IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2020] SGCA 32

Civil Appeal No 5 of 2019

Between

I-Admin (Singapore) Pte Ltd

… *Appellant*

And

(1) Hong Ying Ting
(2) Liu Jia Wei
(3) Nice Payroll Pte Ltd
(4) Li Yong

… *Respondents*

In the matter of Suit No 585 of 2013

Between

I-Admin (Singapore) Pte Ltd

… *Plaintiff*

And

(1) Hong Ying Ting
(2) Liu Jia Wei
(3) Nice Payroll Pte Ltd
(4) Li Yong

… *Defendants*

JUDGMENT

[Copyright] — [Infringement]
[Confidence] — [Breach of confidence]

I-Admin (Singapore) Pte Ltd
v
Hong Ying Ting and others

[2020] SGCA 32

Court of Appeal — Civil Appeal No 5 of 2019
Sundaresh Menon CJ, Andrew Phang Boon Leong JA and Quentin Loh J
30 January 2020

6 April 2020 Judgment reserved.

Sundaresh Menon CJ (delivering the judgment of the court):

Introduction

1 This appeal arises out of a dispute between the appellant, I-Admin (Singapore) Pte Ltd, its former employees and some related parties. The dispute concerned certain acts that pertained to the appellant's payroll processing software and business materials. The appellant commenced Suit 585 of 2013 ("Suit 585/2013") in the High Court, contending, among other things, that the respondents had infringed its copyright and acted in breach of confidence.

2 The High Court judge ("the Judge") found in favour of the respondents and held there was no copyright infringement. Neither were the respondents in breach of their obligations of confidence: *I-Admin (Singapore) Pte Ltd v Hong Ying Ting and others and another suit* [2019] SGHC 127 ("GD").

3 The appellant's predicament is an example of an increasingly common

issue faced by owners of copyrighted and confidential information, particularly in the context of disputes arising out of erstwhile employer-employee relationships. Against the backdrop of a digitised society, it is now significantly more challenging to guard against the wrongful copying, abuse and exploitation of protected information. This appeal provides us with a timely opportunity to review the scope of the law of confidence in particular. We state at the outset that, in our judgment, the legal framework that has hitherto prevailed does not adequately safeguard the interests of those who own confidential information.

The facts

The parties

4 The appellant is a Singapore-incorporated company in the business of outsourcing services and systems software, specifically payroll administrative data processing services ("Payroll Systems") and human resource ("HR") information systems ("HRIS") (GD at [3]). The appellant's Payroll Systems are used by more than 800 clients in 15 countries across Asia and it operates a number of wholly owned subsidiaries including I-Admin (Shanghai) Ltd ("I-Admin (Shanghai)").

5 The appellant's Payroll Systems come in two forms: the "payAdmin" and "ePayroll" software systems. The "payAdmin" system is the appellant's core payroll calculation engine designed for large corporations. The "ePayroll" system is a streamlined version of the "payAdmin" system and caters to small and medium-sized clients. The appellant's HRIS is a collective term to describe the various HR systems it has developed. A number of other materials surround and underlie these software systems, making up the infrastructure through which the appellant operates its business and provides its services.

6 There are four respondents (GD at [4]):

(a) The first respondent is Mr Hong Ying Ting, a former employee of the appellant.

(b) The second respondent is Mr Liu Jia Wei, a former employee of I-Admin (Shanghai).

(c) The third respondent is Nice Payroll Pte Ltd, a Singapore-incorporated company that provides payroll outsourcing services and HR management functions.

(d) The fourth respondent is Mr Li Yong, a national of the People's Republic of China and Singapore permanent resident who invested in the third respondent.

The appellant is not pursuing its claims against the fourth respondent. Unless otherwise specified, references to "the respondents" shall relate to the first, second and third respondents only.

Background

7 The first respondent joined the appellant in 2001. He found the appellant's software, in particular its payroll calculation engine, flawed and inadequate for the tasks it had to perform. The appellant's calculation engine computes the components of its clients' monthly employee remuneration such as basic salary, overtime pay, bonuses, Central Provident Fund ("CPF") payments and so on. Sometime in 2009, the first respondent expressed his frustrations to the second respondent, who shared his desire to design a better payroll software. To that end, they embarked on a personal venture called the

"Kikocci Project" and incorporated "Kikocci Corporation" in the British Virgin Islands. The second respondent also wrote some code for the Kikocci Project.

8 In March 2011, the fourth respondent agreed to invest in the first and second respondents' efforts to develop a payroll software but was not keen on running the business under the umbrella of Kikocci Corporation. The first and second respondents duly dissolved Kikocci Corporation and on 18 March 2011, incorporated the third respondent with the fourth respondent as its sole director and shareholder. The pair also resigned from the appellant and I-Admin (Shanghai) to work for the third respondent. The third respondent purchased two storage spaces, a cloud storage space from Amazon Web Services (the "Amazon Server") and a Buffalo Model HD-LBU3 external storage device (the "Buffalo Drive"). The Amazon Server fulfilled a number of purposes including the storage of client data. The Buffalo Drive was used to backup the third respondent's live server code. The company also obtained a Dell Server Edge T110 II server (the "Dell Server") for application development and programming. The payroll calculation engine they were developing was completed sometime in March 2012. On 19 September 2012, the first and second respondents were appointed as the third respondent's directors and allotted shares.

9 In February 2013, the appellant came across the third respondent's website, which was advertising payroll and HR systems in a number of countries that substantially overlapped with the geographical scope of the appellant's services. A search at the Accounting and Corporate Regulatory Authority revealed that the first and second respondents were directors of the third respondent. This prompted the appellant to instruct Nexia TS Technology Pte Ltd ("Nexia") to conduct some forensic investigations into the activities of the respondents.

10 On 2 July 2013, after reviewing the results of these investigations, the appellant commenced Suit 585/2013 and applied for an Anton Pillar order ("APO") against the first to fourth respondents. The APO was granted on 9 July 2013 and executed on 17 July 2013 at the third respondent's premises. It is undisputed that on this latter date, the first and second respondents deleted files from the first respondent's Lenovo Thinkpad laptop (the "Thinkpad") and the Dell Server (see GD at [14]) The Nexia forensics team recovered these files during its review of the devices. Prior to the APO's execution, the following materials were stored on the Dell Server:

(a) Three folders titled "From Zaza", "Zaza_dev" and "Zaza/Testing". These contained, among other things, the appellant's source codes (these being files written in Java programming language which underlie the operation of the appellant's software systems) as well as its client materials.

(b) A Microsoft Excel ("Excel") document titled "cpf.xls". This contained the substance of the appellant's CPF database, which documented relevant information pertaining to CPF statutory rules.

11 The following materials were stored on the Thinkpad:

(a) An Excel document titled "payitem setup_iAdmin.xls". This was one of the appellant's databases, containing a list of payitems.

(b) An Excel document titled "Copy of ePayroll eHR Pricing for all regions (04 Jan 2011).xls". This contained the appellant's pricing information and other business strategy material, including fees quoted for services rendered.

