**IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE**

**Silverfish Pte Ltd**

**v**

**Asimov Tan and others**

**[2021] SGHC 1**

4 January 2021 Judgment reserved.

**Peter Turing J:**

**Introduction**

1. These proceedings arise out of a civil suit (HC/S 2909 of 2020) brought by Silverfish Pte Ltd (the “Plaintiff”), against Mr Asimov Tan (the “First Defendant”) and Book Dispatch Pte Ltd (the “Second Defendant”) (collectively, “the Defendants”), for copyright infringement and acts in breach of confidence.

**Background**

1. The Plaintiff is a Singapore-incorporated company in the business of running a social cataloguing website that allows individuals to search its database of books and reviews. The users of the Plaintiff’s website can sign up and register books to generate library catalogues and readings lists. They can also create their owns groups of book suggestions, polls and discussions. The Plaintiff does not charge the users of its website a fee for its services and is instead being funded primarily through advertising revenue.
2. The Plaintiff employs a team of talented programmers which created a computer program to serve as a digital assistant, namely the Advanced Processor for Literary Works (APLW). The first iteration of APLW (“APLW 1.0”) was successfully compiled on or about 1 January 2017.
3. APLW 1.0 was programmed to “read” electronic books and tag them with the appropriate keywords to assist users in locating them. More importantly, APLW was programmed to self-improve upon its ability to do so, using a machine-learning method known as “reinforcement learning”. Essentially, APLW would peruse a document and tag it with preliminary keywords; subsequently, when a human writer began processing the document, the writer would rate APLW’s performance on a scale of 1 to 5. APLW was programmed to associate higher ratings with a system of “rewards”. The set of actions taken by APLW to process a document is called a “policy”, and this method of machine-learning was intended to incentivise APLW to, via experimentation, develop good policies which would earn it the best rewards with the greatest consistency.
4. By June 2018, the Plaintiff’s programmers modified part of APLW’s programming, allowing it to not only tag documents with keywords, but also generate preliminary drafts of book synopses to be published on the Plaintiff’s website; thus compiling APLW’s second major iteration (“APLW 2.0”).
5. Initially, APLW 2.0 was only capable of formulaically generating basic sentences and paragraphs based on the Plaintiff’s database. Human writers were presented with a generic draft for them to revise and polish. During this process, APLW was then tasked to learn from the revisions made to its drafts, observing which amendments were made the most often, and to incorporate those changes into its own writing. Just as before, a system of “rewards” was put in place: not only was APLW programmed to derive incentives from the writers’ ratings of its works, but also from assessing its own contribution – the fewer revisions the writers had to make to APLW’s drafts, the greater the “satisfaction” APLW received. In essence, APLW was “teaching” itself to write by “observing” human writers at work.
6. By 29 August 2018, after the compilation of the latest iteration of APLW (“APLW 3.0”), the Plaintiff’s management decided that the book synopses created by APLW (the “APLW Synopses”) were fit to be published without any further amendments. The APLW Synopses were succinct yet comprehensive and interesting to read, and were considered by the Plaintiff’s management to be equivalent, or even superior, in quality to the book synopses that the human writers in its editorial department could produce. In its current iteration, APLW 3.0 operates with minimal human intervention as the entire process of writing of book synopses is automated. The Plaintiff’s technicians merely monitor APLW to ensure that it is operating smoothly, and the Plaintiff’s editorial department merely skims the APLW Synopses before approving them for publication.
7. From 4 June 2018 to 16 September 2019, the First Defendant was employed by the Plaintiff in the role of an IT Executive. The First Defendant was part of the team of technicians employed by the Plaintiff to maintain the Plaintiff’s IT systems, including APLW.
