IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2024] SGCA 16

Court of Appeal / Civil Appeal No 38 of 2023

Between

(1) Priscilla Lim Suk Ling
(2) UrbanRx Compounding Pharmacy Pte Ltd

… *Appellants*

And

(1) Amber Compounding Pharmacy Pte Ltd
(2) Amber Laboratories Pte Ltd

… *Respondents*

In the matter of HC/S 164/2018 (Summons 1589 of 2023)

Between

(1) Amber Compounding Pharmacy Pte Ltd
(2) Amber Laboratories Pte Ltd

… *Plaintiffs*

And

(1) Priscilla Lim Suk Ling
(2) UrbanRx Compounding Pharmacy Pte Ltd
(3) Muhammad ‘Ainul Yaqien Bin Mohamed Zin
(4) Daniel James Tai Hann
(5) Tee I-Lin Cheryl

(6) Tan Bo Chuan

… *Defendants*

GROUNDS OF DECISION

[Intellectual Property — Law of confidence — Breach of confidence]

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v
Amber Compounding Pharmacy Pte Ltd and another

[2024] SGCA 16

Court of Appeal — Civil Appeal No 38 of 2023
Sundaresh Menon CJ, Steven Chong JCA, Andrew Phang Boon Leong SJ
26 March 2024

20 May 2024

Steven Chong JCA (delivering the grounds of decision of the court):

Introduction

1 This was an unusual appeal in one significant aspect. At the end of the hearing, we allowed the appeal even though we found that the judge below (the "Judge") was entirely correct in his decision with respect to the issue that was argued before him.

2 To place this unusual development in its proper context, it is important to explain how this appeal came about. The appellants had entered into a consent judgment in an action for breach of confidence with respect to numerous documents containing confidential information which were improperly obtained (collectively, the "Confidential Information") during the first appellant's part-time employment with the respondents.

3 Prior to the assessment of damages and given the breadth of the pleadings, the Judge invited the parties to reach an agreement as to whether the respondents are entitled, *in the same action*, to claim *both* traditional damages for wrongful gain under the principles laid down in *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41 ("*Coco*") and equitable damages for wrongful loss under the principles laid down in *I-Admin (Singapore) Pte Ltd v Hong Ying Ting and others* [2020] 1 SLR 1130 ("*I-Admin*"), failing which an application should be filed for this issue to be preliminarily determined under O 33 r 2 of the Rules of Court (2014 Rev Ed). As the parties were unable to reach any agreement, HC/SUM 1589/2023 ("SUM 1589") was duly filed.

4 The Judge decided in SUM 1589 that the respondents are indeed entitled to mount a claim for both wrongful gain and wrongful loss in the same *action* (the "Narrow Issue"), and his reasons are recorded in *Amber Compounding Pharmacy Pte Ltd and another v Lim Suk Ling Priscilla and others* [2023] SGHC 241 (the "Judgment"). He, however, made it clear at [31] of the Judgment that "the parties have not argued before [him] that for the *same document*, the plaintiffs are entitled to claim for both the wrongful gain interest and the wrongful loss interest" [emphasis added] (the "Broad Issue"). The Judge was correct in his decision with regard to the Narrow Issue as well as his observation that the Broad Issue was not argued before him.

5 The appellants sought permission to appeal against the decision. In granting permission to appeal, the Appellate Division of the High Court (the "Appellate Division"), took the view that the Broad Issue was in fact live between the parties as it arose from the respondents' pleadings. Thereafter, the appeal was transferred from the Appellate Division to this court to decide the

Narrow and Broad Issues, on the premise that a decision on both issues would be to the public advantage.

6 While the parties and the Judge were fully cognisant that a consent judgment had been entered into, it appears that the terms and effect of the consent judgment and its consequential impact on the application were overlooked. In particular, the consent judgment expressly provided that the appellants had "unconditionally admit[ted] to the unauthorized use of [the] Confidential Information". Accordingly, the respondents' case was thereafter predicated *solely* on the unauthorised use of the Confidential Information and hence rested entirely on the wrongful gain interest; it was not premised at all on any unauthorised taking of the documents by the appellants and therefore did not engage the wrongful loss interest. In our judgment, based on the terms of the consent judgment, the only damages that the respondents can claim are traditional damages under *Coco*.

