

# Breach of Confidence Claim Against Ex-Employee Fails - Knowledge & Experience of Ex-Employee is not Confidential Information

## *Asia Petworld Pte Ltd v Sivabalan s/o Ramasami and another [2022] SGHC 128*

What type of information may an ex-employee use legitimately after it leaves the employment of a company? In *Asia Petworld Pte Ltd v Sivabalan s/o Ramasami and another* [2022] SGHC 128 (“Asia Petworld”), the Singapore High Court discussed whether certain types of information or knowledge acquired by an employee during the course of his employment constitutes protectable confidential information post-employment.

### Background

In this case, the plaintiff (a drop shipper of pet products) had commenced an action for breach of confidence and conspiracy to injure against its ex-employee (the 1st defendant) and the company he jointly incorporated (the 2nd defendant). It was alleged that the defendants had misused the following categories of confidential information<sup>1</sup> (the “Information”):

1. the identity of the plaintiff’s suppliers<sup>2</sup>;
2. the prices which the supplier charges the plaintiff for the pet products (referred to in the judgment as “**true costs**”)<sup>3</sup>;
3. the plaintiff’s method/formula used to calculate landed costs (i.e., the total costs of shipping a product to a customer) (referred to in the judgment to as “**cost factoring**”)<sup>4</sup>; and
4. the percentage of the landed costs which is charged to the plaintiff’s customers per order (referred to in the judgment as “**fulfilment fees rates**”)<sup>5</sup>.

### Decision

The High Court dismissed the breach of confidence claim on the basis that the Information did not possess the necessary quality of confidence.

1. The High Court first reaffirmed two established principles regarding an ex-employee’s confidentiality obligations.
  - a. First, not all information that an employee is obliged to keep confidential during his employment is protectable as confidential information post-employment. Instead, an ex-employee’s confidentiality obligations generally cover information “of a sufficiently high degree of confidentiality as to amount to a trade secret”<sup>6</sup>.

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<sup>1</sup> *Asia Petworld* at [21].

<sup>2</sup> *Asia Petworld* at [45].

<sup>3</sup> *Asia Petworld* at [49].

<sup>4</sup> *Asia Petworld* at [50].

<sup>5</sup> *Asia Petworld* at [52].

<sup>6</sup> *Asia Petworld* at [42].

- b. Second, the knowledge and experience an employee acquires during his employment is generally not protectable confidential information.<sup>7</sup>
  2. Applying these principles, the High Court found that the Information did not possess the necessary quality of confidence.
    - a. **Supplier information.** This was held to be information “*in the first defendant’s head which he acquired through the course of his employment*”, and therefore did not possess the quality of confidence.<sup>8</sup>
    - b. **True costs.** The High Court similarly held that the true costs were not confidential information. This was because the identity of the plaintiff’s suppliers and the information as to which supplier provided the lowest price were not confidential, and the true cost of the products could be obtained simply by approaching the supplier.<sup>9</sup>
    - c. **Cost factoring.** The court found that the plaintiff was not in fact asserting confidentiality over a formula or method it used to calculate landed costs, but rather the factor or percentage by which it multiplies true cost to obtain landed costs. On that basis, the court concluded that this was not confidential, because such information about how to account for factors such as foreign exchange fluctuations, price variations between suppliers, and cost of freight in deriving the landed cost was simply “*knowledge and experience acquired by [the 1st defendant] in the course of his work*”.<sup>10</sup>
    - d. **Fulfilment fee rate.** The High Court found that the fulfilment fee rate was no different from the general pricing rates of any business selling into a market. The fact that its unit rate decreases as the volume of orders increase was “*neither unusual nor special*” and was in fact “*widely used and commonly understood*”. Thus, as the 1st defendant was entitled to use his knowledge and recollection of the plaintiff’s prices in his new business, the plaintiff’s fulfilment fee rate was, by extension, not confidential.<sup>11</sup>
  3. In reaching the conclusions above, the High Court also appeared to have been influenced by the fact that the 1st defendant’s knowledge about the prices paid or charged by the plaintiff would have “quickly lost its relevance”. This was because the markets for purchase and sale of the products, as well as currency exchange, are generally not static, which likely diminishes the utility (and therefore the confidential nature) of such information over time.<sup>12</sup>

The High Court also made *obiter* comments on whether the plaintiff or the defendants bore the burden of proving misuse of the Information (i.e., whether the Modified or Traditional Approach applies<sup>13</sup>).

1. The High Court, applying the principles laid down in *Lim Oon Kuin and others v Rajah & Tann Singapore LLP and another appeal* [2022] SGCA 29, observed that the burden of proof would only shift to the 1st defendant if he had acquired the confidential information without authorisation. However, the court accepted that the 1st defendant had acquired the Information legitimately: he was merely an employee “*who has through his work in the company over the years acquired knowledge of the procurement or sales*”. The court distinguished this from “[a] departing employee who accesses confidential information and memorises it or downloads it when he is not authorised to do so”<sup>14</sup>.

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<sup>7</sup> *Asia Petworld* at [43].

<sup>8</sup> *Asia Petworld* at [45]-[48].

<sup>9</sup> *Asia Petworld* at [49].

<sup>10</sup> *Asia Petworld* at [51].

<sup>11</sup> *Asia Petworld* at [53].

<sup>12</sup> *Asia Petworld* at [67].

<sup>13</sup> The Traditional Approach is based on the test for breach of confidence laid down in *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41, while the Modified Approach is based on the modified test for breach of confidence laid down in *I-Admin (Singapore) Pte Ltd v Hong Ying Ting and others* [2020] SGCA 32. Details of these 2 approaches are discussed in our earlier case note [here](#).

<sup>14</sup> *Asia Petworld* at [56].

- Thus, the court found that the Traditional Approach would apply, with the legal burden of proof on the plaintiff to establish misuse by the 1st defendant<sup>15</sup>.

## Comments

*Asia Petworld* reaffirms the established position that the information or knowledge acquired by an employee during the course of his employment is generally not protectable confidential information post-employment unless they are of such a high degree of confidentiality as to amount to trade secrets. This strikes an appropriate balance between protecting an employer's legitimate interests and the public interest in encouraging labour mobility and fair competition.

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<sup>15</sup> *Asia Petworld* at [56]