

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

**[2017] SGHC 305**

Suit No 300 of 2013 (consolidated with Suit No 302 of 2013)

Between

**LOUIS VUITTON MALLETIER**

*... Plaintiff*

And

**MEGASTAR SHIPPING PTE LTD**

*... Defendant*

And

**PT ALVENINDO SUKSES EKSPRESS**

*... Third Party*

Suit No 306 of 2013

Between

**GUCCIO GUCCI SPA**

*... Plaintiff*

And

**MEGASTAR SHIPPING PTE LTD**

*... Defendant*

And

**PT ALVENINDO SUKSES EKSPRESS**

*... Third Party*

Suit No 310 of 2013 (consolidated with Suit No 311 of 2013)

Between

**BURBERRY LIMITED**

*... Plaintiff*

And

**MEGASTAR SHIPPING PTE LTD**

*... Defendant*

And

**PT ALVENINDO SUKSES EKSPRESS**

*... Third Party*

Suit No 322 of 2013

Between

**HERMÈS INTERNATIONAL**

*... Plaintiff*

And

**MEGASTAR SHIPPING PTE LTD**

*... Defendant*

And

**PT ALVENINDO SUKSES EKSPRESS**

*... Third Party*

Suit No 327 of 2013

Between

**SANRIO COMPANY, LTD**

*... Plaintiff*

And

**MEGASTAR SHIPPING PTE LTD**

*... Defendant*

And

**PT ALVENINDO SUKSES EKSPRESS**

*... Third Party*

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## **JUDGMENT**

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[Trade Marks and Trade Names] — [Infringement]

[Trade Marks and Trade Names] — [Border enforcement measures]

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**Louis Vuitton Malletier**  
**v**  
**Megastar Shipping Pte Ltd (PT Alvenindo Sukses Ekspres,**  
**third party) and other suits**

**[2017] SGHC 305**

High Court — Suit Nos 300, 306, 310, 322, 327 of 2013  
George Wei J  
13–14, 16, 20 March 2017; 17 April 2017

24 November 2017

Judgment reserved.

**George Wei J:**

**Introduction**

1 These proceedings concern claims for trade mark infringement against a freight forwarder, Megastar Shipping Pte Ltd (“the Defendant”). The claims were brought by five registered trade mark proprietors (collectively, “the Plaintiffs”) in the following suits: Suit No 300 of 2013 (consolidated with Suit No 302 of 2013), Suit No 306 of 2013, Suit No 310 of 2013 (consolidated with Suit No 311 of 2013) and Suit No 327 of 2013. The Defendant in turn brought third-party proceedings against PT Alvenindo Sukses Ekspres (“the Third Party”), an Indonesian company based in Batam.

2 In brief, the claims arise out of two shipments by which two containers (“the Containers”) loaded with counterfeit goods were shipped from two ports in China to Singapore, with the intention that they were to be sent on to the Third Party in Batam. The Containers were intercepted by Singapore Customs and detained, inspected and seized under the newly enhanced provisions for “assistance by border authorities” set out in Part X of the Trade Marks Act (Cap 332, 2005 Rev Ed) (“TMA”). Upon examination, the Containers were discovered to contain merchandise bearing infringing trade marks (“the Counterfeit Goods”). After seizure by Singapore Customs, the Plaintiffs commenced proceedings for trade mark infringement against the Defendant, alleging that the Defendant had imported the Counterfeit Goods into Singapore. The Defendant denies importing the Counterfeit Goods into Singapore, and asserts that even if the Counterfeit Goods had been imported into Singapore, the Defendant is, in any case, not the importer.

3 At the heart of the dispute between the parties is the question of what amounts to an act of import or export “under the sign”, and who is the importer or exporter in the context of s 27 of the TMA – that is, in the context of the *substantive rights* enjoyed by the registered trade mark proprietor under the TMA. Put slightly differently, the question concerns the relationship between the substantive right of the trade mark proprietor to bring infringement proceedings where trade-marked goods are imported without consent and the special border enforcement provisions on inspection, seizure and detention of imports and exports of infringing and counterfeit goods contained in the TMA. These enforcement measures in turn dovetail into the general set of legislation and regulations on trade, Port of Singapore operations (such as entry, landing, warehousing, and loading procedures) and Customs control (especially on revenue matters such as import/export duties as well as control of prohibited goods and the like). In short, does “import” and “export” mean the same thing

and is the identity of the “importer” and “exporter” the same for both the substantive rights and the special border enforcement provisions?

4 The questions arise in the specific context of goods being brought into the port of Singapore where they were to be temporarily held pending transshipment to another port in Batam, Indonesia. Distinctions can and are sometimes drawn between (i) through transshipment; (ii) non-through transshipment; (iii) import for re-export; and (iv) goods in transit. Whether these distinctions are just labels of convenience or trade practice, or carry specific legal consequences, depends very much on the context.

5 For example, it is not surprising to find there are many different procedures, forms, and permit applications which may be applicable when goods are sought to be brought into or out of Singapore, given the vast remit of the Port of Singapore Authority (“PSA”), Singapore Customs, and authorities concerned with the regulation of imports and exports, as well as the different circumstances under which goods may enter or leave Singapore. Someone obviously must apply for the necessary permits, make the requisite declarations, pay the required fees or charges and provide information which may be required by the authorities. That person need not necessarily be the shipper, consignor, consignee or the master of the vessel. The person may be an agent of the shipper, consignor or consignee, often taking the form of a freight forwarder. In some cases, perhaps many, forms or permit applications issued by the relevant authorities will include a box or heading describing the person submitting that form or application as an “importer” or “exporter”. Against this backdrop, one of the questions that has arisen is whether and how the Court should take account of the terminology used in such forms, declarations and applications in deciding who is an “importer” or “exporter” within the context of an alleged trade mark infringement.



**Dramatis personae**

6 The Plaintiffs comprise Louis Vuitton Malletier (“LV”), Guccio Gucci SPA (“Gucci”), Burberry Limited (“Burberry”), Hermès International (“Hermès”) and Sanrio Company Ltd (“Sanrio”). The Plaintiffs and the respective Suits commenced by each of them are set out in the following Table:

Suit No	Plaintiff
HC/S 300/2013	LV
HC/S 306/2013	Gucci
HC/S 310/2013	Burberry
HC/S 322/2013	Hermès
HC/S 327/2013	Sanrio

7 The Plaintiffs are the registered proprietors of numerous trade marks in Singapore. These comprise word and device marks registered under multiple classes under the TMA.<sup>1</sup> The Plaintiffs produce a wide variety of goods including bags, wallets, purses, leather accessories and toys in respect of which the registered trade marks are used.

8 The Defendant is a Singapore company which carries on the business of a freight forwarder.<sup>2</sup>

9 The Third Party, who did not appear or take any part in these proceedings, is an Indonesian company based in Batam. The status of the Third Party was never made entirely clear on the evidence, but the parties have proceeded on the basis that the Third Party is itself a freight forwarder.<sup>3</sup>

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<sup>1</sup> PBOD Vol II, tabs 207–234; Statement of Claim (Amendment No 1) for Suit No 327/2013, para 4.

<sup>2</sup> Defendant’s closing submissions, para 6.

<sup>3</sup> Plaintiffs’ closing submissions, para 3; Certified Transcript, 16 March 2017, p 107 (lines 8–16).

### **The witnesses**

10 Before delving into the facts, this may be a convenient juncture to introduce the witnesses who gave evidence at trial, since I will refer to their evidence in the course of describing the factual matrix. A total of three witnesses testified for the Plaintiffs:

(a) Mr Francois Dubois (“Mr Dubois”), the managing director of STU, a firm in Hong Kong specialising in assisting brand owners to investigate intellectual property infringement.<sup>4</sup> Mr Dubois’ evidence was mainly concerned with investigations in Hong Kong and Shenzhen on the companies named as the shippers in the relevant shipping documents.

(b) Mr Chong Wei Hoong (“Mr Chong”), Assistant Head of the Operations Management Branch of Singapore Customs.<sup>5</sup> Mr Chong’s evidence was primarily on the documentation required for shipment of containers into Singapore where containers are to be carried out of Singapore to a third country. Mr Chong was subpoenaed by the Plaintiff in HC/S 327/2013.

(c) Ms Chew Mui Ling (“Ms Chew”), an Executive Director of the Trade and Customs & Indirect Tax Practice of KPMG Services Pte Ltd.<sup>6</sup> Ms Chew’s evidence was primarily on the standard documentation required for shipment of containers into Singapore which containers are to be carried out of Singapore to a third country.

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<sup>4</sup> AEIC of Francois Dubois, paras 1 and 3.

<sup>5</sup> Plaintiffs’ closing submissions, para 11(b).

<sup>6</sup> Plaintiffs’ closing submissions, para 11(c).

11 The following three witnesses testified for the Defendant.

(a) Mr Chua Swee Teck (“Mr Chua”), a director of the Defendant. Mr Chua’s evidence concerned the business of the Defendant, and its relationship with the companies named as the shippers and the third party.

(b) Mr Aaron Cheong (“Mr Cheong”), an officer from Singapore Customs.<sup>7</sup> Mr Cheong’s evidence was primarily on the documentation required for shipment of containers into Singapore which containers are to be carried out of Singapore to a third country.

(c) John Iversen (“Mr Iversen”), the General Manager of special projects (Asia) of C H Robinson Project Logistics Pte Ltd, a company owned by C H Robinson Worldwide Inc. Mr Iversen is also a representative of C H Robinson Freight Services (Singapore) Pte Ltd, a company that specialises in freight forwarding services in Singapore. He is also a council member of the Singapore Logistics Association.<sup>8</sup> Mr Iversen’s evidence was mainly concerned with the role and function of a freight forwarder as well as the usual or standard practices relating to knowledge or information as to the contents of a container in respect of which a freight forwarder’s services are or have been engaged.

12 I note in passing the Defendant had engaged the services of Mr Schweiger Martin Rainer Gabriel (“Mr Schweiger”), an European patent and trade mark attorney and agent, to testify as to European law and legal materials on border enforcement provisions. The intention was to call Mr Schweiger as an expert witness. To this end, Mr Schweiger swore five affidavits

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<sup>7</sup> Plaintiffs’ closing submissions, para 12(b).

<sup>8</sup> Plaintiffs’ closing submissions, para 12(c).

of evidence-in-chief (one for each Suit) which included Mr Schweiger’s expert report. The Plaintiffs applied to strike out Mr Schweiger’s AEICs on the ground that his expert report was “irrelevant” under O 41 r 6 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) and/or the inherent jurisdiction of the Court. After hearing counsel, I struck out the AEICs of Mr Schweiger. Whilst no issue was raised in the submissions, it is convenient to stress that the competency and experience of Mr Schweiger was *not* in issue. The sole question was whether an expert opinion on the European Community’s treatment of similar provisions was *admissible* as evidence in the case at hand.

### **Events leading to the dispute**

13 Before turning to the background to this dispute, I highlight two points at the outset: First, there was no dispute over the ownership, validity and subsistence of the Plaintiffs’ trade marks.<sup>9</sup>

14 Secondly, there was no dispute over the fact that the Counterfeit Goods did infringe the Plaintiffs’ trade marks and moreover that they were *counterfeits*. While a plethora of terms may be used in trade mark disputes to describe infringing goods, counterfeit goods are a particularly egregious type of infringing goods. Infringing goods are defined in s 3(2) of the TMA as follows:

(2) Goods are “infringing goods”, in relation to a registered trade mark, if they or their packaging bears a sign identical with or similar to that mark and –

(a) the application of the sign to the goods or their packaging was an infringement of the registered trade mark;

(b) the goods are proposed to be imported into Singapore, and the application of the sign in Singapore to them or their packaging would be an infringement of the registered trade mark; or

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<sup>9</sup> Plaintiffs’ closing submissions, para 8.

(c) the sign has otherwise been used in relation to the goods in such a way as to infringe the registered trade mark.

15 Under s 3(5) of the TMA, counterfeit goods are infringing goods which bear “counterfeit trade marks”. Section 3(6) of the TMA in turn defines a “counterfeit trade mark” as a sign which is “identical” to or “so nearly resembling the registered trade mark as to be calculated to deceive”, and which is applied to goods without consent and “to falsely represent the goods ... to be the genuine goods ...” of the trade mark proprietor. By the time of the trial, the Defendant had accepted through its counsel that the Counterfeit Goods were, indeed, counterfeit.<sup>10</sup>

16 Turning now to the facts leading to this dispute, these will be summarised below under headings which reflect the sequence of events.

*Shipment of the goods from China to Singapore*

17 It is unclear who the actual manufacturer of the Counterfeit Goods is, but the identity of the actual manufacturer is immaterial. What is clear is that the counterfeit goods came into Singapore in two shipments from ports in China. The first shipment involved a container marked TRLU 5945619 (“the First Container”) which was shipped on board the vessel APL LATVIA belonging to American President Lines (“APL”). The second shipment concerned a container marked GESU 5635375 (“the Second Container”) which was shipped on board the vessel COSCO Napoli owned by Orient Overseas Container Line Limited (“OOCL”).<sup>11</sup>

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<sup>10</sup> PBOD Vol III, Tabs 249 to 253.

<sup>11</sup> Plaintiffs’ closing submissions, para 6.

18 On or around 28 March 2013, the Defendant received letters from the Third Party,<sup>12</sup> and emails from a Ms Susie Xu (“Ms Xu”),<sup>13</sup> who appears to have been acting as an “agent” for the Third Party.<sup>14</sup> The letters requested the Defendant to arrange transshipment of the two containers to Batam, setting out brief details of the incoming shipments and identifying the name of the carrier and the vessel to be used for carriage to Batam. The letters also contained undertakings to indemnify the Defendant against all consequences and liabilities.<sup>15</sup> The Defendant also received from the Third Party the sea waybills, commercial invoices, packing lists and arrival notices in respect of both Containers.

19 With respect to the First Container, the sea waybill dated 28 March 2013 issued by APL stated that Shenzhen Huaguanshun Import and Export Limited Co (“SHIEL”) was the shipper. The port of discharge and delivery was named as Singapore.<sup>16</sup> Some other significant points to note about this sea waybill include the following:

- (a) The point and country of origin for the goods was stated to be “Chiwan, GD, PRC”. This was also the port of loading.
- (b) The sea waybill was marked “non-negotiable”.
- (c) The goods were described as “household goods” and comprised 351 cartons.

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<sup>12</sup> PBOD Vol 1, Tabs 12 and 69.

<sup>13</sup> PBOD Vol 1, Tabs 16 and 67.

<sup>14</sup> Certified Transcript, 16 March 2017, p 75 (lines 20–22).

<sup>15</sup> PBOD Vol 1, Tabs 12 and 69.

<sup>16</sup> PCB, Tab 7.

- (d) The container was sealed by the shipper. The sea waybill stated “shipper’s load, stow and count”.
- (e) The sea waybill was marked “freight prepaid.”
- (f) The Defendant was named as the consignee and notify party.

20 The counterfeit goods found inside this container were of concern to LV, Gucci, Burberry, Hermès, and Sanrio.<sup>17</sup>

21 Apart from the sea waybill, the other relevant documents adduced in evidence with respect to the First Container were: (a) the invoice; (b) the packing list; and (c) the arrival notice:

(a) The invoice was dated 25 March 2013 and provided an address in Shenzhen, China for SHIEL. Salient points to note about this invoice include the following:<sup>18</sup>

- (i) The Third Party was named as the consignee.
- (ii) The products were listed under three categories: car accessories, fashion items, and tools and hardware. As far as fashion items are concerned, the list included: belts, handbags, travel bags, wallets, “bag shopping” and “bag school”.