7 That being the case, the Narrow Issue, although correctly decided by the Judge, was rendered moot and the appeal was allowed on this basis. Furthermore, the Broad Issue which the Judge noted was not argued before him, and which the Appellate Division identified for determination by this court, likewise became academic since that issue was predicated on a *pending* claim for *both* wrongful gain *and* wrongful loss with respect to *same set of documents or information*. In the light of the terms of the consent judgment, the Broad Issue therefore strictly did not arise for our determination since the respondents are only left to pursue the wrongful gain interest.

8 These are our detailed grounds. As it appeared from the parties' submissions that there was some misunderstanding as to the ramifications of

this court's decision in *I-Admin* on the Narrow and Broad Issues, we take this opportunity to explain its relevance and impact on both issues and their relationship with each other.

Material facts

The claim in Suit 164

9 The first and second respondents, Amber Compounding Pharmacy Pte Ltd and Amber Laboratories Pte Ltd respectively, are in the specialised trade of compounding medical and pharmaceutical products, which involves preparing personalised medications for patients based on a practitioner's prescription.

10 The first appellant, Priscilla Lim Suk Ling ("Ms Lim"), worked for the first respondent on a part-time basis in 2012, and subsequently again between May/June to July 2016. On 28 July 2017, Ms Lim, together with one Daniel James Tai Hann, incorporated UrbanRx Compounding Pharmacy Pte Ltd, which is a company which operates a compounding business and the second appellant in this appeal.

11 The respondents commenced HC/S 164/2018 ("Suit 164") on 14 February 2018, alleging that its former employees, including the appellants, committed breach of confidence by copying, exploiting, and disclosing the respondents' confidential information and/or trade secrets.

The consent judgment

12 After fairly protracted proceedings involving multiple applications and numerous affidavits, a settlement agreement was eventually concluded by way of consent judgment entered into on 14 September 2020, in which the parties in

this appeal, who were legally represented at the material time, agreed to the following:

> … The [appellants] unconditionally admit to receiving a hard disk from the [5th defendant in Suit 164] containing Confidential Information (which the [5th defendant in Suit 164] wrongly took without authorization of the [respondents]), and to the unauthorized access and unauthorized use of the said Confidential Information. …
>
> … Damages shall be assessed […] considering, amongst other things, the extent of the use of the Confidential Information, the extent of dissemination of Confidential Information (including Confidential Information in the hard disk received from the [5th defendant in Suit 164] as referred to in paragraph 2 above.

13 Prior to the consent judgment, the respondents were required to prove their pleaded claims for wrongful gain or wrongful loss with respect to each document, depending on whether there was evidence of unauthorised use by the appellants and resulting detriment to the respondents. The effect of the consent judgment is such that the respondents are now no longer required to prove either claim, as the respondents' pleaded claims are superseded by the consent judgment (see the Court of Appeal decision of *Indian Overseas Bank v Motorcycle Industries (1973) Pte Ltd and others* [1992] 3 SLR(R) 841 at [13]). It follows therefore that the remedies to which the respondents are entitled would be circumscribed by the terms of the consent judgment. It is also pertinent to add that the court would generally not interfere with the terms of a consent judgment after it had been made and perfected absent any fraud or other grounds upon which it could be set aside (see the High Court decision of *Bakery Mart Pte Ltd v Ng Wei Teck Michael and others* [2005] 1 SLR(R) 28 at [11]).

14 The terms of the consent judgment therefore preclude the respondents from obtaining damages for a claim falling outside the scope of what was agreed by the parties. As the loss referred to in the consent judgment was solely

predicated on the unauthorised *use* of the Confidential Information and *not* on any unauthorised taking of the Confidential Information by the appellants, it is no longer open for the respondents to claim for wrongful loss at the assessment of damages hearing.

The decision below

15 However, as the effect of the consent judgment was not appreciated by the parties, they nevertheless proceeded with SUM 1589 on the basis that the Narrow Issue arose for determination. The Judge answered the Narrow Issue in the positive and held that "a plaintiff is entitled to plead that it is proceeding on *both* the wrongful gain interest and the wrongful loss interest in a claim for breach of confidence" [emphasis in original] (at [16]).

16 The Judge provided three reasons in support of his conclusion. First, there was no binding authority that precludes a plaintiff from claiming that its wrongful loss and wrongful gain interests were both affected by a defendant's breach of confidence (see Judgment at [18]). Second, the position that a plaintiff may plead and claim the wrongful gain and wrongful loss interests is also strengthened by the rationale for declaring the existence of both forms of interest, which is to bolster and enhance protection for confidentiality (see Judgment at [22]). Third, there was no conflicting High Court *dicta* against his conclusion (see Judgment at [23]). The Judge concluded with an observation that the *Coco* and *I-Admin* approaches each seek to protect different wrongs and a plaintiff should be entitled to have both interests protected (see Judgment at [31]).

