Respondent respectively (both of whom appeared at first instance) filed skeleton arguments and extensive authorities and augmented their submissions orally at the hearing.

The Law on the Right of Appeal

7. Section 2 of the Court of Alderney (Appeals) Law 1969 provides that the Appellant's right of appeal to this Court is on a point of law. To uphold the appeal, I must be satisfied that the Court of Alderney erred in law.

Brief summary of Submissions

8. On the first ground of appeal, Advocate Barnes on behalf of the Appellant accepted that it has long been considered that the prescription period in Alderney for personal actions is six years. This was the conclusion in the decision of the Court of Alderney in *Laughton v Main* 24 February 1994. The Appellant contends that *Laughton v Main* was wrongly decided and that the prescription period in Alderney is in fact thirty years, the customary law remaining unchanged in Alderney.
9. Norman customary law as applied by convention and by the Order in Council of 27 October 1583 ratifying L'Approbation des Lois, Coutumes, et Usages de L'Iles de Guernsey, provided that the prescription period for personal actions is thirty years. This is out set out in Terrien Commentaire de droit Civil, tant public que privé, observé au pays et Duché de Normandie at p.338, Le Marchant, Remarques et animadversions sur l'Approbation des Lois at p.393, and Laurent Carey, Institutions, Lois et Coutumes de L'Isle de Guernsey at p.207.
10. In 1844 by an Order in Council, prescription in relation to actions based on contracts was changed to ten years (the "1844 Order in Council"). Thereafter the prescription period for all personal actions was changed by an Order in Council entitled *the Loi relatif aux Prescriptions* of 1847 (the "1847 Order in Council") which reduced the prescription period from thirty years to ten years. The period was further reduced to six years by the *Loi relatif aux Prescriptions* of 1889 (the "1889 Order in Council"). However, these laws, the Appellant argues, only apply to Guernsey. There is no mention of Alderney or the Bailiwick of Guernsey in the preamble to the Orders in Council therefore it follows, the Appellant argues, that the relevant period in Alderney remains thirty years. Although the Court of Alderney in *Laughton v Main* decided that the 1847 Order in Council and 1889 Order in Council applied in Alderney and noted that the States of Alderney ordered that the 1847 Order in Council be entered on to Alderney's records for the purpose of being observed in Alderney, Advocate Barnes submitted that these actions would not be sufficient to alter the customary law as the Orders in Council did not apply to Alderney.
11. The Appellant submits that the laws in relation to the prescription period for personal claims can be distinguished from the laws in relation to real property. The Order in Council of 1852 which reduced the prescription period in relation to real property to thirty years, the *De la Prescription Immobilière* 1852, specifically refers to the Bailiwick of Guernsey in the preamble and to the law having "*full force of Law within the said Bailiwick*". The *Loi relative de la Prescription Immobilière* 1909 (the "1909 law") further reduced the prescription period to 20 years for real property. Within the preamble to the 1909 law there is also reference to the law having "*force of law in the Bailiwick of Guernsey*". Thus, the Appellant submits, unlike the position for personal actions, the Orders in Council relating to real property amended the customary law in Alderney.
12. The Appellant relies on the case of *Jersey Fishermen's Association and others v States of Guernsey Privy Council Appeal No. 62 of 2005*, to submit that the States of Alderney cannot, by ordinance or resolution alter the customary law. If the Order in Council did not apply to Alderney (as argued by the Appellant), this could not be altered by the

States of Alderney's purported registration of the 1847 Order in Council, thus the customary law would remain unchanged regardless of the action of the States of Alderney. Lord Mance at paragraph 30, quotes the "Chuter Ede" Report of the Privy Council on Proposed Reforms in the Channel Islands of March 1947 (Cmd. 7074):

"The scope of such Ordinances is not clearly defined but appeared to be regulated by custom and tradition; it is clear, however, that they cannot impose taxation or alter existing written and customary law, and that an Ordinance which conflicts with such law is inoperative."