(c) A compressed folder titled "RR to Li Lian.zip". This contained documents critical to the appellant's operations, including its software and hardware technical platform, data security and security design architecture.

(d) A compressed folder titled "Standard Imp Template.zip". This contained the appellant's implementation templates for six jurisdictions. It included the file "SG Client_Imp Template.xls", which was used by the appellant's Singapore clients to input data to be processed.

12 It also came to the appellant's attention that the first and second respondents had circulated some of its materials in a number of emails:

(a) An email was sent from the second respondent to the first respondent dated 18 July 2011, entitled "Imp Template", attaching a copy of "Standard Imp Template.zip" (see [11(d)] above).

(b) An email was sent from the second respondent to the third respondent's employee Ms Zaza Shen ("Ms Shen") on 15 August 2011, entitled "ePayroll from Zaza", attaching a compressed folder titled "epayroll.zip". This contained the appellant's entire "ePayroll" source code, including its payroll calculation engine.

(c) An email was sent by the second respondent to the first respondent on 15 August 2011, entitled "Standard Payitem (SG) & Lenovo Payitem", attaching two Excel documents titled, "Payitem_Singapore.xls" and "LenovoSG.xls" (the "Payitem Bibles"). "Payitem_Singapore.xls" was the appellant's database of all possible payitems that could be included in client payslips for its Singapore customers. This excluded Lenovo Singapore for which the appellant created "LenovoSG.xls" as a specific database.

(d) An email was sent by the first respondent to the third respondent's employee Ms Vercilia Lim ("Ms Lim") on 16 August 2011, attaching copies of the Payitem Bibles ("LenovoSG.xls" had been renamed as "SG payitem (2).xls").

(e) An email was sent by the second respondent to Ms Shen on 20 August 2011, attaching two files. These were "GIRO format.pdf", which contained coding specifications from the appellant's client Oversea-Chinese Banking Corporation Bank ("OCBC") and "BankDiskOCBCSGONI.java", which was a source code created by the appellant to generate a "bankdisk" file for OCBC.

(f) An email was sent from the second respondent to the third respondent's employee, Mr Errol Tan ("Mr Tan"), on 29 September 2011, attaching a copy of "cpf.xls" (see [10(b)] above).

(g) An email was sent from the first respondent to Mr Tan, on 10 May 2012, attaching a copy of "RR to Li Lian.zip" (see [11(c)] above).

13 In June 2014, the appellant obtained a discovery order against the four respondents, compelling the disclosure of certain documents. The third respondent engaged a forensic expert to extract relevant files from the Dell Server, including any files deleted during the APO execution. On 15 July 2014, the first and second respondents reviewed the recovered files and saw that the "From Zaza" folder contained personal data from the appellant's clients including HSBC Holdings plc ("HSBC"). HSBC was a client of ADP International Services BV ("ADP"), a global payroll service provider that had

subcontracted payroll processing to the appellant. The respondents lodged a police report on 17 July 2014. Subsequently, on 4 September 2014, the first respondent emailed HSBC and ADP, informing them their data was in the third respondent's possession.

14 The appellant's case in the court below was as follows. From 2009, the first and second respondents had conspired to start a competing payroll business. They accessed, and later downloaded, the appellant's copyrighted and confidential material. They then went on to use this material in the course of developing the third respondent's business. These entailed breaches of copyright and confidence. The appellant's allegedly infringed materials included:

> (a) Source codes for the Payroll Systems and HRIS ("Category 1 materials").
>
> (b) Databases and other materials constituting the technical infrastructure supporting the Payroll Systems and HRIS ("Category 2 materials").
>
> (c) Business development and client-related materials ("Category 3 materials").
>
> (d) Materials related to its operations, such as documents setting out internal guidelines and policies ("Category 4 materials").

The appellant also asserted that (i) the first respondent had acted in breach of contract; (ii) the four respondents had committed the tort of conspiracy; and (iii) the fourth respondent had induced the first and second respondents to breach their employment contracts. These arguments are not pursued on appeal and the only issues before us concern the claims for copyright infringement and breach of confidence.

The decision below

Copyright infringement

15 The Judge found that copyright subsisted in the Category 1 to 3 materials under ss 7A(1)(*a*) and 7A(1)(*b*) of the Copyright Act (Cap 63, 2006 Rev Ed) ("Copyright Act") (GD at [50], [71] and [84]). The appellant owned this copyright by virtue of the assignment clauses in its employees' contracts of employment and its Employee IT Security Policy 2007. Copyright owned by I-Admin (Shanghai) was assigned to the appellant through a deed of assignment (GD at [51], [72] and [85]). The Judge determined that copyright would only be infringed if the respondents had copied a substantial part of the copyrighted works (GD at [45], relying on *Global Yellow Pages Ltd v Promedia Directories Pte Ltd* [2016] 2 SLR 165 at [239]).

16 In respect of the Category 1 materials, the appellant submitted that two main aspects of its software had been substantially reproduced in the third respondent's software: its database structures and result upload functionality. A "database structure" refers to the manner in which content in a database table is organised. The appellant's "result upload functionality" describes its software's use of Java codes to upload payroll results into its payroll database (GD at [52] and [53]). On the former, the Judge compared the overall architecture and design of the third respondent's software against that of the appellant's (GD at [56]). He concluded that the two were fundamentally different in terms of their database architecture and the development of their respective source codes. On a balance of probabilities, he found that the third respondent's software could not have been copied from the appellant's (GD at [57]–[59]). There was

similarly no substantial copying of the appellant's result upload functionality (GD at [61]).

17 The Judge took the Category 2 materials to consist of the appellant's payitem databases and CPF database (GD at [66]). For completeness, he also considered the Excel documents generated from these tables. One exception was "payitem setup_iAdmin.xls". This was disregarded for the copyright claim because it had only been referenced in the appellant's closing submissions as a file that the first respondent had downloaded from its product demonstration platform (the "Demonstration Platform") (GD at [64]).

18 The Judge found that there was no substantial copying of the Category 2 materials because there were notable structural differences between the appellant's and the third respondent's databases (GD at [73]). The appellant claimed that the respondents had used the Payitem Bibles to develop the third respondent's payitem bible, a database of all possible entries that can be inserted into a payslip and the various parameters necessary for computation. There were two relevant Excel documents, "Payitem Bible_Singapore.xls" and "payitem_bible.xls". "Payitem Bible_Singapore.xls" was a payitem list whilst "payitem_bible.xls" was generated from the third respondent's database table, "PR_PAYITEM". Similarities between the respondents' files and the Payitem Bibles were limited to copied facts such as payitem descriptions and wage types, not the arrangement of those facts. Copyright protection did not extend to the former, and there was therefore no infringement in that regard (GD at [71], [75]–[76] and [79]). The Judge went on to consider the alleged similarities between the appellant's CPF database and the third respondent's database table, "PR_CPF_RATES_SGP". He found there was clear evidence of a difference in organisation, and accordingly held that no copying had occurred (GD at [81]).