17 As explained above (at [4]), the Judge confined his decision to the Narrow Issue and did not consider whether "for the same document, the

[respondents] are entitled to claim for both the wrongful gain interest and the wrongful loss interest" (see Judgment at [31]).

The application for permission to appeal

18 However, before the Appellate Division when the application for permission to appeal was decided, the Broad Issue was alluded to in the respondents' written submissions, which stated:

> … It bears highlighting that there were countless pieces of [Confidential Information] taken and used by the [appellants] (as they had admitted in the Consent Judgment dated 14 September 2020), and leaving aside the issue of whether *a claimant in a breach of confidence case can suffer from wrongful loss and wrongful gain in respect of the* ***same item*** *of* [*Confidential Information*] *that a wrongdoer has taken and used (which the Respondents contend is possible),* it is *also* entirely possible for a claimant in a breach of confidence case to suffer wrongful loss in respect of some items of [Confidential Information] and wrongful gain in respect of the other items of [Confidential Information].
>
> [emphasis in original omitted; emphasis added in italics and bold italics]

19 Thereafter, the Appellate Division explicitly identified the Broad Issue for consideration in its decision to grant permission to appeal, dated 25 October 2023. The Appellate Division was of the view that the Broad Issue was "related" to the Narrow Issue, and "will determine how a plaintiff can plead for losses in a claim for breach of confidence and the issue of the burden of proof".

20 While not explicitly stated by the Appellate Division, it appears that the Broad Issue was identified because it arose from the respondents' pleaded claim. In the respondents' Statement of Claim dated 14 February 2018, there was some allusion to wrongful loss as the respondents were claiming for "damages to be assessed for breach of confidence and/or *equitable remedies of*

confidentiality" [emphasis added]. On 16 November 2021, after the entering of the consent judgment, the appellants informed the court at a pre-trial conference for the assessment of damages that supplemental pleadings would be helpful since many of the issues in the original Statement of Claim had already been resolved by the consent judgment, but it was not clear what the respondents would be claiming for in terms of damages. Following several rounds of amendments, the respondents filed their Supplemental Statement of Claim (Amendment No 3) dated 1 August 2023 wherein the respondents claimed for, among other things, "[l]oss, dilution or erosion of the confidentiality" (*ie*, the infringement of the *wrongful gain interest*), as well as "[e]quitable damages on the ground that the 1st and 2nd [appellants] had used the Confidential Information as a springboard … the [respondents] have been deprived of potential fees in respect of the licensing and use of the Confidential Information" (*ie*, the infringement of *wrongful gain interest*).

Parties' cases on appeal

21 On appeal before us, the appellants argued that both the Narrow and Broad Issues should be answered in the negative.

22 In respect of the Narrow Issue, the appellants submitted that it is not feasible to separate confidential information into separate "sets" of documents and that confidential information must be assessed in its entirety. This was especially since the respondents' pleaded case is that all of the Confidential Information was used by the appellants as a springboard to set up and operate the second appellant. The appellants also submitted that in cases of breach of confidence, where the plaintiffs were awarded damages for the wrongful use of confidential information under *Coco*, the courts did not award additional damages for confidential information that was not used by the defendants. It

was further submitted that it would not be feasible to assess the value of confidential information that was taken but not used since confidential information only has value as a whole and not in its individual components. They also argued that there is only one cause of action for breach of confidence, and what *I-Admin* recognised was that there are two distinct interests that the law seeks to protect. Both interests are affected by the same wrong, and to allow damages to be claimed under both interests for the same wrong is to allow double recovery. In sum, their position was that "[t]he wrongful gain interest is engaged when the confidential information is used whereas the wrongful loss interest is engaged when there is no use". Further, the plaintiff must elect to claim damages either on the basis of his wrongful gain interest under *Coco* or equitable damages on the basis of his wrongful loss interest under *I-Admin*.

23 On the Broad Issue, the appellants similarly submitted that the wrongful gain interest is engaged when there is use of the confidential information while the wrongful loss interest is engaged when there is no use of such information. They also argued that it was also unclear on whom the burden of proof should rest in a case where a plaintiff claims for damages in relation to both the wrongful gain and wrongful loss interests, given that the *Coco* and *I-Admin* approaches adopt different burdens of proof. In this regard, it was submitted that a trial would be more sensibly conducted if a plaintiff were required to elect at the outset whether he is claiming for the wrongful gain interest or the wrongful loss interest.

