IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2020] SGCA 76

Civil Appeal No 226 of 2019

Between

(1) Lim Suk Ling Priscilla
(2) UrbanRx Compounding Pharmacy Pte Ltd

… *Appellants*

And

(1) Amber Compounding Pharmacy Pte Ltd
(2) Amber Laboratories Pte Ltd

… *Respondents*

Civil Appeal No 228 of 2019

Between

(1) Amber Compounding Pharmacy Pte Ltd
(2) Amber Laboratories Pte Ltd

… *Appellants*

And

(1) Lim Suk Ling Priscilla
(2) UrbanRx Compounding Pharmacy Pte Ltd

… *Respondents*

Summons No 64 of 2020

Between

(1) Amber Compounding Pharmacy Pte Ltd
(2) Amber Laboratories Pte Ltd

… *Applicants*

And

(1) Lim Suk Ling Priscilla
(2) UrbanRx Compounding Pharmacy Pte Ltd

… *Respondents*

In the matter of Suit No 164 of 2018 (Summons No 484 of 2019)

Between

(1) Amber Compounding Pharmacy Pte Ltd
(2) Amber Laboratories Pte Ltd

… *Plaintiffs*

And

(1) Lim Suk Ling Priscilla
(2) UrbanRx Compounding Pharmacy Pte Ltd
(3) Muhammad ‘Ainul Yaqien Bin Mohamed Zin
(4) Daniel James Tai Hann
(5) Tee I-Lin Cheryl
(6) Tan Bo Chuan

… *Defendants*

JUDGMENT

[Civil Procedure] — [Anton Piller orders] — [*Riddick* undertaking] — [Test for release from *Riddick* undertaking]

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v
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[2020] SGCA 76

Court of Appeal — Civil Appeal No 226 of 2019, Civil Appeal No 228 of 2019 and Summons No 64 of 2020
Sundaresh Menon CJ, Judith Prakash JA and Steven Chong JA
8 July 2020

14 August 2020 Judgment reserved.

Steven Chong JA (delivering the judgment of the court):

Introduction

1 One of the core principles which regulates the conduct of civil proceedings is that documents ordered to be disclosed are to be used only for the purposes of the civil proceedings from which the disclosure was made. In fact, this court in its recent decision in *ED&F Man Capital Markets Limited v Straits (Singapore) Pte Ltd* [2020] SGCA 64 held that this core principle applies equally to documents which were disclosed to resist interlocutory applications even if such disclosure was, strictly speaking, not made under compulsion of a court order. The key consideration which informs the court's strict approach is to encourage litigants to provide full and complete discovery in the interest of justice with the concomitant assurance that the disclosed documents will not be used for any collateral purpose save with express leave of court. Typically, in

situations where documents have been disclosed under compulsion, an application for leave of court to use the documents for purposes extraneous to the civil proceedings would require a release of the *Riddick* undertaking, an implied undertaking to the court which owes its name to the decision of *Riddick v Thames Board Mills Ltd* [1977] 1 QB 881 ("*Riddick*").

2 This appeal concerns an application for release of the *Riddick* undertaking in order to report the commission of several alleged criminal offences to various enforcement authorities. The complication here is that some of the documents were disclosed to the enforcement authorities not only without leave of court, but in direct breach of undertakings to the court and to the defendants. Therefore, the application before this court was for retrospective leave in respect of those documents already disclosed as well as for prospective leave to disclose additional documents ostensibly to aid the investigations.

3 This appeal has provided this court with the timely opportunity to revisit some of its earlier decisions on the relevant considerations in granting such leave. On this occasion, we have the benefit of leading decisions on this issue from several Commonwealth jurisdictions. In this judgment, given that the purpose of the application is to facilitate the reporting of alleged criminal offences, it will be particularly relevant to examine how the privilege against self-incrimination will feature in the exercise of the court's discretion and whether the motive of the applicant is relevant in the ultimate analysis.

Facts

The parties

4 Amber Compounding Pharmacy Pte Ltd and Amber Laboratories Pte Ltd (collectively, "Amber") are in the specialized trade of compounding

medical and pharmaceutical products, which involves preparing personalized medications for patients based on prescriptions. Lim Suk Ling Priscilla ("Lim") worked for Amber before setting up UrbanRx Compounding Pharmacy Pte Ltd ("UrbanRx"), a company which is in the same business as Amber.[1]

The search orders

5 On 14 February 2018, Amber commenced the present action against Lim and UrbanRx (collectively, "the defendants"), claiming, among other things, that they had misappropriated Amber's confidential information and trade secrets for the purposes of benefitting UrbanRx's business. The alleged information which had been misappropriated included lists of Amber's patients, clients, prices, stocks, vendors, and standard operating procedures. Such lists, it was alleged, were specific to Amber's operations, and constituted sensitive information that had to be strictly guarded.[2]

6 To support its claim against the defendants, on 15 March 2018, Amber applied *ex parte* for search orders against the defendants. The events surrounding the execution of the search orders are highly relevant in informing the parties' understanding on the specific ambit and purpose of the search orders, and it will thus be useful to set them out in some detail.

7 The purpose of the search orders was to retrieve the confidential information which had been purportedly misappropriated by the defendants

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1 Joint Core Bundle Vol II pp 115 to 117.

2 Joint Record of Appeal Vol II p 27 para 17 to p 34 para 23.

before it was deleted by the defendants. Such information could then be used in support of Amber's action against the defendants.[3]

8 In its written submissions to support the search order applications, Amber expressly stated that the defendants' "devices will then be searched using certain keywords so that the ambit of the search will be *limited to data relevant to* [Amber] and will not be oppressive to the [defendants]" [emphasis in original omitted; emphasis added in italics].[4] Significantly, Amber's founder and Managing Director, Jayne Wee Shir Li, confirmed on affidavit that "the purpose of seeking a search order is *purely and solely* for the purpose of obtaining further evidence that is necessary to my companies' case without risking the [defendants'] destruction of the said evidence" [emphasis added].[5]

9 Pursuant to its submissions, Amber sought, as against *both* defendants, the disclosure of the following items:[6]

> (a) all e-mail correspondence on the defendants' email accounts ("item (a)");
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> (b) all electronic, magnetic, optical, electrochemical, or other data processing devices which could process, store, communicate data, such as computers, mobile phones, thumb drives and other electronic items ("item (b)"); and

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3 Amber's Submissions for HC/SUM 1291/2018 (dated 21 March 2018), paras 20 to 24.

4 Amber's Submissions for HC/SUM 1291/2018 (dated 21 March 2018), para 26.

5 Joint Record of Appeal, Vol III (Part 1) p 77, para 174.

6 Draft Search Orders against Lim and UrbanRx, Schedule 2, p 9.

(c) all documents, plans, drawings, notes, memoranda, and power point slides (whether in soft or physical copy) relating to the trade secrets and/or confidential and/or proprietary information of Amber ("item (c)").

10 As against *UrbanRx* alone, Amber further sought the disclosure of:

(a) samples of all products marketed by UrbanRx and sold by UrbanRx to the public ("item (d)"); and

(b) samples of all products marketed by UrbanRx and sold by UrbanRx to clinics that were customers of UrbanRx ("item (e)").

11 On 3 April 2018, the High Court Judge ("the Judge") granted the search orders with respect to items (a), (b) and (c). As regards items (d) and (e), the Judge noted those items were "in relation to [UrbanRx's] property and not [Amber's] property, and ha[d]nothing to do with preservation of [Amber's] property". Accordingly, the Judge did not grant leave to search for and seize items (d) and (e).[7]

12 In the search orders, Amber also gave the express undertaking "[n]ot, without the leave of the Court, … to use any information or documents obtained as a result of the carrying out of this Order *except for the purposes of these proceedings* or to inform anyone else of these proceedings until the trial or further order" [emphasis added].[8]

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7 Minute Sheet (3 April 2018) p 1.

8 Joint Core Bundle Vol III, p 143, para (6) and p 149, para (6).

13 Both search orders were executed on 17 April 2018, in the presence of Lim and a supervising solicitor. In total, more than 100,000 documents were seized pursuant to the search orders.[9]

The setting-aside application and Listing Exercise

14 About a month after the execution of the search orders, on 10 May 2018, the defendants filed HC/SUM 2169/2018 to set aside the search orders ("the setting-aside application"). In the application, the defendants prayed, *inter alia,* for the discharge of the search orders, for Amber to return all items seized pursuant to the said orders, and for Amber to destroy all duplicates, copies and/or imaging of all items made during the searches. To support the application, the defendants alleged that: (a) there were irregularities in the execution of the search orders as the solicitors who had supervised the search did not advise the defendants of their right to refuse entry to "anyone who could gain commercially from anything he might read or see on the premises"; (b) Amber had not returned the originals of all the seized documents within two days of their removal, in breach of Paragraph 2 of Schedule 4 of the search orders; and (c) the ambit of the search orders was too wide, as it gave Amber "*carte blanche* to all documents belonging/relating" to the defendants.[10]

15 The Judge first heard the setting-aside application at a Judge Pre-Trial Conference ("JPTC") on 23 May 2018. During the hearing, the Judge fixed the timelines for the filing of affidavits and submissions in relation to the

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9 Joint Core Bundle Vol II, p 118, para 15.

10 Joint Core Bundle Vol II, pp 52 to 53, paras 7 to 9, and pp 102 to 104, paras 93 to 98.

setting-aside application. She also directed the parties to sort out the seized documents that clearly belonged to either Amber or the defendants.[11]

16 On 31 May 2018, solicitors for both parties provided their signed express undertakings not to hand over the seized documents to their respective clients "and/or any other 3rd party and/or any other solicitors".[12]

17 On 4 June 2018, the parties appeared before the Judge again, and Amber's then-counsel informed the court that solicitors' undertakings had been provided to each other not to release any of the documents to any other parties. Both Amber's and the defendants' counsel agreed that documents which belonged to the other party ought to be returned to that party. However, the defendants' counsel, Mr George Pereira, reserved the defendants' position that Amber was not entitled to take whatever documents it wanted.[13]

18 As the parties were in agreement that the documents ought to be returned to their rightful owners, the Judge directed the parties to come to a workable solution to sort out the ownership of the documents. She also reminded the parties that a search order was not the time to do comprehensive discovery of documents, and that discovery would take place in the course of the proceedings.[14]

19 The parties returned before the Judge on 18 July 2018. Instead of dealing with the setting-aside application proper, the Judge directed, based on their

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11 Minute Sheet (23 May 2018) p 1.

12 Joint Record of Appeal Vol III (Part 12) p 186.

13 Minute Sheet (4 June 2018) pp 1 to 2.

14 Minute Sheet (4 June 2018) p 2.

agreement that the documents would be returned to their rightful owners, that the parties were to carry out a "Listing Exercise", whereby:[15]

(a) Amber was to determine the ownership of the documents based on 32 search terms by 8 August 2018. The list of these documents was to be provided to the defendants by 22 August 2018.

(b) Based on that list, both counsel were to agree on which documents belonged to Amber and the defendants respectively. Any disputed documents would be listed separately.

(c) All documents which indubitably belonged to Amber or the defendants were to be returned to the respective owners and deleted/destroyed by the other party, who was not to keep the document in any form. This was to be done by 12 September 2018.

(d) Any documents in the disputed list would be returned to the defendants' counsel *only*. They were not to be kept in any form by any party. This was to be done by 17 September 2018.

