

A CASE STUDY ON MISUSE OF COMPANY'S CONFIDENTIAL INFORMATION IN MALAYSIA: SUGGESTIONS FOR IMPROVEMENT

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ABSTRACT

Directors and employees are individuals who involved in the course of company's business and would inevitably expose themselves to company's confidential information. At present there are in existence legal provisions imposing duties upon the directors and employees for the purpose of protecting the company's confidential information. In addition, the employees would normally be subjected to non-disclosure agreement upon their employment. The progress of the present technology has exposed company's information at a high risk to be manipulated by individuals who involved in the company. This paper aims to discuss the viability of the present safeguard in protecting the company's confidential information. The research intends to analyse decided cases on the approach adopted in determining whether there is misused or misappropriation of company's confidential information by the directors or the employees. The discussion would also focus on whether the non-disclosure of company's confidential information would still be relevant when the directors or employees leave the company. In suggesting improvement for the present scenario it would be pertinent to analyse as well case laws from different jurisdiction. This study would be significant to ensure that the company's confidential information is being sufficiently protected so that the company would remain competitive and dynamic.

Keywords: directors, employees, confidential information, case study

1. Introduction

It is common for executive directors or employees to move from one company to another in order to gain more experience or to encounter different environment as well as in getting a better pay. Some however, decided to run their own business based on their knowledge and skill that they obtained. This scenario had exposed company's information in particular trade secret and confidential information to be manipulated or abused by their former directors or employees. At present there are specific law protecting patent (Patent Act 1983) and copyright (Copyright Act 1987) but not for trade secrets or confidential information. However, there are provisions which protect the company's information. The provisions can be found in the Companies Act 2016 which impose upon the directors as well as the employees, a duty not to misuse company's information during their tenure or employment in the company (Companies

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Act 2016) and in the Capital Market and Services Act 2007 which refers to protection of company's information in a specific circumstances i.e. insider trading. Besides that, company or employer would normally enter into a covenant with their directors or employees which prevent the disclosure or misuse of company's information. This article focuses on the duty of directors or employees in relation to this matter. The research would discuss the existing protection for company's information and its application with reference to decided cases. Analysis from these cases would be crucial in determining the effectiveness of the provisions and the non-disclosure clause in protecting company's information.

2. Duty Of Loyalty

Duty of loyalty or fidelity originates from the common law and its spirit is embodied in our provisions particularly the Companies Act 2016.

Companies Act 2016

In describing about directors' duties section 218(1) of the Companies Act 2016 states that:

"A directors or officer of a company shall not, without the consent or ratification of a general meeting-

.....(b) use any information acquired by virtue of his position as a director or officer of the company...

..to gain directly or indirectly, a benefit for himself or any other person, or cause detriment to the company".

This means director or officer of a company cannot misuse company's information to benefit himself or to gain advantage for himself out of the information, or disclose the information to other parties or had caused detriment to the company (by the use of such information) unless upon approval of the general meeting.

The word director in the provision includes chief financial officer, chief operating officer and other person primarily responsible in the management of the company (Companies Act 2016). Thus the duty illustrates in the above section could be said to have imposed the duty upon the employees of the company as well besides the directors. It is said that directors are under a special duty not to use the information to obtain collateral gain of competitive edge (Cranleigh, 194) and position as director attracted an implied duty to preserve confidentiality (Faccenda, 1987).

