

**COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT**

COMMON LAW AND EQUITY DIVISION

2023/CLE/gen/00763

BETWEEN

DR. PAUL D. FUCHS

First Claimant/First Judgment Creditor

MC GROTTO LLC

Second Claimant/Second Judgment Creditor

AND

LOCKHART & CO.

(A Firm)

First Defendant/First Judgment Debtor

AND

ELLIOTT B. LOCKHART, K.C.

Second Defendant/Second Judgment Debtor

PATRICIA BULLARD

Third Defendant/Third Judgment Debtor

FIRST CARIBBEAN INTERNATIONAL BANK (BAHAMAS) LIMITED

Third Party

**Before: Her Ladyship The Honourable Madam Senior Justice
Deborah Fraser**

**Appearances: Mr. Dawson Malone, Ms. Raven Rolle, Ms. Ebonesse Bain and
Ms. Miquel Cleare for the Claimants**

Mr. Norwood Rolle for the Defendants

**Mr. Ferron J.M. Bethell K.C. and Ms. Camille A. Cleare for
the Third Party**

Hearing Dates: 16 April 2024, 26 June 2024, 2 July 2024, 3 July 2024

**Final Third Party Debt Order – Rule 45 of the Supreme Court Civil Procedure Rules, 2022
– Court’s Discretion - Evidence**

RULING

1. This is an application brought on behalf of the Claimants/Judgment Creditors, Dr. Fuchs and MC Grotto LC (“**Creditors**”), for a Final Third Party Debt Order against the First and Second Defendants, Lockhart & Co and Elliot Lockhart K.C. (“**Debtors**”).

Background

2. On 08 September 2023 the Creditors filed a Standard Claim Form indorsed with a Statement of Claim against the First, Second and Third Defendants for, inter alia, breach of contract and the return of US\$3,033,454.80 held in escrow by the Debtors in relation to a real estate transaction. On even date, the Claimants filed a Notice of Application seeking a Freezing Injunction against the Debtors, supported by the Affidavit of Francisco Nunez to prevent the dissipation of any assets that the Debtors may possess.
3. 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 (Bahamas) Limited (“**Bank**”). The Bank confirmed that the Debtors held accounts with the Bank that would be frozen in compliance with the Freezing Order.
4. On 20 September 2023, the Debtors filed an Acknowledgement of Service and an affidavit on 21 September 2023 (“**Lockhart Affidavit**”). The Lockhart Affidavit disclosed, inter alia, assets owned by the Debtors in compliance with the Freezing Order but failed to set out accounts held with the Bank.
5. As a result of the failure to disclose the accounts held at the Bank, the Creditors 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.
6. 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 Debtors up to US\$3,033,454.80 (“**Production Order**”).
7. With respect to the Summary Judgment Application, on 11 October 2023, the Court granted the Creditors Summary Judgment against the Debtors and ordered, inter alia, that they (the Debtors) be 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.
8. 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 Creditors) and Norwood A. Rolle & Co. (counsel for the Debtors).

9. On 07 December 2023, this Court heard an application for an Interim Third Party Debt Order (brought by the Creditors) and made an Interim Third Party Debt Order (filed on 08 December 2023), which was subsequently served on the Bank on 11 December 2023 by the Creditors.
10. The Creditors made reasonable attempts to personally serve the Second Defendant/Judgment Debtor, Mr. Elliot Lockhart K.C. (“**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. He was eventually served by way of substituted service.
11. 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 Debtors 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”*
12. 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 Creditors and the Debtors setting out: (i) the number of all accounts held by the Debtors; (ii) the type of accounts; and (iii) the balance on each account.
13. The Bank confirmed that the Debtors have approximately \$119,886.03 in all accounts held by the Bank.
14. The Court then heard the present application before it.

Issue

15. The issue that the Court must determine is whether it ought to grant the Final Third Party Debt Order?

Evidence

Creditor's Evidence

16. The Creditors filed the Tenth Affidavit of Raven Rolle on 22 November 2023 (“**Rolle Affidavit**”), which provides: (i) a history of the matter; (ii) the Debtors’ accounts held by the Bank along with the amounts held on each account; (iii) the Creditors are aware of the accounts and amounts held at the Bank, but are unaware of the details of the branch of the Bank holding such accounts; and (iv) a request that the Final Third Party Debt Order be made.

