

Singapore Court of Appeal Clarifies the Law on the *Riddick* Undertaking in the Context of Enforcement Proceedings

In *Ong Jane Rebecca v Lim Lie Hoa and other appeals and other matters* [2021] SGCA 63 (“*Ong Jane Rebecca*”), the Singapore Court of Appeal held that the *Riddick* undertaking (i.e., the implied undertaking that a document disclosed during discovery will not be used for a collateral purpose) would apply to documents disclosed in examination of judgment debtor (“EJD”) proceedings and clarified the principles regarding the use of such documents for purposes of related enforcement proceedings.

Our Comments

Under Order 48 of the Rules of Court, the court may order a judgment debtor to: (a) attend before the Registrar and be examined; and (b) produce documents or books as part of the EJD proceedings. Prior to the decision in *Ong Jane Rebecca*, there was no local case law that directly addressed whether documents disclosed in EJD proceedings fall within the scope of the *Riddick* principle. There was also a “*dearth of jurisprudence*” with regard to the use of documents protected by the *Riddick* undertaking in related enforcement proceedings. *Ong Jane Rebecca* is significant as this is the first reported decision by the Singapore court that addresses these issues directly.

The Court of Appeal in *Ong Jane Rebecca* followed the approach of the Supreme Court of British Columbia in *Branconnier (Re)* [2017] BCJ No 2107 (“*Branconnier*”) where the court held that the *Riddick* undertaking would apply to evidence and documents obtained at an examination in aid of execution. Although the *Riddick* undertaking would apply to such documents, the Court of Appeal clarified that such documents may be used without leave of court in related *enforcement* proceedings and set out guidelines to determine whether the related proceedings constitute “*enforcement*” proceedings.

The guidelines laid down by the Court of Appeal are instructive and seek to strike a balance between the need to prevent abuse of process (which underpins the *Riddick* principle) and to ensure that in appropriate cases (such as related enforcement proceedings), the *Riddick* principle would not operate to bar the use of documents disclosed in court proceedings.

The Court of Appeal also referred to the High Court’s decisions in *Timing Ltd v Tay Toh Hin and another* [2020] 5 SLR 974 and *Timing Ltd v Tay Toh Hin and another* [2021] SGHC 5 (collectively, the “*Tay Toh Hin decisions*”), where the judgment creditor was allowed to use information and documents obtained from prior EJD proceedings to pursue garnishee proceedings against the bank in respect of joint accounts of the judgment debtor.

Our Koh Swee Yen, Lin Chunlong and Dana Chang acted for the judgment creditor in the *Tay Toh Hin* decisions.

This case update examines the Court of Appeal’s decision.

Background

The appellant was successful in an earlier action against the late Mdm Lim Lie Hoa and was awarded costs by way of BC/118/2006 (“**BC 118**”). Mdm Lim passed away and Mr Ong Siau Ping (“**OSP**”) was the sole executor of Mdm Lim’s estate (“**Estate**”). The appellant sought to enforce BC 118 against the Estate and commenced EJD proceedings where OSP was the respondent in his capacity as the sole executor of the Estate. OSP filed four affidavits in the EJD proceedings (“**EJD documents**”) and, based on the information in the EJD documents, the appellant took the view that OSP had breached his duties as the sole executor of the Estate. Using the information obtained from the EJD documents, the appellant commenced HC/S 47/2020 (“**Suit 47**”) against OSP.

Subsequently, the appellant and OSP made the following applications:

- (a) The appellant applied for summary judgment in Suit 47 (“**Summary Judgment Application**”).
- (b) OSP applied to strike out Suit 47 on the basis that the appellant had used the EJD documents in violation of the *Riddick* principle.
- (c) The appellant filed an application to seek a declaration that she was entitled to use the EJD documents, and the information therein, in Suit 47 without leave of court, and further or in the alternative, an order that the appellant be granted leave to use the EJD documents (“**Leave Application**”).

Below, the appellant did not succeed in the Leave Application and OSP successfully struck out Suit 47. No order was made on the Summary Judgment Application. By the time the appeals were heard by the Court of Appeal, the High Court had ordered the administration of the bankruptcy of the Estate.

The Court of Appeal’s Decision

The Court of Appeal observed that situations involving the *Riddick* principle may broadly be classified under three categories:

- (a) **First category:** Documents which are not protected by the *Riddick* undertaking as they were not disclosed on compulsion. Such documents may be used without the leave of court.
- (b) **Second category:** Documents which are protected by the *Riddick* undertaking (due to the element of compulsion) but may be used without the leave of court, due to the nature of the related enforcement proceedings for which the documents are being used.
- (c) **Third category:** Documents which do not fall within any of the above categories and the leave of court is required for the *Riddick* undertaking to be lifted.

