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Safeguarding your Business's 'Crown Jewels' – A Primer on Dealing with Confidential Information

Introduction

Confidential information such as trade secrets, proprietary know-how, strategy documents, technical drawings / plans, financial data and customer lists often constitute the most valuable assets or 'crown jewels' that a business or company owns to maintain a competitive edge over its competitors.

What happens however when an ex-employee misappropriates and/or misuses the company's confidential information—particularly if it results in the loss of a key business contract to a competitor? What legal recourse does the company have and what kind of compensatory damages can the company recover against the ex-employee? This was the situation that the plaintiff company in the recent Singapore High Court case of *Angliss Singapore Pte Ltd v Yee Heng Khay (alias Roger)* [2021] SGHC 168 found itself in.

This Update provides a summary of the case, highlights the key aspects of the Court's decision, and offers practical insights and suggestions for consideration.

Brief Facts

The plaintiff, Angliss Singapore Pte Ltd ("**Angliss**"), a food distribution company, brought an action against its former employee, Mr Yee Heng Khay (alias Roger) ("**Mr Yee**") to claim for loss resulting from Angliss' loss of an exclusive distributorship agreement with Arla Food Ingredients Singapore Pte Ltd ("**Arla**"), its long-time key client and supplier for some 47 years. Arla signed a distributorship agreement with another food distributor, Indoguna Singapore Pte Ltd ("**Indoguna**"), which Mr Yee was employed with at the time of commencement of the action.

At the material time, Mr Yee had been the dairy sector business development manager ("**BDM**") of Angliss, overseeing about 10 dairy brands, including Arla. Under his employment contract with Angliss, Mr Yee owed a contractual obligation of confidentiality to Angliss, which was expressly stated to continue to be valid and binding notwithstanding the termination of his employment with Angliss ("**Confidentiality Clause**").

As Angliss' BDM, Mr Yee had access to the contact details of, and was in frequent contact with, Angliss' customers and suppliers for its food service business, including representatives of Arla, and he also had access to data and documents on Angliss' information systems. However, he only had viewing rights

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within these systems, and was not able to copy, edit or print information such as client lists, product lists, sales revenue and profit margins, and if any employee (including Mr Yee) required access to editable versions of these restricted files, he had to ask for assistance from another company representative who had charge of Angliss' systems with the confidential information.

A few days after Arla informed Angliss out of the blue that it would not be renewing its distributorship arrangement with Angliss and would be engaging Indoguna as its sole distributor in Singapore instead, Mr Yee gave notice of his resignation to Angliss. Two days later, he signed an employment contract with Indoguna by which he was designated as 'Arla Brand Manager'. After conducting its security check on Mr Yee's laptop, Angliss discovered that he had forwarded certain files pertaining to Arla from his work email address to his personal email address.

Angliss commenced legal proceedings against Mr Yee to claim for breach of equitable duty of confidence, and contractual breach of the Confidentiality Clause, amongst other things. The remedies sought by Angliss included the *loss of chance* of a distributorship with Arla, or alternatively, *loss of profits* from a distributorship agreement with Arla, amongst others.

While Mr Yee admitted that he took confidential information belonging to Angliss, he denied any misuse of this information to constitute breach of the duty of confidence or any contractual duty, and further asserted that it was Angliss' own actions that caused its loss.

Holding of the High Court

The High Court found that Mr Yee had breached his duty of confidence in equity, as well as his contractual obligation owed to Angliss pursuant to the Confidentiality Clause.

On the equitable claim for breach of confidence

The High Court adopted the modified approach set out by the Singapore Court of Appeal in *I-Admin (Singapore) Pte Ltd v Hong Ying Ying and others* [2020] 1 SLR 1130, and found on the facts that:

- (a) First, Angliss' information of price and customer lists, as well as sales figures and targets for several of Angliss' suppliers, including Arla ("**Crucial Information**"), did possess the necessary quality of confidence as these were kept on Angliss' internal systems and Mr Yee was only able to access them by making a request, and the list as a whole was valuable information culled from a network created by Angliss over many years and derived from its business dealings, which were not readily accessible to the public;
- (b) Second, the Crucial Information was received by Mr Yee in circumstances importing an obligation of confidence. This was because Angliss' information was protected within its internal systems and Mr Yee's access to the information was allowed only for the purposes of his employment as BDM. He circumvented these systems to copy this information, by

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surreptitiously forwarding files to his own personal email address and taking screenshots of Angliss' systems, thereby side-stepping these controls; and

- (c) Lastly, Mr Yee was unable to satisfactorily discharge his burden of showing that his conscience was unaffected. The Court rejected Mr Yee's claim that his only motivation for taking the Crucial Information was to "look after the interests of customers" interested in buying Arla products, finding that his intention to continue to service his customers revealed that he intended shrewd use of the information to Angliss' commercial detriment. The Court also rejected Mr Yee's argument that the absence of evidence of misuse of the Crucial Information should constitute probative evidence that his conscience had not been affected, as the burden lies on the defendant seeking to rely on the absence of misuse to prove such defence.

Therefore, the Court held that Angliss had established a breach of confidence in equity against Mr Yee.

On the contractual claim for breach of confidentiality clause

The High Court held that when construing and interpreting a confidentiality clause, the general rationale of the restraint of trade doctrine needs to be kept in mind, such that the clause cannot be read so widely as to include information which amounts to the skill and knowledge of the subject employee. This is to avoid the situation where an employer uses a confidentiality clause to restrain an ex-employee from disclosing his skills and knowledge which, in essence, would amount to an indirect restraint of trade. On the facts, the High Court found that Mr Yee had breached the confidentiality clause because the Crucial Information that was taken was not part of Mr Yee's skills and knowledge, but were lists which were certainly not retained in his memory.

