

## Mr A v V Trustees Ltd (formerly G Trustees Ltd)

<b>Jurisdiction:</b>	Jersey
<b>Judge:</b>	McNeill J.A.
<b>Judgment Date:</b>	19 January 2021
<b>Neutral Citation:</b>	[2021] JCA 12
<b>Date:</b>	19 January 2021
<b>Court:</b>	Court of Appeal

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### Text

[2021] JCA 12

COURT OF APPEAL

(Samedi)

Before:

J. W McNeill, Q.C., sitting as a Single Judge.

Between  
Mr A  
Appellant  
and  
V Trustees Limited (formerly G Trustees Limited)  
First Respondent  
and  
Mrs C  
Second Respondent

and

Mr D  
Third Respondent

**The Appellant in Person.**

**Advocate M. P. Renouf for the First Respondent.**

**The Second Respondent was not represented.**

**Advocate R. Christie for the Third Respondent.**

### **Authorities**

*I v J* [\[2014\] JRC 021](#).

*Holmes v Law Society of Jersey* [\[2018\] JCA 066A](#)

Section 47(1) of the Trustee Act 1975 of Bermuda

Appeal — application by the Appellant seeking the appointment of an *amicus curiae*.

### **IN PRIVATE**

McNeill J.A.

- 1 There is before me, sitting as a single judge of the Court of Appeal, an application by the Appellant, a litigant in person, seeking the appointment of an *amicus curiae*. It is clear from the application that the Appellant is aware in general terms of the nature of such an office.

### **The Grounds of Appeal**

- 2 The appeal in this matter will come before the March sitting of the court and is in respect of a judgment of the Royal Court dated 21 October 2020 whereby the Royal Court, having accepted a surrender of discretion from the Representor trustee, was prepared to direct it to retire as a trustee of a Bermudan trust, duly exercising its power to appoint a new trustee regulated within this Bailiwick and nominated by the Third Respondent. The grounds of appeal are that the Royal Court erred in treating an individual as an expert witness in specified matters and, separately, erred in not permitting the Appellant's expert witness to give oral evidence.

### **Contentions**

- 3 The Appellant represented himself before the Royal Court and, at a hearing before me in December 2020 on his application for stay of a specific direction of 17 November, his submissions were detailed, clear and cogent. In making this application the Appellant indicates that he feels comfortably in control of all the facts, having written very substantial factual briefs, but considers that he requires assistance in situating his facts and arguments within the confines of the relevant legal argument – the area within which he lacks experience and knowledge.
- 4 For the Respondents it is contended that the issues in the appeal are very straightforward and that the procedural points set out in the Notice of Appeal are not complex. It is unclear what material contribution the involvement of an *amicus* would make to the administration of justice on the issues raised in the Notice of Appeal. This was not an appropriate case for the appointment of an *amicus*: such appointments should be made in litigant in person cases only where the burden on the state is justified on proper consideration of the benefit to the administration of justice on the facts of any given case.

### The role of amicus

- 5 The role of *amicus* was considered by Commissioner Clyde-Smith in *I v J* [\[2014\] JRC 021](#) at paragraph 14, where guidance from the English courts from 2001 was followed. The learned Commissioner identified that there should be some flexibility as to the potential grounds for court's exercise of discretion as to an appointment to the role of *amicus* but indicated that the role was usually limited to providing assistance on relevant law and its application to the facts of the case and that it would not normally be one which included an instruction to lead evidence or investigate the facts of a case. It was emphasised that an *amicus* to the court did not represent a particular litigant.
- 6 Against that background the courts in this jurisdiction have on occasion given specific directions to the *amicus*. For example, the following direction of Le Cocq DB in *Holmes v Law Society of Jersey* (quoted at [\[2018\] JCA 066A](#)) provided important clarity for parties as well as for the *amicus*:

***“(i) To assist the applicant in his preparation of statements or arguments and to ensure that they are properly and fully put, making the legal arguments as clear as possible;***

***(ii) That, should the amicus identify authority that is against the applicant, the amicus should notify the applicant and the other parties; and***

***(iii) That the amicus should make supplemental submissions to the extent that is necessary.”***

- 7 In the same Order the learned Deputy Bailiff provided that other administrative acts such as distribution of papers were to be left to the applicant, but subject to the *amicus* being in

charge of the indexing and production of the bundles for the final hearing.

- 8 Such directions reflect the approach that the role of *amicus* is to provide limited assistance, is not to take the lead in presentation and is not that of being asked to represent any party. However, the principal aim has been to deal with proceedings at first instance and their focus might be of more limited relevance for the purpose of the present application within the context of an appeal. In particular circumstances, it might be envisaged that the nature of the role of the *amicus* on appeal would be similar to that carried out in the Royal Court; but this will not always be the case.

