Neutral Citation Number: [2018] EWHC 120 (QB)

Case No: 13X05618

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/01/2018

Before :

MR JUSTICE TURNER

- -

Between :

Kadie Kalma & Others	**Claimants**
- and -	
1) African Minerals Limited	**Defendants**
2) African Mineral (SL) Limited	
3) Tonkolili Iron Ore (SL) Limited	

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Richard Hermer QC, **Eleanor Mitchell** and **Chris Buttler** (instructed by **Leigh Day Solicitors**) for the **Claimants**
Andrew Bershadski and **Robert Cumming** (instructed by **DWF LLP**) for the **Defendants**

Hearing dates: 15th January 2018

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE TURNER

Mr Justice Turner :

INTRODUCTION

1. Tonkolili is a district in the north of Sierra Leone. It is home to the biggest iron ore deposit in Africa. The third defendant is the operator and licensee of the Tonkolili mine site. The 41 claimants all live in villages located close to the mine. It is alleged on their behalf that there were two incidents in November 2010 and April 2012 respectively in which they and other villagers were unlawfully assaulted and imprisoned by the Sierra Leonean Police ("the SLP"). Central to their claims is the controversial assertion that the defendants were both complicit and directly involved in this violence.

2. For reasons which call for no further particularisation, the third defendant has, over time, inherited the rights and obligations of the first and second defendants and is thus the only defendant to play an active part in this litigation. For ease of reference, therefore, where context allows, the defendants generically will henceforth be referred to simply as the defendant.

3. For the purpose of this judgment, it is not necessary to descend into detail concerning the incidents relied upon. Short summaries will suffice.

4. The 2010 incident arose out of a protest staged by the villagers which was directed against the defendant. They were objecting to the clearing of farmland to facilitate the mining operations. It is alleged that the SLP responded to the protest with extreme violence which the defendant both encouraged and participated in.

5. The 2012 incident arose out of strike organised by employees of the defendant to protest about their treatment, pay and conditions. It is alleged that over a period of two days the SLP responded once more with extreme violence upon the instructions and with the assistance of the defendant.

6. The claimants have brought claims for compensation against the defendant arising out of injuries, loss and damage alleged to have been sustained in the course of these two incidents. The trial is listed to start in a little over a week's time.

7. The procedural history of this litigation has been beset with complications, delay and mutual recrimination. Even at this late stage, there remain important matters to be resolved. One such issue forms the subject matter of this judgment. It relates to an application that a number of the claimants' witnesses should be provided with a degree of anonymity to mitigate the risk or fear that, if identified, they would face reprisals. There are a total of six such individuals whose alleged anxieties fall to be considered. A witness statement from each of them has been served from which such details as could lead to their identification have been redacted.

8. The defendant contends that none of the six witnesses should be afforded anonymity. In response, the claimants accept that unredacted statements should be served but argue that only a limited number of named individuals should be permitted to see these statements and that these individuals should be bound by an undertaking not to disclose the details relevant to identification to others. Those with access to the

unredacted statements would be said to be members of what has come to be described in other cases as a "confidentiality club".

THE LAW

9. CPR 39.2(4) provides:

> "(4) 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."

10. In Yalland v Secretary of State for Exiting the European Union [2017] EWHC 629 (Admin), the Divisional Court held:

> "23 Whether 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. The starting point must be that in a Parliamentary democracy subject to the rule of law, a person who wishes to bring a public law challenge to the conduct of the Government on the ground that it is unlawful should normally be expected to do so openly and to identify himself or herself in the process.
>
> 24 Any exception to the principle of open justice will have to be shown to be strictly necessary in order to protect the interests of the administration of justice. The burden of establishing any derogation from the general principle rests on the party seeking it. It must be established by clear and cogent evidence."