19 The Judge also dismissed the appellant's claim in relation to the Category 3 materials, this being "Copy of ePayroll eHR pricing for all regions(04 Jan 2011).xls", "RR to Li Lian.zip", "Standard Imp Template.zip" and "SG Client_Imp Template.xls". The appellant failed to identify and compare infringing materials belonging to the respondents that were allegedly copied from the Category 3 materials (GD at [86]). The appellant made no substantive submissions on the infringement of copyright in the Category 4 materials and the Judge therefore did not consider it necessary to deal with this.

Breach of confidence

20 As to the claim for breach of confidence, the Judge noted that there are three well-established elements of a successful claim (*Clearlab SG Pte Ltd v Ting Chong Chai and others* [2015] 1 SLR 163 ("*Clearlab*") at [64] citing *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41 ("*Coco*") at 47):

(a) the information must possess the quality of confidentiality;

(b) the information must have been imparted in circumstances importing an obligation of confidence; and

(c) there must have been some unauthorised use of that information to the detriment of the party from whom the information originated.

The Judge considered that while the respondents owed the appellant obligations of confidence (GD at [111]–[113]), there had been no use of its confidential information in the relevant sense (GD at [107]). In short, it was only the third limb on which the appellant's case failed before the Judge.

21 The appellant pointed to four incidents that were said to constitute a breach of confidence. First, it was contended that the third respondent made use

of its confidential materials to develop its own source codes, systems and client materials. Flowing from his findings in relation to the appellant's copyright claim, the Judge concluded that no reproduction or adaptation had occurred (GD at [116]). He rejected the appellant's argument that mere copying of or access to its data satisfied the element of unauthorised use (GD at [117], [123]). Whilst there might have been an intention to make use of its materials, the appellant still had to show that any reference to and review of these materials resulted in the creation of the respondents' own materials. The Judge disagreed with the appellant's reliance on the dicta in *Clearlab*, where the High Court found that mere taking of confidential materials could amount to a breach of confidence (GD at [124]–[125]). The appellant could not invoke this "expansive approach" for two reasons: (i) this had not been pleaded; and (ii) the present facts were sufficiently distinguishable from *Clearlab*.

22 The second incident of breach raised by the appellant was the use of a copy of its "ePayroll" system to generate the third respondent's internal payroll reports between May 2011 and February 2012. The Judge found that the available forensic evidence did not support this contention (GD at [128]–[129]).

23 Thirdly, the appellant claimed that the first respondent had breached its confidence by using confidential log-in credentials, given to him during the course of his employment, to log onto the Demonstration Platform. This gave the first respondent access to some of the functionalities of the appellant's live system such as its payitem details, reports and formats for its customers. The first respondent accessed the appellant's server on a number of occasions between April and June 2012 and March and May 2013 (GD at [131]). The first respondent also downloaded "payitem setup_iAdmin.xls" from the Demonstration Platform on 19 April 2013. While the Judge agreed that the information hosted on the Demonstration Platform was confidential, the

appellant failed to prove that the respondents had made unauthorised use of this information (GD at [133]–[134]).

24 Lastly, the Judge considered the disclosures made by the first and second respondents to HSBC and ADP. The Judge considered that the first and second respondents were not obliged to obtain the appellant's authorisation before disclosing to HSBC and ADP that they had come into possession of their confidential client data (GD at [137]).

25 While the appellant failed to prove the unauthorised use of its materials, the Judge nonetheless accepted that the "reference or reviewing" of these materials was made out on the evidence before him (GD at [123]). The respondents had, for instance, reviewed the appellant's Java source codes (located in the "From Zaza" folder on the Dell Server) at least 10 times in the course of the third respondent's business (GD at [120(h)]). The first respondent had also repeatedly accessed the Demonstration Platform to refer to the confidential information that it hosted (GD at [131]).

The parties' cases

26 The appellant asserts that its copyright in the Category 1 to 3 materials was infringed in two main ways: the respondents (i) were in possession of unauthorised copies of these materials; and (ii) circulated them by email without authorisation. In respect of the Category 2 materials, the respondents also substantially reproduced the Payitem Bibles in the course of creating "Payitem Bible_Singapore.xls".

27 The appellant further contends that the Judge erred in finding there was no breach of confidence in relation to the Category 1 to 4 materials because it had not been shown that the respondents did make use of the same. The

appellant disputes the Judge's finding that it did not specifically plead breach of confidence by mere taking. Further, relying on the dicta in *Clearlab* and relevant English and Australian authorities, the appellant argues that the Judge adopted an unduly narrow approach towards the requirement of unauthorised use, which falls short of meeting the policy objectives underpinning the law of confidence. In the alternative, there is sufficient evidence to bear out a finding of there being actual use of the appellant's confidential materials by the respondents.

28 In reply, the respondents assert that there has been a substantial change in the appellant's case. Its claims of copyright infringement and breach of confidence in Suit 585/2013 were premised on the respondents' *use and/or substantial copying* of its materials. Having failed to prove this, the appellant is reframing its case on appeal. It now says that the respondents are liable simply because they *possessed* and *circulated* unauthorised copies of its materials. It would be improper and prejudicial to allow the appellant to advance this position on appeal.

29 Further, the respondents maintain that the Judge rightly found that the appellant's breach of confidence claim failed because it had not proved the *use* of its materials. The appellant's reliance on the "expansive approach" in *Clearlab* is said to be misguided. The court there did not seek to lay down a general extension of breach of confidence to situations of mere possession. The foreign cases relied on by the appellant similarly do not stand for this proposition.

Our decision

No copyright infringement

30 Copyright is the exclusive right to, among other things, "reproduce [a protected] work in a material form" or "make an adaptation of the work" (s 26(1)(*a*) of the Copyright Act). There are two levels to the appellant's claim for copyright infringement. At a higher level, it is contended that the respondents substantially reproduced and/or adapted its copyrighted materials for financial gain. At a more basic level, the allegation is that the respondents downloaded, possessed and circulated unauthorised copies of the appellant's materials. It is said that the latter, in and of itself, was material reproduction in contravention of the Copyright Act. At the hearing before us, counsel for the appellant Mr Lee Eng Beng *SC* ("Mr Lee") confirmed this lower level of infringement to be the primary focus on appeal. He added that this was not a new argument; infringing reproduction by way of possession and circulation had been a part of the appellant's pleaded case and had been advanced before the Judge.

