IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2019] SGHC 269

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) Priscilla Lim Suk Ling
(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*

GROUNDS OF DECISION

[Civil Procedure] — [Discovery of documents] — [Whether release from *Riddick* principle permissible for purposes of making reports to authorities for criminal investigations]

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v
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Audrey Lim J
8 April, 24 June, 8 July, 30 October 2019

19 November 2019

Audrey Lim J:

1 In Summons No 484 of 2019 ("SUM 484"), the Plaintiffs in Suit 164 of 2018 ("the Suit") sought to use 32 documents ("the Documents") seized from the first defendant ("D1") and second defendant ("D2") (collectively "the Defendants") for the purpose of making reports to law enforcement authorities in Singapore. The main issue was in what circumstances a party may be allowed to disclose documents, obtained under a search order, to the authorities for the purposes of reporting and investigating the possible commission of an offence (herein referred to as "criminal investigation purposes"). A further issue was in what circumstances the court may grant retrospective leave to disclose, which was relevant because the Plaintiffs had disclosed some documents before filing SUM 484.

Background

2 The first plaintiff ("P1") specialises in the compounding of medical and pharmaceutical products. The second plaintiff ("P2") is a related company of P1 and provides P1 with essential support services. D1 is an ex-employee of P1. D1 incorporated D2 and is its director. The Plaintiffs commenced the Suit against the Defendants and other parties for breach of contract, inducing breach of contract, breach of confidence, conspiracy to injure, and copyright infringement.

3 On 13 April 2018, the Plaintiffs obtained search orders against the Defendants.[1] They executed the orders on 17 April 2018 and seized numerous documents. It should be noted that paragraph 6 of Schedule 3 to the search orders required the Plaintiffs:

> Not, without the leave of the Court, to inform anyone else of this Order or the carrying out of this Order or 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.

4 On 10 May 2018, the Defendants filed Summons No 2169 of 2018 to set aside the search orders. I declined to set aside the search orders and instead directed parties to sort out which documents belonged to the Plaintiffs and which belonged to the Defendants ("the Listing Exercise").

5 In conducting the Listing Exercise, the Plaintiffs opined that certain documents revealed the commission of offences by the Defendants under the Employment of Foreign Manpower Act (Cap 91A, 2009 Rev Ed) ("EFMA"), Penal Code (Cap 224, 2008 Rev Ed), Prevention of Corruption Act (Cap 241,

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1 ORC 2446/2018 and ORC 2447/2018.

1993 Rev Ed) ("PCA"), and Computer Misuse Act (Cap 50A, 2007 Rev Ed) ("CMA"). They proceeded to disclose some of the Documents or excerpts of them to the authorities. When the Plaintiffs' current lawyers (Lee & Lee) took over the conduct of the matter, they filed SUM 484 seeking leave to disclose the Documents. The Plaintiffs initially sought disclosure of 208 documents but pared this down to the 32 that constitute the Documents.[2]

The alleged offences

6 The Plaintiffs alleged that offences were committed under the following provisions. First, s 22(1)(*d*) of the EFMA provides that any person who:

> … in connection with any application for or to renew a work pass or for any other purpose under this Act, makes any statement or furnishes any information to the Controller or an authorised officer or employment inspector which he knows, or ought reasonably to know, is false in any material particular or is misleading by reason of the omission of any material particular … shall be guilty of an offence …

7 The Plaintiffs alleged that D2 made a false declaration (signed by D1) to support an application for an S-Pass for a foreign employee by affirming that "[t]he employer has not made any voluntary CPF contributions for the purposes of inflating his foreign employee entitlement". This circumvented the requirement that an employer must employ at least five local employees to obtain an S Pass-for a foreign employee.[3] The Plaintiffs referred to various WhatsApp conversations that purportedly showed D1 and the fourth defendant ("D4") arranging to employ a foreign employee (Marc, an ex-employee of P1) under an S-Pass by falsely claiming that four people were D2's employees when

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2 Plaintiff's Further Submissions ("PFS") at [3]; Minute Sheet dated 24 June 2019.

3 Samuel Thaddaeus' affidavit of 29 Jan 2019 ("Thaddaeus' 1st affidavit") at [26]–[28].

they were not.[4] The Plaintiffs relied on the mention of only job positions and salary without any employment details, references to CPF contributions being made "in order to keep Marc in the company", exhortations not to let anyone know, and expressions of caution that the arrangements were risky.

8 Second, under s 5 of the EFMA, it is an offence to employ a foreign employee unless he has a valid work pass. The Plaintiffs alleged that D1 hired a foreign employee, Lydia, without a valid work permit.[5] They relied on an ICA status enquiry confirming that Lydia was on a short-term visit pass during the relevant period of her stay in Singapore; a message stating "no need to apply for work permit [be]cause need pay high levy"; and various messages and photographs or videos showing that Lydia did indeed work for D1.

9 Third, s 425 of the Penal Code, an offence for mischief, provides:

> Whoever, with intent to cause, or knowing that he is likely to cause, wrongful loss or damage to the public or any person, causes the destruction of any property, or any such change in any property, or in the situation thereof, as destroys or diminishes its value or utility, or affects it injuriously, commits "mischief".

The Plaintiffs alleged that "it is likely" that "[D1] and/or Marc" were responsible for two incidents when staple bullets were found in P1's products.[6] They relied on WhatsApp conversations between D1 and the fifth defendant ("D5") discussing these incidents, and between D1 and Marc, where D1 referred to a "staple saga" or "staple bullet thingy" without needing to clarify what this meant.

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4 Thaddaeus' 1st affidavit at [28].

