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Case No: ZC19D00073

IN THE FAMILY COURT SITTING AT
THE HIGH COURT OF JUSTICE

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/05/2021

Before :

THE HON. MR JUSTICE COHEN

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Between :

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

- -

Mr S Leech QC (instructed by **Payne Hicks Beach**) for the **Applicant**
Ms K Wilson and Mr J Tod (instructed by **Miles Preston**) for the **Respondent**
Mr J Browning (Bloomberg) and Mr B Farmer (PA) for the **Media**
Ms H Rogers QC and Mr J Price (instructed by **Signature Litigation)** for the **Interested Parties**

Hearing dates: 20 April 2021

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Approved Judgment

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THE HON. MR JUSTICE COHEN

This judgment was delivered in private. The judge has given leave for the judgment to be published.

The Hon. Mr Justice Cohen :

1. In March 2021 I heard the application by Lady Hiroko Barclay ("W") for financial remedy orders against her husband Sir Frederick Barclay ("H"). I handed down judgment on 30 March 2021.

2. The proceedings were heard in private in accordance with FPR 2010 Rule 27.10. They were attended by a number of accredited representatives of the media as provided for by Rule 27.11(2)(f).

3. At the commencement of the hearing I imposed an interim reporting restrictions order (RRO) which remains in place. In accordance with normal practice, I permitted the publication of the fact that the hearing was taking place before me and that the parties and their legal representatives could be identified.

4. I was referred to the judgment of Mostyn J in *Appleton v Gallagher & others [2015] EWHC 2689 (Fam)*, where at paragraph 24 he had granted an injunction prohibiting the media from publishing any report of the case that … *(b) refers to or concerns any of the parties' financial information whether of a personal or business nature …*

5. I was anxious that a hearing taking place against what appeared to be a tight timetable might be disrupted by arguments about what was and what was not 'the parties' financial information'. Mr Farmer, speaking on behalf of the media, hypothesised certain situations where evidence might be given which the media wished to be free to publish and which would not be financial information. I determined that there should be no publication of the hearing beyond the identity of the parties and their representatives but said that if information or evidence was given during the hearing which it was asserted was not the parties' financial information and which the media wished to publish, I would hear an application in respect of that material. No such application was made at any stage of the trial.

6. I now have to determine whether or not my judgment should be published either in full or in part and whether the RRO should remain in place.

7. Before I turn to the positions of the parties and the interested parties, I should refer to the limited measure of agreement that has emerged between the parties. Both sides agree that the award and the open position of each party should be made public. They were as follows:

Lady Barclay

8. She sought an award of £120m to be paid in two tranches over a period of 3 months from the date of judgment. She accepted that notwithstanding the very long marriage, the production of a sum of this size in relatively short order would require a substantial discount from a full sharing order.

Sir Frederick Barclay

9. He offered W:

i) 40% of the remaining loan notes due to him subject to the consent of the trustees of the trust which issued them, and in the meantime 40% of the net amount received by him from the trust by way of loan note redemption;

ii) 50% of such receipt as he might receive from the relevant trustees of the equity in the yacht and in the family home.

As Mr Leech QC correctly pointed out, the effect of H's offer might be that W would receive nothing as H's trustees would not regard it as in his interest for the funds to be made available to him to pay to W.

The Court Order

10. I ordered H to pay to W lump sums totalling £100m, to be paid as to £50m in 3 months and the remainder in a little over 1 year from judgment.

11. It is against that background that the parties argued about publication as follows:

H's submissions

i) The correct starting point is privacy. These are highly personal proceedings and there should be no publication of any part of them.

ii) Any publication will inevitably lead to identification. An anonymised and redacted judgment is not an option available in the present proceedings because identification would be inevitable by reason of H's business interests which are widely known.

iii) Whatever the nature of his business interests, H is not a public figure. He has never courted publicity and has always been a very private person.

iv) The fact that The Telegraph has taken the lead in publishing details of the finances of others, particularly MPs thought to have abused expenses, is immaterial. They were public figures said to be taking advantage of the public purse.

v) Although criticisms have been made in the judgment, to which I will return, there is no suggestion, as can be found in other cases where litigants have been identified, of the presentation of a perjured case or very serious litigation misconduct. In each case the extent of any wrongdoing has to be examined and there is no rule of general application.

vi) There are genuine concerns for other members of the family who are not parties to the proceedings but may be affected by the judgment, in particular the parties' daughter and, to a lesser extent, the wider Barclay family.

vii) There are aspects of the judgment which are highly personal, in particular matters relating to H's health.

