

**COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Common Law and Equity Division
2021/CLE/gen/00076**

BETWEEN:

HARRIETTE LOUISE HARRIS

Plaintiff

AND

W. A. BRANVILLE McCARTNEY

Defendant

Before: Assistant Registrar Mr. Renaldo Toote

Appearances: Leslie Stuart Amicus Curiae for the Plaintiff
W.A. Branville McCartney Pro Se Defendant.

Hearing Date: 4th May, 2021.

Donee by Power of Attorney – unqualified person – ss. 2, 20, 25 of Legal Profession Act – s. 5 Power of Attorney Act – locus standi – Order 5 rule 6(1) Rules of the Supreme Court.

By virtue of a power of attorney dated 21st January, 2021 the Plaintiff bestowed upon Mr. Leslie Stuart as Donee, the power to act as though he were the Plaintiff regarding legal and personal matters on her behalf situated in the Commonwealth of The Bahamas through litigation or settlement in any matter.

As a result of the said authority, Mr. Stuart filed a specially endorsed Writ of Summons on 1st February, 2021, seeking damages against the Defendant alleging trespass and property damage among other things. The Plaintiff's Statement of Claim arises from the Defendant's 2016 action wherein it is alleged that he demolished her home and property situated Poinciana Drive and Finlayson Street.

In response, the Defendant on the 9th February, 2021 entered a conditional appearance without leave of the Court and then again on the 15 February, 2021 the Defendant filed a summons seeking leave of the Court to Strike out the Plaintiff's statement of claim alleging *inter alia* that:

(i) the action and anything in the Statement of Claim... discloses no reasonable cause of action; (ii) the Statement of Claim is scandalous, frivolous or vexatious; or (iii) the said Statement of Claim is otherwise an abuse of the process of the Court.

At the hearing, Mr. Leslie Stuart appeared in his representative capacity as Donee on behalf of the Plaintiff. The Defendant contends that the Plaintiff has no *locus standi* to institute this action principally because Mr. Leslie Stuart, in his representative capacity on behalf of the Plaintiff is an unqualified person according to the Legal Profession Act, Ch. 64 to appear before the Supreme Court and therefore lack *locus standi* to maintain this action.

Held: The Donee of a Power of Attorney has locus standi to conduct legal proceedings before the Supreme Court.

Section 5 of the Power of Attorney Act grants the Donee of a power of attorney, the authority to do any other thing in his own name by the authority of the Donor of the power.

Having regard to that, an unqualified person pursuant to the Legal Professions Act section 2(b) [definition of unqualified person] denotes that any person who falls within the ambit of section 25 of that Act shall have corresponding meaning as a “qualified person”.

That means section 25 of the Legal Profession Act has the ability to qualify any person who is not Counsel & Attorney and falls outside the scope of section 20 as a qualified person to conduct legal proceedings before the Supreme Court.

Having considered section 25, it seems as though it appropriately empowers an unqualified person to conduct, defend or otherwise act in relation to any legal proceedings provided that any other legislation so empowers that unqualified person to do so.

That empowerment is derived from Order 5 rule 6(1) of the Rules of the Supreme Court which allows pro se litigants as well as persons in other representative capacity to appear before the Court.

This Court is satisfied that when all of the relevant legislations are read together as a whole, it is apparent that the intention of Parliament created provisions for an unqualified person in specific representative capacities to conduct legal proceedings before the Supreme Court.

Authorities Cited

Considered: *Jones & Saldanha v Gurney* [1913] WN 72; *White v Cuyler* (1795) 6 Term Rep 176; *Wilks v Back* (1802) 2 East 142; section 5 Power of Attorney Act, Ch. 81; *Pepper (Inspector of Taxes) v Hart* [1993] AC 593; section 20 Legal Profession Act, Ch. 64.

