Neutral Citation Number: [2020] EWHC 865 (Comm)

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: 8 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 (ala 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**
The First Defendant in person.

Hearing date: 8 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 8 April 2020 at 3.00pm.

Mr Justice Foxton:

INTRODUCTION

1. This is the latest judgment dealing with a succession of applications arising against the background of the Claimants' ("Lakatamia's") long-standing efforts to enforce judgments obtained in this Court against the First Defendant ("Mr Su") in 2014 and 2015. I have summarised the background to the dispute in a judgment I handed down on 3 April 2020 and which is reported at [2020] EWHC 806 (Comm) ("the 3 April Judgment"). In this further judgment, I adopt the same definitions which I used in the 3 April Judgment.

2. The 3 April Judgment addressed three applications which I heard remotely by Skype on 3 April 2020:

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

    ii) Mr Su's application to purge the contempt for which he is presently serving a sentence of imprisonment at HMP Pentonville.

    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 unconditionally from the sentence of imprisonment he is currently serving.

3. Mr Su requested the adjournment of the Injunction Application, claiming that he had only received the papers the day before. While I was very sceptical of Mr Su's claim, I agreed to adjourn the hearing of the return date of the injunction until the earliest date it could be heard this week. That date has transpired to be 8 April 2020. So far as the other two applications are concerned, I dismissed Mr Su's application for early release, and I refused Lakatamia's application to list its third committal application prior to Mr Su's release from prison.

Events since 3 April 2020

4. In the period since 3 April, Mr Su has posted a letter stating, in effect, that he has forgotten the passwords or details which would allow access to the various email and social media accounts which were the subject of the Injunction. Mr Su had indicated during the hearing of 3 April 2020 that this was likely to be his position.

5. In addition, Lakatamia has issued two further applications, both of which were short-served:

    i) An application requiring Mr Su to sign mandates to each of his known email and social media providers authorising them to

disclose to Lakatamia and the Independent Lawyer the details of the accounts ("the Mandate Application").

ii) An application requiring Mr Su to be subject to further restrictions on his release from HMP Pentonville on 11 April 2020 over and above those imposed by the Waksman Order ("the Conditions Application").

THE INJUNCTION APPLICATION

6. The purpose of this application is to allow Lakatamia to obtain disclosure for the purposes of identifying assets against which a judgment can be enforced, and for the purpose of giving effect to the worldwide freezing order obtained against Mr Su which required Mr Su to disclose his assets.

7. It is Lakatamia's case, which I find has been established on the evidence to the necessary standard for injunctive relief (for which purpose I have assumed that the "good arguable case" standard applies), that Mr Su has never satisfactorily complied with the disclosure and production requirement imposed by the Blair Injunction, the Popplewell, Bryan and Waksman Orders and as reiterated in the recent order of Mr Justice Teare.

8. Against this background, the order which Lakatamia seeks is one which in effect, takes the process of giving disclosure out of Mr Su's own hands by:

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; and

ii) allowing the Independent Lawyer to review the materials, and to produce to Lakatamia those documents which are not subject to either the privilege against self-incrimination or legal professional privilege.

Should the hearing of the return date proceed?

9. Mr Su once again sought to adjourn the hearing of the return date, stating that he did not want to incriminate himself and that he wanted time to instruct a lawyer. He also suggested that the amount of the judgment was wrong and made a number of submissions connected with what he said was his ability to assist in finding a cure for COVID-19.

10. I have already adjourned the hearing of the return date application once. I did so for the reasons at [24]-[25] of the Judgment despite considerable scepticism as to Mr Su's account of when the injunction and the relevant papers had first come to his attention.

11. I have concluded that it is not appropriate to further delay this application. The application is urgent for reasons which I set out below. I have reluctantly concluded that Mr Su is engaged in delaying tactics in an attempt to derail the hearing. I have reached that conclusion against the

background of numerous previous attempts by Mr Su in the course of the proceedings to derail hearings:

i) Mr Su has been represented by a number of solicitors during the history of these proceedings, including one firm (Cooke, Young and Keidan: "CYK") who were instructed and disinstructed on no fewer than three occasions.

ii) CYK were sacked after the trial, and Mr Su instructed his third set of solicitors, and new counsel. The first counsel he instructed had limited availability, leading to dates being offered for a hearing some time into the future.

iii) Mr Su secured an adjournment of the first CPR 71 hearing at the last minute by promising to provide documents which were never produced.

iv) Mr Su raised an argument on the first day of the committal hearing before Sir Michael Burton that he lacked capacity, leading to an adjournment. The psychiatrist retained by Mr Su had no availability for a capacity hearing. After a psychiatrist retained by Lakatamia had examined Mr Su, Sir Michael Burton rejected the submission that Mr Su lacked capacity.

v) I have already recorded my deep reservations as to whether Mr Su was telling the truth when he told me on 3 April 2020 that he had only received the papers relating to the Injunction Application for the first time the previous afternoon.

