IN THE HUMAN RIGHTS REVIEW TRIBUNAL **[2015] NZHRRT 43**

	Reference No. HRRT 033/2015
UNDER	**THE HUMAN RIGHTS ACT 1993**
BETWEEN	**YASODHARA DA SILVEIRA SCARBOROUGH**
	PLAINTIFF
AND	**KELLY SERVICES (NEW ZEALAND) LIMITED**
	FIRST DEFENDANT
AND	**ASSA ABLOY (NEW ZEALAND) LIMITED**
	SECOND DEFENDANT

AT AUCKLAND – ON THE PAPERS

TRIBUNAL: Rodger Haines QC, Chairperson

REPRESENTATION:
Ms Y Scarborough in person
Mr C Bennett for first defendant
Mr AJ Lloyd and Ms NF Lord for second defendant

DATE OF HEARING: **Heard on the papers**

DATE OF DECISION: **11 September 2015**

DECISION OF CHAIRPERSON DECLINING APPLICATION BY SECOND DEFENDANT FOR INTERIM NON-PUBLICATION ORDERS[1]

Introduction

[1] By application dated 8 September 2015 Assa Abloy (New Zealand) Ltd (Assa Abloy) applies for interim orders under s 95(1) of the Human Rights Act 1993:

[1] [This decision is to be cited as: *Scarborough v Kelly Services (New Zealand) Ltd (Interim Order Application)* [2015] NZHRRT 43]

[1.1] Prohibiting publication of its name and of the name of its Operations Director, Mr JN McColl; and

[1.2] Preventing search of the Tribunal file without leave of the Tribunal or of the Chairperson of the Tribunal; and in the alternative

[1.3] Prohibiting publication of the name of Mr McColl and of any other details which might lead to his identification.

Position taken by plaintiff and first defendant

[2] As recorded in the *Minute* dated 3 September 2015 at [25], Ms Scarborough, who is representing herself, does not oppose the application and has filed memoranda dated 3 September 2015 and 7 September 2015 confirming her position.

[3] As further recorded in the *Minute* at [24], the first defendant (Kelly Services (New Zealand) Ltd) (Kelly Services) supports the application but does not seek a non-publication order for itself.

Background facts

[4] As recorded in the *Minute* at [1], Kelly Services provides casual labour to Assa Abloy on a contract basis. The Operations Director of Assa Abloy is Mr McColl. In November 2014 Kelly Services assigned Ms Scarborough to work at Assa Abloy for a period of six weeks. Ms Scarborough alleges that during her placement she was sexually harassed by Mr McColl who caused her to be laid off prior to the expiry of the six week contract period "to pursue his personal interest in [her]". Kelly Services, in turn, terminated the employment agreement with Ms Scarborough and "aided and abetted" Mr McColl's alleged misconduct. Ms Scarborough is seeking by way of remedy (inter alia) three months further work from Kelly Services and Assa Abloy.

[5] The allegations made by Ms Scarborough are vigorously contested by Mr McColl, Assa Abloy and Kelly Services. In the statement of reply filed by Assa Abloy Mr McColl says that during the period Ms Scarborough worked at Assa Abloy he had no direct contact with her and did not speak to her or communicate with her in any way either during her assignment or following termination of her assignment. He points out Ms Scarborough has acknowledged in correspondence to Assa Abloy that the two have never spoken. He says the allegation that he has a personal interest in Ms Scarborough and arranged the termination of her employment so that he could pursue her is entirely baseless. He had no contact with her during her time at Assa Abloy and, until the current allegations were made, did not know who she was. The decision to terminate her employment was made by a third person (a team leader) due to production orders dropping. Two other temps working in the same team as Ms Scarborough also had their temporary assignments terminated on the same date for the same reason.

[6] In his affidavit filed in support of the present application Mr McColl again emphasises that he never met or spoke to Ms Scarborough and her complaints are completely without foundation. His reasons for seeking an order prohibiting publication of his name include:

[6.1] Publication of the allegations could cause himself, his wife and son a great deal of upset and embarrassment.

[6.2] The allegations impugn his character and the reputation of Assa Abloy.