31 With respect, the evidence does not support Mr Lee's latter submission. The appellant contends that the references to material reproduction in paras 9 and 10 of its amended Statement of Claim, set out below, are sufficiently broad to encompass claims of substantial copying *and* mere possession and circulation:

> 9. The [first, second, third respondents], as well as the [fourth respondent] (who individually and/or through the [t]hird [respondent]), have individually and/or jointly infringed the [appellant's] copyright in the Copyright Material by doing the following acts in Singapore without the consent or authority of the [appellant], namely:
>
> > (a) Reproducing the Copyright Material in material form;
> >
> > (b) Adapting the Copyright Material; and/or

> (c) Reproducing, adapting, disclosing, distributing and/or being in possession of the Copyright Material for financial or commercial gain.
>
> 10. The [respondents'] infringing acts include the following:
>
> (a) The [first and second respondents] infringed the [appellant's] copyright in the Copyright Material by reproducing, adapting, disclosing, distributing and/or being in possession of the Copyright Material at least starting from the period of the [first respondent's] employment with the [appellant] or the [second respondent's] employment with i-Admin (Shanghai) Ltd; and
>
> (b) The [third respondent] has since its incorporation in 2011 infringed the [appellant's] copyright in the Copyright Material such as by offering sale of products and/or services through the [third respondent's] website … where such products and/or services involve infringing the [appellant's] copyright.

32 It is true that para 9(a) for instance, does not specify the manner in and purpose for which reproduction of the appellant's materials occurred. "Reproducing" could therefore encompass a number of possible meanings such as the storage of a protected work in a computer or any medium by electronic means (ss 17(*a*) and 17(*b*) of the Copyright Act) or the making of a copy incidental to some other use of the protected work (s 15(1A) of the Copyright Act). However, this example aside, the general tenor of the appellant's pleadings concerns the use of its material for "financial or commercial gain*"* (see at para 9(c) of the Statement of Claim). It plainly prioritised its higher level claim of copyright infringement at the trial.

33 This is also apparent from the manner in which the appellant ran its case at trial. Its opening statement framed the copyright claim in terms of use of and access to its confidential materials to develop the third respondent's own software and services. Building on this, a significant portion of its closing submissions addressed the use of its materials "to develop and run [the third

respondent's] software system and business operations". It is also telling that the Judge examined the question of copyright infringement through this lens. Addressing arguments on the Category 1 materials, the Judge observed that the appellant "only submitted that two main aspects of its software were *substantially reproduced* as part of [the third respondent's] software" [emphasis added] (GD at [52]). He distinguished this from the general utilisation of the appellant's materials, which was considered as part of the breach of confidence claim.

34 It was acknowledged before us that nowhere in the appellant's closing submissions was relief sought purely on the basis of mere possession and circulation. Nevertheless, Mr Lee sought to persuade us that the appellant should not be precluded from advancing such a case because the facts relevant to this lower level claim of infringement were fully canvassed in the trial below. Nexia's forensic evidence showed that the respondents had copied and were in possession of the appellant's materials. More significantly, this fact was *admitted* by the respondents in their pleadings. A complete action in copyright, premised on the mere taking of the appellant's materials and to which the respondents have no defence, is therefore embedded within the body of evidence.

35 Pertinently, however, Mr Lee conceded that the Judge's attention had not been directed specifically to the appellant's lower level claim which rested simply on the fact of copying. In our judgment, had that alternative case been signposted, the trial would have proceeded quite differently. The question of infringement would have been resolved simply by examining what materials were in the respondents' possession and where those materials came from. There would have been no need for the parties to canvass issues of substantial reproduction and adaptation, making for a shorter and much more

straightforward trial. On this hypothesis, the respondents might well have chosen to pursue a different channel or litigation strategy from the one they did in fact pursue. Further, the Judge would have likely heard other arguments from the respondents in their defence and possibly have had to examine further evidence relevant to that. It would therefore be prejudicial to the respondents to make a finding of infringement based solely on the fact of possession and circulation. In the circumstances, we think it is too late in the day for the appellant to seek to pursue its lower level claim of copyright infringement at the appeal.

36 This leaves the appellant's higher level claim. The appellant neither compared the Category 3 materials with the respondents' materials nor made any submissions on the Category 4 materials in the proceedings below (at [19] above). Additionally, no challenge has been mounted against the Judge's finding that there was no substantial copying of the Category 1 materials. The argument before us is thus confined to the substantial reproduction of Category 2 materials, the Payitem Bibles.

37 The infringement of copyright in the Payitem Bibles is apparently evidenced by email correspondence between the first respondent and Ms Lim. On 16 August 2011, the first respondent sent an email to Ms Lim, attaching copies of the Payitem Bibles (see [12(d)] above). To save time and costs, Ms Lim was to merge these files with the third respondent's own list of payitems, to develop the third respondent's payitem bible. On 17 August 2011, Ms Lim sent the first respondent an Excel document titled "Master_Payitem_Singapore.xls". This was the first version of the third respondent's payitem bible. An analysis of this document by the appellant's coding expert, Mr Harish Pillay ("Mr Pillay"), revealed that a significant part of

"Master_Payitem_Singapore.xls" was identical to the Payitem Bibles; and that Ms Lim had duplicated two Excel "sheets" from the Payitem Bibles.

38 Ms Lim sent the first respondent three other emails between 23 and 25 August 2011, attaching updated iterations of "Master_Payitem_Singapore.xls". Mr Pillay's analysis indicated that content from the Payitem Bibles was also reproduced in these versions, although Ms Lim made edits to the original draft (for instance, by adding new rows and re-arranging the order and sequence of some of the payitem descriptions). The third respondent's payitem bible underwent further development between August and September 2011. The final "Payitem Bible_Singapore.xls" was attached in an email from the first respondent to Ms Shen on 19 September 2011.

39 The appellant argues that the Judge erred in concluding that the arrangement of the contents in "Payitem Bible_Singapore.xls" was sufficiently distinct from the Payitem Bibles because he confined his assessment to the final product. He failed to consider that in the course of creating "Payitem Bible_Singapore.xls", there was wholesale copying, without any modification, of the arrangement of the Payitem Bibles. At least seven iterations of the third respondent's payitem bible, beginning with "MasterPayitem_Singapore.xls", contained duplicated Excel sheets from the Payitem Bibles. These were infringing material reproductions. The series of emails between the respondents also showed that the third respondent's payitem bible had been developed by way of unauthorised adaptation.

40 The Judge found that the appellant's database tables and the Excel files generated therefrom were "original [and attracted copyright protection] by dint of the creative effort invested to organise the relevant information into a format suitable for computer processing" (GD at [79]). The question of infringement

therefore turns on whether the respondents reproduced the *organisation* of the Payitem Bibles.

41 In our judgment, the third respondent's payitem bible drafts were not material reproductions of the appellant's files. While these drafts contained duplicated Excel sheets from the Payitem Bibles, a closer examination of Mr Pillay's report reveals minor differences in arrangement from the earliest version of "MasterPayitem_Singapore.xls". In merging the appellant's and third respondent's lists of payitems, Ms Lim added an additional blank column entitled "Tax Cat", not found in the Payitem Bibles.