(b) The packing list also dated 25 March 2013 named the Third Party as the consignee. The product descriptions are the same as in the invoice.<sup>19</sup>

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<sup>17</sup> Plaintiffs’ closing submissions, para 6.

<sup>18</sup> PCB, Tab 2.

<sup>19</sup> PCB, Tab 1.

(c) The arrival notice dated 28 March 2013 provided that 1 April 2013 was the expected date of arrival at Singapore. The Defendant was named as consignee and notify party. The box headed “Onward Routing from Port of Discharge” was left blank.<sup>20</sup>

22 With respect to the Second Container, the sea waybill issued by OOCL dated 30 March 2013 stated that Zon Cen Trading Co Limited (“Zon Cen”) was the shipper and the port of discharge and delivery was Singapore.<sup>21</sup> Some other significant points to note about this sea waybill include the following:

- (a) It was marked “non negotiable”.
- (b) The goods were described as “household goods” and comprised 503 cartons.
- (c) The container was sealed by the shipper and the sea waybill was endorsed “shipper load and count”.
- (d) The sea waybill was marked “Ocean Freight Prepaid” and “destination charges collect per line tariff, and to be collected from the party who lawfully demands delivery of the cargo”.
- (e) The port of loading was Shekou, China.
- (f) The Defendant was named as the consignee and notify party.

23 The counterfeit goods found inside this container concerned LV, Burberry and Sanrio.

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<sup>20</sup> PCB, Tab 3, p 16.

<sup>21</sup> PCB, Tab 32.



24 As with the First Container, the other relevant documents adduced in evidence with respect to the Second Container were: (a) the invoice; (b) the packing list; and (c) the arrival notice:

(a) The invoice dated 26 March 2013 provided an address in Hong Kong for Zon Cen. Salient points on this invoice include the following:<sup>22</sup>

(i) The Third Party was named as the consignee.

(ii) The products were listed under five categories: car accessories, computer accessories, fashion items, household goods and tools and hardware. As far as fashion items are concerned, the list included: belts, handbags, “bag shopping”, school bags and wallets.

(b) The packing list also dated 26 March 2013 named the Third Party as the consignee. The product descriptions match those in the invoice.<sup>23</sup>

(c) The undated arrival notice provided 3 April 2013 as the expected date of arrival in Singapore. The consignee and notify party was named as the Defendant.<sup>24</sup>

25 I pause to note Mr Dubois’ evidence concerning his unsuccessful attempts to locate Zon Cen and SHIEL (“the Shippers”) at the addresses provided in the invoices, as well as his unsuccessful attempts to communicate with the Shippers by telephone. Not surprisingly, Mr Dubois’ conclusion was that Zon Cen and SHIEL were not to be found at the addresses provided.<sup>25</sup> In

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<sup>22</sup> PCB, Tab 28.

<sup>23</sup> PCB, Tab 27.

<sup>24</sup> PCB, Tab 30, p 87.

<sup>25</sup> AEIC of Francois Dubois, pp 5–7.

his examination-in-chief, Mr Dubois added that in his experience as an investigator of intellectual property infringement, shippers of counterfeit goods often used fake names and addresses in the documents.<sup>26</sup> I have no reason to doubt his evidence.

26 It is common ground that the Defendant received the sea waybills and the arrival notices in respect of both the Containers before the respective vessels reached Singapore. Prior to receiving these documents, the Defendant was not aware of any arrangements made for the shipment of the Containers to Singapore. The unchallenged evidence of the Defendant's director, Mr Chua, was that the Defendant was neither involved in the packing of the Containers' contents, nor the arrangements to ship the Containers from China to Singapore, as these were either directly concluded between Zon Cen and SHIEL on the one hand, and the Third Party and/or APL and OOCL ("the Carriers") on the other.<sup>27</sup> I thus accept that the Defendant was simply acting as the freight forwarder on the instructions of the Third Party.

27 I note also that while the Third Party was named as the consignee in the invoices and packing list, it is unclear who the actual or ultimate owner of the goods is. As I have mentioned, the parties appear to have accepted that the Third Party was itself a freight forwarder (see [9] above). There was a suggestion from Counsel that the Third Party, after receiving the Counterfeit Goods in Batam, would have sent them onwards to another party.<sup>28</sup> The Defendant's response was that he was unsure. In short there was no concrete evidence as to what would have happened to the Counterfeit Goods after receipt by the Third Party.

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<sup>26</sup> Certified Transcript, 13 March 2017, p 63 (lines 4–9).

<sup>27</sup> AEIC of Chua Swee Teck, para 9.

<sup>28</sup> [Certified Transcript, 16 March 2017, p 107, lines 17–18.](#)

*Steps taken by the Defendant after receipt of the arrival notice*

28 The sea carriage from China to Singapore was relatively short. Both Containers were shipped on board their respective vessels on 28 March 2013 with expected arrival dates of 1 April 2013 and 3 April 2013 respectively. It is clear that time was short and the Defendant had to act quickly on the instructions that it had received. The vessels were very soon due to arrive in Singapore.<sup>29</sup>

29 Operations at the Port of Singapore are highly computerised through the Portnet system operated by PSA. Users of the Portnet system include various types of entities involved in the movement of containers in and out of Singapore. Users are each assigned a unique “operator code”,<sup>30</sup> and have the right to access the Portnet system for the purpose of synchronising operational processes between the various players in the maritime service community, including carriers, the port authorities, and freight forwarders.<sup>31</sup> Under this Portnet system, it would not ordinarily be necessary for the freight forwarder in a transshipment case to take physical possession of the containers or to even have sight of the containers.<sup>32</sup> Once the relevant instructions are entered into the system, PSA essentially undertakes the necessary operations: the unloading of the containers, placement into transshipment stacks (where appropriate) and the loading of the containers on board the outward bound vessel.<sup>33</sup>

30 In the present case, the Containers would have been under the control of the Carriers as the vessels approached Singapore. Once the Defendant accepted the appointment by the Third Party to arrange for transshipment to Batam, the

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<sup>29</sup> Certified Transcript, 16 March 2017, p 28 (lines 18–25).

<sup>30</sup> AEIC of John Iversen, para 21.

<sup>31</sup> Exhibit D252, p 254; AEIC of Chua Swee Teck, para 21.

<sup>32</sup> AEIC of Chua Swee Teck, para 21.

<sup>33</sup> Certified Transcript, 16 March 2017, p 25 (lines 2–7).

Defendant notified the carrier to declare “transshipment status” for the container, and to transfer the “operator code” for the container from the carrier to the Defendant.<sup>34</sup> Once this was done, the Defendant would then use the Portnet system to provide the instructions as per the information that it had been provided by the Third Party.<sup>35</sup> The letter of instructions from the Third Party provided details including the identity of the carrier to be used to transport the containers to Batam, the name of the vessel, and the port code.<sup>36</sup> Using the Portnet system, the Defendant would be able to input such information so that PSA could take the necessary operational steps.

31 The position taken by the Defendant as to its role can perhaps be described as essentially “ministerial” or “quasi-ministerial” in nature. Once the Defendant accepted the engagement, its role was simply to follow the instructions of the Third Party. After all, it was the Third Party who appointed the Defendant. The invoices and packing lists from SHIEL and Zon Cen identified the Third Party in Batam as the consignee. To the question why the goods were not simply shipped direct from ports in China to Batam, the evidence, which I accept, is that larger container vessels would not be able enter the port at Batam. The water depth was too shallow.<sup>37</sup> It was, for this reason, necessary to ship the goods to Singapore and to arrange for on carriage of the sealed containers to Batam on smaller “feeder” vessels or barges. Once the containers arrived in Batam, they were to be received and unpacked by the Third Party. The empty containers would be returned to Singapore as they belonged to the Carriers.

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<sup>34</sup> Certified Transcript, 16 March 2017, p 29 (lines 2–4); AEIC of Chua Swee Teck, Tab 5.

<sup>35</sup> Certified Transcript, 16 March 2017, p 35 (lines 7–18).

<sup>36</sup> PBOD Vol I, Tabs 12 and 69.

<sup>37</sup> Certified Transcript, 14 March 2017, p 142 (lines 15–25)–p 143 (lines 1–5).

*The inspection and seizure of the goods in Singapore*

32 In the event, the containers were never sent out of Singapore to Batam as intended. This was because immediately upon the containers being landed in Singapore, the containers were inspected by Singapore Customs and the Counterfeit Goods seized.

33 In the case of the First Container, Singapore Customs informed the Defendant by email on 1 April 2013 at 5.32 pm that an inspection was to be conducted of the container on 2 April 2013.<sup>38</sup> The Defendant was requested to make the arrangements to truck the container to the place of inspection.

34 In the case of the Second Container, Singapore Customs informed the Defendant by email on 3 April 2013 at 12.29 pm that an inspection was to be conducted of the container on 4 April 2013.<sup>39</sup> The Defendant was again requested to make the arrangements to truck the container to the place of inspection.

35 When the containers were opened by Singapore Customs, the contents were found to include counterfeit trade-marked goods. The Counterfeit Goods were seized by Singapore Customs. Upon completion of inspection, the Defendant was asked to make arrangements to collect the containers and the unseized goods on 5 and 8 April 2013.<sup>40</sup>

36 After the Defendant informed the Third Party of the inspection notices, Ms Xu by an email dated 3 April 2013 responded as follows:<sup>41</sup>

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<sup>38</sup> AEIC of Chua Swee Teck, p 32.

<sup>39</sup> AEIC of Chua Swee Teck, p 34.

<sup>40</sup> AEIC of Chua Swee Teck, pp 53–54.

<sup>41</sup> AEIC of Chua Swee Teck, p 37.

Heard that 2nd container has been held by custom for check today?

This is bad.

Will this continues?

Please advise us how we could handling these matter.

if this continues, It will be a great loss for us.

We could provide any document needed.

All the shipment from China for Nini, suppose to transit only in Singapore. As how we do it before, it is just a transshipment procedure.

Customs Good Declare should be done in Batam, where the unstuffing goods happen.

...

37 The Defendant sent further emails to the Third Party dated 3 April 2013 and 5 April 2013, informing the Third Party of the seizure by Singapore Customs under s 82 of the TMA. In both these emails, the Defendant stated the following “Please advise your next course of actions [*sic*] in view that we are only your agent in Singapore.”<sup>42</sup>

38 The Third Party responded *inter alia* by emailing to the Defendant powers of attorney for the purpose of managing and organising the unseized goods from the Containers to be shipped to Batam.<sup>43</sup> The powers of attorney stated that the Third Party was the owner of the goods. The Defendant responded by email to confirm the Third Party’s instructions to combine the unseized cargo from both containers and to reship the unseized goods to Batam.<sup>44</sup> After receipt of confirmation from the Third Party, it appears that the unseized cargo were combined and sent to Batam.

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<sup>42</sup> AEIC of Chua Swee Teck, pp 38, 40.

<sup>43</sup> AEIC of Chua Swee Teck, pp 48–51.

<sup>44</sup> AEIC of Chua Swee Teck, p 56.

39 The Plaintiffs commenced proceedings for trade mark infringement against the Defendant between 9 April 2013 and 15 April 2013.<sup>45</sup> The Defendant subsequently took out proceedings against the Third Party on 3 May, 7 May and 16 May 2013.<sup>46</sup> Upon receipt of the Third Party Notices, the Third Party appointed a Singapore law firm.<sup>47</sup> It appears that the only step taken by the Third Party's lawyers in Singapore was to request formal proof of the seizure by Singapore Customs.<sup>48</sup> The Third Party has since refused or failed to take any further part in the proceedings. The Third Party neither filed any defence nor led any evidence in the proceedings.

*The detention and the subsequent order for destruction*

40 The goods were stored at a warehouse after the seizure.<sup>49</sup> The Third Party was aware of the seizure and detention of the counterfeit goods and made no attempt to seek release of the goods. After the Third Party was given notice of the detention and impending destruction of the goods, an order for destruction was granted. Samples of the seized goods were retained.

**The parties' cases**

41 The Plaintiffs' position was that the Defendant is liable for infringing their respective trade marks under s 27(1) read with s 27(4)(c) of the TMA, which provide as follows:

**Acts amounting to infringement of registered trade mark**

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<sup>45</sup> See Writs of Summons in Suit No 300/2013 (9 April 2013), Suit No 306/2013 (10 April 2013), Suit No 310/2013 (10 April 2013), Suit No 322/2013 (12 April 2013), Suit No 327/2013 (15 April 2013).

<sup>46</sup> Defendant's closing submissions, para 319.

<sup>47</sup> AEIC of Chua Swee Teck, paras 37–38.

<sup>48</sup> AEIC of Chua Swee Teck, paras 39–40.

<sup>49</sup> Affidavit of Muthusamy Suresh (filed in Summons 1875/2013), 9 April 2013, para 14.

**27.**–(1) A person infringes a registered trade mark if, without the consent of the proprietor of the trade mark, he uses in the course of trade a sign which is identical with the trade mark in relation to goods or services which are identical with those for which it is registered.

...

(4) For the purposes of this section ... a person uses a sign if, in particular, he –

...

(c) *imports or exports goods under the sign.*

[emphasis added]

42 The Plaintiffs argued that transshipment of the Counterfeit Goods amounted to “import[ing]” them, relying for this purpose on the decision of *Trade Facilities Pte Ltd and others v PP* [1995] 2 SLR(R) 7 (“*Trade Facilities*”), and s 2(1) of the Interpretation Act (Cap 1, 2002 Rev Ed).<sup>50</sup>

43 According to the Plaintiffs, the only issue was who should be liable as the “importer” under s 27(4)(c) of the TMA. It was argued that under s 93A of the TMA, where goods in transit are consigned to a local consignee, the local consignee is the importer.<sup>51</sup> As the local consignee, the Defendant had imported and/or intended to export the Counterfeit Goods under the sign, and was thereby liable for trade mark infringement.<sup>52</sup> The Plaintiff also argued that whether the Defendant had knowledge that the Containers contained counterfeit items was irrelevant, and it did not matter whether the Defendant was actively involved or just a passive forwarding agent.<sup>53</sup>

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<sup>50</sup> Plaintiffs’ closing submissions, paras 103–104.

<sup>51</sup> Plaintiffs’ closing submissions, para 30–61.

<sup>52</sup> Plaintiffs’ closing submissions, paras 102 et seq.

<sup>53</sup> Plaintiffs’ closing submissions, para 166.



