

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

MONTSERRAT

MNIHCVAP2020/0026

BETWEEN:

DAVID DORSETT

Appellant

and

ATTORNEY GENERAL

Respondent

Before:

The Hon. Mde. Gertel Thom
The Hon. Mr. Paul Webster
The Hon. Mr. John Carrington, QC

Justice of Appeal
Justice of Appeal [Ag.]
Justice of Appeal [Ag.]

Appearances:

Dr. David Dorsett in person for the Appellant
Ms. Renee Morgan for the Respondent

2022: February 8;
June 1.

Civil appeal – Inherent jurisdiction – Appointment of counsel amicus curiae — Whether the court can appoint an attorney amicus curiae against his will – Whether the appointment of amicus curiae constitutes employment under the Code of Ethics to the Legal Profession Act – Difference between standby counsel and amicus curiae

The appellant is an attorney at law who was admitted to practise in Montserrat in 2014. He was retained by an accused person in criminal proceedings to represent him on a number of issues up to arraignment and appeared for him in several matters between 2016 and 2020. The accused eventually indicated to the court that he wished to represent himself at the criminal trial. However, the court refused to grant the appellant leave to withdraw from the proceedings and further appointed him amicus curiae to assist the court in cross-examining six vulnerable witnesses for the Crown. The appellant refused this appointment.

The appellant commenced administrative proceedings seeking relief under Part 56 and section 20 of the Constitution of Montserrat seeking several heads of declaratory relief, his main issue being: 'can the court appoint an attorney amicus curiae against his will?' The learned judge considered the rights of the appellant under the Constitution and under the Code of Ethics and found that the court acted reasonably and in accordance with settled legal principles, and the order appointing the appellant as amicus curiae was made ex abundante cautela in the circumstances and in the express exercise of its inherent jurisdiction.

On appeal, the appellant's position was that the learned judge had failed to answer the question of whether the court can appoint an attorney amicus curiae against his will. He also posited that he was entitled to decline or withdraw from employment pursuant to the Code of Ethics. The respondent contended on the other hand that the true question to be determined was whether the appellant should be allowed to leave the matter after holding himself out as counsel for the accused and that the question of entitlement to refuse employment simply did not arise as the appellant remained engaged by the accused until he was granted leave by the court to withdraw.

Held: dismissing the appeal and making no order as to costs, that:

1. The appointment of counsel amicus curiae is not employment. The court cannot enter into an employment relationship with a person appearing before it as that would fly in the face of the need for impartiality in the judicial proceedings. The power to appoint an attorney amicus curiae is derived from the court's inherent jurisdiction, i.e. its reserve of powers as a superior court that is essential to the administration of justice and the maintenance of the rule of law and the Constitution. Any limitation on the inherent jurisdiction of a superior court must arise from express legislation or necessary implication.
2. The Code of Ethics, where it speaks to the right to decline employment, does not meet either of these criteria and so did not limit the inherent jurisdiction of the court in making such appointments. Therefore, the appellant was not entitled to decline his appointment as amicus curiae pursuant to clause 9 section A of the Code of Ethics. In any event, as Persad J in the criminal proceedings had refused to grant leave to the appellant to withdraw from representation, he was constrained to act for the accused in the criminal proceedings.

Section 37(3) of the **Legal Profession Act, 2014** No. 8 of 2014 of the Laws of Montserrat applied; **Fahey v The Queen** [2017] NZCA 596 considered; **Her Majesty The Queen v Criminal Lawyers' Association of Ontario and Lawrence Greenspon** 2013 SCC 43 considered.

3. Every person who is subject to an order of the court risks facing sanctions for contempt for failure to obey. The product of our adversarial system of justice is that court orders are almost invariably made against the will of persons save for consent orders. Therefore, an order of the court appointing the appellant amicus curiae could not have been made in vain merely because the appellant was so appointed against his will.
4. The court below did answer the question posed by the appellant in the administrative proceedings by considering whether the appellant had any statutory or constitutional rights to decline the appointment as amicus curiae.

JUDGMENT

[1] **CARRINGTON JA [AG.]:** This appeal concerns the question of whether the court can appoint an attorney at law as amicus curiae against his will. As this is a question of public importance under our system of law, this Court heard the appeal notwithstanding that to a large extent the question had become academic at the date of the hearing due to a change of circumstances. The appellant's position was that the learned judge below had failed to answer that question in his judgment, and it was therefore necessary for this Court to so do. He invites this Court to make declarations that he is entitled to refuse employment, including employment to act as amicus curiae, and that his appointment as amicus curiae in contravention of his right to decline employment as provided by clause 9 of Part A of the Code of Ethics contained in Schedule 3 of the **Legal Profession Act, 2014**¹ ("LPA") was unlawful and is accordingly null and void and of no legal effect.

