

The Law of Confidence Moves into the Digital Era: Singapore Court of Appeal Enhances Protection for Confidential Information

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At a glance:

- Singapore's highest court, the Court of Appeal, modifies the approach to breach of confidence claims, enhancing the action for protection for confidential information.
- Changes to who bears the burden of proof in such cases
- Applying the "springboard" approach to quantifying damages, i.e. costs / time saved through (or would otherwise have been incurred if not for) unauthorised use of confidential information.

Introduction

In the recent decision of *I-Admin (Singapore) Pte Ltd v Hong Ying Ting and others* [2020] SGCA 32, the Singapore Court of Appeal adopts a modified approach for breach of confidence claims, enhancing protection for confidential information.

Recap: The *Coco* Test

Prior to this decision, in order to succeed in a breach of confidence claim, a plaintiff had to prove its case along the approach in *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41 ("**Coco**"), requiring that:

- (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.

Back to Basics: Interests Sought to be Protected by a Breach of Confidence Claim

The Court of Appeal went back to basics. It considered the interests sought to be protected by a breach of confidence claim, namely, a plaintiff's interests to:

- (a) prevent the wrongful gain or profit from its confidential information; and
- (b) 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 Court of Appeal noted that the *Coco* test reveals a significant and unchecked threat to the wrongful loss interest, especially given the fragility of confidential information due to modern technology.

The New Approach to Breach of Confidence Claims

To address this, the Court of Appeal adopted a **modified approach** –

- (a) An action for breach of confidence **would be presumed** where the Court is satisfied that:
 - the information in question "has the necessary quality of confidence about it"; and

- has been “imparted in circumstances importing an obligation of confidence”.
- (b) However, the presumption above 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 might be rebutted by, for instance, the defendant proving 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 Law of Confidence Moves into the Digital Era

This decision signals a paradigm shift in the manner in which confidential information is protected. Traditionally, owners of confidential information seeking to enforce claims face two hurdles –

- (a) proving unauthorised use of its confidential information by the defendant; and
- (b) subsequently proving its damages suffered as a result of the defendant’s wrongdoing.

Proving actual use can be difficult if the defendants can access, copy and disseminate vast amounts of confidential information almost instantaneously, and without the knowledge of plaintiffs (e.g. insider-employee breach cases). This problem gets worse with advancements in modern technology.

This decision also cautions parties to consider carefully the confidentiality of any information, before accessing, retaining, or disclosing it without permission from the owner.

Burden of Proof

The reversal of the burden of proof addresses the first hurdle faced by owners of confidential information. It is now for the defendant to prove he was not in breach of confidence.

In this regard, a situation may arise whereby a former employee is found to be in breach of confidence and thus liable for damages, simply by taking confidential information, without using or disclosing the confidential information. As such, if it is necessary to retain such information, it may be prudent for former employees to expressly seek the necessary permissions, or at least clearly document why, in its view, the retaining of such information does not amount to a breach of confidence.

Proving Damages

Even if a plaintiff succeeds in proving a breach of confidence claim, he faces another hurdle: in proving damages, since the full extent of the defendant’s wrongdoing may not be fully known to the plaintiff. Here, it is worth noting the Court of Appeal’s decision to grant equitable damages, to be assessed at the value of the confidential information – taking into account the following relevant considerations:

- (a) the additional cost that would have been incurred by defendant to create its work product without any reference to the plaintiff’s materials;
- (b) the financial expertise the defendants would have incurred to develop these components independently; and
- (c) the reduction in time taken to set up defendant’s business, allowing it to commence profit-making earlier.

This case eases the burden on the plaintiff in the name of bolstering protection accorded to confidential information. **Might this set the balance too far the other way? That’s a debate for another day.**

Read the Supreme Court case summary [here](#), and judgement [here](#).