Neutral Citation Number: [2021] EWCA Civ 1355

Case No: A4/2021/1187

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)
SIR MICHAEL BURTON GBE (sitting as a High Court Judge)
[2021] EWHC 1929 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/09/2021

Before :

LORD JUSTICE ARNOLD
and
LADY JUSTICE CARR

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Between :

(1) NOBU SU (aka SU HSIN CHI aka NOBU MORIMOTO)	**Appellant/First Defendant and Respondent**
(2) TMT COMPANY LIMITED **(3) TMT ASIA LTD** **(4) TAIWAN MARITIME TRANSPORTATION COMPANY LIMITED** **(5) TMT COMPANY LTD, PANAMA S.A.** **(6) TMT COMPANY LTD, LIBERIA** **(7) IRON MONGER I CO., LTD**	**Second to Seventh Defendants**
- and –	
(1)LAKATAMIA SHIPPING CO LTD	**Respondent/First Claimant and Applicant**
(2)SLAGEN SHIPPING COMPANY LTD **(3)KITION SHIPPING COMPANY LTD** **(4)POLYS HAJI-IONNOU**	**Second to Fourth Claimants**

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Ashley Underwood QC and Adam Tear (instructed by **Scott Moncrieff & Associates**) for the **Appellant**
S.J. Phillips QC, N.G. Casey and James Goudkamp (instructed by **Hill Dickinson LLP**) for the **Respondent**

Hearing date : 8 September 2021

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be at 10am on 15 September 2021

LADY JUSTICE CARR :

Introduction

1. The Appellant ("Mr Su") is a serial contemnor well known to the judges of the English Commercial Court and Court of Appeal. This is now a short appeal brought by him (as of right) against the sentence of two years' immediate custody imposed on him on 7 July 2021 by Sir Michael Burton GBE (sitting as a High Court Judge) ("the Judge") for 20 contempts of court. This was the third occasion on which the Judge had to sentence Mr Su for contempt; he described Mr Su as having mounted what was perhaps "the most serious campaign of contempt in the English courts". In the course of dismissing another recent appeal by Mr Su, Sir Nicholas Patten described the facts of the case as "by any standards extraordinary" (see [2021] EWCA Civ 1187 at [7]), referring (at [43]) to "Mr Su's extraordinary resistance to any order which the court makes".

2. Two years' custody was the maximum sentence available under s. 14(1) of the Contempt of Court Act 1981. The gravamen of this appeal is that the Judge erred in principle by adopting a starting point above two years before allowing for mitigation, alternatively that he failed to pay any or any adequate heed to the mitigation available to Mr Su and imposed a sentence that was manifestly excessive and outside the range of decisions reasonably open to him.

3. At the end of the appeal hearing, the appeal was dismissed, with reasons to follow. These are those reasons.

The context

4. Mr Su's engagement with the English courts has a long and sorry history. For present purposes, the briefest outline will suffice. In November 2014 the Respondent ("Lakatamia") obtained judgment against Mr Su following trial before Cooke J in the Commercial Court for over US$37 million (see [2014] EWHC 3611 (Comm); [2015] 1 Lloyd's Rep 216). The judgment remains wholly unsatisfied (apart from some US$7 million held in the Court Funds Office which was applied in partial discharge and other minor recoveries through third party debt orders). The current value of the debt stands in excess of US$70 million.

5. Since November 2014 Mr Su has disobeyed and acted in flagrant breach of numerous court orders. Those orders include those described in the committal order the subject of this appeal as the Freezing order, the Waksman Order, the Popplewell Order, the Bryan Order, the Teare Order, the Foxton Order, and the Search Order; those descriptions are adopted here.

6. As already indicated, the Judge had already sentenced Mr Su for contempt on two previous occasions. In March 2019 the Judge had sentenced Mr Su to 21 months' imprisonment in respect of 15 contempts ([2019] EWHC 898 (Comm)). On 11 February 2020 the Judge had sentenced Mr Su to a further four months for a further five contempts ([2020] EWHC 314 (Comm)). Upon his unconditional release in April 2020 (by reason of s. 258 of the Criminal Justice Act 2003), Mr Su was compelled to remain in the jurisdiction and under a duty to report daily to police as a result of the Waksman Order.

