



# A review in confidence

April 2020

## Modernising the Law of Breach of Confidence in Singapore

The elements for a claim for breach of confidence were trite, having been established more than 50 years ago in the English case of *Coco v. AN Clark (Engineers) Ltd*<sup>1</sup> and affirmed in numerous Singapore decisions<sup>2</sup>. In the recent case of *I-Admin (Singapore) Pte Ltd v. Hong Ying Ting and others*<sup>3</sup>, the Singapore Court of Appeal modified these elements to provide a more robust approach to protect a party's interest to avoid wrongful loss in a breach of the obligation of confidentiality.

### Background facts

The Plaintiff/Appellant, I-Admin (Singapore) Pte Ltd ("I-Admin"), was a company in the business of outsourcing services and systems software (the "Systems Software"). The Defendants/Respondents<sup>4</sup> were a former employee of I-Admin ("1st Respondent"), a former employee of I-Admin's wholly-owned subsidiary in Shanghai ("2nd Respondent") and another Singapore incorporated company ("3rd Respondent").

I-Admin claimed, amongst other things, that the 1st Respondent and the 2nd Respondent had accessed and downloaded I-Admin's confidential material<sup>5</sup>, and used this material to develop the 3rd Respondent's business. I-Admin's case was that such conduct constituted breaches of confidence.

### High Court's decision

The trial judge considered the traditional three elements to establish breach of confidence:

- the information must possess the quality of confidentiality
- the information must have been imparted in circumstances importing an obligation of confidence, and
- there must have been some unauthorised use of that information to the detriment of the party from whom the information originated.

The trial judge dismissed I-Admin's claim, holding that the third element was not satisfied. The trial judge found, amongst other things, that the Respondents did not copy a substantial part of the confidential material into the 3rd Respondent's software and databases. Given that no reproduction or adaptation of the confidential material occurred, there was therefore no unauthorised use of the confidential information.

The trial judge did find that the Respondents did refer to and review I-Admin's confidential materials. However, he held that I-Admin still needed to show that this reference and review "resulted in" the creation of the 3rd Respondent's own materials.

1. [1969] RPC 41.
2. For instance, in *Obegi Melissa and Others v. Vestwin Trading Pte Ltd and Another* [2008] 2 SLR(R) 540 and *Clearlab SG Pte Ltd v. Ting Chong Chai and others* [2015] 1 SLR 163.
3. [2020] SGCA 32.
4. There were in fact four Defendants/Respondents but I-Admin did not pursue its claims against the 4th Defendant/Respondent.
5. The materials included source codes for the Systems Software, databases and other materials constituting the technical infrastructure supporting the Systems Software, business development and client-related materials and materials relating to I-Admin's operations.

## Deliberations by the Court of Appeal

The Court of Appeal questioned whether the traditional three elements were sufficient to protect an innocent party from the various ways in which confidentiality might be undermined. It considered that the Courts should have the power to grant relief in instances such as I-Admin's case where the Respondents were found to have wrongfully accessed or acquired confidential information. That the Respondents did not use or disclose the information did not detract from the fact that "their actions compromise the confidentiality of the information in question".

Three points were considered – first, what interests are sought to be protected by the law of confidence; second, what is the nature of the threat to these interests; and third, what are the remedies that ought to be available where the interests have been infringed?

On the first point on protected interests, the Court of Appeal reviewed the history of the law of confidence and noted that one of the objectives behind the cause of action was to protect "a plaintiff's interest in preventing wrongful gain or profit from its confidential information" (referred to as "Wrongful Gain Interest"). However, it was noted from early English jurisprudence that breach of confidence claims also sought to protect a plaintiff's interest to avoid wrongful loss, "which is suffered so long as a defendant's conscience is impacted in the breach of the obligation of confidentiality" (referred to as "Wrongful Loss Interest"). While there will be cases involving a violation of both interests, the Court highlighted that there would be instances (such as I-Admin's case) where only an innocent party's Wrongful Loss Interest would be affected.

