

BREACH OF CONFIDENCE ACTIONS IN SINGAPORE

Where Are We Now After *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 1 SLR 1130?

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The law on breach of confidence in Singapore has seen significant developments in recent years. The landmark Court of Appeal decision of *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 1 SLR 1130 modified the well-established test for a breach of confidence claim by placing the burden of proof on a defendant to show that his conscience is unaffected after it has been established that the confidential information in question has been imparted or received in circumstances importing an obligation of confidence. The scope and application of this modified test has since been the subject of important clarifications in subsequent decisions of the Court of Appeal. This article reviews the current state of the law on breach of confidence and proposes a framework to assist in understanding and framing breach of confidence claims.

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I. Introduction

1 In the landmark decision of *I-Admin (Singapore) Pte Ltd v Hong Ying Ting*¹ (“*I-Admin*”), the law on breach of confidence was reviewed and extended by the Court of Appeal. In that decision, the Court of Appeal modified the well-established test for a breach of confidence claim to provide more robust protection

1 [2020] 1 SLR 1130.

to owners of confidential information by placing the burden on the defendant to show that his conscience is unaffected.

2 The modified approach in *I-Admin* has since been the subject of important clarifications in two later decisions by the Court of Appeal in *Lim Oon Kuin v Rajah & Tann Singapore LLP*² (“*Lim Oon Kuin*”) and *Lim Suk Ling Priscilla v Amber Compounding Pharmacy Pte Ltd*³ (“*Amber Compounding*”).

3 This article reviews the state of the law on breach of confidence following *I-Admin* and proposes a framework to assist in understanding and framing breach of confidence claims.

II. The modified approach in *I-Admin* – a brief recap

4 Prior to *I-Admin*, the law on breach of confidence claims was well established in Singapore. The Singapore courts have consistently cited and applied the test set out in *Coco v A N Clark (Engineers) Ltd*⁴ (“*Coco*”),⁵ which featured three elements:

- (a) the information must possess the necessary quality of confidence;
- (b) the information must have been imparted or received in circumstances giving rise to an obligation of confidentiality; and
- (c) there must be unauthorised use and detriment on the party who disclosed the information to the recipient who misused it.

5 However, it was noted in *I-Admin* that the application of the third element of the *Coco* test has, in recent years, come under increased scrutiny and that there may often be circumstances where defendants wrongfully access or acquire confidential information but do not use or disclose the same.⁶ Such acts

2 [2022] 2 SLR 280.

3 [2024] 1 SLR 741.

4 [1969] RPC 41.

5 See, for example, the Court of Appeal decision in *Adinop Co Ltd v Rovithai Ltd* [2019] 2 SLR 808 at [41].

6 *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 1 SLR 1130 at [43].

compromise the confidentiality of the relevant information although they do not, strictly speaking, constitute “unauthorised use” and the third element of the *Coco* test would therefore not be satisfied.

6 This issue led the Court of Appeal in *I-Admin* to conduct a review on the law of confidence in which it held that an action for breach of confidence served two purposes:

- (a) to prevent a defendant’s *wrongful gain* derived from a claimant’s confidential information (termed the “wrongful gain interest”);⁷ and
- (b) to prevent *wrongful loss* to a claimant in the form of loss of confidentiality of its information *per se* (termed the “wrongful loss interest”).⁸

7 The Court of Appeal in *I-Admin* observed that while the *Coco* test protected the wrongful gain interest,⁹ it did not adequately safeguard the wrongful loss interest given its requirement of unauthorised use and detriment under the third element of the test.¹⁰

8 In the circumstances, the Court of Appeal in *I-Admin* propounded a modified approach to breach of confidence claims by removing the third element of the *Coco* test altogether. Under this modified approach (the “*I-Admin* approach”), a breach of confidence is *presumed* upon the establishment of the first two elements of the *Coco* test, and the defendant bears the burden of proof of showing that his “conscience is unaffected” in order to displace the presumption of liability.¹¹

7 *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 1 SLR 1130 at [50].

8 *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 1 SLR 1130 at [51]–[53]. See also the subsequent decision of the Court of Appeal in *Lim Oon Kuin v Rajah & Tann Singapore LLP* [2022] 2 SLR 280 at [36(b)] which characterised the wrongful loss interest recognised in *I-Admin* as a case in which the plaintiff is “seeking protection for the confidentiality of the information *per se*, which loss is suffered so long as a defendant’s conscience has been impacted in the breach of the obligation of confidentiality” [emphasis added].

