Vestwin Trading Pte Ltd and Another v Obegi Melissa and Others
[2006] SGHC 107

Case Number : Suit 542/2005, SIC 6394/2005

Decision Date : 27 June 2006

Tribunal/Court : High Court

Coram : Andrew Ang J

Counsel Name(s) : Vinodh Coomaraswamy SC and Georgina Lum Baoling (Shook Lin & Bok) for the plaintiffs; Kenneth Tan SC, Christopher Chong Chi Chuin and Loy Sye Ling (Kenneth Tan Partnership) for the defendants

Parties : Vestwin Trading Pte Ltd; Hill Tree Enterprise Pte Ltd — Obegi Melissa; Oaktree Capital Management LLC; Gryphon Domestic VI, LLC; OCM Opportunities Fund II, LP; OCM Opportunities Fund III, LP; Columbia/Hca Master Retirement Trust; Gramercy Emerging Markets Fund; Gramercy Advisors LLC; Tang Boon Swa; Nemesis Investigations Pte Ltd

Civil Procedure – Injunctions – Application for interim injunction to be made permanent – Interim injunction granted to restrain defendants from use and disclosure of confidential documents and information – Whether damages sufficient to grant relief – Whether permanent injunctive relief justified

Civil Procedure – Pleadings – Damages – Inquiry for assesment of damages caused by breach of confidence and/or conversion of property – Plaintiffs pleading loss of custom and business profits as general damages – Whether plaintiffs required to plead loss of custom and business profit as special damages before inquiry can be ordered

Civil Procedure – Pleadings – Date for close of pleadings – Single action involving multiple parties – Whether pleadings closed as against each defendant on same date – Order 14 r 14, O 18 r 20, O 25 r 1 Rules of Court (Cap 322, R 5, 2004 Rev Ed)

Tort – Confidence – Defendants obtaining confidential information from rubbish that plaintiffs placed out for collection – Whether plaintiffs thereby abandoning documents and precluded from asserting property rights in such documents

Tort – Confidence – Elements to be satisfied to succeed in action for breach in non-contract cases – Whether breach of confidence existing

27 June 2006

Andrew Ang J:

1 This action (in Suit No 542 of 2005) arose from three affidavits ("the Affidavits") deposed to by the first defendant and filed by or on behalf of the second to eighth defendants in Suit No 632 of 2004 which was commenced by the third to seventh defendants against, *inter alia*, PT Indah Kiat Pulp & Paper Corporation ("Indah Kiat") to enforce against the latter a judgment obtained in the Supreme Court of the State of New York on or about 13 April 2004 ("the New York judgment").

2 The plaintiffs/applicants in this action are not parties to Suit No 632 of 2004. However, the Affidavits in the latter suit exhibited certain documents in respect of which the plaintiffs in this action claimed confidentiality. It was alleged that the documents had been obtained surreptitiously and by illegal means by the ninth and tenth defendants and passed on to the first to eighth defendants in breach of the obligation of confidence owed by the ninth and tenth defendants to the plaintiffs.

3 The plaintiffs further submitted that by receiving the documents in those circumstances and having notice then, or subsequently having been put on notice, that the documents were

confidential, the first to eighth defendants similarly owed them a duty of confidence. The documents were used without the plaintiffs' permission and, allegedly, to the detriment of the plaintiffs for which, they contended, damages would not be an adequate remedy.

4 Earlier, I allowed an interlocutory application (Summons in Chambers No 3784 of 2005) by the plaintiffs for an interim injunction against the defendants (restraining the use and disclosure of the documents and the information therein) and a mandatory injunction (requiring each of the defendants to deliver up to the plaintiffs all originals and copies of the said documents which were in their possession, custody, power or control).

5 I also allowed an application by the defendants in Suit No 632 of 2004 (Summons in Chambers No 3833 of 2005) for an order that certain pages in the Affidavits which made reference to or use of the documents be expunged.

6 There was no appeal against any of the above orders.

7 In the present application for summary judgment, the plaintiffs seek, *inter alia*:

(a) a permanent injunction restraining each of the defendants from using or disclosing confidential information and confidential documents (the "Plaintiffs' Documents" more particularly described in the statement of claim) of the plaintiffs for any purpose whatsoever;

(b) a mandatory injunction requiring each of the defendants to deliver up to the plaintiffs all originals and copies of the Plaintiffs' Documents which were in the possession, custody, power or control of the defendants or any of them; and

(c) an order that an inquiry be held as to the damage suffered by the plaintiffs by reason of the defendants' breach of confidence and/or conversion of the plaintiffs' property.

Preliminary point of procedure

8 A preliminary point raised by all the defendants, other than the eighth defendant, was that the application for summary judgment was brought out of time. Under O 14 r 14 of the Rules of Court (Cap 322, R 5, 2004 Rev Ed) ("the Rules"), no summons is to be filed more than 28 days after the pleadings in the *action* are deemed to be closed. (Note: "action" is in the singular form.) This requirement was introduced by the Rules of Court (Amendment No 4) Rules 2002 (S 565/2002)). Order 18 r 20 provides when pleadings in an action are deemed to be closed. (Again, "action" is in the singular.)

9 The last defendant to file its defence was the eighth defendant. The eighth defendant's defence was filed on 8 December 2005. Under O 18 r 20 of the Rules ("the Rules"), therefore, pleadings were deemed closed on 22 December 2005, 14 days after the eighth defendant's defence was filed.

10 Under O 14 r 14 of the Rules (as amended with effect from 1 December 2005), the plaintiffs had until 19 January 2006, 28 days after the close of pleadings, to file an application for summary judgment. The application for summary judgment was filed on 20 December 2005, well within the 28-day time limit.

11 All the defendants, save the eighth, argued that the application for summary judgment was out of time as against each of them. That argument could succeed only if O 18 r 20 could be read as

providing that in a *single action* with multiple parties, pleadings would close as against each defendant on a different date.

