

I-Admin revisited: Modified Approach for Breach of Confidence Limited to Cases of Unauthorised Acquisition

Lim Oon Kuin and others v Rajah & Tann Singapore LLP and another appeal [2022] SGCA 29

In *Lim Oon Kuin and others v Rajah & Tann Singapore LLP and another appeal* [2022] SGCA 29 (“**Lim Oon Kuin**”), the 5-member coram of the Court of Appeal clarified that its modified test for establishing breach of confidence set out in its earlier decision in *I-Admin (Singapore) Pte Ltd v Hong Ying Ting and others* [2020] SGCA 32 (“**I-Admin**”) (“**Modified Approach**”) was not intended to replace the traditional test for breach of confidence as established in *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41 (“**Traditional Approach**”) – instead it was only intended to fill the lacuna in the law to protect a plaintiff’s *wrongful loss interest* in protecting the confidentiality of its information.

Pre-cap: The modified three-step test for establishing breach of confidence in *I-Admin*

As discussed in our earlier [case note](#), the Court of Appeal in *I-Admin* had devised the following Modified Approach to establishing a breach of confidence claim:

1. An action for breach of confidence is presumed when the plaintiff proves that: (1) the information possesses the necessary quality of confidentiality; and (2) the information has been imparted in circumstances importing an obligation of confidence.
2. The presumption would be displaced on proof by the defendant that its conscience was unaffected, i.e., the defendant did not deal with the plaintiff’s confidential information in a manner that adversely affected the defendant’s conscience.

This is a modification of the Traditional Approach set out in *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41, which places the onus on a plaintiff to prove all of the following:

1. The information must possess the quality of confidentiality;
2. The information must have been imparted in circumstances importing an obligation of confidence; and
3. There must have been unauthorised use of that information to the detriment of the party from whom the information originated.

The key difference between the Modified Approach and Traditional Approach is that when elements (1) and (2) are proven by the plaintiff, the burden of proof shifts to the defendant at the third stage of enquiry. It is up to the defendant to prove that its conscience had not been affected, as the defendant is comparatively better positioned to account for suspected wrongdoing in such instances. This, in turn, serves to safeguard the plaintiff’s *wrongful loss interest* - i.e. plaintiff’s right to protect the confidentiality of its information *per se*, which loss is suffered as long as a defendant’s conscience has been impacted in the breach of the obligation of confidentiality.¹

¹ Lim Oon Kuin at [36].

***Lim Oon Kuin*: The Traditional Approach remains good law**

Lim Oon Kuin concerned a joinder application by family members of embattled oil tycoon Mr. Lim Oon Kuin (the “**Lim Family**”) to join themselves as co-applicants to injunction applications commenced by 2 companies (“**Companies**”) which were managed by the Lim Family. The injunction applications sought to restrain the law firm Rajah & Tann Singapore LLP (“**R&T**”) from acting for the judicial managers of the Companies, in order to protect the confidentiality of information which was disclosed by the Companies and the Lim Family to R&T under a joint retainer.

The basis of the joinder application was that the outcome of the injunction applications would affect the Lim Family’s rights to commence a separate action to restrain R&T from acting for the Companies’ judicial managers on the same basis. Therefore, a key issue in the joinder application, as characterised by the Court of Appeal, was whether the Lim Family could articulate a claim of confidence against R&T which was not obviously factually or legally unsustainable.²

As part of its discussion on this issue, the Court of Appeal provided 3 clarifications on the Modified Approach.

1. **First**, the Modified Approach was not intended to replace the Traditional Approach in its entirety. Rather, the Modified Approach only applies to cases involving alleged harm to the plaintiff’s “wrongful loss interest”, and the Traditional Approach would continue to apply for cases involving alleged harm to a plaintiff’s “wrongful gain interest”—namely, where the defendant had gained a benefit from making unauthorised use or disclosure of confidential information.³
2. **Second**, in line with the above, the Modified Approach is limited to cases involving unauthorised acquisition of confidential information.⁴
3. **Third**, the third limb of the Modified Approach—namely, the burden on the defendant to prove that his conscience is unaffected in his dealings with the plaintiff’s confidential information—is a *legal* burden.⁵

Comments

The introduction of the Modified Approach in *I-Admin* was generally lauded for ameliorating the significant legal and evidentiary difficulties that owners of confidential information typically face when establishing an action in breach of confidence. However, this left open the question of whether the Traditional Approach and the element of misuse were no longer relevant considerations in breach of confidence cases. If so, there was a fear that this may have tilted the balance too far against recipients of confidential information in certain circumstances—for instance, where the recipient had acquired the information lawfully or with due authorisation from its owner.

The decision of the Court of Appeal in *Lim Oon Kuin* is a welcome clarification. It is now clear that the Modified Approach does not displace the Traditional Approach entirely and is limited only to cases involving unauthorised acquisition of confidential information. The implication of this is that parties to a breach of confidence action will now have to address a *de facto* preliminary issue of whether there was unauthorised acquisition of the allegedly confidential information, to determine which approach should apply.

² *Lim Oon Kuin* at [29], [31], and [43].

³ *Lim Oon Kuin* at [39]. There, the Court of Appeal endorsed a commentator’s view that “for cases involving alleged harm to the plaintiff’s ‘wrongful gain interest’, the [Traditional Approach] should be applied.”

⁴ *Lim Oon Kuin* at [41].

⁵ *Lim Oon Kuin* at [40].



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