Neutral Citation Number: [2022] EWHC 2026 (Fam)

Case No: ZC19D00073

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/07/2022

Before :

SIR JONATHAN COHEN

Between :

Lady Hiroko Barclay	**Applicant Wife**
- and -	
Sir Frederick Barclay	**Respondent Husband**

- -
- -

Mr S Leech QC (instructed by **Payne Hicks Beach**) for the **Applicant**
Mr C Howard QC and **Mr M Turnell** (instructed by **Miles Preston**) for the **Respondent**
Ms H Rogers QC and **Mr J Price** and **Ms J Palmer** and (instructed by **Signature Litigation LLP**) for **the Respondent's nephews**
Mr J Bunting QC and **Ms B Grossman** (instructed by **GNM)** for **Guardian News and Media**

Hearing dates: 25 – 28 July 2022

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Approved Judgment

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SIR JONATHAN COHEN

Sir Jonathan Cohen:

1. I have before me three judgments summonses brought by Lady Barclay ("W") against her former husband ("H") Sir Frederick Barclay for what are three admitted breaches of orders made by me for payment of monies.

2. In financial remedy proceedings I made orders on the 30 March 2021 which included an order that H pay W two lump sums of £50m each, the first by 29 June 2021 and the second by 12 April 2022. He has paid no part of either lump sum, and the first judgment summons which is before me, is that issued by W for non-payment of the first lump sum.

3. The second judgment summons arises from H's non-payment of the sum of £185k by way of a legal services payment order ("LSPO") made on 29 October 2021 with payment due by 15 November 2021.

4. The third judgment summons arises from H's unilateral halving of the maintenance payments due from him to W. I had on 30 March 2021 ordered H to pay periodical payments of £60k per month but from January 2022 he has paid only £30k per month. The summons relates to the arrears accrued in January/February 2022, namely £60k.

Background

5. The background can be set out relatively shortly. Sir Frederick and his twin brother Sir David Barclay amassed a fortune through their business activities.

6. In 2014, the two brothers set about dividing what they had so as to make provision for the next generation and with the intention of avoiding tax liabilities arising either in life or on death. This took the form of a web of highly complex overseas trust arrangements.

7. Put simply, the rearrangements of H's interests led to the outcome which I now set out.

Loan notes

8. H is the principal beneficiary of the Co-Ed Trust, Jersey ("Co-Ed"). The trust owns loan notes, originally of the value of £650m and now approx. £540m. The loan notes are owed by the Amelia Trust, Jersey ("Amelia") to Co-Ed. The parties' daughter, Amanda, is the sole beneficiary of Amelia.

9. To provide the funds to honour the loan notes, Amelia is dependent on the flow of funds from the Barclay businesses which are held in other companies/trusts. As Mr Howard QC put it "the Amelia Trust ultimately holds a 25% interest in the Barclay businesses, via 100% shareholdings in First Aurora Limited, BVI and Second Aurora Limited, BVI, and assigned debt from each of those companies".

10. The family fortune built up by the two brothers was divided equally between three of Sir David's sons ("the nephews") and Amanda. Thus it was that one side of the family had 75% of the wealth and the other 25%, all of it held through complicated trust structures.

11. The arrangements operated as intended between 2014-2019, despite a significant deterioration in the relationship between the two brothers in 2014/2015. A factor in this deterioration was that H felt that he had been overwhelmed by his brother's pressure that the wealth should be divided as above. The potential for the nephews ganging up together, outvoting and side-lining Amanda should have been obvious.

12. In the period 2014-2019 H had the use of and spent without the slightest concern some £128m. He withdrew money as and when he wanted and spent it without reference to the trusts who held the money, including upon the purchase of the yacht Leander. At the end of the year an account was taken and the sum expended was deducted from the value of the outstanding loan notes.

13. In September 2019 the flow of funds to H was switched off. At the trial in March 2021 H posited two different reasons, namely:

    i) there was insufficient liquidity within the family companies to permit the flow of funds into Amelia to redeem the loan notes (his initial case at trial) and/or

    ii) there had been a further deterioration in family relations, this time between H/Amanda and the nephews about the operation of the businesses. That reached its peak with the institution of QBD proceedings following the nephews bugging conversations between H and others (his final case at trial). In consequence, the nephews turned off the tap.