11. The strength of any given claim to anonymity will, however, depend in part upon the status within the litigation of the individual whose interests are under consideration. As Lord Woolf observed in R v Legal Aid Board [1998] 3 W.L.R. 925:

> "8. A distinction can also be made depending on whether what is being sought is anonymity for a plaintiff, a defendant or a third party. It is not unreasonable to regard the person who initiates the proceedings as having accepted the normal incidence of the public nature of court proceedings. If you are a defendant you may have an interest equal to that of the plaintiff in the outcome of the proceedings but you have not chosen to initiate court proceedings which are normally conducted in public. 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. In general, however, parties and witnesses have to accept the embarrassment and damage to their reputation and the possible consequential loss which can be inherent in being involved in litigation. The protection to which they are entitled is normally provided by a judgment

> delivered in public which will refute unfounded allegations. Any other approach would result in wholly unacceptable inroads on the general rule."

12. There are two distinct jurisprudential bases upon which an anonymity order can be made. One is by the application of Articles 2 and/or 3 of the European Convention on Human Rights. The other is on the grounds of the common law principle of fairness. The claimants in this case do not rely on the former and so no purpose would be served by examining its scope and application.

13. The nature of the common law approach was set out by the House of Lords in In re Officer L [2007] 1 W.L.R. 2135 in which Lord Carswell held:

> "22 The principles which apply to a tribunal's common law duty of fairness towards the persons whom it proposes to call to give evidence before it are distinct and in some respects different from those which govern a decision made in respect of an article 2 risk. They entail consideration of concerns other than the risk to life, although as the Court of Appeal said in para 8 of its judgment in the Widgery Soldiers Case [2002] 1 WLR 1249, an allegation of unfairness which involves a risk to the lives of witnesses is pre-eminently one that the court must consider with the most anxious scrutiny. Subjective fears, even if not well-founded, can be taken into account, as the Court of Appeal said in the earlier case of R v Lord Saville of Newdigate, Ex p A [2000] 1 WLR 1855. It is unfair and wrong that witnesses should be avoidably subjected to fears arising from giving evidence, the more so if that has an adverse impact on their health. It is possible to envisage a range of other matters which could make for unfairness in relation of witnesses. Whether it is necessary to require witnesses to give evidence without anonymity is to be determined, as the tribunal correctly apprehended, by balancing a number of factors which need to be weighed in order to reach a determination."

14. One way in which the potential unfairness to other parties to which an anonymity order might otherwise give rise can be mitigated is by the creation of a confidentiality club of the type advocated on behalf of the claimants in this case. As Hamblen J held in The Libyan Investment Authority v Societe Generale S.A. [2016] EWHC 375 (Comm):

> "34 The imposition of a confidentiality club and, if so, its terms, generally involves a balancing exercise. Factors relevant to the exercise of the court's discretion are likely to include:
>
> (1) The court's assessment of the degree and severity of the identified risk and the threat posed by the inclusion or exclusion of particular individuals within the confidentiality club…

> (2) The inherent desirability of including at least one duly appointed representative of each party within a confidentiality club…
>
> (3) The importance of the confidential information to the issues in the case …
>
> (4) The nature of the confidential information and whether it needs to be considered by people with access to technical or expert knowledge …
>
> (5) Practical considerations, such as the degree of disruption that will be caused if only part of a legal team is entitled to review, discuss and act upon the confidential information…"

15. Confidentiality clubs are most typically used in antitrust and intellectual property litigation but, as the court observed in The Libyan Investment Authority, the device can properly be deployed in other categories of case where appropriate.

THE SCOPE OF THE EVIDENCE PROPOSED TO BE GIVEN BY THE ANONYMOUS WITNESSES

16. There were originally eight witnesses who provided statements. Two of these however, appear no longer to be willing to co-operate. These two were previously referred to as witnesses 2 and 6. Only the remaining six now fall to be considered.

17. The evidence sought to be adduced from each of these six can be briefly summarised thus:

- Witness 1 was at the material time an African Minerals Limited ("AML") security team leader. His evidence is to the effect that villagers were detained in the aftermath of the 2010 incident and that he saw an employee of the defendant addressing the OSD at the time.

- Witness 3 is an AML security team leader. His evidence is to the effect that PLO Dumbuya told him that the defendant had paid the Operational Support Division ("OSD") of the SLP to break the strike in the 2012 incident.

