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Breach of confidential information damages

Image Source- This article is written by Ravin Bhutta, pursuing a Diploma in Advanced Contract Drafting, Negotiation and Dispute Resolution from Lawsikho.com. Here he discusses “Top 5 Case Laws Explaining How to Enforce a Breach of Confidentiality”. Introduction With the growing data-centric environment, the need for the confidentiality of information has become a new norm. With the boom in E-commerce privacy of data either (personal/ other) has become quintessential to any contractual relationship. The Constitution of India does not guarantee the Right to Privacy explicitly, it's derived from the article 21, 19(1)(a) and 19(1)(g) and the same is echoed in the myriad judgment of the Hon'ble Supreme Court. As with the other boilerplate clause the confidential clause is under emphasised and a general approach is to simply peruse from the draft template and use it with some modification. Confidentiality is essential and a cornerstone to any contractual relationship. The primary purpose this clause is inserted in any agreement is to ascertain that all the party's privy to the information will keep, maintain, and prevent disclosure of confidential information. It is pertinent to note that the confidentiality clause/ agreement can only be enforced against the contracting parties, as enforceability against the third party is usually difficult as the latter is not a party to the agreement. Need and Use of Confidentiality The confidentiality clause/ agreement has a widespread application in real life, and it's used in every commercial dealing. Its use in a variety of different contexts but generally used in a collaboration like an effort which might be a joint venture in developing a new aeroplane engine, to design new viral, or simply put where there is a sharing of any kind of proprietary information. To be enforceable, the disclosing Party must make it clear to the receiving party that the information disclosed shall at all time remain confidential. Absence of such a clear indication would cause an impediment in the enforceability. This is achieved either by pre-defining the term “Confidentiality information” so as to indicate what constitutes confidential information or by simply restricting the use by marking the document as confidential by any overt act of the disclosing party. However, in the absence of the confidentiality clause/ agreement, though not impossible its applicability may still be insisted by the disclosing party based on the principle of justice, equity, good faith and fair dealing. This is to prevent any disclosure of any confidential information which one party has received from the other or its use for its own purposes once the agreement has been terminated when such disclosure will cause irreparable harm or damages. It will also vary based upon the type of information disclosed wherein if general information available in the public domain, i.e. customer data/ phone numbers which are open and available, a Party can't claim confidentiality with regards to such information. How is Confidentiality addressed in a Contract The confidentiality is often addressed in the form of a specific clause, or it can be in the form of a separate “NDA” or “ Confidentiality Agreement”. The terms may differ, but the nomenclature of all the agreements are the same, i.e. protect the dissemination of proprietary/confidential information. In terms of the way, an NDA agreement is worded, it can take shape into two types: Unilateral: Where the responsibilities are cast only on the recipient of the information. Mutual: Where a reciprocal obligation is created on both the parties to the agreement to protect and prevent the breach of the confidential information. Click Above Confidentiality Clause Examples It is essential a clause/ agreement must be addressed and encapsulate the following to reduce the chance of unenforceability. To elucidate some of the vanilla clauses that can be used in a draft. A proper definition of the term confidentiality: “confidential information” For the purpose of this Agreement, the term “Confidential Information” shall mean such information relating to the Disclosing Party as the Disclosing Party may from time to time provide to the Receiving Party under or relating to this Agreement including all information communicated in writing or orally relating to business affairs, any technical data, or know-how, including but not limited to, that which is or relates to: inventions, ideas, processes, research, formats, formulas, human-readable code on any media, object code, data, programs, specifications, other works of authorship, improvements, discoveries, developments, designs and techniques; product plans, products, services, customers, markets, software, developments, inventions, processes, designs, drawings, engineering, hardware configuration information; non-public market information, product plans; marketing or finances of the company in any form, customer information, business plans and strategies, price lists and market studies; and contracts and client database, computer models and programs, research records, statistical methods of doing business, customers, finances, strategic and marketing plans, employee details and such other proprietary information relating to the business of the Disclosing Party and is not in the public domain. All copies, notes, analyses, studies, memorandum, compilation, or others document, both in digital and non- digital format which contains, in whole or in part, the information furnished with respect to employment purpose. Any information identified as being “privilege” or “confidential” shall be deemed to include all information, irrespective of the method of communication being by way of, but not limited to written documents, disks and electronic mail.” The above clause is a very broad definition which covers everything within its ambit. The scope of the definition has to be tailor-made to suit one's own needs. This clause though would fit in, if not for all general contracts. The obligation on the recipient of confidential information not to disclose it: Company Confidential Information means all information of or