12 That cannot be the case. Otherwise, the consequences would be that in a case such as this, where there are multiple parties in foreign jurisdictions and with the attendant delay in effecting service:

(a) close of pleadings will occur for each defendant on a different date;

(b) the time stipulated for taking out the summons for directions will expire as against each defendant on a different date;

(c) the plaintiff must therefore take out as many summonses for directions as there are defendants or risk being out of time;

(d) the court must give separate directions at separate hearings as regards how the plaintiff is to progress the action to trial as against each defendant; and

(e) in a personal injuries matter, different sets of automatic directions would take effect automatically, with different sets of deadlines running as against each defendant under O 25 r 8.

13 Such outcome cannot have been intended. It is contradicted by the words of O 18 r 20 which contemplate only *one* close of pleadings in any given action and of O 25 r 1 which contemplate only *one* summons for directions in any given action. Likewise, O 14 r 14 refers to an "action" in the singular form.

14 Further, the interpretation contended for by the defendants does not advance the underlying purpose of O 14 r 14. That amendment to the rules was added to ensure that resort to the summary judgment procedure is had at an early stage of the proceedings where the savings in costs would be most marked. Where some defendants have filed a defence and others have not filed a defence, it cannot be said that the proceedings are at an advanced stage. Indeed, it cannot be said that the matters in issue in the action have been properly crystallised until the *last* defendant has filed its defence.

15 To require that the plaintiffs take out separate applications for summary judgment against the respective defendants would lead to multiplicity of actions and wastage of costs. All the reasons in favour of a single trial also point to why there should be a single O 14 application. I conclude therefore that the plaintiffs' application is within time not only as against the eighth defendant but as against all the defendants. Even if I were wrong, this would seem to me a paradigm case where the court should allow an extension of time to prevent injustice.

16 As Mustill LJ said in *Erskine Communications Ltd v Worthington* The Times (8 July 1991):

> [I]t would be absurd to say that every instance of overstepping the time limit without excuse, however short and however lacking in harmful consequence to the defendant, should be punished by the loss of the action.

17 Apart from the preliminary point of procedure raised by the defendants, two points of principle were raised in submissions by the plaintiffs at the outset, *viz*:

(a) The fact that one or more points of law arise on an application for summary judgment

does not necessarily mean that leave to defend must be given: *Tokyo Investment Pte Ltd v Tan Chor Thing* [1993] 3 SLR 170.

(b) Where the plaintiffs' entitlement to judgment depends on a clear-cut question of law, the court will hear full arguments as to the point of law rather than grant leave to defend: *Cascade Shipping Inc v Eka Jaya Agencies (S) Pte Ltd* [1992] 1 SLR 197.

I accepted that where the answers to legal issues were clear, there being no arguable defence, to grant leave to defend would unnecessarily delay the disposal of the action. Bearing that in mind, I proceeded to hear the application.

Abandonment of the rubbish?

18 The third to seventh defendants appointed the tenth defendant to locate assets belonging to Indah Kiat in Singapore as part of the third to seventh defendants' efforts to enforce the New York judgment in Singapore.

19 The ninth defendant is a director of the tenth defendant. From the middle of January 2005 to 22 July 2005, the ninth defendant made almost daily trips to Orchard Towers where the plaintiffs' offices were located and (in the words of the ninth defendant in his first affidavit[note: 1]) "retrieved" the plaintiffs' trash bags "when the plaintiffs' cleaner [threw] trash bag(s) in the common rubbish dump" on the ground floor of Orchard Towers. (In the ninth defendant's second and third affidavits, after he was challenged, he explained that the documents were "retrieved" from the walk lane next to the common rubbish dump.)

20 On the uncontroverted evidence of Shilton John Ree, the building manager of Orchard Towers, the loading bay and bin centre at Orchard Towers is "private property from which the Management Corporation Strata Title No 664 ("the MCST") has the right to and takes steps to exclude unauthorised persons from gaining access. The MCST permits only restricted access to this area by authorised personnel for the purposes of loading or unloading goods and/or refuse collection". The MCST exercises control over the bin centre by:

(a) placing the area under 24-hour surveillance;

(b) stationing a security guard from 7.00am to 7.00pm to direct traffic. Part of the security guards' duties is to prevent unauthorised persons from removing rubbish bags from the MCST's property; and

(c) placing a sign warning trespassers to keep out.

21 The plaintiffs asserted that when they disposed of documents in their rubbish, it was for the sole purpose of the same being collected and disposed of by authorised rubbish disposal personnel acting in the course of their duties. By the ninth defendant's own admission, his method of obtaining the documents was as follows:

(a) He observed the Orchard Towers common rubbish dump from a distance from Claymore Drive;

(b) "[T]he [plaintiffs'] cleaner … will turn up … and after she throws the trash bags at the walking lane, I will retrieve this trash bag when there is no one around."[note: 2]

22 The plaintiffs contended that the ninth defendant's method showed a conscious attempt to keep his activities secret, to avoid the control measures put in place by the MCST and was a good indication that he knew that what he was doing was improper and illegal.

23 The defendants argued that by putting rubbish out for collection the plaintiffs had abandoned the documents and therefore could not assert any property rights in the documents. I agreed with counsel for the plaintiffs that the defendants' contention was untenable in law.

24 At common law, the act of putting out rubbish for collection does not amount to an abandonment of property in the rubbish. This precise question was considered in the English case of *Williams v Phillips* (1957) 41 Cr App Rep 5. In that case, dustmen had removed for their own benefit certain commercially valuable items which they found in the rubbish they had collected. The dustmen were charged with and convicted of theft and appealed to the Court of Appeal. As Goddard LCJ in the English Court of Appeal said at 8:

> The first point that is taken here, that the property was abandoned, is on the face of it untenable. Of course, that is not so. If I put refuse in my dustbin outside my house, I am not abandoning it in the sense that I am leaving it for anybody to take away. *I am putting it out so that it may be collected and taken away by the local authority, and until it has been taken away by the local authority it is my property. It is my property and I can take it back and prevent anybody else from taking it away*. It is simply put there for the Corporation [the employer of the dustmen] or the local authority, as the case may be, to come and clear it away. Once the Corporation come and clear it away, it seems to me that because I intended it to pass from myself to them, it becomes their property. Therefore, there is no ground for saying that this is abandoned property. As long as the property remains on the owner's premises, it cannot be abandoned property. *It is a wholly untenable proposition to say that refuse which a householder puts out to taken away is abandoned*. Very likely he does not want it himself and that is why he puts it in the dustbin. *He puts it in the dustbin, not so that anybody can come along and take it, but so that the Corporation can come along and take it*. [emphasis added]

25 This continues to be the law in England. Benjamin Pell, dubbed "Benji the Binman" by the press, was recently convicted in England of theft of confidential waste and fined £20 (see Mark Watts, "Bin Threat" (2005) 149 SJ 846). The facts are not unlike those in the present case. The enterprising binman trawled the rubbish of lawyers advising the "rich and famous" and succeeded on many occasions in obtaining confidential papers which he then sold to interested parties. As the judge said when convicting Pell, "You are well aware now that what people throw away still belongs to someone, and that when they put discarded paper among their rubbish that still belongs to them. I don't think I need say anything further."