8. The First Defendant left the Plaintiff’s employment in September 2019. Thereafter, the First Defendant incorporated the Second Defendant on 4 November 2019 and began working for the Second Defendant. The Second Defendant is a Singapore-incorporated company in the business of selling books through its website. The First Defendant is a director of the Second Defendant.
9. In February 2020, the Plaintiff came across the Second Defendant’s website while conducting market research. The Plaintiff noted that there were 89 product descriptions on the Second Defendant’s website which were each identical to a APLW Synopsis that was created by APLW and published on the Plaintiff’s website in 2019. The Plaintiff further noted that the First Defendant is a director of the Second Defendant. The Plaintiff was suspicious of the Defendants’ activities and conducted investigations into the Defendants’ affairs.
10. On 9 November 2020, the Plaintiff commenced civil suit HC/S 2909 of 2020 (“Suit 2909”) against the Defendants and applied for an Anton Piller order as against the Defendants in Suit 2909 (“APO”). The APO was granted on 16 November 2020 and was executed at the premises of the Second Defendant on 23 November 2020. It was not disputed that folders which contained source codes for APLW (the “Source Codes”) were found in the possession of the Second Defendant on its office server (the “Dell Server”) and on the First Defendant’s Lenovo ThinkPad laptop (the “ThinkPad Laptop”). It was also undisputed that the Dell Server stored the backup of all data, files, applications and databases on devices connected to the Dell Server, including the ThinkPad Laptop.
11. The Plaintiff made two claims in Suit 2909. First, the Plaintiff claimed infringement of copyright in the APLW Synopses by the Second Defendant under the Copyright Act (Cap 63, 2006 Rev Ed) (“the Act”). Second, the Plaintiff claimed that the Defendants breached their duties of confidence to the Plaintiff by their possession of the Source Codes without permission.
12. I directed the parties to appear before me at a hearing to determine certain questions of law, which were suitable for determination without a full trial and which would fully determine the entire matter in line with Order 14 Rule 12 of the Rules of Court.
13. Parties addressed me on the following issues:
    1. Who, if anyone, authored the APLW Synopses;
    2. Whether, if no author can be identified, the APLW Synopses can still be said to be original; and
    3. Whether the Defendants’ possession of the Source Codes constituted a breach of confidence.
14. The Plaintiff submitted that:
    1. The Plaintiff’s employees were the authors of the APLW Synopses;
    2. As the APLW Synopses were automatically generated as a result of the skilled labour of the Plaintiff’s employees in the programming of APLW, the APLW Synopses were original; and
    3. The Defendants’ possession of the Source Codes was sufficient to complete the cause of action for breach of confidence and the Defendants had not displaced the presumption that their conscience was negatively affected.
15. The Defendants submitted that:
    1. The Plaintiff’s employees were not the authors of the APLW Synopses as they had not exerted any control over the final form of expression of the APLW Synopses;
    2. As the APLW Synopses lacked an author, the APLW Synopses must necessarily also lack the originality necessary to sustain copyright; and
    3. The Defendants’ mere possession of the Source Codes did not constitute a breach of confidence and the Defendants had displaced the presumption that their conscience was negatively affected.
16. At the conclusion of the hearing, I held that:
    1. The Plaintiff’s employees were not the authors of the APLW Synopses;
    2. Given that the APLW Synopses lacked an identifiable author, the APLW Synopses were not original and therefore they could not sustain copyright; and
    3. The Defendants’ possession of the Source Codes did not constitute a breach of confidence as the Defendants had displaced the presumption that their conscience was negatively affected.
17. The Plaintiff has appealed against my holding and I set out my written grounds of decision.