[6.3] Given the scandalous nature of the allegations he is concerned the media will become interested in Ms Scarborough's claims. Both he and Assa Abloy wish to minimise the adverse impact of such exposure.

[6.4] Ms Scarborough has offered no evidential foundation for her allegations and has confirmed the statement attached to her statement of claim is all the evidence she intends presenting in support of her claims. Specifically at the teleconference held on 3 September 2015 she advised the Chairperson she will be her only witness at the hearing scheduled for 3 and 4 December 2015.

[7] The written submissions in support of the application as well as the earlier Assa Abloy memorandum dated 27 August 2015 make the following additional points:

[7.1] Ms Scarborough has a demonstrated history of making unsubstantiated allegations:

[7.1.1] She has claimed that the solicitor for Assa Abloy (Mr AJ Lloyd) and his junior (Ms NF Lord) are not qualified to practise and indeed has alleged they are guilty of fraudulent misrepresentation by advertising as lawyers and engaging with their clients as lawyers. See for example Ms Scarborough's most recent articulation of this allegation in her email dated 7 September 2015 to the Case Manager. Ms Scarborough has also alleged the agent representing Kelly Services (Mr C Bennett) is guilty of illegal and fraudulent conduct for allegedly holding himself out as a practising lawyer. For the reasons set out in the *Minute* dated 3 September 2015 at [4] to [16], Ms Scarborough's allegations are demonstrably misconceived. Yet she continues to persist in the making of these allegations. See her memorandum dated 7 September 2015 at paras 8 to 12 and in particular the following extract:

> 9. The counsels advertise as lawyers; call themselves lawyers; charge a fee as lawyers and have engaged in the proceeding as lawyers, but when I ask them for proof of compliance with sections 48 to 55 of the Lawyers and Conveyancers Act 2006, they have become something else. The clients are fully aware of their legal representatives' status, and their attitude can be seen as aiding and abetting the lawyers' fraudulent misrepresentation as their intention is to harm the plaintiff.

[7.1.2] In other proceedings for sexual harassment against a different employer she has made identical allegations that the legal representatives engaged by the employer are not qualified or otherwise permitted to appear. Her claims have been firmly rejected. See *Scarborough v Micron Security Products Ltd* [2015] NZEmpC 39 (30 March 2015) and the related costs decision in *Scarborough v Micron Security Products Ltd* [2015] NZEmpC 105 (3 July 2015).

[7.1.3] The two *Scarborough v Micron Security Products Ltd* decisions show that one year before making her present allegations of sexual harassment against Assa Abloy and Mr McColl, Ms Scarborough made almost identical allegations against Micron Security Products Ltd and members of its management team. That is, that she had been sexually harassed in the work place. Having made these allegations and having instituted proceedings in the Employment Court, Ms Scarborough then did not give evidence herself and did not offer any evidence in support of her claim.

[7.2] Against these background circumstances it is submitted the allegations made in the present proceedings are scandalous and without rational foundation. There can be no genuine public interest in publication of their details.

Grounds of the application

[8] At the risk of repetition, the grounds set out in the notice of application dated 8 September 2015 are, in essence:

[8.1] The allegations made by Ms Scarborough are inherently unreliable.

[8.2] While the allegations are both scandalous and unsubstantiated, both Assa Abloy and Mr McColl could be adversely affected if details of the claim are published. Indeed given the nature of the allegations the proceedings are in fact likely to attract media attention.

[9] The legal issues are now addressed.

INTERIM ORDERS UNDER SECTION 95 – PRINCIPLES

[10] By virtue of s 95 of the Human Rights Act the Chairperson has jurisdiction to make an interim order if satisfied the order is necessary in the interests of justice to preserve the position of a party pending a final determination of the proceedings. Section 95(1) provides:

> **95 Power to make interim order**
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> (1) In respect of any matter in which the Tribunal has jurisdiction under this Act to make any final determination, the Chairperson of the Tribunal shall have power to make an interim order if he or she is satisfied that it is necessary in the interests of justice to make the order to preserve the position of the parties pending a final determination of the proceedings.