5 Thaddaeus' 1st affidavit at [39].

6 Thaddaeus' 1st affidavit at [45].

10 Fourth, s 6(*b*) of the PCA provides:

> If … any person corruptly gives or agrees to give or offers any gratification to any agent as an inducement or reward for doing or forbearing to do, or for having done or forborne to do any act in relation to his principal's affairs or business, or for showing or forbearing to show favour or disfavour to any person in relation to his principal's affairs or business; … he shall be guilty of an offence …

The Plaintiffs alleged that D1 instructed Marc and/or made arrangements with him, while Marc was still employed by P1, to siphon P1's business to the Defendants. They relied on discussions between Marc and D1 regarding which clients to siphon and how the siphoning was to be done, and in which references were made to "commission", "fair share" or "reimburse[ment]" of Marc.[7]

11 Fifth, s 3(1) of the CMA provides that:

> … any person who knowingly causes a computer to perform any function for the purpose of securing access without authority to any program or data held in any computer shall be guilty of an offence …

The Plaintiffs alleged that D1 inserted her personal thumb-drive into a computer belonging to the Plaintiffs without authorisation and downloaded many documents, some of which were later seized under the search orders. The Documents set out 20 extracts of hardcopy pharmaceutical formulas, formulations and order sheets found in D1's possession. Some of these still bore the name "Amber". They also alleged that D1 took and retained documents from other companies in the pharmaceutical industry, especially Allergan (which D1 also worked for previously).[8]

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7 Thaddaeus' 1st affidavit at [50]–[52].

8 Thaddaeus' 1st affidavit at [55]–[62].

12 The Plaintiffs submitted that leave should be granted for them to disclose the Documents that, allegedly, evidenced the commission of offences under the EFMA, Penal Code, PCA, and CMA. The offences were serious, disclosure was being sought for a proper purpose, and no relevant prejudice would be suffered by the Defendants. The Defendants submitted that the Plaintiffs should not be allowed to preserve any of the documents, including the Documents, as the Listing Exercise had been completed and the purpose of the search orders had been fulfilled.[9]

The *Riddick* principle

13 Where a party to litigation has been ordered to give discovery, the discovering party may not use the discovered document (or information obtained therefrom) for any purpose other than pursuing the action in which the discovery is obtained ("the *Riddick* principle", established in *Riddick v Thames Board Mills Ltd* [1977] 1 QB 881 ("*Riddick*")). The *Riddick* principle seeks to strike a balance between the public interest in full and complete disclosure in the interest of justice, and the interest in protecting the privacy and confidentiality of the party ordered to give discovery (given that discovery on compulsion is an intrusion of privacy): *Beckkett Pte Ltd v Deutsche Bank AG* [2005] 3 SLR(R) 555 ("*Beckkett*") at [14]. The *Riddick* principle operates by way of an implied undertaking that extends not only to the documents themselves but also to information derived therefrom (*Crest Homes Plc v Marks and Others* [1987] 1 AC 829 ("*Crest Homes*") at 854), though there might sometimes be express undertakings to similar effect.

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9 Defendants' Submissions dated 21 May 2019 ("DS") at [25].

14 The undertaking may be released or modified by the court where cogent and persuasive reasons have been furnished for the request, and the release would not give rise to any injustice or prejudice to the party who had given discovery ("the *Beckkett* conditions"): *Beckkett* at [19]; *BNX v BOE and another appeal* [2018] 2 SLR 215 at [65]. There must be special or exceptional circumstances to release a party from its implied undertaking, and this would depend on the facts of the case (see *Beckkett* at [18]–[19]; *Reebok International Ltd v Royal Corp and another action* [1991] 2 SLR(R) 688 ("*Reebok International*") at [18]). The *Riddick* principle applies to discovery in general and documents discovered under a search order. In the latter, although the public interest in encouraging full and frank disclosure is not as dominant as in general discovery proceedings (and is indeed largely absent in reality), this difference is not in itself a strong factor on which the court will release or modify the implied undertaking: *Reebok International* at [17], [20]–[21].

15 *Riddick* concerned an application for disclosure of documents for use in another civil matter. The Singapore authorities have yet to analyse whether the *Beckkett* conditions apply in the same manner to the use of documents discovered in civil proceedings for criminal investigation purposes.

Requirement for leave

16 The threshold issue is whether the discovering party must obtain leave of the court, even for the ostensibly civic-minded purpose of providing disclosure to the authorities for criminal investigation purposes.

17 Although *Rank Film Distributors Ltd and Others v Video Information Centre (A Firm) and Others* [1982] AC 380 ("*Rank Film Distributors*") (a case which dealt with the privilege against self-incrimination) seems to suggest that

leave is not required, the weight of authority suggests otherwise. In *Rank Film Distributors*, the House of Lords made certain observations on the *Riddick* principle. In particular, Lord Fraser stated (at 447):

> … [T]he case of *Riddick* had nothing to do with the use of information for prosecution in the public interest. On the contrary … 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]

18 However, the courts have generally proceeded on the basis that leave is required before documents can be disclosed even to further criminal investigation or prosecution – see *O Ltd v Z* [2005] EWHC 238 (Ch) and *Bank of Crete SA v Koskotas and Others (No 2)* [1992] 1 WLR 919 (where the applicant sought leave to use the documents to prepare an audit report legally required to be prepared, with the effect that the report would, under a foreign law, be provided to a third party to investigate a potential criminal offence). The same has been held in *Re NTD (BVI) Trading Ltd (No 2)* [2009] 5 HKLRD 615 ("*Re NTD*") and in *Bailey v Australian Broadcasting Corp* ("*Bailey*") [1995] 1 Qd R 476. This would sieve out cases where the infringement was of a trivial or inconsequential nature, or where the application was brought out of malice or spite (see *Bailey*). Likewise, in *Doucette (Litigation Guardian of) v Wee Watch Day Care Systems Inc* [2008] 1 SCR 157 ("*Doucette*") at [4], the Supreme Court of Canada held that documents and information obtained through discovery, including information thought by one of the parties to disclose criminal conduct, is subject to the implied undertaking, unless and until the scope of the

undertaking is varied by the court or a situation of immediate and serious danger emerges. Whilst the latter qualification has not been adopted by the Singapore courts, *Doucette* nonetheless illustrates the general approach that various jurisdictions have taken to the leave requirement.