9 *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 1 SLR 1130 at [54].

10 *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 1 SLR 1130 at [58].

11 *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 1 SLR 1130 at [61].

9 Accordingly, under the *I-Admin* approach, a defendant’s mere possession of a claimant’s confidential information without consent can amount to a breach of confidence.¹²

III. Subsequent clarifications to the *I-Admin* approach

10 After *I-Admin*, it appeared that the law on breach of confidence had been fundamentally changed given the significant modification of the traditional *Coco* test which had been cited and applied by the Singapore courts for many years.¹³

11 However, the *I-Admin* approach has since been subject to a number of important clarifications by the Court of Appeal in the 2022 decision of *Lim Oon Kuin* and, most recently, in the 2024 decision of *Amber Compounding*. These decisions are discussed below.

A. Applicable only to unauthorised “taker” situations

12 The first important clarification by the Court of Appeal is that the *I-Admin* approach is expressly limited to situations in which confidential information was accessed or acquired without authorisation (which are termed “taker” situations).¹⁴ The *I-Admin* approach is therefore *not* a general approach to be taken in all breach of confidence claims.

13 In this connection, the Court of Appeal emphasised that it did not intend to turn the law on breach of confidence on its head by replacing the traditional *Coco* test in its entirety.¹⁵

12 See *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 1 SLR 1130 at [66] where the Court of Appeal held that “the respondents’ very possession of the appellant’s client data without its consent amounted to a breach of confidence”.

13 See Saw Cheng Lim, Chan Zheng Wen Samuel & Chai Wen Min, “Revisiting the Law of Confidence in Singapore and a Proposal for a New Tort of Misuse of Private Information” (2020) 32 SAcLJ 891 at para 1.

14 *Lim Suk Ling Priscilla v Amber Compounding Pharmacy Pte Ltd* [2024] 1 SLR 741 at [31]–[32]; *Lim Oon Kuin v Rajah & Tann Singapore LLP* [2022] 2 SLR 280 at [41].

15 *Lim Oon Kuin v Rajah & Tann Singapore LLP* [2022] 2 SLR 280 at [39]; *Lim Suk Ling Priscilla v Amber Compounding Pharmacy Pte Ltd* [2024] 1 SLR 741 at [46].

14 Instead, the *I-Admin* approach was “intended to address a specific lacuna in the law at that time, which prevented a plaintiff from obtaining a remedy where a defendant wrongfully accesses or acquires confidential information but does not use or disclose the same”.¹⁶ It is only in this specific situation that the *I-Admin* approach would apply.

15 In cases where the third element of the *Coco* test is satisfied (that is, where there is unauthorised use or disclosure of confidential information by a defendant), the Court of Appeal stated that there is no lacuna and the *I-Admin* approach would not apply.¹⁷

16 In the author’s view, the clarification that the *I-Admin* approach is only limited to “taker” situations is a welcome development. Prior to this clarification, there had been commentary that an unattenuated and general application of the *I-Admin* approach may be unduly favourable to claimants in breach of confidence actions.

17 For example, in *Revisiting the Law of Confidence in Singapore and a Proposal for a New Tort of Misuse of Private Information*,¹⁸ the learned authors observed that possession by the defendant of the claimant’s confidential information *per se* would amount to a *prima facie* breach of confidence (subject to the first two elements of the *Coco* test being satisfied).¹⁹ The learned authors then went on to question “whether the modified [*I-Admin*] approach could have tilted the balance of equities too far in

16 *Lim Suk Ling Priscilla v Amber Compounding Pharmacy Pte Ltd* [2024] 1 SLR 741 at [32].

17 *Lim Suk Ling Priscilla v Amber Compounding Pharmacy Pte Ltd* [2024] 1 SLR 741 at [32]; *Lim Oon Kuin v Rajah & Tann Singapore LLP* [2022] 2 SLR 280 at [39].

18 Saw Cheng Lim, Chan Zheng Wen Samuel & Chai Wen Min, “Revisiting the Law of Confidence in Singapore and a Proposal for a New Tort of Misuse of Private Information” (2020) 32 SAclJ 891.