[11] The relevant principles applicable to interim order applications under s 95 were summarised in *IDEA Services Ltd v Attorney-General (No. 4) – Interim Order Application* [2013] NZHRRT 24 (10 June 2013) at [50] to [52]:

> **[50]** As discussed in *Deliu v New Zealand Law Society* [2012] NZHRRT 1 (8 February 2012) there are similarities as well as differences between s 95 of the HRA and s 8 of the JAA 72. As the differences are significant, s 95 is to be interpreted in its own terms although the established case law under the JAA 72 is a useful point of reference:
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> > **[50.1]** Being "satisfied" in this context simply means that the Chairperson has made up his or her mind that the interim order is necessary in the interests of justice to preserve the position of one of the parties pending a final determination of the proceedings. The term "satisfied" does not require that the Chairperson should reach his or her judgment having been satisfied that the underlying facts have been proved to any particular standard. See by analogy *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [26] (Elias CJ) and [96] (Blanchard, Tipping and McGrath JJ).
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> > **[50.2]** The term "necessary" means reasonably necessary. See by analogy *Carlton & United Breweries Ltd v Minister of Customs* [1986] 1 NZLR 423 (CA) at 430 per Cooke J.
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> > **[50.3]** As to "the interests of justice" it was held in *X v Police* HC Auckland AP 253/91, 9 October 1991 by Barker J that the phrase "interests of justice" is a broad expression. There is no need in the present context for elaboration.
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> > **[50.4]** There is a clear distinction between preserving the position of a party on the one hand and improving it on the other. It is clear from s 95(1) of the HRA and from s 8(1) JAA 72 that the position of a plaintiff cannot be improved: *Movick v Attorney-General*

[1978] 2 NZLR 545 (CA) at 551 line 35; *Nair v Minister of Immigration* [1982] 2 NZLR 571 at 575-576 (Davison CJ) and more recently *Squid Fishery Management Co Ltd v Minister of Fisheries* (2004) 17 PRNZ 97 at [29] (Ellen France J).]

[50.5] The phrase "the position of the parties" must in this context be read as including the singular "party". See Interpretation Act 1999, s 33 and Burrows and Carter *Statute Law in New Zealand* (4th ed, LexisNexis, Wellington, 2009) at 428. Were the position otherwise, an interim order could seldom, if ever be made, as it is difficult to envisage circumstances in which an interim order could be couched in terms which preserved, simultaneously, the position of both parties to the proceedings.

[50.6] The phrase "pending a final determination of the proceedings" in the context of a case where a reference has been made from the Tribunal to the High Court under s 92R HRA means pending the final determination of the Tribunal under s 92U ie after the decision of the High Court on remedies has been remitted to the Tribunal; or alternatively, upon the reference coming to an end for some other reason and the Tribunal then making its final determination.

[51] The power in s 95(1) HRA is to be applied flexibly. Here s 8 JAA 72 assists by analogy:

[51.1] In *Carlton & United Breweries Ltd v Minister of Customs* [1986] 1 NZLR 423 (CA) Cooke J at 430 said that the s 8 power should not be restricted by any formulation such as that found in the cases on interim injunctions, for example *American Cyanamid*. Specifically there is no general rule that a prima facie case must be established by the applicant for the order. The Court has a wide discretion to consider all the circumstances of the case:

> Of course I am not suggesting that there should be any general rule that a prima facie case is necessary before interim relief can be granted under s 8. In general the Court must be satisfied that the order sought is necessary to preserve the position of the applicant for interim relief – which must mean reasonably necessary. If that condition is satisfied, as the Chief Justice was entitled to find that it was here, the Court has a wide discretion to consider all the circumstances of the case, including the apparent strength or weakness of the claim of the applicant for review, and all the repercussions, public or private, of granting interim relief.