19 Hence, leave of court is required for the implied undertaking to be released or modified even if the documents are to be disclosed for criminal investigation purposes. It is precisely because of the potential serious consequences which may weigh against the party who had given discovery, that leave should be obtained and the application subject to the court's scrutiny. This position is consonant with the *Riddick* principle. As the court in *Bailey* stated (at 486), if leave were not required, this would mean that in every case where the criminal law is potentially infringed, the public interest in prosecution would outweigh the public interest in ensuring the integrity of the discovery process. This surely is too sweeping a proposition to be correct. Moreover, the implied undertaking is an obligation also owed to the court and which only the court can modify.

Applicable test for granting leave

20 I first set out the approach of various jurisdictions before determining whether and how the *Beckkett* conditions apply, in the context of disclosure for criminal investigation purposes.

Australia

21 In *Bailey*, the plaintiff sued the defendants for defamation and obtained documents in discovery. He sought leave to disclose the documents to the police to investigate whether offences regarding illegal disclosure of documents had been committed, and if so by whom. The court held that the exercise of its

discretion whether to allow disclosure involved weighing up the competing policy considerations (*ie*, the importance of the implied undertaking and the public interest in preserving the confidentiality of discovered documents, as against the public interest of reporting offences and prosecuting criminal offenders) and determining how those interests were best met. This involved consideration of factors such as:

(a) the nature and severity of the offence alleged;

(b) the cogency of the evidence sought to be adduced;

(c) the authority to which the documents are sought to be disclosed, the manner of the authority's intended use, and the possibility of misuse by the authority;

(d) any prejudice (actual or potential) that may be occasioned to the respondent by the disclosure; and

(e) the purpose of bringing the proceedings (*eg*, whether the applicant is acting out of malice); or, as held in *North East Equity Pty Ltd v Goldenwest Equities Pty Ltd* [2008] WASC 190 ("*North East Equity*") at [44], whether the application is brought for some personal advantage or improper purpose rather than to advance the public interest.

22 With regard to the nature of the offence, the court in *Bailey* distinguished between offences which essentially involve the infringement of private or individual rights and offences which it may be in the greater public interest to uncover. In cases where an act might give rise to both civil and criminal proceedings (such as defamation), there may be an adequate civil remedy which would weigh against disclosure (*Bailey* at 489):

> *… [I]n many cases where private or individual rights are infringed adequate civil remedies will be available to the wronged party. In those types of cases the public interest will be suitably served by permitting the individual to continue with or initiate any action which he may have for a civil remedy.* Conversely, if a party does not feel sufficiently aggrieved to protect his rights by means of any civil action open to him, it is difficult to see why the public conscience should feel any greater insult or burden. Much, of course, will depend on the circumstances of each case, including the nature of the individual's right and the extent to which it has been infringed.
>
> … [A]lthough technically a defamation may give rise to both civil and criminal proceedings, a plaintiff who wishes to vindicate himself by correcting any slur against his reputation may adequately and fully do so by way of an action for damages for defamation. *The public interest having been served by the bringing of the wrong-doer to justice in a court of law, no further or greater public interest could usually be served by the bringing of criminal proceedings.*
>
> It is a very different circumstance, however, where no adequate civil remedy can be pursued in relation to the alleged wrong-doing. *Where the bringing of criminal proceedings is the exclusive or perhaps the superior means of defending the public interest that will no doubt be a greater factor in favour of disclosure …*
>
> [emphasis added]

23 The court in *Bailey* allowed disclosure. Assuming that a criminal offence had been committed, there were no civil proceedings that could be brought against the alleged wrongdoers. The offences, which related to unauthorised disclosure of documents prepared in the course of criminal investigations, were serious and related to the maintenance of confidence in the executive arm of government. The disclosure was also sought to be made to the appropriate authorities. Finally, the only prejudice to the defendants that might result would be associated with their criminal prosecution but that was the very matter which the plaintiff sought to have investigated.

24 The approach in *Bailey* has been applied to cases concerning information obtained via search and seizure orders (*Visy Board v D'Souza &*

Ors (No 3) [2008] VSC 572, although the application was not granted in that case), answers to interrogatories (*Andrew Koh Nominees Pty Ltd v Pacific Corp Ltd (No 2)* [2009] WASC 207 ("*Andrew Koh Nominees*")), and even affidavits obtained in the course of proceedings (*Prime Finance Pty Ltd and Ors v Randall and Ors* [2009] NSWSC 361 ("*Prime Finance*")).

England

25 In *O Ltd v Z*, C sued D for intellectual property infringement and obtained a search order. Under the search order, pornographic materials were found by the computer expert examining the materials. The expert applied for leave to disclose the materials to the prosecuting authorities. Citing the House of Lord's decision in *Crest Homes* (which referred to *Riddick*) the court in *O Ltd v Z* (at [73]) reiterated the general principle with regard to implied undertakings, stating that the undertaking would not be released or modified save in special circumstances and where the release or modification would not occasion injustice to the person giving discovery. In deciding whether to allow disclosure where the use contemplated for the disclosed material involved a risk to the defendant of his criminality being investigated, the court considered the following factors:

(a) the public interest in the administration of justice;

(b) the public interest in the prosecution of serious crime and the punishment of offenders;

(c) the gravity of the offence and the relevance of the evidence to it; and

(d) fairness to the person who has incriminated himself and any others affected by the incriminating statement and any danger of oppression.

26 There, the court allowed disclosure as it was in the general interest and welfare of children that paedophilia be investigated, the offences were grave and the material was of great relevance to the offence. Moreover, D was able to and did consult his own solicitors privately when the search order was being executed and the materials retrieved.

Canada

27 In *Doucette*, a child (C) suffered a seizure whilst in the care of the appellant, a childcare worker, and was subsequently determined to have suffered a brain injury. C and her parents brought an action in negligence against the owners and operators of the day-care centre. At that time, the police were in the midst of investigating the appellant and the authorities then sought access to the appellant's discovery transcripts. The appellant applied to court, relying on the implied undertaking, to prohibit the parties in the civil proceedings from providing the transcripts to the police or Attorney-General. The Supreme Court of Canada declined to vary the implied undertaking in relation to the Attorney-General (who was a non-party), as the purpose would be to sidestep the appellant's right to silence in the face of police investigations of her conduct. The court held that the authorities should not be able to obtain indirectly a transcript which they were unable to obtain directly through a search warrant in the ordinary way because they lacked the grounds to justify it (at [58]).

