Neutral Citation Number: [2020] EWHC 806 (Comm)

Case No: CL-2011-001058

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PRPERTY COURTS
OF ENGLAND AND WALES
COMMERCIAL COURT (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL
Date: 3 April 2020

Before :

MR JUSTICE FOXTON

- -

Between :

(1) LAKATAMIA SHIPPING COMPANY LIMITED
(2) SLAGEN SHIPPING CO LTD
(3) KITION SHIPPING CO LTD
(4) POLYS HAJI-IONNAOU

Claimants

- and –

(1) NOBU SU (aka SU HSIN CHI; aka NOBU MORITOMO)
(2) TMT CO LIMITED
(3) TMT ASIA LIMITED
(4) TAIWAN MARITIME TRANSPORTATION CO LTD
(5) TMT COMPAY LIMITED PANAMA SA
(6) TMT CO LIMITED LIBERIA
(7) IRON MONGER I CO LTD

Defendants

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Stephen Phillips QC, Noel Casey and **James Goudkamp** (instructed by **Hill Dickinson LLP**) for the **First Claimant/Applicant**
Adam Tear (of **Scott-Moncrieff & Associates Limited**) for the **First Defendant** on the Purge and Listing Applications)
The First Defendant in person on the Injunction Application.

Hearing date: 3 April 2020

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JUDGMENT

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be 3 April 2020 at 3.40pm.

Mr Justice Foxton:

INTRODUCTION

1. This judgment deals with three applications which I heard today, 3 April 2020, in hearings conducted remotely by Skype. The three applications are:

   i) The Claimants' ("Lakatamia's") application to continue on the return date the injunction I granted on 26 March 2020, and for further orders in relation to that application ("the Injunction Application").

   ii) The First Defendant's ("Mr Su's") application to purge the contempt for which he is presently serving a sentence of imprisonment at HMP Pentonville ("the Purge Application").

   iii) Lakatamia's application to list a further application to commit Mr Su to a further period for imprisonment for contempt of court so that the hearing is concluded before Mr Su is released from the sentence of imprisonment he is currently serving ("the Listing Application").

2. The disputes from which these applications arise have a long, complex and troubled history, and the applications themselves give rise to a number of issues. They have arisen for determination in the course of the COVID-19 pandemic, which has necessitated the conduct of the hearings remotely, and involved the service of documents on Mr Su in prison, and his participation in the hearing from custody via the HMP video link.

3. Lakatamia has been represented for all three applications by Mr Stephen Phillips QC, Mr Noel Casey and Mr James Goudkamp instructed by Hill Dickinson LLP. Mr Su has been represented by Mr Adam Tear of Scott-Moncrieff & Associates Ltd on the Purge and Listing Applications. Mr Su appeared in person on the Injunction Application.

THE BACKGROUND

4. As I have mentioned, this matter has a long background. That background has been set out in a number of prior judgments of this Court and is largely a matter of record.

5. Mr Su was one of Asia's richest businessmen. In 2008, he and his companies entered into a contract with Lakatamia relating to the purchase of forward positions on the freight market, which positions proved very substantially loss-making. He failed to fulfil his obligations to Lakatamia under that contract. Lakatamia obtained a worldwide freezing order from Mr Justice Blair on 19 August 2011 ("the Blair Injunction") and in due course Lakatamia obtained judgments against Mr Su for the amounts of $37,854,310,24 and $9,852,200, on 5 November 2014 and 16 January 2015 respectively.

6. On 26 January 2018, Mr Justice Popplewell made a passport order against Mr Su, requiring him to remain in the jurisdiction pending cross-examination under CPR Part 71 and the swearing by Mr Su of an affidavit disclosing his worldwide assets and certain documents known as the Schedule A documents ("the Popplewell Order"). That order was served on Mr Su when he entered the jurisdiction on 10 January 2019. Mr Su lied to the officers who served the order as to his intended address, and took a taxi to Liverpool where he sought to take a ferry to Northern Ireland. That attempt failed and he was brought back to London where Lakatamia served him with a committal application.

7. On 16 January 2019, Mr Justice Bryan rejected a submission by Lakatamia (based on a suggestion by Mr Su's counsel) that Mr Su be remanded in custody pending the application to commit him, holding that he had no jurisdiction to make such an order. He reimposed the restrictions set out in the Popplewell Order, together with additional restrictions including a daily reporting restriction ("the Bryan Order").

