

**COMMONWEALTH OF THE BAHAMAS**  
**IN THE SUPREME COURT**  
**Common Law and Equity Side**  
**2017/CLE/gen/FP/00019**  
**BETWEEN**

**CATERPILLER FINANCIAL SERVICES CORPORATION**  
**Plaintiff**

**AND**

**GARET O. FINLAYSON**  
**First Defendant**

**AND**

**MARK FINLAYSON**

**Second Defendant**

**AND**

**KURC LIMITED**  
**Third Party**

**BEFORE:** The Honourable Justice Petra M. Hanna-Adderley

**APPEARANCES:** Ms. Judith Smith for the Defendants  
Mrs. Karen Brown for the Plaintiff

**HEARING DATE:** August 25, 2020

**REASONS**  
**(for Decision made on August 25, 2020)**

**Hanna-Adderley, J**

**Background**

1. On August 25, 2020 I convened a Case Management Conference ("CMC") between the parties in order to determine whether the part heard trial herein should be adjourned to a date when the parties could appear "in person" at the trial or whether the trial could continue remotely by video-conference. The parties had last been before the Court on

February 28, 2020 when the Plaintiff opened its case by calling its first Witness, Mr. Robert Hughes, Accounts Manager with responsibility for the East Coast of the United States of America. After the completion of the evidence-in-chief the matter was adjourned ultimately to August 24 and 25, 2020.

2. On March 11, 2020 the World Health Organization declared that a global pandemic COVID-19 existed. The Government of The Bahamas issued the Emergency Powers (Covid 19 Regulations 2020 and the Emergency Powers (Covid) (No. 1) Order, 2020 which went into effect on the 20<sup>th</sup> day of March, 2020 which outlined how the islands of The Bahamas would be governed, including a period of lockdown and restricted travel to and from the United States of America and between the islands of The Bahamas. On March 17, 2020 the Honourable Chief Justice Mr. Brian M. Moree issued a number of coronavirus mitigation protocols which have been updated as and when necessary.
3. On July 7, 2020 Mrs. Karen Brown, Counsel for the Plaintiff wrote to Ms. Judith Smith, Counsel for the Defendants via email copied to the Court indicating that Mr. Hughes was concerned about quarantine requirements upon arrival and returning to the United States, and that he had asked that she inquire as to the Defendants' amenability to continuing the trial by video conference so as to avoid international travel. On August 7, 2020 Ms. Smith's response was that the Defendants were not in favour of continuing the trial by video conference.
4. On August 7, 2020 Mrs. Brown wrote to Ms. Smith enquiring as to the reason for her clients' position in light of the fact that given the present travel restrictions, an in-person trial would not be practical because, (i) domestic travel was restricted, therefore, the Defendants and their counsel were unable to travel to Freeport; and (ii) international travelers are required to enter into a 14 day quarantine upon arrival to The Bahamas.
5. By letter dated August 14, 2020 Ms. Smith referred Mrs. Brown to the Emergency Powers (Covid-19 Pandemic) (Lockdown) Order 2020 issued on the 4th August 2020 and to the Court Coronavirus Mitigation Protocols 3.0 – Grand Bahama issued July 23, 2020 and to the requirement for the Court, inter alia, to convene a Case Management Conference in respect of a part heard trial. She also set out reasons why her clients were not in favour of continuing remotely thus, that Mr. Hughes had completed his evidence-in-chief and had been tendered for cross-examination in person. That the same conditions should be extant when he is cross-examined otherwise it would be applying disparate conditions to Mr.

Hughes and therefore unfair to the Defendants. That there is a “sensory dilution in video conferencing”, and it was not fair that the Defendants should be faced with that disadvantage. Ms. Smith also had concerns if she and her client had to be in different locations and attending via video link. That they were unable under the present Emergency Orders to be in the same location. That she believed that the video link as it had heretofore been used is where all parties except the witness appearing via video link were in the Courtroom. She concluded that her client had a right to have Mr. Hughes appear in person and that the trial must be conducted fairly.

6. On August 18, 2020 I informed the parties that I wished to convene a CMC on August 25, 2020 and asked them to advise of their availability. Counsel agreed to the date.