28 The court in *Doucette* discussed the rationale for the implied undertaking, imposed in recognition of the private interest (of the person from

whom discovery is obtained) and the public interest in the efficient conduct of litigation (at [25], [26], [30], [33] and [38]). An application to modify or grant relief against an implied undertaking requires the applicant to demonstrate on a balance of probabilities the existence of a public interest of greater weight than the values the implied undertaking is designed to protect. The court was cognisant of *Crest Homes* at 860 where Lord Oliver had stated that the court would not release of modify the implied undertaking save in "special circumstances and where the release or modification will not occasion injustice to the person giving discovery". However, it preferred to rest the discretion "on a careful weighing of the public interest … (here the prosecution of a serious crime) against the public interest in protecting the right against self-incrimination as well as upholding a litigant's privacy and promoting an efficient civil justice process" (at [33]). While being mindful that an undertaking should only be set aside in exceptional circumstances, "[w]hat is important is the identification of the competing values, and the weighing of one in the light of the others, rather than setting up an absolute barrier to occasioning any 'injustice to the person giving discovery'. Prejudice, possibly amounting to injustice, to a particular litigant may exceptionally be held justified by a higher public interest" (at [33]).

Hong Kong

29 In *Secretary for Justice v Florence Tsang Chiu Wing & Ors* [2014] 6 HKC 285, the applicant sought leave to disclose to the Director of Public Prosecutions documents obtained in discovery in matrimonial proceedings, for the purpose of reporting a crime. The Court of Final Appeal reiterated the principles in *Crest Homes*. The court's task was to balance the competing interests. The discovering party had to "demonstrate cogent and persuasive reasons" why the undertaking should be released, and the court would not

release or modify the implied undertaking "save in special circumstances and where the release or modification will not occasion injustice to the person giving discovery" (at [23]). In that case, the court refused to release the applicant from the implied undertaking in relation to documents in which the issue of whether legal professional privilege attached had yet to be determined.

30 In *Re NTD*, the petitioners applied for leave to use documents disclosed by a company in winding up proceedings to, amongst others, lodge a criminal complaint of perjury against two individuals. The court held that it had discretion to modify the implied undertaking "for special reasons" and the general principle was that any release or modification should not occasion injustice to the person giving discovery (at [4]–[5]). It was a balancing exercise whether what was sought to be achieved by relaxing the implied undertaking was more important for the administration of justice generally, such as in discouraging and punishing false evidence, than in maintaining confidentiality so as not to disincentivise full and frank discovery. The factors for consideration include the nature of the document or information, any prejudice the author of the document may sustain, and the likely contribution of the document to achieving justice in the further proceedings (at [6]–[7]). In that case, leave to disclose was granted.

Conclusion

31 The authorities show that the *Riddick* principle continues to apply even where disclosure is sought for criminal investigation purposes. In determining whether the undertaking should be released or modified, the *Beckkett* conditions must be satisfied and generally there must also be special or exceptional circumstances. In conducting the balancing exercise, the courts can take into account factors including the nature and severity of the potential offence, the

cogency of the evidence sought to be adduced and the prejudice that may be occasioned to the respondent by the disclosure. These factors encapsulate the considerations that are relevant in assessing whether there is a greater public interest or policy to justify lifting the undertaking.

32 That said, the application of the second *Beckkett* condition must be modified in the context of disclosure for criminal investigation purposes. I am of the view that the mere exposure to investigation for possible commission of offences does not without more amount to injustice or prejudice under the second *Beckkett* condition, such as to bar the lifting or modifying of the implied undertaking. If the material reveals the possible commission of an offence by the party who had given discovery and is disclosed to the authorities, this would likely result in investigation, and may even result in prosecution, for an offence. Such "injustice or prejudice" within the meaning of the second *Beckkett* condition would mean that an application to modify or to be released from the implied undertaking for such purpose would generally never succeed. This cannot be right. In a case where the materials disclose a serious offence by the respondent that is in the public interest to prosecute, the public interest in the prosecution of the crime and punishment of the offender may amount to an exceptional circumstance justifying the lifting or modifying of the undertaking. Hence, the prospect of criminal investigation or prosecution that is occasioned by such disclosure should not on its own constitute relevant prejudice (see *Andrew Koh Nominees* at [17]), given that the applicant is seeking leave precisely to make reports to the authorities regarding a possible offence.

33 What I have stated above in no way casts doubt on the correctness of how the second *Beckkett* condition was applied in *Beckkett*, given that the facts there are distinguishable. There, the application was for the purpose of using the documents for the applicant in a suit to pursue a private interest (*ie*, to obtain an

injunction in Indonesia against the defendant) and a corollary effect was that the documents might fall into the hands of the Indonesian authorities (who would not be bound by any disclosure obligations and therefore not precluded from commencing proceedings). Likewise, the stress that the party giving discovery would experience upon investigation by the authorities is also generally irrelevant (*Prime Finance* at [42]).

Application to the facts

Offences under the EFMA

34 In relation to the Documents that pertained to possible commission of offences under s 5(1) and s 22(1)(*d*) of the EFMA, I found that the *Beckkett* conditions were satisfied.

35 Offences of this nature are serious. In particular, an offence under s 22(1)(*d*) of the EFMA is one of deception and designated as a serious offence under the Second Schedule to the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (Cap 65A, 2000 Rev Ed) ("CDSA"). Penalties for these offences were enhanced at least twice (in 2007 and 2012). In *Lim Kopi Pte Ltd v Public Prosecutor* [2010] 2 SLR 413, the court (at [10]) stated that an offence under s 22(1)(*d*) of the EFMA was a "serious one, which ought to be dealt with swiftly and sternly by the courts".