Further at paragraph 35 Lord Mance concludes:

The States' power to issue ordinances has limits, so as to preclude any alteration of a law passed with Her Majesty's sanction or of customary law and so as to exclude taxation.

13. The Appellant further relies on *A (Appellant) v R (Respondent) [2018] UKPC Appeal number 0064 of 2017* to submit that customary law as applied by L'Approbation by a judicial decision cannot be altered by judicial decision, at paragraph 33:

"While the status of L'Approbation as legislation prevents direct abrogation of its provisions by judicial decision..."

14. Therefore, he submits, to change the prescription period to six years the legislature must step in and there must be primary legislation in the form of an Order in Council for Alderney. In the absence of an Order in Council which is effective in Alderney the prescription period remains thirty years.
15. With regard to the second *exception de fond*, the Appellant argues there is no reason for the Bailiwick of Guernsey to follow England by not implying a term in a contract between an insurer and the insured that the insurer will settle the claims within a reasonable time. The effect of not doing this is illogical and unfair to the insured, and the Appellant should not be without a cause in circumstances where the Respondent undertook to arrange for the repair of the property (rather than paying for the claim) and went about it in such a disorganised way that it took years to complete the work. Advocate Barnes referred to the position in Australia (and New Zealand) where the courts have been more flexible (for example in *Bankstown Football Club Ltd v CIC Insurance Ltd* (unreported December 16 1993 BC9302335 at 44-50)) until the Australian legislature stepped in to create a duty of utmost good faith into insurance contracts (see Ying: Damages for Late Payment of Insurance Claims L.Q.R. 2006 122 (Apr) 205-210). The term that the insured will settle claims within a reasonable time should be implied on the basis of business efficacy and applying the principles of *Morton v Paint*.
16. In reply, the First Respondent's position is that the Alderney Court in this matter was correct in concluding that there is a prescription period of six years for personal actions. *Laughton v Main* was correctly decided. In that case the Court considered the 1847 Order in Council and the 1889 Order in Council and decided that these Orders in Council had amended the prescription period for personal actions in Alderney with the

1889 Order in Council bringing into force the current prescription period for such actions as six years. This conclusion is supported by a series of documents setting out the constitutional relationship between Guernsey and Alderney and the application of Guernsey law in Alderney dating back to 1585. This is further supported by reports from the 19th and early 20th century. These include the 1853 Report (published in 1938) of Edgar MacCulloch and W.P. Métivier on the Nature and Extent of the jurisdiction of the Royal Court of Guernsey over the Island of Alderney (the “1853 Report”), the Second Report of the Commissioners appointed to inquire into the State of the Criminal Law in the Channel Islands and the 1925 Conference on Alderney and the Agreement arising therefrom.