44 The Defendant strenuously denied knowledge of the Counterfeit Goods (prior to the seizure and inspection in Singapore), and argued that it was acting as a “mere freight forwarder”, and not a trader of the Counterfeit Goods.<sup>54</sup> It was also argued that the true importers of the Counterfeit Goods were either the Shippers or the Third Party,<sup>55</sup> and that the Defendant itself could not be the importer. It was not involved in the shipment of the goods from China to Singapore and thus had not caused the entry of the Counterfeit Goods into Singapore.<sup>56</sup> The Defendant also maintained that it had not imported the goods under the sign within the meaning of s 27 of the TMA because s 27 required a bringing of goods bearing the marks into the territory for the “purpose of releasing those goods into free circulation” within the jurisdiction.<sup>57</sup>

### **Issues to be determined**

45 Section 26 of the TMA provides the trade mark proprietor with the exclusive right to use the trade mark. Section 27 provides that infringement arises if a person without consent of the proprietor uses in the course of trade, *inter alia*, a sign identical or similar to the registered trade marks in relation to identical or similar goods for which the trade mark is registered (subject to certain other requirements). Section 27(4) TMA then provides that a person uses a sign if, in particular, he “imports or exports goods under the sign.”

46 The primary question was whether the Defendant was liable for importing or exporting the Counterfeit Goods within the meaning of s 27(1) read with s 27(4)(c) of the TMA.

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<sup>54</sup> Defendant’s closing submissions, para 94.

<sup>55</sup> Defendant’s closing submissions, para 130.

<sup>56</sup> Defendant’s closing submissions, para 137.

<sup>57</sup> Defendant’s closing submissions, para 274.

47 This in turn involved the determination of several legal issues:

(a) Whether the Counterfeit Goods had been imported into Singapore within the meaning of s 27(4)(c) of the TMA.

(b) Whether the Defendant was the importer and was thereby liable for infringement under ss 27(1) and 27(4)(c) of the TMA. It is in connection with this issue that the Plaintiffs' submissions focused heavily on the relationship between the statutory provisions on infringement as set out in s 27 and the special provisions in Part X of the TMA on Assistance by Border Authorities.

(c) Whether the Defendant was liable for exporting the Counterfeit Goods under the sign.

48 Before I turn to the above issues, however, it may be helpful to first discuss the evidence concerning the steps, procedures, and documents that would be required to arrange for the transshipment of the Containers to Batam (if the Counterfeit Goods had not been seized and detained), as well as the relevant statutory backdrop.

**The steps required to effect transshipment of the containers to Batam**

49 Given the Defendant's position that they were not the importer of the containers or the goods inside the containers (see [44] above), both parties led evidence concerning the applicable procedures, declarations and permits under Port and customs rules required for facilitating transshipment of the Containers to Batam (*ie*, the unloading of the Containers from the inbound vessel, the subsequent transfer in sealed unopened condition and the loading of the Containers on board a vessel bound for Batam).

50 The purpose of this was to shed light on whether a freight forwarder in the position of the Defendant was treated as if it was an importer under the applicable customs regulations or customs procedures. The evidence on this included evidence concerning the steps and procedures taken in respect of the prior shipment of a container in January 2013 (“the January Transaction”).<sup>58</sup>

51 The January Transaction concerned a container shipped on board another vessel belonging to APL from China to Singapore. A “non-negotiable sea waybill” was issued by the carrier, showing SHIEL as the shipper and the Defendant as the consignee and notify party in Singapore.<sup>59</sup> As in the case of the two shipments in question, the goods were described as “household goods.”<sup>60</sup> The associated packing list and commercial invoice for the January Transaction named the Third Party as the consignee in Batam.<sup>61</sup> The shipment was not subject to inspection by Singapore Customs. The container was successfully sent on to Batam.

52 Evidence was given of a “container status” document extracted from Portnet. According to a report prepared by Ms Chew, the document indicates that the container was unloaded at Brani Terminal and moved to the point of loading at Keppel Terminal.<sup>62</sup> According to Ms Chew, the Portnet container status document indicated that the shipment was designated as “re-export” and not “transshipment.” The understanding of this witness was that the “container was for re-export and was not a through transshipment or intended to be brought

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<sup>58</sup> AEIC of Chew Mui Ling, Tab 1, pp 5–7.

<sup>59</sup> AEIC Chew Mui Ling, Tab 1, p 27.

<sup>60</sup> AEIC of Chew Mui Ling, Tab 1, p 27.

<sup>61</sup> AEIC of Chew Mui Ling, Tab 1, p 20.

<sup>62</sup> AEIC of Chew Mui Ling, Tab 1, p 5 (para 2.1.4).

into the Singapore market.” This witness also described the January Transaction as an example of “non-through transshipment” or “an import for re-export.”<sup>63</sup>

53 Evidence was also given of an ocean bill of lading for carriage of the container from Singapore to Batam. The shipper/exporter was named as SHIEL. The consignee was the Third Party in Batam.<sup>64</sup> The bill of lading was issued by the Defendant as agents for and on behalf of the Master of the carrying vessel.<sup>65</sup> The carrying vessel, Winstar 38, is owned by Regional Shipping Line Ltd which appears to be a company incorporated overseas.<sup>66</sup> According to Ms Chew, the January transaction was another example of a non-through transshipment which involved an import and re-export process.<sup>67</sup> Ms Chew’s opinion was also that, since the Defendant was named as the local consignee in the sea waybill, the Defendant was the importer and the subsequent re-exporter in the January Transaction, and not SHIEL.<sup>68</sup>

54 The question as to what permits are necessary for “non-through transshipment” was examined at length. The Plaintiffs’ position was that a cargo clearance permit for import to and re-export from Singapore under the Singapore TradeNet system was necessary.<sup>69</sup> TradeNet is Singapore’s National Single Window for trade declaration. It integrates import, export and transshipment documentation processing procedures and formalities, enabling Singapore Customs and other regulatory authorities to monitor the movement

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<sup>63</sup> AEIC of Chew Mui Ling, Tab 1, p 5 (para 2.1.5).

<sup>64</sup> AEIC of Chew Mui Ling, Tab 1, p 38.

<sup>65</sup> AEIC of Chew Mui Ling, Tab 1, p 38.

<sup>66</sup> Certified Transcript, 16 March 2017, p 59 (lines 7–10).

<sup>67</sup> AEIC of Chew Mui Ling, Tab 1, p 6 (para 2.1.11).

<sup>68</sup> AEIC of Chew Mui Ling, Tab 1, p 7 (para 2.1.11).

<sup>69</sup> Plaintiffs’ closing submissions, para 127.

of goods and to enforce health, safety and other regulatory requirements.<sup>70</sup> Access to the TradeNet system is only available to ACRA registered entities in Singapore.<sup>71</sup> The evidence was that the Third Party in Batam would not have been able to use or access the TradeNet system.

55 In the case of the January transaction as well as the transactions involving the First and Second Containers, Ms Chew's evidence was that the Defendant was the proper person to apply for a cargo clearance permit for the import and re-export from Singapore. In her view, the proper permit was the "In-non-payment" permit with the code "REX". The cargo clearance permit declarations, if properly filled out, would have identified the Defendant as the importer and exporter.<sup>72</sup> The customs permit for the January 2013 transaction (if any) was not placed before the Court.

56 In a similar vein, Mr Chong's evidence was that a customs permit was needed for the two shipments in question under Regulation 3(1) of the Regulation of Imports and Exports Regulations (Cap 272A, Rg 1, 1999 Rev Ed) ("RIER"). Mr Chong, it will be recalled, is an Assistant Head of Operations with the operations management branch of Singapore Customs. Counsel for the Plaintiffs had previously provided Singapore Customs through the Attorney-General's Chambers with a list of questions in connection with the proper procedures for shipments such as those involving the Containers.<sup>73</sup> In examination-in-chief, Mr Chong confirmed that the answers provided were correct.<sup>74</sup> The gist of Mr Chong's evidence was that an in-non-payment customs

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<sup>70</sup> AEIC of Chew Mui Ling, Exhibit XXI, p 65.

<sup>71</sup> AEIC of Chew Mui Ling, Tab 1, p 12 (para 2.9.3).

<sup>72</sup> AEIC of Chew Mui Ling, Tab 1, p 12 (para 2.9.1).

<sup>73</sup> Certified Transcript, 13 March 2017, pp 80 (lines 14–19); 103 (line 7)–105 (line 1).

<sup>74</sup> Certified Transcript, 13 March 2017, p 82 (lines 18–20).

permit under the code REX was needed,<sup>75</sup> since the Defendant was named as the local consignee under the sea waybill.<sup>76</sup> The permit required the name of the importer to be set out.<sup>77</sup>

57 The Defendant also called a witness from Singapore Customs: Mr Aaron Cheong (“Mr Cheong”). Mr Cheong was the customs officer who conducted the inspections of both the First and Second Containers.<sup>78</sup> Mr Cheong had expressed an earlier view to counsel for another trade mark owner not involved in the present suits that the two shipments or transactions involved transshipment with a local consignee and not an importer.<sup>79</sup> The Defendant naturally relied on this to support its case that it was not, in fact and in law, the importer of the goods inside the Containers.<sup>80</sup>

58 Under cross-examination, Mr Cheong was questioned at length on his earlier statement and in particular on whether he made the statement because of confusion over the applicable statutory provisions within the TMA on inspection and seizure.<sup>81</sup> While Mr Cheong was unable to shed much light on why he made the statement, what is significant is that he agreed that on the face of the sea waybills, the Defendant was the importer.<sup>82</sup> The witness accepted under cross-examination that both Mr Chong and Ms Chui Jia Min of Singapore Customs were of the view that permits were needed.<sup>83</sup> Nevertheless, when re-

<sup>75</sup> Certified Transcript, 13 March 2017, pp 101 (lines 4–25) and 102 (lines 1–8)

<sup>76</sup> Plaintiffs’ closing submissions, para 126.

<sup>77</sup> Certified Transcript, 13 March 2017, p 102 (lines 17–19).

<sup>78</sup> Certified Transcript, 20 March 2017, pp 7 (lines 8–25) and 8 (lines 1–5).

<sup>79</sup> Certified Transcript, 20 March 2017 p 4 (lines 1–12); DBOD p 83.

<sup>80</sup> Defendant’s closing submissions, para 91.

<sup>81</sup> Certified Transcript, 20 March 2017, pp 23–27.

<sup>82</sup> Certified Transcript, 20 March 2017, p 26 (lines 13–19).

<sup>83</sup> Certified Transcript, 20 March 2017, p 26.

examined, Mr Cheong stood by his view that the transactions involving the Containers were cases of transshipment and not cases involving an “importer”.<sup>84</sup>

59 I pause to note that Ms Chui Jia Min (“Ms Chui”) was an officer attached to the Procedures and Systems Branch of Singapore Customs at the relevant time.<sup>85</sup> While Ms Chui was not called upon to give evidence, both the Customs Officers called by the Plaintiffs and Defendant accepted that Ms Chui was experienced in customs documentation and procedures.<sup>86</sup> Evidence in the form of emails was placed before the Court wherein Ms Chui stated that a customs clearance permit is required for all goods being transhipped with a local consignee.<sup>87</sup>

60 The long and short of the evidence from Singapore Customs is perhaps best summarised as follows. Two customs employees (Mr Chong and Ms Chui) were of the view that the Defendant was the importer and that customs procedures for this type of “non-through transshipment” required the submission of permit forms identifying the importer and exporter. This evidence was supported by the testimony and report of Ms Chew. Even though the two shipments and transactions and the documents revealed a case of “non-through transshipment” with the ultimate destination of the goods being delivery to the Third Party in Batam, the essence of the evidence of these witnesses was that the goods had been imported into Singapore.

61 The position taken by Mr Cheong, on the other hand, appears to be more nuanced. Mr Cheong accepted that under customs procedures, permit forms

<sup>84</sup> Certified Transcript, 20 March 2017, p 32 (lines 9–16).

<sup>85</sup> Plaintiffs’ closing submissions, para 129.

<sup>86</sup> Certified Transcript, 13 March 2017, p 123 (lines 6–10); Certified Transcript, 20 March 2017, p 30 (lines 12–25).

<sup>87</sup> PCB, Tab 50, p 138.

were required and that, based on the sea waybill, the Defendant would be named as the importer. That said, Mr Cheong was still of the view that the shipments involved transshipment and not importation.<sup>88</sup> To be fair to this witness and indeed all the customs officers, the Court notes the possibility that terms such as “import” and “export” can mean different things in different pieces of legislation. For example, do these words necessarily bear the same meaning when used (i) in respect of customs regulations concerned with control of goods brought into and out of Singapore, including the Port of Singapore and the confines of its free trade zones; and (ii) in legislation setting out the exclusive rights of intellectual property right owners in Singapore? This is a matter to which I shall return later in the decision. The point I make now is that while Mr Cheong’s evidence was not clear, it may be that in Mr Cheong’s mind, the Defendant was only to be named as importer for the purposes of compliance with customs regulations on the required forms.

### **The statutory backdrop**

62 This is the first case which has raised the interplay between the rights of trade mark owners to bring infringement proceedings and the border enforcement provisions in Part X of the TMA on the interdiction of infringing goods that flow through Singapore in the course of international trade. As such, it may be helpful to set out some general points concerning the statutory backdrop and history behind the provisions on assistance by border authorities.

63 The problem of international trade in infringing or counterfeit goods is not new. Given the territorial nature of intellectual property rights, it is not surprising that enforcing such rights may lead to tricky issues where the international movement of goods is concerned. One area concerns parallel

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<sup>88</sup> Certified Transcript, 20 March 2017, p 32 (lines 9–16).



imports or grey market imports and the doctrine of exhaustion of rights. The other area concerns trade in infringing or counterfeit trade marked goods.

64 The present case concerns international trade in goods which have been produced without the consent of the owner of the intellectual property rights in the country of manufacture. The problems surrounding the enforcement of intellectual property rights in this context are well known. Where infringing goods are imported into a jurisdiction, intellectual property right owners in that jurisdiction could of course attempt litigation (a) against the manufacturers in the country or place of manufacture, or (b) against the importers and traders in the country of importation, or the country where the goods are intended to be released into the market for exploitation. Both options, however, may present several obstacles.

65 Litigation against the manufacturers in the country or place of manufacture may be problematic. In some cases, the country of manufacture might not even have recognised or granted intellectual property rights over the subject matter in question. In other cases, the goods may have been produced in disregard for the intellectual property rights in the country or place of manufacture. Some of these infringing goods may be released for sale or exploitation in the country or place of manufacture; but often, and perhaps increasingly so with the development of international trade, the infringing goods are exported and sold in markets far removed from the country or place of manufacture. Even if the intellectual property rights owner was keen to litigate against the manufacturer, the first problem he might face will be to identify and find the manufacturer. The multitude of small-time manufacturers of counterfeit goods whose products find their way into international trade make it problematic even for the most avid intellectual property rights owner to mount effective litigation proceedings in the country of manufacture (see generally

Christopher Morcom, Ashley Roughton & Simon Malynicz, *The Modern Law of Trade Marks* (LexisNexis, 3rd Ed, 2008) at paras 21.1–21.5).

66 Commencing litigation against the importers and traders in the country of importation is also not without its difficulties. The jurisdictions where the goods are intended to be released into the market may or may not have effective intellectual property laws and enforcement policies.

67 It is broadly in this context that the desire for legal recourse at customs “choke points” arises. If a consignment of counterfeit goods could be interdicted at customs prior to the release into the domestic market, from the perspective of the intellectual property right owner, the efficiency and effectiveness of seizure is obvious, as compared to the alternative of bringing numerous suits against traders in the domestic market distribution network. Still more desirable would be interdiction at an intermediate port or country through which the consignment passes during the course of shipment or carriage. Indeed, a bulk shipment intended to be split into smaller parcels at an intermediate port of carriage for release into the internal market of several other countries is, from the perspective of the intellectual property rights holder, best interdicted at the intermediate port simply for reasons of costs and efficiency.