Debtor's Evidence

17. The Debtors filed the Third Affidavit of Dena Feaste filed on 14 August 2024 (which provides that certain client funds are on the Debtors’ CIBC account ending with ‘9501’); the Affidavit of Trudy Reid Ford on 14 August 2024 (which provides further information concerning \$10,000.00 being transferred to Elliot Lockhart, K.C. in relation to a matter); the Affidavit of Ricardo James Morley filed on 15 August 2024 (which merely provides that Mr. Morley retained Elliott Lockhart K.C. to assist him in a real estate transaction. An agreement for sale and closing statement is exhibited, however, no numerical value has been evidenced confirming what amount of funds was sent to Mr. Lockhart K.C.); and the Affidavit of Ludell Wright filed on 14 August 2024 (evidencing that \$8,000.00 was transferred to Mr. Lockhart in relation to Ms. Wright’s matter).

Discussion and Analysis

18. I have considered the written submissions of all parties in this matter.

19. The requirements and procedure for Third Party Debt orders are expressly provided in the Supreme Court Civil Procedure Rules, 2022 (“**CPR**”) at Part 45. **Rules 45.2 , 45.4, and 45.6, of the CPR** provides:

“45.2 Third party debt order.

(1) Upon the application of a judgment creditor, the court may make an order (a “final third party debt order”) in Form EX13 requiring a third party to pay to the judgment creditor —

(a) the amount of any debt due or accruing due to the judgment debtor from the third party; or

(b) so much of that debt as is sufficient to satisfy the judgment debt and the judgment creditor’s costs of the application.

(2) The court will not make an order under paragraph (1) without first making an “interim third party debt order” pursuant to rule 45.4(2).

45.4 Interim third party debt order.

(1) An application for a third party debt order will initially be dealt with by a judge without a hearing.

(2) The judge may make an interim third party debt order in Form EX12 —

(a) fixing a hearing date to consider whether to make a final third party debt order; and

(b) directing that until that hearing the third party must not make any payment which reduces the amount he owes the judgment debtor less than the amount specified in the order.

(3) An interim third party debt order will specify the amount of money which the third party must retain, which will be the total of —

(a) the amount of money remaining due to the judgment creditor under the judgment or order; and

(b) an amount for the judgment creditor's fixed costs of the application, as specified in the relevant practice direction.

(4) An interim third party debt order becomes binding on a third party when it is served on him.

(5) The date of the hearing to consider the application shall be not less than twenty-eight days after the interim third party debt order is made.

45.5 Service of interim order.

(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. 45.6 Obligation of third parties served with interim order.

(1) A bank or credit union served with an interim third party debt order must carry out a search to identify all accounts held with it by the judgment debtor.

(2) The bank or credit union must disclose to the court and the creditor within seven days of being served with the order, in respect of each account held by the judgment debtor —

- (a) the number of the account;*
- (b) whether the account is in credit; and*
- (c) if the account is in credit —*
 - (i) whether the balance of the account is sufficient to cover the amount specified in the order;*
 - (ii) the amount of the balance at the date it was served with the order, if it is less than the amount specified in the order; and*
 - (iii) whether the bank or credit union asserts any right to the money in the account, whether pursuant to a right of set-off or otherwise, and if so giving details of the grounds for that assertion.*
- (3) If —*
 - (a) the judgment debtor does not hold an account with the bank or credit union; or*
 - (b) the bank or credit union is unable to comply with the order for any other reason, for example, because it has more than one account holder whose details match the information contained in the order, and cannot identify which account the order applies to, the bank or credit union must inform the court and the judgment creditor of that fact within seven days of being served with the order.*
- (4) Any third party other than a bank or credit union served with an interim third party debt order must notify the court and the judgment creditor in writing within seven days of being served with the order, if he claims —*
 - (a) not to owe any money to the judgment debtor; or*
 - (b) to owe less than the amount specified in the order.”*

20. Rule 45.8 of the CPR states:

“45.8 Further consideration of the application.

- (1) If the judgment debtor or the third party objects to the court making a final third party debt order, he must file and serve written evidence stating the grounds for his objections.*
- (2) If the judgment debtor or the third party knows or believes that a person other than the judgment debtor has any claim to the money specified in the interim order, he must file and serve written evidence stating his knowledge of that matter.*
- (3) If —*
 - (a) the third party has given notice under rule 45.6 that he does not owe any money to the judgment debtor, or that the amount which he owes is less than the amount specified in the interim order; and*

(b) the judgment creditor wishes to dispute this, the judgment creditor must file and serve written evidence setting out the grounds on which he disputes the third party's case.

