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IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION



No. ZC19D00073

[2023] EWFC 164

Royal Courts of Justice
Strand
London, WC2A 2LL

Thursday, 17 August 2023

Before:

SIR JONATHAN COHEN

(Sitting as a Judge of the High Court)

B E T W E E N :

LADY HIROKO BARCLAY

Applicant

- and -

SIR FREDERICK BARCLAY

Respondent

BARONESS SHACKLETON and MR N MANNERS (of Payne Hicks Beach LLP) appeared on behalf of the Applicant.

MR M TURNELL (instructed by Miles Preston & Co) appeared on behalf of the Respondent.

MR P MARSHALL KC (instructed by Family Law in Partnership ('FLiP')) appeared on behalf of Mr M. Clarke

J U D G M E N T

SIR JONATHAN COHEN:

- 1 On 30 March 2021, I ordered Sir Frederick Barclay to pay his former wife the sum of £100 million by two instalments of £50 million each. The first instalment was due on 29 June 2021, and the second on 12 April 2022. Each instalment carried interest in the event of late payment. No part of the lump sum payments has been made.
- 2 Lady Barclay issued three judgment summonses, the first one being for the first instalment of lump sum, the second instalment having at that time not yet fallen due, and the second and third judgment summonses were for much smaller sums of £185,000 and £60,000 respectively. These came before me on 28 July 2022. I found that I could not be satisfied to the criminal standard of proof which is required by law that Sir Frederick had access to funds to enable him to pay the lump sum orders that I had made, but that he had had during the material time the ability to meet the sums due under the second and third summonses which totalled £245,000. I adjourned for sentence until 11 August 2022. Just before that hearing Sir Frederick paid the sum of £245,000, as his lawyers told me, from monies borrowed from the parties' daughter.
- 3 I further adjourned sentence until 13 February 2023. On that date a last-minute proposal from Sir Frederick led to the hearing being adjourned to 6 March. At every hearing from February onwards, I have been told that money is in the pipeline and will appear at any moment. Indeed, on 13 February, Sir Frederick's then leading counsel told me that money was expected that very day.
- 4 Since then I have repeatedly adjourned the case, in every instance with the approval of both parties. Both they and I wanted nothing more than the making of a payment to Lady Barclay.
- 5 Her position is dire. She is wholly dependent on the parties' daughter for payment of living expenses, her rent and her lawyers. She is hanging on by a thread, not knowing from one month to the next whether she will be able to meet her bills. It is extraordinary to think that the former wife of one of the country's most successful businessmen is in this predicament and that the wider Barclay family have permitted this to transpire.
- 6 In an attempt to break the deadlock, I took it upon myself to issue witness summonses against Aidan Barclay and Howard Barclay, two of the late Sir David Barclay's children. They were the two who had day-to-day management of the family business empire. They sought to set aside the witness summonses, and when I refused to do so they applied for permission to appeal my refusal to the Court of Appeal, who dismissed their application. In consequence, both have given evidence before me, and I will return to what they said a little later.
- 7 Over the course of the last seven weeks, I have been told that the source of funds was proposed to be a deal brokered by Mr Martin Clarke. Mr Clarke is someone who describes himself as a friend of Sir Frederick and Amanda for 30 years or more. For a short time in the proceedings that culminated in 2021, when the husband was without legal representation, he acted as Sir Frederick's McKenzie Friend. It was a great relief to me, and probably to Mr Clarke as well, when Sir Frederick instructed new solicitors and he could be discharged from that role.
- 8 More anxiously for me, I was told by Sir Frederick Barclay in the main proceedings that Mr Clarke was also engaged to some extent – and I want to make it clear that I have only

Sir Frederick's word for it and not that of Mr Clarke – in the sale of Sir Frederick's yacht, when I had expressly ordered Sir Frederick not to sell it.