In *Soon Seng Palm Oil Mill (Gemas) Sdn Bhd & Ors v Jang Kim Luang @ Yeo Kim Luang & Ors* (MLJ 496) and *Plastech Industrial Systems Sdn Bhd v N & C Resources Sdn Bhd & Ors* (MLJ 258), the defendants hold the position as executives director and had breached section 132(2) of the Companies Act 1965 (Companies Act 2016). In these cases the directors had used the confidential information of the plaintiff whilst still being the directors of the plaintiff. In *Soon Seng Palm Oil Mill (Gemas) Sdn Bhd & Ors*, the plaintiff carried on business relating to oil palm industry and the first defendant was a director/chief executive of Soon Seng until she resigned. She was in control of the division assets and properties as well as confidential

information. She was alleged for using the confidential information of the plaintiff for herself and for seventh defendant under Section 132(2) of the Companies Act 1965 and Patents Act. The defendant denied the allegation, however the court held that her position as director exposed her to data and confidential information belonged to the plaintiff and this position attracted an implied duty to preserve confidentiality. In Plastech Industrial Systems Sdn Bhd, the first defendant had illegally used the plaintiff's trade secrets and confidential information to develop and produce its panel. The plaintiff had proved that the defendants had used and took the plaintiff's proprietary information and had breached the duty of confidentiality. The court held that the defendants had breached Section 132(2) of the Companies Act 1965 and the Copyright Act.

i) Capital Market and Services Act 2007

The Capital Market and Services Act 2007(CMSA 2007) is an act which regulates matters relating to fund raising activities. There are few provisions in the act which imposed a general duty upon employees to maintain secrecy of the confidential information and in activities which relate with insider trading. Insider trading is about the sale or purchase of the company's share based on non-public information by insiders (i.e directors and employees). Such activity would affect market efficiency and diminish fairness among the shareholders or the public. Section 153 of CMSA 2007 imposes a general duty to maintain secrecy provides:

- (1) A member, employee or agent of the Corporation shall not give, divulge, reveal or otherwise disclose any information or document which has been obtained by him in the course of his duties

Whilst section 188 of CMSA 2007 is more specific as it refers to insider trading activities. The provision prohibits any insider who is in possession of inside information from using the information which is not generally available, for the purpose of disposal or acquisition of securities or directly or indirectly communicate such information to any other person for the purpose mentioned earlier. Any act which is in breach of these provisions would affect the price of the securities and the interest of the public/investors. And the offenders are subjected to a hefty penalty.³

ii) Contractual Agreement

Besides the statutory provisions the duty to protect company's information could be found in the employment contract. The contract would normally include a non-disclosure clause or a separate non-disclosure agreement would be executed in order to protect the company's information from being manipulated or abused. For example, in *Schmidt Scientific Sdn Bhd v Ong Han Suan* (MLJ 632), the fidelity clause reads:

During the employment with the company you shall not have any direct or indirect interest in any business similar to the company's business and you shall direct all your efforts, duties and

³ Refer sections 153(3) and 188(4) of the Capital Market and Securities Act 2007. The Securities Commission in its media release dated 24th January 2018 reported that the High Court had found that a director had breached section 188(2)(a) of the Capital Market and Securities Act 2007 and was ordered to pay a sum off RM 3,238,760, three times the losses avoided by the director as a result of the insider trading. He was also ordered to pay civil penalty of RM500,000 to the Securities Commission.

responsibilities to further the interests of the company. Any information about the company, its dealings, transactions and financial, matters are regarded as confidential and are not allowed to be divulged to any person whatsoever.

The relationship between employer and employee would give rise to duty of fidelity where employees have a duty to abide with whatever conditions stated in the agreement or clause. In situation where confidential information has been confided it would be natural for the employer to expect the employee to protect its confidentiality.

In the case of *Ecooils Sdn Bhd v Ragunath Ramaiah Kandikeri* (MLJ 309), the defendant was employed as manager of the plaintiff's factory's engineering and project services department. Documentary evidence showed that defendant had misused and disclosed to third parties the confidential technology and confidential information of the trade secrets of the plaintiff whilst under plaintiff employment. This was in breach of the terms and conditions (confidentiality clause) in the letter of appointment. In deciding whether the defendant had breached the duty of confidentiality the courts have to determine whether the confidentiality clause in the letter of appointment create a duty of fidelity and confidence. The High court in this case by referring to several cases (MLJ 297) held that the contract of appointment (in the context of this case the offer letter) by the confidentiality clause imposed an express duty of fidelity on the defendant. This means the defendant was prohibited from divulging confidential information for his own benefit or for the benefit of others. The judge expressed that "this express duty of fidelity imposed by the letter of appointment is over and above his implied duty to act towards his employer in good faith."

