

Singapore Court of Appeal, in Landmark Decision, Modifies Scope of Law of Confidence to Provide Greater Protection for Confidential Information

The Singapore Court of Appeal has set out a modified approach for claims relating to breach of confidence in Singapore, departing from the *locus classicus* on the elements of such claims found in *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41 (“**Coco**”): *I-Admin (Singapore) Pte Ltd v Hong Ying Ting and others* [2020] SGCA 32.

Our Comments

At the end of an employment relationship, an employer may discover that the departing employee has taken steps which compromise the integrity of the employer’s confidential information. It is not uncommon to find that a departing employee, despite reminders not to do so, has accessed or sent confidential information to himself prior to the termination of his employment. In such cases, while it is relatively easy to show the wrongful access of the employer’s confidential information, it is often difficult to show that there was unauthorised use of the employer’s confidential information.

The Court of Appeal has, after considering whether the law on breaches of confidence in Singapore was sufficiently broad to protect parties against the many ways confidentiality might be undermined in today’s context, concluded that a modified approach was necessary to protect the underlying interests of plaintiffs in claims for breach of confidence.

In this modified approach, the Court of Appeal addressed an aspect of a plaintiff’s loss which has been overlooked, i.e., the loss which may be suffered by a plaintiff whose information had lost its confidential character or had that character

threatened by the unconscionable acts of a defendant.

The Court of Appeal’s decision is welcome as it addresses issues arising from an increasingly digitised society, which make it harder to safeguard against the “*wrongful copying, abuse and exploitation of protected information*”.

This update takes a look at the Court of Appeal’s decision.

Background

The key facts relevant to the issues discussed in this update are summarised below.

The first respondent (“**Mr Hong**”) and second respondent (“**Mr Liu**”) were former employees of the appellant (“**I-Admin**”) and its subsidiary respectively. I-Admin is a provider of, among other things, payroll administrative data processing services and human resource (“**HR**”) information systems.

In 2011, while still employed by I-Admin, Mr Hong and Mr Liu set up the third respondent (“**Nice Payroll**”). They left their jobs shortly after and to join Nice Payroll.

In 2013, I-Admin came across Nice Payroll’s website which advertised payroll and HR services in a number of countries that overlapped with I-Admin’s services. After further forensic investigations, I-Admin commenced a High Court suit against Mr Hong, Mr Liu, Nice Payroll and another investor in Nice Payroll for, among other things, acting in breach of confidence, and obtained a search order against them.

A review of the devices obtained during the search order revealed that Mr Hong and Mr Liu had deleted a number of documents belonging to I-Admin during the execution of the search order. In the course of the High Court proceedings, more of such deleted documents were recovered. These deleted documents included I-Admin's source codes, databases supporting the payroll and HR services, business development and client-related materials, and materials relating to operations. In short, it was not disputed that copies of I-Admin's confidential documents had been in the unauthorised possession of Mr Hong, Mr Liu, and Nice Payroll.

In its action before the High Court, I-Admin asserted, among other things, that:

- (a) Nice Payroll had used I-Admin's confidential materials to develop its own source codes, systems and client materials;
- (b) Nice Payroll had used a copy of I-Admin's payroll system to generate its internal payroll reports; and
- (c) Mr Hong had breached I-Admin's confidence by using (without authorisation) confidential log-in credentials, which he had been given during his employment, to access I-Admin's demonstration platform (which contained I-Admin's payitem details, reports and formats for its customers). Mr Hong further downloaded one confidential document through this platform.

The High Court's Decision

The High Court applied the (then) well-established test for claims for breaches of confidence set out in *Clearlab SG Pte Ltd v Ting Chong Chai & Ors* [2015] 1 SLR 163 which cited *Coco*, namely that:

- (a) The information must be possess the quality of confidence;

- (b) The information must have been imparted in circumstances importing an obligation of confidence; and
- (c) There must have been some unauthorised use of that information to the plaintiff's detriment.

The High Court then found that, while the respondents owed I-Admin obligations of confidence, there had been no unauthorised use of its confidential information to I-Admin's detriment as I-Admin failed to show that any reference to and review of its materials resulted in the respondents' creation of their own materials.

In particular, the High Court took the view that:

- The mere copying, accessing or taking of confidential materials by the respondents was insufficient;
- Mr Hong's use of confidential log-in credentials given to him during the course of his employment to log onto I-Admin's platform to download a confidential file belonging to I-Admin was insufficient;
- The respondents having the mere intention to use the confidential materials was insufficient; and
- The mere referencing and reviewing of the confidential materials by the respondents was insufficient. Instead, I-Admin had to show that the reference to and review of its confidential materials had resulted in the creation of the respondents' own materials.