7. Lakatamia had by this stage already issued its third application for committal against Mr Su (on 27 March 2020). That application was subsequently amended (in June and December 2020) to introduce further allegations. Mr Su originally denied but ultimately (in a witness statement dated 25 June 2021) admitted the contempts. This was just before the hearing which took place before the Judge on 6 July 2021. That date had been fixed as a sentencing hearing in the light of an indication from Mr Su's solicitors on 9 June 2021 that Mr Su intended to admit the contempts.

The contempts

8. The index contempts are summarised at [8] to [18] of the judgment below ([2021] EWHC 1929 (Comm)) ("the Judgment"). They are described as "specimen" counts of Mr Su's non-compliance with and contravention of the orders referred to in [5] above. The breaches included non-disclosures, presentation of false affidavits of assets to purge, failure to provide access to email and social media accounts, non-compliance with a search order, and dissipation of an interest in a vessel and cash and funds. They spanned a period between 2011 and 2020.

The Judgment

9. Having introduced the application and hearing, the Judge said at the outset:

> "4. Mr Su vigorously but hopelessly denied the first 15 contempts and did not admit the second set of five, but on this occasion he has very recently admitted all the contempts….
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> 5. I have read and carefully considered the Defendant's Statement of Mitigation, which, apart from the fact that he thereby admits the 20 contempts, adds little. He relies on having been in prison for some part of the time, although a number of the contempts were prior to his being in custody…; and some post-dated his custody.
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> 6. In any event i) he had the opportunity to respond to the orders while in custody and in part did so, although wholly inadequately; ii) he has remained determinedly non-complaint during the 15 months since his release."

10. The Judge described the contempts as:

> "….very serious breaches indeed and, on top of the previous contempts for which the defendant was committed to prison, have shown a continuing blatant disregard of court orders, non-cooperation…, non-compliance, non-disclosure and blatant contravention and dissipation…He has been determined to find some way, notwithstanding the continuing court orders, to avoid payment and to hide and dissipate assets."

11. He went on to consider the relevant principles (by reference to the authorities) as follows:

    i) It is important for the court to uphold the law and court orders. This was "perhaps both in quantum of the liability evaded and in the duration and extent

of the contemptuous conduct, the most serious campaign of contempt in the English courts";

ii) It plainly can be appropriate to impose further sentences for further contempts;

iii) The question can arise whether the time has come when any coercive element has evaporated. This is however less relevant where the court orders are not simply requiring positive action but are directed towards unlocking missing assets;

iv) In serious cases, to impose the statutory maximum of two years is appropriate. There is a broad range of conduct which can justify such a sentence: see *FCA v McKendrick* [2019] EWCA Civ 524; [2019] 4 WLR 65 at [40] ("*McKendrick"*).

12. Referring to his judgment in 2019 ([2019] EWHC 898 (Comm)), the Judge stated that the factors that he there identified (at [47] - by reference in particular to *Crystal Mews Ltd v Metterick* [2006] EWHC 3087 (Ch) at [13] and *Asia Islamic Trade Finance Fund Ltd v Drum Risk Management Ltd* [2015] EWHC 3748 (Comm) at [7(6)]) were still present, "only more so":

i) Lakatamia had been prejudiced by the contempt and the prejudice was incapable of remedy;

ii) Mr Su had not acted under pressure;

iii) The breach was deliberate;

iv) There was high culpability;

v) Mr Su had not been placed in breach by reason of the conduct of others;

vi) Mr Su had not yet appreciated the seriousness of the deliberate breach;

vii) Mr Su had "far from" co-operated;

viii) As for acceptance of responsibility, apology and remorse:

> "Meaningless apologies have been given in the past and are still repeated, but he is simply paying lip service to the orders".

13. The Judge stated that the submissions for Mr Su were "quite unrealistic":

i) Although Mr Su had, this time, admitted the allegations in the round, he had not explained them and made no attempt to remedy them. The time and costs saved were "minimal";

ii) Whilst Mr Su's failure to satisfy the judgment had had its own penalty, it had its own consolation, in that he could still avoid his obligations and plan to evade them completely;

iii) He was not satisfied of Mr Su's insolvency;

iv) However high the price paid for the earlier contempts, Mr Su obviously thought that it was worth it, "at any rate, so far";

v) He was not satisfied as to the harsh consequences of an immediate term of imprisonment. It would be an opportunity for him to reconsider and avoid further cross-examination on and tracing of his assets in due course.