W's submissions

12. H has been the subject of serious criticism in the judgment.

i) Whilst H may wish to maintain his privacy, W wishes to exercise her right of freedom of expression. Neither party's wish trumps that of the other. W does not wish to be silenced about the way that H has behaved before and during the litigation.

ii) H overstates the intrusion which he or members of the family will suffer by publication. There is no evidence that anyone other than H would be affected by full publication of the judgment (redacted only to remove reference to H's health issues). The fact that the Barclay family do not like their financial and tax affairs being discussed is immaterial. They are in the public eye and indeed H has initiated widely reported proceedings against his nephews in the Queen's Bench Division.

iii) The public have a right to know of the way that H has behaved, as set out in the judgment. His behaviour has removed his right to privacy.

The Media

13. I have received submissions both written and oral from Mr Browning (Bloomberg) and Mr Farmer (PA). They say that:

i) As a part owner of a newspaper, H is a public and political figure. Newspapers exercise a great influence on the public and set an agenda of what people are told. There is a public interest in knowing how H deals with others.

ii) To the extent that the judgment criticises H in respect of financial matters, it is important that the criticism is made public. This applies particularly in circumstances when The Telegraph has excoriated others in respect of the conduct of their own finances, whether MPs in respect of expenses claims or celebrities who have entered tax avoidance schemes.

iii) The evidence of the relationship between H and his twin brother and the evidence of the way that the parties conducted their lives financially are matters of general public interest.

iv) It is important that the whole of the judgment is published so that the public can understand how it is that the court has reached its conclusion as to the appropriate size of the award. It is only by knowing the whole context of the case that the award can be understood.

The wider family (The Interested Parties)

14. I heard counsel on behalf of Sir David's children. They are anxious about any publicity which impinges on their financial affairs. They have not seen the judgment but are anxious that because of the inter-relationship between the various family members through the trust structures that Sir Frederick and Sir David set up, their privacy may be invaded.

Discussion

15. The relevant legal principles are conveniently summarised by Baker J (as he then was), in *XW v XH (No.2) [2018] EWFC 44* at [4]:

"(1) Open justice is a fundamental principle of our constitution. The general rule is that hearings are carried out, and judgments delivered, in public. This fundamental principle, set out by the House of Lords in Scott v Scott [1913] AC 417 , has been reiterated on numerous occasions.

(2) There are, however, established exceptions to this general rule. Amongst those exceptions are proceedings in the family court. Such proceedings, including those concerning applications for financial remedies orders, are usually conducted in private: Family Procedure Rules ("FPR") rule 27.10.

(3) The mere fact that proceedings are heard in private does not of itself prohibit publication of what happens in those proceedings: Administration of Justice Act 1960 , Clibbery v Allen [2002] Fam 261 paras 17 and 51; Norman v Norman [2017] EWCA Civ 49.

(4) In financial remedy proceedings, however, there is an obligation on the litigants to give full and frank disclosure of all relevant matters. The quid pro quo of this obligation is the confidentiality which attaches to all information disclosed within the proceedings. The party receiving the confidential information is subject to an implied undertaking not to use it for any purpose other than within the proceedings in which the information has been disclosed. "Information disclosed under the compulsion of ancillary relief proceedings is ... protected by the implied undertaking before, during and after the proceedings are completed" (per Butler-Sloss P in Clibbery v Allen, supra, para 72).

(5) Any disclosure by a party of information arising from financial proceedings amounts to a breach of confidence and a contempt of court unless authorised by the judge.

(6) In deciding whether to restrict or permit disclosure or publication of information relating to financial remedy proceedings, and, if so, on what terms, the court has to balance the conflicting rights and interests under ECHR , in particular articles 6 , 8 and 10 , applying the well-established principles identified in the case law, in particular Re S (Identification: Restrictions on Publication) [2005] 1 AC 593. Importantly, the article 8 rights to be balanced include those of the children to the marriage as well as the parties themselves: K v L [2011] EWCA Civ 550, [2012] 306 at para 26.

(7) The same principles apply to the publication of judgments in financial remedy proceedings. But, as Thorpe LJ acknowledged in Lykiardopulo v Lykiardopulo [2010] EWCA Civ 1315 at para 33:

"a distinction can be validly drawn between the privacy of the hearing and the privacy of the judgment. A judgment considering a point of law or practice has generally been released to the specialist series of law reports. There have been many first instance judgments so reported in addition to appellate decisions selected by the reporters. Without this collaboration between the judiciary and the reports evolution of ancillary relief law and practice by the judges would hardly have been possible."

Thus in cases where there is a public interest in the publication of the judgment which explains or illustrates an aspect of the law or practice, the judge will normally give

permission for it to be reported, but subject to anonymisation and redaction of sensitive or confidential information.