12. In short, I have been reluctantly driven to the conclusion that Mr Su is someone who seeks to "play the system", and who seeks to exploit the Court's natural desire to achieve fair hearings by continually pointing to some factor which is said to require an adjournment or delay.

13. In this case, there can be no case of Mr Su needing protection against self-incrimination because this is already addressed in the terms of the Injunction. In any event, it is Mr Su's evidence that he has already done his best to comply with the Injunction, but that he cannot remember any of the details which would allow access to his accounts. So long as he maintains that position (and it is strongly disputed by Lakatamia), the Injunction is not capable of causing him any prejudice, save to the extent that any material might come forward if the Court were to grant the Mandate Application. I address that application, and the steps taken to ensure that Mr Su is not prejudiced by the short service of the Mandate Application, below.

14. Finally, the amount of the judgment has been established by prior decisions of this Court. In any event, even on Mr Su's own submissions, the outstanding judgment debt exceeds $50m. Even if were open to Mr Su to re-open this issue (and in my view it is not), it is not a matter which could provide any answer to the Injunction Application.

15. I therefore turn to consider the Injunction Application.

Does the Court have jurisdiction to make such an order?

16. The first issue is whether I have jurisdiction to make an order which, in effect, ensures so far as possible that the steps which Mr Su is obliged to take but refuses to take in relation to the provision of documents are taken by someone else in his stead.

17. I am satisfied that I do have jurisdiction, certainly to the good arguable case thresholds appropriate for an interim application:

    i) under section 37(1) of the Senior Courts Act 1981, on the basis that such an order is just and convenient as a necessary adjunct to the injunctions and orders for the giving of information and production of documents already made against Mr Su;

    ii) under the Court's inherent jurisdiction to ensure compliance with the orders already made against Mr Su.

18. I have reached the conclusion that the Court has jurisdiction to make an order to procure compliance by a defendant with an obligation the defendant is under but refuses to perform itself for the following reasons.

19. First, it is clear that where a party is obliged to sign certain documents, but refuses to do so, the court can order an official of the court to perform that obligation in that party's stead. Thus the powers under ss.37(1) and 39 of the Senior Courts Act 1981 can be used to order a party to produce a conforming document which can be presented under a letter of credit, and if the buyer refuses to sign that document, then the Court can direct that the document will be signed by a person nominated by the High Court. This course was followed in The Messiniaki Tolmi [1983] 2 AC 787.

20. Second, the entire Anton Piller or search order jurisdiction can be analysed as a mechanism for doing things which the defendant could be required to do directly – to produce documents, to hand-over merchandise and so forth – in circumstances in which there are good grounds to anticipate that no such order would be complied with and the order might be frustrated if compliance was left to the defendant. Search orders can be used to obtain documents to aid enforcement of a judgment as well as on an interim basis (Leggatt J in Distributori Automatica Italia SpA v Holford General Trading Co [1985] 1 WLR 1066, 1073). When a search order involves the search for and seizure of documents, computers or other data storage devices, it is standard practice for the legitimate interests of the defendant in relation to those documents to be protected by the appointment of an independent solicitor.

21. It is right to record that the Anton Piller jurisdiction is not intended to be a substitute for disclosure which ordinarily should be done by a party's solicitor. In TBD (Owen Holland) Limited v Simons and others [2020] EWHC 30 (Ch), Mr Justice Marcus Smith noted at [42] that the essential

purpose of search orders was not to provide early disclosure but to preserve documents necessary for the proper conduct of litigation. The statutory footing on which such orders now rest – s.7 of the Civil Procedure Act 1997 – provides for the court to make orders for the *preservation* of evidence which is or may be relevant (emphasis added).

22. However, what is to happen when the time for disclosure has already arisen, but a defendant has shown no intention of complying with his obligations and has repeatedly refused to do so? In this context, there can be no question of a party seeking early disclosure or of seeking to use a preservation order as a means of obtaining disclosure now of material which the defendant should review and disclose at a later stage in the case. Nor can there be any question of seeking to usurp the legitimate role of a defendant's solicitor, in circumstances in which the defendant has had ample opportunity to produce the documents himself and to appoint a solicitor to assist him in doing so, but has not done so.

