

Neutral Citation Number: [2021] EWHC 935 (Comm)

Case No: CL-2011-001058

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 15 April 2021

Before :

Sir Michael Burton GBE
Sitting as a High Court Judge

Between :

Lakatamia Shipping Company Limited and Others
- and -
Nobu Su and Others

Claimants

Defendants

Stephen Phillips QC and Noel Casey (instructed by Hill Dickinson LLP) for the Claimants
Adam Teare of Scott Moncrieff for Mr Su

Hearing dates: **15th April 2021**

JUDGMENT

Sir Michael Burton
(1.10 pm)

Thursday, 15 April 2021

Judgment by **SIR MICHAEL BURTON GBE**

1. I have, of course, a considerable amount of knowledge of this case, because I have dealt with three applications over the last two years. Since my last involvement there have been other orders, of which the most significant for my purposes is that of Waksman J, whose judgment I have read, in January of this year.
2. Although Waksman J's judgment is subject to an appeal to be heard in July, until that appeal is heard Waksman J's judgment stands and although, technically, I am not bound by it, I obviously am persuaded by it as I would be by any judgment of a brother judge. But in any event, the very existence of that judgment creates the circumstance of which there must be, or from which there must be, a change before any reargument of the case can be presented to the Commercial Court.
3. Waksman J plainly knew of and dismissed an application to discharge or vary the existing orders in the light of the fact that, as he puts it in paragraph 17, Mr. Su has sought to declare himself bankrupt and, as he said, he was familiar with that process. So I am now dealing with this application on the basis that there must be a change of circumstance before the applications can be renewed, as they have been, by Mr. Tear, who has argued the matter very ably on behalf of Mr. Su, and can be now considered.
4. Insofar as concerns the existing freezing orders dating back to Blair J in August 2011, or disclosure orders or the search order, there appears to me be no conceivable argument for a change of circumstance, the bankruptcy itself not being a change of circumstance, both because, as I said, it was known to Waksman J, but also because nothing in the s285 of the Bankruptcy Act requires the discharge or variation of any of the orders. Ss285ff of the

Bankruptcy Act relate to the question of enforcement proceedings and the bringing of fresh proceedings.

5. The only change of circumstance, if there be one, and I shall now consider it, relates, therefore, to the fact that the parties have now agreed that the further examination of the defendant, Mr. Su, as to his assets, which was fixed to be in front of me yesterday and today, has by agreement been adjourned.
6. The reason why it has been adjourned is twofold. One is the technical point that enforcement proceedings have been stayed as a result of s285 but that, of course, would not immediately lead to an adjournment of the examination, but also because both parties have agreed that there is no point in expending further costs, and time and inconvenience to both parties, in an examination as to assets when the bankruptcy itself is in place and may, in circumstances which I shall mention, be annulled.
7. So it is not an automatic result that the examination has been adjourned, but it is one that has been agreed. So that is, arguably, a change of circumstance since the decision of Waksman J, entitling Mr. Tear to make an application for variation or discharge of the "passport order", as I call it, to cover all those aspects of the existing orders which involve a prohibition on Mr. Su from leaving the United Kingdom and reporting in the meanwhile. The passport order alone, therefore, as so defined, is what I shall address, having in those circumstances concluded that there is no basis for any other order to be discharged or varied.
8. Dealing with other matters apart from the passport order, I make on the basis of the application by Mr. Phillips QC, on behalf of the Claimants, the following provisions in relation to those other orders.

