

## UNDERSTANDING POST-EMPLOYMENT OBLIGATIONS OF CONFIDENCE AND CONFIDENTIALITY IN COMPILATIONS OF DATA

This article closely examines two specific areas in the law of confidence. The first concerns erstwhile employer–employee relationships and the various obligations of confidentiality that may bind an employee – including individuals who find themselves in positions analogous to employees – after the contract of employment has come to an end. The second relates to compilations of data (comprising public domain information) and whether they fall to be protected by the law of confidence. In both of these areas, reference will also be made, where appropriate and for the purposes of analysis, to the recent decisions of the High Court and Court of Appeal in *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 3 SLR 615 (HC); [2020] 1 SLR 1130 (CA).

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### **I. Introduction**

1 At its heart, the relationship between employer and employee is founded on a contractual transaction: the employer agrees to engage the employee for his services for a period of time or for a specific project, while the employee agrees to provide his skills, knowledge and experience for his employer’s business typically in exchange for remuneration.<sup>2</sup> The legal boundaries of this relationship are almost always defined by a contract of employment. Given the parties’ freedom to contract, one might expect the contract of employment to be a sensible compromise between the respective interests of the employer and employee. The multifarious

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1 The authors are grateful to Chai Wen Min for reading an earlier draft of this article. The usual disclaimers apply.

2 See Hugh Collins, *Employment Law* (Oxford University Press, 2nd Ed, 2010) at p 3.

complexities surrounding the employer–employee relationship, however, suggest that this may not always be the case.

2 While the law endeavours to give maximum effect to contracts of employment as the consensual agreement between employer and employee, it should be recognised that these agreements alone may be insufficient in providing adequate protection for the interests of both parties, in particular those of the employee. This stems from the power dynamics which inevitably exist in most (if not all) employer–employee relationships ever since the dawn of the Industrial Revolution. This, in turn, has given rise to a particular vulnerability or disadvantage on the part of the employee<sup>3</sup> and also probably explains the rise of unions over time.<sup>4</sup>

3 Typically, it is the employer who is in a position of power or who possesses a greater degree of ascendancy in this relationship.<sup>5</sup> This is because employers tend to be corporations with access to greater resources than individual employees, and that employees on the whole are more dependent on their employers for wages than employers are in need of their services. Indeed, in most cases, employers retain the benefit of not hiring until the price is right.<sup>6</sup> Furthermore, in the dismal economic climate presently battered by the COVID-19 pandemic, employees in most sectors have become far more dependent on the income from their jobs than ever before. Given these harsh realities for the majority of employees,<sup>7</sup> the law should rightly intervene – as a matter of fairness – to redress any potential inequalities in such relationships. In so doing, the overall interests of employees will hopefully remain properly safeguarded (if not bolstered) and that the broader policy concerns identified above will, in turn, be adequately addressed.

4 In relation to the law of confidence specifically, the relevant tensions at play in the context of relationships of employment were

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3 See *Whitehill v Bradford* [1952] 1 Ch 236 at 245–246 and *Routh v Jones* [1947] 1 All ER 179 at 183–184.

4 See Hugh Collins, *Employment Law* (Oxford University Press, 2nd Ed, 2010) at pp 17–18.

5 See Paul Davies & Mark Freedland, *Kahn-Freund's Labour and the Law* (Stevens, 3rd Ed, 1983) at p 18 and *Caterpillar Logistics Services (UK) Ltd v Paula Huesca de Crean* [2012] EWCA Civ 156 at [65].

6 See Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (Penguin, 1970 Ed, 1776) at p 169.

7 Certainly, there are also employees at the other extreme – eg, directors of companies. For such employment relationships, the law has sought to categorise them as *fiduciary* relationships, which is an area of law that is beyond the scope of discussion in this article.

helpfully laid down by Lord Neuberger in the UK Supreme Court in *MVF3 APS v Bestnet Europe Ltd*<sup>8</sup> as follows:<sup>9</sup>

Particularly in a modern economy, the law has to maintain a realistic and fair balance between (i) effectively protecting trade secrets (and other intellectual property rights) and (ii) not unreasonably inhibiting competition in the market place. The importance to the economic prosperity of the country of research and development in the commercial world is self-evident, and the protection of intellectual property, including trade secrets, is one of the vital contributions of the law to that end. On the other hand, the law should not discourage former employees from benefitting society and advancing themselves by imposing unfair potential difficulties on their honest attempts to compete with their former employers.

5 The central question therefore appears to be this: how far should the freedom of the former employee be curtailed in the name of protecting the employer's economic interests? On one hand, the viability and success of many businesses as well as the livelihoods of their employees may well hinge on the protection of their trade secrets and confidential information, without which these businesses would obviously lose their competitive edge over other rivals. The legal protection of such information is also crucial in reassuring firms that the benefits and advantages derived from their research and development efforts will not go to waste. On the other hand, the former employee should not, going forward, be unfairly restrained from utilising the skills, knowledge and experience which he has legitimately amassed over the course of his prior employment.<sup>10</sup> In fact, a key objective of employment is for the employee to gain all the necessary skills and expertise which he can subsequently exploit for his own benefit and that of his future employer.<sup>11</sup> Such post-employment freedom accorded to employees will not only allow them to pursue greener pastures but will also increase their mobility within industries, thereby promoting healthy and productive competition to fuel innovation and growth.<sup>12</sup> The protection of both parties' interests – those of the employer and employee, respectively – ultimately appears to generate positive consequences for the economy as a whole. Unsurprisingly, therefore,

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8 [2013] UKSC 31; [2013] 1 WLR 1556.

9 *MVF3 APS v Bestnet Europe Ltd* [2013] UKSC 31; [2013] 1 WLR 1556 at [44].

10 See *United Indigo Chemical Co Ltd v Robinson* [1931] 49 RPC 178 at 187.

11 See *Flavel v Harrison* (1853) 68 ER 1010 at 1012.

12 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. For instance, some have argued that the success of Silicon Valley has been due to the high labour mobility resulting from the Californian law's disinclination to enforce covenants purporting to restrain former employees from joining competitor firms: see, *eg*, Ronald Gilson, "The Legal Infrastructure of High Technology Industrial Districts: Silicon Valley, Route 128, and Covenants Not to Compete" (1999) 74 NYULR 575 at 627–629.

the law has sought to strike an appropriate and fair balance between the various competing interests with great care and sensitivity.

6 Returning once more to the central question, the prevailing judicial thinking in the UK is that the interests of the former employee should generally take precedence over those of the employer.<sup>13</sup> This response, as previously observed, has ostensibly been adopted due to the inherently vulnerable status that former employees tend to find themselves in, as well as the (overt) recognition that employers – armed with greater financial resources – have a propensity to launch pre-emptive strikes to eliminate potential competition from their former employees.<sup>14</sup> Indeed, some employers appear to regard (any) competition from former employees as “presumptive evidence of dishonesty”.<sup>15</sup> Therefore, where the employer’s right to protect his confidential information (which does *not* rise to the level of trade secrets or their equivalent) collides with the public policy of ensuring that the employee is entitled to use and put at the disposal of new employers all the *skill and knowledge* acquired in the course of employment, the latter would typically prevail.<sup>16</sup> This mantra has, by and large, charted the general direction in which the law in the UK (which will be examined in greater detail in this article) has so far developed.<sup>17</sup>

7 The courts in Singapore have generally been cognisant of these policy considerations, namely, the protection of an employer’s interests in trade secrets and confidential information has to be judiciously balanced against the public policy in favour of competition (otherwise known as “the need for proportionality”).<sup>18</sup> However, a recent pronouncement by the Court of Appeal suggests to the authors that judicial sentiments here may well have shifted; it appears that the courts have now become more sympathetic towards former employers.

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13 See, eg, *G D Searle & Co Ltd v Celltech Ltd* [1982] FSR 92 at 99; *Ocular Sciences Ltd v Aspect Vision Care Ltd* [1997] RPC 289 at 370–371; and *Trailfinders Ltd v Travel Counsellors Ltd* [2020] EWHC 591 (IPEC) at [26].

14 See *Lock International plc v Beswick* [1989] 3 All ER 373 at 383–384.

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

16 See, eg, *G D Searle & Co Ltd v Celltech Ltd* [1982] FSR 92 at 99; *Ocular Sciences Ltd v Aspect Vision Care Ltd* [1997] RPC 289 at 370–371; and *Trailfinders Ltd v Travel Counsellors Ltd* [2020] EWHC 591 (IPEC) at [26].

17 The discussion in this article is only concerned with the law’s treatment of obligations that arise during the currency of the employment as well as post-employment obligations, leaving aside any issue(s) that may arise when an employee has been placed on “garden leave”.

18 *Tang Siew Choy v Certact Pte Ltd* [1993] 1 SLR(R) 835 at [3] and [34]; *Clearlab SG Pte Ltd v Ting Chong Chai* [2015] 1 SLR 163 at [67].

8 In *I-Admin (Singapore) Pte Ltd v Hong Ying Ting*<sup>19</sup> (“*I-Admin*”), the apex court recognised that the vulnerability of confidential information has been exacerbated by rapid advances in modern technology, given that it is now “significantly easier to access, copy and disseminate vast amounts of confidential information ... often without the knowledge of plaintiffs”.<sup>20</sup> In addition, employees “often have access to large volumes of confidential business material for the purposes of their employment”,<sup>21</sup> and as such, any breach of their duties of confidence may only be discovered “years after”, thereby placing employers on an “evidential back-foot”.<sup>22</sup> It was therefore against this evolving backdrop that the Court of Appeal introduced a “modified approach”<sup>23</sup> for the breach of confidence action in Singapore, so as to more “adequately safeguard the interests of those who own confidential information” (such as the plaintiff employer),<sup>24</sup> in particular the “wrongful loss interest”.<sup>25</sup>

9 On the other hand, while the trial judge (Aedit Abdullah J) briefly noted that employees, in reality, are likely to take “preparatory steps” to explore other opportunities for themselves (such as in setting up competing businesses) towards the end of their employment,<sup>26</sup> there was comparatively little recognition – both in the High Court and Court of Appeal – of the need to protect, in light of the “proportionality” principle,<sup>27</sup> the competing interests of former employees. The resulting implication, it is suggested, is that the post-employment interests of the defendant employees in *I-Admin* may not have been adequately addressed by the courts; or perhaps, they may even have been symbolically displaced, given how the Court of Appeal holistically viewed Hong and Liu (the first and second defendants, respectively) as “unconscionable”<sup>28</sup> *wrongdoers*.<sup>29</sup> This, in the authors’ respectful view, would have considerably tilted the balance of interests too far in favour of the former employer.<sup>30</sup>

19 [2020] 3 SLR 615 (HC); [2020] 1 SLR 1130 (CA).

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

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

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

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

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

25 *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 1 SLR 1130 at [53] and [61].

26 *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 3 SLR 615 at [163].

27 *Tang Siew Choy v Certact Pte Ltd* [1993] 1 SLR(R) 835 at [3] and [34].

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

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

30 A number of case comments and articles have been published by local commentators in response to the Court of Appeal’s decision in *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 1 SLR 1130 – see, eg, Jon Chan, “The Importance of a Clean Conscience in Breach of Confidence Claims” *Singapore Law Gazette* (September 2020); Benjamin Wong & David Tan, “A Modern Approach to Breach of Confidence Based on an Obligation of Conscience” (2020) 136 LQR 548; and Saw Cheng Lim, Chan Zheng Wen Samuel & Chai Wen Min, “Revisiting the Law of Confidence in  
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10 With these considerations in mind, the authors will embark on a closer examination of how the law in the UK has sought to achieve the appropriate balance between the various policy concerns in ex-employer–employee scenarios and, indeed, how such concerns – particularly in light of *I-Admin* – may be similarly addressed in the local context. Thereafter, the article will segue into an analysis of yet another facet of the law of confidence which, rather surprisingly, has attracted very little attention: namely, whether (and to what extent) *compilations* of facts/data which essentially comprise public domain information may nevertheless be the subject of obligations of confidence. The relevance of the latter inquiry may be attributed to Abdullah J’s judgment in *I-Admin* where his Honour had the opportunity to consider the confidentiality status of the Excel file named “payitem setup\_iAdmin.xls” belonging to the plaintiff.<sup>31</sup> The finale to this article is marked by a brief summary of the authors’ findings and submissions in both of these areas in the law of confidence.

## II. Balancing the competing interests in erstwhile employer–employee relationships: The legal response

### A. *A primer on the employee’s duty of good faith and fidelity*

11 Before turning to post-employment obligations in the law of confidence, the authors will briefly address another form of duty which is also relevant in the employment context – namely, the duty of good faith and fidelity owed by an (existing) employee to his employer.

12 The duty of good faith and fidelity – which subsists by virtue of an “implied term” in the contract of employment<sup>32</sup> and is to be distinguished from a “fiduciary duty”<sup>33</sup> – appears to share its historical origins in the case law with the duty of confidence. The former can generally be traced to the seminal case of *Robb v Green*<sup>34</sup> which first introduced the language of “good faith and fidelity”.<sup>35</sup> However, the language employed in the older cases (some of which predate *Robb v Green* and were considered

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Singapore and a Proposal for a New Tort of Misuse of Private Information” (2020) 32 SAclJ 891.

31 See *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 3 SLR 615 at [131]–[133].

32 *Man Financial (S) Pte Ltd v Wong Bark Chuan David* [2008] 1 SLR(R) 663 at [193]; *Tempcool Engineering (S) Pte Ltd v Chong Vincent* [2015] SGHC 100 at [62]; *Bluestone Corp Pte Ltd v Phang Cher Choon* [2020] SGHC 268 at [244].

33 See *Smile Inc Dental Surgeons Pte Ltd v Lui Andrew Stewart* [2012] 4 SLR 308 at [51]–[54] and *Bluestone Corp Pte Ltd v Phang Cher Choon* [2020] SGHC 268 at [245].

34 [1895] 2 QB 315.