[2] As there is little or no dispute on the facts, I summarise the background facts extracted from the judgment in the court below. The appellant is an attorney at law who was admitted to practise in Montserrat in 2014. He gave evidence that he was engaged by Mr. David Brandt ("Mr. Brandt") to represent him with respect to constitutional issues, issues of statutory interpretation and preliminary issues up to arraignment in a criminal matter in Montserrat.

¹ No. 8 of 2014, Laws of Montserrat.

- [3] The appellant in fact appeared on behalf of Mr. Brandt on several applications between 2016 and 2020, including at the preliminary inquiry in December 2016 and on appeal therefrom; in the High Court seeking constitutional relief and on appeal therefrom; at a case management hearing of the criminal trial in May 2019; at the trial itself on an application to quash the indictment; on an application for the trial judge to recuse himself for apparent bias in July 2019 and on appeal therefrom in January 2020; and on an application to have Mr. Brandt's bail restored in November 2019. The appellant additionally had sent a 'Notice of Counsel' to the Director of Public Prosecutions in January 2018 indicating that he acts as counsel for Mr. Brandt and in May 2019 wrote to the Registrar of the High Court on behalf of Mr. Brandt.
- [4] In June 2019, Mr. Brandt indicated to the court that he would represent himself at the criminal trial. In March 2020, Persad J appointed the appellant amicus curiae to assist the court in cross-examining six vulnerable witnesses for the Crown at the criminal trial. Persad J also referred to the fact that he had given the appellant adequate opportunity to put forward reasons why he should not be appointed. His finding was that the reasons given were not sufficient to prevent the court from appointing the appellant to assist the court in relation to the cross-examination of the vulnerable witnesses. The directions/orders made by Persad J were: (a) refusal to give leave to the appellant to withdraw from his representation of Mr. Brandt; and (b) the appointment of the appellant as amicus curiae. This appointment was later revoked by Persad J.
- [5] The appellant commenced administrative proceedings seeking relief under Part 56 and section 20 of the **Constitution of Montserrat**² (the "**Constitution**") in the High Court seeking several heads of declaratory relief. The court recorded at paragraph 20 of its written judgment, however, that he framed the thrust of his submission as:

² Cap 1.01, Revised Laws of Montserrat 2013.

'can the court appoint an attorney amicus curiae against his will?' i.e. the same question that we are asked to determine on this appeal.

- [6] Ms. Morgan who appeared for the respondent, the Attorney General of Montserrat, did not agree that the issue before the court below was in the above terms and advanced that the real question was whether the appellant should be allowed to leave the matter at will after holding himself out as counsel for Mr. Brandt. She submitted that the learned judge did answer that question by his finding that the entitlement to refuse or decline employment simply did not arise as the appellant remained engaged by the accused until he was granted leave by the court to withdraw.
- [7] The learned judge below considered whether Persad J had the jurisdiction to make the amicus order and whether it was proper for him to so do in the circumstances. Persad J made the order in the express exercise of his inherent jurisdiction after making efforts to seek other representation for Mr. Brandt. He considered that the appellant remained the best option based on the fact that he was on record, his familiarity with the matter, his good working relationship with the accused and his competence.
- [8] After considering section A paragraph 9 (an attorney's right to decline employment) and section B paragraph 32 (an attorney's right to withdraw from employment) of the Code of Ethics under the **LPA**, the learned judge reviewed authorities on the justification for and the practice of appointing amicus curiae and in particular the decision of the New Zealand Court of Appeal in **Fahey v The Queen**³ which stated that (i) the court's power to appoint standby counsel in criminal proceedings is grounded in its public duty to ensure that criminal trials are fair and its implied power to control its own processes to that end (i.e. the court's inherent jurisdiction in criminal matters); and (ii) that the decision about whether and who to appoint [as] counsel is entirely in the court's discretion although it is prudent to consult. He

³ [2017] NZCA 596.

concluded that Persad J had acted reasonably and within his inherent powers and in accordance with settled legal principles in making the order appointing the appellant amicus curiae.