relating to Company (...) which X knows or reasonably should know to be confidential or proprietary (...) during the term of this Agreement and at all times thereafter, neither party shall directly or indirectly (a) use the other party's Confidential Information for any purpose other than that for which it is used or disclosed under the terms of this Agreement, (b) disclose to any person or entity any Confidential Information or in any other way publicly or privately disseminate any Confidential Information, or (c) assist, authorize or encourage anyone else to use, disclose, or disseminate any Confidential Information. Other variation can be as follows: “In connection with the business relationship contemplated by this Agreement, each party may receive or have access to commercially valuable technical and non-technical confidential or proprietary information (...) relating to the business of such party that is not generally known or available to others (...) each party acknowledges and agrees that any Confidential Information received or obtained from the other Party will be the sole and exclusive property of the other party and may not be used, disseminated or disclose, except as may be necessary to perform the obligations required under this Agreement or as may be required by law.” Both the clauses convey and try to restrict the use of the information for the purpose it's intended. The draft clause clearly shows that information is only for the purpose required for fulfilling the obligation under the agreement. The agreement expressly restricts and imposes an obligation on the recipient not to use it for any purpose other than for what it is intended for. This will enable a recipient to analyse and evaluate whether or not to enter into a particular form of transaction. A typical example can be a software development agreement wherein access to the company's server data, employee's data for testing the interface is given. Under this arrangement, the use of the data is permitted only for software testing and nothing else. “The Recipient agrees to keep strictly confidential the terms and conditions of this agreement, all information in or relevant to this agreement, and all information the other party provides (hereafter as “confidential information”), and will not disclose them to any third party except where it is otherwise stipulated in this clause. The Recipient agrees to receive all Confidential Information in strict confidence and to use the Confidential Information for the sole purpose of performing its obligations under this Agreement in accordance with this Agreement and not to use the Confidential Information for any other purpose. Without limiting the foregoing, the Recipient agrees to protect the Confidential Information against disclosure to Third Parties, using the same standard of care that the Recipient applies to protect its own most highly confidential information (which in no event will be less than a reasonable standard of care). The Recipient agrees not to disclose the Confidential Information to any Person other than: (i) its Representatives who are directly concerned, working on, advising on or consulted in connection with the Recipient's obligations hereunder and whose knowledge of the Confidential Information is reasonably considered to be necessary for such purposes, or (ii) as required by applicable Law or an order by a Governmental Authority or any requirements of the stock market or exchange or other regulatory body having competent jurisdiction; provided, except where not permitted by Law, the Recipient will give the Disclosing Party reasonable advance notice of such required disclosure, and will reasonably cooperate with the Disclosing Party, in order to allow the Disclosing Party an opportunity to oppose, or limit the disclosure of the Confidential Information or otherwise secure confidential treatment of the Confidential Information required to be disclosed; provided further, that if the disclosure is ultimately required, the Recipient will furnish only that portion of the Confidential Information which, based upon the advice of legal counsel, the Recipient is required to disclose in compliance with any such requirement.” In general, the obligation not to disclose, with proper care is usually comparatively easy to accomplish. All the recipient has to do is ensure that the content of the document containing the information or otherwise is not revealed to someone else. The real challenge comes from ensuring that the confidential information is not used other than for the intended purpose. The problems stem from the fact that once information has been learnt, it is often impossible to unlearn it. Even though the recipient wants to comply fully with the obligation set forth, if the information is relevant to the performance of his other functions or duties, which is likely to be different from the specific purpose permitted by the agreement, the problem will erupt. Case Laws on Breach of Confidentiality The plaintiff is a banking company, and the defendant was in employment with the plaintiff as head of their wealth management program for the northern region. The plaintiff stated that the defendant quit her job and had taken up work with the competitor bank and was using plaintiff's client data to solicit their client/ customer from the plaintiff and induced them to shift to the competitor bank. The plaintiff filed the suit for a permanent and mandatory injunction against the defendant seeking inter-alia a restrain against the defendant from using or disclosing any information and trade secrets relating to the business and operations of the plaintiff. The plaintiff alleged that defendant's action constitutes a breach of confidentiality terms as mentioned in her letter of appointment, and the defendant's action was against the code of conduct concert the customer privacy policy. It was categorically asserted by the defendant that the names of customers, their phone numbers and addresses are well known and can easily be ascertained by anybody and such information cannot be characterised as trade secrets or confidential information. It was further contended by the defendant that she had built the relationship with all her clients and obtained