20 The Listing Exercise was not completed by the stipulated dates. On 28 September 2018, at a JPTC, counsel for Amber informed the Judge that pursuant to the search terms, Amber had identified 64,000 documents, of which 10,000 belonged to an unrelated third party, while the ownership of the remaining 54,000 was still unascertained. The Judge ordered that the 10,000 documents belonging to the third party were to be deleted forthwith. As for the remaining 54,000 documents, the Judge reiterated that Amber was to comply with her previous directions, so that the ownership of the documents could be

15 Minute Sheet (18 July 2018) p 2.

determined, and all documents which belonged to the defendants were to be returned to them, and not to be kept in any form by Amber. Furthermore, documents of which the ownership was disputed were to be kept by the defendants' counsel *only*. This Listing Exercise was to be completed by 16 November 2018.[16]

21 The Listing Exercise was however not completed by 16 November 2018.

Leave application

22 As it transpired, while Amber was conducting the Listing Exercise, it had apparently formed the opinion that certain documents ("the Documents") were probative of various criminal offences:

(a) First, the defendants had falsely claimed that four local persons were employees of UrbanRx to inflate UrbanRx's foreign worker entitlement for the purpose of obtaining an S-Pass for a foreign employee, one Jose Marc Alinio ("Marc").[17] Further, Lim had purportedly hired her sister, Lydia Lim ("Lydia"),[18] as another foreign employee, without a valid work permit.[19] These constituted offences under the Employment of Foreign Manpower Act (Cap 91A, 2009 Rev Ed) ("EFMA").

(b) Second, Lim was responsible for an incident whereby staple bullets were found in Amber Pharmacy's products (the "staple saga"),

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16 Minute Sheet (28 September 2018) pp 1 to 2.

17 Joint Core Bundle Vol II p 123 para 27 to p 136 para 37.

18 Joint Record of Appeal Vol III (Part 13) p 141.

19 Joint Core Bundle Vol II p 136 para 39 to p 139 para 40.

and this constituted an offence of mischief under s 425 of the Penal Code (Cap 224, 2008 Rev Ed) ("Penal Code").

(c) Third, Lim had instructed or made arrangements with Marc while he was in the employ of Amber Pharmacy to siphon Amber Pharmacy's business to UrbanRx. This was an offence under s 6(*b*) of the Prevention of Corruption Act (Cap 241, 1993 Rev Ed) ("PCA"), which states that it is an offence for any person to corruptly give or agree to give any gratification to any agent as an inducement or reward for doing any act in relation to his principal's business.

(d) Fourth, Lim had inserted her personal thumb drive into a computer belonging to Amber without authorisation and downloaded many documents, some of which were seized under the search orders, and this constituted an offence under s 3(1) of the Computer Misuse Act (Cap 50A, 2007 Rev Ed) ("CMA").

23 Spurred by the view that "serious criminal offences" had been committed by the defendants, and allegedly out of civic-mindedness, Amber's representative, Sudesh Samuel, made reports to the Singapore Police Force, Ministry of Manpower, and the Corrupt Practices Investigation Bureau (collectively, "the authorities"), disclosing ten of the Documents or excerpts of them in the process. These reports were allegedly made "in or around the 3rd Quarter of 2018."[20] It is not clear whether the reports were made with or without legal advice, though we observe that it is likely that some legal input must have been provided in identifying the above offences.

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20 Joint Core Bundle Vol III p 81, paras 6 to 9.

24 On 14 December 2018, after the reports were made, Lee & Lee was appointed to take over the conduct of the matter from Amber's previous solicitors.[21]

25 On 23 January 2019, at a pre-trial conference ("PTC") before the senior assistant registrar ("SAR"), Lee & Lee explained that Amber's persistent failure to comply with the timelines set by the Judge for the Listing Exercise was due to "the sheer number of documents involved".[22] No mention whatsoever was made about the use of certain documents for the reports to the authorities.

26 In the meantime, on 25 January 2019, Lee & Lee wrote to the defendants' solicitors to seek their consent for an extension of time for the Listing Exercise to be completed by 5 April 2019.[23] Again, no mention whatsoever was made that various documents belonging to the defendants had been used in making reports to the authorities without leave of court. The impression given by Amber was that it was still endeavouring to sort out the ownership of the seized documents, so as to comply with the Judge's direction to return the defendants' documents.

27 Subsequently, on 29 January 2019, Amber took out the present leave application (HC/SUM 484/2019) *ex parte* seeking, among other orders, prospective and retrospective leave to use the Documents for the purpose of making reports to the authorities. According to Amber, having recently instructed Lee & Lee, it was "informed and advised that it would be best –

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21 Joint Core Bundle Vol III p 81, para 9.

22 Minute Sheet (23 January 2019) p 1.

23 Joint Record of Appeal Vol III (Part 12) pp 69 to 70.

indeed, necessary … to seek leave" of court to use the Documents in support of the reports given, or further reports to be made.[24]

28 As the leave application was taken out *ex parte*, the defendants did not have notice of the extraneous purpose which Amber had used, and was seeking to use, the Documents for. Without such knowledge, on 31 January 2019, the defendants agreed to the extension of time sought by Amber to comply with the Listing Exercise.[25] Based on the defendants' agreement, on 8 February 2019, the Judge granted Amber an extension of time to comply with the terms of the Listing Exercise by April 2019.[26]

29 After the extension of time was obtained, and because the Judge had directed, on 8 February 2019, that Amber serve the summons for leave and the supporting affidavit on the defendants,[27] Amber served the papers on the defendants on 12 February 2019.[28] This was when the defendants first came to know that Amber had used, and intended to use, the Documents for the extraneous purpose of making criminal reports to the authorities. Prior to that, the impression which Amber had given to the court and to the defendants was that it was taking time to comply with the Listing Exercise (which only required the parties to determine the *ownership* of the seized documents) because of "the sheer number of documents involved".

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24 Joint Core Bundle Vol II pp 121 to 122, para 24.

25 Joint Record of Appeal Vol III (Part 12) p 130, para 2.

26 Joint Record of Appeal Vol III (Part 12) pp 132 to 134.

27 Correspondence from Court (8 February 2019).

28 Joint Record of Appeal Vol III (Part 12) p 13, para 33 and p 139, para 2.

The Judge's decision

30 The parties appeared before the Judge on 8 April 2019 for her consideration of the summons for leave. In the Judge's view, two key issues arose for her consideration. The main issue was in what circumstances could a party be allowed to disclose documents obtained under a search order to the authorities for criminal investigation purposes. The further issue was whether the court could grant retrospective leave to disclose, given that Amber had disclosed some documents prior to the filing of the present summons.

31 The Judge recognised that leave of court was required before a party could be released from the *Riddick* undertaking. Surveying the various approaches in the Commonwealth, she concluded that a "balancing exercise", whereby the court takes into account factors such as the nature and severity of the potential offence, the cogency of the evidence sought to be disclosed with respect to the potential offences, and the prejudice that might be occasioned to the respondent by the disclosure, was to be adopted (GD at [31]).

32 Applying the test to the facts, she held that the Documents pertaining to the EFMA offences could be disclosed, as the nature of the offences was serious, deterrence against such offences was required, and the materials sought to be disclosed were cogent evidence of the offences. There was also no adequate civil remedy, and the prospect of criminal investigation would not without more amount to injustice to the defendants (GD at [35]–[38]). The Judge was also unable to conclude that Amber had been motivated by an improper purpose, or that it had acted out of malice in seeking leave for the relevant disclosures (GD at [41]). The Judge found that the privilege against self-incrimination had been waived, as the defendants failed to assert it at the time of the search orders, or thereafter when the setting-aside application was made (GD at [59]–[61]). For

much the same reasons, retrospective leave was also granted for the EFMA documents (GD at [66]).

33 However, leave was refused for the Documents which related to the other offences, as the evidence in this regard was insufficiently cogent, and there were also adequate civil remedies available for Amber to pursue (GD at [46]–[54]).

34 Thus, Amber was granted leave (and retrospective leave) to disclose 23 of the 32 Documents (GD at [70]). Leave was denied for the remaining nine documents, which pertained to the alleged Penal Code, PCA and CMA offences.

The parties' submissions on appeal

35 Both parties appealed against the Judge's decision. As both appeals relate to the same issue as to whether leave ought to be granted *vis-à-vis* the Documents, the appeals will be referred to collectively, as an "appeal".

36 In their submissions, the defendants raised the preliminary issue that the Judge ought not to have heard Amber's leave application as it was (and remains) in contempt of court.[29] Furthermore, even if there were cogent and persuasive reasons for leave to be granted, the real risk of investigation and prosecution which the defendants could suffer ought to have barred Amber from being released from its *Riddick* undertaking (see *Beckkett Pte Ltd v Deutsche Bank AG* [2005] 3 SLR(R) 555 ("*Beckkett*") at [19]).[30] The same result would have been reached by the balancing exercise, as Amber had been motivated by the

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29 Appellant's Case (CA 226) paras 7 to 60.

30 Appellant's Case (CA 226) paras 84 to 87 and 91.

improper purpose to disrupt the defendants' business and to bring to bear pressure on the defendants to settle the suit. The prejudice which the defendants would suffer was also relevant, and the Documents were not cogent evidence of the alleged offences.[31]

37 Amber submitted that the preliminary objection was without merit. Apart from the fact that it was being raised for the first time on appeal, the defendants had sought leave to apply for an order for committal against the directors of Amber (HC/SUM 1068/2019 ("the committal proceedings")). The committal proceedings were pending, and this court ought not to prejudge the live issue of whether Amber's representatives had acted in contempt.[32]

38 As regards the substantive appeal, Mr Afzal Ali ("Mr Ali"), Amber's newly appointed counsel who had taken over conduct from Lee & Lee, proffered a two-step test, under which leave would be granted if (a) there was *prima facie* evidence of criminal conduct in the documents sought to be disclosed; and (b) the court was satisfied that the person applying for leave is not acting for an improper purpose (*eg,* acting out of spite or malice).[33] Applying this test, leave ought to be granted for all the Documents, as there was *prima facie* evidence of criminal wrongdoing, and Amber was not motivated by any improper purpose.[34] Alternatively, applying the balancing approach, the Documents constituted cogent evidence of the offences, which are serious, and the potential harm that could have been caused to Amber warranted further

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31 Appellant's Case (CA 226) paras 103, 136 to 137, and 161 to 175.

32 Respondent's Case (CA 226) paras 23 to 25.

33 Appellant's Case (CA 228) paras 2 and 11.

34 GD at [41]–[42]; Respondent's Case (CA 226) paras 77 to 81; Appellant's Case (CA 228) paras 81 to 82.

investigation. The availability of civil remedies did not lessen the public interest in investigating and prosecuting such acts.[35] The privilege against self-incrimination had also been waived, as it was not timeously asserted. Hence, leave ought to have been granted for all the Documents.[36]

The issues on appeal

39 Flowing from the parties' submissions, the issues that arise on appeal are:

(a) whether this court ought to hear Amber in this appeal, given the allegations of contempt levied by the defendants;

(b) if Amber ought to be heard, under what circumstances should a party be allowed to disclose documents, obtained during a search order, to the authorities for criminal investigation purposes;

(c) applying the test set out in (b), which, if any, of the Documents may be disclosed; and

(d) finally, whether Amber should be granted retrospective leave for the Documents which have already been disclosed to the authorities.

Preliminary issue

40 In our view, the preliminary issue may be easily disposed of. In *Lee Kuan Yew v Tang Liang Hong and another* [1997] 2 SLR(R) 862 ("*Lee v Tang*"), the plaintiff, Lee, had applied to court for leave to delete certain

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35 Appellant's Case (CA 228) paras 80 to 98.