14. As for the coercive element, the Judge was satisfied that there was still a chance of compliance "if [Mr Su] knows that the court means business, particularly now that the bankruptcy, which was his latest strategy, has failed. He needs to realise that no amount of clever advice is going to help him to avoid compliance with court orders."

15. The Judge dismissed the possibility of a suspended sentence. The contempts were far too serious and prolonged for that to be appropriate. But in any event, it could not be demonstrated or even suggested that a suspended sentence would lead to repayment, co-operation and compliance. Further, a suspended sentence would be unenforceable if Mr Su were to leave the jurisdiction.

16. The Judge went on:

> "25. As to the maximum sentence of 24 months, the only question is whether I should, as I did on the occasion of my 2019 Judgment, reduce it for his having had to remain within the jurisdiction; the jurisdiction which he claimed for himself in the bankruptcy court, and when he has not taken advantage of his time out of custody to take any steps to comply with the orders of the court…but for the 2003 Act he would have been, for almost all of the time, in custody serving imprisonment for his contempts.
>
> 26. I am satisfied that his conduct merits longer than 24 months and he is fortunate that the law only permits a 24-month sentence. That is what I order."

Grounds of appeal

17. Three grounds of appeal are advanced:

i) Ground 1: it is said that the Judge erred in principle, starting with a sentence in excess of the statutory maximum of 24 months prior to giving any credit for mitigating factors. It is the plain intention of Parliament that the maximum sentence is two years. Where a Sentencing Council Guideline is applied, the starting point must be within the statutory maximum. Aggravating factors could never take the term above the statutory maximum. The Judge, accepting submissions from Lakatamia, was wrongly persuaded that he could go above the statutory maximum and then, after deduction for mitigation, "cap" the sentence to the maximum period. Reliance is placed on *Re R (A Minor) (Contempt: Sentence)* [1994] 1 WLR 487 ("*Re R*");

ii) Ground 2: it is said that the Judge failed to take into account material factors, namely Mr Su's admission of contempt and the 305 days spent reporting to police whilst restrained by injunction from leaving the jurisdiction. Relying on [46] in *McKendrick*, it is said that the Judge plainly erred in not providing for any discount

at all for Mr Su's admissions. Further, the Judge erred in ignoring Mr Su's time spent reporting to the police. S. 258(2) of the Criminal Justice Act 2003 provides that a contemnor must be released unconditionally having served one-half of his or her sentence;

iii) Ground 3: it is said that in all the circumstances the Judge imposed a sentence outside of the range of decisions reasonably open to him. It is said to be unclear whether the Judge sentenced entirely for punishment and he failed to give any credit for mitigation which he was bound to reflect.

Discussion and analysis

18. The function of this court is to review the sentence below. As the court stated in *McKendrick* at [37] and [38], the sentencing judge has to weigh and assess a number of factors. This court is reluctant to interfere with decisions of this nature and will generally do so only if the judge i) made an error of principle; ii) took into account immaterial factors or failed to take into account material factors; or iii) reached a decision which was plainly wrong in that it was outside the range of decisions reasonably open to the judge. There will therefore be few cases in which a contemnor will be able successfully to challenge a sentence that was merely excessive.

19. The court in *McKendrick* observed at [40]:

> "Breach of a court order is always serious, because it undermines the administration of justice. We therefore agree with the observations of Jackson LJ in the *Solodchenko* case…as to the inherent seriousness of a breach of a court order, and as to the likelihood that nothing other than a prison sentence will suffice to punish such a serious contempt of court. The length of that sentence will, of course, depend on all the circumstances of the case, but again we agree with the observations of Jackson LJ as to the length of sentence which often be appropriate. Mr Underwood was correct to submit that the decision as to the length of sentence appropriate in a particular case must take into account that the maximum sentence is committal to prison for two years. However, because the maximum term is comparatively short, we do not think that the maximum can be reserved for the very worst sort of contempt which can be imagined. Rather, there will be a comparatively broad range of conduct which can fairly be regarded as falling within the most serious category and as therefore justifying a sentence at or near the maximum."