24 The respondents submitted to the contrary, that the Narrow and Broad Issues should be answered in the affirmative. In relation to the Narrow Issue, the respondents contended that *I-Admin* at [54], which states that "it may not always be the case that a defendant's conduct will affect both the wrongful gain

and wrongful loss interests", should be read as supporting the inference that there are "some cases where a defendant's conduct will affect *both* the wrongful gain and wrongful loss interests" [emphasis in original]. As the two interests are distinct, a plaintiff should be able to plead and claim in respect of both interests. An injured party would have an independent cause of action in respect of each confidential document.

25 The respondents further submitted as regards the Broad Issue that it is possible for a plaintiff to have both his wrongful gain and wrongful loss interests infringed by the use of the same document or the same set of documents. The respondents pointed out that they had suffered a loss of profit in respect of products that they could have sold to customers poached by the appellants, and that at the same time, the appellants had enjoyed a springboard effect from the use of the respondents' pharmaceutical formulas, customer list and product pricing, as well as secured a competitive advantage that they would not have had if the confidential information was not stolen. As the respondents had suffered both types of damages from the same set of documents, they should not be made to elect which loss they are claiming for as this would deprive them of proper compensation.

Our decision

The law of confidentiality and recent developments

26 The law relating to the protection of confidential information has a long pedigree and historically found expression in various forms, such as in breach of contract, the tort of inducing breach of contract, and criminal offences (see Tanya Aplin et al*, Gurry on Breach of Confidence* (Oxford University Press, 2nd Ed, 2012) ("*Gurry*") at para 2.03). Yet, at least conventionally understood,

it was not until the mid-nineteenth century that the seeds of growth for the development of a distinct cause of action in breach of confidence were firmly planted in the case of *Prince Albert v Strange* (1849) 47 ER 1302 ("*Prince Albert*"). In that case, Lord Cottenham LC conceptualised the court's jurisdiction to grant an injunction against several defendants who had "surreptitiously and improperly obtained" etchings of the Royal Family made by Prince Albert as one "originat[ing] in breach of trust, confidence *or* contract" [emphasis added] (at 1311). This observation indicated that a cause of action existed independently from contract.

27 Two years later, in *Morison v Moat* (1851) 9 Hare 241 ("*Morison*"), *Prince Albert* was cited as authority for the granting of an injunction against the use of a secret relating to the making of a medicine, and Sir George Turner VC famously recognised the existence of an independent cause of action "founded upon trust or confidence" (at 255). Notwithstanding what was then a significant development in the protection of confidential information, a commentator has observed that "the most remarkable feature of the century that followed the decision was how little the case was used or referred to" (see *Gurry on Breach of Confidence* at para 2.91).

28 The development of the modern law of confidence finally gained momentum after the Second World War in the decisions of *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* (1948) 65 RPC 203 ("*Saltman*"), *Duchess of Argyll v Duke of Argyll* [1967] Ch 302, and *Seager v Copydex Ltd* [1967] 1 WLR 923. Those cases further reinforced the position that a claim for breach of confidence was a distinctive cause of action that arose independently of contract. A high point in this area of law was arrived at in *Coco*, where Megarry J distilled the principles set out in previous cases and laid

down the oft-cited traditional test for an action in breach of confidence, requiring amongst other things that a plaintiff prove unauthorised use of confidential information to the detriment of the plaintiff from whom the confidential information originated (see the High Court decision of *Clearlab SG Pte Ltd v Ting Chong Chai and others* [2015] 1 SLR 163 ("*Clearlab*") at [64], citing *Coco* at 47). This requirement, as well as the language of taking "unfair advantage" of information that was used in some cases, pointed to the protection of a specific interest: a plaintiff's interest in preventing wrongful gain or profit from its confidential information. We termed this the "wrongful gain interest" in *I-Admin* (at [50]).

29 At the same time, we saw in *I-Admin* the need to recognise and protect an additional interest (at [43]), consistent with the notion that the law of confidence is a developing area "the boundaries of which are not immutable" (see the Court of Appeal of England and Wales decision of *Douglas and others v Hello! Ltd* [2001] 2 WLR 992 at [165]). Indeed, we observed that the requirement in *Coco* of unauthorised use and resulting detriment had come under increased scrutiny because there may often be circumstances where defendants wrongfully access or acquire confidential information but do not use or disclose the same. The framework in *Coco* could not avail plaintiffs of a remedy in such situations, even when it was clear that the confidentiality of such information had been wrongfully compromised (see *I-Admin* at [54]–[57]). This was the impetus in *I-Admin* for recognising an additional interest that can be vindicated under the same cause of action in breach of confidence.