36 Respondent's Case (CA 226) paras 85 to 88.

statements from his affidavit which he had filed in proceedings against the defendant, Tang, as reference to those statements had provoked widespread anger in Malaysia. The judge allowed Lee's application on the grounds that Tang had abused the process of the court by using the affidavits for a collateral purpose, and that it was in the interest of maintaining friendly relations between Malaysia and Singapore. Costs were also awarded against Tang. Tang sought leave to appeal against the costs order, which was denied by the judge. On appeal to this court, Lee brought a preliminary objection that the court ought not to hear Tang, who was in contempt of court, unless and until he had purged his contempt. Rejecting Lee's preliminary objection, this court observed that it was within its *discretion* to disallow a contemnor to be heard. The court refused to exercise such discretion, holding that it would not be "fair or just to deny [Tang] a hearing", given that the objections were not raised before the judge below, when Tang was already in contempt of earlier court orders (*Lee v Tang* at [12]–[13]).

41 Similarly, in the present case, the preliminary objection was not raised before the Judge below, when Amber was already allegedly in contempt of the court's orders. Hence, it would not be "fair or just to deny [Amber] a hearing" on appeal (*Lee v Tang* at [12]). This is especially so as the arguments that the defendants are relying on in their preliminary objection are essentially similar to the arguments that will be ventilated in the committal proceedings, which is pending and due to be heard after the present summons for leave is disposed of. It would thus be premature for this court to deny Amber its right to be heard on the premise of such arguments.

Test for disclosure of documents

42 Turning to the main issue on the appropriate test for determining whether leave ought to be granted to Amber to disclose the Documents to the authorities, this court held in *Beckkett* (([36] *supra*) at [18]) that "a discovering party should only be released from its implied undertaking on the discovered documents in *special or exceptional* circumstances which warrant overriding the public interest in encouraging full disclosure" [emphasis added].

43 While *Beckkett* concerned the use of documents obtained during *discovery*, the same approach has been adopted in the context of search (or Anton Piller) orders (see *Reebok International Ltd v Royal Corp and another action* [1991] 2 SLR(R) 688 ("*Reebok*") at [17] and *Hearne and another v Street and others* (2008) 248 ALR 609 at [96]). After all, a search order functions as a form of discovery (*Crest Homes plc v Marks and others* [1987] AC 829 ("*Crest Homes*") at 853, per Lord Oliver of Alymerton). Amber does not dispute that leave is required before it can be released from the *Riddick* undertaking and hence applied to the Judge for leave.

44 The dispute therefore centres on the appropriate test to be applied before such release may be granted.

The balancing of interests test

45 As the Judge observed after her extensive review of the relevant decisions in England, Australia, Canada and Hong Kong, the weight of the authorities in the Commonwealth demonstrates that, in determining whether a party ought to be granted leave to be released from its *Riddick* undertaking, a balancing of interests test is to be adopted (see GD at [21]–[31]).

46 Under this balancing of interests approach, the court will be required to engage in a multifactorial balancing exercise, and leave will only be granted if, in all the circumstances of the case, the interests advanced for the extraneous use of the disclosed documents outweigh the interests that are protected by the *Riddick* undertaking (see, for England: *ACL Netherlands BV and others v Michael Richard Lynch and another* [2019] EWHC 249 (Ch) ("*ACL Netherlands*") at [49], *O Ltd v Z* [2005] EWHC 238 (Ch) ("*O Ltd v Z*") at [72]–[81] and *Marlwood Commercial Inc v Kozeny and others and another matter* [2004] 3 All ER 648 ("*Marlwood*") at [45]–[46]; for Canada: *Suzette F Juman also known as Suzette McKenzie v Jade Kathleen Ledenko Doucette, by her litigation guardian* [2008] 1 SCR 157 ("*Doucette (SC)*") at [33]; for Hong Kong: *Secretary for Justice v Florence Tsang Chiu Wing & ors* [2014] 6 HKC 285 ("*Florence Tsang*") at [23], *Re NDT (BVI) Trading Limited* [2009] HKCU 1593 ("*Re NDT*") at [6]–[7] and *Unicredit Bank Austria AG v Dragon Wise Trading Ltd* [2013] HKCU 331 at [8]; for Australia: *Bailey v Australian Broadcasting Corporation* [1995] 1 Qd R 476 ("*Bailey*") at 486 and *Ambridge Investments Pty Ltd v Baker (No 3)* [2010] VSC 545 at [33]–[35]).

47 The injustice (or lack thereof) to the disclosing party and the privileges which may be asserted are relevant factors which would feature in the balancing exercise (*Marlwood* at [46]; *Doucette (SC)* at [33]; *Florence Tsang* at [23] and [29]; *O Ltd v Z* at [37] and [75]–[81]), though as explained at [72] below, the weight to be accorded to such factors is necessarily fact-specific.

A "crimes exception"?

48 Against the weight of the authorities, Mr Ali submits that the court ought not to engage in a multifactorial balancing exercise to determine if the public interest in the investigation of potential crimes is sufficiently compelling to

justify a release from the *Riddick* undertaking. Instead, under Mr Ali's proposed two-step test, leave ought to be granted if (a) there is *prima facie* evidence of criminal conduct in the documents sought to be disclosed; and (b) the court is satisfied that the person applying for leave is not acting for an improper purpose (*eg*, acting out of spite or malice). Mr Ali further submits that a multifactorial balancing approach would be "unprincipled as it arrogates to the Court a function constitutionally vested in the Attorney-General".[37]

49 In support, Mr Ali relies on the House of Lords' decision in *Rank Film Distributors Ltd and others v Video Information Centre (a firm) and others* [1982] AC 380 ("*Rank Film*"), where Lord Fraser of Tullybelton remarked (at 447) that:

> … the case of *Riddick* … recognis[es] that there *might* be a public interest in favour of disclosure which would override the public interest in the administration of justice which goes to preserve the confidentiality of documents disclosed on discovery. That is clearly correct. If a defendant's answers to interrogatories tend to show that he has been guilty of a *serious* offence I cannot think that there would be anything improper in his opponent reporting the matter to the criminal authorities with a view to prosecution, certainly if he had first obtained leave from the court which ordered the interrogatories, and probably without such leave.
>
> [emphasis added]

50 Taken at face value, his Lordship's observations may be construed as suggesting that the implied undertaking would inevitably be lifted where the disclosure is for the purpose of initiating or furthering a criminal prosecution. This has been referred to as the "crimes exception". However, as seen by the emphasised portions of Lord Fraser's quote, his Lordship was in any case referring to *serious* offences only, and even then, the earlier use of "might"

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[37] Appellant's Case (CA 228) p 4–5, para 11; p 19 para 42; p 28 para 59.

suggests that the public interest in favour of disclosure may not always override the public interest in the administration of justice.

51 Nonetheless, inasmuch as Lord Fraser's *dictum* may be viewed as authority for a broad-based crimes exception, Mr Ali submits that such an exception would not be overly expansive, as it could be subject to the qualification that the person applying for leave is not acting for an improper motive.[38] This safeguard accords with the approach of the Court of Appeal for British Columbia in *Doucette (litigation guardian of) v Wee Watch Day Care Systems Inc* [2006] BCJ No 1176 ("*Doucette (CA)*"), where Kirkpatrick JA (with whom Newbury and Low JJA agreed) concluded that "the [implied] undertaking in the action cannot form a shield from the detection and prosecution of crimes in which the public has an overriding interest" (at [48]). In her view (at [56]),

> … [a] party seeking to use the discovery evidence other than in the proceedings in which it is produced must obtain the permission of the disclosing party or leave of court. However, **the obligation of confidentiality does not extend to *bona fide* disclosure of criminal conduct**. On the other hand, non-*bona fide* disclosure of alleged criminal conduct would attract serious civil sanctions for contempt.
>
> [emphasis added in bold]

52 We do not accept Mr Ali's submission. As the Supreme Court of Canada observed in *Doucette (SC)* ([46] *supra*) at [49], the good faith of the applicant is not directly relevant to the court's rationale for granting relief against the *Riddick* undertaking:

> The B.C. Court of Appeal [in *Doucette (CA)*] qualified its "crimes" exception by the requirement that the communication to the

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[38] Appellant's Case (CA 228) at para 62.

> police be made in good faith. Aside from the difficulties in applying such a requirement, as previously mentioned, I do not see how a "good faith" requirement is consistent with the court's rationale for granting relief against the undertaking. If, as the hypothesis requires, it is determined in a particular case that the public interest in investigating a crime and bringing the perpetrators to justice is paramount to the examinee's privacy interest, *the good faith of the communication should no more be an issue here than in the case of any other informant. Informants are valued for what they can tell[,] not for their worthy motives.*
>
> [emphasis added]

53 Hence, the focus is on the balance to be struck between the competing interests, not on the motives of the applicant *per se* without considering the other factors. In other words, it is essential to situate the motive of the applicant in the specific context of each case.

54 More importantly, a broad-based "crimes exception" assumes that every evidence of criminal conduct deserves equal treatment. However, "evidence relating to a crime may vary from mere suspicion to blatant admissions, from peripheral clues to direct evidence, from minor offences to the most heinous" (*Doucette (SC)* at [43], citing the decision of the first instance judge in *Doucette (litigation guardian of) v Wee Watch Day Care Systems Inc* [2005] BCJ No 589 at [27]). The Supreme Court then observed that "[t]his difficulty is compounded by the fact that parties to civil litigation are often quick to see the supposed criminality in what their opponents are up to, or at least to appreciate the tactical advantage that threats to go to the police may achieve" (*Doucette (SC)* at [43]).

55 Similar observations were made in the Australian case of *Bailey* ([46] *supra*). After considering Lord Fraser's observations in *Rank Film* ([49] *supra*), the judge remarked (*Bailey* at 486):

> … the law is not so black and white. Indeed the plaintiff conceded that it will not be in every case where the criminal law is infringed that the Court will grant the leave sought…. The

> infringement may be of a trivial or inconsequential nature or the application for leave might be brought, not for the purpose of promoting the public interest, but rather out of malice of spite on the part of the applicant.… Moreover, the disclosure may have been brought about by circumstances in which the respondent was unable to claim a privilege otherwise open to him, e.g. through the compulsion of an Anton Pillar [*sic*] order. In such a case, the respondent may have a legitimate right to have the order set aside …, and that is a factor which may render it unfair or unjust for the Court to grant the leave sought. All of the circumstances must be looked to in order to determine the nature and extent of the countervailing public interest raised.
>
> [internal citations omitted]

56 Also, in *Reebok* ([43] *supra*), Chan Sek Keong J (as he then was) declined to adopt a broad-brushed approach towards the use of documents in aid of criminal proceedings, holding (at [36]):

> The Anton Piller order is granted in the exercise of the court's equitable jurisdiction which originated from the need to administer justice based on conscience and fairness. This court should have regard to the potential penal consequences that may befall the third party if such information is allowed to be used against him. *The nature of the offence and severity of the penal sanctions that may be imposed on him may be entirely out of the proportion to the need to protect the economic interests of the discovering party.* Unless compelled by higher authority, I am not prepared to allow such information to be used against a third party in criminal proceedings abroad if, for example, the punishment for an offence involving an infringement of intellectual property rights may be imprisonment for life, or worse, or some other form of cruel or unusual punishment.
>
> [emphasis added]

57 Hence, notwithstanding the force of Mr Ali's argument to adopt the practical simplicity of a broad-based "crimes exception", we reject such an approach. Instead, "each case must turn on its own individual facts", and a party ought not to be released from its *Riddick* undertaking unless "special circumstances" can be shown (*Crest Homes* ([43] *supra*) at 860). As seen by the authorities that have followed *Crest Homes*, this entails a careful balancing of

the competing interests. For completeness, we should add that we do not agree with Mr Ali's submission that the adoption of a multifactorial balancing exercise would interfere with the exercise of prosecutorial discretion. A balancing of competing interests undertaken by the court is to protect its own processes from abuse. That is well within the remit of the court and has nothing to do with the exercise of prosecutorial discretion which remains vested in the Attorney-General.