35 *Robb v Green* [1895] 2 QB 315 at 320, per A L Smith LJ. See *Merryweather v Moore* [1892] 2 Ch 518 at 525 where Kekewich J, on similar facts, used the language of

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to have introduced the action for breach of confidence) does make for some conceptual confusion. Included in the judicial nomenclature were such phrases as “against conscience”,<sup>36</sup> “violation of good faith”,<sup>37</sup> “breach of trust”,<sup>38</sup> “breach of trust and confidence”,<sup>39</sup> “breach of faith”<sup>40</sup> and “contrary to the good faith”<sup>41</sup> – all used interchangeably. This made it very unclear as to whether the two duties (and therefore the two doctrines) were in fact distinct. While it is now likely to be accepted that these are separate categories of duty,<sup>42</sup> some commentators still argue that there exists no real distinction between the two,<sup>43</sup> or that one may be subsumed within the other.<sup>44</sup> The present authors acknowledge that the inconsistent historical treatment of the two duties has led to a certain degree of controversy and uncertainty, but, for the purposes of this article, the assumption will be made that these are distinct duties.

13 The scope of the implied contractual duty of good faith and fidelity has been found to be “rather vague”<sup>45</sup> and may vary depending on the facts.<sup>46</sup> The learned authors of *Gurry on Breach of Confidence* observe that there are, in general, three main approaches adopted by the courts as to the nature and scope of this duty.<sup>47</sup> The first is that the employee, as part

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“an abuse of confidence”. See also *Trailfinders Ltd v Travel Counsellors Ltd* [2020] EWHC 591 (IPEC) at [11]–[12].

36 *Hogg v Kirby* (1803) 32 ER 336 at 339.

37 *Perceval v Phipps* (1813) 35 ER 225 at 228.

38 *Canham v Jones* (1813) 35 ER 302 at 302; *Hogg v Kirby* (1803) 32 ER 336 at 338 (albeit only reflected in the submissions of counsel).

39 *Yovatt v Winyard* (1820) 37 ER 425 at 426. Cf also *Prince Albert v Strange* (1849) 41 ER 1171 at 1178–1179.

40 *Morison v Moat* (1851) 68 ER 492 at 498; *Tuck & Sons v Priester* (1887) 19 QBD 629 at 639.

41 *Lamb v Evans* [1893] 1 Ch 218 at 226.

42 See Tanya Aplin *et al*, *Gurry on Breach of Confidence: The Protection of Confidential Information* (Oxford University Press, 2nd Ed, 2012) at paras 11.18–11.19 and 11.44.

43 See Robert Flannigan, “The [Fiduciary] Duty of Fidelity” (2008) 124 LQR 274 at 275–277 (where the author argues that both duties are simply “direct applications of fiduciary accountability”) and 284 (“courts and commentators have been unable to differentiate credibly the two ideas. The reality is that there is no substantive difference in conceptual terms”).

44 See Hazel Carty, “Employment Confidentiality and Disclosure in the Public Interest” [1985] EIPR 195. See also *Spafax Ltd v Harrison* [1980] IRLR 442 at [25].

45 *Hivac Ltd v Park Royal Scientific Instruments Ltd* [1946] Ch 169 at 174.

46 *Eg*, the scope may vary according to the type of work (*Hivac Ltd v Park Royal Scientific Instruments Ltd* [1946] Ch 169 at 174 and 180; *Faccenda Chicken Ltd v Fowler* [1987] Ch 117 at 136), the seniority of the employee (*UBS Wealth Management (UK) Ltd v Vestra Wealth LLP* [2008] EWHC 1974 (QB) at [10]), the expectation in the particular field or industry (*Merryweather v Moore* [1892] 2 Ch 518 at 521 and 525), or whether the employee is working in the public or private sector (*Bennett v President, Human Rights & Equal Opportunity Commission* (2003) 204 ALR 119 at [124]–[126]).

47 See Tanya Aplin *et al*, *Gurry on Breach of Confidence: The Protection of Confidential Information* (Oxford University Press, 2nd Ed, 2012) at para 11.09.

of his duty of loyalty, must look after and seek to *further* his employer's interests. This view is supported by *dicta* from *Robb v Green*, where the trial judge (Hawkins J) held that there was an "implied obligation" on the part of the employee to "honestly and faithfully serve his master ... not abuse his confidence in matters appertaining to his service, and ... by all reasonable means in his power, protect his master's interests in respect to matters confided to him in the course of his service".<sup>48</sup> The second is that the employee is simply prevented from harming his employer's interests.<sup>49</sup> The third, ostensibly "the most widely accepted account of the duty",<sup>50</sup> is that the employee is recognised as possessing his own distinct interests but is expected to act honestly, fairly and in good faith.<sup>51</sup> It is not at all surprising that these three approaches may well overlap.

14 Nevertheless, owing to the imprecision of the scope of this duty, it may be preferable to carefully examine the facts of each case to determine which particular act(s) will amount to a breach of duty instead.<sup>52</sup> The courts have tried to do this by providing examples of such conduct, for instance, employees copying or otherwise purloining confidential information during the course of employment for purposes of establishing competing businesses and building up their clientele post-employment.<sup>53</sup> In essence, the main object of this duty is to prevent opportunistic conduct during employment.<sup>54</sup>

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48 *Robb v Green* [1895] 2 QB 1 at 10–11.

49 See, eg, *Tullett Prebon plc v BGC Brokers LP* [2010] EWHC 484 (QB) at [66] (an employee should not "act in a way which is intentionally contrary to the interests of his employer").

50 Tanya Aplin *et al*, *Gurry on Breach of Confidence: The Protection of Confidential Information* (Oxford University Press, 2nd Ed, 2012) at para 11.09.

51 See, eg, *Louis v Smellie* [1895-99] All ER Rep 875 at 876–877.

52 See *Smile Inc Dental Surgeons Pte Ltd v Lui Andrew Stewart* [2012] 4 SLR 308 at [70]: "It is clear, therefore, that whether or not a certain course of conduct constitutes a breach of the duty of good faith and fidelity cannot – because of the signal importance of the *facts* – be ascertained in a mechanistic fashion, but instead requires a nuanced and close analysis of the entire factual matrix" [emphasis in original].

53 See *Clearlab SG Pte Ltd v Ting Chong Chai* [2015] 1 SLR 163 at [270]. For the legal position on the implied duty of good faith and fidelity in cases where the employee, prior to termination of employment (eg, when serving out the notice period), embarks on – or has gone beyond – "mere preparatory steps" towards future competition with his employer, see *Smile Inc Dental Surgeons Pte Ltd v Lui Andrew Stewart* [2012] 4 SLR 308 at [65] ff as well as George Wei J's discussion in *Leiman, Ricardo v Noble Resources Ltd* [2018] SGHC 166 at [134]–[137] (but note that Wei J's finding on this issue was reversed by the Court of Appeal in *Leiman, Ricardo v Noble Resources Ltd* [2020] 2 SLR 386 at [164]).

54 See Robert Flannigan, "The [Fiduciary] Duty of Fidelity" (2008) 124 LQR 274 at 275 and 288.



15 Because the duty of good faith and fidelity subsists for the duration of employment only,<sup>55</sup> the authors wish to point out that this duty – or rather, breach thereof – may be of particular relevance in cases where the employee appropriates or deliberately/consciously memorises his employer’s confidential information *before* he leaves the employer’s payroll.<sup>56</sup> This may then provide the employer with an additional cause of action against the employee, alongside any breach of confidence action.<sup>57</sup> Although there remain uncertainties surrounding the precise scope of the duty of good faith and fidelity,<sup>58</sup> the surreptitious taking of confidential information during an employee’s course of employment for unauthorised use thereafter should at least provide the employer with an arguable case that a breach of duty has occurred.<sup>59</sup> Nevertheless, as a matter of balance, it is always prudent to bear in mind Cumming-Bruce LJ’s timely reminder in *G D Searle & Co Ltd v Celltech Ltd*:<sup>60</sup>

The law has always looked with favour upon the efforts of employees to advance themselves, provided that they do not steal or use the secrets of their former employer. In the absence of restrictive covenants, there is nothing in the general law to prevent a number of employees in concert deciding to leave their employer and set themselves up in competition with him.

16 Needless to say, it must ultimately be a question of getting the balance right.

### **B. *The law of confidence and post-employment obligations of confidence***

17 In so far as the law of confidence is concerned, the balance has traditionally been struck by varying the scope of the duty of confidence in the ex-employer–employee context. Depending on the circumstances, a former employee may owe his former employer (one or more of) the following post-employment obligations of confidence: (a) express

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55 See *Robb v Green* [1895] 2 QB 1 at 19 and *Clearlab SG Pte Ltd v Ting Chong Chai* [2015] 1 SLR 163 at [269].

56 See *Faccenda Chicken Ltd v Fowler* [1987] Ch 117 at 136; *Universal Thermosensors Ltd v Hibbon* [1992] FSR 361 at 372–373; and *Trailfinders Ltd v Travel Counsellors Ltd* [2020] EWHC 591 (IPEC) at [23]–[24]. Cf also *Printers & Finishers Ltd v Holloway* [1965] RPC 239 at 255 and *Merryweather v Moore* [1892] 2 Ch 518 at 524.

57 See, eg, *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 3 SLR 615 at [144]–[151] where, apart from a breach of confidence claim, the plaintiff also alleged that Hong (its former employee) had breached his implied duty of good faith and fidelity. Aedit Abdullah J, however, found otherwise (at [147] and [151]).

58 See generally Tanya Aplin *et al*, *Gurry on Breach of Confidence: The Protection of Confidential Information* (Oxford University Press, 2nd Ed, 2012) at para 11.08 *ff* (and, in particular, paras 11.29–11.57).

59 See *Clearlab SG Pte Ltd v Ting Chong Chai* [2015] 1 SLR 163 at [270].

60 [1982] FSR 92 at 101–102.

obligations; (b) implied obligations; and (c) equitable obligations. Each of these obligations and their respective scopes will be examined in turn.

18 An *express* obligation of confidence arises through an express undertaking by the employee in the contract of employment not to use or disclose the employer's trade secrets or other confidential information.<sup>61</sup> Such clauses are also commonly referred to as (express) "confidentiality clauses".<sup>62</sup> The express obligation of confidence has been understood to protect all information defined as confidential by the ex-employer and is not only restricted – at least according to the preferred view – to the protection of highly confidential information such as trade secrets.<sup>63</sup> This interpretation serves to give full effect to the parties' freedom to contract for the protection of all confidential information belonging to the employer.<sup>64</sup> However, the ostensibly broad express obligation is typically circumscribed by the restraint of trade doctrine, which ensures that the interests of ex-employees remain adequately safeguarded.<sup>65</sup>

19 Often employed as a tool for giving effect to judicial perceptions of public policy, the restraint of trade doctrine constitutes the primary limitation on the enforceability of express post-employment obligations of confidence.<sup>66</sup> It renders any contract in restraint of trade invalid and

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61 See Tanya Aplin *et al*, *Gurry on Breach of Confidence: The Protection of Confidential Information* (Oxford University Press, 2nd Ed, 2012) at para 12.02. Cf also *Adinop Co Ltd v Rovithai Ltd* [2019] 2 SLR 808 at [38].

62 See Tanya Aplin *et al*, *Gurry on Breach of Confidence: The Protection of Confidential Information* (Oxford University Press, 2nd Ed, 2012) at para 12.02. In practice, confidentiality clauses may also be supplemented by non-solicitation clauses and non-compete clauses which seek to restrain the unauthorised use or disclosure of confidential information and/or trade secrets indirectly. For a more thorough analysis of express confidentiality clauses, see *Employee Competition: Covenants, Confidentiality, and Garden Leave* (Paul Goulding ed) (Oxford University Press, 3rd Ed, 2016) at paras 4.65–4.83.

63 See *Man Financial (S) Pte Ltd v Wong Bark Chuan David* [2008] 1 SLR(R) 663 at [86]; *Clearlab SG Pte Ltd v Ting Chong Chai* [2015] 1 SLR 163 at [75]; *Faccenda Chicken Ltd v Fowler* [1985] 1 All ER 724 at 731; *Balston Ltd v Headline Filters Ltd* [1987] FSR 330 at 348; and *Littlewoods Organisation Ltd v Harris* [1978] 1 All ER 1026 at 1033. See also *Lansing Linde Ltd v Kerr* [1991] 1 WLR 251 and *FSS Travel & Leisure Systems Ltd v Johnson* [1999] FSR 505.

64 See *Man Financial (S) Pte Ltd v Wong Bark Chuan David* [2008] 1 SLR(R) 663 at [86] and *Clearlab SG Pte Ltd v Ting Chong Chai* [2015] 1 SLR 163 at [75] and [78]. See also Hugh Collins, *Employment Law* (Oxford University Press, 2nd Ed, 2010) at pp 14–15.

65 See *Clearlab SG Pte Ltd v Ting Chong Chai* [2015] 1 SLR 163 at [75] and *Intelsec Systems Ltd v Grech-Cini* [2000] 1 WLR 1190 at 1206. See also Tanya Aplin *et al*, *Gurry on Breach of Confidence: The Protection of Confidential Information* (Oxford University Press, 2nd Ed, 2012) at paras 12.09–12.10.

66 Indeed, it has been observed that "once employment has ceased the courts are vigilant to limit the scope of an ex-employee's obligations in accordance with the  
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unenforceable unless it is reasonable having regard to the interests of the parties and the public interest.<sup>67</sup> The legal test for reasonableness involves a preliminary inquiry as to whether there is a legitimate proprietary interest to be protected by the restrictive covenant, over and above the mere protection of the employer from competition.<sup>68</sup> If there exists such an interest, the court then applies the twin test of reasonableness – whether the restrictive covenant is reasonable with reference to the interests of the parties, and whether it is reasonable with reference to the interests of the public.<sup>69</sup> In applying these tests to the facts of the case at hand, the court will also ensure that the covenant goes no further than necessary to protect the legitimate proprietary interest(s) identified.<sup>70</sup>

20 A confidentiality clause may also be found to be unreasonable where it seeks to restrain a former employee from using or disclosing information which constitutes his or her general skill, knowledge and experience gained during the course of employment,<sup>71</sup> although this principle is subject to a consideration of other factors as well (such as the nature of the information and the duration and geographical scope of the restraint).<sup>72</sup> The former employee's general skill, knowledge and experience have been defined by Lord Shaw in *Herbert Morris Ltd v Saxelby*<sup>73</sup> to comprise “a man's aptitudes, his skill, his dexterity, his manual or mental ability”. In other words, the “professional expertise” which a former employee has acquired through employment.<sup>74</sup> Therefore, where the information protected by an express obligation of confidence overlaps with the former employee's general skill, knowledge and experience,

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doctrine of restraint of trade”: Tanya Aplin *et al*, *Gurry on Breach of Confidence: The Protection of Confidential Information* (Oxford University Press, 2nd Ed, 2012) at para 12.01.