36 There is a public interest in the prosecution of such offences that would outweigh the public interest the implied undertaking was designed to protect. Such offences are also hard to detect. As explained in the Parliamentary Debates when the penalties in both ss 5(1) and 22(1)(*d*) of the EFMA were enhanced, greater deterrence was needed. The number of foreigners who obtained work passes through illegal means had increased significantly. There was a need to

maintain equilibrium between Singapore's economic competitiveness and other social objectives, such as enabling locals to compete for jobs and ensuring they did not lose out in terms of employment opportunities; and preventing employers who played by the rules from being disadvantaged (see the *Singapore Parliamentary Debates, Official Report* (11 September 2012) vol 89 (Tan Chuan-Jin, Acting Minister for Manpower); *Singapore Parliamentary Debates, Official Report* (22 May 2007) vol 83 at cols 929 and 933 (Dr Ng Eng Hen, Minister for Manpower)).

37 Further, the materials sought to be disclosed to the relevant authorities were cogent. When D2 sought to employ Marc, D1 (on D2's behalf) signed a declaration to the Ministry of Manpower ("MOM") to confirm that D2 had not made any voluntary CPF contributions for the purpose of inflating its foreign employee entitlement. However, this would seem to be contradicted by WhatsApp conversations between D1 and Patrick (who was a shareholder of D2) which suggested that the Defendants had been making CPF contributions to individuals who were not in fact employed by D2. Further, there were WhatsApp messages between D1 and Lydia (a foreigner) which suggested that D2 had hired Lydia without a valid work permit, and where D1 suggested to Lydia that she should apply for a short term visit pass and there was "no need [to] apply for [a] work permit" to avoid "pay[ing a] high levy" and that Lydia would be reimbursed for her work.[10] Pertinently, the Defendants did not attempt to explain away the materials and WhatsApp messages, but merely stated on affidavit that "a failure to respond [did] not amount to any admission on [D1's] or [D2's] part".[11]

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10 Thaddaeus' 1st affidavit at [40].

11 D1's affidavit dated 11 March 2019 ("D1's affidavit") at [27].

38 This was also not a case in which the potential offending acts could give rise to both civil and criminal proceedings and where an adequate civil or personal remedy would weigh against disclosure. Further, as I had earlier held, the prospect of criminal investigation or prosecution occasioned by such disclosure should not without more amount to an injustice or prejudice referred to in the second condition of *Beckkett*. The Plaintiffs were seeking leave for the release from or modification of the implied undertaking precisely to allow for disclosure for criminal investigation purposes. Likewise, that there may be inconvenience caused to D1 (or D2) if the authorities investigate the matter further was not something I considered to weigh significantly in the balance (see also *North East Equity* at [53]).

39 Next, I considered the purpose for the Plaintiffs' application and whether it was brought for some personal advantage or improper purpose.

40 The Plaintiffs claimed that they wanted to "deter any further wrongdoing" and "reduce the chance that other innocent parties would suffer detriment".[12] The Plaintiffs' counsel (Mr De Souza) subsequently agreed to reduce the number of documents sought from the initial 208 to 32.[13] At the hearing, Mr De Souza clarified that the Plaintiffs had already made reports to MOM (as well as the Corrupt Practices Investigation Bureau and the police) between July to October 2018.[14] The Plaintiffs explained that after Lee & Lee took over conduct of this Suit, they were advised to take out a proper application to seek the court's leave to disclose the materials and hence they filed SUM 484.

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12 Thaddeus' 1st affidavit at [24].

13 PFS at [3].

14 Notes of Evidence dated 8 April 2019.

The Defendants alleged that the Plaintiffs lodged the reports "out of vindictiveness and to cause as much harm as possible", and that the Plaintiffs wanted to "destroy" D2 who were their business competitors.[15]

41 On balance, I was unable to conclude that the Plaintiffs were motivated by an improper purpose or acted out of malice. Whilst paragraph 6 of Schedule 3 to the search orders (see [3] above) would have been apparent to the Plaintiffs, this must be considered in the light of what the Plaintiffs had actually disclosed to the investigating authorities. The Plaintiffs' claims in the Suit are based on D1 having wrongfully removed confidential information and trade secrets from P1 when D1 was working there for barely five weeks (from 1 June to 7 July 2016). D1 then went on to incorporate D2 which is in the same business as the Plaintiffs.[16] It was not disputed that thousands of documents that belonged to the Plaintiffs were found in the Defendants' possession pursuant to the search orders, and that the Defendants had not explained why these documents had been retained by them even in April 2018 (when the search orders were executed), some two years after D1 had left P1's employ. Whilst thousands of documents belonging to the Plaintiffs were recovered pursuant to the search orders, they eventually disclosed only about a dozen to the relevant authorities.[17] When Lee & Lee took over conduct of the matter, the Plaintiffs quickly complied with the lawyers' advice and filed SUM 484, and subsequently pared down the number of documents it sought the court's leave to disclose to 32 documents in all.

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15 D1's affidavit at [63].

16 Thaddeus' 1st affidavit at [12]–[13]; Notes of Evidence dated 24 June 2019.

17 Thaddeus' affidavit of 8 July 2019 at [14]–[21].

42 I was cognisant that SUM 484 was filed *ex parte* and that I had then directed that it be served on the Defendants. Nevertheless, that it was filed *ex parte* was neutral at best – it did not assist in my assessment of the Plaintiffs' motivation *at the time* they disclosed the handful of documents to the authorities. It could equally be said that the Plaintiffs, having realised that they should not have disclosed documents to third parties without seeking permission, then attempted to act in self-preservation. Likewise, even if the Plaintiffs did not inform the court or the Defendants' counsel that they had already disclosed certain documents or information to the authorities when they first asked for an extension of time to comply with various directions of the court (pursuant to the Listing Exercise), this was again after-the-fact and hence neutral.

43 The Defendants also claimed that the Plaintiffs' alleged civic-mindedness was hypocritical given that the Plaintiffs had also committed possible offences.[18] This was irrelevant to the analysis – it was equally open to the Defendants to seek the appropriate recourse if they were minded to do so.

44 In the round, the factors such as the nature and seriousness of the offences under the EFMA and the public interest in the prosecution of such offences, the lack of alternative (civil) remedies, the cogency of evidence and the lack of material prejudice to the Defendants (other than the prejudice of potential investigations against them) militated in favour of disclosure. Even if the Plaintiffs had acted improperly by disclosing some information before seeking the court's leave in SUM 484 (which I had found was not the case), I was not satisfied that this tilted the balance in favour of the Defendants.

