IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2020] SGHC 281

Suit No 691 of 2020 (Summons No 3170 of 2020)

Between

BAFCO Singapore Pte Ltd

… *Plaintiff*

And

(1) Lee Tze Seng (Li Shucheng)
(2) Leo Ming Min Rachel
(3) Teo Wee Yong (Zhang Weiyong)
(4) Dafydd & Yong Pte Ltd
(5) Vortikul Ltd

… *Defendants*

JUDGMENT

[Confidence] — [Breach of confidence]
[Injunctions] — [Interlocutory Injunction]

BAFCO Singapore Pte Ltd
v
Lee Tze Seng and others

[2020] SGHC 281

High Court — Suit No 691 of 2020 (Summons No 3170 of 2020)
Choo Han Teck J
5 October, 25 November 2020

22 December 2020 Judgment reserved.

Choo Han Teck J:

1 This is the plaintiff's application for interim injunctive relief and a disclosure order against the defendants, on the basis that the defendants misused and disclosed the plaintiff's confidential information without the plaintiff's consent.

2 The plaintiff is the Singapore subsidiary of the BAFCO group of companies, which is engaged in the business of developing, manufacturing and selling high-volume, low-speed ("HVLS") fans. The first to third defendants (collectively, "the Former Employees") are all former employees of the plaintiff. The first defendant ("Lee") was previously the plaintiff's Sales Manager for the Asia Pacific Region. The second defendant ("Rachel") was formerly a Sales and Design Representative and Assistant Manager in the plaintiff's Sales Department. The third defendant ("Teo") was formerly a director of the plaintiff and was also the plaintiff's Financial Controller and

Company Secretary. Rachel was employed by the plaintiff from 2014 until 1 July 2019, whereas Lee and Teo were employed by the plaintiff from 2014 until 17 July 2020.

3 The fifth defendant ("Vortikul") is a US-incorporated company which is also in the business of manufacturing and selling HVLS fans. Vortikul was founded by one David Williams, who is the plaintiff's former Managing Director.

4 The fourth defendant ("D&Y") is a company that was incorporated in Singapore in 2016. Lee and Rachel are presently directors of D&Y. The plaintiff alleges that (a) D&Y is distributing fans and cooling products, including HVLS fans manufactured by Vortikul; and (b) the Former Employees founded and were actively involved in D&Y while they were still employed by the plaintiff. Lee and Teo acknowledge that they incorporated D&Y during their employment with the plaintiff "as a hobby outside of work" but assert that D&Y is, and was at all material times, a dormant company because of their full-time job commitments.

5 The plaintiff commenced an action against the defendants in the underlying suit (Suit 691 of 2020) for, *inter alia*:

(a) the Former Employees' breaches of their obligations owed to the plaintiff;

(b) D&Y's and Vortikul's wrongful inducement of the Former Employees' breaches; and

(c) unlawful conspiracy between the Former Employees, D&Y and Vortikul.

The plaintiff's US parent company has also commenced an action in the US against Vortikul and David Williams for unlawful competition.

6 In the present summons, the plaintiff seeks the following:

(a) an injunction to restrain the Former Employees from using and/or disclosing any of the plaintiff's confidential information acquired by them during their employment with the plaintiff (until final determination of this action or further order) ("the Disclosure Injunction");

(b) an injunction to restrain the Former Employees and D&Y from relying on the plaintiff's confidential information to procure or do any business with third parties that will enable the defendants to carry out any business which is similar to the plaintiff's business (until final determination of this action or further order or for a period of 12 months, whichever is earlier) ("the Procurement Injunction");

(c) an injunction to restrain the Former Employees and D&Y from continuing communications with the plaintiff's customers whom any of the defendants communicated with during the Former Employees' employment with the plaintiff and up to 3 August 2020, with a view towards procuring or doing business for persons other than the plaintiff (until final determination of this action or further order or for a period of 12 months, whichever is earlier) ("the Communications Injunction");

(d) an order ("Affidavit Order") that the Former Employees and D&Y file a disclosure affidavit stating:

(i) the identities of the plaintiff's customers whom any of them have sought to procure and/or do business with on behalf of D&Y and/or any parties from 16 May 2016 to 3 August 2020; and

(ii) details of all confidential information disclosed by the Former Employees to D&Y and/or any other parties from 16 May 2016 to 3 August 2020.

7 As I understand it, the plaintiff's case is that the defendants have misused the plaintiff's confidential information in at least two different respects: first, by using the said information to divert business opportunities to themselves and the plaintiff's competitors; and second, by using the said information to help a competing bidder secure a tender project known as the 'Faber Peak Project'.