68 Given their utility, it is unsurprising that interdiction procedures have long featured in many international agreements for the protection of intellectual property. As will be seen below, Singapore’s own statutory provisions on border enforcement measures have been shaped to a large extent by such international agreements. What follows is an overview of the relevant international agreements and how Singapore’s trade mark legislation has been adapted in line with its international obligations.

***The relevant international agreements****The Paris Convention for the Protection of Industrial Property (1883)*

69 For much of the 20th Century, the primary international agreements or conventions on intellectual property rights comprised the Berne Convention for the Protection of Literary and Artistic Works (9 September 1886), 1161 UNTS 30 and the Paris Convention for the Protection of Industrial Property (20 March 1883), 828 UNTS 205 (1883) (“the Paris Convention”). The provisions of the Paris Convention suggest that the utility of interdiction as a response to the problem of the international trade in counterfeit goods was already recognised from an early stage. For example, Art 9 of the Paris Convention sets out provisions relating to the seizure of goods unlawfully bearing a mark or trade name. In particular, Art 9(1) provides that “[a]ll goods unlawfully bearing a trademark or trade name shall be seized on importation into those countries of the Union where such mark or trade name is entitled to legal protection.” Article 9(5) states, however, that “[i]f the legislation of a country does *not* permit seizure on importation, seizure shall be replaced by prohibition of importation or seizure inside the country” [emphasis added]. Article 9(6) goes on to provide that if a Contracting State does not permit seizure on importation, or allow seizure within the country, then “until such time as the legislation is modified accordingly, these measures shall be replaced by the actions and remedies available in such cases to nationals under the law of such country”.

70 It is clear the Paris Convention recognises the problem of goods in transit. Whereas Arts 9(1), 9(5) and 9(6) stipulate the obligations of Contracting States in relation to infringing goods which are *imported*, Art 9(4) provides that “[t]he authorities shall not be bound to effect seizure of goods in transit.” Article 9(4) left it to Contracting States to determine whether their national laws would

permit seizure of goods in transit. The Paris Convention recognised a distinction between imported goods and goods in transit.

*The TRIPS Agreement*

71 In 1995, the Agreement on Trade-Related Aspects of Intellectual Property Rights (15 April 1994), 1869 UNTS 299 (1994) (“the TRIPS Agreement”) came into force in Singapore. Part III, Section 4 sets “Special Requirements Related to Border Measures”. Article 51 is entitled “Suspension of Release by Customs Authorities”, and is concerned with the right holder who has valid grounds for suspecting the importation of counterfeit trade mark goods may take place. Member States are required to enable such a right holder to lodge an application with competent authorities for the suspension by customs authorities of release into free circulation.

72 Counterfeit goods are defined in Art 51 as meaning “any goods, including packaging, bearing without authorization a trademark which is identical to the trademark validly registered in respect of such goods, or which cannot be distinguished in its essential aspect from such a trademark, and which thereby infringes the rights of the owner of the trademark in question under the law of the country of importation.”

73 Articles 52–55 set out provisions concerning the making of the application, the provision of security, the giving of notice to the importer and applicant of the suspension, and the duration of the suspension. In particular, Art 55 provides that the goods are to be released if the customs authorities have not been informed within ten days of the applicant being served with notice of the suspension that proceedings on the merits have been initiated by a party other than the defendant.

74 I pause to note that under Art 51, where goods are suspended from release into free circulation, this is done on the basis that the right holder had *valid grounds to suspect* that importation of counterfeit trade mark goods was going to take place. The fact that the customs authorities granted suspension does *not* mean that infringement has been committed or was about to be committed. It only means that the right holder must within a specified period start proceedings on the merits of the case under the applicable trade mark legislation conferring the substantive rights. Whether the right holder succeeds in a claim for infringement is a question that can only be decided in the substantive proceedings. Indeed, if the action fails there is provision in Art 56 for the relevant authorities to order the right holder to pay appropriate compensation to the importer, consignee and owner of the goods.

75 It should also be noted that footnote 12 to Art 51 clarifies that TRIPS Member States are not required to apply the special provisions on border measures to goods in transit.

76 Article 58 of the TRIPS Agreement relates to “*Ex Officio* Action” and provides as follows:

Where Members require competent authorities to act upon their own initiative and to suspend the release of goods in respect of which they have acquired *prima facie* evidence that an intellectual property right is being infringed:

- (a) the competent authorities may at any time seek from the right holder any information that may assist them to exercise these powers;
- (b) the importer and the right holder shall be promptly notified of the suspension ...
- (c) Members shall only exempt both public authorities and officials from liability to appropriate remedial measures where actions are taken or intended in good faith.

77 As noted by Carlos M Correa, *Trade Related Aspects of Intellectual Property Rights: A Commentary on the TRIPS Agreement* (Oxford University Press, 2007) at p 447, the TRIPS Agreement provisions on *ex officio* action are not mandatory. Instead, it is only when a Member State chooses to introduce such measures that it must comply with Art 58.

*The United States-Singapore Free Trade Agreement*

78 The next major international agreement to shape Singapore’s trade mark legislation was the United States-Singapore Free Trade Agreement (6 May 2003) (“USSFTA”), which entered into force in 2004. Article 16.9 of the USSFTA is entitled “Enforcement of Intellectual Property Rights”. Articles 16.9.16–16.9.20 come under the heading “Special Requirements Related to Border Measures Concerning the Enforcement of Intellectual Property Rights”. Article 16.9.19 provides as follows:

19. Each Party shall provide that its competent authorities may initiate border measures *ex officio*, without the need for a formal complaint from a private party or right holder. Such measures shall apply to shipments of pirated and counterfeit goods imported into or exported out of a Party’s territory, including shipments consigned to a local party. *For transhipped goods that are not consigned to a local party, each Party shall, upon request, endeavor to examine such goods.* For products transhipped through the territory of a Party destined for the territory of the other Party, the former shall cooperate to provide all available information to the latter Party to enable effective enforcement against shipments of counterfeit or pirated goods. Each Party shall ensure that it has the authority to undertake such cooperation in response to a request by the other Party on counterfeit or pirated goods en route to that other Party.

[emphasis added]

79 It is clear that one area of concern addressed by USSFTA was *ex officio* inspection procedures. As noted, the TRIPS Agreement did not make mandatory a system for *ex officio* action. Instead, what was required was that if *ex officio*

action was made available, the rules on such action had to comply with Art 58. Article 16.9.19 of the USSFTA goes further than the TRIPS Agreement in that it requires each State Party to establish a system whereby *ex officio* measures may be conducted in respect of shipments of goods imported into or exported out of that State Party's territory, including shipments consigned to a local party. Article 16.9.19 also envisions that certain border measures are to be available in respect of transhipped goods that are not consigned to a local party. In such a case, each Party shall, upon request, endeavor to examine such goods. In the case where the goods are transhipped through the territory of a State Party and are destined for the territory of the other State Party, the focus is on obtaining "all available information" in order to facilitate "effective enforcement".

### ***Singapore's trade mark legislation***

#### *Prior to 1998*

80 The first statutory law on trade marks in Singapore was the Trade Marks Ordinance 1938 ("TMO 1938"), which later became the Trade Marks Act (Cap 206, 1970 Rev Ed) ("the old TMA"). The provisions of the TMO 1938 were closely modelled on the UK's Trade Marks Act 1938 (c 22) (UK) ("UK TMA 1938").

81 The UK TMA 1938 did not contain any provisions on the seizure of imported goods bearing false trade marks. While the problem of importation of goods bearing false trade marks had been recognised in the UK, the statutory measures created to address this problem were to be found in the Merchandise Marks Act 1887 (50 & 51 Vict. c 28) (UK) ("UK MMA 1887"). However, the UK MMA 1887 was not concerned with setting up a statutory system for registering trade marks and enforcing the rights of the trade mark owner. Instead, it was concerned with the need for criminal offences, and for forfeiture

and seizure provisions to protect the public against what may loosely be termed as “false” goods (see H Fletcher Moulton & P G Langdon-Davies, *Butterworths Annotated Legislation Service: Statutes Supplement No 83, The Law of Merchandise Marks* (Butterworth & Co (Publishers) Ltd, 1954) at p 1).

82 Like the UK TMA 1938, the TMO 1938 did not contain any provisions on the seizure of imported goods bearing false trade marks. Indeed, even though the old TMA was amended several times before its repeal in 1999, no specific provisions were ever introduced concerning the detention, inspection and seizure of counterfeit goods by the customs authorities.

#### *The 1998 Trade Marks Act*

83 The old TMA was repealed and replaced by the Trade Marks Act 1998 (No 46 of 1998) (“the 1998 TMA”) which commenced on 15 January 1999. The 1998 TMA was passed to ensure Singapore’s compliance with the TRIPS Agreement. Extensive provisions on border enforcement measures were set out in Part X of the 1998 TMA, modelled on the provisions in the TRIPS Agreement. The explanatory note under the Fourth Schedule to the Trade Marks Bill 1998 (Bill No 42 of 1998) states that Part X seeks to give effect to Section 4 of Part III of the TRIPS Agreement (see [71] above). Section 82 of the 1998 TMA provided as follows:

#### **Restriction of importation of infringing goods**

**82.-(1)** A person may give the Director-General a written notice stating –

- (a) that he is the proprietor of a registered trade mark or a licensee thereof having the power to give such a notice;
- (b) that, at a time and place specified in the notice, goods which, in relation to the registered trade mark, are infringing goods are expected to be imported for the purpose of trade; and



(c) that he objects to such importation.

...

(4) If –

- (a) a notice has been given under this section in respect of a registered trade mark;
- (b) the notice has not lapsed or been revoked; and
- (c) a person imports goods, *not being goods in transit*, which bear a sign that, or whose packaging bear a sign that, in the opinion of an authorised officer, is identical with or similar to the registered trade mark in question,

an authorised officer may seize the goods.

[emphasis added]

84 As the Plaintiffs emphasise,<sup>89</sup> s 82(4) of the 1998 TMA suggests that suspected counterfeit goods *in transit* could not be seized under the border enforcement measures existing at the time.

*The Trade Marks (Amendment) Act 2004*

85 The 1998 TMA was amended in 2004 via the Trade Marks (Amendment) Act 2004 (Act 20 of 2004). The amendments were passed *inter alia* to give effect to Singapore's obligations under the USSFTA (see [78]–[79] above). Speaking at the Second Reading of the Amendment Bill, the Minister of Law, Prof S Jayakumar made the following remarks (*Singapore Parliamentary Debates, Official Report* (15 June 2004) vol 78 at col 1113 (Prof S Jayakumar, Minister for Law)):

The Bill also deals with border enforcement measures ... [It] is not enough just to put in place good legislation. There must be a suitable enforcement environment. *We will be making several amendments to enhance our border enforcement measures.* For example, clause 30 amends section 82 to make it easier for the owner of a registered trade mark to rely on the enforcement

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<sup>89</sup> Plaintiffs' closing submissions, para 51.

mechanism under section 82. The new section 93A will confer additional powers on enforcement officers. Custom officers will be empowered to take immediate action if they detect any counterfeit goods in the course of their duties. These powers will be exercised judiciously by our enforcement authorities and they will continue to work in close partnership with the rights holders.

[emphasis added]

86 For reasons that will become clear, the Plaintiffs emphasise the fact that the 2004 amendments were intended to *enhance* border enforcement measures.

*The current Trade Marks Act*

87 The special provisions on assistance by border authorities are now to be found in Part X of the TMA. What follows is a brief overview of the provisions:

(1) Restriction of importation of infringing goods

88 Section 82 of the TMA sets out detailed provisions whereby the trade mark proprietor or his licensee may give a written notice to the Director-General of Customs (“the Director-General”) which (i) states that he is the proprietor or licensee; (ii) states that goods in relation to the registered trade mark which are *infringing goods* are expected to be imported; (iii) provides sufficient information to identify the goods, to enable the Director-General to ascertain when and where the goods are expected to be imported and to satisfy the Director-General that the goods are infringing goods and (iv) states that he objects to the importation.

89 It is noted that seizures effected under s 82 are based on applications by the trade mark proprietor or the licensee. Customs officers do not have the right to detain goods *ex officio* under these provisions.

90 Section 82(4)(c) of the TMA provides that during the currency of the notice, an authorised officer may seize the goods if:

- (c) a person imports goods, *not being goods in transit*, which bear a sign that, or whose packaging bears a sign that, in the opinion of the authorised officer, is identical or similar to the registered trade mark in question ...

[emphasis added]

91 Section 85 of the TMA requires notice of the seizure to be given to the importer and objector. Under s 85(2), the notice must state that the goods will be released to the importer unless an infringement action in respect of the goods is instituted by the objector within the period specified and gives notice to the Director-General of that action.

92 Section 88 of the TMA sets out the situations in which the seized goods will compulsorily be released to the importer. Under s 88(1), the seized goods are released if within the specified period no infringement action has been commenced. It follows that once goods are seized by customs authorities pursuant to s 82 of the TMA, the objector must decide whether infringement proceedings are to be commenced.

(2) Detention and examination: *ex officio* action

93 As mentioned, new provisions pertaining to border enforcement measures were introduced in 2004 as a result of the USSFTA (see [85] above). These include a new provision on *ex officio* action in the form of s 93A of the TMA. Section 93A(1) provides as follows:

93A.-(1) Notwithstanding section 82(4), any authorised officer may –

(a) detain any goods –

(i) that are imported into, or that are to be exported from, Singapore; and

(ii) that are not goods in transit, unless the goods are consigned to any person with a commercial or physical presence in Singapore; or

(b) examine any goods, including goods in transit,

which he reasonably suspects are counterfeit goods in relation to a registered trade mark.

94 The following points should be noted:

(a) Section 93A of the TMA is directed towards the *detention* of the goods as opposed to *seizure* under the provisions summarised at [88]–[92] above.

(b) Under s 93A(1)(a), goods in transit cannot be *detained* unless they have been consigned to a person who has commercial or physical presence in Singapore (“a local consignee”). Where goods are in transit through Singapore without any local consignee, the authorised officer only has the power to *examine* the goods under s 93A(1)(b).

95 Where goods have been detained under s 93A(1)(a), the Director-General is required by s 93A(2) to give notice as soon as practicable to the “importer, exporter or consignee, as the case may be,” as well as the proprietor of the registered trade mark. I pause here to note the specific reference to (i) the importer; (ii) the exporter; and (iii) the consignee in s 93A(2). The point is that it must follow that the local consignee is *not* necessarily also the importer or exporter.

96 Under s 93A(3) of the TMA, the goods are to be released to the importer, exporter or consignee unless, within the prescribed period, the proprietor of the trade mark takes the following action:

- (a) For goods imported into Singapore and which are not in transit, a notice under s 82(1) of the TMA is provided together with the necessary documents, information and security (s 93A(3)(a)).
- (b) For goods that are to be exported from Singapore or goods in transit that are consigned to a local consignee, (i) an action for infringement is commenced, (ii) an order of court is served on the Director-General authorising further detention of the goods and (iii) the required deposits are furnished to the Director-General (s 93A(3)(b)).

