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IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
COMMERCIAL COURT
QUEEN'S BENCH DIVISION
[2020] EWHC 3658 (Comm)



No. CL-2011-001058

Rolls Building
Fetter Lane
London, EC4A 1NL

Friday, 11 December 2020

Before:

MR JUSTICE CALVER

B E T W E E N :

(1) LAKATAMIA SHIPPING COMPANY LIMITED Claimant/Applicant
(2) SLAGEN SHIPPING CO. LTD
(3) KITON SHIPPING CO. LTD
(4) POLYS HAJI-IOANNOU Second to Fourth
Claimants

- v -

(1) NOBU SU
(aka SU HSIN CHI; aka NOBU MORIMOTO) Defendant/Respondent
(2) TMT CO. LIMITED
(3) TMT ASIA LIMITED
(4) TAIWAN MARITIME
TRANSPORTATION CO. LIMITED
(5) TMT COMPANY LTD PANAMA S.A.
(6) TMT CO. LTD LIBERIA
(7) IRON MONGER 1 CO. LTD Second to Seventh Defendants

MR N. CASEY (instructed by Hill Dickinson LLP) appeared on behalf of the Claimant/Applicant.

MR A. UNDERWOOD (instructed by Scott-Moncrieff & Associates Ltd) appeared on behalf of the First Defendant/Respondent.

THE SECOND TO SEVENTH DEFENDANTS were not present and not represented.

J U D G M E N T

MR JUSTICE CALVER:

- 1 This is an application by the claimant, Lakatamia, to re-amend its committal application notice to incorporate 11 additional alleged contempts on the part of the first defendant, Mr Su.
- 2 This application arises out of a long standing dispute. Mr Su owes Lakatamia more than \$60 million pursuant to judgments and costs orders of this court dating back to 2014 and 2015. He has consistently sought to evade those obligations and has already been committed on two separate occasions.
- 3 On 29 March 2019 Sir Michael Burton committed Mr Su to HMP Pentonville for a period of 21 months for various contempts, including a failure to disclose his interest in two valuable Monégasque properties in breach of the disclosure obligations in the freezing order made against him in 2011 by Blair J, and dissipating the proceeds of the sale of those properties again in breach of that freezing order. Sir Michael Burton also committed him for attempting to flee the jurisdiction in breach of an order of Popplewell J.
- 4 On 11 February 2020 Sir Michael Burton committed Mr Su to prison for a further period of four months for failing to sign mandates to various banks permitting them to disclose information to Lakatamia and failing, in breach of his disclosure obligations, to disclose his interest in three apartments in New York.
- 5 This, the third committal application, was issued on 27 March 2020. Lakatamia's original application was based upon the discovery in the context of related proceedings against Mr Su and his mother, that they had shared a previously undisclosed interest in a valuable residential property in Japan. Moreover, he was alleged to have failed to disclose various documents that he had been ordered to disclose.
- 6 The hearing of Lakatamia's committal application had been listed to be heard on 22/23 June 2020. However, before that application could be heard, Lakatamia say that Mr Su committed yet further contempts. First, it is alleged that he failed to comply with an order of Teare J of 11 March 2020, that he disclose a number of documents in a schedule to that order; and, secondly, that he failed to comply with an order of Foxton J made on 26 March 2020, that he should provide an independent reviewing lawyer with access to his email and social media accounts.
- 7 On 27 May 2020, Lakatamia accordingly issued an application to amend its committal application notice to include those allegations. That application was consented to by Mr Su (para. 1 of the order of Foxton J of 12 June 2020 refers). Further, on 17 June 2020, Lakatamia applied for and obtained a search order against Mr Su which was executed on 18 June 2020. In the course of that execution two incidents occurred which Lakatamia say suggests Mr Su was guilty of further contempts. First, they allege that the supervising solicitor was denied access to the premises for over two hours, and it is alleged that at about 16.10 hours the independent computer expert observed Mr Su making a repeated swiping motion on the screen of his iPad. He took the iPad and observed that the open application was the deleted items folder of one of Mr Su's email accounts, and so it appeared therefore that Mr Su may have been in the process of permanently deleting emails in his deleted items folder. Lakatamia applied for an adjournment, therefore, of the committal hearing listed to begin on 22 June. That adjournment was granted by Foxton J, who directed that Lakatamia

should file and serve any application to amend its committal application notice by 24 July 2020.