**Decision**

***Copyright infringement***

1. It was not disputed that the APLW Synopses fall under the category of literary works. Whether the Plaintiff can claim ownership of copyright over the APLW Synopses turns on the question of whether they are “original literary works” within the meaning of Section 27 of the Act.
2. In order for the Plaintiff to establish ownership of the APLW Synopses, the Plaintiff must prove the following:
   1. Firstly, that the requirements of either limb (c), (d), or (e) of section 27(2) of the Act, which the Court of Appeal has confirmed are disjunctive requirements (*Asia Pacific Publishing Pte Ltd v Pioneers and Leaders (Publishers) Pte Ltd* [2011] 4 SLR 381 (“*Asia Pacific Publishing*”) at [48]) are met; and
   2. Secondly, the work in question must be original.
3. On the facts, the first condition is clearly satisfied, as each APLW Synopsis was first published in Singapore. Therefore, I turned my mind to the issue of whether or not they were original.
4. I took as my starting point the position laid down by the Court of Appeal in *Asia Pacific Publishing*, which at [38] reiterated the key principles discerned in *Feist Publications v Rural Telephone Service Company Inc* 499 US 340 (1991), namely that the *sine qua non* of copyright is originality, and that “originality simply means that the work was independently created by the author and that it possesses some minimal degree of creativity, the level of creativity required being extremely low”.
5. More importantly, the Court of Appeal in *Global Yellow Pages Ltd v Promedia Directories Pte Ltd* [2017] 2 SLR 185 (“*Global Yellow Pages (CA)*”) clarified at [28] that prescribing a minimum level of sufficient intellectual effort would be “practically impossible” and the focus should instead turn to characterising the human acts and decisions made in the creation of the works. It will ultimately be a question of fact and degree whether such acts and choices demonstrate sufficient intellectual effort and bear a sufficient causal nexus with the final work such that it attracts copyright (*Global Yellow Pages (CA)* at [28]-[30]).
6. Ostensibly, there is nothing about the APLW Synopses themselves that would seem to invite scepticism as to their originality. While the APLW Synopses are no doubt summaries of books, they rely no more heavily on the actual text of the books themselves than the synopses written by the Plaintiff’s staff writers prior to APLW’s creation (the “Earlier Synopses”). I accepted the evidence of *amicus curiae*, Dr Cher Lock, that each APLW Synopsis demonstrates every bit as much variety in terms of syntax, vocabulary, and tone as the Earlier Synopses, and that therefore each APLW Synopsis possessed some minimal degree of creativity. In Dr Lock’s view, there was no fixed sequence of how the APLW Synopses were created.
7. The Plaintiff submitted that, as each APLW Synopsis possessed the requisite level of creativity, the APLW Synopses were thus original, and capable of sustaining copyright that rightly vested in the Plaintiff’s employees as their authors. The Plaintiff further submitted that the Plaintiff owned such copyright by virtue of the assignment clauses in its employees’ contracts of employment.
8. The Second Defendant, however, argued that the test for whether the APLW Synopses were original should not be whether the APLW Synopses appeared novel or creative, but rather whether an identifiable human author had provided that intellectual creativity.
9. In support of this proposition, the Second Defendant cited *Telstra Corporation Limited v Phone Directories Company Pte Ltd* [2010] FCAFC 149 (“*Telstra*”) at [32] (approved of by the Court of Appeal in *Asia Pacific Publishing* at [74] – [75]): “The question of whether copyright subsists is concerned with the particular form of expression of the work. … *Start with the work. Find its authors*.” The Court of Appeal in *Asia Pacific Publishing* went on to state at [75] that “An author must first be identified before the work in question can be deemed to be original.”
10. The Second Defendant concluded that, as no human author of the APLW Synopses could be identified, they could therefore not be original.

Who, if anyone, authored the APLW Synopses?

The Plaintiff’s submissions

1. The Plaintiff submitted that “the mere fact that a literary work is reduced into its final form of expression through the instrumentality of computer software does not divorce the work’s origination from the person operating the machine” (per Wei J, *Global Yellow Pages Ltd v Promedia Directories Pte Ltd* [2016] 2 SLR 165 (“*Global Yellow Pages (SGHC)*”) at [253]). Based on that logic, the Plaintiff argued that the Plaintiff’s programmers had ultimate control over the computer software for APLW in the same way that a painter controlled his brush, thus making its programmers the authors of the APLW Synopses.
2. The Plaintiff further argued that there could not be any such thing as a computer-generated work. Citing James Grimmelmann, *There’s No Such Thing as a Computer-Authored Work — And It’s a Good Thing, Too*, 39 Colum. J. L. & Arts 403 (2016) (“*Grimmelmann*”), the Plaintiff claimed that all creative processes were essentially algorithmic: that it involved the selection of, and then adherence to, various rules of composition, and that the creator was whoever decided to adopt various rules and processes. For example, in choosing to write a literary novel in a particular language and genre (say, an English-language romance novel), an author would have selected the rules guiding his creative process in relation to the particular grammar, vocabulary, syntax, generic convention that are appropriate to his desired end-product. If an author chose to be limited by rules such as to write an entire work without using a particular letter, or threw dice or flipped coins to help resolve certain authorial decisions, he would no less be the author of the final work. “To say that an author creates intuitively is simply to say that neither she nor we have ready access to the algorithm she follows” (*Grimmelmann*).

