10-2020

Revisiting the law of confidence in Singapore and a proposal for a new tort of misuse of private information

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(2020) 32 SAcLJ 891
(Published on e-First 28 August 2020)

REVISITING THE LAW OF CONFIDENCE IN SINGAPORE AND A PROPOSAL FOR A NEW TORT OF MISUSE OF PRIVATE INFORMATION

This article critically examines the recent Court of Appeal decision in *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 1 SLR 1130 and its implications for the law of confidence. The article begins by setting out the decision at first instance, and then on appeal. It argues that the Court of Appeal's "modified approach" fails to meaningfully engage the plaintiff's wrongful gain interest and places the law's emphasis primarily, if not wholly, on the plaintiff's wrongful loss interest. The new framework also appears to have been influenced by English jurisprudence, which has had a long but unhelpful history of conflating the distinct concepts of "privacy" and "confidentiality". To that end, it is submitted that the "modified approach" can play a more meaningful role in the context of a new common law cause of action to be known as the tort of "misuse of private information". In so far as disputes involving commercial confidences are concerned, the traditional three-stage test for the breach of confidence action famously laid down in *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41 should be retained, albeit in a modified form.

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1 The authors are grateful to the anonymous reviewer for the very kind and helpful comments as well as to Soh Kian Peng for reading an earlier draft of this article. The usual disclaimers apply.

The secret is of value only so long as it remains a secret.[2]

I. Introduction

1 As much as the circuit breaker which the Government implemented on 7 April 2020 was unprecedented with numerous far-reaching consequences, the same can arguably be said of *I-Admin (Singapore) Pte Ltd v Hong Ying Ting*[3] ("*I-Admin (CA)*") – a decision of the Court of Appeal delivered just a day earlier – in relation to the authors' understanding and the future application of the law of confidence in Singapore. *I-Admin (CA)* unquestionably marked a watershed for Singapore as the decision significantly modified the analytical framework and test which had hitherto been employed to establish the equitable action for breach of confidence.[4] In essence, the "modified approach" in the court's judgment[5] introduced a legal presumption in favour of the plaintiff but, in the process, also jettisoned the need for the plaintiff to prove the third requirement[6] embodied in Megarry J's oft-cited test in *Coco v A N Clark (Engineers) Ltd*[7] ("*Coco*"), a decision which has been cited with glowing approval by the Singapore courts for very many years.[8]

2 In an action for breach of confidence, the plaintiff – pursuant to the traditional *Coco* formulation – must establish three elements: (a) the information concerned is confidential in nature; (b) it was imparted in circumstances importing an obligation of confidence; and

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2 *Microbiological Research Corp v Muna* 625 P 2d 690 at 696 (Utah, 1981), *per* Maughan CJ. Contrariwise, "[t]he secret, as a secret, had ceased to exist": *O Mustad & Son v Dosen* [1964] 1 WLR 109 at 111, *per* Lord Buckmaster.

3 [2020] 1 SLR 1130.

4 As a caveat, the reader should note that the focus of this article is on the common law action for breach of confidence that is rooted in equity. Breaches of confidentiality between parties to a contract and arising from express contractual provisions that stipulate the parties' confidentiality obligations are therefore beyond the scope of discussion.

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

6 *Ie*, "there must be an unauthorised use of the information to the detriment of the person communicating it": see *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41 at 48.

7 [1969] RPC 41 at 47.

8 See, *eg*, *X Pte Ltd v CDE* [1992] 2 SLR(R) 575 at [27]; *Stratech Systems Ltd v Guthrie Properties (S) Pte Ltd* [2001] SGHC 77 at [33]; *Vestwin Trading Pte Ltd v Obegi Melissa* [2006] 3 SLR(R) 573 at [34]; *QB Net Co Ltd v Earnson Management (S) Pte Ltd* [2007] 1 SLR(R) 1 at [65]; *PH Hydraulics & Engineering Pte Ltd v Intrepid Offshore Construction Pte Ltd* [2012] 4 SLR 36 at [55]; *Invenpro (M) Sdn Bhd v JCS Automation Pte Ltd* [2014] 2 SLR 1045 at [129]; *Clearlab SG Pte Ltd v Ting Chong Chai* [2015] 1 SLR 163 at [64]; *ANB v ANC* [2015] 5 SLR 522 at [17]; *Adinop Co Ltd v Rovithai Ltd* [2018] SGHC 129 at [54]; [2019] 2 SLR 808 (CA) at [41]; and *LVM Law Chambers LLC v Wan Hoe Keet* [2020] 1 SLR 1083 at [15].

(c) unauthorised use was made of that information to the detriment of the plaintiff. Following *I-Admin (CA)*, however, a plaintiff is now only required to prove the first two elements of the action, whereupon a breach of confidence is *presumed* and the defendant, in turn, bears the burden of showing that his conscience has not been affected. To say that the Rubicon has been crossed might therefore be no understatement. Indeed, to some segments of society, the decision in *I-Admin (CA)* is to be warmly welcomed since it reflects a marked shift towards the legal protection of confidences, particularly in an age where information can easily be abused, copied and exploited *en masse*.[9] Nevertheless, for reasons which will become clear later, the authors are of the view that the law of confidence in Singapore remains in a state of flux. It is also the case that *I-Admin (CA)* itself, with respect, raises several questions of its own that call for greater sensitivity in their treatment by the courts.

3 The objectives of this article are relatively straightforward. Although the authors have set out in the first instance to critically examine the judgment of the Court of Appeal in *I-Admin*, this article is much *more* than just a comment on that decision. It aims to unravel the various doctrinal difficulties and uncertainties inherent in the "old fashioned"[10] cause of action for breach of confidence – by, *inter alia*, (a) transporting the reader back to the roots of the action;[11] (b) understanding the two distinct, but related, interests (namely, "privacy" and "confidentiality") that the action is capable of protecting and the various limitations and inadequacies of the action in trying to protect privacy interests in information; as well as (c) proposing a modification of the third requirement in the *Coco* framework.

4 More importantly, the authors take this opportunity to sound the clarion call for a new common law action in Singapore (existing alongside, but operating independently of, the traditional cause of action for breach of confidence) to more effectively safeguard the individual's informational privacy in the modern world – through the proposed tort for "misuse of private information". A *bifurcated* approach can then be adopted, with *Coco* (albeit modified) applying to cases where commercial confidences are concerned and the new tort applying to cases involving private or personal information. The discussion, however, first begins with

9 See *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 1 SLR 1130 at [3].

10 See Paul Stanley, *The Law of Confidentiality: A Restatement* (Hart Publishing, 2008) at p 6.

11 The law of confidence has been developed by the Courts of Chancery from at least the 18th century. For a historical survey of English case law that traces the evolution of the law of confidence, see *Imerman v Tchenguiz* [2010] EWCA Civ 908; [2011] 2 WLR 592 at [54] *ff* as well as *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 1 SLR 1130 at [46] *ff*.

an outline of the background facts and the judgments of the High Court and Court of Appeal in *I-Admin*.

II. Background facts and judgments of the High Court and Court of Appeal in *I-Admin*

5 The facts are as follows. The plaintiff, I-Admin (Singapore) Pte Ltd ("I-Admin"), is a Singapore-incorporated company in the business of providing outsourcing services and systems software, primarily in the areas of payroll and human resource management.[12] The first defendant, Hong, was previously employed by the plaintiff, while the second and fifth defendants, Liu and Tan, were previously employed by the plaintiff's subsidiaries.[13] All three defendants resigned within the space of two months,[14] after which they started working for the third defendant, Nice Payroll Pte Ltd ("Nice Payroll"), a Singapore-incorporated company that was also in the business of providing similar services.[15] Nice Payroll was formed earlier (in 2011) by Hong, together with the fourth defendant, Li. An agreement was also reached whereby Li, Liu and Hong would share equal ownership of the company.[16]

6 In 2013, however, I-Admin discovered the existence of Nice Payroll, including the fact that Hong and Liu were the directors of the company.[17] I-Admin then sought and obtained an Anton Piller order against the defendants, pursuant to which certain materials belonging to I-Admin were found on Nice Payroll's premises.[18] I-Admin then sued the defendants for copyright infringement, breach of confidence, conspiracy, breach of contract and inducement thereof.[19] For present purposes, the authors will only focus on the parts of the case pertaining to the law of confidence. It was argued, in relation to the claim for breach of confidence, that the breach manifested itself in four instances, namely:

(a) the defendants' reproduction of I-Admin's confidential material;

(b) the use of I-Admin's source codes and databases to generate Nice Payroll's payroll reports;

12 *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 3 SLR 615 at [3].
13 *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 3 SLR 615 at [7]–[9].
14 *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 3 SLR 615 at [12].
15 *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 3 SLR 615 at [4].
16 *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 3 SLR 615 at [11].
17 *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 3 SLR 615 at [13].
18 *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 3 SLR 615 at [14].
19 *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 3 SLR 615 at [17]–[21].

(c) Hong's access to and use of I-Admin's demonstration platform; and

(d) Hong's disclosure to I-Admin's clients (HSBC Bank Ltd and ADP International Services BV) that their client data was in Nice Payroll's possession.[20]

A. The High Court judgment

7 At first instance, Aedit Abdullah J in *I-Admin (Singapore) Pte Ltd v Hong Ying Ting*[21] ("*I-Admin (HC)*") substantially found in favour of the defendants, except for a claim involving breach of contract.[22] In particular, where copyright infringement was concerned, the court found that substantial copying was not proved in relation to the plaintiff's source codes, databases and other materials.[23]

8 The claims for breach of confidence also failed for several reasons. First, with respect to the argument that the defendants had reproduced, copied, adapted and/or referenced I-Admin's materials[24] in developing Nice Payroll's products, the court held that it was not proved that any copying or reproduction had occurred.[25] In any event, it was found that mere copying alone "[could] not amount to actual use"[26] for the purposes of establishing unauthorised use. In reaching this conclusion, Abdullah J distinguished the earlier decision of the High Court in *Clearlab SG Pte Ltd v Ting Chong Chai*[27] ("*Clearlab*"). I-Admin ultimately failed to show that the defendants had in fact used its confidential materials when developing their own products.[28]

9 Second, with respect to the claim that the defendants had used I-Admin's payroll software to generate Nice Payroll's internal payroll reports,[29] the court found that it was unlikely that the defendants had actually installed and utilised the plaintiff's software simply to process internal payroll reports when less taxing alternatives were available to them. More crucially, however, there was no forensic evidence to show actual use – that the plaintiff's software had actually been run.[30] The same

20 *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 3 SLR 615 at [18].
21 [2020] 3 SLR 615.
22 *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 3 SLR 615 at [140] and [172].
23 *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 3 SLR 615 at [106].
24 These were the source codes, systems, database structures and client materials.
25 *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 3 SLR 615 at [116].
26 *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 3 SLR 615 at [117].
27 [2015] 1 SLR 163.
28 *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 3 SLR 615 at [123].
29 *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 3 SLR 615 at [126].
30 I-*Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 3 SLR 615 at [129].

defect plagued I-Admin's third claim that Hong had accessed and utilised confidential information hosted on the plaintiff's online demonstration platform. While forensic evidence showed that a file was downloaded from the server,[31] I-Admin could not give further details as to how the defendants had made unauthorised use of that particular file.[32] Merely gaining access to the confidential information alone was insufficient to establish unauthorised use.[33]

10 Finally, in so far as I-Admin argued that the defendants had breached confidence by disclosing that they had confidential client data in possession, the court held that this merely confused the client data with the fact that such data was in the defendants' possession. Although the defendants could not make use of the data, it did not follow that they could not also disclose the fact that they had come into possession of such data to the plaintiff's clients.[34] As such, the fourth claim also failed.

B. The Court of Appeal judgment

11 On appeal, the apex court agreed that I-Admin's claim for copyright infringement had been correctly rejected.[35]

12 With respect to the claim for breach of confidence, the issue was whether the mere access to or possession or referencing of confidential information would suffice to complete the action for breach of confidence.[36] The court first noted that the *Coco* three-stage framework traditionally required a plaintiff to prove unauthorised use of information (including detriment). However, there were often situations where a defendant would wrongfully access or acquire confidential information without further using or disclosing the same.[37] The present case was no different; there was indeed access and reference made to I-Admin's materials. Such acts on the defendants' part, in the court's view, had undermined I-Admin's desire "to maintain the confidentiality of its materials".[38]

13 More pertinently, however, the Court of Appeal queried whether the existing law of confidence was sufficiently broad to encompass the myriad of ways in which the confidentiality of information could be

31 *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 3 SLR 615 at [131].
32 *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 3 SLR 615 at [134].
33 *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 3 SLR 615 at [134].
34 *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 3 SLR 615 at [137].
35 *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 1 SLR 1130 at [42].
36 *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 1 SLR 1130 at [44].
37 *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 1 SLR 1130 at [43].
38 *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 1 SLR 1130 at [44].

undermined.[39] The court opined that there were three factors to consider: namely (a) the interests protected by breach of confidence; (b) the nature of the threat to those interests; and (c) the remedies available when such interests were infringed.[40]

14 Addressing the first factor, the Court of Appeal found that the requirement of unauthorised use and consequential detriment to the plaintiff pointed to the protection of a specific interest, namely the plaintiff's "interest in preventing wrongful gain or profit from [the] confidential information" ("wrongful gain interest").[41] However, the court noted that the earlier English authorities concerning breach of confidence had omitted any mention of detriment, thereby suggesting that the policy objectives behind confidence could have extended beyond protecting the plaintiff's wrongful gain interest.[42] Citing *Smith Kline & French Laboratories (Australia) Ltd v Secretary, Department of Community Services and Health*[43] ("*Smith Kline*") for the proposition that the obligation of confidence was not merely "to refrain from causing detriment" but to also "respect the confidence [of the relevant information]",[44] the Court of Appeal further concluded that there was a second distinct interest protected by the law of confidence, namely the plaintiff's "interest to avoid wrongful loss" ("wrongful loss interest").[45] This interest would be affected if the defendant's conscience was impacted in the breach of the obligation of confidentiality,[46] or more specifically, whenever there was "any kind of improper threat to the confidentiality"[47] of the relevant information.

15 In addressing the second and third factors, the Court of Appeal found that "a more robust response"[48] was needed to protect a plaintiff's wrongful loss interest. First, given the huge advances in modern technology, it was now "significantly"[49] easier to access, copy and disseminate vast amounts of confidential information. In the present case, although it was not proven that the defendants had directly profited from their access to and referencing of the plaintiff's materials, the fact remained that they had "knowingly acquired and circulated"[50]

39 *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 1 SLR 1130 at [45].
40 *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 1 SLR 1130 at [45].
41 *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 1 SLR 1130 at [50].
42 *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 1 SLR 1130 at [50].
43 (1990) 17 IPR 545 at 584.
44 *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 1 SLR 1130 at [51].
45 *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 1 SLR 1130 at [53].
46 *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 1 SLR 1130 at [53].
47 *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 1 SLR 1130 at [51] and [59].
48 *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 1 SLR 1130 at [54] and [58].
49 *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 1 SLR 1130 at [55].
50 *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 1 SLR 1130 at [54].

those materials without consent. This represented a "significant" and "unchecked" threat to the plaintiff's wrongful loss interest.[51] Second, mere infringement of the plaintiff's wrongful loss interest (or the dissipation of the information's confidential character) did not always immediately translate into monetary terms or quantifiable detriment. This meant that even a simple claim for damages would not necessarily succeed for such infringements.[52]

16 Accordingly, a "modified approach" for breach of confidence claims was adopted. The first two *Coco* requirements have been preserved under the new framework, with the third discarded. Henceforth, in any action for breach of confidence, the court will only consider whether:[53]

> … the information in question 'has the necessary quality of confidence about it' and if it has been 'imparted in circumstances importing an obligation of confidence'. An obligation of confidence will also be found where confidential information has been accessed or acquired without a plaintiff's knowledge or consent. *Upon the satisfaction of these prerequisites, an action for breach of confidence is presumed*. This might be displaced where, for instance, the defendant came across the information by accident or was unaware of its confidential nature or believed there to be a strong public interest in disclosing it. Whatever the explanation, *the burden will be on the defendant to prove that its conscience was unaffected* [emphasis added].

The Court of Appeal observed that the modified approach would place greater emphasis on the wrongful loss interest without undermining the protection of the wrongful gain interest.[54] The shift in the burden of proof was based on the notion that a putative defendant would be better positioned to account for any suspected wrongdoing as compared to owners of confidential information. Such owners, the court reasoned, would often be unaware of any breach of confidence, and thus face "practical"[55] and evidentiary difficulties in bringing claims of this nature. Finally, the court took the view that the new approach would also be in line with that taken in other Commonwealth jurisdictions, such as in the decision of *Imerman v Tchenguiz*[56] ("*Imerman*") where the English Court of Appeal held that the very act of "looking at" documents could in itself be a breach of confidence.[57]

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51 *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 1 SLR 1130 at [55].
52 *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 1 SLR 1130 at [57].
53 *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 1 SLR 1130 at [61].
54 *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 1 SLR 1130 at [61].
55 *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 1 SLR 1130 at [62].
56 *Imerman v Tchenquiz* [2010] EWCA Civ 908; [2011] 2 WLR 592 at [68].
57 *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 1 SLR 1130 at [59].

17 Applying the modified approach, the Court of Appeal held that the defendants were liable for breach. First, it was undisputed that I-Admin's materials were confidential in nature. Second, the defendants were under an obligation to preserve the confidentiality of the materials. In turn, this obligation of confidence was *prima facie* breached when the defendants acquired, circulated and referenced I-Admin's materials without permission.[58] No evidence was proffered to displace the rebuttable presumption that the defendants' conscience had been negatively affected. Unsurprisingly, the court held that the defendants' possession and referencing of the plaintiff's confidential materials were sufficient to constitute acts in breach of confidence.[59] The same analysis applied to Hong's downloading of files from I-Admin's online server; that too, in conjunction with the use of confidential login details, was a breach of confidence.[60] Finally, the defendants' mere possession of client data was also found to constitute a breach.[61]

18 Turning to the question of remedies, the court held that neither an injunction nor an order for delivery up of confidential information was appropriate as any benefit from the referencing of I-Admin's materials had presumably been extracted.[62] As such, equitable damages were awarded instead, with the precise measure being left to the lower court to determine.[63]

III. Revisiting the law of confidence and critique of *I-Admin (CA)*

19 Before examining the *I-Admin (CA)* decision in any detail, the authors would like to briefly address one specific aspect of the case. In the context of erstwhile employer–employee relationships, it is important to bear in mind the need for the law to strike an appropriate balance between two competing policy concerns.[64] On the one hand, the law seeks to protect trade secrets and other commercially valuable confidential information belonging to the employer. This objective is particularly pertinent in today's context as technological advances would have rendered confidential information increasingly fragile.[65] On a broader scale, it is also important to provide the certainty and security necessary for individuals and entities to engage in research and development

58 *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 1 SLR 1130 at [63].
59 *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 1 SLR 1130 at [64].
60 *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 1 SLR 1130 at [65].
61 *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 1 SLR 1130 at [66].
62 *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 1 SLR 1130 at [69]–[70].
63 *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 1 SLR 1130 at [79].
64 See *Tang Siew Choy v Certact Pte Ltd* [1993] 1 SLR(R) 835 at [2] and [34].
65 See *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 1 SLR 1130 at [55].

in the commercial world.[66] Yet, on the other hand, the law must be careful not to unreasonably inhibit competition in the marketplace.[67] Ex-employees should be allowed to make full use of the knowledge, skills and experience they have gained from their previous employment to contribute meaningfully to their new jobs.[68] This would ensure a higher degree of labour mobility within the industry, which in turn promotes healthy and productive competition to fuel innovation and growth.[69]

20 A brief survey of the jurisprudence in this area reveals that, in the absence of express covenants, the law has sought to achieve the right balance by *limiting* the scope of the obligation of confidence imposed upon ex-employees to only trade secrets or their equivalent.[70] In other words, only highly confidential information belonging to the ex-employer will be protected post-employment.[71] This approach has generally required the courts to judiciously examine whether each piece of information alleged to be confidential embodies a sufficiently high degree of confidentiality as to amount to a trade secret.[72]

21 While the courts in *I-Admin (HC)* and *I-Admin (CA)* did recognise the importance of protecting confidential information belonging to the former employer,[73] it appears, with respect, that a careful consideration of the countervailing interests of the former employees featured much less prominently in the analyses.[74] In the authors' respectful view, it might be prudent for the courts, going forward, to exercise greater sensitivity to the nuances and policy concerns which underlie the *narrower* scope of the obligation of confidence that is imposed upon former employees.

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66 See *MVF3 APS v Bestnet Europe Ltd* [2013] UKSC 31; [2013] RPC 33 at [44].

67 See *Tang Siew Choy v Certact Pte Ltd* [1993] 1 SLR(R) 835 at [34].

68 See *Faccenda Chicken Ltd v Fowler* [1985] 1 All ER 724 at 731.

69 See Tanya Aplin *et al*, *Gurry on Breach of Confidence – The Protection of Confidential Information* (Oxford University Press, 2nd Ed, 2012) at paras 12.07, 12.08 and 12.178.

70 See, *eg*, *Faccenda Chicken Ltd v Fowler* [1985] 1 All ER 724 at 731; *Tang Siew Choy v Certact Pte Ltd* [1993] 1 SLR(R) 835 at [16]–[17].

71 See *Faccenda Chicken Ltd v Fowler* [1985] 1 All ER 724 at 731. See also Tanya Aplin *et al*, *Gurry on Breach of Confidence – The Protection of Confidential Information* (Oxford University Press, 2nd Ed, 2012) at para 12.173.

72 In carrying out this assessment, the courts have developed several guidelines: see, *eg*, *Faccenda Chicken Ltd v Fowler* [1987] 1 Ch 117 at 137–138; *Force India Formula One Team Ltd v 1 Malaysia Racing Team Sdn Bhd* [2012] EWHC 616 (Ch); [2012] RPC 29 at [237]–[238].

73 See, *eg*, *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 1 SLR 1130 at [55] and [62].

74 See, *eg*, *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 3 SLR 615 at [163] where, in the context of the tort of conspiracy by unlawful means, Aedit Abdullah J briefly recognised the reality for most employees to explore further opportunities for themselves post-employment.

A detailed consideration of this specific segment of the law of confidence is, unfortunately, beyond the scope of this article but the authors do intend to undertake this exercise on a future occasion.

