



Neutral Citation Number: [2022] EWHC 3115 (Comm)

Case No: CL-2011-001058

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT

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

Date: 05/12/2022

Before :

MR JUSTICE JACOBS

Between :

**(1) LAKATAMIA SHIPPING COMPANY
LIMITED**

Claimant

**(2) SLAGEN SHIPPING CO. LTD
(3) KITION SHIPPING CO. LTD
(4) POLYS HAJI-IOANNOU**

**2nd to 4th
Claimants**

- and -

**(1) NOBU SU (aka SU HSIN CHI; aka NOBU
MORITOMO)**

Defendant

**(2) TMT CO., LIMITED
(3) TMT ASIA LIMITED
(4) TAIWAN MARITIME TRANSPORTATION
CO., LIMITED
(5) TMT COMPANY LTD, PANAMA S.A.
(6) TMT CO., LTD, LIBERIA
(7) IRON MONGER I CO., LTD**

**2nd to 7th
Defendants**

N G Casey (instructed by **Hill Dickinson LLP**) for the First **Claimant**
The Defendant did not attend the hearing

Hearing date: Friday 25th November 2022

Approved Judgment

This judgment was handed down remotely at 2:00pm on Monday 5th November by circulation to the parties or their representatives by e-mail and by release to the National Archives (see eg <https://www.bailii.org/ew/cases/EWCA/Civ/2022/1169.html>).

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MR JUSTICE JACOBS

Mr Justice Jacobs:

Introduction

1. The First Claimant (“Lakatamia”) applies for an order that certain specific categories of document belonging to the First Respondent, (“Mr Su”), be released to Lakatamia notwithstanding any apparent privilege with which they may be clothed. Lakatamia contends that the documents in question are not, in fact, clothed with privilege at all because of Mr Su’s manifest iniquity.
2. The relevant documents were obtained from Mr Su pursuant to search orders made against him as described below. The search orders were made in support of Lakatamia’s long-running attempts to enforce judgments of this Court against Mr Su, in the principal judgment of Cooke J entered in November 2014 and supplemented by further order in January 2015 for over USD 47 million.
3. The search orders yielded substantial volumes of documents. These documents were, in the first instance, passed to Independent Reviewing Lawyers (“IRLs”). The IRLs are barristers, two of whom are Japanese speakers. The IRLs were appointed by the court under the search orders in order to protect Mr Su’s legitimate privileges. The IRLs were directed to review the documents and to pass them to Lakatamia unless the documents were clearly irrelevant to Mr Su’s assets or were, or might be, privileged or incriminating.
4. The IRLs have released a large volume of documentation to Lakatamia. But they have also withheld a large number of documents, some of them on the basis that they are, or may be, privileged.
5. Lakatamia does not know what those withheld documents are, or what they show, but they contend that the documents are likely to provide information as to Mr Su’s assets. Lakatamia contends that Mr Su has used lawyers to present a false picture of his assets to this court, in breach of several orders, including a worldwide freezing order made by Mr Justice Blair against Mr Su back in August 2011 (“the Blair Freezing Order”); or that he has used them to assist in the dissipation of his assets in breach of the Blair Freezing Order. They submit that documentation in pursuit of those dishonest schemes falls within the exception to privilege known as the “fraud” or “iniquity” exception. This principle, derived from *R v Cox & Railton* (1884) 14 QBD 153, is described as follows in *Hollander*: Documentary Evidence 14th edition, paragraph 25-11:

“Legal professional privilege does not exist in respect of documents which are in themselves part of a criminal or fraudulent proceeding or communications made in order to get advice for the purpose of carrying out fraud, and this is so whether the solicitor was, or was not, ignorant of the fact that he was being used for this purpose. This is because there is no public interest in the protection of such communications and a communication in furtherance of a criminal purpose does not come within the ordinary scope of professional appointment.”