RULING

Toote, Assistant Registrar

Background

- [1]. By a specially endorsed Writ of Summons filed on 1st February, 2021, Mr. Leslie Stuart as Donee of a Power of Attorney obtained from the Plaintiff dated 21st January, 2021 commenced this action seeking among other things, damages against the Defendant for trespass and damages to her property for the unlawful demolition of same.
- [2]. The Writ of Summons was served on the Defendant's legal chambers and not personally on him pursuant to O. 10 r. 1 of the Rules of the Supreme Court ("RSC").
- [3]. On 9th February, 2021 the Defendant entered a conditional appearance, however no leave from the Court was obtained pursuant to O12. R. 6 of the RSC. Shortly thereafter, on the 15th February, 2021 the Defendant filed a Summons and Affidavit in Support to strike out the Plaintiff's statement of claim alleging *inter alia* that the statement of claim (i) discloses no reasonable cause of action; (ii) the Statement of Claim is scandalous, frivolous or vexatious; or (iii) the said Statement of Claim is otherwise an abuse of the process of the Court.
- [4]. On the same date, the Plaintiff filed a summons seeking leave of the Court to enter judgment in default of defence against the Defendant since it was regularly obtained.
- [5]. On the hearing date of both summonses, Mr. Leslie Stuart appeared before me in his representative capacity as Donee pursuant to the Power of Attorney obtained from the Plaintiff. Learned Counsel, Mr. McCartney appeared *pro se* and submitted that Mr. Stuart is precluded from appearing in this matter as he is an unqualified person pursuant to s. 20 of the Legal Professions Act, therefore he should not be before the Court.
- [6]. Mr. Stuart stated that the duly valid and registered Power of Attorney from the Plaintiff, specifically authorises him act on her behalf in any legal proceedings before the Court.
- [7]. *Inasmuch* as it is relevant, I will appropriately reproduce the Power of Attorney for ease of reference.

COMMONWEALTH OF THE BAHAMAS

New Providence

GENERAL POWER OF ATTORNEY

THIS POWER OF ATTORNEY is made this 21st day of January A.D. 2021

BY HARRIETH LOUISE HARRIS

1. I do hereby appoint **MR. LESLIE STUART**, of the Eastern District of New Providence, one of the Islands of The Commonwealth of The Bahamas, as Attorney by Power of Attorney, pursuant to Chapter 81 of the Statutory Laws of the Commonwealth of The Bahamas.
2. To act on my behalf in any matter before any Court, Insurance Company, Bank, Government Agency, Business or whatsoever and whosoever in the Commonwealth of the Bahamas.

WHEREAS:-

- (A) This Power of Authority is to transact and to obtain information from any Government Agency, Company, Business, Person or Court in The Commonwealth of The Bahamas, or to act and do as though I, Harrieth Louise Harris, would do or act regarding legal and personal matters on my behalf situated in The Commonwealth of The Bahamas through transaction, litigation or settlement in any manner **MR. LESLIE STUART** sees fit upon my instructions.

NOW THIS POWER OF ATTORNEY WITNESSED, as follows:-

- (1) The Donor Harrieth Louise Harris **HEREBY** grants and appoint the said Donee (Leslie Stuart) the power by Power of Attorney as herein aforementioned.
- (2) This Power of Attorney shall become effective immediately, and shall not be affected by any disability or lack of mental competence by the Donor except as may be provided otherwise by an applicable Statute.
- (3) This Power of Attorney shall continue effective until the Donor's death provided that all transactions and proceedings required to be conducted by the Donee have come to an end prior to the death of the Donor, and except in the case of any transactions or proceeding which ought to be done for the continuation of the terms of this Power of Attorney to the Donee after the death of the Donor.
- (4) This Attorney by Power of Attorney is governed by the Laws of the Commonwealth of The Bahamas and it is continuous until the Donor in writing revokes the said power from the Donee, provided that the Donor has satisfied all outstanding debts owed to the Donee for acting on behalf of the Donor.
- (5) **THE DONOR NOW BEING OF SOUND MIND AND BODY HEREBY** certify.
 - (a) That all of the contents of this Power of Attorney have been read by the Donor.
 - (b) That all of the contents of this Power of Attorney have been fully explained to the Donor.

- (c) That all of the contents of this Power of Attorney are fully accepted and agreed to by the donor.

IN WITNESSED WHEREOF THE DONOR

has hereunto set his hand Seal
On the date herein first written.

SIGNATURE x Harrieth Louise Harris

Signed Sealed and delivered by the said Donor in the presence of:-

Trevor Harris

Fernley A. Palmer

[8]. In response, Mr. McCartney argues that a power to conduct legal proceedings by a Power of Attorney cannot include litigation by an unqualified person having regard to the disqualification outlined in s. 20 of the Legal Professions Act. Mr. McCartney contends that s. 20 is absolute and prohibits any unqualified person from practising before the Supreme Court.

[9]. All of the aforementioned arguments were raised in *limine* and were not substantively included in the summonses to strike out; however, both parties are of the view that this point of law should be addressed by the Court prior to the consideration of the substantive interlocutory application.