First category: Documents not covered by the Riddick undertaking

The Court of Appeal held that whether a document disclosed in court falls within the first category depends on whether the document was disclosed on compulsion. It referred to its earlier decision in *ED&F Man Capital Markets Limited v Straits (Singapore) Pte Ltd* [2020] 2 SLR 695 where it made the following points on the *Riddick* principle:

- (a) The *Riddick* principle is not engaged simply because information has been disclosed in court proceedings. The critical factor is the element of compulsion that accompanies the discovery.
- (b) It is not invariably necessary for a breach of the court order to be punishable by contempt of court to engage the *Riddick* principle.
- (c) The *Riddick* principle has no application to documents that have been voluntarily disclosed.
- (d) In determining whether the discovery was voluntary or otherwise, the court must examine the context in which the disclosure was made.

The Court of Appeal noted that there was no local case law that directly addressed whether documents disclosed in EJD proceedings fall within the scope of the *Riddick* principle. It referred to the Canadian decision of *Branconnier* where the Supreme Court of British Columbia held that the *Riddick* undertaking would apply to evidence and documents obtained at an examination in aid of execution, highlighting that “*judgment debtors are compelled, notwithstanding any privacy interest, to attend at the examination and to disclose information that is relevant*”, and also observed that a “*judgment debtor who has some assurance that the documents and answers that he or she provides will not be used for any collateral purpose is more likely to provide complete and honest responses to the questions that they are asked*”.

Recognising that the EJD proceedings commenced under Order 48 of the Rules of Court “*represent an invocation of the coercive powers of the court*”, the Court of Appeal found that the “*element of compulsion [was] thus patently present*”. Adopting the court’s reasoning in *Branconnier*, the Court of Appeal held that, in general, documents disclosed in EJD proceedings would be covered by the *Riddick* principle. The Court of Appeal also noted that non-compliance with orders made in EJD proceedings can result (and have resulted) in committal proceedings being commenced, referring to the decision of *Tay Kar Oon v Tahir* [2017] 2 SLR 342.

Second category: Use of protected documents in related enforcement proceedings

The Court of Appeal then proceeded to discuss the principles governing the use of documents covered by the *Riddick* principle (such as documents disclosed in EJD proceedings) in related enforcement proceedings.

It referred to the *Tay Toh Hin* decisions, where the High Court allowed the judgment creditor to use information and documents obtained from prior EJD proceedings in garnishee proceedings against the bank. The Court of Appeal also noted, that while that *Riddick* principle was not expressly addressed in the *Tay Toh Hin* decisions, those decisions “*were consistent with, and falling within, the second category of the framework*”. The Court of Appeal also cited the decision in *Leads Engineering (S) Pte Ltd v Chin Choon Co (Pte) Ltd (personal representatives of the estate of Choo Kok Hoe, deceased, garnishee)* [2009] SGHC 53, where the court had no reservations about the plaintiff using documents obtained through EJD

proceedings in subsequent garnishee proceedings against the same judgment debtor. Based on these cases, the Court of Appeal held that there were two “*key points of reference*” in determining whether related proceedings are “*enforcement*” proceedings:

- (a) First, the nature of the proceedings in which the documents were disclosed.
- (b) Second, the nature of the proceedings in which the documents were used.

On the first point, the Court of Appeal noted that EJD proceedings are intended to aid the judgment creditor in garnering additional information which might (or might not) result in the implementation of actual execution of the judgment concerned. Hence, there is no question that the judgment debtor would know that information disclosed in the course of such EJD proceedings will be used for subsequent related proceedings. In contrast, a party disclosing documents pursuant to an application for specific discovery in an action would have the expectation that such documents would only be used for the purposes of that action, and not in related proceedings.

With regard to the second point, the focus is on the nature of the related proceedings in which the documents are being used and the following three factors are relevant when examining the nature of subsequent related proceedings:

- (a) **Identity of parties:** If the defendant in the related proceeding is also the defendant (or an entity legally empowered or obliged to make payment on behalf of the defendant, e.g., a bank) in the original proceeding in which the documents were obtained, it could be said that the related proceeding constitutes enforcement against the defendant.
- (b) **Nature of debt:** If the sum being pursued in the related proceedings is the same debt that forms the subject matter of the original proceedings in which documents were disclosed, this would indicate that the former set of proceedings is an enforcement of the latter. On the other hand, if the sum being pursued in related proceedings is different, this might suggest that it is a claim *de novo*, and leave of the court might be required.
- (c) **Nature of related proceedings:** The court would consider whether the related proceedings can be considered “*enforcement*” in the ordinary sense, i.e., modes of execution or proceedings that facilitate the payment of judgment debts owing to a plaintiff. “*Traditional*” modes of enforcement recognised under the Rules of Court (such as garnishee proceedings) are most likely to satisfy this requirement.