6. The principle, and the authorities, were the subject of detailed consideration by Popplewell J in *JSC BTA Bank v Ablyazov* [2014] EWHC 2788 (Comm). The judge concluded as follows in paragraph [93]:

“[93] I would conclude, therefore, that the touchstone is whether the communication is made for the purposes of giving or receiving legal advice, or for the purposes of the conduct of actual or contemplated litigation, which is advice or conduct in which the solicitor is acting in the ordinary course of the professional engagement of a solicitor. If the iniquity puts the advice or conduct outside the normal scope of such professional engagement, or renders it an abuse of the relationship which properly falls within the ordinary course of such an engagement, a communication for such purpose cannot attract legal professional privilege. In cases where a lawyer is engaged to put forward a false case supported by false evidence, it will be a question of fact and degree whether it involves an abuse of the ordinary professional engagement of a solicitor in the circumstances in question. In the ‘ordinary run’ of criminal cases the solicitor will be acting in the ordinary course of professional engagement, and the client doing no more than using him to provide the services inherent in the proper fulfilment of such engagement, even where in denying the crime the defendant puts forward what the jury finds to be a bogus defence. But where in civil proceedings there is deception of the solicitors in order to use them as an instrument to perpetrate a substantial fraud on the other party and the court, that may well be indicative of a lack of confidentiality which is the essential prerequisite for the attachment of legal professional privilege. The deception of the solicitors, and therefore the abuse of the normal solicitor/client relationship, will often be the hallmark of iniquity which negates the privilege.”

7. Subsequently, in *Z v Z and others* (Legal Professional Privilege: Fraud Exemption) [2016] EWHC 3349 (Fam) para [14], Haddon-Cave J identified a number of pertinent statements of principle derived from prior cases:

“[14] There is, however, a “fraud” exception. The following statements of principle are pertinent: (1) Where legal advice is sought or given for the purpose of effecting fraud or “iniquity”, it is not privileged (per Schiemann LJ in *Barclays Bank*, at p 1249, who noted that the use of the word “iniquity” in this context stemmed from Bingham LJ in *Ventouris* (supra)). (2) The “fraud” exception is not confined to cases of criminal fraud or cases of civil fraud in the narrow sense, but is used in a relatively wide sense (per Munby J in *C v C*, at para 35 citing Schiemann LJ in *Barclays Bank*, at p 1249). (3) The court must be satisfied in every case that what is prima facie proved really is dishonest, and not merely disreputable or a failure to

maintain good ethical standards. Each case depends on its own facts (per Goff LJ in *Gamlen Chemicals Co (UK) Ltd v Rochem Ltd* (unreported) 7 December 1979 – cited by Schiemann LJ in *Barclays Bank*, at p 1249).(4) In any given case, the court must weigh the important considerations of public policy on which legal professional privilege is founded and the gravity of the charge of fraud on the other. The court must be slow to deprive a defendant of the important protection of legal professional privilege on an interlocutory application (per Vinelott J in *Derby & Co Ltd v Weldon* (No 7) [1990] WLR 1156, 1173). (5) Each case depends on its own facts (per Goff LJ in *Gamlen* (supra)).”

8. Mr Casey, who appeared for Lakatamia, said that whilst *Z v Z* did not establish any different principles to those considered by Popplewell J, it provided a useful illustration of how the principles are to be applied in relation to facts which have some similarity to those of the present case.
9. I approach Lakatamia’s application on the basis that the above passages are correct statements of the law. The question is how they are to be applied to the facts here.
10. Lakatamia’s application ultimately focused on the following two categories of document:
 - (1) Correspondence between Mr Su and his English solicitors and direct access counsel in the period for January to March 2019. During this period, Mr Su was providing, or at least purporting to provide, disclosure of his assets pursuant to the Blair Freezing Order (and other subsequent disclosure orders). Lakatamia contends that the disclosure that he gave was (in the event) wholly inadequate, and also that Mr Su lied to these English lawyers about the source of the funds used to pay their fees. Lakatamia seeks disclosure of any documents held by these lawyers that are potentially relevant to Mr Su’s assets, because they may reveal assets that Mr Su owns (or owned) but about which he lied to his lawyers.
 - (2) Correspondence between Mr Su and a lawyer in Monaco, Maître Zabaldano, for the period from 16 March 2015 to date. Maître Zabaldano acted on behalf of a company called Cresta Overseas Limited (“Cresta”). In the context of earlier applications in these proceedings, the court has held that Cresta owned two very valuable Monaco properties on Mr Su’s behalf; and that Mr Su dissipated the net proceeds of sale of those properties following their sale at auction in 2015: see [2019] EWHC 898 (Comm), paragraphs [8] – [14] (Sir Michael Burton). The dissipation was effected through Maître Zabaldano’s client account. Lakatamia contended that Maître Zabaldano and his firm may well hold documents that reveal information about Mr Su’s assets.
11. The judgment referred to in the previous paragraph was given by Sir Michael Burton on 29 March 2019 after a 4-day hearing. It was the first in a series of three judgments of Sir Michael Burton in relation to successful contempt applications by Lakatamia. The other two judgments were given on 11 February 2020 ([2020] EWHC 314