The Second Defendant’s submissions

1. The Second Defendant argued that the Plaintiff’s programmers had not chosen or designed the rules by which the APLW Synopses were generated. APLW’s relevant capability (to write book synopses) had been intrinsically self-programmed due to the machine-learning regime imposed upon it. While the Plaintiff’s programmers may have trained APLW in learning, by creating the mechanisms by which APLW evaluated its own performance and had been incentivised to improve, once those mechanisms were in place APLW became an autodidact capable of learning all the relevant skills by itself. The bulk of APLW’s code that enabled it to produce the APLW Synopses had not been written by the Plaintiff’s programmers, and in fact, that the Plaintiff’s programmers could not have written APLW 3.0’s code without the said machine-learning component. This is because the programmers were not writers and did not have the relevant experience to write book synopses of the relevant nature. The Second Defendant argued that it is therefore unacceptable that the Plaintiff should be allowed to claim that the Plaintiff’s programmers exercised control over a process that they could not actually replicate on their own.
2. The Defendant cited *Kelley v Chicago Park District* 635 F.3d 290 (7th Cir. 2011), where a gardener claimed to have created a garden and the court found that, due to the plethora of forces outside of the gardener’s control, the final product originated “in nature, and not in the mind of the gardener”. The Defendant argued that likewise, the actual form and expression of the APLW Synopses had originated not in the mind of the Plaintiff’s programmers but rather, in whatever mind APLW may be said to have.
3. The Defendant further submitted that the Plaintiff thus cannot rely upon *Global Yellow Pages (SGHC)*, where Wei J noted that “the crucial question is the degree of control that the putative authors exercise over the computer software in shaping the final form of expression” (at [255]). Instead, the Defendant submitted that in the present case, as was the case in *Telstra*, there was no author because the person in control of the software was not involved in “shaping or guiding the material form” of the works in question. The Plaintiff’s programmers had not used the software as a novelist uses a word processor. The intellectual effort that went into the APLW Synopses went to the creation and operation of the software, and not the “incarnation of the material form” of works (*Telstra* at [117]).

Conclusion

1. In my view, the Plaintiff’s argument only goes so far. Even if I were to accept that any creative act were essentially algorithmic, that was not the question before me. The question I had to decide was whether the Plaintiff’s programmers were responsible for the algorithms behind APLW’s creative process.
2. It is quite clear that the Plaintiff’s programmers did not write the APLW Synopses nor did they possess sufficient experience or skills in the relevant discipline to have written code that would have allowed APLW to do so. The Plaintiff cannot claim that its programmers had chosen the rules for the creation of the APLW Synopses if they themselves did not know what those rules were or ought to have been.
3. On this point, I found that the Plaintiff’s employees were not the authors of the APLW Synopses.

Whether, if no author can be identified, the APLW Synopses can still be said to be original

1. Keeping in mind the Court of Appeal’s ruling in *Asia Pacific Publishing* that an author must first be identified before the work in question can be deemed to be original (at [75]), I requested the Plaintiff and the Second Defendant to address me on the question of whether, lacking an identifiable author, the APLW Synopses may nonetheless be “original” such that they may sustain copyright.