26 "Abandonment" has been defined in *Simpson v Gowers* (1981) 121 DLR (3d) 709 at 711 as:

> … "a giving up, a total desertion, and absolute relinquishment" of private goods by the former owner. It may arise when the owner with the specific intent of desertion and relinquishment casts away or leaves behind his property …

To my mind, this is a good working definition of the term.

27 Putting rubbish out for collection by refuse collection personnel is not an abandonment because there is no intent to relinquish the goods absolutely but only conditionally for the purpose of such collection.

28 The defendants argued that there was a triable issue as to the plaintiffs' state of mind in putting out the rubbish containing the Plaintiffs' Documents for collection. That argument ran counter to the English case of *Williams v Phillips* ([24] *supra*). If the defendants' contention was that the plaintiffs intended a different legal effect by their act in putting the rubbish out for collection, the burden was on the defendants to adduce evidence of the factual basis on which they said that the plaintiffs were prepared to permit all and sundry to have access to their rubbish. A mere assertion to that effect was not enough.

29 Counsel for the plaintiffs went further to submit that at common law, an owner of chattels could not divest himself of his rights as owner by a mere abandonment of the chattel. Although I was inclined to agree with counsel, it was, in my view, unnecessary to further consider that point given my view that, in putting out the rubbish for collection, the plaintiffs had not abandoned the documents. Besides, even if abandonment were in and of itself sufficient to divest the plaintiffs of property in the rubbish, the defendants had not adduced evidence anywhere close to discharging their burden of proof that the plaintiffs had abandoned the documents. I therefore agreed with the plaintiffs that there was no triable issue on this point.

30 Counsel for the plaintiffs went to great lengths to establish that the ninth and tenth defendants had obtained the documents surreptitiously and improperly by criminal and illegal means. Although, at the hearing of the interlocutory application for interim injunction, the defendants had challenged the plaintiffs' contentions as to the criminal nature of the ninth and tenth defendants' conduct, at the hearing of the application for summary judgment, it appeared the defendants had abandoned the point.

31 In any case, in my view, it was unarguable that the ninth defendant had surreptitiously and improperly obtained the documents by criminal means (*ie*, theft) and unlawful means (*ie*, conversion). (Counsel for the defendants had argued that the right to sue for conversion belonged to the party in possession of the documents and not the owner of the documents unless the owner had the immediate right to possession of the documents. This is correct in law and is clearly set out in *Clerk & Lindsell on Torts* (Sweet & Maxwell, 19th Ed, 2006) at para 17-40. However, as counsel for the plaintiffs pointed out, the plaintiffs retained the right to possess the documents even while they were in the bin centre awaiting collection. To my mind, there was no doubt that if, at any stage prior to collection, the plaintiffs had asked for the trash to be returned, they would have been well entitled to the same. In the result, there was no question but that the defendants had committed the tort of conversion against the Plaintiffs' Documents.)

32 The plaintiffs' case was that the circumstances in which the ninth and tenth defendants obtained the documents and in which the first to eighth defendants received the documents imposed on them an obligation under the law of confidence not to use or disclose the same.

Juridical basis

33 The basis on which equity will impose an obligation of confidence on a person is founded on conscience and good faith. As Swinfen Eady LJ said in *Lord Ashburton v Pape* [1913] 2 Ch 469 at 475:

> The principle upon which the Court of Chancery has acted for many years has been to restrain the publication of confidential information improperly or surreptitiously obtained or of information imparted in confidence which ought not to be divulged. Injunctions have been granted to give effectual relief, that is not only to restrain the disclosure of confidential information, but to prevent copies being made of any record of that information, and, if copies have already been made, to restrain them from being further copied, and to restrain persons into whose possession

that confidential information has come from themselves in turn divulging or propagating it.

Essential elements

34 The essential elements of an action in breach of confidence were set out in the case of *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41 at 47 ("*Coco*") where Megarry J held that "three elements are normally required if, apart from contract, a case of breach of confidence is to succeed":

(a) The information must be of a confidential nature.

(b) The information must have been communicated in circumstances importing an obligation of confidence. (This aspect has had a gloss added to it, which will be dealt with below.)

(c) There must be an unauthorised use of the information. (There is an open question as to whether detriment needs to be shown in addition and this too will be dealt with below.)

Confidential nature of the documents

35 The protection of the law of confidence is not restricted to trade secrets. It is not even confined to commercially valuable information: the obligation is capable of encompassing all information which any party has an interest in keeping confidential.

36 In *Franklin v Giddins* [1978] Qd R 72 at 78, the following definition from *Meagher, Gummow and Lehane's Equity – Doctrines and Remedies* (Butterworths, 1975) was endorsed:

> What has been protected by equity has been "confidential information"; that is defined by those authors as "facts, schemes or theories which the law regards as of sufficient value or importance to afford protection against use of them by the defendant otherwise than in accordance with the plaintiff's wishes."

37 The cases show that the types of information which have been protected under the law of confidence are indeed multifarious:

(a) private etchings and prints made by the Royal Consort, Prince Albert: *Prince Albert v Strange* (1849) 1 H & Tw 1; 47 ER 1302;

(b) communications between solicitor and client: *Lord Ashburton v Pape* ([33] *supra*);

(c) communications between husband and wife during the currency of a marriage: *Duchess of Argyll v Duke of Argyll* [1967] Ch 302;

(d) the design of a moped engine: *Coco* ([34] *supra*);

(e) telephone conversations: *Francome v Mirror Group Newspapers Ltd* [1984] 1 WLR 892.