14. The result is that H has, as I am satisfied to be the case, received nothing via Amelia/Co-Ed since September 2019.

15. W's response is that it is a put-up sham, designed by H to ensure that she is kept out of her money. That sham has been supported by the nephews and Amanda and with the connivance, witting or unwitting, of various professional advisors.

16. W's suspicion is understandable. As I set out in my substantive judgment, H totally excluded W from any knowledge, let alone discussion, of financial affairs and kept her in the dark. Consistent with his approach to minimising taxes and to keep control himself, for only a short time during this very long marriage did W ever hold any property assets of any sort other than her own bank account which contained modest (in the context of this case) savings.

17. W knows very little about the trust structure because H told her nothing but she is convinced that H has retained the power and can get money out of it if he so wants. She points out that prior to 2019, the year in which the parties separated, H never had any trouble accessing money and she does not accept the story of any permanent rift with the nephews.

18. H's case is that since 2019 he has been financially dependent on Amanda. During the marriage he made her a rich woman. Since the Co-Ed payments stopped, she has provided him with large sums of money and has paid from her resources much of his legal costs and living expenses including payments towards the maintenance orders I had made. It is W's belief that H transferred money to Amanda expressly for the purpose of her paying it back to him, but there is no evidence to support her proposition

that the payments made by Amanda to him come from funds recently provided by her father to try and deceive the court as to his true financial position.

19. W accepts that she knows of no other assets of substance other than the loan notes and H's interest in Brecqhou, the island off Sark, the freehold of which was owned by the two brothers, and where a huge mock castle was built by them at a cost variously put to the court at £80-90m and £120m.

20. W is convinced that the nephews would dance to H's tune if he so required, notwithstanding what W described as a recent conversation with her nephew Aidan (the biggest shareholder of the three) that he has no love for H and Amanda in the light of the bugging case that they brought against the nephews.

The law

21. FPR 2010 r.33.14(1) provides that

> On a hearing of an application for a judgment summons the debtor may be committed for making default on payment of a debt if the judgment creditor proves that the debtor—
>
> (a) has, or has had, since the date of the order the means to pay the sum in respect of which the debtor has made default; and
>
> (b) has refused or neglected, or refuses or neglects, to pay that sum.

22. The court has to be satisfied that H has had at any point since the relevant order was made the means to pay the sums due. The test is made out if proof of both ability to pay and refusal or neglect to pay is made at any single point from the date of the order right up to the date of the hearing (per Mostyn J in Bhura v Bhura [2013] 2 FLR 44 and not doubted by the Court of Appeal in Prest v Prest [2015] EWCA Civ 714).

23. The process was spelt out by McFarlane LJ (as he then was) in Prest:

> 55. […] *The court must be clear as to the following requirements, namely that:*
>
> a) *the fact that the respondent has or had, since the date of the order or judgment, the means to pay the sum due must be proved to the criminal standard of proof;*
>
> b) *the fact that the respondent has refused or neglected, or refuses or neglects, to pay the sum due must also be proved to the criminal standard;*
>
> c) *the burden of proof is at all times on the applicant; and*
>
> d) *the respondent cannot be compelled to give evidence.*

24. Mr Leech QC on behalf of W sought to persuade me that there is an evidential burden on H to prove his positive defence, namely that H is deprived of access to funds by the nephews. He says that the burden arises once H accepts, as he does, that he is in breach of the order for payment.

