

JERSEY / JUDGMENT

I -v- J [2015] JRC 025 (03 February 2015)

[2015] JRC 025

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judgment

the master:

Introduction

1. This judgment represents my reasons for refusing to appoint an amicus for the defendant. Present Proceedings 2. The present proceedings follow on from earlier disputes between the plaintiff and defendant. Those earlier disputes related to applications for financial provision and residence orders. Those proceedings were therefore family law proceedings. 3. The present proceedings by contrast are proceedings for breach of contract. The essence of the plaintiff's allegation is that the defendant orally agreed with the plaintiff that in return for the plaintiff transferring her 50% share in a company where she alleges her and the defendant were "equal members", the defendant would pay her the sum of £50,000 as a one off lump sum payment. The defendant denies any contract or any breach and argues that any shares in the name of the plaintiff were held on trust for the defendant. The grounds of the application 4. The defendant sought the appointment of an amicus because one had been appointed previously which had assisted him in other proceedings before the Royal Court see (I v J (Family)

[2014] JRC 021) and before the Court of Appeal reported at I-v-J (Family)

- [2014] JCA 235 . In his mind there was no difference between the present proceedings and the previous proceedings for financial provision and residence orders. 5. He further contended that he was dyslexic with the result that he struggled with dealing with large amounts of documentation. In this case he had some 30 lever arch files which he had to consider in order to effect disclosure. 6. He also expressed concern that if he had to conduct the proceedings personally this would put significant pressure on his children by virtue of them witnessing the stress that litigation put upon him. 7. Finally, while he accepted he had assets, he indicated his income was limited with the result that he could not afford to pay a lawyer. He felt it was unfair that the plaintiff was on legal aid when his income was limited. 8. During submissions he also expressed concern that this action was in reality being driven by Viberts in order to recover costs incurred in the previous proceedings which had not been paid as the plaintiff had no means to do so. Advocate Hall

on behalf of the plaintiff confirmed that if the present proceedings were successful any monies recovered would not be used to pay fees arising out of the previous proceedings. She did however make it clear that this confirmation from Viberts did not extend to the costs of the present proceedings which the plaintiff and Viberts would look to recover against the defendant, if the proceedings were successful and costs were awarded in the plaintiff's favour. 9. Advocate Hall in her submissions observed that if I were to appoint an amicus in this case that could open the flood gates. One of the factors I had to take into account was that any court, when considering an application for an amicus to be appointed, had to bear in mind that the cost of an amicus would be paid out of public funds and therefore would be a burden on public funds. 10. She also contended that it was not appropriate to appoint an amicus where an individual had sufficient assets in order to retain a lawyer. This submission followed from the court's judgments in previous proceedings and the defendant stating he had been refused legal aid by the Acting Bâtonnier. Decision 11. The basis upon which the court might appoint an amicus was considered by Commissioner Clyde-Smith in *I v J (Family)*

[2014] JRC 021 . The reasons for his decision were set out at paragraphs 19 to 24 as follows:- "19. What I believe can be distilled from the authorities cited is that:- Whilst retaining flexibility as to the circumstances in which it will appoint an amicus curiae, the Court will ordinarily appoint a lawyer for assistance on questions of law. For these purposes and consistent with Article 15(1)(A) of the Royal Court (Jersey) Law 1948 , questions of law will include questions of procedure. The role of the amicus curiae so appointed is to assist the Court and he or she does not represent any person. That assistance can be given by the amicus curiae in turn and on behalf of the Court assisting a litigant in person. The amicus curiae so appointed will be paid out of public funds, and thus the cost will be a burden upon the State. This must be taken into account by the Court when deciding whether the appointment of an amicus curiae is justified. The amicus curiae should have no interest in the proceedings and it would be helpful if when appointing an amicus curiae the Court were to clarify the nature of the assistance it requires. 20. Turning to the facts of this case, Advocate English is quite right to say that on the basis of the findings of the Court in the Financial Provision judgment, the father should be well able to procure legal representation, but in my judgment he is not making this application to avoid that cost. 21. Whilst the father has the capacity in law to represent himself or to instruct a lawyer, I find that he has got himself into such an emotional frame of mind over this litigation, perceiving failings if not conspiracies by all those involved, that would render any working relationship with a lawyer difficult, if not impossible. I cannot force him to instruct a lawyer and I therefore accept that as a matter of fact he is going to represent himself. If he does so, then it will make the administration of justice by this Court very much more difficult, although not impossible. 22. Where I disagree with Advocate English is that the appointment of an amicus curiae will add expense, trouble and delay in this case. Advocate English was concerned that an amicus curiae, encouraged by the father, could act as lawyers may sometimes be instructed to act in commercial litigation, taking every

