

Ser Kim Koi and Another v William Merrell Fulton and Others
[2009] SGHC 5

Case Number : Suit 427/2006, SUM 4677/2008
Decision Date : 07 January 2009
Tribunal/Court : High Court
Coram : Teo Guan Siew AR
Counsel Name(s) : Derek Kang and Thng for the plaintiffs; Khoo Boo Jin and Tan Suan Boon for the 1st defendant; Chua Sui Tong and Cheng for the 2nd defendant to the 4th defendant
Parties : Ser Kim Koi; Ser Song Cheh — William Merrell Fulton; Anurag Mathur; Stephen King Chang-Min; Thio Shen Yi; Metalform Asia Pte Ltd

Civil Procedure

7 January 2009

AR Teo Guan Siew:

Introduction

1 The plaintiffs in this suit wanted to use certain documents, disclosed by the defendants in the course of proceedings, for the purpose of another related action in which the plaintiffs are the third parties. What stood in the way of the plaintiffs was the general rule (frequently referred to as the “*Riddick* principle”) that where a party to litigation is ordered to provide documents to the other party, the latter is under an implied obligation not to use those discovered documents other than for the purpose of those proceedings pursuant to which discovery is obtained. This application was about whether the court should order a release of that implied undertaking in respect of documents in one suit which were argued to be relevant to the issues in another.

Background

2 The present action (S 427/2006) was commenced by the plaintiffs (hereinafter “the Sers”) against a company Metalform Asia Pte Ltd (“MFA”) and its directors and officers. The Sers were directors and shareholders of another company called Holland Leedon Pte Ltd (“HL”), the business and assets of which were transferred to MFA in 2004. The corporate structure arising from this business acquisition was complex, but in essence, the Sers (through a Mauritius holding company) ended up with 49% control of the ultimate holding company of MFA. A Singapore incorporated company CCMP Capital Asia Pte Ltd had the majority 51% control through another Mauritius holding company JPMP MPL Holding Limited (“JPMP”). The Board of MFA included three directors appointed by JPMP (the second, third and fourth defendants) and the Sers. The first defendant was the Chief Executive Officer of MFA. After the acquisition, MFA, which was in the business of manufacture and sale of top covers for hard disk drives, purchased steel from HL from around July 2004.

3 From these background facts arose a series of disputes which have given rise to a number of related actions involving overlapping parties. For present purposes, it would suffice to focus on two of these suits. In S 427/2006, the Sers allege that MFA had been insolvent since December 2005 and should have stopped trading and incurring further debts. They seek a declaration that MFA is insolvent as well as injunctions to prevent the defendants from causing the company to continue to

trade and disposing of the company's assets. In addition, the Sers say that the defendant directors acted in breach of their fiduciary duties to MFA by *inter alia* diverting its assets to other related entities.

4 The related S 668/2006 consists of a claim brought by HL, in its capacity as a creditor of MFA, against certain directors and officers of MFA which include the first, second and third defendants in S 427/2006. The nature of HL's claim is that the defendants in S 668/2006 had procured the purchase of steel from HL in circumstances where they knew or had reason to believe that MFA would not be able to pay HL, and are therefore liable for knowingly carrying on the business of MFA with intent to defraud HL. The Sers were brought in to S 668/2006 as third parties, on the basis of their alleged knowledge and approval of the procurement of steel by MFA such that they should bear responsibility if such procurement indeed amounted to a fraud on HL. The defendants in S 668/2006 further allege that the Sers had subsequently obstructed MFA's various efforts to refinance so as to repay HL for the steel debt.

