IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1992] SGHC 245

Suit No 1812 of 1989

Between

Cheap & Good Trading Pte Ltd

… Plaintiff

And

King Alisan Marketing (a firm)

… Defendant

GROUNDS OF DECISION

Version No 1: 11 Sep 2026 (01:05 hrs)

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Cheap & Good Trading Pte Ltd v King Alisan Marketing (a firm)

[1992] SGHC 245

Suit No 1812 of 1989
Chua F A J
17 September 1992

1 **Judgment:**

2 Coram: F A Chua J

3 **Cur Adv Vult**

4 JUDGMENT

5 This is an action for passing off.

6 The plaintiff Company (the plaintiffs) was at the material time in the retail business of selling, inter alia, men's underwear under the trade mark "FA-98". The defendant firm (the defendants) at the material time was a partnership consisting of two partners: Low Beng Chuan (DW 1) and Ler Ah Kian. Low Beng Chuan was the manager of the defendants.

7 Previously the trade mark "FA-98" was used by Fa- Terlly Enterprise (Fa-Terlly) founded by Ang Ah Buck (PW 1) in March 1984 and who created

the trade mark "FA- 98". Fa-Terlly manufactured men's underwear and marketed them under the trade mark "FA-98" ("FA-98" underwears). In December 1984 Ang Ah Buck left Fa- Terlly and his wife Kwek Sok Hoon (PW 3) became the sole owner and carried on the business with the help of her husband. It was a family business. Ang Ah Buck was involved in the sales and marketing of the product while his wife was involved in the manufacturing of the product. Sometime in 1986 Low Beng Chuan joined Fa- Terlly as a sales assistant, assisting Ang Ah Buck to sell and market the "FA-98" underwears.

8 Fa-Terlly applied to register the trade mark "FA-98" at the Registry of Trade Marks, Singapore, on 22 April 1987.

9 In 1987 sales of "FA-98" underwears were good and Ang Ah Buck registered Fa-Terlly Marketing Pte Ltd (Fa-Terlly Co) on 22 October 1987 with himself and Low Beng Chuan as directors and a paid-up capital of $2. The function of Fa-Terlly Co was to help in the marketing of "FA-98" underwears.

10 The plaintiffs were incorporated on 7 May 1988. It is run and owned by the Ang family. At the time of incorporation, it had a paid-up capital of $500,000. The Ang family through their Pisces departmental stores were already in the retail business and they were the biggest retailers of the "FA-98" underwears. The Ang family wanted to enter the wholesale business and set up the plaintiff Company.

11 In June 1988 Kwek Sok Hoon sold the entire business of Fa-Terlly to the plaintiffs for about $200,000. The contract was not put into writing. Ang Ah Buck handled the sale which included the goodwill, the stock and the trade mark "FA-98". At that time the application to the Registrar of Trade Marks was still pending and a Deed of Assignment (Ex P 2) was later executed by Kwek Sok

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Hoon assigning the application for registration of the trade mark "FA-98" to the plaintiffs. (The application was refused on 5 June 1991 (Ex P 1)).

12 The plaintiffs started to sell "FA-98" underwears wholesale to NTUC outlets, HDB retail shops and Daimaru. The Ang family also continued to sell "FA-98" underwears retail at their Pisces departmental stores. For a short period, until the existing stock and material ran out, Fa-Terlly manufactured the underwears for the plaintiffs. After that, the plaintiffs obtained their underwears from China as it was much cheaper. The underwears that were manufactured in China were manufactured to the order of the plaintiffs and to their specifications and they instructed the manufacturers in China on the use of the "FA-98" trade mark. The plaintiffs continued to use the same package for the underwears as previously used by Fa-Terlly.

13 Fa-Terlly Co ceased business and Ang Ah Buck and Low Beng Chuan went to work for the plaintiffs some time in June 1988: Ang Ah Buck as marketing manager and Low Beng Chuan as sales representative in charge of sales of "FA-98" underwears. Low Beng Chuan tendered his resignation on 9 November 1988 and left the plaintiffs.