97 The point to be made is that where goods are detained pursuant to *ex officio* action, the consequences and steps that must be taken thereafter depends on whether the goods are “that are imported into Singapore and are not goods in transit”, or are goods “that are to be exported from Singapore or goods in transit that are consigned to [a local consignee]”. In the present case, the two shipments of counterfeit goods before this Court fall into the latter category. Section 93A(3)(b)(ii) requires in such a case that the trade mark proprietor serves on the Director-General an order of court authorising the *further detention* of the goods.

98 Section 93A(5)(b) goes on to provide that where the Court has made an order authorising further detention under s 93A(3)(b) (*ie*, for the further detention of goods in transit consigned to a local consignee), ss 86, 87, and 89–93 of the TMA are applicable “with the necessary modifications” to the further detention of the goods. The provisions in ss 86, 87 and 89–93 of the TMA are those which pertain to goods *seized* under s 82 of the TMA. However, by virtue of s 93A(5)(b), they also apply when goods are *detained* or *further detained*

pursuant to s 93A(3)(b). This is subject, however, to the following modifications in s 93A(5)(b):

- (a) References to the objector become references to the proprietor of the registered trade mark.
- (b) References to importer become references to the exporter or consignee as appropriate.
- (c) References to the seized goods become references to detained goods.
- (d) References to seizure become references to detention or further detention of the goods.
- (e) References to import or importation of goods become:
  - (i) In the case of goods to be exported from Singapore, as a reference to the export of the goods;
  - (ii) In the case of goods in transit that are consigned to a person with a commercial or physical presence in Singapore, as a reference to the import, importation or export of the goods by the consignee.

99 I note that s 93A(5)(b)(v) provides that, in the case of goods in transit consigned to a local consignee, references to import or importation are to be read as a reference to the import, importation or export of the goods by the consignee. This suggests that the local consignee of goods in transit is to be regarded for the purpose of the inspection, release and forfeiture provisions in ss 86, 87 and 89–93 TMA as the “importer”, as the Plaintiffs emphasise.<sup>90</sup> As

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<sup>90</sup> Plaintiffs’ closing submissions, para 40.

will be seen, however, that does *not* mean that the local consignee is the “importer” for the purpose of *all* of the provisions of the TMA.

(3) Interplay between seizure pursuant to an application and *ex officio* detention

100 The provisions in s 82 of the TMA are concerned with seizure of goods by customs pursuant to a notice given to the Director-General objecting to the importation. The person giving the notice is the “objector” and the authorised officer is empowered to “seize” the goods. It will be recalled that s 82(4)(c) makes clear that the power to seize only arises where the goods are imported into Singapore and are *not* goods in transit. Section 81 of the TMA sets out the definitions relevant specifically to Part X of the TMA. The term “goods in transit” is defined as “goods imported, whether or not landed or transhipped within Singapore, which are to be carried to another country either by the same or another conveyance”. So long as the goods are in transit, the seizure provisions do not apply even if there is a local consignee and the goods are landed or transhipped.

101 On the other hand, s 93A appears to have been enacted to address the requirements of the USSFTA on *ex officio* procedures. These provisions are concerned with detention and examination by customs authorities without any necessity for an earlier application by an objector. The detention and examination provisions in s 93A are different from the seizure provisions in s 82. The key differences are as follows:

- (a) The powers under s 93A relate to detaining *counterfeit goods* as opposed to seizing *infringing goods*.
- (b) The powers under s 93A apply to imported goods as well as goods in transit, provided that these are consigned to a person

with a commercial or physical presence in Singapore (a local consignee). However, where the goods are in transit (but there is no local consignee), there is no power to detain. There is, however, a power to examine.

- (c) The power to detain also applies to goods to be exported from Singapore.

### ***Other statutes***

102 In the course of these proceedings, the issue of whether the Defendant is an “importer” has been addressed by several different witnesses through the lens of the various procedures, permit applications and forms which apply to the movement of goods into and out of Singapore. It may thus be helpful to provide an overview of two of the statutes governing this area: the Customs Act (Cap 70, 2004 Rev Ed), and the Regulation of Imports and Exports Act (Cap 272A, 1996 Rev Ed) (“RIEA”).

### ***The Customs Act***

103 The control of goods arriving in or entering into Singapore falls within the Customs Act. Section 3(1) of the Customs Act contains the following definitions:

“export” means to take or cause to be taken out of the customs territory by any means or to place goods in any form of conveyance for the purpose of taking the goods out of the customs territory by any means to any place including a free trade zone; except that goods bona fide in transit, including goods which have been transhipped, shall not be deemed to be exported unless they are or become uncustomed goods;

...

“import” means to bring or cause to be brought into the customs territory by any means from any place including a free trade zone; except that goods bona fide in transit, including



goods which have been taken into any free trade zone from outside the customs territory or transhipped, shall not, for the purpose of the levy of customs duties or excise duties, be deemed to be imported unless they are or become uncustomed goods;

“importer” includes and applies to any owner or other person for the time being possessed of or beneficially interested in any goods at and from the time of importation thereof until the goods are duly removed from customs control;

...

“in transit” means taken out or sent from any country and brought into Singapore by land, sea or air (whether or not landed or transhipped in Singapore) for the sole purpose of being carried to another country either by the same or another conveyance;

...

“prohibited goods” means goods the import or export of which is prohibited, either conditionally or absolutely, by notification made under section 38 or by any other written law for the time being in force in Singapore;

104 While it is unnecessary to examine the substantive provisions of the Customs Act, I make the following observations as part of the general backdrop and context in which the detention, inspection and forfeiture provisions for counterfeit trade marks now found in the 1998 TMA are to be assessed.

105 In brief, the Customs Act is essentially concerned with controlling goods entering or passing through Singapore for the purposes of revenue matters (import/export duties) and detection/interdiction of prohibited items.

106 Extensive provisions on levying and payment of duty and tax are set out in Part III of the Customs Act. Section 12(1) sets out the power of the customs officer to value, weigh, measure, test and examine any dutiable or uncustomed goods for determining customs duty and excise.

107 Part IV of the Customs Act sets out detailed provisions on importation and exportation. In brief:

- (a) Section 31 provides that dutiable goods can only be imported, exported or transhipped at authorised places.
- (b) Section 33 prohibits import, export and transhipment of goods dutiable on import unless done in accordance with applicable regulations and restrictions.
- (c) Section 34 provides detailed requirements on permits for the removal of dutiable goods from the vessel or authorised place at which the goods arrived, as well as removal from the free trade zone in which the goods were deposited or landed.
- (d) Section 37 requires every importer or exporter of dutiable goods and every person transshipping goods of a class dutiable on import to declare the required particulars of the goods imported, exported or to be transhipped before removing the goods from the vessel or the authorised place at which the goods arrived, or from the free trade zone in which the goods were deposited or landed.

108 Extensive provisions concerning these required permits, forms and declarations are set out in the Customs Regulations (Cap 70, R 2, 2009 Rev Ed). For example, reg 14(1) provides that “[t]he consignor of goods intended for transhipment or his agent shall submit to the proper officer of customs a declaration, in such form as the Director-General may require, of the goods to be transhipped.” Regulation 15 sets out the customs declarations which may be required for the various types of movement of dutiable goods in Singapore.

109 Turning back to the Customs Act, Part VI sets out detailed provisions on warehousing. For example, s 60 states that dutiable goods arriving in Singapore for transshipment and landed to await the arrival of the vessel in which they are intended to be transhipped shall be landed and deposited in a free trade zone. Part XIII contains detailed provisions on search, seizure and arrest. These are essentially concerned with dutiable or uncustomed goods, goods liable to forfeiture under the Customs Act, or goods as to which an offence under the Customs Act has been committed (see s 101 Customs Act). Section 110 of the Customs Act makes provision for the seizure of all goods in respect of which there is reasonable cause to suspect that an offence or breach has been committed under the Customs Act.

110 It is clear that the Customs Act is concerned with the movement of goods into and out of Singapore including those which enter Singapore in the course of transit to another destination. Section 3(2) of the Customs Act provides that the goods shall be deemed to be under customs control while they are deposited or held in any free trade zone, Government warehouse, licensed warehouse, or bottling warehouse or post office or in any vessel, train, vehicle or aircraft or any place from which they may not be removed except with the permission of the proper officer of customs.

111 The provisions are focused on revenue collection in respect of dutiable goods as well as the control of prohibited goods. The definitions of terms such as “import”, “importer” and “export” must be seen in the context of these goals. Permits must be applied for and declarations may be required. The short point is that it does not necessarily follow that a person who is required to apply for permits or to provide declarations under the Customs Act is necessarily to be regarded as the importer under the Trade Marks Act. This is a point that will be dealt with in more detail below.

*Regulation of Imports and Exports Act 1995*

112 The RIEA concerns regulation, registration and control of imports and exports by the International Enterprise Singapore Board (“the Board”). Under s 3(1), the Board may make regulations for the registration and control of all or any class of goods imported into, exported from, transhipped in, or in transit through Singapore.

113 As with s 3 of the Customs Act, s 2 of the RIEA contains an extensive list of definitions. For the purposes of this decision, it will suffice to note the following definitions:

“export”, with its grammatical variations and cognate expressions, means to take or cause to be taken out of Singapore by land, water or air and includes the placing of any goods in a conveyance for the purpose of the goods being taken out of Singapore but does not include the taking out from Singapore of any goods on the same conveyance on which they were brought into Singapore unless such goods after being brought into Singapore have been landed or transhipped within Singapore;

...

“goods in transit” includes goods imported from a place outside Singapore for the sole purpose of conveyance through Singapore to any place outside Singapore;

“import”, with its grammatical variations and cognate expressions, means to bring or cause to be brought into Singapore by land, water or air from any place which is outside Singapore but does not include the bringing into Singapore of goods which are to be taken out of Singapore on the same conveyance on which they were brought into Singapore without any landing or transshipment within Singapore;

...

“tranship” means to remove goods from one conveyance to another for the purpose of export;

...

114 The definitions are similar but not identical to those in the Customs Act. Take for example, the word “import.” Under s 3 of the Customs Act, this word is defined as follows: “... to bring or cause to be brought into the customs territory by any means from any place including a free trade zone...”. Goods which are bona fide *in transit*, including goods which have been *transhipped*, are not, for the purpose of the levy of customs duties, deemed to be imported unless they are or become uncustomed goods.

115 On the other hand, under the RIEA, the word “import” is defined as follows:

...to bring or cause to be brought into Singapore by land, water or air from any place which is outside Singapore *but does not include the bringing into Singapore of goods which are to be taken out of Singapore on the same conveyance on which they were brought into Singapore without any landing or transshipment within Singapore.*

[emphasis added]

116 For the purposes of the RIEA, “import” includes goods brought into and transhipped within Singapore. It is only when the goods are brought in and out of Singapore without any landing or transshipment that they are not to be treated as imported.

117 Again, the point is that the same term may carry different meanings in different legislation even though the pieces of legislation are all concerned broadly with import and export of goods.

***The TMA provisions relied on for the seizure of the goods***

118 As I have mentioned, Singapore Customs gave notice of its intention to inspect the First and Second Containers via emails on 1 April 2013 and 3 April 2013 respectively. The notices both explained that the inspections were to be

conducted in response to a request by LV to “shut-out” the container.<sup>91</sup> Following the inspection, the goods were seized or detained by Singapore Customs. As far as LV is concerned, it appears that the goods were seized under s 82 of the TMA,<sup>92</sup> after LV gave a notice that it objected to the importation of infringing goods which it expected to be imported in the two containers.<sup>93</sup> However, as regards Burberry, Gucci, Hermès and Sanrio, the goods were detained under s 93A(1)(a) of the TMA (*ie*, they were detained *ex officio*).

119 Upon inspection, goods bearing counterfeit trade marks of LV were discovered together with other goods appearing to bear counterfeit trade marks of Burberry, Gucci, Hermès, and Sanrio. The registered proprietors of the trade marks were informed. As for LV, it was given the required notice under s 85(2) of the TMA to commence action within the prescribed period in respect of the infringing goods, failing which the seized goods would be released. But in the case of Burberry, Gucci, Hermès and Sanrio, a notice of detention was given under s 93A(2) to the trade mark proprietors.<sup>94</sup> In accordance with s 93A(3)(b)(i), these trade mark proprietors were given notice to commence proceedings for infringement failing which the detained goods would be released.

120 While the basis of the notice to commence infringement proceedings was different (s 85(2) as opposed to s 93A(3) of the TMA), the end result was similar. Infringement actions under s 27 of the TMA were commenced against the Defendant. The crucial issues or questions in respect of the infringement actions are identical.

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<sup>91</sup> AEIC of Chua Swee Teck, pp 32 and 34.

<sup>92</sup> AEIC of Chua Swee Teck, pp 38 and 41.

<sup>93</sup> PBOD Vol II, Tabs 171–172.

<sup>94</sup> PBOD Vol II, Tabs 173–177.

## Decision and analysis

### ***Were the Counterfeit Goods imported into Singapore within the meaning of s 27(4)(c) of the TMA?***

#### *The meaning of import*

121 As I have mentioned, while s 27(4)(c) of the TMA provides that a person uses a sign if he “imports or exports goods under the sign”, the TMA does not set out a general definition of either “import” or “export”. That being so, the starting point must be s 2(1) of the Interpretation Act, which provides, in relevant part:

#### **Interpretation of certain words and expressions**

**2.-(1)** In this Act, and in every written law enacted before or after 28th December 1965, the following words and expressions shall, without prejudice to anything done prior to that date, have the meanings respectively assigned to them unless there is something in the subject or context inconsistent with such construction or unless it is therein otherwise expressly provided:

...

“import”, with its grammatical variations and cognate expressions, *means to bring or cause to be brought into Singapore by land, sea or air*;

...

[emphasis added]

122 Since it is not “otherwise expressly provided” within the TMA, the above construction of the word “import” will apply unless there is “something in the subject or context inconsistent with such construction”.

123 In *Trade Facilities* at [55], Yong Pung How CJ held that there was nothing in the subject or context of s 73 of the former Trade Marks Act (Cap 332, 1992 Rev Ed) (“the 1992 TMA”) which required the use of the special meaning assigned to the word “import” in the Customs Act. The appellants in

that case were convicted under s 73 of the 1992 TMA, which made it an offence for any person to import any goods or thing to which a counterfeit trade mark was applied. The subject matter of the conviction consisted of bottles of counterfeit Hennessy XO cognac which were seized when they arrived in Singapore via a shipment. Counsel for the appellants argued that the word “import” in s 73 of the 1992 TMA should be read according to the meaning given to that word in the Customs Act.

124 Yong CJ rejected this argument. He observed that even if there were “very good policy reasons why Singapore should or should not police the transshipment of goods bearing counterfeit trade marks or the like as they pass through Singapore’s free trade zone”, this was a matter for Parliament to deal with. For example, Parliament could expressly incorporate the narrower definition of “import” in the Customs Act (at [55]). In the absence of such express incorporation, there was no reason to construct “import” in s 73 of the 1992 TMA in accordance with the Customs Act.

125 That said, Yong CJ held that the meaning of “import” in s 73 of the 1992 TMA was not necessarily as wide as that provided for in s 2(1) of the Interpretation Act (at [56]). He reasoned that s 73 of the 1992 TMA was clearly “directed at persons who deal in the course of business”, and not at “the consumer who uses or merely possesses these goods” (at [57]). Thus, for example, an individual who brought into Singapore a counterfeit handbag he had purchased abroad would not have “imported” that handbag within the meaning of s 73 of the 1992 TMA (at [56]). The concept of “importing” in s 73 of the 1992 TMA envisioned the bringing of goods or items into Singapore “for the purpose of sale or for any purpose of trade or manufacture” (at [57]).