## Discussion

- 9 The circumstances before me are ones in which the Appellant has already represented himself in the proceedings below, in which those proceedings have been completed and in response to which he has embarked upon an appeal. It must also be added that, as part of the appeal proceedings, he has acquitted himself in the presentation of his case with some clarity and precision.
- 10 Leaving aside the Appellant's abilities as shown in the earlier hearing before me, it is pertinent to remember that this application is made in respect of proceedings which have reached the stage of an appeal. The question as to the potential need for an *amicus* at the stage of an appeal raises quite different considerations from those when the issue is raised at first instance. At the earlier stage, as emphasised by the directions of the learned Deputy Bailiff in *Holmes v Law Society*, initial presentation in a systematic fashion is a considerable asset to a party and to the court. On the other hand, at appellate level the Appellant's case (whether plaintiff or claimant or respondent or third party) will have been properly considered by the first instance court and, absent contentions of bias or unfairness, the appellate court has before it a judicially approached appraisal of the Appellant's case at first instance.
- 11 Applying all of the foregoing considerations to the present circumstances I am not persuaded that there is proper warrant for the appointment of an *amicus*. At the outset I entirely accept the precept of the Appellant's contentions that it is important for any litigant to situate her or his facts and arguments within the confines of relevant legal principles. However, not every litigation in its fair trial – whether adversarial or otherwise – requires the most detailed exegesis of the bases of competing arguments. Such bases in litigation have two constituent parts: fact and relevant law. Here, there has been a detailed consideration by the Royal Court of the issues raised in the Representation and the Appellant's appeal is carefully focussed.
- 12 Put shortly, the critical issue for the Appellant below was that the single trustee of the two family trusts should carry out an exercise which has been referred to as a “rebalance” of the assets of the Trusts. For that to be open to the trustee, the trustee would have to be invested

with a power to do so. In the circumstances here, the trusts being established under the law of Bermuda, Bermudan trust law was potentially relevant. As the arguments developed, the Royal Court had to consider the proper interpretation of Section 47(1) of the Trustee Act 1975 of Bermuda. That is a matter of law for the court considering the issue; any issues of fact as to whether the trustee should carry out the exercise do not emerge until the power to do so has been identified. It is also a matter of law as to how the court should carry out the exercise and it is on this aspect that the Appellant's grounds of appeal are presented. First, that the Royal Court should not have treated one of the witnesses for the Third Respondent as an expert in Bermudan law. Second, that the Royal Court should not have refused to permit his expert witness to give oral evidence and be cross examined.

- 13 Each of these grounds, as matter of principle, is a perfectly proper issue to raise on appeal. As it happens however, although directly related to the issue of law on proper interpretation, neither raises a point of substantive law on which this court would require detailed guidance on matters outwith the competence of the Appellant. The first issue, witness expertise, is a matter of fact which this court will determine upon the basis of the information which was before the Royal Court. The determination of such an issue is well within ordinary judicial skills and no guidance from the general law will arise. As to the second issue, the appropriateness of oral evidence, this is a procedural matter and the question is whether, in the whole circumstances before the Royal Court, it was within the reasonable range of options open to the court to proceed as it did. Again, no guidance from general law will arise, and this court will determine the issue upon the basis of the information which was before the Royal Court.

### Potential additional appeal issues

- 14 In a detailed supplementary submission, the Appellant made it clear that he wished now to amend his grounds in order to add to his appeal, that possibility having been left open to him when lodging his Notice of Appeal. As set out by him, he contends that it was only upon being able to consider the transcripts of the hearing on 15 and 16 September 2020, which led to the October judgment, that he saw that they “yielded up new and vitally important evidence with regards the Inter-trust-loans” which loans “*sit at the centre of the arguments, especially the hearing I am appealing of 15th and 16th September 2020*”. In brief he wishes to contend that the inter-trust loans are sham; and it would appear that it is principally this line of argument upon which he seeks the appointment of an *amicus* to provide assistance on relevant law and its application to these salient facts.
- 15 Assuming for the present that there were a basis, in fact and as a matter of proper procedure, to allow the court to consider whether to allow an application to amend the grounds of appeal in this respect, such an application would be bound to fail. As a matter of procedure, the issue here is as to whether the Representor trustee should retire from one of the trusteeships on account of conflict of interest. The appropriateness of such a step is unaffected by whether the inter-trust loans were sham. The appellate court might take the view that there was an arguable case, but that would require a different process. One such

possible process would be at the instance of the party entitled to claim recovery of losses arising out of the sham. In circumstances such as the present, the claimant would be the trustee of the disadvantaged trust and such a trustee could not take such action without being properly advised that this was an appropriate claim to make. Generally speaking, one beneficiary cannot insist that the trustee of the trust of which he is a beneficiary engage in litigation. Another possible process might be a claim by a beneficiary against her or his trustee for breach of trust. Neither of these processes would be deleteriously affected by the determination below that the Representor trustee should retire. I would add that the fact that some form of legal proceedings have been raised does not, of itself, entitle any party to those proceedings to use the proceedings as a forum within which to raise issues of a different nature. There are many reasons for this: examples may relate to the powers of the court, to where the burden of proof lies and to the way in which expenses should be determined.

- 16 Not only would such different processes not be deleteriously affected by the determination below that the Representor trustee should retire; the stronger the contention that inter-trust loans were sham, the greater the need for the two trusteeships to be separated. If the future of these trusts is to involve an assertion that the inter-trust loans do not exist as a matter of law, that dispute cannot be carried through with the same person both claiming and defending: the conflict is obvious and the need for fully independent trustees even more stark than on a question of repayment of loans which exist as a matter of law.

## Directions

- 17 I should add that the Appellant also suggested that the appointment of an *amicus* might be warranted because of the need to engage with the other parties in agreeing a directions order in preparation for the upcoming appeal. There is no question of this being necessary. No complex issues of fact arise nor is there any issue of substantive law; all that is required, whether in discussion or in contention to the court, is an assessment of the practicalities of preparing the way to the appeal hearing.

## Conclusion

- 18 For all of these reasons, the application for appointment of an *amicus* is refused.