(2021) 22 SAL Ann Rev 249
(Published on e-First 30 May 2022)

11. CONFIDENTIAL INFORMATION AND DATA PROTECTION

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I. Confidential information

A. Angliss Singapore Pte Ltd v Yee Heng *Khay – Damages for misuse – Rebutting presumption of breach*

11.1 *Angliss Singapore Pte Ltd v Yee Heng Khay*[1] ("*Angliss*") was a High Court case involving an ex-employee whose breach of confidence caused his ex-employer to lose a customer to a competitor. While this case is a fairly typical case involving breach of confidence in the employment context, it usefully elucidates some features of the current law on breach of confidence after *I-Admin (Singapore) Pte Ltd v Hong Ying Ting*[2] ("*I-Admin*").

11.2 The plaintiff ("Angliss") was a food distributor. For several decades, Angliss had acted as an exclusive distributor for a dairy producer ("Arla"). The defendant ("Yee") was a former employee of Angliss. In 2017, Yee copied a large number of files from Angliss's system, including documents relating to Angliss's work for Arla. On 30 December 2017, Arla terminated its distributorship arrangement with Angliss and engaged the services of a competitor ("Indoguna"). Shortly after Arla's termination, Yee resigned from Angliss to work at Indoguna as "Arla Brand Manager".

11.3 Angliss commenced proceedings in the High Court against Yee, alleging breach of confidence, breach of contract and breach of fiduciary duties.[3] Angliss alleged that Yee had shared Angliss's confidential information with Indoguna, thereby helping Indoguna to displace Angliss as Arla's distributor.

1 [2021] SGHC 168. This case was decided on 30 July 2021.
2 [2020] 1 SLR 1130.
3 *Angliss Singapore Pte Ltd v Yee Heng Khay* [2021] SGHC 168 at [25].

11.4 The High Court found that Angliss had made out its claims for breach of confidence and breach of contract. The claim for breach of fiduciary duties was rejected because Yee was not a fiduciary of Angliss.[4]

11.5 To determine if Yee had committed an equitable breach of confidence, the High Court applied the three-step test in *I-Admin*.[5] First, the High Court found that the information obtained by Yee had the necessary quality of confidence as the information was not readily accessible to the public and was valuable information.[6] Second, the High Court found that the information was obtained by Yee in circumstances importing an obligation of confidence because he had only been given access to the information for the purposes of his employment, and because he had used surreptitious means to make copies of the information.[7] Third, as the first two elements of the *I-Admin* test had been satisfied, this raised a presumption of breach, placing the burden on Yee to prove that his conscience was unaffected. Yee failed to rebut the presumption of breach because the High Court did not believe that his subjective motivations were innocent, and because he had not adduced evidence to show that he had not misused the confidential information.[8] Therefore, the High Court concluded that Yee had breached his duty of confidence to Angliss.[9]

11.6 Separately, the High Court also found that Yee had breached his employment contract with Angliss: the employment contract contained a confidentiality clause,[10] which Yee had contravened by disclosing Angliss's information to Indoguna.[11]

11.7 As for damages, the High Court found that Angliss would have, in all probability, secured its distributorship with Arla for the next six years but for Yee's breach.[12] Accordingly, the High Court awarded damages of $729,423 to Angliss for profits lost due to its loss of the Arla distributorship.[13] The High Court rejected Angliss' alternative heads of damage (namely damages for loss of chance, *Wrotham Park* damages and *I-Admin* damages). In relation to *I-Admin* damages, it is interesting to note that the High Court rejected this claim for the reason that it "would

4 *Angliss Singapore Pte Ltd v Yee Heng Khay* [2021] SGHC 168 at [28]–[36].
5 See para 11.1 above.
6 *Angliss Singapore Pte Ltd v Yee Heng Khay* [2021] SGHC 168 at [39]–[43].
7 *Angliss Singapore Pte Ltd v Yee Heng Khay* [2021] SGHC 168 at [45].
8 *Angliss Singapore Pte Ltd v Yee Heng Khay* [2021] SGHC 168 at [46]–[50].
9 *Angliss Singapore Pte Ltd v Yee Heng Khay* [2021] SGHC 168 at [51].
10 *Angliss Singapore Pte Ltd v Yee Heng Khay* [2021] SGHC 168 at [53].
11 *Angliss Singapore Pte Ltd v Yee Heng Khay* [2021] SGHC 168 at [115].
12 *Angliss Singapore Pte Ltd v Yee Heng Khay* [2021] SGHC 168 at [128].
13 *Angliss Singapore Pte Ltd v Yee Heng Khay* [2021] SGHC 168 at [131].

not have been possible for an entity without Angliss's historical reach and network to create the information",[14] which suggests that damages on the basis of consultancy fees are not appropriate in cases where the hypothetical consultant would never have been able to independently produce the confidential information.[15]

11.8 *Angliss* provides some useful insights on the continuing relevance of misuse after *I-Admin*.[16]

11.9 First, although misuse is no longer an element of the test for breach of confidence, *Angliss* demonstrates that misuse may still be a relevant consideration. In particular, misuse will be relevant where, as in *Angliss*, the plaintiff is seeking substantial damages for profits lost as a result of the defendant's alleged misuse of confidential information – in such a case, the plaintiff will still have to prove that the defendant had in fact misused his confidential information, and will also have to prove the causal connection between the misuse and the loss.