Issue

[10]. The issue for determination is whether or not a Donee by Power of Attorney is an unqualified person to conduct legal proceedings in the Supreme Court pursuant to section 20 of the Legal Profession Act?

The Law

[11]. When addressing the aforementioned, the relevant legislations to consider are:

(i) Power of Attorney Act section 5 states:

The donee of a power of attorney may, if he thinks fit —

(a) execute any instrument with his own signature and, where sealing is required, with his own seal; and

(b) do any other thing in his own name, by the authority of the donor of the power; and any instrument executed or thing done by a donee under such power of attorney in that manner shall be as effective as if executed or done by the donor of the power.

(ii) Legal Profession Act section 2 states:

(2) “unqualified person” means either a person whose name does not for the time being appear on the Roll or counsel and attorney whose name is on the Roll but who is for the time being suspended from practice, but does not include —

(a) a person specially admitted, a registered associate or a legal executive as respects the performance by him of any function falling within his competence under this Act as a person specially admitted or as a registered associate or a legal executive; or

(b) any person within the benefit of section 25, and “qualified person” shall have a corresponding meaning.

(iii) Legal Profession Act section 20 (1) states:

(20) (1) Save where expressly permitted by this or any other Act, no unqualified person shall act as a counsel and attorney, or as such sue out any writ or process, or commence, carry on or defend any action, suit or other proceeding, in the name of any other person or in his own name, in any court, or act as counsel and attorney in any case, civil or criminal, to be heard or determined in any court.

[12]. In the instant matter, the Plaintiff avers that the right to appoint a Donee pursuant to s. 5 of the Power of Attorney Act is sufficient and should be legally recognized before the Court.

[13]. Contrary to this, the Defendant asserts that s. 20 of the Legal Professions Act clearly identifies who is qualified to act as Counsel and Attorney before the Court.

[14]. The common law position with respect to legal standing is that the Court can only exercise jurisdiction over a claim provided the Plaintiff has the requisite *locus standi*. *A fortiori*, if a plaintiff lacks *locus standi*, the court will equally lack the competence to entertain the matter notwithstanding that the claim is within the jurisdiction of the court.

[15]. The Court in **African Apolostic Mission v Dlamini N.O and Others** (3117/10) [2011] SZHC 53 (10 June 2011) considered the term *locus standi* to denote “legal capacity to institute proceedings in a Court of law... It is the right or competence to institute proceedings in a Court for redress or assertion of a right enforceable at law”.

[16]. A good starting point to determine the issue before this Court, is to look at section 2 and 25 of the Legal Profession Act respectively, which provides the definition of an unqualified person and the savings clause provision which empowers an unqualified person to conduct legal proceedings before the Court.

[17]. Section 2 provides as follows:

“unqualified person” means either a person whose name does not for the time being appear on the Roll or counsel and attorney whose name is on the Roll but who is for the time being suspended from practice, **but does not include** —

(a) ...; or

(b) any person within the benefit of section 25, and “qualified person” shall have a corresponding meaning.

[18]. Section 25 provides:

Nothing in this Act shall derogate from any enactment empowering an unqualified person to conduct, defend or otherwise act in relation to any legal proceedings.

[19]. Succinctly put, the effect and operation of ss. 2 & 25 when read together enables the Court to exercise its discretion in determining who is a “qualified person” when weighed against corresponding legislation.

[20]. In fact, the interpretation of “unqualified person” pursuant to s. 2(b) of the Legal Profession Act contains a *proviso* which qualifies any person to conduct legal proceedings before the Court so long as that person fall within the scope of section 25 as being empowered to act by any other enabling legislation.

[21]. That being the case, Mr. Stuart asserts that his power to conduct, defend or otherwise act in relation to this matter derives from the Power of Attorney obtained by the Plaintiff. I am of the view that O. 5 r. 6 of the RSC is the enabling legislation which empowers pro se litigants or their representatives, who are not Counsel & Attorney, the right to conduct proceedings before the Supreme Court. To remove the same, would be tantamount to denying a litigant access of justice.

[22]. In fact, the marginal notes of O. 5 r.6 is entitled: “Right to sue in person”. Although, the marginal notes are not justiciable, their purpose is to illuminate the mischief and provide guidance as to the intention of Parliament.

[23]. In **Pickstone v Freemans Plc** [1989] AC 66, 127 Lord Oliver of Aylmerton said that the explanatory note attached to a statutory instrument, although it was not of course part of the instrument, could be used to identify the mischief which it was attempting to remedy.