20. The relevant questions here are whether the Judge erred in principle (by stepping outside the maximum period of two years' custody) or reached a sentence that was manifestly excessive (or plainly wrong).

21. Mr Su maintains that the Judge took as his starting point a term in excess of the two year statutory limit. However, there is nothing to indicate that the Judge did so. His final comments - that he was satisfied that Mr Su's conduct "merited longer than 24 months" and that Mr Su was "fortunate" that the law did not permit a greater sentence - were no more than concluding remarks. He was observing that he would have imposed a greater sentence, had he been entitled to do so. This was not a case where the Judge was impermissibly remedying perceived defects in the level of sentence

available to him by refusing to award an appropriate discount; rather, he concluded that no discount was appropriate.

22. The Judge's substantive assessment was, in effect, that there was no material mitigation (or discount) available to Mr Su such as to justify a reduction downwards from the maximum sentence of two years. This will explain why he did not consider it necessary to identify the appropriate length of term of imprisonment before reduction - an omission which would in any event not have amounted to an error of law (see *Sellers v Podstreshnyy* [2019] EWCA Civ 613 at [31]).

23. The weight to be given to an admission, if any, will always be fact-specific and there is always a limit to that weight (see *McKendrick* at [46]). The timing of any admission is clearly an important factor (see *Liverpool Victoria Insurance Co Ltd v Zafar* ("*Zafar*") [2019] EWCA Civ 392; [2019] 1 WLR 3833 at [68] endorsed in *McKendrick* at [46]). For the avoidance of doubt, the case of *Re R* does not reflect, let alone establish, any obligation to award credit for an admission of contempt (although it does indicate (at 490H) that any credit is to be applied to the statutory maximum of two years). Rather the judge there had indicated explicitly and unequivocally that he would grant such credit, but then omitted to do so. Likewise, the result in *McKendrick* was fact-specific: a reduction of 25% based on the appellant's admissions there could not be criticised. Nor did the court in *Zafar* establish any absolute obligation, referring for example in [68] not to "the" reduction for an admission, but rather to "any" reduction.

24. I reject the submission by Mr Underwood QC for Mr Su that there is an <u>absolute</u> rule that in all cases where an admission of contempt is made, some credit <u>must</u> be given. Of course in many, if not most, situations some credit will be appropriate; the general rule is that it will be. There is no broad disincentive to contemnors, even the most serious, to accept their breaches. But there may be exceptional cases, such as the present, where the judge is entitled to consider in all the circumstances that credit is not appropriate.

25. Here the Judge was pre-eminently well-placed to assess what weight, if any, should be given to Mr Su's admissions, given his long-standing involvement with Mr Su, in particular in the context of his contempts, and within the overall context of Mr Su's pattern of behaviour. Mr Su's admissions to these contempts came a year late following "vigorous" denials. Little time or money was saved. Further, the admissions were hardly fulsome or unequivocal. Mr Su opened his "Apology and Statement of Mitigation" as follows:

> "I accept that I am in contempt of court for breaching various orders that have been made against me. Whilst it seems technically some of the breaches would not be proven, it seems disproportionate nor (sic) a reasonable use of the Courts time to try and resolve them. <u>As such</u> I accept all of the allegations made against me…."
>
> (emphasis added)

26. Perhaps most significantly, the Judge found that Mr Su had remained not only non-compliant with the orders made against him but "determinedly" so. This was therefore unlike a case where, for example a criminal defendant has pleaded guilty to a past offence for breaches which are not continuing and cannot be remedied, albeit late in the day.

27. Nor was the Judge obliged to give treat the period over which Mr Su was required to stay in England and report to the police following his automatic release from prison on 9 April 2020 as mitigation. Such release did not in some way reduce or halve the original custodial sentence, which has stood at all times: the extra year of imprisonment did not "just disappear", as I put it in the context of a hearing on a different (and also unsuccessful) appeal by Mr Su heard in July 2021. Thus, from the court's perspective, Mr Su was serving a sentence of imprisonment until 29 April 2021 (only a few months before his next sentence was to commence). Further, as the Judge pointed out, Mr Su had not taken advantage of his time out of custody to take any steps to comply with the orders of the court.