8. After the adjournment of the initial hearing due to the absence of satisfactory disclosure from Mr Su, Mr Su was cross-examined as to his assets before Sir Michael Burton on 27 and 28 February 2019. In that hearing, it emerged that Mr Su had been involved in the sale of two villas in Monaco, and Mr Su gave evidence that the proceeds of sale had been transferred to his mother Mrs Morimoto (which evidence led to a further freezing order and fresh proceedings by Lakatamia against Mrs Morimoto and others alleged to have been involved in the sale).

9. Lakatamia's motion to commit Mr Su was heard in March 2019. On 29 March 2019, Sir Michael Burton found that Mr Su had committed contempt of court in 10 respects. These included failing to disclose the villas and dissipation of the sale proceeds and other monies in breach of the Blair Injunction, failure to supply a genuine address and the attempt to flee the jurisdiction in breach of the Popplewell Order, failing to produce the Schedule A documents in breach of the Popplewell and Bryan Orders and failing to serve an appropriate affidavit of assets in breach of the Popplewell and Bryan Orders. Sir Michael Burton sentenced Mr Su to 21 months' imprisonment. It is apparent from the sentencing remarks that Mr Su would have been sentenced to the two year maximum sentence but for the fact that he had already had to remain in the jurisdiction and report daily to the police in accordance with the Bryan Order.

10. Material which came to light in the proceedings commenced against Mrs Morimoto revealed involvement by Mr Su in the transfer of the proceeds of sale of the villas.

11. On 4 November 2019, Mr Su applied before Mr Justice Jacobs to purge his contempt. Mr Justice Jacobs refused that application, which he held to be totally without merit. In the course of that application Mr Su had produced a new affidavit of assets which Lakatamia contends can now be shown to have been seriously misleading in failing to refer to assets the existence of

which has subsequently come to light (namely three New York apartments and a Tokyo residential property to which I return below).

12. On 13 November 2019, His Honour Judge Pelling QC ordered Mr Su to sign various bank mandates and to provide them to Lakatamia, to allow Lakatamia to approach Mr Su's banks directly for documents which Mr Su had been ordered to provide within the Schedule A documents. When Mr Su refused to sign those mandates, Lakatamia issued a fresh committal application on 6 January 2020. That application was due to be heard on 30 January 2020. However, before it was heard, Lakatamia discovered three apartments in which Mr Su had an interest in New York.

13. On 30 January 2020 Mr Justice Waksman made the following order ("the Waksman Order"):

    i) The committal application was amended to include the failure to disclose the New York properties.

    ii) Mr Su was ordered to attend Court for a further cross-examination as to his assets under CPR 71.

    iii) Mr Su was ordered to produce further documents relating to his interest in two companies involved in handling the proceeds of the sale of the villas, UP Shipping and Blue Diamond.

    iv) An order was made preventing Mr Su from leaving the jurisdiction or applying for documents to enable him to do so until the second CPR 71 hearing had taken place.

    v) An order was made requiring Mr Su to report daily to Charing Cross police station upon his release from prison.

14. The hearing of the second CPR Part 71 order was fixed for 31 March and 1 April 2020 but has since been adjourned by consent while Lakatamia seeks further information and documents for the purposes of conducting the cross-examination.

15. On 11 February 2020, Sir Michael Burton heard a fresh committal application. He found that Mr Su had committed contempt of court in failing to disclose the three New York apartments in breach of the Blair Injunction and Popplewell and Bryan Orders and in the affidavit filed for the purposes of the purge application before Mr Justice Jacobs and in failing to sign the bank mandates. He committed Mr Su to a period of a further 4 months' imprisonment to be served consecutively to his current sentence.

16. On 11 March 2020, Lakatamia obtained a further order from Mr Justice Teare requiring Mr Su once again to produce the Schedule A documents. Mr Su responded by saying he was unable to comply while in prison, but he would sign authorities allowing Lakatamia to obtain those documents.

17. By 5 March 2020, Lakatamia had discovered what they contend to be an interest Mr Su held in a residential property in Tokyo. The failure to disclose that asset, and the alleged failure of Mr Su to produce documents relating to his interest in UP Shipping and Blue Diamond as required by the Waksman Order are the subject of Lakatamia's third committal application, which is the subject of the Listing Application.

THE INJUNCTION APPLICATION

18. Lakatamia seeks an order:

    i) requiring Mr Su to identify social media and email accounts to Lakatamia and an independent lawyer appointed by the court, and to give the independent lawyer access to the accounts by providing necessary passwords;

    ii) allowing the independent lawyer to review the materials so accessed; and

    iii) allowing the independent lawyer to produce to Lakatamia those documents which are not subject to either the privilege against self-incrimination or legal professional privilege.

