

CAN A NON-DISCLOSURE AGREEMENT REALLY PROTECT ME?*

I. INTRODUCTION

1. “My employee signed a non-disclosure agreement (“NDA”) with my company, promising not to divulge my company’s confidential information to anyone. I recently found out that he has been sharing my customers’ list and other sensitive information to our competitor. How can I enforce the NDA against him?”

2. The above scenario may seem familiar to many employers. But what exactly is an NDA? An NDA, simply put, is a legally binding contract in which parties are bound to keep secret about sensitive information obtained, usually during the course of employment. NDAs are governed by the usual contractual principles, and employers can sue or take action against employees for breaches of NDAs.

3. However, it is often disputed what kinds of information are protected by NDAs, and when breaches of NDAs arise. Ironically, suing for breaches of NDAs may result in public disclosure of sensitive information that companies had originally sought to protect, as these matters are litigated in open courts. In light of these problems, this article shall look at:
 - (a) Information that companies can protect in NDAs;
 - (b) Problems in proving breaches of NDAs;
 - (c) Enforcement of NDAs; and
 - (d) Effectiveness of NDAs in protecting companies’ secrets.

4. In summary, there is no closed list of information that companies may seek to protect in NDAs, which makes it difficult to determine when do breaches of NDAs arise. In order to

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maintain the secrecy of the information companies seek to protect in the NDAs, companies should consider other ways of settling the matter besides suing in court. Further, NDAs must be properly drafted in order to be effective in protecting the companies' secrets.

II. DISCUSSION

A. *Information that companies can protect in NDAs*

5. Companies often use NDAs to prevent the disclosure of what they regard as confidential information. In commercial settings, confidential information may include any information "which any party has an interest in keeping confidential".¹ It can be said that the list of information that can be protected by NDAs is not closed. The Singapore courts have, for instance, explicitly recognized a wide range of information capable of being protected as confidential information, including communications between a lawyer and his client, telephone bills and receipts, medical research questionnaires, an engine design, and internal financial information.²

B. *Problems in proving breaches of NDAs*

6. Given the wide range of information that companies may seek to protect through NDAs, companies will inevitably face problems when asserting that their employees are in breach of the NDAs. One problem is when the alleged confidential information is so closely linked to the employees' own skill and knowledge, possibly amassed through experience during the course of employment. For instance, you may regard the disclosure of a particular piece of information, such as a customers' list,³ to be a breach of the NDA, but your employee may not agree so. This problem may be exacerbated if the employee has been working in the company for a considerable period of time, and it is difficult to distinguish between the company's confidential information and the employee's personal knowledge. This is because the employee's knowledge and skill could have been enhanced or improved during

¹ *Vestwin Trading Pte Ltd v Obegi Melissa* [2006] 3 SLR 573, at [35].

² *Id.*, at [37]-[40].

³ *Adinop Co Ltd v Rovithai Ltd* [2018] SGHC 129, at [66].

his term of work with the company. While an employer's confidential information should be protected, the scope of protection should not be so wide that it unreasonably encroaches upon the employee's liberty to make use of his skill and knowledge.⁴

7. Another problem is that companies may seek to protect information which are already publicly available (e.g. on the Internet). For instance, you may regard your company's customers' list as confidential, but the information in the list can also be obtained from public sources. If your employee shares this list to your competitor, would he be in breach of the NDA? In such a case, the court will consider whether it would take the competitor "some time and effort" to construct the customers' list by obtaining the information from independent sources,⁵ as opposed to obtaining the list wholesale from the employee. This approach seems to suggest that the more complicated the alleged confidential information is, the more likely court would regard the nature of the information as confidential, hence protected under the NDA. However, this would result in small businesses being marginalized from the protection of NDAs. This is because small businesses often do not have very complicated or sophisticated confidential information, but such information is nonetheless very valuable to the businesses.

8. The above problems can be prevented with carefully drafted NDAs by listing down the specific information and the boundaries within which employees can use such information. This would make it difficult for employees to deny that they had breached their obligations under the NDAs. It would also be irrelevant that the alleged pieces of confidential information are of a relatively trivial nature, given that employees are under express obligations to keep them secret under the NDAs. Companies should also constantly review and update their NDAs, and ensure that information sought to be protected under the NDAs are kept updated. Notably, companies must be mindful of the scope of the NDAs. For instance, if the NDAs specifically states that employees are not allowed to use the companies' confidential information for a period of 2 years after they leave their respective

⁴ *Clearlab SG Pte Ltd v Ting Chong Chai* [2015] 1 SLR 163, at [67].

⁵ *Supra* n 3, at [81].

employments, the employees will then be free to disclose and make use of the said confidential information upon the expiry of the stipulated 2 years.⁶

C. *Enforcing NDAs*

9. If you find out that your employee has breached the NDA, you may want to sue him for the breach. However, this would mean that the confidential information in question may be disclosed to the public when the court issues a written decision of the case, or if the media reports on the case. The company's "secret" would lose its confidentiality and it defeats the company's objective of maintaining the secrecy of the sensitive information in an NDA. Hence, companies should only consider enforcing NDAs through court proceedings as a last resort. A better solution might be to insert a mediation clause stating that parties must settle any dispute in connection with the NDAs through private mediation,⁷ held on a "without prejudice"⁸ basis.

D. *Effectiveness of NDAs*

10. Notwithstanding the problems highlighted above, properly-drafted NDAs remain effective in protecting companies' secrets. Such NDAs should specify the particular sensitive information to be protected, and the boundaries within which the employee can use the sensitive information. When breaches of NDAs arise, employers can rely on the NDAs and enforce it as legally binding contracts, and obtain remedies available under contract law, such as injunctions or damages.⁹ Of course, as with any contract, parties can also choose to settle amicably out of court.

⁶ *PH Hydraulics & Engineering Pte Ltd v Intrepid Offshore Construction Pte Ltd* [2012] 4 SLR 36, at [56]. Note that there was also a non-competition clause in this case.

⁷ Unlike court proceedings which are open to the public and may be reported in the media, mediations in Singapore are confidential in nature. This provides a platform for parties to resolve their disputes privately without attracting any publicity. More information can be found on the Singapore Mediation Centre website:

<https://www.mediation.com.sg/>

⁸ Singapore State Courts website <https://www.statecourts.gov.sg/cws/Mediation_ADR/Pages/An-Overview%20of%20Mediation.aspx> (accessed 10 October 2019). This means that what is said by you or the other party will not be used against you as evidence if your case proceeds to trial.

⁹ Andrew Phang and Goh Yihan, *Contract Law in Singapore* (Kluwer Law, 2012) at 1488.

III. CONCLUSION

11. NDAs are useful in protecting sensitive information belonging to companies. Employees who sign the NDAs are legally bound to abide by their terms. If any employee breaches the NDA, companies have the option of either settling the matter out of court, or to go for mediation. Suing in court should be the last resort, in order for the confidential information to not be disclosed to the public.¹⁰ Even if the confidential information may be redacted from the judgment released to the public, litigation may exhaust the financial and manpower resources of companies. Given the wide-ranging types of confidential information, companies should ensure that NDAs are properly drafted by lawyers to include the specific information which companies want to protect, and what the employees can or cannot do with the information.

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¹⁰ The court may of course at times release a redacted version of their judgment.