

IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1998] SGHC 359

Suit 24/1997

Between

DHKW Marketing
Another

... Plaintiff

And

Nature's Farm Pte Ltd

... Defendant

GROUND'S OF DECISION

Tort — Defamation — Malice

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DHKW Marketing and Another v Nature's Farm Pte Ltd

[1998] SGHC 359

Suit 24/1997
Judith Prakash J
02 November 1998

1 **JUDITH PRAKASH J**

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In today's increasingly health conscious world, there is a big market for dietary supplements which are believed not only to increase the body's own health but also to help it combat the deleterious effects of a polluted environment. Pycnogenol, a substance extracted from the bark of the French maritime pine tree, is advertised as a powerful antioxidant which helps neutralise environmental toxins in the body. It was first discovered by one Professor Jack Masquelier but at present there are two companies which manufacture it and claim proprietary rights to it, namely, Horphag Research Ltd, a Guernsey corporation ('Horphag'), and INC BV, a Liechtenstein company ('INC').

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2. In Singapore, the plaintiffs and the defendants are among the organisations which seek to exploit for commercial benefit the growing interest in health food

products. The defendants have their own brand name `Nature`s Farm` and about 20 shops in Singapore through which they sell health food and dietary supplements. The first plaintiff is a sole proprietorship owned by one Daniel Hwee Kum Weng, a pharmacist. The first plaintiff trades in health care products which he purchases from Europe and sells to clients in Asia. One of his clients is the second plaintiff, a company involved in the retail of pharmaceutical and health care products. It is an authorised sub-distributor and wholesaler for various well known brands and supplies products to doctors, hospitals, clinics, pharmacies and medical laboratories as well as engaging in direct retail sales through its one retail outlet.

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3.The defendants first started selling pycnogenol in Singapore in 1989. At the time, they sold pycnogenol produced by Horphag. A few years later, however, they ceased selling Horphag pycnogenol and switched to pycnogenol produced by INC. By 1996, apart from the Nature`s Farm brand of pycnogenol, the supplement was also sold in Singapore under the Kordel, Nature`s Sunshine, Irwin`s Natural and New Image brands.

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4.In about May 1996, the plaintiffs entered the market. The first plaintiff imported Horphag pycnogenol tablets from a company in Finland and in June 1996, he signed an agreement with Horphag which made him the sole distributor in Singapore for the Horphag pycnogenol raw material (which the first plaintiff wanted to incorporate into a cream) for the period up to June 1997. At the same time the first plaintiff appointed the second plaintiff as his sole distributor of the Horphag pycnogenol. In pursuance of their commercial objectives, the plaintiffs

published and distributed numerous brochures and newspaper advertisements. By July 1996, the plaintiffs had successfully persuaded about 20 retail pharmacies with 70 retail outlets islandwide to stock the Horphag pycnogenol that they dealt in.

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5. On 14 August 1996, the defendants procured the publication of an advertisement in the ***Straits Times***. A copy of the full advertisement is attached to this judgment. The advertisement contained a photograph of the defendants' INC pycnogenol and some material about it as well as extracts from a letter written by Professor Masquelier. The material part of the advertisement read as follows:

... BEWARE PYCNOGENOL The Powerful Antioxidant ...

... In Singapore, the only PYCNOGENOL that is manufactured per Professor Jack Masquelier's technical standards and that is being sold under his explicit trademark authorization is the original PYCNOGENOL that is delivered to you by (the defendants) ...

Under authorization of Professor Masquelier, PYCNOGENOL is a trademark of (the defendants') supplier INC/Vaduz/Liechtenstein. ...

PYCNOGENOL is available exclusively at all (the defendants') stores ...

'... Dear Users of PYCNOGENOL

... As you know, I am the inventor of the process of extraction of substances coming from the bark of the pine trees and the seed of grapes, and the sole keeper of the name PYCNOGENOL which I created in 1979 and registered as a commercial trademark in France no 1522228 ...

I have discovered that the trademark has been fraudulently used and registered in various countries by non-authorised companies. We have taken legal action to end these fraudulent acts ...

Yours sincerely,
(signature)
Professor Jack Masquelier ...`

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It would be noted that the main assertion in the advertisement was the trademark `pycnogenol` belonged to INC under authorisation of Professor Masquelier and that in Singapore the only pycnogenol that was manufactured according to Professor Masquelier`s standards and that was being sold under his explicit trademark authorisation was the original pycnogenol that was sold by the defendants. At this time the trademark `pycnogenol` had not been registered in Singapore.

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6. According to the plaintiffs, although the advertisement did not refer to either of them directly, many people understood that it referred to them and as a result both plaintiffs received many phone calls and correspondence from the public as well as their clients making enquiries as to the truth of the advertisement. The plaintiffs alleged that from the date of the advertisement through to 1997, each of them suffered embarrassment, distress, actual loss of reputable and a general loss of business in relation to the sale of Horphag pycnogenol.