- 8 The search order yielded a substantial volume of documents that Lakatamia say are relevant to Mr Su's asset position and demonstrate that he is guilty of further substantial contempts. Lakatamia applied for and obtained an extension of the deadline for the filing and service of an application to amend its committal application notice to 14 September 2020 by order of Jacobs J, dated 7 August 2020.
- 9 Lakatamia has complied with that time table because I am told the present application was put on the CE file on 14 September 2020, albeit not sealed until 15 September. There may be a dispute about that but no point has been taken, rightly, by Mr Underwood on that point.
- 10 Mr Su is accused of, first, failing to allow the supervising solicitor to enter the premises immediately upon being served with the search order (contempt 10). Secondly, failing to disclose an interest in a company called Ocean Net Company Limited in breach of the orders of Popplewell J and Bryan J (contempts 11 and 12). Lakatamia say that Ocean Net is the company through which Mr Su appears to manage his residual business interests. Thirdly, it is said that Mr Su failed to disclose an interest in a vessel called 'CLEAN OCEAN 1' and subsequently dissipated the proceeds of her sale (contempts 13 to 15). Fourthly, Lakatamia say he also has an undisclosed interest in another vessel called 'TRIUMPH', contempts (16 and 17). Fifthly, he is said to have dissipated the sum of \$422,000 to various individual companies and law firms (contempt 18). Sixthly, Mr Su is accused of dissipating the sum of \$53,375 to fund the production of a pop music video for his daughter (contempt 19). Finally, he is said to have dissipated funds through RAKBANK, an institution in the UAE, between 17 October 2018 and 17 January 2019 for his own benefit. That is the background to this application.
- 11 Lakatamia make three points in support of their application. First, as the adjourned committal hearing has not yet been relisted, Mr Su, they say, will have adequate time to marshal any evidence that he wishes to serve before that hearing. Secondly, Lakatamia say it is desirable that all the alleged contempts should be brought on the same occasion. They say it is certainly desirable from Mr Su's perspective because the statutory maximum sentence for contempt of 24 months applies to each occasion on which contempt allegations are heard, and for these purposes an 'occasion' is a hearing. Thus, if there are two separate applications on two separate occasions, Mr Su is exposed to the risk of a longer cumulative sentence. Given that there is already to be a committal application there is no good reason, Lakatamia say, to exclude these additional contempts. Thirdly, they say there has not been, prior to this application, any clear ground articulated by Mr Su for resisting the application.
- 12 On 8 July 2020 Mr Su applied for and obtained an order declaring him to be bankrupt. Lakatamia considers that Mr Su has applied to be declared bankrupt so as to defeat Lakatamia's claims and to preserve his residual wealth. On 22 September 2020 Lakatamia applied to annul the bankruptcy order on the grounds that the insolvency court did not have jurisdiction to make the order and that the information placed before it on that application was not accurate. However, on 7 December 2020 the office of the Official Receiver wrote to the court saying that Lakatamia should not have issued the instant application because it had not applied for leave under s.285(3) of the Insolvency Act. It is fair to say that Mr Su, himself, takes no point on his bankruptcy on this application. So far as s.285(3) is concerned, that section provides:

"After the making of a bankruptcy order no person who is a creditor of the bankrupt in respect of a debt provable in the bankruptcy shall:

- (a) have any remedy against the property or person of the bankrupt in respect of that debt, or
- (b) before the discharge of the bankrupt, commence any action or other legal proceedings against the bankrupt except with the leave of the court and on such terms as the court may impose."

13 It is important to view this section in the context of the rest of s.285. Section 285(1) provides that:

"At any time when proceedings on a bankruptcy petition are pending or an individual has been adjudged bankrupt the court may stay any action, execution or other legal process against the property or person of the debtor or, as the case may be, of the bankrupt."

Section 285(2) provides:

"Any court in which proceedings are pending against any individual may, on proof that a bankruptcy application has been made or a bankruptcy petition has been presented in respect of that individual or that he is an undischarged bankrupt, either stay the proceedings or allow them to continue on such terms as it thinks fit."

Lakatamia say that it is this subsection that is relevant here. This is not a claim in respect of the judgment debt in favour of Lakatamia, and by the committal proceedings Lakatamia is not seeking to enforce against the assets of Mr Su, nor is there any prejudice to the other creditors with claims in the bankruptcy.

14 In *Heating Electrical Lighting and Piping Ltd (in liquidation) v Ross* [2012] EWHC 3764 (Ch) His Honour Judge Peter Langan QC said at para. 39:

". . . The object of s 285(3)(a) must, I think, be to prevent one creditor from getting his hands on part of the bankrupt's estate to the actual or potential detriment of the general body of creditors. Allowing proceedings to run their normal course up to (but not beyond) judgment does not undermine this object, and is consistent with s 285(1) which envisages that a claim already commenced against the bankrupt will, unless stayed, remain on foot against him."