8 Before turning to consider the substantive merits of the plaintiff's application, I will address the defendants' objection that the relief sought by the plaintiff is "no longer relevant" in view of the fact that the Former Employees have given the following undertakings in their affidavits filed on 7 September 2020:

(a) Lee undertakes not to disclose information which he can recall from his employment with the plaintiff to the plaintiff's competitors for a period of one year from 17 July 2020;

(b) Teo undertakes not to disclose financial information which he can recall from his employment with the plaintiff to the plaintiff's competitors for a period of one year from 17 July 2020;

(c) Lee and Teo undertake not to communicate with the plaintiff's customers known to them, or to carry on any business which is similar to the plaintiff's business in Singapore for a period of one year from 17 July 2020;

(d) Rachel undertakes not to communicate with the plaintiff's customers known to her, or to carry on any business which is similar to the plaintiff's business in Singapore for a period of one year from 1 July 2020.

9 Counsel for the plaintiff, Ms Angelia Thng, argues that the defendants' undertakings are unsatisfactory because they do not afford the protection that the plaintiff is seeking in the present application. I agree with this submission. It is evident that the scope of the undertakings given by the defendants does not correspond to the scope of the protection sought by the plaintiff in terms of subject-matter, time frame and the parties covered. For instance, the plaintiff seeks an injunction to restrain all of the Former Employees from disclosing "any" of the confidential information which they have acquired during their course of employment with the plaintiff. However, Rachel has not given any undertakings in relation to the non-disclosure of confidential information, and Teo's undertaking is restricted to the non-disclosure of "financial information" only. Moreover, D&Y has not given any undertakings whatsoever. In the circumstances, I am of the view that the defendants' undertakings do not adequately address the plaintiff's concerns. It is therefore necessary to examine the substantive merits of the plaintiff's application.

10 I turn now to the plaintiff's application for interlocutory injunctive relief. Counsel for the defendants, Ms Luo Ling Ling, argues that the injunction sought

by the plaintiff is a "springboard" injunction, the requirements for which are "more stringent than that of any other interim injunction". A springboard injunction is one that is intended to restrain a wrongdoer from enjoying the fruits of a "head start" which he has unfairly obtained as a result of his unlawful acts (see *QBE Management Services (UK) Ltd v Dymoke and others* [2012] IRLR 458 ("*QBE Management*") at [240]–[241]). The requirements for a "springboard" injunction in the context of a breach of confidence were distilled by Lai Siu Chiu SJ in *Goh Seng Heng v RSP Investments and others and another matter* [2017] 3 SLR 657 ("*Goh Seng Heng*") at [67] as follows:

(a) confidential information has been misused or is at risk of being misused;

(b) such misuse of confidential information has given rise to an unfair competitive advantage to the defendant;

(c) the "unfair advantage" is still being enjoyed by the defendant (at the time the injunction is sought); and

(d) damages would be an inadequate remedy for the plaintiff.

Owing to the peculiar nature of a "springboard" injunction, the court considering whether an interim "springboard" injunction ought to be granted must look beyond the usual *American Cyanamid* principles and assess the relative strength of the parties' rival arguments at the interlocutory stage (see *Jardine Lloyd Thompson Pte Ltd v Howden Insurance Brokers (S) Pte Ltd and others* [2015] 5 SLR 258 ("*Jardine*") at [21]).

11 In my view, one must consider the historical origin and the evolution of "springboard" relief in order to understand the nature of the mischief that it is

intended to address. As I previously noted in *Jardine*, "springboard" relief was first granted in *Terrapin Ltd v Builders Supply Co (Hayes) Ltd* [1960] RPC 128 ("*Terrapin*"), in which Roxburgh J noted (at 391):

> … the essence of this branch of the law, whatever the origin of it may be, is that a person who has obtained information in confidence is not allowed to use it as a springboard for activities detrimental to the person who made the confidential communication … the possessor of such information must be placed under a special disability in the field of competition to ensure that he does not get an unfair start.

12 It is apparent from *QBE Management* and *Terrapin* that the basis for "springboard" relief lies in the removal of an unfair competitive advantage arising from an unlawful act – in this case, a breach of confidence – and not the prevention of a breach of confidence itself. Where the plaintiff seeks a "conventional" injunction to restrain a breach of confidence *simpliciter*, it is the principles in *American Cyanamid* which ought to apply (see *eg Jardine* at [27]).