28. It was well within the proper ambit of the Judge's discretion to conclude that there should be no reduction on account of the restrictions on Mr Su's movements upon his release in April 2020, those restrictions notably themselves being the product of Mr Su's own defaults imposed for entirely separate and independent reasons to the matters the subject of the contempts.

29. Mr Underwood emphasised the approach of the Judge when sentencing Mr Su in 2019 for contempt, when the Judge did reduce the sentence to take account of a period when Mr Su had been forced to remain in the jurisdiction. The Judge said this:

> "50. I cannot say…that he has cooperated, I do not accept that he has. However, I do accept that, by analogy with the giving of a tag in a criminal case, there should be some credit for the fact that he has had these last two months or so of reporting to a police station and having his freedom to that extent curtailed, not least by having to remain in this country. Allowing for that amount of mitigation and for the fact that I would not have considered that this was absolutely the worst case that can be foreseen, though it is certainly the most serious case of financial breach that I have experienced and that can be set alongside the other authorities to which I have been referred…"

This, submitted Mr Underwood, created a legitimate expectation on the part of Mr Su that some reduction would be made to reflect time when he was required to remain in this country and report to the police.

30. There are a number of difficulties with this argument:

i) At [50] of his judgment in 2019 the Judge was not laying down any general principle or approach such as to give rise to any legitimate expectation. Rather he was saying that for the purposes of his decision on that occasion the period over which Mr Su's freedom had been curtailed would be taken into account as a mitigating factor in the exercise of his overall discretion;

ii) More significantly, as Mr Phillips identified, there was a material factual distinction between the position in 2019 and 2021. One of the contempts for which Mr Su was sentenced in 2019 related to his attempt to flee the jurisdiction (in breach of the Popplewell Order), for which he was to be sentenced. The restrictions on Mr Su's movements which the Judge took into account in 2019 by way of mitigation were connected to that attempt; they were imposed because of it. Thus, there was a link between the contempt and the restrictions in question, for which some credit was then given;

iii) By contrast, there was no link between the contempts before the Judge in 2021 and the restrictions on his movements for which he was seeking a reduction. Those restrictions were imposed in connection with a second means hearing – in order to avoid Mr Su evading that hearing. They were not related to matters the subject of the contempt proceedings. In those circumstances, a different approach on the part of the Judge was both understandable and legitimate.

31. The appeal on Ground 2 is parasitic on Ground 1. There is no proper basis on which to contend that the Judge overlooked Mr Su's admissions or that he had required to stay in England and report to the police since 9 April 2020. He expressly referred to these matters (at [4] to [6], [13], [20(v)(h)], [22] and [25]) of the Judgment. As set out above, the Judge was entitled on the extreme facts of this case not to make any reduction on account of the admissions given amongst other things their timings, the lack of explanation for the commission of the contempts and the ongoing failures to remedy. The Judge was entitled to find, as he did, that any apologies from Mr Su were "meaningless" and "lip service" only. Further, as already indicated, the Judge was entitled to consider that the fact that Mr Su had been prohibited from leaving the jurisdiction did not amount to any effective mitigation.

32. Ground 3 is hopeless. An overall sentence of two years' custody cannot in any way be said to be plainly wrong as outside the range of decisions reasonably open to the Judge given, amongst other things, Mr Su's long history of flagrant contempt of court orders; the sheer number, duration and blatant nature of the index contempts; and Mr Su's continued non-compliance. It fairly reflected the gravity of Mr Su's conduct. It is suggested that there is some mismatch between the Judge's observation that there was some chance of compliance by Mr Su on the one hand, and his later observation that there was little to suggest that a suspended sentence would secure compliance by Mr Su. But there is no disjunct as suggested. The Judge was entitled to accept that there was a chance of compliance (due to imprisonment) and at the same time considering that a suspended sentence would not achieve such compliance – given Mr Su's deliberate and sustained non-compliance over the previous two years.

Conclusion

33. For these reasons, the appeal was dismissed. The sentence of two years' immediate custody was neither wrong in principle nor manifestly excessive or plainly wrong.

LORD JUSTICE ARNOLD :

34. I agree.