19. I made an order on a "without notice" basis on 26 March 2020 to the effect of (i) and (ii) (but not (iii)) above, and provided for the order and accompanying papers to be served on Mr Su by post to HMP Pentonville, with notice being given (but not by way of service) to Mr Tear, who was acting for Mr Su in the contempt application but not, as I have stated, in the Injunction Application. That order required compliance by Mr Su with the order to hand over details of his email and social media accounts, and the means of accessing them, by 4pm on 30 March 2020. It provided for the return date of the injunction to be 1 April 2020.

20. After receiving a copy of the order, Mr Tear sent a response to Hill Dickinson LLP, which he sent in blind copy to my (rather than my clerk's) email address. The effect of that email was to suggest that the Order could not be complied with as a matter of practicality, it being suggested that "most post going into prison is subject to around 5 days of delay", that "it seems highly unlikely that the Order will even be with Mr Su by 1 April 2020" and that Mr Su was "highly unlikely to even be aware of the terms of the order" by 30 March 2020. In addition Mr Tear made a number of other criticisms of the order, while stressing at the same time that he had not been instructed by Mr Su in the Injunction Application.

21. I was troubled by Mr Tear's assertion that the date for compliance and the return date might pass without the order being likely to come to Mr Su's attention and requested further submissions on this issue. In response, Lakatamia made it clear that they did not accept the accuracy of the points which Mr Tear had made, but that in the circumstances, given the Court's concern, they were content for the date for compliance to be varied so that Mr Su was required to respond by posting a letter in first class post by 4pm

on 1 April 2020 and for the return date to be moved to 3 April 2020. I made a second order varying the original order in these respects.

22. The evidence of Mr Gardner (in his 17th affidavit) is that HMP Pentonville received a notice copy of my first order at 8.21am on Friday 27 March. Mr Gardner confirmed that Mr Su was sent two stamped and addressed envelopes (which were addressed to Hill Dickinson LLP and the independent lawyer respectively) which were received at HMP Pentonville at 8.40am on 28 March 2020. Finally, Mr Gardner confirmed that a letter enclosing both orders and the underlying documents was received at HMP Pentonville at 8.57am on Monday, 30 March 2020. Mr Gardner also gave evidence that Ms Fraser, an associate at Hill Dickinson LLP, had contacted HMP Pentonville on 31 March 2020, who confirmed that prison mail was still being distributed to prisoners daily (that response being given in response to requests by Ms Fraser emphasising the importance of the orders I had made reaching Mr Su).

23. However, at the hearing Mr Su said that he had only become aware of my order at 4pm yesterday when he received the hearing papers. He asked for an adjournment, saying that he was not in a position to deal with the application.

24. I have considerable scepticism as to whether Mr Su only became aware of my order at 4pm yesterday. It seems to me rather more likely that the documents which Mr Su only received yesterday were the hearing bundles, containing documents in relation to my order which had already been provided to Mr Su. However, it was difficult to be categoric on this matter, given the technological constraints under which the hearing was conducted, and the difficult circumstances in which prisons now operate. In these circumstances, but reluctantly, I decided to adjourn the return date until the earliest possible date next week, continuing my existing order in the meantime.

25. However, as I made clear to Mr Su many times during the hearing, my existing order remans binding on Mr Su and he is obliged to comply with it. Failure to do so will involve a breach of my order, with all the possible consequences of such a breach of which Mr Su is all too well aware. I made it clear to Mr Su that he needed use his best efforts to provide the best information which he could in a letter to be provided to the prison authorities for postage by 4pm today. My decision to accede to Mr Su's request to adjourn the return date does not in any way affect that obligation.

THE PURGE APPLICATION

26. Mr Tear, on behalf of Mr Su, asks me to release Mr Su from prison now pursuant to the Court's jurisdiction to allow Mr Su to purge his contempt and obtain a reduction of his sentence. The present application was heard only 8 days before Mr Su is due for release from his current sentence.

The jurisdiction under CPR r 81.31

27. Where a contemnor seeks discharge from custody before expiry of the term of his or her sentence, the procedure in CPR 81.31 should ordinarily be followed. This provides:

> "(1) A person committed to prison for contempt of court may apply to the court to be discharged.
>
> (2) The application must –
>
> (a) be in writing and attested by the governor of the prison (or any other officer of the prison not below the rank of principal officer);
>
> (b) show that the person committed to prison for contempt has purged, or wishes to purge, the contempt; and
>
> (c) be served on the person (if any) at whose instance the warrant of committal was issued at least one day before the application is made".