23. In this connection I referred the parties to the judgment of Mr Justice Teare in Nolan v Walsh [2011] EWHC 535 (Comm). That was a case of an alleged fraud involving the first defendant, who had ceased to participate in the proceedings. The claimant wished, in a pre-judgment context, to ensure that disclosure of documents within the first defendant's control was given, and also to obtain disclosure from non-party companies, and applied for an order that an independent solicitor be appointed by the court to carry out disclosure on the first defendant's behalf, and be given access to documents held by a non-party company for this purpose. One of the principal reasons for seeking the disclosure was to find out where the proceeds of the fraud had gone.

24. Mr Justice Teare rejected the suggestion that the court has no jurisdiction to make such an order. Describing the order sought as one "designed to enable the first defendant's disclosure obligations to be fulfilled", he held that the court had inherent jurisdiction to appoint a supervising solicitor "to enable discharge of the first defendant's disclosure obligation, in order to ensure that that obligation is fulfilled".

25. It appears to me that the present application is consistent with the order made by Mr Justice Teare, and in keeping with the policy underlying search orders and Messiniaki Tolmi orders. It is also consistent, in a post-judgment context, with the strong policy which favours facilitating the satisfaction of court judgments by those able to do so (as emphasised by the Court of Appeal in Emmott v Michael Wilson Partners Ltd [2019] EWCA Civ 219 at [44]).

26. For these reasons I am satisfied, certainly to the necessary good arguable case standard, that I have jurisdiction to make an order of the kind sought.

What test should be applied in making the order?

27. It is generally easier in a post-judgment context to obtain orders under s.37(1) than at a stage when the parties are still in dispute as to whether

there is any liability at all. As I have noted, there is also a strong judicial policy of seeking to ensure that court orders are effective and that judgments of the court are complied with.

28. However, Mr Phillips QC invited me to, and I have concluded that I should, approach this application on the basis of the more stringent test applicable to obtaining search order relief in a pre-judgment context. That is one of the most draconian orders a Court can make, and is arguably more invasive than the present application in involving access not simply to a party's documents but its premises. If I conclude that relief would be appropriate applying that test, then the present case in a post-judgment context will be *a fortiori*.

29. That test requires Lakatamia to satisfy four conditions.

30. First, an extremely strong prima facie case. As this is a post-judgment application, it follows that Lakatamia has an unanswerable case.

31. Second, the damage or potential damage to Lakatamia must be serious. In this case, there has already been a finding by Sir Michael Burton in his judgment of 29 March 2019 that Mr Su's contemptuous refusal to disclose the location of his assets has "grossly prejudiced" Lakatamia. Mr Justice Burton also found, when sentencing Mr Su again on 11 February 2020, that Mr Su's contumelious conduct had left Lakatamia "very, very, very much out of pocket". On the material before me, I am also satisfied that there is a very strong case that Mr Su's refusal to disclose documents has not only prevented Lakatamia from obtaining satisfaction for its long-standing judgment, but is involving it in ongoing legal costs in an attempt to obtain satisfaction.

32. Third, there must be clear evidence that the defendant has in its possession incriminating documents and a real possibility that they may destroy such documents. I am satisfied of both of those matters to the "clear evidence" standard on the material before me.

    i) As to the first element, the obvious inference on the material before me is that Mr Su still controls substantial levels of undisclosed assets. I have already mentioned the Monaco villas which Mr Su sold, and the proceeds of which, some $27 million, appear to have been channelled through Mr Su's mother Mrs Morimoto to a Dubai company he controls. I have also referred to the three apartments in New York and his part interest in a residential property in Tokyo. Further, credit card receipts which Mr Su was required to produce established that up until his committal, he was leading a lavish lifestyle.

    ii) The location and movement of assets controlled by Mr Su must be documented in communications emanating to or from Mr Su or otherwise coming to his attention. Indeed, Mr Su's continuing refusal to produce documents in breach of court orders itself

strongly suggests that he is seeking to hide material which would assist Lakatamia in enforcement.

iii) As to the second element, given the lies Mr Su is found already to have told the Court, and the evidence of his determination to frustrate any satisfaction of the judgment against him, there is clearly a real risk that he will take steps to destroy or render irrelevant documents within his control if given warning of the present application. The evidence given by Mr Gardner as to the ongoing pursuit in Monaco of proceedings by a company called Cresta, which Sir Michael Burton found to be Mr Su's company, against Barclays Bank Pc, including pursuing an appeal against the decision of the Court of Appeal of Monaco of 4 June 2019, suggests that Mr Su is still able to communicate instructions in relation to assets from inside prison.