- [9] The learned judge considered the rights of the appellant under section 2 of the **Constitution**. He found firstly that any deprivation of the appellant's personal liberty by the appointment fell within the exception under section 6(1)(c), namely that the appointment was made in accordance with a procedure prescribed by law and in the execution of the order of a court made in order to secure the fulfilment of an obligation imposed on the appellant by law. He then considered whether there had been a breach of the appellant's right not to be subjected to forced labour under section 5 of the **Constitution** and concluded that there was no breach of this section as the labour was required in consequence of an order of the court. He next considered whether the appointment was in breach of the appellant's right to freedom of religion under section 11 of the **Constitution** on which he considered he did not need to come to a definite conclusion due to a change in circumstances.
- [10] The learned judge concluded his judgment by considering the issues of the appellant's standing and entitlement to declaratory relief and found that while the appellant met the threshold of standing, he was not entitled in the circumstances to declaratory relief as there was no infringement or threatened infringement of his rights or dispute as to the extent of his rights justifying the need for declaratory relief in accordance with the decisions of **Martinus Francois v The Attorney General**⁴ and **Gouriet v Union of Post Office Workers**.⁵
- [11] Before this Court, the appellant, appearing in person, outlined in his written submissions a fuller history of the matter including the efforts by Persad J to appoint counsel who would be publicly funded and which ended with his appointment of the appellant as amicus curiae, which the appellant submitted that he immediately

⁴ Civil Appeal No. 37 of 2003.

⁵ [1978] AC 435.

declined. It seems to me immediately clear from the extracts quoted from the ruling of Persad J that no question arose that the appellant's appointment would be as a legal representative at the public expense under section 7(2)(d) of the **Constitution**. While Persad J may have been considering such an appointment at some stage, when he made the decision to appoint the appellant amicus curiae, he did not purport to make the appointment under section 7(2)(d) of the **Constitution**, but only under his inherent jurisdiction.

[12] The thrust of the appeal nonetheless was that the learned judge failed to adjudicate upon the issue 'can the court appoint an attorney amicus curiae against his will?'. This, however, was largely an academic issue since Persad J had also refused to give the appellant leave to withdraw his representation. In the absence of such leave, the appellant was in any event constrained to act as attorney for Mr. Brandt in the criminal proceedings "against his will" and indeed also against the will of the accused himself as he had indicated to the court that he wanted to represent himself. As the learned judge below observed, the appointment as amicus curiae was in the circumstances 'ex abundante cautela'. It took the matter no further in reality as the appellant was already on record as the legal representative of the accused. The effect of the appellant's will, if relevant, had already been determined by the refusal of leave to withdraw for which he had applied.

[13] The appellant's arguments before us recognize that the appointment as amicus curiae was at least unnecessary or perhaps even wrong having regard to (i) the dicta at paragraphs 80 and 81 of the decision in **Fahey** as his role would have been more akin to that of standby counsel than amicus curiae; and (ii) Persad J's refusal to grant the appellant leave to withdraw so that there was no need for standby counsel in any event. I respectfully adopt the dicta in **Fahey** as to the traditional role of amicus curiae and agree that the functions which were contemplated by Persad J that the appellant would perform did not come within the traditional role of amicus curiae but appeared more readily identifiable with the role of standby counsel. However, as indicated, the appointment was made ex abundante cautela

only so that any misnomer or even mistake in the appointment was of no practical effect.

[14] The central plank of the appellant's submissions was that he is entitled, under the Code of Ethics, to decline employment and thereby to refuse an appointment as *amicus curiae*. The Code of Ethics is contained in Schedule 3 of the **LPA** and is made under section 37 of that Act which provides that the Code of Ethics regulates the professional practice, etiquette, conduct and discipline of attorneys at law and the breaches of the rules in Part A may constitute professional misconduct and of Part B constitutes professional misconduct. Section 37(3) states that '[w]here no provision is made by the rules in respect of any matter, the rules and practice of the legal profession which before the commencement of this Act governed the particular matter apply in so far as is practicable.' These rules and practices will include, in my view, the powers exercisable under the court's inherent jurisdiction.

[15] The starting (and indeed ending) point of the appellant's argument appeared to be that the appellant would be remunerated by the Crown for his appointment and so the appointment was subject to agreement of terms with the Attorney General. The appellant's argument continued that the appointment could not be made against the will of an attorney as he could then simply refuse to agree terms with the Attorney General or be prepared to risk contempt so that the appointment would be in vain. Before considering these arguments, I propose to look at the decision in **Her Majesty The Queen v Criminal Lawyers' Association of Ontario and Lawrence Greenspon**,⁶ ("Ontario"), a decision of the Canadian Supreme Court on which the appellant relied.

[16] The **Ontario** decision concerned whether counsel appointed *amici curiae* by the criminal courts when the accused had discharged their representatives in order to maintain the orderly conduct of trial and avoid delay should be paid only at legal aid rates or at rates set by the court. By a majority decision, the Supreme Court held

⁶ 2013 SCC 43.

that while there is an inherent jurisdiction to appoint amicus curiae, to the extent that the terms of the appointment blur the distinction between the role of amicus and that of defence counsel, an appointment for such purpose can conflict with the accused's constitutional right to represent himself and can require the amicus to make legal submissions that are not favourable to the accused or that are contrary to the accused's wishes. Hence, a lawyer appointed as amicus who takes on the role of defence counsel is no longer a friend of the court. The respondent criticized these statements as being strictly obiter. While this may well be correct, they are nevertheless entitled, in my view, to the greatest respect from this Court as having fallen from the highest court in another common law jurisdiction.