17. Advocate Geall on behalf of the First Respondent submits that at the time of the 1847 and 1889 Orders in Council the Court of Alderney applied the law of Guernsey. This was the case continued in the formal acknowledgement in Article X of the 1585 Royal Commissioners’ Report confirming that Guernsey law has always been in force in Alderney; the Royal Court had concurrent jurisdiction with the Court of Alderney in civil matters, the Royal Court and the States of Guernsey had the power to legislate for Alderney with Alderney only having a limited power to legislate by Ordinance. The Reports evidence that Orders in Council amending customary law or introducing new legislation were directed to be registered in the Island of Guernsey only but nevertheless were applied to Alderney without registration in Alderney being required and nor was it necessary for the Order in Council to refer to Alderney to be in force in the island.
18. Advocate Geall places particular reliance on the 1853 Report. The Report at page 59 states that an Order in Council was enforceable in Alderney even if Alderney was not mentioned in the law, its application in Alderney being included within the reference “*all other Persons whom it may concern*”. Specific reference is made in the 1853 Report at page 60 to the Order in Council of 1847 which containing “*several laws of general application.*” Amongst these was the 1847 Order in Council relating to prescription which the States of Alderney at the Chief Pleas after Michaelmas 1850 ordered should be registered in Alderney even though this “*might not unreasonably be deemed superfluous*”.
19. On behalf of the First Respondent, Advocate Geall submits that neither the 1847 Order in Council nor the 1889 Order in Council required registration in Alderney to have force of law and thus the customary law was amended in Alderney by the Orders in Council. It was thus these Orders in Council not the registration of the Order in Council by the Alderney Court in the case of the 1847 Order in Council which changed the law. Registration in Alderney reflected the already amended position. Thereafter the changes of law in Alderney in 1847 and 1889 brought into force by the two Orders in Council were preserved by the various Government of Alderney laws of 1948, 1987 and 2004.
20. Advocate Geall also relies on the wording of the *Loi Relative a la Peremption d’ Instance Aux Retraits et a la Prescription* of 1941 which suspended the operation of prescription periods during the occupation. This law only refers to it having force of “*law within the Island [of Guernsey]*”. However, in the *Confirmation of Laws (Guernsey) Law* 1945 which confirmed the efficacy of a number of laws including the

1941 law after the occupation, the preamble refers to the law having force of Law in the Bailiwick. To the extent that this created confusion about whether the 1941 had force in the Bailiwick (and in that case suspended la prescription period for real property), this was dealt with in Vaudin v Hamon Privy Council Appeal No. 29 of 1970 at page 7:

“the argument being based on the distinction between the Bailiwick of Guernsey which includes Sark and the Island of Guernsey which does not: the legalisation it was said only applied to the latter. Their Lordships, in agreement with the Court of Appeal whilst accepting that the language is not entirely precise, nevertheless upon a consideration of these enactments are clearly of opinion that the distinction sought to be drawn should not be made and that the legislation applied throughout the Bailiwick”.

21. In any event, the First Respondent submits that the recognition and implementation of a prescription period of six years by Alderney since 1889 represents a development of customary law which has been undisturbed other than to be confirmed when it was challenged in Laughton v Main. If the Appellant is correct that the 1847 and 1889 Orders in Council had not extended to Alderney, the law of Alderney should be developed by application of the principles of Morton v Paint or confirmation that the customary law of Alderney has developed to reduce the prescription period to six years since 1889.
22. With regard to the second *exception de fond*, the First Respondent argues that, in line with English common law, the concept of an implied term as submitted by the Appellant is not one that should be recognised in the Bailiwick of Guernsey. Therefore, in the absence of an implied term, the Appellant’s claim will be prescribed if I determine that the prescription period in Alderney is six years. The damage occurred in early 2009 and was notified to the First Respondent on the 1 April 2009 but he did not commence proceedings until 2020. Callaghan v Dominion Insurance Co [1997] 2 Lloyds Rep 541 is authority for the proposition that the date on which an assured’s cause of action accrues under an insurance indemnity policy is the date on when the event insured against occurs and not on a later date such as when the loss is manifested, the assured incurs expenditure, or the insurers deny liability. There is nothing in the terms of the Policy which imposes a continuing obligation. The concept of an implied term as argued by the Appellant is not recognised at common law and should not be introduced into Alderney.

Discussion

23. The judgment of the Court of Alderney in Laughton v Main sets out what Deputy Bailiff Carey, as he was then, referred to on appeal as a “*commendably simple and lucid judgment*” in coming to the conclusion that “*the Law of Alderney with regard to prescription is the same as that in Guernsey as propounded by the Court of Appeal in Smith v Harvey.*” However, although Laughton v Main was appealed to the Royal Court, the judgment in the Royal Court did not focus on the issue of prescription period of six years for personal actions but an alternative argument put forward by the defendant based on a specific prescription period of a year and a day for personal injury actions. This latter point had already been decided in Smith v Harvey 14 May 1981 where the Court of Appeal concluded that the six year period applied to personal injury

claims. The Royal Court was bound by the Court of Appeal decision of *Smith v Harvey* on this issue, and the appeal in *Laughton v Main* was dismissed in the Royal Court without a full review of the arguments in order that it could be heard in early course by the Court of Appeal. However, it is evident from the decision that the then Deputy Bailiff (and counsel representing the parties) accepted that the law on prescription for personal claims in Alderney and Guernsey were the same and it required a decision of the Court of Appeal to overturn *Smith v Harvey*. However, before the Court of Appeal could examine the arguments and decide the matter, the appeal was withdrawn.