9. First, of course, that they are allowed all of them to remain in place, none of them impeding or impinging upon the role of the Trustee in discovering and gathering in assets: in particular, that the Claimants are to be allowed to continue to consider, if so advised, the product of the search order, which has diminished down from 900,000-odd documents which were originally taken on the search and put into the custody of an independent lawyer, by virtue of the fact that it has been decided, and I respect and understand that, as does Mr. Tear, that to throw yet further money, and a great amount of money, on the independent lawyer continuing to investigate is pointless at this stage.
10. What it relates to will be the 38,000 documents which have been given by the independent lawyer to the Claimants' solicitors as being documents which may well be directly relevant to the existence of assets of Mr. Su. Plainly, the Claimants should be entitled to consider those documents and make any use of them that is appropriate in these proceedings, which obviously will permit them to make any further applications in these proceedings, subject always to the overriding supervision of the court under s285 and the involvement of the Trustee in Bankruptcy.
11. What I do, however, give permission for is for the consideration of the documents and, if appropriate, use of the documents, both in the bankruptcy proceedings, which technically amount to other proceedings, and I shall refer in a moment to what they involve, or to the possible bringing of applications and proceedings against third parties, which may be disclosed by the 38,000 documents, for which permission will be further needed, of course, actually to issue such proceedings, whether ex parte or otherwise, but consideration of which is now permitted.

12. So all the orders and their effect to date remain in place, subject to my now considering the passport/jurisdiction orders on which Mr. Tear has, for understandable reasons, primarily concentrated. He points out that the continued existence of Mr. Su in this country is inconvenient and possibly a miserable one. He is separated from his family, he may be unable to access the vaccination against COVID and he is living in property which is not as good as he is and has been used to and certainly not as good as he would live in if he were in Tokyo or otherwise outside of the United Kingdom, in any event, as Mr. Tear pointed out, and will point out in the Court of Appeal on appeal from Waksman J's order, in possible infringement of his human rights.
13. Waksman J's Order continues, and I must now consider what, if any, is the effect on it of the change of circumstance that there is not now to be the examination as to assets which was otherwise to take place. As canvassed in the course of the hearing with both counsel, I conclude that the appropriate order is to continue the passport/jurisdiction orders until the end of July, for reasons which I will now give.
14. First, and most significantly, there is still pending a challenge to the bankruptcy proceedings. The Claimants assert that, although they were unsuccessful in relation to a summary application to dismiss the bankruptcy proceedings, the basis on which this Court has jurisdiction against Mr. Su is ill founded, and that they should be entitled to challenge the jurisdiction and, if they were successful, then the bankruptcy would be annulled on that basis. But they also assert that in true reality, in the light of the knowledge that there is about Mr. Su's assets and his alleged liabilities, he is not in truth insolvent and, further, that he has lied both to the Trustee and otherwise in relation to the bankruptcy. That will be the subject of the challenge to the bankruptcy proceedings.

15. There is a directions hearing in May fixed before the Insolvency Court and I hope and expect that the hearing of the annulment application will be well before the end of the summer term, i.e. the end of July, so that if the annulment is successful, there will then be fixed a further examination as to means, and all other tracing and asset-chasing applications can be made by these Claimants, who are so very much out of pocket in relation to all that has occurred since 2011.
16. If, of course, the application to annul the bankruptcy is unsuccessful, then there will still need to be a taking forward of matters by the Trustee, further informed, no doubt, by the information which the Claimants will put before the Insolvency Court as part of their challenge to the bankruptcy.
17. It would not be appropriate for me to decide, and I do not decide, what the outcome of the bankruptcy application will be. Suffice it to say that there must be a very real possibility that the agreed adjournment of the examination as to assets for today will not lead to an abandonment of such examination and that they may well resuscitate, and, given that the primary purpose of the passport/jurisdiction orders was to enable such examination as to assets, in a case in which it is sadly common ground that there have been disgraceful failures by Mr. Su in the past to disclose and lies told the court and a previous thwarted attempt by him to leave the jurisdiction., they will remain relevant, indeed crucial to ensure that such examination takes place.
18. Therefore, whereas it may well be that, had an effective cross-examination as to assets taken place today, the passport and jurisdiction orders might well then have achieved their effect and been discharged, that has not occurred, and there must be the real possibility that there

will be a further cross-examination as to assets for which the passport/jurisdiction orders will be fundamentally required in the meanwhile.