Clarifying the Beckkett *conditions*

58 In this vein, we would like to take the opportunity to clarify this court's decision in *Beckkett* ([36] *supra*) where we held that a party seeking leave to be released from its *Riddick* undertaking has to demonstrate (a) cogent and persuasive reasons; and (b) that no prejudice or injustice would result to the other party by such disclosure (*Beckkett* at [19]). These twin requirements have been termed the *Beckkett* conditions and are *conjunctive*. Hence, even if cogent and persuasive reasons can be shown, any prejudice or injustice to the party who had provided disclosure would typically tilt the scales back in favour of denying leave, as was aptly demonstrated on the facts in *Beckkett*.

59 In that case, the appellant ("Beckkett") had obtained pre-action discovery against Deutsche Bank AG ("DB"). From the discovery, it emerged that the bank had sold its pledged shares to a third party ("DSM"). Beckkett (who was the owner of the pledged shares) subsequently commenced a Singapore action against the bank and the third party, claiming that the pledged shares had been sold at a gross undervalue. While the Singapore action was taking its course, Beckkett received information that DSM was planning to sell the shares that it had bought from DB. Seeking to restrain the sale, Beckkett sought leave to use the documents which it had obtained during pre-action

discovery in the Singapore action to apply for an injunction in Indonesia. This court upheld the High Court Judge's decision to deny leave to Beckkett to use the documents (at [42]):

> [I]f leave was granted to Beckkett to be released from its [*Riddick*] undertaking, there would be a real risk that DB might have to face criminal investigation or prosecution in Indonesia. *There would be prejudice to DB.* ***For this reason alone****, leave should not be given to allow Beckkett to use the disclosed documents to obtain an injunction in Indonesia.*
>
> [emphasis added in italics and bold italics]

60 It seems to us that the *Beckett* conditions could be construed to mean that regardless of the cogency and persuasiveness of the reasons proffered by Beckkett in favour of disclosure, it was the court's view that leave would not be granted *for the sole reason* that the prospect of criminal prosecution against DB amounted to prejudice to the disclosing party, DB. In other words, prejudice to the disclosing party appeared to operate as an overriding factor against the grant of leave.

61 Having reviewed the authorities above, which weigh heavily in favour of a balancing of interests approach, we find the *Beckkett* conditions to be inconsistent with both precedents and principle. We elaborate.

(1) The *Beckkett* conditions are inconsistent with precedents

62 In *Reebok* ([43] *supra*), the plaintiff sought, *inter alia*, leave to send certain pairs of shoes which it had seized from the defendant in Singapore proceedings to Taiwan, so as to assist criminal proceedings against the alleged manufacturers of the shoes. Considering that the potential penal consequences that could befall the alleged manufacturer was not entirely out of proportion and/or cruel or unusual, the judge adjourned the application to allow the plaintiff to adduce evidence to satisfy him that the criminal charges against the purported

manufacturer indeed concerned the manufacture of the said shoes (*Reebok* at [36]–[37] and [41]). This demonstrates that prejudice, while relevant, is not necessarily an overriding factor that would invariably prevent the lifting of the *Riddick* undertaking.

63 Such an approach, which accords *due weight*, but not necessarily *overriding* weight, to the factor of prejudice, has similarly been adopted in other jurisdictions. For example, in *Smith v Jones* [1999] 1 SCR 455 ("*Smith v Jones*"), the Supreme Court of Canada held that the prejudice which could be suffered by the accused person upon the release of privileged communications with his psychiatrist was outweighed by the "clear and imminent threat of serious bodily harm to an identifiable group" (at [84]).

64 Similarly, in *Attorney-General for Gibraltar v May and others* [1999] 1 WLR 998 ("*AG v May*"), the English Court of Appeal allowed affidavits sworn by the defendant in earlier civil proceedings to be used in separate criminal proceedings in Gibraltar against him. In the court's view, the prejudice to the defendant *did not outweigh* the interest in lifting the undertaking as the criminal court in Gibraltar was the proper forum to determine the admissibility of the affidavits, including considerations of unfairness to the defendant in that regard (at 1009–1010).

65 In *Bailey* ([46] *supra*), the Australian court also found that while the defendants could suffer the prejudice of being subject to criminal investigation and prosecution in the event that the disclosed documents were handed to the authorities, "the public interest in investigating the possibility of any criminal activity… outweighs the public interest in requiring strict adherence to the plaintiff's [*Riddick*] undertaking" (at 490).

(2) The *Beckkett* conditions are inconsistent with principle

66 It should be observed that the *Riddick* undertaking is not intended to prevent prejudice to the disclosing party *per se*. Rather, its object is to promote openness in discovery while simultaneously protecting the disclosing party's right to privacy (see *Process Development Ltd v Hogg* [1996] FSR 45 at 51 and *BNX v BOE and another appeal* [2018] 2 SLR 215 at [64]). It is these twin objects that inevitably feature in the court's consideration in any application to release a party from its *Riddick* undertaking, and the factor of prejudice is not invariably a factor to be given weight, let alone *overriding* weight.

67 Indeed, there is no principled reason to grant such overriding weight to prejudice as a factor – if so, documents obtained during discovery or pursuant to a search order could never be released to the authorities, given that the natural corollary of such release would be that the party granting discovery would suffer prejudice in the form of criminal investigation and (potentially) prosecution. This would fetter the court's jurisdiction, and prevent the use of discovered documents or information for criminal investigation purposes, even if a potentially serious and heinous offence, such as a plan to kidnap, rape and kill prostitutes (*Smith v Jones* ([63] *supra*)) or a collection of paedophilic pornography of a serious nature (*O Ltd v Z* ([46] *supra*)), is disclosed.

68 Hence, following the approach adopted in the decisions above, we find that prejudice is but a factor which *may* be accorded relevance, and the appropriate weight to be given to it would depend on the entire circumstances of each case (*Bailey* ([46] *supra*) at 488, and *ACL Netherlands* ([46] *supra*) at [49], citing *AG v May* ([64] *supra*)).

The applicable test

69 The general tenor of the authorities demonstrates that a balancing exercise is to be conducted in determining whether the circumstances are such as to justify lifting the *Riddick* undertaking. Under this balancing approach, while the *Beckkett* conditions appear to give prejudice overriding weight as a matter of course, other decisions in Singapore and several other jurisdictions demonstrate that prejudice is but a factor amongst others, with the appropriate weight dependent on the specific circumstances of each case. A consideration of the rationale underpinning the *Riddick* undertaking supports such an approach.

70 Surveying the authorities, the following are non-exhaustive factors which may be considered in determining whether the circumstances warrant the release of the *Riddick* undertaking.

71 On the one hand, the following factors have been raised in favour of lifting the undertaking:

(a) ***Countervailing legislative policy****:* Legislative policy may provide countervailing considerations to support the lifting of the *Riddick* undertaking (see *Doucette (SC)* ([46] *supra*) at [39]). For example, ss 175 and 176 of the Penal Code provide that whoever, being legally bound "to produce or deliver up any document or electronic record" or "to give notice or to furnish information on any subject" to a public servant, but who intentionally omits to do so, shall be punished with imprisonment for up to a month, a fine of up to $1,500, or with both. In such situations, it is an offence in itself not to provide the relevant document or information to the authorities, notwithstanding that the relevant document or information may be subject to the *Riddick*

undertaking. The prospect of the disclosing party being in contravention of the law by adhering to the *Riddick* undertaking is a weighty factor in favour of the lifting the undertaking. However, the weight to be placed on this factor *may* be overridden, for example, if the prejudice to the disclosing party would be entirely disproportionate with the offence(s) disclosed, or if the party seeking to be released from the undertaking is acting with grossly improper purposes, under the guise of complying with its legal obligations (see [71(c)] and [72(b)] below).

(b) ***Support of related proceedings***: The disclosed documents may also be used in support of related civil or criminal proceedings, whether domestic or foreign (see *Crest Homes* ([43] *supra*)*, Marlwood* ([46] *supra*)*, Bailey* ([46] *supra*) and *Reebok* ([43] *supra*). This is because there is a "strong countervailing public interest in ensuring that all relevant evidence which may be required … [is] before the court" (*Microsoft Corp and others v SM Summit Holdings Ltd and another* [1999] 3 SLR(R) 1017 ("*Microsoft Corp (HC)*") at [35]). In this respect, the identity of the parties and the nature of the related proceedings is relevant (*Crest Homes* at 860; *Reebok* at [32]). Hence, in *Crest Homes*, where the related proceedings involved the *same* parties and as it was "purely adventitious that there happened to be two actions", the court was satisfied that releasing the plaintiff from its undertaking would not "detract from the solemnity and importance of the [*Riddick*] undertaking" (*Crest Homes* at 860–861; see also *Sybron Corporation and another v Barclays Bank Plc* [1985] 1 Ch 299 at 326–328). Documents obtained on discovery may also be utilised to discredit a witness' contradictory testimony in a separate action (*Re NDT* ([46] *supra*) at [11]–[13]), as "[a]n undertaking implied by the court … to make civil litigation more effective should not permit a witness to play

games with the administration of justice" by tailoring his evidence to suit his needs in each particular proceeding (*Doucette (SC)* at [41]).

(c) ***Investigation and prosecution of criminal offence(s)***: Another public interest in favour of release may be the location and prosecution of criminal offence(s). In determining the weight to be given to this interest, the Court may consider, among others: (a) whether civil remedies are available; (b) the cogency of the evidence to be adduced in support of the offence; (c) the body or authority to which the documents will be disclosed to; (d) the seriousness of the crime reported; and (e) the proportionality of the potential penal sanctions (*Reebok* at [36]; *Bailey* at 488; *O Ltd v Z* ([46] *supra*) at [76]–[77]; *Prime Finance Pty Limited and ors v Randall and ors* [2009] NSWSC 361 at [39]). In relation to (e), it has been observed that the court would not allow the use of disclosed information or documents against another party in support of criminal proceedings abroad "if, for example, the punishment for an offence involving an infringement of intellectual property rights may be imprisonment for life, or worse, or some other form of cruel or unusual punishment" (*Reebok* at [36]). When considering the weight to be accorded to this factor, the privilege against self-incrimination, if timeously asserted, would also feature prominently in the balancing exercise (see [72(c)] below).

(d) ***Public safety concerns*** raised by the disclosed documents, such as concerns of paedophilia (*O Ltd v Z*) or a plan to commit heinous crimes against an identifiable person or group or persons (*Smith v Jones* ([63] *supra*)) may warrant a lifting of the undertaking, especially if there is a threat of "immediate and serious danger" (*Doucette (SC)* at [40]). This factor is closely tied to and may overlap with factor (c).