procedural point for the very purpose of causing delay and adding expense. That seems to me to do a disservice to the lawyer appointed as amicus curiae and to misunderstand the role. 23. Take the view that the appointment of an amicus curiae will greatly speed up the resolution of these remaining three issues. I bear in mind that this litigation involves two children and the very powerful advice the Court received from the guardian Eleanor Green as to how damaging this ongoing litigation between the parents is to the children and how important it is for it to be brought to an end. The Court envisaged these three outstanding matters being dealt with in short hearings either on the judgments being handed down or very soon thereafter and it is deeply regrettable that here we are in January 2014 and they are still to be resolved. 24. Therefore, on the special facts of this case, I am going to accede to the father's application and appoint an amicus curiae who has had no previous connection with the case to be nominated either by the Bâtonnier or the Deputy Judicial Greffier, whichever is more administratively appropriate." 12. In relation to the present application, the defendant is still in an emotional frame of mind over the present litigation just as he was in respect when an amicus was appointed by Commissioner Clyde-Smith. 13. However, the nature of the claim is different from the previous proceedings. It is not family proceedings or matrimonial proceedings as that term was discussed at paragraphs 20 to 22 of I v J before the Court of Appeal reconfirming *Flynn v Reid*

[2012] 2 JLR 326. 14. Secondly, an amicus will not be able to assist with the practical issues that the defendant faces. These are firstly how to identify what documents are relevant to the present dispute from the extensive documentation in his possession from previous proceedings. Secondly, an amicus cannot assist in the drafting of witness statements. Rather his or her role is limited to assisting on points of law or procedure or assisting the court by commenting on the evidence produced. 15. The present case is also not legally complicated. The issue between the parties is a factual dispute and not one where any points of law appear to arise on the pleadings. If there are any points of law they are not complex. What the defendant is facing is a potential inequality of arms in representation, if he represents himself, in relation to how to adhere to the process of discovery and production of witness statements to enable a trial to take place. Ultimately the view I reached is that in reality the defendant was asking for an amicus to be appointed to represent him. That is not ordinarily the function of an amicus as is clear from the judgment of Commissioner Clyde-Smith to which I have referred. I therefore refused the application. 16. Equally this is a case where the defendant needs help with the procedural challenges and faces a potential inequality of arms because he is dyslexic. I also accept that the case may have an indirect effect on his children either because of the stress that the present dispute may create or because of other applications, (which I am not encouraging), which are made as a consequence of the present dispute. 17. In the circumstances of this case, while I refused the application of the defendant for an amicus to be appointed, I did conclude this was a case where it was appropriate to invite the Bâtonnier or someone on his behalf to consider awarding legal aid on a discretionary

basis. Even though the defendant does not fall within the guidelines where legal aid is granted, the Bâtonnier can award legal aid on a discretionary basis. While the award of legal aid on such a basis would not mean that the assets of J might not be subject to a charge to meet the costs of any lawyer appointed, the appointment of such a lawyer would assist J in complying with discovery obligations, filing witness statements and presenting his version of events on the factual dispute, which is at the heart of this case, to the Royal Court. 18. The alternative is that if the Bâtonnier was not minded to award discretionary legal aid, I permitted J to be assisted by a Mackenzie Friend both in terms of producing relevant documents and the production of witness statements, as well at trial. 19. Finally, I encourage the parties, if they can, to try to resolve their differences by mediation or some similar process sooner than later and in particular firstly before further costs are incurred and secondly before there is any escalation of the present dispute into areas covered by previous judgments of the Royal Court and the Court of Appeal. *Authorities I v J (Family)*

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

[2014] JCA 235 . *Flynn v Reid*

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