The present application

5 The Sers took the view that the issues in S 427/2006 overlapped with S 668/2006 as well as a third suit S 496/2006 involving similar parties (there, MFA is suing the Sers for breach of fiduciary duties owed to MFA in not informing MFA of certain breaches of warranty by HL in the sale and purchase of MFA's business and assets mentioned above at [2]). The Sers therefore made an application in S 427/2006 for leave to rely on the documents disclosed in the suit for the purposes of the other two actions, insofar as such documents were relevant to the issues in those two suits, but without specifying what those documents were. This application was rejected at first instance by AR Chung Yoon Joo and on appeal by Judith Prakash J, largely because the Sers were effectively seeking a blanket release from their implied obligations under the Riddick principle. It would appear that both the AR and the Judge were concerned that if such blanket leave was granted and since the documents in question would already be in the Sers' possession, the Sers could decide for themselves which of those documents they want to rely on in the other two suits without any need to take up further applications. The effect would be that the issue of relevance of the documents in those two suits becomes exclusively in the hands of the Sers. The argument of the defendants, which the AR (and seemingly the Judge) agreed with, was that it should be for the Sers to identify the specific documents for which they seek a release of the implied undertaking.

6 That the Sers tried to do which gave rise to the present application before me. This time round, the Sers stipulated the specific categories of documents disclosed in S 427/2006 which they wish to rely upon in S 668/2006. These documents had been either disclosed by the first defendant, or by the second to fourth defendants, in the proceedings of S 427/2006. One critical point to note is that those documents that had been disclosed by the first defendant had also been concurrently produced for discovery by the fifth defendant MFA. But unlike their previous application for a general release from the implied undertaking, the Sers' present application was not taken up against MFA.

7 The categories of documents were arranged according to certain issues which the Sers submitted were common to both suits, such as (a) the financial position of MFA; (b) the management and control of MFA; and (c) various refinancing initiatives which MFA allegedly undertook for the purpose of *inter alia* repaying HL for the steel debt. This more narrowly-scoped application however still met with strenuous objections from the first to fourth defendants. Although the first defendant was represented by different solicitors from the second to fourth defendants, their points of objection were largely the same. Both sets of solicitors relied strongly on the Riddick principle, arguing that there were no exceptional circumstances for the implied undertaking to be released in respect of those stipulated documents. It was also submitted that the documents in question were in any event

not relevant or necessary for the purposes of S 668/2006. Counsel for the first defendant had an additional argument, which was that in respect of those documents pertaining to their client, the application was improper as MFA had not been made a party despite the fact that those same documents had also been disclosed by MFA in the proceedings of S 427/2006. It was contended that MFA (which had separate legal representation from the first defendant) ought to be given an equal chance to object to the release of the Sers' implied undertaking in respect of those documents in question.

The rationale and application of the *Riddick* principle

8 Discovery is today undoubtedly regarded as an essential component of all established civil procedure systems, for it serves the important function of ensuring that all documents pertaining to the issues in dispute are surfaced in the proceedings so that the truth can be discovered and justice done. Yet, many litigants may feel aggrieved at being compelled to produce such documents, particularly those that are confidential in nature, or which are adverse to their interests. It is this tussle between the objective of discovering the truth in litigation on the one hand, and the interest of safeguarding privacy and confidentiality on the other, that underlies the *Riddick* principle. The rationale is nowhere better explained than by Lord Denning in the case from which the principle acquired its name (*Riddick v Thames Board Mills* [1977] 1 QB 882 at 895-896):

The reason for compelling discovery of documents in this way lies in the public interest in discovering the truth so that justice may be done between the parties. That public interest is to be put into the scales against the public interest in preserving privacy and protecting confidential information. The balance comes down in the ordinary way in favour of the public interest of discovering the truth, i.e., in making full disclosure.

...

Compulsion is an invasion of a private right to keep one's documents to oneself. ***The public interest in privacy and confidence demands that this compulsion should not be pressed further than the course of justice requires. The courts should, therefore, not allow the other party – or anyone else – to use the documents for any ulterior or alien purpose.*** Otherwise the court themselves would be doing injustice.

[emphasis added]

9 In addition, it has also been pointed out that another reason for the principle is to promote full and frank disclosure in discovery. Without such an implied undertaking, the possibility that the disclosed documents could be put to some collateral use may operate as a disincentive to proper discovery (see Matthews & Malek, *Disclosure* (London: Sweet & Maxwell, 3rd ed., 2007) at 454).