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7. Course of the proceedings

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11 In January 1997, the plaintiffs and Horphag commenced this action against the defendants. All three parties sued the defendants for defamation and malicious falsehood based on the advertisement. Horphag, claiming to be the owner of the pycnogenol trademark, also sued the defendants for passing off the INC product as being pycnogenol.

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8.The defendants filed their defence in early February. They admitted placing the advertisement but denied that the words complained of referred or were understood to refer or were capable of referring or of being understood to refer to the plaintiffs or any of them. They further denied that the words were defamatory but, as an alternative, pleaded that the occasion of the publication of the words was an occasion of privilege. A further alternative defence was that the words complained of were true in substance and in fact.

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9.At the time when the advertisement was placed, the defendants were run by a lady named Cynthia Poa. In August 1997, she left the defendants and joined a company owning a chain of health food retail outlets known as GNC. At about this time the defendants ceased to be the distributors for the INC pycnogenol and GNC took over as the new distributor.

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10.In early 1998, there was a dramatic turn of events: the defendants themselves started selling Horphag pycnogenol. They began to publish promotional literature stating in unequivocal terms that pycnogenol was the trademark of

Horphag. They did not, however, apologise for the advertisement and they maintained the justification plea in their defence. In June 1998, pursuant to a commercial settlement between the two parties and the defendants' appointment as Horphag's distributor, Horphag discontinued their claim against the defendants.

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11. On 17 July 1998, the defendants filed a substituted defence in reply to the plaintiffs' substituted statement of claim which had been necessitated by discontinuance of the Horphag suit. It was only then, in the substituted defence, that the defendants abandoned the defence of justification.

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12. At the beginning of the trial, the plaintiffs' stand was that the advertisement was defamatory in its natural and ordinary and/or inferential and/or innuendo meaning and referred to each of them. Pointing to the sections of the advertisement quoted in para 5 above, the plaintiffs asserted that the advertisement in its natural and ordinary and/or inferential and/or innuendo meaning meant and was understood to mean that the first plaintiff and/or the second plaintiff: (a). conducted and were conducting fraudulent businesses;

17 (b). misled and/or were misleading the public into purchasing counterfeit pycnogenol products or Horphag pycnogenol products;

18 (c). distributed, promoted and/or sold or fraudulently distributed, promoted and sold counterfeit pycnogenol product or Horphag pycnogenol

product to the public; and/or used or fraudulently used the pycnogenol trademark without authority.

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13. In their opening statement, the defendants characterised the issues which the court had to decide as follows: (a). whether the advertisement or the words contained therein were defamatory of the plaintiffs or either of them;

20 (b). whether the advertisement or the words contained therein referred to or were understood to refer to or were capable of referring or of being understood to refer to the plaintiffs or either of them;

21 (c). whether the advertisement or the words contained therein bear or were understood to bear or were capable of bearing or being understood to bear any meanings pleaded by the plaintiffs; and

22 (d). whether the defendants' publication of the advertisement was protected by privilege.

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On the third day of the trial, the defendants withdrew the defence of qualified privilege. At the end of the plaintiffs' case, the defendants elected not to call any witnesses although originally they had intended to adduce evidence from Cynthia Poa, her successor one Chan Chong Leong and one Egbert Mensse Schwitters, the principal director of INC. The defendants were left with the technical defences arising from the law of defamation.

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14. First issue: was the advertisement defamatory?

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26 The defendants' closing submissions on this point were perfunctory. Mr Rabi's main contention was that the plaintiffs had not either in their pleadings or in their closing submissions made any reference to specific defamatory words. Although the plaintiffs were claiming to be drawing a defamatory imputation from the phrase 'the only pycnogenol that is manufactured per Professor Jack Masquelier's technical standards' that and the advertisement as a whole were trade puffs and not defamatory.

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15.I could not accept that submission. The emphasis of the advertisement was on fraud and danger and it did not simply extol the benefits of the defendants' product. As Mr Thio submitted, its size and design were meant to draw full attention to its meaning. First of all, the advertisement was represented as a warning to the public against danger. The words 'Beware Pycnogenol' were printed in bold with a large font size. Secondly, it contained a photograph of the defendants' INC Pycnogenol to ensure that readers would immediately distinguish it from all other types of pycnogenol. Thirdly, the advertisement was the size of a quarter of a page and printed in the main section of the Straits Times and strategic sections of it were underlined to highlight the defendants' claims which were that they were the only sellers of genuine pycnogenol in Singapore and, therefore by inference, that all other sellers of pycnogenol in the local

market were dealing in fake products. All in all, it was an advertisement that could not be overlooked.