(f) details of a lesbian relationship between the plaintiff and a third party: *Stephens v Avery* [1988] Ch 449.

(g) information known by a former crown servant of alleged illegal activities of the British Security Services: *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109 ("*AG v Guardian Newspapers*").

(h) telephone bills and other bills and receipts: *X Pte Ltd v CDE* [1992] 2 SLR 996;

(i) a medical research questionnaire prepared from material in the public domain: *Dr Lam Tai Hing v Dr Koo Chih Ling Linda* [1993] 2 HKC 1;

(j) a mugshot taken at a police station: *Hellewell v Chief Constable of Derbyshire* [1995] 1 WLR 804;

(k) photographs of a celebrity wedding: *Douglas v Hello! Ltd* [2001] QB 967; and

(l) the genetic information needed to reproduce a variety of nectarines imprinted in the twig wood or scion wood of the nectarine tree itself: *Franklin v Giddins* ([36] *supra*).

38 Of particular interest is *Tipping v Clarke* (1843) 2 Hare 383; 67 ER 157. In that case, the defendant had a commercial dispute with the plaintiff and took undisclosed steps to obtain information from the plaintiff's books about the plaintiff's financial dealings, not only with the defendant but with the plaintiff's other Irish customers, and threatened to disclose that information to those customers.

39 The plaintiff sought an injunction and delivery up of the accounts, books and documents obtained by the defendant. The plaintiff challenged the sufficiency of the defendant's answer, which challenge was dismissed by the Master and went on appeal to Sir James Wigram VC, who held as follows:

> [I]t is clear that every clerk employed in a merchant's counting-house is under an implied contract that he will not make public that which he learns in the execution of his duty as clerk; if the Defendant has obtained copies of books, it would very probably be by means of some clerk or agent of the Plaintiff, and if he availed himself surreptitiously of the information, which he could not have had except from a person guilty of a breach of contract in communicating it, I think he could not be permitted to avail himself of that breach of contract. I cannot say that a serious injury may not arise by the publication of accounts under such circumstances; nor am I in a condition to say, with any satisfaction to myself, that this is not a case in which the Court will give relief of the nature which is sought.

40 The case is clear authority that books of account and other internal financial and commercially-sensitive information of a business enjoy protection under the law of confidence.

41 There is no denying that the documents obtained by the ninth and tenth defendants were confidential in nature. As described in the affidavit of 27 July 2005 deposed to by Chua Chun Kay (a director of the plaintiffs), the documents contained information relating to, *inter alia*, the plaintiffs' financial affairs, management procedures and trading practices.

42 The defendants' contention that the documents could not be confidential because they were not marked as such is insupportable. A perusal of the cases listed in [37] above does not bear out the defendants' contention. *Per contra*, in the local case of *X Pte Ltd v CDE* ([37] *supra*), the plaintiff successfully restrained the defendant from making use of or disclosing information evidencing the plaintiff's adulterous relationships contained in telephone bills and receipts, among others. Those documents were not marked "confidential" but Judith Prakash J held nevertheless at 1009, [36] that:

> Whilst telephone and shop bills may not have the degree of confidentiality of a personal diary, there is no doubt that these documents are the property of [the plaintiff] and the defendant had no right to make use of them in any way without his authorization.

43 Counsel for the defendants sought to rely on Prof George Wei's article, "Surreptitious Takings of Confidential Information" (1992) 12 Legal Studies 302 where the author wrote at 319:

> In cases where the defendant is a recipient of information, the conduct of the plaintiff and his attitude towards the information in issue, can shed light on the confidentiality of the information and whether it was imparted in circumstances importing an obligation of confidence.

The argument was that if the plaintiffs chose to dispose of the documents as trash, they could not have attached any importance to the confidentiality of the documents.

44 However, as a more careful reading of the passage showed, that was said in the context of a plaintiff/confider releasing information to the defendant/recipient. The learned writer went on to say at 320:

> Carelessness on the part of the plaintiff should not automatically have the effect of turning conduct of the defendant which is otherwise improper into conduct which is proper. Even more so, if liability is based on the use of illegal means, the lack of care on the part of the plaintiff should not prevent the imposition of an equitable obligation of confidence. The concept of improper and/or illegal means is one which goes to the imposition of an equitable obligation of confidence. Cases which have held that 'carelessness' on the part of the confider is relevant in determining whether an obligation is imposed on the confidee/recipient can be distinguished. In the latter situation, the plaintiff/confider, is releasing information to the defendant/confidee without taking precautions to limit its use in the hands of the defendant. In the case of surreptitious takings, the plaintiff has not entered into any dealings with the defendant and has not released any information to him. Indeed, in many of such cases the defendant will be fully aware that the plaintiff has no desire at all to let him have access to the confidential information in question. The defendant is deliberately setting out to take the confidential information and in many cases will be using illegal means to do so.

The case of *Cray Valley Limited v Deltech Europe Limited* [2003] EWHC 728 (Ch) cited by the defendants should be read in this light.

Importing an obligation of confidence

45 The second requirement in *Coco* ([34] *supra*), while accurate on the facts of the case, does not amount to a requirement that there be an intentional communication of the confidential information by a plaintiff to a defendant in order to found a cause of action.

46 That there is no such requirement was made clear by Lord Goff of Chieveley in *AG v Guardian Newspapers* ([37] *supra*), where his Lordship said, at 281, as follows:

> [A] duty of confidence arises when confidential information comes to the knowledge of a person (the confidant) in circumstances where he has notice, or is held to have agreed, that the information is confidential, with the effect that it would be just in all the circumstances that he should be precluded from disclosing the information to others. I have used the word "notice" advisedly, in order to avoid the (here unnecessary) question of the extent to which actual knowledge is necessary; though I of course understand knowledge to include circumstances where the confidant has deliberately closed his eyes to the obvious. The existence of this broad general principle reflects the fact that there is such a public interest in the maintenance of confidences, that the law will provide remedies for their protection.