A. The Court of Appeal's "modified approach": Two preliminary observations

22 Two preliminary observations will first be made about the modified approach laid down by the Court of Appeal in *I-Admin*.[75] The first concerns the shifting of the burden of proof onto the defendant upon the satisfaction of the first two *Coco* requirements and the raising of a presumption of breach of confidence in the plaintiff's favour. In particular, does the modified approach involve a shift of the legal or evidential burden of proof? Second, if it is the legal burden of proof that shifts, under what circumstances can a defendant displace the presumption and discharge this burden?

23 It may be helpful, at the outset, to lay out the differences between the legal burden of proof and the evidential burden of proof. This issue was carefully addressed by the Court of Appeal in *Britestone Pte Ltd v Smith & Associates Far East, Ltd*[76] ("*Britestone*") where the court said:[77]

> The term 'burden of proof' is more properly used with reference to the obligation to prove. There are in fact two kinds of burden in relation to the adduction of evidence. The first, designated the legal burden of proof, is, properly speaking, a burden of proof, for it describes the obligation to persuade the trier of fact that, in view of the evidence, the fact in dispute exists. This obligation never shifts in respect of any fact, and only 'shifts' in a manner of loose terminology when a legal presumption operates. The second is a burden of proof only loosely speaking, for it falls short of an obligation to prove that a particular fact exists. It is more accurately designated the evidential burden to produce evidence since, whenever it operates, the failure to adduce some evidence, whether in propounding or rebutting, will mean a failure to engage the question of the existence of a particular fact or to keep this question alive. As such, this burden can and will shift.

In other words, the legal burden of proof refers to the obligation to convince the court – on a balance of probabilities in all civil claims – that a particular fact or issue is made out. This burden lies with the party who affirms the fact or issue in question, and not the party denying it.[78] The legal burden has also been described as a permanent and enduring

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

76 [2007] 4 SLR(R) 855.

77 *Britestone Pte Ltd v Smith & Associates Far East, Ltd* [2007] 4 SLR(R) 855 at [58].

78 This is based upon the general rule *ei qui affirmat non ei equi negat incumbit probatio* (*ie*, proof rests on he who affirms, not he who denies). See *Constantine Line v*

(cont'd on the next page)

burden which does not shift.[79] As such, the legal burden always rests on the plaintiff.[80] Even where a legal presumption operates, it would be largely inaccurate to describe the legal burden as having shifted to the defendant. Instead, the better view is that a *separate* issue has been engaged, for which the opposite party now bears the legal burden of proof.[81]

24 On the other hand, the evidential burden of proof has been described as "the tactical onus to contradict, weaken or explain away the evidence that has been led".[82] This burden typically falls on the plaintiff at the start of his case to adduce evidence in support of his assertion(s) that a fact or issue is made out.[83] Upon the adduction of sufficient evidence to raise the inference that the fact or issue is made out, the evidential burden then shifts to the defendant to adduce evidence in rebuttal.[84] The defendant may discharge this burden by adducing further evidence of his own, in which case the evidential burden shifts back to the plaintiff. The evidential burden of proof will therefore shift back and forth between the plaintiff and defendant in the course of the proceedings until one party fails to discharge this burden. If it is the defendant who ultimately fails to satisfy the evidential burden, then the law regards the legal burden of proof in establishing the fact or issue in question as having been discharged by the plaintiff.[85]

25 Having outlined the distinction between the legal and evidential burdens of proof, the discussion returns to the modified approach in *I-Admin (CA)*. The Court of Appeal did not expressly indicate whether the burden which shifts to the defendant to prove that his conscience was unaffected (and thereby displace the presumption) was a legal burden or an evidential one. It was also not explicitly stated if the presumption of "an action for breach of confidence",[86] which arises upon the plaintiff's satisfaction of the first two *Coco* requirements, refers to a legal presumption

Imperial Smelting Corp [1942] AC 154 at 174 and *Lee Tso Fong v Kwok Wai Sun* [2008] 4 HKC 36 at [22].

79 See *Britestone Pte Ltd v Smith & Associates Far East, Ltd* [2007] 4 SLR(R) 855 at [60].

80 See *Cristian Priwisata Yacob v Wibowo Boediono* [2017] SGHC 8 at [23].

81 See *Britestone Pte Ltd v Smith & Associates Far East, Ltd* [2007] 4 SLR(R) 855 at [60].

82 *Britestone Pte Ltd v Smith & Associates Far East, Ltd* [2007] 4 SLR(R) 855 at [59].

83 See *Britestone Pte Ltd v Smith & Associates Far East, Ltd* [2007] 4 SLR(R) 855 at [60].

84 See *Norbrook Laboratories Ltd v Bomac Laboratories Ltd* [2006] UKPC 25 at [31] and *Wade v British Sky Broadcasting Ltd* [2016] EWCA Civ 1214 at [3].

85 See *Britestone Pte Ltd v Smith & Associates Far East, Ltd* [2007] 4 SLR(R) 855 at [60].

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

or an evidential presumption (although, in the authors' view, it is likely to be the former).[87]

26 At first blush, it seems that the Court of Appeal intended for a shift of the *legal* burden of proof to the defendant. First, as set out in *Britestone*, the term "burden of proof" has been recognised as more accurately, and commonly, describing the legal burden of proof.[88] This is supported by the fact that the term "proof", where it appears in the Evidence Act,[89] refers to the legal burden of proof.[90] Second, the language employed by the Court of Appeal in *I-Admin*, namely that the burden is on the defendant "to prove that [his] conscience was unaffected",[91] hints at a more stringent obligation to persuade the court of this fact and also suggests that an issue *separate* from proof of the first two *Coco* requirements has now been engaged.[92] This therefore points away from any indication of a mere "tactical onus" on the defendant to adduce evidence to "contradict, weaken or explain away the evidence that has been led" by the plaintiff.[93]

27 With this in mind, the authors will proceed to consider, as the second preliminary observation, the three specific instances provided by the Court of Appeal through which the court said this burden placed upon the defendant may be discharged.[94] These examples will be addressed in turn. From the analysis below, it remains unclear (a) whether the court was actually referring to a shift of the legal or evidential burden of proof; and (b) under which of the enumerated circumstances (apart from the third) can a defendant successfully discharge this burden.

28 The first example provided concerns a defendant who came across the plaintiff's confidential information by accident. With respect, it is somewhat puzzling how the coming across of confidential information by accident can, in itself, be sufficient to displace the presumption that a breach of confidence has occurred. According to conventional wisdom, the equitable action for breach of confidence no longer distinguishes between the different ways in which a defendant may come across

87 See *Britestone Pte Ltd v Smith & Associates Far East, Ltd* [2007] 4 SLR(R) 855 at [58], which affirms the existence of legal presumptions. *Cf Lee Tso Fong v Kwok Wai Sun* [2008] 4 HKC 36 at [22] which states that presumptions are rules of evidence.

88 See *Britestone Pte Ltd v Smith & Associates Far East, Ltd* [2007] 4 SLR(R) 855 at [58]. See also *Brady v Group Lotus Car Companies plc* (1987) 60 TC 359 at 376–377, which referred to the legal burden of proof as the "basic burden of proof".

89 Cap 97, 1997 Rev Ed.

90 See *Britestone Pte Ltd v Smith & Associates Far East, Ltd* [2007] 4 SLR(R) 855 at [59].

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

92 See *Britestone Pte Ltd v Smith & Associates Far East, Ltd* [2007] 4 SLR(R) 855 at [60].

93 *Britestone Pte Ltd v Smith & Associates Far East, Ltd* [2007] 4 SLR(R) 855 at [59].

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

confidential information for the purposes of imposing the obligation of confidence upon him, thereby binding his conscience. This is clearly illustrated in Lord Goff's oft-cited speech in *Attorney-General v Guardian Newspapers Ltd (No 2)*.[95] In that decision, Lord Goff recognised that a duty of confidence may distinctly arise with respect to direct and indirect recipients of confidential information as well as adventitious finders who come upon confidential information by accident.[96] More pertinently, in relation to the latter, Lord Goff observed that a duty of confidence arises when "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".[97] Clearly, the critical factor which determines whether or not a duty of confidence arises is not the manner in which the defendant comes upon the information, but rather the *knowledge* possessed by the defendant that the information in question is confidential. Thus, if the defendant possesses actual or constructive knowledge of, or is wilfully blind to, the confidentiality of the information, an obligation of confidence will certainly bind his conscience in equity.[98] It cannot therefore be the case that a defendant who simply comes across confidential information by accident is capable, by this fact alone, of displacing the presumption that a breach of confidence has occurred. It is respectfully submitted that regardless of how the defendant came into possession of the information, it is still necessary to consider whether the defendant did possess the requisite *knowledge* of the confidentiality of the information concerned.

29 This leads nicely to the second example provided by the Court of Appeal which involves a situation where the defendant was unaware of the confidential nature of the information. As explained above,[99] the absence of the requisite knowledge of the information's confidential nature should rightly leave the defendant's conscience unaffected in equity since the obligation of confidence should not be imposed on him under such circumstances.[100] Curiously, in respect of the second example, why should the defendant's lack of knowledge of the confidentiality of the information concerned be at all relevant in displacing the presumption?

95 [1990] 1 AC 109.

96 See *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109 at 281.

97 *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109 at 281.

98 See, *eg*, *Force India Formula One Team Ltd v 1 Malaysia Racing Team Sdn Bhd* [2012] EWHC 616 (Ch); [2012] RPC 29 at [224]; *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109 at 281; *Wade v British Sky Broadcasting Ltd* [2014] EWHC 634 at [48]; and *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41 at 48.

99 See para 28 above.

100 See, *eg*, *Force India Formula One Team Ltd v 1 Malaysia Racing Team Sdn Bhd* [2012] EWHC 616 (Ch); [2012] RPC 29 at [224].

Even assuming that the defendant was truly unaware of the confidential nature of the information, the only occasion when he can be expected to adduce evidence in support of this fact is during the court's consideration of the second *Coco* requirement. It is noted, in this regard, that the legal burden of proof in establishing the second *Coco* requirement, namely that the information was imparted in circumstances importing an obligation of confidence, falls squarely on the plaintiff, under both the traditional *Coco* framework and the modified approach. As such, the defendant can only be expected to adduce evidence to show that he was unaware of the information's confidential nature if, and when, the plaintiff has adduced sufficient evidence to raise an inference that the second *Coco* requirement has been made out. This then shifts the evidential burden of proof to the defendant,[101] whereupon the absence of knowledge would be sufficient to satisfy the defendant's evidential burden and result in a failure by the plaintiff to discharge his legal burden of proof in establishing the second *Coco* requirement on a balance of probabilities.[102]

30 Following the above analysis, the authors wish to point out that the discharge of the defendant's evidential burden *vis-à-vis* the second *Coco* requirement must logically occur *prior to* the raising of the presumption under the modified approach.[103] In fact, if the defendant can successfully discharge his evidential burden for the second *Coco* requirement (which he is very likely to if he were to be unaware of the confidentiality of the information), then the said presumption should not even be raised at all in the first instance. In other words, there would be no shifting of the legal burden to the defendant where the plaintiff, in the discharge of his legal burden, is unable to successfully establish the second *Coco* requirement. The authors therefore take the view that the defendant's lack of knowledge of the confidential nature of the information concerned appears better suited to the discharge of the defendant's *evidential* burden of proof *vis-à-vis* the second *Coco* requirement, rather than to have any bearing whatsoever on the defendant's attempts at displacing the said presumption. Accordingly, the authors do not, with respect, share the court's view that the presumption of a breach of confidence (already raised in favour of the plaintiff) can be displaced where the defendant was unaware of the confidentiality of the information in question.

101 See *Norbrook Laboratories Ltd v Bomac Laboratories* [2006] UKPC 25 at [31] and *Wade v British Sky Broadcasting Ltd* [2016] EWCA Civ 1214 at [3].

102 See *Force India Formula One Team Ltd v 1 Malaysia Racing Team Sdn Bhd* [2012] EWHC 616 (Ch); [2012] RPC 29 at [224] and *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109 at 281.

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

31 Turning now to the third example with which the authors respectfully agree, the presumption of a breach of confidence might well be displaced where the defendant believed that there was a strong public interest in disclosing the information. In the authors' view, this provides a useful example of how a defendant may successfully discharge his burden of proof in displacing the presumption. After all, the public interest defence is a familiar exception to liability in the law of confidence[104] where the need to balance the public interest in preserving and protecting confidences against any countervailing public interest in favour of disclosure is very well established.[105]

32 The allusion to a public interest defence as illustrative of how a defendant may rebut the presumption of a breach of confidence also suggests that the burden which has since shifted to the defendant must refer to the *legal* burden of proof. This would be consistent with the traditional understanding that the legal burden of proving a defence rests solely on the proponent of the defence.[106] Also, unlike the scenario featured in the second example above, a public interest defence should, in law, be treated as a *separate* issue engaged and asserted by the defendant, on whom the legal burden now rests.[107]

33 Apart from the three examples provided by the Court of Appeal, there is a possibility of a fourth on account of the recent decision of the High Court in *iVenture Card Ltd v Big Bus Singapore Sightseeing Pte Ltd*[108] ("*iVenture*"), which was decided after *I-Admin (CA)*. Choo Han Teck J in *iVenture*, by recognising that the three-limb test in *Coco* "had been approved in its entirety (until very recently) by the courts in Singapore",[109] must be taken to have alluded to the modified approach laid down by the Court of Appeal in *I-Admin*. On the facts, his Honour concluded that even if the first two *Coco* requirements were made out, the defendants had not misused the plaintiff's confidential information or "acted unconscionably in any other way" as the defendants' competing product was found to have been independently developed.[110] This, in the authors' view, hints at the possibility that the absence of any misuse of confidential

104 See *Lion Laboratories Ltd v Evans* [1985] QB 526 at 544, 546 and 550 and *Francome v Mirror Group Newspapers Ltd* [1984] 1 WLR 892 at 899.

105 See *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109 at 282 (in particular, Lord Goff's "third limiting principle" stipulated therein).

106 See *Cooperatieve Centrale Raiffeisen-Boerenleenbank BA, Singapore Branch v Motorola Electronics Pte Ltd* [2011] 2 SLR 63 at [31]; *iTronic Holdings Pte Ltd v Tan Swee Leon* [2016] 3 SLR 663 at [61]; and *Currie v Dempsey* [1967] 2 NSWR 532 at 539.

107 *Cf Britestone Pte Ltd v Smith & Associates Far East, Ltd* [2007] 4 SLR(R) 855 at [60].

108 [2020] SGHC 109.

109 *iVenture Card Ltd v Big Bus Singapore Sightseeing Pte Ltd* [2020] SGHC 109 at [26].

110 *iVenture Card Ltd v Big Bus Singapore Sightseeing Pte Ltd* [2020] SGHC 109 at [27].

information by the defendant may well constitute probative evidence that the defendant's conscience has not been affected and be sufficient to enable the defendant to displace the *prima facie* presumption. If this proposition is accepted, then arguably, the introduction and impact of the modified approach would simply be to *reverse* the legal burden of proof at the third stage of the *Coco* framework – from the plaintiff (to prove misuse) to the defendant (to disprove misuse after the presumption has been raised). Such an interpretation of Choo J's decision, which in the authors' view is not entirely implausible, may in fact be bolstered by the Court of Appeal's expressed concern of plaintiffs having to overcome the "evidential back-foot" which they used to encounter when establishing the third *Coco* requirement under the old framework.[111]

34 Be that as it may, the authors recognise that the outcome of the appeal in *I-Admin* – to the effect that the duty of confidence imposed on the defendants (who were found on the facts to have only possessed and referenced the plaintiff's confidential information)[112] may extend *beyond* their refraining from acts of unauthorised use or disclosure[113] – means that the absence of misuse, in and of itself, is *insufficient* to discharge the defendants' legal burden of proof in displacing the presumption. It may, however, be contemplated that the reasoning in *I-Admin (CA)* should really be confined to the specific facts of that decision, concerned as it was with surreptitious takers of confidential information.[114] Perhaps in alternative scenarios involving mere recipients or accidental finders of information (whose conduct is less likely to amount to "wrongdoing"), a court might come to the view that the absence of misuse may well be sufficient to establish that a defendant's conscience was unaffected in equity. Despite this, the authors would respectfully disagree with such an approach – namely, that it is for the defendant to bear the legal burden of disproving misuse. In the authors' respectful view, as a matter of equity and fairness and also for other reasons which will be elaborated upon below, the legal burden of proof ought to rest squarely on the *plaintiff* to satisfy the third *Coco* requirement of misuse (albeit in a modified fashion, a proposal to which the authors shall return later in this article).[115]

111 *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 1 SLR 1130 at [62].
112 See *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 1 SLR 1130 at [64].
113 See *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 1 SLR 1130 at [51].
114 See *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 1 SLR 1130 at [55] and [63]–[64].
115 See paras 101–118 below.

35 In summary, while it appears that the modified approach in *I-Admin (CA)* involves a shifting of the legal burden of proof after the presumption of breach of confidence is triggered, the second example given by the court curiously hints at the need for the defendant to satisfy an evidential burden of proof, rather than a legal one (albeit at a different stage of the analysis). In addition, it is not entirely clear in which of the scenarios provided by the Court of Appeal (except the third) would a defendant be able to discharge his burden of proof and displace the presumption – given that the first example on its own is ambivalent and the circumstances inherent in the second example have the likely effect of preventing the legal burden from shifting to the defendant (since the presumption in favour of the plaintiff should *not* even be triggered in the first instance). Finally, the authors are of the view that the recent decision of the High Court in *iVenture* has raised the further question whether the absence of misuse of confidential information, particularly in cases where the defendant did not come upon the information through clandestine or underhanded means, may be sufficient to enable him to displace the presumption. It is hoped that further judicial clarification and guidance on all these matters will be forthcoming.

B. "Wrongful gain interest" versus "Wrongful loss interest" under the "modified approach"

36 The Court of Appeal stated at the outset of its judgment that because the current framework for the law of confidence did not "adequately safeguard the interests of those who own confidential information", it was timely to review the scope of the action for breach of confidence, particularly in light of the challenges faced in protecting such information against misuse in a digitised society.[116] In determining whether a "modern approach" should be implemented for the breach of confidence framework in Singapore, the court thought it relevant to ask, *inter alia*, what "interests" were sought to be protected by this cause of action.[117] It was in this context that the Court of Appeal introduced two types of interests – namely, "wrongful gain interest" and "wrongful loss interest" – which, as far as the authors can tell, appear to be original catchphrases aptly coined by the court.

116 See *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 1 SLR 1130 at [3].
117 *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 1 SLR 1130 at [45].

(1) Wrongful gain interest

37 Drawing on *dicta* in *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd*,[118] *Seager v Copydex Ltd*[119] and *Coco*,[120] it seemed clear to the Court of Appeal – from the judicial language of taking "unfair advantage" of information received in confidence and the requirement of unauthorised "use" and consequential "detriment" (or "prejudice") – that the equitable action for breach of confidence is, in this regard, envisaged to protect a plaintiff's interest in "preventing wrongful gain or profit from [the] confidential information", otherwise known as the plaintiff's "wrongful gain interest".[121]

38 This observation is hardly surprising and indeed uncontroversial as the aforementioned cases were all set in the *commercial* context and concerned with *commercially valuable* information (or information of a "commercially exploitable character"),[122] such as trade secrets and secret processes of manufacture. Therefore, when mention is made of safeguarding a plaintiff's wrongful gain interest, it makes eminent sense for a court to have regard to the *conduct* of the defendant. This is where the defendant, who is in prior possession of the plaintiff's confidential information (whether in the shoes of a recipient or surreptitious taker), is shown to have taken unfair advantage of such information and wrongfully gained (or profited) at the plaintiff's expense.[123] It follows that in so far as the wrongful gain interest is concerned, there must also be evidence of

118 (1948) 65 RPC 203 at 213: so long as a defendant *uses* "confidential information directly or indirectly obtained from a plaintiff, without [their express or implied consent], he will be guilty of an infringement of the plaintiff's rights".

119 [1967] 1 WLR 923 at 931: "[t]he law on this subject … depends on the broad principle of equity that he who has received information in confidence shall not *take unfair advantage* of it. He must not *make use* of it to the *prejudice* of him who gave it without obtaining his consent" [emphasis added].

120 *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41 at 48: "there must be an *unauthorised use* of the information to the *detriment* of the person communicating it" [emphasis added].

121 *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 1 SLR 1130 at [50]; see also para 14 above. For further examples in the case law which have engaged the plaintiff's wrongful gain interest, see *Morison v Moat* (1851) 68 ER 492; *Terrapin Ltd v Builders' Supply Co (Hayes) Ltd* [1967] RPC 375; *OBG Ltd v Allan* [2008] 1 AC 1; *Clearlab SG Pte Ltd v Ting Chong Chai* [2015] 1 SLR 163; *Adinop Co Ltd v Rovithai Ltd* [2019] 2 SLR 808.

122 This formulation appears in the English Law Commission's report: Law Commission of England and Wales (Law Com No 110), *Breach of Confidence: Report on a Reference under Section 3(1)(e) of the Law Commissions Act 1965* (Cmnd 8388, 1981) at pp 80, 126, 133 and 153.

123 See, *eg*, *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41 at 50 where Megarry J spoke of a "duty" – in cases involving "industry and commerce" – not to use confidential information "without paying a reasonable sum for it".

actual (or at least threatened)[124] *misuse* on the defendant's part[125] which may, in turn, result in detriment or prejudice to the plaintiff (depending on the facts at hand). It bears repeating, however, that the main focus of this interest – which is akin to the notion of unjust enrichment – is on the conduct of the defendant who must be shown to have wrongfully benefited in some way at the plaintiff's expense, even if there is no direct evidence of economic harm or any prejudice suffered by the plaintiff.

39 Accordingly, when examined in this light, it is submitted that the proper protection of a plaintiff's wrongful gain interest ought to be effected through the application and satisfaction of the third *Coco* requirement – namely, unauthorised use or disclosure (or the element of "misuse" for short). In the absence of any misuse by the defendant of the plaintiff's confidential information, it is difficult to ascertain how the plaintiff's wrongful gain interest can be compromised.

