Published on 6 July 2020

Case Comment

HERE WE GO AGAIN: ACTING AGAINST THE SAME DEFENDANTS TWICE?

LVM Law Chambers LLC v Wan Hoe Keet [2020] 1 SLR 1083

[2020] SAL Prac 13

The Court of Appeal considered whether a law firm should be injuncted from acting against a party whom it had acted against in a prior litigation, where the law firm had purportedly come into confidential information in the course of settlement negotiations. In permitting the law firm to act against the same defendants twice *subject to* safeguards to protect confidential information, the Court of Appeal optimally balances the competing interests of protecting confidentiality and a party's right to counsel of choice.

Jonathan **MUK** Chen Yeen
LLB & BBM (Summa cum Laude) (Singapore Management University);
Advocate and Solicitor (Singapore);
Of Counsel, LVM Law Chambers LLC.

I. Introduction

1 It is not uncommon for lawyers to bring test cases before the court against defendants on behalf of one plaintiff and, upon success, bring legal proceedings against the same defendants on behalf of multiple subsequent plaintiffs. This is often a matter of litigation strategy. However, the lawyer's ability to act for multiple subsequent plaintiffs is not one which is unfettered.

2 In *LVM Law Chambers LLC v Wan Hoe Keet*[1] ("*Wan Hoe Keet (CA)*"), the Court of Appeal explored the issue of whether a lawyer

1 [2020] 1 SLR 1083.

is entitled to act against the same set of defendants on behalf of a different client in subsequent proceedings. This comment will summarise the facts and the High Court decision, before turning to the Court of Appeal decision and contrasting the approach in Singapore with the approach taken in other jurisdictions.

II. The facts

3 In 2016, LVM Law Chambers LLC ("LVM") acted for a plaintiff, Dr Lee Hwee Yeow ("Dr Lee"), against Mr Wan Hoe Keet and Ms Sally Ho (the "Defendants") in a legal action (the "1st Action"). Dr Lee's case against the Defendants was that he had been induced by misrepresentations made by the Defendants to invest in a scheme known as SureWin4U, which was later discovered to be a Ponzi scheme.

4 On the first day of the trial of the 1st Action in 2017, pursuant to out of court negotiations, Dr Lee and the Defendants entered into a written settlement agreement (the "Settlement Agreement"), the terms of which imposed a duty of confidentiality on Dr Lee. While LVM was involved in the discussions that led to the Settlement Agreement, LVM did not sign the Settlement Agreement.

5 Subsequently, in 2018, LVM acted for Ms Chan Pik Sun ("Ms Chan") in another action (the "2nd Action") against the Defendants. Like Dr Lee, Ms Chan had invested in the Scheme and discovered it to be a Ponzi scheme. The cause of action pleaded in the 2nd Action was similar to the 1st Action in so far as it was also based on misrepresentations made by the Defendants.

6 The Defendants did not oppose LVM's representation of Ms Chan initially. However, they later applied for an injunction (the "Injunction") to restrain LVM from continuing to act for Ms Chan on the ground that it was privy to the discussions that led to the Settlement Agreement. Prior to making the Injunction application, the Defendants had filed other applications in court and had not objected to LVM acting for Ms Chan in those applications (the "Applications").

III. The High Court judgment

7 In the High Court, the Defendants argued that they were owed equitable obligations of confidence by LVM because it knew of the "the negotiation positions taken, even the body language of the parties, and, crucially, the settled amount".[2] They claimed there was a real risk that LVM would misuse or disclose confidential information obtained by virtue of the 1st Action if not restrained from continuing to act in the 2nd Action.

8 The High Court held that an equitable duty of confidence arose for the following reasons:

(a) The question was whether there was a conflict of interest in LVM in acting for both Dr Lee and Ms Chan and, if so, whether there was a threat of misuse sufficient to justify restraining LVM from acting for Ms Chan.[3]

(b) The Defendants relied on the Australian case of *Worth Recycling Pty Ltd v Waste Recycling and Processing Pty Ltd*[4] ("*Worth*") and the New Zealand case of *Carter Holt Harvey Forests Ltd v Sunnex Logging Ltd*[5] ("*Carter Holt*").