25. I have been referred to many authorities on this issue, but in my judgment the burden of proof remains on the applicant. All that the defendant (H) needs to establish is some evidence of the reason that he says explains why payment is not possible. I refer particularly to Perkier Foods v Halo Foods [2019] EWHC 3462 (QB), 2019 WL 06878176 at paragraphs 12-14 in which Chamberlain J set out the law as follows:

> 12. *The authorities to which I was referred do not in terms decide who bears the burden of proof on the question of impossibility. Mr Saoul submitted that impossibility is in the nature of a defence and should be proved by a defendant to the civil standard. He draws attention to the language used by Males J in the Addbins case ('defendants… are not in a strong position to persuade the court'), which he says is consistent with the burden of proof being on the defendant. He refers in addition to Reynolds v Long [2018] EWHC 3535 (Ch), in which Rose J at [50]-[55] examined the evidence put forward by a defendant alleged to be in contempt before rejecting the suggestion that compliance was impossible.*
>
> 13. *Mr Zaman, for his part, submits that, as a matter of principle, the fact that it is possible to comply with the order should be regarded as an essential ingredient of contempt. That being so, the position is similar to that which applies in criminal law: the respondent bears an evidential burden; but once this is satisfied the burden of proving that compliance was possible passes to the applicant and the standard of proof is the criminal standard: see by analogy Phipson on Evidence (19th ed.), §§6-09 and 6-16, setting out the general rule in criminal law. One of the cases mentioned there is R v Bennett (1979) 68 Cr App R 168, where the Court of Appeal applied the general rule to impossibility in cases of common law conspiracy.*
>
> 14. *In my judgment, Mr Zaman is correct on this point. Contempt of court, whether criminal or civil, was at common law a misdemeanour: see Dean v Dean [1987] 1 FLR 517, per Neill LJ, cited in Arlidge, Eady & Smith on Contempt (5th ed.), §12-51. That, together with the fact that its potential consequences include imprisonment and other penal sanctions, is why its elements must be proved to the criminal standard. In Sectorguard, Briggs J reasoned that a person who has no choice, because compliance with the order is impossible, does not have even the modest mens rea required for contempt. It is for the applicant to prove to the criminal standard that the respondent had the necessary mens rea. In a case where the respondent says that compliance was impossible, and there is <u>some</u> evidence to that effect, mens rea is in issue and it should be for the applicant to prove to the criminal standard that compliance was possible, in the sense that the respondent had a choice about what to do. That result is consistent with the general rule in criminal law. <u>(emphasis added)</u>*

26. In my March 2021 judgment I set out what I found to be H's assets which included his interest in his home in Cleveland Court and in the yacht, Leander. Cleveland Court has recently been repossessed and sold for a sum that will leave nothing available to H after the charges on it have been redeemed. H now lives with Amanda in one of her homes.

27. Leander was sold by H during the substantive proceedings, notwithstanding my order to the contrary, and the proceeds dispersed. For these purposes I have to accept that the bulk of the money is no longer available. There remains a residue to which I shall return but its size means that it is material to the second and third judgment summonses, and not the first.

The first judgment summons

28. The only potential source of funds is either the loan notes or Brecqhou. I start with the loan notes. There is no evidence before me of any significant sum of money in either Co-Ed or Amelia. The issue is whether funds are available from the superior companies/trusts to redeem the loan notes and release funds to H and whether such funds are proved to the requisite standard to be accessible to H.

29. H's evidence on this and all other issues comes entirely from Mr Dearle, his solicitor. This is understandable in the sense that medical reports show that H at age 87 has a cognitive impairment. Thus, H has delegated the entire operation of investigation of the availability of funds to his solicitor. But the result is unsatisfactory as it enables the solicitor, quite properly, to hide behind the professional privilege of his discussions with his client. Mr Dearle can tell the court what he has done, and produce the correspondence in support, but that is all. In addition, he has no familial relationship with the nephews or any of the entities in this case which must impact on his dealings with them.

30. H has filed no statement and given no evidence, as is his right.

31. More significantly, H has not called any of the nephews. I have said on occasions in the past before this trial how much I would have been assisted by hearing from them. It is obvious that they are at the core of what H says is the problem.

32. I accept that Mr Dearle has made repeated attempts to obtain information from the nephews and from the relevant trusts. He has been consistently blocked in his efforts by solicitors on behalf of the nephews and the trustees or their solicitors, who on most occasions, could not have been less helpful.

33. It is not suggested that anyone except the nephews (other than Amanda) are the true ultimate beneficial owners of the underlying assets. They have ultimate control beneficially of 75% of the businesses and they could have authorised the release of the information that Mr Dearle sought. After all, as Howard Barclay puts it, "I along with my brother Aidan head up the day-to-day responsibility for the group businesses" and as Mr Howard QC said "it cannot be right that (they) do not know about the assigned debt/loan notes going up the structure to the Amelia Trust".