13 Turning back to the facts of the present case, I am satisfied that the Disclosure and the Procurement Injunctions seek to prevent the incidence, or further incidence, of a breach of confidence by the defendants, and thus qualify as "conventional" injunctions. On the other hand, the Communications Injunction seeks to restrain the defendants from "continuing communications" with the plaintiff's customers, regardless of whether such communications involve the disclosure of confidential information or not. It is evident that the purpose of the Communications Injunction is to prevent the defendants from exploiting what the plaintiff perceives as an unfair competitive advantage, which is consistent with the function of "springboard" relief. It also bears note that the plaintiff itself characterised the Communications Injunction as a "springboard" injunction in its Summons for Injunction filed on 3 August 2020. In the premises, I find that the Communications Injunction falls within the ambit

of "springboard" relief, which can only be granted if the requirements set out in *Goh Seng Heng* are cumulatively satisfied.

14 As to the plaintiff's case as regards the Disclosure and the Procurement Injunctions, the first issue to be determined is whether there is a serious question to be tried, *ie*, whether the plaintiff has a "real prospect of succeeding in his claim for a permanent injunction at trial" (see *American Cyanamid* at 408). In other words, the court must be satisfied that the plaintiff's claim is not "frivolous or vexatious" (at 407).

15 The approach to be taken in breach of confidence cases was recently modified by the Court of Appeal in *i-Admin (Singapore) Pte Ltd v Hong Ying Ting and others* [2020] 1 SLR 1130 ("*i-Admin*") at [61]. Under the new approach, the burden lies on the plaintiff to establish that:

> (a) the information sought to be protected has the necessary quality of confidence about it; and
>
> (b) the information was imparted in circumstances importing an obligation of confidence. This includes cases where the information was accessed or acquired without the plaintiff's knowledge or consent.

Upon the satisfaction of conditions (a) and (b), a breach of confidence is presumed. The burden then shifts to the defendant to rebut the presumption by proving that its conscience was unaffected by its acts.

16 As noted by Ms Luo, the plaintiff has not always been clear or consistent in identifying the scope of the confidential information that it seeks to protect. However, in its written submissions filed on 18 November 2020, the plaintiff

clarified that it would focus mainly only on two types of confidential information, namely:

(a) information stored in the plaintiff's Customer Relationship Management ("CRM") platform, which contains information about the plaintiff's current and potential customers (including their contact information, designations *etc.*) ("CRM Information"); and

(b) information relating to the plaintiff's bids for tender projects, including technical, pricing and strategic information and all other commercially-sensitive information which is accessible only to the plaintiff's employees in preparing for such bids ("Tender Projects Information").

17 The defendants' case is not so much that the two types of information set out above do not possess the necessary quality of confidence. Rather, the bulk of counsel's submissions dealt with the question of whether the defendants had disclosed or misused such information without the plaintiff's consent.

18 If the CRM Information were to consist merely of the names of customers and potential customers which are available in the public domain and which can be discovered with reasonable diligence on the defendants' part, it would be difficult to see how or why such information ought to be classified as confidential information. However, the position may be different where the customer information in question is not available in the public domain and is instead discovered and collated through the plaintiff's own efforts. In *Adinop Co Ltd v Rovithai Ltd and another* [2019] 2 SLR 808 ("*Adinop*"), the appellant sued the respondents for misusing confidential information including the appellant's 'Key Customers Lists' which set out, *inter alia*, the names of the

customers that the appellant had secured and the types of products they were intending to purchase. The Court of Appeal there held that the lists had the necessary quality of confidence about them as they were "a result of [the appellant] identifying selected customers based on specific information gathered from its own records", and "represent[ed] [the appellant's] market reach and important clientele" (at [57]). Like the customer lists in *Adinop*, the CRM Information was painstakingly gathered by the plaintiff through various channels such as advertising and external agencies and was not available in the public domain. Based on this evidence, I am inclined to hold that the CRM Information has the necessary quality of confidence about it, but I add the caveat that the trial judge will be better placed to make a conclusive finding when the full evidence is heard at trial.

19 Likewise, I am satisfied that the Tender Projects Information is confidential in nature. I agree with Edmund Leow JC's observation in *Tempcool Engineering (S) Pte Ltd v Chong Vincent and others* [2015] SGHC 100 at [59] that "a company's pricing information such as quotations and pricing mechanisms is generally confidential". Although the defendants aver that tender documents for open tenders are available for public viewing, the tender documents — and the commercially-sensitive information therein — would nevertheless remain confidential unless and until they are released into the public domain.

