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IP Update



Court of Appeal strengthens protection for owners of confidential information from loss, sets out modified approach for breach of confidence claims

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In the recent Singapore Court of Appeal (“CA”) decision in I-Admin (Singapore) Pte Ltd v Hong Ying Ting and others [2020] SGCA 32 (“I-Admin”), the CA laid down a modified approach for breach of confidence claims. The modified approach is a notable change from what had been the position in Singapore for many years, and better takes into account the risks suffered by owners of losing confidential information given modern technology. It is also more aligned with the position taken by the English and Australian Courts in recent cases. Both owners of confidential information and employees should take note of the decision.

Background to the CA Decision

The appellant, I-Admin (Singapore) Pte Ltd, is in the business of payroll administrative data processing services and human resource information systems. The first and second respondents were former employees of the appellant and its subsidiary respectively. After leaving, the first and second respondents set up their own company, the third respondent, which provides payroll outsourcing services and HR management functions.

Following forensic investigations into the respondents, the appellant successfully applied for an Anton Pillar Order, which was executed at the third respondent’s premises. A number of the appellant’s materials were recovered from the first respondent’s laptop and the third respondent’s server. It also came to the appellant’s attention that the first and second respondents had circulated some of these materials via email. The appellant subsequently commenced a Suit against the respondents, claiming infringement of copyright and breach of confidence. The breach of confidence claim will be the focus of this case note.

At the High Court, the Judge held that the respondents were not in breach of their obligations of confidence. The Judge relied on the English case of *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41 (“Coco”), which required three elements for a successful claim for breach of confidence:

- a) the information must 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 unauthorised use of the information to the detriment of the party from whom the information originated.

The Judge held that the appellant’s case failed on the third limb of the *Coco* test, as they had failed to show that there was unauthorised use of its confidential information to the detriment of the appellants. In particular, the Judge did not find on the evidence that the respondents’ use of the appellant’s materials *had resulted in the creation or development of the respondents’ own materials*. The Judge rejected the argument that the mere

copying of, or access to the appellant's materials by the respondents satisfied this requirement.

The CA Decision

Before the CA, the appellant submitted that the respondents' mere possession of, and their act of referring to the confidential materials, was sufficient to complete the cause of action for breach of confidence. Courts in England and Australia had in more recent cases cast doubt on the third limb of the *Coco* test, and the appellant argued that the "modern" approach espoused in these cases should be adopted in Singapore as well.

The CA began its analysis by considering the interests sought to be protected by the breach of confidence cause of action. Having considered several cases and academic authorities, the Court observed that two key interests guided the operation of breach of confidence claims. These were a plaintiff's interest to:

- a) prevent the *wrongful gain or profit* from its confidential information; and
- b) to avoid *wrongful loss*, which was the loss occasioned to a plaintiff whose information had lost its confidential character or had that character threatened by the unconscionable acts of a defendant.

The CA opined that the *Coco* test does not sufficiently protect the wrongful loss interest. This was brought to the fore in the present case. The CA noted that whilst it was not proven that the respondents directly profited from their use of the appellant's confidential materials (i.e. there was no *wrongful gain* proven), this does not detract from the fact that the respondents knowingly acquired and circulated these materials without consent (i.e. there was *wrongful loss*).

The CA also considered that protecting wrongful loss is all the more important in the modern-day given that it is now significantly easier to access, copy and disseminate vast amounts of confidential information, and where employees will often have access to large volumes of confidential business material for purposes of their employment. The fragility of such confidential information suggests the need for stronger measures to protect owners from loss.

The new approach to breach of confidence claims

In light of the concerns articulated above, the CA set out a modified approach to be taken in assessing breach of confidence claims:

- a) In line with the first two requirements of *Coco*, a court had to consider whether (i) the relevant information had the necessary quality of confidence about it and (ii) if it was imparted in circumstances importing an obligation of confidence. Upon satisfaction of these prerequisites, an action for breach of confidence would be presumed.
- b) This presumption would be displaced on proof by the defendant that its conscience was not affected in the circumstances in which the plaintiff's wrongful loss interest had been harmed or undermined. This presumption could be rebutted by, for instance, the defendant showing that he came across the information by accident, or was unaware of its confidential nature, or believed there to be a strong public interest in disclosing it.

The CA also observed that the reversal in the burden of proof also addresses the evidential difficulties faced by owners of confidential information in bringing a claim in confidence. Such breaches of confidence could be discovered years after, placing owners on an evidential back-foot in bringing their claim for breach of confidence. In comparison, defendants are better positioned to account for their suspected wrongdoing.

Applying the modified approach to the facts, it was undisputed that the appellant's materials were confidential, and that the respondents were under an obligation to preserve their confidentiality. The respondents *prima facie* breached this obligation by acquiring, circulating and referencing the appellant's materials without permission. In this instance, the respondents had not displaced the presumption that their conscience was negatively affected, and had accordingly acted in breach of confidence.

The CA held that the appellant's injury should be vindicated by an award of equitable damages, which should be assessed at the value of the confidential information. To assess this value, the CA opined that it was relevant to consider the cost saved by the respondents in taking that information. Relevant considerations included the additional cost that

would have been incurred by the third respondent to create the different elements of its payroll software without any reference to the appellant's materials, and the reduction in the time taken to set up the third respondent's business, allowing it to commence profit-making earlier. The determination of the precise quantum of damages was remitted to the Judge below.

Comment

The decision will likely be welcomed by owners of confidential information, given that it seeks to address significant legal and practical difficulties that owners of confidential information would face when their confidential information is taken by third parties. The decision also serves as a useful reminder for parties in possession of confidential information to be careful in how they handle and deal with confidential information. Following *I-Admin*, it is possible that a former-employee could breach a duty of confidentiality and find themselves liable for damages simply by taking confidential information, without using or disclosing the confidential information. If it is necessary to retain such information, it may be prudent for former employees to expressly seek the necessary permissions, or at least to clearly document why, in its view, the taking of such information does not constitute a breach of confidence.

The decision is also a timely reminder that a duty of confidence can arise regardless of whether there is a non-disclosure agreement (NDA) between

parties. A claim for breach of confidence is distinct from a claim for breach of agreement. Interestingly, in the present case, the first respondent had been found in breach of its NDA with the appellant by the Judge, and nominal damages had been awarded against him. This did not preclude the CA from finding that the respondents (including the first respondent) were, quite apart of the breach of contract claim, also in breach of their duties of confidence towards the appellant.

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