33. Finally, the harm caused by the order must not be excessive or disproportionate to the legitimate object of the order. In this case, the order will involve interference with Mr Su's right of privacy in his communications. However, this interference is only necessary because Mr Su has failed to comply with orders of this Court. Further, the order should be drafted so as to minimise any interference with Mr Su's right of privacy, and to limit such interference to the extent necessary to ensure compliance with Mr Su's obligations. I consider the steps which should be taken to achieve that aim below. I am satisfied that any prejudice to Mr Su is not in any way out of proportion to the legitimate interest of providing Lakatamia with information which Mr Su is obliged to give it anyway to enable it to enforce these long outstanding judgments.

Should fortification of the cross-undertaking be required?

34. In circumstances in which Mr Su has been found to be indebted to Lakatamia in an amount exceeding $50m, I can see no basis for requiring Lakatamia to fortify any cross-undertaking so far as Mr Su is concerned. In any event, it is very difficult to see how Mr Su could suffer any damage from the Injunction in respect of which he would be entitled to compensation.

35. So far as non-parties are concerned, once again I find it very difficult to see how non-parties could suffer damage from an order requiring Mr Su to hand over access to his own email and social media accounts. However, it is appropriate that the undertaking in damages offered be extended to third parties, albeit I will not require that undertaking to be fortified.

Continuation of the injunction: conclusion

36. For the reasons set out above, I am satisfied that in the circumstances it is appropriate to continue the injunction in existing form as a proportionate means of attempting to ensure compliance with the disclosure orders which have been made against Mr Su and of seeking to put Lakatamia in a

position where it is able to take steps to identify assets for the purposes of enforcing the long outstanding judgments.

37. On the evidence before me, I can see no realistic alternative to this course if Lakatamia is to obtain information as to the assets in Mr Su's control.

Disclosure

38. The order which Lakatamia sought at the without notice hearing was one by which the Independent Lawyer would be in a position to hand over documents to Lakatamia prior to the return date. I was not willing to make such an order on a "without notice" basis, and concluded that I should adopt the same approach as Mr Justice Marcus Smith in TBD Owen, and that the Independent Lawyer should not hand over any material to the Claimants until after the return date. I reached this conclusion because if material was handed over, and then the order discharged on the return date, it might well have been too late to get the documentary genie back in the bottle.

39. I also flagged a potential issue which might arise when that application was renewed (as Mr Phillips QC confirmed it would be) at the return date, namely whether the Independent Lawyer should hand over all non-privileged documents to Lakatamia, or whether the Independent Lawyer should undertake some review of the documents by reference to criteria of relevance (in the way in which Mr Su or lawyers acting on his behalf would have done had Mr Su engaged properly with the disclosure exercise).

40. Having concluded that the Injunction should be renewed on the return date, I am now willing (subject to the issue I identify below) to amend the order to provide for the Independent Lawyer to provide non-privileged materials to Lakatamia. However, the issue of whether the Independent Lawyer should apply a criteria of relevance remains.

41. The evidence of Mr Gardner of Hill Dickinson LLP, who has been involved in this matter for a very long time, is that it is simply not practical for the Independent Lawyer to undertake a review of the documents from a relevance perspective. The Independent Lawyer, Ms Aska Fujita, is a member of the English bar who is a Japanese speaker (Mr Su's native language). She has had no prior involvement in the dispute. Mr Gardner gave evidence that even material of apparently limited relevance – for example confirming Mr Su had visited particular destinations – might assist Lakatamia by alerting it to the need to search property registers in those locations, and communications with particular business persons might suggest corporate affiliations or associations. Finally, Mr Gardner points to the fact that Mr Su's approach to communications is one which will not lend itself to the ready identification of relevant documents. Mr Justice Cooke, in giving judgment against Mr Su, noted that Mr Su "characteristically" wrote emails in "terse terms" (at [24]]).

42. I accept that there is considerable force in the points made by Mr Gardner. Further, in circumstances in which it is Mr Su who has brought the present application on himself through his repeated failures to comply with the orders made against him, and which has necessitated the use of the Independent Lawyer, I only have limited sympathy for the fact that the mechanism which it has been necessary to adopt will involve non-privileged irrelevant documents finding their way to Lakatamia.

43. However, I have concluded that the following safeguards should be imposed to protect Mr Su's right to privacy to the fullest extent consistent with the order achieving its intended purpose:

    i) First, the Independent Lawyer should not hand over non-privileged documents to Lakatamia which the Independent Lawyer concludes are obviously irrelevant to the identification of assets against which the judgments might be enforced (relevance, in this context, to be judged on the wider "train of enquiry" test).

    ii) Second, Lakatamia may only use documents obtained from the Independent Lawyer for the purpose of enforcing the judgments of the Court (save with the permission of the Court).