67 See, eg, *Nordenfelt v Maxim Nordenfelt Co* [1894] AC 535 at 565 and the cases cited in Tanya Aplin *et al*, *Gurry on Breach of Confidence: The Protection of Confidential Information* (Oxford University Press, 2nd Ed, 2012) at para 12.09 (especially at fn 21).

68 See *Smile Inc Dental Surgeons Pte Ltd v Lui Andrew Stewart* [2012] 4 SLR 308 at [19] and *Sin Hwa Dee Foodstuff Industries Pte Ltd v Christabel Ang Hoo Hui* [2013] SGDC 376 at [14].

69 See *Nordenfelt v Maxim Nordenfelt Co* [1894] AC 535 at 565; *Smile Inc Dental Surgeons Pte Ltd v Lui Andrew Stewart* [2012] 4 SLR 308 at [19]; and *Office Angels Ltd v Rainer-Thomas & O'Connor* [1991] IRLR 214 at 217.

70 See *Smile Inc Dental Surgeons Pte Ltd v Lui Andrew Stewart* [2012] 4 SLR 308 at [19] and *Sin Hwa Dee Foodstuff Industries Pte Ltd v Christabel Ang Hoo Hui* [2013] SGDC 376 at [14].

71 See *Spafax Ltd v Harrison* [1980] IRLR 442 at [25].

72 See Tanya Aplin *et al*, *Gurry on Breach of Confidence: The Protection of Confidential Information* (Oxford University Press, 2nd Ed, 2012) at para 12.66 and *Ixora Trading Incorporated v Jones* [1990] FSR 251 at 258–259.

73 [1916] 1 AC 688 at 714.

74 *Lancashire Fires Ltd v SA Lyons & Co Ltd* [1997] IRLR 113 at 117.

the courts have been inclined to find that the obligation amounts to an unreasonable restraint of trade so as to ensure that his post-employment freedoms are not unreasonably curtailed.<sup>75</sup> In short, where lateral movement between firms has become more prevalent and arguably more significant for one's career advancement in today's labour environment, the contractual restraint must be no wider than is reasonably necessary for the adequate protection of the covenantee.<sup>76</sup>

21 Separately, even in the absence of express covenants, an *implied* (contractual) obligation of confidence may nonetheless be imposed on the former employee<sup>77</sup> where the former employee knew or ought to have known that the information imparted to (or acquired by) him/her possessed the necessary quality of confidence.<sup>78</sup> To appreciate the scope of the implied obligation, it is imperative that the authors cite and examine *Faccenda Chicken Ltd v Fowler*<sup>79</sup> ("*Faccenda Chicken*"), the *locus classicus*. Crucially, not all forms of confidential information belonging to the employer will fall to be protected by the implied obligation of confidence. Three observations will be made in this regard.

22 First, in *Faccenda Chicken*, Goulding J in the English High Court categorised information to which an employee, in the course of employment, would typically gain access into three classes:<sup>80</sup>

First there is information which, because of its trivial character or easy accessibility from public sources of information, cannot be regarded by reasonable persons or by the law as confidential at all. The servant is at liberty to impart it during his service or afterwards to anyone he pleases, even his master's competitor. ...

Secondly, there is information which the servant must treat as confidential (either because he is expressly told it is confidential, or because from its character it is obviously so) but which once learned necessarily remains in the servant's head and becomes part of his own skill and knowledge applied in the course of his master's business. So long as the employment continues, he cannot otherwise use or disclose such information without infidelity and therefore

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75 See *Hengxin Technology Ltd v Jiang Wei* [2009] SGHC 259 at [117] and *Clearlab SG Pte Ltd v Ting Chong Chai* [2015] 1 SLR 163 at [78].

76 See *Herbert Morris Ltd v Saxelby* [1916] 1 AC 688 at 707 and *Hengxin Technology Ltd v Jiang Wei* [2009] SGHC 259 at [115]. For more in-depth discussion of the restraint of trade doctrine, see Tanya Aplin *et al*, *Gurry on Breach of Confidence: The Protection of Confidential Information* (Oxford University Press, 2nd Ed, 2012) at paras 12.09–12.149.

77 See *Kirchner & Co v Gruban* [1909] 1 Ch 413 at 422 and Tanya Aplin *et al*, *Gurry on Breach of Confidence: The Protection of Confidential Information* (Oxford University Press, 2nd Ed, 2012) at paras 12.153–12.154.

78 See *Trailfinders Ltd v Travel Counsellors Ltd* [2020] EWHC 591 (IPEC) at [30]–[31].

79 [1985] 1 All ER 724 (Ch); [1987] Ch 117 (CA).

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

breach of contract. But when he is no longer in the same service, the law allows him to use his full skill and knowledge for his own benefit in competition with his former master; ...

Thirdly, however, there are, to my mind, specific trade secrets so confidential that, even though they may necessarily have been learned by heart and even though the servant may have left the service, they cannot lawfully be used for anyone's benefit but the master's.

23 Gouling J was clearly of the view that the implied obligation of confidence did not extend to “class 2” information and would only cover information in the form of “specific trade secrets” (or “class 3” information). This finding was confirmed on appeal, where Neill LJ in the English Court of Appeal held that information belonging to a former employer would only be protected if it could “properly be classed as a trade secret or as material which, while not properly to be described as a trade secret, [was] in all the circumstances of *such a highly confidential nature* as to require the same protection as a trade secret *eo nomine*” [emphasis added].<sup>81</sup> Parenthetically, the narrowly defined scope accorded to implied obligations of confidence imposed upon former employees has also been acknowledged and endorsed by the courts in Singapore.<sup>82</sup>

24 Second, while various formulations of “trade secrets” have been provided by the courts, this category of information still confounds. Gouling J in *Faccenda Chicken* regarded trade secrets as information with a particularly high degree of confidentiality (information “so confidential”).<sup>83</sup> While Neill LJ on appeal accepted that it was impossible to “provide a list of matters which will qualify as trade secrets or their equivalent”,<sup>84</sup> several factors were provided to aid the court in deciding whether a piece of information constituted a protectable trade secret

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81 *Faccenda Chicken Ltd v Fowler* [1987] Ch 117 at 137. See also *Printers & Finishers Ltd v Holloway* [1964] 3 All ER 731 at 738.

82 See *Clearlab SG Pte Ltd v Ting Chong Chai* [2015] 1 SLR 163 at [73]; *Man Financial (S) Pte Ltd v Wong Bark Chuan David* [2008] 1 SLR(R) 663 at [85]; *Asia Business Forum Pte Ltd v Long Ai Sin* [2003] 4 SLR(R) 658 at [9]; *Ng Thiam Kiat v Universal Westech (S) Pte Ltd* [1996] 3 SLR(R) 429 at [37]; *Tang Siew Choy v Certact Pte Ltd* [1993] 1 SLR(R) 835 at [16]; and *Collins & Aikman Floorcoverings Asia Pte Ltd v Low Su Peng Jeremy* [2006] SGDC 154 at [112].

83 *Faccenda Chicken Ltd v Fowler* [1985] 1 All ER 724 at 731. See also *Lansing Linde Ltd v Kerr* [1991] 1 WLR 251 at 259–260.

84 *Faccenda Chicken Ltd v Fowler* [1987] Ch 117 at 138. In similar vein, Kan Ting Chiu J in *Asia Business Forum Pte Ltd v Long Ai Sin* [2003] 4 SLR(R) 658 at [18] said: “A trade secret can be in any form. It can be simple or complex. It can be the result of intense thought and immense effort, or it may be a chance discovery. It is not possible to state comprehensively the necessary make-up of a trade secret.” Be that as it may, some classic examples of trade secrets include “secret processes of manufacture such as chemical formulae ... or designs or special methods of construction”: see *Faccenda Chicken Ltd v Fowler* [1987] Ch 117 at 136.

(or equivalent). These include the nature of the employment, the nature of the information itself, the steps (if any) taken by the employer to impress on the employee the confidentiality of the information, and the ease or difficulty of isolating the information in question from other information which the employee is free to use or disclose.<sup>85</sup> Indeed, the latter two factors are often taken to reflect the overall attitude of the employer towards the information concerned.

25 Other cases have also provided additional indicators, such as whether the owner of the information reasonably believes that the release of the information would be injurious to him or of advantage to his rivals or others, whether the owner reasonably believes that the information is confidential or secret, and whether the information when judged in the light of the usages and practices of the particular industry or trade concerned is entitled to protection as confidential information or trade secrets.<sup>86</sup> The collective consideration of these *non-exhaustive* factors is intended to shed light on whether a particular piece of information, to be capable of post-employment protection by the implied contractual obligation, does in fact possess a sufficiently high degree of confidentiality.<sup>87</sup> Needless to say, this is in essence a multi-factorial and contextual inquiry, although obviously, “[t]he over-zealous characterisation and over-protective treatment of information would not transform information of unexceptional confidentiality into a trade secret.”<sup>88</sup>

26 Third, this notion of confidentiality that is calibrated on a sliding scale – with some types of information possessing a higher degree of confidentiality than others – nevertheless draws a distinction between “ordinary” (or “mere”) confidential information and “highly” (or “higher level”) confidential information amounting to trade secrets or their equivalent.<sup>89</sup> Although this distinction has proved to be a difficult one to

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85 See *Faccenda Chicken Ltd v Fowler* [1987] Ch 117 at 137–138. See also *Lancashire Fires Ltd v SA Lyons & Co Ltd* [1997] IRLR 113 at 117.

86 See *Thomas Marshall Ltd v Guinle* [1979] Ch 227 at 248.

87 See *Asia Business Forum Pte Ltd v Long Ai Sin* [2003] 4 SLR(R) 658 at [10]. For yet other factors, see the detailed discussion in Tanya Aplin *et al*, *Gurry on Breach of Confidence: The Protection of Confidential Information* (Oxford University Press, 2nd Ed, 2012) at paras 12.179–12.200.

88 *Asia Business Forum Pte Ltd v Long Ai Sin* [2003] 4 SLR(R) 658 at [10], *per* Kan Ting Chiu J.

89 See Tanya Aplin *et al*, *Gurry on Breach of Confidence: The Protection of Confidential Information* (Oxford University Press, 2nd Ed, 2012) at para 12.173. See also *A T Poeton Ltd v Horton* [2000] ICR 1208 at 1218. Indeed, such a distinction has also been recognised by the Singapore Court of Appeal in *Asia Business Forum Pte Ltd v Long Ai Sin* [2004] 2 SLR(R) 173 at [18]: “Granted that there is considerable overlap between the concepts of trade secrets and confidential information, they are  
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draw,<sup>90</sup> it bears testament to the degree of latitude which the courts have thought fit to afford former employees. Therefore, taking guidance from *Faccenda Chicken*, it appears that the scope of the implied obligation of confidence owed by an ex-employee only encompasses information which the courts *narrowly* construe to be of a sufficiently high degree of confidentiality as to amount to a trade secret or its equivalent. Indeed, it has been aptly observed that “*Faccenda Chicken* imposes a fairly high bar for the [former] employer to negotiate”<sup>91</sup> and, in the authors’ view, rightly so once it is appreciated that the ex-employee’s duty of good faith and fidelity would have ceased upon termination of the employment contract.

27 Finally, and independently of the above obligations, there is also the *equitable* obligation of confidence that may bind the former employee whenever confidential information is imparted in circumstances importing an obligation of confidence.<sup>92</sup> This is, of course, not limited to circumstances where the information concerned has been communicated to a recipient, but also includes situations where the information has been accidentally chanced upon or surreptitiously acquired by anyone who knows or ought reasonably to know of the information’s confidential character.<sup>93</sup> Given the possibility that an ex-employee may owe equitable obligations *alongside* either express or implied (contractual) obligations of confidence,<sup>94</sup> it is desirable, in the authors’ view, to examine the scope of the equitable obligation in greater detail. The authors posit at the outset that the scope of the equitable obligation ought to be *coterminous* with that of the implied (contractual) obligation of confidence. In other words, only confidential information of a sufficiently high degree of confidentiality as to amount to a trade secret or its equivalent ought to be protected by the post-employment *equitable* obligation of confidence.

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nevertheless distinct. ... While a trade secret must be confidential, it does not follow that confidential information would be a trade secret.”

90 See, eg, *Lancashire Fires Ltd v SA Lyons & Co Ltd* [1997] IRLR 113 at 117; *Littlewoods Organisation Ltd v Harris* [1978] 1 All ER 1026 at 1033; and John Hull, “Analysis: Stealing Secrets: A Review of the Law Commission’s Consultation Paper on the Misuse of Trade Secrets” (1998) 4 IPQ 422 at 430 (where the author termed this as “probably the most difficult dividing line in this field of law”). For further criticisms of *Faccenda Chicken Ltd v Fowler* [1987] Ch 117, see Tanya Aplin *et al*, *Gurry on Breach of Confidence: The Protection of Confidential Information* (Oxford University Press, 2nd Ed, 2012) at paras 12.174–12.177 (but note also, *per contra*, para 12.178).

91 *Harbro Supplies Ltd v Hampton* [2014] EWHC 1781 (Ch) at [224].

92 See *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41 at 47–48.

93 See *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109 at 281; *Campbell v MGN Ltd* [2004] 2 AC 457 at [14]; and *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41 at 48.