As a result, the High Court dismissed I-Admin's claim for breach of confidence and I-Admin appealed to the Court of Appeal.

The Court of Appeal's Decision

The Court of Appeal allowed the appeal, finding that I-Admin should succeed in its claim for breach of confidence and ordering equitable damages to be assessed.

In particular, it addressed the question whether the court should grant relief in cases where there was wrongful access to or acquisition of confidential information, but no use or disclosure of the same to the plaintiff's detriment, and concluded a modified approach was necessary. The Court of Appeal found that:

- (a) In breach of confidence claims, the law is interested in protecting both a plaintiff's interests in: (i) preventing wrongful gain or profit from its confidential information ("**wrongful gain interest**"); and (ii) avoiding wrongful loss, which is suffered by the plaintiff so long as a defendant's conscience has been impacted in the breach of the obligation of confidentiality ("**wrongful loss interest**"). (In this respect, the wrongful loss which is suffered is the loss of the confidential character of the information.)
- (b) In light of modern advances in technology, it is now significantly easier to access, copy and disseminate confidential information instantaneously, often without the knowledge of employers, making it nearly impossible in these situations to safeguard information from all potential wrongdoing.
- (c) Plaintiffs who have suffered a violation of their interest in avoiding wrongful loss may not immediately experience quantifiable detriment (and, in some cases, only discover a potential breach years after the fact), which can create significant obstacles to plaintiffs seeking to vindicate their claims.
- (d) *Coco* explicitly protected the wrongful gain interest but not necessarily wrongful loss interest.
- (e) The requirement of unauthorised use and detriment has held back the development of the law by overemphasising the prevention of wrongful gain at the expense of the interest in preventing wrongful loss.
- (f) To address this imbalance, the Court of Appeal adopted a modified approach under which:
 - (i) The court should first consider whether the information possesses the quality of confidentiality and if it was imparted in circumstances importing an obligation of confidence (i.e., the first two requirements of the test in *Coco*). An obligation of confidence will also be found where confidential information has been accessed or acquired without a plaintiff's knowledge or consent.
 - (ii) Upon satisfaction of the above prerequisites, an action of breach of confidence is presumed.
 - (iii) The burden then shifts to the defendant to prove that his conscience was unaffected (for example, that he came across the information by accident, was unaware of its confidential nature, or had believed there to be a strong public interest in disclosing it). This shift places the burden on the defendant to account for his suspected wrongdoing.

On the facts of the case, it was undisputed that I-Admin's materials were confidential. The Court of Appeal found that Mr Hong, Mr Liu and Nice Payroll were under an obligation of confidence and had *prima facie* breached this obligation by acquiring, circulating and referencing I-Admin's confidential materials without its authorisation.

To this, Mr Hong, Mr Liu and Nice Payroll argued that there was evidence that most of I-Admin's materials were brought to Nice Payroll by one Ms Shen, a former employee of I-Admin's subsidiary, for which they should not be held responsible. This contention was rejected by the Court of Appeal. The Court of Appeal noted that Mr Hong and Mr Liu could not "*feign ignorance*", and in particular, the mass deletions of I-Admin's

materials from the devices during execution of the search order “*demonstrate[d] that they knew they were not allowed to be in possession of [I-Admin’s] materials*”. It found that their very possession of I-Admin’s client data without its consent amounted to a breach of confidence.

In the circumstances, the Court of Appeal allowed I-Admin’s appeal in respect of its breach of confidence claim.

As regards remedies, the Court of Appeal found an injunction or delivery up order would be unsatisfactory as both orders would not set right the loss suffered by virtue of the respondents’ unconscionable conduct. An account of profits was also inappropriate as there was no finding of actual use of the appellant’s materials.

Instead, the Court of Appeal awarded equitable damages, as this gave the court flexibility to determine the manner in which damages should be assessed. To that end, the Court of Appeal noted that the observations of the English Court of Appeal in *Seager v Copydex Ltd (No 2)* [1969] 1 WLR 809 that damages should be assessed at

“*the value of the [confidential] information*” would serve as a useful guide.

Here, the respondents had saved themselves the time and trouble of developing Nice Payroll’s software and business materials from scratch because they used I-Admin’s confidential information as a spring-board from which to develop their own intellectual property. This saved the respondents the expense of compiling information themselves or having to engage more staff to do so. The value of I-Admin’s confidential information would therefore be the costs saved by the respondents in appropriating that information.

The question of the precise measure of equitable damages was remitted to the High Court Judge, with the direction that, in determining the appropriate award, the High Court Judge consider the additional cost that would have been incurred by Nice Payroll to create the different elements of its payroll software without reference to I-Admin’s materials, as well as the time saved by Nice Payroll in setting up its business and allowing it to turn profitable earlier.

If you would like information on this 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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