> I realise that, in the vast majority of cases, in particular those concerned with trade secrets, the duty of confidence will arise from a transaction or relationship between the parties – often a contract, in which event the duty may arise by reason of either an express or an implied term of that contract. It is in such cases as these that the expressions "confider" and "confidant" are perhaps most aptly employed. But it is well settled that a duty of confidence may arise in equity independently of such cases; and I have expressed the circumstances in which the duty arises in broad terms, not merely to embrace those cases where a third party receives information from a person who is under a duty of confidence in respect of it, knowing that it has been disclosed by that person to him in breach of his duty of confidence, but also to include certain situations, beloved of law teachers – where an obviously confidential document is wafted by an electric fan out of a window into a crowded street, or where an obviously confidential document, such as a private diary, is dropped in a public place, and is then picked up by a passer-by.

47 In England, it was held as long ago as 1849 that the maker and owner of confidential material (in that case private etchings) which had "by improper and surreptitious means, [gone] into the possession of other parties, [was] entitled to an injunction … to restrain those parties from exhibiting … impressions [of the same], and from publishing copies of them": see the headnote of *Prince Albert v Strange* ([37] *supra* at 1; 1302).

48 In Singapore, Prakash J in *X Pte Ltd v CDE* ([37] *supra*) followed *Coco* ([34] *supra*). In connection with the second of the three elements set out in that case, she reviewed the 1913 case of *Lord Ashburton v Pape* ([33] *supra*) and *Francome v Mirror Group Newspapers Ltd* ([37] *supra*) and concluded (at 1008, [35]) that:

> [T]he second element is not limited to information being imparted in confidence. It will satisfy the second element if the information is received or learned in such circumstances that it is clear that a duty of confidentiality arises.

Her Honour went on to state (inferentially at 1009, [37]) that confidentiality law would apply, regardless of whether the information was gained by the defendant while she was in a position of confidence or was private information she obtained by surreptitious or underhanded means. In my view, contrary to the contention of the defendants, it was clear that the imposition of the obligation of confidentiality with respect to the information did not depend upon her being a confidential secretary.

49 Whether confidential information was "improperly or surreptitiously obtained" (as in Swinfen Eady LJ's formulation of the principle in *LordAshburton v Pape*) or "obtained by surreptitious or underhanded means" (as in *X Pte Ltd v CDE*), it is clear that illegal means are well within both descriptions.

50 Thus in *Francome v Mirror Group Newspapers Ltd*, the English Court of Appeal held that the plaintiff was entitled to the protection of the law of confidence to prevent further publication or disclosure of private telephone communications which had been intercepted and recorded illegally. This is to be contrasted with *Malone v Metropolitan Police Commissioner* [1979] Ch 344 where the tapping of telephone conversations was done legally and it was held that, even if there was a duty of confidentiality, this was overridden by public interest in assisting the police in crime detection and prevention.

First to eighth defendants also bound

51 The first to eighth defendants as recipients of information illegally and surreptitiously obtained

are likewise bound by a duty of confidence. Those defendants said they received the documents in good faith with no knowledge of the means by which the ninth and tenth defendants obtained the information. Accepting that at face value for present purposes, that fact does not negate an obligation of confidence. For the first to eighth defendants to be susceptible to restraint by injunction, there is no need for a finding that they acted in bad faith or that they participated in the illegal activities of the ninth and tenth defendants.

52 In *Prince Albert v Strange* ([37] *supra*), it was not alleged that the defendants themselves were a party to the wrongdoing by which the confidential material had come into their possession. Nevertheless, it was held that the defendants had been correctly enjoined from breaching the confidence.

53 In any event, now that the first to eighth defendants are aware of the circumstances in which the information was obtained and of the confidential nature of the documents, they are bound by an obligation of confidence: see *English & American Insurance Co Ltd v Herbert Smith* [1988] FSR 232. The court there held as follows (at 237):

> In the present case, it is submitted, there is no such complicity of any kind so far as Messrs. Herbert Smith and B.I.C.C. are concerned. They were asked to collect the documents, they collected the documents and they received them in good faith. It is then submitted that the equitable right of the owner of confidential information to restrain the use of that confidential information does not apply as against a third party (as opposed to the party who has himself undertaken the duty of confidentiality) where there has been what was called an accidental escape of the information to the third party.
>
> I reject that submission. I can see no reason for distinguishing the earlier Court of Appeal decisions on that ground. The judgment of May L.J. in *Goddard* v. *Nationwide Building Society* in no way suggests that the right to restrain the use of confidential information by a third party depends on the third party being improperly implicated in the leakage of that information. Nourse L.J., on page 745 at C, in fact deals expressly with the point. He says this:
>
> > "Third, the right of the party who desires the protection to invoke the equitable jurisdiction does not in any way depend on the conduct of the third party into whose possession the record of the confidential communication has come. Thus, several eminent judges have been of the opinion that an injunction can be granted against a stranger who has come innocently into the possession of confidential information to which he is not entitled …"

54 The circumstances in the present case are even more compelling. Even if one accepts that the first to eighth defendants had no knowledge of the ninth and tenth defendants' illegal means and even if one accepts that they specifically instructed the ninth and tenth defendants to use legal means, the fact remains that:

(a) they specifically instructed the ninth and tenth defendants to obtain material not publicly available about the plaintiffs' business; and

(b) they were expressly put on notice by the plaintiffs' solicitors' letter dated 14 July 2005, sent 12 days prior to the commencement of these proceedings, that the defendants were in possession of surreptitiously obtained confidential documents belonging to the plaintiffs.

All the more, therefore, the defendants ought to be enjoined permanently from making use of or disclosing the documents.

55 Counsel for the defendants cited *Susan Thomas v Elizabeth Pearce* [2000] FSR 718 for the proposition that a third-party recipient of confidential information (given to her by someone in breach of confidence) must be found to have acted dishonestly to be liable for breach of confidence. In that case the claimant operated a letting agency. The first defendant, an employee of the claimant, left to join the second defendant. She took with her a list of clients of the claimant and showed it to two employees of the second defendant. The judge found that she had breached her contract of employment and an implied duty of confidentiality.