(Comm)) and 7 July 2021 ([2021] EWHC 1929 (Comm)). Those judgments resulted in the imposition of prison sentences of 21 months, 4 months and 2 years respectively.

12. Lakatamia originally also sought a third category of documents, namely correspondence between Mr Su and Chao Pen Wei, also known as Sarah Chao, in the period from 22 August 2011 to date. Mr Casey ultimately did not press for this particular category at the present stage, whilst reserving the right to do so subsequently. This was because it was unclear whether the IRLs were in fact withholding any documents, within this category, on the grounds of privilege. Some documents within this category had previously been produced, and it was therefore possible that privilege was not being claimed. Mr Casey recognised that it was premature to ask the court for an order at this stage, prior to the position being clarified with the IRLs.
13. The application was supported by the 34th witness statement of Mr Russell Gardner, the partner at Hill Dickinson LLP with the conduct of the case. Mr Su did not serve any responsive evidence. He sought an adjournment of the application, which I refused on 24 November 2022 for the reasons set out in my order of that date. Mr Su has apparently now returned to Japan, after having served one half of the various prison sentences described above. The hearing on 28 November was arranged as a hybrid hearing, so that Mr Su had the opportunity of participating from Japan. He did not do so.
14. In the result, I have only heard submissions on this issue from Mr Casey on behalf of Lakatamia. The case-law indicates that the power to override privilege is an exceptional remedy, only to be used with the greatest care: see *Hollander* paragraph 25-15. During the course of argument, I put to Mr Casey a number of matters which concerned me in relation to the application, and I reserved judgment following Mr Casey's argument. In the end, for the reasons which follow, I have been persuaded that Lakatamia's application is well-founded, albeit that the order sought requires some modification. I start by summarising relevant aspects of the proceedings hitherto, since this has some bearing on whether Lakatamia has advanced a sufficient case that the fraud exception applies.

B: The litigation background

15. Mr Su owes Lakatamia more than USD 60 million pursuant to the original judgment of Cooke J and unsatisfied costs orders of this court. Lakatamia submits that Mr Su has done everything that he can to avoid honouring both the original judgment and the subsequent costs orders, including repeatedly failing to comply with disclosure orders made against him.
16. In my view, this submission is borne out by the three judgments of Sir Michael Burton, which concerned a large number of different contempts on the part of Mr Su. A number of these contempts comprised non-disclosures of specific assets, including valuable properties in Monaco, apartments in New York and interests in companies. Mr Gardner's witness statement and Mr Casey's written argument described the litigation background in some detail, but it is sufficient for present purposes simply to refer to the following aspects.