20 As regards the second prerequisite in *i-Admin*, I accept Ms Thng's submission that the CRM Information and the Tender Projects Information were imparted in circumstances importing an obligation of confidence. Pertinently, access to the CRM database was strictly controlled by the use of unique passwords, and only certain employees — including the Former Employees —

were allowed to view and use the information therein. Furthermore, each of the Former Employees' employment contracts with the plaintiff contained a confidentiality clause obliging them not to disclose the plaintiff's confidential information ("the Confidentiality Clause"). For ease of reference, the relevant portions of the Confidentiality Clause are reproduced below:

> **Confidential information**
>
> Confidential information includes all information relating to the [plaintiff] or a related body corporate of the [plaintiff] or the business of the [plaintiff] or a related body corporate of the [plaintiff] regardless of its form including but not limited to:
>
> (a) information relating in any way to the business of the [plaintiff] or a related body corporate of the [plaintiff];
>
> […]
>
> (g) all information relating in any way to the employees, customers or potential customers, suppliers or potential suppliers, contracts, business operations, business processes, trade secrets, methodologies, formulae, financial affairs, projections and accounts of the [plaintiff] or a related body of the [plaintiff] including without limitation any databases, data surveys, customer lists, marketing strategies and plans, details of trading relationships, charter or carriage rates, training methods and investment opportunities or acquisitions investigated but not implemented; and
>
> (h) any other information recognised at law or in equity as being confidential information …
>
> You acknowledge that during the course of your employment with us you may become acquainted with or have access to Confidential Information and you agree to maintain the confidence of the Confidential Information and to prevent its unauthorised disclosure to or use by any other person.
>
> You agree not to use the Confidential Information for any purpose other than for our benefit during or after your employment with us.

In my view, the scope of the Confidentiality Clause is wide enough to encompass both the CRM Information and the Tender Projects Information. The

Confidentiality Clause thus affirms and reinforces the defendants' obligations of confidence to the plaintiff.

21 Since the first and second prerequisites of the approach in *i-Admin* are satisfied, the burden lies on the defendants to disprove the presumption that they have committed a breach of confidence by showing that their conscience is clear. The defendants have sought to do so by demonstrating that they have not disclosed or misused the CRM Information or the Tender Projects Information. Their arguments, in summary, are that: (a) the Former Employees are regular individuals who do not have the means to compete with a multinational company like the plaintiff; (b) the Former Employees did not have access to the plaintiff's confidential information; (c) D&Y is, and was at all material times, a dormant company; (d) the Former Employees and D&Y have never solicited, and have never attempted to solicit, the plaintiff's customers or potential customers; and (e) the Former Employees and D&Y have never helped Vortikul or any other competitor of the plaintiff to win against the plaintiff in a tender bid.

22 I note, however, that these contentions were largely unsubstantiated by documentary evidence. For instance, when confronted with evidence that D&Y had sent non-solicited marketing e-mails to the plaintiff's specific customer contacts, the defendants responded with the bare assertion that the plaintiff's sales leads could be easily obtained from Google searches or even "trial and error and some common sense". However, there was nothing to show that the defendants had actually carried out such "Google searches" at the material time.

23 There are also gaps and inconsistencies within the defendants' case. I list several non-exhaustive examples of these here. First, the defendants insist

that the Former Employees did not have access to "all" of the plaintiff's confidential information, but they do not appear to dispute that the Former Employees had access to the confidential information forming the subject-matter of the plaintiff's claim, *ie*, the CRM and Tender Projects Information. Second, the defendants aver that D&Y is a dormant company despite admitting that they used D&Y to provide financial support for Rachel's personal projects and receive her alleged income for her alleged services. Third, Rachel admits that she offered consulting services to a "third-party electrical contractor" who eventually won the bid for the Faber Peak Project, but she inexplicably refuses to disclose who this "third-party electrical contractor" is.

24 Having regard to all of the above, and bearing in mind that the burden lies on the defendants to disprove the presumption that they are liable for a breach of confidence, I am satisfied that the plaintiff's claim is not frivolous or vexatious. I thus find that there is a serious question to be tried as regards the plaintiff's claim against the defendants.

25 That brings me to the question of whether the balance of convenience lies in favour of granting the Disclosure and Procurement Injunctions.