(2) Wrongful loss interest

40 *I-Admin (CA)*, however, identified a second, distinct interest that the breach of confidence action is capable of protecting – a plaintiff's interest "to avoid wrongful loss ('wrongful loss interest'), which is suffered so long as a defendant's conscience has been impacted in the breach of the obligation of confidentiality".[126] Thus defined, it is understandable that when addressing the plaintiff's wrongful loss interest, the Court of Appeal was naturally influenced by judicial language – employed particularly in "the early law of confidence"[127] – that hinged on the word "conscience".[128]

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124 It is submitted that the plaintiff's wrongful gain interest is broad enough to encompass not just instances of actual misuse by the defendant but to also include the notion of "threatened" misuse, which will be explained in greater detail at paras 105–110 below.

125 *Cf* the "springboard" doctrine espoused in *Terrapin Ltd v Builders' Supply Co (Hayes) Ltd* [1967] RPC 375 at 391 which seeks to prevent a defendant from using the plaintiff's confidential information as a springboard to gain an unfair head-start over other trade competitors.

126 *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 1 SLR 1130 at [53].

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

128 See, *eg*, *Tipping v Clarke* (1843) 2 Hare 383 at 393 ("the Court interposes to prevent a positive wrong"); *Prince Albert v Strange* (1849) 41 ER 1171 ("*Prince Albert*") at 1179 ("to prevent what this court considers and treats as a wrong … arising from a … breach of … confidence"); *Morison v Moat* (1851) 68 ER 492 at [255] ("the Court fastens the obligation on the conscience of the party"); *Pollard v Photographic Co* (1888) 40 Ch D 345 at 354 ("the Defendant is wholly in the wrong" and endorsing *Prince Albert* at 1179); *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* (1948) 65 RPC 203 at 211; *Moorgate Tobacco Co Ltd v Philip Morris Ltd* (1984) 156 CLR 414 at 438; *Smith Kline & French Laboratories (Australia) Ltd v Secretary, Department of Community Services and Health* (1990) 17 IPR 545 at 584 ("obligation

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41 Three observations are to be made in this regard. First, "the policy objectives behind the early law of confidence [that] may have extended beyond safeguarding against wrongful gain"[129] to also include "wrongful loss" may plausibly be explained on the basis that a number of the early cases concerned the protection of information that was essentially *private* or *personal* in nature – for example, the proposed publication of a catalogue containing descriptions of (surreptitiously obtained) private etchings of the Royal Family[130] and the unauthorised disclosure of a photograph bearing a lady's likeness.[131]

42 In respect of the former example and in granting an injunction restraining publication because the defendant's (unconscionable) conduct amounted to an unlawful invasion of the plaintiff's "privacy" rights, Knight Bruce VC observed that this was:[132]

> … an unbecoming and unseemly intrusion … offensive to that inbred sense of propriety natural to every man – if intrusion, indeed, fitly describes a sordid spying into the *privacy* of domestic life – into the home (a word hitherto sacred among us), the home of a family whose life and conduct form an acknowledged title, though not their only unquestionable title, to the most marked respect in this country [emphasis added].

On appeal, Lord Cottenham LC also noted the "private character" of the plaintiff's etchings and that "[i]n the present case, where *privacy* is the right invaded, postponing the injunction would be equivalent to denying it altogether" [emphasis added].[133]

43 In the authors' respectful view, it makes eminent sense to speak of "conscience" or for a court to have regard to the *conscience* of the defendant in addressing the plaintiff's wrongful loss interest – as did the Court of Appeal in *I-Admin*[134] – where there is ample evidence of prejudice to the *privacy* (that is, beyond "confidentiality") interests of the claimant. Indeed, the breach of confidence action in the early cases was precisely premised on the defendant's conscience having been adversely affected by an equitable "wrong"[135] and was used, in effect, to vindicate

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of conscience is to respect the confidence"). See also, generally, *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109 (where the word "conscience" was used fairly extensively).

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

130 *Prince Albert v Strange* (1849) 41 ER 1171. *Cf*, albeit of tangential relevance, *Pope v Curl* (1741) 26 ER 608.

131 *Pollard v Photographic Co* (1888) 40 Ch D 345.

132 See *Prince Albert v Strange* (1849) 2 De G & SM 293 at 313.

133 See *Prince Albert v Strange* (1849) 41 ER 1171 at 1178–1179.

134 See *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 1 SLR 1130 at [51].

135 See, *eg*, *Tipping v Clarke* (1843) 2 Hare 383 at 393; *Prince Albert v Strange* (1849) 41 ER 1171 at 1179; *Pollard v Photographic Co* (1888) 40 Ch D 345 at 354.

the plaintiff's "privacy" rights in what was essentially *private/personal* information.[136] On the facts of *Prince Albert v Strange*,[137] the defendant simply could not explain why he was improperly found in *possession* of the plaintiff's private etchings and this fact alone was sufficient to entitle the plaintiff to immediate injunctive relief.[138] Megarry J in *Coco* appears, in *obiter*, to have also drawn a distinction between a *stricter* form of duty (which ought to apply to cases that concern private/personal information in particular and may also suggest that the courts are more wary of such information entering the public domain) and a *less strict* one (which ought to be applicable in the realm of industry and commerce):[139]

> If the duty is a duty not to use the information without consent, then it may be the proper subject of an injunction restraining its use, even if there is an offer to pay a reasonable sum for that use. If, on the other hand, the duty is merely a duty not to use the information without paying a reasonable sum for it, then no such injunction should be granted. … [Here,] the essence of the duty seems more likely to be that of not using without paying, rather than of not using at all. It may be that *in fields other than industry and commerce* (and I have in mind the *Argyll* case)[140] the duty may exist in the *more stringent* form; but in the circumstances present in this case I think that the less stringent form is the more reasonable. [emphasis added]

44 From a general survey of the case law ever since the celebrated decision of *Prince Albert v Strange*, it would therefore appear that the law of confidence readily attaches the "obligation of conscience"[141] on the defendant to prevent misuse of (especially) private/personal information – such as intimate, sensitive or embarrassing information.[142] This is to

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136 See Lord Hoffmann in *Campbell v MGN Ltd* [2004] 2 AC 457 at [43] (in relation to *Prince Albert v Strange* (1849) 2 De G & SM 293): "the equitable action for breach of confidence … has long been recognised as capable of being used to protect privacy".

137 See *Prince Albert v Strange* (1849) 41 ER 1171 at 1179. *Cf*, by analogy, *Imerman v Tchenguiz* [2010] EWCA Civ 908; [2011] 2 WLR 592; and *ANB v ANC* [2015] 5 SLR 522.

138 Indeed, *Prince Albert v Strange* (1849) 2 De G & SM 293; (1849) 41 ER 1171 was an early case that arguably stood as potential authority for the protection of "informational privacy": see generally Samuel D Warren & Louis D Brandeis, "The Right of Privacy" (1890) 4 Harv L Rev 193.

139 *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41 at 50. See also *A v B plc* [2002] EWCA Civ 337; [2003] QB 195 at [11(ii)].

140 *Duchess of Argyll v Duke of Argyll* [1967] Ch 302 – a case which involved confidential communications of private information between husband and wife during the currency of a marriage (*ie*, marital confidences).

141 *Moorgate Tobacco Co Ltd v Philip Morris Ltd* (1984) 156 CLR 414 at 438; *Smith Kline & French Laboratories (Australia) Ltd v Secretary, Department of Community Services and Health* (1990) 17 IPR 545 at 584.

142 See, *eg*, *Prince Albert v Strange* (1849) 41 ER 1171; *Pollard v Photographic Co* (1888) 40 Ch D 345; *Duchess of Argyll v Duke of Argyll* [1967] Ch 302; *Francome v Mirror Group Newspapers Ltd* [1984] 1 WLR 892; *Stephens v Avery* [1988] Ch 449; *X Pte Ltd v CDE* [1992] 2 SLR(R) 575; *Hellewell v Chief Constable of Derbyshire* [1995]

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more effectively safeguard the plaintiff's wrongful loss interest in the specific context of his *privacy* (and not merely his "confidentiality") interests.

45 An analysis of the privacy-confidentiality dichotomy will be undertaken later in this article.[143] Suffice to say, for present purposes, that a plaintiff arguably suffers wrongful loss – or a plaintiff's wrongful loss interest would arguably have been compromised – the moment information, particularly of a private/personal character, comes into the (unlawful) *possession* of the defendant, whether an indirect recipient or a surreptitious taker of information.

46 As regards the second observation, while it has been acknowledged in the preceding paragraphs that the breach of confidence action was historically used to safeguard a plaintiff's wrongful loss interest in what was essentially private/personal information, it is apparent from a broad survey of the case law that the ambit of the action is not so confined and can also extend to protect a plaintiff against wrongful loss where the subject matter of the dispute pertains to *commercially valuable* information (or information of a *commercially exploitable* character).[144] This is where an appreciation of the plaintiff's wrongful loss interest is apposite. The wrongful loss interest within the breach of confidence framework simply refers to the plaintiff's interest to protect (or prevent) the information in question from *losing* its "confidential" character.[145] In other words, this specific interest serves to safeguard the plaintiff's "confidentiality" interests in the particularised information, which can obviously extend to *both* information encountered in the commercial context as well as to private/personal information.

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1 WLR 804; *Barrymore v News Group Newspapers Ltd* [1997] FSR 600; *A v B plc* [2002] EWCA Civ 337; [2003] QB 195; *Associated Newspapers Ltd v HRH Prince of Wales* [2006] EWCA Civ 1776; [2007] 2 All ER 139; *Mosley v News Group Newspapers Ltd* [2008] EWHC 1777 (QB); *White v Withers LLP* [2009] EWCA Civ 1122; *Imerman v Tchenguiz* [2010] EWCA Civ 908; [2011] 2 WLR 592; *ANB v ANC* [2015] 5 SLR 522; *ZXC v Bloomberg LP* [2020] EWCA Civ 611. See also George Wei, "Milky Way and Andromeda: Privacy, Confidentiality and Freedom of Expression" (2006) 18 SAcLJ 1 (especially at 42–43, para 62).

143 See paras 57–76 below.

144 See, *eg*, *Morison v Moat* (1851) 68 ER 492 at [255]; *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* (1948) 65 RPC 203 at 211; *Smith Kline & French Laboratories (Australia) Ltd v Secretary, Department of Community Services and Health* (1990) 17 IPR 545 at 584; *Adinop Co Ltd v Rovithai Ltd* [2019] 2 SLR 808 at [88]–[89].

145 See *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 1 SLR 1130 at [51] (to protect plaintiffs from "improper [threats] to the confidentiality of their information"), [57] ("the wrongful loss suffered, meaning the dissipation of the confidential character of the information") and [59] (the wrongful loss interest reflects "a plaintiff's right to preserve the confidentiality of [the] information").

47 Third, regardless of the nature of the information in question (that is, private/personal secrets or commercial confidences), it is observed that the judicial use of the word "conscience" – to more effectively protect the plaintiff against wrongful loss – has consistently surfaced in the course of the court's determination of whether an equitable obligation of confidence ought to be imposed on the defendant, pursuant to the *second* requirement of the *Coco* formulation. This, it is submitted, follows logically from the authors' understanding of the plaintiff's wrongful loss interest. So as to protect the information in question from losing its confidential character and thereby preserve the confidentiality of the information, the plaintiff's wrongful loss interest necessitates that whenever a defendant comes upon confidential information (either as a recipient or surreptitious taker), equity ought to impose upon him, in appropriate circumstances, an obligation of confidentiality and bind his conscience (to ensure that he observes the duty and respects the confidence).

48 Accordingly, in answering the question of when a defendant's conscience is bound by the equitable duty of confidentiality, it is necessary for the court to examine, through the eyes of the "reasonable man", "the notion of an obligation of conscience arising from the *circumstances* in or through which the information was communicated or obtained" [emphasis added].[146] In this regard, it is trite law that equity will impose an obligation of confidence on the defendant whenever circumstances reveal that the recipient or surreptitious taker of information has the requisite *knowledge* or *notice* that the information in question is confidential.[147] To put it another way, equity will regard the defendant's conscience as having been bound whenever he receives or obtains information which he knows (or ought to know) is confidential in nature and must be kept secret.[148]

49 By way of illustration, Belinda Ang Saw Ean J for the Court of Appeal in *Adinop Co Ltd v Rovithai Ltd*,[149] when addressing the second *Coco* requirement, recognised that "an obligation of confidence in equity may arise [on an objective test] by applying principles of good

146 *Moorgate Tobacco Co Ltd v Philip Morris Ltd* (1984) 156 CLR 414 at 438, *per* Deane J.

147 See, *eg*, the oft-cited *dicta* of Lord Goff in *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109 at 281.

148 See *Stephens v Avery* [1988] Ch 449 at 456 ("It is the acceptance of the information on the basis that it will be kept secret that affects the conscience of the recipient of the information") and *Douglas v Hello! Ltd* [2001] QB 967 at [65] ("If information is accepted on the basis that it will be kept secret, the recipient's conscience is bound by that confidence, and it will be unconscionable for him to break his duty of confidence by publishing the information to others").

149 [2019] 2 SLR 808.

faith and conscience"[150] and that "[t]he intervention of equity ultimately depends on conscience".[151] On the facts, the Court of Appeal held that Rovithai Ltd's conscience was bound because the *circumstances* of its receipt of confidential information "were part of the context affecting its conscience".[152]

50 In light of the foregoing analysis, the authors are therefore of the view that the breach of confidence action is indeed capable of protecting a plaintiff's wrongful loss interest through a judicious application (and satisfaction) of the second *Coco* requirement.

(3) Wrongful loss interest versus *wrongful gain interest*

51 Relevantly, it is in this context that the authors respectfully disagree with the Court of Appeal's observation in *I-Admin* that "[t]he elements of breach of confidence set out in *Coco* explicitly protect the wrongful gain interest".[153] As the authors have sought to explain above,[154] the underlying objectives of the second and third *Coco* requirements are quite different. Whereas the former requirement serves the targeted purpose of protecting a plaintiff's wrongful loss interest, the latter is *prima facie* concerned with protecting his wrongful gain interest.[155]

52 Furthermore, in response to the Court of Appeal's thinking that "it may not always be the case that a defendant's conduct will affect both the wrongful gain and wrongful loss interests",[156] the authors venture to suggest that:

> (a) once it is established that the defendant's conscience is bound by the equitable obligation of confidentiality pursuant to the second *Coco* requirement, the plaintiff's wrongful loss interest is at once engaged and protected, but not his wrongful gain interest *unless* the element of "misuse" (actual or threatened) on the part of the defendant is *also* satisfied pursuant to the third *Coco* requirement; and

150 *Adinop Co Ltd v Rovithai Ltd* [2019] 2 SLR 808 at [88]. See also [40]: "… equity may step in to impose a duty of confidence, where, for instance, '[the] contract does not necessarily assuage conscience, and equity may yet give force to conscience' …".

151 *Adinop Co Ltd v Rovithai Ltd* [2019] 2 SLR 808 at [89].

152 *Adinop Co Ltd v Rovithai Ltd* [2019] 2 SLR 808 at [89].

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

154 See paras 37–50 above.

155 After all, a plaintiff's wrongful gain interest is clearly referable to the gains/profits made by the defendant at his expense and can only be meaningfully spoken of where the defendant has made an *unauthorised use or disclosure* of the plaintiff's confidential information.

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

> (b) in circumstances where the plaintiff's wrongful gain interest has been adversely affected by the defendant's conduct (in light of the defendant's *misuse* of the plaintiff's confidential information), it *must* follow that his wrongful loss interest would also have been correspondingly compromised: because the defendant's *breach* of his duty of confidentiality – which results in his conscience being negatively impacted – would have *eroded* or *destroyed* the confidential character of the plaintiff's information.[157]

It therefore appears, from the latter observation in the preceding paragraph, that the element of "misuse" enshrined in the third *Coco* requirement conduces to protecting not only a plaintiff's wrongful gain interest but also, when properly understood, his wrongful loss interest as well. As such, the authors are also unable to agree with the Court of Appeal's observation that "[t]he requirement of unauthorised use and detriment has held back the development of the law by overemphasising the wrongful gain interest at the expense of the wrongful loss interest".[158]

(4) Is the wrongful gain interest still relevant under the "modified approach"?

53 Relying on lucid considerations of policy,[159] the Court of Appeal chose to re-formulate the breach of confidence action – which, in the court's view, hitherto did not adequately safeguard the plaintiff's wrongful loss interest[160] – in the following manner:[161]

> Once the plaintiff has established the first two *Coco* requirements, a *prima facie* presumption of breach of confidence arises and the legal burden shifts to the defendant to prove that his conscience has not been affected.

The Court of Appeal was of the view that "this modified approach places greater focus on the wrongful loss interest without undermining

157 One possible exception to this proposition is perhaps where equity's darling (the *bona fide* purchaser of information for value without notice) is involved – see *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109 at 177, where Sir John Donaldson MR said: "Since the right to have confidentiality maintained is an equitable right, it will (in legal theory and practical effect if the aid of the court is invoked) 'bind the conscience' of third parties, unless they are *bona fide* purchasers for value without notice …". To similar effect, see *Imerman v Tchenguiz* [2010] EWCA Civ 908; [2011] 2 WLR 592 at [74].

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

159 See *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 1 SLR 1130 at [55] and [62].

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

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

the protection of the wrongful [gain] interest".[162] Again, the authors respectfully disagree.

54 The Court of Appeal's modified approach, in the authors' view, primarily (perhaps wholly) gives effect to the wrongful loss interest of the plaintiff and leaves very little room, if any, for the engagement of his wrongful gain interest. If the foregoing analysis of the plaintiff's wrongful loss and wrongful gain interests is correct, this must be the logical consequence of the *eradication* of the third *Coco* requirement from the modified framework for the breach of confidence action. This will be explained below.

55 A plaintiff who initiates a breach of confidence action will naturally take advantage of the presumption and bear the legal burden, under the modified approach, to prove that the information in question "has the necessary quality of confidence about it" and that it has been "imparted in circumstances importing an obligation of confidence". This alone is sufficient to trigger the presumption in the plaintiff's favour and, in the process, engage the plaintiff's wrongful loss interest (because it has been established, pursuant to the second *Coco* requirement, that the defendant's conscience has been bound by the equitable obligation of confidentiality). In raising the presumption, however, it matters not whether, on the facts, the plaintiff's wrongful gain interest has also been engaged (let alone compromised) because it is not at all incumbent on the plaintiff to show that the defendant has taken unfair advantage of such information and wrongfully gained (or profited) at his expense from the breach. Actual or threatened misuse of confidential information on the defendant's part is beside the point since the presumption of breach of confidence is automatically triggered without proof by the plaintiff of the third *Coco* requirement. Indeed, the Court of Appeal was adamant that once the defendant's conscience is found to have been bound in equity, *possession* by the defendant of the plaintiff's confidential information *per se* amounts to a *prima facie* breach of confidence.[163] Under such circumstances, it is difficult to see how the plaintiff's wrongful gain interest can ever be engaged (or even considered) under the modified approach.[164]

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

163 See *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 1 SLR 1130 at [63]–[66] (especially at [64] and [66]).

164 It may also be asked whether the modified approach could have tilted the balance of equities too far in favour of the plaintiff (in light of the irrelevance of the third *Coco* requirement and the corresponding superfluousness of the wrongful gain interest), particularly in situations that do not involve surreptitious takers of information.

56 Be that as it may, it is respectfully submitted that the element of "misuse" enshrined in the third *Coco* requirement – and the associated wrongful gain interest of the plaintiff – should continue to have a meaningful role to play in the analytical framework for the breach of confidence action. This is principally because it is information that is "confidential" in nature (and not *per se* "private/personal") that the cause of action seeks to protect. It is therefore appropriate, at this juncture, to turn the present discussion to the importance of the privacy-confidentiality distinction.

C. The privacy-confidentiality distinction

57 There are, of course, myriad ways in which the confidentiality of information might be undermined. In this regard, the Court of Appeal was of the view that "where defendants wrongfully access or acquire confidential information but *do not use or disclose* the same", "their actions [nevertheless] compromise the *confidentiality* of the information in question" [emphasis added].[165] Even assuming *arguendo* that a plaintiff would have suffered wrongful loss as a result of "the dissipation of the confidential character of the information",[166] the relevant question for the purposes of this article is whether a defendant's "mere possession" of and act of "referring to" the plaintiff's confidential materials – in the absence of any misuse on his part – "is sufficient to complete the cause of action for breach of confidence".[167]

58 In the authors' respectful view, the short answer is "no". It is submitted at the outset that whereas it is perfectly conceivable for a claimant's *privacy* interests in information to have been compromised by the defendant's mere possession of the information in question, this argument becomes less defensible (and is in fact rather undesirable as a matter of policy) where the former's *confidentiality* interests in such information are concerned. It is also posited that a rational distinction should be drawn between the law's protection of private/personal information on the one hand and commercially valuable information (or information of a commercially exploitable character) on the other.

165 *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 1 SLR 1130 at [43].
166 *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 1 SLR 1130 at [57].
167 *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 1 SLR 1130 at [44]. See also [63]–[66].

(1) Privacy interests

59 The article first considers what it takes for someone's action(s) to compromise the *privacy* of the information in question.[168] The word "privacy" has existed in the judicial vocabulary since at least the middle of the 19th century. For instance, Knight Bruce VC in *Prince Albert v Strange* gave an illustration of how an individual's privacy may be undermined in the following terms:[169]

> [A]n intrusion – an unbecoming and unseemly intrusion … offensive to that inbred sense of propriety natural to every man – if, intrusion, indeed, fitly describes a *sordid spying into the privacy of domestic life* – into the home … [emphasis added].

60 A more contemporary interpretation – in deference to Art 8(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms[170] ("ECHR") which recognises the need to respect one's "private and family life" in the European context – focuses on whether the defendant's conduct has "[interfered] with the personal autonomy of the individual".[171] In simpler terms, the question may be put thus: does the defendant's conduct amount to a form of *disrespect* for an individual's "informational privacy" (which broadly concerns any information about an individual's private life[172] and in which he has a "reasonable expectation of privacy")?[173]

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168 The genesis of the American tort of privacy can arguably be traced to two seminal articles, namely Samuel D Warren & Louis D Brandeis, "The Right of Privacy" (1890) 4 Harv L Rev 193 and William L Prosser, "Privacy" (1960) 48 Cal L Rev 383. In the latter article, Prosser identified four distinct privacy torts, including the "public disclosure of embarrassing private facts about the plaintiff" (at 389). It is this specific tort that the present article – in its discourse on informational privacy – is chiefly concerned with. However, an in-depth analysis of the law of privacy in America is beyond the purview of this article.

