

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

Royal Courts of Justice
Rolls Building, 7 Rolls Buildings
Fetter Lane, London EC4A 1NL

Date: 05/11/2018

Before :

MR. JUSTICE TEARE

Between :

(1) Suez Fortune Investments Ltd **Claimants**

(2) Piraeus Bank AE

- and -

Talbot Underwriting Ltd **Defendants**

And others

- and -

(1) The witness known as Theo Blake **Non-Party**

(2) The Commissioner of the City of London Police **Respondents**

Peter MacDonald Eggers QC and Tim Jenns (instructed by Clyde & Co LLP) for the
Second Claimant

Jonathan Gaisman QC, Richard Waller QC and Keir Howie (instructed by Norton Rose
Fulbright LLP) for the Defendants

Gary Pons (instructed under the direct access scheme) for the witness known as Theo Blake

Sarah Wood (instructed by the Comptroller and City Solicitor's Department) for the
Commissioner of the City of London Police

Hearing date: 26 October 2018

Judgment Approved

Mr. Justice Teare:

1. This action concerns a constructive total loss claim under a war risks policy on the vessel BRILLANTE VIRTUOSO which is being defended on the grounds that the vessel was "scuttled" by her Owner. The claim by the First Claimant, the Owner, has been struck out for failure to give disclosure but the claim by the Second Claimant, the vessel's mortgagee bank, is pursued. The trial is due to commence in February 2019 and scheduled to last many weeks.
2. This is an application by the Defendants, the war risk underwriters, for an order that a witness in this action, presently known by the pseudonym Theo Blake, should be

identified by his real name. His real name is known to the Defendants but not to the Second Claimant, who supports the Defendants' application. The application is however resisted by Theo Blake and by the City of London Police.

3. 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 says 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 indeed Yemeni, but say that they were acting as part of a conspiracy with the Owner, with the assistance of a local salvor.
4. There is at present no order requiring that the true identity of Theo Blake not be disclosed. However, in deference to the concerns expressed by Theo Blake and the City of London Police the Defendants have properly decided not to reveal the true identity of Theo Blake without the court's approval. Thus, this application is made under the court's general powers of case management in CPR 3.1 but it is common ground that in exercising such powers the court will have regard to the approach taken when an application is made under CPR 39.2(4) for an order that the true identity of a witness not be disclosed.
5. The Defendants, as is usual in a case where scuttling is alleged, rely upon a very considerable body of circumstantial evidence from which they say the court can confidently infer that there has been wilful misconduct by the Owner. In this case, in addition to that evidence, the Defendants propose to rely upon the evidence of two "whistleblowers". One, presently known as "X", claims personal knowledge of the alleged conspiracy to scuttle. He has not made a statement but has spoken to a claims investigator who will give hearsay evidence of what X told him. The second whistleblower is Theo Blake.
6. Theo Blake has been assisting the City of London Police with their 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 the name of "Theo Blake" in October 2017. In that statement he gives evidence, as summarised by the Defendants, of the alleged conspiracy with the benefit of his personal knowledge of the events and of his dealings with a number of the key individuals alleged to have been involved in the conspiracy including the local salvor who was first on the scene to assist the vessel. By contrast, the Second Claimant says that much of his evidence is hearsay or opinion. The Defendants obtained a copy of that statement in March 2018 pursuant to an order of the court and it has been served in these proceedings. Theo Blake has been served with a witness summons. He has accepted in a further statement to the court (provided in response to this application) that that summons compels him to give evidence. It is therefore assumed that he will do so.
7. The reason why the Defendants wish to be able to reveal the true identity of Theo Blake to the Second Claimant is that they do not wish the credibility of Theo Blake to be limited by his anonymity. The reason why the Second Claimant wishes to know his true identity is that knowledge of his identity will assist them in investigating his credibility, for example, in investigating whether statements allegedly made by third parties to him were in fact made by them to him.

