COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT

COMMON LAW AND EQUITY DIVISION

2023/CLE/gen/00763

BETWEEN

DR. PAUL D. FUCHS

First Claimant

MC GROTTO LLC

Second Claimant

AND

LOCKHART & CO.
(A Firm)

First Defendant

AND

ELLIOTT B. LOCKHART, K.C.

Second Defendant

PATRICIA BULLARD

Third Defendant

Before:	**Her Ladyship The Honourable Madam Senior Justice Deborah Fraser**
Appearances:	**Mr. Dawson Malone and Ms. Ebonesse Bain for the Claimants**
	Mr. Norwood Rolle for the Defendants
Judgment Date:	**16 April 2024**

Preliminary Objection –– Party in Contempt - Contemnor – Hadkinson v Hadkinson – Public Policy – Impede Course of Justice

RULING

1. This matter concerns a preliminary objection raised by the Claimants in relation to the Defendants' Notice of Application filed herein on 01 March 2024 ("**Application**").

2. Essentially, the Claimants object to the Defendants' Application being heard on the basis that the Defendants are presently contemnors and, as such, the Court has a discretion not to hear any application they make unless and until they purge their contempt. The Claimants request the Court to exercise such discretion and not hear the Defendant's Application.

Background

3. On 08 September 2023 the Claimants filed a Standard Claim Form indorsed with a Statement of Claim against the Defendants for, inter alia, breach of contract and the return of US$3,033,454.80 held in escrow by the Defendant in relation to a real estate transaction. On even date, the Claimants filed a Notice of Application seeking a Freezing Injunction against the First and Second Defendants, supported by the Affidavit of Fracisco Nunez to prevent the dissipation of any assets that the Defendants may possess.

4. The Freezing Injunction application was heard on 13 September 2023 and a Freezing Order was granted on the same date ("**Freezing Order**"). The Freezing Order was served on First Caribbean International Bank ("**Bank**"). The Bank confirmed that the First and Second Defendants held accounts with the Bank that would be frozen in compliance with the Freezing Order.

5. On 20 September 2023, the First and Second Defendants filed an Acknowledgement of Service and an affidavit on 21 September 2023 ("**Lockhart Affidavit**"). The Lockhart Affidavit disclosed, inter alia, assets owned by the First and Second Defendants in compliance with the Freezing Order but failed to set out accounts held with the Bank.

6. As a result of the failure to disclose the accounts held at the Bank, the Claimants filed a Notice of Application and the Affidavit of Raven Rolle on 04 October 2023 seeking information from the Bank ("**Information Application**"). An application seeking Summary Judgment ("**Summary Judgment Application**") was also filed on even date. Both applications were heard on 11 October 2023

7. In relation to the Information Application, the Court ordered the Bank to, inter alia, provide the account balance of any and all documents held by the First and Second Defendants up to US$3,033,454.80 ("**Production Order**").

8. With respect to the Summary Judgment Application, the Court ordered, inter alia, that the First and Second Defendants are jointly and severally liable for the return of the sum of US$3,033,454.80 with prejudgment interest from 08 September

2023 to the date hereof at the rate of 3% per annum and thereafter at the statutory rate (6.25%) until payment in full with judgment entered accordingly.

9. In compliance with the Production Order, on 19 October 2023, an agent of the Bank sent several documents by email to Justice Lewis-Johnson, Callenders & Co (counsel for the Claimants) and Norwood A. Rolle & Co. (counsel for the First and Second Defendants).

10. On 07 December 2023, this Court heard an application for an Interim Third Party Debt Order and made an Interim Third Party Debt Order (which was filed on 08 December 2023), which was subsequently served on the Bank on 11 December 2023 by the Claimants.

11. The Claimants made reasonable attempts to personally serve the Second Defendant, Mr. Elliot Lockhart ("**Mr. Lockhart**") with the Interim Third Party Debt Order and all documents relied upon in support of the application for same, however, he could not be located and the office of Lockhart & Co ("**Second Defendant**") was closed.