[51.2] The broad language of this section was also emphasised by Richardson J at 430-431 and by Somers J at 433. In the interests of brevity only the passage from the judgment of Richardson J is reproduced here:

> Section 8 of the Judicature Amendment Act 1972 does not mandate any particular approach to the statutory test of whether an interim order is necessary for the purpose of preserving the position of the applicant. The legal answer must depend on an assessment by the Judge of all the circumstances of the particular case. Clearly the nature of the review proceedings will be material. So will the character, scheme and purpose of the legislation under which the impugned decision was made. And appropriate weight must of course be given to all the factual circumstances including the nature and prima facie strength of the applicant's challenge and the expected duration of an interim order. Nor should the residual discretion under s 8 be circumscribed by reading qualifications into the broad language of the section.

The *Carlton & United Breweries* approach was recently described by the Supreme Court in *Easton v Wellington City Council* [2010] NZSC 10 at [5] as settled principle. See also *Minister of Fisheries v Antons Trawling Company Ltd* (2007) 18 PRNZ 754 (SC) at [3] and [8].

[52] Also relevant in the context of exercising the power to make an interim order under s 95 are the provisions of s 105 of the HRA which provide:

> **105 Substantial merits**
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> (1) The Tribunal must act according to the substantial merits of the case, without regard to technicalities.

(2) In exercising its powers and functions, the Tribunal must act—
(a) in accordance with the principles of natural justice; and
(b) in a manner that is fair and reasonable; and
(c) according to equity and good conscience.

[12] These principles have not been modified or changed since delivery of the *IDEA Services* decision. Because the "interests of justice" in s 95 require account be taken of the principle of open justice, that topic is addressed next.

NON-PUBLICATION ORDERS AND THE OPEN JUSTICE PRINCIPLE

[13] While it is routine for confidential matters to be the subject of court (or tribunal) proceedings, orders suppressing the names of the parties is exceptional. This is because of the open justice principle. The Human Rights Act s 107(1) explicitly provides every hearing of the Tribunal must be held in public unless it is desirable for the hearing to be closed or for a non-publication order to be made.

[14] The open justice principle is already part of the Tribunal's jurisprudence on non-publication applications. However, given the principle has recently received significant emphasis in the Court of Appeal it is appropriate the Tribunal's approach to non-publication orders be updated.

The Tribunal's non-publication jurisdiction to date

[15] The Tribunal's present approach to name suppression is possibly best summarised in *Director of Proceedings v Emms* [2013] NZHRRT 5 (25 February 2013) at [117]:

> **[117]** The granting of name suppression is a discretionary matter for the court or tribunal: *R v Liddell* [1995] 1 NZLR 538 (CA). The starting point when considering suppression orders is the presumption of open judicial proceedings, freedom of speech (as allowed by s 14 of the New Zealand Bill of Rights Act 1990) and the right of the media to report. However, in *Liddell* it was recognised at 547 that the jurisdiction to suppress identity can properly be exercised where the damage caused by publicity would plainly outweigh any genuine public interest. The decision in *Lewis v Wilson & Horton* [2000] 3 NZLR 546 (CA) underlines that in determining whether non-publication orders should be granted, the court or tribunal must identify and weigh the interests of both the public and the individual seeking publication.

[16] To this analysis it must be added that more than embarrassment or detriment to reputation must be shown. See *Peters v Birnie* [2010] NZAR 494 (Asher J) at [30] and *Haydock v Gilligan Sheppard* HC Auckland, CIV-2007-404-2929, 11 September 2008 at [31] where Harrison J stated:

> [31] … The legislature and the Courts are well aware that the hearing of a case in public requires individuals to give evidence which may be embarrassing or humiliating. Nevertheless, the public interest, demanding the fair and efficient administration of justice, consistently trumps any personal features. A party who chooses to initiate a hearing which Parliament stipulates is to be held in public must take all the unpalatable consequences, not only of an adverse substantive decision but also on publicity and costs.
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> [32] The last word on this subject belongs, as Ms Grace points out, to Lord Woolf CJ in *R v Legal Aid Board, ex parte Kaim Todner* [1999] QB 966 at 978 as follows:
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> > ... 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.

[17] These statements of principle were recently applied by the Tribunal in *Jones v Waitemata District Health Board* [2014] NZHRRT 52 at [51].