14 The defendant firm was registered on 19 December 1988. The firm dealt in men's underwears, T-shirts, handbags and garments. The underwears were sold under the trade mark "FF-98".

15 The plaintiffs commenced this action on 28 September 1989. The plaintiffs allege that the trade mark "FF-98" used in conjunction with a get-up is identical with the get-up used by the plaintiffs in respect of their underwears and that the defendants have endeavoured to pass-off their goods as and for the goods of the plaintiffs.

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16 The plaintiffs' claim is for:

17 1) An injunction to restrain both in Singapore and overseas the Defendants whether acting by themselves, their servants or agents or any of them or otherwise howsoever from doing the following acts or any of them, that is to say, passing-off or attempting to pass- off or causing, enabling or assisting others to pass-off goods not the goods of the Plaintiffs as and for the goods of the Plaintiffs by the use or in connection therewith in the cause of trade of the mark "FF-98" together with a get-up similar to that of the Plaintiffs' goods.

18 2) An order for the delivery up or destruction upon oath of all goods, items and dies, tools, moulds and plates for the making thereof in the possession, custody, power or control of the Defendants, the continued retention use of or dealing with which by the Defendants would offend against the foregoing injunction.

19 3) An enquiry as to damages or at the Plaintiffs' option an account of profits in respect of the Defendants' wrongful acts.

20 4) An order for payment by the Defendants of all sums found due to the Plaintiffs.

21 The defendants say that the trade mark "FA-98" has not been registered under the provisions of the Trade Marks Act (Cap 332) and they deny that the trade mark "FA-98" and get-up were of the plaintiffs' manufacture. Such trade mark and get-up was manufactured and/or made by Fa-Terlly Marketing Pte Ltd before the plaintiffs manufacture. The defendants deny that they have ever endeavoured to pass-off their goods as the goods of the plaintiffs and say that they are fully entitled to use the trade mark "FF-98".

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22 I THE TRADE MARK

23 The trade mark "FA-98" (plaintiffs') compared with the trade mark "FF-98" (the defendants').

24 (i) Except for one letter "F" the trade marks are identical.

25 (ii) They are both written in white on a green background which is in the shape of an underwear.

26 (iii) Both have the same style of lettering.

27 (iv) Both have a red hyphen.

28 II THE GET-UP OF THE PACKAGE

29 (i) The packages are of the same size, shape and material. Both have a transparent window.

30 (ii) Both are in silver grey.

31 (iii) Both have the same words: Eventi Sports Brief in same colours.

32 (iv) Both have the flags of countries running around the package in the same order.

33 (v) Both have the same photograph of a man in a blue underwear.

34 (vi) Both have the same writings on the package.

35 (vii) Both have the same trimmings.

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36 In fact, the get-up of the packages are identical.

37 III THE PRICE

38 The price of the two products indicated on the packages is the same: 3 for $8.50 in white on red background.

39 IV THE INDORSEMENT

40 At the side of the plaintiffs' "FA-98" package, there is the wording: "Another Quality Product from Cheap & Good Trading Pte Ltd". At the same side of the defendants' "FF-98" package is the same wording: "Another Quality Product from Cheap & Good Trading Pte Ltd".

41 V THE UNDERWEARS

42 In the samples before the court, the plaintiffs' underwears are small whilst the defendants' underwears are large due to different sizes but -

43 (i) the material used is basically the same;

44 (ii) the style is the same;

45 (iii) the trade marks are almost identical: "FA-98", "FF-98" and have the same style of lettering;

46 (iv) the trade marks are found at the same position in both parties' underwears;

47 (v) both underwears have a white tag in the inside and at the same position;

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48 (vi) both white tags have almost identical writings except that the defendants' tag also has washing instructions;

49 (vii) both packages have three underwears each in assorted colours.

50 The trade mark "FA-98"

51 On the evidence I find that Ang Ah Buck coined the trade mark "FA-98" and designed the package in 1984. "FA" in Cantonese means "good luck" and "98" has the same meaning. The package, too, has been in continued use since 1984 first by Fa-Terlly and then later by the plaintiffs.