126 I agree with the holding in *Trade Facilities*. While s 73 of the 1992 TMA was a penal provision, whereas s 27 of the TMA pertains to *civil* liability for infringement, I find that there is also no reason to read into s 27 the definitions of “import” in the Customs Act or the RIEA. This means that the term “import” should be understood broadly in accordance with s 2(1) of the Interpretation Act – *ie*, “to bring or to cause to be brought into Singapore by land, sea, or air”. This is, however, subject to the following qualifier: s 27(1) of the TMA deals with unauthorised use of a sign *in the course of trade*.

127 On the present facts, I find that the Containers and the Counterfeit Goods found within were indeed imported into Singapore in the sense that they were “brought into Singapore” by sea. I also note that the bringing of these goods in transit through Singapore was clearly done “in the course of trade”.

*Does “importing” under s 27(4)(c) of the TMA require that the goods be intended for release for free circulation in the Singaporean market?*

128 The Defendant has cited a number of English and European decisions concerning whether, and in what circumstances, goods temporarily introduced into a jurisdiction in transit to some other country are to be regarded as “imported” for the purposes of trade mark law. The Defendant relies on these cases to argue that, at least for the purpose of trade mark infringement, goods are not “imported” unless they are brought into a territory for the purpose of releasing those goods into free circulation within the jurisdiction.<sup>95</sup>

129 As noted by the Court of Appeal in *City Chain Stores (S) Pte Ltd v Louis Vuitton Malletier* [2010] 1 SLR 382 at [15], while decisions of the ECJ are not binding in Singapore, they are relevant because s 27 of the TMA was taken from s 10 of the Trade Marks Act 1994 (c 26) (UK), which implemented the First

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<sup>95</sup> Defendant’s closing submissions, para 274.

Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks.

130 One of the decisions cited by the Defendant is the European Court of Justice (“ECJ”) case of *Class International BV v Colgate-Palmolive Company and others*, C-405/03, [2005] ECR I-8735 (“*Class International*”) concerned a container of genuine “Aquafresh” toothpaste shipped from South Africa to Rotterdam in the Netherlands, where the goods were stored in a customs warehouse. The container was detained by customs authorities on the application of the trade mark proprietors. The claimant, Class International, was the purchaser of the goods. It applied for the release of the goods and damages. At the time the container was seized, it appeared that the claimant had yet to determine the final destination for the goods. One possibility was the goods might be on-sold and sent to a buyer outside of the European Economic Area (“EEA”). Another possibility was the goods would be on-sold and sent to buyers within the EEA (after the necessary customs clearance etc).

131 At the heart of the dispute was the clash or interplay between the principle of free movement of goods within the European Community (“EC”), the right to control entry of goods into the EC, the right of a registered trade mark proprietor under EU law to prevent importation of goods bearing the trade mark and the principle of exhaustion of rights.

132 At issue were the scope of the trade mark proprietor’s exclusive rights under Art 5 of the First Council Directive 89/104/EEC of 21 December 1988 (“the Trade Marks Directive”) and Council Regulation (EC) No 40/94 of 20 December 1993 (“Regulation No 40/94”). Article 5(1) of the Trade Marks Directive and Art 9(1) of Regulation No 40/94 both entitled registered trade mark proprietors to prevent third parties not having his consent from “using

[signs identical and/or confusingly similar to the trade mark] in the course of trade”. Article 5(3)(c) of the Trade Marks Directive and Art 9(2)(c) of Regulation No 40/94 also provided that registered trade mark proprietors had the right to prohibit third parties from “importing or exporting goods under the sign”.

133 The Dutch courts referred, *inter alia*, the following question to the ECJ (*Class International* at [22]):

- (1) May the proprietor of a trade mark oppose the (direct or indirect) introduction without his consent of goods from third countries, bearing a trade mark within the meaning of [the Trade Marks Directive] and/or of [Regulation No 40/94], into the territory of a Member State ... in the context of transit or transit trade as referred to below?
- (2) Does “using a sign in the course of trade” within the meaning of the opening words of Article 5(1) in conjunction with Article 5(3)(b) and (c) of the [Trade Marks Directive] and the opening words of Article 9(1) in conjunction with Article 9(2)(b) and (c) of [Regulation No 40/94] cover the storing, in a customs office or warehouse within the territory of a Member State, of original branded goods ... which have not been imported into the EEA by the trade mark proprietor or with his consent, which come from outside the EEA and which have the customs status of non-Community goods [...]?

134 The ECJ held that “importing” goods under Art 5 of the Trade Marks Directive and Art 9 of Regulation No 40/94 required “introduction of those goods into the [EC] for the purposes of putting them on the market therein” (at [34]). The mere physical introduction of goods into the territory of the Community was not “importing” within the meaning of Art 5(3)(c) of the Trade Marks Directive and Art 9(2)(c) of Regulation No 40/94. It also did not constitute “use in the course of trade” within the meaning of Art 5(1) and Art 9(1) of the Trade Marks Directive and Regulation No 40/94 respectively.

135 I note that the decision of the ECJ in *Class International* was subsequently followed and applied in the UK by the Court of Appeal in *Eli Lilly and Company and another v 8PM Chemist Ltd* [2008] EWCA Civ 24 (“*8PM Chemist*”). In this case, genuine trade marked goods (medicines) sold in Turkey were in the process of being shipped to buyers in the United States via the UK. The medicines were packed inside boxes bearing the claimant’s trade marks. These boxes were then placed inside an “anonymous brown box” which only bore the patient’s name and address (*8PM Chemist* at [7]). Hundreds of these anonymous brown boxes were then placed inside a larger box. The larger box was then air-freighted to Slough in the UK where they were kept under customs supervision. After the larger boxes were opened by the defendant’s employees, the individual “anonymous brown box[es]” were removed, stamped and sent by post to the USA. The individual boxes of medicines bearing the claimant’s trade marks were never taken out or exposed in the UK. The goods were processed duty free and were not released for circulation in the European Union.

136 The Court of Appeal held that there was no infringement. Jacob LJ, delivering the judgment of the Court, cited a previous ECJ decision, *Arsenal Football Club plc v Matthew Reed*, C-206/01, [2002] ECR I-10273 for the proposition that the essential function of a trade mark is to guarantee the identity of origin of the marked goods or services to the consumer by enabling him, without any possibility of confusion, to distinguish the goods or services from others which have another origin. He then remarked at [22]:

Now the essential function of [the claimants’] European trade marks is in no way jeopardised by 8PM’s activities. No one in Europe even sees the trade marks. It is unlikely in those circumstances that there will be infringement. ...

137 Jacob LJ then reviewed the relevant ECJ decisions, including *Class International*, and concluded that the “touchstone” was “no placing on the market, no infringement” (at [46]).

138 Following the decision of the ECJ in *Class International*, the Court of Appeal in *8PM Chemist* held that the trade marked goods were never released into free circulation and used in the course of trade in the UK or the EU. It followed that they had not been imported. The Court rejected the “quixotic” argument that even if the goods had not been “imported”, they were or would have been exported (at [43]).

139 Another decision cited by the Defendant was the judgment of the ECJ in *Koninklijke Philips Electronics NV v Lucheng Meijing Industrial Company Ltd and others, Nokia Corporation v Her Majesty’s Commissioners of Revenue and Customs*, Joined Cases C-446/09 and C-495/09, ECLI:EU:C:2011 (“*Philips and Nokia*”). I will not go into the details of this decision. In brief, references were made to the ECJ from Belgium and UK courts in respect of the legal position of goods originating outside of the EC and which were seized by customs in Belgium and the UK whilst in transit to destinations outside the EC. The ECJ stated that the question was whether certain imitation goods coming from a non-Member State could be classified as counterfeit or pirated goods under the applicable EC regulations on intellectual property border enforcement and customs interdiction procedures, based only on the fact that they were brought into the customs territory of the EU without being released for free circulation there (*Philips and Nokia* at [49]). After a detailed review, the ECJ held that in order for goods in transit to be classified as counterfeit or pirated under the applicable EC regulations on intellectual property border enforcement and customs interdiction procedures, it was necessary to show that they were intended to be “the subject of a commercial act directed at European Union

consumers, such as a sale, offer for sale or advertising” (*Philips and Nokia* at [56]–[57]).

140 The Defendant, in the case at hand, raised the point that the Counterfeit Goods were loaded inside sealed containers and, but for the inspection in Singapore, would never have been exposed to view in Singapore. There is a superficial attraction to this argument. The Singapore courts, like the ECJ, have held that the essential function of a trade mark is to guarantee the origin of the origin of goods and services (*Société des Produits Nestlé SA and another v Petra Foods Ltd and another* [2017] 1 SLR 35 at [38]). That being so, the question might be raised as to whether there could be an “import” or a “use in the course of trade” or, more generally, liability for infringement if the trade marks were never exposed to the market.

141 As noted above, the trade mark proprietor in Singapore enjoys the exclusive right under s 27(4)(c) to import or export goods “under the sign.” The exclusive rights under the UK Trade Marks Act 1994 (c 26) (UK) (“UK TMA 1994”) and under the Trade Mark Directive and Regulation No 40/94 are couched in similar terms. It was in this context that the UK Court of Appeal in *8PM Chemist* stated that even though no one in Europe sees the trade marks “[n]onetheless one must ask whether there is a use of the marks ‘in the course of trade’”, and more specifically whether there was an “import” or “export” such as to infringe the UK Trade Marks Act (at [22]).

142 In the end, however, I have come to the view that the term “import” in s 27(4)(c) of the TMA does not require that the goods must be intended for free circulation in the Singapore market. The leading decision in Singapore on the meaning of “import” under trade mark legislation remains *Trade Facilities*.

Even though the ECJ cases discussed above have come to a different conclusion, I would not follow those decisions for the following reasons.

143 First, the structure and language of s 27(4) of the TMA militates against reading into the term “import” any requirement that goods be intended for free circulation in the Singapore market. I note that s 27(4)(b) and s 27(4)(c) of the TMA provide as follows:

(4) For the purposes of this section and sections 28, 29 and 31, a person uses a sign if, in particular, he –

(a) ...

(b) offers or exposes goods *for sale, puts them on the market or stocks them for those purposes* under the sign;

(c) imports or exports goods under the sign;

...

[emphasis added]

In my view, if Parliament had intended that the term “import” should require not only a physical bringing of goods into Singapore but also that they be *intended for sale or circulation* in the Singapore market, it would have been all too easy to include express words to that effect, as was done in s 27(4)(b). Further, s 27(4)(b) already specifies that using a sign encompasses both “put[ting] [goods] on the market” *and* “stocking them for those purposes”. To read into the term “import”, a requirement that the goods be intended for sale or circulation into the Singapore market would, at the very least, create a significant overlap between s 27(4)(b) and s 27(4)(c) of the TMA.

144 Secondly, the ECJ position that goods are only imported into a Member State of the EU if they were intended for release into free circulation in that Member State or another Member State was heavily driven by considerations concerning the free movement of goods and the exhaustion of rights. The

principle of exhaustion essentially stipulates that once intellectual property protected goods are placed into a first market by or with the consent of the right holder, the intellectual property rights in respect of those goods are exhausted. Within the EC, the principle of exhaustion of rights plays a vital role in supporting the core EC objective of free movement of goods and services within the EC. Viewed through the lens of exhaustion of rights and free movement of goods, the intellectual property owner's rights to prevent importation are concerned with the initial or first entry of the goods into a Member State of the EC. Once that has occurred, the right holder is not permitted to assert his rights to prevent further dealings such as sales or movement within the EC. It is on this basis that the ECJ held that goods are only to be regarded as imported if they have entered into the territory of a Member State for the purpose of free circulation in that Member State or another Member State. As will be seen, there are English decisions involving patents and trade marks where goods brought into the UK for transshipment to other destinations were nevertheless treated as having been imported into the UK (see [152]–[171] below).

145 Thirdly, I agree with the Plaintiffs that the effect of the ECJ decision in *Philips and Nokia* was to significantly raise the bar for owners of intellectual property rights who desire to take action against goods in transit.<sup>96</sup> The decision is, in any event, now subject to changes introduced by Regulation (EU) 2015/2424 of 16 December 2015 (“the 2015 Regulations”) and Directive 2015/2436 of 16 December 2015 (“the 2015 Directive”). In brief, under the 2015 Regulations and the 2015 Directive, trade mark proprietors now have the right to prevent third parties from bringing infringing goods, in the course of trade, into the European Union *without being released for free circulation there* (see, for example, Reg 11 of the 2015 Regulations).

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<sup>96</sup> Plaintiffs closing submissions, para 74.



146 To recapitulate, I find that the term “import” in s 27(4)(c) of the TMA bears the meaning given to that term under s 2(1) of the Interpretation Act – *ie*, to bring or cause to be brought into Singapore by land sea or air – subject to the limitation that “import[ing]” will not give rise to liability for infringement if it is not done “in the course of trade” (see [126] above). I have found that the Counterfeit Goods were “import[ed]” into Singapore within the meaning of s 27(4)(c) of the TMA, and that this was done “in the course of trade”. That does not, however, mean that the Defendant is liable for infringement. The question is whether the Defendant was the *importer* of the Counterfeit Goods.

***Was the Defendant the importer?***

*The relevance of the terminology used in the relevant permit declarations*

147 I have mentioned Ms Chew’s evidence that the relevant cargo clearance permit declarations, if properly filled out, would have identified the Defendant as the importer and exporter (see [55] above). I have also mentioned Mr Cheong’s view that this was a case involving transshipment and not a case involving an “importer” (see [57] above). I should state at the outset that the fact that the Defendant would have been named as the importer or indeed the exporter in the relevant permits and declarations required by customs or port authorities says nothing about whether the Defendant is liable for trademark infringement under s 27 of the TMA. So, too, Mr Cheong’s view that the Defendant did *not* import the goods is of limited assistance. I have made the point that the definition of terms such as “import” and “export” and “exporter” varies across the various statutes, including the Customs Act and the RIEA. The views of witnesses such as Ms Chew, Mr Cheong and the other customs officers must be taken in that light.

*The argument based on s 93A(5)(b)(v) of the TMA*

148 Section 93A of the TMA (enacted to address the requirements of the USSFTA on *ex officio* procedures) is concerned with detention and examination by customs authorities. The power extends to goods that are imported into, or that are to be exported from Singapore, and goods in transit provided that these are consigned to a local consignee.

149 As I have mentioned, s 93A(5)(b)(v) of the TMA provides that, in the case of goods in transit consigned to a local consignee, references to import or importation are to be read as a reference to the import, importation or export of the goods by the consignee for the purposes of ss 86, 87 and 89–93 of the TMA. The Plaintiffs take the position that this supports the case that the Defendant is the importer and would have been the exporter but for the seizure and detention by Singapore Customs. While this is attractive at first sight, on closer examination I am unable to accept the submission.

150 The effect of s 93A(5)(b)(v) of the TMA is that the local consignee of goods in transit is to be regarded *for the purposes of applying those provisions as the importer*. It does not mean that he must be regarded as the importer for *all* purposes, such as for deciding whether he is the importer in an infringement action under s 27.