34. I have heard nothing from them except, tellingly, by way of statements in support of their application that would have the effect of removing from this public hearing the power of the media and others to make reference to a huge raft of evidence which they describe as confidential information.

35. Ms Rogers QC who appeared throughout this hearing with no less than two experienced juniors (along with a family law silk on the paper documents) has been realistic enough to reduce substantially the material that she seeks to keep private. But it is very striking that rather than assist in finding a solution to what should be a matter of honour to this family they refuse to provide information, hiding behind the walls of the trust structure, whilst spending over £1m in subsidising H's legal fees and no doubt a very large sum on their own fees to try to avert the gaze of the media.

36. It would be beyond comprehension if the nephews are not seeking to assist in finding a solution to help meet the needs of their aunt, who has next to nothing after a very long marriage, and when it was the express agreement between their father and H that the latter should receive 25% of the family wealth.

37. However, the burden of proof is upon the applicant to the criminal standard. I am not prepared to infer from the failure of H to call the nephews or other potential witnesses, unless supported by other evidence, that he has or had since I made the order the ability to pay W the lump sum.

Mr Dearle's efforts

38. Following the making of the substantive order, Mr Dearle wrote or drafted letters to Co-Ed and to Amelia (sent by Amanda) seeking information and which led to further letters from Amelia demanding partial repayment of a loan due from Second Aurora Limited, who in turn demanded repayment of a loan from Epitome, which holds directly or indirectly the overarching interests in the Barclay businesses.

39. In the same month, he held telephone meetings with the protector of the Co-Ed and Amelia trusts, and the following day, with a senior representative in the Barclay family office. It initially looked as though some progress might be made. However, all Mr Dearle's efforts turned to nothing. Over the course of the period since May 2021, he has engaged in continued correspondence with the relevant entities including the solicitors instructed on behalf of the nephews. It is not so much that any entity has said that it will not provide the funds to enable money to wash downstream to enable the loan notes to be realised. Rather, there has been a failure to engage or provide information.

40. It is not necessary for me to quote from the correspondence, because its tone is all of the same nature. There is no basis upon which I can find to the requisite standard of proof that H has at any time since I made my order the means to satisfy the payment of the lump sum of £50m.

41. Mr Leech QC raises a number of points, with which I must deal. I accept that at times the gaps in the correspondence were longer than they might have been, and there was an omission in chasing up Co-Ed. I accept also that the correspondence seeking £100m did not specifically raise the suggestion of payment of a smaller sum, only £50m being due at the time. But I agree with Mr Howard QC that it is insufficient to meet the criminal standard of proof for W to show that H (or Mr Dearle) has not done everything that he might have.

42. Mr Leech QC raises the failure of H to institute arbitration proceedings as potentially envisaged in the settlement agreement of the QBD proceedings. Mr Howard QC argues that the arbitration clause is not applicable to the circumstances arising in this case. I do not seek to duck the issue, but it is not clear to me that the arbitration clause is material to the issues arising between H and the trusts/nephews, although it may be. But the greater problem is that H does not have the funds to institute such proceedings.

43. In any event, it is not enough for W to show that H might have instituted such proceedings. For W to satisfy the court that H had the means, she must show that if H

had taken such a step, it would have been either certain or very likely to have been successful. The evidence falls well short of that.

44. W sees a direct link between her leaving H and the cessation of his ability to access funds from Co-Ed. I remind myself that the separation took place in March 2019, and the money dried up in September 2019. I cannot exclude the possibility that the two events are connected, but it is equally likely that the starvation of funds into Co-Ed was a result of the deterioration in the relations between H/Amanda and the nephews.

45. The position of Amanda in all this has been curious. She is the beneficiary of Amelia, and it might be thought to be much in her interest to ally herself to the efforts of H/Mr Dearle to access funds. Initially, she joined force with them in seeking information, but in September 2021 she changed her mind and withdrew co-operation. Mr Dearle said that he was unable to follow this up because he had been told not to communicate with Amanda by her doctor. I am not able to draw any proper inference from her conduct.