52 Fa-Terlly manufactured the "FA-98" underwears and the packages. Prior to the incorporation of Fa-Terlly Co and for more than three years, Fa-Terlly marketed and sold the "FA-98" underwears to retail outlets. After 22 October 1987 when Fa-Terlly Co was incorporated the Company took over this function but Fa-Terlly continued to sell to Pisces departmental stores, the biggest customers of "FA-98" underwears. Fa-Terlly Co did not co-produce the "FA-98" underwears. They were exclusively manufactured by Fa-Terlly. By distributing the "FA-98" underwears in Singapore for barely eight months Fa-Terlly Co could not claim that they have a share in the goodwill to the "FA-98" trade mark and get-up. The assignment of the goodwill of the trade mark "FA-98" and get-up from Fa-Terlly to the plaintiffs

53 Both Kwek Sok Hoon and her husband Ang Ah Buck and Ang Chin Thian (PW 6) the Managing Director of the plaintiffs stated in their testimony that the entire business of Fa-Terlly together with the trade mark, get- up, goodwill and stock was sold to the plaintiffs in June 1988. The defendants, however, suggested that the sale never took place but offered no evidence. In

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fact Low Beng Chuan stated that he did not know much about the takeover by the plaintiffs of Fa-Terlly. The evidence is overwhelming that the transaction did in fact take place:

54 (i) Fa-Terlly stopped doing business except for completing the existing stock and material in hand. Kwek Sok Hoon stated that she ceased to have anything to do with the trade mark and she had no interest in it at all.

55 (ii) The plaintiffs started to manufacture the underwears under the "FA-98" trade mark in China.

56 (iii) The plaintiffs started to use the trade mark "FA-98" on other garments.

57 (iv) The staff of Fa-Terlly and Fa-Terlly Co started to work for the plaintiffs co- ordinating both the manufacturing and marketing of the garments under the "FA-98" trade mark.

58 (v) There was an assignment of the trade mark application No 1852/87 from Fa-Terlly to the plaintiffs. Mr Chan Jer Hiang (PW 2), an advocate and solicitor and the trade mark agent of the trade mark application said that Ang Ah Buck informed him in July 1989 that the business of Fa-Terlly and the trade mark "FA-98" had been sold to the plaintiffs. Mr Chan told Ang Ah Buck that a Deed of Assignment in respect of the trade mark application No 1852/87 was necessary. Mr Chan prepared the Deed of Assignment which was duly executed by the parties before the filing of the Writ.

59 (vi) The plaintiffs put the endorsement: "Another Quality Product from Cheap & Good Trading Co Ltd" on the package.

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60 I find that Kwek Sok Hoon had sold the entire business of Fa-Terlly, together with trade mark, get-up, goodwill and stock to the plaintiffs in June 1988.

61 The defendants contend that for an assignment of goodwill to be valid it should be in writing. In support of this contention the defendants refer to Section 4(6) of the Civil Law Act (Cap 43) which provides as follows:

62 Any absolute assignment by writing under the hand of the assignor, not purporting to be by way of charge only, of any debt or other legal chose in action of which express notice in writing has been given to the debtor, trustee or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be and be deemed to have been effectual in law, subject to all equities which would have been entitled to priority over the right of the assignee under the law as it existed before 23rd July 1909 to pass and transfer the legal right to such debt or chose in action, from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor.

63 Section 4(6) of the Civil Law Act is concerned with "debt or other legal chose in action". A "legal chose in action" has been defined in Torkington v Magee (1902) 2 KB 427 at 430 as a "known legal expression used to describe all personal rights of property which can only be claimed or enforced by action, and not by taking physical possession".

64 Goodwill, on the other hand, is property. In The Commissioner of Inland Revenue v Muller & Co's Margarine Ltd (1901) AC 217, Lord Macnaghten said (p 223):

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65 It is very difficult, as it seems to me, to say that goodwill is not property. Goodwill is bought and sold every day. It may be acquired, I think, in any of the different ways in which property is usually acquired. When a man has got it, he may keep it as his own. He may vindicate his exclusive right to it if necessary by process of law. He may dispose of it if he will - of course under the conditions attaching to property of that nature.