44. It is, of course, open to Mr Su to seek permission to appeal against the Injunction, and to seek a stay of the handover of documents by the Independent Lawyer until that application had been determined.

THE MANDATE APPLICATION

45. This application was issued on 6 April 2020, after it was suggested in the course of the hearings on 3 April 2020 that it would be Mr Su's position that he had forgotten the details which would allow access to his email and social media accounts. The application seeks an order that requires Mr Su to sign mandates which would be provided to the email and social media providers of Mr Su's last known accounts requiring them (a) to provide details of the accounts to Lakatamia and to the Independent Lawyer; and (b) to grant access or provide the means of obtaining access to the accounts to the Independent Lawyer.

Should the Court hear the Mandate Application at this hearing?

46. The first issue which arises is whether the Court should hear the Mandate Application given that the application was short-served and that Mr Su had either had little or possibly no notice of it.

47. I concluded that I should hear the application, but that I should treat it as a "without notice" but "on notice" application so far as Mr Su is concerned which would be subject to a return date. I reached this conclusion for the following reasons:

    i) First, the Mandate Application seeks to achieve, by another means, the purpose which the Injunction is intended to achieve, and for

which I have found that there is an urgent and compelling necessity.

ii) Second, as with the without notice Injunction, if it is appropriate to grant the Mandate Application, it would be possible to preserve the *status quo* so far as Mr Su is concerned pending the return date by providing that no documents obtained as a result of the Mandate Application should go further than the Independent Lawyer prior to the return date of any order made on the Mandate Application.

The Mandate Application

48. I have no doubt that I have jurisdiction to grant the Mandate Application under s.37(1) of the Senior Courts Act 1981, that such order is necessary, and that it would be just and convenient to grant such an order.

49. A number of authorities have confirmed the Court's jurisdiction under s.37(1) to order a respondent to sign mandates directing banks to disclose information to the claimants: for example Bank of Crete v Koskotas [1999] 2 Lloyd's Rep 57 and Bayer AG v Winter [1986] FSR 357. A similar order has already been made by His Honour Judge Pelling QC in the Commercial Court in relation to mandates to obtain records from Mr Su's banks.

50. I cannot see any difference in principle between an order requiring the defendant to sign a mandate directed to his banks for the production of documents, and an order requiring a defendant to sign a mandate directed to those who provide his social media and email accounts for access. Accordingly I am satisfied that I have jurisdiction to make the order.

51. I am also satisfied that it is appropriate to do so, essentially for the reasons set out when addressing the Injunction above. In circumstances in which Mr Su claims to have forgotten the passwords to enable him to access his email and social media accounts, granting the Mandate Application is the only means of seeking to ensure access to the documents to which I have already held it is necessary that Lakatamia should be able to access.

52. I should note that the Order is not directed against the third parties who provide the email and social media accounts. Instead, it requires Mr Su to request access to his own email and social media accounts. In those circumstances, it is very difficult to see how the recipients of the request could suffer any loss from this Order, albeit the undertaking in damages should extend to them.

The terms of the draft Mandate Order

53. Lakatamia sought an order requiring Mr Su then and there to sign the Mandates and to post them by first class post from HMP Pentonville. I granted that application, and Mr Su signed the mandates.

54. However, as I observed above, the Mandate Application was short-served on Mr Su, and I have concluded that this application is to be treated as a "without notice" application.

55. In those circumstances, I have concluded that it is appropriate to order that no documents obtained pursuant to the Mandate Application are handed over by the Independent Lawyer to Lakatamia prior to the return date which should be listed within 14 days of the present application. That period of time reflects the time it will take to act on and obtain any response to the mandates.

THE CONDITIONS APPLICATION

Introduction

56. Mr Su is already, by reason of the Waksman Order, obliged on his release from HMP Pentonville:

    i) Not to leave or attempt to leave England and Wales.

    ii) Not to make or attempt to make any application for any document that would enable him to leave England and Wales.

    iii) To inform the Tipstaff of the address at which he intends to reside and to provide a telephone and email address at which he can be contacted.

    iv) To report to Charing Cross Police Station every day between 11.00 and 13.00.