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16. Once read, the true meaning of the advertisement was apparent. It showed that the defendants were trying to put the public on Singapore on the alert against being deceived into buying fraudulent products. The defendants' claim was explicit: in Singapore they were the only ones who were selling the original pycnogenol manufactured according to Professor Masquelier's standards and which bore his trademark authorisation. There was also an allegation, underlined, that Professor Masquelier's trademark had been fraudulently used by non-authorised companies. The net effect was that the advertisement meant and was intended to be understood to mean that other parties in Singapore, including the plaintiffs, who sold pycnogenol were not selling the original product and were fraudulently using the pycnogenol trademark to promote their fake product. The inference and/or innuendo was that such parties were conducting fraudulent businesses, they were misleading the public into purchasing counterfeit pycnogenol products and were distributing, promoting and/or selling such counterfeit products. There was a further innuendo that they were using the pycnogenol trademark without proper authority. All these inferences and innuendoes were clearly defamatory.

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17. *Second issue: did the advertisement refer to the plaintiffs?*

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31 This issue was the main point of the defendants' defence. Mr Rabi noted that the advertisement did not mention either of the plaintiffs by name and in fact it did not mention any particular person other than the defendants themselves. The reference in the advertisement, it was submitted, was to a class of persons distributing and selling pycnogenol products and this class included not just the distributors but also all the retailers. The class was wider than the six or seven people that the plaintiffs had referred to. As an example, counsel referred to one of the plaintiffs' witnesses, Mr Woo, who owned his own pharmacy. He had testified that his own customers had complained that by supplying them with the Horphag pycnogenol he had not been selling them the real pycnogenol and that they could only get that from the defendants. The conclusion was that because the advertisement maligned a whole class without differentiation, the plaintiffs could not complain that they were being pointed out and defamed.

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18. Counsel developed his submission by referring to the law on defamation of a class as set out in the following passage from **Gatley on Libel and Slander** (9th Ed) at para 7.8 at pp 167 to 169:

*However, the civil law of defamation does not allow an individual to sue in respect of words directed only at a group. Where the words complained of reflect on a body or class of persons generally, such as lawyers, clergymen, publicans, or the like, no particular member of the body or class can maintain an action. 'If', said Willes J in **Eastwood v Holmes**, 'a man wrote that all lawyers were thieves, no particular lawyer could sue him unless there was something to point to the particular individual'. As this statement makes plain there is no special rule about 'class libel', it is simply a question of whether a reasonable reader could conclude that the plaintiff as an individual was pointed at and the broader the 'class' the less likely this is. The leading case is **Knopffer v London Express Newspaper** in which a war time article accused a Russian emigre group, 'Mlado Russ', of being*

instruments of Hitler. The group numbered 24 members in England and about 2,000 in the world and the plaintiff was head of the British branch. Although four of the plaintiff's witnesses said that their minds went to him when they read the article, the House of Lords held that as a matter of law the words were incapable of referring to the plaintiff as an individual. According to Lord Atkin, the 'reason why a libel published of a large or indeterminate number of persons described by some general name generally fails to be actionable is the difficulty of establishing that the plaintiff was, in fact, included in the defamatory statement, for the habit of making unfounded generalisations is ingrained in ill-educated or vulgar minds, or the words are occasionally intended to be facetious exaggeration'. As a practical matter the plaintiff is more likely to succeed where he is a member of a small group at whom the words are aimed and more likely to fail if the group of a large one; but as a matter of principle the test is not whether the group is 'small' or 'large'. Thus in **Knupffer**'s case Lord Porter said that he 'could imagine it being said that each member of a body, however large, was defamed where the libel consisted in the assertion that no one of the members of a community was elected as a member unless he had committed a murder'. Again, the words, though directed at a group, may be used in circumstances which point at a particular individual. For this purpose the knowledge of the recipients of the statement about whom the defendant is aiming at is relevant. In **Le Fanu v Malcolmson** a newspaper article imputed that 'in some of the Irish factories' cruelties were practised upon the employees, and the plaintiffs, who were the owners of a factory in Ireland, proved to the satisfaction of the jury that the newspaper was referring especially to their factory. The House of Lords refused to arrest judgment for the plaintiff. In giving judgment Lord Campbell said: 'Where a class is described it may very well be that the slander refers to a particular individual. That is a matter of which evidence is to be laid before the jury, and the jurors are to determine whether, when a class is referred to, the individual who complains that the slander applied to him is, in point of fact, justified in making such complaint. That is clearly a reasonable principle, because whether a man is called by one name, or whether he is called by another, or whether he is described by a pretended description of a class to which he is known to belong, if those who look on, know well who is aimed at, the very same injury is inflicted, the very same thing is in fact done as would be done if his name and Christian name were ten times repeated.'