the data from the directories of the various organizations to solicit the customer for the plaintiff while working for them. The bank does not have any proprietary rights on these relationships, and the clients are not bound by any arrangement of exclusivity with the plaintiff bank. In the circumstances, it was averred that the relief claimed against the defendant is nothing but an attempt to injunct the client shifting their accounts from the plaintiff and to restrain the defendants from dealing with the clients. The court held that the plaintiff had not produced anything which would show that they have done something with the material which is available in the public domain to claim exclusive rights in that. Moreover, whether the restraint is total or partial, unqualified or qualified, the agreement is void if it is in control of trade. The court will not look into the test applied by the English courts when the code is exhaustive on the topic covered by it. The perpetual injunction demanded by the plaintiff was denied. Sandhya Organic Chemicals Pvt Ltd & Ors v. United Phosphorus Ltd & Anr The appellant in this case (original defendant) has preferred an appeal against the order of the trial court granting an interim injunction which restrained the appellant from adopting, using and resorting to in any manner whatsoever form the new process as invented by the Respondent(original plaintiff) for the manufacture of AIP and ZnP and from selling such products in the open market or secretly and from divulging, passing on any information, documents, drawings descriptions etc. to any other person, corporation, agents, servants body corporate etc. The said order was challenged in this appeal. It was the case of the plaintiff that while under the employment, the defendant no 3 has covenanted not to divulge any confidential and secret information acquired during employment. The covenant extended beyond the period of employment. It was further stated that since it was the know-how acquired during the employment process which has helped the defendant to manufacture AIP and ZnP form using white phosphorus instead of red phosphorus, it was a breach of the confidentiality by the defendant no 3 and it was further pleaded that the agreement was not affected by section 27 of the in view of the cause of action on common law and equity. The defendant averred that The trial Court has failed to appreciate the ingredients of Order 39, Rules (2) and (3) of the CPC. The trial Court, by granting the interim relief, has virtually decided the suit without a trial. The plaintiff has no proprietary interest in the nature of a registered trademark, which would enable it to sue and obtain an injunction in the terms in which it has been granted by the trial Court. In view of the provisions of the Patents or Designs Act. Unless a patent or a design is registered in respect of an invention, there is no proprietary right of which the plaintiff can complain of and ask for relief in the nature of the injunction. The said covenant of the defendant no 3 was void under section 27 of the India Contract Act 1872. The court held that a service covenant extending beyond the termination of service is void. While doing so, the High Court was fortified by the judgement of the Apex court in Superintendence Company of India Vs Krishan Murgai. Accordingly, the ad-interim injunction grant by the trial court was vacated. Homag India Private Ltd v. Mr Ulfath Ali Khan & Other The plaintiff was an Indian subsidiary of an international MNC Homaga group, and its business focused on providing machines, cells and factory installations for the panel processing furniture, structural element and timber frame house construction industries. The defendant(first defendant) joined the services of the plaintiff as a Senior Service Engineer. After joining services of the plaintiff's company, the defendant was given two promotions in the year 2009. In the course of employment, the defendant had access to confidential information of the plaintiff's business. The first defendant had submitted his resignation on 25.03.2009 and requested the plaintiff to relieve him from employment on the grounds that he had received better employment with the second defendant. The plaintiff discovered that the defendant had sent several e-mails from an official e-mail address containing confidential information to the second defendant. These e-mails contained customer details including added updated commissioned reports, the status of pending orders and other technical details of plaintiff's products. The defendant subsequently confessed this in an affidavit. The court held that the second defendant colluded with the first defendant and had the intention to set up a rival private limited company in India. It was the intention of the Second defendant to appoint the first defendant as the Director of Sales and Service of its Indian entity. It was agreed between defendants till such a company is established, the first defendant would be an employee of the second defendant. The injunction was accordingly granted, preventing the use of the plaintiff data. Burlington Homes Shopping Pvt Ltd v. Ajnish Chibber The plaintiff was a mail order service company, and it publishes mail-order catalogues dealing with several consumer items which were posted to the select list of the plaintiff's clients. The plaintiff has developed a list of clientele/customers database over a period of years, investing a considerable amount of money and time. It was avered by the plaintiff that on severing its relationship with the plaintiff, the defendant had established himself as a competitor by entering into similar mail-order shopping business. The defendant has managed to get a copy of the database, and otherwise guarded the secret of the plaintiff and has started making use of the same for the purpose of establishing a relationship with the plaintiff's customers. Against this, the plaintiff sought a permanent injunction against the defendant. The defendant has denied all the material plaintiff averments on the ground that the said database was neither developed by the plaintiff nor does he have any copyright therein. Defendant further submitted that he independently developed his