11.10 Second, *Angliss* demonstrates that, if the defendant wishes to point to the absence of misuse to rebut the presumption of breach, the onus is on the defendant to adduce positive evidence that he did not misuse the confidential information. In *Angliss*, Yee claimed that Angliss had not produced sufficient evidence of misuse, and argued that this should "constitute probative evidence that his conscience has not been affected, and should be enough to displace the presumption of an actionable breach of confidence".[17] The High Court appeared to accept that the presumption of breach could be rebutted by an absence of misuse, but held that it was not enough for Yee to simply make the bare allegation that that Angliss had not adduced sufficient evidence of misuse; rather, it was incumbent on Yee to "produce evidence which supports a *positive case* that there was no misuse or abuse of the confidential information" [emphasis in original].[18]

14 *Angliss Singapore Pte Ltd v Yee Heng Khay* [2021] SGHC 168 at [121].
15 This is consistent with *Seager v Copydex Ltd (No 2)* [1969] 1 WLR 809; see *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 1 SLR 1130 at [76].
16 See para 11.1 above.
17 *Angliss Singapore Pte Ltd v Yee Heng Khay* [2021] SGHC 168 at [49].
18 *Angliss Singapore Pte Ltd v Yee Heng Khay* [2021] SGHC 168 at [50]. This proposition has been affirmed in the later case of *Macs Associates Pte Ltd v Siew Kang Yoke* [2021] SGHC 210 at [14].

B. iVenture Card Ltd v Big Bus Singapore City Sightseeing Pte Ltd – *Rebutting presumption of breach*

11.11 In *iVenture Card Ltd v Big Bus Singapore City Sightseeing Pte Ltd*[19] ("*iVenture*"), the Court of Appeal dismissed a claim for breach of confidence because the respondents had successfully proved that they had not misused the appellants' confidential information. Such proof was sufficient to discharge the respondents' burden of proving that their conscience was unaffected.

11.12 *iVenture* involved Tourist Attractions Aggregator Passes ("TAAPs"), which allow pass-holders to access multiple tourist attractions. The appellants were part of the iVenture Group, which was in the business of developing and marketing tourist packages worldwide. The respondents were part of the Duck and HiPPO Group, a Singapore tourism business. Since 2006, the Duck and HiPPO Group had been operating a local TAAP. In 2014, the iVenture Group and the Duck and HiPPO Group agreed on a collaboration, in which the iVenture Group's TAAP transaction management system ("the Smartvisit System") would be used to operate a new co-branded TAAP ("the Singapore iVenture Pass"). After the launch of the Singapore iVenture Pass, however, the relationship between the two sides deteriorated, culminating in the suspension of the Singapore iVenture Pass. Subsequently, one of the respondents launched another TAAP ("the HiPPO Singapore Pass") – this new TAAP covered similar attractions to the Singapore iVenture Pass but did not rely on the Smartvisit System.

11.13 In proceedings before the High Court, the parties made various claims and counterclaims against each other. Among these was the claim by two of the appellants (namely "iVenture Card" and "iVenture International") that the respondents had acted in breach of confidence. Specifically, the two appellants alleged that the respondents had misused confidential information relating to, *inter alia*, "product development, pricing, operating processes and marketing" ("the Alleged Confidential Information") when developing the HiPPO Singapore Pass.[20]

11.14 Preliminarily, it should be noted that, in bringing their claim before the High Court, iVenture Card and iVenture International relied on the traditional test for breach of confidence instead of the modified

19 [2022] 1 SLR 302. This case was decided on 12 October 2021, and arose from an appeal against the High Court's decision in *iVenture Card Ltd v Big Bus Singapore City Sightseeing Pte Ltd* [2020] SGHC 109.

20 *iVenture Card Ltd v Big Bus Singapore City Sightseeing Pte Ltd* [2020] SGHC 109 at [26]; *iVenture Card Ltd v Big Bus Singapore City Sightseeing Pte Ltd* [2022] 1 SLR 302 at [11].

test set out in *I-Admin*.[21] This was probably because, at that time, *I-Admin* had only been very recently decided.[22] It will be recalled that under the traditional test, established in *Coco v AN Clark (Engineers) Ltd*,[23] the plaintiff must prove that the defendant had misused the confidential information – this element of misuse has since been removed by the Court of Appeal in *I-Admin*.

11.15 The High Court dismissed the claim for breach of confidence as it found that the respondents had not "misused the Alleged Confidential Information" or "acted unconscionably in any other way".[24] The main evidence of misuse given by iVenture Card and iVenture International was that the attractions featured on the HiPPO Singapore Pass were the same as those on the Singapore iVenture Pass, but this was not probative of misuse as the attractions were merely typical tourist attractions in Singapore. On the other hand, the respondents had given a persuasive explanation that their HiPPO Singapore Pass was part of a system that they had been independently developing for at least a year before the parties' dispute, which went to show that the HiPPO Singapore Pass had not been developed using the Alleged Confidential Information.

11.16 The appellants appealed against the High Court's decision. They argued, *inter alia*, that the High Court had erroneously placed the burden of proving the third element of the traditional test (that is, the element of misuse) on them, and that the High Court had therefore erred in dismissing their claim for breach of confidence.[25]

11.17 The Court of Appeal affirmed the High Court's decision to dismiss the appellants' claim for breach of confidence. The Court of Appeal found that the High Court had not placed the burden of proof on the appellants.[26] In any case, the respondents had successfully "discharged their burden of proof to show that they did not misuse the Alleged Confidential Information".[27] The evidence showed that the respondents were already familiar with TAAP operations before the conception of

21 See para 11.1 above.
22 *iVenture Card Ltd v Big Bus Singapore City Sightseeing Pte Ltd* [2020] SGHC 109 at [26].
23 [1969] RPC 41.
24 *iVenture Card Ltd v Big Bus Singapore City Sightseeing Pte Ltd* [2020] SGHC 109 at [27].
25 *iVenture Card Ltd v Big Bus Singapore City Sightseeing Pte Ltd* [2022] 1 SLR 302 at [93].
26 *iVenture Card Ltd v Big Bus Singapore City Sightseeing Pte Ltd* [2022] 1 SLR 302 at [94].
27 *iVenture Card Ltd v Big Bus Singapore City Sightseeing Pte Ltd* [2022] 1 SLR 302 at [100].

the Singapore iVenture Pass;[28] there was also a previous TAAP by the iVenture Group, of which pricing, structure and covered attractions were already information that was available to the general public;[29] the attractions covered by the HiPPO Singapore Pass were typical Singapore attractions, expected to be covered in a Singapore TAAP;[30] and the respondents did not use the Smartvisit System in the HiPPO Singapore Pass.[31] These facts suggested that it was unlikely that the respondents had misused any of the Alleged Confidential Information in developing the HiPPO Singapore Pass.