[17] The analysis in **Ontario**, in my view, is consistent with the view expressed by the New Zealand Court of Appeal in **Fahey**⁷ on the difference between the roles of amicus curiae and standby counsel, which may also be technically categorized as being obiter but are also entitled to our highest regard.

[18] The Supreme Court in **Ontario** also held that while the courts have the jurisdiction to set terms to give effect to their authority to appoint amici curiae, the ability to fix rates of compensation for amici is not essential to the power to appoint them and its absence does not imperil the judiciary's ability to administer justice according to law in a regular, orderly and effective manner.

[19] The majority in **Ontario** found therefore that while the court has the inherent jurisdiction to appoint an amicus curiae, the court's obligation to respect the constitutional roles of other arms of government meant that it was for the executive to determine an appropriate rate of compensation, with the court having the power to stay the proceedings where such rates have not been agreed.

[20] In my judgment, if the power to appoint amicus curiae is derived from the court's inherent jurisdiction, i.e. its reserve of powers as a superior court that are essential

⁷ Especially paragraphs 6-64 of the judgment.

to the administration of justice and maintenance of the rule of law and the **Constitution**,⁸ such power cannot be limited by the will of the object of the power. If so, the tail will be wagging the dog. This is more so as this particular power is exercisable over its officers, one of whom is invariably to be so appointed, and it is the role of these officers to assist the court in upholding the rule of law.

[21] **Ontario**, as the appellant submits, indicates that the way in which superior courts exercise their powers may be structured by Parliament.⁹ However, in my view, a limitation on the inherent jurisdiction of a superior court must arise from express legislation or necessary implication due to the fundamental constitutional role of such jurisdiction. The Code of Ethics, where it speaks to the right to decline employment, does not meet either of these criteria. Firstly, the appointment of *amicus curiae* is not employment. If it were, the question would be: by whom? The court? The court could not enter into an employment relationship with a person appearing before it as that would fly in the face of the need for impartiality in judicial proceedings, a cornerstone of the rule of law. By the State/Crown? There is usually a procedure laid down in the **Constitution** or by statute for the employment of persons by the State/Crown and there is no indication that such a procedure is followed or meant to be followed on an appointment of *amicus curiae*. The mere fact that the State/Crown may (not must) compensate the legal practitioner does not create an employment relationship as none of the contractual, common law or statutory rights of such relationship would appear to arise merely from the executive act of agreeing to and making payment of compensation for provision of legal services to a third party. The appointment of *amicus curiae* therefore falls within section 37(3) of the **LPA** and the inherent jurisdiction of the court applies without limitation by that Act.

[22] In any event, the payment of remuneration to the appellant for his appointment as *amicus curiae* did not appear to be within the contemplation of Persad J for the

⁸ See paragraph 28 and paragraphs 44 et seq.

⁹ See paragraph 23.

understandable reason that the appellant was already on record as counsel for the accused. No question of his having to agree terms with the Attorney General therefore would have arisen. As every person who is subject to an order of the court risks facing sanctions for contempt for failure to obey, this does not constitute a valid reason for concluding that orders cannot be made against persons against their will. The product of our adversarial system of justice is that court orders are almost invariably made against the will of persons save for consent orders. I therefore firmly reject the argument that the order for appointment of amicus curiae would be made in vain because it could be frustrated by the attorney who is the object of the order.

- [23] For the above reasons, I conclude that clause 9 of section A of the Code of Ethics does not assist the appellant and I hold in answer to the question raised by the appellant on this appeal that the inherent jurisdiction to appoint amicus curiae can be exercised without regard to the will of the appointee. I would therefore dismiss the appeal for these reasons and for the additional reason that I am satisfied that the learned judge below did answer the question posed by the appellant by addressing and rejecting the appellant's arguments under the **LPA** and the **Constitution**. Even though he may not have expressed a conclusion in terms of the question which the appellant claims he was asked to answer, a full reading of the judgment does provide a sufficiently clear expression of the court's reasoning and conclusion on the issue, namely that the 'will' of the attorney must find expression in his statutory or constitutional rights and not merely his personal predilections and that neither was infringed in the circumstances of the instant case.

[24] As the appeal lies from administrative proceedings in the court below and no issue arises as to the unreasonableness of the application or of the conduct of the application or appeal therefrom, I would order that the appeal be dismissed with no order as to costs.

I concur.
Gertel Thom
Justice of Appeal

I concur.
Paul Webster
Justice of Appeal [Ag.]

By the Court

Chief Registrar