12. The Claimants then served the documents on Mr. Lockhart by email on 23 January 2024. They subsequently made an application for retrospective and prospective service by alternative method and at an alternative place on the Second Defendant. An order for alternative service was granted on 20 February 2024 directing, inter alia, that all documents sent electronically to Mr. Lockhart on 23 January 2024 was good and sufficient service on the First and Second Defendants. Hard Copies of all documents were also served on the First and Second Defendants in accordance with the said order.

13. Accordingly, all documents filed and/or relied upon in support of the Third Party Debt Order Application ("**TPDO Application**") were duly served on the Bank and the First and Second Defendants in accordance with **Part 45.5 of the Civil Procedure Rules, 2022** ("**CPR**"). That rule provides:

> *"(1) Copies of an interim third party debt order, the application notice and any documents filed in support of it must be served —*
>
> > *(a) on the third party, not less than twenty-one days before the date fixed for the hearing; and*
> >
> > *(b) on the judgment debtor not less than —*
> >
> > > *(i) seven days after a copy has been served on the third party; and*
> > >
> > > *(ii) seven days before the date fixed for the hearing.*
>
> *(2) If the judgment creditor serves the order, he must either —*
>
> > *(a) file a certificate of service not less than two days before the hearing; or*

(b) produce a certificate of service at the hearing"

14. On 21 December, 2023, in compliance with the terms of the Interim Third Party Debt Order, the Bank provided a letter to the Court and counsel for the Claimants and First and Second Defendants setting out: (i) the number of all accounts (held by the First and Second Defendants); (ii) the type of account; and (iii) the balance of the accounts.

15. Prior to the hearing of the Final Third Party Debt Order application, a myriad of applications were filed by all parties. Further, prior to formally hearing any substantive applications, the Defendants requested that the Bank produce a report detailing all information and records in relation to all accounts held by the Defendants with the Bank. The Court then ordered the Bank to produce such report, which it did. The Court also ordered that the Defendants produce a copy of the check presented to the Bank in the amount of US$3,033,454.80. Notwithstanding this order, the Defendants have not complied. Based on affidavit evidence, they aver that such copy could not be located by the Second Defendant.

16. On 01 March 2024, the Defendants filed a Notice of Application pursuant to section 177 of the Evidence Act, Chapter 65, and/or the inherent jurisdiction of the Court that the Bank, within seven (7) days (or such date the Honourable Court may set) provide the following:

> *"(i) Copy of the check in the amount of Three Million One Hundred and Seventy-five Thousand Dollars (US$3,175,000.00) deposited to the CIBC First Caribbean International Bank (Bahamas) Limited, at its branch at the Mall at Marathon, Nassau The Bahamas, on the 6th March 2023 to account No. 201502417 in the name of Elliott Lockhart T/A Lockhart & Co. Clients Account as evidenced by receipt stamped by CIBC First Caribbean International Bank (Bahamas) Limited.*
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> *(ii)The bank statement for the account No. 201502417 in the name of Elliott Lockhart T/A Lockhart & Co. Clients Account for the month beginning the 1st February 2023 to October 30th 2023.*
>
> *(iii) All debits and credits, together with all supporting source documents/vouchers, to the account No. 201502417 in the name of Elliott Lockhart T/A Lockhart & Co. Clients account for the month beginning the 1st February 2023 to October 30th 2023…*
>
> *(iv) Such further or other Order the Court deems just; and*
>
> *(v) An order that the costs of this Application be paid by CIBC First Caribbean International* Bank (Bahamas) Limited to the defendants to be taxed if not agreed."

17. Prior to the hearing of the Defendants' Application, the Claimants made a preliminary objection on the basis that the Defendants are presently contemnors

and thus should not be allowed to be heard on any application they make until such contempt is purged.