8. However, Theo Blake says that there is a need to keep his identity secret. He also fears that there will be threats to his mother if his identity is revealed. He relies upon threats to others, in particular threats alleged to have been made to an able seaman, Mr. Marquez, by the Owner and by the chief engineer that he will be killed if he tells what happened on the vessel, and threats to X that he will “end up in the ground”. In addition, Mr. Zavos of Norton Rose (the solicitors acting for the Defendants) understands from Theo Blake and the City of London Police that in Greece on 9/10 January 2018 calls were made to an address known only to Theo Blake’s immediate family and the caller asked for Theo Blake by his real name. Theo Blake believes that people were sent in cars to “grab” him. As a result of these events the police, who deemed these events to be a credible threat to Theo Blake and his family, have removed Theo Blake to this jurisdiction where he resides at a location known only to the police. Theo Blake has seen Mr. Zavos’ statement and has not challenged his account of the events in Greece.
9. Whilst the Defendants do not dispute that there is a credible risk to the safety of Theo Blake, the Second Claimant does not accept that there have been any threats. But, because the alleged threats may be a matter explored in evidence at the trial in relation to which the court may have to make findings, the Second Claimant is anxious that the court does not rule on such matters now. In the light of that concern the present application is to be determined upon an assumption that the threats to which I have referred are genuine. I have therefore not reviewed the evidence in any critical sense or come to any conclusion upon it.

THE LAW

10. The applicable legal principles were not in dispute. Ordinarily, the identity of a witness in civil proceedings will be made public as a matter of course (see *Scott v Scott* [1913] AC 417). The CPR provides for the Court to depart from that general rule. CPR 39.2(4) 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 (see, for example, *R v Legal Aid Board (ex p. Kaim Todner)* [1999] QB 966, at [2], and *Yalland v Secretary of State for Exiting the European Union* [2017] EWHC 629 (Admin), at [24]).
11. The parties based their submissions largely on the Court’s common law jurisdiction to grant anonymity, rather than on the ECHR, but it is clear that the applicable principles are substantially the same whichever jurisdiction is being invoked (see *Re Officer L and others* [2007] 1 WLR 2135, and *Adebolajo v Ministry of Justice* [2017] EWHC 3568 (QB), at [19] – [23]). As Lord Reed said in *Re BBC* [2014] UKSC 25, ‘the common law principle of open justice remains in vigour, even when Convention rights are also applicable’.
12. 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.

13. 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]).
14. 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]).
15. 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.’
16. 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.

DISCUSSION

17. The first and crucial question on this application is whether Theo Blake and the City of London Police can show that anonymity is necessary to ensure the safety of Theo Blake and his mother. The Defendants and the Second Claimant are agreed that that cannot be shown because, they submit, his identity is already known to those whom from he is said to be at risk and it can, in any event, be determined from the biographical details of Theo Blake in his statement. That his identity is already known to those who would, it is alleged, do him harm is apparent from the events in Greece in January 2018. Those who called by telephone asked for him by name. Thus, as Mr. Gaisman put it, “the cat is already out of the bag”.

18. Mr. Pons, on behalf of Theo Blake, has submitted that there is a real and immediate risk to the life of Theo Blake. As I have said that is to be assumed on this application. He further submitted that “were Theo Blake’s real identity to be known coupled with the fact that he is going to be giving evidence at the trial for the Defendants, then there is every likelihood that the threats that have been made will be carried out.” This submission was developed orally. Mr. Pons, noting that the witness statement made by Theo Blake was not disclosed to the Defendants until March 2018, said that the events in Greece in January 2018 were not linked with the witness statement. But if his true identity were made public they could now be, and thus the risks to Theo Blake would be heightened. Ms. Wood, on behalf of the City of London Police, adopted Mr. Pons’ submissions.
19. The first comment to make upon Mr. Pons’ submission is that, if it is correct, what heightens the risk to Mr. Blake is not the revelation of his identity, because that is already known, but knowledge of the witness statement he has provided. The second comment to be made (one made by Mr. Gaisman in his reply) is that Theo Blake believes- according to Mr. Zavos- that it was the contents of Mr. Zavos’ 19th witness statement (which said that a person had been interviewed at length by the City of London Police and that his evidence went directly to the central issue of the Owners’ complicity) which led to Theo Blake’s being identified in Greece as a possible source of the information in Mr. Zavos’ statement. Thus, said Mr Gaisman, the true identity of the person known as Theo Blake had already been linked with the provision of information as to the owners’ complicity. Mr. Gaisman further noted that although the loss of the BRILLANTE VIRTUOSO occurred in July 2011, the attempt to “grab” Theo Blake did not occur until January 2018. In circumstances where Mr. Blake had made his statement to the police in October 2017 it is more likely than not that the attempt was provoked by the statement or by knowledge that Theo Blake was providing information. Finally, Mr. Gaisman said that the Bank may already have shown the witness statement to the Owner or, if it has not done so, there is no bar on its doing so at any time. Thus, any enhancement of the risk to Theo Blake caused by knowledge of the “detailed and condemnatory” evidence in the witness statement either has already come about or may come about hereafter. In either case it is not the revelation of Theo Blake’s true identity which enhances the risk but knowledge of the contents of his witness statement, something which is not sought to be restricted.
20. I have given this application careful and anxious thought. That is obviously appropriate when a risk to life is said to be engaged. I have also kept well in mind that Theo Blake is not a party but a witness and so, for the reasons given by Lord Woolf in the *Kaim Todner* case, he has the “strongest claim to be protected by the court”.
21. This application concerns the question whether the true identity of Theo Blake can be revealed to the Second Claimant. There does not appear to be any dispute that his true identity is already known to those who, it is said, threaten to harm him and his mother. That is the inevitable conclusion from the events in Greece in January 2018. That being so I find it impossible to resist the conclusion that revealing his true identity to the Second Claimant will not give rise to a risk to Theo Blake over and above that which already exists. For that reason I am unable to find that the anonymity of Theo Blake is necessary to avoid harm to him or his mother.
22. That being so it is unnecessary to conduct a balancing exercise between, on the one hand, the risk to Theo Blake and, on the other hand, the need to ensure a fair and just