24. A significant difficulty with any matter involving a historical review of Alderney's laws and the manner in which they were applied is that the public records including Alderney's Ordinances and Court records were destroyed during the German occupation.
25. Alderney, like Guernsey, has two principal sources of domestic law. Those sources are legislation and its customary law. Norman customary law as applied by convention and by the Order in Council of 27th October 1583 ratifying *L'Approbation des Lois, Coutumes, et Usages de L'Iles de Guernsey*, provides that the prescription period for personal actions is thirty years. Article X of the 1585 Commissioner Report confirms that Guernsey law had always been in force in Alderney:

“the Jurats of Alderney shall exercise and administer justice in all causes arising in the said Isle, according to their privileges, without any interference by John Chamberlain or his heirs; and shall admit appeals and refer all criminal matters to the Royal Court of Guernsey, before the Bailiff and Jurats of the Isle of Guernsey, as at all times [Alderney] had been accustomed; and shall regulate their judgements and proceedings according to the laws and constitutions used in the Island of Guernsey; and of all proceedings and judgements done and passed by the said Jurats, shall keep a true and legal record, as they should answer to the contrary”

26. According to the introductory paragraphs of the 1853 Report, the authors concluded that within the terms of Article X was an observation that the “*laws in Guernsey were not at this time first introduced into the island of Alderney: but that they had always been in force there.*”¹
27. Although there is now not a separate record of it, in *Le Mesurier v Barbenson et al Privy Council 1814*, the submissions to the Privy Council of the Respondent refer to a 1761 Ordinance which was passed by the States of Alderney stipulating that the Alderney Court “*shall regulate its Judgements and Proceedings according to the Laws and Constitutions used in the said Island of Guernsey, as it is enjoined by the Order of the Royal Commissioners, Anno 1585*” (List of Documents relied on by the Respondents in *Le Mesurier v Barbenson et al* Privy Council case of 1814).

¹ Article X of the Orders made by the Royal Commissioners in 1585 is also referred to in Jacob to justify his comment that “the entire jurisprudence of the island, must be, in every respect, similar to that of Guernsey.” Page 165 (Annals of some of the British Norman roles constituting the Bailiwick of Guernsey 1830).

28. As Advocate van Leuven Q.C. points out in his learned article in the Jersey Law Review on the *Constitutional relationships within the Bailiwick of Guernsey - Alderney* (June 2004) – “Prior to the 19th century, Orders in Council enacting new substantive law or amending or clarifying existing customary laws were rare.”
29. Due to the lack of other contemporaneous evidence considering Alderney’s position at the time of the relevant Orders in Council dealing with prescription, the 1853 Report is an essential in establishing the law of Alderney in the 19th century.
30. The 1853 Report at page 8 states unequivocally, “*the Law of Guernsey – except so far as it may be modified by local custom – is the Law for Alderney*” and thereafter at page 9 that the principle set out Article X of 1585 still “*regulates the Law in Alderney*”.
31. There is also a reference in the 1853 Report to an Order in Council of the 25 December 1709, which was registered in the Royal Court, the object of which was to establish the Custom House Officers in Guernsey and to cause the Act of Navigations and certain other Acts to be duly observed. The Report at page 36 states:

“It may be right to observe en passant that though in terms this Order in Council speaks only of the Island of Guernsey it has always been considered to be in force throughout the Bailiwick.”