26 In ascertaining where the balance of convenience lies, the court's task is to assess which course of action carries the lower risk of injustice if it should turn out to be wrong at trial (see *Maldives Airports Co Ltd and another v GMR Malé International Airport Pte Ltd* [2013] 2 SLR 449 at [53]). In my view, there are two factors in this case which tilt the balance of convenience in favour of the plaintiff. The first is that, as noted at [20] above, the Former Employees are already restricted, by the Confidentiality Clause, from disclosing or misusing the plaintiff's confidential information. The Disclosure and Procurement

Injunctions, if granted, would simply debar the defendants from carrying out that which they are already bound not to do. The second is that damages may not be an adequate remedy for the plaintiff in this case. As noted by the Court of Appeal in *ANB v ANC and another and another matter* [2015] 5 SLR 522 at [25], confidentiality, once breached, is lost forever. I am therefore satisfied that the Disclosure and Procurement Injunctions ought to be granted.

27 I now turn to consider the third injunction sought by the plaintiff, *ie*, the Communications Injunction, which (as held at [13] above) qualifies as a "springboard" injunction. Importantly, "springboard" relief is not punitive in nature, and is intended only to restore the parties to the competitive position they each set out to occupy and would have occupied but for the defendant's misconduct (see *QBE Management* at [244] and [246]). The scope of the "springboard" relief awarded must be no wider than what is reasonably necessary to achieve this purpose. In my view, the necessity of the Communications Injunction must be determined with reference to the nature and impact of the other reliefs sought by, and awarded to, the plaintiff. The effect of the Disclosure and Procurement Injunctions is that the defendants will no longer be able to solicit the plaintiff's customers using the plaintiff's confidential information until the final determination of this action. There is also nothing to suggest that the defendants intend to compete with the plaintiff or assist the plaintiff's competitors in any upcoming tender bids. Consequently, with the Disclosure and Procurement Injunctions in place, it cannot be definitively concluded that the defendants enjoy, and will continue to enjoy, an unfair competitive advantage vis-à-vis the plaintiff pending trial.

28 Furthermore, I am of the view that the scope of the Communications Injunction is too wide. As stated at [13] above, the Communications Injunction

would effectively prevent the defendants from communicating with the plaintiff's customers even if such communications do not entail the disclosure or misuse of the plaintiff's confidential information. Given that (a) Lee's and Teo's contractual non-solicitation obligations only apply within Australia, and (b) Rachel's contractual non-solicitation obligations expired on 1 July 2020, the Communications Injunction would essentially allow the plaintiff to enjoy a position that is more advantageous than that which it would have occupied in the absence of any misconduct by the defendants. I thus reject the plaintiff's application for the Communications Injunction.

29 That leaves me with the final issue of whether the Affidavit Order ought to be granted. The statutory basis for this order is O 92 rr 4 and 5 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed), which provide as follows:

> **Inherent powers of Court (O. 92, r. 4)**
>
> 4. For the avoidance of doubt it is hereby declared that nothing in these Rules shall be deemed to limit or affect the inherent powers of the Court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.
>
> **Further orders or directions (O. 92, r. 5)**
>
> 5. Without prejudice to Rule 4, the Court may make or give such further orders or directions incidental or consequential to any judgment or order as may be necessary in any case.

30 Ms Thng submits that the Affidavit Order is necessary to determine the "full extent" of the plaintiff's confidential information that was misused or disclosed, given the "furtive nature" of the defendants' unlawful actions. I respectfully disagree. In my view, there is no further utility in, or benefit to be obtained from, the Affidavit Order. As Ms Luo points out, the Former Employees have already filed affidavits stating their answers to the issues that

the plaintiff wishes them to address. Any further information which the plaintiff seeks to obtain from the defendants can be elicited during cross-examination at trial.

31 In conclusion, I allow the plaintiff's application for the Disclosure and Procurement Injunctions, and dismiss the plaintiff's application for the Communications Injunction and the Affidavit Order. I thus grant an order in terms of prayers 1 and 2 of the summons, and dismiss prayers 3 and 4 of the summons.

32 Counsel on both sides argue that the opposing party or parties should pay indemnity costs but, having regard to their submissions, I see no reason to make such an order. It does not appear to me that either party's case was clearly without basis or conducted in bad faith. I therefore order costs to be costs in the cause.

- Sgd -
Choo Han Teck
Judge

Thng Yu Ting Angelia, Tan Zhi Xin and Sim Wei Min Stephanie (Braddell Brothers LLP) for the plaintiff;
Luo Ling Ling and Sharifah Nabilah Binte Syed Omar (Luo Ling Ling LLC) for the 1st to 4th defendants.