[24]. *Inasmuch* as it is relevant, O. 5 r. 6 (1) states:

(1) Subject to paragraph (2) and to Order 70, rule 2, any person (whether or not he sues as a trustee or personal representative or in any other representative capacity) may begin and carry on proceedings in the Supreme Court by an attorney or in person. (Underline mine)

[25]. When the relevant legislations are read as a whole, the effect of [a Donee] s. 5 of the Power of Attorney Act, falls within the scope of “any other representative capacity” mentioned in O5 r.6 and is akin to the appearance of a pro se litigant. To think otherwise, would derogate from the statutory authority conferred upon a Donee and would create a conundrum.

[26]. **Lord Griffiths** in **Pepper (Inspector of Taxes) v Hart** [1993] AC 593 stated:

“The days have long passed when the courts adopted a strict constructionist view of interpretations which required them to adopt the literal meaning of the language. The courts now adopt a purposive approach which seeks to give effect to the true purpose of legislation and are prepared to look at much extraneous material that bears upon the background against which the legislation was enacted.”

[27]. It is the job of the Court to find in statutes when read together as a whole, or in other statutory materials to which they are permitted by law to refer to as aids to interpretation of Parliament’s purpose or policy. (See **R v Barnett LBC** [1983] 2 AC 309).

[28]. I agree with the Mr. McCartney that the Court should also be mindful to avoid against abuse of its legal machinery and not allow

vexatious litigants to enter through the proverbial backdoor. However, having thoroughly considered the relevant statutory materials in full context, I am satisfied that Parliament created provisions to qualify an unqualified person in specific representative capacities so as to conduct legal proceedings before the Supreme Court.

[29]. Therefore, if the proverbial backdoor is indeed open, then it is the job of Parliament to close it and not the Court.

[30]. Upon review of the instant case, the issue for consideration not only concerned whether *locus standi* was a matter of law, but also involved whether or not it was a question of fact. The Plaintiff's statement of claim demonstrates (i) the legal right of the Plaintiff; (ii) the allegations constituting the breach of the Plaintiffs' legal right; and/or (iii) the alleged failure of the Defendant to remedy his obligation in a manner that if there is no proper defence the Plaintiff will succeed in the relief sought.

[31]. Accordingly, I am satisfied that the Donee:

- (i) acted within the terms of his authority;
- (ii) acted in the name of the Donor (see **White v Cuyler** (1795) 6 Term Rep 176 and **Wilks v Back** (1802) 2 East 142);
- (iii) did not put himself in a position where his duties as attorney conflict with his own personal interests or the interests of any third party (see **Boardman v Phipps** [1967] 2 AC 46, [1966] 3 All ER 721, HL).

[32]. Therefore, having regard to the aforementioned authorities, it is Ordered that Mr. Leslie Stuart in his representative capacity as Donee by Power of Attorney, has the authority to conduct legal proceedings on behalf of the Plaintiff, before the Court.

Procedural Irregularities

[33]. Having dealt with the legal issues of this matter, I turn now to address the plethora of procedural irregularities that plague this application.

[34]. Firstly, by virtue of the Defendant's summonses filed, the Defendant alleges that the service on him was improper as the Writ of Summons was served on Halsbury Chambers Law Firm and not personally on the

Defendant pursuant to O. 10 r 1 of the RSC. Further, the Defendant argues that the Plaintiff's omission of pertinent information in the Writ of Summons as prescribed by O. 6 r.4 of the RSC should be grounds to strike out the claim as it is an abuse of the courts process.

[35]. Nevertheless, on 9th February, 2021, the Defendant entered a conditional appearance without leave of the Court. O. 12 r. 6 (1) RSC states:

(1) A defendant to an action may with the leave of the Court enter a conditional appearance in the action.

[36]. As aforementioned, the Plaintiff seeks leave to enter an interlocutory judgment against the Defendant for default of defence.

[37]. Notably, none of the irregularities by the parties nullified the proceedings (see O. 2 r.1 (1), RSC). Therefore, I will exercise my inherent jurisdiction and Order that:

- i. the interlocutory judgment filed herein against the Defendant be set aside;
- ii. Leave is granted to the Defendant to enter a conditional appearance.

[38]. The parties are to provide convenient dates for hearing of the Defendant's substantive application to strike out the Plaintiff's claim.

[39]. Cost of this application to be cost in the cause.

Dated this 27th day of May A.D. 2021

**Renaldo Toote
Assistant Registrar**