11.18 The principal insight to draw from *iVenture* is that the defendant to a breach of confidence claim may rebut the presumption of breach by proving that he had not misused the confidential information in question. This is clear from the totality of the Court of Appeal's analysis, which focused on the question of whether the defendants had misused the Alleged Confidential Information.[32] It is suggested that in cases like *iVenture*, where the confidential information was *imparted* by the plaintiff to the defendant, the absence or presence of misuse should be the central concern, since the main thing that could impinge upon the defendant's conscience would be his use of the imparted confidential information beyond the scope of the plaintiff's authorisation.[33] This is, of course, not to say that other factors (such as any public interest in the use or disclosure of the confidential information) are irrelevant.

C. Jethanand Harkishindas Bhojwani v Lakshmi Prataprai Bhojwani – *Particularisation of documents – Rebutting presumption of breach – Damages for injury to feelings*

11.19 *Jethanand Harkishindas Bhojwani v Lakshmi Prataprai Bhojwani*[34] ("*Bhojwani*") was an unusual High Court case involving the surreptitious taking of confidential information by family members of the plaintiff.

28 *iVenture Card Ltd v Big Bus Singapore City Sightseeing Pte Ltd* [2022] 1 SLR 302 at [96].
29 *iVenture Card Ltd v Big Bus Singapore City Sightseeing Pte Ltd* [2022] 1 SLR 302 at [97].
30 *iVenture Card Ltd v Big Bus Singapore City Sightseeing Pte Ltd* [2022] 1 SLR 302 at [98].
31 *iVenture Card Ltd v Big Bus Singapore City Sightseeing Pte Ltd* [2022] 1 SLR 302 at [99].
32 *iVenture Card Ltd v Big Bus Singapore City Sightseeing Pte Ltd* [2022] 1 SLR 302 at [90]–[100].
33 Benjamin Wong & David Tan, "A Modern Approach to Breach of Confidence Based on an Obligation of Conscience" (2020) 136 LQR 548 at 552–553.
34 [2021] SGHC 256. This case was decided on 16 November 2021.

11.20 The plaintiff and the first defendant were former husband and wife. The second and third defendants were two of their children. The fourth defendant was a law firm representing the first defendant in her legal proceedings against the plaintiff ("the Matrimonial Proceedings" and "the Trust Proceedings"). The Trust Proceedings had been commenced by the first defendant against the plaintiff to get the plaintiff to account as trustee of a trust ("the Trust") created by the plaintiff's father for the benefit of the plaintiff's wife and his children.

11.21 The plaintiff had a laptop which was used for personal and business purposes. In 2016, the third defendant requested to use the laptop to watch a movie. The plaintiff agreed to the request. However, while using the laptop, the third defendant surreptitiously downloaded a large number of the plaintiff's documents ("the Copied Data") onto a Universal Serial Bus (USB) stick. The Copied Data was shown to the second defendant, who sent some of it to the fourth defendant. Subsequently, the first defendant used some of the Copied Data in the Matrimonial Proceedings; the plaintiff alleged that the first defendant had also used some of the Copied Data in the Trust Proceedings.

11.22 The plaintiff brought action against the defendants in the High Court for breach of confidence. He sought damages, a permanent injunction to restrain the defendants from using, disclosing or destroying the Copied Data, and an order for delivery up of the Copied Data.

11.23 The High Court first clarified that *I-Admin*[35] preserved the first element of the test for breach of confidence. Therefore, it is for the plaintiff to prove that the information concerned has the necessary quality of confidence.[36] This is true even when the defendant had surreptitiously acquired the confidential information.[37]

11.24 On the procedural requirement for the plaintiff to particularise the documents claimed to be confidential, the High Court declined to adopt an absolutist approach that would require the plaintiff to particularise each and every document. Instead, the High Court applied the general principle that "there must be enough particulars of sufficient specificity to allow the defendant to know the case to meet".[38] In the present case, the High Court considered that sufficient specificity had been provided

35 See para 11.1 above.

36 *Jethanand Harkishindas Bhojwani v Lakshmi Prataprai Bhojwani* [2021] SGHC 256 at [15].

37 *Jethanand Harkishindas Bhojwani v Lakshmi Prataprai Bhojwani* [2021] SGHC 256 at [18]–[21].

