

WHEN AN EMPLOYEE ACQUIRES CONFIDENTIAL INFORMATION WITHOUT CONSENT: CASE UPDATE ON I-ADMIN (SINGAPORE) PTE LTD V HONG YING TING AND OTHERS [2020] SGCA 32

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Authors: Wong Pei-Ling and Jolyn Wah.

What happens when an employee has acquired his employer's confidential information without consent, but has not made any actual use of the information? Can an employer bring a successful claim for breach of confidence? This was the scenario examined by the Singapore Court of Appeal ("**SGCA**") in the case of *I-Admin (Singapore) Pte Ltd v Hong Ying Ting and others SGCA 32 ("I-Admin")*. Notwithstanding that there was no finding of actual use of the confidential information by the employees, the SGCA recognised the employer's interest to avoid wrongful loss and laid down a modified approach in relation to breach of confidence claims.

Background

The appellant and employer, I-Admin (Singapore) Pte Ltd ("**Employer**"), is in the business of outsourcing services and systems software, specifically payroll administrative data processing services and human resource ("**HR**") information systems. The first and second respondents were former employees of the Employer and the Employer's subsidiary, I-Admin (Shanghai) Ltd respectively ("**Employees**"). The third respondent is a Singapore-incorporated company ("**Company**") that provides payroll outsourcing services and HR management functions, which the Employees set up and worked for after resigning from the

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Employer and its subsidiary. The Employer had discovered the Company's website, which advertised payroll and HR systems in countries that overlapped with the Employer's geographical scope of services. This prompted the Employer to appoint Nexia Technology Pte Ltd to conduct forensic investigations and thereafter, file applications for an Anton Pillar Order (i.e. to enter the Company's premises in order to obtain evidence) and a discovery order (to compel the disclosure of certain documents) against the Company and the Employees (collectively, "**Respondents**"). The investigations revealed that the Employees had accessed the Employers' materials without consent, stored the materials on a server and laptops purchased by the Company as well as circulated the materials in emails to third parties. These materials fell into four broad categories:

- Source codes for the Employer's payroll systems and HR systems;
- Databases (for example, databases containing a list of pay-items) and other materials constituting the technical infrastructure supporting the payroll systems and HR systems;
- Business development and client-related materials, such as pricing information and business strategy material; and
- Materials related to the Employer's operations, such as documents setting out internal guidelines and policies.

The Employer brought claims for, among others, copyright infringement and breach of confidence, which were rejected by the Singapore High Court. On appeal, the SGCA accepted the High Court's finding that there was no copyright infringement, but held in favour of the Employers that there was a valid claim for breach of confidence.

Traditional test for breach of confidence

The SGCA noted that the traditional test for a claim for breach of confidence rested on the owner of confidential information (i.e. the plaintiff) showing three elements: (i) that the information is confidential in nature, (ii) that it was imparted in circumstances of confidence and (iii) that it has been used without authorisation and to the detriment of the plaintiff. However, there may be circumstances where the infringing party (i.e. a defendant) did not use or disclose the confidential information. Nevertheless, his actions compromised the confidentiality of the information in question. The High Court in *I-Admin* held that the Employer's case failed on the third limb of the test, as the Employer had failed to show that there was unauthorised use of confidential information to their detriment. The mere copying of, or access to the Employer's materials by the Employees failed to satisfy this test. The SGCA noted that the purpose of an action for breach of confidence is to protect a plaintiff's interest in preventing wrongful gain or profit from its confidential information ("wrongful gain interest"). At the same time, the law is also interested in protecting a plaintiff's interest to avoid wrongful loss ("wrongful loss interest"). Wrongful loss is suffered as long as a defendant's conscience has been impacted in the breach of the obligation of confidentiality. The SGCA further recognised that it is not always the case that the infringing conduct will affect both the wrongful gain and wrongful loss interests. In this case, though it was not proven that the Employees had directly profited from their use of the Employer's confidential materials, it did not detract from the fact that

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the Employees had knowingly acquired and circulated these materials without the consent of the Employer. These are actionable wrongs because the information will, through the unauthorized acts of the Employees, either lose its confidential character, or will at least be at risk of doing so.

