**COMMONWEALTH OF THE BAHAMAS**
**IN THE SUPREME COURT**
**Common Law and Equity Division**
**2013/CLE/equ/FP/00078**

**BETWEEN**

**KEVIN ARCHER**
**Plaintiff**

**AND**

**FREEPORT CONTAINER PORT**
**1st Defendant**

**AND**

**HUTCHINSON PORTS (BAHAMAS) HOLDINGS LIMITED**
**2nd Defendant**

**AND**

**THE ATTORNEY GENERAL**
**(As Minister Responsible for the Ministry of the Environment and Department of Meteorology)**
**3rd Defendant**

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| BEFORE: | The Honourable Justice Petra M. Hanna-Adderley |
| APPEARANCES: | Mr. Osman Johnson for the Plaintiffs |
| | Mrs. Metta MacMillian-Hughes along with McFalloughn Bowleg and Chizelle Cargill for the First Defendant |
| | Mr. Loren Klein for the Third Defendants |
| HEARING DATES: | February 21, 2019, November 3, 2020 |

**RULING**

1. By letter dated November 21, 2018 Counsel for the Plaintiff requested a date for the hearing of the 3rd Defendant's application for consolidation in order to progress the action

on behalf of the Plaintiff. The Court obviously could not set the Third Defendant's application for consolidation down at the behest of the Plaintiff but the Court did convene a Case Management Conference ("**CMC**") on February 21, 2019. At the CMC a number of issues were raised by the parties for either clarification or by way of strenuous preliminary objection.

**Clarification-capacity in which Mr. Osman Johnson acts for the Plaintiff**

2. Mr. Loren Klein sought clarification as to whether Mr. Johnson was representing the Plaintiff in a personal capacity or whether the firm Ayse Rengin-Dengizer Johnson was representing the Plaintiff. Mr. Johnson indicated that the Plaintiff was being represented by Ayse Rengin-Dengizer Johnson & Co. "the firm". Notwithstanding the fact that Mr. Johnson had filed several Notices of Change of Attorney, either placing himself personally on record for the Plaintiffs or placing the firm on the record for the Plaintiffs, the last Notice of Change of Attorney was filed herein on January 2, 2019 indicating that the firm had been appointed to act for the Plaintiffs herein. In as much as my comments amount to a "ruling" on that point, I consider that matter to have been clarified as requested by Mr. Klein.

**Failure by Third Defendant to enter an appearance**

3. Mr. Johnson raised an objection to the Court proceeding to hear any applications by the Third Defendant because the Third Defendant had failed to enter and appearance to this action. Mr. Klein responded by (1) relying on Order 12 rule 5 of the Rules of the Supreme Court ("RSC") which provides that a Defendant may enter an appearance after the time limited for appearing; (2) that the Third Defendant's Summons filed on December 11, 2014 seeking an Order on the Limitation point asked in the alternative for leave to enter an appearance; (3) the Court pursuant to Order 2 of the RSC had the power to cure or regularize any irregularity; (4) the Plaintiff had waived any objection to any irregularity because he had taken a fresh step by having filed a Reply to the Third Defendant's Defence filed herein on January 2, 2019. That it was now too late for the Plaintiff to raise this objection. I accept every submission made by Mr. Klein on this point. The Plaintiff having taken a fresh step by filing a Reply to the Defence filed by the Third Defendant cannot now object to the Third Defendant's interlocutory applications proceeding. In any event the Court has the power under Order 2 of the RSC to regularize and such irregularity. On February 24, 2019 the Third Defendant entered an appearance. Although I am satisfied

that the Plaintiff has already waived any objection to the filing of an Appearance out of time for completeness, I hereby regularize the filing of the appearance pursuant to Order 12 r 5 of the RSC and will treat it as though it had been filed within the time specified by the RSC.

**Costs**

**Hearing on May 10, 2018**

4. Mr. Johnson asked the Court to award costs to the Plaintiff for a "wasted" CMC which took place on May 10, 2018. The CMC had been adjourned sine die, pending a ruling from the Acting Assistant Registrar on an application for the renewal of the Amended Writ of Summons filed herein, so that the same could be served on the Second Defendant and, for the hearing of a consolidation application by the Third Defendant. The application for renewal of the Amended Writ of Summons was denied by Acting Assistant Registrar Dawson Malone on May 22, 2018 and the Third Defendant did not proceed with an application for consolidation, occasioning, according to Mr. Johnson, several months of undue delay and stagnation of this action, which necessitated the request by the Plaintiff for a hearing to determine the Third Defendant's application for consolidation.
5. With respect to the application for consolidation, Mrs. Kenria Smith for the Crown indicated that a number of actions pertaining to the same subject matter had been filed and it was the intention of the Crown to add these three actions to those actions so that they could all be tried together. Mr. Klein's response was that it was no longer the intention of the Crown to consolidate these matters. He also raised the issue of another action that has been filed by Mr. Swann in connection with the same subject matter, action 2011/CLE/gen/FP/00076 and he made the point that it was an abuse of the process of the Court to have two actions pending in respect of the same claim. That Munroe & Associates are still the Attorneys of record in that action. Mr. Klein had made Mr. Johnson aware of the 2011 action two days before the hearing. Mr. Klein sought clarification of the Plaintiff's intentions in respect of the 2011 action. Mr. Johnson said in response was that neither he nor his client were aware of the 2011 action. He then stated that his client had not in touch with Munroe & Associates and was not aware of the status of the action. There was no evidence that the 2011 action had been heard and determined by any court and so res judicata does not arise. While it is not desirable that there are 2 actions subsisting in respect to the same subject matter, it seems to me that the Plaintiff is not

engaged in the 2011 action and can withdraw it or the Third Defendant can apply to have it struck out for want of prosecution. I was not asked to make any ruling in connection with the same. I consider the status of the 2011 action to be clarified.