Another aspect of discussion regarding duty of fidelity is whether this duty is subjected to a certain duration. In other words, whether such duty of fidelity can only be relied upon during the term of employment. In *Dynacast (Melaka) Sdn Bhd & Ors v Vision Cast Sdn Bhd & Anor* (MLJ 417) the Federal court had highlighted that protection of confidential information did not have time limit. It depends to the terms of the agreed contractual obligation. In *Svenson Hair Centre Sdn Bhd v Irene Chin Zee Ling*⁴, it was held that the protection of confidential information did not have any time limits since the clause in the employment agreement expressly provided that the clause is applicable "during or after the termination of this agreement without limit in point of time." Hence, whether the confidentiality could be for a certain period or perpetual would depend on the terms of the agreed contractual obligation. In *Maggbury Pty Ltd & Anor v Hafele Australia Pty Ltd & Anor* (LRC 395), the High Court of Australia recognized that the term in the contract may make the employee to observe the confidentiality obligation forever.

⁴ [2008] 7 MLJ 903. In this case plaintiff sought injunction to restrain the defendant from contacting or corresponding with any of the plaintiff's customers. The defendant was former employee of the plaintiff and had executed employment agreement which contained specific prohibitions regarding confidentiality (non-solicitation and non-competition). The plaintiff asserted that the defendant after leaving the employment had set up similar business and might have utilized the plaintiff's confidential information.

It is important to note that it was decided in *Schmidt Scientific Sdn Bhd*, that such duty would still be relevant after the employees leave the employment on the basis of implied contract, even though the fidelity clause in that case specifically mentioned ‘During the employment...’. Kamalanathan Ratnam JC in *Schmidt* referred to Lord Ersher’s judgment that the existence of service contract would stipulate the understanding that employees will act in good faith towards his employer, the expectation of both parties when they entered into a contract.⁵ According to the judge in *Schmidt*, “It is not possible to envisage that a master would have reposed upon his servant confidential material nor put him into a position of confidence to enable that servant to use it against him or in competition with him.” (MLJ 632) In describing the relationship of the plaintiff and defendant the judge viewed that “where the court finds that there is in existence a confidential relationship between two parties, the court can infer an implied contract arising out of that confidential relationship”.

Lord Denning on the other hand agreed that the duty remains after the employment based on equity. He viewed that:

“The law on this subject does not depend on any implied contract. It depends on the broad principle of equity that he who has received information in confidence shall not take unfair advantage of it. He must not make use of it to the prejudice of him who gave it without obtaining his consent”

Vincent Ng J had referred to the law of confidentiality in the relationship between employer and employee elaborated in *Faccenda Chicken* which can be summarized as follows:

- When there is a contract between the employer and employee the obligations of the employees are to be determined by that contract
- In absence of any express terms, the obligations of the employee in respect of the use and disclosure of the information are the subject of implied terms
- Whilst in the employment, the employee has a duty of good faith or fidelity on the employer. The extent of the duty of fidelity will vary according to the nature of the contract. The duty of good faith will be broken if an employee makes copies a list of the customers of the employer to be used after his employment.
- To determine whether the information falls within the implied term not to use or disclose after an employee ceased employment, two matters should be considered: i) The nature of the employment, if the employee habitually handled confidential information this would impose a high obligation of

⁵ Refer *Robb v Green*[1895] QB 315 at 316-317. In this case it was held that the employee was in breach of an implied term of the contract of service in making copies of his employer’s list of customers’ name and addresses, with the intention to use it to solicit the customers after he left the employment and set up his own business. Refer also *Merryweather v Moore* [1892] 2 Ch 518 where the court held that in compiling and retaining the table for his own purposes (where he used them in his new employment), the defendant (a clerk) had committed an abuse of the confidence ordinarily existing between a clerk and his employer, or a breach of the implied contract apparently arising from that confidence.

confidentiality compared to employee who only occasionally or incidentally expose to such information. ii) The nature of information. The information will be protected if it is classed as trade secrets or is in all circumstances of such highly confidential nature as to require the same protection as a trade secret.