38 *Jethanand Harkishindas Bhojwani v Lakshmi Prataprai Bhojwani* [2021] SGHC 256 at [35].

by the plaintiff, such that the defendants were not prejudiced by any lack of particulars; further, it was not the case that the plaintiff's claim of confidentiality was being made by someone unfamiliar with the content, nor was it the case that the plaintiff was attempting to fish for evidence using broad claims of confidentiality.[39] The High Court also agreed with the plaintiff that to require particularisation of every document in this case would be "unnecessary", "disproportionate" and "unfair", citing *dicta* from *Imerman v Tchenguiz*.[40]

11.25 The High Court found that most of the Copied Data was confidential as it was not in the public domain and was taken from the plaintiff's personal e-mails (the High Court considered such private communications to be the "stuff of personal confidentiality").[41] The High Court also had no trouble finding that the second and third defendants were bound by an obligation of confidence, applying the rule in *I-Admin* that "an obligation of confidence will be found where confidential information has been accessed without a plaintiff's knowledge or consent".[42]

11.26 The second and third defendants sought to rebut the presumption of breach by justifying their actions. However, the High Court was not convinced by their justifications. First, the second and third defendants argued that they were justified in taking the Copied Data because the plaintiff was under a duty to disclose that information in the context of the Matrimonial Proceedings and the Trust Proceedings – however, the Copied Data was not restricted to documents relevant to the proceedings, the proceedings had not even commenced at the time of the taking of the Copied Data, and the second and third defendants were not party to the proceedings.[43] Second, the second and third defendants argued that they were beneficiaries of the Trust and were therefore entitled to take documents about the Trust – however, they had taken much more than just the documents relevant to the Trust, and in any case the proper procedure for them would have been to apply to the court for such access.[44]

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39 *Jethanand Harkishindas Bhojwani v Lakshmi Prataprai Bhojwani* [2021] SGHC 256 at [32].

40 [2011] 2 WLR 592 at [78]. *Jethanand Harkishindas Bhojwani v Lakshmi Prataprai Bhojwani* [2021] SGHC 256 at [33].

41 *Jethanand Harkishindas Bhojwani v Lakshmi Prataprai Bhojwani* [2021] SGHC 256 at [50]–[51].

42 *Jethanand Harkishindas Bhojwani v Lakshmi Prataprai Bhojwani* [2021] SGHC 256 at [55].

43 *Jethanand Harkishindas Bhojwani v Lakshmi Prataprai Bhojwani* [2021] SGHC 256 at [74].

44 *Jethanand Harkishindas Bhojwani v Lakshmi Prataprai Bhojwani* [2021] SGHC 256 at [77]–[78].

11.27 The High Court issued the injunction and order for delivery up sought by the plaintiff. However, the injunction was subject to a "Knowledge Exception": the defendants were free to use their "knowledge or recollection" of the Copied Data to make discovery applications in any proceedings, and were free to make use of documents so disclosed in those proceedings.[45] However, the High Court did not grant relief for damages as it was not sufficiently pleaded by the plaintiff.

11.28 *Bhojwani* provides welcome clarification about the requirement of particularisation of documents. It shows that the court will take a non-dogmatic and contextual approach to this requirement, in light of its primary purpose (to ensure that the defendant understands the case that he needs to meet). A plaintiff must provide enough detail to the defendant about the alleged confidential information but need not necessarily particularise every single document. This is especially useful in cases such as *Bhojwani*, where the massive number of documents involved would make it oppressive to insist upon complete particularisation, and would incentivise defendants to take large numbers of documents to make particularisation more difficult for the plaintiff.[46]

11.29 *Bhojwani* also raises the question of the use of private interest justifications to justify breaches of confidence. In *I-Admin*,[47] the Court of Appeal suggested that public interest justifications could be used to rebut a presumption of breach of confidence but was silent on private interest justifications.[48] In *Bhojwani*, however, it will be observed that the second and third defendants sought to justify their taking of the plaintiff's confidential information by reference to private interests. Their justifications were ultimately rejected, but not because they were private in nature. This suggests that stronger private interest justifications could potentially be effective in rebutting a presumption of breach of confidence.

11.30 Finally, the High Court in *Bhojwani* had the opportunity to consider (in *obiter dicta*) whether damages for injury to feelings should be awarded in cases of breach of confidence. The High Court distinguished the main authority in favour of such damages, *Cornelius v De Taranto*[49] ("*Cornelius*"), on two grounds. First, *Cornelius* was premised on the right to private life under Art 8 of the European Convention on Human

45 *Jethanand Harkishindas Bhojwani v Lakshmi Prataprai Bhojwani* [2021] SGHC 256 at [81]–[83].
46 *Jethanand Harkishindas Bhojwani v Lakshmi Prataprai Bhojwani* [2021] SGHC 256 at [34].
47 See para 11.1 above.
48 *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 1 SLR 1130 at [61].
49 [2001] EWCA Civ 1511.

Rights,[50] to which Singapore was not a signatory.[51] Second, unlike in the present case, injunctions and delivery up could not rectify the wrong done to the plaintiff in *Cornelius*.[52] Thus, while the High Court appeared to have closed the door to the award of damages for injury to feelings, there may be an argument for such damages in the rare situation where there is no other effective remedy in the courts' existing arsenal.

II. Data protection

A. Re HSBC Bank (Singapore) Ltd – *Personal data – Access*

11.31 *Re HSBC Bank (Singapore) Ltd*[53] ("*HSBC*") was a decision from the Personal Data Protection Commission ("PDPC") involving an individual's request for access to his personal data, which was rejected by the organisation because of an applicable exception to the Access Obligation.

11.32 The organisation in this case was HSBC Bank (Singapore) Limited ("HSBC"). In 2018, an individual ("the Applicant") applied to HSBC for a credit card but was rejected. The Applicant then requested for HSBC's internal evaluation report of his credit card application ("the Report"), pursuant to the Access Obligation. HSBC provided the Report but with some details redacted. HSBC justified its redactions on the basis that the redacted data fell within the evaluative purpose exception to the Access Obligation. The Applicant was dissatisfied and applied to the PDPC for a review of HSBC's refusal to provide full access to the Report.