32. The 1853 report at page 59 then goes to say:

“Any inquiry into the relation in which Alderney stands to these superior Authorities of the Bailiwick, would be incomplete, if the Authority of Council were over-looked, as evinced in the framing of its orders.

In this point of view, there are two clauses that are entitled to attention: One of which, no order in Council is without.-The other, though less essential, is not unfrequently introduced. The clauses alluded to are 1. that which expressly enjoins the registering of the Order. 2. that which designates the authorities that are required to take notice of it.

1. As to the first of these clauses, - I When an Order in Council is issued for registration of an Act of Parliament, or any other general purpose, -it is rarely if ever required that it should be registered or published by any other authority than that of the Royal Court.

As to the Second, - it will be remembered that in the Royal Charters hearing before adverted to, the Bailiff and Jurats of Guernsey are introduced, together with the Inhabitants of the several islands of the Bailiwick as constituting the community.

A modern order in Council relating to the community at large; is framed upon the same principle; - the Bailiff and Jurats of the Royal Court are specially required “to take notice of it and govern themselves “accordingly”; - but no mention is made of the subordinate Authorities of Alderney or Sark; - they are many included among “all other persons whom “it may concern”.”

33. There is then specific mention of the 1852 Order in Council reducing the prescription period in relation to real property throughout the Bailiwick although no mention was made of the Authorities of Alderney and Sark.

Not to multiply instances, the Committee will merely refer to an Order in Council of 5th March 1852, - whereby the Royal Sanction was given to a Law for shortening the period of prescription throughout the Bailiwick – the Bailiff and Jurats and all other Her Majesty's Officers in the island of Guernsey are especially required to take notice of it.; but no mention was made of the authorities of either of the two smaller islands.

34. The report then refers to the Orders in Council dated 22 July 1847 which included *Loi relatif aux Prescriptions* of 1847. After listing out the individual Orders in Council, the report then states at page 60:

“The States of Alderney at the Chief Pleas after Michaelmas, 1850, ordered these several laws to be also entered on the register of that Island, for the purpose of being observed there.

In the Act of the Alderney States - which is of some length-, it is, among other things, stated that the effect of the Orders in Council was to change entirely the ancient Laws of the Bailiwick; - and that, having been once sanctioned by Her Majesty for the Island of Guernsey, it was needless to make any further application to Her Majesty, in order that they should be enforced in Alderney.”

35. The report goes on to say at page 60 that:

“The States of Alderney were undoubtedly correct in supposing, having once been sanctioned by Her Majesty - the laws in question did not require any repetition of the Sanction in order to be in force throughout the Bailiwick. It might also be very advisable that these Laws should be entered upon the Register of Alderney for the convenience of the inhabitants. The propriety of such a proceeding is sufficiently recognized by the course that has been followed for some years past with respect to Acts of Parliament whenever an extra Copy of them has been transmitted to the Royal Court for the purpose. But in the absence of any special injunction to that effect, it is manifest that any Act of registration by the States of Alderney could be no otherwise of importance than as affording facilities for reference; and the States acted quite consistently with this view, in ordering that many the Laws should be entered without the Orders in Council; - The Orders in Council from which the Laws derived their force having been registered in Guernsey, any further registering of them within the Bailiwick might not unreasonably be deemed superfluous.”

36. In any event it does not appear that a copy of that act of registration of 1850 by the States of Alderney has survived the occupation, however, the report of 1853 continues that if the change of law is very unsuitable for Alderney, then States of Alderney would take the following steps:

“where any such changes have received the Royal Sanction on the application of the States of Guernsey, the States of Alderney would reserve to themselves the

right of pronouncing their opinion upon the same; as well as of applying to the Crown to adopt what may be good for the island. Nothing can be more reasonable in principle than the views here expressed by the States, - or better calculated to work satisfactorily. if their objections to the change appeared to cancel to be well founded the order made be revoked or modified or Alderney may be exempted from its operation: - if otherwise the order will remain in force”