10 The law therefore requires suitable controls to be imposed on the use of documents obtained from other parties who disclosed them under compulsion. This comes in the form of a general rule that the documents should not be used for any collateral or ulterior purpose, but only for the purpose of the action in which they were disclosed. Since the early decision of *Alterskye v Scott* [1948] 1 All ER 469, this has been regarded by the English courts as operating by means of an implied undertaking by the party seeking discovery. This general principle has been accepted by the Singapore courts in numerous decisions, and it would suffice to refer to the Court of Appeal's decision in *Beckkett Pte Ltd v Deutsche Bank of AG* [2005] 3 SLR 555 ("*Beckkett*"), where Chao Hick Tin JA (delivering the judgment of the court) stated the principle in the following terms (at [14]):

[W]here a party to litigation has been ordered to give discovery, the discovering party may not use the discovered documents, and the information obtained therefrom, for a purpose other than pursuing the action in respect of which discovery is obtained.

11 The *Riddick* principle has been applied to prevent a party who obtains discovery of certain documents in the course of an action from using those same documents *in order to bring a new action*. In *Riddick's* case itself, Mr Riddick had sued his former employer company for wrongful arrest and false imprisonment. During the course of those proceedings, the company had disclosed a memorandum which detailed unsatisfactory aspects of his work. Mr Riddick subsequently brought a separate action against the company for defamation based on the memorandum. The English Court of Appeal held that he was not entitled to rely on that memorandum to bring a new claim on defamation and his action failed. On fairly similar facts, in *Sim Leng Chua v Manghardt* [1987] SLR 205 ("*Sim Leng Chua*"), Chan Sek Keong JC (as he then was) struck out a defamation claim on the ground of abuse of process of the court because it was an action brought based on a document which the plaintiff had obtained during the discovery process of another earlier suit. Chan JC held that the interest of the plaintiff in vindicating his private rights by suing for defamation could not outweigh the public interest in the proper administration of justice which underscored the *Riddick* principle.

12 But the *Riddick* principle is not absolute, and it is possible for the court to order a release of the implied undertaking. In *Beckett*, the Court of Appeal decided that two conditions need to be satisfied for that to happen: (a) cogent and persuasive reasons must be furnished; and (b) it must not give rise to any injustice or prejudice to the party who had given discovery. The Court of Appeal further stated that it is only in exceptional circumstances that the implied undertaking would be released or modified.

13 What amounts to such exceptional circumstances would have to depend on the facts and circumstances of each case (see *Reebok International Ltd v Royal Corp* [1992] 2 SLR 136 ("*Reebok International*")), but it remains useful to examine previous cases. In *Sybron Corporation v Barclays Bank Plc* [1985] 1 Ch 299 ("*Sybron*"), the plaintiffs had commenced action in 1981 against a bank ("the 1981 action") for being party to a conspiracy by providing banking services to certain companies which were set up by the plaintiffs' ex-employees to exploit the plaintiffs' trade secrets and confidential information. After having sight of certain documents disclosed by the bank as part of the discovery process in the 1981 action, the plaintiffs decided to add other associated companies as plaintiffs and to add three of the bank employees as defendants. As there could be difficulties with the limitation period, the plaintiffs decided it was preferable to commence another fresh action ("the 1983 action"). Leave was then sought from the court to refer in the 1983 action to the documents discovered in the 1981 action. In delivering judgment, Scott J provided valuable guidance (at 326) on the approach to be adopted by the court in such a situation:

If a proposed action is not shown to be an abuse of process or obviously unsustainable then prima facie a plaintiff is entitled to prosecute it. Whether leave to use discovered documents for the purposes of such an action should be granted should depend in my view on ***the nature of the first action, the circumstances in which discovery was given and the nature of the proposed new action***. [emphasis added]

14 In deciding to grant such leave, Scott J was influenced by the identity in the causes of action in both suits and the fact that the context was akin to a joinder of additional parties. He reasoned as follows (at 327-328):

[T]he causes of action in the 1981 action and the 1983 action are the same. That being so, common sense seems to me to argue in favour of granting leave. Use of the documents in the

1983 action is, as I have held, outside the scope of the implied undertaking given as a term of the discovery in the 1981 action. But it is not inconsistent with the broad purpose for which that discovery was given...Joinder of additional parties as a consequence of discovery is a common procedural occurrence. Neither I nor counsel have ever in practice heard of an objection to such joinder on the ground that discovered documents ought not to be used for such a purpose. If, instead of joinder, a new action is started, the substance of the situation does not seem to me relevantly different. I cannot see any sensible reason why the court should regard this new action as inappropriate for the use of the discovered documents.