151 That conclusion is supported by s 93A(2) of the TMA, under which notice must be given to the importer, exporter or *consignee* of the goods. The reference to “importer, exporter or *consignee*, as the case may be, of the detained goods” [emphasis added] suggests that a consignee is *not* necessarily the importer or exporter.

*The case law*

152 I now turn to the case law and commentaries. A large number of English and European authorities was cited by the Parties. The discussion will be confined to the principal cases.

153 The first decision is that of Oliver J in *Smith, Kline and French Laboratories Ltd v R.D. Harbottle (Mercantile) Ltd and others* [1980] RPC 363 (“*SKF*”). In this case, the UK patent was over a medicinal product. The first defendant (“D1”), a UK company, entered into an arrangement with a company (X) to supply the drug to Nigeria. To this end, D1 placed an order with the third defendant, an Italian company (“D3”), for D3 to supply 20kg of the drug on *cif* terms. The consignment was transported to the UK by the second defendant, British Airways (“D2”). The airway bill, which was not a document of title, named D1 as the consignees and D3 as the consignor and shipper.

154 The goods arrived at Heathrow Airport and placed in D2’s bonded warehouse. Problems quickly arose. First, X had not made the required payment to D1. As a result, D1 wished to return the goods to D3. In the meantime, the plaintiffs (owners of the UK patent) obtained an *ex parte* order against D1 for delivery up of the goods on the basis that D1 was liable for infringing the patent. Problems and disputes quickly followed over delivery up of the goods which were in D2’s custody as well as liability for warehouse charges and related matters. The plaintiffs added D2 as a defendant. D2 now found itself in an unenviable position as the warehouseman in possession and facing conflicting claims: a claim for delivery up by the Plaintiffs and an apparent claim for delivery up by D1. As a result, D2 commenced a motion for interpleader. By the time the matter was heard by Oliver J, D1, while disputing certain reliefs,

had admitted infringement. D3 had also admitted infringement as a result of having for a short time constructive possession of the goods at Heathrow.

155 What remained was the question whether D2 was also liable for patent infringement under s 60(1)(a) of the Patents Act 1977 (c 37) (UK) on the basis (i) as the carrier it had imported the patented goods; and (ii) as the warehouseman had kept the patented goods at their bonded warehouse (see *SKF* at 370). Section 60(1)(a) provided that a patent would be infringed, *inter alia*, by any person who imports or keeps the product whether for disposal or otherwise. Resolution of this issue was necessary for the determination of the appropriate cost orders.

156 It bears underscoring that the case, as originally framed, included the claim that a carrier brings the patented product into UK, was *ipso facto* an infringer because he had imported the goods into UK. It did not matter that he did not know the goods were patented. This claim was subsequently abandoned. The case against D2 proceeded before Oliver J simply on the basis that the carrier had been “keep[ing]” the patented product as a warehouseman (see *SKF* at 371). It is not necessary to examine this aspect of the decision. It suffices to note that the claim against D2 failed.

157 In the end, D1 and D3 were found liable for infringing the UK patent by participating in the importation of the drug. D1 was the UK buyer of the drugs on *cif* terms from D3 in Italy. D1 was the consignee and D3 was the shipper named in the airway bill. D3 as the consignor had a right of disposal or stoppage *in transitu* under the terms under which D2 was carrying the goods.

158 Even though *SKF* concerned patent infringement (and not registered trade marks), there are several points which are relevant to the case at hand.

159 First, it may be thought that *SKF* supports the view that so far as the exclusive rights of intellectual property holders are concerned, importation includes the situation where goods enter jurisdiction and are temporarily stored or kept at a custom-bonded warehouse awaiting on-carriage to another country. Indeed, Oliver J commented at 366 that the conception that importation from abroad of a substance made in accordance with the patent and re-exported to Nigeria without clearing UK customs was not patent infringement was “quite wrong[.]”

160 Secondly, *SKF* also demonstrates the care which must be taken when identifying the importer. Even if entry into the UK for on-carriage elsewhere is an act of importation, the question remains: who is the actual importer? The initial claim that D2, the carrier, was the importer or joint importer was abandoned. The Defendant, in the present case, would doubtless submit that the abandonment was completely justified as a matter of law. The carrier, as a mere transporter and bailee in possession, is not the “importer” at least for the purposes of the substantive rights. If a carrier is held to be an importer or a joint importer simply because the goods were transitorily under their control in circumstances when he has no knowledge of the relevant intellectual property rights and the consignment, the consequences would be far reaching indeed. The same is true of freight forwarders. On this, the evidence of Mr Iverson bears underscoring. A freight forwarder who deals with a number of agents or many agents worldwide will not know who the agents’ importers (clients/customers) are.<sup>97</sup> The evidence is clear. During a working day, the Defendant as freight forwarder might deal with some 150 to 200 containers.<sup>98</sup> It is well-known the volume of container traffic, whether inbound, awaiting transhipment or out

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<sup>97</sup> Certified Transcript, 20 March 2017, p 99 (lines 18–25) and p 100 (lines 1–17).

<sup>98</sup> Certified Transcript, 16 March 2017, p 110 (lines 2–6).

bound Singapore is very substantial. Some in-bound shipments may involve a long sea transit from the load port. Other in-bound shipments, as in the case at hand, will be from load ports only a few days sailing time from Singapore. The circumstances are varied. Time will often be short.

161 Even though *SKF* is a UK decision under the Patents Act 1977, I find that the principles discussed helpful and provide persuasive support for the view that the Defendant, in the case at hand, is not liable as the importer under s 27 TMA.

162 Whilst the Defendant was named as the consignee and notify party in the sea waybills, the Defendant's position is rather different from D1 and D3 in *SKF*. In that case, D3 was the shipper and consignor of the goods carried to UK. D1 was the UK buyer and consignee of the goods under a *cif* contract. It was D1 as buyer and D3 as seller who had interests in the property in the goods. The control that D2 had over the goods was transitory and flowed from its role as carrier and warehouseman.

163 In the present case, the Shippers were both the shippers and consignors. The goods were destined for Batam where the Third Party was named as the consignee in the invoices. The relationship between the Shippers and the Third Party was never made clear in the evidence. Nevertheless, based on the documents and evidence, it is apparent that the only persons who were interested in the property in the goods were the Shippers and Third Party. I note the evidence of the Defendant's expert, Mr Iverson, that the Defendant was likely dealing with the Third Party who was also an agent/freight forwarder. The Third Party may not have been the final consignee.<sup>99</sup> In the end, while there is evidence that the Defendant dealt with or acted on the instructions of the Third Party in

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<sup>99</sup> Certified Transcript, 20 March 2017, p 99 (lines 18–25) and p 100 (lines 1–17).

previous transactions,<sup>100</sup> there was no evidence as to who (if any) the Third Party may have had obligations to in Indonesia or elsewhere in respect of the seized/detained goods.

164 In *Nobel's Explosives Company v Jones, Scott & Co* (1881) 17 Ch D 721 (CA), (1882) 8 App Cas 5 (HL) ("*Nobel's Explosives*"), a patent was granted in the UK over a process for manufacturing an explosive. A quantity of the explosive made abroad by the patented process was brought into the UK for the purposes of transshipment for exportation. The goods were landed in the UK and stored pending transshipment. The defendants acted as customs house agents for the foreign manufacturer ("K") and undertook the tasks of landing and storing the goods. On the facts, K manufactured the goods in Cologne. The goods were consigned to K by themselves. The bill of lading was made out to K or their assigns. The defendants as customs house agents for K simply filled out the necessary documents to obtain a discharge order or warrant for discharge from the ship. The steps necessary were to ascertain whether any duty was payable, to obtain the necessary licences for landing of explosive articles and to obtain the landing order.

165 The Court of Appeal (whose decision in *Nobel's Explosives Company v Jones, Scott & Co* (1881) 17 Ch D 721 ("*Nobel's Explosives CA*") was upheld on appeal) decided that while K was the importer it could not be said that the defendants had as customs house agents assisted in such a manner as to be liable on the basis that they had enabled K to commit patent infringement. James LJ held (*Nobel's Explosives CA* at 743) that it would be "a most injurious encouragement to idle and vexatious litigation" if any person who had anything to do either directly or indirectly with the means by which infringing goods get from one place to another was liable in an action at law.

<sup>100</sup> Certified Transcript, 16 March 2017, p 47 (lines 2–9) and p 106 (lines 23–25).

166 *Nobel's Explosives* was decided at a time when the exclusive rights of the patentee were still defined by reference to the terms of Letters Patent issued by way of royal prerogative. The grantee was provided with the exclusive right to “make, use, exercise and vend the said invention” within the UK.

167 Despite its venerable age and different legislative context, the decision is still significant for two reasons. First, it accepts that where goods enter the UK for purposes of transshipment to a third country, the goods can be treated as “imported” for patent and trade mark purposes even if they were not intended for release into the UK market. Secondly, an agent for the importer who provides some services in the UK in respect of the transshipment process such as filling out the necessary customs forms does not thereby become a joint importer. The agent, on the facts, was not the importer. Neither was he liable for providing assistance to the importer. The significance of the last point is that it is well established that an individual who shares a common design with a tortfeasor to commit a tort and who participates by performing an act in furtherance of that common design, is liable as a joint tortfeasor in conspiracy.

168 Unsurprisingly, the Defendant cites and relies on *Nobel's Explosives* to support its position that, as the freight forwarder, the Defendant was not the importer or liable on the basis that it had taken steps to facilitate the intended transshipment process. Of course, unlike the customs house agent in *Nobel's Explosives*, the Defendant in the present case was named as the consignee in the sea waybills. For reasons that I discuss below, however, it is not easy to see why that should make any difference.

169 In particular, the goods were inside sealed containers. There was no evidence at all that the Defendant had a common design with the importer to infringe. The steps required of the Defendant were largely concerned with



documentation and entry of the necessary details into the Portnet system. The transshipment process did not entail the Defendant taking physical possession or control of the containers or their contents.

170 The Defendant also cited the decision of the House of Lords in *Sabaf SpA v MFI Furniture Centres Ltd and another* [2004] UKHL 45 in support of its case that it is not the importer. This case involved a consignment of goods made in Italy by X and which had been sold to MFI, a buyer in the UK. The goods were protected by a patent in the UK but not in Italy. The question arose as to whether X was liable on the basis that it had imported the goods into UK. Under the sales agreement, title and property in the goods passed to MFI in Italy. MFI arranged for transportation to the UK. Subsequently, X arranged for carriage to the UK at MFI's request. The carriage contract was made by X for and on behalf of MFI. If there had been short delivery by the carrier, the proper person to sue was MFI. On this basis, it was held that MFI was the importer and not X.

171 In coming to this decision, the Court distinguished the trade mark case of *Waterford Wedgwood plc v David Nagli Ltd* [1998] FSR 2 (“*Waterford*”) where the seller supplied counterfeit Waterford crystal to a buyer in New York (“the US buyer”). The seller arranged for the counterfeit crystal to be shipped for Ireland to Spain and to Felixstowe where they were to be transhipped and sent to New York. The Court found that the seller was liable for importing the goods into the UK. The US buyer was not the importer. It was the seller who in the course of sending the goods to the buyer imported the counterfeit goods into UK. The House of Lords in *Sabaf* agreed with that decision (*Sabaf* at [43]).

172 The principle that emerges is that the question as to who is the importer or exporter is highly fact-sensitive. Careful attention to the underlying

transaction in respect of the goods is necessary. In some cases, the seller of goods under an international sale contract will also be the importer. In other cases, it will be the buyer. Indeed, *Waterford* demonstrates that both the seller and buyer may wear different hats at different stages of the transport process. In yet other cases an agent for either the buyer or the seller may be an importer. Bearing in mind the fact-sensitive nature of the inquiry, I turn now to examine the Defendant's role in the transaction.

*The nature of the Defendant's role in the transaction*

173 The background facts concerning the Defendant's engagement and role have been set out earlier. The Defendant had no part in making the shipping arrangements, packing, or loading the Containers on board the inbound vessels. These arrangements and acts were done by the shippers in China and/or by the Third Party. The instructions to the Defendant to declare transshipment status also came from the Third Party. Indeed, Ms Chew's evidence suggested that by the time the Defendants received instructions from the Third Party, there was nothing the Defendant could have done to prevent the Counterfeit Goods from being brought into Singapore.<sup>101</sup>

174 I agree with the Defendant that in these circumstances it could not be said that the Defendant was the "importer". It certainly had not "brought" or "caused to be brought" the Counterfeit Goods into Singapore. If anyone was the importer, it was either the Shippers or the Third Party.

175 I also noted that sea waybills were used for the short sea carriage from China to Singapore. Sea waybills are not negotiable instruments under common law (*Voss Peer v APL Co Pte Ltd* [2002] 1 SLR(R) 823 at [27], upheld on appeal

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<sup>101</sup> Certified Transcript, 14 March 2017, p 126 (lines 18–24).

in *APL Co Pte Ltd v Voss Peer* [2002] 2 SLR(R) 1119 and Tan Lee Meng, *The Law in Singapore on Carriage of Goods by Sea* (Butterworths Asia, 2nd Ed, 1994) at pp 286–288). As noted in Stephen Girvin, *Carriage of Goods by Sea* (Oxford University Press, 2nd Ed, 2011) (“*Carriage of Goods by Sea*”) at para 4.04:

Unlike a bill of lading, the sea waybill does not change hands because it is not normally used for the purpose of payment for the goods. The clear advantage of this is that the shipper can vary his delivery instructions to the carrier at any time during transit. Furthermore, commercial documents (such as invoices and certificates of origin) can be sent to the buyer earlier than otherwise because there is no waiting period for the waybill to be produced, as there is with a bill of lading. There is no problem with the ship arriving ahead of the documents and so the ship can discharge at once. ...

176 As noted in *Carriage of Goods by Sea* at para 4.05, as a sea waybill is not a document of title at common law; ownership of the goods represented in the sea waybill will pass by reason of the underlying transaction. Thus, in the present case, it follows that ownership and the property in the Counterfeit Goods is a matter that can only be determined by reference to the underlying transaction between the Shippers and the Third Party.

177 The relationship between the Shippers and the Third Party was never made clear in the evidence, which is unsurprising, since neither appeared in these proceedings. I note the evidence of the Defendant’s expert, Mr Iversen, that the Defendant was likely dealing with the Third Party who was also an agent/freight forwarder. The Third Party may not have been the final consignee.<sup>102</sup> It bears repeating that while there is evidence that the Defendant dealt with or acted on the instructions of the Third Party in previous transactions,<sup>103</sup> there was no evidence as to who (if any) the Third Party may

<sup>102</sup> Certified Transcript, 20 March 2017, p 99 (lines 18-25) and p 100 (lines 1–17).

<sup>103</sup> Certified Transcript, 16 March 2017, p 47 (lines 2–9) and p 106 (lines 23–25).

have had obligations to in Indonesia or elsewhere in respect of the seized/detained goods. What is clear, however, is that the Defendant did not acquire any property in the Counterfeits Goods simply by virtue of being named as the consignee in the sea waybills.