30 We observed in *I-Admin* that a deeper examination of the earlier authorities in the law of confidence revealed that the initial policy objectives behind the law of confidence may have extended beyond safeguarding against

wrongful gain. Before *Coco*, some of the cases concerning breach of confidence omitted any mention of detriment and rationalised the protection of confidentiality as arising from an "obligation on the conscience" (see *Morison* at 255). In our view, this imported a "broader, more fundamental, equity-based rationalisation for the protection of confidentiality" (see *I-Admin* at [51]). We therefore considered that besides a plaintiff's wrongful gain interest, the law was also interested in a plaintiff's *distinct* interest in avoiding wrongful loss. We termed this the "wrongful loss interest", which is infringed so long as a defendant's conscience has been impacted in breach of the obligation of confidentiality (see *I-Admin* at [53]).

31 To afford robust protection for the wrongful loss interest, a modified approach was established. The innovation of *I-Admin* was to vindicate the wrongful loss interest in situations where confidential information was accessed without authorisation (termed "taker" situations). In such situations, we made relief possible where the first two elements of *Coco* are satisfied *and* the conscience of the defendant is affected. Recognising the practical difficulties faced by owners of confidential information in bringing a claim, a breach of confidence is presumed upon the satisfaction of the first two elements of *Coco* and the burden of proof is placed on the defendant to prove that his conscience is unaffected (see *I-Admin* at [61]). The fact that the legal burdens of proof in the *I-Admin* and *Coco* tests are different reflects the principle that the two tests served to protect *distinct* interests. Further to this, we also recognised that where a breach of confidence under the *I-Admin* test is made out, it is open for the court to make an award of equitable damages, which affords the court the flexibility to determine the manner in which damages should be assessed (see *I-Admin* at [73] and [77]).

32 It is clear from the foregoing discussion that the modified approach in *I-Admin* was intended to address a specific *lacuna* in the law at that time, which prevented a plaintiff from obtaining a remedy where a defendant wrongfully accesses or acquires confidential information but does not use or disclose the same. It is *only* in such situations that the *I-Admin* approach is meant to apply to vindicate the wrongful loss interest. In contrast, in situations where the third element of the *Coco* test is satisfied and the wrongful gain interest is accordingly vindicated, there is no *lacuna* and the *I-Admin* test does not apply.

33 We should also clarify what this court stated at [41] of *Lim Oon Kuin and others v Rajah & Tann Singapore LLP and another appeal* [2022] 2 SLR 280 ("*Lim Oon Kuin*") on the requirement under the *I-Admin* test that the defendant must be an unauthorised "taker", because the distinction between an unauthorised taker and someone who lawfully obtains the information can be easily misunderstood. In the latter case, the only circumstance where a breach of confidence arises is where there is a "real and sensible possibility" of misuse of the confidential information by the defendant (see the Court of Appeal decision of *LVM Law Chambers LLC v Wan Hoe Keet and another and another matter* [2020] 1 SLR 1083 at [21]). Where information is lawfully possessed by an individual, and there is no intention to improperly use or disclose it, there is simply no breach of confidence at all. Neither the *Coco* nor the *I-Admin* test would be engaged.

The Narrow Issue

34 While the Narrow Issue was rendered moot by the terms of the consent judgment, we nevertheless take this opportunity to express our view that, in relation to *pending* claims in the same action, there is no impediment to claiming for breach of confidence under the *I-Admin* approach in relation to one set of

documents or information, and under the *Coco* approach for another set of documents or information.

35 This conclusion is obvious when two germane characteristics of the law of confidence are considered. First, whether an action for breach of confidence is made out is a fact-sensitive question. An assessment of whether there is breach of confidence does not simply involve the question of whether some information at large has been accessed or obtained without authorisation, but also the question of *what* information has been accessed or obtained and whether such information possesses the necessary quality of confidence. The court is not bound to find that the defendant is either liable for breach of confidence in respect of *all* the documents which is the subject of the claim, or in respect of *none* of the documents.