11.33 The PDPC found that the Report contained the Applicant's personal data. As a whole, the Report contained information about the Applicant, and the Applicant was identifiable from that information.[54] In particular, the Redacted Data, which was "opinion data auto-generated by HSBC's proprietary algorithm that determined an individual's suitability for a credit card by analysing data from various sources", was also the Applicant's personal data.[55] Therefore, HSBC was *prima facie* obliged to provide access to the Report (including the Redacted Data) unless it could rely on one of the exceptions to the Access Obligation.

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50 213 UNTS 221 (4 November 1950; entry into force 3 September 1953).
51 *Jethanand Harkishindas Bhojwani v Lakshmi Prataprai Bhojwani* [2021] SGHC 256 at [110].
52 *Jethanand Harkishindas Bhojwani v Lakshmi Prataprai Bhojwani* [2021] SGHC 256 at [111].
53 [2021] SGPDPC 3. This decision was issued on 10 March 2021.
54 *Re HSBC Bank (Singapore) Ltd* [2021] SGPDPC 3 at [11].
55 *Re HSBC Bank (Singapore) Ltd* [2021] SGPDPC 3 at [12].

11.34 In relation to the Redacted Data, the PDPC found that HSBC was entitled to rely on the evaluative purpose exception to the Access Obligation.[56] Under the evaluative purpose exception, an organisation need not provide access to "opinion data kept solely for an evaluative purpose".[57] The purpose of this exception is to "preserve the confidentiality of the decision-making process".[58] In this case, the Redacted Data was opinion data, which HSBC was using for the purpose of evaluating the Applicant's credit card application. This was a valid "evaluative purpose" within the meaning of the Personal Data Protection Act 2012[59] ("PDPA") as HSBC was evaluating the Applicant's "suitability or eligibility" for the "awarding" of a (credit card) contract.[60] As such, the Redacted Data fell within the scope of the evaluative purpose exception and did not need to be disclosed to the Applicant. HSBC had correctly excluded the Redacted Data and provided the rest of the Report to the Applicant.[61]

11.35 *HSBC* affirms a broad interpretation of the concept of "personal data". In particular, by determining that the Redacted Data was the Applicant's personal data, the PDPC confirmed that derived data (that is, data derived from other information) is personal data as long as it falls within the definition of "personal data" in the PDPA – this is regardless of whether or not the derived data is "algorithmically" generated.[62] Similarly, *HSBC* also confirms that opinion data can constitute personal data;[63] this position is consistent with the positions taken in other jurisdictions[64] and has also received academic support.[65]

B. Re Progressive Builders Pte Ltd – *Employer's liability*

11.36 Section 53(1) of the PDPA provides that an employer will be regarded as having done any act that was done by its employee if the act was done "in the course of his or her employment". In the PDPC decision of *Re Progressive Builders Pte Ltd*[66] ("*Progressive Builders*"), two organisations' liabilities for the acts of their employees came into question.

56 *Re HSBC Bank (Singapore) Ltd* [2021] SGPDPC 3 at [17].
57 Personal Data Protection Act 2012, Fifth Schedule, para 1(a).
58 *Re HSBC Bank (Singapore) Ltd* [2021] SGPDPC 3 at [8] and [16].
59 2020 Rev Ed.
60 *Re HSBC Bank (Singapore) Ltd* [2021] SGPDPC 3 at [17].
61 *Re HSBC Bank (Singapore) Ltd* [2021] SGPDPC 3 at [18].
62 *Re HSBC Bank (Singapore) Ltd* [2021] SGPDPC 3 at [13].
63 *Re HSBC Bank (Singapore) Ltd* [2021] SGPDPC 3 at [14].
64 See, *eg*, s 6(1) of the the Australian Privacy Act 1988.
65 See Warren B Chik & Pang Keep Ying Joey, "The Meaning and Scope of Personal Data under the Singapore Personal Data Protection Act" (2014) 26 SAcLJ 354 at 379.
66 [2021] SGPDPC 2. This decision was issued on 16 April 2021.

11.37 In this case, the complainants were tower crane operators. The complainants operated tower cranes for Progressive Builders Private Limited ("PBPL"), among other clients. In 2019, some incidents occurred at a worksite ("the Geylang Worksite"), leading to PBPL banning the complainants from the Geylang Worksite. PBPL's workplace safety and health officer ("WSHO") was directed to compile a list containing the complainants' details ("the Banned Operators List"). Later, and without the knowledge of PBPL, PBPL's WSHO posted the Banned Operators List on a WhatsApp group with other workplace safety professionals.

11.38 The WSHO of Greatearth Corporation Pte Ltd ("GCPL") was on the same WhatsApp group. He was in charge of a different worksite ("the Clementi Worksite"). Wanting to prevent the complainants from entering the Clementi Worksite, GCPL's WSHO sent the Banned Operators List to GCPL's safety co-ordinator, instructing him to place a copy of the Banned Operators List in the guardroom. However, the safety co-ordinator misunderstood his instructions and instead pasted a poster of the Banned Operators List on the external façade of the Clementi Worksite, where it was visible to the general public.

11.39 The complainants complained to the PDPC about the Banned Operators List, leading to the PDPC's investigation of PBPL and GCPL.