57. In his judgment reported as [2020] EWHC 426 (Comm) at [46], Mr Justice Waksman explained his reasons for making those orders (which were not appealed by Mr Su) as follows:

> "This is a paradigm case where the court should make a further protective order, which is that Mr Su must not leave or attempt to leave England or Wales or make any application for or attempt an application for a passport, identity card, ticket travel warrants or any travel document which would allow him to leave; and that if he has been discharged from prison, he must, before leaving inform the Tipstaff of where he intends to reside within the jurisdiction, and provide a working telephone number and email address where he can be contacted. Of course, it goes without saying that the present confiscation of the passports pursuant to the order of Popplewell J will remain in place. One only has to state the attempt by Mr Su to flee the jurisdiction by going to Liverpool and hopefully onto Belfast, and his general conduct, to conclude without any hesitation on my part that he is a serious flight risk. Accordingly, as a matter of principle, I will grant the application that is being made for the further cross-examination".

58. By the Conditions Application, Lakatamia seek to impose two further conditions on Mr Su after his release:

    i) First, that he be required to reside at the address which he is already required to provide to the Tipstaff.

    ii) Second, that Mr Su's compliance with these requirements be subject to electronic monitoring in accordance with directions to be given to the Tipstaff.

59. The argument before me did not seek to differentiate between the two conditions. This is because the order sought requires the installation of a base monitoring station at the address given by Mr Su, with his proximity to that base station being monitored, such that the orders stand or fall together.

Should I hear the Conditions Application at this hearing?

60. The Conditions Application was also only issued on 6 April 2020, and has been short-served. However, the issues raised by it arise for urgent determination as the application is designed to address the state of affairs which will arise on Mr Su's release from HMP Pentonville on 11 April 2020.

61. I have concluded that the Conditions Application is of sufficient urgency that it is appropriate that I should hear the application today, because any delay might render the Conditions Application nugatory if Mr Su were to flee the jurisdiction before there was an opportunity for the Conditions Application both to be heard and, if granted, arrangements to implement the order to be put in place. I have, however, treated the application as "without notice".

Does the Court have jurisdiction to grant the Order sought?

62. Lakatamia accept that the Conditions Application is novel, but submit that that of itself is no bar to acceding to it, referring me to Fox LJ's statement in Bayer AG v Winter [1986] 1 WLR 497, 502 that the Court "should not shrink, if it is of the opinion that an injunction is necessary for the proper protection of a party to the action, from granting relief, notwithstanding it may, in its terms, be of a novel character".

63. For the purposes of considering this application, it is helpful to consider how curfew and electronic monitoring (or "tagging") have been used in other jurisdictions.

The Family Division cases

64. Combined curfew and electronic tagging orders have been the subject of consideration in a number of cases in the Family Division. The history of tagging orders in those jurisdictions is set out in the judgment of Sir James

Munby P, in In the matter of X v In the matter of Y [2015] EWHC 2265 (Fam).

65. The first recorded consideration of electronic tagging in the family jurisdiction appears to have been in the judgment of Singer J in Re C (Abduction: Interim Directions: Accommodation by Local Authority) [2003] EWHC 3065 (Fam), an international child abduction case. At [5], Singer J noted that it was the invariable practice in proceedings brought in respect of the wrongful removal or retention of a child to put in place protecting measures, noting that:

> "Routinely, orders are made for passports and travel documents of both child and accompanying adult to be handed over and retained to the order of the court, and injunctions are granted to inhibit removal of the child from the address at which he or she has been located, and restraining removal from England and Wales. The port alert procedure can be activated in cases where there is a 'real and imminent' risk of removal. Sometimes further requirements are imposed, such as an obligation to report at specified times to a local police station."

66. The Judged noted that in that case, the mother herself had volunteered to be subject to electronic monitoring. At [45]-[46] the Judge said:

> "[45] … An innovation in this case was the mother's suggestion that the package of protective measures should include … that she undergo electronic tagging. I take the view that such a direction may be made …
>
> [46] … In principle arrangements for electronic tagging can be made if the court so orders, which I assume it would ordinarily only do with the consent of the individual concerned (or perhaps as a condition non-compliance with which might bring about alternative safeguards against the perceived risk). I emphasise that such requirements are unlikely to be appropriate save in a very few cases."

67. The issue in that case appears to have arisen in the context of the Court's power under s.5 of the Child Abduction and Custody Act 1985, when an application had been made under the Hague Convention on the Civil Aspects of International Child Abduction 1980, to "give such interim directions as it thinks fit for the purpose of securing the welfare of the child concerned, or of preventing changes in the circumstances relevant to the determination of the application". The child had been placed in foster care by the local authority pending the determination of the father's application under CACA. The context in which the issue of electronic tagging arose, therefore, is one in which the Court had alternative means of ensuring that the child remained within the jurisdiction, by placing the child in local authority care, but the mother was willing to consent to electronic monitoring in order to avoid that outcome. No doubt this is what Singer J had in mind when identifying as a basis for imposing such a requirement that it take effect "as a condition non-compliance with which might bring about alternative safeguards against the perceived risk".