[18] In this context it is relevant to note that earlier, in *Clark v Attorney-General (No. 1)* [2005] NZAR 481 (CA) (Glazebrook, Panckhurst and Gendall JJ) at [11] it had been noted that the corollary of the principle of open justice is that persons engaged in proceedings will necessarily be identified publicly. This might be painful or humiliating but is tolerated because a public trial is the best security for the pure, impartial and efficient administration of justice and the best means for winning public confidence and respect for the system.

The open justice principle – recent Court of Appeal jurisprudence

[19] The Court of Appeal has recently held that an applicant for name suppression must show the interests of justice displace the presumption favouring publication. The threshold is high. See *McIntosh v Fisk* [2015] NZCA 247, [2015] NZAR 1189 (Harrison, Miller and Cooper JJ) at [1] where the following statement of principle was made:

> [1] The principle of open justice requires that all aspects of proceedings, both civil and criminal, are conducted in public. It extends to the identification of parties to litigation. Accordingly, a litigant seeking confidentiality in the nature of a name suppression order must show the interests of justice displace the presumption favouring publication. The threshold is high because any suppression order necessarily derogates from the principle of open justice and the right to freedom of expression. [Footnote citations omitted]

[20] Different formulae have been used to better described that threshold. In *Clark v Attorney-General (No. 1)* at [42] it was stated that the presumption in favour of disclosure of all aspects of court proceedings can be overcome only in "exceptional circumstances":

> [42] … we remark that the principles of open justice and the related freedom of expression create a presumption in favour of disclosure of all aspects of Court proceedings which can be overcome only in exceptional circumstances. We refer here to the case of *Re Victim X* [2003] 3 NZLR 220 (HC and CA) in which this Court upheld the setting aside of a suppression order in favour of the intended victim of a failed kidnapping plot. The Court was mindful of the "sense of anguish" the result would cause the intended victim and his family but held that the victim's private interest did not outweigh the fundamental principles of open justice and freedom of expression.

[21] By way of contrast in *Jay v Jay* [2014] NZCA 445, [2015] NZAR 861 (Randerson, Stevens and White JJ) at [118], without citation of *Clark v Attorney-General (No. 1)*, it was stated that in a civil case extraordinary or exceptional circumstances are not required to justify suppression:

> [118] It is true the starting point is generally based on the principle of open justice of proceedings. The desirability of open justice must be weighed against competing considerations arising in particular cases and each case must be addressed on its merits. Unlike in the criminal context, "extraordinary circumstances" are not required to justify suppression in a civil case. This Court's judgment in *Muir v Commissioner of Inland Revenue* made no reference to the need for "extraordinary" or "exceptional" circumstances. In refusing leave in that case the Supreme Court observed that situations warranting confidentiality are "likely to differ between the [civil and criminal] categories", and also "within them". Ultimately, bearing in mind the requirements for open justice in a civil context the court must exercise a discretion as to whether to make a suppression order in the particular circumstances of the case. [Footnote citations omitted]

[22] On the other hand in *Sax v Simpson* [2015] NZCA 222 (9 June 2015, Stevens, French and Miller JJ) at [10] the Court stated (in the context of civil proceedings for defamation) that the presumption in favour of disclosure will be overcome only in the most exceptional circumstances, citing the above passage from *Clark v Attorney-General (No. 1)* at [42]. The Court went on to state at [11] that there is no definition or list of circumstances a court will regard as exceptional.

[23] The *McIntosh v Fisk* decision was given only a few days later on 16 June 2015. The passage from this decision cited earlier makes no reference to "exceptional circumstances" but does emphasise that the threshold is high. The decision in *Clark v Attorney-General (No. 1)* is, however, cited.

[24] Whether there is a difference in substance between *Clark v Attorney-General (No. 1)* and *Jay v Jay* does not have to be determined in the present context. The differences may not be significant. The more important point is that as observed by the Court of Appeal in *McIntosh v Fisk*, the threshold is high because any suppression order necessarily derogates from the principle of open justice and the right to freedom of expression. It is this threshold which Assa Abloy and Mr McColl must cross when demonstrating the interests of justice displace the presumption favouring publication.