(e) ***International comity***: Concerns of international comity may also be relevant. For instance, in *Marlwood* ([46] *supra*), the claimants brought civil proceedings in the English High Court against the defendants, complaining of fraudulent misrepresentation. In the course of the English proceedings, the defendants disclosed certain documents. In the meantime, criminal investigations into the affairs of the first defendant were being carried out by the District Attorney of New York, who sought the assistance of the United Kingdom's Secretary of State. Pursuant to the request, a notice was served on the claimants' solicitors to produce copies of documents disclosed by the defendants to the claimants in the course of the English proceedings. The English Court of Appeal granted leave to the claimants to release the disclosed documents. In the court's view, the public interest in the investigation of fraud, coupled with the public interest in mutual international assistance, which were interests that were reflected in English legislations, took precedence over the " general concern of the courts to control the collateral use of compulsorily disclosed documents" (*Marlwood* at [46] and [52]).

72 The factors in favour of granting leave are then to be balanced against the interests sought to be protected by the *Riddick* undertaking, namely the public interest in ***encouraging full disclosure*** and the disclosing party's ***privacy interests*** (*Crest Homes* ([43] *supra*) at 861; *ACL Netherlands* ([46] *supra*) at [53]; *Bailey* at 488). Other factors which may militate against the grant of leave include:

(a) ***Injustice or prejudice*** to the disclosing party (*Beckkett* ([36] *supra*) at [42]; *Crest Homes* at 860; *Doucette (SC)* at [33]). However, where no irremediable prejudice is demonstrated, this factor may be

accorded little weight. Hence, in *AG v May* ([64] *supra*) at 1010, the English court lifted the *Riddick* undertaking as there was no suggestion of any specific prejudice to the first defendant otherwise than in relation to its privilege against self-incrimination, which the court was satisfied could be fully protected in the Gibraltar criminal proceedings (see also *Bailey* at 490–491).

(b) ***Improper purpose for which leave is sought***: While "[i]nformants are valued for what they can tell [and] not for their worthy motives" (*Doucette (SC)* at [49]), the court nonetheless has a general concern to control the collateral use of disclosed documents (*Marlwood* at [47] and [52]). This bears relation to the concept of abuse of process, which "pervades the whole law of civil (and criminal) procedure", and by which the court ascertains "whether the proceedings in question constitute an 'improper use of its machinery'" (*JTrust Asia Pte Ltd v Group Lease Holdings Pte Ltd and others* [2018] 2 SLR 159 at [99], citing *Gabriel Peter & Partners v Wee Chong Jin* [1997] 3 SLR(R) 649 at [22]; see also *Microsoft Corp and others v SM Summit Holdings Ltd and another and other appeals* [1999] 3 SLR(R) 465 ("*Microsoft Corp (CA)*") at [36]). Hence, where relevant, the court may also consider whether the application has been brought for some personal advantage or improper purpose (*North East Equity Pty Ltd v Goldenwest Equities Pty Ltd* [2008] WASC 190 at [44]). For example, in *755568 Ontario Ltd v Linchris Homes Ltd* [1990] 1 OR (3d) 649 at [15], the court dismissed an application to release documents covered by the *Riddick* undertaking to the police, as a reasonable inference was that the applicant was hoping that the police could help uncover additional information that would assist the applicant's action, or that the police investigations would pressure the other party into offering to settle the matter.

(c) ***Privilege against self-incrimination***: It is also relevant to consider whether the disclosing party may rely on the privilege against self-incrimination, and whether such privilege has been waived in the circumstances. Certain authorities suggest that the proper assertion of a privilege is necessarily overriding (see *O Ltd v Z* ([46] *supra*) at [50] and [53] and *Florence Tsang* ([46] *supra*) at [29]). Both Amber and the defendants also accept that the privilege against self-incrimination would suffice to bar the *Riddick* undertaking from being lifted so long as it is timeously and properly asserted.[39] While we accept that the privilege against self-incrimination is necessarily a weighty factor that is not to be easily displaced, it is our view that the better approach is for the privilege to be regarded as a factor to be given significant, but not necessarily overriding, weight. This accords with our observations relating to prejudice at [62]–[68] above, *viz,* that no one factor should be given overriding weight under the balancing approach, and that the appropriate weight to be given to any factor is, at end, fact-specific.

In this vein, this court in *Beckkett* saw the merits of the "flexible approach" adopted by the English courts in *Arab Monetary Fund v Hashim* [1989] 1 WLR 565 and *Credit Suisse Fides Trust SA v Cuoghi* [1998] QB 818 where "if disclosure of a document could give rise to self-incrimination in relation to the criminal law of a foreign state, that was a factor which the court *could* take into account" [emphasis added]. This discretionary approach would allow the privilege to yield in exceptional situations, for example, to a "clear and imminent threat of serious bodily harm to an identifiable group, and if this threat is made in

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[39] Transcripts, p 19 lines 26 to 29; p 31 lines 5 to 7; p 93 lines 16 to 21.

> such a manner that a sense of urgency is created" (*Smith v Jones* ([63] *supra*) at [84]), or where the interests against self-incrimination can be adequately secured by some other means (see, *eg, AT & T Istel Ltd and another v Tully and another* [1993] AC 45 at 57, where the Crown Prosecution Service stated by a letter that they did not intend to use any of the alleged privileged material disclosed by the defendant in compliance with the order of court since the Prosecution could use material already obtained, or which they could obtain independently from the civil proceedings). In another example, in *AG v May*, while the English Court of Appeal "fully recognise[d] the great importance of the privilege against self-incrimination", it was held that this privilege did not bar the use of the relevant document in support of criminal proceedings in Gibraltar. In the court's view, the court in Gibraltar was "in a much better position … to give appropriate weight to all relevant conclusions, … including not only the full and proper protection of the first defendant against any injustice, but also the importance of ensuring, subject always to fairness, that all relevant material is available to the jury in the criminal trial" (at 1009 to 1010).

73 We pause here to make a few observations about the appropriate weight to be given to privileges in the balancing exercise. On the facts of the present case, only the privilege against self-incrimination is engaged. The cases of *Beckkett, O Ltd v Z, Smith v Jones* and *AG v May* show that the privilege against self-incrimination is often relevant in determining whether documents disclosed during discovery may be utilised for extraneous purposes, such as for the facilitation of criminal investigations.

74 However, in applications by a party to be released from the *Riddick* undertaking, the privilege against self-incrimination is not the only privilege

which may be asserted. This is illustrated by the case of *Florence Tsang,* where legal professional privilege was successfully asserted in resisting an application to release a discovering party from the *Riddick* undertaking. In that case, the husband and wife were engaged in matrimonial proceedings following the breakdown of their marriage. During the course of the matrimonial proceedings, the husband and his father executed certain documents, purporting to transfer the interest in certain assets from the husband to his father, thus depleting the pool of matrimonial assets. The wife applied to set aside the dispositions by the husband. In aid of her application, she obtained orders for discovery, which were resisted by the husband and his father on the ground of legal professional privilege. Saunders J rejected the arguments on privilege, as legal professional privilege "cannot include the case of communications, criminal in themselves, or intended to further any criminal purpose" ("the *Cox and Railton* rule") (*Florence Tsang* at [9]). The wife thus came into possession of the privileged documents.

75 After the privileged documents were disclosed to the wife, the Secretary of Justice ("SJ") applied to the court for the wife to be released from her *Riddick* undertaking so that the Director of Public Prosecutions ("DPP") could access the privileged documents for criminal investigation purposes. The Hong Kong Court of Final Appeal rejected the SJ's application. In the court's view, while it was common ground that legal professional privilege could not be asserted as against the wife given Saunders J's decision (*Florence Tsang* at [21]), this did not necessitate that the privilege could not be asserted by the husband as against the SJ and the DPP (*Florence Tsang* at [31]). Given that the issue of the husband's right to assert the privilege against the SJ and the DPP was a live one which had not been determined by the court, it was inappropriate to side-step the determination of that issue by releasing the wife from her *Riddick* undertaking (*Florence Tsang* at [31]). This was especially so as legal

professional privilege is a "fundamental right" that is *constitutionally guaranteed* by Art 35 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (1990), which provides that "Hong Kong residents shall have the right to confidential legal advice…" (*Florence Tsang* at [27]–[28]). Hence, while an exercise of balancing competing interests was required in deciding whether someone should be released from the *Riddick* undertaking, "it is well established that '[legal professional privilege] does not involve such a balancing of interests. It is absolute and is based not merely upon the general right to privacy but also upon the right of access to justice'" (*Florence Tsang* at [29], citing *Regina (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax and another* [2003] 1 AC 563 at [16]). Accordingly, the public interest in facilitating the reporting of crime and in the proper investigation of suspected crime could not override the legal professional privilege which was asserted by the husband against the SJ and DPP. The appropriate recourse was for the SJ and DPP to bring the privileged documents within the *Cox and Railton* rule, as the wife had done (*Florence Tsang* at [34]).

76 We accept that different considerations apply to different forms of privileges. However, we note that, unlike in Hong Kong, legal professional privilege is not constitutionally guaranteed in Singapore. That said, it is enshrined in statute (s 128 of the Evidence Act (Cap 97, 1997 Rev Ed) ("Evidence Act")), and "has been firmly entrenched as part of the common law system of justice for centuries" (*Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd and other appeals* [2007] 2 SLR(R) 367 at [23]). We also observe that legal professional privilege is *not* absolute, and it may be waived by the client (although waiver is not to be easily implied) (*ARX v Comptroller of Income Tax* [2016] 5 SLR 590 at [51] and [68]–[69]), or overridden where the allegedly privileged

communication was "made in furtherance of any illegal purpose", or if it concerns "any fact … showing that any crime or fraud has been committed since the commencement of [the lawyer's] employment" (s 128(2) of the Evidence Act). Nonetheless, as the point of the appropriate weight to be accorded to other privileges, such as legal professional privilege, does not arise in the present case, we leave this issue to be properly considered when the point arises squarely before this court in a future case.

Leave to release Amber from its *Riddick* undertaking

77 Returning to the facts of the case, we note that the Documents relate in essence to four distinct sets of offences, namely the EFMA, Penal Code, PCA and CMA offences.

Privilege against self-incrimination

78 In our view, the weightiest factor against the release of the *Riddick* undertaking is the defendants' privilege against self-incrimination.

79 For a party to rely on the privilege against self-incrimination, the risk of self-incrimination must be "*reasonable*, rather than *fanciful*" [emphasis added] (*Beckkett* ([36] *supra*) at [32], citing *Sociedade Nacional de Combustiveis de Angola UEE v Lundqvist* [1991] 2 QB 310 at 324). To demonstrate that the risk of self-incrimination is reasonable, the party asserting the privilege is required to tender evidence to show that the privilege is being asserted *bona fide*, and the mere assertion by a party that he may or will incriminate himself is insufficient (*Expanded Metal Manufacturing Pte Ltd and another v Expanded Metal Co Ltd* [1995] 1 SLR(R) 57 at [33]).

80 Nonetheless, even if appropriately asserted, the privilege against self-incrimination may be found to have been waived by the disclosing party. For example, in *Nikkomann Co Pte Ltd and others v Yulean Trading Pte Ltd* [1992] 2 SLR(R) 328 ("*Nikkomann*"), the first appellant and respondent entered into a joint venture, whereby the first appellant would be responsible for the marketing and reselling of timber and related products, while the respondent would provide financial assistance, and receive 30% of the profit on the transactions in turn. Thereafter, it was represented to the respondent that the first appellant had entered into a contract for sale of sawn timber. On this basis, the respondent furnished two letters of credit. However, despite multiple discussions and convoluted explanations from the first appellant and its representatives (collectively, "the appellants"), the respondent never received any payment on the sale of the timber, and a cheque that was given by the first appellant was dishonoured on presentation. On that basis, the respondent sought several interim orders against the appellants, including search orders. The search orders sought to determine the whereabouts of the alleged timber goods, and their proceeds, if any. The appellants complied with the search orders without objection, and, in the course of inspecting the documents that were obtained pursuant to the orders, the respondent discovered that the entire lot of timber had in fact been on-sold to a buyer, and that the first appellant had received the proceeds of the sale.