The Plaintiff’s submissions

1. The Plaintiff submitted that the originality of computer-generated works remained an open question unresolved by *Asia Pacific Publishing*, which could be distinguished from the present case on its facts, for the following reasons:
   1. The case argued before the Court of Appeal in *Asia Pacific Publishing* was not on all fours with the current facts, as the Court did not have the benefit of submissions on whether a computer program could be original. The question was instead whether or not a corporate entity could be an author and thus the Court's comments on authorship and originality are not binding generally; and
   2. The Court of Appeal endorsed the opinion expressed in *Copinger & Skone James on Copyright* vol 1 (Sweet & Maxwell, 16th Ed, 2011) (“*Copinger*”) at [56], that: “[w]ith very limited exceptions [*such as computer-generated works* and old photographs], the ‘author’ of these categories of work must be a natural person”. This suggests that *Asia Pacific* *Publishing* could be seen as anticipating an exception to the author-based-originality regime where computer-generated works are concerned; and/or
   3. The general rule articulated by the Court of Appeal (that an author must first be identified) gives way in specific circumstances to the *lex specialis*, which in this case was section 133 of the Act. Section 133 of the Act provides that, *inter alia*, the regime governing posthumous work may be applied to anonymously-authored published work, and in such circumstances, the work shall be presumed to be an original work unless the contrary is established. This presumption of originality must necessarily also include a presumption as to authorship. In such circumstances, section 29(1) of the Act provides that copyright will subsist in the work for 70 years after the expiration of the calendar year in which the work was first published. The Court of Appeal in *Asia Pacific Publishing* had not contemplated the application of the posthumous works regime to anonymous authors, as the respondent in that case had claimed to be the author of the disputed works, and the question of anonymous authorship had not arisen.
2. Further, the Plaintiff argued that notwithstanding that the Plaintiff’s programmers had not written the exact code that APLW uses to create works, the programmers were nonetheless the persons by whom the arrangements necessary for the creation of the work had been undertaken, which is an alternative test for the authorship of computer-generated works, for which proposition the Plaintiff cited *Copinger*. The Plaintiff’s programmers had devised the machine-learning regime by which APLW learned to write. The coding of the “reward” structure made APLW uniquely receptive to the feedback of users and the Plaintiff’s staff writers. This demonstrated a “sufficient amount of skill, labour and judgement” (at [33] of *Asia Pacific Publishing*) in establishing a nexus between the work of the Plaintiff’s programmers and the final output of APLW 3.0, thereby fulfilling the “minimal degree of creativity” (at [38] of *Asia Pacific Publishing*) required for originality to be made out.

The Second Defendant’s submissions

1. The Second Defendant disagreed with the Plaintiff on the basis that the link between the unique creativity and skill in coding of the Plaintiff’s programmers, and the final product of the APLW Synopses, is too remote. The Second Defendant submitted that originality should only turn on the question of authorship.
2. On that issue regarding the relationship between originality and authorship, the Second Defendant disagreed on the basis that I was bound by *Asia Pacific Publishing*, and that the “exception” for computer-generated works proposed by the Plaintiff does not exist under Singapore law. The Second Defendant pointed out that the quotation from *Copinger* was in fact, referring to specific provisions in the UK, Copyright, Designs and Patents Act 1988 (the “CDPA”). Section 178 of the CDPA identifies computer-generated works as being those works generated by a computer in circumstances such that there is no human author, and section 9 of the CDPA provides in such circumstances, the author is to be taken as the person by whom the arrangements necessary for the creation of the work are undertaken.
3. The Second Defendant submitted that the CDPA is not in *pari materia* with the Act, which draws its inspiration instead from the Australian Copyright Act (*Asia Pacific Publishing*, [21]). Parliament had every opportunity to adopt provisions from the CDPA and other similar statutory regimes for computer-generated works (in this regard, the Second Defendant referred to legislation from Ireland and India) when the Act was amended post-1988, but it chose not to. The Second Defendant submitted that Parliament’s intention must therefore have been to exclude such protection from Singapore law. Due to the Act’s provenance and lack of parliamentary intention to the alternative, the Second Defendant submitted that local and Australian cases are therefore highly persuasive and that I should disregard the Plaintiff’s reliance on *Copinger* in favour of *Asia Pacific* and *Telstra*.
4. On the issue of anonymous authorship, the Second Defendant submitted that a party cannot ask the court to apply section 29 of the Act as if the work were anonymous, in an action where that same party was putting forward its employees as authors of the work. The Second Defendant argued that if the APLW Synopses truly were written anonymously, then the Plaintiff cannot claim that its employees are the authors of the APLW Synopses. In addition, the Defendant argued that section 133 of the Act, which includes a presumption of the author’s death, clearly cannot have been intended by Parliament to cover situations in which the work was authored by a non-human and more importantly non-living author (*Asia Pacific Publishing* at [63], referring to section 28 of the Act which also refers to the death of the author as not being contemplated to refer to non-living authors).