15 The case of *Crest Homes Plc v Marks* [1987] 3 WLR 293 ("*Crest Homes*") is another instance where the implied undertaking was released by the court. In a previous action for copyright infringement ("the 1984 action"), the plaintiffs had obtained an *Anton Piller* order pursuant to which the defendants therein had provided certain undertakings and disclosures. The following year, the plaintiffs discovered further copyright infringements and commenced another action. In this second action, an *Anton Piller* order was again obtained and amongst the documents seized, the plaintiffs discovered infringing designs which fell within the scope of the earlier *Anton Piller* order. They then sought leave of court to rely on those documents for the purpose of bringing proceedings for contempt of court against the defendants in the 1984 action for having breached their undertakings under the earlier *Anton Piller* order. In understanding the decision of the House of Lords to grant such leave, it is important to first bear in mind that the documents in question were discovered under an *Anton Piller* order and not pursuant to general discovery. Although the *Riddick* principle was found to be equally applicable, Lord Oliver of Aylmerton (whose judgment the other members of the House concurred with) commented on how the rationale of encouraging full and frank disclosure (alluded to above at [9]) may not feature in such a context (at 301-302):

So far as concerns the effect of a relaxation of the undertaking upon the performance of the obligation to make full and frank disclosure...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.

16 In allowing the documents to be used for the contempt proceedings, it is clear from his judgment that Lord Oliver took into account the *countervailing consideration of public policy* that orders of court should be obeyed. However, in Lord Oliver's view, had the revelation of contempt been in respect of some wholly unrelated proceeding, the importance of ensuring obedience to the court's orders would not outweigh that of ensuring the continued observance of the undertaking given pursuant to the *Riddick* principle. In this instant case, Lord Oliver was of the opinion that it was purely adventitious that there happened to be two separate actions for copyright infringement. That was occasioned by technical considerations and by the failure of the defendant in the 1984 action to make full disclosure under the first *Anton Piller* order. In substance, there was only one single set of proceedings. Lord Oliver appears to see the plaintiffs' application as no different from the use of documents, disclosed in the discovery process of an action, for the purpose of enforcing the due observance of orders made in that same action, which in his view is clearly permissible.

17 In *Halcon International Inc v The Shell Transport and Trading Co* [1979] RPC 97, an application was made for permission to use a bundle of documents disclosed in an English patent action for the purpose of related Dutch proceedings. The application was rejected by Whitford J at first instance, who took the view that the mere pursuit of private interest is never sufficient to justify a relaxation of the *Riddick* principle. He said (at 109-110):

[T]he use of a document disclosed in a proceeding in some other context, or even in another

proceeding between the same parties in the same jurisdiction, is an abuse of process unless there are very strong grounds for making an exception to the general rule. It does, I think, emerge that ***some overriding public interest might be a good example, but not the mere furtherance of some private interest even where that private interest arises directly out of or is brought to light as a result of the discovery made.*** [emphasis added]

The English Court of Appeal affirmed the decision of Whitford J to refuse leave, but only for the specific reason that if the bundle of documents were to be used in the Dutch proceedings, it could lead to prejudice to the defendant in having to disclose other confidential documents in order to explain the contents of that bundle. Due to the nature of Dutch civil procedure, these confidential documents if disclosed would then be available to the world at large. On the above general statement of principle by Whitford J however, the appellate court made no comment.