trial of the dispute between the Second Claimant and the Defendants. It must follow that the application made by the Defendants should be granted.

23. Mr. Pons's submission, as I understood it, was that it was the linkage of Theo Blake's identity with the witness statement he gave to the City of London Police, and which is now available to the Defendants, that will increase the risk to Theo Blake. I am not persuaded that that is a good or a sufficient reason for retaining the anonymity of Theo Blake. First, it appears probable that the attempt to "grab" him in Greece in January 2018 was triggered by knowledge of the assistance he had given to the police. Second, Theo Blake himself believes that it was the account of that assistance in Mr. Zavos' 19th witness statement which led to that attempt. For those reasons it appears that the linkage relied upon by Mr. Pons has already occurred. Preserving the anonymity of Theo Blake will not prevent that linkage, which appears already to have been made.
24. What may not have happened is the disclosure of Theo Blake's statement to those who are said to be a threat to him. If and when that happens there may, it is said, be an increase in the risk to Theo Blake and his mother. But nobody has suggested that such disclosure can be withheld and in any event a refusal to permit the Second Claimant to be informed of Theo Blake's true identity will not prevent such disclosure.
25. What protects Theo Blake is the fact that he resides at an unknown location within the jurisdiction. Mr. Pons submitted that disclosure of when Theo Blake will be giving evidence "will allow him to be easily located". That is a reason for those responsible for transporting him to and from court to take special care to avoid him being followed to his place of residence. In this regard Mr. Pons said that he would wish to be able to make submissions as to the arrangements which govern the giving of evidence by Theo Blake. There is no reason why Mr. Pons should not be able to make such submissions, and the Defendants have said that they take a 'benevolently neutral' position on such matters. It may well be that the Pre-trial Review on 30 November 2018 would be an appropriate occasion on which to make such submissions. However, I have no doubt that this matter will be discussed before then by those representing the Defendants, Theo Blake, the City of London Police and the Second Claimant.
26. There remains one point made by Ms Wood on behalf of the City of London Police. She said that in the event that criminal charges were brought an order by this court refusing anonymity to Theo Blake would "bind" the Crown Court. By that I understood her to mean that in practice it would not be possible for the Crown Court to permit Theo Blake to give evidence anonymously in any criminal case because his identity would already have been disclosed. She said that was a matter I should bear in mind. I have done so but I do not consider that it requires me to alter the view I have formed. First, there are as yet no criminal proceedings. There may never be any. Second, the evidence which shows that Theo Blake's identity is already known will also be available to the Crown Court and there is no reason to think that the Crown Court would reach a different decision than this court on the question of a need for anonymity.
27. The Defendants also made an application for disclosure of certain emails referred to in Theo Blake's statement in soft copy or native format. They wish to obtain these in order to establish that they were sent on the date they bear. In the event that I grant the Defendants' first application, which I have done, there is no opposition to this further application. I therefore grant that also.

28. My conclusion therefore is that both of the Defendants' applications are granted. I would request all parties to cooperate in agreeing a form of order giving effect to my ruling.