178 I also note that the Defendant was never in physical possession of the Containers. Indeed, it appears that in the ordinary course of giving instructions on goods in transit, a freight forwarder in the Defendant’s position would not necessarily have sight or physical possession of the Containers as part of the process of transferring them to the outbound vessel (see [29] above). The actual unloading of the sealed containers, their storage at designated places, and loading on board the “outward bound” vessel was under the control of PSA.

***Is the Defendant liable for exporting under the sign?***

*Is a mere intention to export sufficient?*

179 The Plaintiffs argue that even if the Defendant did not “import” the Counterfeit Goods into Singapore, it is nevertheless liable for infringement under s 27(1) read with s 27(4)(c) of the TMA because it had the intention to export the Counterfeit Goods.

180 In this regard, the Plaintiffs argue that a mere intention to export the Counterfeit Goods is sufficient for the imposition of liability on the Defendant. The Defendant points out that under s 93A(3)(b) of the TMA, goods detained *ex officio* will be released to the exporter unless, within the prescribed period, the proprietor institutes an action for the infringement of his trade mark. If a mere intention to export the Counterfeit Goods would be insufficient to constitute trade mark infringement, the trade mark proprietor would *necessarily* fail in its action for trade mark infringement. This would mean that the customs

authorities would have to release the goods to the exporter, which would render s 93A(3)(b) of the TMA meaningless. It would, in the Plaintiffs’ words, “be closing the stable door after the horse has bolted”.<sup>104</sup>

181 While the Plaintiffs’ argument is attractive at first blush, I have come to the view that having a mere intention to export is insufficient to amount to “use” within the meaning of s 27(4)(c) of the TMA. To begin with, the plain wording of s 27(4)(c) of the TMA does not suggest that a mere intention is sufficient. Section 27(4)(c) instead provides that there is “use” if a person “imports or exports goods under the sign”.

182 Furthermore, I disagreed with the Plaintiffs that s 93A(3)(b) of the TMA would be meaningless if a mere intention to export was insufficient to impose liability on the would-be exporter. I note that s 93A(3)(b) does *not* require the trade mark proprietor to commence an infringement action *against the would-be exporter*. The trade mark proprietor is simply required to “institute *an action* for the infringement for his trade mark” [emphasis added]. It seems to me that in many cases where goods are detained *ex officio* prior to being exported, the trade mark proprietor may well have a cause of action (or causes of action) against several other parties along the supply chain. He may, for instance, commence an action against the manufacturer or seller of the goods. Such an infringement action need not be founded on the intention to export the goods. It may well be founded on other acts which amount to “use in the course of trade” under s 27(4) of the TMA. For instance, the manufacturer or seller may well have “offer[ed] goods for sale”, have “[put] them on the market” or have “stock[ed] them for those purposes under the sign”. In yet other instances, the trade mark proprietor may be able to commence an action for infringement against the would-be exporter by virtue of the fact that the would-be exporter

<sup>104</sup> Plaintiffs’ closing submissions, para 143–145.

himself has offered goods for sale, put them on the market or stocked them for those purposes under the sign. The argument that s 93A(3)(b) would be meaningless and customs authorities would simply have to release the infringing goods to the would-be exporter is therefore not borne out.

183 Nevertheless, for completeness, I have considered whether the Defendant could be made liable for infringement solely on the basis that it was the would-be exporter.

*Was the Defendant the would-be exporter?*

184 As with the term “import”, there is no definition of “export” under the TMA. Again, applying the reasoning in *Trade Facilities* as discussed above, I agree that “export” should be understood in accordance with s 2(1) of the Interpretation Act. The question, therefore, is whether the Defendant is the party who would have “take[n] or caused to be taken out of Singapore by land, sea or air” the Counterfeit Goods (see the definition of “export” in s 2(1) of the Interpretation Act). I have come to the view that the Defendant was not the party who would have “taken” the Counterfeit Goods or caused them to be taken out of Singapore.

185 In coming to my decision, I found helpful the discussion of the role of a freight forwarder in *Carriage of Goods by Sea* at paras 1.30 and 3.16–3.20. What is clear is that the role of a freight forwarder varies and depends on the terms of the contract under which he has been engaged. His duties may range from basic matters such as booking spaces or slots on a vessel, sending documents to the loading broker, arranging customs clearance, collecting bills of lading, all the way to carrying out packaging, warehousing and lighterage services, arranging insurance, acting as a freight consolidator (combining

several consignments into a full container load) and issuing house bills of lading.

186 The role of the freight forwarder may also depend whether he is engaged to act at the load port or discharge port or intermediate port of call. For example, at a discharge port the freight forwarder may be involved in the process of informing the importer of the due date of arrival and in collecting or preparing documents needed for customs clearance. This may include co-ordinating and effecting customs duties on behalf of his principal. In some cases, the freight forwarder will be acting as agent for his principal. In other cases, he may be required to enter into transactions as principal (see *Carriage of Goods by Sea* at para 3.17).

187 The Plaintiffs' witness, Ms Chew, accepted that based on the information available, the Defendant was a freight forwarder and not a trader of goods. She agreed there was no indication that the goods were intended for the Defendant's use or consumption.<sup>105</sup>

188 In the present case, I find that the Defendant's engagement by the Third Party was for the limited purpose of arranging for transshipment of the inbound Containers. The Defendant acted as agent for the Third Party in taking the action and steps that it took. It was the Third Party who engaged the Defendant to declare the goods for transshipment. It was the Third Party who instructed the Defendant on which vessels were engaged to perform the transshipment to Batam. The commercial invoices supplied by the Third Party made clear that the Containers' final destination was Batam and that the Third Party were the ultimate consignees. All the preparations were made by the Third Party and carried out by the Defendant as the Singapore freight forwarder by virtue of its

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<sup>105</sup> Certified Transcript, 14 March 2017, p 15 (lines 11–17) and p 16 (lines 7–10).

ability to access PSA's Portnet system. On that basis, I have come to the view that if any party was the "exporter" of the Counterfeit Goods, it was the Third Party and not the Defendant.

## **Conclusion**

189 To summarise my findings:

(a) First, the Counterfeit Goods in the Containers were imported into Singapore for the purposes of the TMA notwithstanding that there was no intention for the consignments to be released into free circulation in Singapore.

(b) Secondly, the importer of the Counterfeit Goods was either the Shippers in China or the Third Party, who was the ultimate consignee in Batam. It was not the Defendant. While the underlying transaction between the Shippers and the Third Party is unclear, there is no doubt that the Defendant was not the party who caused the Counterfeit Goods to be brought into Singapore. The fact that the Defendant as freight forwarder was named as the consignee in the Sea waybills and was required to submit or make declarations under Singapore customs rules and regulations does not mean the Defendant is to be treated as an importer or exporter for the purposes of the TMA. This is so even though some of the customs permits and declarations may name the Defendant as importer.

(c) Thirdly, a mere intention to export does not suffice to constitute "use" under s 27(4)(c) of the TMA. Even if I am wrong on this point, the Defendant was not the would-be exporter of the Counterfeit Goods. It was engaged as freight forwarder by the Third Party for the limited



purpose of arranging for transshipment, but all the preparations and instructions for the onward shipment of the Counterfeit Goods came from the Third Party.

(d) Fourthly, the Defendant did not act in concert with or have or shared a common design with either the shippers or the Third Party (or indeed anyone else) to commit acts now said to amount to infringement.

190 It follows that the claims against the Defendant are dismissed. The Defendant is not the importer or liable as joint tortfeasor for the importation. Costs are awarded to the Defendant to be taxed unless agreed.

### **Concluding observations**

191 Earlier the point was made that after the seizure or detention of the goods by Singapore Customs, these proceedings were commenced by the trade mark proprietors to prevent the infringing goods from being released to the Defendant. A court order for the further detention of the goods was obtained on 16 April 2013.<sup>106</sup> It also appears that the Court in Suit No 300 of 2013 and Suit No 302 of 2013 also made orders further detaining the goods found within the two Containers on 11 April 2013.<sup>107</sup>

192 At the first JPTC on 25 April 2016, the question was raised by counsel as to whether the Counterfeit Goods (minus representative samples) could be forfeited to save costs. The Plaintiffs and the Defendant agreed that the goods bore counterfeit trade marks. The Defendant's position was that it was not the importer and was not responsible in law for any importation that might have

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<sup>106</sup> Opening statement for Suit No 322/2013, para 7.

<sup>107</sup> ORC 2486/2013 and 2485/2013.

taken place. On that basis, ORC Nos 2486 and 2485 of 2013 were discharged. The Court directed at the JPTC that the goods detained pursuant to those orders were to be released to the custody of the Plaintiffs for destruction according to “normal procedures.” Subsequently, and prior to the extraction of the order, a PTC was heard before the learned AR to clarify the basis of the order and the “normal procedures” for destruction. The Parties at the PTC agreed that the court’s power flowed from ss 33 and 34 of the TMA.

193 Section 33 provides the Court power to order infringing goods in possession of the defendant or before the Court to be delivered up to the plaintiff. Section 34 goes on to provide that where an order has been made under s 33, the Court may order the destruction or forfeiture of the goods. While s 34(2) of the TMA requires the Court to consider what other remedies are available to compensate the plaintiff and protect his interest, s 34(3) states that notwithstanding s 34(2), where the infringing goods are counterfeit goods, the order is to be granted unless there are exceptional circumstances to justify refusal. Notice must however be served on persons having an interest in the goods. For completeness, I note that no reference was made to the possible application of ss 90(3)(c) and 92 of the TMA.

194 While the matter is not directly before me, I note that a question may arise in future cases as to the proper scope of s 34 of the TMA. Simply put, the question is whether an order for destruction of counterfeit goods under s 34 is dependent on a finding of infringement against the Defendant in the infringement proceedings. This was not a point that was raised by either the Plaintiffs or the Defendant in the JPTC. Neither does it appear that the question was raised in the subsequent PTC. It is in this context that I make the following observations.

195 First, s 33 (which sets out the Court's power to order delivery up of infringing goods) is concerned with infringement proceedings. Secondly, s 33 makes clear that the power to order delivery up is *in addition* to any relief granted under ss 31 and 32. Section 31 states that the relief the Court in an action for infringement may grant includes: (a) an injunction; (b) damages; (c) an account of profits; and (d) statutory damages. Section 32 sets out a power for the Court, where a person has been found to have infringed a registered trade mark, to require him to erase the offending mark or to have the infringing goods destroyed.

196 The observation is that s 33 may be said to be predicated on a finding of infringement against the defendant. It is not enough that the goods are counterfeit goods or accepted by the plaintiff and defendant to be counterfeit goods. Put differently, what is needed is a power to order delivery up and destruction of counterfeit goods irrespective of whether the infringement proceedings are complete or have resulted in a finding of infringement against the defendant. I say no more given that the question is not directly raised in this Suit, which is of course on the liability of the Defendant in the substantive infringement action. The parties before the Court in any case consented to the destruction order. The Third Party who clearly had a direct interest in the seized/detained goods was notified and did not respond or enter any objection.

197 The facts of this case, while relatively straightforward, have raised numerous connected issues and questions of law. These have arisen because the reality is international trade is complex. There are many different circumstances whereby goods may be shipped to, transhipped through and shipped out of Singapore. Numerous parties, both private and public, will have legitimate reasons for wanting inspection, control and detention of consignments coming into or leaving the Port of Singapore.

198 Port authorities will be concerned with the whole gamut of regulations, rules and procedures in running the Port from booking of berths, arrival notices, landing of goods, storage, loading and much more. Customs authorities will be concerned with customs procedures, customs declarations and any other matters for which they have been assigned responsibility such as the border enforcement measures in the TMA. Other regulatory authorities may also be concerned with health, safety and enforcement of laws and procedures concerned with dangerous and prohibited goods.

199 There will of course be the interests of intellectual property right owners whose concern will be to interdict and stop trade in counterfeit or pirated goods. For convenience, the interests of the intellectual property right owner lies in two areas: First, there is the interest to prevent counterfeit or pirated goods entering into the Singapore market for exploitation by sale or marketing within Singapore. Secondly, there is the interest to prevent counterfeit or pirated goods from being exported from Singapore for exploitation overseas. From the perspective of the intellectual property rights owner, it does not matter whether these counterfeit goods were made in Singapore and sent to the port for shipment out or were made outside Singapore and were only temporarily in Singapore under customs control pending shipment out either as goods in transit or goods for transshipment.

200 That said, the problem for intellectual property right owners and international trade in counterfeit and pirated goods is likely to be especially acute where the counterfeit or pirated goods originate from an unknown source in a third country and which “passes through” an intermediate country such as Singapore, as goods in transit or for transshipment to another country.

201 The intellectual property right owner will desire procedures whereby authorities in the intermediate country can inspect and detain shipments passing through even though the goods are not intended to enter the market of the intermediate country. Inspection and detention by customs authorities is akin to an “interlocutory” remedy. It arises at a time when an infringement action has not been started in Singapore. It is in this sense “pre-action” relief. Once the consignment has been inspected, the matter which must be addressed is what are the steps and procedure if the goods appear to be counterfeit or pirated goods?

202 Under the Singapore border enforcement provisions, an action for infringement must be commenced within a stated period. If the infringement action is not commenced, the goods even though they are reasonably suspected to be counterfeit or pirated will be released. The intellectual property right owner bears the responsibility of deciding whether to bring proceedings in Singapore and against who he is going to sue for substantive infringement. Once he makes that choice and starts the action for infringement, the question as to whether he succeeds depends entirely on whether his substantive rights conferred by the TMA has been infringed by the person(s) named as defendant(s).

203 In the present action, the Plaintiffs decided to commence infringement proceedings in Singapore on the basis that their trade mark rights were infringed by “importation” and/or “exportation.” The Plaintiffs also chose to sue the Defendant freight forwarder on the basis that it was the importer or liable for the importation. They did not sue the Shippers or the consignee – perhaps because the latter could not be found and properly identified. They chose not to sue the ultimate consignee, the Third Party. Whatever the reason for that decision, there is no basis for the Court to find that just because the goods were

properly inspected and detained by Singapore Customs, Parliament must have intended there to be a local defendant against whom the intellectual property rights owner could claim and hold liable for the substantive act of infringement by importation. In the end, the action against the Defendant for infringement under the TMA has failed for the simple reason the Defendant was not the importer or erstwhile exporter. This does not mean that the Plaintiffs' trade marks in Singapore were not infringed. They were infringed by the importer. It bears repeating that the Defendant accepted that the seized goods were counterfeit goods under the TMA. Indeed, they brought third-party proceedings against the Third Party in case they were found liable or responsible. The Defendant agreed the seized goods (less the representative samples) were to be destroyed. The Third Party, on the other hand, was well aware of the Singapore proceedings and chose not to appear and defend the third-party proceedings. The Third Party also made no response to the notice of the intended destruction of the counterfeit goods.

204 The end result is that while the Plaintiffs have failed in their claim for infringement against the Defendant, the consignments were interdicted, detained and an order for their destruction was obtained.

205 I thank all counsel for their patience and their helpful closing submissions and arguments. In particular, I acknowledge the assistance of Mr Ravindran s/o Muthucumarasamy (Ravindran Associates), Mr Dedar Singh Gill (Drew and Napier LLC), Mr Andy Leck (Wong & Leow LLC), lead counsel for the Plaintiffs, and Mr Leonard Chia (Asia Ascent Law Corporation), lead counsel for the Defendant.

George Wei  
Judge

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