- 9 Mr Clarke has repeatedly assured the court that the money has been sent by the lender, and that he will have it "imminently". His explanation for the delay was that it was caught in the banking system. I have been provided with a schedule of the assertions made by Mr Clarke saying that the money will arrive "today", "tomorrow", depending on that which I am quoting from, "that the money has left the bank Switzerland and has been sent to the relevant Bank of Ireland account", that "it is expected any moment". There are at least ten quotes of that sort, but I am not going to lengthen this judgment by going through them.
- 10 To cut to the end of that saga, on 4 August I was told that the loan was in abeyance because the lender was worried that his or its confidentiality had been breached and was concerned that if documents were disclosed, his name or its name would become public. I was asked to allow more time and was told that the money had been sent only the previous evening, 3 August, to Mr Clarke's account or that of his company with the Bank of Ireland, and I was asked to put the matter over. I did so.
- 11 On 11 August, Mr Clarke told me that when he said on 4 August that the money had been sent, in fact that had not happened, and it was still held by the lender in an overseas account. He told me that the lender was anxious about his or its confidentiality being breached by reason of the need to disclose the name as part of the anti-money laundering checks that solicitors have to carry out when they receive funds. I was asked to put the matter over until today.
- 12 I did so because I was also told on 4 August that a way through appeared to have emerged which would satisfy the lender about confidentiality, and Mr Richards said that he would speak to the lender that very night in the hope that it would be sorted. I am now told in correspondence that I have seen that the lender has withdrawn because confidentiality has been breached.
- 13 This is quite extraordinary in circumstances where the only people connected with the case who know the identity of the lender are Mr Clarke and Mr Richards. None of the lawyers in this case know who the person or entity is, and I do not know either.
- 14 It appears – and I make no concluded finding – that there is no document of any sort which I had ordered to have been disclosed which would show the identity of the lender, or anything that might assist in identification. Whether the lender even exists would be a matter of speculation by me, so little has been produced by way of material. It is equally unclear to me why Sir Frederick Barclay has not been able to call on any of a range of business contacts he must have and has entrusted instead all his endeavours to Mr Clarke.
- 15 To try and assess the reality of the situation about the loan, I have made various orders for the production of documents by Mr Clarke and more latterly Mr Richards. Those do not appear to have been complied with, and that is a matter that I may need to return to at a later stage.
- 16 I cannot see that there has been any meaningful breach of the confidentiality of the lender. All that has been disclosed has been the mention of a sum and the name of a bank in Switzerland where the money might be coming from, information which seems to me to be of little significance. Instead, in the last seven weeks I have held six hearings on 4 July,

7 July, 24 July, 4 August, 11 August, and now today, on each occasion doing so because I have been told that the money will be here. Sadly, the information that the court has been given has not been reliable.