18 In *Beckett*, the Court of Appeal took the view that such a proposition that some overriding public interest is an *essential requirement* before leave would be granted to use discovered documents in other proceedings is too stringent, and agreed with Scott J's view in *Sybron* that Whitford J's suggestion should be regarded only as a valuable general guide not applicable in all cases. The position under Singapore law is therefore clear: the mere fact that leave of court is being sought purely in furtherance of a private interest, and that it is impossible to identify any overriding public interest justifying the use of the disclosed documents outside the context of the action in which they were disclosed, does not serve as a conclusive bar to the court exercising its discretion to release the implied undertaking given pursuant to the *Riddick* principle. Having said that, the instances where the pursuit of private interest on its own warrants the relaxation or modification of the *Riddick* principle can be expected to be few and far between. In *Sybron* itself, as already mentioned above (at [13]), Scott J was primarily influenced by the fact that the unusual circumstances of that case made it akin to a joinder of additional parties. It is possible to interpret the facts of *Sybron* as *not* constituting a situation where the pursuit of private interest was allowed to trump the public interest considerations underlying the *Riddick* principle. Indeed, such was the view of Chan JC in *Sim Leng Chua*, where he opined (at 213):

In my view, *Sybron's* case is not an example of a case where a private interest has, with the leave of the court, prevailed over a public interest. It was a case analogous to a joinder of parties who had conspired with the existing defendants to defraud the plaintiff, so that the giving of leave could be said to have come within the very terms of the *Riddick* principle. There was no question of a contest between a private interest and a public interest.

In the later case of *Reebok International*, Chan Sek Keong J (as he then was) restated his view in *Sim Leng Chua* that "it would be an extremely rare occasion that a private interest could outweigh the public interest".

19 The case of *Crest Homes* further suggests that even the public interest of seeing that orders of court are observed through contempt of court proceedings may not necessarily prevail over the *Riddick* principle. As observed above, the House of Lords reached its conclusion in favour of granting leave only after taking into account other considerations such as the commonality of causes of action and parties in the two actions, and the fact that the documents in question were disclosed pursuant to compulsion under an Anton Piller order as opposed to being part of the discovery process.

20 From the above, it will be apparent that an applicant seeking a variation or release of its implied obligations under the *Riddick* principle faces an uphill task. The burden on the applicant to show that there are exceptional circumstances is an onerous one. Where documents disclosed are sought to be used in another action, the identity or similarity in the causes of action, or in the parties and issues

involved, are factors that such an applicant can rely upon. Usually although not invariably, the applicant would have to show that there is some countervailing public interest in favour of allowing the use of the documents other than in respect of the action in which they were disclosed.

Where documents relevant and necessary to another pending suit

21 The objective of the present application was for the documents to be used in a separate *pending suit*, and to that extent, the application could be distinguished from cases such as *Sim Leng Chuan* and *Riddick* itself where the release of the implied undertaking was refused for the documents to be relied upon to *bring a new action*. It is true, as pointed out by the first defendant's counsel, that the present suit and S 668/2006 involve different causes of action with different reliefs sought, and that the parties although overlapping are not identical in the two suits. As already seen above, identity or similarity in causes of action and parties were important considerations for the courts' exercise of discretion in those cases where leave was granted for documents disclosed in one suit to be used in another. However, this was not the precise basis upon which the plaintiffs in the present suit framed their request.

22 In seeking a release of the implied undertaking, counsel for the Sers, Mr Kang, contended that there are overlapping issues between the present suit and S 668/2006, and that the categories of documents forming the subject of their application are relevant and necessary for both suits. This was a simple enough argument, one which might at first glance seem somewhat inadequate to discharge the onerous burden of showing cogent and persuasive reasons for the *Riddick* principle to be relaxed. Indeed, counsel for the second to fourth defendants, Mr Chua, submitted that this was not like an ordinary discovery application and it was not sufficient for the Sers to simply show the relevance and necessity of those documents for the purposes of S 668/2006. He argued that something else needs to be shown in order to constitute exceptional circumstances. In my view however, there was merit to Mr Kang's contention. If the documents were indeed shown to be relevant to the issues in S 668/2006, and necessary for the fair disposal of the matter therein, it would mean that the defendants ought to have disclosed those documents in that suit as part of their obligations under general discovery, or that they would have to disclose them if an application for specific discovery were to be taken out in that suit. That being the case, it was difficult to see what prejudice or injustice would be caused to the defendants if the implied undertaking owed to them by the Sers to use the disclosed documents exclusively for S 427/2006 were to be released (but of course only for the purposes of S 668/2006). Indeed, a party should not be able to avoid disclosing clearly relevant and necessary documents in one suit simply because those documents happened to have been already disclosed by him in another related suit. Otherwise, the *Riddick* principle would effectively be used as a way to evade one's discovery obligations.