- Witness 4 is an employee of AML. His evidence is to the effect that he saw PLO Dumbuya giving a brown envelope to the OSD commander and Kim Gordon, the AML Security Manager, instructing members of the OSD to use "the hard way" on those who were striking.

- Witness 5 worked for AML as a driver. His evidence is to the effect that an AML manager told members of the OSD in 2012 that they were to "do anything" to the workers who were causing problems.

- Witness 7 is an administrative manager in a local construction firm. His evidence is to the effect that in 2012 he saw an AML employee make a cash payment to police officers and provide them with instructions.

- Witness 8 is an OSD commander. His evidence is to the effect that his own commander was provided with money and alcohol as an incentive to him and his men to break the strike. Kim Gordon instructed the police to use live rounds if necessary. AML's PLO drove the commander round and told him who to arrest.

18. The evidence of these witnesses is of considerable relevance to the issues in the case. The evidence of witness 8 in particular is, potentially, of central importance.

REASONS GIVEN BY EACH WITNESS TO JUSTIFY ANONYMITY

19. Each of the six witnesses have provided a witness statement setting out their reasons for seeking anonymity. Again, a brief summary will suffice:

- Witness 1 says he is afraid for his own safety. He makes particular reference to one Salieu Conteh who was employed by the defendant and who was a union representative who spoke out against some of their practices at a public enquiry. Some two months later Mr Conteh died in what appeared to be an accident in which he came off his motorcycle. Witness 1 was one of the first to arrive at the scene and, according to his witness statement, he concluded that the nature of the injuries suggested that Mr Conteh had been ambushed and killed. He was also scared by rumours that the OSD had killed and buried victims at it mine site.

- Witness 3 expressed fears for his safety and for his job. He too was on the scene shortly after the death of Mr Conteh and, from what he saw, concluded that it had been no accident. He says that many people have lost their jobs through speaking out against the defendant and gives an example of this happening to one of his friends. It is to be noted that the general level of unemployment in Sierra Leone is very high with in excess of 60% lying below the national poverty line. Thus the loss of a job would be likely to have significantly more serious consequences than would follow in, for example, the UK.

- Witness 4 expressed fears for his personal safety from named senior personnel working for the defendant. He refers to a fellow employee who he says had been suspended without pay from his employment with the defendant for speaking out to the media about the mine. He has children of his own and suspension or termination of his job would have very severe consequences for him and his family.

- Witness 5 gave evidence to the effect that AML security had a policy of shooting intruders and burying the bodies and, as the only witness to this practice, he was particularly vulnerable to reprisals. He expressed fear that he might be shot by the OSD who were also involved in the shootings. He also professed a belief in black magic which he feared might be used to kill him for speaking out.

- Witness 7 expresses fears for his personal safety referring to an allegation that 14 people protesting in Kono about the relocation of their village by a mining company were shot and killed.

- Witness 8 was also a friend of Mr Conteh and says that he believes him to have been unlawfully killed for speaking out. He expresses fears that the paramount chief would have him killed if he were to be identified.

OTHER EVIDENCE RELATING TO RISK

20. The claimants further rely upon the evidence of other individuals who have come forward on this issue.

21. Edmond Abu, is the director of an NGO campaigning for economic justice. He gave a press conference raising the issue of a local landowner who complained that the defendant's parent company had deprived him of his land without compensation. Later he received a series of anonymous phone calls threatening that he and his family would be killed if he did not stop talking to the media about the company. He went to the lengths of removing his children from school out of fears for their safety.

22. Rona Peligal is the former Deputy Director of the Africa Division at Human Rights Watch. She states that a woman who had assisted her in hosting the launch of a report on human rights abuses in Sierra Leone's mining community gave an interview about the report's findings whereupon she was assaulted at the radio station where the interview had taken place.

23. Abdul Fatoma is the Chief Executive of the organisation Campaign for Human Rights and Development International. He states that there is a close relationship between the mining companies and the government of Sierra Leone because of the revenue which mining generates for the state. He asserts that the police work in the interests of the mines rather that the local population and that, as a result, it is not safe for his organisation's researchers to work on the ground.