28. Mr Phillips QC has taken a point about the absence of a written attestation from the Governor of HMP Pentonville in this case. However, I have been able to resolve the application without needing to consider the significance of that lack of attestation.

29. Helpful guidance was given as to the approach to be taken to an application under CPR r 81.31 by the Court of Appeal in Swindon Borough Council v Webb (trading as Protective Coatings) [2016] EWCA Civ 152, [2016] 1 WLR 3301. In that case, Lord Justice Tomlinson, with whom Lord Justice Lewison agreed, derived particular assistance from the judgments of Lord Justice Wilson in CJ v Flintshire Borough Council [2010] 2 FLR 1224 at [21], where he posed eight questions, as follows:

> "(i) Can the court conclude, in all the circumstances as they now are, that the contemnor has suffered punishment proportionate to his contempt?
>
> (ii) Would the interest of the state in upholding the rule of law be significantly prejudiced by early discharge?
>
> (iii) How genuine is the contemnor's expression of contrition?
>
> (iv) Has he done all that he reasonably can to demonstrate a resolve and an ability not to commit a further breach if discharged early?
>
> (v) In particular has he done all that he reasonably can (bearing in mind the difficulties of his doing so while in prison) in order to construct for himself proposed living and other practical arrangements in the event of early discharge in such a way as to minimise the risk of his committing a further breach?

(vi) Does he make any specific proposal to augment the protection against any further breach of those whom the order which he breached was designed to protect?

(vii) What is the length of time which he has served in prison, including its relation to (a) the full term imposed upon him and (b) the term which he will otherwise be required to serve prior to release pursuant to section 258(2) of the Criminal Justice Act 2003?

(viii) Are there any special factors which impinge upon the exercise of the discretion in one way or the other?"

30. At [22] Lord Justice Wilson made it clear that the success of an application for an order for early discharge did not depend upon favourable answers to all these questions. However, he suggested that in general an affirmative answer to the first question would be required before early discharge would be ordered, and the second ordinarily required a negative answer, while an affirmative answer to the third question was likely to be necessary, but not sufficient. At [37] of his concurring judgement in the same case, Lord Justice Sedley said this:

> "When a judge comes to consider discharge from a sentence which has already been found both necessary and proportionate, he or she is looking at new factors, if there are any, albeit these may modify what is now necessary and what is now proportionate."

31. I was also referred by Mr Tear to Mrs Justice Andrews' decision in Her Majesty's Solicitor-General v Stephen Dodd [2014] EWHC 1285 (QB) in which the judge, faced with evidence as to the effect imprisonment had had on the applicant, the fact that Mr Dodd had been imprisoned a long way from his family and that imprisonment had had a severe impact on Mr Dodd's health, concluded that Mr Dodd should be released after 8 weeks' imprisonment (as against the 3 months he would otherwise have served). That was a case in which there could not be said to be any continuing breach of the order of which Mr Dodd had been found to have been in contempt, such that the sentence of imprisonment had only been intended to serve a punitive and not a coercive function. Each case, however, will turn on its own facts, and I do not think Dodd contains any statement of principle of relevance to the case before me.

The eight factors considered

(i) Can the court conclude, in all the circumstances as they now are, that the contemnor has suffered punishment proportionate to his contempt?

32. In circumstances in which only one week of the custodial part of Mr Su's sentence remains to be served, it might be thought that this consideration is relatively easily satisfied. However, the sentence imposed by Sir Michael Burton had both a punitive and a coercive element, and the contemptuous failures to comply with the disclosure orders for which Sir Michael

sentenced Mr Su have not been rectified. In those circumstances, I do not feel able to conclude that this first test is satisfied.

(ii) Would the interest of the state in upholding the rule of law be significantly prejudiced by early discharge?

33. The position on this factor is essentially the same. Where a sentence for contempt has a coercive as well as a punitive function, and the failure to comply with the order has yet to be remedied, it would, in my view be a rare case in which the interests of the rule of law would be served by releasing the contemnor earlier than the date on which release would occur under the sentence duly considered and carefully arrived at by the sentencing judge.

(iii) How genuine is the contemnor's expression of contrition?

34. The Purge Application has not been made as a result of any contrition on the part of Mr Su. In fairness to Mr Tear, he did not seek to rest the application on any contrition by Mr Su, but on the conditions which it was said Mr Su now faced in prison as a result of the COVID-19 pandemic (to which I return below).