56 The claim against the second defendant was that (at 720):

> The second defendant received [the] information *knowing that it was disclosed in breach* of the first defendant's … contract of employment and/or duty of confidence to the plaintiff. … [emphasis added]

The evidence showed that of the two employees of the second defendant, one (Mr Harrison) had no knowledge at all. As to the other employee, Mrs Price, the trial judge found that, from glancing through the list and being aware of the nature of its contents, she must have known the value of such information, but that she did not check with the first defendant or anyone else whether there was any restriction on its use, having previously been told by the first defendant that there was no express restriction against its use. The judge accepted that when Mrs Price gave instructions to her people to prepare a letter to the claimant's clients on the list informing them that the first defendant had joined the firm, she had dealt with the list as just one event in a particularly busy day. The judge found that it simply did not occur to her that what she was doing was wrong.

57 The trial judge was of the view that the test was whether by acting as she did on that day she was "deliberately closing her eyes and ears, or deliberately not asking questions lest she learned something which she would rather not know, and that she went on regardless". Answering the question in the negative, the trial judge found the second defendant not liable whereupon the claimant appealed. The Court of Appeal held, dismissing the appeal, that the correct test was whether the second defendant had acted honestly; that to be held liable for a breach of confidence more was required than mere careless, naïve or stupid behaviour; and that there had to be an awareness that the information was confidential or a willingness to turn a blind eye.

58 Counsel for the plaintiffs sought to distinguish the case on several grounds.

59 The first ground was that *Susan Thomas v Elizabeth Pearce* was not a case involving the passing of information which had been surreptitiously taken.

60 The second ground was that in that case, the information was unsolicited and therefore it was perhaps not surprising that the second defendant was excused for a lapse of judgment in making use of it. In contrast, the defendants in the present case admitted that the ninth and tenth defendants were engaged in order to get information of the very type they received.

61 The third ground was that the claim against the second defendant in that case was "knowing assistance" in the first defendant's breach of confidence. The claim in that case having been pursued on that basis, it was no wonder that the honesty of the defendant became relevant. In contrast, the plaintiffs' claim in the present case merely pleads that the defendants were aware of the confidential nature of the documents.

62 I am of the view that the case is of little assistance to the defendants if what they seek to argue is that there is a need for a subjective determination that the defendants were dishonest in the

taking and use of the documents.

63 In *Susan Thomas v Elizabeth Pearce* (at 720), it was:

> … common ground that if it is … proved that [the second defendant] received the list *knowing that it had been disclosed by [the first defendant] in breach of confidence*, then [the second defendant] themselves owed a duty of confidence to the plaintiff. [emphasis added]

64 But that is not what the law requires. From the authorities earlier considered (in particular, Lord Goff's statement of the law in *AG v Guardian Newspapers* (see [46] above)), what is required is an awareness that the information is confidential and that awareness includes a situation where the recipient of the information deliberately closed his eyes to the obvious. (See [45]–[50] above.) Even in *Susan Thomas v Elizabeth Pearce*, while requiring that to be held liable the second defendant must have acted dishonestly, the Court of Appeal accepted that the test was whether there was an awareness that the information was confidential or a willingness to turn a blind eye.

65 If dishonesty meant no more than that the recipient was actually or constructively aware of the confidential nature of the information, then the case did not depart from the law as expounded in the other authorities.

66 In any case, as stated earlier, the first to eighth defendants did know of the confidential nature of the documents. Having commissioned private investigators for the very purpose of obtaining information not publicly available and having been put on notice by the plaintiffs' solicitors that the information they received was confidential information which had been surreptitiously obtained, it did not lie in their mouths to deny that they had the requisite awareness.

67 I am satisfied therefore that the second element in *Coco* ([34] *supra*) was met.

Unauthorised use

68 I move on now to the third element in the *Coco* case, *viz*, that there must be unauthorised use of the confidential documents. In the present case, that element was clearly made out. There was no assertion by the defendants otherwise.

69 As noted earlier, there was a question whether the third element of *Coco* included a requirement that the unauthorised use must have been to the detriment to the plaintiffs. It is not clear from the English case law if detriment is an essential ingredient of the cause of action and the question was expressly left open by Megarry J in *Coco* itself. The learned judge said at 48:

> Thirdly, there must be an unauthorised use of the information to the detriment of the person communicating it. Some of the statements of principle in the cases omit any mention of detriment; other include it. At first sight, it seems that detriment ought to be present if equity is to be induced to intervene; but I can conceive of cases where a plaintiff might have substantial motives for seeking the aid of equity and yet suffer nothing which could fairly be called detriment to him, as when the confidential information shows him in a favourable light but gravely injures some relation or friend of his whom he wishes to protect. The point does not arise for decision in this case, for detriment to the plaintiff plainly exists. I need therefore say no more than that although for the purposes of this case I have stated the propositions in the stricter form, I wish to keep open the possibility of the true proposition being that in the wider form.

Likewise, Lord Goff in *AG v Guardian Newspapers* ([37] *supra*), while preferring to leave the question

open, opined at 282 that detriment may not always be necessary. Lord Keith of Kinkel was of the view at 256 that:

> [A]s a general rule, it is in the public interest that confidences should be respected, and the encouragement of such respect may in itself constitute a sufficient ground for recognising and enforcing the obligation of confidence even where the confider can point to no specific detriment to himself.

On the other hand, Lord Griffiths at 270 thought it was necessary.

70 In *Smith Kline & French Laboratories (Australia) Limited v Secretary to the Department of Community Services and Health* [1990] FSR 617 at 664, Gummow J noted that the position in Australia remained open but added his view as follows:

> The basis of the equitable jurisdiction to protect obligations of confidence lies … in an obligation of conscience arising from the circumstances in or through which the information, the subject of the obligation, was communicated or obtained: *Moorgate Tobacco Co. Ltd* v. *Philip Morris Ltd. (No. 2)* … *The obligation of conscience is to respect the confidence, not merely to refrain from causing detriment to the plaintiff. The plaintiff comes to equity to vindicate his right to observance of the obligation, not necessarily to recover loss or to restrain infliction of apprehended loss*. To look into a related field, when has equity said that the only breaches of trust to be restrained are those that would prove detrimental to the beneficiaries? [emphasis added]

It would appear that there are at least some situations where the insistence upon the presence of detriment would be inappropriate if not unjust.