37. It appears to be the case that in 1841 after the enactment of the Law of succession in Guernsey in 1840, the States of Alderney applied to the Privy Council to ensure that changes in the law of succession reflected the differences that should apply to Alderney. This is referred to in the 1846 Minutes of Evidence taken before the Commissioners into the State of the Criminal Law in the Channel Islands:

“At 4835 Do you know the limits within which they have the power of making laws? – I do not. I consider that a great part of their Ordinances are police regulations. There is a recent case in which after change had been effected in the laws of inheritance here, the States of Alderney submitted to Her Majesty in Council a place of certain modifications in the laws of inheritance in Alderney, which was confirmed by the Privy Council. Some of the details which have been adopted in Guernsey were found to be inapplicable in Alderney.”

(page 184 Second Report of the Commissioners appointed to enquire into the State of the Criminal Law in the Channel Islands 1848)

38. The preamble to the 1841 Ordinance states:

“Having been pleased by your order in Council of the 1st of April last to refer unto this Committee the Humble Petition of the States of the Island of Alderney setting forth: - that Your Majesty was pleased by Your Order in Council of the 13th of July 1840 to sanction changes in the Laws of Succession and Inheritance in the island of Guernsey:- That the Island of Alderney in all matters of succession and inheritance followed and is still subject to the Laws of Normandy so amended and that from time immemorial the laws on those points in the Island of Guernsey were with few exceptions also those of Alderney:- That the Petitioners conceive it desirable to continue with your Majesty’s sanction the assimilation of laws in the two islands so far as the wants of the inhabitants of both agree. - That the Petitioners with that view obtained a copy of those changes and referred the same to a Committee in October 1840 and took the report of the said Committee into consideration on the 18th of January following, having previously given publicity of their intention of praying Your Majesty’s sanction to such of those changes which the lapse of time and the altered state of society necessitate:

39. Thus, it appears that having been given notice of the changes happening in the 1840 Order of Council, as identified in the 1853 Report, the States of Alderney was able separately petition Her Majesty in Council and seek their own modified version of the Order in Council dealing with succession which related only to Alderney.

40. It is apparent from the notes of the Conference on Alderney held at the Royal Court House on the 11 March 1925, where there were representatives of both the Royal Court of Guernsey and the Court of Alderney, that there was a lack of consistency in law-making in relation to Alderney. The then Bailiff, H W de Sausmarez in a memorandum refers to *“the loose way in which laws were made”*. There is also a recognition in the memorandum by the Bailiff, of the reminder from Sir John Capper who was the Lieutenant Governor of Guernsey at the time of Article X of the Order of the Royal Commissioners in 1585 *“that the jurats of Alderney should regulate their judgments and proceedings according to the laws and constitutions used in the Island of Guernsey.* The Bailiff then goes on the memorandum:

“Nevertheless Alderney kept its local land customs which differed somewhat from those in Guernsey and I doubt not others, and further continued to make Ordinances which in many cases were reviewed by the Royal Court. Alderney laws were not altogether excluded by the Commissioners’ order nor was the legislative power of the [Alderney] Court seriously curtailed..... I wish to glance at one or two pieces of Alderney legislation in the past.

In 1841 Alderney got through a law regulating succession to real property and in its Court’s petition shewed a desire to keep its laws as far as possible in line with those of Guernsey.

In 1878 the Alderney States passed a bill on the registration of Contracts which received the sanction of H.M in Council and was sent by Council to the Royal Court to register. The Royal Court pointed out that grave inconveniences must follow from this law which altered the condition of transfer of real property and affected the sanctity of contract, with a result that the law was withdrawn and subsequently enacted as amended.”