94 See, eg, *Trailfinders Ltd v Travel Counsellors Ltd* [2020] EWHC 591 (IPEC) at [3].

28 It may be asked, in so far as former employees are concerned, why is it that the ambit of the equitable obligation of confidentiality cannot possibly be as extensive as that arising from an express restrictive covenant but should instead be coterminous with that arising from an implied contractual term as to post-termination use of confidential information? Consider this hypothetical scenario. In respect of *B* (the employer), *A* conducts himself in every manner akin to an employee save for the fact that there is no formal (oral/written) contract between the parties. *A*, in carrying out his duties, gains access to and acquires a host of confidential information belonging to *B* – from trade secrets to client-related information (Goulding J’s “class 3” and “class 2” information, respectively).<sup>95</sup> When *A* “resigns” to join *C*, what types of information is he entitled to take along with him for the use of himself and *C*? It would, in this context, be meaningless to speak of express covenants or implied terms in the employment contract and hence the only cause of action that *B* can sensibly initiate to restrain *A* from misusing confidential information is to be found in equity. Under such circumstances, it is submitted that the equitable obligation of confidence owed by *A* to *B* must necessarily be *circumscribed* by the scope of the implied obligation arising in contract (assuming one to be in existence between the parties). If *B* were minded to restrain *A* from misusing sensitive information – post “employment” – that would ordinarily fall *outside* the realm of trade secrets or information akin to trade secrets, *B* had every opportunity (indeed, the legal right) to do so and could have easily executed a formal contract between the parties that contained enforceable *express* covenants. In the absence of any formal agreement, it would not seem appropriate for equity to intervene to afford *B* the same degree of protection that would otherwise have been available to him at law (or indeed any broader degree of protection). However, as a matter of fairness, equity should, at most, only impose upon *A* a far more *limited* obligation of confidence that is *compatible* with the (narrower) obligation that would have arisen from the *implied* terms of a contract. This, in the authors’ view, is an appropriate compromise because parties to a formal/written contract must be given the freedom to impose, by means of an express and valid contractual undertaking (such as a reasonably drawn restrictive covenant), an obligation of confidence of *wider* scope than that which is rooted in equity.<sup>96</sup>

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

96 Granted, it is recognised that there may be imposed, beyond the scope of (express) contractual obligations of confidence, “**wider equitable** duties of confidence in circumstances that are *not ordinary*” [emphasis in italics and bold italics added]: see *CF Partners (UK) LLP v Barclays Bank plc* [2014] EWHC 3049 (Ch) at [132] (and see also [133]). However, the authors submit that the given hypothetical scenario – involving the action by *B* against *A* for breach of the equitable obligation of confidence – does *not* fall within the “not ordinary” exception.



29 Elsewhere, it has also been observed that there exists no sensible reason why the scopes of the implied contractual and equitable obligations of confidence arising from erstwhile employer–employee relationships should be any different.<sup>97</sup> As Judge Toulmin perceptively pointed out in *Také Ltd v BSM Marketing Ltd*,<sup>98</sup> both sets of obligations – which some of the cases have regarded as “alternatives” – arise (at least conceptually) “because of the circumstances of confidentiality in which the information is imparted”.<sup>99</sup> After all, it is true that employees generally obtain or come into possession of an array of confidential information belonging to their respective employers precisely because of their “privileged” position as organisational employees. This therefore led Judge Toulmin to the view that the obligation of confidentiality arising from an implied term in the contract of employment was but “an *example* of the general equitable principle” [emphasis added].<sup>100</sup>

30 Other cases in England have also recognised that in the name of consistency, the same principles ought to apply for obligations of confidence founded in equity and implied contract.<sup>101</sup> In particular, Judge Hacon in *Trailfinders Ltd v Travel Counsellors Ltd*<sup>102</sup> categorically took the view that the scope of the equitable obligation should be consistent and coterminous with that of the implied contractual obligation in relation to erstwhile employer–employee relationships.<sup>103</sup> Accordingly, in light of these English authorities, the authors respectfully submit that coterminous obligations of confidence founded in equity and implied contract – in so far as former employees are concerned – would be the sensible position to adopt for Singapore as well.

31 Having examined the law and its associated nuances in respect of post-employment obligations of confidence, it is evident that the courts in the UK are generally inclined to safeguard the freedoms of

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97 See Tanya Aplin *et al*, *Gurry on Breach of Confidence: The Protection of Confidential Information* (Oxford University Press, 2nd Ed, 2012) at para 12.157. See also *United Sterling Corp Ltd v Felton and Mannion* [1973] FSR 409 at 415 and *MVF3 APS v Bestnet Europe Ltd* [2009] EWHC 657 (Ch) at [648] (although this was common ground between counsel for both disputing parties).

98 [2006] EWHC 1085 (QB).

99 *Také Ltd v BSM Marketing Ltd* [2006] EWHC 1085 (QB) at [53]. In other words, both sets of obligations arise because a former employee has found himself in a situation where confidential information had been imparted or made accessible to him prior to the termination of employment.

100 *Také Ltd v BSM Marketing Ltd* [2006] EWHC 1085 (QB) at [53].

101 See, *eg*, *Trailfinders Ltd v Travel Counsellors Ltd* [2020] EWHC 591 (IPEC) at [31] and [38]. *Cf* also *Force India Formula One Team Ltd v 1 Malaysia Racing Team Sdn Bhd* [2012] EWHC 616 (Ch) at [338].

102 [2020] EWHC 591 (IPEC).

103 See *Trailfinders Ltd v Travel Counsellors Ltd* [2020] EWHC 591 (IPEC) at [43].

former employees to the maximum extent possible – such that in the absence of valid and reasonably drawn express covenants, ex-employees are only restrained by the implied (contractual) and equitable obligations of confidence from misusing information of a sufficiently high degree of confidentiality (amounting to trade secrets or their equivalent) belonging to their former employers. The authors observe parenthetically that the English approach, for the most part, has also been adopted in Singapore.<sup>104</sup> Yet, it bears underscoring that the central tensions inherent in all relationships of employment (elucidated at the beginning of this article) should be firmly borne in mind when future cases arise so that the post-employment freedoms of employees will not, in the public interest, be unnecessarily curtailed.

### C. *Obligations of confidence in the context of relationships analogous to that of employer–employee*

32 Taking the discussion further, the authors argue that parties who find themselves in relationships *analogous* to employer–employee relationships should also be subject to obligations of confidence of similar scope. This, in the authors’ view, is not an untenable proposition given that many of the considerations pertinent to the law surrounding ex-employer–employee relationships would likewise be applicable, *mutatis mutandis*, in the context of such analogous relationships. The article now turns to an examination of how the English courts have approached this subject.

33 In *MVF3 APS v Bestnet Europe Ltd*<sup>105</sup> (“*Bestnet*”), one of the defendants (Dr Skovmand) was not actually employed by the claimant but served as its consultant for a long time and was in effect its head of development.<sup>106</sup> He often acted for the claimant in relation to third parties and devoted a substantial proportion of his time to working for the claimant.<sup>107</sup> The trial judge (Arnold J) held – on the basis that this was common ground between counsel for both disputing parties – that “although Dr Skovmand was a *consultant*, in this respect his position was *analogous to that of an employee*” [emphasis added].<sup>108</sup> As such, after the termination of the relationship, he was only entitled to use information forming part of his own skill, knowledge and experience acquired during the course of the relationship but not any trade secrets belonging to the

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104 See, eg, *Tang Siew Choy v Certact Pte Ltd* [1993] 1 SLR(R) 835 at [16] and *Clearlab SG Pte Ltd v Ting Chong Chai* [2015] 1 SLR 163 at [68].

105 [2011] EWCA Civ 424.

106 *MVF3 APS v Bestnet Europe Ltd* [2011] EWCA Civ 424 at [5].

107 *MVF3 APS v Bestnet Europe Ltd* [2011] EWCA Civ 424 at [5].

108 *MVF3 APS v Bestnet Europe Ltd* [2009] EWHC 657 (Ch) at [648].

claimant. On appeal, it was not challenged that Dr Skovmand did owe the claimant an obligation of confidence and the English Court of Appeal also agreed with Arnold J that the information which Dr Skovmand had misused did not fall within “his general skill and knowledge or matter in the public domain”.<sup>109</sup> The reference made by the English Court of Appeal in the preceding sentence to “general skill and knowledge” suggests, in the authors’ view, that the scope of the obligation of confidence arising from *analogous* consultant–client relationships ought to *mirror* that arising from employer–employee relationships.

34 Similarly, in *Force India Formula One Team Ltd v 1 Malaysia Racing Team Sdn Bhd*<sup>110</sup> (“*Force India*”), the fourth defendant (Aerolab) had entered into a development contract with the claimant (Force India), whereby Aerolab would provide wind tunnel facilities as well as aerodynamic development advice and suggestions to Force India for the development of their racecar. At trial, Arnold J in the English High Court accepted Aerolab’s argument that “there was no fundamental distinction ... between an employment contract and a contract for the provision of services by an *independent contractor*” [emphasis added].<sup>111</sup> This is largely because there is often no clear dividing line between employees and independent contractors – or, more accurately, as to “where to place a particular relationship on the spectrum between employment contract at one end and entrepreneurial contract for services at the other end”.<sup>112</sup> Accordingly, in the absence of an express restrictive covenant, an independent contractor such as Aerolab – much like Dr Skovmand (the consultant) in the *Bestnet* decision – “can only be restricted from using information which is a trade secret or akin thereto” post termination of the contractor-client relationship.<sup>113</sup>

35 In light of the *Bestnet* and *Force India* precedents,<sup>114</sup> it is submitted that the scope of any obligation of confidence – whether express, implied or equitable in origin – binding on defendants who find themselves in positions *analogous* to former employees ought to be *coterminous* with that imposed on former employees. The authors are of the view that

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109 *MVF3 APS v Bestnet Europe Ltd* [2011] EWCA Civ 424 at [23].

110 [2012] EWHC 616 (Ch).

111 *Force India Formula One Team Ltd v 1 Malaysia Racing Team Sdn Bhd* [2012] EWHC 616 (Ch) at [234]. See also [235].

112 *Force India Formula One Team Ltd v 1 Malaysia Racing Team Sdn Bhd* [2012] EWHC 616 (Ch) at [234].

113 *Force India Formula One Team Ltd v 1 Malaysia Racing Team Sdn Bhd* [2012] EWHC 616 (Ch) at [230].

114 Cf also *Také Ltd v BSM Marketing Ltd* [2006] EWHC 1085 (QB) where the defendant – who was an *agent* of the plaintiff company and came into possession of the plaintiff’s confidential information – was nevertheless treated by Judge Toulmin as occupying a position *analogous* to that of an employee.

this is a sensible approach to adopt given the relevance and coincidence of post-termination considerations, such as the need to protect trade secrets and other forms of information of a sufficiently high degree of confidentiality but also the public interest in promoting fair competition in the marketplace.<sup>115</sup> Further, in underscoring the argument in *Force India*, it might be increasingly difficult to distinguish between “pure” employment relationships and contractor–client relationships, given that “it [is] not always the case that the employer or client [has] greater bargaining power than the employee or contractor, particularly where highly skilled employees/contractors [are] concerned”.<sup>116</sup> Indeed, the duality between such categories of relationships may be one with “no really clear dividing line”,<sup>117</sup> again suggesting that there is a certain degree of *artificiality* inherent in these distinctions. It is therefore preferable, in the authors’ view, for the law surrounding these analogous relationships – particularly post-termination and in so far as the scope of the obligation of confidence is concerned – to be applied in a *consistent* manner, so as to give rise to less uncertainty befalling employees and independent contractors/consultants alike.

**D. I-Admin (Singapore) Pte Ltd v Hong Ying Ting: A missed opportunity to clarify post-employment obligations of confidence?**

36 To reiterate, the law in *Faccenda Chicken* has, on many occasions, been cited and applied by the courts in Singapore.<sup>118</sup> The authors have also explained that the nuances inherent in post-employment obligations of confidence reflect the very balance which the law, realistically, attempts to strike in protecting the various competing interests. This article will now turn to the recent decisions of the High Court and Court of Appeal in *I-Admin* to examine how, if at all, these considerations might have been taken into account in respect of the post-employment obligations of confidence owed by the defendants, in particular Hong and Liu. On the facts of *I-Admin*, Hong was an ex-employee of the plaintiff while Liu was

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115 The underlying policy interests have been examined at paras 4–5 above.

116 *Force India Formula One Team Ltd v 1 Malaysia Racing Team Sdn Bhd* [2012] EWHC 616 (Ch) at [234].

117 Mark Freedland, *The Personal Employment Contract* (Oxford University Press, 2003) at p 31. See also Tanya Aplin *et al*, *Gurry on Breach of Confidence: The Protection of Confidential Information* (Oxford University Press, 2nd Ed, 2012) at para 10.07.

118 See, eg, *Tang Siew Choy v Certact Pte Ltd* [1993] 1 SLR(R) 835 at [16]; *Asia Business Forum Pte Ltd v Long Ai Sin* [2003] 4 SLR(R) 658 at [9]; *Man Financial (S) Pte Ltd v Wong Bark Chuan David* [2008] 1 SLR(R) 663 at [83] ff; *Hengxin Technology Ltd v Jiang Wei* [2009] SGHC 259 at [117]; *Clearlab SG Pte Ltd v Ting Chong Chai* [2015] 1 SLR 163 at [68]; and *Tempcool Engineering (S) Pte Ltd v Chong Vincent* [2015] SGHC 100 at [23] and [25].

an ex-employee of the plaintiff's wholly-owned Chinese subsidiary.<sup>119</sup> Relevantly, it is not unreasonable to suggest that Liu was in a position *analogous* to that of a former employee of the plaintiff. After all, it was borne out by the evidence that Liu did have access to and acquire confidential information belonging to the plaintiff in the course of his employment with I-Admin (Shanghai) Ltd.<sup>120</sup>

37 With respect, both the High Court and the Court of Appeal did not, on the facts,<sup>121</sup> appear to have engaged in a careful consideration of a former employee's post-employment obligations of confidentiality. In the High Court, Abdullah J "agreed that the plaintiff's source codes, systems, database structures and client materials were confidential, but only to the extent the information in question was not found in the public domain and was original".<sup>122</sup> However, *Faccenda Chicken* was curiously not cited or considered by the court<sup>123</sup> – neither Goulding J's judgment at trial nor that of the English Court of Appeal. Abdullah J also did not expressly consider whether *each* item of information – the source codes, systems, database structures and client materials (which were all found to be confidential) – fell within the more *restricted* category of "trade secrets or their equivalent". This is significant because, according to *Faccenda Chicken*, it is *only* this category of information that is entitled to post-termination protection by the implied contractual obligation of confidence as well as (according to the thesis of this article) the *coterminous* equitable obligation of confidence.<sup>124</sup>

38 Abdullah J's finding on confidentiality was not disturbed by the Court of Appeal, which accepted that "the appellant's materials, being an integral part of its business operations, were confidential in nature" and "were not intended for dissemination"; indeed, "the respondents were under an obligation to preserve their confidentiality".<sup>125</sup> The apex court, however, went on to clarify an issue raised by the respondents (defendants):<sup>126</sup>

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119 See *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 3 SLR 615 at [4].