(4) Written evidence under paragraphs (1), (2) or (3) must be filed and served on each other party as soon as possible, and in any event not less than three days before the hearing.

(5) If the court is notified that some person other than the judgment debtor may have a claim to the money specified in the interim order, it will serve on that person notice of the application and the hearing.

(6) At the hearing the court may —

(a) make a final third party debt order;

(b) discharge the interim third party debt order and dismiss the application;

(c) decide any issues in dispute between the parties, or between any of the parties and any other person who has a claim to the money specified in the interim order;
or

(d) direct a trial of any such issues, and if necessary give directions.

21. The Supreme Court Civil Procedure Rules, 2022 Practice Guide January 2024 at pages 353 and 354 read:

“Third party not appearing or not disputing liability Where, on the further consideration of the matter, the third party does not attend, or does not dispute the debt due or claimed to be due from him to the judgment debtor, the court may, [subject to Central Bank approval where the judgment creditor is out of the jurisdiction] make a final third party debt order under which the third party is ordered forthwith to pay to the judgment creditor the amount of the debt due from the judgment debtor, or so much of it as is sufficient to satisfy the judgment debt together with the costs of the proceedings, including the costs of the third party.

Third party disputing liability – Part 45.8 If the third party disputes liability he must appear and show cause against it. He must show some real ground for disputing liability. He must not merely deny the particular debt or debts alleged to be due, but should state specifically whether he is indebted to the judgment debtor at all. The third party is entitled to set off any debt due to him from the judgment debtor at the date when the order was served upon him. He cannot set off debts accruing after service of the third party debt order, nor can he set off a debt due to him from the judgment creditor.

The court may either summarily determine the question at issue or order that any question necessary for determining the third party's liability be tried in any manner in which any question or issue may be tried (Part 45.8(6). If the judgment creditor declines to contest the issue, the interim third party order will be discharged and the judgment creditor may have to pay the costs incurred.”

22. The Creditors' counsel also draws the Court's attention to the English decision of **Ross Leasing Ltd and others v Nile Air [2021] EWHC 2201 (Comm)** ("Ross Leasing"). The case provided a "road map" which the court may employ in such applications. In considering an application for a Third Party Debt Order pursuant to Part 72 of the English CPR (which is the equivalent to Part 45 in our CPR), the Court made the following pronouncements:

"11 From the rule and from the authorities I derive the following steps or "route map" I must follow in order to be satisfied that I should make a final TPDO [Third Party Debt Order]:

i. Is the third party "within the jurisdiction"?

ii. Is there a debt "due or accruing due to the judgment debtor from the third party"?

iii. Is that debt situated within the jurisdiction?

iv. If the debt is situated outside the jurisdiction would the foreign court regard the debt as automatically discharged by the order of the English court?

v. If not, is there a "real and substantial risk" that the third party might be called upon to pay the debt twice over?

vi. Taking the foregoing and all other relevant circumstances into account, should the court, exercising a judicial discretion, make a final third party debt order?"

23. In the recent Bahamian Supreme Court decision of **Incorporated Trustee's of St. John's Particular Church of Native Baptists in The Bahamas v Freeport Commercial and Industrial Limited et al – 2009/CLE/gen/01367 and 2011/CLE/gen/FP/00276** ("Incorporated Trustee's") Winder CJ provided helpful guidance on what the Court ought to consider when hearing an application for a Final Third Party Debt Order.

24. There, Winder CJ opined:

"[12.] I accept the correctness of the very helpful discussion as to the Court's discretion in making third party debt orders found in Blackstone's Civil Practice 2022, paragraph 79.24 at page 1555:

A third party debt order may be refused if it would be inequitable to grant it. The onus of proof is on the judgment debtor to show why an interim third party debt order should not be made final (*Westacre Investments Inc. YugoImport SDPR [2009] 1 All ER (Comm) 780.*)...the insolvency of the judgment debtor is sufficient reason for refusing to make an order because its effect may be to prefer the judgment creditor over the general

body of creditors (Roberts Petroleum Ltd v Bernard Kenny Ltd [1983] AC 192). Conversely, if a judgement creditor secures a charging order or third parity debt order in competition with other creditors who had not been so quick off the mark, that should not affect the court's discretion to make the order final (Reed v Oury [2000] WLUK 63.