81 The appellants sought a discharge of the search orders, arguing that their compliance with the orders would infringe their privilege against self-incrimination. Rejecting this argument, this court held that the appellants' right to assert the privilege had been waived (at [65]):

> The time to take the objection is on being served with the order, and the objection should be by way of response to the order. If he does not object then, but instead provides the information

> required by the order, we are of the view that he is precluded thereafter from raising the point.

82 The Judge considered the present case to be materially similar to that of *Nikkomann,* and she found that the appropriate time for the defendants to assert the privilege was at the time of the search or, at the latest, after they had engaged lawyers to set aside the search orders. By asserting the privilege on 11 March 2019, which was almost a year after the search orders were executed, the defendants had waived their privilege against self-incrimination (GD at [59]–[61]). With respect, we do not agree.

83 In *Nikkomann*, the search orders were clearly for the specific purpose of ascertaining the whereabouts of the subject goods and their sale proceeds, if any. The appellants complied with the search orders without objection. As it turned out, the documents obtained revealed that, contrary to the representations made to the respondent, the goods had already been sold, and the first appellant had already received the proceeds of the sale. It was only at that time that the appellants sought to assert the privilege, which was roundly rejected by this court as having been waived. In our view, this was unsurprising, as the very documents that had been voluntarily handed over pursuant to the search orders turned out to be the incriminating documents. Hence, the proper time to assert the privilege against self-incrimination was rightly at the time of the search orders.

84 In this case, the circumstances giving rise to the right to assert the privilege only arose sometime after 12 February 2019, when the defendants received notice of the present summons, and thus understood, *for the first time*, that Amber intended to use the Documents for criminal investigation purposes.

85 Prior to that, upon being served with the search orders, the defendants could not reasonably have been expected to assert the privilege against self-incrimination. Even though the search orders contained express provisions for the defendants to obtain legal advice and to vary or discharge the search orders, they also contained express undertakings by Amber to the effect that the seized documents would not be used for extraneous purposes, or handed over to third parties. Such third parties would include the authorities.

86 Furthermore, the documents sought under the search orders were expansive, and they included *all* e-mail correspondence on the defendants' email accounts, all data storage devices, including computers, mobile phones and thumb drives of the defendants, and all documents, plans, drawings, notes, memoranda, and power point slides relating to Amber's trade secrets or proprietary information. Pursuant to such expansive search terms, more than 100,000 documents were seized from the defendants.

87 Had the defendants attempted to assert their privilege against self-incrimination at the time of the searches, such an assertion would have been dismissed as "fanciful", rather than "reasonable", as they would have had to assert their privilege in a vacuum, *vis-à-vis* all the documents, which were in excess of 100,000 in number. Given the expansive volume of documents and the common understanding between the parties on the scope and purpose of the search orders, it would be entirely unreasonable to expect the defendants to identify the specific documents over which the privilege was to be asserted. After all, it was both the direction of the Judge and the common understanding of the parties that the defendants' documents would be returned to the defendants. Apart from being a blanket and untargetted assertion, any assertion of the privilege would have been particularly fanciful as Amber had, prior to obtaining the search orders, given assurances to the court that the seized

documents would be utilised "*purely and solely* for the purpose of obtaining further evidence that is necessary to [Amber's] case without risking the [defendants'] destruction of the said evidence" [emphasis added].[40] Under *those* circumstances, there was simply no occasion for the defendants to entertain the necessity of asserting their privilege against self-incrimination writ large, much less for the Documents which Amber is seeking leave to disclose to the authorities.

88 After the search orders were executed, the defendants took out the setting-aside application. The Judge did not deal directly with the application, and she instead directed the parties to carry out the Listing Exercise, so that all documents which belonged to the defendants, or which ownership was disputed, would be returned to the defendants or their solicitors, and would not be kept in any form by Amber. Had the Listing Exercise been complied with as directed, there would have been *no possibility* of Amber using the defendants' documents to support any reports to the authorities, as Amber would not retain possession of any such documents in the first place.

89 Yet, Amber failed to comply with the Listing Exercise on multiple occasions. Even so, it repeatedly represented to the defendants and the court that this was simply due to the voluminous number of documents that were the subject of the exercise. In fact, as late as on 23 January 2019, at the PTC before the SAR, Amber's solicitors, Lee & Lee, continued to represent to the court and the defendants' solicitors that it fully intended to comply with the Listing Exercise, and that any delays were due simply to the sheer number of documents involved. There was no indication that such delays were caused by Amber

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40 Joint Record of Appeal, Vol III (Part 1) p 77, para 174.

having taken the liberty of reviewing the substance of the defendants' documents to determine if they disclosed any potential offences on the defendants' part.

90 However, six days after the PTC before the SAR, on 29 January 2019, Amber took out the present application, *ex parte,* for leave. As it turned out, unbeknownst to the defendants, Amber had already disclosed WhatsApp chat logs which belonged to the defendants to the authorities.[41] The defendants were clearly unaware of such extraneous use of the seized documents, as their solicitors agreed to a further extension of time to comply with the Listing Exercise on 31 January 2019.[42] It was only on 12 February 2019, when the defendants were served with the present summons and the supporting affidavit, that they first became aware of Amber's intention to use the Documents for the extraneous purpose of supporting its reports to the authorities. Shortly thereafter, on 11 March 2019, in their first affidavit filed in response to the present summons for leave, the defendants made clear that they "have never waived their privilege against self-incrimination."[43]

91 In our judgment, it is clear from the above sequence of events that the defendants had been led by Amber to form the impression that the seized documents belonging to the defendants would be returned upon completion of the Listing Exercise and as a corollary, would not be used for any extraneous purpose, such as to assist in unsolicited criminal investigations. Once the defendants gained notice of the extraneous purpose for which Amber was seeking to utilise the Documents, it became apparent to them, *for the first time*,

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41 Joint Core Bundle Vol III, pp 83 to 84, para 14.

42 Joint Record of Appeal Vol III (Part 12), p 130.

43 Joint Core Bundle Vol III p 34, at para 45.

that there was a *reasonable*, rather than *fanciful*, risk that they could be incriminated by the Documents which they had handed over to Amber pursuant to the search orders. Given the reasonable risk, the defendants then timeously asserted the privilege against self-incrimination in the first affidavit which they filed in response to the summons for leave. Save in exceptional circumstances, such timeous and proper assertion of the privilege is a factor to be given significant weight in the balancing exercise. Indeed, Mr Ali went further, and accepted that the privilege, if timeously asserted, would operate as an absolute bar against the granting of leave to Amber.

Improper purpose

92 We are also satisfied on the evidence before us that Amber's application was motivated by an improper purpose. This would weigh as a significant factor against the lifting of the *Riddick* undertaking.

93 As we have recounted above, Amber had given multiple express undertakings, both to the defendants and the court, that the seized documents would not be used for extraneous purposes, or disclosed to third parties. The last of such express undertakings was given on 4 June 2018, when Amber's then-counsel informed the Judge that "[Amber's] and [Lim's] counsel have also given solicitor undertakings to each other not to release any of the documents to any other parties." At that same hearing, Amber's counsel also agreed to return the defendants' documents to them.[44]

94 On the back of the express undertakings and the agreement to return the documents to their rightful owner, the Judge ordered the parties to carry out the

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44 Minute Sheet (4 June 2018) p 2.

Listing Exercise, whereby documents which rightfully belonged to the defendants, or ownership of which was disputed, would be returned to the defendants or their counsel, and would not be kept in any form by Amber. In the meantime, while conducting the Listing Exercise, Amber handed over some of the Documents to the authorities without seeking leave of court, as it formed the opinion that the Documents disclosed potential offences committed by the defendants. Amber only took out the present application to seek retrospective and prospective leave on 29 January 2019, apparently on the basis of legal advice from Lee & Lee.

95 In our view, considering that Amber was legally represented prior to Lee & Lee's appointment, and that its previous solicitors had given *express* undertakings to the court and to the defendants' solicitors not to disclose the documents to other parties, Amber's purported belated discovery of the need to seek leave of court does not withstand scrutiny. This is especially so since the terms of the Judge's directions did not even require Amber to review the substance of the seized documents – rather, the Judge simply required Amber to utilise *search terms* to determine the *ownership* of those documents. Consistent with the limited nature of such an exercise, Amber was initially given only about two months to comply with the Judge's directions, notwithstanding that the task involved more than 100,000 documents. In view of the clear directions and the limited time provided for compliance, there was *no* reason for Amber to conduct a substantive review of the documents, much less to disclose certain documents to the authorities. In so doing, it deliberately went beyond the Judge's orders. In fact, it was in direct breach of its *express* undertakings.

96 In light of the numerous instances in which the express undertakings were given, we find that Amber was plainly aware that it was not entitled to

utilise the Documents for purposes extraneous to the present action without prior leave of court. Despite this, it deliberately breached the various undertakings when it took the calculated decision to make the reports to the authorities, tendering some of the Documents in support. Its purported explanation in relation to the clear breach of its undertaking has also been highly economical and scanty. In its various affidavits, Amber did not disclose any of the reports which were made to the authorities. Such reports would have revealed what was in fact disclosed to the authorities, and whether Amber was able, at the time of the reports, to identify the offences which had allegedly been committed by the defendants. This would have supported the inference that the reports were made with the benefit of legal advice and if so, it would suggest that Amber's breach of the express undertakings was a considered decision.

97 Amber was also deliberately vague about the exact date on which the reports were made, stating only that they were made sometime during the *third quarter of 2018*.[45] The dates of the reports are within the knowledge of Amber and should have been identified with precision. The vagueness as to the date of the reports left this court with some difficulty in determining whether the disclosures had been made *prior to any* of the express undertakings. If that had been the case, it would mean that Amber provided the express undertakings intending to mislead.

98 During this time, Amber was also repeatedly appearing before the Judge to seek extensions of time to complete the Listing Exercise. As late as 23 January 2019, *after* it had changed solicitors to Lee & Lee, it continued to represent to the court that the various extensions were necessitated by the sheer

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45 Joint Core Bundle Vol III p 81, para 8.

number of documents. Taking Amber's case at its highest that it was concerned about the offences allegedly committed by the defendants which it had reported to the authorities in the third quarter of 2018, we find it inexplicable that Amber failed to inform the court about the alleged offences and its disclosure to the authorities until the leave application was taken out on 29 January 2019. Were Amber's *bona fides* beyond question, there should have been no difficulty for Amber to inform the court that the circumstances made it necessary to examine the substance of the documents before reporting to the authorities. What it did instead was to render the disclosure to the authorities a *fait accompli* and thereafter to take its chances to convince the court to grant retrospective leave.