68. The issue of electronic monitoring was considered again by Parker J in Re A (Family Proceedings: Electronic Tagging) [2009] EWHC 710 (Fam), another child abduction case. This was another case in which the parties had agreed that there should be tagging. At [7], Parker J noted that:

> "Electronic tagging works by monitoring the whereabouts of the person wearing a tag, but only in a specific location. The tag is monitored by a device which needs to be installed in particular premises, that device monitors the tag, and the tagging officer is notified if the tagged person is either not in the premises during the relevant times or if the tag is removed".

69. Parker J stated at [8] that "tagging is available in family cases." In this case, the context in which the issue arose was a request by the mother (who had twice abducted the child) that the child spend time with her "under an interim order whilst all the many issues in the case are investigated". The tagging requirement, therefore, was imposed by the Court as a condition of the mother's application for an interim order under which the child would spend time with the mother, and, had the mother not consented to the tagging requirement, the Court could no doubt have refused to make the interim order sought.

70. As I have mentioned, the use of electronic monitoring in family cases was reviewed by Sir James Munby P in In the matter of X v In the matter of Y [2015] EWHC 2265 (Fam). In that case, the local authority had been granted emergency protection orders in respect of four children whom it believed their mother was planning to take to Syria. The issue was whether the interim care orders made by the Court should be discharged. The parents sought to support their application that the orders should be discharged by pointing to measures which could be put in place to reduce the risk of an attempt to remove the children from the jurisdiction, including electronic monitoring. Once again, therefore, the requirement of electronic monitoring was a condition of the Court's order, to which the objects of such monitoring had agreed, in circumstances in which, absent such agreement, it was open to the Court to decide that the interim care order should not be discharged.

71. At [78]-[79], the President referred to two types of electronic tagging. The first involved the use of monitoring by a radio-frequency monitor, placed in a tagged person's home ("RF" tagging). The second involved a more sophisticated system of GPS monitoring which tracked the tagged person's movements at defined intervals and which provides alerts if a person travels outside pre-defined limits. The President favoured the use of GPS tracking, but received correspondence from the Ministry of Justice family policy unit ("MOJ"), which he set out in an appendix to the judgment, which expressed concern about the use of GPS tracking in family cases, and noted that "in criminal cases GPS tagging is currently available on an exceptional basis only". It further stated that when drawing up guidelines with the National Offender Managing Services ("NOMS"), it had not been considered "that GPS was within the scope of the powers available to the family court".

72. The MOJ and NOMS were given the opportunity to make further submissions. These are recorded in a follow-up judgment of the President (In the matter of X (Children) v In the matter of Y (Children) [2015] EWHC 2358 (Fam). The MOJ submitted that the use of GPS tagging would "raise a number of operational considerations and the necessary arrangements would take time to put in place". The Court ordered that RF tagging (with a base station) be used until arrangements for GPS tracking could be put in place (which it was said would take two weeks). A curfew order would be made for so long as RF tagging was in place, but would cease once GPS tagging was place. The GPS excluded the mother from entering any part of the United Kingdom more than 16 miles from her address, and any airport within the United Kingdom.

The use of electronic monitoring in the criminal courts

73. Electronic monitoring principally features in two contexts in the criminal courts. In both contexts, the monitoring is almost invariably RF monitoring, implemented in conjunction with a curfew order.

74. The first context is, pre-trial, as a condition of granting a defendant bail. S.3AB of the Bail Act 1976 specifies conditions which must be complied with before a Court can impose electronic monitoring requirements on a person who has attained the age of 18. S.3AB(1) specifies that the first condition is that "the court is satisfied that without the electronic monitoring requirements the person would not be granted bail". Electronic monitoring, therefore, can only be imposed when it is a necessary condition of granting bail. No doubt if a person refused to agree to electronic monitoring, the court would refuse to grant bail.

75. Further, it should be noted that a defendant who has been placed under an electronically monitored curfew as a condition of bail is ordinarily entitled to a credit for one half of the total number of days in which the defendant has been subject to the curfew when sentenced (s.240A Criminal Justice Act 2003), with the sentencing judge having a discretion to make allowance for a non-qualifying curfew (R v David Barrett [2009] EWCA Crim 2213, [12] per Rix LJ). The statutory and discretionary credits reflect, in my view, the penal nature of the imposition of a curfew with electronic monitoring.