36 This was illustrated in at least two decisions which show that the question of whether breach of confidence is made out must be assessed with reference to the *specific* documents or information in the case at hand. In *Swift Maids Pte Ltd and another v Cheong Yi Qiang and others* [2023] SGHC 317, the General Division of the High Court (the "General Division") held (at [80]) that not every individual component of the allegedly confidential information which was the subject of the claim had the necessary quality of confidence. Similarly, in *Asia Petworld Pte Ltd v Sivabalan s/o Ramasami and another* [2022] 5 SLR 805, the same court opined that not all information that an employee was obliged to keep confidential during his employment was information that was protectable as confidential information after he ceases to be employed (at [42]). It was significant that there were broadly four categories of information which the plaintiff had alleged to be confidential, and the court did not treat those four categories as a single whole. Instead, each category was

analysed separately to determine if that category bore the necessary quality of confidence (at [21] and [45]–[54]). It is therefore entirely possible that confidential information may be segregated and whether there has been a breach of the obligation of confidence can be separately assessed.

37 Second, quite apart from the question of whether the information in question was confidential, it was also not uncommon for courts to find that some information had been used without authorisation and others not. The facts of *Clearlab* are illustrative. The defendants were found to have wrongfully used *some* of the plaintiff's confidential information and had also taken thousands of documents belonging to the plaintiff. Given the promptness with which the plaintiff obtained an interim injunction against the defendants, there were other documents that the defendants had no opportunity of using by the time of the proceedings (at [196]). The High Court found that there had been actual use of the information by the defendants in relation to some categories of confidential information (at [157]–[194]) but, for another category of confidential information, there was no evidence that the defendants had made actual use of it (at [208]–[210]).

38 In that case, while the plaintiff's wrongful gain interest in respect of the latter group of documents was not infringed, those documents were nevertheless confidential and obtained in an unauthorised manner in violation of the plaintiff's wrongful loss interest. Yet, prior to *I-Admin*, there was no remedy for such violations, and it was such situations which necessitated a new approach that would provide a remedy for the wrongful diminution of the confidentiality of the unused information. It would surely go against the tenor of *I-Admin* if there are some categories of confidential information or documents in respect of which a plaintiff is unable to obtain a remedy even if his wrongful loss

interest has been infringed. To take an extreme example, suppose that the defendant took from the plaintiff ten categories of documents without authorisation. The vast amount of the documents obtained relate to nine categories. However, these nine categories have not been used without authorisation and only one category has been used without authorisation. In such a scenario, if the plaintiff claims for breach of confidence in respect of that single category under the *Coco* approach and in so doing is disentitled from claiming in relation to the other nine categories, his wrongful loss interest in relation to those nine categories would be wholly unvindicated. This cannot be the import of *I-Admin* and the subsequent decisions that followed.

39 From the foregoing, it follows that a plaintiff is not prevented from pleading that there was a breach of confidence in respect of one set of documents or information under the *Coco* test while simultaneously mounting a claim under the *I-Admin* test in the same action in respect of a different set of documents or information. He is well entitled to seek to vindicate his wrongful gain interest in respect of the documents or information which he says has been used without authorisation to his detriment, and to also mount a claim for his distinct wrongful loss interest in respect of other documents or information. However, whether the court would ultimately award damages for wrongful gain and wrongful loss with respect to different categories of documents is a function of the evidence before the court.

40 For completeness, we deal briefly with the appellants' written submissions on appeal. The appellants submitted that "it is not feasible to separate confidential information into separate 'sets' of documents" and that the value of confidential information must be assessed in its entirety, relying on Prof Ng-Loy Wee Loon's analysis in *Law of Intellectual Property of Singapore*

(Sweet & Maxwell, 3rd Ed, 2021) ("*Law of Intellectual Property*") at paras 39.2.9–39.2.14. However, this was not an accurate representation of Prof Ng-Loy's analysis. Her statements were made with reference to the principle that it is not fatal to a breach of confidence claim if the confidential information had *components* which were already in the public domain. For example, in the High Court decision of *Stratech Systems Limited v Guthrie Properties (S) Pte Ltd and Another* [2001] SGHC 77, the fact that the technical information included components that were already practised by persons skilled in the area was not fatal to the plaintiff's case, as the confidentiality in the technical information did not lie in the individual components but in the way that the plaintiff had combined these components to work as an integrated unit. It was therefore determined in that case that the technical information as an integrated unit possessed the necessary quality of confidence (see *Law of Intellectual Property* at para 39.2.10). In these paragraphs, Prof Ng-Loy was *not* commenting on whether confidential information can be segregated such that a claimant can plead that its wrongful gain interest was engaged in respect of one set of documents and that its wrongful loss interest was engaged in respect of another set of documents. In any event, from the example in *Clearlab* (see [37] above), it is abundantly clear as a matter of legal principle that whether confidential information can be segregated into different sets must be a question which is dependent on the specific facts of each case.