3. Breach Of Confidence

Megarry J. in *Coco v AN Clark (Engineers) Ltd (No 2)* (RPC 41) had laid out that in order to succeed in an action for breach of confidence the plaintiff must establish to the satisfaction of the court three elements :

- I. The information which the plaintiff is seeking to protect is of a confidential nature
- II. The information in question was communicated in circumstances importing an obligation of confidence; and
- III. There must be an unauthorized use of that information to the detriment of the party communicating it.

These elements have been accepted by the courts in Malaysia⁶ in establishing a case for breach of company's confidential information.

i. Confidential Information

Goulding J (Ch. 117) had classified information gained whilst in the course of employment into three; first, information which was easily accessible to the public and thus an employee would be at liberty to impart it during or after his employment; second, confidential information which could not be used or disclose during his employment but in the absence of an express restriction he is free to use it after his employment and third, specific trade secrets which he should not be used or disclosed either during or after his employment.

In describing confidential information Kalamathan CJ viewed that "trade secrets are not limited to manufacturing processes or secret formulae but extend to information relating to the list of names and addresses of the customers and suppliers, specific questions sent to the customers, cost prices, specific needs and requirements of the customers and suppliers, status of all on-going negotiations with the customers." (MLJ 632) His Justice regarded such information as highly confidential in nature and generally not known in the market and its' disclosure would cause detriment to the plaintiff's terms of business and reputation.

In this case the plaintiff dealt in very specialized imported equipment and instruments. The first to fourth defendants were the employees of the plaintiff and later resigned. Then they became the only directors and shareholders of the fifth defendant. The plaintiff applied against the fifth defendant from using, divulging and disclosing confidential information or trade secrets of the plaintiff, as well as not to approach or solicit any of the plaintiff's suppliers and customers. The

⁶ *Schmidt Scientific Sdn Bhd v Ong Han Suan* [1997] 5 MLJ 632, *Soon Seng Palm Oil Mill(Gemas) Sdn Bhd & Ors v Jang Kim Luang @ Yeo Kim Luang & Ors* [2011] 9 MLJ 496, *China Road & Bridge Corp & Anor v DCX Technologies Sdn Bhd and another appeal* [2014] 5 MLJ 1, *Dynacast (Melaka) Sdn Bhd & Ors v Vision Cast Sdn Bhd & Anor* [2016] 3 MLJ 417, *Ganesh Raja A/L Nagaiyah & Ors* [2017] 2 MLJ 396

plaintiff alleged that the defendants had breach their duty of fidelity and good faith. However, the defendants denied the allegation and contended that they had received market information from the suppliers and customers. But this defense was without evidence. The defendants also claimed that the plaintiff's action amounted to a restraint of trade. In this case it was held that the defendant had breached the duty of good faith or fidelity, the information disclosed is trade secrets or confidential information and there was no issue restraint of trade because the plaintiff's case is about restrain of *using company's information*.

In *Soon Seng Palm Oil* it was also held that confidential information relating to invention include technical details, specifications and trade secrets relating to the invention as well as market study and research and list of customers of the plaintiffs (MLJ 496).