169 *Prince Albert v Strange* (1849) 2 De G & SM 293 at 313.

170 Convention for the Protection of Human Rights and Fundamental Freedoms 213 UNTS 221 (4 November 1950; entry into force 3 September 1953) (hereinafter "European Convention on Human Rights").

171 *Per* Simon LJ in *ZXC v Bloomberg LP* [2020] EWCA Civ 611 at [46]. See also Sedley LJ in *Douglas v Hello! Ltd* [2001] QB 967 at [126], Lord Hoffmann in *Campbell v MGN Ltd* [2004] 2 AC 457 at [50]–[51] and Eady J in *Mosley v News Group Newspapers Ltd* [2008] EWHC 1777 (QB) at [7].

172 *Per* Lord Phillips MR in *Douglas v Hello! Ltd (No 3)* [2005] EWCA Civ 595; [2006] QB 125 at [83]:

> What is the nature of 'private information'? It seems to us that it must include information that is personal to the person who possesses it and that he does not intend shall be imparted to the general public. The nature of the information, or the form in which it is kept, may suffice to make it plain that the information satisfies these criteria.

173 See, *eg*, *Campbell v MGN Ltd* [2004] 2 AC 457 at [21], [85] and [134]–[135].

61 In the modern world, there is clearly a heightened need for individuals to be able to "control the dissemination of information about one's private life" and retain "the right to the esteem and respect of other people".[174] An unwarranted intrusion into an individual's private life – for instance, through *unwanted attention* – will, in all likelihood, cause alarm, offence, embarrassment, "dreadful unhappiness and distress",[175] *even in the absence of any misuse of private information*.[176] The authors are of the view that the unauthorised possession (including unauthorised access, acquisition, referencing and reviewing) of private/personal information *per se* is sufficient to constitute an affront to human dignity and an individual's self-esteem and hence an unlawful invasion of informational privacy. Such unconscionable conduct on the part of the defendant, to use a familiar catchphrase, sufficiently compromises the plaintiff's wrongful loss interest in the specific context of his *privacy* (but *not* his "confidentiality") interests in the relevant information. This is particularly so where highly intimate, sensitive and/or embarrassing information is concerned[177] and it seems that this is precisely when a "more stringent form" of duty ought to be imposed on the wrongdoer.[178]

62 Some examples of how an individual's privacy interests may be infringed even where there is no clear breach of his confidentiality interests are briefly canvassed:

> (a) A famous actor lies in hospital after suffering serious head injuries in a car accident (which is unreported in the media). Whilst recovering from brain surgery, two "fans" of his surreptitiously gain access to his hospital bed and take multiple photographs of him without consent for their personal keepsake. Assume that there is no further misuse of these photographs but the actor is obviously very upset.[179]

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174 *Per* Lord Hoffmann in *Campbell v MGN Ltd* [2004] 2 AC 457 at [51].

175 See Sir Richard Henriques's report titled "An Independent Review of the Metropolitan Police Service's Handling of Non-recent Sexual Offence Investigations Alleged against Persons of Public Prominence" (31 October 2016) at para 1.67 – as cited in *Khuja v Times Newspapers Ltd* [2019] AC 161 at [51]. In other words, harm in the form of emotional and psychological damage.

176 See *A v B plc* [2002] EWCA Civ 337; [2003] QB 195 at [11(x)].

177 For some examples in the case law, see n 142 above.

178 See *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41 at 50.

179 Facts adapted from *Kaye v Robertson* [1991] FSR 62. See also Tom Bingham, "Should There Be a Law to Protect Rights of Personal Privacy?" (1996) European Human Rights L Rev 455 at 457:

> It has also been suggested, to my mind more ingeniously than persuasively, that the action could have successfully been based on a breach of confidence. *My own view is that a claim for breach of confidence could not have been successfully made, at any rate without doing impermissible violence to the principles upon which that cause of action is founded*: the complaint in this case was not that

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(b) A photographer with a telephoto lens takes from a distance and without consent pictures of *X* (a married man) who is engaged in some "private act" with *Y* (who is not his spouse). Assume that there is no further misuse of these photographs but *X* subsequently finds out about them.[180]

(c) A supermodel tells the world in media interviews that she does not take drugs. Alas, she is subsequently caught standing on a public road just outside the premises of Narcotics Anonymous several times each week and is surreptitiously photographed by a photojournalist. Assume that there is no further misuse of these photographs but the supermodel is somehow aware of (and highly distressed by) the "transgression".[181]

63 Although there is often a considerable degree of overlap between these two forms of interests, it is apparent from the foregoing illustrations[182] that an individual's privacy interests in information are not coterminous with his confidentiality interests therein. It is important to reiterate that a person's informational privacy may well be undermined simply on the basis that the information concerned is already "out there" in the know of someone who has not been authorised by the plaintiff. Crucially, for the purposes of this article, the privacy-confidentiality distinction has also been expressly recognised in the case law – such as in England, New Zealand and here in this jurisdiction. The following extracts from the pool of relevant judgments are but some examples:

(a) "I cannot, however, exclude the possibility that the trial judge might find … that the photographer was an intruder with whom no relationship of trust or confidence had been established. In that event the court would have to explore the law

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information obtained or imparted in confidence was about to be misused, but that Mr Kaye's *privacy had been the subject of a monstrous invasion* but for which the interview would never have been obtained at all. [emphasis added]

180 Facts adapted from Laws J's illustration in *Hellewell v Chief Constable of Derbyshire* [1995] 1 WLR 804 at 807. *Cf* also *Douglas v Hello! Ltd (No 3)* [2005] EWCA Civ 595; [2006] QB 125 at [105] as well as the facts in *Mosley v News Group Newspapers Ltd* [2008] EWHC 1777 (QB) regarding the intrusive nature of photography and clandestine filming/recording in the context of sexual activities (albeit unconventional) on private property. See further Arye Schreiber, "Confidence Crisis, Privacy Phobia: Why Invasion of Privacy Should Be Independently Recognized in English Law" [2006] IPQ 161 at 182; Alistair Wilson & Victoria Jones, "Photographs, Privacy and Public Spaces" [2007] EIPR 357 at 359.

181 Facts adapted from *Campbell v MGN Ltd* [2004] 2 AC 457.

182 The authors recognise that all these illustrations involve photographs but (a) "[s]pecial considerations attach to photographs in the field of privacy"; and (b) "[a]s a means of invading privacy, a photograph is particularly intrusive" (*Douglas v Hello! Ltd (No 3)* [2005] EWCA Civ 595; [2006] QB 125 at [84], *per* Lord Phillips MR).

relating to privacy when it is not bolstered by considerations of confidence."[183]

(b) "The continuing use of the phrase 'duty of confidence' and the description of the information as 'confidential' is not altogether comfortable. Information about an individual's private life would not, in ordinary usage, be called 'confidential'. The more natural description today is that such information is private. The essence of the tort is better encapsulated now as misuse of private information."[184]

(c) "Privacy and confidence are different concepts. To press every case calling for a remedy for unwarranted exposure of information about the private lives of individuals into a cause of action having as its foundation trust and confidence will be to confuse those concepts."[185]

(d) "As the law has developed, breach of confidence, or misuse of confidential information, now covers two distinct causes of action, protecting two different interests: privacy, and secret ('confidential') information. It is important to keep these two distinct."[186]

(e) "We thus disagreed with the Judge's rigid application of the test in *Coco* to the facts of this case in dealing with whether there was a serious question of a breach of confidence to be tried. In doing so, the Judge failed to consider English (and other) jurisprudence which has, under the confidentiality *genus*, developed 'different features' for cases involving the protection

183 *Douglas v Hello! Ltd* [2001] QB 967 at [59].

184 *Campbell v MGN Ltd* [2004] 2 AC 457 at [14], *per* Lord Nicholls. See also *Campbell v MGN Ltd* [2004] 2 AC 457 at [45]–[46], *per* Lord Hoffmann; *Campbell v MGN Ltd* [2002] EWCA Civ 1373, [2003] QB 633 at [70], *per* Lord Phillips MR; and *McKennitt v Ash* [2006] EWCA Civ 1714, [2008] QB 73 at [8(iii)], *per* Buxton LJ.

185 *Hosking v Runting* [2005] 1 NZLR 1 at [48]. See also [246]: "It therefore seems to me, with respect to those who do not share this view, that it is more jurisprudentially straightforward and easier of logical analysis to recognise that confidence and privacy, while capable of overlapping, are essentially different concepts."

186 *OBG Ltd v Allan* [2008] 1 AC 1 at [255], *per* Lord Nicholls, whose view of the matter was accepted as "obviously correct" by the English Court of Appeal in *Google Inc v Vidal-Hall* [2015] EWCA Civ 311 at [25]. See also *OBG Ltd v Allan* [2008] 1 AC 1 at [118], *per* Lord Hoffmann and Law Commission of England and Wales (Law Com No 110), *Breach of Confidence: Report on a Reference under Section 3(1)(e) of the Law Commissions Act 1965* (Cmnd 8388, 1981) at para 2.4 ("It is important to bear in mind the essentially different nature of the two kinds of right"). For a more recent consideration and endorsement of the privacy-confidentiality distinction in the UK, see *PJS v News Group Newspapers Ltd* [2016] UKSC 26; [2016] AC 1081.

> of private information in contrast to the 'old fashioned breach of confidence' cases …" [emphasis in original][187]

It is submitted that this snapshot of *obiter dicta* reveals strong judicial support, at least from a doctrinal perspective, for a clear demarcation in the respective causes of action for the protection of private/personal secrets on the one hand and commercial confidences on the other.[188] In other words, there are dangers in conflating the developing law of informational privacy and the traditional/"old fashioned" law of confidence, to which the discussion now turns.

(2) Confidentiality interests

64 The reasons why a third party's unlawful possession of private/personal information is sufficient to compromise the affected individual's privacy interests have been set out above.[189] By contrast, the authors do not think that a defendant's mere "possession and referencing of the [plaintiff's] confidential materials constituted acts in breach of confidence"[190] that could have amounted to "improper [threats]" to the "confidentiality" of the plaintiff's information.[191] To understand why, it would be apt to consider how protected information may lose its *confidential* character (or how an individual's confidentiality interests in information may be undermined).

65 First, the information in question – to be capable of protection – must be "confidential" in nature or must possess the "necessary quality of confidence about it".[192] Notably, the protection of confidential information is not at all dependent on the private/personal character of the information[193] (trade secrets being archetypal) and, according to trite law, confidential information retains its confidentiality so long as the information is not in the "public domain" (or is generally inaccessible

187 *ANB v ANC* [2015] 5 SLR 522 at [19].

188 For strong academic support to similar effect, see Arye Schreiber, "Confidence Crisis, Privacy Phobia: Why Invasion of Privacy Should Be Independently Recognized in English Law" [2006] IPQ 161 (especially at 168 *ff*).

189 See paras 59–63 above (especially para 61).

190 *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 1 SLR 1130 at [64].

191 *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 1 SLR 1130 at [51].

192 See *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* (1948) 65 RPC 203 at 215 and *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41 at 47.

193 As Simon LJ correctly said in *ZXC v Bloomberg LP* [2020] EWCA Civ 611 at [90], "[n]ot all confidential information is private information, and not all confidential documents contain private information …". Given this, the law of confidence will protect private/personal information only to the extent of "preserving the confidentiality" of such information: see Lord Hoffmann's *dicta* in *Campbell v MGN Ltd* [2004] 2 AC 457 at [44].

to the public).[194] In short, the law of confidence serves to protect and preserve the confidentiality of the information and, in the process, gives effect to the plaintiff's wrongful loss interest.

66 It should be borne in mind, however, that confidentiality interests in information are not so easily compromised despite the Court of Appeal's expressed concern over the "fragility" of such information.[195] For instance, it has been argued that the "springboard" doctrine famously associated with Roxburgh J's decision in *Terrapin Ltd v Builders' Supply Co (Hayes) Ltd*[196] is, in principle, not inconsistent with the "public domain" requirement:[197]

> The purpose of the 'springboard doctrine' is to protect the plaintiff, not to punish the defendant; and we think that the interest of the plaintiff which the doctrine seeks to protect can be protected by a *qualification* of, or perhaps more accurately by a *gloss* on, the 'public domain' principle. [emphasis added]

67 The notion of "relative secrecy" (or "residual confidentiality") which the law recognises further demonstrates that confidentiality is not an absolute concept. It has been said that "[i]nformation only ceases to be capable of protection as confidential when it is in fact known to a *substantial* number of people" [emphasis added].[198] It has also been said that "information will be confidential if it is available to one person (or a group of people) and not generally available to others, provided that the person (or group) who possesses the information does not intend that it should become available to others".[199] But it is, in the authors' view, Cross J's *dicta* in *Franchi v Franchi* that best illustrates the concept:[200]

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194 According to Lord Greene MR in *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* (1948) 65 RPC 203 at 215, "it must not be something which is public property and public knowledge".

195 See *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 1 SLR 1130 at [55].

196 *Terrapin Ltd v Builders' Supply Co (Hayes) Ltd* [1967] RPC 375 at 391. See also the fascinating analogy of a secret recipe for a "sparkling tomato cold soup" provided by George Wei JC (as he then was) in *Invenpro (M) Sdn Bhd v JCS Automation Pte Ltd* [2014] 2 SLR 1045 at [137].

197 See the Law Commission of England and Wales (Law Com No 110), *Breach of Confidence: Report on a Reference under Section 3(1)(e) of the Law Commissions Act 1965* (Cmnd 8388, 1981) at para 6.70. See also *Force India Formula One Team Ltd v 1 Malaysia Racing Team Sdn Bhd* [2012] EWHC 616 (Ch); [2012] RPC 29 at [219].

198 *Stephens v Avery* [1988] Ch 449 at 454.

199 *Douglas v Hello! Ltd (No 3)* [2005] EWCA Civ 595; [2006] QB 125 at [55].

200 *Franchi v Franchi* [1967] RPC 149 at 152–153. Citing this case, Sir John Donaldson MR in *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109 at 177 said:

> As a general proposition, that which has no character of confidentiality because it has already been communicated to the world, i.e., made generally available to the relevant public, cannot thereafter be subjected to a right of confidentiality … However, this will *not* necessarily be the case if the information has previously

(cont'd on the next page)

> Clearly a claim that the disclosure of some information would be a breach of confidence is not to be defeated simply by proving that *there are other people in the world who know the facts in question* besides the man as to whom it is said that his disclosure would be a breach of confidence and those to whom he has disclosed them. … It must be a question of degree depending on the particular case, but if *relative secrecy* remains, the plaintiff can still succeed. [emphasis added]

68 To prove the point that absolute secrecy is not necessary to establish the confidentiality of the information, the claimant (Prince Charles) in *Associated Newspapers Ltd v HRH Prince of Wales*[201] was successful in restraining the publication of extracts from his private diaries despite the fact that he had circulated parts of them amongst all his private secretaries (indeed, the evidence also suggested that those to whom Prince Charles' journals had been sent totalled 50 to 75, including politicians, media people, journalists and actors).[202]

69 Clearly, confidentiality in information is but a relative concept. The touchstone for determining when information can be said to have lost its confidential character (or when an individual's confidentiality interests in information may have been undermined) is to ask whether "the information in question is so generally accessible [in the public domain] that, in all the circumstances, it cannot be regarded as confidential".[203] Much depends on the general inaccessibility of the information in question (which is always a matter of degree), but, crucially for the purposes of this article, the fact that information is already known to a limited number of people does *not* rob the information of its confidentiality.

70 In light of this analysis, it is difficult to accept that a defendant's mere "possession" and "referencing" of the plaintiff's confidential materials will, *ipso facto*, result in the information losing its confidential character and compromise the plaintiff's wrongful loss interest in the

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> only been disclosed to a *limited* part of that public. It is a question of degree … [emphasis added].

See also *Schering Chemicals Ltd v Falkman Ltd* [1982] QB 1 as well as the *dicta* of Lord Toulson (dissenting) in *PJS v News Group Newspapers Ltd* [2016] UKSC 26; [2016] AC 1081 at [86]: "Confidentiality in a meaningful sense can survive a certain amount of leakage, and every case must be decided on its own facts …".

201 [2006] EWCA Civ 1776; [2008] Ch 57.

202 See *Associated Newspapers Ltd v HRH Prince of Wales* [2006] EWCA Civ 1776; [2008] Ch 57 and *HRH Prince of Wales v Associated Newspapers Ltd* [2007] EWHC 1685 (Ch). See also *A v B plc* [2002] EWCA Civ 337; [2003] QB 195 and *Mosley v News Group Newspapers Ltd* [2008] EWHC 687 (QB).

203 *Attorney-General v Guardian Newspapers (No 2)* [1990] AC 109 at 282.

process, a concern expressed by the Court of Appeal in *I-Admin*.[204] With respect, the authors are of the view that to "complete the cause of action for breach of confidence"[205] *after* the defendant's conscience has been bound by the equitable obligation of confidentiality (pursuant to the second *Coco* requirement), the plaintiff must further prove that the defendant has done (or at least threatened to do) something more to put the confidential information "out there".[206] The defendant, in the authors' view, must be shown to have *breached* the plaintiff's confidence through the *misuse* of confidential information. This is the subject of the discussion in the next section.

(3) Confidentiality and breach: the relevance of "misuse"

71 As canvassed above,[207] once the second *Coco* requirement is established, the defendant's conscience is bound in equity by the obligation of confidentiality and the plaintiff's wrongful loss interest is thereby engaged. However, because the *raison d'être* for the law of confidence is to preserve the "confidentiality" (and *not* the "privacy") of information, the action for breach of confidence can only be successfully brought against a defendant if his conduct – however unconscionable – has indeed *compromised the plaintiff's confidentiality interests* and caused the information in question to *lose its confidential character*. It is submitted that this is only possible where the defendant's conscience is impacted (or negatively affected) by a further *breach* of the aforementioned obligation of confidentiality, and unless and until this breach on the defendant's part has occurred, there can be no threat to (and undermining of) the plaintiff's wrongful loss interest. Indeed, in the absence of tangible evidence of breach, it may be argued that any such threat to the wrongful loss interest is purely illusory.

72 This position is fortified by the carefully articulated views expressed in the English Law Commission's report on *Breach of Confidence*,[208] with which the authors wholeheartedly agree. Notably, the English Law Commission explicitly recognised the "distinction between

204 See, *eg*, *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 1 SLR 1130 at [43] and [44].

205 *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 1 SLR 1130 at [44].

206 *Cf* Cross J's *dicta* in *Printers & Finishers v Holloway* [1965] RPC 239 at 255.

207 See paras 47–50 above.

208 Law Commission of England and Wales (Law Com No 110), *Breach of Confidence: Report on a Reference under Section 3(1)(e) of the Law Commissions Act 1965* (Cmnd 8388, 1981).

[the protection of] privacy and confidence".[209] In emphasising the essentially different nature of the two kinds of right and causes of action (namely, for breach of confidence and the infringement of a privacy right in relation to the information itself), it was perceptively observed that:[210]

> … a person who is under a duty of confidence in respect of information will *not* incur liability for breach of confidence *unless he discloses or uses the information*. By contrast, the very *acquisition*, by certain means or in certain circumstances, of information categorised as *private* would constitute an infringement of a right of privacy relating to the information if there were such a right. Under the recommendations in this report, on the other hand, concerned as it is solely with the law concerning confidence, *no liability will arise merely from the acquisition of information* by any of the reprehensible methods that we list, since a *breach* of confidence would be committed only by a *subsequent disclosure or use of such information* [emphasis added].

It is therefore respectfully submitted – contrary to the Court of Appeal's modified approach[211] – that to *breach* the duty of confidence and undermine the plaintiff's wrongful loss interest, the defendant must have *misused* (and not merely possess or make reference to) the plaintiff's confidential information.[212] Once actual or threatened misuse has been established,[213] the plaintiff's wrongful gain interest can then be meaningfully engaged and, depending on the facts, may also be compromised as a result: if, for instance, the defendant has wrongfully gained/profited from the unauthorised use or disclosure of the information at the plaintiff's expense. For the avoidance of doubt, the authors reiterate the earlier argument that the defendant's mere possession or acquisition of *private/*

209 Law Commission of England and Wales (Law Com No 110), *Breach of Confidence: Report on a Reference under Section 3(1)(e) of the Law Commissions Act 1965* (Cmnd 8388, 1981) Part II(A) at pp 5–7.

210 See the Law Commission of England and Wales (Law Com No 110), *Breach of Confidence: Report on a Reference under Section 3(1)(e) of the Law Commissions Act 1965* (Cmnd 8388, 1981) at para 2.6. See also para 6.56.

211 As to which, see *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 1 SLR 1130 at [61].

212 As to what amounts to a breach by wrongful disclosure, Lord Hoffmann went so far as to say that it was not essential for the defendant, in breach of confidence, to "have intended widespread publication" since "[c]ommunication to a *single unauthorised person* would have been enough" [emphasis added]: see *Campbell v MGN Ltd* [2004] 2 AC 457 at [45]. This principle seems to accord with the position under the law of patents, where, as to whether any piece of information has been "made available to the public" and therefore formed part of the state of the art, it is sufficient if the information in question has been made available to "at least one member of the public who was free in law and equity to use it": see *Fomento Industrial SA v Mentmore Manufacturing Co Ltd* [1956] RPC 87 at 99–100; *PLG Research Ltd v Ardon International Ltd* [1993] FSR 197 at 226; *First Currency Choice Pte Ltd v Main-Line Corporate Holdings Ltd* [2008] 1 SLR(R) 335 at [38]; *Dien Ghin Electronic (S) Pte Ltd v Khek Tai Ting* [2011] 3 SLR 227 at [29].

213 See the discussion in paras 105–110 below.

personal information may, in appropriate circumstances, amount to an infringement of a *distinct* right of "privacy" in relation to such information if there were such a right.

73 Finally, the authors posit that the "misuse" requirement in the context of *breach* of confidence is particularly appealing from a policy angle. Surreptitious takers of information aside (whose conduct is in any event presumed to be unconscionable),[214] the position of mere *recipients/finders* of information – whether it be a direct recipient (or confidant), an indirect recipient (or third party) or indeed an adventitious finder of information (who is much "beloved of law teachers") – should also be considered.[215]

74 Who, it may be asked, would ever be willing to stand in the shoes of a confidant and lend the confider a listening ear if, by the very possession of confidential information with attendant knowledge, he were to be presumed – under the modified approach in *I-Admin (CA)*[216] that is applicable *regardless of who the defendant is* – to have acted in breach of confidence? Should the confidant (whose conscience has clearly been bound in equity) be made to bear the legal burden to prove that his conscience was not affected by the mere receipt of confidential information? No doubt, common sense dictates that no confider would, as a practical matter, ever contemplate suing the confidant (and relying on the presumption) under such circumstances.