46. Mr Howard QC presses the issue of illiquidity. He sought to refer me to a report by KPMG commissioned in the financial remedy proceedings. However, despite a series of orders made in those proceedings by me, H refused to pay KPMG's fees or provide them with the information that I had ordered him to provide. The consequence was that the report was not available at trial. It is extraordinary that in these proceedings, he seeks to rely on it, having now paid the fees in order to obtain its release. It was not on the reading list with which I was provided, and it would have been a valueless document, bearing in mind that it was largely based on public documents which are now three or more years old. I do not accept that H has provided any evidence of illiquidity of the underlying businesses.

47. I am unable to conclude to the criminal standard that H has, at any time since I made my order, had the means to pay the lump sum. W has not satisfied me that H has wilfully refused or neglected to pay this very large sum. I cannot be sure that the nephews are ready and willing to make the funds available to H and nor am I satisfied that there is any sort of conspiracy as suggested by W or that the tap has been turned off by them at H's behest and that it would be turned back on again if only he would ask.

48. I accept that H has to provide sufficient evidence to show that there is a prima facie case that access to the funds is beyond his control, and in my judgment he has done that by way of the correspondence that Mr Dearle provides.

Brecqhou

49. I can deal with this relatively shortly. H has a 50% interest in the freehold, with the other 50% held by the other side of the family. However, it is subject to a 150 year lease of which about 130 years are outstanding. The terms of the lease give H no right to occupy the island. He last visited in about 2015.

50. Sir David lived there, and now his widow lives there, at least as one of her many homes. She and the nephews do not wish to sell it and for as long as that is the case H's ability to profit from his half interest in the freehold is very severely diminished.

51. In reality his only option, until the family are willing to sell, is a sale of his interest to a nephew. Negotiations started but fizzled out. There is no evidence that there is anyone willing to pay other than a nominal sum for the freehold interest.

52. H has taken legal advice from a prominent firm of Guernsey lawyers. They have provided a long letter in which various litigation options are set out. In a separate letter, they provided an estimate of fees of $450k. Exactly the same difficulties arise as in connection with the arbitration argument. The lawyers have given no advice as to the prospects of success and H does not have the funds to pay for uncertain litigation on the many fronts that are referred to in the letter.

53. It is difficult to see how H is going to get back any of the very large investment that he has made in Brecqhou absent a member of the other side of the family being willing to buy out H's legal interest, or a sale of the island which would require the agreement of both sides of the family.

54. For all these reasons I dismiss the first judgment summons.

Judgment summonses 2 and 3

55. It is convenient to take these together. The LSPO was ordered by me on 29 October 2021. The payments of maintenance arise under the order of 30 March 2021.

56. I asked Mr Leech QC to identify the precise resources available to H to pay the sums which are the subject of these two judgment summonses. He replied that there were two assets from which he could have paid.

57. The first was that Mr Dearle had received from November 2021-March 2022 into his firm's client account significant sums from the nephews. Mr Dearle says and I accept that he was told from the outset by Martin Clarke (H's personal advisor) that this provision was intended solely to cover H's legal costs, even though the nephews did not put that in writing until March 2022. In my judgment it would not have been proper for Mr Dearle to pay it out to H for him to pay W when he had received the funds on a different basis.

58. The second potential source of payment was the sum of €1.575m received by Co-Ed, being the retention money from the purchaser of Leander. That sum was credited on 24 March 2021 to the company holding the yacht which was wholly owned by another company which in turn was wholly owned by Co-Ed.

59. The sale of the yacht took place in September 2020 and was carried out by or at the instance of H, and I was very critical in my main judgment of the failure of H to disclose what was happening in this respect. I also should have been told by H, but was not told, that there was a sum still to be paid at the time that I conducted the March 2021 hearing, and it is very likely that I would have made an order preserving the retained money if I had known of it.

60. As at 7 December 2021 there was £453k remaining in Co-Ed's account "in order to meet ongoing expenses". By the end of February 2022 when the second maintenance default occurred the balance was still over £338k. I am told that the balance is now down to £154k.