Analysis

[25] While it is clear an application for non-publication orders under s 95 must be determined in the particular circumstances of the case the applicant must show the interests of justice displace the presumption favouring publication. The threshold is high because any suppression order necessarily derogates from the principle of open justice and the right to freedom of expression.

[26] Guidance as to how high that threshold is can be found in the cases referred to earlier. In particular:

> **[26.1]** The hearing of a case in public requires individuals to give evidence which may be embarrassing or humiliating. Nevertheless, the public interest, demanding the fair and efficient administration of justice, consistently trumps any personal features. See *Haydock v Gilligan Sheppard* at [31].
>
> **[26.2]** More than embarrassment or detriment to reputation must be shown. See *Peters v Birnie* at [30].
>
> **[26.3]** In general, 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. See *R v Legal Aid Board, ex parte Kaim Todner* [1999] QB 966 at 978 cited in *Haydock v Gilligan Sheppard* at [32].
>
> **[26.4]** The corollary of the principle of open justice is that persons engaged in proceedings will necessarily be identified publicly. This might be painful or humiliating but is tolerated because a public trial is the best security for the pure, impartial and efficient administration of justice and the best means for winning public confidence and respect for the system. See *Clark v Attorney-General (No. 1)* at [11].

[26.5] Even though in *Clark v Attorney-General (No. 1)* the Court was mindful of the "sense of anguish" the result would cause the intended victim and his family it held that the victim's private interest did not outweigh the fundamental principles of open justice and freedom of expression.

[27] Applying the law to the circumstances of the present case, the application for name suppression is based, in essence, on potential upset and embarrassment to Mr McColl (and his members of his family) and the potential damage to the reputation of Assa Abloy and of Mr McColl.

[28] In my view the evidence does not establish a risk of anything over and beyond mild embarrassment or detriment. As stated in *McIntosh v Fisk* at [26], "much more" than personal and professional embarrassment is required to outweigh the open justice principle. If the allegations made by Ms Scarborough are indeed as unfounded and lacking in credibility as claimed, Mr McColl and Assa Abloy will receive their vindication at a public hearing and in a decision delivered in public. As emphasised by the Court of Appeal in *Clark v Attorney-General (No. 1)*, the embarrassment to which Mr McColl and Assa Abloy are exposed is tolerated because a public trial is the best security for the pure, impartial and efficient administration of justice and the best means for winning public confidence and respect for the system.

[29] In this context it is not without significance that to a large measure the submission that Ms Scarborough's case is unfounded is based on the two decisions of the Employment Court earlier referred to in *Scarborough v Micron Security Products Ltd*. Assa Abloy and Mr McColl only know of this case because it is publicly available. Had Micron Security Products obtained a non-publication order the present defendants would not have been aware of the circumstances which have allowed them to submit Ms Scarborough has a demonstrated history of making unsubstantiated allegations. This is but one example of the benefits of the principle of open justice.

[30] The fact that Ms Scarborough has consented to the making of the orders sought does not add anything to the strength of the application. At the end of the day the application must be measured against the legal standard clearly enunciated by the superior courts.

[31] It follows that the "interests of justice" referred to in s 95(1) of the Human Rights Act do not favour the making of the non-publication order. Certainly on my view of the facts it is not "necessary" in the interests of justice for the order to be made to preserve the position of Assa Abloy and of Mr McColl.

CONCLUSION

[32] For the reasons given the application for non-publication orders under ss 95 and 107 of the Human Rights Act 1993 is dismissed.

Interim non-publication order pending possible appeal

[33] While the application for interim orders has been dismissed account must be taken of the fact that Assa Abloy and Mr McColl have a right of appeal to the High Court. See s 123(1) of the Act. The time for appealing is 30 days after the date of the giving of this decision. So that the appeal right is not rendered nugatory an interim non-publication order is made for the period between the delivery of this decision and expiry of the appeal period. If an appeal is filed application can be made either to the Tribunal or to the High Court for continuation of the interim order. If, on the other hand, no appeal is to

be lodged counsel for Assa Abloy are asked to so notify the Tribunal and this interim order will then lapse.

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Mr RPG Haines QC
Chairperson