

CASE UPDATE

6 April 2017

SINGAPORE COURT OF APPEAL RESTRAINS USE OF PRIVILEGED DOCUMENTS UPLOADED ON WIKILEAKS

Wee Shuo Woon v HT S.R.L.
[2017] SGCA 23

SUMMARY

The crux of the issue in this case was whether confidential materials protected by legal professional privilege (“LPP”) could be used in legal proceedings after they had been uploaded on a website known as “WikiLeaks”.

BACKGROUND

HT SRL (“HT”) brought a claim against Wee Shuo Woon (“Wee”) for breaches of his employment contract.

After the suit was commenced, HT’s email server was hacked by an unknown third party and the contents were uploaded on WikiLeaks.

The contents of the email server included email correspondence between HT and its solicitors in respect of the suit against Wee (“Emails”). Significantly, these Emails contained express reservations and warnings of privilege and confidentiality.

Wee accessed the Emails on the Internet and, relying on them, brought an application to strike out the bulk of HT’s claim on the basis that it was an abuse of process (“**Striking Out Application**”).

To this end, Wee filed an affidavit which referred to the Emails and exhibited copies of the Emails as annexures.

In response, HT filed an application to seek an order that all references to the Emails be expunged from Wee’s affidavit as they were privileged.

The parties were in agreement that the Emails attracted LPP which had not been waived by HT, and that the Emails were originally confidential in nature.

The key question in the proceedings was whether Wee’s use of the Emails should be restrained notwithstanding that the Emails had become publicly accessible.

At first instance, the Assistant Registrar (“AR”) granted HT’s application to expunge the Emails from Wee’s affidavit.

Wee appealed against the AR’s decision and his appeal to the High Court was dismissed.

Significantly, the High Court Judge (“**Judge**”) held that the prayer to expunge should be granted on the basis that it remained just and reasonable to impose an obligation of confidentiality on Wee in respect of the Emails even though the Emails had been made available on the Internet.

Dissatisfied with the High Court’s decision to dismiss his appeal, Wee filed a further appeal to the Court of Appeal (“CA”), arguing, among other things, that:

- (a) the Emails were so widely accessible that they had lost the necessary quality of confidence;
- (b) HT had not come to Court with clean hands as the Emails revealed that HT had been acting in a dishonest and deceitful manner and abused the legal process; and

(c) the Courts did not have an inherent discretion to exclude evidence in civil cases.

CA'S DECISION

Wee's appeal was dismissed by the CA.

First, the CA held that the prayer to expunge the Emails should be granted on the basis of confidence (as opposed to privilege).

The CA reasoned that privilege only allows a party to withhold the disclosure of information that would otherwise be compulsory for it to disclose.

Where the privileged information is already in the possession of the opponent, the issue becomes one of admissibility. In such cases, the Courts have an equitable jurisdiction to restrain breaches of confidence through the grant of injunctions.

On the facts, the CA found that the Emails retained its confidential status and could claim the protection of the law of confidence since they could only be accessed by someone doing an intense search on WikiLeaks.

It was highly probable that few, if any, knew of the existence of the Emails or their presence in the hacked material.

In these circumstances, it was just that Wee be restrained from using the Emails as he knew that the emails were privileged.

Such knowledge was inferred from the fact that the Emails contained warnings of privilege and confidentiality, and that the Emails contained legal advice in respect of the suit against Wee.

An issue arose as to whether the Court's equitable jurisdiction to restrain the use of the privileged or confidential material had to be invoked prior to the presentation of the material in Court as evidence.

In this case, it was unnecessary for the CA to conclusively decide this issue since the Striking Out Application had not been heard and the Emails had not entered into evidence.

However, the CA expressed some dissatisfaction with the view that the availability of a remedy is dependent on when steps are taken to restrain the use of the information.

Second, the CA acknowledged the possibility that it could refuse relief on the ground of HT's alleged iniquitous conduct since it is the Court's equitable jurisdiction that is being engaged.

However, it declined to do so because on the facts, there was no basis to support Wee's allegation that HT had been acting in a dishonest and deceitful manner and had abused the legal process.

Finally, the CA expressed its tentative view that the Court's discretion to exclude evidence in criminal proceedings should be exercised robustly in civil proceedings.

In this regard, the CA also commented that the test employed in criminal proceedings, which weighs the probative value against the prejudicial effect of the evidence, may have to be adapted for civil proceedings.

COMMENT

What comes through most clearly from this decision is that a party is not allowed to take advantage of an opponent who has been the victim of a cyber-attack. This is so notwithstanding that the party seeking to rely on the evidence did not participate in the cyber-attack.

The decision also clarifies that information does not necessarily lose its confidential character simply because the information in question has become theoretically accessible by members of the public.

Ultimately, the question for the Court in every case is whether the degree of accessibility to the information is such that it would not be just to require the party on whom a duty of confidentiality is imposed to treat it as confidential.

Moving forward, one should take immediate steps to restrain the use of the privileged or confidential material as soon as practicable.

Any untoward delay in bringing the relevant applications, though unlikely to be determinative, may still remain a factor that would affect the exercise of the Court's equitable jurisdiction to restrain the use of the material in question.

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If you have any questions or comments on this article, please contact:



Chia Voon Jiet
Director, Dispute Resolution
T : +65 6531 2397
E: voonjiet.chia@drewnapier.com

Yeo Gek Min
Legal Executive, Dispute Resolution
T: +65 6531 2396
E: gekmin.yeo@drewnapier.com

Drew & Napier LLC
10 Collyer Quay
#10-01 Ocean Financial Centre
Singapore 049315

www.drewnapier.com

T : +65 6535 0733
T : +65 9726 0573 (After Hours)
F : +65 6535 4906