24. Similar assertions are made in a witness statement from Abass Kamara who works for another organisation intended to promote the rights of the local communities.

25. Vandie Nabie is a barrister in private practice working in Sierra Leone. He represented the villagers in the Magistrates' Court in the aftermath of the 2010 incident. After his first court appearance in this role, he was approached by the manager of the hotel at which he was staying saying that he had received visits from AML employees and a private security firm from which he concluded that Mr Nabie should leave for his own safety. In about February 2011, Mr Nabie said that he had been approached by the Local Unit Commander ("LUC") of AML with whom he was on good terms. The LUC ran up to him outside court and told him that he had instructions to kill him. Mr Nabie fled the town and was frightened into abandoning his representation of the villagers in the criminal proceedings.

THE DEFENCE CASE ON THE ALLEGED THREAT TO THE WITNESSES

26. The defendant denies that the evidence relating to the threat or perceived threat to the safety and wellbeing of the six witnesses is sufficiently cogent to pass the threshold beyond which the court should even embark on a consideration of a path which might involve any incursions into the principle of open justice.

27. In support of this contention, the defendant points out that there are a number of witnesses who have provided witness statements hostile to the interests of the defendant but who have not considered it necessary to apply for anonymity. Furthermore, there is no evidence of retribution or threats of retribution having been made to those witnesses whose identities have already been disclosed.

28. It is contended that the evidence on this issue relied upon by the claimants, when taken as a whole, amounts to no more than the expression of unspecified and subjective concerns of doubtful genuineness backed up by no more than conspiracy theory and unjustifiable stereotyping of Sierra Leone as a country where "this sort of thing" is inherently likely to be going on.

THE THRESHOLD

29. At this stage of my analysis I must point out that the question is whether or not the evidence tendered on behalf of the claimants is sufficient even to surmount the threshold which would entitle the court even to begin to consider the competing issues arising on the question of common law fairness. Even if it is, this does not, without more, entitle the claimants to succeed in abrogating the default position of open justice. There must still follow a proper balancing exercise.

30. I have reached the conclusion that the relevant threshold has been passed.

31. I bear in mind that none of the six witnesses is a party to the action and so the relevant threshold, whilst remaining formidable, is less onerous than if they had been bringing their own claims.

32. Taking the evidence from each of the six witnesses separately and assessing it against the more generic evidence of the background potential for violence or the threat of violence in the event of the identities of the witnesses being made public, I am satisfied in each case that, at the very least, a genuine subjective fear of violence and/or the loss of livelihood had been made out.

33. It is unnecessary for me to adjudicate on the objective validity of the fears expressed by these witnesses. Indeed, if I were tempted to do so then there might arise the risk that the court could be perceived to have drawn conclusions adverse to the defence case concerning the relationship between the defendant and its employees and between the defendant and the state before having had the opportunity to hear all of the evidence on this controversial topic. There may arise cases in which such an adjudication would become necessary but this is not one of them.

34. The defence point that there are a number of witnesses who have not asked for anonymity is not devoid of merit but is counterbalanced by the following factors:

    i) Those witnesses who are also parties to the action were, in any event, less likely to be eligible for anonymity protection for the reasons set out in R v Legal Aid Board.

    ii) The level of perceived threat is bound to vary from one person to the next. Some witnesses are bound to have seen or heard about matters which make the threat appear to be more imminent to them than to others with less vivid exposure to such information.

    iii) Some people are simply more robust than others. Just because a certain proportion of witnesses are prepared to reveal their identities does not mean that it is automatically inappropriate or disproportionate for the others to seek anonymity.

35. The fact that there is no evidence that witnesses who have revealed their identities have since come forward to complain that they have suffered reprisals is also a relevant factor. Nevertheless, the genuine fears of the six anonymous witnesses are unlikely to be significantly allayed by this. Suffice it to say that it is not necessary for them to demonstrate that the consequences which they fear would be immediate.

THE PUBLIC INTEREST

36. There is a strong level of public interest in open justice. The extent to which such interest is engaged in any given case will, however, vary considerably.