On the second point on the nature of the threat to the interests, the Court felt

that a more robust response was required by the law to protect the Wrongful Loss Interest. The threat to the Wrongful Loss Interest was compounded by the advances in modern technology where it was significantly easier to access, copy and disseminate considerable amounts of confidential information without the plaintiff's knowledge.

Regarding the third point on remedies, the Court acknowledged that there may be limits to the remedies for parties who have only suffered violations to their Wrongful Loss Interest. In the present case, the Court held that there was little benefit to granting I-Admin an injunction or a delivery up order as they did not rectify I-Admin's loss suffered from the breach of confidence. While equitable damages could be awarded to I-Admin, the Court believed that the quantum of such damages could not possibly be quantified on the traditional profits-based approach. Indeed, such an exercise would be an "insurmountable" task for I-Admin as the Respondents did not use the confidential material, but only referred and reviewed the same.

### Modified elements to establish a breach of confidence claim

Having concluded that the traditional three elements did not adequately safeguard an innocent party's Wrongful Loss Interest, the Court of Appeal modified the legal framework by preserving only the first two traditional elements. In other words, a plaintiff would now have to prove that:

- the information must possess the quality of confidentiality (the "Confidentiality Element"), and
- the information must have been imparted in circumstances importing an obligation of confidence (the "Obligation Element").

(collectively, the "Modified Approach").

There are a few points to note under the Modified Approach.

First, an obligation of confidence can now be found where the confidential information has been accessed or acquired without the plaintiff's knowledge or consent.

Second, once the Confidentiality Element and the Obligation Element have been satisfied, the plaintiff is deemed to have a presumptive action for breach of confidence. The burden of proof then shifts to the defendant to prove that "its conscience was unaffected", for example, if the defendant did not know the information was confidential or believed there was a strong public interest behind disclosing the confidential information.

Applying the Modified Approach, the Court of Appeal found that I-Admin did have a presumptive action for breach of confidence. The Court further held that the Respondents were unable to prove that their conscience was unaffected as they had specifically referred to and reviewed the confidential material for the 3rd Respondent's benefit. The Respondents were therefore found to have acted in breach of confidence.

The Court of Appeal held that equitable damages were an appropriate remedy for

I-Admin and directed that the trial judge ought to consider<sup>6</sup>: (a) the additional cost the Respondents would have incurred to set up the equivalent of its Systems Software, if they had not referred to I-Admin's confidential material; and (b) the time saved in setting up the 3rd Respondent's business due to the benefit of referring to I-Admin's confidential material, allowing the 3rd Respondent to be profitable earlier.

### Our views

The Court of Appeal's decision is a welcomed judicial response towards the need to bolster parties' rights to safeguard their confidential information in this digital age. By reversing the burden of proof on the Defendant to prove its conscience was unaffected, the Modern Approach places considerably greater scrutiny on a Defendant's conduct and motives behind accessing information which should otherwise have been confidential.

On the other hand, the removal of the traditional third element (ie, the plaintiff is required to prove unauthorised use of the confidential information to its detriment) is a shot in the arm for prospective plaintiffs. Plaintiffs will no longer have to grapple with the evidential difficulties of proving how the defendants used the confidential information, which would be impractical in many instances.



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6. The High Court proceedings in this case were bifurcated and the Court of Appeal's decision was in relation to issues of liability only.

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- Shortlisted – Commercial Litigation Team of the Year – Legal Business Awards 2019
- Shortlisted – Best Copyright Team – Managing IP Awards 2019
- Shortlisted – Insurance Team of the Year – Legal Business Awards 2018
- Winner – Best Employer – Bristol Pride Gala Awards 2018
- Winner – Client Service Innovation Award – The Lawyer Awards 2017
- Shortlisted – Corporate Team of the Year – The Lawyer Awards 2017
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