41. It was agreed by the conference that it would be proper that any proposed measure should originate with the local authorities of Alderney, and, if it required the sanction of Council, it should be referred to the Royal Court of Guernsey for agreement. This proposal then formed part of the agreement dated 11th March 1925. As did the statement:

“when it is desirable that the same law should apply to both islands, and it is agreed to, with or without modifications to meet the needs of Alderney, the Bailiff as representing the Bailiwick shall forward the same to His Majesty in Council through the usual channels stating that Alderney has concurred in its terms.”

42. Thus, at that time, there appears there was an agreement in place about how to approach Orders in Council concerning Alderney going forward. Nevertheless, up until this point, the inconsistency in the way legislation was dealt with appears to accord with the research of Advocate van Leuven in his article when he says:

“In the 19th and the early part of the 20th century, Orders in Council amending existing customary law, or introducing new civil law, were directed to be registered upon the records of the Island of Guernsey without specifying whether

such legislation was limited in effect to Guernsey, or applied, or was intended to apply, throughout the Bailiwick.”

43. Whilst there are clearly examples of the Orders in Council making specific reference to the Bailiwick in the preamble during this period, this does not mean that this Court can ignore the contemporaneous evidence as set out in the Reports that the making and drafting of legislation was not consistent. The evidence of the time is that references to the Bailiwick in the preamble to a law was not a requirement in order for the law to be in force in Alderney during the relevant time. Further that “*all other Persons whom it may concern*” included Alderney for these purposes even where there has been no reference to the Bailiwick in the preamble.
44. Whilst the statement by Advocate Barnes in his submissions that if a statute applies in Guernsey, it does not follow it applies in Alderney would be true now, it would be wrong to apply modern-day standards of drafting and clarity to the 19th Century. At the time of the Orders in Council dealing with prescription for personal claims, an Order of Council whether expressed as referring to the Island of Guernsey or the Bailiwick of Guernsey was binding on the Bailiwick unless specifically modified or irrelevant. Registration in Alderney was not necessary for the Order in Council to be in force in Alderney. What is evident however is that in relation to the 1847 *Loi relatif aux Prescriptions* of 1847 the States of Alderney entered the law on its record. Whilst this may not have been necessary nevertheless it evinces an expectation that the Island’s legislators considered that the customary law had been amended by the Order in Council.
45. Having taken into consideration all the submissions and the evidence that has been placed before me I have therefore come to the conclusion that the Court of Alderney was correct in deciding that the prescription period in Alderney is six years having been so amended by the 1847 and 1889 Orders in Council. Since that time there have been Government of Alderney Laws which have confirmed but not amended the law and customs of Alderney. This includes the preservation of the law of Alderney in relation to prescription as amended by the laws of 1847 and 1889.
46. Following my conclusion that the effect of the Order in Council was to change the law in Alderney the actions of the States of Alderney cannot be said to have been *ultra vires*. Whilst there is no information about an act of registration for the 1889 law, the 1853 Report makes clear that at that time it was not a necessary step but rather was “*superfluous*”.
47. If I am wrong in relation to the legislative effect of the 1847 and 1889 Orders in Council, I have considered whether it can be said that the customary law of Alderney has developed such that I can conclude the prescription period for personal actions is now six years.
48. Since the ratification of *L’Approbation* in 1583, starting with Article X of the Commissioner’s Report of 1585 it has been reiterated on a number of occasions including the Ordinance of 1761 that the Court of Alderney shall apply the law of Guernsey. Article X is recited in the preamble to the 1848 Order in Council entitled

“*Jurisdiction Criminelle d’iLe d’Auregny*” without qualification, post-dating the 1844 and 1847 Orders in Council (the latter by a matter of a year) dealing with the reduction of prescription periods for personal actions and at the Conference on Alderney in 1925. As Advocate van Leuven states in his article:

“Neither Article 10 nor the Ordinance of 1761 have been expressly amended or repealed and there is no legislative enactment or other act or circumstance impliedly amending or repealing their provisions. Both remain good law”.