99 Tellingly, when Amber filed the leave application on 29 January 2019, it elected to do so *ex parte*. This was despite the fact that by then, it was clear beyond peradventure that the defendants were the counterparties to the action, and that the summons ought to be served on the defendants. There was no question that the defendants were entitled to be heard and would have expected to be heard in any event on a matter of such significance. In our view, this conduct has a significant bearing on the *bona fides* of Amber. When Amber decided to proceed on an *ex parte* basis, it was simultaneously seeking the defendants' agreement for a further extension of time for the completion of the Listing Exercise. After obtaining the defendants' consent to the extension of time, Amber then applied to the court, on 7 February 2019, to seek the extension of time. On 8 February 2019, the Judge granted the extension of time, and allowed Amber until 18 April 2019 to comply with the Listing Exercise.[46] On the same day, the Judge also directed Amber to serve the present summons and supporting affidavit on the defendants. On 12 February 2019, Amber finally

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46 Joint Record of Appeal Vol III (Part 12) pp 132 to 134.

served the present summons on the defendants. By that time, the extension of time had been obtained, and Amber was thus given an additional two months to continue reviewing the substance of the defendants' documents before returning them to the defendants, pursuant to the Listing Exercise.

100 In our view, it is also vital that Amber itself accepted, at least once the Listing Exercise was ordered, that it had *no* entitlement to the documents which belonged to the defendants, or which ownership was disputed. Yet, while the Listing Exercise was underway, Amber repeatedly sought to conceal from the court and the defendants that it was reviewing the substance of the defendants' documents, which documents it had *no* entitlement to in the first place. Instead, it consistently conveyed the misleading impression that its various delays in complying with the Listing Exercise were solely attributable to the magnitude of the exercise. By acting in this manner, Amber obtained various extensions of time, with the final extension having been obtained while it was concealing the *ex parte* leave application from the defendants. The lengthy review of the defendants' documents enabled Amber to identify about 208 documents which apparently disclosed the commission of potential offences.[47] Thereafter Amber proceeded to disclose some documents to the authorities.

101 Although Mr Ali asserted that Amber would not have disclosed the allegedly incriminating evidence were it seeking to retain its leverage,[48] the more reasonable inference is that Amber had made the relevant disclosure in the hope that such documents could cause the authorities to conduct further investigations to potentially uncover additional information which would assist

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47 Joint Core Bundle Vol III p 58, paras 6 and 9.

48 Respondent's Case (CA 226) at para 77.

its action or to cripple or at least disrupt the defendants' operations. In doing so, Amber breached the multiple express undertakings which it had provided to the defendants and to the court. It also acted in a manner which was entirely contrary to its purported acceptance that it had *no* entitlement to the defendants' documents, and that such documents would be returned to the defendants pursuant to the Listing Exercise. In our view, it beggars belief that Amber was spurred solely by a sense of "civic duty" to undertake the extensive review of the defendants' documents. Rather, reviewing its conduct in totality, we find that the repeated extensions of time sought to review the defendants' documents (which it had no entitlement to), was a blatant abuse of process by Amber. To grant leave to Amber to disclose such documents in such circumstances would be to condone the grave misuse of the court's machinery (see [72(b)] above).

Privacy and encouraging full disclosure

102 The release from the *Riddick* undertaking would also undermine the protection of privacy and confidentiality afforded by the undertaking.

103 The public interest in encouraging full disclosure of documents in the interests of justice could also be compromised. In this vein, we note that given that the Documents were obtained via a search order, rather than through general discovery, it is arguable that this second factor may be given less weight. As explained in *Reebok* ([43] *supra*) at [20]:

> 20 In discovery by means of the Anton Piller order, the public interest in encouraging frank and full disclosure is not as dominant as in general discovery proceedings. In reality, it is largely absent as the defendant is compelled to obey the order of court or be in contempt of court. In *Crest Homes* [[43] *supra*], at 301–302, Lord Oliver addressed counsel's concern with a relaxation of the implied undertaking upon the performance of the obligation to make full and frank disclosure in these words:
>
> > In the first place, that obligation can be of little relevance in relation to the seizure of documents and materials under an Anton Piller order, the whole purpose of which is to gain possession of material evidence without giving the defendant the opportunity of considering whether or not he shall make any disclosure at all. Indeed the justification for the application is the likelihood that, short of immediate and unheralded intervention, relevant material is likely to be spirited away or destroyed. …

104 That said, the interest of promoting full disclosure is not entirely insignificant in the context of documents obtained through a search order. As held in *Microsoft Corp (CA)* ([72(b)] *supra*) at [34]:

> The execution of the search warrants was a clear invasion of privacy and confidentiality and the justification for this was the requirement of full and frank disclosure for the purpose of administration of justice. But such disclosure is to be counterbalanced by the limitation on the use of such documents and information to the proceedings … and this is achieved in the form of the implied undertaking … *We can see no good reason, in principle, why such implied undertaking should not be imposed with full force on documents and information obtained pursuant to search warrants*…
>
> [emphasis added]

105 In other words, the full and frank disclosure that can be obtained via a search order is premised in part on the protection afforded by the implied undertaking. The compulsory nature of the search order does not diminish the persuasive force of such a protection. Instead, much like in discovery proceedings, the implied undertaking works *in tandem with* the compulsory nature of the search order to compel a party to disclose documents in the

interests of justice. Hence, while "[t]he need to protect the integrity of the implied undertaking is less under the Anton Piller form of discovery… this difference is not, in itself, a strong factor on which the court will exercise release or modify the implied undertaking" (*Reebok* at [21]). Rather, this is another factor which weighs against the grant of leave, as "an undertaking designed in part to encourage open and generous discovery by assuring parties being discovered of confidentiality will not achieve its objective if the confidentiality is seen by reluctant litigants to be too readily set aside" (*Doucette (SC)* ([46] *supra*) at [38]).

Prejudice

106 Finally, we accept that the defendants will also suffer prejudice, in being subject to criminal investigations and possible prosecution, by the release of the *Riddick* undertaking. This, as explained at [62]–[68] above, is a relevant, albeit not necessarily overriding, factor.

Investigation and prosecution of criminal offences

107 Against the above factors which weigh heavily against lifting the *Riddick* undertaking, Amber submits that leave is warranted as the Documents are necessary for the investigation and prosecution of criminal offences. In determining the weight to be given to this factor, the court can have regard to factors such as the nature and seriousness of the offence(s), the cogency of the evidence adduced, and the severity of the penal sanctions (see [71(c)] above).

108 Here, it is clear that the alleged offences that have been uncovered by Amber are of varying degrees of severity – on the one hand, there appears to be cogent evidence in support of EFMA offences, which by their nature, are difficult to detect, and for which deterrence is necessary (GD at [35]–[36]). On

the other hand, the alleged offence of mischief flowing from the "staple saga", is premised on an equivocal WhatsApp conversation which shows at best Lim's *knowledge* (but not *participation* or *orchestration*) of the incident (GD at [47]).

109 To substantiate the defendants' involvement in the "staple saga", Amber filed Summons No 64 of 2020 to adduce fresh evidence which shows that its bottles were indeed contaminated with staple bullets, and that Marc, a former employee of Amber, had received an email complaint regarding the staple bullets. We disallowed the application since the first two *Ladd v Marshall* [1954] 1 WLR 1489 requirements, which require (a) that the evidence could not have been obtained with reasonable diligence for the hearing below and (b) that the evidence would have an important influence on the result of the case, were not satisfied. First, Amber candidly accepted that such evidence was available at the time of the hearings before the Judge.[49] Secondly, even if the evidence were adduced, it would not have an important influence on the result of the present appeal, as the new evidence does not demonstrate that the defendants (and specifically Lim) were directly responsible for the "staple saga". The present case was also not the exceptional case where it would "affront common sense or a sense of justice to refuse leave to adduce [the] fresh evidence" (*AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Co)* [2019] 2 SLR 341 at [38], citing *Chan Fook Kee v Chan Siew Fong* [2001] 2 SLR(R) 143 at [9]).

110 Furthermore, of greater significance is that the relevant reports have already been made to the authorities. These reports have also been supported by some of the Documents. The authorities have thus been notified of the possible

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[49] Affidavit of Samuel Sudesh Thaddaeus (27 May 2020) at para 12.

offences, and are well positioned to invoke their own powers to seize any additional documents or information from the defendants should they deem fit to do so. This is consistent with our view at [57] above that in undertaking a balancing of competing interests, the court in no way interferes with the exercise of prosecutorial discretion. That having been said, apart from an email conversation in February 2019 between Lim and a Senior Investigation Officer from the Ministry of Manpower relating to UrbanRx's employees,[50] the parties have not pointed to any evidence of ongoing criminal investigation or prosecution of the defendants following Amber's reports. In the result, the merit of allowing further disclosure of the Documents to the authorities is uncertain.

111 Balanced against the uncertain assistance which may be derived by the authorities from the grant of leave is a multitude of factors. First, the defendants can, and have asserted, their privilege against self-incrimination. Contrary to the Judge's finding, we do not think that the privilege has been waived for the reasons outlined at [84]–[91] above. Secondly, we are satisfied that Amber was motivated by improper purposes in bringing the leave application, and the court should not lend its assistance to a clear abuse of its processes. Thirdly, there is a need to protect the defendants' privacy and to promote full disclosure in civil proceedings. Fourthly, the defendants would be unfairly prejudiced by the grant of leave, as it would expose them to further investigations and possibly prosecution for offences which bear largely civil remedies (see GD at [47], [50] and [54]).

112 In all the circumstances, we find that the balance weighs overwhelmingly against the grant of leave with respect to all the Documents.

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50 Joint Record of Appeal Vol III (Part 13) pp 138 to 142.

Accordingly, the defendants' appeal against the Judge's grant of leave with respect to the EFMA Documents is allowed, while Amber's appeal for leave *vis-à-vis* the remaining Documents is dismissed.

Retrospective leave

113 Retrospective leave is also denied with respect to the EFMA Documents. The Judge's grant of leave in this regard was premised in the main on her conclusion, which we have departed from, that prospective leave would have been granted for the EFMA Documents in any event (GD at [66]). However, for the reasons given above, the balance of interests lies against the grant of such leave.

114 In any case, even if leave is granted prospectively, such prospective leave "cannot be sufficient, else the requirement to seek permission for collateral use would be undermined" (*The ECU Group Plc v HSBC Bank Plc and others* [2018] EWHC 3045 (Comm) ("*ECU Group*") at [12]). Hence, in *Miller and another v Scorey and others* [1996] 3 All ER 18 ("*Miller*"), while the court observed that it would have been "sympathetic" to the plaintiffs had they applied to court to relax the implied undertaking prior to using the discovered documents to initiate a new action (at 26), there was "no good reason to grant any such retrospective leave" as the undertaking was an important one that was "well known to practitioners" (at 28).

115 Instead, retrospective leave is to be granted "very sparingly" (*Microsoft Corp (HC)* ([71(b)] *supra*) at [50]), and it requires "something unusual about the particular facts of a case" (*ECU Group* at [12]). In deciding whether retrospective leave should be granted, it will be relevant for the court to understand the reason why leave was not obtained in the first place prior to disclosure. But Amber has been conspicuously silent as to why it omitted to

apply for leave prior to disclosure. In the absence of any *sensible* explanation, the inference that Amber's breach was deliberate is an irresistible one to draw.

116 Also, while Amber has sought to imply that it had failed to seek leave prospectively because it only knew of such a requirement when Lee & Lee was appointed, this is contradicted by the express undertakings given by Amber in the search orders, as well as by its previous solicitors in the repeated undertakings to the defendants and the court. Furthermore, although it is alleged that Amber was driven by a sense of civic duty to make the relevant disclosures, as there was no real urgency in disclosing the Documents (as the alleged offences had already been committed), we find that Amber was in truth motivated by improper purposes, such as to drive further investigations in order to exert pressure on the defendants. In the circumstances, the present case simply does not rise to the level of the very rare circumstances that are required before retrospective leave can be granted.