42 As for the third respondent's finalised payitem bible, this exhibits more significant modifications. One example is the inclusion of a sophisticated naming convention which encodes payitem names to give additional information about each payitem. The Payitem Bibles were not simply repurposed for the third respondent's business but were transformed into a new and unique product. In our judgment, the Judge correctly found that the respondents' database tables were sufficiently distinguishable from the Payitem Bibles and that "[t]he process by which [the third respondent's] materials were created did not go towards the quality of those materials" (GD at [106]). The appellant's claim for copyright infringement was therefore correctly rejected by the Judge and we dismiss that part of its appeal.

Reviewing breach of confidence

43 We turn to the claim for breach of confidence. Traditionally, a claim for breach of confidence rested on three elements being shown: (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 (see [20] above). However, in recent years, the

requirement that plaintiffs must show unauthorised *use* of their materials and resulting detriment has come under increased scrutiny. There may often be circumstances where defendants wrongfully access or acquire confidential information but do not use or disclose the same. Nevertheless, their actions compromise the confidentiality of the information in question. In such circumstances, why should the courts not have the power to grant relief?

44 These considerations are at the forefront of the present claim for breach of confidence. The appellant submits that the respondent's mere possession of and their act of referring to its confidential materials is sufficient to complete the cause of action for breach of confidence. The respondents wrongfully accessed, downloaded and circulated the appellant's materials which they knew to be confidential in character. The Judge also found that the materials were referenced and reviewed by the respondents for their own purposes (GD at [123]). These acts undermined the appellant's desire to maintain the confidentiality of its materials. We note that unlike the lower level claim of copyright infringement, this argument was specifically pleaded. It is unclear why the Judge considered otherwise (GD at [124]). The amended Statement of Claim particularised the fact that the respondents had "referenced" the appellant's confidential information "to develop [their] source codes, systems [and] materials". It is also apparent from the Judge's findings that this point was explicitly canvassed before him. The respondents therefore cannot claim there has been a change in position.

45 The appellant's argument for a modern approach prompts the question of whether the current law of confidence is sufficiently broad to encompass the myriad of ways in which confidentiality might be undermined. There are three considerations this court should have in mind in answering this:

(a) What interests are sought to be protected by the cause of action?

(b) What is the nature of the threat to these interests?

(c) What are the remedies that ought to be made available where the relevant interests have been infringed?

The protected interests

46 The answer to the first question can be gleaned from the history of the law of confidence. Early English jurisprudence reveals a longstanding tradition of protecting confidential information. By the early 19th century, confidentiality was safeguarded through a range of doctrines in contract and criminal law as well as the law of inheritance, common law copyright, patent law and the law of evidence (Tanya Aplin *et al*, *Gurry on Breach of Confidence* (Oxford University Press, 2nd Ed, 2012)) ("*Breach of Confidence*") at para [2.01]). However, confidentiality was not, of itself, a basis for legal protection but only an indirectly protected interest (see *Lord and Lady Perceval v Phipps* (1813) 35 ER 225 at 229; *Gee v Pritchard* (1818) 36 ER 670 at 678).

47 *Prince Albert v Strange* (1849) 41 ER 1171 ("*Prince Albert*") is widely regarded as one of the earliest cases that recognised the existence of an independent action for breach of confidence. Prince Albert sought injunctive relief to prevent the exhibition and publication of a catalogue that described etchings by himself and Queen Victoria. This was granted *ex parte* and the defendants failed in their attempts to have the injunction lifted. At first instance, Knight-Bruce VC grounded his reasoning in the common law protection of "property" (*Prince Albert v Strange and others* (1849) 64 ER 293 at 311). The unpublished etchings, being the "produce of labour", were a kind of property and the common law "provided for their security, at least before general

publication by the writer's consent" (at 312). This protection was also broad enough to justify a prohibition on the description of the etchings, meaning the catalogue.

48 On appeal, Lord Cottenham LC similarly recognised the existence of a common law property right in the unpublished etchings. But, he also found a second basis for injunctive relief. Given the evidence adduced on behalf of the plaintiff and the absence of any explanation as to how the defendants came by the etchings legitimately, the court was bound to assume that the possession of the etchings originated in a "breach of trust, confidence, or contract" (*Prince Albert* at 1179). This warranted an exercise of its original and independent jurisdiction, "not for the protection of merely a legal right, but to prevent what this Court considers and treats as a wrong, whether arising from a violation of an unquestionable right, or from a *breach of* contract or *confidence*…" [emphasis added] (at 1179). This dicta was cited with approval by Turner VC in *Morison v Moat* (1861) 68 ER 492 ("*Morison*"). Besides the law of property and contract, a breach of confidence could be (at [255]):

> founded upon trust and or *confidence, meaning, as I conceive, that the Court fastens the obligation on the conscience of the party, and enforces it against him* in the same manner as it enforces against a party to whom a benefit is given the obligation of performing a promise on the faith of which the benefit has been conferred … [emphasis added]

49 Similar language was used by the English Court of Appeal in *Saltman Engineering Co Ltd and others v Campbell Engineering Co Ltd* [1948] 65 RPC 203 ("*Saltman*"), which held that "the obligation to respect confidence is not limited to cases where the parties are in a contractual relationship" (at 211). There exists an implied duty of confidentiality that "b[inds] the conscience" of the defendant. So long as a defendant *uses* "confidential information directly or indirectly obtained from a plaintiff, without [their express or implied consent],

he will be guilty of an infringement of the plaintiff's rights" (at 213). In *Seager v Copydex Ltd* [1967] 1 WLR 923 ("*Seager*"), Lord Denning MR referred to *Saltman* and observed that "[t]he law on this subject … depends on the broad principle of equity that he who has received information in confidence shall not take unfair advantage of it. He must not make use of it to the prejudice of him who gave it without obtaining his consent" (at 931). This line of cases, developing the unique features of an action for breach of confidence, concluded with *Coco*. Megarry J's articulation of the three elements for a successful claim (at [43] above) took on a foundational status in England as well as other common law jurisdictions including Singapore (see for example, *X Pte Ltd and another v CDE* [1992] 2 SLR(R) 575 at [27]).

50 The dicta in *Saltman*, *Seager*, and *Coco* shed some light on the envisaged purpose of an action for breach of confidence. The language of taking "unfair advantage" of information and the requirement of unauthorised use and consequential detriment, point to the protection of a specific interest: a plaintiff's interest in preventing wrongful gain or profit from its confidential information ("wrongful gain interest"). Yet interestingly, even though Megarry J in *Coco* stipulated that detriment to the plaintiff was an essential element of the cause of action, he noted that not all the early cases concerning breach of confidence focused on damage stemming from the misuse of confidential information, observing: "some of the statements of principles in the [preceding] cases omit any mention of detriment" (at 48). This suggests that the policy objectives behind the early law of confidence may have extended beyond safeguarding against wrongful gain.