19 Saw Cheng Lim, Chan Zheng Wen Samuel & Chai Wen Min, “Revisiting the Law of Confidence in Singapore and a Proposal for a New Tort of Misuse of Private Information” (2020) 32 SAclJ 891 at para 55.

favour of the plaintiff ... particularly in situations that do not involve surreptitious takers of information”.²⁰

18 In a similar vein, the author had also written elsewhere²¹ that while the *I-Admin* approach may not cause hardship to defendants who surreptitiously and improperly obtain confidential information without consent, it may be a surprising result to find a presumed breach of confidence in cases where confidential information is voluntarily disclosed to the defendant by the claimant²² or obtained innocently.²³

19 The above concerns have now been addressed by the Court of Appeal’s confinement of the *I-Admin* approach solely to “taker” situations which serves to properly “vindicate the wrongful loss interest in situations where confidential information was accessed without authorisation” as stated in *Amber Compounding*.²⁴

B. Application of Coco test and I-Admin approach in the same breach of confidence action with respect to different pieces of information or documents

20 The second important clarification by the Court of Appeal is that a claimant is entitled to mount a claim for breach of confidence in the same action utilising both the traditional *Coco* test and the *I-Admin* approach for *different* pieces of information or documents.²⁵

20 Saw Cheng Lim, Chan Zheng Wen Samuel & Chai Wen Min, “Revisiting the Law of Confidence in Singapore and a Proposal for a New Tort of Misuse of Private Information” (2020) 32 SAclJ 891 at fn 164.

21 Jon Chan Wenqiang, “The Importance of a Clean Conscience in Breach of Confidence Claims”, *Law Gazette* (September 2020) <<https://lawgazette.com.sg/feature/clean-conscience-in-breach-of-confidence-claims/>> (accessed 21 October 2024).

22 For example, in the context of employment relationships where confidential information is imparted by employers to their employees to allow the latter to perform their duties.

23 For example, where the defendant receives an unsolicited e-mail containing confidential information sent by the claimant by accident.

24 *Lim Suk Ling Priscilla v Amber Compounding Pharmacy Pte Ltd* [2024] 1 SLR 741 at [31].

25 *Lim Suk Ling Priscilla v Amber Compounding Pharmacy Pte Ltd* [2024] 1 SLR 741 at [34].

21 In this regard, the Court of Appeal in *Amber Compounding* observed that the question of whether there has been a breach of confidence “must be assessed with reference to the *specific* documents or information in the case at hand” [emphasis in original].²⁶

22 The Court of Appeal then explained this approach as follows:

38 ... To take an extreme example, suppose that the defendant took from the plaintiff ten categories of documents without authorisation. The vast amount of the documents obtained relate to nine categories. However, these nine categories have not been used without authorisation and only one category has been used without authorisation. In such a scenario, if the plaintiff claims for breach of confidence in respect of that single category under the *Coco* approach and in so doing is disentitled from claiming in relation to the other nine categories, his wrongful loss interest in relation to those nine categories would be wholly unvindicated. This cannot be the import of *I-Admin* and the subsequent decisions that followed.

39 From the foregoing, it follows that *a plaintiff is not prevented from pleading that there was a breach of confidence in respect of one set of documents or information under the Coco test while simultaneously mounting a claim under the I-Admin test in the same action in respect of a different set of documents or information.* He is well entitled to seek to vindicate his wrongful gain interest in respect of the documents or information which he says has been used without authorisation to his detriment, and to also mount a claim for his distinct wrongful loss interest in respect of other documents or information.

[emphasis added]

C. *Traditional Coco test and I-Admin approach cannot apply at the same time to the same piece of information or document*

23 The third important clarification by the Court of Appeal is that the traditional *Coco* test and the *I-Admin* approach are mutually exclusive in respect of the *same* piece of information

26 *Lim Suk Ling Priscilla v Amber Compounding Pharmacy Pte Ltd* [2024] 1 SLR 741 at [36].

or document.²⁷ Accordingly, a claimant cannot hedge its bets by concurrently relying on both the *Coco* test and the *I-Admin* approach in a breach of confidence claim relating to the same information or document.

