

To release or not to
release: *Riddick*
undertaking?
Asserting right(s)
against self-
incrimination and
more ...

*Lim Suk Ling Priscilla and
another v Amber Compounding
Pharmacy Pte Ltd and another*
[2020] SGCA 76

1 September 2020

LEGAL
UPDATE

In this Update

The Court of Appeal in *Lim Suk Ling Priscilla and another v Amber Compounding Pharmacy Pte Ltd and another* [2020] SGCA 76 held that a multifactorial balancing exercise is to be adopted in determining whether a party ought to be released from its *Riddick* undertaking.

The Court of Appeal applied the balancing approach and declined to grant leave to disclose certain documents obtained pursuant to a search order to the authorities for criminal investigation purposes.

The Court found that the timely assertion of a party's privilege against self-incrimination was a consideration that weighed against the release of the *Riddick* undertaking.

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INTRODUCTION

The Court of Appeal in *Lim Suk Ling Priscilla and another v Amber Compounding Pharmacy Pte Ltd and another* [2020] SGCA 76 held that a multifactorial balancing exercise is to be adopted in determining whether a party ought to be released from its *Riddick* undertaking. The conjunctive two-step test in *Beckett Pte Ltd v Deutsche Bank AG* [2005] 3 SLR(R) 555 (which held that prejudice to a disclosing party was an overriding factor) was unsupported by the authorities and principle, and ought not to be applied.

The Court of Appeal also emphasised that search orders ought to be targeted and specific in their reach.

In this case, the Court of Appeal applied the balancing approach and declined to grant leave to disclose certain documents obtained pursuant to a search order to the authorities for criminal investigation purposes. The High Court's decision which permitted the disclosure of 23 documents was reversed.

Our earlier update on the High Court decision of *Amber Compounding Pharmacy Pte Ltd & Anor v Priscilla Lim Suk Ling & Ors* [2019] SGHC 269 of may be accessed [here](#).

BACKGROUND

Two related companies (collectively, “**Amber**”) commenced an action against Priscilla Lim (“**Lim**”) and UrbanRX Compounding Pharmacy Pte Ltd (“**Urban**”) (collectively, “**Defendants**”), claiming among other things, that the Defendants had misappropriated Amber's confidential information and trade secrets for the purposes of benefitting Urban's business.

Amber applied for and obtained expansive search orders against the Defendants. In the search orders, Amber also gave the express undertaking that they would not, without the leave of the Court, use any information or documents obtained “as a result of the carrying out of the search orders except for the purposes of these proceedings”.

More than 100,000 documents were seized by Amber pursuant to these search orders.

About a month later, the Defendants applied to set aside the search orders, arguing among others that the ambit of the search orders was too wide. As the solicitors had provided undertakings that the seized documents would not be released to any other parties, and that the documents would be returned to their rightful owners, the Judge directed the parties to carry out a “Listing Exercise”.

Under this Listing Exercise, Amber would employ search terms to determine the ownership of the seized documents. Thereafter, all documents which belonged to Amber or the Defendants were to be returned to their respective owners and deleted or destroyed by the other party, who was not to keep the documents in any form.

While Amber was conducting the Listing Exercise, it formed the view that certain documents belonging to the Defendants were probative of various criminal offences, including offences under the Employment of Foreign Manpower Act (“**EFMA**”) and an incident whereby staple bullets were found in Amber’s pharmaceutical products. A representative of Amber made reports to the Police, Ministry of Manpower and the Corrupt Practices Investigation Bureau, disclosing ten documents, or excerpts of them in the process. These reports were allegedly made in Y2018 Q3 without first obtaining leave of court.

Amber subsequently took out the present application (“**Leave Application**”) *ex parte* for leave to use the documents for the purpose of making reports to the authorities. As the Leave Application had been taken out *ex parte*, the Defendants had no notice of the extraneous purpose for which Amber had used and was seeking to use the documents. Accordingly, the Defendants agreed to a further extension of time sought by Amber to comply with the Listing Exercise. The Judge granted Amber an extension of time to comply with the terms of the Listing Exercise by April 2019.

After the extension of time was obtained, and after being directed by the Judge to have the Leave Application heard *inter partes*, Amber served the Leave Application on the Defendants. Soon after, the Defendants, among other things, asserted their privilege against self-incrimination, objected to Amber’s disclosure of the documents to the authorities, and commenced separate committal proceedings against Amber for its breach of the *Riddick* undertaking.