### **Submissions**

7. At the CMC conducted remotely via Zoom, Ms. Smith submitted that she had a concern about the environment in which Mr. Hughes would be giving his evidence. He would have given his evidence in person but the Defendants would be at a disadvantage because now he would be able to give his evidence via video. That this is a disadvantage because there is a different setting when a witness is giving evidence by video. He would be very comfortable in his home, whereas when in the witness stand and the person is cross-examining, she and the Court are able to perceive him in real-time. In addition, she submitted that we (those observing) would not know his set up, whether he is going to be sitting down, when in court he would be standing up. There would be different conditions available to him than when he was in Freeport and had to come in person. Conditions should be equal and that he needs to be cross-examined the same way that he was led and that is in person. That the trial was “on a track” and that now that track was being adjusted or changing in the manner in which that track took place. That she was not certain whether the Orders permitted this, and she did not know whether it was fair.
8. Mrs. Brown on the other hand submitted that a video conference does allow for observation in real-time. That the only argument being advanced by Counsel is that the witness would be in a less intimidating environment, which she did not think was something that the Court needed to consider. Ms. Brown saw no difficulty with the witnesses for the Defendants giving evidence remotely provided she and her client could be at the same location.

9. Having heard Counsel I made the determination that in light of the current travel restrictions necessitating 14 days quarantine for all visitors to The Bahamas, the part heard trial could continue remotely via video conference but that if the Defendants and their Counsel could not be present at the same location so as to facilitate the ability to confer with each other during the cross-examination of the witness, the trial would be adjourned. I indicated that I would give my reasons for this determination and I do so as follows.

### **Reasons**

10. On March 15, 2020 Prime Minister the Most Hon. Dr. Hubert Minnis announced during a National Address the terms and scope of the Government's response to the Covid-19 virus.

11. On March 17, 2020 The Honourable Chief Justice Mr. Brian M. Moree, having been informed by the measures announced in the said National Address, implemented the first phase of the Court Coronavirus Mitigation Protocols, Notice #1, which came into effect on March 18, 2020 and which stated its purpose:

"The Judiciary has now developed its coronavirus mitigation protocols reflecting the twin priorities of:

- (i) protecting the safety and health of our judicial officers and staff, the law enforcement personnel assigned to the Courts, members of the Bar who work in and around the Courts and all public users of the Courts; and
- (ii) keeping the Judiciary operating to provide continued access to justice as it discharges its mission-critical functions in a democratic society. "

12. With respect to civil trials the Protocols provided as follows:

"Supreme Court – Civil Side (all cases which are not Criminal):

Part heard Trials – part heard trials will be completed. Social distancing procedures to be followed. Wherever possible witnesses (in New Providence and elsewhere) to give evidence by video conference."

13. The continuing spread of the virus throughout several islands of the Commonwealth of The Bahamas caused the Government of The Bahamas and the Honourable Chief Justice to revise and extend the Emergency Powers Orders, Regulations and Protocols as and when necessary.

14. In response to the measures announced by the Government and to ensure the continued operation of the Courts and access to justice the Chief Justice issued 11 Notices and several Practice Directions up to the time of the CMC. Notice #8 The Court Coronavirus Mitigation Protocols 2.0 came into effect on July 1, 2020 and with respect to the Supreme Court – Civil Side (all cases which are not Criminal) provided:

“6. (i) Part heard trials in New Providence and Grand Bahama commenced before 17 March, 2020. The Judge will conduct a Remote Hearing for directions in each case and after considering submissions on behalf of the parties will determine whether the trial is to continue prior to the Expiration Date or adjourned to a date after the Expiration Date.

(ii) In the event that the trial is to continue prior to the Expiration Date the Judge will direct which Disposition Mode is to be used and give such other directions as necessary to facilitate the completion of the trial.

(iii) In all cases, the parties will be given not less than ten (10) calendar days’ notice of the date of the resumption of the trial unless a shorter period is agreed by all parties.”

“Expiration Date” is defined as the date when these Protocols shall cease to have effect pursuant to the direction of the Chief Justice by Practice Direction. Notice #8 sets out a detailed process as to how Remote Hearings ought to be conducted.

15. NOTICE #9 The Coronavirus Mitigation Protocols 3.0 – Grand Bahama came into effect on 23 July, 2020 and expired on August 11, 2020 (“the Cessation Date”) and stated that the Protocols 2.0 continued to be in effect subject to modifications in respect to Grand Bahama during the period July 24 to August 11, 2020. At Section 4 part heard trials commenced before July 24, 2020 were suspended until August 11, 2020 and were to continue thereafter on a date and at a time and in a manner fixed by the presiding Judge (emphasis mine).