35. So far as Mr Su is concerned, I have seen no evidence which would justify my drawing a different conclusion as to Mr Su's state of mind to that drawn by Mr Justice Jacobs when Mr Su brought a purge application in November 2019. In his decision (reported as Lakatamia Shipping Company v Su [2019] EWHC 3180 (Comm)), Mr Justice Jacobs made the following findings at [27] to [30]:

> "27. I have listened with care to Mr Su's argument that he has been punished enough. He has spent some considerable time in prison. I have no doubts that the conditions in prison are not easy. Mr Su has told me, albeit sometimes when prompted by Mr McKendrick and also in his reply submission somewhat at the end of his reply, that he wishes to apologise and has learnt his lesson. He has told me that his mother is about to turn 90, that she is very old and that he has not seen her for some time. All of these are points which would, in my view, have some considerable force had there been real attempts to make amends for what has happened and real evidence of a reversal of the €27 million payment which should not have been made in the first place. Had there been such attempts and had efforts been made to pay the claimant and those efforts were evidenced by documentation, the arguments which Mr Su has advanced would be approached by me in a rather different light. But that is not what has happened.
>
> 28. Apologies from Mr Su are all very well, but the present case needs to be accompanied by positive action. That, to my mind, is particularly important in the context of this case. The history of this case, which I need not describe in great detail, is that apologies have previously

been given to the court when Mr Su has been charged with being in contempt of court, and promises have been made to obey court orders. But that has not prevented Mr Su from subsequently breaching the orders, and these breaches then led to the decision of Sir Michael Burton in this case. It is also important to bear in mind, when considering the points raised by Mr Su, that the contempts found by Sir Michael Burton were the most serious that he had ever seen, at least in the context of a case of this kind. That was reflected in a sentence which was very much at the top end of the scale for a contempt of court committal.

29. This is a case where Mr Su has been told in the past by Sir Michael Burton and Lewison LJ, and is now told again by me, that any apologies need to be accompanied by positive action. Mr Phillips said colloquially in his submission, "What he could do is he could tell us where he has squirreled away the money that he has taken and come to court and say 'Here is the money'. That would show good faith and might entitle him to some discount". I paraphrase Mr Phillips's submission but that was essentially what it was. It seems to me that is the most important point in the present case.

30. For those reasons it seems to me that the sentence which has been imposed by Sir Michael Burton should not, in the light of the materials which I have been provided with subsequently, be altered in any way. That does not rule out the possibility of a further application by Mr Su made with the benefit of attempts to make good on the €27 million that was taken away, but that lies in the future and all I can do is express the same hope that Sir Michael Burton expressed at the end of his judgment."

(iv) Has he done all that he reasonably can to demonstrate a resolve and an ability not to commit a further breach if discharged early?

(v) In particular has he done all that we reasonably can (bearing in mind the difficulties of his doing so while in prison) in order to construct for himself proposed living and other practical arrangements in the event of early discharge in such a way as to minimise the risk of his committing a further breach?

36. There has been no demonstration by Mr Su of any resolve not to breach further orders of the court. Guideline (v) does not appear to be of particular relevance in this case.

(vi) Does he make any specific proposal to augment the protection against any further breach of those whom the order which he breached was designed to protect?

37. Mr Su has put forward no proposals to protect Lakatamia against the harm which it has suffered as a result of his breaches of the orders which led to his committal for contempt.

(vii) What is the length of time which he has served in prison, including its relation to (a) the full term imposed upon him and (b) the term which he will otherwise be required to serve prior to release pursuant to section 258(2) of the Criminal Justice Act 2003?

38. The position here is essentially as per factors (i) and (ii).

(viii) Are there any special factors which impinge upon the exercise of the discretion in one way or the other?

39. It is essentially on this ground that Mr Tear bases his submissions. In essence he contends that the changed experience in prison conditions which has resulted from the COVID-19 crisis has led to the prison sentence constituting a harsher penalty than anticipated when it was imposed. However, the real difficulty for Mr Tear, in the face of my conclusions on the other factors, is that it would take a wholly exceptional case to make out a factor of sufficient weight to justify releasing Mr Su earlier than his due date, in circumstances in which there are only 8 days left on the sentence in any event.

40. I am quite satisfied that the material relied upon by Mr Tear does not begin to make out such a case. Mr Tear relies on the following matters.

41. First, Mr Tear referred to the suspension of prison visits due to COVID-19. However, I received no evidence as to how frequently Mr Su in fact enjoyed visits (given the fact that his family does not live in this jurisdiction). In any event, prison visits were only suspend as of 24 March 2020. The absence of visits (if any would otherwise have taken place) between 24 March and 11 April 2020 does not represent a significant change in the conditions of Mr Su's imprisonment.