71 In *Prince Albert v Strange* (1849) 2 De G & Sm 652 at 697; 64 ER 293 at 312, Knight Bruce VC held that a person was entitled to relief whenever "the produce of his private hours" was invaded, irrespective of whether such invasion showed him in a creditable or a disadvantageous light.

72 In *Pollard v Photographic Company* (1888) 40 Ch D 345, the plaintiff was granted an injunction against the unauthorised disclosure of a photograph of herself even though the breach could hardly have caused her anything more than embarrassment or discomfort.

73 In R G Toulson & C M Phipps, *Confidentality* (Sweet & Maxwell, 1996) at p 72, it was suggested that one situation (where detriment is not required) may be between a doctor and a celebrity patient suffering from AIDS. The authors opine that any intimate details revealed in confidence by the patient to the doctor ought to be respected even after his death although it cannot be said that the deceased will suffer any detriment from the publication, and thus the estate should be able to obtain an injunction to enforce the obligation.

74 It may be, as suggested by Scott J in *AG v Guardian Newspapers* ([37] *supra* at 147–148) that whether detriment is required depends on the surrounding circumstances of the case.

75 The circumstances of the case before me are such that to insist upon proof of detriment will send a wrong signal encouraging vigilantism. In any event, I am satisfied that the plaintiffs have suffered detriment in that:

> (a) the third to seventh defendants obtained two garnishee orders against the plaintiffs purporting to attach debts due to Indah Kiat (the garnishee orders were subsequently set aside

by consent with costs to the plaintiffs); and

(b) the third to seventh defendants circulated to the plaintiffs' banks a Mareva injunction which they obtained using the confidential information, thereby causing the banks to freeze the plaintiffs' accounts. (The Mareva injunction was subsequently set aside and the freezing of the accounts was lifted only after the plaintiffs challenged the banks' actions.)

76 If an injunction was not to issue, the prospect of the third to seventh defendants seeking to obtain fresh garnishee orders cannot be ruled out. In these circumstances, it is not unreasonable to expect that Indah Kiat might curtail or terminate any dealings with the plaintiffs.

77 I therefore find that the third element in *Coco* ([34] *supra*) was satisfied and, accordingly, the defendants owe an obligation of confidence to the plaintiffs.

Damages not an adequate remedy

78 It is a pre-requisite to the grant of permanent injunctive relief that damages will not be an adequate remedy. Where the plaintiffs' rights of confidentiality have been infringed and will, beyond peradventure, be further infringed if an injunction is denied, the court should intervene to prevent any further breach. In these circumstances, it would be exceptional indeed that damages will adequately compensate the claimant for the prospect of further breaches. As put succinctly by David Bean QC in *Injunctions* (Sweet & Maxwell, 8th Ed, 2004) at para 2.12, "[a] defendant cannot buy the privilege of infringing the claimant's rights".

79 For all the foregoing reasons, I held that the plaintiffs were entitled to a permanent injunction in terms of prayer 1 of their application and that the mandatory injunction by court order dated 18 October 2005 (as subsequently modified by agreement between the parties) be made final.

80 I also made an order in terms of prayer 5, "[t]hat an inquiry as to the damage suffered by the Plaintiffs by reason of the Defendants' breach of confidence and/or conversion of the Plaintiffs' property be carried out". Finally, I ordered costs to the plaintiffs to be taxed unless agreed.

81 With regard to prayer 5, the defendants requested further arguments at which they contended that, no special damage having been pleaded in regard to the conversion, only nominal damages would lie. Accordingly, they argued that no inquiry was called for with regard to damages in conversion.

82 The defendants' submissions (as summarised by counsel for the plaintiffs) were as follows:

(a) As a matter of procedure, special damages must be pleaded whereas general damages do not have to be pleaded.

(b) The plaintiffs intend at the assessment phase to claim consequential loss arising from the defendants' conversion of their property.

(c) Consequential loss is equivalent to special damages.

(d) The plaintiffs have not pleaded special damages in their statement of claim.

(e) Therefore, the plaintiffs are precluded from claiming against the defendants damages for the consequential loss arising from their conversion.

(f) Therefore, the court ought not to order an assessment of damages as the damage caused by the conversion apart from the consequential losses is *de minimis*.

83 Counsel for the plaintiffs contended that the defendants were wrong with regard to proposition (c) above. He contended that the defendants had fallen into the very error of which Harvey McGregor, *McGregor on Damages* (Sweet & Maxwell, 17th Ed, 2003) ("*McGregor*") cautioned at para 1-029:

> [T]he terms [*ie*, "general damages" and "special damages"] are used in a variety of different meanings, and if these meanings are not kept separate the indiscriminate use of the terms only spells confusion.

McGregor at paras 1-029 to 1-034 identified four principal senses in which the terms "general damages" and "special damages" are used. Of these, one (at para 1-034), which deals only with special damage, is not relevant for our purposes. The three remaining senses are as follows:

(a) The first sense (at para 1-030) in which the two terms are contrasted concerns liability, principally in contract. Used in this sense, the two terms correspond with the distinction between the first and second rules in *Hadley v Baxendale* (1854) 9 Exch 341; 156 ER 145. This sense does not apply in the present case, dealing as it does, with contractual damages. As *McGregor* says in the concluding sentence of para 1-030, "[i]f this [contractual] distinction were applied to tort, *all tort damages would count as general*". [emphasis added]

(b) The second sense (at para 1-031 of *McGregor*) in which these terms are used concerns proof. "General damages" in this sense are damages to which the plaintiff is entitled at law but for which there is no measure by which to assess them. Pecuniary losses which are difficult to estimate accurately are also general damages in this sense and such damages include loss of business profits. "Special damages" in this sense are damages awarded in respect of any consequences reasonably and probably arising from the breach complained. As counsel for the plaintiffs pointed out, one of the heads of the plaintiffs' entitlement to damages is a claim for loss of custom and business profits. Accordingly, a claim for damages of this nature, being general damages, does not have to be pleaded. Even in this sense, therefore, the plaintiffs' claim for damages is again for general damages. As counsel for the defendants himself stated, general damages do not need to be pleaded.

