LAW REFORM COMMISSION

Issue Paper

Party and Witness Anonymity in Civil Proceedings

[August 2012]

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THE LAW REFORM COMMISSION OF MAURITIUS consists of –

(a) a Chairperson, appointed by the Attorney-General;
(b) a representative of the Judiciary appointed by the Chief Justice;
(c) the Solicitor-General or his representative;
(d) the Director of Public Prosecutions or his representative;
(e) a barrister, appointed by the Attorney-General after consultation with the Mauritius Bar Council;
(f) an attorney, appointed by the Attorney-General after consultation with the Mauritius Law Society;
(g) a notary, appointed by the Attorney-General after consultation with the Chambre des Notaires;
(h) a full-time member of the Department of Law of the University of Mauritius, appointed by the Attorney-General after consultation with the Vice-Chancellor of the University of Mauritius; and
(i) two members of the civil society, appointed by the Attorney-General.

Under the direction of the Chairperson, the Chief Executive Officer is responsible for all research to be done by the Commission in the discharge of its functions, for the drafting of all reports to be made by the Commission and, generally, for the day-to-day supervision of the staff and work of the Commission.

The Secretary to the Commission is responsible for taking the minutes of all the proceedings of the Commission and is also responsible, under the supervision of the Chief Executive Officer, for the administration of the Commission.

The Commission may appoint staff on such terms and conditions as it may determine and it may resort to the services of persons with suitable qualifications and experience as consultants to the Commission.
Executive Summary

Issue Paper “Party and Witness Anonymity in Civil Proceedings”

[August 2012]

In the context of the reform of civil procedural rules, the Commission has examined the concept of “party and witness anonymity”, as it obtains in UK under Rule 39.2 (4) of Civil Procedure Rules 1998, and is favourable to its incorporation in our law. A court must be given the power to 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.
Party and Witness Anonymity in Civil Proceedings

1. In the context of the reform of civil procedural rules, the Commission has examined the concept of “party and witness anonymity”, as it obtains in UK under Rule 39.2 (4) of Civil Procedure Rules 1998, and is favourable to its incorporation in our law.

2. Rule 39.2 (4) of UK Civil Procedure Rules 1998 provides that 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 power of the court to order that the identity of any party or witnesses must not be disclosed is a broad power and the “interests” involved may include, although they are not limited to, privacy and confidentiality.¹

3. The question of whether a court should grant an order under Rule 39.2(4), or any other anonymity order, is not a matter of the judge’s discretion, but is a matter of obligation under the Human Rights Act 1998 section 6 and ECHR article 8. The test to be applied is whether there is sufficient general public interest in publishing a report of proceedings that identifies the party to justify any resulting curtailment of that party’s article 8 rights.²

¹ The question whether a court should grant anonymity to a party or witness is separate from the question whether the court should sit in private. Obviously, the two questions may arise in the same practical context. Where a court sits in private but gives judgment in public, and there is a continuing need to protect the interests which justified the hearing being held in private in the first place, the court may “anonymise” the judgment by identifying parties or witness by letter only (e.g. AB v CD; witness X). This may be done, for example, where a court considers that, by naming the parties or witnesses, the court itself would infringe their art.8 Convention rights as to privacy and family life and therefore act unlawfully under the Human Rights Act s.6 [Re Guardian News and Media Ltd [2010] 2 W.L.R. 325 (SC)].

² Vide AMM v HXW [2010] EWHC 2457 (QB), October 7, 2010 unrep., Tugendhat J., where anonymity order made together with interim injunction in proceedings for injunction restraining publication of information which claimant claimed to be private. In Secretary of State for the Home Department v AP (No.2) [2010] UKSC 26 ; [2010] 1 W.L.R. 1652 , S.C., an individual (D) subject to a control order appealed successfully to the Supreme Court against conditions as to place of residence imposed by the order which had been upheld by the Court of Appeal. An anonymity order, protecting D from being identified, had been in force throughout the proceedings. By the time the Court’s judgment was handed down, D was no longer subject to a control order, but was on bail pending deportation with a residence condition imposed. The Supreme Court ordered that the anonymity order should be continued after judgment and that the judgment and any reports of it should not reveal the identity of D. In the circumstances, the public interest in
4. Cases have arisen where the court has anonymised its written judgment even after a public hearing.³

5. The power of the court referred to in rule 39.2(4) goes beyond the “anonymising” of judgments and includes a power to make orders restraining others (including the press) from disclosing the identities of parties and witnesses.⁴

6. An order for anonymity and reporting restrictions cannot be made simply because the parties consent; a judge at the return date for the hearing of an interlocutory application restraining publication must come to his own view as to the necessity for any derogations from the principle open justice in the light of the facts as they are known to him at the time.⁵ Where the court has decided that the publication of private information should be restrained, that information (the subject matter of the action) should not be directly or indirectly identified in a public judgment delivered by, or order made by, the court; alternatively, the court may anonymise the judgment or order (protecting the identity of those affected by publication. In Pink Floyd Music Ltd v EMI Records Ltd [2011] 1 W.L.R. 770, Lord Neuberger M.R. stated that party anonymisation (whether or not granted by the court below) will be granted in the Court of Appeal only if, and only to the extent that, a member of the Court is satisfied that it is necessary for the proper administration of justice and gave guidance as to the correct procedure to be adopted where a party to an appeal wants anonymisation.

³ Vide Revenue and Customs Commissioners v Banerjeee (No.2) [2009] 3 All E.R. 930 (Henderson J.), where party’s application for anonymity in judgment following public hearing was refused and authorities referred to there.