(c) The obligation of confidence owed by the solicitors of one party to the counterparty in mediation or settlement negotiations need not strictly arise out of an explicit contractual duty. However, an equitable duty of confidence would be imposed if the circumstances are such that a reasonable solicitor in the position of LVM or their lead counsel should have known that information was given in confidence.[6]

(d) Although the Settlement Agreement did not explicitly impose a contractual duty of confidence on LVM or their lead counsel, it was clear that they knew Dr Lee had promised the Defendants that he would not use or disclose any of the confidential information except as contractually

2 *Wan Hoe Keet v LVM Law Chambers LLC* [2020] 3 SLR 568 at [7].
3 *Wan Hoe Keet v LVM Law Chambers LLC* [2020] 3 SLR 568 at [4].
4 [2009] NSWCA 354.
5 [2001] 3 NZLR 343.
6 *Wan Hoe Keet v LVM Law Chambers LLC* [2020] 3 SLR 568 at [9].

provided. The fact that the parties had negotiated instead of mediated made no difference as the private and confidential nature of the negotiations created the same nature and degree of fidelity, and Dr Lee's solicitors were bound to the confidential agreement that Dr Lee had signed with the Defendants.

9 The High Court held that a threat of misuse of confidential information sufficient to justify the Injunction arose for the following reasons:

(a) While it was not doubted that LVM's lead counsel would not disclose the terms of the settlement agreement to Ms Chan and there was no threat of this taking place, the "subconscious currents in our minds" were what the judges in *Worth* and *Carter Holt* meant when they referred to the possibility of a "future breach occurring accidentally or unconsciously".[7]

(b) The 1st Action was settled by negotiation and there was a likelihood that the 2nd Action would also involve negotiation. Regardless of whether any negotiation in the 2nd Action succeeded, the Defendants would be disadvantaged by the knowledge LVM's lead counsel possessed from his participation in the negotiations leading up to the Settlement Agreement just as Ms Chan would gain an advantage of inside knowledge she would not otherwise have.[8]

10 *Wan Hoe Keet (HC)* received numerous reactions from the Singapore Bar. In a *Law Gazette article*, Mr Alvin Chen commented that:[9]

> With the increasing emphasis on mediation and other forms of alternative dispute resolution in the past decade, things look very different in 2020 and there is a real possibility that disqualification applications will become increasingly prevalent as a tactical

7 *Worth Recycling Pty Ltd v Waste Recycling and Processing Pty Ltd* [2009] NSWCA 354 at [41].
8 *Wan Hoe Keet v LVM Law Chambers LLC* [2020] 3 SLR 568 at [11].
9 Alvin Chen, "Acting Against the Same Opponent in Similar Matters" *Singapore Law Gazette* (February 2020).

weapon by shrewd adversaries to diminish client choice. As argued in this article, a rebalancing of the policy considerations in Singapore, through a more critical analysis and application of the applicable legal test, is necessary to recognise the importance of client choice, as well as to minimise the possible unintended consequence of a deteriorating incentive to mediate disputes.

IV. The Court of Appeal judgment

11 On appeal, the Court of Appeal held that although LVM came under an equitable duty of confidence, the Injunction should not have been granted as a court order for the non-disclosure of the terms of the Settlement Agreement would suffice. The Court of Appeal held:

(a) The burden of proof lies with the injuncting party.[10]

(b) If the lawyer had contractually agreed to be bound by a duty of confidentiality, then the agreement will operate accordingly and whether or not he can act for a subsequent party against the same counterparty in a previous set of proceedings will depend on the scope of the duty in the contract itself.[11]

(c) *Carter Holt* could be distinguished on the basis that the lawyers in *Carter Holt* had signed confidentiality agreements in their personal capacity prior to taking part in the mediation and these agreements were sufficiently wide to encompass everything which occurred as part of the mediation process.[12]

(d) An equitable duty of confidence may be imposed by the court such that it might be inappropriate for a lawyer or law firm to act for a party against the same counterparty in a previous set of proceedings. A good starting point would be the test laid down in *Coco v AN Clark (Engineers) Ltd*[13] ("*Coco*"), albeit in a slightly modified iteration. The onus is on the applicant to show that the information was confidential