(8) In some cases, the judge may authorise publication of the judgment without anonymisation or redaction – for example, where a party has provided false information to the court (for example, the Lykiardopulo case, supra), or where the parties are in the public eye and the details of the matrimonial dispute are already in the public domain (for example, McCartney v Mills McCartney [2008] EWHC 401 (Fam)). In other cases where the parties are in the public eye, but the details of the dispute are not in the public domain, the court may authorise publication of the fact that they are engaged in litigation but restrain publication of detailed information relating to the proceedings (for example, Appleton v Gallagher [2015] EWHC 2689 (Fam)).

(9) Although in most cases, confidentiality can be protected by publishing judgments in an anonymised and redacted form, there are some rare cases where the factual matrix is unique or so unusual that confidentiality can only be protected by withholding the judgment from publication altogether. One example is the judgment in the so-called "Scottish case" delivered by Mostyn J which has never been published but was subsequently cited by the same judge in WM v HM (Financial Remedies: Sharing Principle: Special Contributions) [2017] EWFC 25. As Mostyn J explained in the latter case at para 110, "I have not given leave for that decision to be reported as the case is incapable of camouflage and were its details to be reported there may be adverse economic consequences."

(10) The principles set out above are unaffected by the change in the rules incorporated in FPR r.27(11)(2)(f) and Practice Direction 27B, under which duly accredited representatives of news gathering and reporting organisations are permitted to attend hearings in the family court unless the judge orders otherwise. I respectfully agree with the observations made by Mostyn J in Appleton v Gallagher, supra, at paras 12 to 14, DL v SL, supra, para 1, and again in L v L [2015] in EWHC 2621 (Fam) [2016] 1 WLR 1259 at para 1 that, whilst accredited representatives of the press may be present at the hearing, they are not permitted to report confidential and private information disclosed into the proceedings. It is fair to say, however, that there is some disagreement amongst judges and practitioners on this issue, and as a result the courts are not infrequently invited by the parties to financial remedy proceedings to make a reporting restrictions order."

16. In financial remedy proceedings the starting point is one of privacy. This arises from a number of considerations including the fact that parties are obliged by rules of court to give full and frank disclosure of all relevant matters. But, further, the breakdown of a relationship and its consequences are intensely personal matters. For the public to be admitted, whether by attendance at a hearing or being able to read about it, would add a layer of pain and embarrassment which is damaging both to the parties and to their wider families. There is no corresponding public benefit.

17. On the other hand, what goes on in family courts is a proper matter of public concern. Open justice is part of the DNA of our constitution. There is a proper public interest in what goes on in the courtroom.

18. These tensions are normally resolved by the publication of anonymised judgments so that although the identity of the party is not revealed, the basis upon which the court has acted is fully visible to anyone interested.

19. One of the curiosities of our legal system is that cases conducted in the Court of Appeal are almost invariably held in public and fully reported with identities (save for anonymisation in children cases) when at first instance the cases have been heard in private. Although the media rely on the argument that if this case had been heard in the Court of Appeal no question of anonymisation would arise, I do not regard that as a relevant consideration. Parties who appear in the Court of Appeal know that their cases will be heard in public. Parties who appear in the Family Court know and expect their cases to be heard in private.

20. In rare cases the conduct of a litigant disentitles him or her from protection against publicity. The leading authority in this area remains *Lykiardopulo v Lykiardopulo [2010] EWCA Civ 1315*. That was a case in which the judge had found that members of a very wealthy Greek shipping family had conspired to manufacture for the purposes of the divorce financial hearing documents concerning H's assets. It was a case of forgery and "*plain perjury*" where there had been a "*conspiracy within the family to protect the family business which resulted in the presentation to the court of forged and backdated documents*". It was an extreme case involving an attempted perversion of justice.

21. The judge in that case (Baron J) had ordered publication of the judgment in an anonymised form. What emerged "*went beyond anonymisation and involved the creation of a work of fiction"*. The Court of Appeal held that the husband's conduct had deprived him of the right to privacy and directed the publication of the judgment with correct identification.

22. The judgment of Thorpe LJ identifies the various alternatives open to the court when considering publication:

    i) Publication of a judgment in full;

    ii) A direction that there shall be no publication;

    iii) Publication with anonymisation;

    iv) Publication with redaction;

    v) Publication of a summary of the judgment.

23. In the occasional high-profile case anonymisation or redaction simply cannot protect the confidentiality of the parties. Thorpe LJ quoted the example of *McCartney v Mills McCartney [2008] EWH 401 (Fam)* where the choice was either to sanction or to refuse publication. It is agreed between all parties that anonymisation/redaction is not possible in this case if its purpose is to protect the identity of the parties.