The Court of Appeal held that if the related proceeding complied with the above factors, the party using the documents protected by the *Riddick* principle to commence such proceedings would not require the leave of court. However, the Court of Appeal also cautioned that “*a pronouncement that documents fall under the second category for one case does not operate carte blanche to allow indiscriminate use of the said documents in any and all subsequent proceedings*”.

Third category: Other documents in respect of which the leave of court is required to lift the Riddick undertaking

If the documents in question do not fall within the first or the second category, leave of court is required.

Ong Jane Rebecca is such a case. The Court of Appeal found that the EJD documents were clearly covered by the *Riddick* undertaking as they were disclosed by OSP on compulsion and Suit 47 could not be said to be an enforcement of BC 118. Hence, the EJD documents could not be used without the court's leave. The Court of Appeal then carried out the following two-part analysis in deciding whether leave should be granted to the appellant for use of the EJD documents in Suit 47:

- (a) Whether the balance of interests lies for or against the grant of leave for the appellant to use the EJD documents to commence and sustain Suit 47.
- (b) Whether the fact that the leave sought by the appellant was retrospective militates against the granting of such leave, despite the conclusion on the balance of interests.

In relation to the first part of the analysis on balance of interests, the Court of Appeal referred to its decision in *Lim Suk Ling Priscilla and another v Amber Compounding Pharmacy Pte Ltd and another and another appeal and another matter* [2020] 2 SLR 912 which sets out the relevant factors to be considered in determining whether circumstances warrant the release of the *Riddick* undertaking. Some factors which are in favour of lifting the *Riddick* undertaking include countervailing legislative policy, support of related proceedings (given the strong countervailing public interest in ensuring that all relevant evidence which may be required is before the court), investigation and prosecution of criminal offence(s), public safety concerns and international comity. On the other hand, factors such as injustice or prejudice to the disclosing party, improper purpose for which leave is sought, and privilege against self-incrimination militate against the grant of leave.

The Court of Appeal emphasised that the need to preserve the integrity of the court's processes is "*of utmost importance*", bearing in mind that the *Riddick* undertaking is ultimately an expression of the doctrine of abuse of process, and cautioned that where collateral or improper motives exist, the court will intervene to ensure that its processes are not being insidiously invoked.

In the present case, the Court of Appeal held that the balance of interests militated *in favour* of lifting the *Riddick* undertaking. It found that the appellant had commenced the EJD proceedings to recover a legitimate debt and it was upon discovering the information in the EJD documents that the appellant became concerned that the Estate's assets would be dissipated, leaving her with a paper judgment. That led the appellant to commence Suit 47. There was nothing to suggest that the appellant commenced the EJD proceedings with a "*putative suit against OSP in mind*". The Court of Appeal also pointed out that, while Suit 47 was not an "*enforcement*" of BC 118, the two matters were "*inextricably tied*", and the appellant's success in Suit 47 might mean the difference between recovery and a paper judgment in BC 118, especially in light of the estate's bankruptcy. The countervailing considerations militating against the lifting of the *Riddick* undertaking were also absent in this case.

The Court of Appeal further held that, in totality, the fact that leave was sought retrospectively did not tilt the balance either way given the unique facts of the dispute and the plausible nature of the appellant's explanation for not seeking prospective leave. The Court of Appeal noted that the if the allegations in Suit 47 were proven true, *"this would be a classic case of a family (wrongfully and surreptitiously) squirreling assets away to frustrate creditors' attempts at recovery"* and this, together with the bankruptcy of the Estate demonstrated a *"real risk"* that the appellant would be left without recourse in BC 118 which *"accentuated the exceptional nature of the present case"*.

In the circumstances, the Court of Appeal lifted the *Riddick* undertaking over the EJD documents and allowed the appellant to use these documents in Suit 47, holding that any prejudice occasioned to the Estate could be resolved as a matter of costs. It also reinstated Suit 47 which was struck out on the basis of the High Court Judge's decision not to grant the appellant leave to use the EJD documents in Suit 47.

If you would like information or assistance on the above or any other area of law, you may wish to contact the Partner at WongPartnership whom you normally work with or any of the following Partners:



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