January 2018 to February 2019

17. The principal judgment against Mr Su was entered against him by Mr Justice Cooke in November 2014. In January 2018, Popplewell J made a passport order (“the Passport Order”) against him. In outline, it directed that if Mr Su were to enter the jurisdiction, he was to surrender his passport and remain within the jurisdiction pending a cross-examination as to his assets under CPR Part 71. It also required him to disclose details of his worldwide assets worth more than USD 10,000, and various specific categories of document.
18. In January 2019, Mr Su came to this jurisdiction. He was served with the passport order made by Popplewell J. Mr Su sought to evade the order by leaving the jurisdiction. This attempt was foiled by the Merseyside police who arrested him at the Liverpool ferry terminal. He was brought before Bryan J in the Commercial Court on 16 January 2019. Bryan J sought to address the flight risk by directing Mr Su to report to a police station on a daily basis pending the cross-examination as to his means (“the Bryan Order”). He also reiterated the disclosure obligations in the Passport Order.
19. At this stage, Mr Su was assisted by a firm of English solicitors, W Legal. They came off the record on 31 January 2019, but continued to be involved to some extent. Mr Su instructed three direct access counsel to represent him at the cross-examination as to his means. This was listed for the week of 25 February 2019.
20. Mr Su’s lawyers told Lakatamia that their fees were being paid by a company called Platform Shipping LLC (“Platform Shipping”), and that the monies being used to pay these fees were not caught by the Blair Freezing Order. From subsequent disclosure (obtained pursuant to the first of the search orders described below) Lakatamia has identified that Mr Su told them that Platform Shipping was a company owned by one Wade Wang, that Mr Wang was a friend of his, and that he had agreed to pay his fees. He made similar statements to the court on 27 February 2019, in the course of cross-examination as to his assets. The evidence now indicates that this was untrue. Mr Wang was an employee of Mr Su’s and Platform Shipping was a business that belonged to him. He had not, however, disclosed this interest in response to the Blair Freezing Order. Mr Su was thereby seeking to obscure the fact that Mr Su’s mother, Madam Su, was meeting his legal fees. This was a matter later considered by Bryan J in paragraphs [516] – [520] of his judgment relating to a claim made against Madam Su and others concerning the Monaco properties: see [2021] EWHC 1907 (Comm).
21. The cross-examination as to means was listed for 25 February 2019, but was adjourned for a few days in order to allow Mr Su to give rolling disclosure in accordance with the Passport Order and the Bryan Order. A very limited amount of disclosure was given.
22. The cross-examination took place on 27 and 28 February 2019. Mr Su was asked about the Monaco properties. Lakatamia had identified through its own researches that Mr Su appeared to have had an interest in those properties, held through Cresta. Lakatamia knew that the properties had been sold at auction in October 2015 for over €60 million. But it did not know what had happened to the net sale proceeds (in the sum of approximately €27 million) after they had been released from the Caisse des Dépôts et Consignations (the Monaco equivalent of the Court Funds Office). In cross-

examination, Mr Su said that he had passed the monies to his mother. Lakatamia immediately applied for and obtained a freezing order against Madam Su and Cresta and another company (through which Mr Su appeared to own his interest in Cresta) called Portview Holdings Limited. It was these proceedings that led to the 2021 judgment of Bryan J, in which the judge found that Madam Su and various corporate defendants, including Cresta, had conspired with Mr Su to dissipate the net proceeds of sale of the Monaco properties, in breach of the Blair Freezing Order.

March 2019: the first committal hearing before Sir Michael Burton

23. In late March 2019, Sir Michael Burton GBE heard a committal application on the part of Lakatamia against Mr Su. He found him guilty of a number of contempts, including failures to comply with disclosure orders, the dissipation of the net proceeds of sale of the Monaco properties and the attempt to flee the jurisdiction. He sentenced Mr Su to 21 months in prison, being the maximum sentence of 24 months, less three months to reflect the fact that he had been compelled (under the Bryan Order) to report to a police station since January 2019.

February 2020: the second committal hearing before Sir Michael Burton

24. Sir Michael committed Mr Su for a second time on 11 February 2020. On that occasion the contempts included a failure to disclose an interest in three New York apartments.

The Search Order

25. Mr Su was released from prison on 9 April 2020. On 17 June 2020, Andrew Baker J made a search order against Mr Su (“the Search Order”). This was executed on 18 June 2020. As appears from the third judgment of Sir Michael Burton, Mr Su breached the Search Order. Lakatamia’s evidence was that Mr Su had refused to allow the supervising solicitor appointed thereunder immediate access to the premises, and that he appeared to have deleted emails from his iPad during the conduct of the search.
26. In spite of that, the search yielded approximately 800,000 electronic documents and a substantial number of physical files. These were passed to the IRL (only one IRL was appointed at this initial stage). On 2 July 2020, Foxton J continued the Search Order and authorised the release of documents to Lakatamia on a rolling basis, subject to various filters. In particular, documents were not to be released to Lakatamia if they were (or might be) incriminating or privileged, or if they were unintelligible to the IRL, or if they were clearly irrelevant to Mr Su’s assets (or a train of enquiry that might lead to his assets). Documents were released to Lakatamia on that basis.