41 The appellants also relied on two decisions of the General Division, namely *Writers Studio Pte Ltd v Chin Kwok Yung* [2023] 4 SLR 814 ("*Writers Studio")* and *Shanghai Afute Food and Beverage Management Co Ltd v Tan Swee Meng and others* [2024] 3 SLR 1098 ("*Shanghai Afute*"), in arguing that the Narrow Issue should be answered in the negative. Likewise, their arguments did not withstand scrutiny.

(a) In *Writers Studio*, Lee Seiu Kin J stated that following the clarifications provided on the modified *I-Admin* approach, counsel should take care to "plead with specificity, whether they are proceeding on the basis of the 'wrongful loss' or 'wrongful gain' interest" (at [135]). The appellants submitted that if Lee J thought that plaintiffs could claim on the basis of both the wrongful gain and wrongful loss interests, he would not have stated that. However, as the Judge observed (see Judgment at [26]), Lee J was not making a pronouncement that a plaintiff may only plead either the wrongful loss interest or wrongful gain interest when claiming for breach of confidence, but was merely reminding counsel to sufficiently plead their clients' case for breach of confidence and to be clear which basis they would be proceeding on, in view of the differing interests which guide breach of confidence claims.

(b) The appellants further submitted that the Judge should not have departed from his earlier decision in *Shanghai Afute*. In *Shanghai Afute*, the Judge noted that "the correct approach is first to determine whether the defendant's actions were an incursion to the wrongful gain interest or the wrongful loss interest, before applying the traditional approach or the modified approach respectively" (at [103]). However, we agreed with the Judge that since that case did not concern a "taker" scenario, the only plausible interest that was engaged was the wrongful gain interest, and therefore the Narrow Issue did not arise on those facts (see Judgment at [30]).

42 For these reasons, we had no difficulty in affirming the Judge's decision on the Narrow Issue which was eminently correct as a matter of legal principle. This leaves us with the Broad Issue to which we now turn.

The Broad Issue

43 To date, the Broad Issue has not squarely been decided by this court although, as we explain below, its determination flows from a logical extension of our decision on the Narrow Issue.

44 The Broad Issue contemplates a *pending* claim for *both* the wrongful gain and wrongful loss interests with respect to the *same* set of documents. Although this arises from the respondents' pleadings, it had been overtaken by the terms of the consent judgment. Nonetheless, given the importance of this issue, we provide our views.

45 As we explained above (at [32]), the modified approach in *I-Admin* was intended to fill a specific *lacuna* in the law where no remedy was available in "taker" situations involving a diminution in the confidentiality of the information notwithstanding that unauthorised use and/or resulting detriment was not proved. Claims to vindicate the wrongful gain and wrongful loss interests are unique to the *Coco* and *I-Admin* tests respectively, and both tests cannot apply at the same time in respect of the same document or piece of information as the application of the *Coco* test would necessarily mean that there is no *lacuna* that would engage the *I-Admin* test. It therefore follows that claims for the vindication of the wrongful gain interest are mutually exclusive with claims to vindicate the wrongful loss interest in respect of the same document or piece of information. Hence, where the plaintiff's case is that the third limb of the traditional *Coco* test is satisfied, he should typically proceed under the *Coco* test which is geared towards the wrongful gain interest. Where there is no use made of the confidential information and/or no resulting detriment, but the confidential information was nevertheless accessed without authorisation, the plaintiff can proceed under the modified test in *I-Admin* to

seek a remedy to reflect the interest he has in preventing the wrongful diminution of the confidentiality of his information.