42. Second, Mr Tear also suggested that prisoners' exercise had been reduced. However, he adduced no evidence of this and the effect of this factor is much diminished by the very short period of the sentence which remains outstanding.

43. Third, Mr Tear stated that the COVID-19 risk was significant "particularly for a person who is 62 years of age". He further suggests that "those seven days away from the confined spaces of the prison or ability to stay 2 meters from other persons is significant and could for a person of Mr Su's age be the difference between life and death". However, 62 is not an age which has been identified as being associated with a significantly enhanced COVID-19 risk. No evidence was adduced that Mr Su fell within any of the recognised "increased risk" categories which have featured in the United Kingdom government guidelines. Mr Tear acknowledged that the press reports he relied on for this part of his submissions which were based on a heightened risk of COVID-19 infection in prisons did not identify any sources. I note that one of those articles – an article in the Islington Gazette of 31 March 2020 – referred to a statement by the Ministry of Justice that they had "robust and flexible plans in place to protect the lives of our staff,

prisoners and visitors based on the latest advice from Public Health England".

44. Fourth, it was suggested that it was significant that Mr Su had provided a wide-ranging authority "to the Claimant addressed to any and all persons and giving absolute authority so that the Claimant can obtain" documents which the Court required to be produced. Mr Tear referred to this as an authority that "no properly advised individual would have given" which the Court should "consider as a significant factor in this matter". Against the background of the repeated findings by judges of breaches by Mr Su of his obligations to provide disclosure, in my view Mr Tear's submission is misjudged. Mr Su should be doing everything he can to facilitate compliance with those judgments, primarily by providing information and documents himself or through his own efforts. The process of providing an authorisation to Lakatamia, in effect, to go and look for documents, is a very poor substitute. On any view, it is not a factor which lends any support to the Purge Application.

45. Finally, Mr Tear relies on the fact that HM Inspector of Prisons found, after a visit to HMP Pentonville between 4 to 6 February 2020, that there had been insufficient or no meaningful progress on certain matters since their 2019 inspection. I do not accept that this finding was outside the contemplation of Sir Michael Burton when imposing the second custodial sentence on Mr Su in February 2020, when Mr Su was already serving a sentence in HMP Pentonville. The 2020 report did not identify any adverse change in conditions since 2019, but reported that in certain respects the absence of any sufficient improvement. By contrast, the report noted some matters where there had been good or reasonable progress. In any event, it is a factor which can carry only very limited weight when there are only 8 days left of the custodial part of the sentence.

Conclusion

46. Applying the Flintshire Borough Council criteria, I do not think Mr Su has come close to establishing that it would be appropriate to release him in advance of the due date for his release pursuant to the sentence of imprisonment which Sir Michael Burton imposed.

THE LISTING APPLICATION

47. This application relates to the listing of Lakatamia's third committal application, and whether it should be listed for hearing (and, implicitly, for determination) before Mr Su is released from his existing sentence of imprisonment on 11 April 2020 so that if Mr Su is found guilty of contempt for a third time, and an immediate sentence of custody imposed, he would proceed immediately to serve the custodial element of that sentence after completing the custodial element of his current sentence.

The position under CPR 81

48. Lakatamia issued its committal notice on 27 March 2020 which arrived at HMP Pentonville on 30 March 2020. There is a dispute as to when Mr Su received the application and supporting evidence. Lakatamia contend that it arrived at the prison on 28 March 2020 and would have been received by Mr Su that day. Mr Su contends that the committal application and supporting documents reached him on 2 April 2020.

49. CPR Part 81 PD 15.2 provides that "unless the court otherwise directs, the hearing date of a committal application must not be less than 14 days after service of the claim form or application notice on the Respondent".

50. PD 15.5 provides that "in dealing with any committal application, the court will have regard to the need for the respondent to have details of the alleged acts of contempt and the opportunity to respond to the committal application". PD15.6(1) requires the Court to have regard to the need for the respondent "to be allowed a reasonable time for responding to the committal application", and "if unable to understand English, [be] allowed to make arrangements, seeking the assistance of the court if necessary, for an interpreter to attend the hearing".

The practicalities

51. The matters which are the subject of Lakatamia's third committal application are:

    i) The interest which it is said that Mr Su has, but did not disclose, in a residential property in Tokyo of which Lakatamia became aware on 5 March 2020.

    ii) The failure to comply with Mr Justice Waksman's Order of 30 January 2020 which required service of the relevant documents by 26 February 2020.