own database and its utilisation thereof does not amount to any infringement of the copyright of the plaintiff. The court held that “the determining factor in finding whether another person's copyright has been infringed is to see whether the impugned work is a slavish imitation and copy of another person's work or it bears the impression of the author's own labours and exertions.” When the data made available by the plaintiff was compared with the data available on the floppies seized from the custody of the defendant it is found that there were a substantial number of entries which are comparable word by word, line by line and even space by space. Plaintiff application for grant of the injunction was allowed. Click Above Mr X v. Hospital Z The plaintiff was found to be HIV(+) after conducting several tests in the other hospitals. The marriage of the plaintiff was called off as the doctors of the Hospital disclosed the HIV(+) status of the Plaintiff to the other party to the marriage, i.e. to his fiancée. The plaintiff moved the court for damages against the hospital on the ground that the information was required to be kept secret under the medical ethics and it was disclosed illegally leading to calling off of the marriage. The Supreme Court held that the woman with whom the marriage of the plaintiff was settled, was saved in time by the disclosure of the vital information that the petitioner was HIV(+). It was held by the Supreme court, that when there is a clash of two fundamental rights Viz Plaintiff's right to privacy and his fiancée's right to lead a healthy life, the court would enforce the right which would advance the public morality or public interest. The law laid down by the Supreme Court is, the disclosure of HIV(+)status of the plaintiff is not violative of either the rule of confidentiality or the Plaintiff's claim of right to privacy. Exemption to Confidentiality Some of the exemption that is standard and the information to which confidentiality doesn't apply as follows: information that subsequent to the disclosure becomes publicly available to the Receiving Party without any violation of this agreement; that is in possession of the Receiving Party on the date of this Agreement other than due to the disclosure of such information by a Disclosing Party; approved for public release by prior written consent of the Disclosing Party in terms of this agreement; was independently developed by Receiving Party without reference to or use of any Confidential Information; which at the time of disclosure is already in possession of the Receiving Party and such prior possession can be demonstrated by the Receiving Party; information the disclosure of which would advance the public morality or public interest. Remedies for Breach of Confidentiality In order to succeed in an action for breach of confidentiality, it is essential that the following elements are established: The information/ data has all the quality of or fits within the parameter of the term confidentiality. The information/ data was communicated to the recipient imposing a duty of confidence. The recipient has misused the information/ data for the purpose other than the reason it was disclosed. The first essential stipulates that the information is not in the public domain. It can be a trade secret (such as recipes or formulae), client date, process or manufacturing information about a new product. The second essential stipulates the manner in which the confidential information has been passed from the disclosing party to the receiving party. The obligation usually arises out of a contractual relationship whereby the information is passed on only to be used for the intended purpose. The third essential stipulates that the receiving party has disclosed or used the confidential information without the consent and to the detriment of the disclosing party causing loss, injuries and damage. In a suit for breach of confidentiality, the choice of remedies are usually one or more of the following: Damages (monetary compensation). This usually requires the aggrieved party to quantify, adduce evidence as to the amount of loss and to show how the amount has been calculated. Where the aggrieved party does not actually suffer loss; he is entitled to get only nominal damages and nothing more. To claw back any profit, the breaching party has unjustly made. An injunction can be prayed to prevent the party from continuing to do something or stop them from doing something in future under CPC. Exemplary damages, if the breach is so flagrant that an additional level of punishment is required. The choice of remedy would depend upon the fact of each case, in the above Case law no. 4 if the ex-employee who left the organisation and started a competitive business upon infringing data the appropriate remedy would be an injunction plus file suit for damages. If the ex-employee left the organisation and is about to set its rival business, the proper remedy would be to go for perpetual injunction. This would be much better in the absence of any legal injury. Conclusion A person when entrusted with a piece of confidential information, breaks the covenant and breaches the trust reposed on him, the injured party has the right to sue for damages or specific performance. The examples illustrated above have a common thread, i.e. in order to be successful in an action, the information must be proprietary, which must be developed independently by own labour and efforts. Such enforcement is essential to foster strong commercial growth and activity and are in line with or commitment under international treaties. References Students of Lawsikho courses regularly produce writing assignments and work on practical exercises as a part of their coursework and develop themselves in real-life practical skill. LawSikho has created a telegram group for exchanging legal knowledge, referrals and various opportunities. You can click on this link and join: how to sue for breach of confidentiality. how to report breach of confidentiality. what are direct damages for breach of confidentiality. what is the penalty for breach of confidentiality. how much compensation for breach of confidentiality

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