11.40 The PDPC found that PBPL was not responsible for its WSHO's disclosure of the complainants' personal data on WhatsApp. This was because PBPL's WSHO was not acting in the course of his employment when he posted the Banned Operators List. Two factors were relevant in reaching this conclusion: first, PBPL had not directed the WSHO to share the Banned Operators List on WhatsApp; and second, the WSHO had acted in contravention of the obligations of confidence in his employment contract.[67]

11.41 In contrast, GCPL was responsible for the disclosure of the complainants' personal data at the Clementi Worksite. This was because GCPL's WSHO was acting in the course of his employment when he instructed the safety co-ordinator to put up the Banned Operator List in the Clementi Worksite guardhouse, and GCPL's safety co-ordinator likewise acted in the course of his employment when he complied with the instruction (albeit in an incorrect manner) by putting up the Banned Operator List on the external façade of the Clementi Worksite.[68] As no consent had been obtained from the complainants for the disclosure

67 *Re Progressive Builders Pte Ltd* [2021] SGPDPC 2 at [13].
68 *Re Progressive Builders Pte Ltd* [2021] SGPDPC 2 at [15].

of their personal data (and as no exception was applicable), GCPL was found to have breached the Consent Obligation.[69]

11.42 *Progressive Builders* offers a useful illustration of the application of employers' liability under the PDPA.

11.43 Significantly, the PDPC made an important clarification relating to s 53(2) of the PDPA, although this clarification did not have any bearing on the outcome of the present case. Section 53(2) of the PDPA provides for a "defence of reasonable diligence" for employers:[70]

> In any proceedings for an offence under [the PDPA] brought against any person in respect of an act or conduct alleged to have been done or engaged in (as the case may be) by an employee of that person, it is a defence for that person to prove that the person took such steps as were practicable to prevent the employee from doing the act or engaging in the conduct, or from doing or engaging in, in the course of his or her employment, acts or conduct (as the case may be) of that description.

As should be clear from the quoted text, s 53(2) of the PDPA applies only to *offences*. Therefore, strictly speaking, it would not apply in cases such as the present, where the contravention concerned (that is, of the Consent Obligation) is not a criminal offence. However, the PDPC clarified that in such cases, "a similar standard of reasonable diligence may be applied by virtue of section 11(1) of the PDPA, by considering whether the organisation had acted reasonably in meeting its responsibilities under the PDPA".[71] Thus it would appear that, *in effect*, the s 53(2) defence of reasonable diligence will be available to employers facing liability for non-criminal breaches of the PDPA as well. Organisations may be able to rely on this defence by taking reasonable measures, such as providing proper training to their employees and exercising oversight on their employees' data processing activities.

C. Alex Bellingham v Michael Reed – *Public availability exception – Purpose limitation – Right of private action*

11.44 *Alex Bellingham v Michael Reed*[72] ("*Bellingham*") is the first data protection case to be decided by the High Court. In *Bellingham*, the High Court considered the scope of the right of private action in the

69 *Re Progressive Builders Pte Ltd* [2021] SGPDPC 2 at [17]–[20].
70 *Re Progressive Builders Pte Ltd* [2021] SGPDPC 2 at [12].
71 *Re Progressive Builders Pte Ltd* [2021] SGPDPC 2 at [12].
72 [2021] SGHC 125. This case was decided on 25 May 2021 and arose from an appeal against the District Court's decision in *IP Investment Management Pte Ltd v Alex Bellingham* [2019] SGDC 207.

PDPA, among other issues. The right of private action allows a person who "suffers loss or damage" from a breach of the PDPA to bring civil proceedings in court.[73]

11.45 In this case, the data subject was the respondent ("Reed"). Reed was an investor in an investment fund ("the Edinburgh Fund") which was set up by two related companies, namely IP Investment Management Pte Ltd ("IPIM") and IP Investment Management (HK) Ltd ("IPIM HK"). The appellant ("Bellingham") worked for another related company ("IP Real Estate"), and he was seconded to IPIM HK where he managed the Edinburgh Fund. During the course of his work, Bellingham obtained Reed's personal data, along with the personal data of other investors in the Edinburgh Fund. Subsequently, after Bellingham joined a competitor firm called Q Investment Partners Pte Ltd ("QIP"), he sent e-mails to the Edinburgh Fund investors in order to discuss their impending exit from the Edinburgh Fund and to promote QIP's products.

11.46 IPIM and IP Real Estate commenced proceedings against Bellingham, with Reed later joining as plaintiff. They alleged that Bellingham had breached the PDPA by using the investors' personal data (their names, e-mail addresses and personal investment activity in the Edinburgh Fund) to contact the investors.

11.47 At first instance before the District Court, only Reed succeeded in his application.

11.48 On liability, the District Court found that Bellingham had breached both the Consent Obligation and the Purpose Limitation Obligation[74] because he did not have the investors' consent to use their personal data for the purpose of contacting them regarding other investments.[75] On standing, the District Court held that Reed had standing to sue as he had suffered the requisite "loss or damage" under s 32 of the PDPA.[76] However, IPIM and IP Real Estate had no standing to sue because s 32 of the PDPA was only intended to confer standing on the data subjects (in this case, the investors).[77] Accordingly, the District

73 It should be noted that the right of private action was previously found under s 32 of the Personal Data Protection Act 2012 (2020 Rev Ed) ("PDPA") but is now found under s 48O of the PDPA.

74 *IP Investment Management Pte Ltd v Alex Bellingham* [2019] SGDC 207 at [122].

75 *IP Investment Management Pte Ltd v Alex Bellingham* [2019] SGDC 207 at [132]–[133].

76 *IP Investment Management Pte Ltd v Alex Bellingham* [2019] SGDC 207 at [135]–[142].

77 *IP Investment Management Pte Ltd v Alex Bellingham* [2019] SGDC 207 at [110]–[113]. It should be noted that the 2020 amendments to the Personal Data

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Court issued a prohibitory injunction to prevent Bellingham from using, disclosing or communicating Reed's personal data,[78] and also ordered Bellingham to destroy Reed's personal data.[79]

11.49 Bellingham appealed against the District Court's decision. The High Court allowed the appeal, setting aside the orders made by the District Court.