75 But what about the indirect recipient of information? Is it desirable as a matter of policy for the third party to bear the burden of displacing the *prima facie* presumption and showing that his conscience had been unaffected in view of his receipt of confidential information with attendant knowledge from the confidant (who had clearly acted in breach)?[217] Should the indirect recipient of information – who may be equally innocent for having lent his ear to the (hitherto innocent) confidant – be in any worse-off a position than confidants generally, in the absence of any misuse of confidential information on his part? *A fortiori*,

214 See *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 1 SLR 1130 at [55], [62] and [71]. But *cf Invenpro (M) Sdn Bhd v JCS Automation Pte Ltd* [2014] 2 SLR 1045 at [181], *Attorney-General v Guardian Newspapers (No 2)* [1990] AC 109 at 270 and 277 (where Lord Griffiths appeared to have taken the view that the law of confidence and the remedy of an injunction in particular have been "fashioned to protect the confider [and] not to punish the confidant") and *Ocular Sciences Ltd v Aspect Vision Care Ltd* [1997] RPC 289 at 401 and 403.

215 *Attorney-General v Guardian Newspapers (No 2)* [1990] AC 109 at 281, *per* Lord Goff.

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

217 See also the discussion in *Invenpro (M) Sdn Bhd v JCS Automation Pte Ltd* [2014] 2 SLR 1045 at [135].

to what extent is this policy consideration pertinent where accidental finders are concerned – that is, those who come upon (and simply remain in possession of) confidential information in the most innocent of circumstances? Why should the accidental finder of confidential information with attendant knowledge also be made to explain the state of his conscience?

76 In short, between "innocent" recipients/finders of confidential information and alleged "wrongdoers" who use reprehensible means to purloin such information, where should the balance of equities lie *sans* misuse? Respectfully, the raising of the presumption of breach of confidence – introduced in *I-Admin (CA)'s* modified approach – is not the answer because it does not differentiate between the various kinds of defendants contemplated in the preceding sentence. The answer, short of the law's attempt at drawing distinctions on culpability between recipients/finders of confidential information on the one hand and surreptitious takers on the other, must lie in the utility of the "misuse" requirement. Because once it transpires that there is *misuse* (or "egregious" conduct)[218] on the defendant's part giving rise to a *breach* of the obligation of confidentiality, it is then clear – in the absence of good reason to the contrary – that the defendant's conscience has been impacted (or negatively affected) to such an extent that equity ought to timeously intervene to aid the plaintiff.

(4) Did the defendants in I-Admin *breach confidentiality?*

77 On the facts of *I-Admin*, the trial judge (Abdullah J) found that the defendants had not misused the plaintiff's confidential information[219] and this finding was not disturbed on appeal.

78 In distinguishing the facts in *Clearlab* on the point of misuse, Abdullah J held that "copying of information alone does not constitute breach of confidence"[220] and the evidence on the whole fell short of establishing, on a balance of probabilities, that the defendants in *I-Admin* had used or embodied the plaintiff's confidential information in a competing business and/or to create competing products.[221] Given the evidence, *inter alia*, that payitems were "common knowledge" in

218 *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 3 SLR 615 at [125].

219 See *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 3 SLR 615 at [107] and [117] *ff* (especially at [123]).

220 *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 3 SLR 615 at [119]. See also [117]: "I took the view, however, that mere copying did not amount to actual use for the purposes of making out the breach of confidence claim."

221 *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 3 SLR 615 at [27] and [123].

the payitem industry,[222] the judge found that the defendants' competing products were indeed independently derived from information in the public domain[223] and were "ultimately dissimilar".[224] Crucially, this lack of a *causal link* – which would otherwise have given rise to evidence of misuse (albeit always a question of fact in each case)[225] – between the plaintiff's confidential information and the defendants' resulting conduct in producing the derivative products in question proved *fatal* to the plaintiff's breach of confidence claim under the *Coco* framework. This is notwithstanding Abdullah J's findings that the defendants had indeed referenced and reviewed the plaintiff's confidential materials prior to developing their own derivative products.[226]

79 The authors venture to suggest, however, that this is not at all a surprising outcome. Numerous other cases in Singapore and England have also been decided in similar fashion, with plaintiffs failing to surmount the "misuse" hurdle in their breach of confidence claims.[227]

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222 *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 3 SLR 615 at [119].

223 *Cf Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* (1948) 65 RPC 203 at 215; *Seager v Copydex Ltd* [1967] 1 WLR 923 at 931; *Invenpro (M) Sdn Bhd v JCS Automation Pte Ltd* [2014] 2 SLR 1045 at [136] *ff* (especially at [170] *ff*).

224 *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 3 SLR 615 at [121]. *Cf* also the court's findings in *Wade v British Sky Broadcasting Ltd* [2014] EWHC 634 (Ch) at [121] and [123] (upheld on appeal: [2016] EWCA Civ 1214). Interestingly, it was observed that the first defendant in *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 1 SLR 1130 at [7] "found the [plaintiff's] software, in particular its payroll calculation engine, flawed and inadequate for the tasks it had to perform" and sometime later, "the first [defendant] expressed his frustrations to the second [defendant], who shared his desire to design a better payroll software".

225 For guidelines as to the sort of evidence that could give rise to a reasonable inference of misuse, see Laddie J's decision (albeit at the interlocutory injunction stage) in *CMI-Centers for Medical Innovation GmbH v Phytopharm plc* [1999] FSR 235 at [61].

226 See *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 3 SLR 615 at [123]. *Cf* also Laddie J's decision in *Ocular Sciences Ltd v Aspect Vision Care Ltd* [1997] RPC 289 at 401 and 404. On the importance of establishing a causal link, Laddie J said this (at 404): "It is not every derived product, process or business which should be treated as a camouflaged embodiment of the confidential information". A derived/derivative product is one made from or with the assistance of information which is still confidential but where it does not itself directly disclose or incorporate the information (see 396 and 401). Relevantly, where the confidential information has (by way of referencing it) contributed towards the making of a derivative product, the contribution must be sufficiently "significant" and have made a difference to the latter in terms of "content, time to produce or use" (at 404).

227 See, *eg*, *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41 at 51; *Force India Formula One Team Ltd v 1 Malaysia Racing Team Sdn Bhd* [2012] EWHC 616 (Ch) at [267] and [338] *ff* (especially at [339]–[340]) (upheld on appeal: [2013] EWCA Civ 780 at [94]); *Invenpro (M) Sdn Bhd v JCS Automation Pte Ltd* [2014] 2 SLR 1045 at [170] *ff* (especially at [199]); *Wade v British Sky Broadcasting Ltd* [2014] EWHC 634 (Ch) at [123] (upheld on appeal: [2016] EWCA Civ 1214); *iVenture Card Ltd v Big Bus Singapore City Sightseeing Pte Ltd* [2020] SGHC 109 at [27].

For instance, Birss J in *Wade v British Sky Broadcasting Ltd*[228] found that even though there were similarities in ideas and features between the defendant's TV programme and the plaintiff's original format for a music talent show, the inference of copying (from tell-tale indications) was insufficient to constitute probative evidence of the requisite *causal link* and hence of any misuse by the defendant of the plaintiff's confidential information.[229] Instead, it was decided that the defendant's competing product was created or derived "entirely independently" of the plaintiff's ideas (that is, without either deliberate or sub-conscious copying) and the breach of confidence claim must therefore fail. What is also noteworthy for the purposes of this article is the court's conclusion that there was no misuse and breach of confidence on the defendant's part notwithstanding the judge's observation that the defendant's employees were likely to have not only possessed, but also reviewed and made reference to, the plaintiff's confidential ideas.[230] Birss J's decision was upheld on appeal.[231]

80 Similarly, Choo J on home ground found that the defendants in *iVenture* had not misused the plaintiffs' confidential information, principally because the defendants' competing product (the HiPPO Singapore Pass) was part of an integrated IT system which had been independently developed. As such, irrespective of whether the first two limbs of the *Coco* test had been made out, the plaintiffs' claim for breach of confidence could not succeed.[232]

81 Given the tenor of the discussion above, the authors are in complete agreement with Abdullah J's conclusion that the plaintiff's breach of confidence claims against the defendants ought to have been dismissed on the basis of the plaintiff's failure to establish the "misuse" requirement and hence any *breach* of confidentiality on the part of the defendants, even under the "expansive approach" alluded to in *Clearlab* (which will be examined below).[233] The authors do, of course, recognise that the thesis in this article is at odds with the outcome of the appeal in

228 [2014] EWHC 634 (Ch).

229 *Wade v British Sky Broadcasting Ltd* [2014] EWHC 634 (Ch) at [123].

230 See *Wade v British Sky Broadcasting Ltd* [2014] EWHC 634 (Ch) at [106]: "… although Mr Gray and Mr Murphy genuinely believe they never read the deck, perhaps they are mistaken. Perhaps one of them did skim it, the key ideas lodged in their mind and went on to influence the development of Must Be The Music."

231 See *Wade v British Sky Broadcasting Ltd* [2016] EWCA Civ 1214 and *cf* also *Invenpro (M) Sdn Bhd v JCS Automation Pte Ltd* [2014] 2 SLR 1045 at [184] *ff* (especially at [195]).

232 See *iVenture Card Ltd v Big Bus Singapore City Sightseeing Pte Ltd* [2020] SGHC 109 at [27].

233 See *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 3 SLR 615 at [124]–[125], citing *Clearlab SG Pte Ltd v Ting Chong Chai* [2015] 1 SLR 163 at [205]–[207]. See further paras 106–108 below.

I-Admin and to that extent, the authors would respectfully disagree with the Court of Appeal's modified approach for the breach of confidence action in Singapore.[234]

(5) A word on Imerman

82 It appears that the Court of Appeal in *I-Admin* was rather influenced by the decision of the English Court of Appeal in *Imerman*,[235] a case that also involved the surreptitious taking of information.[236] So much is clear from the Court of Appeal's reliance on *Imerman* in framing its modified approach for the breach of confidence action to redress the perceived imbalance arising from the law's failure to give adequate effect to a plaintiff's wrongful loss interest.[237]

83 Therefore, in line with the English court's reasoning that the mere "looking at [or examining of] documents" – which one knows to be confidential or knows the claimant can reasonably expect to be kept private – is itself a breach of confidence (or "capable of constituting an actionable wrong"),[238] the Court of Appeal in *I-Admin* came to the same conclusion that the defendant's "possession and referencing" of the plaintiff's confidential materials also constituted acts in breach of confidence.[239] However, as explained above,[240] while it is arguable that a plaintiff's *privacy* interests in information may well be compromised by the defendant's mere possession of (and "looking at") the information in question, it is rather more doubtful if the same argument can extend to an individual's *confidentiality* interests in the same. In other words, it might seem like a stretch of the imagination to suggest that the "confidential" (as opposed to the "private") character of the information contained in a secret document would have been compromised simply upon a visual examination of the document without consent.[241]

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234 As to which, see *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 1 SLR 1130 at [61].

235 *Imerman v Tchenguiz* [2010] EWCA Civ 908; [2011] 2 WLR 592.

236 Lord Neuberger MR described *Imerman v Tchenguiz* [2010] EWCA Civ 908; [2011] 2 WLR 592 as "an extreme case of wrongful access to confidential material" and that "[w]hat happened in this case was an invasion of privacy in an underhand way and on an indiscriminate scale": see [144].

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

238 See *Imerman v Tchenguiz* [2010] EWCA Civ 908; [2011] 2 WLR 592 at [68] and [69].

239 *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 1 SLR 1130 at [64], and see generally [44] and [63]–[66].

240 See paras 59–63 above.

241 With respect, the authors are unable to agree with Lord Neuberger MR when he said that "a claimant who establishes a right of confidence in certain information contained in a document should be able to restrain any threat by an unauthorised defendant to look at … the contents of the document" because "the information

(cont'd on the next page)

84 In any event, it is submitted that the *Imerman* decision and the English court's use of the "confidence"/"confidential" nomenclature must be understood in context, as *Imerman* was a case that dealt with the defendant's surreptitious taking of *private/personal* information[242] (that is, information in which the claimant had a "reasonable expectation of privacy").[243] This is clearly evidenced by the following *dicta* where Lord Neuberger MR (as he then was) rather unhelpfully conflated the two distinct interests, namely "confidentiality" on the one hand and informational "privacy" on the other:[244]

> It would seem to us to follow that intentionally obtaining such information, secretly and knowing that the claimant reasonably expects it to be *private*, is itself a breach of *confidence*. [emphasis added]

With respect, the unfortunate obfuscation of these concepts is repeated by his Lordship throughout his judgment.[245]

85 Indeed, it has been rightly pointed out by the learned authors of *Gurry on Breach of Confidence* that "[w]hat is confusing about *Imerman* … is that the court veered between the terminology of the 'old' and the 'new'" and the court "couched most of its reasoning in 'old-fashioned' confidence terminology with the discussion of Articles 8 and 10 being largely implicit".[246] In this regard, it would have been preferable for Lord Neuberger MR to have *abandoned* the language of "confidence" altogether on the facts of the case before him, as did Lord Nicholls in

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will, through the unauthorised act of the defendant, either lose its confidential character, or will at least be at risk of doing so": see *Imerman v Tchenguiz* [2010] EWCA Civ 908; [2011] 2 WLR 592 at [69].

242 Involving electronic copies of the claimant's e-mails and other documents (detailing his personal finances and business dealings) stored on his computer server that were likely to be used in separate divorce proceedings concerning an ex-wife's application for ancillary financial relief.

243 *Campbell v MGN Ltd* [2004] 2 AC 457 at [21], *per* Lord Nicholls, [85], *per* Lord Hope, and [134], *per* Baroness Hale. This point was explicitly recognised by Lee Seiu Kin J in *Clearlab SG Pte Ltd v Ting Chong Chai* [2015] 1 SLR 163 at [203].

244 *Imerman v Tchenguiz* [2010] EWCA Civ 908; [2011] 2 WLR 592 at [68] (and *cf* also, to similar effect, Lord Woolf CJ's *dicta* in *A v B plc* [2002] EWCA Civ 337; [2003] QB 195 at [11(ix)]). With respect, this unhelpful conflation of doctrinally distinct concepts (accompanied by Lord Neuberger MR's loose and unfortunate use of the word "confidential" for what, in the authors' view, should have been the word "private") was repeated at [72]. And *cf* [77].

245 See, *eg*, *Imerman v Tchenguiz* [2010] EWCA Civ 908; [2011] 2 WLR 592 at [79] and [89].

246 See Tanya Aplin *et al*, *Gurry on Breach of Confidence – The Protection of Confidential Information* (Oxford University Press, 2nd Ed, 2012) at para 7.155. The authors also noted therein that the language of "confidence" rather than "privacy" dominated Lord Neuberger MR's judgment.

Campbell v MGN Ltd[247] ("*Campbell*") where his Lordship candidly acknowledged that:[248]

> … [t]he continuing use of the phrase 'duty of confidence' and the description of the information as 'confidential' is not altogether comfortable. Information about an individual's private life would not, in ordinary usage, be called 'confidential'. The more natural description today is that such information is private. The essence of the tort is better encapsulated now as misuse of private information.

86 Nevertheless, when examined in this light, it is perhaps understandable why Lord Neuberger MR in the English Court of Appeal adopted the view that mere possession and referencing of an individual's *private/personal* information – even without any evidence of misuse on the defendant's part – may be sufficient to complete the cause of action for breach of confidence and grant the claimant equitable relief (in the absence of good reason otherwise) in the English context.[249] This line of thinking is, in any event, consistent with the views expressed above.[250] However, it would not have been appropriate, in the authors' respectful view, for the Court of Appeal to have also taken the same approach on the specific facts of *I-Admin*, which did *not* concern (confidential) private/personal information. After all, as Lord Phillips CJ stated:[251]

> … [i]nformation received in confidence may not be of such a nature as to engage Article 8. A trade secret [or commercial confidences in general] will not necessarily do so.

87 Be that as it may, there are two other aspects of Lord Neuberger MR's judgment that the authors would like to critique. First, as regards the relationship between the law of confidence and the contemporary protection afforded to informational privacy under English law, his Lordship was of the opinion thus:[252]

> However, given that the domestic law on confidentiality had already started to encompass privacy well before the 1998 Act came into force, and that, with the 1998 Act now in force, privacy is still classified as part of the confidentiality *genus*, the law should be developed and applied consistently and coherently in

247 [2004] 2 AC 457.

248 *Campbell v MGN Ltd* [2004] 2 AC 457 at [14].

249 *Imerman v Tchenguiz* [2010] EWCA Civ 908; [2011] 2 WLR 592 ("*Imerman*") was clearly a case where an English court had to give effect to the claimant's right to privacy under Art 8 of the European Convention on Human Rights: see *Imerman* at [76]–[77] and [154].

250 See paras 59–63 above.

251 *Associated Newspapers Ltd v HRH Prince of Wales* [2006] EWCA Civ 1776 at [29]. The reference to Art 8 is that of the European Convention on Human Rights.

252 *Imerman v Tchenguiz* [2010] EWCA Civ 908; [2011] 2 WLR 592 at [67].

> *both* privacy and 'old fashioned confidence' cases, *even if they sometimes may have different features*. [emphasis in original; other emphasis added]

88 If, by these remarks, Lord Neuberger MR meant to conflate the developing law of informational privacy and the traditional law of confidence (inherently "different features" notwithstanding), the authors respectfully disagree and caution against adopting such an approach given the views expressed above on the significance of the privacy-confidentiality distinction.[253] Further, it appears somewhat ironic that his Lordship would have followed this line of reasoning (no doubt in the name of "consistency" and "coherence")[254] when, having referred to the unease in "shoe-horning" a claim based upon the tort of misuse of private information into the "old fashioned" cause of action for breach of confidence,[255] it was expressly pointed out in his judgment that there were "dangers" in taking this precise path.[256]

89 Relevantly, it also appears that Lord Neuberger MR's *dicta* – in finding it acceptable to further develop the law's protection of informational privacy under the umbrella of the "old fashioned" breach of confidence action – is out of step with judicial guidance emanating from the jurisprudence of the apex court in the UK. It is apposite to reiterate Lord Hoffmann's advice in *OBG Ltd v Allan*[257] that it is "necessary" to distinguish between privacy claims under Art 8 of the ECHR and "old fashioned" breach of confidence claims for breach of commercial confidences:[258]

> It is first necessary *to avoid being distracted by the concepts of privacy and personal information*. In recent years, English law has adapted the action for breach of confidence to provide a remedy for the unauthorized disclosure of personal information: see *Campbell v MGN Ltd* [2004] 2 AC 457. This development has been mediated by the analogy of the right to privacy conferred by article 8 of the European Convention on Human Rights and has required a balancing of that right against the right to freedom of expression conferred by article 10. *But this appeal is not concerned with the protection of privacy.* Whatever may have been the position of the Douglases, who, as I mentioned, recovered damages for an invasion of their privacy, *OK!'s* claim is to protect *commercially confidential information* and nothing more. So your Lordships need not be concerned with

253 See paras 59–70 above.
254 *Imerman v Tchenguiz* [2010] EWCA Civ 908; [2011] 2 WLR 592 at [67].
255 See *Douglas v Hello! Ltd (No 3)* [2005] EWCA Civ 595; [2006] QB 125 at [96], *per* Lord Phillips MR. See also [53]: "*We cannot pretend that we find it satisfactory* to be required to *shoe-horn* within the cause of action of *breach of confidence* claims for publication of unauthorised photographs of a *private* occasion" [emphasis added].
256 *Imerman v Tchenguiz* [2010] EWCA Civ 908; [2011] 2 WLR 592 at [66].
257 [2008] 1 AC 1. *Cf* also his Lordship's *dicta* in *Campbell v MGN Ltd* [2004] 2 AC 457 at [51]–[52].
258 *OBG Ltd v Allan* [2008] 1 AC 1 at [118].

> Convention rights. *OK!* has *no claim to privacy under article 8* nor can it make a claim which is parasitic upon the Douglases' right to privacy. [emphasis added]

Lord Nicholls in the same case also made a similar (and equally compelling) point:[259]

> As the law has developed, breach of confidence, or misuse of confidential information, now covers two *distinct causes of action*, protecting two *different interests*: privacy, and secret ('confidential') information. *It is important to keep these two distinct.* In some instances information may qualify for protection both on grounds of privacy and confidentiality. In other instances information may be in the public domain, and not qualify for protection as confidential, and yet qualify for protection on the grounds of privacy. Privacy can be invaded by further publication of information or photographs already disclosed to the public. Conversely, and obviously, a trade secret may be protected as confidential information even though no question of personal privacy is involved. [emphasis added]

90 A more recent reminder of the bifurcated approach which the law of confidence in England has now adopted – to address a claimant's distinct interests in protecting informational *privacy* on the one hand and the *confidentiality* of his information on the other – can be gleaned from the following *dicta* by Briggs LJ (as he then was), with which the authors wholeheartedly agree:[260]

> By contrast with the law relating to *private confidences*, which has been *transformed* by the influence of the Human Rights Convention, the law relating to *mis-use of confidential information in a business context* has been well settled for very many years. The following well-known dictum of Megarry J in *Coco v A N Clark (Engineers) Limited* [1969] RPC 41, at 47 has *stood the test of time*: … [emphasis added]

91 Separately, in noting that the more contemporary incarnation of the law of confidence in England clearly recognises the action for "misuse of private information"[261] as an actionable wrong, Lord Neuberger MR in *Imerman* said that this "does not mean that there has to be such misuse before a claim for breach of confidentiality can succeed".[262] With respect,

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259 *OBG Ltd v Allan* [2008] 1 AC 1 at [255], whose view of the matter was accepted as "obviously correct" by the English Court of Appeal in *Google Inc v Vidal-Hall* [2015] EWCA Civ 311 at [25]. *Cf* also his Lordship's *dicta* in *Campbell v MGN Ltd* [2004] 2 AC 457 at [14]. It appears that private/personal information may be more resilient and resistant to public exposure than in the case of confidential commercial information. See also, in this regard, *PJS v News Group Newspapers Ltd* [2016] UKSC 26; [2016] AC 1081.