52. As I have mentioned, the committal application was issued on 27 March 2020, in circumstances in which Lakatamia was aware that Mr Su's existing term of imprisonment was due to end on 11 or 12 April 2020. While I do not in any way criticise Lakatamia for the time taken to issue the application – the legal team has clearly been working under great pressure in increasingly challenging conditions – I believe that I am entitled to have regard to the period of time it has taken to issue the application when considering the suggestion that it should be resolved within 10 days of service of the application.

53. In writing, Mr Phillips QC and Mr Casey submitted that the Court should waive the 14-day requirement because "the rule contemplates a neophyte defendant without lawyers possessed of a defence". However, I do not accept that the relevance of the 14-day rule is constrained in this manner. The rule is clearly intended to allow the party accused of contempt a reasonable opportunity to consider and respond to the allegations, albeit it is open to the Court to abridge that period where this can be done without unfairness to the respondent.

54. Mr Casey, who addressed this issue at the hearing, submitted that the issues which were the subject of the committal application were limited and discrete, and that there was no reason why Mr Su could not deal with them.

55. I have not found the resolution of this issue straightforward. However, having considered the matter carefully, I am not satisfied that Mr Su can fairly be in a position to deal with the application if listed next week (in circumstances in which there would only be at most 3 working days to prepare for the application):

    i) As I have mentioned, there is a dispute before me as to when Mr Su received the committal bundle.

    ii) While the committal bundle is some 400 pages, of which I am told a significant part is bank statements, the further application to commit arises against the background of the lengthy history of this matter, and I think it unlikely that considerations of committal and (if they arose) sentencing could be undertaken without considering that history. Further, it is right to note that Lakatamia's legal team are a good deal more steeped in that material than Mr Tear.

    iii) Mr Tear has confirmed that he has been unable to visit Mr Su in prison for the purpose of taking instructions and preparing any responsive evidence. He had a 16 minute telephone call with Mr Su on 30 March 2020 which he told me was when Mr Su first became aware of the application. Mr Tear has concerns as to whether his communications with Mr Su in prison sufficiently protect legal professional privilege. While social distancing will be required in relation to the period after release, that would not preclude Mr Tear from meeting Mr Su in an environment in which social distancing can be maintained.

    iv) Mr Su's legal aid certificate was only amended to include the application at 13.47 on 30 March 2020.

    v) The Court would need to consider whether Mr Su was entitled to an interpreter for the purposes of any cross-examination: CPR Part 81 PD para. 15.6. I am told that Mr Su had an interpreter when he was cross-examined as to his assets, but did not request one for his first committal hearing and Sir Michael Burton rejected an application for an interpreter for the second committal saying it was not necessary. However, Mr Tear has indicated that he would wish an interpreter to be present, and, at least on the material presently available to me, I do not feel I am in a position to second-guess his view. No steps have been taken to ascertain whether an interpreter could be obtained for next week.

    vi) In any event, there are only four working days left before Mr Su's release to prepare for and conduct such a hearing and for the Judge to reach and issue a decision. In my view, that timetable is extremely

tight, and I am concerned that a hearing conducted on the basis of it would appear unfair.

56. There is the further difficulty that any hearing would need to be conducted within the constraints imposed by the COVID-19 pandemic. Both Mr Phillips QC and Mr Tear confirm that the hearing would have to take place in a court room with the physical presence of the judge, court staff and the lawyers. Lakatamia's legal team acknowledged "the risks to health of all concerned" of the hearing. However, the arrangements for such a hearing, and the need to take steps to minimise the risk to those attending, are matters which require careful considering and planning. That will not be assisted by the attempt to bring the hearing on in 3 or 4 days next week.

57. Mr Casey submitted that the Court could list a hearing next week, and could give fresh consideration to the fairness of the hearing on the hearing date. However, I have concluded that this is a decision I should reach now. It would, to say the least, be highly unsatisfactory if individuals had to put themselves at risk in attending for a hearing, only for that hearing to be non-effective.

Flight risk

58. The principal reason given by Lakatamia for seeking to list the application before Mr Su completes the custodial element of his sentence is that Mr Su is a flight risk. Understandably, Lakatamia places heavy emphasis on the fact that, when served with the Popplewell Order, Mr Su gave police a false address and travelled to Liverpool with a view to seeking to take a ferry to Northern Ireland, no doubt with a view to crossing the border into Eire.

59. I accept on the basis of this evidence that Mr Su does represent a flight risk. However, the issue arises of whether, even assuming it were possible to complete the hearing of Lakatamia's third committal application before 11 April 2020, rushing through the hearing of Lakatamia's application is the only way of managing that risk .