The claim against Madam Su and Cresta

27. In March 2021, Bryan J tried Lakatamia’s claim against Madam Su, Cresta and sundry other corporate defendants. Bryan J found that the defendants had conspired to dissipate the net proceeds of sale of the Monaco properties in breach of the Blair Freezing Order. In particular, he found as follows (references in square brackets are to the paragraphs of his judgment):

- (1) In 2017, the net sales proceeds from the sale of the properties were released from the the Caisse des Dépôts et Consignations to the client account of Maître Zabaldano: paragraph [482];
- (2) On 21 February 2017, Maître Zabaldano was instructed by a director of Cresta (one TC Chang) to transfer those monies to the bank account of a company called UP Shipping Corporation (“UP Shipping”) in Taiwan. UP Shipping was owned and controlled by Madam Su: see [714];
- (3) On 23 February 2017, Maître Zabaldano complied with that instruction, and the monies arrived in UP Shipping’s bank account on 1 March 2017: see [489];
- (4) At all material times, Cresta (and Portview, its parent) knew about the judgments of Cooke J and the Blair Freezing Order: see [887].

July 2021 - the third committal motion

28. On 7 July 2021, the same day that Bryan J handed down his judgment in the claim against Madam Su and others, Sir Michael Burton committed Mr Su for a third time. On this occasion, Mr Su had admitted 20 specimen contempts, which included preventing the supervising solicitor from entering the flat at which he was staying, in breach of the Search Order, and expending USD 50,000 on the production of a pop music video in which his younger daughter was to star. That latter breach of the Blair Freezing Order was committed while he was appearing before Sir Michael on the first committal application in March 2019. Sir Michael said that:

“This is perhaps both in quantum of liability evaded and in the duration and extent of the contemptuous conduct, the most serious campaign of contempt before the English courts”

29. At the end of the hearing of that committal motion, Mr Su passed a smartphone to an individual in the public gallery. On the following day (8 July 2021), Lakatamia made an application for, and obtained, an order for the smartphone to be delivered up and searched. That eventually occurred, and further documents were passed to the IRLs to go through the same filter as imposed under the Search Order.

Further proceedings: the claim against Mr Su, Mr Chang and Maître Zabaldano

30. Subsequent to these events, Lakatamia has recently started proceedings against Mr Su, Mr Chang and Maître Zabaldano. Lakatamia contends that the three defendants unlawfully conspired to transfer the net proceeds of sale of the Monaco properties out of Monaco, in breach of the Blair Freezing Order. The claim is based on many of the facts and matters found in the judgment of Bryan J.
31. In these new proceedings, Lakatamia does claim that Maître Zabaldano was complicit in the wrongdoing alleged. That allegation is contested by Maître Zabaldano (the parties have exchanged pre- action correspondence, and Maître Zabaldano has indicated an intention to challenge the jurisdiction of the Court). For the purposes of Lakatamia’s present application, Lakatamia does not seek to establish wrongdoing on the part of Maître Zabaldano.