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[18] DS at [74].

Offence under section 425 of the Penal Code

45 The Plaintiffs also sought to disclose WhatsApp messages to the authorities as these allegedly showed that D1 and/or Marc were likely to be responsible for incidents when staple bullets were discovered in P1's products. D1 and/or Marc would potentially have committed an offence of mischief under s 425 of the Penal Code. I disallowed the Plaintiffs' application in relation to these documents.

46 The Plaintiffs themselves accepted that mischief is generally not a serious offence.[19] The facts also did not point to it being a serious offence in this case. The Plaintiffs alleged that the presence of staple bullets in pharmaceutical products could lead to a patient being injured, and that the risk of personal injury to others is a recognised aggravating factor. However, the Plaintiffs have not elaborated how many staple bullets were allegedly found in their products, or even where they were located (*eg*, within the consumable product or outside on the packaging).

47 Further, the WhatsApp messages were equivocal and did not amount to cogent evidence of an offence of mischief *by* D1 or Marc. The messages between D1 and D5, which mentioned the "staple saga" and contained an assertion by D5 that Marc was "likely … the culprit",[20] must be read in context and cannot be taken too far. D1 had on affidavit categorically denied any involvement in the staple bullet incident,[21] she had on the WhatsApp messages stated that she did not think Marc was involved, and the messages did not

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19 PFS at [23].

20 Thaddaeus' 1st affidavit at [47].

21 D1's affidavit at [47].

suggest or show that D1 was a perpetrator in the incident. All that could be said from the messages is that the senders and recipients were *aware* of the incident, and that they amounted to "office chat" or gossip after the incidents had happened – which was not unusual. The WhatsApp messages between D1 and Marc regarding the staple bullet incident where D1 had informed Marc that "This kinda [*sic*] thing very toxic, too much gossip … no harmony, I don[']t like"[22] supported that interpretation. This was also not a case in which there were no civil remedies that the Plaintiffs could pursue against D1 if they thought she had committed the staple bullet incident.

Offences under the Prevention of Corruption Act

48 Next, the Plaintiffs sought leave to disclose various WhatsApp messages between D1 and Marc on 10 October 2017 and between 22 to 25 October 2017, as follows:[23]

(a) D1 informed Marc (who was then in P1's employ) that she would help to produce certain products which "they" could not produce in time and D1 would "commission" Marc. The Plaintiffs submitted that this showed that D1 was attempting to offer Marc gratification to siphon business from P1.

(b) Marc informed D1 that he knew that one Dr Ho would choose either a "transparent white or the opaque white" colour, and D1 replied, "Ok … This one need prior order … If deal comes through [you will] have [your] fair share". The Plaintiffs claimed Marc had informed D1 of

22 Thaddeus' 1st affidavit at p 216.

23 Thaddaeus' 1st affidavit at [53].

the preferences of Dr Ho (then P1's client) to enable D1 to obtain Dr Ho's business, and Marc would get some reward if D1 managed to clinch a deal with Dr Ho.

(c) In another series of messages, D1 told Marc that "It is a [good] chance for me to approach [Dr Chiam]", "if [I] can take over his service … I will reimburse [you] 5%" and "[It's] your effort". The Plaintiffs claimed that by this conversation, D1 was saying she would reimburse Marc 5% if D1 was able to take over Dr Chiam's business and that she depended heavily on Marc's "effort" to do so. Dr Chiam was then P1's client.

49 I accepted that corruption is a serious offence. This stance has been affirmed in our courts (see *Public Prosecutor v Syed Mostofa Romel* [2015] 3 SLR 1166 at [13]). Nevertheless, I did not think that the circumstances in this case justified a departure from the *Riddick* principle. It is not unusual, in a claim of the nature brought by the Plaintiffs (*ie*, for breach of confidence and diversion of business), that the perpetrators would engage in some acts that may be considered corrupt, and which would form the gravamen of the plaintiff's complaint and the factual basis of his action. But it does not follow that in every such case, documents disclosed in the civil suit should *invariably* be made available to the authorities to investigate into possible corruption offences. Apart from examining the nature of the offence itself (*ie*, whether the offence is in itself a serious one), the court should also consider whether the particular circumstances are serious enough that the public interest in reporting the offence and prosecuting the offender would outweigh the public interest in encouraging full disclosure of documents and protecting their confidentiality. In this case, although the WhatsApp messages may, on one reading, suggest that D1 was attempting to get Marc to help her divert business from P1, they are bereft of

crucial details that would demonstrate the severity of the situation and therefore assist the Plaintiffs to surmount the high hurdle of displacing the *Riddick* principle. The Plaintiffs did not adduce any evidence of the severity of the damage to them as a result of these attempted corrupt acts, or the amount of gratification that Marc would (or did) eventually receive.

50 This was also a case where there would be an adequate civil remedy for the Plaintiffs. In the Suit, they have sought damages and an account of profits and payment of all sums found due upon taking an account for, amongst others, the Defendants' breach of contractual duties and/or duties of good faith and fidelity.

51 All matters considered, I refused the Plaintiffs leave to be released from the undertaking in relation to the documents that purported to disclose an offence under s 6(*b*) of the PCA.

Offences under the Computer Misuse Act

52 Next, the Plaintiffs sought leave to disclose some 20 extracts of hardcopy pharmaceutical formulas, formulations and order sheets found in D1's possession. The contents of these documents belonged to the Plaintiffs. Some of them even referred to "Amber". The Plaintiffs claimed that D1 had inserted her personal thumb drive into P1's computer without authorisation and downloaded these documents, which were later seized under the search orders.