60. In my view, it is not. When Mr Su was brought back from Liverpool, Mr Justice Bryan rejected Lakatamia's submission that he had jurisdiction to remand Mr Su in custody in advance of the hearing of a contempt application, but instead imposed a comprehensive order which was aimed at preventing Mr Su from leaving the jurisdiction, including a requirement that Mr Su report daily to Westminster Police Station. It is common ground that Mr Su complied with that obligation between the date of the Bryan Order and the date of his committal to his first sentence of imprisonment.

61. Mr Phillips QC and Mr Casey suggest that three things have changed since that order.

62. The first is that Mr Su has now served 12 months of imprisonment, which gives him a greater incentive to flee the jurisdiction. I am not persuaded by this argument which seems to me essentially speculative. I have no basis for assuming that Mr Su's actual experience of imprisonment was more

adverse than the experience he anticipated and, even if that is the case, and having failed in his efforts to flee once, Mr Su might well be unwilling to risk the further custodial sentence which would inevitably follow from a second unsuccessful attempt in circumstances in which a daily reporting requirement would render the risk of detection all the greater.

63. The second is that the confusion created by the current COVID-19 crisis may create opportunities for Mr Su to exploit. Once again, this seems to me an essentially speculative suggestion. Further, given the current travel restrictions and difficulties of leaving this jurisdiction, and the significantly reduced scope of public transport and the number of individuals using it, the likelihood is that it will now be more difficult for Mr Su to leave the jurisdiction than in 2019.

64. The third is that it is said that Mr Su is now a proven contemnor, whereas when Mr Su was before Mr Justice Bryan, the question of whether Mr Su was a contemnor had yet to be tested. I do not see how this issue bears materially on the flight risk. Further, while Mr Su had not been found guilty of contempt when he appeared before Mr Justice Bryan, he had been arrested when seeking to catch a ferry in Liverpool. So far as the position today is concerned, while Mr Su has been found guilty of contempt on two occasions, he will by 11 April 2020 have served the custodial element of the sentences for those contempts. So far as Lakatamia's third committal application is concerned, the Court has not made any findings, and the position is therefore materially the same as it was before Mr Justice Bryan.

65. The Waksman Order has already imposed significant restrictions on Mr Su, including a reporting requirement, to take effect when he finishes the custodial element of his current sentence. If Lakatamia believe further restrictions are appropriate, they will have to make an application.

Risk of frustrating the injunction order

66. I accept that if Mr Su is not in custody, there is a greater risk of Mr Su taking steps to frustrate the Injunction. However, the Injunction Application was brought by Lakatamia at a time when Mr Su was due for release from prison within a short period of the application. The application was not advanced by Lakatamia on the basis that the order was only capable of being effective if Mr Su remained in custody after 11 April 2020, and I would have had to consider the implications of such a submission for the Injunction Application had it been made.

67. In any event, I do not accept that this is the case. The order has been served on Mr Su while he is in custody. Any steps which Mr Su now took to interfere with the Injunction would involve a very real risk of detection and of a further sentence of imprisonment for contempt. In particular, Mr Su would be running a high risk of detection if he attempted now to procure the deletion of electronic communications which are hosted by third party service providers.

Conclusion

68. Having considered all of these factors, I have concluded that it would not be appropriate to list Lakatamia's latest committal application so that it can be heard and determined before Mr Su's release on 11 April 2020. In summary:

    i) I am not satisfied that the hearing can be conducted in a manner which is fair to Mr Su in that period.

    ii) There are alternative arrangements in place under the Waksman Order to address the flight risk. If Lakatamia wish to seek further measures, they are in a position to make a further application before Mr Su's release.

    iii) Nor am I satisfied that the risk of Mr Su interfering with the Injunction is sufficient to justify listing the application next week in the light of the other factors I have identified.

    iv) Arrangements for the hearing will require careful consideration in the context of the COVID-19 pandemic.

69. In these circumstances, the parties' legal representatives are asked to liaise to produce an agreed timetable with a view to this hearing coming on within a reasonable time but after Mr Su's release on 11 April 2020. If directions cannot be agreed, I will resolve any dispute.

Conclusion

70. I would ask the parties (or in the case of the Injunction Application, Lakatamia) to draw up orders recording my rulings.

71. Finally I would like to thank all those whose hard work and co-operation has facilitated the conduct of the hearing in these difficult circumstances: the court and prison staff, and the parties' respective legal teams.