11.50 As a starting point, the High Court agreed that Bellingham had breached both the Consent Obligation and the Purpose Limitation Obligation, in relation to Reed's personal data.[80] However, the High Court disagreed with the District Court on the issue of standing, and it took the view that Reed did *not* have standing to sue. This was a result of the High Court's narrow interpretation of the term "loss or damage" in s 32 of the PDPA. According to the High Court, "loss or damage" referred to the "heads of loss or damage applicable to torts under common law", and it did not include emotional distress or "loss of control over personal data".[81] Since Reed had suffered no "financial loss, psychiatric injury or nervous shock" as a result of Bellingham's breach of the PDPA, he had not suffered any "loss or damage" within the meaning of s 32 of the PDPA and therefore he had no standing to sue.[82]

11.51 *Bellingham* raises three points of interest.

11.52 First, the public availability exception to the Consent Obligation appears to have been limited by the High Court. Under the public availability exception, consent need not be obtained for the collection, use or disclosure of personal data that is publicly available.[83] Bellingham sought to rely on the public availability exception, arguing that Reed's e-mail address was publicly available on his LinkedIn account.[84] However, the High Court rejected Bellingham's attempt to rely on the public availability exception. It reasoned that, although Bellingham had

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Protection Act 2012 (2020 Rev Ed) ("PDPA") have since extended the right of private action to "organisations and public agencies that suffer direct loss or damage arising from contraventions of the new business-to-business obligations" in the PDPA: *Parliamentary Debates, Official Report* (2 November 2020), vol 95 (S Iswaran, Minister for Communications and Information).

78 *IP Investment Management Pte Ltd v Alex Bellingham* [2019] SGDC 207 at [162].

79 *IP Investment Management Pte Ltd v Alex Bellingham* [2019] SGDC 207 at [171]–[172].

80 *Alex Bellingham v Michael Reed* [2021] SGHC 125 at [39].

81 *Alex Bellingham v Michael Reed* [2021] SGHC 125 at [76] and [93].

82 *Alex Bellingham v Michael Reed* [2021] SGHC 125 at [90].

83 Paragraph 1 of Part 2 of the First Schedule to the Personal Data Protection Act 2012 (2020 Rev Ed) ("PDPA") read with s 17(1) of the PDPA.

84 *Alex Bellingham v Michael Reed* [2021] SGHC 125 at [35].

collected Reed's e-mail address from Reed's public LinkedIn account, he would not have been able to so do without the unlawful use of Reed's name.[85] The High Court then stated categorically that, "where personal data that is publicly available is obtained only through the unlawful use of other personal data, s 17(1) PDPA cannot apply and the personal data so obtained cannot be collected, used or disclosed without consent".[86]

11.53 Post-*Bellingham*, therefore, it seems that the public availability of personal data will not guarantee the applicability of the public availability exception. Going forward, it may be useful for future cases to clarify what kinds of "unlawful use" of personal data would disentitle an organisation from relying on the public availability exception – for example, would the use of personal data in breach of confidence or breach of copyright also be an "unlawful use" in this context? Further elaboration on the theoretical basis for this limitation to the public availability exception may also be beneficial in shaping its precise scope.

11.54 Second, the High Court's application of the s 18(*a*) "appropriateness" limb of the Purpose Limitation Obligation is noteworthy. Here, the High Court found that Bellingham had breached the Purpose Limitation Obligation under s 18 of the PDPA (in particular, s 18(*a*)) because his use of Reed's personal data to contact him for marketing QIP's products "exceeded what a reasonable person would have considered appropriate in the circumstances".[87] This exemplifies how a purpose which would ordinarily be regarded as unobjectionable in the abstract (for example, product marketing) can become objectionable in light of the particular circumstances of the case.[88]

11.55 Third, the High Court has substantially constrained the scope for private action under the PDPA. As mentioned above,[89] the High Court adopted a narrow reading of the term "loss or damage" in s 32 of the PDPA. In particular, the High Court rejected the contention that "loss of control over personal data" constituted such "loss or damage", as such a reading would render "loss or damage" otiose since every breach of the PDPA involved a loss of control over personal data.[90] Furthermore, the

85 *Alex Bellingham v Michael Reed* [2021] SGHC 125 at [37].
86 *Alex Bellingham v Michael Reed* [2021] SGHC 125 at [37].
87 *Alex Bellingham v Michael Reed* [2021] SGHC 125 at [39].
88 See also Benjamin Wong, "Purpose Limitation Obligation: The Appropriate Purpose Requirement" [2019] PDP Digest 25.
89 See para 11.50 above.
90 *Alex Bellingham v Michael Reed* [2021] SGHC 125 at [47]. It should also be noted here that the English Court of Appeal decision in *Lloyd v Google LLC* [2019] EWCA Civ 1599, which was relied upon by Reed on this point, has now been overturned by the UK Supreme Court: see *Lloyd v Google LLC* [2021] UKSC 50.

High Court also excluded emotional distress from the meaning of "loss or damage": Parliament had intended to create a statutory tort through the right of private action, and in the High Court's view, this intention would be advanced if "loss or damage" referred only to "the heads of loss or damage applicable to torts under common law".[91]

11.56 On the point of emotional distress, the High Court undertook a broad examination of the jurisdictions that were referred to during the drafting of the PDPA (namely, Canada, New Zealand, Hong Kong, the UK and the European Union).[92] Notably, the data protection laws of these other jurisdictions recognised emotional distress as a compensable harm. Nevertheless, although the High Court acknowledged Parliament's intention for the PDPA to "be in line with international standards for data protection",[93] it found that the positions taken in those other jurisdictions were not relevant to the interpretation of "loss or damage" in s 32 of the PDPA.[94] This was because the positions taken in those other jurisdictions were "driven primarily by the need to recognise the right to privacy",[95] whereas the PDPA was "not driven by any recognition of the right to privacy as a fundamental right".[96]

11.57 It is reasonable to conjecture that *Bellingham* may have broader implications on the interpretation and application of the PDPA. In this regard, however, it is suggested that *Bellingham* should not be read as presupposing a fundamental distinction between the PDPA and the data protection laws of other countries worldwide, especially in light of the legislative provenance of the PDPA.[97] It is submitted that the positions taken in data protection laws of other jurisdictions, and in particular the jurisdictions from which the drafters of the PDPA drew inspiration, remain of high persuasive value when addressing interpretive issues in the PDPA.