51 Support for this is found in *Morison* where Turner VC referred to a claim for breach of confidence as arising from an "obligation of *conscience*" [emphasis added] (see also *Saltman* at 211). The use of the word "conscience",

imports a broader, more fundamental, equity-based rationalisation for the protection of confidentiality: an "obligation of conscience is to respect the confidence [of the relevant information], not merely to refrain from causing detriment to the plaintiff." (*Smith Kline & French Laboratories (Australia) Ltd and others v Secretary, Department of Community Services and Health* (1990) 17 IPR 545 ("*Smith Kline*") at 584). It places defendants under a duty; they are "bound" not to deal with confidential information in a manner that adversely affects their conscience. Depending on the circumstances under which the obligation arises, this duty may extend beyond refraining from acts of unauthorised use or disclosure. The language of "conscience" reflects an interest in "prevent[ing] … a wrong" (*Prince Albert* at 1179), and protecting plaintiffs from *any* kind of improper threat to the confidentiality of their information.

52 The importance of the "conscience" in an action for breach of confidence has also been discussed in our jurisprudence. *Adinop Co Ltd v Rovithai Ltd and another* [2019] 2 SLR 808 concerned, among others, an action for breach of the obligations of confidentiality. Adinop Co Ltd ("Adinop") alleged that the respondent companies had misused confidential customer information that had been shared with them for purposes specified under a confidentiality agreement. In finding that the first respondent was under an obligation of confidence, we made reference to the first respondent's "conscience" being "bound" against the use of Adinop's confidential information for collateral purposes, noting that the "intervention of equity ultimately depends on conscience" (at [89]).

53 Gathered from the foregoing discussion, we consider that a second distinct interest guides the operation of breach of confidence claims. Besides a plaintiff's wrongful gain interest, the law is also interested in protecting a plaintiff's interest to avoid wrongful loss ("wrongful loss interest"), which is

suffered so long as a defendant's conscience has been impacted in the breach of the obligation of confidentiality.

Threat to the interest

54 A question that follows is whether there is a threat to this wrongful loss interest that warrants a more robust response by the law. The elements of breach of confidence set out in *Coco* explicitly protect the wrongful gain interest. Although there is often a degree of overlap, it may not always be the case that a defendant's conduct will affect both the wrongful gain and wrongful loss interests. This is exemplified by the facts of the present appeal. It was not proven that the respondents directly profited from their use of the appellant's confidential materials. However, this does not detract from the fact that the respondents knowingly acquired and circulated these materials without consent. As submitted by Mr Lee, such conduct would have affected the respondents' conscience, invoking the wrongful loss interest, because it was known that the relevant materials had been subject to an obligation of confidence.

55 This illustrates a significant and unchecked threat to the wrongful loss interest. The vulnerability of this interest is magnified when considered against the backdrop of advances in modern technology. It is now significantly easier to access, copy and disseminate vast amounts of confidential information. This can be done almost instantaneously, often without the knowledge of plaintiffs. As in the present case, employees will often have access to large volumes of confidential business material for the purposes of their employment. If at some point they were to proceed to surreptitiously download this information for their personal use or to start a competing business, employers are likely to be none the wiser for a considerable time. It is nearly impossible in these situations to safeguard information from all potential wrongdoing. The fragility of such

confidential information suggests the need for stronger measures to protect owners from loss. An undue focus on the wrongful gain interest to the exclusion or diminution of the wrongful loss interest, under the current law of confidence, would mean that those measures are lacking.

Availability of remedies

56 A final consideration relates to the adequacy of remedies in situations where the wrongful loss interest has been infringed. The law relating to breach of confidence encompasses a wide range of factual situations and this has produced a “formidable armoury” of remedies which includes “injunctions and delivery up, as well as monetary remedies, whether termed equitable compensation or damages” (*Breach of Confidence* at para [17.01]).

57 Unfortunately, plaintiffs who have only suffered a violation of their wrongful loss interest may not always avail of these remedies and might find themselves with limited alternatives. This is then compounded by the fact that the wrongful loss suffered, meaning the dissipation of the confidential character of the information, does not always immediately translate into monetary terms or quantifiable detriment. The owner of the compromised information may know he has suffered loss but may only be able to speculate as to how, for example, this will negatively affect his business or future operations. This means that even a simple claim for damages will not necessarily succeed. It is clear that there can be significant obstacles in the way of plaintiffs seeking to vindicate their wrongful loss interest, independently of their wrongful gain interest.

Modified approach

58 Having determined that the wrongful loss interest is a legitimate objective undergirding the law of breach of confidence, we consider that the current legal framework does not adequately safeguard this interest or offer recourse where it has been affected. The requirement of unauthorised use and detriment has held back the development of the law by overemphasising the wrongful gain interest at the expense of the wrongful loss interest.

59 In evaluating how this imbalance ought to be rectified, we take cognisance of recent developments in England and Australia. In *Imerman v Tchenguiz and others* [2011] 2 WLR 592 ("*Imerman*") the English Court of Appeal relaxed the prerequisite of use and detriment and held that the act of looking at documents, which one knows to be confidential or "intentionally obtaining [confidential] information, secretly and knowing that the claimant reasonably expects it to be private, is itself a breach of confidence" (per Lord Neuberger MR at [68]). These are actionable wrongs because "the information will, through the unauthorised act[s] of the defendant, either lose its confidential character, or will at least be at risk of doing so" (*Imerman* at [69]). The reasoning in *Imerman* emphasises a plaintiff's right to preserve the confidentiality of their information, echoing the substance of the wrongful loss interest. The Federal Court of Australia in *Smith Kline* similarly held that the court's equitable jurisdiction to grant relief for a breach of confidence may be invoked where there is "actual or *threatened* abuse of confidential information" [emphasis added] (at 593). An obligation of confidence may be breached even where a wrongdoer has yet to actually profit from misuse.

60 These decisions were also discussed by the High Court in *Clearlab*. By way of background, the plaintiff company in *Clearlab* manufactured and sold

contact lenses and possessed a wealth of relevant confidential information for this purpose. A number of the plaintiff's employees subsequently joined a rival company called "Aquilus". Before leaving the plaintiff's employ, they took confidential documents, without authorisation, to create a database of information from which Aquilus could extract useful information. As there were clear instances where the defendants had actually used the plaintiff's materials for various purposes, the court was not required to address the question of whether the mere taking of confidential information, in the absence of use or disclosure, would constitute a breach of confidence. Nevertheless, the court summarised the positions taken in *Imerman* and *Smith Kline* before making the following observations (at [205]):

> [T]he courts have accepted that accessing, acquiring or threatening to abuse … confidential information may also form a breach of confidence. The turning point for this development seems to be an awareness that an obligation of confidence is ineluctably shaped by the particular facts of the case. I can imagine that the relationship between the parties, the manner in which confidential information was obtained, the measures taken to safeguard confidentiality, *etc*, would define the boundary of the defendants' obligation of confidence and, in turn, affect the analysis of whether the obligation was indeed breached. Thus, whether there has been breach of confidence appears to be a question of fact and degree that must be regarded in its wider context.
>
> [emphasis in original]

This dicta is useful in so far as it recognises the fluidity in the scope of a defendant's obligation of confidence, in turn reiterating the fact that the wrongful loss interest may be infringed in a variety of situations outside actual use and disclosure.