16. On August 5, 2020 the Chief Justice issued NOTICE #10 The Court Coronavirus Mitigation Protocols 4.0 which extended the Notice #9 Court Coronavirus Mitigation Protocols 3.0 to Grand Bahama until the Cession Date, August 11, 2020. In this Protocol August 24, 2020 was stipulated as “the Extension Period”.

17. On August 10, 2020 the Chief Justice issued NOTICE #11 Extension of the Court Coronavirus Mitigation Protocols which extended as of August 12, 2020 Protocols 4.0 to Grand Bahama with the exception of a few modifications. Section 4 of Protocol 4.0 states:

“Supreme Court – Civil Side (all cases which are not criminal):

4. During the Extension Period, unless the **presiding judge determines otherwise** after hearing submissions by or on behalf of the parties:

- (i) In-Person hearings under paragraphs 6 and 7 of the Protocols 2.0 are suspended. All such hearings which are adjourned as a result of such suspension will be rescheduled by the judge to a fixed date after the Extension Period;
- (ii) the Court will proceed with all Remote Hearings and Applications on the Papers under paragraphs 8 and 9 of the Protocols 2.0. (Emphasis mine).

18. The common thread running through all of the Protocols is the power of this Court to exercise its discretion to suspend “in person hearings” in relation to part heard trials if the circumstances warrant such suspension. The spread of the virus was one such circumstance. What the Protocols do not do is prohibit remote hearings in part heard trials. The Protocols in fact promote remote hearings, bearing in mind the purposes set out in the Chief Justice’s Protocols of March 17, 2020.

19. It is clear from a reading of Notice #11 that the Presiding Judge has the discretion to, after hearing from the parties, up to August 24, 2020, to either suspend in person hearings and reschedule the trial after August 24, 2020. There is no prohibition against having remote hearings in either instance. In fact, 4 (ii) permits the Court to proceed with all Remote Hearings.

20. Practice Direction No.3 of 2020 New Court Procedures in the Supreme Court deals extensively with the conduct of Remote Hearings during the Emergency Period:

“Remote Hearings

- 3. The Covid 19 pandemic necessitates the wider use of remote hearings whenever possible. Accordingly, the Court accelerated the implementation of its remote platforms and since 14 May, 2020 has increased its use of Remote Hearings for applications and, where appropriate, Videoconferencing for trials under the relevant statutory provisions. You

are specifically directed to paragraph 11 of Notice # 8 with reference to these modes of proceedings. Attached hereto as Annex 1 is a copy of that paragraph. Additionally, counsel should ensure that his/her face is visible on camera at all times during a Videoconferencing hearing in front of a neutral background and that all incoming audible notifications to their computer are muted or turned off.

4. The method by which all hearings, including Remote Hearings, are conducted is always a matter for the presiding judicial officer, operating in accordance with applicable law, Rules, Protocols and Practice Directions. In determining whether there should be a Remote Hearing, the judicial officer must have regard to the interests of justice, public health issues and the ability to maintain appropriate physical distancing attendance in courtrooms. Further, when considering the suitability of a Remote Hearing, judicial officers must consider issues such as the nature of the matters at stake during the hearing, any issues which the use of video/audio technology may present for participants in the hearing, the individuals'/witnesses' needs and any issues around public access to or participation in the hearing."

21. Further, as the Chief Justice noted in the Practice Direction, Order 31A(1)(k) of the Rules of the Supreme Court provides for the court to actively manage cases by "making appropriate use of technology" and Order 31A r18(2)(n) provides that the Court may hold a hearing by "...electronic means or use any other method of direct communication: Provided that where evidence is received by telephone or other electronic means, all persons participating must be able to hear each other and to identify each other so far as practicable." Section 78C (2) of the Evidence Act as amended by section 2 of the Evidence (Amendment) Act, 2013 provides that in criminal proceedings "...the court may, at any time during any proceedings relating to an offence other than at a time when the evidence of a witness is being taken, direct that the accused appear by live link or by any other means that will allow the court and the accused to engage in simultaneous visual and oral communications." For completeness, (Sections 78A-E of the Evidence Act as amended by section 4 of the Evidence (Amendment) Act, 2011 makes provisions for the use of live television link and recorded evidence in criminal proceedings. In particular, section 78B

(1)(b) provides "A person, other than the accused person, may give evidence by way of a live television link in proceedings to which this Part applies, where the court is satisfied that – the witness is outside of The Bahamas". Clearly, the legislative framework exists for the Courts (on the Civil and the Criminal side) to conduct remote hearings/trials, part heard or otherwise.