24 This is because the application of the *Coco* test (that is, in cases where there has been unauthorised use or disclosure of confidential information by a defendant) would “necessarily mean that there is no lacuna that would engage the *I-Admin* test”.²⁸

25 Therefore, in a case where a claimant takes the position that the *Coco* test is satisfied with respect to a piece of confidential information or document, the Court of Appeal in *Amber Compounding* held that a claimant should proceed under the *Coco* test.²⁹ That said, the Court of Appeal stated that the *I-Admin* approach could be pleaded as an alternative in the event that the claimant failed to satisfy the *Coco* test.³⁰

26 However, the Court of Appeal highlighted that the converse is not applicable – a claimant cannot plead and rely on the *I-Admin* approach as its primary claim and then plead and rely on the *Coco* test in the alternative.

27 As stated by the Court of Appeal in *Amber Compounding*, a claimant:³¹

... cannot equivocate by first alleging that there was *no* authorised use of the confidential information and/or resulting detriment and thereafter, on the contrary, mount an inconsistent secondary case that there was in fact unauthorised use and resulting detriment. [emphasis in original]

27 *Lim Suk Ling Priscilla v Amber Compounding Pharmacy Pte Ltd* [2024] 1 SLR 741 at [45] and [50].

28 *Lim Suk Ling Priscilla v Amber Compounding Pharmacy Pte Ltd* [2024] 1 SLR 741 at [45].

29 *Lim Suk Ling Priscilla v Amber Compounding Pharmacy Pte Ltd* [2024] 1 SLR 741 at [45].

30 *Lim Suk Ling Priscilla v Amber Compounding Pharmacy Pte Ltd* [2024] 1 SLR 741 at [50].

31 *Lim Suk Ling Priscilla v Amber Compounding Pharmacy Pte Ltd* [2024] 1 SLR 741 at [50].

IV. Concluding remarks – a proposed framework for breach of confidence claims

28 Drawing the above clarifications made by the Court of Appeal in respect of the *I-Admin* approach together, the author suggests that the following proposed framework may be utilised to better understand and frame breach of confidence claims.

(a) As a starting point, one should assess *each* piece of information or document that is the subject of a breach of confidence claim and determine whether that information or document was accessed or acquired by the defendant without authorisation.

(i) If a piece of information or document had been accessed or acquired by the defendant without authorisation, the defendant will be considered an unauthorised “taker”. In such case, either the *I-Admin* approach or the traditional *Coco* test will potentially be applicable *vis-à-vis* that information or document.

(ii) If the defendant is not an unauthorised “taker” of the information or document in question, only the traditional *Coco* test will be applicable.

(b) In a “taker” situation, one should then assess *each* piece of information or document that has been taken by the defendant and determine whether the *Coco* test is satisfied with respect to that information or document.

(i) If it is clear that the *Coco* test is satisfied (that is, where the confidential information or document in question has been used or disclosed by the defendant without authorisation with resulting detriment to the claimant), a claimant should only plead and advance a claim under the *Coco* test.

(ii) Conversely, if it is clear that the *Coco* test is not satisfied (that is, where there is no unauthorised use or disclosure of confidential

information by a defendant), a claimant should only plead and rely on the *I-Admin* approach.

(iii) If it is unclear whether the *Coco* test is satisfied,³² a claimant can either:

(A) plead and rely on the *Coco* test as its primary claim³³ with the *I-Admin* approach pleaded and pursued as an alternative claim;³⁴ or

(B) plead and rely solely on the *I-Admin* approach (that is, the claimant is not permitted to plead and rely on the *Coco* test as an alternative claim as this would constitute an inconsistent secondary case).

32 In *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 1 SLR 1130 at [62], the Court of Appeal recognised the practical difficulties faced by owners of confidential information in bringing a claim in confidence given that claimants “may often be unaware of the fact that someone has done an act inconsistent with their right of confidentiality”.

33 Note that a claimant would still be required to plead sufficient particulars pertaining to the alleged unauthorised use and resulting detriment: see *Lim Suk Ling Priscilla v Amber Compounding Pharmacy Pte Ltd* [2024] 1 SLR 741 at [50].

34 The Court of Appeal in *Lim Suk Ling Priscilla v Amber Compounding Pharmacy Pte Ltd* [2024] 1 SLR 741 held at [49] that it would “accord with the gap-filling purpose of *I-Admin* if a plaintiff fails to prove unauthorised use and/or resulting detriment as his primary case but, notwithstanding this, is able to mount a secondary case based on the *I-Admin* test”.