C: Lakatamia's submissions

32. It is against that factual background that Lakatamia seeks an order that the IRLs may release the two categories of document described above. Lakatamia submits that the iniquitous conduct of Mr Su and Cresta means that exchanges with their lawyers in which they sought to hide or dissipate their assets are not privileged.
33. As to the applicable legal principles:
- (1) In *Kuwait Airways Corp v Iraqi Airways Co* (No. 6) [2005] 1 EWCA Civ 286 at [14], Longmore L.J. stated that if a person consults a solicitor in furtherance of a criminal purpose then, whether or not the solicitor knowingly assists in the furtherance of such purpose, the communications between the client and his solicitor do not attract legal professional privilege.
 - (2) The principle is not, however, limited to criminal purposes. Per Popplewell J in *JSC BTA Bank v Ablyazov* at [68], “it extends to fraud or other equivalent underhand conduct which is in breach of a duty of good faith or contrary to public policy or the interests of justice”. In *Barclays Bank v Eustice* [1995] 1 WLR 1238, 1249D-E, Schiemann L.J noted that the “case law indicates that ‘fraud’ is in this context used in a relatively wide sense”.
 - (3) The principle applies to both legal advice privilege and litigation privilege, see *Kuwait Airways* (No.6), at [31].
 - (4) In the context of legal advice privilege, a distinction is to be drawn between advice sought in order to structure a transaction; and advice sought to understand the legal effect of something that has already been done. The former will not be privileged if the transaction has the requisite iniquitous quality; but the latter will be: see *O'Rourke v Darbishire* [1920] AC 581, 632.
 - (5) In *Barclays Bank v Eustice*, there was a strong prima facie case that the defendants had entered into transactions at an undervalue in order to defeat the rights of the claimant bank (such that the transactions were vulnerable to being unwound pursuant to section 423 of the Insolvency Act 1986). The judge at first instance directed that correspondence between the defendants and their lawyers about the transaction was not privileged. The Court of Appeal upheld that decision, holding that the purpose of the transaction was “sufficiently iniquitous for public policy to require that communications between him and his solicitor in relation to the setting up of these transactions be discoverable”.
34. In relation to the first category of documents sought, any correspondence between Mr Su and his English lawyers in January to March 2019 about his assets falls squarely within the iniquity exception. Following his arrival in the jurisdiction, and his attempt to flee in breach of the Passport Order, Mr Su engaged with W Legal and then with his direct access counsel in order to prepare for the scheduled cross-examination as to means and first committal motion. He was (as it transpired) determined not to reveal his assets, while at the same time purporting to comply with the disclosure requirements that had been placed upon him. He obtained an adjournment of the cross-examination as to means to allow him to provide “rolling disclosure”, but the subsequent judgments of Sir Michael Burton show that this was not properly

provided. At that time, he was also lying to his lawyers and to the Court about the source of the funds used to meet his legal fees, in order to conceal the fact that it was his mother who was paying.

35. Mr Casey submitted that there were close parallels with the decisions in both *JSC BTA Bank v Ablyazov* and *Z v Z*.
36. In relation to the second category of documents sought, even if Maître Zabaldano was not part of any conspiracy to dissipate the net proceeds of sale of the Monaco properties, he was used by Mr Su and Cresta to effect the dissipation. Those proceeds were passed out of Monaco via Maître Zabaldano's client account. To the extent that Maître Zabaldano assisted in the management of the sale of the properties and the dissipation of the proceeds, he was assisting (whether knowingly or unknowingly) in Mr Su's scheme to defeat the orders made by the court.
37. Lakatamia seeks disclosure of these documents because they may shed light on Mr Su's asset position. That is particularly so because Mr Su was the personal guarantor of loans secured against the Monaco properties, and just before the properties were sold at auction in October 2015, Maître Zabaldano was involved in efforts to refinance the Monaco properties. It is likely therefore that Maître Zabaldano corresponded with Mr Su about other assets that he owned (and which might have provided additional security against further loans).