*[13.] I therefore accept the submission of the Creditor, that **while the court has a discretion and ought not to make a third party debt order where it would be inequitable to do, the Debtor has not properly demonstrated the inequity. He who comes to equity must do equity.** The making of an offer, the repayment of which barely covers the interest on the debt does not meet the mark. **The Debtor maintains ownership in 60 debt free properties and several overdraft facilities, yet they have not leveraged these assets to prevent the extraordinary steps being taken by the Creditor** (emphasis added).”*

25. Winder CJ then made a Final Third Party Debt Order against the Debtor as he was not satisfied that the Debtor would be insolvent or suffer any hardship if he had done so. The Debtor in that decision **did not provide satisfactory evidence of any insolvency or hardship it would suffer if such an order was made against it.**
26. Winder CJ, however, did not leave the Debtors completely without funds (as the Debtor did evidence that it had operational funds on account required to continue its operation) to ensure there was no inequity.
27. From the *Incorporated Trustee's* decision and the **Rule 45.8(1) of the CPR**, it is readily understood that a Judgment Debtor *must* provide evidence of reasons why a Final Third Party debt order ought not be made. The Debtors have not furnished affidavit evidence expressing any insolvency or financial hardship that may follow if a Final Third Party Debt Order is made. In fact, in an earlier affidavit, not directly related to this application, Mr. Lockhart K.C. lists several substantial properties which he owns. The total value of said properties exceed the judgment debtor, yet no steps were taken to satisfy the judgment debt. It is to be noted, however, that the numerous affidavits filed by the Debtors do, to an extent, evidence that innocent third parties are likely to be affected by the Final Third Party debt order. The Court has considered this and will discuss further in the judgment.
28. In relation to the “road map” as mentioned in the *Ross Leasing* decision, and applying same to the instant case, the Bank is in the jurisdiction, funds are in the account held by the Bank belong to the Debtors, the debt is situated in The Bahamas, I am unaware of any real and substantial risk that the Bank may be called upon to pay the debt twice. Furthermore, the Bank confirmed that it holds funds for the Debtors and the Bank did not make any representations resisting or objecting to this application.

29. According to the Rolle Affidavit, the Bank confirms the following amounts on the Debtors' accounts held by the Bank:

Elliot Lockhart T/A Lockhart & Co.

- Account ending 9486: \$422.41
- Account ending 9501: \$94,156.32
- Account ending 3150: \$400.17
- Account ending 2417: \$876.52

Elliot Lockhart K.C.

- Account ending 0831: \$230.20
- Account ending 0536: \$5,153.65
- Account ending 3819 (Time Deposit): \$2,204.74
- Account ending 1340 (Time Deposit): \$5,544.54

Elliot Lockhart T/A Cyclops

- Account ending 2012 (loan): \$10,897.00

30. The sum total in the Debtor's bank accounts is thus, \$119,886.03. Though the funds in the aforementioned accounts do not satisfy the debt in their entirety, the Creditors are at liberty to pursue the Debtors further to recover the outstanding judgment debt. It is unclear if the Debtor has any other accounts or other financial means, however, based on the evidence (or lack thereof from the Debtor), I am unaware of any financial hardship/insolvency that would follow if I make a Final Third Party Debt Order. Unlike the *Incorporated Trustee's* decision, there is no affidavit evidence demonstrating that the Debtors would be insolvent if the Third Party Debt Order is made final.

31. I acknowledge the evidence in the Third Dena Feaste Affidavit where the following was provided at paragraph 5:

“5 In my 2nd Affidavit I stated that I was advised and verily believe that the funds standing to account 201459501, styled Elliott Lockhart T/A Lockhart & Co., Client Account, totaling \$94,073.82 as at February 29 2024 at FirstCaribbean International Bank (Bahamas) Limited, are funds the property of the following clients and for the following purposes:

- | | | | |
|------|---------------------------|-------------|--|
| i. | Ludell Wright | \$10,000.00 | - Retainer to be returned |
| ii. | Truday Reid-Ford | \$10,000.00 | - Retainer to be returned |
| iii. | Rodney Livingstone Forbes | \$66,118.49 | - Settlement Proceeds
From the Attorney
General of The Bahamas |

iv. The Public Treasury \$7,840.00 - VAT Stamping on
Behalf of Ricardo
Morley

the said Ludell Wright, Trudy Reid-Ford and Ricardo Morley swore affidavits of their own.”