In *Ecooils Sdn Bhd* , the High Court in determining whether the information is confidential had considered the fact that the plaintiff company is one of the pioneer companies involved in recycling SBE(Spent Bleach Earth), and thus no other company in Malaysia knew or was using such technology. As a result, the plaintiff's custom-made specifications of the boiler used to burn SBE and information to plaintiff's business of recycling SBE are confidential information and constitute trade secret. Names of plaintiff's suppliers, vendors and customers are also regarded as confidential information. The court in this case referred to Lord Greene MR who viewed that:

'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' (ER 413). This was also referred by Abdul Malik Ishak J in *Worldwide Rota Dies Sdn Bhd v Ronald Ong Cheow Joon* (MLJ 297) in determining the confidentiality of information. In short it has been judicially recognized that customers name, lists and details are confidential information.

In the case of *Dynacast (Melaka) Sdn Bhd & Ors v Vision Cast Sdn Bhd & Anor* (MLJ 417), Cheok (the defendant) was held to be liable for breach of confidentiality obligation by the High Court. Subsequently, the Court of Appeal reversed the decision which was later affirmed by the Federal Court which agreed with the Court of Appeal's decision that the description of 'confidential information' in the confidentiality agreement was too wide and generic. It was held that the plaintiff failed to show that the material which was sought to protect had the necessary quality of confidence or that such material was in defendant's possession and had been disseminated to the detriment of the plaintiff. In this case the defendant (Cheok) was previously an employee of the plaintiff and later promoted as regional director of wholly owned company of the plaintiff. Then he left the employment and a year later set up his own business and engaged in the same business with the plaintiff. The plaintiff alleged the defendant had misappropriated confidential information belonged to the plaintiff and therefore had breached the terms of his employment contract and an employee confidentiality agreement and deed of restrictive covenants.

The Federal Court held that the appellants' claimed for breaches of confidentiality clauses failed on account of vague and insufficient pleadings as well as from the evidential aspects.

The court held that the appellant/plaintiff should state the particulars of the alleged misappropriation of the confidential information. Based on *Faccenda Chicken Ltd* and *Ixora Trading Incorporated and another* the court emphasized that the information which are not classed as trade secret would still be protected if the information is in all circumstances of such a highly confidential nature as to require the same protection as a trade secret. Besides proving the elements mentioned by Megarry J in *Coco's* case the Federal Court held that it was equally important for the defendant to be clear what knowledge that they can or cannot use after their employment. Mummery J in his judgment concerning enforcement of confidentiality said that the plaintiffs are not entitled to achieve breach of confidence under the cloak of a vaguely pleaded case. In *Sigma Gloves Industries Sdn Bhd & Ors* (MLJ 481) it was decided that the plaintiffs had failed to specify the confidential information and therefore failed in their action against the defendant (RPC 41).

ii. Obligation of Confidence

This element is related with the knowledge of the confidential information which would give rise to obligation of confidence. According to Megarry J: (RPC 41).

“ It seems to me if the circumstances are such that any reasonable man standing in the shoes of the recipient of the information would have realized that upon reasonable ground the information was being given to him in confidence, then this should suffice to impose upon him the equitable obligation of confidence.”

In other words, when directors or employees were exposed or have accessed to confidential information they have an obligation not to disclose the information otherwise this would amount to be breach of confidence. In *Cranleigh Precision Engineering Co Ltd v Bryant*, the defendant, former managing director of plaintiff who have accessed to company's confidential information had took with him (before he left the employment) files, correspondence and information relating to plaintiff's application for patent for his commercial gain. The defendant was found to have breached his duty of confidence by the court.

It can be construed that the position of the employees in the company would determine their accessibility to the confidential information which would eventually give rise to obligation of confidence. In *Schmidt's case*, the court conceded that the senior position held by the first to fourth defendants in the plaintiff had exposed them to a great deal of confidential information in the plaintiff. Thus, the claimed of the defendants that the information involved was market information could not be accepted. Similarly, in *Soon Seng Palm Oil*, the defendant's position as director/chief executive of the company had exposed her to the data and confidential information of the plaintiff which attracted a duty of confidence to preserve its confidentiality. In *Ecooils Sdn Bhd*, the defendant scope of works as the manager of the project and engineering services gave him complete access to the plaintiff's confidential information and trade secrets and established an obligation of confidence to preserve them.