120 See *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 3 SLR 615 at [112].

121 *Ie*, in factual circumstances excluding express obligations of confidence.

122 *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 3 SLR 615 at [115].

123 Nor by the Court of Appeal: see *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 1 SLR 1130. This was also the case in *BAFCO Singapore Pte Ltd v Lee Tze Seng* [2020] SGHC 281, a recent High Court decision involving a claim against three former employees for breach of confidence (though it should be noted that the action brought by the former employer in this case was for the primary purpose of seeking interlocutory injunctive relief).

124 *Cf Také Ltd v BSM Marketing Ltd* [2006] EWHC 1085 (QB) at [208] *ff* (and, in particular, [224]–[230]).

125 *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 1 SLR 1130 at [63].

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

As for the argument that [the appellant's confidential materials] are to be analysed in the context of the claim for breach of the non-disclosure agreement, a breach of the first respondent's contractual obligations is a distinct cause of action from a claim premised on equitable obligations of confidence. The appellant is not foreclosed from relying on the *same categories of materials* to pursue its claim in confidence. [emphasis added]

39 The italicised portion of the *dicta* above, in the authors' view, implicitly suggests that the Court of Appeal did not think that it was at all necessary to distinguish between "mere" confidential information and "higher level" confidential information amounting to trade secrets or their equivalent in relation to the appellant's claim against its former employee (Hong) for breach of the *post-employment, equitable* obligation of confidence. The judgment of the apex court categorically states that "the same categories of materials" may be relied upon by a plaintiff-employer *regardless* of whether the action for breach of confidence against the ex-employee is premised on express contractual obligations, or equitable (or indeed, according to the thesis of this article, implied) obligations of confidence. With respect, in light of the law as established in *Faccenda Chicken*,<sup>127</sup> the authors do not share this view.

40 Separately, in so far as Abdullah J's judgment is concerned, it is also unclear whether:

(a) the judge did (or did not) consider Gouling J's threefold classification of information – as well as the four guiding factors laid down by Neill LJ on appeal – in *Faccenda Chicken* to be relevant and applicable;

(b) the judge considered *all* of the alleged confidential material (namely, source codes, systems, database structures and client materials) to possess a sufficiently high degree of confidentiality as to amount to trade secrets or their equivalent; and

(c) the judge did (or did not) consider *equitable* obligations owed by former employees (such as Hong) – as well as individuals in *analogous* positions (such as Liu) – as being restricted to information in the form of trade secrets or their equivalent only, in line with the scope of the ex-employee's *implied contractual* obligation of confidence.

41 In addition, Abdullah J's finding in one sentence that the plaintiff's "client materials" were confidential may, with respect, be contrasted

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127 See *Faccenda Chicken Ltd v Fowler* [1985] 1 All ER 724 (Ch) at 731; [1987] Ch 117 (CA) at 137.

with the (comparatively more detailed) manner in which Judge Hacon in the Intellectual Property Enterprise Court in England had examined the confidentiality of the claimant's "Client Information" in *Trailfinders Ltd v Travel Counsellors Ltd*.<sup>128</sup> In the recent English decision, while it was accepted that client information "is highly characteristic of information long regarded by the courts as capable of being confidential",<sup>129</sup> Judge Hacon nevertheless undertook to examine how the claimant had stored the allegedly confidential client information in its IT system (to which it was found that only the claimant's employees had access with individualised IDs and passwords assigned to them).<sup>130</sup> In reaching the decision that the claimant's client information was confidential and fell within Gouling J's "class 2" category of confidential information, Judge Hacon was notably mindful that the claimant "clearly took steps to ensure that the Client Information was *not openly available to anyone* by requiring the use of a password" [emphasis added].<sup>131</sup> With respect, it would have been preferable for Abdullah J to have also engaged in similar discourse before reaching the conclusion that he did in relation to the confidentiality of the plaintiff's "client materials" in *I-Admin*.

42 Given that the principles of law propounded in *Faccenda Chicken* were intended to prevent the post-termination freedoms of employees from being unreasonably curtailed, the authors respectfully submit – in the name of the public interest – that a meticulous examination of *all* the particularised information alleged by the plaintiff to be confidential *cannot* be dispensed with, particularly on facts such as those in *I-Admin*.<sup>132</sup> It is in this context that the authors respectfully agree with the following

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128 [2020] EWHC 591 (IPEC). See, in particular, *Trailfinders Ltd v Travel Counsellors Ltd* [2020] EWHC 591 (IPEC) at [67]–[74]. Notably, Judge Hacon's judgment as to liability was very recently upheld on appeal: see *Travel Counsellors Ltd v Trailfinders Ltd* [2021] EWCA Civ 38.

129 *Trailfinders Ltd v Travel Counsellors Ltd* [2020] EWHC 591 (IPEC) at [69].

130 See *Trailfinders Ltd v Travel Counsellors Ltd* [2020] EWHC 591 (IPEC) at [70].

131 *Trailfinders Ltd v Travel Counsellors Ltd* [2020] EWHC 591 (IPEC) at [73] (and see also [72]). It should be noted that when this case went on appeal, there was no challenge to Judge Hacon's conclusion on the confidentiality of the claimant's client information: see *Travel Counsellors Ltd v Trailfinders Ltd* [2021] EWCA Civ 38 at [13].

132 See also Tanya Aplin *et al*, *Gurry on Breach of Confidence: The Protection of Confidential Information* (Oxford University Press, 2nd Ed, 2012) at para 12.178, where the learned authors recognise that although the application of the principles and factors in *Faccenda Chicken Ltd v Fowler* [1987] Ch 117 "is not without its difficulties in practice, ... there is much to be said for the decision". Also, it is emphasised therein that "we strongly approve of the general tenor of the Court of Appeal's intervention in *Faccenda Chicken*".

perspective elucidated in *Gurry on Breach of Confidence*, which, rather fittingly, also brings the first segment of this article to a close:<sup>133</sup>

[W]e are *unhappy* with any attempts to water the *Faccenda* test down in a way that implies that mere confidential information (whether or not properly categorized as ‘skill and knowledge’) is protected by way of the implied term, or that *the key question is one of ‘honesty’*. [emphasis added]

### III. Understanding confidentiality in compilations of data

43 Separately, the *I-Admin* decision also raised another interesting issue in the law of confidence which does not appear to have attracted much attention. On the facts, the file “payitem setup\_iAdmin.xls” (“the Excel file”) – which Hong (the first defendant) had downloaded from the plaintiff’s Demonstration Platform and stored on his Thinkpad – was alleged to contain, along with other files, the plaintiff’s payitems database.<sup>134</sup> The defendants, on the other hand, argued that the Excel file (which contained “information regarding payitems and their natures”) was public data and not confidential.<sup>135</sup> In the High Court, Abdullah J agreed with the defendants that the Excel file did not technically amount to “databases and other infrastructure materials” as it was not shown that the file was part of the plaintiff’s source code or database architecture. Instead, the relevant Excel files were treated as *compilations of data* or representations of the data in the database tables within the software.<sup>136</sup> In any event, Abdullah J concluded thus:<sup>137</sup>

Even if the payitems and their nature were public information, the file ‘payitem setup\_iAdmin.xls’ was original in so far as its contents were arranged and compiled in an original manner. To this extent, the file was confidential in nature.

44 This finding was not disturbed nor further considered by the Court of Appeal.<sup>138</sup> Further, apart from the Excel file, reference was also made in numerous other parts of the High Court judgment to subject matter such as “database structures” and “database tables”, the latter of which was found by Abdullah J to constitute “*compilations of facts*” under s 7A(1)(a)

133 Tanya Aplin *et al*, *Gurry on Breach of Confidence: The Protection of Confidential Information* (Oxford University Press, 2nd Ed, 2012) at para 12.178; *cf I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 1 SLR 1130 at [55], [64] and [71].

134 See *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 3 SLR 615 at [62].

135 *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 3 SLR 615 at [132].

136 See *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 3 SLR 615 at [65].

137 *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 3 SLR 615 at [133].

138 See *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 1 SLR 1130 at [65].



of the Copyright Act” [emphasis added].<sup>139</sup> Against this backdrop, the article will now examine whether (and to what extent) compilations of facts, data or information belonging to an employer – such as the plaintiff in *I-Admin* – which essentially comprise public domain information may nevertheless be the subject of obligations of confidence.

45 This particular issue may be of a wider importance because many employers are likely to possess confidential information in the form of compilations (or databases). Some examples of compilations might include compilations of client, sales and/or pricing information,<sup>140</sup> compilations of ideas/features for a television music talent show,<sup>141</sup> or (as in the *I-Admin* decision) compilations of public domain information such as payitems and their natures.<sup>142</sup>

46 This segment of the article will begin by examining the approaches/standards traditionally adopted in the case law for establishing the confidentiality of information in general, before a closer and more careful assessment is made of the desirability of adopting them for compilations of data. In particular, the focus of discussion will be on the confidentiality of compilations which comprise largely (or even wholly) of public domain information. It is respectfully submitted that especial care must be exercised when the subject of the confidentiality inquiry concerns compilations, because the law must not inadvertently extend its protection to the underlying public domain information to which confidentiality obviously cannot attach.<sup>143</sup> However, it is also recognised that the compilation *as a whole* may be deemed confidential even though its constituent parts are in the public domain because the subject matter of confidentiality (“the end result”) may well be more

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139 *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 3 SLR 615 at [71]. On the other hand, according to the Court of Appeal, a “database structure” refers to “the manner in which content in a database table is organised”: *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 1 SLR 1130 at [16].

140 See *Faccenda Chicken Ltd v Fowler* [1985] 1 All ER 724 at 727; *Robb v Green* [1895] 2 QB 1 at 18–19; and *BAFCO Singapore Pte Ltd v Lee Tze Seng* [2020] SGHC 281 at [18]–[19].

141 See *Wade v British Sky Broadcasting Ltd* [2014] EWHC 634 (Ch) at [76]–[81].

142 See *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 3 SLR 615 at [71], [119] (“payitems were common knowledge in the payitem industry”) and [132]–[133].

143 See *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* (1948) 65 RPC 203 at 215, where Lord Greene MR laid down the proposition that confidential information is information which is not “public property and public knowledge”.

than simply the sum of its parts.<sup>144</sup> As Megarry J famously said in *Coco v A N Clark (Engineers) Ltd*<sup>145</sup> (“Coco”):<sup>146</sup>

Novelty depends on the thing itself, and not upon the quality of its constituent parts. Indeed, often the more striking the novelty, the more commonplace its components.

### A. *The “product of the brain” (test?)*

47 According to conventional wisdom, the *inaccessibility* of the information in question remains a “particular touchstone” in the law of confidence.<sup>147</sup> In other words, a piece of information may be regarded as confidential so long as it remains relatively secret or inaccessible to the public, as compared to information already in the public domain.<sup>148</sup> The question of confidentiality is ultimately “one of fact and degree”.<sup>149</sup> Nevertheless, one particular “test” has often been employed by the courts to determine whether the information concerned possesses the necessary quality of confidence – namely, the “product of the brain” test.<sup>150</sup> This test was famously expounded in *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd*<sup>151</sup> (“Saltman”), where Lord Greene MR observed that:<sup>152</sup>

[I]t is perfectly possible to have a confidential document, be it a formula, a plan, a sketch, or something of that kind, which is the result of work done by the maker on materials which may be available for the use of anybody; but what makes it confidential is the fact that the maker of the document has *used his brain* and thus *produced a result* which can only be produced by somebody who goes through the same process. [emphasis added]

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144 See *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41 at 47; *Wade v British Sky Broadcasting Ltd* [2014] EWHC 634 (Ch) at [62], [81] and [122]; *Wade v British Sky Broadcasting Ltd* [2016] EWCA Civ 1214 at [5] and [46]–[47]; *Invenpro (M) Sdn Bhd v JCS Automation Pte Ltd* [2014] 2 SLR 1045 at [130(e)]; and *Tempcool Engineering (S) Pte Ltd v Chong Vincent* [2015] SGHC 100 at [22]. See also *The Racing Partnership Ltd v Sports Information Services Ltd* [2020] EWCA Civ 1300 (especially at [75]–[77], [188]–[189] and [204]).

145 [1969] RPC 41.

146 *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41 at 47.

147 *Cray Valley Ltd v Deltech Europe Ltd* [2003] EWHC 728 (Ch) at [52]. See also *The Racing Partnership Ltd v Sports Information Services Ltd* [2020] EWCA Civ 1300 at [48] and [67].

148 See *Invenpro (M) Sdn Bhd v JCS Automation Pte Ltd* [2014] 2 SLR 1045 at [130(a)].

149 *Invenpro (M) Sdn Bhd v JCS Automation Pte Ltd* [2014] 2 SLR 1045 at [130(a)].

150 Tanya Aplin *et al*, *Gurry on Breach of Confidence: The Protection of Confidential Information* (Oxford University Press, 2nd Ed, 2012) at para 5.15.

151 (1948) 65 RPC 203.

152 *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* (1948) 65 RPC 203 at 215.

48 While other cases have interpreted this test with some variance,<sup>153</sup> the underlying idea is that the information alleged to be confidential must have been the product of some degree of intellectual skill and effort/labour.<sup>154</sup> It appears that this test may also be applied to bodies of information (for example, compilations) which comprise elements already in the public domain to determine if the information assembled/embodied in the compilation may, as a whole (that is, as a discrete entity), possess the necessary quality of confidence.<sup>155</sup>

49 Given the imprecision in judicial language that surrounds this test, a careful analysis is called for. Words/concepts such as “originality”<sup>156</sup> and “novelty”<sup>157</sup> abound in the case law on confidence. However, their use and relevance might cause some confusion, given that these very words/concepts embrace specific meanings in other branches of intellectual property.<sup>158</sup> This therefore raises several questions. Should the “product of the brain” test be applied in a manner akin to how these distinct legal concepts are employed in their respective regimes, or does it look to a different threshold altogether? Also, how does this test relate to the “particular touchstone” of *inaccessibility*?<sup>159</sup>

50 Academic commentators have sought to provide some answers. The learned authors of *Gurry on Breach of Confidence*, referring to

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153 See, eg, *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41 at 47 (“originality or novelty or ingenuity or otherwise”; “some product of the human brain”); *Fraser v Thames Television Ltd* [1984] QB 44 at 66 (“originality”; “ingenuity”); *De Maudsley v Palumbo* [1996] FSR 447 at 455 and 458 (“original”); *Exchange Telegraph Co Ltd v Central News Ltd* [1897] 2 Ch 48 at 53 (“expenditure of labour”); and *Littlewoods Organisation Ltd v Harris* [1978] 1 All ER 1026 at 1034 (“acquired at great expense and by great expertise”).