23 It was obviously the furtherance of the Sers' interest in S 668/2006 (more specifically in the third party proceedings therein) that formed the motivation behind the present application, and in line with the discussion above, it could be suggested that such private interest alone may not suffice to interfere with the *Riddick* principle. However, one must certainly also consider the public interest in the proper administration of justice in S 668/2006. It is a matter of public interest that all relevant and discoverable documents are disclosed in S 668/2006 so that the truth can be discovered and justice done as among the parties in that suit. These considerations must be held in the balance against the competing interests of privacy and confidence of the defendants in seeing that the documents they disclosed in S 427/2006 are only to be used for that matter alone. In this regard, as Lord Denning pointed out, "the balance comes down in the ordinary way in favour of the public interest of discovering the truth" (see [8] above).

24 It also did not seem inappropriate to examine, in this application in S 427/2006, whether the

documents in question are relevant to the issues in S 668/2006. In fact, since the very reason or basis for the application was the alleged relevance and necessity of the documents to S 668/2006, it was imperative that the question be considered at this juncture. This was not a case where it would be difficult to consider the issues of relevance in another set of proceedings. Both S 427/2006 and S 668/2006 were brought in the same jurisdiction and pending before the same Singapore High Court. This court could gain ready access to the file records of S 668/2006 and be fully acquainted with the pleaded issues in those proceedings. I would add that I had heard various interlocutory applications and pre-trial conferences relating to both suits (together with S 496/2006), and was therefore sufficiently familiar with their background facts and issues. Furthermore, the first to fourth defendants are all parties to both S 427/2006 and S 668/2006. Significantly, the documents forming the subject matter of this application were disclosed in this suit by the first to fourth defendants, who were also the same parties against whom it was alleged should have provided discovery of those same documents in the other suit S 668/2006. They were therefore precisely the ones in a position to dispute the relevance of those documents for the purpose of S 668/2006.

25 The first respondent's counsel, Mr Khoo, pointed out that the Sers had previously pursued separate discovery applications in S 427/2006 and S 668/2006. According to him, the Sers had by their own conduct accepted that discovery in one suit should be considered and determined separately from the other. The proper course, so the argument went, should be for the Sers to bring another separate discovery application for the documents in question under the proceedings in S 668/2006. That argument, with respect, failed to recognise that the Sers may not be in a position to make such a discovery application in S 668/2006 without first obtaining a release of their implied undertaking given to the defendants in S 427/2006 not to use those documents other than for the purpose of S 427/2006. As noted in *Beckett* by the Court of Appeal, this implied undertaking is not owed only to the party who provided discovery, but is also one owed to the court. Seeking discovery of those documents disclosed in S 427/2006 in another suit, without first obtaining the leave of the court, would open the Sers to the risk of being in contempt of court.

26 In my view, where an application is made for leave of court to use documents disclosed in one suit for the purposes of another pending suit, if the applicant is able to show that the disclosed documents are relevant and necessary to the second suit such that they ought to be disclosed in the proceedings therein, that can constitute cogent and persuasive reasons for the release of the implied undertaking. If in addition the party who had given discovery in the first suit is also a party to the second suit, and on whom the obligation to disclose those same documents in the second suit falls, he cannot be said to suffer any prejudice or injustice if the implied undertaking is released. Such a situation would, in my opinion, constitute exceptional circumstances for the *Riddick* principle to be relaxed or modified.

27 In the course of preparing these grounds of decision, I came across two authorities from other jurisdictions, not referred to by counsel in the hearing before me, which are broadly consistent with the conclusion I have reached above. In the first, a decision from the High Court of Hong Kong (*Anex Electrical Company Limited v Kingsland International Limited* [1998] HKCU 352), leave was granted by the court for the plaintiff to use documents, discovered in a Hong Kong action for copyright infringement, for the purposes of another action commenced earlier by the same plaintiff in the US. The claims in the US action, which also included one for breach of copyright, were far more varied and were brought against a different party from the defendant in the Hong Kong proceedings. On the ground that the copyright causes of action were the same, and that *the documents disclosed in the Hong Kong action were clearly relevant to the US action*, the Hong Kong court found that there was special circumstances which enabled the court to grant leave for the collateral use of the documents in the US action.