19. That is the main reason why I am ordering that the passport order should continue until the end of the summer term, the end of July, which will allow both the hearing and the resolution of the annulment application and, thus, there will be knowledge as to whether there will be the restored cross-examination as to assets.
20. The second reason is really in parallel with the first. That is, whether as a result of the rejection of the annulment application or otherwise, the Trustee, who has not yet had an effective opportunity to consider the position of assets, and whose first effective interview with the debtor is presently fixed for 22 April, may himself apply for, or even take without application, the course of restraining Mr. Su from leaving the jurisdiction. Mr. Tear has said that could be done by giving the Trustee 14 days to consider the position. I am wholly clear that that would be an insufficient time, even if this was the only reason whereby I was adjourning or extending the passport order. Clearly, he would not even have had time to consider what is said to him, if anything, on 22 April, in 14 days. But in any event, this is much too difficult a case for him to reach any such conclusion, at least without the full consideration of the information which will no doubt be supplied to him by the Claimants. So although this is not the main reason, it is certainly an important subsidiary reason why I am adjourning, or continuing, the passport order until the end of July.
21. Of course, the Court of Appeal will be hearing the appeal, if it proceeds, against Waksman J's order also at the same stage in July and that will give them too the opportunity of considering the order of Waksman J which they are being asked to overturn, as continued by me.

22. Finally, I do take into account, although not as the main reason, the fact that there is a hearing of a contempt application (the third against Mr. Su) in July and it would obviously remove any point in the possibility of his being further committed for contempt if he had in the meanwhile left the jurisdiction. I accept that that would not of itself be a ground for continuing the order, but it is a subsidiary and a significant factor.
23. In those circumstances, I continue the passport/jurisdiction orders until 31 July. Mr. Tear invites me to say that if I make such an order, I should make it clear that there should be no further extensions. Clearly, the reasons for my granting this extension, notwithstanding the application by Mr. Su, are clear from this judgment, which would no doubt be considered if there were any application for an extension. But if, for example, the judgment of the Insolvency Court were not quite ready to be delivered by the end of July, or there were to be a renewed cross-examination fixed, or some other such reason, I do not rule out the possibility of a further exceptional extension in appropriate circumstances. and I give liberty to apply to both sides, just as it would be open for Mr. Su to apply if, for example, he thought it appropriate to do so in the light of the developments either in the Insolvency Court or by reference to the Court of Appeal's reconsideration of Waksman J's Order.
24. That leads me to deal with the two cross-applications made by the Claimant. I have already referred to the first, namely, the use that they wish to make of the 38,000 documents. They can clearly do so for the purposes of these proceedings, and I also grant them permission to make use and consider the documents in respect of possible third party proceedings or the bankruptcy proceedings as I have already indicated. That, of itself, is another reason for continuing the passport order until the end of July, in case some very significant matter were to arise as a result of their consideration of the documents.

25. Finally, the Claimants make an application in respect of paragraph 10(1) of Blair J's Order, which reads:

"This Order does not prohibit the Defendants from spending a reasonable sum on living expenses and legal advice and representation. But before spending any money the Defendants must tell the Claimant's legal representatives where the money is to come from."

26. Mr Su's previous legal representatives appear to have complied with that order. There has been a number of changes of such representation and the present representative, Scott Moncrieff & Co., have not, despite request, disclosed the source of the money which Mr Su is expending through them in relation to these applications. Mr. Tear has questioned whether paragraph 10(1) applies to the expending of monies supplied by third parties, but in so far as he runs that argument, it seems to me one that has no legs. Plainly, Mr Su is spending the money on legal expenses to fund his actions and applications. Where it comes from is then the question. He is spending someone else's money. It is either being given or loaned to him, but he is spending it and he must now comply with paragraph 10(1). Insofar as there has been reluctance to do so, I now make a specific order to that effect in relation to the present legal representatives and the present applications.