154 See *Invenpro (M) Sdn Bhd v JCS Automation Pte Ltd* [2014] 2 SLR 1045 at [130(c)] and *BAFCO Singapore Pte Ltd v Lee Tze Seng* [2020] SGHC 281 at [18] (where the customer information in question was “discovered and collated through the plaintiff’s own efforts” and “painstakingly gathered by the plaintiff”).

155 See *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41 at 47. See also *Invenpro (M) Sdn Bhd v JCS Automation Pte Ltd* [2014] 2 SLR 1045 at [164]: “It is well established that confidentiality may reside in the way in which individual elements combine together so as to ‘create’ something which (as a whole) is new (and in some cases, inventive).”

156 See *Fraser v Thames Television Ltd* [1984] QB 44 at 66 and *De Maudsley v Palumbo* [1996] FSR 447 at 455 and 458–459.

157 See *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41 at 47 (“[b]ut whether it is described as originality or novelty or ingenuity or otherwise, I think there must be some product of the human brain which suffices to confer a confidential nature upon the information”).

158 See, eg, s 14 of the Patents Act (Cap 221, 2005 Rev Ed); ss 26 and 27 of the Copyright Act (Cap 63, 2006 Rev Ed); *University of London Press Ltd v University Tutorial Press Ltd* [1916] 2 Ch 601 at 608–609; and *Global Yellow Pages Ltd v Promedia Directories Pte Ltd* [2017] 2 SLR 185 at [15].

159 *Cray Valley Ltd v Deltech Europe Ltd* [2003] EWHC 728 (Ch) at [52].

Megarry J's "product of the brain" *dicta* (which contained such words as new, novelty, originality and ingenuity) in *Coco*,<sup>160</sup> suggested that what was intended was a concept "closer to originality (in the copyright sense)", rather than the requirement of novelty in patent law.<sup>161</sup> They argued, *inter alia*, that the language used by Lord Greene MR in *Saltman* (a case cited with approval by Megarry J in *Coco*)<sup>162</sup> – namely, "the maker of the document has used his brain"<sup>163</sup> – suggested "an application of intellectual skill and labour", which again points to the concept of originality in copyright law.<sup>164</sup>

51 The rejection of the novelty standard in patent law as the pertinent threshold for confidentiality was also underscored by Gareth Jones, who was of the view that "[t]he element of novelty is ... only relevant as a *factor* which may persuade a court that some particular information was *not known to the public*" [emphasis added].<sup>165</sup> Jones' observation, to the present authors, is a salutary reminder that the singular requirement which the law of confidence demands is that the information in question must not be public/common knowledge. This harks back nicely to the fundamental principle of *inaccessibility* which the law has long regarded as the "touchstone" of confidentiality.

52 Having considered the academic commentary, the authors make two observations. First, it is agreed that the requirement of novelty was not what the courts had in mind when applying the "product of the brain" test. Apart from the reasons already canvassed, the exacting standard imposed by the patent law concept makes for an unsuitable test for confidentiality. It is well known what "novelty" means in the law of patents – the invention in question must not "form part of the state of the art", which in turn is taken to comprise all matter which has been made available to the public (in Singapore or elsewhere) as at the priority date of the invention.<sup>166</sup> In

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160 See *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41 at 47.

161 Tanya Aplin *et al*, *Gurry on Breach of Confidence: The Protection of Confidential Information* (Oxford University Press, 2nd Ed, 2012) at para 5.46.

162 See *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41 at 47.

163 *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* (1948) 65 RPC 203 at 215.

164 Tanya Aplin *et al*, *Gurry on Breach of Confidence: The Protection of Confidential Information* (Oxford University Press, 2nd Ed, 2012) at para 5.47.

165 Gareth Jones, "Restitution of Benefits Obtained in Breach of Another's Confidence" (1970) 86 LQR 463 at 470 (and see also p 471: "the introduction of novelty and concreteness as specific requirements should be resisted, for their adoption will introduce into the law the alien and more stringent requirements of patent law"). See further the discussion in Lionel Bently *et al*, *Intellectual Property Law* (Oxford University Press, 5th Ed, 2018) at pp 1233–1234.

166 See generally s 14 of the Patents Act (Cap 221, 2005 Rev Ed), but note also the exceptions contained in s 14(4).

*Windsurfing International Inc v Tabur Marine (Great Britain) Ltd*,<sup>167</sup> the English Court of Appeal decided that a surfboard which a 12-year-old boy (Peter Chilvers) had built and used off the coast of Hayling Island<sup>168</sup> on weekends over two summer seasons did anticipate the plaintiff's far more sophisticated invention.<sup>169</sup> Notwithstanding that this "limited and fairly distant [prior] use" by Chilvers had occurred some ten years before the priority date of the plaintiff's invention, it was nevertheless sufficient to defeat the novelty of the said invention and render the plaintiff's patent invalid.<sup>170</sup> Parenthetically, it has also been observed in the law of copyright that even "an esoteric book in a musty library with tedious membership requirements and strict loan policies" would constitute matter made available to "the public".<sup>171</sup> Such perspectives and outcomes, however, do not sit well with the conventional understanding of confidentiality, which is not concerned with absolute novelty/secretcy but with *relative* secrecy/inaccessibility.<sup>172</sup> The confidential nature of a piece of information is not necessarily destroyed by "adventitious publicity"<sup>173</sup> or just because "there are other people in the world who know the facts in question",<sup>174</sup> as long as relative secrecy/inaccessibility is established. Accordingly, the authors submit that the "product of the brain" test does not – and indeed should not – reflect or incorporate the concept of novelty in patent law.<sup>175</sup> To reiterate Jones' observation, it is at most "only relevant as a *factor* which

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167 [1985] RPC 59.

168 For further information on Hayling Island, see Wikipedia, "Hayling Island" <[https://en.wikipedia.org/wiki/Hayling\\_Island](https://en.wikipedia.org/wiki/Hayling_Island)> and Visit Hampshire, "Hayling Island" <<https://www.visit-hampshire.co.uk/explore/towns/hayling-island>> (accessed 15 January 2021).

169 See *Windsurfing International Inc v Tabur Marine (Great Britain) Ltd* [1985] RPC 59 at 75.

170 *Windsurfing International Inc v Tabur Marine (Great Britain) Ltd* [1985] RPC 59 at 76.

171 *RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2010] 2 SLR 152 at [77].

172 See *Invenpro (M) Sdn Bhd v JCS Automation Pte Ltd* [2014] 2 SLR 1045 at [130(a)] (and see also [130(c)]: "[i]nformation does not have to be inventive to possess the necessary quality of confidence").

173 *Schering Chemicals Ltd v Falkman Ltd* [1982] QB 1 at 28.

174 *Franchi v Franchi* [1967] RPC 149 at 152–153. See also *CF Partners (UK) LLP v Barclays Bank plc* [2014] EWHC 3049 (Ch) at [124]: "It is not necessary for a claimant to show that no one else knew of or had access to the information" for it to be treated as confidential.

175 See also Tanya Aplin *et al*, *Gurry on Breach of Confidence: The Protection of Confidential Information* (Oxford University Press, 2nd Ed, 2012) at para 5.50 for further reasons as to why it is inappropriate to impose patent law's novelty and non-obviousness requirements for the protection of confidential information. See further *Tempcool Engineering (S) Pte Ltd v Chong Vincent* [2015] SGHC 100 at [18] ("there is no necessity for confidential information to be patentable or inventive to have a quality of confidentiality").

may persuade a court that some particular information was not known to the public” [emphasis added].<sup>176</sup>

53 On the other hand, the authors acknowledge that the concept of originality in copyright law might have some tangential relevance in so far as it may reflect the overall inaccessibility of a piece of information. It is trite that “originality” is closely allied to the copyright notion of “authorship”<sup>177</sup> – that is, an original work need not be “the expression of original or inventive thought”, as long as it has not been copied from another work.<sup>178</sup> One might therefore make the argument that the work in question, having been derived independently from the “intellectual skill and labour” of the author, is likely to contain (at least some) ideas or pieces of information that are not generally accessible to the public, particularly at the point in time of the work’s genesis.

54 Notwithstanding the force of this argument, it is preferable, in the authors’ view, that the doctrinal distinctions between “originality” and “confidentiality” be kept firmly in mind. One important difference is that information conveyed through an original work will lose its confidential character once the work enters the public domain (for example, upon its publication). Nevertheless, the work remains original in the copyright sense. This is simply because the copyright notion of originality is only concerned with the facts and evidence surrounding the work at the time of its creation. By contrast, the confidentiality (or overall inaccessibility) of a copyrighted work is fluid in nature – it must necessarily take into account circumstances and developments following the conception of the work in question.

55 Another pertinent difference is that whereas, as aforementioned, “originality” in copyright is tied to the “authorship” of a work, “confidentiality” is rather more concerned with the *substance* of the *information* or *ideas* inherent/embodied in the work (which must be generally inaccessible to the public). In other words, the *legal conception* of “originality” should rightly be confined to the copyright context and limited in its application to *forms of expression* of information only – that is, it is the *expression* of thought that must be “original”. It is doctrinally

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176 Gareth Jones, “Restitution of Benefits Obtained in Breach of Another’s Confidence” (1970) 86 LQR 463 at 470. In other words, if a piece of information is deemed “novel” in the patent law sense, it ought to follow, as a matter of course, that the information in question is also confidential in nature (assuming, of course, that s 14(4) of the Patents Act (Cap 221, 2005 Rev Ed) does not apply).

177 See *Asia Pacific Publishing Pte Ltd v Pioneer & Leaders (Publishers) Pte Ltd* [2011] 4 SLR 381 at [40].

178 *University of London Press Ltd v University Tutorial Press Ltd* [1916] 2 Ch 601 at 608–609.

incoherent, in light of the idea-expression dichotomy, to insist upon the originality/novelty of ideas or underlying pieces of information for the purposes of the copyrightability inquiry. However, in the realm of confidentiality, it makes eminent sense to identify and underscore the “originality” (or “newness” in *common parlance*) in thought/ideas that conduces to the overall “inaccessibility” of the information in question. This is also clearly in line with Hirst J’s perceptive observation in *Fraser v Thames Television Ltd*<sup>179</sup> – that “[u]nquestionably, of course, the *idea* must have some significant element of **originality** *not already in the realm of public knowledge*” [emphasis in italics and bold italics added].<sup>180</sup>

56 To illustrate the point that a work (specifically, a compilation of horse-racing data) may well qualify as an “original” work in the copyright sense (because it was the “product of the brain”) but where the information embodied in the work concerned may not possess the necessary quality of confidence, consider the facts and decision of the Court of Appeal in *Asia Pacific Publishing Pte Ltd v Pioneer & Leaders (Publishers) Pte Ltd*.<sup>181</sup> Here, the apex court reached the conclusion that no copyright subsisted in the respondent’s compilation of horse-racing information contained in its horse-racing magazine (*Punters’ Way*) because it could not be considered an “original” work (“without the identification of a human author from whom the work originates”).<sup>182</sup> However, had the respondent’s case been pleaded differently, the court was prepared to accept, in *obiter*, that there was sufficient originality in the selection, arrangement and presentation of horse-racing information in the tables of the respondent’s magazine to attract copyright protection (that is, as a product of *intellectual creation*).<sup>183</sup> Yet, from the authors’ reading of the judgment, it appears that the Court of Appeal would have found the horse-racing *information/data* compiled in (and conveyed through) a set of four tables in *Punters’ Way* – as a whole – to *not* possess the necessary quality of confidentiality, because the underlying (raw) material/data as

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179 [1984] QB 44.

180 *Fraser v Thames Television Ltd* [1984] QB 44 at 66.

181 [2011] 4 SLR 381.

182 *Asia Pacific Publishing Pte Ltd v Pioneer & Leaders (Publishers) Pte Ltd* [2011] 4 SLR 381 at [82] (and see also [95]). See further [72], where the Court of Appeal categorically pronounced that “an ‘author’ must be a natural person in copyright law” and cannot refer to “corporate entities”.

183 See *Asia Pacific Publishing Pte Ltd v Pioneer & Leaders (Publishers) Pte Ltd* [2011] 4 SLR 381 at [96] and [103]–[105]. See also *Global Yellow Pages Ltd v Promedia Directories Pte Ltd* [2017] 2 SLR 185 at [23]–[24] and s 7A(2)(a) of the Copyright Act (Cap 63, 2006 Rev Ed) (which states that any copyright subsisting in a compilation “is limited to the selection or arrangement of its contents which constitutes an intellectual creation”).

well as the magazine itself were “easily accessible to all”.<sup>184</sup> In any event, it was also common ground that “the information in the [respondent’s] Tables [was] freely available in the public domain”.<sup>185</sup>

57 Given the foregoing arguments, it is posited that despite the purported utility of the originality and novelty concepts in signifying the potential inaccessibility of information in certain instances, the “product of the brain” test in the law of confidence should *not* be interpreted and applied in a manner akin to the concept of originality in copyright law *nor* the requirement of novelty in patent law. Perhaps, for the sake of conceptual clarity as well as to avoid unnecessary confusion, it may be best to eschew the language of “originality” and “novelty” as far as possible where the law of confidence is concerned. Instead, the “product of the brain” test is probably best understood in this context: any idea, thought or piece of information that is the product of a *greater* degree of intellectual effort, skill and/or creativity is simply *more likely* – as a matter of probability – to be generally *inaccessible* to the public (in common parlance, because of its “newness”), and hence confidential in nature. As Jones yet again usefully illustrates:<sup>186</sup>

The engineer who develops a novel refinement to a moped may establish the secrecy of his invention by proving that the adaptation was not known to other engineers. In contrast, the banal sloganist may not be able to show that many other ad-men had not already thought, quite independently, of his idea.