28 The second case, *Patrick v Capital Finance Pty Ltd (No. 3)* [2003] FCA 436, was a decision by the Federal Court of Australia concerning the issue of whether an order for further discovery ought to be made in respect of a letter, that had been earlier disclosed in separate proceedings in the County Court by a bank which was also a party to the Federal Court proceedings. Tamberlin J, who delivered the judgment of the Federal Court, took the view that the court was perfectly at liberty to consider whether the letter relates to a matter in question in the proceedings before it. Similar to my approach above, it was decided that if the letter was indeed found to be relevant and the subject of discovery in the Federal Court proceedings, then it should accordingly be disclosed in those proceedings notwithstanding the implied undertaking given before the County Court. Tamberlin J reasoned as follows:

There is a clash of two important public interest considerations in this case. First, there is the public interest in protecting the discovery process in the interest of encouraging openness and frankness in discovery made in the County Court proceeding by way of consistent and effectively enforced assurance to the party faced with compulsory discovery that the documents will not be used for any other purpose for which they were discovered in that court. Second, there is the competing important public interest in the due and proper administration of justice in the proceedings before this Court by ensuring compliance with its orders. In these circumstances if the document was one which ought to have been discovered I am not persuaded either as a matter of power, discretion or comity that release of the undertaking must or should be first obtained from the County Court.

29 It can be seen that Tamberlin J went a step further to hold that there was not even a need for a release of the implied undertaking to be first obtained from the County Court before an application and order for discovery could be made in the Federal Court proceedings. He arrived at such a conclusion taking into consideration the following factors:

First, this Court [the Federal Court] is in a far better position than the County Court, after hearing the matter for over fifteen days and having considered a detailed no-case submission, to form a clear opinion as to the use and relevance of the document to the present proceeding. Second, the deterrent power of the County Court to punish for any breach of the implied undertaking to that court is not diminished. Anyone who can be shown to have breached the undertaking without reasonable and proper excuse, can be duly sanctioned by the County Court. The third factor is the delay, expense and inconvenience and disruption to the administration of justice in the particular circumstances of the proceeding before me which would necessarily be occasioned if this matter was to be adjourned at this stage and an application made to the County Court. This is an important consideration. Fourth, this Court has a statutory duty to ensure that discovery obligations imposed by it under a Court order should be complied with in a full and proper manner. Fifth and most importantly, the interests of justice are best served in this case by this Court enforcing the discovery obligations of the parties before it. Finally, in this case, there is no question of breach of comity between courts because the implied undertaking properly understood does not prevent or diminish the enforcement of discovery or the compulsion to discover documents in the proceeding before the County Court.

30 In analysing this Australian decision, it should be borne in mind that the application for the letter to be discovered was made only after the hearing in the Federal Court had already carried on for over fifteen days. It was therefore highly disruptive to the Federal Court proceedings if the application had to be adjourned so that a release of the implied undertaking could be first obtained from the County Court. There was also the problem of the two sets of proceedings being in different fora, and specifically that the County Court might not be in a good position to assess the relevance of the letter for the Federal Court action, the facts and issues of which it was not well acquainted

with. These considerations taken into account by Tamberlin J did not feature in the present application before me. As highlighted above, both S 427/2006 and S 668/2006 were brought and pending before the same High Court. There were no difficulties in assessing the relevance of the documents for the purpose of S 668/2006. Nor were there any practical problems of delay for this application to obtain the release of the implied undertaking in S 427/2006 to be first considered before the documents are permitted to be used in S 668/2006. While Tamberlin J noted that the power of the court (in the proceedings pursuant to which the documents in question were first disclosed) to subsequently punish for breach of the implied undertaking is not diminished even if another court permits the documents to be used as part of discovery in another action, one would expect a prudent litigant intending such collateral use of the documents to first obtain a release of the undertaking lest he be found to be in contempt of court. I would further add that Tamberlin J's approach of not requiring the release of the implied undertaking to be first obtained may not be appropriate where the documents in question were provided by a party in the original proceedings who is *not also* a party to the other set of proceedings for which the documents are subsequently sought to be used. This is because such a party, not being privy to the other action, would be prejudiced in not having any opportunity at all to raise any objections that he may have to such collateral use of those documents disclosed by him.