37. In this case, the relevant witnesses are not public figures but residents of small towns and villages in Sierra Leone. Their names are highly unlikely to mean anything to members of the public at large. The contents of the redacted witness statements will reveal, in respect of every witness, his job and details of his role and status in the context of the litigation as a whole. The position, therefore, is not dissimilar to that arising in Yalland as observed by Lloyd Jones LJ:

> "38 We have nevertheless sought to assess whether there is here a sufficient public interest capable of outweighing the risk to the Claimants. We consider that matters such as the Claimants' nationality, status and personal situation may make a material contribution to the public debate on the issues in this case. However, the following facts concerning these Claimants are already in the public domain…The order which we propose to make will not restrict disclosure of that information.
>
> 39 We consider that in this particular case to publish the names of the Claimants would add little, if anything, to a proper understanding of these proceedings and the issues involved. Furthermore, the issues are such that the proceedings and the result are likely to be widely reported and read irrespective of any inability to name the Claimants. This is not a case in which the grant of anonymity to the Claimants will impede public debate of the issues involved."

38. Taking a similar approach in this case leads to the conclusion that the level of encroachment on the legitimate interest of the public in the event that the anonymity of the six witnesses were to be preserved would be relatively modest.

PREJUDICE TO THE DEFENDANT

39. The defendant contends that the preservation of the anonymity of the six witnesses would prejudice its ability to investigate the accuracy and credibility of their evidence.

40. To mitigate such prejudice, the claimants have conceded throughout that it would be appropriate to set up a confidentiality club the members of which would see the unredacted statements of the witnesses and thus learn their identities. Indeed, the claimants have been offering to disclose the redacted statements to identified members of the defendant's legal team for several months, subject to the provision of

suitable undertakings. Unhappily, disputes as to the appropriateness of such undertakings have led to delays which were such that, even at the time of the hearing in which the issue of anonymity fell to be determined, the defendant's legal team had still not seen the redacted statements. During the course of the hearing, I expressed concern at the defendant's persistent refusal to contemplate giving undertakings. This concern was allayed by the concession made by counsel on behalf of the defendant that no prejudice which might have arisen as a result of the delay would be relied upon by the defendant in support of its position on the issue of anonymity. Upon this assurance, I will make no further comment upon the substantive justification, if any, for the defendant's continued refusal to give undertakings.

41. I bear in mind that when considering the option of the formation of a confidentially club the court must remain vigilant that the principles of open justice remain protected to the full extent which is compatible with the common law requirement of fairness.

42. Equipped with knowledge of the identities of the witnesses, the defendant's legal team would be in a position to review their personnel files and make contact with employees and other witnesses who might be able to contribute relevant evidence. Of course, it would be more simple and straightforward for such steps to be taken without the need to preserve the identities of the witnesses from those of whom the relevant enquiries would have to be made but there is no information before me to establish that any such difficulties would be likely to be insurmountable or would materially impair the defendant's ability to have a fair trial.

43. Furthermore, if the process of enquiry were to be seriously hampered by the obligation of confidence owed by member of the club there would be no reason why the membership of the club could not be expanded accordingly. Indeed, the defendant has recently identified a number of individuals whom they would wish to be members of the club on the contingent basis that, contrary to their primary case, I were to find that the formation of such a club would be appropriate. Any application to admit new members would have to be examined on its own merits.

44. I should also point out that, as the claimants have realistically conceded, if it should transpire in the case of any given anonymous witness that the ability of the defendant to challenge his evidence were found to have been impaired then the court would adjust the weight to be given to the evidence of such witness accordingly.

CONCLUSION

45. Performing, as I must, the balancing act between the various factors arising in this case, the respective significance of which I have already considered in this judgment, I am satisfied that the anonymity order should be granted. Notwithstanding the strong public interest in open justice and the potential for some level of prejudice to the defendant, the common law demands of fairness mandate that the anonymity of the six witnesses should be preserved. The impact upon the public interest and any potential prejudice to the defendant, however, can and should be mitigated by the formation of a confidentiality club the final membership of which has yet to be determined.