



Legal updates

Breach of confidence

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Legal update on breach of confidence

Confidential information or trade secrets are one of the most common types of intellectual property (IP) and intangible assets (IA) held by businesses. Unlike registrable IP such as patents and trademarks which enjoy statutory protection, confidential information is generally protected under common law through a claim for breach of confidence.

This article discusses the recent Court of Appeal decision [2024] SGCA 16 issued on 20 May 2024, which is a helpful and timely update to the modern law of confidence in Singapore.

Existing Legal Position

The traditional test in an action for breach of confidence requires the plaintiff to prove three core elements:

- 1) The information is of a confidential nature;
- 2) The information was imparted in circumstances importing an obligation of confidence; and
- 3) There had been unauthorised **use** of the information to the detriment of the party from whom the information originated.

A significant development emerged in 2020, when the Singapore Court of Appeal issued its landmark decision in the case of [2020] SGCA 32, addressing a longstanding lacuna in the protection of confidential information. In this case, the court recognised the distinct and separate interests at stake in actions for breach of confidence:

- 1) Preventing wrongful gain from confidential information; and
- 2) Avoiding wrongful loss resulting from the loss of its confidential nature.

Recognising a gap in existing law which failed to adequately protect the latter “wrongful loss” interest, the Court of Appeal introduced a reformulated test.

Under this reformulated test, if the plaintiff demonstrates that the information in question was confidential and was obtained without authorisation, a rebuttable presumption of breach of confidence arises. The burden then shifts to the defendant to refute this presumption by demonstrating that the receipt of the confidential information did not compromise the plaintiff's interest in maintaining its confidentiality.

Clarified Legal Approach

In this latest decision, the Singapore Court of Appeal made important clarifications on the interpretation and application of the traditional and reformulated tests above in answering two distinct issues:

The Narrow Issue: Can a plaintiff pursue breach of confidence claims for both "wrongful gain" and "wrongful loss" in a single legal action?

- The court found this to be permissible, acknowledging that the determination of breach of confidence is highly specific to the context and facts. After all, it is not uncommon for courts to find that some information had been used without authorisation and others taken but not used.
- Firstly, a plaintiff can seek to address any harm or disadvantage they suffered due to the unauthorised use of certain confidential documents or information, addressing their "wrongful gain" interest.
- Secondly, they can also pursue legal action to address the potential harm or loss resulting from the loss of confidentiality of other documents or information, even if those documents were not necessarily used. This pertains to their "wrongful loss" interest.
- Accordingly, the plaintiff can pursue claims related to both unauthorised use and potential loss of confidentiality in the same legal action.

The Broad Issue: Can a plaintiff claim both "wrongful gain" and "wrongful loss" for the same set of documents?

- The court concluded that this is not permissible because the claim for wrongful loss is premised on the absence of unauthorised use of the same set of documents or information. Allowing simultaneous claims under both tests risks double recovery and introduces undue complexity in legal proceedings regarding breach of confidence.
- Having said that, the court opined that it is permissible for a plaintiff in a claim for breach of confidence to plead "wrongful gain" as their primary claim and "wrongful loss" in the **alternative** as the same set of facts can be used to satisfy common elements of the traditional and reformulated tests. This means that if a plaintiff fails to prove unauthorised use and/or resulting detriment as their primary case, they can still mount a secondary case based on "wrongful loss" in the alternative. However, the converse (i.e. "wrongful loss" as the primary claim and "wrongful gain" in the alternative) is not allowed because the claims would be incongruous and lead to abuse of process.

In its closing remarks, the Court of Appeal reminded counsel to plead in detail whether they are proceeding on the basis of the "wrongful loss" or "wrongful gain interest" in situations where the claim involves many documents each containing different confidential information.

The requirement of specificity is also necessary for the purposes of assessing damages. In a claim for "wrongful gain", damages may be assessed based on an account of the defendant's profits or on the account of damages suffered by the plaintiff due to the unauthorised use. In a claim for "wrongful loss", however, equitable damages are applicable, and courts have a wider discretion to consider relevant factors such as the monetary value arising from the character of the confidential information.

Our view

This decision not only underscores the importance of precise pleadings but also reflects a nuanced understanding of breach of confidence cases and associated evidential difficulties in modern legal contexts. Additionally, the ruling highlights the evolving landscape of confidentiality law to better accommodate the protection of information in today's digital world which facilitates large-scale extraction of data.

If you have any questions or legal inquiries, please do not hesitate to contact your Sabara Law LLC representative.

**The authors would like to thank their practice trainee Linisha Shanker, and intern Jackson Neo, for their assistance in the production of this article.*

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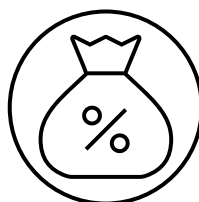
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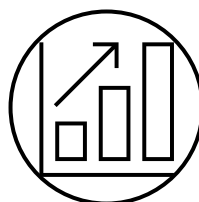
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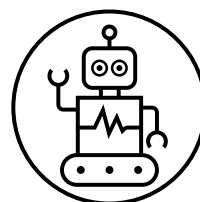
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