61 With these considerations in mind, we set out a modified approach that should be taken in relation to breach of confidence claims. Preserving the first two requirements in *Coco*, a court should consider whether the information in

question "has the necessary quality of confidence about it" and if it 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 these prerequisites, an action for breach of confidence is presumed. This might be displaced where, for instance, the defendant 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. Whatever the explanation, the burden will be on *the defendant* to prove that its conscience was unaffected. In our view, this modified approach places greater focus on the wrongful loss interest without undermining the protection of the wrongful profit interest.

62 A shift in the burden of proof also addresses the practical difficulties faced by owners of confidential information in bringing a claim in confidence. As noted at [55], plaintiffs may often be unaware of the fact that someone has done an act inconsistent with their right of confidentiality. A potential breach could be discovered years after, placing them on an evidential back-foot. Defendants are comparatively better positioned to account for their suspected wrongdoing.

63 It is undisputed that the appellant's materials, being an integral part of its business operations, were confidential in nature. They were not intended for dissemination and the respondents were under an obligation to preserve their confidentiality. They *prima facie* breached this obligation by acquiring, circulating and referencing the appellant's materials without permission. The respondents raise two points in reply. First, the Judge determined that there was evidence that most of the appellant's materials were downloaded and brought over to the third respondent by Ms Shen, a former employee of I-Admin

(Shanghai) (GD at [148]–[150]). The respondents, it is said, cannot be held responsible for her acts of taking. Second, the appellant is precluded from advancing a claim for breach of confidence in respect of materials circulated by the first respondent, such as the Payitem Bibles, as well as items stored on the Thinkpad. This is because these acts of possession and circulation were dealt with by the Judge as breaches of the first respondent's non-disclosure agreement (GD at [139]–[140]) and those findings were not appealed against. We reject these contentions.

64 While Ms Shen may have been directly responsible for certain acts of taking, this does not absolve the respondents from wrongdoing. The appellant's materials were specifically acquired to be reviewed and potentially used for the third respondent's benefit. The first and second respondents cannot feign ignorance as they were heavily involved in the third respondent's software development and operations. The mass deletions from the Thinkpad and the Dell Server on the day of the APO execution demonstrate that they knew they were not allowed to be in possession of the appellant's materials. As for the argument that these are to be analysed in the context of the claim for breach of the non-disclosure agreement, a breach of the first respondent's contractual obligations is a distinct cause of action from a claim premised on equitable obligations of confidence. The appellant is not foreclosed from relying on the same categories of materials to pursue its claim in confidence. On the available evidence, the respondents have done nothing to displace the presumption that their conscience was negatively affected. We accordingly find that the possession and referencing of the appellant's confidential materials constituted acts in breach of confidence.

65 We make the same finding in respect of the first respondent's downloading of the appellant's database "payitem setup_iAdmin.xls" from the

Demonstration Platform (at [23] above). After having left the appellant's employ on 30 June 2011, the first respondent retained and abused confidential log-in credentials to surreptitiously access the Demonstration Platform on multiple occasions. He also downloaded "payitem setup_iAdmin.xls", which the Judge deemed to be confidential in nature. This was plainly in breach of the first respondent's obligation of confidence.

66 For completeness, the appellant also advanced an *alternative* case as to the actual use of its confidential materials. Disputing the findings of the Judge (at [24] above), it claimed the respondents wrongfully disclosed the fact that they were in possession of the appellant's confidential client data to HSBC and ADP. It is not necessary to consider whether these disclosures did in fact constitute wrongful use. It follows from our findings above that the respondents' very possession of the appellant's client data without its consent amounted to a breach of confidence.

Appropriate remedy

67 We turn our attention to the question of remedies. The appellant's claim being founded on equity, remedial action is a matter of the court's discretion. A number of possible remedies were ventilated at the hearing, namely an injunction, an order for delivery up of unauthorised copies of the appellant's materials, an account of profits and/or damages. We consider the suitability of each of them in turn.

68 Injunctions and interim injunctions are often regarded as vital remedies in confidence cases because they operate to contain the damage suffered from the loss of confidentiality. Mr Lee's submissions focused on a final injunction, accompanied by an order for delivery up. Implicit in his request was the argument that there exists a risk of continued wrongdoing. Although the Judge

ordered a delivery up of "any materials belonging to the [appellant]" (GD at [172]), which the respondents say they have complied with, Mr Lee asserted that this order did not include any "infringing copies" of the appellant's materials. He referred to the emails between the first respondent and Ms Lim attaching different iterations of the third respondent's payitem bible. These documents should have also been subject to delivery up because the respondents would otherwise retain access to material belonging to the appellant, located therein.

69 Where a plaintiff establishes that (i) there has been a wrongful interference with their legal or equitable rights; and (ii) the defendant intends to continue this wrong, then, barring any special circumstances, he is *prima facie* entitled to an injunction (*Breach of Confidence* at para [18.48], citing *Pride of Derby and Derbyshire Angling Association Ltd and another v British Celanese Ltd and others* [1953] 2 WLR 58 at 81–82). The Judge found the third respondent's own software and business material to be sufficiently distinct from the appellant's Category 1 and 2 materials. There is no suggestion, that having now acquired their own intellectual property, the respondents are *still* relying on the appellant's materials in the course of the third respondent's business. Presumably, they have extracted any benefit from these files. Proceeding on this basis, there would be little benefit in or justification for the grant of an injunction.

70 The same reasoning applies to an order for delivery up. Referencing the first respondent's email correspondence with Ms Lim, there is limited utility in calling for a delivery up or deletion of the earlier versions of the respondents' payitem bible because these files are no longer in use. The respondents have since created "Payitem Bible_Singapore.xls". The appellant contends that wrongful copies of its materials should nonetheless be "returned or destroyed

… [because without] such an order, the information would still be 'out there' in the possession of someone who should not have it" (*Imerman* at 621). There are, however, difficulties in applying this reasoning to the present case. While the circulated drafts of the respondents' payitem bible contained content from the Payitem Bibles, edits were made over time, transforming the end-product into a new and unique document. At some point these drafts became the respondents' own content, as opposed to infringing copies. The blanket order for delivery up being sought by the appellant would also compel the surrender of materials which the respondents are entitled to retain possession of.