260 *Wade v British Sky Broadcasting Ltd* [2016] EWCA Civ 1214 at [2].

261 *Campbell v MGN Ltd* [2004] 2 AC 457 at [14], *per* Lord Nicholls: "The essence of the tort is better encapsulated now as misuse of private information."

262 *Imerman v Tchenguiz* [2010] EWCA Civ 908; [2011] 2 WLR 592 at [71].

the authors are somewhat sceptical of this "blanket" (and controversial) proposition *if* it is taken to mean that proof of misuse (whether actual or threatened) is *not* required under English law.[263] After all, his Lordship had expressed the view that a defendant's unauthorised possession of and "looking at" the claimant's protected information – even if the defendant "did not intend to reveal the contents to any third party" – was sufficient to infringe the claimant's rights in confidence/privacy (because "there would be a *risk* of the information getting out") [emphasis added].[264] It is observed, parenthetically, that this "blanket" proposition appears to have influenced the Court of Appeal's deliberations for modifying the approach that should be taken in relation to breach of confidence claims in Singapore.[265]

92 The decision of the House of Lords in *Campbell* has traditionally been recognised to have extended the "old fashioned" breach of confidence action to embrace and give full effect to Art 8 of the ECHR in English law. However, it must be emphasised that the *Campbell* decision is *not* clear authority for the proposition that misuse on the part of the defendant is not a necessary ingredient in establishing the tort of misuse of private information. This is because there was ample evidence of *actual* misuse in that case – which, it is noted, is typical of cases involving the surreptitious taking of information – due to the unauthorised publication by the *Daily Mirror* of various pieces of information in which the claimant (Naomi Campbell) had a reasonable expectation of privacy.[266]

93 On facts that were largely similar to *Imerman*, the case of *White v Withers LLP*[267] concerned, *inter alia*, the state of English law on misuse of private information (or the invasion of informational privacy). Crucially, for the purposes of this article, there was no evidence that the defendant

263 Presumably under *both* the "old" and "new" law, given the authors' interpretation of Lord Neuberger MR's enigmatic observation as follows: "The fact that misuse of private information has … 'become recognised over the last few years as a wrong actionable in English law' does not mean that there has to be such misuse before a claim for breach of confidentiality [informational privacy?] can succeed, unless that was the position before the Human Rights Act 1998 came into force, which it was not": *Imerman v Tchenguiz* [2010] EWCA Civ 908; [2011] 2 WLR 592 at [71]. See also *ANB v ANC* [2015] 5 SLR 522 at [19]: "Further, with respect to the third [*Coco*] element, it was held in *Imerman* (at [71]) that there was no need to prove that there had been a misuse of the information for the claim to succeed (although this holding *purported to apply* to 'old fashioned breach of confidence' cases as well)." [emphasis added]

264 See *Imerman v Tchenguiz* [2010] EWCA Civ 908; [2011] 2 WLR 592 at [72].

265 See *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 1 SLR 1130 at [59], where the Court of Appeal observed that the court in *Imerman v Tchenguiz* [2010] EWCA Civ 908; [2011] 2 WLR 592 had "relaxed the prerequisite of use and detriment".

266 See *Campbell v MGN Ltd* [2004] 2 AC 457 at [15].

267 [2008] EWHC 2821 (QB).

firm of solicitors had disclosed any private information to third parties or that there was any *threat* or intention to do so in the future.[268] The claimant therefore did not seek an injunction to prevent onward disclosure of such information. Nevertheless, counsel for the defendant made the following submissions:[269]

> … that the mere *receipt* of documents by the solicitors from their client, and their continued *retention* in connection with the matrimonial proceedings, simply cannot give rise to a cause of action. Nor could the fact that such documents had been *read* and *noted* in connection with the litigation. [emphasis added]

Agreeing, Eady J in the English High Court held that there was no relevant "misuse" – which, in the authors' view, can be interpreted to mean both *actual* as well as *threatened* misuse – of any information on the part of the defendant solicitors to give rise to a cause of action for misuse of private information.[270] Eady J's decision to strike out the claimant's action was upheld on appeal, where Ward LJ recorded his *obiter* concurrence with the trial judge's reasoning as follows:[271]

> Mrs White's communication of [the claimant's] confidential/private information to her solicitors [the defendant] for their use in the litigation could *never* be characterised as *misuse* of it. [emphasis added]

The English Court of Appeal accordingly ruled that "Eady J was quite right to dismiss the claim relating to the misuse of confidential or private information".[272] This must necessarily suggest, contrary to Lord Neuberger MR's "blanket" proposition noted above,[273] that the "misuse" requirement is very much alive and well in the *corpus* of English law on breach of confidence and misuse of private information, however the cause of action is labelled and pleaded.

94 The reasoning of Eady J and Ward LJ appear to be at odds with that of Lord Neuberger MR in *Imerman*, who sought to confine Eady J's holding – in relation to the absence of any misuse (actual/threatened) by the defendant – to the specific facts of that case (that is, "as applying only to the receipt of documents by solicitors from their client").[274] For the purposes of this article, what is notable about these contrasting decisions on largely

268 Indeed, such information as the defendant firm of solicitors had been given was received, read/noted and retained by them *purely* for use in connection with matrimonial court proceedings and the protection of their client's interest in that context.

269 *White v Withers LLP* [2008] EWHC 2821 (QB) at [8].

270 See *White v Withers LLP* [2008] EWHC 2821 (QB) at [16].

271 *White v Withers LLP* [2009] EWCA Civ 1122 at [23].

272 *White v Withers LLP* [2009] EWCA Civ 1122 at [68].

273 See para 91 above.

274 See *Imerman v Tchenguiz* [2010] EWCA Civ 908; [2011] 2 WLR 592 at [70].

similar facts is this – whereas Lord Neuberger MR was of the view that just because "the defendant did not intend to reveal the contents to any third party [did not mean that this] would not meet the claimant's concern [of a breach of confidentiality/privacy]",[275] the fact that the defendant had not disclosed any private information to third parties and that there was no threat or intention to do so in the future proved entirely *fatal* to the claimant's action for misuse of private information in the *White v Withers LLP* litigation.[276] The authors further observe, in respectful disagreement with Lord Neuberger MR, that there is no indication whatsoever in both sets of judgments in *White v Withers LLP* that the "misuse" requirement in the English law of confidence (as extended to protect against the misuse of private information) ought to be confined *only* to situations that involve "the receipt of [confidential/private] documents by solicitors from their client".[277] It is also in this context that the authors disagree with Lord Neuberger MR's "blanket" proposition that proof of misuse is *not* required under the "old" (or traditional) as well as "new" (or extended) action for breach of confidence in England.[278]

95 Finally, a brief survey of English case law on claims for breach of informational privacy under Art 8 of the ECHR reveals that a defendant's mere access to, or acquisition, possession or referencing of, the claimant's private/personal information may not suffice to constitute "misuse" of the information in question. For instance, Lord Woolf CJ said that "[w]hether a duty of confidence does exist which courts can protect … will depend on all the circumstances of the relationship between the parties at the time of the *threatened or actual breach* of the alleged duty of confidence" [emphasis added].[279] Similarly, Lord Phillips CJ was of the view that:[280]

> … [w]hether a publication, or *threatened publication*, involves a breach of a relationship of confidence, an interference with privacy or *both*, it is necessary to consider whether these matters justify the interference with Article 10 rights that will be involved if the publication is made the subject of a judicial sanction. [emphasis added]

Such *dicta* may therefore suggest that some form of "misuse" on the part of the defendant – either actual or at least threatened misuse, and certainly going beyond a mere "*risk* of the information getting out" [emphasis added][281] – might still be necessary to complete the cause of

275 See *Imerman v Tchenguiz* [2010] EWCA Civ 908; [2011] 2 WLR 592 at [72].
276 *White v Withers LLP* [2008] EWHC 2821 (QB); *White v Withers LLP* [2009] EWCA Civ 1122.
277 See *Imerman v Tchenguiz* [2010] EWCA Civ 908; [2011] 2 WLR 592 at [70].
278 See *Imerman v Tchenguiz* [2010] EWCA Civ 908; [2011] 2 WLR 592 at [71].
279 *A v B plc* [2002] EWCA Civ 337; [2003] QB 195 at [11(ix)].
280 *Associated Newspapers Ltd v HRH Prince of Wales* [2006] EWCA Civ 1776 at [65].
281 *Imerman v Tchenguiz* [2010] EWCA Civ 908; [2011] 2 WLR 592 at [72].

action for breach of confidence/misuse of private information in the English context. For all these reasons, it remains doubtful (contrary to what Lord Neuberger MR had articulated in *Imerman*)[282] that the notion of misuse has been categorically rendered redundant by contemporary developments in the breach of confidence landscape in England.

(6) Coda on the requirement of "misuse"

96 Arising from the privacy-confidentiality distinction which has been carefully studied above,[283] the authors remain of the view that the element of "misuse" enshrined in the third *Coco* requirement – and the accompanying wrongful gain interest of the plaintiff – should continue to have a meaningful role to play in the analytical framework for the breach of confidence action. It has been explained that this is principally because it is information that is "confidential" in nature (and not *per se* "private/personal") that the "old fashioned" cause of action seeks to protect.

97 There is also another justification for the misuse requirement that is particularly pertinent to breach of confidence disputes in the commercial context. Where commercially valuable information or information of a commercially exploitable character is the subject of the dispute in question, the misuse requirement serves as a meaningful *policy lever*: to distinguish between instances of *fair competition* (where the defendant has accessed and retained the plaintiff's confidential information – for instance, in his head/memory because of his former employment – or has received confidential information as a consequence of a prior working relationship with the plaintiff but does not, and has no intention to, misuse such information (referencing and reviewing notwithstanding) in a competing business and/or to produce competing products) and instances of *unfair competition* (where the defendant has clearly taken "unfair advantage" of the plaintiff's confidential information by using it – in a competing business and/or for purposes thereof – as a "springboard" to gain an unfair head-start over other trade competitors).[284] As a matter of policy, liability for breach of confidence should only arise in the latter scenario where there is at least some tangible evidence of harm or damage suffered by the plaintiff (or, in the alternative, of the defendant having

282 See *Imerman v Tchenguiz* [2010] EWCA Civ 908; [2011] 2 WLR 592 at [71].

283 See paras 57–76 above.

284 See generally *Morison v Moat* (1851) 68 ER 492; *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* (1948) 65 RPC 203; *Terrapin Ltd v Builders' Supply Co (Hayes) Ltd* [1967] RPC 375; *Seager v Copydex Ltd* [1967] 1 WLR 923; *Tang Siew Choy v Certact Pte Ltd* [1993] 1 SLR(R) 835; *Force India Formula One Team Ltd v 1 Malaysia Racing Team Sdn Bhd* [2012] EWHC 616 (Ch); [2012] RPC 29 (especially at [267]–[268]); *Clearlab SG Pte Ltd v Ting Chong Chai* [2015] 1 SLR 163; and *Adinop Co Ltd v Rovithai Ltd* [2019] 2 SLR 808.

wrongfully gained/benefited in some way at the plaintiff's expense). The authors would argue that where unfair competition is made out, there is likely to be some measure of harm to the economic value of the plaintiff's commercial confidence – for instance, because the defendant has made an unauthorised use of the plaintiff's confidential information "without paying a reasonable sum for it".[285]

98 It is also in the context of the defendant's misuse of confidential information (and, on certain facts, resulting unfair competition) that the protection of the plaintiff's wrongful gain interest through the action for breach of confidence would be triggered. For it is only when misuse on the part of the defendant is established that the plaintiff's wrongful gain interest can be meaningfully engaged and compromised – such as when the defendant has wrongfully gained/profited from the unauthorised use or disclosure of the confidential information at the plaintiff's expense. To the extent that the Court of Appeal's modified approach (and its triggering of the presumption of breach of confidence after the plaintiff's wrongful loss interest has been engaged) does not leave any room for a court's consideration of the misuse requirement and hence the plaintiff's wrongful gain interest, the authors respectfully disagree with its adoption for breach of confidence claims in Singapore.

D. Breach of confidence actions in Singapore: A suggested way forward

99 For "old fashioned" breach of confidence actions in Singapore, the authors respectfully suggest retaining the three-element analytical framework famously set out in *Coco* – but in a modified fashion.[286] In the authors' view, the long-standing *Coco* test for breach of confidence is attractive from the doctrinal and policy perspectives because it embraces a balanced approach in protecting, at the appropriate stages of the test, both the wrongful loss and wrongful gain interests of the plaintiff.[287]

100 It may be thought that the recent *I-Admin (CA)* decision stands in the way of this proposal but the authors argue otherwise. Curiously, up until three days before judgment in *I-Admin (CA)* was handed down by Sundaresh Menon CJ, the test in *Coco* was still good law in Singapore

285 *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41 at 50.

286 Explained at paras 111–118 below.

287 Whereas the second *Coco* requirement serves the purpose of protecting a plaintiff's wrongful loss interest, the misuse requirement is principally concerned with protecting his wrongful gain interest. The authors therefore take the view that because the *Coco* framework pays due regard to the plaintiff's wrongful loss interest without undermining the protection of his wrongful gain interest, it best accords with equity and fairness to both plaintiff and defendant.

and usefully adopted/endorsed (albeit with modification) by a similarly constituted Court of Appeal in *LVM Law Chambers LLC v Wan Hoe Keet*[288] ("*LVM (CA)*") with Andrew Phang Boon Leong JA delivering the court's judgment.[289] It is observed at the outset that (a) the court in *LVM (CA)*, in embracing a modified *Coco* test, did not refer to the then-impending *I-Admin (CA)* decision; and (b) *I-Admin (CA)* did not at all cite the earlier decision and, more importantly, expressly overrule the application of the *Coco* framework – against the *acknowledged* backdrop of its very recent endorsement by the same court just three days earlier – to future breach of confidence actions in Singapore. Further, there is no indication in either case that their guidance on and application of the law of confidence ought only to be confined to the specific facts of each case – with the earlier decision on lawyer–client confidentiality and *I-Admin (CA)* concerning a breach of confidence dispute "arising out of erstwhile employer-employee relationships".[290] For these reasons, the authors are of the respectful view that a future Court of Appeal, in an appropriate case coming before it, has every opportunity to revisit its decision in *I-Admin (CA)* and seriously consider (and hopefully endorse) this proposal, which will now be discussed.

(1) Why modify the third Coco *requirement?*

101 In the authors' view, in line with conventional wisdom and also the views expressed in *LVM (CA)*,[291] the legal burden of proof must remain on the plaintiff throughout to establish all three elements of the *Coco* test on a balance of probabilities. Indeed, "mere assertions or vague generalisations" of confidentiality would be insufficient to discharge this burden of proof.[292] However, the authors do recognise the necessity for a clarification and modification of the third limb of the test – namely, "there must be an unauthorised use of the information to the detriment of the person communicating it"[293] – so as to (a) correct the misperception that proof of *actual* misuse of confidential information on the part of the defendant is required; and (b) jettison the additional requirement of "detriment" to the plaintiff, respectively.

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288 [2020] 1 SLR 1083. *Cf* also the reasoning in and outcome of this case with *White v Withers LLP* [2008] EWHC 2821 (QB) and *White v Withers LLP* [2009] EWCA Civ 1122.

289 The only difference in the constitution of the Court of Appeal is that Quentin Loh J sat in *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 1 SLR 1130 whereas it was Judith Prakash JA who presided alongside the other two members of the apex court in the other appeal.

290 *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 1 SLR 1130 at [3].

291 See *LVM Law Chambers LLC v Wan Hoe Keet* [2020] 1 SLR 1083 at [23] *ff*.

292 See *LVM Law Chambers LLC v Wan Hoe Keet* [2020] 1 SLR 1083 at [18] and [23].

293 *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41 at 48.

102 With regard to "detriment", in laying down the third requirement for the breach of confidence action, it is true that Megarry J spoke of an unauthorised use of confidential information to the "detriment" of the confider (plaintiff). Nevertheless, it is clear that the judge was equivocal as to the need for such a requirement – after citing the example of an abuse of confidential information which shows the plaintiff "in a favourable light but gravely injures some relation or friend of his whom he wishes to protect"[294] – and ultimately decided to leave the question open. Similarly, Lord Goff in *Attorney-General v Guardian Newspapers Ltd (No 2)* also decided to "keep open the question whether detriment to the plaintiff is an essential ingredient of an action for breach of confidence",[295] although Lord Griffiths was of the opinion that "detriment, or potential detriment to the confider, is an element that must be established before a private individual is entitled to the remedy [of an injunction]".[296] Over in Australia (where it appears that the position remains open), Gummow J in *Smith Kline & French Laboratories (Australia) Ltd v Secretary, Department of Community Services and Health*[297] was of the view thus:[298]

> 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. [emphasis added]

103 In the local case of *Vestwin Trading Pte Ltd v Obegi Melissa*,[299] Andrew Ang J in the High Court cited an example that was raised in academic commentary to illustrate why detriment may not always be necessary in breach of confidence scenarios:[300]

> [O]ne situation (where detriment is not required) may be between a doctor and a celebrity patient suffering from AIDS. The authors opine that any intimate

294 *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41 at 48. *Cf Prince Albert v Strange* (1849) 2 De G & SM 293 at 312: "Everyone, however, has a right, I apprehend, to say that the produce of his private hours is not more liable to publication without his consent, because the publication must be *creditable or advantageous* to him, than it would be in *opposite* circumstances" [emphasis added].

295 *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109 at 281–282. Similar views were expressed by Lord Keith in *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109 at 256.

296 See *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109 at 270.

297 (1990) 17 IPR 545.

298 *Smith Kline & French Laboratories (Australia) Ltd v Secretary, Department of Community Services and Health* (1990) 17 IPR 545 at 584.

299 [2006] 3 SLR(R) 573.

300 *Vestwin Trading Pte Ltd v Obegi Melissa* [2006] 3 SLR(R) 573 at [73], citing Roger G Toulson & Charles M Phipps, *Confidentiality* (Sweet & Maxwell, 1996) at p 72. Andrew Ang J went on to say (at [75]): "The circumstances of the case before me are such that to insist upon proof of detriment will send a wrong signal encouraging vigilantism."

> 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.

Finally, it has also been pointed out in *Gurry on Breach of Confidence* that:[301]

> … it is possible to conceive of cases (other than Megarry J's example [in *Coco*]) where no real detriment is suffered. In the case of technical secrets, there is no requirement that the information be used in order to compete with the claimant (and thus to cause him direct economic detriment in that sense) and so in such a case it might be suggested that there is liability without any real detriment.

From the foregoing account, the weight of judicial and academic authority appears to cast doubt on the element of "detriment" as a formal prerequisite under the third limb of the *Coco* formulation. Indeed, Ang J was firmly of the view that "there are at least some situations where the insistence upon the presence of detriment would be inappropriate if not unjust".[302] The authors agree entirely with these perspectives.

104 When the requirement of "misuse" in the third stage of the *Coco* test is properly understood, it is apparent that there is no need for the plaintiff to be put to strict proof of detriment – if, by this, the plaintiff is required to establish that he has openly suffered economic damage as a result of the defendant's unfair trade practices – even in cases where the plaintiff's wrongful gain interest has been compromised. As explained above,[303] the main focus of the plaintiff's wrongful gain interest is on the *conduct of the defendant* who must be shown to have wrongfully gained/benefited from the misuse at the plaintiff's expense. Obviously, this sort of "unjust enrichment" may occur even where there is no direct evidence of economic harm or any prejudice suffered by the plaintiff.

105 Separately, but relatedly, the thinking that proof of *actual* misuse of confidential information on the part of the defendant is required in breach of confidence actions may well have arisen because of the perceived need to prove "detriment", a point already addressed above.[304] The argument goes that unless the defendant has actually misused confidential information, the plaintiff will not be able to prove that he

301 See Tanya Aplin *et al*, *Gurry on Breach of Confidence – The Protection of Confidential Information* (Oxford University Press, 2nd Ed, 2012) at para 15.43.

302 *Vestwin Trading Pte Ltd v Obegi Melissa* [2006] 3 SLR(R) 573 at [70].

303 See para 38 above.

304 See paras 102–104 above.

has suffered any detriment as a consequence.[305] Such an argument may, in fact, have led the Court of Appeal in *I-Admin* to form the mistaken view that "[t]he requirement of unauthorised use and detriment has held back the development of the law by overemphasising the wrongful gain interest at the expense of the wrongful loss interest".[306] It is submitted at once that this approach does not represent the state of the law. So much is clear from Lord Griffith's *dicta* in *Attorney-General v Guardian Newspapers Ltd (No 2)* where his Lordship expressed the view that "detriment, or *potential detriment* to the confider, is an element that must be established before a private individual is entitled to the remedy" [emphasis added].[307]

106 In any event, this question of "potential use" (or "potential detriment" for that matter) has been exhaustively examined, in *obiter*, by Lee Seiu Kin J in *Clearlab*.[308] The principal concern in this case was to restrain the defendants, who were proven to have wrongfully used some of the plaintiff's confidential information, from committing further breaches of confidence in respect of a whole lot of remaining information and documents that they had wrongfully obtained. In deciding to leave the question open as to whether the mere taking of confidential information (in the absence of actual use or disclosure) can constitute a breach of confidence, Lee J nevertheless took the opportunity to review the authorities in Australia and the UK on the question of "threatened" misuse.

107 His Honour helpfully pointed out that the Australian courts have explicitly moved away from the concept that actual use or disclosure (or "misuse" by the authors' definition) was required to establish a breach of confidence. Instead, the courts now embrace the notion of a "threatened" misuse/abuse of confidential information.[309] In relation to

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305 See also *Clearlab SG Pte Ltd v Ting Chong Chai* [2015] 1 SLR 163 at [199]:

> [M]any of the cases on breach of confidence are grounded on past unauthorised use or disclosure. Based on the consistent emphasis of breach being actual use or disclosure, and the vintage of *Coco's* formulation of the element of breach as 'an unauthorised use of that information to the detriment of the party communicating it' …, the opposing argument is that the defendants should not be liable if they are not actually shown to have used the confidential information.

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

307 *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109 at 270.

308 *Clearlab SG Pte Ltd v Ting Chong Chai* [2015] 1 SLR 163.