I accept that nothing in these proceedings, on this application, undermines this object and subsection 3(a) is accordingly not engaged. Section 285 also clearly draws a distinction between proceedings which are already pending and those which are not. It is only the commencement of legal proceedings which requires the leave of the court pursuant to subsection 285(3)(b). Here, the original committal application notice was issued in existing proceedings dating back to 2011 on the 27 March 2020, thus the proceedings against Mr Su and the instant committal application notice pre-date the bankruptcy order. Accordingly, the relevant section for present purposes is sub-section (2) of s.285. I accept that this an appropriate case not to grant a stay of proceedings under that subsection.

15 As **Fletcher** on The Law of Insolvency, 5th Edition para. 7-007 states:

"A distinction is made between proceedings which are designed to enforce a legal obligation owed by the debtor and those which are of a punitive character and are brought on account of his personal misconduct. In the latter type of case – for instance proceedings for contempt of court or for committal of a defaulting trustee – the court of bankruptcy will not intervene."

I accept the applicant's submission that this application is in no way prejudicial to the other creditors who, indeed, have an interest in Mr Su's compliance with court orders and in the provision of a full and accurate account of his asset position. There is, moreover, significant public interest in ensuring that orders of the court are obeyed. Accordingly, had a stay application been made I would have dismissed it.

16 In his skeleton argument Mr Su makes two related submissions in opposition to this application. First, through Mr Underwood QC, he says that the re-amendments should not be allowed because there may be further committals that come to light in reviewing the remainder of the search order documents. The review of 80,000 documents to date out of some 620,000 documents has been random. There is, therefore, it is said, no purpose in granting the application. Secondly, this is said to be doubly unfair when Mr Su is not funded to review the totality of those materials. The proper approach, says Mr Underwood on his behalf, is to review everything and only then should the application to re-amend be made. Mr Underwood did not suggest that the amendments themselves are demurrable.

17 It is right that the new allegations, which are the subject matter of the present application, are at this stage based upon an incomplete reading of the entirety of the materials revealed by the search order which is very substantial indeed. However, they are discrete allegations and I do not consider that it necessarily follows that more allegations will follow on, despite the fact that further serious contempts may well be revealed as the review progresses. Lakatamia have limited this application to these contempts on the basis that it is sufficient to commit Mr Su for the maximum two-year period. As Mr St. John Gardner puts it in his witness statement:

"It is crystal clear from the limited data and documents that have been disclosed to Lakatamia to date, via the independent reviewing lawyers, that Mr Su is guilty of contempt on an industrial scale. Lakatamia has chosen to pursue, if the court grants it permission to amend its committal application notice, just a small sample of the additional contempts that Mr Su has committed. On any assessment the additional contempts, especially coupled with those that are already alleged in the committal application notice, more than justify the imposition of the maximum sentence on Mr Su in the event that they are established against him."

18 Accordingly, I do not accept that there is no purpose in granting the committal application. In any event, the committal application is to be fixed very shortly, by the terms of para. 3 of the draft order that is apparent. Any further applications to amend the committal application notice will have to be judged on their own merits bearing in mind that the court is very unlikely to allow the hearing of the committal application to be vacated a second time without exceptional reasons. That, at least, should give Mr Su some comfort that the committal application will now be fixed and brought to a hearing.

19 Nor do I consider that Mr Su is prejudiced by the application. Mr Su is funded by legal aid. On 22 September 2020 a request for funding to review the totality of the seized material was refused by Foxton J in these terms:

"I do not accept that 800,000 documents must all be reviewed by Mr Su's legal team. In circumstances in which they are his documents the vast majority are unlikely to be relevant to the issues and in which Mr Su will be able to focus the inquiries of his team on the topics which matter."

20 Accordingly, it is said, on behalf of Mr Su, that it is unrealistic to expect Mr Su to face a committal application based on a selection of materials which is likely to be expanded to be based on other, so far unspecified, materials which his legal team are not funded to review. I do not accept that submission. The point that Foxton J was making in refusing the further funding to review all the documents was that Mr Su will be able to focus the inquiries of his team on the topics which matter. That rationale is not undermined by the adding of these additional specific contempt topics. They have been fully elaborated upon in the witness statement of Mr St. John Gardner. Mr Su will, no doubt, still be able to direct his lawyers to relevant documents which concern him as these are documents which belong to Mr Su.

21 Accordingly, for all those reasons, I grant the first claimant's application to re-amend its committal application notice to incorporate the additional alleged contempts and, subject to anything that Mr Underwood wishes to say, I am prepared to grant the order in the terms sought.

CERTIFICATE

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This transcript has been approved by the Judge