71 We would add that an injunction and/or delivery up order are somewhat unsatisfactory remedies by themselves as they do not set right the loss *already* suffered by virtue of the respondents' unconscionable conduct. Problematically, equitable monetary remedies do not guarantee more ideal outcomes (David Brennan, "*A short argument in favour of all-proceeds remedies for breach of confidence"* (2012) 17 MALR 232):

> A classic profits-based remedy requiring [the defendant] to disgorge his net monetary gains [from the breach] may be seen to present insurmountable problems of accounting because so much of [the defendant's] own capital has been intermingled with the information in [the defendant's] commercial use of it. Alternatively, making allowance for [the defendant's] own capital might make the award very modest or even nominal.
>
> An award of money as equitable compensation for what [the plaintiff has lost] — so that [the defendant] is obliged to put [the plaintiff] in the position [it] would have been in if the duty of confidence had not been breached — creates such a wildly counter-factual basis of calculation that a court may rail against it as unduly speculative …

72 The appeal before us does not lend itself to an account of profits analysis because there was no finding of actual use of the appellant's materials. The appellant faces the nearly "insurmountable" challenge of quantifying the portion of the third respondent's proceeds attributable to the referencing and reviewing

of its materials. Likewise, equitable compensation would be inappropriate. The restitutionary objective of equitable compensation requires that a plaintiff be restored to the same position they would have been in if the breach had not been effected. However, as noted by Prof Brennan, this may prove to be a highly speculative exercise, particularly where there has been no actionable use of the confidential information.

73 This leaves a possible award of equitable damages, a statutory remedy under s 2 of the Chancery Amendment Act 1858 (c 27) (UK) ("Chancery Amendment Act") where a court "is not limited to any specific basis for assessing damages" (*Lunn Poly Ltd and another v Liverpool & Lancashire Properties Ltd and another* [2006] 2 EGLR 2 at [22]). Prior to the enactment of the Chancery Amendment Act, one of the Acts which led to the combined administration of law and equity, the English Courts of Chancery sporadically used their power to award monetary compensation but ordinarily considered it undesirable to do so (*Breach of Confidence* at [19.10]; see also, I.C.F. Spry, *The Principles of Equitable Remedies: Specific Performance, Injunctions, Rectification and Equitable Damages* (Lawbook Co, 8th Ed, 2010) at p 623)). Section 2 of the Chancery Amendment Act, better known as Lord Cairns' Act, provided that:

> [where] the Court of Chancery has jurisdiction to entertain an application for an injunction … against the commission or continuance of any wrongful act … it shall be lawful for the same Court … to award damages … either in addition to or in substitution for such injunction or specific performance, and such damages may be assessed in such manner as the Court shall direct.

74 Notwithstanding initial debate as to the intended scope of s 2 and whether the phrase "wrongful act" was envisaged to include causes of action that fell within the exclusive jurisdiction of equity (*Breach of Confidence* at

[19.12]), English courts have applied Lord Cairns' Act in relation to purely equitable rights including breaches of confidence. Besides ordering the delivery up of confidential drawings in the defendant's possession, the Court of Appeal in *Saltman* called for an inquiry on "what damages have been and may be suffered … by reason of the [d]efendant's breaches of confidence" (per Cohen J at 219).

75 The decision in *Seager* produced a similar outcome, although the award of damages was not expressly made under Lord Cairns' Act. The plaintiff in that case invented a carpet grip and obtained a patent for it. He then commenced negotiations with the defendant company to market the grip. During negotiations, the plaintiff described, in confidence, the features of his design as well as a potential alternative design. When the parties' discussions concluded unsuccessfully, the defendant went on to produce its own carpet grip, embodying the alternative design disclosed by the plaintiff. Lord Denning MR opined that the defendant had to pay for the advantage it had gained by using information received in confidence. He then stated that "[i]t may not be a case for injunction or even for an account, but only for damages, depending on the worth of the confidential information to [the defendant] in saving him time and trouble" (*Seager* at 932). The court went on to order an inquiry by a Chancery master (the "Master") for damages to be assessed.

76 In proceedings before the Master, the plaintiff advanced two alternative bases for the computation of damages: capitalised royalties or the loss suffered by his carpet grip business. The defendant proposed that reasonable remuneration should be the cost of hiring a consultant who would have provided information of the character of the plaintiff's confidential information. The Master decided that the Court of Appeal should determine which of the three bases was correct. In *Seager v Copydex Ltd (No 2)* [1969] 1 WLR 809 ("*Seager*

(No 2)”), the court reiterated that damages were to be assessed at “the value of the [confidential] information”. On the facts, there were two possibilities. If the plaintiff’s information were of a sort that the defendant could have obtained by employing a competent consultant, its value would be the consultant’s fee. This would have been the cost saved by the defendant’s taking of the information. If, however, the information were “something special” such as a patentable invention, its value to a defendant would be higher. The value of the information would be the price a willing buyer would pay a willing seller for it (per Lord Denning MR at 813). Given the nature of the plaintiff’s information, it was concluded that damages should be assessed on this latter basis.

77 It is uncontroversial that Singapore courts have the jurisdiction to award equitable damages. Paragraph 14 of the First Schedule to the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed), read with s 18(2) thereof, gives the High Court the “[p]ower to grant all reliefs and remedies at law and equity, including damages in addition to, or in substitution for, an injunction or specific performance”; see also *Turf Club Auto Emporium Pte Ltd and others v Yeo Boong Hua and others and another appeal* [2018] 2 SLR 655 at [141]. The remedy of equitable damages is attractive because it affords the court the flexibility to determine the manner in which damages should be assessed. To that end, the dicta in the *Seager* decisions serve as a useful guide.

78 The respondents “saved themselves the time and trouble” (see *Seager (No 2)* at 813) of developing the third respondent’s software and business materials from scratch because they were able to refer to and even extract content from the appellant’s confidential information. They used the appellant’s materials as a “spring-board” (*Seager* at 932) to create their own intellectual property. As an example, “cpf.xls”, the appellant’s CPF database, was created using CPF calculation rule data as well as CPF contribution rates for different

income and age ranges (GD at [63(b)] and [69]). The respondents were saved the additional expense of compiling this information themselves or having to employ additional members of staff. The value of the appellant's information would therefore be the cost saved by the respondents in taking that information.

79 As to the precise measure of damages, we consider it appropriate to remit this question to the Judge. Suit 585/2013 was bifurcated, and the Judge would be best placed to undertake such an inquiry having heard evidence on the manner in which the appellant's materials may have been exploited. We direct that in determining the appropriate award, the Judge ought to consider 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. Besides the financial expense the respondents would have incurred to develop these components independently, it may also be relevant to look at the reduction in the time taken to set up the third respondent's business, allowing it to commence profit-making earlier. Taken together, this would provide a quantifiable impression of the value of the appellant's information to the respondents.

Conclusion

80 For these reasons, we allow the appeal in part. The appellant should succeed in its claims for breach of confidence and have its injury vindicated by a measure of equitable damages, to be assessed.

81 Unless the parties are able to come to an agreement on costs here and below, they are to furnish within 21 days of the date of this judgment, written submissions limited to ten pages setting out the costs orders they each contend we should make.

Sundaresh Menon Chief Justice	Andrew Phang Boon Leong Judge of Appeal	Quentin Loh Judge

Lee Eng Beng *SC*, Tng Sheng Rong and Leow Jiamin (Rajah & Tann Singapore LLP) for the appellant; and
Lai Tze Chang Stanley *SC* and Leong Yi-Ming (Allen & Gledhill LLP) for the first to fourth respondents.