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UNRELIABLE, ABSENT AND UNPROTECTED WITNESSES - WITNESS ISSUES IN ENGLISH LITIGATION

THE LONDON LITIGATION LETTER

DERIPASKA V CHERNEY

The respondent, R, brought proceedings against the appellant, A. R claimed that he and A had entered into an agreement regarding the sale of an interest in a Russian aluminium company. A denied that any agreement had been made. He alleged that R was involved in an organised crime group in Russia, and that he had been the victim of an extortion and protection racket perpetuated by R and the criminal group. In support of his defence A intended to call evidence from certain witnesses about the existence, membership and activities of Russian criminal gangs. However, he believed that his intended witnesses would face the risk of violence as a result of giving evidence and he, therefore, applied to the court for witness protection orders so that they could give evidence either partly or wholly in private. A argued that a refusal of the Order sought would infringe the witnesses' right to life guaranteed by Article 2 of the European Convention on Human Rights (the Convention). Furthermore, that protection was also necessary in the interests of justice.

THE FIRST INSTANCE DECISION

The judge allowed certain witness protection measures to be put in place for two witnesses, but dismissed the application in regard to the ten remaining witnesses. He held that there was no specific reason to think that any of the majority of the witnesses had in fact been the subject of threats or pressure not to give evidence. A appealed.

THE APPEAL RULING

The appeal was dismissed. The Court of Appeal considered the two limbs of A's appeal argument. First, it found that to succeed on the submission under Article 2 of the Convention A had to overcome a high threshold; he had to demonstrate that there was a real and immediate risk, objectively verified, to the lives of the witnesses in question and that the threat would be materially increased if the protection was not granted. However, the evidence which A had relied upon had been of a high level of generality. None of the witnesses had given direct evidence on the matters in dispute, and none had expressed a fear of being killed as a result of their evidence. Therefore, A had not met the required threshold and consequently Article 2 of the Convention would not be infringed if the protection orders were not to be granted.

Secondly, as to whether the proposed witness protection orders were necessary in the interests of justice, the Court of Appeal held that the starting point was the general principle that justice must be done in public. The question before the Court had not been one of the exercise of the Court's discretion; rather it had been a question of whether the necessary derogation from the general principle of open justice had been established. In deciding whether an anonymity order was necessary a judge had to weigh different factors. The ultimate conclusion to the question was one to which different people might come to different conclusions on the same facts, without any of them being wrong. Therefore, unless the judge had taken into account immaterial factors, omitted to take into account material factors, erred in principle, or come to a conclusion that was impermissible or not open to him, an appellate court would be reluctant to interfere with the first instance decision. The onus had, therefore, been on A to satisfy the Court of Appeal that the judge had been wrong and not merely that different inferences could be drawn.

In the present case, the first instance judge had taken into account that organised criminal gangs were still active in Russia and that there had been evidence of intimidation against witnesses in criminal investigations. However, the real question had been whether there was a real risk of reprisals against the witnesses in question arising out of their evidence. The first instance judge had noted that most of the relevant events had occurred nearly 20 years ago and the facts were already in the public domain as they had been widely reported. Further, the fact that the case had generated international publicity was a powerful pointer towards the public interest in the trial being conducted in public.

The Court of Appeal stated that there was no specific reason to suppose that the witnesses would not give full and frank evidence without the anonymity orders. A's submission that the witnesses may become fearful and change their minds about giving evidence if they were not protected had been speculation. The first instance judge had not rejected A's evidence wholesale but had rather taken a balanced view, and crucially his decision was provisional and could be revisited if there were material changes in the circumstances. Therefore, the balancing exercise undertaken by the first instance judge was one which he had conducted in accordance with the law and was not plainly wrong. As a result, the argument that the protection orders were necessary in the interests of justice, also failed.

EVALUATING THE EVIDENCE OF A NOT ENTIRELY RELIABLE WITNESS

Slocom Trading Ltd v Tatik Inc and others [2012] EWHC 3464 (Ch) concerned a dispute as to whether a contract was a sham. At the centre of the case was a former Swiss Banker, H, who had acted as a financial advisor to two different Russian businessmen. H had been authorised by a wealthy Russian businessman, who controlled the claimant company, to invest his funds at the best possible return, but to do so as safely as possible. Unbeknownst to the Claimant, H had loaned the Claimant's money to another wealthy Russian and companies that he controlled (the Defendants). The Claimant subsequently brought proceedings seeking to recover the money loaned and a large villa in the Cote D'Azur. The Claimant called H as a witness. The Defendants submitted that H's evidence should be

rejected as he was fundamentally dishonest and had acted for his own personal gain. They relied upon the fact H had signed and processed invoices that he knew to be false, had allowed a company to be used as a vehicle for dishonest transactions, and had transferred the ownership of companies using sham documents and had then used those documents as the basis on which to instruct lawyers.

Roth J held that the fact that an individual had acted dishonestly did not mean that he was dishonest in everything he said and did. Roth J stated that after observing H under "intensive" cross examination whilst also assessing his answers against contemporaneous documents, he did not find that H was totally lacking credibility.

Roth J also took account of the fact that H had agreed to give evidence knowing full well that he would be subjected to a very uncomfortable cross examination, even though he was not a party to the case and could not be compelled to attend court as he was living in Switzerland. Roth J believed that H knew that he had let down the Claimant's principal and that, therefore, he should do everything he could to help him recover what he had lost. Accordingly Roth J did not reject H's evidence but rather held that he would treat it with great care.

THE COURT'S APPROACH WHEN A POTENTIALLY KEY WITNESS ELECTS NOT TO GIVE EVIDENCE

In the same case, Roth J also had to consider the impact of the Defendants' wealthy Russian principal's decision not to give evidence. He held that the principles to be applied in such circumstances were: if the evidence of the witness would have been relevant to the case, the Court would be entitled to draw adverse inferences; if the Court did draw such inferences they might go to strengthen the evidence of the other party or they might weaken the evidence of the party who could have reasonably been expected to call the witness. However, there had to be some evidence, no matter how weak, adduced by the other party, on the issues in question before the Court would be entitled to draw adverse inferences; if the witness had a sufficient reason for his absence, then no inferences would be drawn by the Court. Accordingly, Roth J held that he would bear these principles in mind when assessing the evidence.

COMMENT

A party applying for an anonymity order has a high threshold to meet, as the English Court is traditionally reluctant to depart from the principle of open justice. The question that the Court will set itself, on such an application, is not whether or not a witness should be protected, but rather whether the need for a derogation from the principle of open justice has been established. Therefore, it is for the party applying for witness protection to convince the Court that there is a real risk of reprisals against the witness if the witness is not allowed to give evidence in private. Generalities about potential threats to witnesses will not be sufficient.

The English Court will not immediately disregard the evidence of an unreliable witness; rather it will evaluate it against contemporaneous documents and the conduct of the witness in the witness box. However, it is a high risk strategy for a witness to refuse to give evidence as it is open to the Court to draw adverse inferences from his absence. All that is required for the Court to do so, is evidence from the other side, no matter how weak, on issues relevant to that witness.

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FEBRUARY 2013

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