309 See *Clearlab SG Pte Ltd v Ting Chong Chai* [2015] 1 SLR 163 at [201], citing *Moorgate Tobacco Co Ltd v Philip Morris Ltd (No 2)* (1984) 156 CLR 414 at 438; *Smith Kline & French Laboratories (Australia) Ltd v Secretary, Department of Community Services and Health* (1990) 22 FCR 73 at 87; (1990) 17 IPR 545 at 593; and *AZPA Pty Ltd v Dogan* [2010] VSC 51 at [10]. See also *Australian Broadcasting Corp v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 222 as well as *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 1 SLR 1130 at [59].

English authorities, Lee J unsurprisingly relied on Lord Neuberger MR's decision in *Imerman* for the proposition that a "threat" by the defendant to use or disclose confidential information (that is, "imminent use or disclosure") appeared to be good enough for equity to intervene.[310]

108 On the facts in *Clearlab*, the defendants were found to have wrongfully used some of the plaintiff's confidential information and also taken thousands of documents belonging to the plaintiff – such conduct, additionally, being in "flagrant breach of contract".[311] Against this backdrop of proven (and multiple) instances of breach/misuse, it was not difficult for Lee J to form the view that the defendants' (especially future) conduct clearly satisfied the threshold of a "threatened" misuse.[312] But the same cannot be said of the facts and state of the evidence in *I-Admin* where the trial judge (Abdullah J) had made the express finding that the defendant's conduct, on the whole, was comparatively "not so egregious".[313] In other words, it was found that there was neither actual nor threatened misuse of confidential information in *I-Admin (HC)*. This therefore suggests that whether or not there has been a *breach* of the plaintiff's confidence because of the defendant's *misuse* ultimately depends on the particular facts and circumstances of each case.

109 There are some further observations on "threatened" misuse. Apart from the *Imerman* decision,[314] several other English authorities have also adopted the language of "threatened" misuse (or any of its variants). This only goes to show that the third *Coco* requirement was never intended to be confined only to instances of "actual" use or disclosure without consent. Here are three additional examples in the case law:

> (a) In deciding whether the defendant had "threatened" to breach a duty of confidence, the court held that "for present purposes, if the first two elements [of the *Coco* test] are satisfied, *threatened unauthorised use* would constitute a threat to the integrity of the 11+ exams and thereby be detrimental" [emphasis added].[315]

310 See *Clearlab SG Pte Ltd v Ting Chong Chai* [2015] 1 SLR 163 at [202]–[203].
311 *Clearlab SG Pte Ltd v Ting Chong Chai* [2015] 1 SLR 163 at [206]. See also [197].
312 See *Clearlab SG Pte Ltd v Ting Chong Chai* [2015] 1 SLR 163 at [206]–[207]. See also *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 1 SLR 1130 at [29].
313 *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 3 SLR 615 at [125]. See also [124].
314 See *Imerman v Tchenguiz* [2010] EWCA Civ 908; [2011] 2 WLR 592 at [69], [71] and [72].
315 *Warwickshire County Council v Matalia* [2018] EWHC 1340 (Ch) at [45], *per* Judge Simon Barker QC.

(b) "Whether a publication, or *threatened publication*, involves a breach of a relationship of confidence, an interference with privacy or both, it is necessary to consider whether these matters justify the interference with Article 10 rights that will be involved if the publication is made the subject of a judicial sanction" [emphasis added].[316]

(c) "If the information in question can fairly be regarded as a separate part of the employee's stock of knowledge which a man of ordinary honesty and intelligence would recognise to be the property of his old employer and not his own to do as he likes with, then the court, if it thinks that there is a *danger* of the information being used by the ex-employee to the detriment of the old employer will do what it can to prevent the result by granting an injunction" [emphasis added].[317]

110 It should further be mentioned that the notion of "threatened" – as opposed to "actual" – misuse is also to be found in breach of confidence/invasion of (informational) privacy cases in England that were concerned with applications for interim or interlocutory injunctions.[318] In the fairly recent decision of the UK Supreme Court in *PJS v News Group Newspapers Ltd*,[319] Lord Mance expressed the view that "whether an interim injunction should be granted to restrain an *anticipated* tortious invasion of privacy raises different considerations from those involved in the simple question whether disclosure or publication would constitute a tortious act" [emphasis added].

(2) Reformulating the third Coco *requirement and the suggested approach for the breach of confidence action*

111 In what manner then should the third *Coco* requirement be modified? Given the arguments above[320] that the "threatened" misuse concept is very much alive and well in other jurisdictions (such as the UK and Australia) and there is no sensible need for the defendant's misuse to amount to "detriment" suffered by the plaintiff, a reformulation of

316 *Associated Newspapers Ltd v HRH Prince of Wales* [2006] EWCA Civ 1776 at [65], *per* Lord Phillips CJ.

317 *Printers & Finishers v Holloway* [1965] RPC 239 at 255, *per* Cross J.

318 See, *eg*, *Merryweather v Moore* [1892] 2 Ch 518; *G D Searle & Co Ltd v Celltech Ltd* [1982] FSR 92; and *McKenna Breen Ltd v James* [2002] 6 WLUK 190; 2002 WL 31422186. See also *Cream Holdings Ltd v Banerjee* [2005] 1 AC 253 and *Caterpillar Logistics Services (UK) Ltd v Paula Huesca de Crean* [2012] EWCA Civ 156; [2012] FSR 33.

319 *PJS v News Group Newspapers Ltd* [2016] UKSC 26; [2016] AC 1081 at [33].

320 See paras 105–110 above.

the third limb of the *Coco* test by looking to the *LVM (CA)* decision for guidance is proposed.

112 In connection with an application for an injunction against a firm of solicitors[321] and the related plea that the lawyer in question owed the applicant equitable obligations of confidentiality,[322] the Court of Appeal, in disagreeing with the trial judge that there was a sufficient threat of misuse to justify the grant of an injunction,[323] dealt with the *Coco* precedent in the following terms:[324]

> In our view, a good starting-point would be the test for breach of confidence laid down by Megarry J in the seminal English High Court decision in *Coco* … albeit *modified* slightly having regard to the nature of the precise issue before this court and the relevant case law which will be considered briefly below. … Put simply, the counterparty in the previous set of proceedings [that is, the applicant] must establish that:
>
> (a) the information concerned must have the necessary quality of confidence about it;
>
> (b) that information must have been received by the lawyer (or law firm) concerned in circumstances importing an obligation of confidence; and
>
> (c) there is a real and sensible possibility of the information being misused.
>
> [emphasis in original]

113 There may be a certain desire to restrain lawyers in possession of information impressed with an obligation of confidentiality from acting (for a different party in subsequent proceedings) due simply to the risk/possibility of an accidental, "unconscious or subconscious misuse of the confidential information concerned".[325] However, Phang JA ruled that the third *Coco* requirement "entails that there must be evidence that there is *a real and sensible possibility* of the information concerned being *misused* in the subsequent proceedings" [emphasis added].[326] His Honour observed that the "real and sensible possibility" test, which was said to be well

321 To enjoin the lawyer concerned – who had intimate knowledge of the confidential terms of a settlement agreement entered into by litigants in a separate action – from acting for his client.

322 On the basis that there was a real risk that confidential information would be misused/disclosed if the law firm were not restrained from acting.

323 See *Wan Hoe Keet v LVM Law Chambers LLC* [2020] 3 SLR 568.

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

325 *LVM Law Chambers LLC v Wan Hoe Keet* [2020] 1 SLR 1083 at [19].

326 *LVM Law Chambers LLC v Wan Hoe Keet* [2020] 1 SLR 1083 at [21]. In the UK, the equivalent test in a similar context is that of a "real risk of prejudice": see *Glencairn IP Holdings Ltd v Product Specialities Inc* [2020] EWCA Civ 609 at [69].

established in the case law, must be applied on an "objective basis"[327] – that is, through the perspective of "a fair-minded reasonably informed member of the public".[328]

114 Crucially, it would not have been acceptable to apply a legal test where the appearance of risk of misuse of the information concerned was "remote or merely fanciful".[329] In some instances, "the risk of misuse is patently obvious, such as where there is clear evidence of an intention to use information contrary to the obligation of confidence" but there might also be other instances where "the [real and sensible possibility] test could be satisfied by circumstances falling short of this high threshold".[330] But certainly, a mere "suspicion" of misuse will not do.[331]

115 For plaintiffs who bear the burden of establishing the misuse requirement in breach of confidence actions, what matters, in the final analysis, is the court's holistic assessment of the weight to be accorded to all the evidence available, with the court having regard also to the facts and circumstances of the case at hand in order to ascertain whether there would be a real and sensible possibility of the confidential information being misused by the defendant. This is obviously a fact-sensitive inquiry (that typically involves the court's drawing of inferences from the evidence) but it bears repeating that the *legal* burden of proof nevertheless falls squarely on the plaintiff.[332]

116 In the authors' respectful view, the "real and sensible possibility" test propounded in *LVM (CA)* is an eminently sensible test to adopt in the proposed modification of the third *Coco* requirement. It echoes, in substance, the "threatened" misuse concept well entrenched in the law of confidence in the UK and Australia. The authors are also of the view that the "real and sensible possibility" test is of wider import than to be

327 *LVM Law Chambers LLC v Wan Hoe Keet* [2020] 1 SLR 1083 at [21].

328 Citing *Grimwade v Meagher* [1995] 1 VR 446 at 455, *per* Mandie J.

329 *LVM Law Chambers LLC v Wan Hoe Keet* [2020] 1 SLR 1083 at [21], citing *Carter Holt Harvey Forests Ltd v Sunnex Logging Ltd* [2001] 3 NZLR 343 at [26]. *Cf* the threshold for "risk" adopted by Lord Neuberger MR in *Imerman v Tchenguiz* [2010] EWCA Civ 908; [2011] 2 WLR 592 at [69] and [72].

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

331 See *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 3 SLR 615 at [27]: "I was not satisfied that the plaintiff's claims had been made out on the balance of probabilities. While there were perhaps strands of evidence that pointed to a suspicion of breaches by the defendants in the Suits, this was not enough to bring the plaintiff over the requisite evidential threshold." See also *Invenpro (M) Sdn Bhd v JCS Automation Pte Ltd* [2014] 2 SLR 1045 at [181]: "The Plaintiff must still prove its case against the Defendants on a balance of probabilities. The fact that there exists a suspicion of access and copying is not enough."

332 See *LVM Law Chambers LLC v Wan Hoe Keet* [2020] 1 SLR 1083 at [24].

applied only to cases involving a litigant's right to instruct/retain the lawyer of his choice. Indeed, there is no good reason why it cannot apply more generally to all breach of confidence cases.

117 In summary, the suggested approach for breach of confidence actions in Singapore entails proof by the plaintiff of all three elements of the *Coco* test. However, in so far as the third *Coco* requirement is concerned, it is incumbent on the plaintiff to establish either *actual* misuse of confidential information on the part of the defendant or that there is a *real and sensible possibility* of the information concerned being misused by the defendant. As has been argued above,[333] there is no need for the plaintiff to further prove that the defendant's alleged misuse had caused him any "detriment".

118 Once the plaintiff has discharged this legal burden of proof, the burden then shifts to the defendant to raise potential defences – for example, that the misuse of confidential information on his part was justified in the public interest.[334] It is noted, parenthetically, that although the overall *legal* burden of proof lies squarely on the plaintiff, the *evidential* burden may well shift as between the parties throughout the course of the proceedings,[335] a point which has also been raised above.[336]

IV. A new cause of action for "misuse of private information"?

119 Although the authors do not agree with the application of the modified approach to breach of confidence actions in Singapore, the authors are of the respectful view that the analytical framework adopted by the Court of Appeal in *I-Admin* (that is, the raising of a presumption and shifting of the legal burden) can nevertheless play a useful role in the context of a *new* cause of action for "misuse of private information" which will now be proposed.

120 The starting point for this proposal must be the Court of Appeal's decision in *ANB v ANC*.[337] Arising from an application for an interlocutory injunction in the context of a family law dispute (not unlike the facts in

333 See paras 102–104 above.

334 The reader will recall that this is also the third example provided by the Court of Appeal through which the defendant may be able to displace the *prima facie* presumption after the legal burden of proof has shifted to him: see *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 1 SLR 1130 at [61].

335 See *Britestone Pte Ltd v Smith & Associates Far East, Ltd* [2007] 4 SLR(R) 855 at [58] *ff*. See also the discussion in *Sim Poh Ping v Winsta Holding Pte Ltd* [2020] 1 SLR 1199.

336 See para 24 above.

337 [2015] 5 SLR 522.

Imerman), the Court of Appeal made several *obiter* but tentative remarks on whether the law of confidence in Singapore should be extended, at some point in time, to also protect private/personal information that (on the facts) had been surreptitiously obtained.

121 Phang JA cautioned that under such factual circumstances, the rigid application of the *Coco* test "must be viewed with at least some circumspection".[338] Notwithstanding the absence of any express guarantee of the right to privacy under the Constitution of the Republic of Singapore,[339] his Honour observed that legal developments elsewhere – for instance, through an extension of the breach of confidence action in the UK and a common law right to privacy in New Zealand – have clearly demonstrated the prowess of the common law to fill this lacuna in the protection of private/personal information.

122 Above all, it was also pointed out that recent legislative developments in Singapore – such as the enactment of the Personal Data Protection Act 2012[340] and Protection from Harassment Act[341] – may well have paved the way for similar developments under the common law. The authors respectfully agree with Phang JA that the time is indeed ripe for the Singapore courts to expressly and robustly recognise the need for the protection of informational privacy in Singapore.[342]

123 If the call for reform in this area of the law is sensible and accepted, how should Singapore fashion a common law cause of action for misuse of private information? As we know, the protection accorded to private/personal information in the UK appears, at least from the earlier decisions, to have been "shoe-horned" into the law of confidence,[343] given the need for the English courts to give effect to the relevant provisions of the UK Human Rights Act 1998.[344] This "shoe-horning" practice is also due, in large part, to the fact that there is no independent tort for

338 *ANB v ANC* [2015] 5 SLR 522 at [18].
339 1999 Reprint.
340 Act 26 of 2012.
341 Cap 256A, 2015 Rev Ed.
342 See also *Re My Digital Lock Pte Ltd* [2018] PDP Digest 334 at [35] *ff* (especially at [40]).
343 *Douglas v Hello! Ltd (No 3)* [2005] EWCA Civ 595; [2006] QB 125 at [96], *per* Lord Phillips MR. See also Lord Woolf CJ in *A v B plc* [2002] EWCA Civ 337; [2003] QB 195 at [4] and Dingemans J in *Weller v Associated Newspapers Ltd* [2014] EWHC 1163 (QB) at [36]; and see generally Nicole Moreham, "Privacy in the Common Law: A Doctrinal and Theoretical Analysis" (2005) 121 LQR 628.
344 c 42. This piece of legislation, in turn, embraced the right to privacy enshrined in Art 8 of the European Convention on Human Rights, in addition to the Art 10 right to freedom of expression.

the invasion of privacy in the English context.[345] It is, of course, open to question whether such a "shoe-horning" practice still represents English law today in light of the decision of the UK Supreme Court in *PJS v News Group Newspapers Ltd* which appears to have treated the "tort of invasion of [informational] privacy" as having finally broken free from its roots in breach of confidence.[346]

124 Regardless of what the current judicial thinking is in the UK, it would be preferable *not* to base a legal claim for the misuse of private information on the juridical foundations of the "old fashioned" law of confidence. The reasons for this have already been canvassed above,[347] particularly in view of the importance of keeping the concepts of "privacy" and "confidentiality" distinct. For emphasis, Lord Nicholls' advice in *OBG Ltd v Allan* is reiterated:[348]

> As the law has developed, breach of confidence, or misuse of confidential information, now covers two *distinct causes of action*, protecting two *different interests*: privacy, and secret ('confidential') information. *It is important to keep these two distinct.* [emphasis added]

Pursuant to the proposed model, whereas the focus of the traditional action for breach of confidence is on preserving the "confidentiality" of the information concerned and the binding of the defendant's "conscience" in equity via the imposition of the obligation of confidentiality, the *standalone* action to safeguard informational privacy focuses instead on the protection of *private/personal* information against (especially emotional and psychological) harm caused by the defendant's conduct to an individual's personal autonomy, dignity and self-esteem. It is respectfully submitted that the time has now come for the judges in Singapore – as "bold spirits" and not "timorous souls"[349] – to recognise that the privacy of personal information is "something worthy of protection in its own right".[350]

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345 See *Wainwright v Home Office* [2004] 2 AC 406 at [35] and *Campbell v MGN Ltd* [2004] 2 AC 457 at [43].

346 See *PJS v News Group Newspapers Ltd* [2016] UKSC 26; [2016] AC 1081 at [25] *ff*. See also *Google Inc v Vidal-Hall* [2015] EWCA Civ 311.

347 See the discussion at paras 57–76 above.

348 *OBG Ltd v Allan* [2008] 1 AC 1 at [255]. *Cf* his Lordship's *dicta* in *Campbell v MGN Ltd* [2004] 2 AC 457 at [14] and see also *Wade v British Sky Broadcasting Ltd* [2016] EWCA Civ 1214 at [2], *per* Briggs LJ. See further *Hosking v Runting* [2005] 1 NZLR 1 at [48] and [246]; *Google Inc v Vidal-Hall* [2015] EWCA Civ 311 at [25]; and *PJS v News Group Newspapers Ltd* [2016] UKSC 26; [2016] AC 1081.

349 *Candler v Crane, Christmas & Co* [1951] 2 KB 164 at 178, *per* Denning LJ (dissenting).

350 *Campbell v MGN Ltd* [2004] 2 AC 457 at [46], *per* Lord Hoffmann. See also the Law Commission of England and Wales (Law Com No 110), *Breach of Confidence: Report on a Reference under Section 3(1)(e) of the Law Commissions Act 1965* (Cmnd 8388, 1981) at para 2.3: "By contrast, a right of privacy in respect of information would

(cont'd on the next page)

A. Juridical basis for this new cause of action

125 In order to distinguish this new cause of action from the traditional action for breach of confidence, it is clear – at least at the conceptual level – that the juridical basis for the action for misuse of private information cannot lie in equity, for fear of violating the very principles upon which the breach of confidence action was founded (for example, to protect relationships of trust and confidence). It bears repeating that misuse of private information is an *independent* cause of action at common law that does *not* import the customary indicia of a duty of confidence.

126 Instead, the authors would like to pay deference to Lord Nicholls' speech in *Campbell* where his Lordship expressed the view that the "essence of the *tort* is better encapsulated now as misuse of private information" [emphasis added].[351] *Prima facie*, there does not appear to be any harm in classifying the extended action for breach of confidence/misuse of private information as a "tort" in the English context given that it is but a subset of a much broader and general *tort* of invasion of privacy (had the existence of this latter tort been accepted in the authorities).[352]

127 In *Douglas v Hello! Ltd (No 3)*,[353] Lord Phillips MR was of the view that "[t]he Douglases' claim in relation to invasion of their privacy might seem most appropriately to fall within the ambit of the law of delict", but "that the effect of shoe-horning this type of claim into the cause of action of breach of confidence means that it does not fall to be treated as a tort under English law".[354] It is abundantly clear that Lord Phillips MR would have had no hesitation in treating the cause of action for breach of informational privacy as a "tort" under English law *but for* the fact that this sort of claim had, in his *obiter* opinion,[355] already been "shoe-horned" into the "equitable" action for breach of confidence. Eady J in *Mosley v News Group Newspapers Ltd*[356] has also acknowledged

arise from the nature of the information itself: it would be based on the principle that certain kinds of information are categorised as private and for that reason alone ought not to be disclosed."

351 *Campbell v MGN Ltd* [2004] 2 AC 457 at [14].

352 See *Wainwright v Home Office* [2004] 2 AC 406 at [35] and *Campbell v MGN Ltd* [2004] 2 AC 457 at [43].

353 [2005] EWCA Civ 595; [2006] QB 125.

354 *Douglas v Hello! Ltd (No 3)* [2005] EWCA Civ 595; [2006] QB 125 at [96]. *Cf* also Lord Phillips MR's *dicta* in *Campbell v MGN Ltd* [2002] EWCA Civ 1373; [2003] QB 633 at [61] where his Lordship referred to the "protection of privacy by expanding the scope of breach of confidence" as a "tort".

355 See *Google Inc v Vidal-Hall* [2015] EWCA Civ 311 at [38].

356 [2008] EWHC 1777 (QB).

that (leading) "textbooks dealing with the law of tort … do address the subject as being within their remit".[357]

128 Crucially, a survey of the relevant jurisprudence clearly suggests that the action for misuse of private information in the UK ought rightly to be characterised as a "tort".[358] As the English Court of Appeal aptly observed in *Google Inc v Vidal-Hall*:[359]

> … [m]isuse of private information is a civil wrong without any equitable characteristics. We do not need to attempt to define a tort here. But if one puts aside the circumstances of its 'birth', there is nothing in the nature of the claim itself to suggest that the more natural classification of it as a tort is wrong.

129 The UK Supreme Court in its fairly recent decision in *PJS v News Group Newspapers Ltd* also referred to the claim for misuse of private information as being based on the "tort of invasion of privacy".[360] On balance, therefore, the authors are of the view that it is legally permissible to label the proposed cause of action at common law as the "tort" of misuse of private information.[361]

B. Analytical framework and requirements for the new tort of "misuse of private information"

130 By gratefully drawing on the modified approach in *I-Admin (CA)* as well as taking guidance from the decision of the House of Lords in *Campbell*, this is how the authors envision the new common law tort in Singapore for the "misuse of private information". However, before setting out the analytical framework and constituent elements for the new tort, some substantive differences between the approach that will be proposed for Singapore and the contemporary position under English law (on the scope of the expanded cause of action for breach of confidence/ infringement of informational privacy) will be highlighted.

131 First, it is stating the obvious that Singapore is not bound by the provisions in the ECHR; therefore, the proposed cause of action does not involve the court's balancing of competing Convention rights (typically

357 *Mosley v News Group Newspapers Ltd* [2008] EWHC 1777 (QB) at [181].

358 See, *eg*, *McKennitt v Ash* [2006] EWCA Civ 1714; [2008] QB 73 at [11]; *Lord Browne of Madingley v Associated Newspapers Ltd* [2008] QB 103 at [21]–[22]; *Murray v Express Newspapers plc* [2008] EWCA Civ 446; [2009] Ch 481 at [24]; *Google Inc v Vidal-Hall* [2015] EWCA Civ 311 at [21], [43] and [51].

359 *Google Inc v Vidal-Hall* [2015] EWCA Civ 311 at [43].