58 It must ultimately be a question of degree, but the interpretation elucidated in the paragraph above is arguably in keeping with Megarry J’s observation that “there must be some product of the human brain *which suffices to confer a confidential nature upon the information*” [emphasis added].<sup>187</sup> Notably, however, the mere expenditure of time, effort, labour and/or capital *per se* ought to be insufficient to confer confidentiality.<sup>188</sup>

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184 *Asia Pacific Publishing Pte Ltd v Pioneer & Leaders (Publishers) Pte Ltd* [2011] 4 SLR 381 at [104]. The horse-racing information contained in the respondent’s magazine was arranged in a set of four tables and according to a particular sequence: see [6]. *Cf* also *The Racing Partnership Ltd v Sports Information Services Ltd* [2020] EWCA Civ 1300 (especially at [75]–[77]).

185 *Asia Pacific Publishing Pte Ltd v Pioneer & Leaders (Publishers) Pte Ltd* [2011] 4 SLR 381 at [97].

186 Gareth Jones, “Restitution of Benefits Obtained in Breach of Another’s Confidence” (1970) 86 LQR 463 at 470. See also *Wade v British Sky Broadcasting Ltd* [2014] EWHC 634 (Ch) at [56].

187 *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41 at 47.

188 With respect, the authors do not share in the views expressed by Gouling J in *International Scientific Communications Inc v Pattison* [1979] FSR 429 at 434: “In my judgment the lists with which I am concerned embodied *enough labour* of composition, experience of the trade, and practical utility, to fall into the class of confidential trade information” [emphasis added]. It is submitted that  
(*cont’d on the next page*)



59 In light of all these considerations, the authors submit that the “product of the brain” “test” should, at most, only be employed as a *factor* which may well persuade a court that the information in question was not generally accessible to the public. Ideally, it should be further *supplemented* by affirmative evidence demonstrating the overall *inaccessibility* of the information concerned.<sup>189</sup> The following *dicta* extracted from a sample of the case law are in support of this view:

(a) “Something that has been constructed solely from materials in the public domain may possess the necessary quality of confidentiality: for something *new and confidential* may have been brought into being by the application of the *skill and ingenuity of the human brain*. Novelty depends on the thing itself, and not upon the quality of its constituent parts. ... But whether it is described as originality or novelty or ingenuity or otherwise, I think there must be some *product of the human brain which suffices to confer a confidential nature upon the information*.”<sup>190</sup> [emphasis added]

(b) “Unquestionably, of course, the idea must have some significant element of *originality not already in the realm of public knowledge*. The originality may consist in a significant twist or slant to a well known concept (*Talbot’s case*). This is, I think, by analogy, consistent with the statements in *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd*, 65 RPC 203 and *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41, that novelty in the industrial field can be derived from the application of *human ingenuity* to well known concepts.”<sup>191</sup> [emphasis added]

(c) “I am satisfied that what was called the ‘commercial twist’, or the particular slant, of the plaintiff’s concept (or idea)

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beyond the mere expenditure of time, effort and labour, the ultimate touchstone for confidentiality, in the final analysis, must be the general *inaccessibility* of the resulting information. See also Tanya Aplin *et al*, *Gurry on Breach of Confidence: The Protection of Confidential Information* (Oxford University Press, 2nd Ed, 2012) at para 5.20.

189 See *Invenpro (M) Sdn Bhd v JCS Automation Pte Ltd* [2014] 2 SLR 1045 at [130(e)]: [T]he fact that the individual features or elements are already known does not mean that the end result does not possess the necessary quality of confidence. It may be a case where the end result is more than just the sum of the parts. Nevertheless, in these instances, the plea that the individual elements have been combined together in a way so as to produce something which is new in itself, is a plea that requires *careful analysis* and must be *supported by the evidence*. [emphasis added]

190 *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41 at 47.

191 *Fraser v Thames Television Ltd* [1984] QB 44 at 66.

does give it a quality which takes it *out of the realm of public knowledge*.<sup>192</sup> [emphasis added]

(d) “A great deal of effort and investment of capital were expended by the Pharand group to *originate* the idea and then prove it up as required by the second proposals call. These *factors*, coupled with the *ingenuity*, insight and innovativeness of the idea, prove the *quality of confidence*.”<sup>193</sup> [emphasis added]

60 In short, such judicial observations amply demonstrate that the *touchstone* for confidentiality must, in the final analysis, be that of *inaccessibility*.<sup>194</sup> While evidence of the “product of the brain” may, in many cases, offer a convenient heuristic pointing towards a finding of confidentiality, the authors are of the view that it is far more accurate and desirable to refer to this particular indicator as the “product of the brain” *factor*, rather than as a “test” for confidentiality. This will perhaps allow for greater precision in a court’s reasoning on the confidentiality (or otherwise) of the particularised information, and aid in our understanding of the extent to which this particular *factor* has added to the overall evidence and analysis.

## B. *Assessing the confidentiality of compilations and a return to I-Admin*

61 The authors will now consider if the “product of the brain” factor remains helpful in the assessment of confidentiality for compilations of data. It is observed at the outset that this factor (in its myriad formulations) was employed by the courts as a generic indicator suggestive of the *inaccessibility*, and hence confidentiality, of the information in question. Many cases which have applied this factor were not specifically concerned with compilations, much less compilations comprising – in whole

192 *Talbot v General Television Corp Pty Ltd* [1981] RPC 1 at 9.

193 *Pharand Ski Corp v Alberta* [1991] 80 Alta LR (2d) 216 at [147].

194 See *The Racing Partnership Ltd v Sports Information Services Ltd* [2020] EWCA Civ 1300 at [48] and [67] and *WRN Ltd v Ayris* [2008] EWHC 1080 (QB) at [81]–[86]. See also Tanya Aplin *et al*, *Gurry on Breach of Confidence: The Protection of Confidential Information* (Oxford University Press, 2nd Ed, 2012) at para 14.30:

The *prime determinant* of confidentiality is the *inaccessibility* of the information to the public. This *inaccessibility* is identified by reference to the process of mind which produced the information and, if the information can only be reproduced by someone who goes through the same process, it will be confidential. What the courts are protecting, therefore, is essentially *an original process of mind which produces inaccessible information*, and the protection operates against anyone who, by taking unfair advantage of the information which has been disclosed to him, saves himself the time, trouble, and expense of going through the same process. [emphasis added]

or large part – information already available in the public domain.<sup>195</sup> Nevertheless, whenever the courts are faced with issues concerning the confidentiality of technical processes, inventions and compilations comprising information in the public domain, *etc*, the “product of the brain” factor continues to be highly valued.<sup>196</sup>

62 In this regard, the authors cite three cases to illustrate how the courts have assessed the confidentiality of compilations comprising public domain information. First, in *Ocular Sciences Ltd v Aspect Vision Care Ltd*<sup>197</sup> (“*Ocular Sciences*”), Laddie J was of the view that the plaintiffs’ Lens Design Booklet – which was essentially a compendium containing the detailed dimensions for all lenses manufactured by the first plaintiff (in essence, contact lens design information) – constituted a mere “mechanical collection” of data in the public domain and was therefore not a “product of the skill of the human brain”.<sup>198</sup> The dimensions of the individual lenses were, in any event, “easily measurable from the commercially available products”.<sup>199</sup> Further, it was observed in *obiter* that:<sup>200</sup>

A mere *non-selective* list of publicly available information should *not* be treated as confidential even if *putting it together involves some time and effort*. No relevant skill is employed. Were this not the case, it would be possible for individual competitors to copy or make use of the individual items of information but they could not get together to make use of all or most of them. [emphasis added]

63 Laddie J would therefore have ruled that there was no confidentiality in the Lens Design Booklet but for the fact that the parties were prepared to accept that confidentiality subsisted therein.<sup>201</sup> Crucially, the judge maintained that “valuable and novel ideas” – well capable of being the subject of obligations of confidence – “may be produced by the *judicious selection and combination* of a number of items which, *separately*, are in the public domain” [emphasis added].<sup>202</sup>

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195 See, eg, *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* (1948) 65 RPC 203; *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41; and *Exchange Telegraph Co Ltd v Central News Ltd* [1897] 2 Ch 48.

196 See, eg, *Ocular Sciences Ltd v Aspect Vision Care Ltd* [1997] RPC 289 at 374–375; *Littlewoods Organisation Ltd v Harris* [1978] 1 All ER 1026 at 1034; and *Under Water Welders & Repairers Ltd v Street* [1967] FSR 194 at 202–203.

197 [1997] RPC 289.

198 *Ocular Sciences Ltd v Aspect Vision Care Ltd* [1997] RPC 289 at 374–375.

199 *Ocular Sciences Ltd v Aspect Vision Care Ltd* [1997] RPC 289 at 373.

200 *Ocular Sciences Ltd v Aspect Vision Care Ltd* [1997] RPC 289 at 375. Cf also *WRN Ltd v Ayris* [2008] EWHC 1080 (QB) at [81]–[86].

201 See *Ocular Sciences Ltd v Aspect Vision Care Ltd* [1997] RPC 289 at 375.

202 *Ocular Sciences Ltd v Aspect Vision Care Ltd* [1997] RPC 289 at 375.

64 Second, in *Robb v Green*<sup>203</sup> (a case that concerned the employee's duty of good faith and fidelity), the defendant had copied a list of names and addresses of his former employer's customers before his service was terminated.<sup>204</sup> Although this compilation contained names and addresses which may have been available individually in public/trade directories, Hawkins J at first instance would likely have decided that the compilation as a whole was confidential in nature as it required the necessary "expense and delay of searches" for its creation.<sup>205</sup> It may well be that this compilation of names and addresses did not appear to require the "relevant skill" identified by Laddie J in *Ocular Sciences*.<sup>206</sup> However, neither was it a purely mechanistic compilation of publicly available data. Instead, the resulting compilation revealed – as a one-stop resource – *additional* (and otherwise *unavailable*) information regarding the *precise* names and addresses of the employer's customers for pheasants' eggs. As Hawkins J said:<sup>207</sup>

The order-book contains collected together the names and addresses of purchasers of pheasants' eggs spread over the length and breadth of England, Wales, and Scotland. *No directory would give this information in this collocation ...* Practically, to bring all those names together, even though singly each may appear in some directory or other, would be *almost impossible ...* [emphasis added]

65 Finally, in *WRN Ltd v Ayriss*,<sup>208</sup> the defendant took a Rolodex (a rotating index on a stand) containing business cards when he left the plaintiff's employ. These business cards contained information of persons who were representatives of customers of, or suppliers to, the plaintiff.<sup>209</sup> The defendant also retained several e-mail addresses which he had copied

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203 [1895] 2 QB 1.

204 See *Robb v Green* [1895] 2 QB 1 at 5. See also *Roger Bullivant Ltd v Ellis* [1987] FSR 172.

205 *Robb v Green* [1895] 2 QB 1 at 19, wherein Hawkins J also said that "[b]y making a copy of the order-book [the] defendant was able to canvass at once each of his master's customers without trouble or expense". See also *CF Partners (UK) LLP v Barclays Bank plc* [2014] EWHC 3049 (Ch) at [125]: "A special collation and presentation of information, the individual components of which are not of themselves or individually confidential, may have the quality of confidence: for example, a customer list may be composed of particular names all of which are publicly available, but the list will nevertheless be confidential."

206 *Ocular Sciences Ltd v Aspect Vision Care Ltd* [1997] RPC 289 at 375.

207 *Robb v Green* [1895] 2 QB 1 at 18–19. Similarly, the defendant ex-employee had taken away a card index which contained a "ready and finite compilation of the names and addresses of those who had brought or might bring business to the plaintiffs and who might bring business to [the defendant]" [emphasis added]: see *Roger Bullivant Ltd v Ellis* [1987] FSR 172 at 181. But *contra Také Ltd v BSM Marketing Ltd* [2006] EWHC 1085 (QB) at [225].

208 [2008] EWHC 1080 (QB).

209 See *WRN Ltd v Ayriss* [2008] EWHC 1080 (QB) at [33].

from his work e-mail address book to his home e-mail address book.<sup>210</sup> The English High Court held that much of the information contained in the defendant's collection of business cards and addresses was not confidential or treated by the plaintiff as confidential, "because the information had been made available to the public by [the plaintiff] itself by putting it on its own website".<sup>211</sup> The court observed that the highest which the plaintiff could have put its case was that the individual cards and addresses had also revealed the names of specific individuals (contact persons) at the customer/supplier concerned which could not have been ascertained from the plaintiff's website directly.<sup>212</sup> However, given that the names of these individuals were readily identifiable from public domain sources on the Internet without significant expenditure of labour, skill or money,<sup>213</sup> the judge found, in *obiter*, that the information contained in the business cards and addresses was not confidential in nature.<sup>214</sup> What this case usefully illustrates is that "the widespread availability of supplier and customer data on the Internet will make it increasingly difficult to establish that lists [or compilations of such information] are confidential merely because their collation would take some time and effort".<sup>215</sup>

66 Given the above case analyses, it appears that the courts have generally applied the "product of the brain" factor to assessing the confidentiality of compilations comprising public domain information in a manner consistent with the thesis of this article. In other words, the fact that a compilation is a "product of the brain" suggests, *prima facie*, that the compiler has applied some degree of intellectual effort, skill and/or creativity, which may, in turn, be indicative of assembled information that is generally inaccessible to the public. Crucially, however, in so far as confidentiality is concerned, much depends on whether the "end result"<sup>216</sup> – in *substance* and regardless of how the public domain information had been collated and presented (that is, laboriously or otherwise) – has added a *new/unique dimension* or any *new insight* to the underlying information that is not already in the realm of public knowledge. This explains why, as Laddie J correctly pointed out, "[a] mere

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210 See *WRN Ltd v Ayris* [2008] EWHC 1080 (QB) at [35].

211 *WRN Ltd v Ayris* [2008] EWHC 1080 (QB) at [81]. See also [82]: "it was manifest from the Website that not only did [the plaintiff] not regard the identities of its ... customers as confidential, it actively collected their names together and publicised them".

212 See *WRN Ltd v Ayris* [2008] EWHC 1080 (QB) at [85].

213 Indeed, it transpired that all the names could have been retrieved within 3½ hours, perhaps suggesting that the disputed information was not quite a "product of the brain".