10 *LVM Law Chambers LLC v Wan Hoe Keet* [2020] 1 SLR 1083 at [23].
11 *LVM Law Chambers LLC v Wan Hoe Keet* [2020] 1 SLR 1083 at [13].
12 *LVM Law Chambers LLC v Wan Hoe Keet* [2020] 1 SLR 1083 at [13].
13 [1969] RPC 41.

in nature and the lawyer subject to an obligation in equity to uphold its confidentiality. However, such an assertion cannot rest on "mere assertions or vague generalisations"[14] and the injuncting party must establish that:[15]

(i) **Requirement 1**: The information must have the necessary quality of confidence. If the information is common or public knowledge, a duty of confidence, equitable or otherwise, cannot arise.[16]

(ii) **Requirement 2**: The information must have been received by the lawyer or law firm in circumstances which import an obligation of confidence.

(iii) **Requirement 3**: There is a real and sensible possibility of the information being misused.

12 On the facts, the Court of Appeal held:

(a) The facts here were different from *Carter Holt* as the lawyers there were contractually bound by a confidentiality agreement.[17]

(b) The Defendants failed to prove that any other matters relating to the settlement negotiations in the 1st Action were confidential. There were "only vague references to negotiations and a certain degree of 'to-ing and fro-ing'".[18] Such assertions are insufficient in proving that there would be a breach of confidence.[19]

(c) The terms of the Settlement Agreement must be kept confidential and cannot be revealed in the context of the 2nd Action. The question is whether there was nevertheless a real and sensible risk that LVM's knowledge of the terms of the Settlement Agreement could be misused. In this regard, the Defendants failed to show how information

14 *LVM Law Chambers LLC v Wan Hoe Keet* [2020] 1 SLR 1083 at [18].
15 *LVM Law Chambers LLC v Wan Hoe Keet* [2020] 1 SLR 1083 at [15].
16 *LVM Law Chambers LLC v Wan Hoe Keet* [2020] 1 SLR 1083 at [16].
17 *LVM Law Chambers LLC v Wan Hoe Keet* [2020] 1 SLR 1083 at [27].
18 *LVM Law Chambers LLC v Wan Hoe Keet* [2020] 1 SLR 1083 at [29].
19 *LVM Law Chambers LLC v Wan Hoe Keet* [2020] 1 SLR 1083 at [29].

gleaned from the settlement negotiations in the 1st Action could lead to Ms Chan gaining a tactical advantage whether consciously, unconsciously, or subconsciously.[20]

(d) There was therefore no real or sensible possibility of confidential information being misused which would justify the grant of the Injunction against the Defendants in the 2nd Action. It would be sufficient to grant an order that LVM refrain from disclosing the terms of the Settlement Agreement.

V. Comments

13 The following observations may be made of *Wan Hoe Keet (CA)*.

A. A litigant generally has a right to its lawyer of choice

14 First, the Court of Appeal was unequivocal that a party has a right to appoint counsel of its choice and this right should not be impinged upon lightly. There should be real concerns about a potential breach of confidentiality to justify injuncting a party from appointing the law firm of its choice.[21]

15 The applicant had the burden of demonstrating a real or sensible risk of misuse of confidential information if LVM continued representing Ms Chan. Details of the confidential information, its materiality, and how it was likely to cause detriment must be particularised. Requiring an injuncting party to fulfil such a threshold compels a party to have good reasons to support the grant of the injunction rather than reference to vague assertions of "to-ing and fro-ing" in the course of out of court negotiations.[22]

---

20 *LVM Law Chambers LLC v Wan Hoe Keet* [2020] 1 SLR 1083 at [30].

21 The Court of Appeal remarked favourably upon the comments made by the Supreme Court of Victoria in *Tricontinental Corporation Ltd v Holding Redlich* (22 December 1994, unreported) that "[i]t is a serious matter to prevent a party from retaining the legal representative of its choice, particularly upon the application not of a former client but of an adverse party".

22 *LVM Law Chambers LLC v Wan Hoe Keet* [2020] 1 SLR 1083 at [29].