49. In *A (Appellant) v R (Respondent)* [2018] UKPC Appeal number 0064 of 2017 the Privy Council considered the principles of *Morton v Paint*:

“In the Board’s view, L’Approbation has not prevented the judicial development of the common law of Guernsey, including in areas of law which it addressed. Judges in developing the law “interstitially”, to use Wendell Holmes’s vivid phrase, must take care not to create incongruity in the law when developing the common law in areas in which the legislature has legislated. See for example the decision of the House of Lords in *Johnson v Unisys Ltd* [2003] 1 AC 518, in which Lord Hoffmann stated (para 37) that judicial development of the law

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

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

50. The 19th century and the beginning of the 20th century was a period where the time limits for making claims were examined on a number of occasions legislatively and successively reduced. With regard to prescription periods for real property, Alderney has remained at all times in line with legislative policy developments in Guernsey. It would be out of kilter with these developments for the prescription periods in relation to personal claims to have remained unchanged.
51. I was not provided within any examples from either before or since *Laughton v Main* in 1989 where the question of prescription in Alderney has been tested in court until now. The lack of records of any case law in this area is specifically mentioned in *Laughton v Main*. In a jurisdiction as small as Alderney it is unsurprising that case law will be sparse, further exacerbated by the destruction of records during the occupation. Nevertheless, the decision in *Laughton v Main* has been relied on as confirming the prescription period for personal actions in Alderney since that time. Considering the guidance set out in *A (Appellant) v R (Respondent)* (*ibid*) and when I consider 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 which are referred to in Morton v Paint, I am confident that this area supports judicial development (to the extent it is needed at all) of the customary law in this area:

“(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.”

52. The Alderney States in 1850 evinced a clear intention that Alderney should be bound by the Order in Council of 1847 and, whilst the position in relation to the registration of otherwise of the 1889 Order in Council is not clear, the States of Alderney has not taken any opportunity to petition for legislation separately. Looking at it in another way, the legislature has not stepped in in the 28 years since Laughton v Main decision to confirm that, contrary to the prevailing view that the prescription period for personal claims is six years, it is in fact thirty years. The development of Alderney law in this regard is thus consistent with legislative policy of Alderney in this area and certainty in this area is of great importance. Alderney’s law on prescription has not remained in aspic or remained fixed for over 400 years but has been moved on in line with developments of Guernsey. Uncertainty and a radical reintroduction of a thirty year prescription period for personal claims would unquestionably be a recipe for chaos. Therefore, to the extent it is necessary, over and above my conclusions that Laughton v Main was correctly decided, in all the circumstances of this particular area of law, it would be appropriate and consistent with the application of the principles found in A (Appellant) v R (Respondent) (ibid) for this court to confirm that prescription period for personal actions in Alderney is six years in line with Guernsey.
53. Having found that the prescription period for personal actions is six years, it is necessary for me to consider the second ground of appeal. The second ground of appeal can be more shortly dealt with. The position in England and Wales is clear and I can see no reason that the same principles would not apply in this jurisdiction. The implied term as argued by the Appellant “*that any claim would be settled within reasonable time*” is not one that is recognised at common law. The case law is long-standing and clear (see MacGillivray on Insurance Law 21-055, Callaghan v Dominion Insurance Co [1997] 2 Lloyds Rep 541 and Sprung v Royal Insurance (UK) Ltd [1999] Lloyd’s Rep I.R. 111). Further, applying the principles set out in Musa Holdings Limited v Newmarket Holdings (Guernsey) Limited GCA Judgment 14/2014, there no proper basis for implying the term sought by the Appellant into the insurance contract and the Appellant has failed to make out a case as to why the contract requires the term sought to be implied in order to give the contract business efficacy. This is not an area where judicial law-making is appropriate or necessary. Therefore, the Appellant has failed to demonstrate that the Court of Alderney was wrong in law to conclude that the Appellant’s claim was prescribed.
54. I therefore dismiss the appeal.