D: Discussion

38. I broadly accept the submissions of Lakatamia as summarised above. The context of the present application is, as Sir Michael Burton described it, one of the most serious campaigns of contempt in the English courts. It has been a campaign fought by Mr Su over a number of years, and its purpose has been to avoid giving disclosure of assets pursuant to court orders and with a view to avoiding enforcement. Many of the contempts found by Sir Michael Burton, in the course of his three judgments, were instances of Mr Su failing to reveal assets – often very significant assets, such as the Monaco properties – in which he had an interest.
39. There is in my view ample evidence that, as Mr Casey submitted, the instruction of lawyers in the period January to March 2019 was not for the purpose of providing a proper account of Mr Su's assets as ordered by the court, but rather was an attempt to give the impression that there was compliance when in fact there was not. Mr Casey described this as a “blind” or a “diversionary tactic”, with Mr Su seeking to give the impression that he was complying with orders of the court by “drip feeding” materials, whilst at the same time he was hiding assets or dealing with them in contempt. Amongst the assets concealed were the ownership of the three New York apartments, one domestic property in Japan, interests in vessels (such as his interest of USD 4 million in the “Triumph”, referred to in paragraph [15] of Sir Michael Burton's third judgment), and the dissipation of USD 53,875 in late February 2019 for a pop music video in which his daughter was to star. As Sir Michael Burton said in paragraph [17] of his third judgment, this payment was at a time when Mr Su was being cross-examined as to his means and was putting forward apologies for his breaches. The campaign of contempt and concealment of assets had started some time before January 2019, as shown by Sir Michael Burton's findings concerning the sale of the Monaco properties in 2015.

40. Against this background, I consider that there was here (to use the words of Popplewell J) an abuse of the ordinary professional engagement by Mr Su of his solicitor and direct access counsel. There is no suggestion that any of them were complicit with Mr Su in his concealment and contempt. But it can fairly be said that they were being used as an instrument to perpetuate the deception of Lakatamia and of the court in relation to the existence and whereabouts of Mr Su's assets. I agree with Mr Casey that there is here a parallel between the conduct of Mr Su in relation to his lawyers, and the conduct of Mr Ablyazov in relation to his lawyers (Clyde & Co and later two other firms) in *JSC BTA Bank*. In that case, in holding that there was no privilege in communications between Mr Ablyazov and his lawyers concerning his assets, Popplewell J said at [98]:

“[Mr Ablyazov’s] subsequent conduct in carrying out the strategy of concealment, forgery and deceit in relation to the assets, and in breaching the court’s orders in dealing with assets in an attempt to conceal and preserve them, gives rise to a strong inference that the advice was sought from the start in order to assist in fashioning and pursuing such strategy. The strategy was pursued throughout the litigation which was, in February 2009 [i.e. when Clyde & Co were engaged] within his contemplation. By the time each of the other two firms was engaged on behalf of Mr Ablyazov the strategy was being pursued with vigour and it has been relentlessly pursued throughout the period of the engagement of all three firms up to the present day.”

41. Popplewell J in that case went on to say, in paragraph [99], that in relation to such strategy, the solicitors were not being employed in the ordinary course of professional engagement:

“On the contrary they were being unwittingly used as an instrument to pursue a strategy which, had they known of it, they would have been unable to pursue on their client’s behalf. It was an abuse of the normal relationship between solicitor and client to engage the solicitors in order to effect such a strategy, and there can be no confidence in communications between solicitor and client by which a client seeks to further such a strategy whilst trying to keep the solicitor in the dark about it.”

42. It seems to me that the key reasons, as summarised above, why the fraud exception applied to Mr Ablyazov, are equally applicable to the present case involving Mr Su, and that relief similar to that obtained in *JSC BTA Bank* should be granted in relation to the first category of documents sought by Lakatamia.
43. As far as the second category of documents is concerned (i.e. those concerning the sale and possible refinance of the Monaco properties): there is in my view no real basis for any distinction between those documents and those which are sought in relation to the first category. For present purposes, it should be assumed that Maître Zabaldano was acting unwittingly; i.e. without knowing that Mr Su was seeking to evade the Blair Freezing Order or his disclosure obligations. On that basis, Maître Zabaldano was being used, as the lawyers engaged in early 2019 were used,

unwittingly to assist in the concealment and dissipation of Mr Su's assets, and as part of the overall campaign described by Sir Michael Burton. Again, in my view, there is an abuse of the normal relationship of client and lawyer.