76. The second context is as a term of a community order or suspended sentence: ss.177(1)(e), 190(1)(e) and 204 of the Criminal Justice Act 2003. In this context, the electronically monitored curfew is intended to form part of the punishment imposed on the defendant for the offence of which they have been convicted.

Electronic monitoring in immigration proceedings

77. Paragraph 2(5) of Schedule 3 to the Immigration Act 1971 confers a power on the Home Secretary to impose "restrictions as to residence …. and as to reporting to the police" on those against whom a deportation order has been made. A purported exercise of that power to impose an

electronically monitored curfew was held to be unlawful in R (Gedi) v SSHD [2016] 4 WLR 93. The Court of Appeal rejected the argument that a right to impose a "restriction as to residence" under paragraph 2(5) "necessarily imports a right to impose a curfew" ([35]). At [37], the Court of Appeal observed that "it is important to underline the need for the clearest legislative authority for a requirement of this nature".

78. In R (Jalloh) v SSHD [2020] UKSC 4, the Supreme Court held that the unlawful imposition of an electronically monitored curfew constituted the tort of false imprisonment. In the leading judgment, Baroness Hale P noted at [1] that "the right to physical liberty was highly prized and protected by the common law long before the United Kingdom became party to the … ECHR".

The position under s.37(1) of the Senior Courts Act 1981

79. I am not persuaded that the Court has power to impose a curfew order with RF monitoring under s.37(1) of the Senior Courts Act 1981, which is the order Lakatamia seeks. This is not a case in which the requirement can be imposed as a condition of some order Mr Su seeks, or where the Court has an alternative order which it can impose if Mr Su does not agree to the imposition of the conditions which Lakatamia seeks.

80. An order of the kind sought would involve a very severe interference with Mr Su's liberty, effectively confining him to his address for 22 hours a day for so long as the order continued. The significantly penal character of such a requirement (which involves a more prolonged curtailment of liberty than, for example, a power of arrest) is reflected in the fact that, in a criminal context, time spent on curfew can and sometimes must count towards a sentence of imprisonment and can be a form of punishment in its own right, and that an unlawfully imposed curfew and monitoring requirement constitutes the tort of false imprisonment. It is no answer to the issue of jurisdiction that, as a result of the COVD-19 pandemic, most people are currently confined to their homes for such periods. The order sought against Mr Su must be one for which s.37(1) provides a statutory foundation, not the statutory measures taken to address COVID-19.

81. However, I do find on the evidence before me that Mr Su represents a significant flight risk. There have been clear attempts by Mr Su on repeated occasions to avoid orders of this Court and attempts to enforce those orders by leaving the jurisdiction. On the evidence before me:

    i) In 2018, when Mr Su's passport was red-flagged at the UK Border at Paris Gare du Nord, Mr Su absconded from the station.

    ii) Mr Su gave a false address when the police acting on behalf of the Tipstaff served him with the Popplewell Order at Heathrow Airport in January 2019.

    iii) Mr Su then took a taxi to Liverpool and attempted to catch a ferry to Belfast, in what was clearly an attempt to flee the jurisdiction to

Eire (as Sir Michael Burton has already held, to the criminal standard of proof, in the first committal hearing).

iv) I reject Mr Su's evidence that he "panicked" in 2019, or that his behaviour was less serious because he never left England and Wales.

v) There has been no change in Mr Su's desire to thwart orders of this Court in the meantime, as is apparent from the judgment of Mr Justice Jacobs of November 2019 in Mr Su's first purge application and the judgment of Sir Michael Burton of February 2020 when sentencing Mr Su to his second period of imprisonment for contempt.

vi) Mr Su faces a further committal application by Lakatamia.

vii) I can place no reliance on Mr Su's suggestion that he has no motivation to flee. His own submissions on this issue referred to his concern for his mother who lives in Tokyo.

82. I believe that these factors justify the Court in taking all the proportionate measures open to it for the purpose of reducing the flight risk which Mr Su represents for a limited period, until the completion of the further cross-examination under CPR 71 which the Waksman Order has directed. However, I have concluded that the order sought by Lakatamia is not one which it is open to the Court to make.

83. However, I have concluded it is appropriate:

i) To order Mr Su to provide the address at which he will live after leaving HMP Pentonville to Hill Dickinson LLP and Mr Adam Tear, as well as to the Tipstaff.

ii) To issue a Ports Alert in the form of the draft submitted by Lakatamia.

CONCLUSION

84. I would ask Lakatamia to draw up orders recording my rulings for approval by the Court, together with the additional rulings issued during the hearing.

85. Once again 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 legal teams.