Issue

18. The issue that the Court must determine is whether it ought to accede to the Claimants' preliminary objection?

Evidence

Claimant's Evidence

19. The Claimants filed the Fourth Affidavit of Miquel L. Cleare on 20 March 2024 ("**Cleare Affidavit**") which provides that: (i) the Defendants are contemnors due to the Second Defendant's non-compliance with paragraphs 9 and 10 of the Freezing Order (the Freezing Order is exhibited to the affidavit); (ii) as a result of such breaches, the Court granted the Claimants permission to apply for an order of committal against the Defendants; (iii) an order made on 27 February 2024 provided for a discovery by requiring the Bank to provide information relating to US$3,175,000.00 which, the Claimants aver, adequately address the requests made in the Defendants' Application (the order is exhibited); (iv) the Second Defendant filed an Affidavit on 21 February 2023 advising that he had requested information from the Bank but to date has failed to timely disclose any such information to the Court in compliance with paragraphs 9 and 10 of the Freezing Order and extended by order of the Court on 27 September 2023; (v) that an affidavit filed by the Second Defendant on 21 September 2023 did not provide evidence that the sum of US$3,033,454.80 was returned to the Claimants but instead state that attempts to return the funds were unsuccessful; (vi) The Bank produced information as required under the Freezing Order; (vii) the Second Defendant took positive steps to obtain information in relation to his accounts at the Bank and the US$3,033,454.80 only after Summary Judgment was entered; (viii) the Second Defendant has failed to present himself to the Royal Bahamas Police Force in relation to a criminal complaint related to the issues herein; and (ix) the information provided to the Bank in compliance with a court order dated 27 February 2023 should be sufficient to resolve the outstanding issues between the Parties.

Defendants' Evidence

20. The Defendants did not file any affidavits in response to the Claimants' affidavit evidence.

Discussion and Analysis

21. I have read and considered the submissions of counsel. I will now provide my interpretation of the law to the facts of this case.

22. The Court has a discretion to refuse to hear a contemnor on any application unless and until he purges his contempt. This was expressly stated in the English Court of Appeal decision of **Hadkinson v Hadkinson [1952] P 285** ("**Hadkinson**"). There, the Court opined:

> *"It is the plain and unqualified obligation of every person against, or in respect of whom, an Order is made by a Court of competent jurisdiction, to obey it unless and until that Order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an Order believes it to be irregular or even void…*
>
> *Such being the nature of this obligation, two consequences will, in general, follow from its breach. The first is that anyone who disobeys an Order of the Court (and I am not now considering disobedience of Orders relating merely to matters of procedure) is in contempt and may be punished by committal or attachment or otherwise. The second is that no application to the Court by such a person will be entertained until he has purged himself of his contempt. It is the second of these consequences which is of immediate relevance to this appeal. The rule, in its general form, cannot be open to question. There are many reported cases in which the rule has been recognised and applied and I need refer only to (Garstin v. Garstin 4 Swaby & Tristram, 73) and (Gordon v. Gordon 1904 Probate, 163)…*
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> *…such exceptions is that a person can apply for the purpose of purging his contempt and another is that he can appeal with a view to setting aside the Order upon which his alleged contempt is founded; neither of those exceptions is relevant to the present case. A person against whom contempt is alleged will also, of course, be heard in support of a submission that, having regard to the true meaning and intendment of the Order which he is said to have disobeyed, his actions did not constitute a breach of it; or that, having regard to all the circumstances, he ought not to be treated as being in contempt. The only other exception which could in any way be regarded as material is the qualified exception which, in some cases, entitles a person who is in contempt to defend himself when some application is made against him (see e.g. Parry v. Ferryman — referred to in the notes to Chuck v. Cremer, 1 Cooper 205)...*
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> *It is a strong thing for a Court to refuse to hear a party to a cause and it is only to be justified by grave considerations of public policy. It is a step which a Court will only take when the contempt itself impedes the course of justice and there is no other effective means of securing his compliance. In this regard I would like to refer to what Sir George Jessel, M.R. said in a similar connection in (In re Clements v. Erlanger 46 Law Journal, Ch. 375, page 382): "I have myself on many occasions had to consider this jurisdiction, and I have always thought*

that,necessary though it be, it is necessary only in the sense in which extreme measures are sometimes necessary to preserve men's rights, that is, if no other pertinent remedy can be found. Probably that will be discovered after consideration to be the true measure of the exercise of the jurisdiction". Applying this principle I am of opinion that the fact that a party to a cause has disobeyed an Order of the Court, is not of itself a bar to his being heard, ***but if his disobedience is such that, so long as it continues, it impedes the course of justice in the cause, by making it more difficult for the Court to ascertain the truth or to enforce the Orders which it may make, then the Court may in its discretion refuse to hear him until the impediment is removed or good reason is shown why it should not be removed****(emphasis added)."*

