

Dispute Resolution

Do Hacked Emails Retain Confidentiality?

Introduction

The confidentiality of and legal professional privilege over documents and communications are key concerns of any client. They are also of concern to corporate entities with in-house counsel who provide legal advice to management. These issues take on a new dimension in an age when the security of computers is threatened as never before.

In the case of *Wee Shuo Woon v HT S.R.L.* [2017] SGCA 23, the Singapore Court of Appeal had to consider whether advice that had been accessed by hacking the client's email account and then posted on WikiLeaks were in the public domain and no longer entitled to legal protection. The Court answered this in the negative.

Summary of Decision

The case involved a dispute between a company ("**HT**") and its former employee ("**Wee**"). In the course of the dispute, HT's computer systems were hacked by an unknown party, and around 500 gigabytes of data was taken and uploaded onto the WikiLeaks website. This included emails between HT and their lawyers regarding the dispute with Wee (the "**Emails**").

Wee then accessed WikiLeaks and located the Emails. He sought to strike out HT's claim, relying almost entirely on the contents of the Emails. Dismissing Wee's application, the Court of Appeal held that the Emails remained privileged and confidential even though they had been uploaded onto the internet, where it was accessible to the general public.

Privilege over Hacked Data

Privileged information is protected from disclosure to the court, whether it be communications between a lawyer and client, or documents produced for purposes of litigation. However, such information may still find its way into the hands of the opposing party. In this case, the information had been hacked from HT's computer system and uploaded online.

If privileged information is hacked, can it be used in court? The Court of Appeal's decision indicates that it is unlikely to be allowed. The court can restrict the use of privileged information on the basis of confidentiality. If the opposing party knows or ought to know that the information is confidential, he too will owe a duty of confidence. This applies even for information which is accidentally released or intentionally stolen (such as through hacking). The Court of Appeal observed that to hold otherwise would be to encourage the theft of confidential information.

Here, the Emails were clearly privileged and confidential as they were made between lawyer and client for purposes of litigation. Further, Wee knew or ought to have known the Emails were confidential, as they were marked as such. The Court was thus entitled to restrain Wee's use of the Emails.

Is the privileged information no longer confidential once it has been uploaded to the internet due to it entering the 'public domain'? The Court of Appeal held that information does not lose its confidential nature just because it is

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published online. If the information is difficult to access, or has not actually been widely accessed by the public (perhaps due to lack of interest or knowledge), then it may be regarded as not having entered the public domain.

Here, although the emails were technically available to the public on the WikiLeaks website, they made up a minute fraction of the 500 gigabytes of data hacked from HT and uploaded online. Trawling through the data would have been very time consuming, and few would have been inclined or interested to do so. Therefore, the Court of Appeal held that the Emails were not public knowledge, and retained their confidential status.

Concluding Words

Clients are faced with the very real threat of cyber-attacks, which puts their privileged and confidential information at risk. However, the Court of Appeal stressed that a victim of hacking should not be taken advantage of in the litigation process. Litigation counterparties aware of the confidential nature of such information cannot capitalise on the theft and use the information in court proceedings. The holding though that the emails were not in the public domain on the facts (see [42]-[43] of the judgment) leaves open the question of whether advice that is hacked and then posted on its own would be treated differently if the party seeking to refer to it had no role in the hacking and posting. This may then in turn depend on whether the victim of the hacking is able to invoke the equitable jurisdiction of the court (see [50]). At a minimum, the victim has to act without delay.

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ASEAN Economic Community Portal

The launch of the ASEAN Economic Community (“AEC”) in December 2015, businesses looking to tap the opportunities presented by the integrated markets of the AEC can now get help a click away. Rajah & Tann Asia, United Overseas Bank and RSM Chio Lim Stone Forest, have teamed up to launch “Business in ASEAN”, a portal that provides companies with a single platform that helps businesses navigate the complexities of setting up operations in ASEAN.

By tapping into the professional knowledge and resources of the three organisations through this portal, small- and medium-sized enterprises across the 10-member economic grouping can equip themselves with the tools and know-how to navigate ASEAN’s business landscape. Of particular interest to businesses is the “Ask a Question” feature of the portal which enables companies to pose questions to the three organisations which have an extensive network in the region. The portal can be accessed at <http://www.businessinasean.com>.

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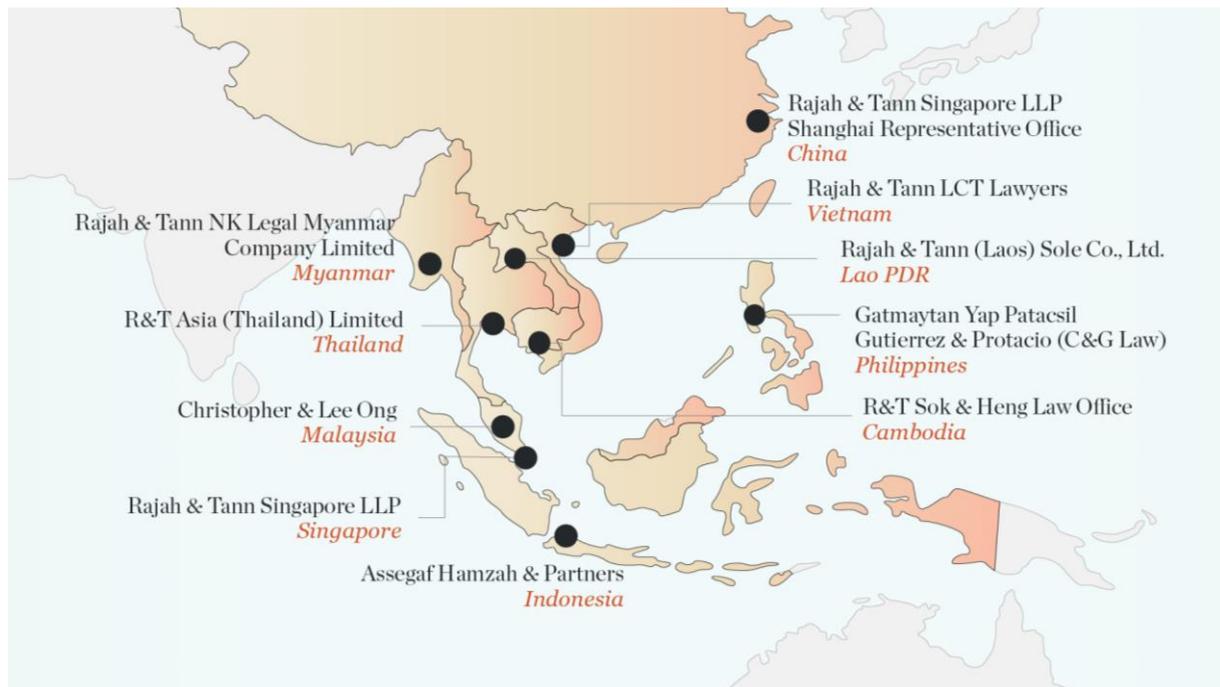
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