61. I have to consider very carefully whether these were funds which H could have used to pay the second and third judgment summonses if he was so minded.

62. I remind myself that the funds were held within a trust structure and therefore have to consider whether they would be made available to H. I refer to the case of Thomas v Thomas [1995] 2 FLR 668:

> "*The availability of unidentified resources may, for example, be inferred from a spouse's expenditure or style of living, or from his inability or unwillingness to allow the complexity of his affairs to be penetrated with the precision necessary to ascertain his actual wealth or the degree of liquidity of his assets. Another is that where a spouse enjoys access to wealth but no absolute entitlement to it (as in the case, for example, of a beneficiary under a discretionary trust or someone who is dependent on the generosity of a relative), the court will not act in direct invasion of the rights of, or usurp the discretion exercisable by, a third party. Nor will it put upon a third party undue pressure to act in a way which will enhance the means of the maintaining spouse. This does not, however, mean that the court acts in total disregard of the potential availability of wealth from sources owned or administered by others. There will be occasions when it becomes permissible for a judge deliberately to frame his orders in a form which affords judicious encouragement to third parties to provide the maintaining spouse with the means to comply with the court's view of the justice of the case. There are bound to be instances where the boundary between improper pressure and judicious encouragement proves to be a fine one, and it will require attention to the particular circumstances of each case to see whether it has been crossed*."

63. I must also have regard to the words of Mr Mostyn QC (as he then was) in *TL v ML* [2006] 1 FLR 1263 where, at paragraph 85, he said:

> "*If it is said that the width of the words in Thomas clearly permit what is sought here, then that gives rise to a conundrum that I find myself unable to resolve. What happens if the person being encouraged says very politely "Thank you for your encouragement, but I have decided not to assist"? Or, as here, "I am only prepared to assist to such and such an extent". Is the court supposed to ignore that stance and simply make an award on the basis that the assistance will be given? What happens if and when it is not? How is the court supposed to enforce its order? It could hardly be said that the payer is in wilful default justifying a penalty under the Debtors Act 1869. It is for this reason that I expressed the view during argument that often the so called "judicious encouragement" can turn out to be no more than mere empty rhetoric.*"

64. Each case is fact-specific, but the following matters are particularly relevant:

(1) H is the primary beneficiary of Co-Ed.

(2) So far as I am aware, Co-Ed has never paid out to any other beneficiary.

(3) Co-Ed has never refused to provide H with funds when it had them.

(4) The sums of £185k and £60k are relatively modest when set against the deposit money received.

(5) H has, in the past, used Co-Ed in effect as his bank account.

65. It might be said that the nephews would have hindered the making of this payment, but there is no evidence at all to that effect. It would make little sense for them to obstruct the payment if they are as keen as they say to protect H from the threat of imprisonment, even to the extent of paying over £1m of his legal fees to do so.

66. The trustees of Co-Ed are professional trustees. I can think of no reason why they would not comply with the wishes of the primary beneficiary supported by other members of his family. I am satisfied, so that I am sure, that in the period 29 October 2021- 28 February 2022 H had the means and access to funds to pay the second and third judgment summonses.

67. I find that H needed to do no more than ask for the money and he would have received it. He has therefore neglected to pay the sums which are the subject of the second and third judgment summons. I will need to hear submissions as to what steps I should take as a result of this ruling.

Some general points

68. I conclude with some general points. It might seem strange to an outsider that a court can find on a civil standard that a payer has the means to pay £100m and yet when he does not pay, finds that it cannot be satisfied to the criminal standard of proof that he has the means to make the payment.

69. It will, however, be obvious that the arguments I have heard in this hearing are very different to those that I heard last year and an analysis of the differing legal concepts provides the explanation. My ruling does not in any way reduce H's liability to pay the sums ordered.

70. I cannot leave without paying tribute to W's solicitors and counsel. They have repeatedly appeared when no funds are available to pay their fees as a result of H's breaches of court orders. They say that as a matter of honour they cannot leave W unrepresented in the court. That is very much to their credit and I hope an example to others in this case.