23. **Hadkinson** was applied in this jurisdiction in the case of **Hackett v Inverugie SC Equity Side 145 of 1975.** There, Gonsalves-Sabola Acting CJ made the following pronouncements:

> *"It is a fact, however, that the defendant sought to impugn the ex parte order of Smith J. on ground of alleged non-disclosure of material facts, and not on any supposed voidness of that order. However, the House of Lords' judgment gives recent confirmation of the imperative of obedience of an order of a court of unlimited jurisdiction not yet set aside either by itself or by a higher court. Here in the Bahamas it is sound policy for the courts to act promotively of that recital of the Preamble of the Constitution, which professes the abiding national respect for the rule of law, by being adamant for due observance of orders of the Supreme Court of the land. In the archipelagic dispersion of the territory of the state doubt must not be encouraged that the court's writ effectively runs throughout every constituent island. This is why the court must not shirk from strictly applying the appropriate letter of the law to a contemnor whose contempt remains unpurged.*
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> *On 5th July, 1990, a slap was delivered to the Supreme Court when its authorised official, armed with the visible symbol of authority, sought to implement a court's decree. The court's response to that slap must not be to turn the other cheek but to emphasize its authority. The defendant has failed to come within any exception discussed in the case of Hadkinson v. Hadkinson above, and I therefore do not consider that its application to set aside the ex parte order of Smith J. should be entertained."*

24. I have also noted the Defendants' submissions that the Claimants are not a party to the Application, thus, have no standing. Bearing in mind the aforementioned principles and the fact that the Defendants have not challenged the Claimants' evidence, it appears that the Defendants are presently in contempt by virtue of their non-compliance with paragraphs 9 and 10 of the Freezing Order and with an order made by this Court requiring the production of a copy of the aforementioned check and information relating thereto. I acknowledge that the Second Defendant could not locate the copy of the check, but there is additional

information relating to the copy that was to be disclosed, which still has not been so disclosed.

25. More so, despite affidavit evidence stating that the Defendants are in contempt, they do not resist, object to or deny this position – this evidence is uncontroverted. In fact, based on the uncontroverted evidence of the Cleare Affidavit, the Second Defendant admits to having obtained information relating to his accounts, yet has not disclosed it to the Court – which is in direct contravention of the Freezing Order.

26. Despite the fact that the Claimants are not parties to the Application, the fact of the matter is that the Defendants are presently in breach of an order of the court and are thus contemnors. No application is before me to purge the contempt. Furthermore, there are no applications to set aside any such order that the Defendants have breached. Lastly, I am unaware of any appeal of any order made.

27. In the premises, none of the exceptions mentioned in **Hadkinson** apply to the Defendants. Accordingly, I see no reason why I would not accede to the preliminary objection.

28. I agree with the submissions of the Claimants' counsel – to allow such an application would simply delay the matter and the Defendants' non-compliance with an order of the Court indeed impedes the course of justice. It is the role of the Court to ensure orders are complied with and not permit persons who voluntarily choose to disobey an order to make applications while flaunting their disregard of court orders – I will not allow it.

29. For public policy purposes and to preserve the public's trust and confidence in the authority of the Court, I must protect and preserve such authority. I am therefore, not prepared to hear any application advanced by the Defendants unless and until they have purged their contempt.

30. In any event, I agree with the Claimants that the Bank has adequately provided comprehensive information relating to the Defendants' accounts. I am also aware of an additional report provided by the Bank to all parties and the Court – which admittedly came after this Application was filed. In my view, the report sufficiently addresses any lingering issues and/or questions the Defendants may have relating to their accounts and comprehensively addresses matters contained in their Application. The Application is therefore, superfluous. Accordingly, I refuse to hear the Defendants' application.

Conclusion

31. Based on the foregoing, and the present state of the law, I exercise my discretion and refuse to hear this Application or any application by the Defendants unless and until their contempt is purged.

32. The Claimants shall have their costs, to be assessed by this Court if not agreed.

Senior Justice Deborah Fraser

Dated this 16 day of April 2024