Meanwhile, the Court of Appeal in *Ganesh Raja A/L Nagaiah & Ors* (MLJ 396) had allowed the appeal due to the failure of the respondent/plaintiff to established that the information was imparted in confidence. According to Hamid Sultan JCA, confidentiality of the information

can be construed by limited accessibility and any general information available to all employees or public cannot per se attract the doctrine of confidentiality.

iii. *Detriment to the Company*

The third element refers to the consequence of breach of confidence which would be detrimental to the company. In most circumstances the disclosure of confidential information would be incidental with detrimental to the company.

In section 218 of the Companies Act 2016 a director or employee would be in breach of duty regardless of whether it caused detriment to the company or not. The fact that the director/employee had gained benefit for himself or for the third party from the used of the company's information is enough to implicate them with breach of duty. Cases⁷ which referred to the elements in *Coco's case* have not emphasized on this third element in its' judgment. The reason could be that when trade secret or confidential information has been misused the harmful effect that it would cause to the company is inevitable.

4. Observation And Suggestion

It is indeed true that trade secrets and confidential information are valuable and precious assets of the company which are essential to be preserved for the sustainability of a company. At present, companies may rely on section 218 of the Companies 2016 or on employment agreement in order to protect its confidential information. Section 218 is referred when the breach occurred whilst the directors/employees are still with the company. The retirement or resignation of the director put an end to the duty imposed on them unless the resignation is prompted by the fact that the director would want to misappropriate the company's information.⁸ Since the application of the section is rather restrictive, companies may opt to protect the information through employment contract by providing a non-disclosure clause. To ensure the effectiveness of this clause it is essential for the clause to be specifically clear on what confidential information is and whether the duty to preserve the confidentiality subjected to a certain duration or otherwise. The clause may forbid the employees from wrongfully utilizing the company's information after they left the company but not to forbid them from having a competing business after they left the company. This would be in line with section 28 of the Contract Act 1950 which prohibits restraint of trade. It should also be noted that the employee's skill and experience is not something that the court can protect and thus are not considered as confidential information.

⁷ For examples *Soon Seng Palm Oil Mill (Gemas) Sdn Bhd & Ors v Jang Kim Luang @ Yeo Kim Luang & Ors* [2011] 9 MLJ 496, *Schmidt Scientific Sdn Bhd v Ong Han Suan* [1997] 5 MLJ 632. In *Dynacast (Melaka) Sdn Bhd & Ors v Vision Cast Sdn Bhd & Anor* [2016] 3 MLJ 417 the emphasized at the Court of Appeal and Federal Court is only the first element which the plaintiff had failed to fulfill.

⁸ *Southern real Estate v Dellow* [2003] SASC 318, in this case the court held that there was a breach of duty by a director who resigned to set up business in competition after preparing a client list (confidential information) for that purpose.

On the other hand, not all countries have a specific statutory protection for trade secret and confidential information. Countries like United States, Thailand and Sweden protect trade secret in a specific act. For United States it is known as Defend Trade Secret Act 2016. The act provides a federal private right of action for trade secret protection creating a uniform standard for trade secret misappropriation. In most civil law countries, they have unfair competition law which applies to trade secret. Whereas countries like United Kingdom, Australia, Singapore which are without a specific law on trade secret, these matters are dealt with in certain provision/s in other Act such as Companies Act/Corporation Act as well as applying contract law and equitable principles similar like Malaysia.

It is therefore suggested that a specific law on trade secret and confidential information would be an advantage as the law would be able to preserve the confidentiality from being misused by those inside the company but also from any invasion of the outsiders which would affect the confidentiality of trade secret and confidential information. The law would be able to protect the confidentiality in a wider aspect and would ensure the steady growth of the company as well. Since introducing a new law is not an overnight process, improving the present measure of protection would be necessary.

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