53 Even if the above acts could potentially fall within s 3(1) of the CMA, taking all the relevant factors into account, I did not consider the circumstances of the case to be serious enough to warrant a departure from the *Riddick* principle. Offences under s 3(1) of the CMA have a wide range of culpability. Whilst a large number of documents were seized from the Defendants, with

many of these containing confidential information or trade secrets, these documents were (as the Plaintiffs themselves stated) taken "indiscriminately" without any deliberate targeting of especially sensitive information. In view of this, although the potential for damage or mischief caused to the Plaintiffs undeniably exists, what could potentially have amounted to an aggravating factor should be applied sensibly in the context of the case. Additionally, the Plaintiffs have an eyewitness, their sales and operations manager (Chua), who saw D1 inserting her thumb drive into P1's computer, and a report of an IT technology consultant (Cheng) who had examined P1's computer to show that an external device was plugged into the computer.[24] There is nothing to suggest that the Plaintiffs are precluded from relying on Chua's account or Cheng's analysis and findings to make reports to the relevant authorities if they so choose.

54 Finally, the Plaintiffs brought numerous claims against the defendants in the Suit, these being breach of contract, breach of confidence, conspiracy to injure the Plaintiffs by removing their confidential information and trade secrets to set up a business in competition, and infringement of copyright. They have claimed damages and an account of profits as well as various injunctions, including to restrain the defendants from using the Plaintiffs' information and trade secrets. In my view, they have an adequate civil remedy, and the offences which they wanted the authorities to investigate mirrored the civil wrongs that they have claimed in the Suit.

55 In this connection, I had regard to *Websyte Corp Pty Ltd (ACN 097 870 936) v Alexander and Another* (2012) 95 IPR 344 ("*Websyte*"). The applicant

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[24] Thaddeus' 1st affidavit at [56]–[57]; Cheng Haoming's affidavit dated 15 March 2018.

sued its employees (R) for reproducing its software for use in their business giving rise to various claims such as infringements of copyright, and breach of duty of confidence ("the suit"). The applicant obtained a search order against R. There was an express undertaking not to use without leave of court the information other than for the purpose of the suit. Subsequently it informed the police it wished to press charges against R (for unauthorised access and modification of restricted data in a computer) and provided the statement of claim of the suit, which contained information obtained as a result of the search order. It then sought to be released from its undertaking to disclose the emails and contents of R's computer server (seized under the search order) to the police. The court did not grant leave, as the offences being investigated corresponded with civil wrongs in relation to which the applicant was suing on, and involved the infringement of private rights rather than conduct which injured the community or alleged criminal conduct which may be in the greater public interest to uncover (at [17]).

56 In the round, I refused the Plaintiffs leave to be released from the undertaking in relation to the documents that purported to disclose alleged offences under s 3(1) of the CMA.

Privilege against self-incrimination

57 The Defendants relied on the privilege against self-incrimination pertaining to the documents that the Plaintiffs sought disclosure of, for purposes of reporting possible offences under the EFMA and PCA.[25] I considered the privilege only in relation to the documents that may show possible offences

[25] Notes of Evidence of 24 June 2019.

under the EFMA, as this was the only category of documents which I had granted the Plaintiffs leave to be released from the undertaking.

58 Before the privilege against self-incrimination can be claimed successfully by a person, it must be shown that there is a real risk that the incriminating answers would expose the person to arrest or prosecution for a criminal offence. However, the privilege can be waived, such as where the person answers a question (which may tend to incriminate him) without claiming the privilege (*Guccio Gucci SpA v Sukhdav Singh and other suits* [1991] 2 SLR(R) 823 at [20]).

59 In the present case, I found that the Defendants had waived the privilege. In coming to my decision on the issue, whilst D1 and D2 are separate persons (and hence entitled to raise the privilege separately), D1's acts in this case represented D2 and counsel for D1 and D2 (Mr Pereira) did not argue that privilege operated differently for D1 and D2.

60 I rejected Mr Pereira's assertion that there was never an occasion whereby the Defendants were presented with the opportunity to raise the right against self-incrimination.[26] The search orders contained express provisions for the Defendants to obtain legal advice and to vary or discharge the search orders. There was no indication that D1 objected to the search and removal of documents at the material time. The supervising solicitor who conducted the search at D1's residence (Mr Silvester) deposed[27] that he had explained the nature and consequences of the search order to D1 and that she had confirmed

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26 DS at [115] and [117].

27 Silvester's affidavit dated 23 May 2018 at [6]–[7].

her understanding of the contents of the search order. He also informed D1 that she had the right to consult with a lawyer and had a two-hour window before the search would begin. Mr Silvester attested that D1 then proceeded to make a phone call and shortly after, told him that the search could commence. The other supervising solicitor (Mr Tay) who conducted a search at D2's premises deposed[28] that he had explained the nature and consequences of the search order to D1. Mr Tay also stated that he allowed D1 to communicate with lawyers to obtain advice. D1 then made a phone call, and managed to obtain advice in relation to the search order (although she could not find a lawyer at that time to help her set it aside) before the search proceeded. While D1 claimed (in an affidavit filed about one year later) that Mr Silvester did not bring her through all the orders in the search orders,[29] this was a bare assertion that did not refute Mr Silvester's explanation that she had confirmed the understanding of the contents of the search order; nor did she attempt to refute Mr Tay's assertions at all.

61 Further, the standard form of the search order under "Disclosure of information by the Defendant" stated that "Nothing in this Order shall abrogate [the defendant's] right against self-incrimination".[30] D1 was literate in English and could have clarified with either the supervising solicitors or the counsel she had called to obtain legal advice. Not only did D1 not assert the privilege of self-incrimination at the time of the search, she did not do so even after she had engaged lawyers to set aside the search orders and filed an affidavit in May 2018. It was not until SUM 484 was filed that the Defendants asserted the

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28 Tay's affidavit dated 22 May 2018 at [8]–[9].

29 D1's affidavit at [40]; DS at [120].

30 ORC 2447/2018.

privilege for the first time in their affidavit of 11 March 2019, nearly a year after the search had been conducted and documents seized. A party, on being served with a search order, who does not object then but instead provides the information required by the order, may be precluded thereafter from raising the point (*Nikkomann Co Pte Ltd and others v Yulean Trading Pte Ltd* [1992] 2 SLR(R) 328 at [65]).

