

5 November 2018

Suez Fortune Investment Ltd (and another) v Talbot Underwriting Limited (and others)
(“The Brillante Virtuoso”)
[2018] EWHC 2929 (Comm)

BEFORE: Mr Justice Teare

CASE SUMMARY

The Court refused to grant an order requiring the non-disclosure of the identity of a witness known as ‘Theo Blake’ (a non-party respondent to the application). The Court set out the applicable two-stage test for such an application: (1) The threshold test: the grant of anonymity must be necessary, based on a the witness’ fear of danger; (2) If that threshold is met, the court will balance the witness’ interest in anonymity with the interests of the parties in a fair trial, together with the public interest in open justice. In the present case, the threshold test was not met, because the true identity of Theo Blake was already known to, or could easily have been discovered by, those who threatened him harm.

Factual background

This application relates underlying constructive total loss claim under a war risks policy on the vessel BRILLANTE VIRTUOSO, brought by the mortgagee of the vessel (the Owner’s claim having been struck out). That claim is defended on the basis that the vessel was “scuttled” by her Owner. The vessel became a constructive total loss following a fire off Aden in July 2011, deliberately started in the purifier room by means of an explosive incendiary device. The Second Claimant claims that the fire was caused by the hostile act of third parties, said to be renegade members of the Yemeni navy or coast guard who planned to take the vessel to Somalia and share in a ransom with Somali pirates. The Defendants agree that those who boarded the vessel and caused the fire were Yemeni, but allege that were they acting as part of a conspiracy with the Owner, with the assistance of a local salvor.

In the underlying proceedings, the Defendants rely upon a body of circumstantial evidence from which they say the court can confidently infer that there has been wilful misconduct by the Owner. In addition, they propose to rely upon the evidence of two “whistleblowers”. One of these whistleblowers, known as ‘Theo Blake’, has been assisting the City of London Police with its criminal investigation into the loss of the vessel (pursuant to which no charges have yet been brought). He gave a signed statement to the police in October 2017, which gives evidence of the alleged conspiracy with the benefit of his personal knowledge of the events and of his dealings with individuals alleged to have been involved. Theo Blake is the subject of a witness summons in the present proceedings.

The Defendants submitted that they should be entitled to reveal the true identity of Theo Blake in order that his credibility as a witness at trial could not be undermined by his anonymity. The Second Claimant submitted that knowledge of Theo Blake’s true identity will assist it in, for example, investigating whether statements allegedly made by third parties to him were in fact made by them to him. By contrast, Theo Blake and the City of London Police) (both of whom were respondents to the application) argued that anonymity is necessary for his, and his family’s, safety. They relied (inter alia) upon death threats allegedly made to others involved in the underlying events, and the fact that in Greece on 9/10

January 2018 calls were made to an address known only to Theo Blake's immediate family with the caller asking for Theo Blake by his real name. Theo Blake has been removed to this jurisdiction, and resides at a location known only to the police.

Anonymity: legal test

Teare J noted that the general rule was that 'the identity of a witness in civil proceedings will be made public as a matter of course.' That is subject to CPR 39.2(4), which says 'The court may order that the identity of any party or witness must not be disclosed if it considers non-disclosure necessary in order to protect the interests of that party or witness.' The burden in such applications lies with the party seeking non-disclosure.

Teare J summarised the applicable legal principles, at [12] – [16], as follows:

"In considering an application for non-disclosure of a witness' identity, the Court applies a two-stage test (see, for example, *Kalma v African Minerals Limited* [2018] EWHC 120 (QB), at [29]). These stages are: (1) The threshold test: the grant of anonymity must be *necessary*, based on a legitimate fear of danger; (2) If that threshold is met, the court will balance the witness' interest in anonymity with the interests of the parties in a fair trial, together with the public interest in open justice.

As to the first stage of the test, the threshold of 'necessity' is 'formidable' (see the *Kalma* case, at [31] and the *Yalland* case, at [24]). The applicant must show some direct link between the witness' legitimate fear of danger, on the one hand, and the disclosure of the witness' identity, on the other. If the extent of the witness' fear, or the prospects of the danger eventuating, would not be 'materially increased' by the disclosure of the witness' identity, then it cannot be said that *anonymity* is necessary, though of course some other protective measures may be (see *Re Officer L*, at [24]). Accordingly, anonymity is unlikely to be necessary if the identity of the witness is already known to, or could easily be discovered by, those who threaten harm (see *Cherney v Deripaska* [2012] EWHC 1781 (Comm), at [51] – [52]).

It is sufficient (at least for the purposes of the common law jurisdiction) that the witness has a genuine subjective fear of danger, even if that fear is not objectively verified (see the *Adebolajo* case, at [30], and *Libyan Investment Authority v Société Générale* [2015] EWHC 550 (QB), at [32]). If such a genuine fear is proven, it is no response to show that other people in the same position as the applicant would not be similarly fearful (see the *Kalma* case, at [34]).

The second stage of the test arises only if the 'necessity' threshold has been met. This stage requires a balancing exercise, looking at the interests of the witness, the parties, and the public in all the circumstances of the case. As Lloyd-Jones and Lewis LJ said in the *Yalland* case, at [23]: '[w]hether a departure from the principle of open justice is justified in any particular case will be highly fact-specific and will require a balancing of the competing rights and interests.'

Amongst the factors that may be considered within this balancing exercise are: (1) what the witness' evidence is and how central it is to either party's case; (2) the nature and extent

of the danger to which the witness fears he or she is exposed; (3) the extent of the public interest in the case, and whether the public interest would be met by, for example the disclosure of certain descriptive qualities about the witness rather than his or her actual identity (see the *Yalland* case, at [38] – [39]); and (4) whether the witness is, or is associated with, a party to the proceedings, or has been called purely to assist in the resolution of the dispute. As to the last of these, Lord Woolf MR said in the *Kaim Todner* case, at [8]: ‘A witness who has no interest in the proceedings has the strongest claim to be protected by the court if he or she will be prejudiced by publicity, since the courts and parties may depend on their co-operation.’ The extent to which these, and other, factors are relevant will depend on the facts of each case.”

Decision

Teare J refused the application for non-disclosure, on the basis that the threshold test had not been met. It was clear that Theo Blake’s true identity was known to, or easily discoverable by, those who threatened him harm, and *‘had already been linked with the provision of information as to the owners’ complicity.*’ Theo Blake’s own belief was that it was the contents of a witness statement provided by the Defendant’s solicitor that had led to Theo Blake’s being identified in Greece as the possible source of the information contained therein. In any event, the Bank could at any time show the witness statement to the Owner. As a result, what was protecting Theo Blake was not anonymity but rather the protective arrangements put in place by the City of London Police. Further special arrangements for Theo Blake’s giving evidence (as to which the Defendants took a “benevolently neutral” stance) could be considered in due course.

NOTE: This summary is provided to assist in understanding the Court’s decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments of the Commercial Court are public documents and are available at: <https://www.bailii.org/ew/cases/EWHC/Comm/>