214 See *WRN Ltd v Ayris* [2008] EWHC 1080 (QB) at [86].

215 Tanya Aplin *et al*, *Gurry on Breach of Confidence: The Protection of Confidential Information* (Oxford University Press, 2nd Ed, 2012) at para 11.50.

216 *Invenpro (M) Sdn Bhd v JCS Automation Pte Ltd* [2014] 2 SLR 1045 at [130(e)].

non-selective list of publicly available information should not be treated as confidential even if putting it together involves some time and effort”.<sup>217</sup> Ultimately, the resulting information contained/reflected in the compilation must still convey generally *inaccessible* information in order to attract the necessary quality of confidence. Otherwise, there is a real danger that the law may inadvertently extend confidential protection to the underlying public domain information as well.

67 To determine whether the compilation in question does indeed convey something *more* (that is, information that, on the whole, can be regarded as publicly inaccessible),<sup>218</sup> the authors cite *Fraser v Thames Television Ltd*<sup>219</sup> for its instructive value. Hirst J, in considering whether an idea for a television series (which may well comprise elements already in the public domain) could nevertheless be protected as confidential information, expressed the view that:<sup>220</sup>

... the idea must have some significant element of originality not already in the realm of public knowledge. The originality may consist in a *significant twist or slant* to a well known concept ... [emphasis added]

Applying this guidance, the authors submit that if, through the application of the “skill and ingenuity of the human brain”,<sup>221</sup> there is effected a *significant twist or slant* to ideas or concepts that are otherwise in the public domain, there is no reason why the compilation as a whole – and as a “product of the brain” – cannot be regarded as confidential in nature.

68 As always, it is imperative for the courts to scrutinise what exactly the compilation in question *adds* to the existing stock of public domain information; hence the need to distinguish between mechanistic compilations applying banal methods of arrangement from compilations produced by the judicious selection and combination of discrete pieces of information which add *new insights* or a *new/unique dimension* to the

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217 *Ocular Sciences Ltd v Aspect Vision Care Ltd* [1997] RPC 289 at 375. See also Lionel Bently, Brad Sherman, Dev Gangjee & Phillip Johnson, *Intellectual Property Law* (Oxford University Press, 5th Ed, 2018) at p 1232.

218 Cf, eg, *Invenpro (M) Sdn Bhd v JCS Automation Pte Ltd* [2014] 2 SLR 1045 at [167]; *Asia Business Forum Pte Ltd v Long Ai Sin* [2003] 4 SLR(R) 658 at [20]–[22] (but *contra*, without detailed reasoning, the outcome in [28] and see also *Asia Business Forum Pte Ltd v Long Ai Sin* [2004] 2 SLR(R) 173 at [14]) and *Under Water Welders & Repairers Ltd v Street* [1967] FSR 194 at 202–203.

219 [1984] QB 44.

220 *Fraser v Thames Television Ltd* [1984] QB 44 at 66, wherein Hirst J cited as authority *Talbot v General Television Corp Pty Ltd* [1981] RPC 1. See also Lionel Bently *et al*, *Intellectual Property Law* (Oxford University Press, 5th Ed, 2018) at p 1232.

221 *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41 at 47.

underlying information.<sup>222</sup> Be that as it may, the authors again emphasise that confidentiality ultimately depends on the overall *inaccessibility* of the resulting information, with the “product of the brain” factor and evidence of “a significant twist or slant” being highly relevant (but *non-exhaustive*) considerations pointing towards a likely finding of inaccessibility.

69 It is apposite, at this juncture, to return to the *I-Admin* decision to consider how the courts dealt with the confidentiality of the compilation in question – that is, the Excel file. In the High Court, Abdullah J reached the following conclusion:<sup>223</sup>

Even if the payitem and their nature were public information, the file ‘payitem setup\_iAdmin.xls’ was *original* in so far as its contents were *arranged and compiled in an original manner*. To this extent, the file was *confidential* in nature. [emphasis added]

70 To better understand Abdullah J’s reasoning here, it is necessary, in the authors’ view, to consider and appreciate how his Honour had used the word “original” in arriving at the finding above. Crucially, was his Honour referring to “originality” in the copyright law context (the *legal conception* of “originality” as termed by the authors),<sup>224</sup> or was the expression used in a more generic sense (such as in *common parlance* to mean “newness”)?<sup>225</sup> The answer to this question is further obfuscated by the fact that Abdullah J had also articulated in an earlier part of his judgment, when dealing with the plaintiff’s claim in copyright in respect of its database tables and the relevant Excel files generated from them, that:<sup>226</sup>

... even if payitem and CPF information was publicly available, intellectual effort, analysis, industry knowledge, and knowledge of regulatory rules, HR policies and employment best practices were still required to *organise* the information into a format that was suitable for processing by a computer program. ... the *organisation* of the relevant information into columns and

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222 Take, for instance, a compilation comprising historical financial data. Even though the underlying data is clearly in the public domain and cannot be the subject of an obligation of confidence, the compilation could have arranged the financial information using highly unique metrics such that fresh insights into the financial industry may be distilled. In such a scenario, it is arguable that the use of highly unique metrics coupled with the new insights gleaned from scrutinising the assembled information may, on the whole, vest the resulting compilation with the necessary quality of confidence.

223 *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 3 SLR 615 at [133]. This finding (that the file “payitem setup\_iAdmin.xls” was confidential in nature) was not disturbed on appeal: see *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 1 SLR 1130 at [65].

224 See para 55 above.

225 See para 55 above.

226 *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 3 SLR 615 at [71].

rows in a database table involved a minimal degree of *creativity*, and that the database tables therefore constituted compilations of facts under s 7A(1)(a) of the Copyright Act that were *original* and attracted copyright protection ... I also found that such copyright protection extended to any Excel files generated from the database tables. To the extent the information was publicly available, this only affected whether the resultant copyright protection was ‘thin’, as copyright protection would not extend to the data contained in the tables and Excel files. [emphasis added]

71 While the authors recognise that Abdullah J was addressing the issue of copyright subsistence in the plaintiff’s “Category 2 materials”<sup>227</sup> at this stage of his judgment, the observations made here nevertheless raise the distinct possibility that his Honour could well have had the same concept of “originality” in mind when subsequently examining the *confidentiality* of the Excel file (the compilation in question)<sup>228</sup> – that is, “originality” in terms of the selection and arrangement of the relevant information/contents in the Excel file (or “originality” in the copyright sense). Given the analysis above as well as the earlier discussion of the Court of Appeal’s decision in *Asia Pacific Publishing Pte Ltd v Pioneer & Leaders (Publishers) Pte Ltd*,<sup>229</sup> the authors respectfully caution against making the assumption that the compilation in question be regarded as confidential merely because “its contents were arranged and compiled in an original manner”.<sup>230</sup> It bears repeating that the “originality” of the compilation (as understood in the copyright context) can, at best, only *suggest* the “inaccessibility” of the information which it contains. After all, the plea of “inaccessibility” “requires careful analysis and must be supported by the evidence”.<sup>231</sup>

72 If, on the other hand, Abdullah J meant to suggest that the compilation as a whole was a “product of the brain” and had provided “a significant twist or slant” to the underlying public domain elements (that is, payitems or payitem information)<sup>232</sup> – for example, through a unique manner of compilation resulting in new insights gleaned from the resulting information – that made the “end result”<sup>233</sup> new and generally *inaccessible* to the public, the authors are then prepared to accept that such an interpretation serves as a more accurate indicator that the Excel file on the whole did contain inaccessible, and therefore

227 *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 3 SLR 615 at [33(b)] and [62].

228 See *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 3 SLR 615 at [133].

229 [2011] 4 SLR 381; see paras 56–58 above.

230 *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 3 SLR 615 at [133].

231 *Invenpro (M) Sdn Bhd v JCS Automation Pte Ltd* [2014] 2 SLR 1045 at [130(e)].

232 See *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 3 SLR 615 at [71], [119] (“payitems were common knowledge in the payitem industry”) and [132]–[133].

233 *Invenpro (M) Sdn Bhd v JCS Automation Pte Ltd* [2014] 2 SLR 1045 at [130(e)].



confidential, information.<sup>234</sup> Respectfully, further judicial clarification of all these matters would be very welcome indeed.

#### IV. Conclusion

73 Before concluding with an overview of the authors' findings and submissions made in this article, it may be helpful to briefly mention an important (albeit trite) matter concerning the process of bringing suit for breach of confidence. In all such actions, it is critical for the plaintiff – in the context of this article, the former employer – to *particularise* the specific piece(s) of information alleged to be confidential, so as to prevent any abuse which may arise from over-generalised and/or speculative claims. This is, of course, not a novel requirement in this area of the law.<sup>235</sup> In particular, the plaintiff must provide “full and proper particulars of all the confidential information on which he intends to rely in the proceedings.”<sup>236</sup> This ensures that any potential injunction that may be granted is capable of being framed with sufficient precision and allows the defendant to know, with greater clarity, the case he has to meet (as he might wish to aver that some pieces of information relied upon by the plaintiff are matters of public knowledge).<sup>237</sup> Therefore, while it is the case that “[t]he rules relating to the particularity of pleadings apply to breach of confidence actions as they apply to all other proceedings”, it is also “well recognised that breach of confidence actions can be used to oppress and harass competitors and ex-employees.”<sup>238</sup> This is indeed a salutary and timely reminder with which the authors entirely agree.

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234 It is plausible, the authors posit, that Aedit Abdullah J may instead have had this (latter) interpretation in mind when considering the confidentiality of the Excel file, in light of these observations: “I agreed that the plaintiff’s source codes, systems, database structures and client materials were confidential, but only to the extent the information in question was not found in the public domain and was original” [emphasis added] (*I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 3 SLR 615 at [115]).

235 See, eg, *Tang Siew Choy v Certact Pte Ltd* [1993] 1 SLR(R) 835 at [23]; *The Racing Partnership Ltd v Sports Information Services Ltd* [2020] EWCA Civ 1300 at [49]; *Ocular Sciences Ltd v Aspect Vision Care Ltd* [1997] RPC 289 at 359–361; *John Zink Co Ltd v Wilkinson* [1973] FSR 1 at 12; and *Diamond Stylus Co Ltd v Bauden Precision Diamonds Ltd* [1972] FSR 177 at 178.

236 *Ocular Sciences Ltd v Aspect Vision Care Ltd* [1997] RPC 289 at 359.

237 See *Ocular Sciences Ltd v Aspect Vision Care Ltd* [1997] RPC 289 at 360. See also *The Racing Partnership Ltd v Sports Information Services Ltd* [2020] EWCA Civ 1300 at [49].

238 *Ocular Sciences Ltd v Aspect Vision Care Ltd* [1997] RPC 289 at 359. See also *Caterpillar Logistics Services (UK) Ltd v Paula Huesca de Crean* [2011] EWHC 3154 (QB) at [60].

74 Where erstwhile employer–employee relationships are concerned, it is important to keep in mind the competing policy interests at play and the need for the law to strike an appropriate and fair balance between them whenever the inquiry relates to post-employment obligations of confidence owed by ex-employees. In this regard, the principles of law espoused in *Faccenda Chicken* have stood the test of time and should, at the very least, serve as the starting point in any analysis.

75 In so far as express obligations are concerned, the scope of a former employee’s duty of confidence is typically governed and defined by the terms of the contract (such as restrictive covenants), subject always to concerns of reasonableness as prescribed by the doctrine of restraint of trade. However, in the absence of express covenants, an implied (contractual) obligation of confidence – which is comparatively narrower in scope – may bind the former employee who, with the requisite knowledge, comes into possession of the former employer’s trade secrets and/or other forms of (higher grade) confidential information akin to trade secrets. Notably, the former employee cannot be restrained from using, for his own benefit or that of a subsequent employer, any information which has become part of his general skill, knowledge and experience.

76 The authors have also expressed the view that the scope of the former employee’s equitable obligation of confidence as to post-termination use of confidential information ought to be coterminous with that arising from an implied term in the contract of employment (as outlined in the preceding point). By extension, it has been further argued that individuals who occupy positions analogous to employees (such as independent contractors and consultants) ought also to be bound by coterminous obligations of confidence.

77 The upshot of the above summary is that the law of confidence designedly undertakes to prevent the post-employment freedom of employees from being unreasonably curtailed while also, at the same time, recognising that trade secrets (and information akin thereto) belonging to employers unquestionably deserve legal protection. In the authors’ respectful view, it is prudent to keep these principles and policy concerns in mind when considering how the law in this particular field ought to be developed in future.

78 Separately, to establish confidentiality in breach of confidence actions, the plaintiff must show that the information in question is generally inaccessible to the public. This is ultimately a question of fact and degree, though it bears repeating that confidentiality is only concerned with the relative inaccessibility of the information and does not

demand absolute secrecy. Inaccessibility, of course, remains a “particular touchstone” in the law of confidence.

79 Nevertheless, the confidentiality-inaccessibility assessment is often aided and supplemented by a multitude of factors, such as whether the information in question was a “product of the brain” or, specifically as regards compilations of data, whether the compilation as a whole (the “end result”) conveyed information with “a significant twist or slant” – or which added new insights or a new/unique dimension – to that already in the realm of public knowledge. All of these factors, together with the surrounding facts of the case at hand, serve as helpful indicators in the overall determination of whether a particular piece of information (or compilation of data) possesses the necessary quality of confidence. As always, the law of confidence must resist any inadvertent extension of protection to the underlying public domain information.

80 Particularly at a time like this when humankind – almost everywhere – is ferociously battling an unprecedented and long-drawn global pandemic, the confidentiality issues engendered by the ex-employer–employee scenario have assumed an even greater significance and, indeed, poignancy than ever before. Relevantly, the law of confidence has long recognised that the protection of an employer’s interest in confidential information and trade secrets has to be realistically and fairly balanced against the public policy in favour of competition in the marketplace. The courts in England and Singapore are generally cognisant of this “need for proportionality” and have, by and large, engaged meaningfully with the various policy considerations affecting this balance.

81 Yet, during these unusual and dismal times, the need for the courts to remain particularly sensitive to the economic situation which many vulnerable employees (or, more accurately, former employees) now find themselves in cannot be overemphasised. This is indeed not the time for excessive and/or unjustified incursions into their post-employment freedoms. With respect, the authors fear that with the recent *I-Admin* decision, the burden may just be a tad too heavy for former employees to bear otherwise.