Retrospective release from implied undertaking

62 Having determined that the undertaking should be modified to allow documents relating to the EFMA offences to be disclosed for criminal investigation purposes, and having determined that the Defendants could no longer assert the privilege of self-incrimination, I considered whether the above analysis would be different where the applicant was seeking retrospective release from the implied undertaking. The Plaintiffs submitted that the court has power to grant leave to disclose *nunc pro tunc*. The Defendants did not dispute this, but submitted that the court should exercise its discretion to do so only in rare circumstances, especially where disclosure was sought to further criminal investigations. The Defendants also accepted that whether prospective leave would have been granted would be a factor to consider in an application for retrospective leave.[31]

63 In *Miller and Another v Scorey and Others* [1996] 1 WLR 1122 ("*Miller v Scorey*"), the plaintiffs discovered from documents disclosed by the defendants in ongoing proceedings ("first action") that the latter might have taken a bribe. Concerned that the limitation period would expire, the plaintiffs commenced fresh proceedings for the bribe ("second action"), using the

[31] DS at [99] to [101].

documents obtained in the first action. The court struck out the second action. The plaintiffs were in contempt of court for breaching the implied undertaking prohibiting the use of documents other than for the action in which they were disclosed, and so the second action was an abuse of process. Allowing the second action to proceed would permit the plaintiffs to take advantage of their own wrong and consequently deny the defendants a limitation defence that would have accrued had the plaintiffs been compelled to sue afresh. Considering this, Rimer J stated (at 1133) that he did not find it necessary to decide whether he had jurisdiction to grant the plaintiffs retrospective leave, although "[i]t may be that the court does have some such jurisdiction but, if so, it seems to [him] that the circumstances in which it would be proper to exercise it would be rare".

64 In *The ECU Group Plc v HSBC Bank Plc & others* [2018] EWHC 3045 (Comm), the applicant sought retrospective permission to use certain documents disclosed by the respondents in pre-action disclosure. The court held (at [12]) that whether permission for the use of documents in fact made would have been granted would be a very important factor, although it could not be said in the abstract to be either necessary or sufficient. However, it would require "something unusual about the particular facts of a case" and it would be "very rare, for permission to be granted retrospectively that the court would not have granted if it had been sought prospectively".

65 In *Websyte*, the court did not grant retrospective leave in relation to information contained in a statement of claim provided to the police. In addition to the fact that the offences being investigated corresponded with civil wrongs that the applicant was suing on and involved the infringement of a private right (see [55] above), the court found that the applicant's position, in seeking the favourable exercise of the court's discretion, had been compromised by an act of self-help on its part (at [21]).

66 The authorities show that the court has power to grant retrospective leave, although the court should exercise this discretion in "rare circumstances" (see *Miller v Scorey*, cited in *Microsoft Corp and others v SM Summit Holdings Ltd and another and other appeals* [1999] 3 SLR(R) 1017 at [50]). In the present case, I exercised my discretion to grant retrospective leave for the documents relating to the EFMA offences, as I considered the circumstances justified it. This was a case in which I would have granted leave if sought prospectively, as explained above. The purpose of the disclosure was to report the possible commission of EFMA offences which are difficult to detect and in the greater public interest to uncover. The offences which were to be investigated neither corresponded with any civil wrongs that the Plaintiffs were suing on nor involved the infringement of private rights. Further I did not find that the Plaintiffs were motivated by an improper purpose (see [41] above) even if they had disclosed some documents to the authorities without first obtaining the court's leave.

67 I clarify that my decision to grant retrospective leave applied only to the documents (pertaining to possible offences under the EFMA) which had already been disclosed to the relevant authorities for investigation.[32] It did not apply to documents which have not yet been disclosed, for which I had granted prospective leave. These included D2's declaration to MOM to support an application for an S-Pass for a foreign employee, CPF documents revealing that D2 had contributed CPF to three persons who the Plaintiffs alleged were phantom workers (see [7] above), and photographs or videos of Lydia working (see [8] above).

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[32] See Thaddeus' affidavit of 8 July 2019 at [14].

The Plaintiffs' additional request for disclosure

68 After all the written submissions had been filed and arguments made, and Mr De Souza had confirmed that the Plaintiffs intended to rely only on the 32 documents that constitute the Documents, I adjourned the matter for decision. The Plaintiffs then filed a further affidavit to explain which of the documents (forming the Documents) pertaining to the EFMA offences had already been disclosed to authorities for investigation. This was pursuant to my directions as it was not clear to me which of the documents constituting the Documents had already been disclosed to third parties. However, in the same affidavit, the Plaintiffs then requested retrospective leave to disclose six other documents ("the Additional Documents")[33].

69 I refused to deal with the Plaintiffs' request for disclosure of the Additional Documents in SUM 484. All the submissions and arguments had proceeded on the basis of the Documents and none other, and the Defendants did not have an opportunity to file a reply affidavit or make submissions on the Additional Documents. Also, the proper course of action would have been for the Plaintiffs to apply to the court for leave to deal with the Additional Documents and to file an affidavit to explain their basis, with an opportunity to the Defendants to respond.

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[33] See Thaddeus's affidavit of 8 July 2019 at [16]–[19].

Conclusion

70 To conclude, I allowed the implied undertaking to be modified only to permit the disclosure of the Documents that might reveal the potential commission of EFMA offences. This was limited to 23 of the documents constituting the Documents. I stress that the overarching principle remains that documents obtained via discovery or by a search order should not be used for a purpose other than pursuing the action in respect of which the discovery is obtained. The *Beckkett* conditions must be satisfied in order for the implied undertaking to be released or modified, and the court will only release or modify the undertaking in exceptional circumstances. Where the release (or modification) of the implied undertaking is for criminal investigation purposes, the court must determine if the public interest in the prosecution of the crime and punishment of the offence outweighs the public interest of promoting full and frank disclosure in discovery in the interest of justice and in protecting the privacy and confidentiality of the party ordered to give discovery.

Audrey Lim
Judge

Tan Tee Jim SC, Christopher James De Souza, Tan Sih Im (Chen Shiyin), Lee Junting, Basil, Chew Zhi Xuan (Lee & Lee) for the plaintiffs;
Pereira George Barnabas and Sarah Yeo Qi Wei (Pereira & Tan LLC) for the first and second defendants.