- 17 Both sides say to me that enough is enough, and I should bring these judgment summons proceedings to an end. I am told that this is the fifteenth hearing. That is a lamentable statistic and this has been going on now for 12 months. It would be unfair on Sir Frederick Barclay for me to keep the sword of committal hanging over him. There is no point in putting the parties to yet further expense in circumstances where so many representations have been made and shown to have no factual foundation. It does not seem to me that there is any sign of a further adjournment producing anything of benefit.
- 18 Lady Barclay has asked me to make a suspended committal order - that is a sentence of imprisonment, suspended for seven days, she suggests, to be activated in the event that Sir Frederick does not pay the sum which she has selected of £8.5 million within that period.
- 19 The powers of the court under Section 5 of the Debtors Act 1869 are extremely limited. The maximum sentence the court can impose is six weeks imprisonment, of which half only would be served. Self-evidently, that maximum must be reserved for the more serious cases.
- 20 A number of factors in this case are of particular importance. First, I remind myself that I am dealing with sentences for breach of the obligation to pay £245,000. I am **not** sentencing for the failure to pay £50 million or £100 million. Secondly, Sir Frederick paid the money promptly after I made my finding of contempt. I am told, and I have no reason to disbelieve, that it was paid by way of a loan from Amanda and did not come from any resource of his own. I am therefore not sentencing for a continuing failure to pay the sum which is the subject of a judgment summons.
- 21 Next, I have no evidence that Sir Frederick Barclay has access to any material funds. Despite the great wealth that Sir David and Sir Frederick built up, they placed it in trust structures which deprived them of ownership and control. This was all part of their financial planning in 2014. No doubt, there were fiscal reasons for it, but sadly, their arrangements never contemplated either (i) divorce and the need for funds; or (ii) a family schism – that is the breakdown in relations between the two sides of the family. The result is that Sir Frederick owns nothing other than £550 million of loan notes issued by an entity which does not have funds to honour them, that is to permit them to be realised. He too is wholly dependent for the expenses of life upon the generosity of their daughter, albeit he has the great advantage of living with her.
- 22 Next, I must not forget the fact that Sir Frederick is 88 years old. He suffers from the physical and cognitive decline that one would expect of someone of his age. I was urged by Mr Leech KC, when he appeared on behalf of Lady Barclay, and by her solicitors, Payne Hicks Beach, to make a suspended sentence of imprisonment on the basis that I can be satisfied that, if I do that, money will be forthcoming. I have great sympathy with this request, and even more with Lady Barclay in her predicament, but I cannot make a committal, whether suspended or otherwise.
- 23 I do not know of any source of funds to which Sir Frederick Barclay has access, or of anyone who has any obligation in law to provide funds for him. I cannot make an order on a wing and a prayer that they will somehow appear.

- 24 I am satisfied that the current impasse is not caused by any deliberate frustration of my orders by Sir Frederick Barclay. In short, it would be quite wrong for me to make a committal order, whether suspended or otherwise, in the circumstances in which Sir Frederick Barclay now is. I am, therefore, left in the position of having no alternative but to make no further order by way of punishment other than as to the costs of the proceedings, about which I am still to be addressed.
- 25 This is not necessarily the end of the story. It still leaves Sir Frederick owing £100 million plus interest and other sums to Lady Barclay. The debt is not in any way forgiven. Rightly or wrongly, I have long felt that the key to unlocking the door was held by Sir Frederick's nephews.
- 26 There was a notable contrast between the stance of Aidan Barclay and Howard Barclay. I have to say that I felt that Aidan Barclay seemed quite unconcerned about the predicament of his uncle and aunt. Howard Barclay told me in evidence that he regarded sorting out their position as "a priority".
- 27 It seems to me that it is within the control of Sir Frederick's nephews to unlock the problem, and it would strike me as very disappointing if they did not come up with a solution, and I wish to explain why.
- 28 Their father persuaded Sir Frederick to part with one half of his 50 per cent interest in the family empire so as to leave Sir David's children with 75 per cent between them, and Sir Frederick's daughter with 25 per cent. Thus they – that is Sir David's children – have benefited not just from what their father created, but from one half of what their uncle created. The decisions that they, the nephews, have taken in managing the family businesses have had the effect of stopping the flow of funds to their uncle. There may be sound commercial reasons for what they did, but that has been the effect of it.
- 29 Notwithstanding the financial difficulties of at least a part of the Barclay empire which have been widely publicised, I cannot imagine that a package could not be put together that would at the very least take the place of Mr Clarke's vanished lender. It would be a sad reflection on the family if this priority was not satisfied.
- 30 No one in the family can look forward to continued litigation, but that is a risk that hangs over every member of the family for as long as there is no settlement. I still hope that the arrangement said to have been brokered by Mr Clarke and Mr Richards achieves fruition. I now suspect that it is rather more likely to happen if the court spotlight is turned off than it would be if it remained on, but unless some solution is found the family is likely to find themselves back in this court.
- 31 That is all I want to say at this stage before we turn to the other matters that remain.
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CERTIFICATE

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This transcript has been approved by the Judge.