24. I had been attracted to the idea of a summary of the judgment being made public. This is not a course that I or the parties know to have been taken in previous financial cases but that it exists as at least a possibility is made clear by paragraph 34 of *Lykiardopulo*

which reads *"if a case in advance and during its course has generated press interest and speculation the judge may release the judgment or a summary to the press* (emphasis added) *in such cases it is questionable what is gained by anonymisation. The identity of the family has been the generator"*.

25. Neither party was enthusiastic about this suggestion, it being a middle course for which neither contended. I would have been minded to take it but for the fact that in giving this judgment I can incorporate into it the matters that would have appeared in a summary.

26. The key argument between the parties has been the extent to which H's conduct in the litigation has deprived him of the right to confidentiality.

The criticisms made of H

27. The principal criticism that I made of H related to his treatment of orders made for the production of documents and answers to questions. Those orders were made specifically in the context of H seeking to argue that loan notes to which he was entitled and which constituted the vast bulk of his wealth were not likely to be honoured, in full or in part, by reason of an alleged absence of liquidity in the underlying family businesses. Without that argument on his behalf, few if any of the orders would have been made. Likewise, it would have been unnecessary for the court to order the instruction of an SJE to advise on this issue.

28. H repeatedly ignored orders to produce documents or answer questions and failed to put the SJE in funds, despite my orders, so that they could carry out their work. These were serious acts of omission. They also led to the court timetable having to be put back by some 9 months.

29. Part of H's available assets included a luxury yacht which was on the market for sale. I made orders intended to control the sale and the use of the proceeds. H completely ignored those orders, sold the yacht, and applied the equity for his own use. I regarded that behaviour as reprehensible.

30. Other criticisms are more minor and do not add to the argument. The issue is what impact these findings should have on publication.

Discussion

31. I have to conduct a balancing exercise between the right to privacy and the right to freedom of expression, both rights protected under the European Convention on Human Rights. In normal circumstances, the right to privacy found in the FPR will prevail.

32. This is a finely balanced argument. H's default does not get near to the level of misconduct in *Lykiardopulo* or that to be found in *Veluppillai v Veluppillai [2016] 2 FLR 681*.

33. It is in my judgment also relevant to bear in mind that H's behaviour has caused much more damage to him than it has to W. H's failure to provide information led inevitably to my rejection of his claim about the loan notes.

34. I accept W's contention that if H had provided the information that had been ordered she might have been able to argue for a different timeframe for payment but I regard it as theoretical. I cannot envisage that I would have made an order that was in any significant way different to that which I did make.

35. The balance between the interests that arise does not always require an all or nothing approach. A proportionate approach is appropriate, weighing the starting point of privacy as against the gravity of wrongdoing. In cases where the balance is not overwhelming, justice can be served by limiting the publication to the misbehaviour. A litigant may expose himself to publication of his wrongful acts without losing the protection of confidentiality of other matters.

Conclusion

36. I have reached the conclusion that I should not permit the publication of my substantive judgment. I would have permitted the publication of a summary but for the fact that it will be overtaken by the publication of this judgment.

37. The factors that lead me this conclusion are as follows:

    i) The starting point, namely that these proceedings are conducted in private.

    ii) Although I have been critical, indeed at times very critical, of aspects of the presentation by H of his case, these are largely acts of omission rather than commission and apart from delay have not significantly affected the outcome of the proceedings.

    iii) This is not a case of H "getting away with it". By order or agreement H has paid almost the entirety of W's costs to the tune of some £1.8m. Despite hiccups along the way, that has all been paid.

    iv) Whilst a relevant matter, I do not consider that the fact that H has or has had (directly or indirectly) a share in the ownership of The Telegraph is in itself sufficient reason to dictate my decision. Leaving aside the issue of which members of the family were involved in the newspaper at the relevant times, I have heard no evidence as to whether or the extent to which the owners dictated or influenced the content of the paper.

    v) H is a public figure who should have been aware of the potential consequences of disobedience of court orders and his behaviour in the proceedings should not be allowed to pass completely under the radar.

    vi) The provision of this judgment properly and proportionately satisfies the public interest.

38. H's nephews made submissions about the draft judgment which led to several minor alterations, but my conclusion has made it unnecessary for them to be further concerned.

39. The parties' positions in respect of the continuation of the RRO were the opposite of what one might have expected. H argued that if the judgment was to be made public then, save as to his health issues, there was no reason why everything that was said in

the hearing should not be made open whilst W's position was that she wanted the RRO to remain in place and only the judgment to be made public. I do not need to go into the labyrinthine logic of these positions.

40. The RRO will remain in place and the extent of the publication will be limited to this judgment.