(c) The third sense (at para 1-033 of *McGregor*) in which these terms are used concerns pleading. The fundamental purpose of pleadings, of course, is to give the opposing party notice of the case against it so that it is not taken by surprise by an unexpected claim. The plaintiffs argued that in this sense the consequential damages flowing from the defendants' conversion were general damages and not special damages. As stated by *McGregor* at para 43-006:

> General damage consists in all items of loss which the claimant is not required to specify in his pleadings in order to permit proof and recovery in respect of them at the trial. Special damage consists in all items of loss which must be specified by him before they may be proved and recovery granted. The basic test of whether damage is general or special is whether particularity is necessary and useful to warn the defendant of the type of claim and evidence or of the specific amount of claim which he will be confronted with at the trial. "Special damage", said Bowen L.J. in *Ratcliffe v Evans* [[1892] 2 QB 254 at 528],
>
> > "means the particular damage (beyond the general damage), which results from the particular circumstances of the case, and of the claimant's claim to be compensated, for

> which he ought to give warning in his pleadings in order that there may be no surprise at the trial."

As Lord Macnaghten said in *Ströms Bruks Aktie Bolag v John & Peter Hutchison* [1905] AC 515 at 525–526:

> "General damages" … are such as the law will presume to be the direct natural or probable consequence of the act complained of. "Special damages," on the other hand, are such as the law will not infer from the nature of the act. They do not follow in ordinary course. They are exceptional in their character and, therefore, they must be claimed specially and proved strictly.

84 Counsel for the defendants submitted that the only relevant sense in which the terms "general damages" and "special damages" were used was that concerning pleadings. I did not think that was correct for there is a relationship between the various senses in which the terms are used. As *McGregor*, dealing further with the meaning of "general damages", stated at paras 43-008 and 43-009:

> *If an item of damage is general for the purpose of liability because it represents a normal loss,* a fortiori*it will be general for the purpose of pleading* in so far as its existence cannot take the defendant by surprise; only in so far as he could be surprised by the detail of its amount, when this has become crystallised and concrete since the wrong, will it become special damage. Thus Lord Goddard in *British Transport Commission v Gourley* [[1956] AC 185 at 206] defined the general damage in personal injury cases as including
>
> > "compensation for pain and suffering and the like, and if the injuries suffered are such as to lead to continuing permanent disability, compensation for loss of earning power in the future."
>
> … Furthermore, even if an item of damage is special for the purpose of liability because not representing a normal loss, it may yet be general damage for the purpose of pleading, because the test of unexpectedness is not at the time of the commission of the tort or of the making or breaking of the contract but at the later time of pleading. This may possibly be the explanation of *Ward v Smith* [(1822) 11 Price 19; 147 ER 388] where, in an action against a lessor for failure to complete a lease of business premises, the lessee recovered as general damages his loss of general business profits, although such a loss was consequential and not part of the normal measure of damages.
>
> *If an item of damage is general for the purpose of proof because it is inferred or presumed by the court,* a fortiori*it will be general for the purpose of pleading*, since what the law is prepared to infer or presume in the claimant's favour the defendant cannot contend would surprise him at the trial.
>
> [emphasis added]

With regard to the defendants' intentional tort of conversion, it hardly lay in the mouths of the defendants to contend that they were surprised that companies the plaintiffs traded with became reluctant to further trade with them.

85 As was pointed out by the plaintiffs' counsel, it was undisputed that the tenth defendant "was appointed by the third to seventh defendants to locate assets belonging to Indah Kiat in

Singapore as part of the third to seventh defendants' efforts to enforce" the New York judgment.

86 It was also undisputed that by the time the action herein commenced and the initial pleadings were filed, the defendants had taken the following steps in pursuit of their avowed intention to enforce the New York judgment:

(a) Using the converted documents to secure *ex parte* a Mareva injunction against the plaintiffs' supplier, Indah Kiat.

(b) Serving the Mareva injunction on the plaintiffs' bankers, even though the plaintiffs were not ordered to do or refrain from doing any act by the said injunction, thereby causing the plaintiffs' bankers to freeze the plaintiffs' bank accounts.

(c) Securing *ex parte* two garnishee orders *nisi* garnishing debts said to be due from each of the plaintiffs to its supplier, Indah Kiat.

Given their avowed intention in converting the plaintiffs' property, the defendants could hardly be heard to say that they were taken by surprise when, as Chua Chun Kay deposed to in para 8.1 of his third affidavit filed on 15 August 2005:

> The companies [the plaintiffs] trade with are … reluctant to trade with us because of the defendant's activities in procuring our confidential documents through these means.

The plaintiffs argued that the natural and probable consequences of an intentional tort are simply the natural and probable consequences of the tortfeasor's intention. Therefore, the loss of custom and loss of business profits which, amongst other heads of damage, the defendants have caused the plaintiffs by reason of their conversion, is in the pleading sense rightly classified as general damages within the principle set out in para 43-008 of *McGregor*.

87 Paragraph 43-012 from *McGregor* cited by the defendants would appear at first blush to favour the defendants. There the author stated:

> Where consequential losses are claimed in actions of tort these will generally be a matter of surprise to the defendant at the trial. Thus in *Moon v Raphael* [(1835) 2 Bing N C 310; 132 ER 122] the claimant, suing for conversion of goods, was refused damages for loss of business profits from being deprived of the use of the goods because such loss was not pleaded. This is confirmed in the twentieth century by *Re Simms* [[1934] Ch 1], where the Court of Appeal took the view that such loss of profits was special damage and therefore must be pleaded.

Upon closer examination, both authorities cited in the above passage were cases in which the court had to deal with both the question of liability as well as the quantum of damages. Where there is bifurcation so that the quantum of damages is dealt with separately at a later assessment, there can be no genuine objection that there was no particularisation at the trial on liability.

88 In any case, even if I were wrong in deciding that the damages sought by the plaintiffs are general and not special, an inquiry would in any event have been required for the assessment of damages arising from the breach of confidence. I therefore ordered that the inquiry be held as prayed for.

[note: 1] At para 8.

[note: 2] See ninth defendant’s second affidavit at para 27.