Such a requirement is also consistent with existing case authorities on breach of confidentiality.[23]

16 The requirement to particularise the alleged confidential information provides an important counter-balancing safeguard against abusive applications. The High Court in *Harsha Rajkumar Mirpuri (Mrs) née Subita Shewakram Samtani v Shanti Shewakram Samtani Mrs Shanti Haresh Chugani*[24] expressed concern *in obiter* that injunctions to disqualify counsel of choice may be taken out for tactical reasons.

B. The Court of Appeal will scrutinise the grounds of any injunction application before granting an injunction

17 Secondly, *Wan Hoe Keet (CA)* also shows that such injunction applications will be scrutinised carefully before being granted. This stands in contrast to the approach taken by the High Court in *Wan Hoe Keet (HC)* which adopted an overly broad approach by granting the Injunction simply based on LVM's involvement in the negotiations which led to the settlement.

18 A significant reason why the approach in *Wan Hoe Keet (CA)* is preferable is because it is not uncommon for one party to bring a test case before the courts at the first instance and, if successful, for other parties to employ the same set of solicitors to bring similar legal actions against the same defendants later.[25] By taking a robust and fact-intensive approach, the Court of Appeal reaffirms a party's right to retain counsel of its choice and places

23 In *QB Net Co Ltd v Earnson Management (S) Pte Ltd* [2007] 1 SLR(R) 1 at [68], Lai Siu Chiu J held that "[a] plaintiff who alleges a breach of confidence must define the allegedly confidential information with precision. As a corollary, the courts have applied the principle that a defendant's use of information cannot be restrained by injunction unless the injunction is drafted in sufficiently specific terms to enable the defendant to know with certainty what he can and cannot do". Lai J's position is supported by the cases of *Chiarapurk Jack v Haw Par Brothers International Ltd* [1993] 2 SLR(R) 620 and *Stratech Systems Ltd v Nyam Chiu Shin* [2005] 2 SLR(R) 579, where the Court of Appeal rejected claims of breach of confidentiality because the particularisation of such claims was insufficient.

24 [2018] 5 SLR 894.

25 See, for example, the legal commentary from Slater & Gordon, "Group Litigation Explained" <https://www.slatergordon.co.uk/commercial-and-group-litigation/group-litigation/> (accessed 13 June 2020).

the burden of proof on the party seeking the injunction to prove the facts supporting the grant of the injunction. In contrast, the Australian and New Zealand approaches appear to be far more indulgent and put at risk the principle that a party should generally be entitled to its choice of counsel.[26]

C. The breach of confidence test is malleable to suit specific needs

19 Thirdly, *Wan Hoe Keet (CA)* demonstrates the malleability of the breach of confidence test. The Court of Appeal made it clear that the starting point would be the test for breach of confidence, albeit modified slightly with regard to the precise issue before the court.[27] The factors considered under the framework of the breach of confidence test are highly customised to suit the specific fact scenario where an injunction is sought by an adverse party against a party appointing a particular solicitor who had acted against the adverse party in prior proceedings. The malleability of the breach of confidence test was reinforced by the Court of Appeal's judgment in *I-Admin (Singapore) Pte Ltd v Hong Ying Ting*[28] ("*I-Admin*") on 6 April 2020.

20 *I-Admin* is significant because it heralded a significant reformulation on the law of confidence. The Court of Appeal had to consider the issue of whether the burden of proof should nevertheless remain on the appellant to prove unauthorised use

---

26 The indulgence of the Australian and New Zealand approaches can be seen in *Carter Holt Harvey Forests Ltd v Sunnex Logging Ltd* [2001] 3 NZLR 343 at [34] (which was cited by *Worth Recycling Pty Ltd v Waste Recycling and Processing Pty Ltd* [2009] NSWCA 354 at [41]), where it was held that:

(a) "While it may be accepted that the lawyers have acted in good faith and that they have not broken their promises to preserve confidentiality, and that they intend not to do so, it has not been demonstrated to the satisfaction of the Court that there is no risk of a future breach occurring accidentally or unconsciously."

(b) A partial ban extending to settlement negotiations only would not be sufficient as the perceived risk is not confined to disclosure or misuse of information in connection with any settlement negotiations.

(c) The risk appears to exist if the lawyers are permitted to conduct the litigation and it may well prove to be completely artificial to try to separate settlement discussions from the course of the litigation.