D. Re Belden Singapore Pte Ltd – *Jurisdiction – Transfer limitation*

11.58 In *Re Belden Singapore Pte Ltd*[98] ("*Belden*"), the PDPC found that an organisation failed to comply with the Transfer Limitation Obligation

91 *Alex Bellingham v Michael Reed* [2021] SGHC 125 at [76]
92 *Alex Bellingham v Michael Reed* [2021] SGHC 125 at [53].
93 *Alex Bellingham v Michael Reed* [2021] SGHC 125 at [55].
94 *Alex Bellingham v Michael Reed* [2021] SGHC 125 at [80].
95 *Alex Bellingham v Michael Reed* [2021] SGHC 125 at [57].
96 *Alex Bellingham v Michael Reed* [2021] SGHC 125 at [75].
97 *Alex Bellingham v Michael Reed* [2021] SGHC 125 at [53]. See also the Court of Appeal's decision in *ANB v ANC* [2015] 5 SLR 522 at [22].
98 [2021] SGPDPC 13. This decision was issued on 12 November 2021.

because it had inadvertently omitted to enter into a binding contract with the recipient organisation to whom it was transferring personal data. This decision highlights a potential pitfall that organisations may face when seeking to comply with the Transfer Limitation Obligation.

11.59 Belden Inc was an entity headquartered in the US. It performed human resources ("HR") functions for Belden Singapore Private Limited ("Belden Singapore") and Grass Valley Singapore Pte Ltd ("GVSPL"), both of whom were Singapore companies. For this purpose, Belden Singapore and GVSPL transferred employee personal data to Belden Inc. The question that arose in this case was whether Belden Singapore and GVSPL had complied with the Transfer Limitation Obligation when transferring personal data out of Singapore to Belden Inc.

11.60 Under the Transfer Limitation Obligation, an organisation who is transferring personal data out of Singapore must ensure that the recipient organisation will provide the personal data a standard of protection comparable with that under the PDPA.[99] In particular, the transferring organisation must take appropriate steps to ensure that the recipient organisation is bound by legally enforceable obligations to provide a comparable standard of protection.[100] One recognised type of "legally enforceable obligation" is contractual obligations.[101]

11.61 As a starting point, the PDPC found that the data protection obligations under the PDPA did not apply to Belden Inc because Belden Inc did not process personal data in Singapore.[102]

11.62 Turning to the Singapore-based companies, the PDPC found that GVSPL had not breached the Transfer Limitation Obligation.[103] This was because Belden Inc and GVSPL were party to a data sharing agreement ("DSA") governing the transfer of personal data to Belden Inc.[104] The DSA contained appropriate provisions addressing the protection of GVSPL's personal data.[105] Since the provisions of the DSA were contractually enforceable by GVSPL against Belden Inc, GVSPL had complied with the Transfer Limitation Obligation.

99 Personal Data Protection Act 2012 (2020 Rev Ed) s 26.
100 Personal Data Protection Regulations 2021 reg 10(1).
101 Personal Data Protection Regulations 2021 reg 11(1)(*b*).
102 *Re Belden Singapore Pte Ltd* [2021] SGPDPC 13 at [9].
103 *Re Belden Singapore Pte Ltd* [2021] SGPDPC 13 at [18].
104 *Re Belden Singapore Pte Ltd* [2021] SGPDPC 13 at [19].
105 *Re Belden Singapore Pte Ltd* [2021] SGPDPC 13 at [19]–[22].

11.63 On the other hand, the PDPC found that Belden Singapore had breached the Transfer Limitation Obligation.[106] On the facts, Belden Inc had entered into a global data transfer agreement ("GDTA") with other entities in the Belden group of companies, and the GDTA did contain provisions requiring Belden Inc to provide personal data transferred to it from Singapore with a comparable standard of protection to that under the PDPA.[107] However, the problem was that Belden Singapore was not party to the GDTA at the material time as Belden Singapore had not completed the necessary formalities; this meant that Belden Singapore could not enforce the GDTA against Belden Inc, and it had "no legal means to ascertain and ensure that the data transferred outside Singapore was afforded the same level of protection as under the PDPA".[108] As such, Belden Singapore had failed to comply with the requirements of the Transfer Limitation Obligation.

11.64 The key takeaway to note from *Belden* is that the Transfer Limitation Obligation requires the transferee to be bound by obligations that are legally enforceable *by the transferor* if the transferor is relying on contractual obligations. Thus, although Belden Inc was bound by the contractual obligations in the GDTA, those contractual obligations could not be enforced by Belden Singapore (as it was a non-party to the GDTA), which was why Belden Singapore had breached the Transfer Limitation Obligation.

106 *Re Belden Singapore Pte Ltd* [2021] SGPDPC 13 at [12].
107 *Re Belden Singapore Pte Ltd* [2021] SGPDPC 13 at [13]–[16].
108 *Re Belden Singapore Pte Ltd* [2021] SGPDPC 13 at [17].