22. On August 25, 2020 the Bahamas Government issued the Emergency Powers (Covid 19 Pandemic) (No. 5) Order, 2020 at Section 18 (2) and (3) which states a visitor to The Bahamas must have a negative RTPCR COVID 19 molecular diagnostic test and must submit to a mandatory 14 days quarantine at a government identified facility. Mr. Hughes would be subject to these restrictions upon entering The Bahamas. While I am of the view that the restrictions are reasonably justifiable in a pandemic, they would be onerous on the Plaintiff, to have an executive forced to remain in the Bahamas for 14 days. Further, he would not be able to attend Court to give evidence until the end of his quarantine period, further delaying his departure from The Bahamas. Furthermore, the Second Defendant and his Counsel would also be subject to 14 days quarantine after inter island travel.

23. Practice Direction 3 of 2020 sets out the "test" or the matters that the Court should consider when determining whether to proceed with a trial remotely as follows:

(i) Interests of justice: Ms. Smith argued that to change the manner in which the trial was being conducted would amount to unequal treatment of the Defendants, that it would be unfair to continue remotely. I do not accept this argument. Mr. Hughes would be subject to the same cross-examination via video conference as he would have been at an in person trial. The Defendants will not be denied their right to ask him questions on or to test his evidence-in-chief. The Defendants' fundamental right to equal treatment before the law would not in my opinion be infringed by the trial proceeding remotely.

(ii) Public health issues: The Protocols were clearly implemented to reduce the number of persons attending the Court. Remote hearings meet this goal. What is also relevant is the high risk now involved in travelling through busy international airports in a pandemic, which Mr. Hughes and



participants from Nassau, N.P. would be subject to if I were to convene an in person hearing.

- (iii) The ability to maintain appropriate physical distancing attendance in courtrooms: The witness list in this action is short. Each party intends to call one witness and total of 2 Counsel have the carriage of the action. My Courtroom is large and so social distancing would not have been an issue should I have determined to continue with the in person trial.
- (iv) The nature of the matters at stake during the hearing: this action is fairly uncomplicated. It is an action to recover money and involves primarily a fair amount of documentation. But each party and the Court has a copy of the bundle of pleadings and documents to refer to no matter where each participant happens to be sitting or standing. A remote hearing will cause no difficulties here.
- (v) Any issues which the use of video/audio technology may present for participants in the hearing: Ms. Smith argues that neither she nor the Court would be able to observe the Witness as he gives evidence. In other words, we would not be able to observe his body language as he gives evidence. I disagree. I have been conducting hearings remotely almost since the pandemic affected The Bahamas. I am of the view that I see even more of the witness's facial expressions and body movements from the waist up. Hearing the evidence is often clearer. The video is a real time device. We would be seeing the witness give evidence in real time as argued by Mrs. Brown. Ms. Smith's complaint is that Mr. Hughes would be in a relaxed environment as opposed to standing in the witness box. As I recall Mr. Hughes did not appear to be particularly intimidated by the Court setting. In light of the "test" to be applied I do not accept that this is an issue that I need to consider.
- (vi) The individuals'/witnesses' needs: None of the witnesses have any special needs that I am aware of that would be affected by a remote trial.
- (vii) Any issues around public access to or participation in the hearing: Notice of the trial will be contained in the Cause List and a monitor will be set up in my courtroom so that any member of the public could watch the trial

from my courtroom should they have an interest, thereby satisfying the "open Court" requirement.

Similar issues were considered by the Court in **The Attorney General of the Turks and Caicos Islands** CL-AP 06/2020 which I found to be most instructive and one which I highly commend to Counsel.

24. It is for these reasons that I have determined that the part heard trial may continue remotely provided that Ms. Smith and Mr. Finlayson can be at the same location.
25. Ms. Smith was given leave to appeal this decision.

This: 4<sup>th</sup> day of September, 2020

**Petra M. Hanna-Adderley**  
**Judge**