27 *LVM Law Chambers LLC v Wan Hoe Keet* [2020] 1 SLR 1083 at [15]–[17].

28 [2020] 1 SLR 1130.

because the respondents "*possessed and circulated* unauthorised copies of its materials" [emphasis in original].[29] It held as follows:

> (a) The law of confidence protected a specific interest, which was a plaintiff's interest in preventing wrongful gain or profit from its confidential information.[30] It also protects a plaintiff's interest to avoid wrongful loss which is suffered as long as a defendant's conscience has been affected in the breach of the obligation of confidentiality.[31]
>
> (b) The vulnerability of the wrongful loss interest is magnified when considered against the backdrop of the advances in modern technology, given that it is now significantly easier to copy and spread vast amounts of confidential information, often without the knowledge of plaintiffs. It is near impossible to safeguard information from all potential wrongdoing and suggests that stronger measures are required to protect owners from loss.[32]
>
> (c) Therefore, once it is established that the information in question has the "necessary quality of confidence" about it and was "imparted in circumstances importing an obligation of confidence", an action for breach of confidence is presumed, to be displaced by the defendant.[33]

21 The wrongful loss analysis is potentially applicable to *Wan Hoe Keet (CA)* since it may be argued that LVM should come under an "obligation of conscience" to respect the confidence of the relevant information and not merely refrain from causing detriment to the plaintiff.[34] To this end, it is worth considering whether the analysis put forth in *I-Admin* will potentially lead to further modifications to the test set out in *Wan Hoe Keet (CA)*

29 *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 1 SLR 1130 at [28].
30 *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 1 SLR 1130 at [50].
31 *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 1 SLR 1130 at [53].
32 *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 1 SLR 1130 at [55].
33 *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 1 SLR 1130 at [61].
34 Indeed, it must be noted that for this proposition, the Court of Appeal cited *Smith Kline & French Laboratories (Australia) Ltd v Secretary, Department of Community Services and Health* (1990) 17 IPR 545 at 584, which was also cited in part by the Court of Appeal in *LVM Law Chambers LLC v Wan Hoe Keet* [2020] 1 SLR 1083 at [15].

moving forward. As both cases address radically different facts, one surmises that no changes will eventuate.

D. Equitable remedies remain relevant and can give rise to practical justice

22 Finally, Justice Michael Briggs of the Supreme Court of the UK had previously commented that equity is still relevant to modern-day practice because it is able to provide a toolkit of flexible remedies to achieve practical justice beyond the realm of damages and money. Equity can add a "dimension of humanity into the law" and this was something no rule could ever achieve.[35]

23 *Wan Hoe Keet (CA)* is a masterclass in the demonstration of how the court can wield its equitable jurisdiction to grant relief for breach of confidence.[36] It may be argued that injunctive relief would be disproportionate to the objective sought to be achieved, *ie*, the prevention of wrongful loss since this would lead to Ms Chan losing her right to appoint her counsel of choice in the 2nd Action. The remedy preferred by the Court of Appeal optimally balances the court's concern with a breach of confidential information arising from LVM's knowledge of the terms of the Settlement Agreement in the 1st Action with Ms Chan's right to appoint counsel of her choice to act in the 2nd Action.

VI. Conclusion

24 In conclusion, *Wan Hoe Keet (CA)* is a welcome decision in Singapore's jurisprudence as it provides clarity on several areas of Singapore law. To summarise:

(a) A party is entitled to be represented by counsel of its choice unless exceptional circumstances arise.

(b) The breach of confidentiality test is malleable to meet different factual scenarios. In so far as *I-Admin* has

35 Debby Lim & Jonathan Muk, "Equitable Remedies in Commercial Litigation" *Singapore Law Blog* (8 April 2015).

36 *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 1 SLR 1130 at [59].

reversed the burden of proof for Requirement 3, this is unlikely to apply to the holding in *Wan Hoe Keet (CA)*.

(c) The equitable jurisdiction of the court allows the court to examine the facts and consider the optimal remedy to be dispensed such that practical justice may be achieved.

25 Finally, the practicality of the decision will undoubtedly assuage the concerns expressed by Mr Alvin Chen in his article. It is likely to be warmly embraced by legal practitioners in Singapore.