360 *PJS v News Group Newspapers Ltd* [2016] UKSC 26; [2016] AC 1081 at [32].

361 In further support of this proposition, see *Google Inc v Vidal-Hall* [2015] EWCA Civ 311 at [51].

those embodied in Arts 8 and 10 of the ECHR).[362] Second, while it is helpful to adopt the "reasonable expectation of privacy" test propounded by their Lordships in *Campbell* for the purposes of the new tort, it should be emphasised at this juncture that the application of this test will necessarily be different in the local context. This is explained below.

132 Apart from having to establish a "reasonable expectation of privacy" (or "legitimate expectation of protection")[363] in relation to the matter of complaint at stage 1 of the enquiry in England, it is also incumbent on the claimant to prove – so as to engage Art 8 of the ECHR and trigger the obligation of confidentiality (because of the shoe-horning effect, recognised at least in the earlier cases) – that the alleged defendant *knows or ought to know* that the claimant had a reasonable expectation that the information concerned would remain private (*or* "knows or ought to know" that there is a "reasonable expectation of privacy").[364]

133 In the local context, however, the *sole* enquiry should be whether the information in question is private/personal in nature, the relevant test for which is also proof of a "reasonable expectation of privacy". Crucially, in order to discharge the legal burden of proof, there is no need for the plaintiff to also establish that the defendant did possess either actual or imputed knowledge that the information concerned was private. This must necessarily be the right approach to take for Singapore once it is appreciated that (a) a right of privacy in respect of information will arise from the very *nature* of the information itself and be protected by the new tort on that basis (and for that reason) alone; and (b) misuse of private information in the local context is truly an *independent* cause of action that is uncluttered by any limitations deriving from the equitable,

362 For a recent exposition of the English position on the "balancing exercise" or "proportionality test" that courts must undertake at stages 1 and 2 of the enquiry, see *ZXC v Bloomberg LP* [2020] EWCA Civ 611 at [46].

363 According to Simon LJ in *ZXC v Bloomberg LP* [2020] EWCA Civ 611 at [46], the two tests are "synonymous".

364 See *Campbell v MGN Ltd* [2004] 2 AC 457 at [85] and [134]; *Douglas v Hello! Ltd (No 3)* [2005] EWCA Civ 595; [2006] QB 125 at [82]; *A v B plc* [2002] EWCA Civ 337; [2003] QB 195 at [11(ix)]; and *Weller v Associated Newspapers Ltd* [2014] EWHC 1163 (QB) at [36]–[38]. See also Nicole Moreham, "Privacy in the Common Law: A Doctrinal and Theoretical Analysis" (2005) 121 LQR 628 at 631–632. It is, however, questionable whether such knowledge is still relevant to the assessment at stage 1 of the enquiry today in light of the decision of the UK Supreme Court in *PJS v News Group Newspapers Ltd* [2016] UKSC 26; [2016] AC 1081 which appears to have treated the "tort of invasion of [informational] privacy" as having finally broken free from its roots in breach of confidence (at [25] *ff*); and see also *Google Inc v Vidal-Hall* [2015] EWCA Civ 311.

conscience-based origins of the "old fashioned" action for breach of confidence.[365]

134 With these considerations in mind, the authors respectfully set out the approach that should be taken in relation to the proposed tort for "misuse of private information". First, the legal burden falls squarely on the plaintiff to prove – on an *objective* basis – that he has a "reasonable expectation of privacy" in respect of the information concerned.[366] In applying this test, "there must be an objective assessment of what a reasonable person of ordinary sensibilities would feel if he or she were placed in the same position as the claimant and faced with the same publicity".[367] Helpfully, Sir Anthony Clarke MR in *Murray v Express Newspapers plc* provided the following (non-exhaustive) list of factors that might be relevant in determining whether a reasonable expectation of privacy is established on the facts:[368]

> the attributes of the claimant, the nature of the activity in which the claimant was engaged, the place at which it was happening, the nature and purpose of the intrusion, the absence of consent and whether it was known or could be inferred, the effect on the claimant and the circumstances in which and the purposes for which the information came into the hands of the [defendant].

Reference may also be usefully made to the following observations by Gleeson CJ in the High Court of Australia in *Australian Broadcasting Corp v Lenah Game Meats Pty Ltd*:[369]

> There is no bright line which can be drawn between what is private and what is not. Use of the term 'public' is often a convenient method of contrast, but there is a large area in between what is necessarily public and what is necessarily private. An activity is not private simply because it is not done in public. It does not suffice to make an act private that, because it occurs on private property, it has such measure of protection from the public gaze as the characteristics of the property, the nature of the activity, the locality, and the disposition of the property owner combine to afford. Certain kinds of information about

365 See generally Nicole Moreham, "Privacy in the Common Law: A Doctrinal and Theoretical Analysis" (2005) 121 LQR 628.

366 *Cf Campbell v MGN Ltd* [2004] 2 AC 457 ("*Campbell*") at [21], [85] and [134]–[135]. Significantly, Lord Nicholls in [21] referred to a "reasonable expectation of privacy" as the "touchstone of private life". It should also be noted that their Lordships in *Campbell* clearly preferred the "reasonable expectation of privacy" test to the somewhat stricter test suggested by Gleeson CJ of what private information is in *Australian Broadcasting Corp v Lenah Game Meats Pty Ltd* (2001) 185 ALR 1 at [42] (namely, whether "disclosure or observation of information or conduct would be highly offensive to a reasonable person of ordinary sensibilities").

367 *ZXC v Bloomberg LP* [2020] EWCA Civ 611 at [43], *per* Simon LJ, referring to Lord Hope's *dicta* in *Campbell v MGN Ltd* [2004] 2 AC 457 at [99].

368 *Murray v Express Newspapers plc* [2008] EWCA Civ 446; [2009] Ch 481 at [36].

369 *Australian Broadcasting Corp v Lenah Game Meats Pty Ltd* (2001) 185 ALR 1 at [42].

> a person, such as information relating to health, personal relationships, or finances, may be easy to identify as private; as may certain kinds of activity, which a reasonable person, applying contemporary standards of morals and behaviour, would understand to be meant to be unobserved.

135 Once the plaintiff has discharged the legal burden of proof (that there is a "reasonable expectation" that the information in question will be kept private), a *prima facie* presumption of misuse of private information arises in the plaintiff's favour.

136 The legal burden then shifts to the defendant to displace this presumption. For example, the defendant may be able to adduce evidence to show that although he has come upon – or is now in possession of – the information without consent (whether as an indirect recipient, accidental finder or surreptitious taker of information):

> (a) he had *no actual or constructive knowledge* that the information concerned was private in nature (or that the plaintiff had a reasonable expectation that the information concerned would remain private); or
>
> (b) there was a legitimate *public interest* in his access to and/or possession of such information.

Notably, this new cause of action – unlike other property-based torts such as trespass, conversion and infringement of copyright – does not take on the complexion of a strict liability tort.

137 Finally, because of the potential overlaps in the two causes of action (namely, the traditional breach of confidence action and the tort for misuse of private information), it is suggested that a plaintiff who initiates proceedings for the infringement of informational privacy ought to be able to avail himself of the same suite of remedies as someone who seeks relief for "old fashioned" breach of confidence.[370] Apart from the familiar remedy of an injunction, it appears that damages (and even aggravated damages where appropriate) are also available as compensation for the misuse of private information.[371]

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370 It is envisaged that in so far as the tort for misuse of private information is concerned, the primary remedy sought will be that of an injunction: see Megarry J's *dicta* in *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41 at 50 ("If the duty is a duty not to use the information without consent, then it may be the proper subject of an injunction restraining its use, even if there is an offer to pay a reasonable sum for that use."). A deeper consideration and more extensive discussion of the whole area of remedies is unfortunately beyond the scope of this article.

371 See *Weller v Associated Newspapers Ltd* [2014] EWHC 1163 (QB) at [192].

138 There are three further observations to be made regarding the proposed tort for "misuse of private information". First, it is important to point out that the protection afforded to private/personal information by the new tort is comparatively *broader* in scope than that provided by the traditional law of confidence (as exemplified in *Coco*) as well as the modified approach in *I-Admin (CA)*. As highlighted above,[372] the new tort focuses squarely on the protection of private/personal information and does not, strictly speaking, protect the claimant's confidentiality interests in the information concerned. To further elucidate the differences in the scope of protection afforded to private/personal information and confidential information by the two respective causes of action, Lord Nicholls' observations in *OBG Ltd v Allan* bear repeating for their instructive value:[373]

> In some instances information may qualify for protection both on grounds of privacy and confidentiality. In other instances information may be in the public domain, and not qualify for protection as confidential, and yet qualify for protection on the grounds of privacy. Privacy can be invaded by further publication of information or photographs already disclosed to the public.

139 This therefore suggests that private/personal information may, in appropriate circumstances, be more resilient and resistant to public exposure than in the case of confidential commercial information. In other words, a piece of private information may well retain its "private" character even after its release into the public domain[374] and it appears that this is particularly true where photographs are concerned.[375] This may explain why informational privacy justly deserves a broader and more robust scope of protection under the common law, through an independent cause of action which goes *further* than the protection currently afforded to private/personal information by the traditional law of confidence as well as the modified approach in *I-Admin (CA)*.

140 Second, in applying this analytical framework to the new tort, it is apparent that there is no need for the plaintiff, in establishing a breach of informational privacy, to prove that the defendant has made (or threatened to make) an unauthorised use or disclosure of the protected information. This is clearly in line with the thesis of this

372 See paras 124 and 133 above.

373 *OBG Ltd v Allan* [2008] 1 AC 1 at [255]. See also *Re My Digital Lock Pte Ltd* [2018] PDP Digest 334 at [35]: "The key development in this tort is, to my mind, the availability of remedies even where the private communication does not have the necessary quality of confidence, which had hitherto been the death knell to any action based on the breach of confidentiality".

374 See *PJS v News Group Newspapers Ltd* [2016] UKSC 26; [2016] AC 1081.

375 See *Douglas v Hello! Ltd (No 3)* [2005] EWCA Civ 595; [2006] QB 125 at [84] *ff* and *Campbell v MGN Ltd* [2004] 2 AC 457 at [75].

article since the defendant's unauthorised access to and/or possession of private/personal information *per se* – on account of, *inter alia*, the level of distress and/or embarrassment caused to the plaintiff – is sufficient to compromise the privacy rights of the latter in respect of the information concerned. It is observed, parenthetically, that the question of misuse under English law and, in particular, the equivalent action for misuse of private information still remains unresolved because it is by no means clear that the reservations expressed by Lord Neuberger MR in *Imerman* – on whether there is any need for "such misuse before a claim for breach of confidentiality can succeed"[376] – have been unequivocally and universally endorsed by the English courts in subsequent breach of confidence/invasion of informational privacy cases. In the local context, however, if the tort for misuse of private information is indeed recognised by the courts as an actionable wrong in its own right, then, despite its name, it is submitted that there does not have to be "such misuse" before a claim can succeed.

141 Finally, it must be emphasised that in proposing this new tort of misuse of private information, the authors are in no way advocating a "blockbuster" common law tort to protect against the invasion of privacy generally – or what Lord Nicholls described as an "over-arching, all-embracing cause of action for 'invasion of privacy'".[377] Although case law developments in New Zealand appear to have been more promising in the field of privacy (first, in the guise of an independent common law tort of invasion of privacy that was recognised in *Hosking v Runting*,[378]

376 *Imerman v Tchenguiz* [2010] EWCA Civ 908; [2011] 2 WLR 592 at [71].

377 *Campbell v MGN Ltd* [2004] 2 AC 457 at [11]. It may be usefully noted that Andrew Phang Boon Leong JA's allusion to a "common law right to privacy" in *ANB v ANC* [2015] 5 SLR 522 at [22] could not have been in relation to this "over-arching, all-embracing cause of action for 'invasion of privacy'". Indeed, such a "blockbuster" tort had itself been categorically rejected by the House of Lords in *Wainwright v Home Office* [2004] 2 AC 406 at [35] and *Campbell v MGN Ltd* [2004] 2 AC 457 at [43]. Instead, it is suggested that Phang JA was likely referring to a common law action to safeguard informational privacy *within* the framework of the law of confidence: see *ANB v ANC* [2015] 5 SLR 522 at [23].

378 See *Hosking v Runting* [2005] 1 NZLR 1 at [246]:

> Breach of confidence, being an equitable concept, is conscience-based. Invasion of privacy is a common law wrong which is founded on the harm done to the plaintiff by conduct which can reasonably be regarded as offensive to human values. While it may be possible to achieve the same substantive result by developing the equitable cause of action [for breach of confidence], I consider it legally preferable and better for society's understanding of what the Courts are doing to achieve the appropriate substantive outcome under a self-contained and stand-alone common law cause of action to be known as invasion of privacy.

See also [117] for the two fundamental requirements for a successful claim for interference with privacy: (a) the existence of facts in respect of which there is a

(cont'd on the next page)

followed by incremental changes to the law in subsequent cases before culminating in the adoption of a separate tort of "intrusion upon seclusion" in *C v Holland*),[379] the authors remain somewhat sceptical of its evolution in the local context. Given that this "blockbuster" concept had been categorically rejected by the House of Lords in the UK many years ago,[380] the authors are of the view that this is probably a matter best left to Parliament.[381]

V. Conclusion

142 Granted, the facts in *I-Admin* intuitively leave one with the sense that some *wrong* has occurred, and that this wrong *must* be put right. The Court of Appeal hinted as much through its rhetorical proclamation: "[i]n such circumstances, why should the courts not have the power to grant relief"?[382] Although the remedial outcome in *I-Admin (CA)* seems fair, how this was achieved reflects the extent to which the domestic law of confidence had been contorted in order to fashion a remedy for the plaintiff. On the other hand, the so-called challenges faced by I-Admin (the plaintiff) in this suit may well have been overstated. For instance, it may be posited that relief was *always* available for copyright infringement; the plaintiff simply decided to pitch its case too "high".[383]

143 In any event, the court's modified approach fails, with respect, to accord sufficient sensitivity to the conceptual premise undergirding each stage of the old *Coco* framework, in particular the specific interests protected by the obligation of confidentiality and the element of

reasonable expectation of privacy; and (b) publicity given to those private facts that would be considered highly offensive to an objective reasonable person.

379 *C v Holland* [2012] 3 NZLR 672. See also *Re My Digital Lock Pte Ltd* [2018] PDP Digest 334 at [28] *ff* (especially at [34]).

380 See *Wainwright v Home Office* [2004] 2 AC 406 at [35] and *Campbell v MGN Ltd* [2004] 2 AC 457 at [43].

381 See generally *Kaye v Robertson* [1991] FSR 62 (especially at 66).

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

383 The plaintiff in *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 3 SLR 615 (HC); [2020] 1 SLR 1130 (CA) would presumably have been entitled to a remedy for infringement of copyright had it decided to pursue a different litigation strategy. On the facts, there was clear evidence that the defendants had downloaded, possessed and circulated unauthorised copies of the plaintiff's materials. However, this "lower level" claim of copyright infringement was not meaningfully pursued before the trial judge, which therefore led the apex court to reject this claim on appeal – observing in *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 1 SLR 1130 at [35] that "had that alternative case been signposted, the trial would have proceeded quite differently", with the question of infringement "resolved simply by examining what materials were in the [defendants'] possession and where those materials came from".

unauthorised use. The new framework also appears to have been heavily influenced by foreign, and in particular English, jurisprudence, the latter of which has had a long (but unhelpful) history of conflating the distinct concepts of "privacy" and "confidentiality".

144 Going forward, it would be prudent to distinguish between these two unhappy bedfellows, such that each may, particularly in distinct circumstances, attain the desired degree of protection that it rightly deserves. To that end, the authors suggest that the time has now come for the Singapore courts to boldly advance the law and recognise that informational privacy is a human value that has *always* been worthy of independent protection. The law of confidence in Singapore will, until then, simply have to amble along, with privacy interests uncomfortably in tow.

145 The authors have one parting thought on *I-Admin (CA)*. As mentioned, it is clear that the sympathies of the Court of Appeal lay with I-Admin, the former employer.[384] The authors also allude to the possibility that the court, on the facts of this litigation, may have deemed the defendant former employees (in particular, Hong and Liu) – being surreptitious takers of confidential information belonging to I-Admin – as *wrongdoers*[385] "by virtue of [their] unconscionable conduct".[386] Indeed, such a perspective calls to mind what Hoffmann J (as he then was) had to say in *Lock International plc v Beswick*:[387] "Some employers seem to regard competition from former employees as presumptive evidence of dishonesty".[388] Through this article, the authors have sought to impress upon the reader that the Court of Appeal's modified approach taken in relation to the law of confidence – for a variety of (mostly doctrinal) reasons – may not have been the most appropriate tool to regulate (and perhaps deter) such post-employment conduct and address predicaments of this nature. There is one other important explanation for this.

146 Although it is widely acknowledged that there is "lingering uncertainty" over the conceptual basis of the action to protect confidential information,[389] it is also widely accepted that information *per se* is not property and the law has generally refused to recognise a property right

384 See *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 1 SLR 1130 at [55] and [62].

385 See *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 1 SLR 1130 at [64] ("this does not absolve the respondents from wrongdoing").

386 *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 1 SLR 1130 at [71].

387 [1989] 3 All ER 373.

388 *Lock International plc v Beswick* [1989] 3 All ER 373 at 383.

389 See *Invenpro (M) Sdn Bhd v JCS Automation Pte Ltd* [2014] 2 SLR 1045 at [129]. A more detailed discussion of the debate surrounding the various doctrinal bases for the breach of confidence action is unfortunately beyond the scope of this article.

(or a right *in rem*) in pure ideas and information.[390] Accordingly, it is imperative that extreme caution be exercised before attempts are made to (a) elevate the status of confidential information (or information generally) to that of property; as well as (b) suggest that the mere unauthorised taking, retention and/or referencing of the plaintiff's confidential information would be sufficient – in the absence of any further misuse by the defendant – to give rise to liability (or a *presumption* of liability) under the equitable framework for the law of confidence. In this regard, it has been perceptively observed (and the authors respectfully agree) that "[i]f confidential information does not create proprietary rights, then the mere fact of a [surreptitious] taking cannot be a ground for liability".[391]

147 Relevantly, as against the equitable action for breach of confidence with fairly malleable notions for imposing liability and where the grant of relief ultimately remains discretionary, there are alternative causes of action (with stronger juridical and conceptual underpinnings) that an employer can rely upon if its former employee(s) were to clandestinely purloin the company's confidential information. This strategy is particularly apposite in respect of areas of the law which do not require a court's judicious balancing of competing interests, such as those between ex-employers and ex-employees. Some examples of these alternative causes of action include conversion,[392] trespass to goods/chattels,[393] wrongful interference with property[394] and copyright infringement (already alluded to above),[395] in addition to the use of the criminal law for offences like theft and against cybercrime and/or other forms of computer crime under the Computer Misuse Act.[396]

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390 See, *eg*, *Boardman v Phipps* [1967] 2 AC 46 at 127–128, *per* Lord Upjohn ("In general, information is not property at all. … But in the end the real truth is that it is not property in any normal sense but Equity will restrain its transmission to another if in breach of some confidential relationship"); *OBG Ltd v Allan* [2008] 1 AC 1 at [275]; *Force India Formula One Team Ltd v 1 Malaysia Racing Team Sdn Bhd* [2012] EWHC 616 (Ch) at [376]; *Phillips v Mulcaire* [2013] 1 AC 1 at [27] (Lord Walker expressed the view, in *obiter*, that confidential *private/personal* information is not strictly "intellectual property"); and *Clearlab SG Pte Ltd v Ting Chong Chai* [2015] 1 SLR 163 at [85] and [308]. See also *Seager v Copydex Ltd (No 2)* [1969] 1 WLR 809 at 813 where Lord Denning MR referred to "property" in confidential information only "so far as there is property in it".

391 George Wei, "Surreptitious Takings of Confidential Information" (1992) 12 *Legal Studies* 302 at 305.

392 See, *eg*, *Tat Seng Machine Movers Pte Ltd v Orix Leasing Singapore Ltd* [2009] 4 SLR(R) 1101 at [45]; *OBG Ltd v Allan* [2008] 1 AC 1 at [95] and [308]; and *White v Withers LLP* [2009] EWCA Civ 1122 at [51]–[52].

393 See, *eg*, *White v Withers LLP* [2009] EWCA Civ 1122.

394 See, *eg*, *White v Withers LLP* [2008] EWHC 2821 (QB); [2009] EWCA Civ 1122.

395 See *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 1 SLR 1130 at [30]–[35], [55] and [65].

396 Cap 50A, 2007 Rev Ed.

148 Indeed, it is only when one has property rights to a thing (or *res*) that one has *locus standi* to exclude others from interfering with such rights (such as for being in unlawful possession of the thing in question). However, in so far as confidential information is concerned, the plaintiff may, in equity, only be able to prevent/remedy a breach of his confidence *after* the defendant's threatened/actual misuse of the information in question.[397] In this connection, the learned authors of *Gurry on Breach of Confidence* have also pointed out that access to, acquisition, retention and/or referencing of confidential information entail acts by the defendant that constitute "*novel* forms of breach" – falling outside the classic acts of unauthorised use or disclosure – and "appear to be *more redolent of other causes of action* such as copyright ('retaining or supplying copies') or even trespass ('looking at')" [emphasis added].[398]

149 In closing, *Imerman* remains a difficult decision (despite the attempted rationalisation above)[399] because "it suggests a wider basis for liability than had been suggested by previous authorities on breach of confidence".[400] *I-Admin (CA)* will likewise generate its fair share of controversy. Yet, it is the authors' fervent hope that this article will make a timely and meaningful contribution to the anticipated debate and, more importantly, serve as a sensible catalyst for legal *reform* in the near future – no less in a post-pandemic Singapore!

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397 *Contra Imerman v Tchenguiz* [2010] EWCA Civ 908; [2011] 2 WLR 592 at [69] and *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 1 SLR 1130 at [63]–[66].

398 See Tanya Aplin *et al*, *Gurry on Breach of Confidence – The Protection of Confidential Information* (Oxford University Press, 2nd Ed, 2012) at paras 15.18 and 15.21.

399 See paras 82–95 above (especially para 86).

400 Tanya Aplin *et al*, *Gurry on Breach of Confidence – The Protection of Confidential Information* (Oxford University Press, 2nd Ed, 2012) at para 15.23.