Conclusion

1. In my view, the present facts did not warrant a departure from the Court of Appeal’s ruling in *Asia Pacific Publishing* that an author must first be identified before the work in question can be deemed to be original. While the Court of Appeal in *Asia Pacific Publishing* made its findings in relation to a body corporate, rather than a computer software, its concern that authors should not be given “indefinite and extraordinary perpetual copyright” hold just as true for undying computer programs as for immortal companies (at [63]).
2. With regard to the “exception” for computer-generated works expressed in *Copinger* that was cited by the Plaintiff, I agreed with the Second Defendant that there is simply no such thing under Singapore law.
3. On the issue of anonymous authorship, that there is a logical contradiction between the Plaintiff’s reliance on sections 29 and 133 of the Act, on the basis that the APLW Synopses are anonymously-authored published works, and the Plaintiff’s claim that its employees are the authors of the APLW Synopses. As such, I found that the Plaintiff cannot apply sections 29 and 133 of the Act as if the APLW Synopses were anonymous.
4. In view of the above, I found that there was no infringement of the Plaintiff’s copyright by the Second Defendant as no copyright subsisted in the APLW Synopses.

***Breach of confidence***

1. Under the modified approach to breach of confidence claims set out by the Court of Appeal in *I-Admin (Singapore) Pte Ltd v Hong Ying Ting and others* [2020] 1 SLR 1130 (“*I-Admin*”) at [61]:
   1. The plaintiff must prove that the information in question has the necessary quality of confidence about it and that it has been imparted in circumstances importing an obligation of confidence. An obligation of confidence will be found where confidential information has been accessed or acquired without a plaintiff’s knowledge or consent.
   2. Upon the satisfaction of the two prerequisites above, an action for breach of confidence is presumed and the burden will be on the defendant to prove that its conscience was not affected. This presumption may be displaced where, for instance, the defendant came across the information by accident or was unaware of its confidential nature or believed there to be a strong public interest in disclosing it.
2. The Court of Appeal in *I-Admin* (at [50] and [53) held that two interests guided the operation of breach of confidence claims, namely a plaintiff’s interest to:
   1. Prevent the wrongful gain or profit from its confidential character (“wrongful gain interest”); and
   2. Avoid wrongful loss, which was the loss occasioned to a plaintiff whose information had lost its confidential character or had that character threatened by the unconscionable acts of a defendant (“wrongful loss interest”).
3. For the present case, it was undisputed that the Source Codes, being an integral part of the Plaintiff’s business operations, were confidential in nature, and that the Defendants were under an obligation to preserve the confidentiality of the Source Codes. It was also undisputed that the Defendants had not used or referred to the Source Codes, accessed the folders in the ThinkPad Laptop or Dell Server containing the Source Codes, or disclosed the Source Codes to the public or circulated the Source Codes amongst the employees of the Second Defendant.
4. In view of the Court of Appeal’s ruling in *I-Admin*, I requested the Plaintiff and the Defendants to address me on the question of whether the mere possession of the Source Codes is sufficient to complete the cause of action for breach of confidence.