6. Mr. Klein further indicated to the Court that it was no longer possible to consolidate these cases with the other cases. That no formal application had been made in these actions and there was no intention at present to make such an application. That Counsel had only made verbal indication that such an application would be made.
7. As to Mr. Johnson's claim that the hearing of May 10, 2018 was "wasted" due to the fault of the Third Defendant, I have read the transcript for the hearing. It is correct as stated by Mr. Johnson that the matter was adjourned sine die pending the ruling by the Assistant Registrar on his application and that the Attorney General stated it's intention at the time of applying for consolidation. The Plaintiff and the Third Defendant both asked for costs. Costs were ordered in the cause. Neither party perfected the Order made but I consider the issue of costs for the May 2, 2018 to have been dealt with when the order for costs in the cause was made. I need make no further ruling on that and I do not propose to revisit this issue.

**Purported Hearing on December 14, 2018**

8. Mr. Johnson complains about costs incurred by his client as a result of the hearing adjourned to December 14, 2018. As hereinbefore mentioned by letter dated November 21, 2018 Mr. Johnson informed the Court that the Third Defendant had not requested that the consolidation application be set down and he asked that the application be set down for hearing in order to progress the Plaintiff's applications. At the hearing on February 21, 2019 the Court made it abundantly clear that it had not set this matter down for a CMC on December 14, 2019. The Plaintiff had served a Summons on the First Defendant for a CMC returnable on December 14, 2019. The First Defendant argued that it had not agreed to the date and was seeking a cost order for the costs involved in preparing for the hearing. This application was however subsequently withdrawn by the First Defendant and is no longer before me.
9. Furthermore, as hereinbefore-mentioned, Acting Assistant Registrar Malone rendered his decision on May 22, 2018. There was nothing preventing Mr. Johnson from asking for the matter to be referred to a CMC prior to the passage of 9 months from the May 10 hearing, particularly when no formal application for consolidation was forthcoming from the

Attorney General. I make no order as to costs in this regard because I have determined that the matter was not set down for hearing on December 14, 2018.

**February 21, 2019 hearing**

10. With respect to costs for the February 21, 2019 hearing, this was a CMC and as is usually the case, costs are in the cause.

11. At the close of the CMC on February 21, 2019 I indicated to the parties that I would consider all of the matters raised and, if necessary, give further directions. By e-mail correspondence on June 9, 2019 I forwarded the following Directions for the proceedings scheduled for June 21, 2019:

    (1) The Court will hear the Extant Summons file by the 3rd Defendant on December 11, 2018 on June 21, 2019 at 10:00 a.m.

    (2) The 3rd Defendant shall file and serve its submissions on or before May 31, 2019.

    (3) The Plaintiffs shall file and serve their Submissions in Response on or before June 14, 2019.

    (4) Should the 3rd Defendant's Summons be dismissed the Plaintiffs' outstanding Summons filed on April 23, 2014, December 31, 2018 and February 12, 2019 shall be heard on September 20, 2019 at 10:00 a.m.

    (5) The 3rd Defendant having filed a Notice and Memorandum of Appearance on February 25, 2019 the 3rd Defendant is directed to address the same in its Submissions so that Counsel for the Plaintiffs can address the issue in his Submissions in support of his Summons filed April 23, 2014, which will be heard on September 20, 2019.

12. June 21, 2019 was subsequently designated a Bahamas Bar Association Training Day by the Chief Justice. As a result, the hearing was adjourned to September 20, 2019 and, with the leave of the Court, Mr. Klein filed his Submissions and authorities in July 3, 2019 and Mr. Johnson was directed to file his Submissions in response on August 1, 2019. Mr. Klein also advised the Court that he was in the process of leaving the Attorney General's Office. As everyone will recall Hurricane Dorian devasted and disrupted Grand Bahama in September of 2019 and as a result this matter did not come on for hearing on September 20, 2019. After several attempts to agree dates for the continuation of this matter the matter came on for hearing on November 3, 2020.

13. The Notice of Objection filed by the Plaintiff on October 30, 2020 sets out the same objections raised at the February 21, 2019 hearing on behalf of Messrs Archer and Moultrie. This Ruling applies to the Actions 78/2013, 79/2013 and 80/2013. It is therefore not necessary to address these issues again.

14. I will now proceed to hear the Third Defendant's Summons filed December 11, 2018.

Dated this 6th day of November, A. D. 2020

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