44. In relation to this second category, I have given careful consideration as to whether there are discretionary reasons for declining to grant the relief sought. In particular, I have considered the following matters.
- (1) The Monaco properties were sold, and the destination of the proceeds of sale has been known to Lakatamia for some time, as a result of the proceedings which culminated in the first contempt order. Disclosure of otherwise privileged material is therefore not required in order to establish the destination of the monies derived from the transaction on which Maître Zabaldano was instructed;
 - (2) Although there appears to have been the possibility of a refinance of the Monaco properties, that did not in fact take place. The properties were indeed sold. Accordingly, disclosure of otherwise privileged material relating to the refinancing is not required in order to assist in locating money derived from the properties, because there was no refinancing;
 - (3) Proceedings have been commenced against Maître Zabaldano in which it is alleged that he was party to a conspiracy with Mr Su to cause loss by unlawful means. That case will raise questions as to the extent of Maître Zabaldano's knowledge of relevant matters, in particular the judgment of Cooke J and the Blair Freezing Order. Maître Zabaldano is not a party to the present application, and has been given no opportunity to make submissions on the question of whether documents passing between him and Mr Su should be disclosed.
45. In the end, I have concluded that none of these matters provide a reason why appropriate relief should not be granted. Given that there was a possible refinancing, there is a real prospect that the communications between Mr Su and Maître Zabaldano will have encompassed discussion as to Mr Su's other assets which might have been made available for the purposes of providing security. If, as I consider to be the case, the iniquity exception applies, Lakatamia should be entitled to see these documents. Furthermore, any privilege would be a privilege of Mr Su, rather than Maître Zabaldano. Accordingly, it is Mr Su (not Maître Zabaldano) who must meet the case that privilege in these documents does not exist, and in my judgment he has not done so.

The terms of the relief sought

46. Lakatamia seeks an order in the following terms:

“1. The following documents are not subject to any relevant privilege of the Respondent or Cresta Overseas Limited (“Cresta”):

1.1. Correspondence between the Respondent and W Legal Limited and/or Marion Smith KC of Counsel and/or Damien

Falkowski of Counsel and/or Dr Anton van Dellen of Counsel in the period from 16 January to 29 March 2019.

1.2. Correspondence between the Respondent and/or representatives of Cresta and Maître Arnaud Zabaldano and/or members and employees of his firm, Zabaldano Avocats, in the period from 16 March 2015 to date.

1.3. Correspondence between the Respondent and Chao Pen Wei, also known as Sara Chao, in the period from 22 August 2011 to date.

2. The Independent Reviewing Lawyers appointed pursuant to the Search Order and the Smartphone Order are permitted to release the documents referred to at paragraph 1 and above, to the extent that such documents are not clearly irrelevant to the First Respondent's assets"

47. I do not consider it appropriate to grant an order in precisely these terms, since I am not persuaded that there can be no claim for privilege at all in relation to every item of correspondence covered by paragraphs 1.1 and 1.2. Furthermore, the sale of the Monaco properties took place in 2017, and any discussions about refinancing would have taken place prior to that time. I have not been persuaded, at present, that it would be appropriate to order disclosure beyond the end of February 2017, by which time payment of the proceeds of sale had been made to UP Shipping.

48. I consider that it is appropriate for the terms of the order to be similar to that made by Popplewell J in *JSC BTA Bank*, taking account of the existence of reviewing lawyers in the present case. I therefore propose, subject to any further submissions, to make an order as follows:

"1. The Independent Reviewing Lawyers appointed pursuant to the Search Order and the Smartphone Order are permitted to release the following documents:

1.1 Correspondence between the Respondent and W Legal Limited and/or Marion Smith KC of Counsel and/or Damien Falkowski of Counsel and/or Dr Anton van Dellen of Counsel in the period from 16 January to 29 March 2019, in so far as such correspondence concerns or contains information about the assets of the Respondent;

1.2 Correspondence between the Respondent and/or representatives of Cresta and Maître Arnaud Zabaldano and/or members and employees of his firm, Zabaldano Avocats, in the period from 16 March 2015 to 28 February 2017, in so far as such correspondence concerns or contains information about the assets of the Respondent."

49. I also consider that it is appropriate, as provided for in paragraph 3 of the Claimant's draft order, for permission to be given to use the documents for other applications or proceedings. This has previously been ordered in the context of documents produced pursuant to the search orders, and this should be extended to the documents whose production has been permitted on the basis that the fraud or iniquity exception applies.