46 We do not think that precluding the application of the *I-Admin* test in situations where the *Coco* test is already satisfied would deprive a plaintiff of the full measure of damages to which he is entitled. As we indicated in *Lim Oon Kuin* (at [39]), the introduction of the modified approach in *I-Admin* was not intended to turn the *Coco* test on its head. It certainly does not change the types of remedies and measures of damages that were available in a claim for breach of confidence under the traditional approach, and the principles which were previously instructive in that regard would continue to be relevant. Under the *Coco* approach, damages may be assessed on the basis of the loss caused to a plaintiff for the diminution of the confidentiality of his information through its wrongful use. This was illustrated by *Talbot v General Television Corporation Pty Ltd* [1981] RPC 1, where the Full Court of the Supreme Court of Victoria held that damages could be assessed based on the diminished value of a television concept in the plaintiff's hands after the breach of confidence had occurred (at 31–32). Similarly, in *Dowson & Mason Ltd v Potter and Another* [1986] 1 WLR 1419, the Court of Appeal of England and Wales held that it was possible for damages to be assessed on the basis of the plaintiffs' loss of manufacturing profits by reason of the second defendant's wrongful use of the confidential information (at 1426). Implicit in the measure of damages for such cases must include the loss of confidentiality of the information in light of its wrongful use. This being the case, since the *I-Admin* test also provides a remedy for the diminution of the confidentiality of the plaintiff's information, allowing a plaintiff to concurrently claim under both the *Coco* and *I-Admin* approaches may lead to double recovery.

47 Finally, as a practical matter, to allow the concurrent application of both the *Coco* and *I-Admin* tests in respect of the same set of documents or information would give rise to conflicting burdens of proof. We do not think that it is appropriate to introduce undue complexity in the way in which a plaintiff is to make out his case, and indeed in any event there is no reason to do so given that we have already concluded that the *Coco* and *I-Admin* tests are mutually exclusive in respect of the same set of information or documents (see [32] and [45] above).

48 The upshot of our conclusions on the Narrow and Broad Issues is that in a claim for breach of confidence involving multiple sets of documents or information, the plaintiff is entitled to vindicate both his wrongful gain and wrongful loss interests only if he is claiming wrongful gain for one set of documents or information and wrongful loss in respect of another. He cannot seek to vindicate both his wrongful gain and wrongful loss interests in respect of the same set of documents or information.

Alternative pleadings

49 We also take this opportunity to express our views on the propriety of alternative pleadings in light of our conclusions above. In our view, it should be permissible for a plaintiff in a claim for breach of confidence to plead wrongful gain and wrongful loss in the alternative, given that the facts required to establish the elements of the *Coco* and *I-Admin* tests are not mutually exclusive. It would also accord with the gap-filling purpose of *I-Admin* if a plaintiff fails to prove unauthorised use and/or resulting detriment as his primary case but, notwithstanding this, is able to mount a secondary case based on the *I-Admin* test.

50 That being said, it would not be permissible for a plaintiff to plead wrongful gain and/or wrongful loss in *general* terms with respect to the same set of documents. In line with our observation above (at [45]), a plaintiff should first be expected to identify the documents over which it is claiming wrongful gain through unauthorised use and resulting detriment, and particulars of those allegations in support of the claim for wrongful gain should be provided. Wrongful loss can be pleaded in the alternative in the event that the plaintiff fails to prove wrongful gain. However, the converse is not applicable: it would be incongruous for a plaintiff to plead wrongful loss as his primary claim and wrongful gain in the alternative because the claim for wrongful loss is premised on the absence of unauthorised use to begin with. A plaintiff cannot equivocate by first alleging that there was *no* authorised use of the confidential information and/or resulting detriment and thereafter, on the contrary, mount an inconsistent secondary case that there was in fact unauthorised use and resulting detriment. In this way, parties are prevented from hedging their position because it can otherwise lead to an abuse of process in circumventing the distinction between wrongful gain and wrongful loss. Allowing plaintiffs to plead wrongful gain as their primary claim and wrongful loss in the alternative, but not *vice versa*, addresses the twin concerns of filling the gap identified in *I-Admin* on the one hand and preventing abuse of process on the other.

Concluding remarks

51 Finally, it bears repeating the *dicta* in *Writers Studio* (at [135]) that "counsel should take care to plead with specificity, 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. Moreover, as the controversy as to whether a plaintiff

is entitled to claim wrongful gain and/or wrongful loss typically arises in the context of an assessment of damages flowing from a judgment, counsel should also bear in mind the effect of a judgment on a plaintiff's claims for wrongful gain or wrongful loss.

52 Following our decision, it is for the respondents in this case to establish each head of claim under the wrongful gain interest and we make no finding as to what the respondents are permitted to claim under their consent judgment for damages for wrongful gain. This is for the judge hearing the assessment to decide based on the parameters set out above.

53 Given the circumstances, we also decided that it was fair for each party to bear their own costs here and below.

Sundaresh Menon
Chief Justice

Steven Chong
Justice of the Court of Appeal

Andrew Phang Boon Leong
Senior Judge

Pereira George Barnabas and Chan Chee Yun Timothy (Pereira & Tan LLC) for the appellants;
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