66 And Lord Lindley added (p 235):

67 Goodwill regarded as property has no meaning except in connection with some trade, business or calling. In that connection I understand the word to include whatever adds value to a business by reason of situation, name and reputation, connection, introduction to old customers, and agreed absence from competition, or any of these things, and there may be others which do not occur to me. In this wide sense, goodwill is inseparable from the business to which it adds value, and, in my opinion, exists where the business is carried on. Such business may be carried on in one place or country or in several, and if in several there may be several businesses, each having a goodwill of its own.

68 Goodwill, therefore, is not a legal chose in action. It is property which may be "vindicated" by process of law e.g. the right to sue for passing-off.

69 An assignment of goodwill does not have to be in writing or any particular form and need not mention goodwill by name. A transaction intended to assign a business as a whole necessarily passes the goodwill to the assignee. (See The Law of Passing-Off by Christopher Wadlow p 88; Halsbury's Fourth Edition Vol 47 p 11 para 5).

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70 Independent of any assignment of the "FA-98" trade mark and get-up to the plaintiffs by Fa-Terlly, the plaintiffs themselves have generated an independant goodwill. The plaintiffs started using the "FA-98" trade mark and get-up in June 1988. Seven per cent of the total sales turnover of the plaintiffs for the period May 1988 to March 1991 represent the turnover of "FA-98" underwears. The plaintiffs also started using the "FA-98" trade mark for other products: Ladies' panties, brassieres, ladies' stockings, Polo T-shirts, shirts, bermudas, socks etc. The evidence is that 15% of the total turnover of the plaintiffs represents sales of garments under the "FA-98" trade mark including underwears. The plaintiffs sold their products through many outlets in Singapore. The goodwill of the "FA-98" trade mark became more substantial. The plaintiffs have earned sufficient goodwill to sustain an independent action for passing-off against the defendants.

71 The similarities between the defendants' product and the plaintiffs' product are set out earlier in the judgment. It is clear that the members of the public when buying the "FF-98" underwears would be confused into thinking that they are the plaintiffs' product that they are buying. On the evidence, the irresistible conclusion is that the defendants must have copied the package of the plaintiffs and copied the "FA-98" logo from the plaintiffs.

72 The defendants say that they have only sold less than 70 boxes of the "FF-98" underwears before they were restrained from doing so by the interim injunction. All the plaintiffs are required to establish is that there is a likelihood of damage to the goodwill if the defendants were to be allowed to carry on their activities.

73 In H P Bulmer Ltd & Showerings Ltd v J Bollinger S A & Champagne Lanson Pere et Fils (1978) RPC 79, Buckley L J said (p 95):

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74 It is well settled that the Plaintiff in a passing-off action does not have to prove that he has actually suffered damage by loss of business or in any other way. A probability of damage is enough, but the actual or probable damage must be damage to him in his trade or business, that is to say, damage to the goodwill in respect of that trade or business.

75 The fact that the defendants' get-up is so similar to the plaintiffs' get-up will cause customers to buy the defendants' product thinking that they are buying the plaintiffs' product. Inevitably, this will affect the sales turnover of the plaintiffs in that the turnover would be less. The quality of the "FF-98" underwears is poor. It's cutting is bad. The diameter of the opening for the thigh is marginally smaller than the waist and this will cause discomfort to the wearer. This, of course, damages the plaintiffs' goodwill.

76 In fact the plaintiffs did suffer damage. The defendants were selling their underwears to retailers much cheaper than the plaintiffs with the result that the plaintiffs have suffered damage through direct loss of sales. I find that the defendants copied the plaintiffs' get- up and trade mark for a fraudulent and improper purpose to attempt to obtain some benefit from the reputation attaching to the "FA-98" underwears.

77 There will be judgment for the plaintiffs and costs. There will be an order in terms of the plaintiffs' claim.

Chua F A J

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M Ravindran with Yoong Siun Lee (Ella Cheong & G Mirandah) for the plaintiffs
Yeo Kee Chin (Yeo Kee Chin & Co) for the defendants

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