IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

No. ZC19D00073

NCN: [2023] EWHC 1179 (Fam)

Royal Courts of Justice
Strand
London, WC2A 2LL

Tuesday, 28 March 2023

Before:

SIR JONATHAN COHEN
(Sitting as a Judge of the High Court)

(**In Open Court**)

B E T W E E N:

LADY HIROKO BARCLAY

Petitioner

- and -

SIR FREDERICK HUGH BARCLAY

Respondent

- and -

HOWARD BARCLAY
AIDAN BARCLAY

Applicants

MR J ROBERTS KC and MS J PALMER (instructed by Signature Litigation LLP) appeared on behalf of the Applicants.

THE PETITIONER and RESPONDENT did not attend and were not represented but with permission of the court had filed written submissions.

J U D G M E N T

SIR JONATHAN COHEN:

1 I am dealing with an application by Mr Howard Barclay and Mr Aidan Barclay, who are two of the sons of Sir Frederick Barclay's deceased brother, Sir David, to set aside witness summonses made by this court on 6 March.

2 The background is very widely known and my previous judgments are available to be read by anyone who wants, and I refer to them. Suffice it to say that Sir Frederick has not paid any part of the lump sum of the £100 million I have ordered him to pay and, as a result of that, his former wife issued three judgment summonses against him. I have dismissed the first judgment summons, that in relation to the default of payment of the £50 million that was then due, but I found him to have been in contempt in respect of the second and third judgment summonses.

3 The foundation of Sir Frederick's case was that he says, and he said this in relation to all three judgment summonses, that he has no access to funds because the moneys which are due to the trust which granted him loan notes to the current value of over £500 million are being withheld so that the trust is being starved of funds. Those funds are under the control of the Barclay group of businesses (to put it in a very broad sense, but one that has been used by the nephews), and of those businesses Sir David's nephews own 75 per cent and are managed by the applicants.

4 Now, I have formed no view at all as to whether Sir Frederick's assertion is correct or not, but it is his case that, much though he would like to comply with the orders, he cannot do so because he has no funds because his nephews do not make them available.

5 When the matter came before me on the last two occasions, it appeared that the dispute between Sir Frederick and Lady Barclay was within a very small distance of being settled. Six weeks ago or so, I was asked to adjourn what was going to be the sentencing hearing because proposals had been made which would have meant the matter would never come back to me. On the last occasion, some three weeks ago, I was told by Mr Howard KC, representing Sir Frederick, that money was expected that very day and I was asked to put the matter over to 2 o'clock, which, unfortunately, I was unable to do.

6 It would be a matter of great sadness if this case had to come back to court, so I ventilated with counsel the question of the issue of a witness summons. Mr Leech's anxiety on behalf of Lady Barclay was that a witness summons might have the effect of putting him in a position where he could not cross-examine a witness on the basis that you cannot cross-examine your own witnesses. So, I took what seemed to me to be the obvious course, in those circumstances, namely, to use my case management powers to have the court issue the witness summonses, which means that both parties then are on a level playing field in dealing with the witness who attends.

7 The summons as drawn up refers specifically to rule 33.17 of the Family Procedure Rules 2010, which provides, under the heading "Special provisions as to judgment summonses in the High Court":

> "(1) The High Court may summons witnesses to give evidence to prove the means of the debtor and may issue a witness summons for that purpose."

Mr Roberts KC, who appears with Ms Palmer on behalf of the nephews (if I can call them that) says that that subrule does not permit the court to summons witnesses when the means

of the debtor has already been dealt with and found or not found (as the case may be) in respect of the three judgment summonses.

8 I do not accept that my powers are limited in the way that Mr Roberts puts them. Specifically, I refer, first, to rule 33.16, which provides that:

> "(1) On the hearing of the judgment summons the court may –
>
> (a) where the order is for lump sum provision...,
>
> …..
>
> make a new order for payment of the amount due under the original order..."

I have to consider, in my view, at all stages of these proceedings, including after a contempt has been found but before sentence has been pronounced, whether or not the lump sum should be recalibrated or adjusted. I do not read the rule as saying that I only exercise that power before the contempt is or is not found. It must, in my judgment, be a power that I have to keep under consideration at all stages of the judgment summons process, both the stage when I have to consider whether or not there has been a default for which there should be punishment and when dealing with the punishment.

9 There is no doubt that the court has a general power under rule 24.2 to summons a witness at any stage to attend court to give evidence. Mr Roberts accepts that, as he must. But he says that the summons as served on his client refers only to rule 33.17. In my judgment, I have the power to summons any witness to the court to give evidence when considering whether or not to recalibrate the order, and that is a consideration that I have always to keep in mind. It seems to me that it would be an absurd situation if it were to be found that I had no power to call those who are alleged by the debtor to hold the purse strings so that the court can form a view as to whether or not that is the case, something that is highly material to whether or not the order is recalibrated and equally relevant, in my judgment, to the issue of punishment. It would also be a most unfortunate use of all parties' resources if what the court had to do was to set up a separate hearing using a different rule so as to hear the nephews. It would be expensive and it would not be a constructive way forward.

10 I do not accept for a moment Mr Roberts' further argument that there are not any circumstances in which their evidence may turn out to be material. It would be surprising if their evidence was not material, but I do not know whether it will be until I hear what they have to say.

11 So, I do not intend to discharge the order. I am not satisfied that there is anything wrong with it procedurally. I will give Lady Barclay permission, if she so wishes, to amend the summons to add 33.16 and/or 24.2. That will be a matter for her. I will adjourn the hearing currently fixed for Friday because I am told, and I have no reason to doubt, that both Mr Howard and Mr Aidan Barclay are going to be out of the jurisdiction on business matters. Mr Roberts has been good enough to say that he has the dates when they are available and so this case will then be refixed for such time.

12 I want to conclude this short judgment by saying nothing would be better for everyone (the two parties and the nephews) if they did not have to come back and to give evidence. I do not know why this matter has not been able to be concluded in some form of consensual way. I very much hope that that can be done and the nephews can thus be released from the obligation to come to court.

13 That is my judgment.

CERTIFICATE

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