32. The Court has reviewed the affidavits referenced at paragraph 5 of the Third Dena Feaste Affidavit filed herein on 14 August 2024. The Creditor’s counsel valiantly attempted to debunk the aforementioned evidence and challenge its credibility. I, accept, in part, the challenges contained in the submissions, however, the Debtor has evidenced that certain funds in the account (which the Creditor seeks to have taken out of to satisfy the debt) are funds which belong to innocent third parties who are not before the Court. Notwithstanding such evidence, this Court only accepts evidence which is before it – specifically, evidence which has been corroborated through receipts, invoices and the like. I will not and cannot accept bare assertions or agreements for sale and closing statements which do not expressly provide numerical amounts paid in relation to the mentioned transactions exhibited to affidavits nor emails alone without more.
33. Specifically, as the Creditors’ counsel correctly submitted, the Debtors attempted to provide corroborating evidence in relation to Rodney Livingstone Forbes’ purported Settlement Proceeds said to amount to some \$66,118.49. However, there was no wire transfer confirmation from the opposing side or any account number evidencing that such funds were sent as a settlement for Mr. Forbes’ matter. In the premises I do not accept this evidence. Furthermore, the email which the Debtors seek to rely on to prove the settlement proceeds were sent is from 2020 (which is before the Freezing Order came into effect). This Court finds it difficult to accept that settlement proceeds for a client remained in an attorney’s client account for years. In my view, that is highly unlikely. I, thus, reject this email as evidencing any such settlement proceeds in the Debtors’ bank account on behalf of Rodney Livingstone Forbes.
34. With respect to Trudy Reid-Ford, the Creditors’ counsel also correctly highlights the inconsistencies in the evidence. Mrs. Reid-Ford states that she is owed \$10,000.00, however, the evidence shows that only \$9,000.00 was proven to be transferred to Mr. Lockhart K.C.’s account ending with ‘9501’.
35. In relation to Ludell Wright, only \$8,000.00 has been evidence through an invoice confirming that a retainer fee was paid in part to Mr. Lockhart K.C. There is no other evidence confirming any other funds were sent to the Debtors expressly by or on behalf of Ludell Wright in relation to her matter. Accordingly, the Debtors have evidenced that the following funds belong to innocent third parties:

- \$9,000.00 to Trudy Reid-Ford
- \$8,000.00 to Ludell Wright

TOTAL: \$17,000.00

36. I shall exclude the \$17,000.00 from the total \$119,886.03 held by the Bank on behalf of the Debtors, representing funds belonging to third innocent parties. Accordingly, I shall make the appropriate order to ensure that such funds are not affected by the Final Debt Order.
37. With respect to the Debtor's submission that under the Freezing Order he is permitted to withdraw \$1,000.00 per week for his ordinary living expenses and it has been approximately 40 weeks since the Freezing Order was in effect (resulting in \$40,000.00 being owed to the Second Defendant) such funds will be kept on account to ensure compliance with the Freezing Order.
38. The Creditors' counsel requests indemnity costs based on the conduct of the Debtors. Though the Debtors' conduct has delayed the delivery of this, I do not believe the conduct was unreasonable to a high degree, egregious or deserving of moral condemnation (*Taihu International Cruise Co. Limited v Diamond Cruise International C. Limited* [2020] 1 BHS J No. 45). Innocent third parties' funds may have been impacted by the third party debt order and justice demanded that the Court be provided with evidence confirming same (which the Debtors, in part, have proven) even if belatedly provided. Accordingly, I shall make an appropriate order as to costs.
39. It is important to note that the Court is relying on evidence which is before it. I am thus unaware if any other bank accounts with the Bank may have any other funds belonging to third parties. To that end, it is incumbent on the Bank to ensure no innocent third parties' funds are affected by the Final Third Party Debt Order. For clarity, no innocent third parties' funds are to be affected by this order.

Conclusion

40. Based on the foregoing, and the present state of the law, I exercise my discretion and order that the Third Party Debt Order be made final and that the Bank do pay to the Creditors \$62,886.03 out of the bank accounts of the Debtors.
41. The Debtors shall pay the costs of the Creditors, to be assessed, if not agreed.
42. The Debtors shall also pay the costs of the Third Party, to be assessed by this Court, if not agreed.

Dated this 11th day of September 2024

Deborah E. Fraser
(Acting) Chief Justice