The Plaintiff’s submissions

1. The Plaintiff submitted that I was bound by the Court of Appeal’s decision in *I-Admin* and that the Defendants’ mere possession of the Source Codes is sufficient to complete the cause of action for breach of confidence.
2. The Plaintiff submitted that the Defendants had *prima facie breached* their obligation to preserve the confidentiality of the Source Codes by their very possession of the Source Codes without the Plaintiff’s consent, which undermined the Plaintiff’s desire to maintain the confidentiality of its materials. Further, the Plaintiff submitted that the Defendants had not displaced the presumption that their conscience was negatively affected. The First Defendant had knowingly acquired the Source Codes without the Plaintiff’s consent and the Second Defendant cannot “feign ignorance” (*I-Admin* at [64]) to the First Defendant’s actions.
3. The Plaintiff further argued that mere possession of confidential information should be sufficient for a finding of breach of confidence, and that the application of the modified approach in *I-Admin* is not limited to cases where the defendants had circulated and referred to the confidential information. The Plaintiff submitted that this was in line with shift in the burden of proof under the modified approach to “[address] the practical difficulties faced by owners of confidential information in bringing a claim in confidence” against the backdrop of a digitised society (*I-Admin*, at [62]), and to rectify the imbalance between the wrongful gain interest and the wrongful loss interest, such that relief for a breach of confidence may be invoked where there is a “threatened abuse of confidential information” (*I-Admin* at [59], citing *Smith Kline & French Laboratories (Australia) Ltd and others v Secretary, Department of Community Services and Health* (1990) 17 IPR 545).
4. The Plaintiff submitted that the Defendant’s wrongful possession of the Source Codes, even without any circulation or referencing by the Defendants of the same, represented a “threatened abuse of confidential information” as the Source Codes could be potentially used for the Defendant’s benefit. Following from the Court of Appeal’s decision in *I-Admin*, the Plaintiff should be entitled to prevent any wrongful loss, in the form of the dissipation of the confidential character of its confidential information.

The Defendants’ submissions

1. The Defendants disagreed that their mere possession of the Source Codes is sufficient to complete the cause of action for breach of confidence and submitted that *I-Admin* could be distinguished from the present case on the facts:
   1. The Defendants did not refer to the Source Codes for their own purposes or circulate the Source Codes.
   2. The Defendants did not engage in mass deletions from the ThinkPad Laptop or the Dell Server on the day of the APO execution;
   3. The Plaintiff’s allegation of “threatened abuse of confidential information” by the Defendants is too remote and highly speculative. In particular, unlike the parties in *I-Admin* that were all engaged in the business of providing payroll services, the Defendants were not in the same line of business as the Plaintiff. Further, the Defendants had not used the Source Codes as a “spring-board” to develop their own intellectual property (*I-Admin* at [78], citing *Seager v Copydex Ltd* [1967] 1WLR 923).
2. For the above reasons, the Defendants submitted that they had displaced the presumption under the modified approach from *I-Admin* that their conscience was negatively affected.
3. The Defendant further submitted that the Court of Appeal in *I-Admin* did not set out a general rule that the mere possession of confidential information will always lead to a finding of a breach of confidence. The Defendant argued that this would entail an unduly wide approach towards breach of confidence claims that over-emphasises the wrongful loss interest.

Conclusion

1. In my view, the Court of Appeal’s ruling in *I-Admin* did not contain a general rule under which the mere possession of confidential information would always be sufficient to complete the cause of action for breach of confidence. Otherwise, this would render the shift of the burden of proof to the Defendant under the modified approach in *I-Admin*, to displace the presumption of a breach of confidence, otiose.
2. Given that the Defendants in the present case were merely in possession of the Source Codes, but did not refer to or circulate the same, I am of the view that there should be a lower threshold for the Defendants to cross in displacing the presumption of a breach of confidence. This would avoid an overly wide approach towards breach of confidence claims and take into account the remoteness of the wrongful loss interest suffered by the Plaintiff. On a balance, I found that Defendant’s conscience cannot be said to be affected since the Defendants were not in the same line of business as the Plaintiff and the Defendant had not used the Source Codes as a “spring-board” to develop their own intellectual property.
3. Therefore, I found that the Defendant’s possession of the Source Codes did not constitute a breach of confidence.