Modified approach to breach of confidence

The SGCA acknowledged that the traditional test did not adequately safeguard the wrongful loss interest or offer recourse where it has been affected. The SGCA laid down a modified approach where the courts should consider the following:

- Whether the information in question “has the necessary quality of confidence about it”.
- If the information has been “imparted in circumstances importing an obligation of confidence”. An obligation of confidence will also be found where confidential information has been accessed or acquired without a plaintiff’s knowledge or consent.

Upon the satisfaction of the aforementioned prerequisites, an action for breach of confidence is presumed. The burden of proof is then on the defendant to displace this presumption by showing that his conscience was unaffected. The defendant could show, for example, that he came across the information by accident, was unaware of its confidential nature or believed there to be a strong public interest in disclosing the information.

The SGCA’s decision in favour of the Employer

The SGCA held that the Employer’s materials, being an integral part of its business operations, were confidential in nature. The Respondents were under an obligation to preserve the confidentiality of the materials, which they breached when they acquired, circulated and referenced the Employer’s materials without permission. There was no evidence to displace the presumption that the Respondents’ consciences were negatively affected. Although most of the materials had been downloaded and brought over to the Company by another employee of I-Admin (Shanghai) Ltd (who was not a defendant to the action), this did not absolve the Employees from wrongdoing. The materials were acquired to be reviewed and potentially used for the Company’s benefit, which the Employees were aware of as they were heavily involved in the Company’s software development and operations.

Remedies

The SGCA noted that there was no justification for an injunction and/or delivery up order. The Company’s software and business material were sufficiently distinct from the Employer’s materials, and there was no suggestion that the Company was still relying on the Employer’s confidential information in the course of its business. Neither would such remedies set right the loss already suffered by the Employer. As there was no finding of actual use of the confidential information, the Employer could not ask for an account of profits. It was also highly speculative to determine the quantum of equitable compensation to restore the Employer to the same position it would have been if the breach had not occurred. Nonetheless, the SGCA held that equitable damages could be awarded, which is a flexible remedy where a court is not limited to

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any specific basis for assessing damages. This is especially the case when breaches of confidence may not be discovered until years later. In this case, the value of the Employer's confidential information was the cost saved by the Employees and the Company in taking such information. The Company had saved the additional expense of developing its software and business materials from scratch because it was able to refer to and extract content from the Employer's confidential information. The Company also saved the additional expense of compiling information such as CPF calculation rules and CPF contribution rates for their databases or having to employ additional members of staff to do so, as the Employer's databases already contained such information. However, in determining the appropriate sum of damages, the additional cost incurred by the Company to create the different elements of its payroll software without reference to the Employer's additional materials had to be taken into account. Another consideration was also the reduction in the time taken to set up the Company's business, thereby allowing the Company to commence profit-making earlier.

Conclusion

The modified approach is a laudatory move and should be welcomed by owners of confidential information, as a duty of confidence can arise regardless of whether there is a non-disclosure agreement in place between the parties. The SGCA observed that it was in a plaintiff's interest to prevent a wrongful gain or profit from confidential information in its possession and to avoid any wrongful loss arising from access by a defendant of the plaintiff's confidential information without its permission. An employer no longer needs to show unauthorized use of the confidential information to its detriment before it can bring a claim for breach of confidence. An employee would have *prima facie* committed a breach of confidence when he accessed or acquired confidential information without the employer's knowledge or consent as his very action compromises the confidentiality of the information in question, and undermines the employer's desire to maintain the confidentiality of its information. However, even though the burden of proof has now shifted from the employer to the employee to show that his conscience is unaffected, the difficulty remains in quantifying damages which the employer is entitled to in the event a breach of confidence is established. *Coco v AN Clark (Engineers) Ltd* RPC 41, which laid down the three elements for a successful claim for breach of confidence. *Imerman v Tchenguiz and others* 2 WLR 592.

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