Upon hearing the Leave Application, the Judge granted Amber leave to disclose 23 of the 32 documents which pertained to the EFMA offences. Leave was denied for the release of the remaining nine documents, which pertained to other offences.

Both parties appealed against the Judge’s decision, with the Defendants arguing that leave ought not to have been granted for any of the documents, and Amber arguing that leave ought to have been granted for all of the documents.

COURT OF APPEAL’S DECISION

The Court of Appeal examined the facts of this case, and held that the balance weighed overwhelmingly against the grant of leave with respect to all of the documents.

The Court of Appeal acknowledged that a core principle which regulated the conduct of civil proceedings was that documents ordered to be disclosed were to be used only for the purposes of the civil proceedings from which the disclosure was made, and not for any collateral purpose save with the express leave of court ("**Riddick undertaking**").

The Court of Appeal examined a line of Commonwealth authorities and noted that they demonstrated that, in determining whether a party ought to be released from its *Riddick* undertaking, a balance of interests test was to be adopted.

KEYPOINT

Under the balancing of interests approach, the court would engage in a multifactorial balancing exercise, and leave would be granted if, in all the circumstances of the case, the interests advanced for the extraneous use of the disclosed documents outweighed the interests that were protected by the Riddick undertaking.

Factors such as injustice to the disclosing party and the privileges which could be asserted were relevant factors, with the appropriate weight dependant on the specific circumstances of each case.

Non-exhaustive factors in favour of lifting the *Riddick* undertaking included the following:

- (a) countervailing legislative policy;
- (b) support of related proceedings;
- (c) investigation and prosecution of criminal offences;
- (d) public safety concerns; and
- (e) international comity.

The Court of Appeal held that these factors needed to be balanced against the interest sought to be protected by the *Riddick* undertaking, namely the public interest in encouraging full disclosure and the disclosing party's privacy interests.

Other (non-exhaustive) factors which could militate against granting leave could include the following:

- (a) injustice or prejudice to the disclosing party;

- (b) improper purpose for which leave was sought; and
- (c) the timeous assertion of the privilege against self-incrimination by the disclosing party.

KEYPOINT

Prejudice was but a factor which could be accorded relevance. The appropriate weight accorded to it would be dependent on the entire circumstances of each case.

On the facts of this case, the Court of Appeal held that the following were relevant considerations in deciding against the lifting of the *Riddick* undertaking:

- (a) The Defendants' privilege against self-incrimination (which the Court found had been timeously asserted);
- (b) Amber's application being motivated by an improper purpose;
- (c) the release from the *Riddick* undertaking would undermine the protection of privacy and confidentiality afforded by the undertaking and compromise the public interest in encouraging full disclosure of documents in the interests of justice; and
- (d) the Defendants would suffer prejudice in being subject to criminal investigations and possible prosecution.

Balanced against the factors above was that the documents were necessary for the investigation and prosecution of criminal offences. However, as the authorities had been notified of the possible offences, they were well positioned to invoke their own investigative powers. The merit of allowing further disclosure of the documents to the authorities was therefore uncertain.

Taking all these factors into consideration, the Court refused to grant leave (both prospective and retrospective, for documents already disclosed by Amber to the authorities) to Amber. Accordingly, the Court of Appeal dismissed Amber's appeal and allowed the Defendants' appeal.

Finally, the Court also gave valuable guidance on the breadth of search orders, taking the view that search orders ought to be targeted and specific in their search. The Court opined that 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, only created unnecessary work for solicitors and increased the risk of use of the documents for extraneous purposes.

Finally, for electronic documents, the Court encouraged the use of targeted search terms, and suggested that the Rules Committee should consider and determine any other measures to address the concerns outlined. These included the appropriate role, if any, of independent computer experts to assist the Court in ensuring that search terms were appropriately defined to meet the legitimate needs of the applicant, and no further.

COMMENTS

The Court of Appeal's decision underscores the sanctity of the *Riddick* undertaking, and highlights the importance of seeking leave of Court *before* disclosing documents obtained via search orders to the authorities.

As highlighted in our previous commentary on the High Court's decision, in the event that parties disclose such documents to the authorities without first seeking the leave of Court, there remains a real risk of that party being found in contempt of Court for breaching the *Riddick* undertaking.

The Court of Appeal's decision also highlights the importance of the disclosing party's timely assertion of its privilege against self-incrimination. On the facts of the case, the Court found this to be a strong factor which militated against granting leave to Amber to disclose the documents to the authorities.

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