Conclusion

117 In conclusion, we allow the defendants' appeal, and dismiss Amber's appeal. In the result, prospective leave is denied for all 32 Documents. Nonetheless, we clarify that our decision does not circumscribe the ability of the authorities, should they deem fit, to invoke their own powers to obtain the Documents. As regards Amber's breach of the *Riddick* undertaking in handing some of the Documents to the authorities without prior leave of court, retrospective leave is also not granted. That said, whether the breach of the *Riddick* undertaking by Amber amounts to contempt of court is more appropriately reserved for consideration in the committal proceedings that has been brought by the defendants. In that regard, we note that the reports that were

made by Amber to the authorities, which were not available to this court, would be pertinent for the purposes of the committal proceedings.

118 Costs should follow the event. Taking into account the parties' respective costs schedules, we order Amber to pay the defendants costs fixed at $40,000 inclusive of disbursements for both appeals together with the costs for Summons No 64 of 2020. As for the costs below, the costs order is reversed such that Amber is to pay the defendants costs fixed at $8,000 inclusive of disbursements.

Postscript on search orders

119 The above suffices to dispose of both appeals. However, we proffer some observations on the breadth of the search orders. As mentioned above, the search orders in the present case allowed Amber to obtain a wide range of documents, which included all e-mail correspondence on the defendants' email accounts and all data storage devices or related devices, including computers, mobile phones and thumb drives of the defendants. Owing to the expansiveness of the search orders, more than 100,000 documents were seized by Amber. Thereafter, parties were directed to sift through the documents, to determine their ownership, and for the documents which belonged to the defendants to be returned to the defendants.

120 In our view, search orders ought to be targetted and specific in their reach. Granting broad search orders in the first instance, before requiring parties to undertake listing exercises to return documents which ought not to have been seized, not only creates unnecessary work for the solicitors on both sides, but may also open the gateway for the discovering party to utilise the seized documents for purposes extraneous to the search order.

121 To be fair, the Judge clearly appreciated that the search orders which were sought by Amber were over-expansive, and she thus refused leave for Amber to seize samples of all products marketed and sold by UrbanRx as such products were "in relation to [UrbanRx's] property and not [Amber's] property, and ha[d] nothing to do with [the] preservation of [Amber's] property" (see [11] above). Nonetheless, Amber was still able, under the search orders, to obtain more than 100,000 documents from the defendants, many of which were documents which clearly belonged to the defendants. To compound matters, while Amber had initially professed to the court that the purpose of the search orders was to seize their *own documents* which had been misappropriated by the defendants in support of its action, it subsequently examined the *defendants' documents* to identify offences that were allegedly committed by the defendants and made reports to the authorities notwithstanding the directions of the Judge and their express undertakings to the contrary.

122 This unfortunate series of events, and indeed, the present summons for leave, could have been avoided had the search orders been limited to enable Amber to seize only their own documents, which it alleged to be in the possession of the defendants. With the benefit of hindsight, it would perhaps have been useful for the Judge to expressly stipulate that the search orders only permitted the seizure of *Amber's* documents; while item (c) made clear that Amber could only seize documents, plans, drawings, notes, memoranda, and power point slides which related to Amber's trade secrets and/or confidential and/or proprietary information, the same qualification did not explicitly apply to items (a) and (b) (see [9] above). In our view, the same qualification should have been extended to items (a) and (b) and if that had been done, it would not only have substantially curtailed the scope of the search orders, it would also have prevented Amber from undertaking the opportunistic review of the defendants' documents.

123 In light of the difficulties presented, we take this opportunity to provide our suggestions, which are intended to provide guidance to litigants and judges alike, to ensure that the breadth of the search order is carefully calibrated to meet the needs of the discovering party only, and no further:

(a) First, it bears emphasis that a search order is an exceptional order which allows the party seeking discovery to infringe upon the privacy of the other party without first giving a right of response to the respondent. To protect the interests of the putative respondent, four strict requirements must thus be met before a search order will be granted (*Asian Corporate Services (SEA) Pte Ltd v Eastwest Management Ltd (Singapore Branch)* [2006] 1 SLR(R) 901 at [14]):

(i) the applicant must have an extremely strong *prima facie* case against the respondent;

(ii) the damage that the applicant would suffer would be very serious;

(iii) there is a real possibility that the respondent would destroy the relevant documents; and

(iv) the effect of the search order would not be out of proportion to the legitimate object of the order ("the proportionality requirement").

(b) The applicant is also bound by the duty of full and frank disclosure. This duty requires the applicant to be extremely careful to avoid misleading the court, either by act or omission, and to disclose all important facts, regardless of whether they are harmful or helpful to the application (*Bengawan Solo Pte Ltd and another v Season Confectionary Co (Pte) Ltd* [1994] 1 SLR(R) 448 at [12]; *The "Vasiliy*

Golovnin" [2008] 4 SLR(R) 994 at [91]–[95]). Failure to abide by this duty would render the search order liable to be set aside (*BP Singapore Pte Ltd v Quek Chin Thean and others* [2011] 2 SLR 541 at [22]). To further safeguard the interests of the respondent, the applicant is also bound by the various undertakings to the court;[51] being undertakings to the *court*, they can only be varied or modified by the *court*, and are not to be disregarded at whim (see GD at [18]–[19]). Breaches of undertakings to the court can, in the appropriate case, amount to contemptuous conduct (*Mok Kah Hong v Zheng Zhuan Yao* [2016] 3 SLR 1 at [108], citing *Weirs v Weirs* [2012] FMCAfam 247 at [70]).

(c) Given the proportionality requirement, in applying for a search order, the applicant should also be clear as to what categories of documents and items are required. This entails a careful consideration of the precise documents that are necessary to support the applicant's case, and whether such information or documents will be held in different formats (*eg,* in hard copy and/or electronically). Where the envisaged documents are likely to be stored electronically, search terms should be proposed to ensure that the documents reaped from the respondent's devices will not be unduly broad. A proposed plan to the court to limit the scope of otherwise expansive searches would also be useful in the determination of whether the breadth of the search order is proportionate to its object.

(d) Once the application for a search order and the supporting affidavit(s) are placed before the judge, the judge must be satisfied that the strict legal requirements necessary for granting a search order have

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[51] See Joint Core Bundle Vol III, p 143 and p 149, "Undertakings given by the Plaintiffs".

> been met. Consistent with the proportionality requirement, attention must be had to the proper remit of the search order – in this regard, after ascertaining the precise purpose for which the search order is sought, the judge should ensure that the scope of the search order is carefully calibrated to cater to the specific purpose for which the order is sought, and no further. For example, in *Nikkomann* ([83] *supra*), where the allegation was that the appellants had conspired to defraud the respondent of its entitlement to the proceeds of certain timber goods, the search orders were restricted to determining the whereabouts of the alleged timber goods and their sale proceeds, if any. Additionally, where search orders are not intended to apply to any specific class of documents that belong to the respondent, the search orders should expressly prohibit the seizure of such documents. Finally, if the documents sought are in electronic form, judges ought to assess the adequacy of the search terms and/or the proposed plan in limiting the scope of documents, and the assistance of an independent computer expert (see [**Error! Reference source not found.**] below) could be helpful in circumscribing the breadth of the search terms.

124 For the avoidance of doubt, we should state that the guidelines set out above are in no way exhaustive, and serve to provide broad guidance to limit the scope of otherwise expansive searches which, as demonstrated by the facts of the present case, can result in wasted costs and abuse by the discovering party.

125 Further, we note that expansive search orders are permitted in part due to the increased use of computers, which have the ability to store vast amounts of information and documents. Without properly limiting the search terms, the discovering party may find itself with a vast array of documents which it would not otherwise have any entitlement to. This is not a problem unique to

Singapore. As a matter of interest, in the recent decision of *TBD (Owen Holland) Ltd v Simons and others* [2020] EWHC 30 (Ch) ("*TBD v Simons*"), the English court was also confronted with the misuse of documents by a claimant company which had obtained some 400,000 imaged materials pursuant to a search order. While the search order sanctioned the *preservation* of the listed items, the claimant went much further – after inspecting the searched items, the claimant proceeded to use the material therein for a variety of purposes, including to rejoin a defendant who had successfully applied to have the claim against it struck out. In those circumstances, the court concluded that the claimant had committed a "serious and completely unjustified breach of the terms of the Search Order" (at [70]).

126 To counteract the problem of over-expansive search orders, the use of search terms have been introduced, and the practice of appointing computer experts to facilitate the execution of search orders has begun to take root (see, *eg, C plc v P (Secretary of State for the Home Office and another intervening)* [2007] Ch 1; *O Ltd v Z* ([46] *supra*); *Directed Electronics OE Pty Ltd v OE Solutions Pty Ltd (No 6)* [2020] FCA 64). In fact, the Search Orders Practice Note (GPN-SRCH, 2016) of the Federal Court of Australia mandates that "[i]f it is expected that a computer will be searched, the search party must include a computer expert who is independent of the applicant and of the applicant's lawyers", and the search of the computer must be carried out only by the independent computer expert (at paras 20(*a*) and 20(*b*)). However, the appointment of an independent computer expert *per se* may not sufficiently mitigate the issue of over-expansive search orders. Indeed, computer experts were appointed in *TBD v Simons*. Yet, more than 400,000 documents were seized pursuant to the order, and the claimant then used some of the seized documents for purposes extraneous to the terms of the search order. Given the clear difficulties that can arise with the increased prevalence of computers, and

with their increasing storage capacities, we suggest that the Rules Committee should consider and determine any other measures to address the concerns we have outlined here including the appropriate role (if any) of an independent computer expert in the context of search orders. Among others, we envisage that such computer experts could assist the court and the applicant in ensuring that the search terms are appropriately defined to meet the legitimate needs of the applicant, and no further. Computer experts can also ensure that the integrity of the digital documents and data will not be damaged in the process.

127 Finally, we note that unduly broad search orders work fundamentally to the detriment of the applicant, as the applicant would have to incur additional costs in sieving out the documents which are relevant for its action against the respondent. Apart from being irrelevant to the applicant's action, such documents would not be available for extraneous purposes without leave of court releasing the applicant from its *Riddick* undertaking. As canvassed over the course of this judgment, this would require a careful balancing of the interests at stake, and the court is unlikely to lend its assistance to an applicant who seeks to utilise seized documents for improper purposes, such as to exert undue pressure on the respondent. In a related vein, as the Judge noted, a search order is not the time to seek comprehensive discovery of documents, as discovery will take place in the usual course of the proceedings.[52] Hence, search orders should not be utilised for a fishing expedition, and the subject of search orders should be restricted to documents that are clearly relevant to achieving the legitimate object of the search and which will likely be destroyed if not seized expeditiously. Abiding by this overarching guideline not only facilitates the due administration of justice, but also bodes well for prospective litigants,

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52 Minute Sheet (4 June 2018) at p 2.

as it ensures that valuable time and resources are not wasted in sieving out irrelevant documents that ought not to have been seized in the first place.

Sundaresh Menon Chief Justice	Judith Prakash Judge of Appeal	Steven Chong Judge of Appeal

Pereira George Barnabas and Balachandran Arun Amraesh (Pereira & Tan LLC) for the appellants in Civil Appeal No 226 of 2019 and the respondents in Civil Appeal No 228 of 2019 and Summons No 64 of 2020;
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