Relationship between the equitable and contractual claims for misuse of confidential information

The High Court made two observations. First, the contractual Confidentiality Clause was drafted to include a wider scope of documents that would have a necessary quality of confidence under the equitable doctrine, as it covered information "*relating to all or any part of the business*" of Angliss. Nevertheless, as Angliss' claim for damages was the same under both heads of claim, with the loss in both cases to be the loss of the Arla distributorship, the extent of damages was the same whether the claim in contract or equity was pursued. Therefore, only the Crucial Information was important, and the High Court did not see the need to deal with the precise width of the documents covered in an objective construction of the Confidentiality Clause.

Second, there was a crucial point of difference between the equitable head of claim and that of contract. To pursue its contractual claim, Angliss had to prove breach of contract, the evidence for which (on the facts) was integrally related to the evidence that the breach caused the loss of the Arla distributorship. In contrast, for the equitable claim for breach of confidence, the High Court considered whether the information had the necessary quality of confidence about it and whether the information was given to Mr Yee in circumstances importing an obligation of confidence.

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While the elements of the equitable and contractual claim were different, the High Court was willing to find in this case that both heads of claim had been proven. As highlighted above, on the equitable head of claim, the High Court found that Angliss had established a breach of confidence in equity.

As for the contractual head of claim, the High Court found on the facts that Angliss had also proven its contractual claim for breach of the Confidentiality Clause on a balance of probabilities, for instance, that Mr Yee had involved himself early with Indoguna, the timing and volume of his copying which clearly showed that his intention was to use Angliss' confidential information to help his work at Indoguna, and crucially, the forensic evidence that revealed that he had accessed and saved the Crucial Information on a different device multiple times during the relevant time period.

On loss of profit vs loss of chance

Finally, the High Court considered the issue of whether Mr Yee's conduct had caused the loss of the chance of securing the Arla distributorship, or the loss of the distributorship itself.

To establish loss of chance, Angliss had to show that the chance lost was "real or substantial". To establish loss of profits, Angliss had to show that Arla would, as a matter of certainty *albeit* on the balance of probabilities, have obtained the distributorship but for Mr Yee's breach. There was significant difference between the two, in terms of the quantification of the loss:

- (a) The loss of chance of securing the Arla distributorship had been quantified by the expert witness for Angliss at about S\$267,000, derived on the assumption that there was only a 50% chance that the distributorship agreement would have been entered into, which rested on the "*long-standing relationship*" between Arla and Angliss which had not been disputed by parties; while
- (b) The loss of profits resulting from the loss of the distributorship had been calculated by Angliss' expert witness to be about S\$749,000 (which Mr Yee did not dispute), as stemming from the loss of the distributorship agreement with Arla, as well as subsequent extensions, pro-rated by the expert witness to reflect the probability of such extension, based on the assumption that the first 3-year agreement was 100% certain, a 3-year renewal thereafter was only 50% certain, and there was 0% certainty for any subsequent renewals.

The High Court ultimately found that the evidence went much further than a finding that Angliss lost a chance of securing the distributorship, and held that but for Mr Yee's disclosure of Angliss' confidential information to Indoguna, Angliss would, in all probability, have secured the distributorship. This was because Angliss had worked together with Arla for some 47 years; and Angliss' network and reach were such that it would not have been logical for Arla to consider another distributor unless it was assured of the same network and reach. The High Court therefore awarded damages of S\$729,423 to Angliss against Mr Yee.

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Concluding Words

Employers and business owners should be heartened by this judgement of the High Court. This judgement has affirmed the Court's willingness to consider certain data relating to customers as confidential data and that employees having charge of confidential information owe an equitable duty not to misuse or abuse such information. While the scope of what constitutes confidential information may depend on the specific facts of the case, the judgment demonstrates that this may include information such as lists of customers, comprehensive pricing, and sales revenues and targets.

This judgment also provides helpful guidance to businesses and companies regarding how to safeguard confidential information and ensure that specific information is clothed in the intended character of confidentiality. Businesses seeking to protect their information from abuse by employees should consider the following measures:

- (a) **Review of employment contracts** – Employers should review their employment contracts to ensure that they have adequately provided for confidentiality obligations. Such confidentiality clauses should comprehensively set out the scope of information that is protected and the prohibited manners of using such information. This is to ensure certainty in any contractual claim for breach of confidentiality.
- (b) **Procedural restrictions on access to information** – Businesses should take practical on-the-ground steps to protect and limit access to information that they deem important and confidential, such as in this case, where access to the relevant information was restricted to "view-only" rights, and any further access required access request procedures. This is important to prove that the information in question does possess the necessary quality of confidence and is received by the business's employees in circumstances importing an obligation of confidence.
- (c) **Post-breach action** – The judgment focuses attention on the importance of taking timely steps following suspicions that an employee may have wrongfully accessed and copied/downloaded confidential company information to secure the necessary forensic evidence. Evidence of breach is vital as the claimant employer bears the burden of proof in a claim for breach of confidence and/or contractual breach of a confidentiality clause.

Finally, the Court's decision also offers an interesting insight on the considerations involved in deciding whether and when to pursue a claim based on loss of chance vs a claim based on loss of profits. This may not always be an easy decision on the facts as it requires both legal analysis as well as expert evidence on quantification.

Please contact us if you have any queries about this update or how to protect your confidential information.

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