31 This need for the party who provided discovery to be given an opportunity to protest against the lifting of the implied undertaking brings me to the specific objection raised by Mr Khoo to this application insofar as it related to his client the first defendant. As noted earlier (at [7]), in respect of the documents disclosed by the first defendant, these were also disclosed by the fifth defendant in the present suit. The fifth defendant, MFA, was however not made a party to this present application. Mr Khoo argued that this omission made the application improper, and relied on the following commentary in Matthews & Malek, *Disclosure* (London: Sweet & Maxwell, 3rd ed., 2007) at 467-468:

The application [for release of the implied undertaking] ought to specify clearly the documents in respect of which permission is sought...Where the application for permission is made at trial, a formal application may not be strictly necessary, but **sufficient notice of the application should be given to the party who provided discovery to enable him to consider his position adequately and if thought fit, defend his interests accordingly**. [emphasis added]

32 I agree that MFA should have been given an opportunity to raise any objections and show any prejudice that they may suffer should the documents be used in S 668/2006. Since the documents in question were also disclosed by MFA, the implied undertaking by the Sers was also owed to them and MFA's interest ought to be considered in the balancing exercise to determine whether the undertaking should be released. In fact, whether the second requirement in *Beckkett* was satisfied (*viz* the release of the undertaking must not give rise to any injustice or prejudice to the party who had given discovery) could not even be determined without hearing from MFA. The reason why the Sers did not include MFA in this present application was probably because MFA was not a party to S 668/2006, the suit in which the documents were sought to be used. Presumably, this meant that MFA's interest would not be affected whether or not the documents were allowed to enter the proceedings in S 668/2006. It might also be said that MFA was in any event not in a position to competently argue the relevance or not of those documents for the purposes of an action to which it was not a party. Be that as it may, there was always the possibility, even if unlikely, that MFA might be able to point to some prejudice or injustice they would suffer as a result of such use of the documents in S 668/2006. The Sers' application should therefore have been taken up against MFA as well in respect of those documents that were concurrently disclosed by both MFA and the first defendant. It would not be prudent or appropriate, in my opinion, to determine the question of whether to release the implied undertaking without hearing from MFA, a party to whom that implied undertaking was owed.

Orders made

33 For the above reasons, my decision on the application was as follows:

(a) With regard to the documents disclosed by the second to fourth defendants, I considered whether they satisfied the test of discovery in S 668/2006, specifically the third party proceedings therein. My conclusion was that several of the documents were relevant and necessary for the determination of the issues in S 668/2006, including in particular the financial position of MFA as well as its management and control at the material time. I accordingly ordered a release of the implied undertaking in respect of these documents and granted leave for them to be used in S 668/2006. In respect of some other remaining documents, I was not satisfied as to their relevance in S 668/2006, nor could I see how these documents would advance the case of the Sers in the third party proceedings in that suit. The Ser's application in relation to these remaining documents was therefore disallowed.

(b) I dismissed the application in respect of the documents that were produced for discovery in the present suit by the first defendant, because these same documents were also disclosed by MFA which ought to have been made a party to this application and have their position heard on whether the implied undertaking should be released.

34 In relation to the documents for which leave was granted by me for their use in S 668/2006, it would seem to me that no further application for discovery needs to be taken in the proceedings of S 668/2006, since the issues of relevance and necessity of those documents for the purposes of S 668/2006 had already been heard and determined in this present application in S 427/2006. Such a position, according to counsel for the Sers, is similar to the view taken by Prakash J in the earlier application for blanket leave to use all relevant documents, although this is not clear from the record of proceedings.

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