19. Mr Rabi submitted that the question to be answered was whether the words complained of were, on their true construction, published of and concerning the plaintiffs. His contention was that there was nothing in the advertisement which pointed to the plaintiffs in contradistinction to other members of the group of persons marketing and distributing pycnogenol. Mr Rabi pointed out in this connection that a letter written by the first plaintiff showed that both Kordel and New Image considered the advertisement to be referring to them. Further, the witnesses whom the plaintiffs had produced as reference witnesses had given testimony that when they first read the advertisement it had indicated to them that the defendants were the only ones authorised to use the pycnogenol trademark and that they therefore inferred that all others dealing with pycnogenol were dealing with fraudulent pycnogenol. These witnesses had then gone on to say that since they had bought pycnogenol from the second plaintiff, they inferred that the second plaintiff was dealing in a fraudulent product. Counsel's point was that if the witnesses thought that the advertisement referred to the plaintiffs it was because they knew that the plaintiffs were selling pycnogenol and not because there was something in the advertisement that referred to the plaintiffs.

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20. The claim made in the advertisement was that in Singapore the only pycnogenol manufactured according to Professor Masquelier's standards and sold under his trademark authorisation was the original pycnogenol delivered by Nature's Farm. This meant that any other pycnogenol that was being delivered or distributed to the public in Singapore was not original nor manufactured to the necessary standards nor bearing an authorised trademark. The advertisement was aimed at a class of persons and this class was the class

that distributed non-Nature's Farm pycnogenol in Singapore. This was a determinate class. If it was considered to include retailers then it was a rather large class but the members of the class were still capable of identification. In any case, the test of whether words are defamatory or not does not depend on whether the class is large or small. As the passage from *Gatley* mentions, Lord Porter in **Knupffer v London Express Newspaper Ltd** [1944] AC 116 was able to imagine that in certain cases each member of a class however large could be defamed by the libel. Lord Atkin in the same case stated that even where there is a libel of a large number of persons 'words may be used which enable the plaintiff to prove that the words complained of were intended to be published of each member of the group, or, at any rate, of himself'. See **Knupffer v London Express Newspaper Ltd** [1944] AC 116 at 122.

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21. In this case, I considered that as a matter of construction, the advertisement defamed each member of the class concerned in that it was quite clear in implying that anyone (and that included the plaintiffs) who distributed or sold pycnogenol in Singapore other than the defendants themselves was dealing in a fraudulent product and/or using the trademark 'pycnogenol' without authorisation. It could not be regarded as an unfounded generalisation made by someone with a vulgar mind because it was a specific accusation made by the person who claimed to be the only authorised dealer in the authentic product, and who thus would be presumed to have knowledge of what was being alleged. The circumstances of this case were far removed from that of *Knupffer*'s where the defamation related to a group called Mlado Russ which had a total membership of 2,000, and where various general allegations were made in respect of the policies and intentions of the group as a whole. They were much

closer to the situation in **Foxcroft v Lacey** [1613] Hob 89; 80 ER 239, also cited in **Gatley**, where a suit was pending against Foxcroft and 16 other persons and in talking about the suit, Lacey said `these defendants helped murder HF`. It was held that although Lacey had referred to a group, each of the defendants was entitled to maintain an action as if he had been specifically called a murderer.

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22. Quite apart from being a member of the class that was defamed, since the advertisement did not specifically name them, the plaintiffs would have to show that it or words therein referred to or were understood as referring to the plaintiffs. The test on reference is set out in **Gatley** at pp 162 to 163 as follows:

The test of whether words that do not specifically name the plaintiff refer to him or not is this: Are they such as reasonably in the circumstances would lead persons acquainted with the plaintiff to believe that he was the person referred to? That does not assume that those persons who read the words know all the circumstances or all the relevant facts. But although the plaintiff is not named in words, he may, nevertheless, be described so as to be recognised; and whether that description takes the form of a word picture of an individual or the form of a reference to a class of persons of which he is or is believed to be a member, or any other form, if in the circumstances the description is such that the person hearing or reading the alleged libel would reasonably believe that the plaintiff was referred to, that is a sufficient reference to him.

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In fact, as Mr Thio submitted, even if the plaintiffs in a defamation case do not call or are unable to call witnesses to give evidence of reference, the court can still make a finding of reference. It is sufficient for the plaintiffs to allege and prove that there are persons who know the special facts and so might understand

the words complained of in the defamatory sense without proving that any person did in fact understand them in that sense. See **Hough v London Express Newspaper Ltd** [1940] 2 KB 507. Also as **Gatley** states in the passage cited at para 18 above, where the words refer to a class, the question is whether a reasonable reader could conclude that each of the plaintiffs, as an individual was pointed at.

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23. The following facts were relevant. First, that there was a smallish group of entities selling or distributing pycnogenol in Singapore and therefore members of the group were easily identifiable. Secondly, in order to promote their product, the plaintiffs had gone on an aggressive advertising and promotion campaign. By the end of July 1996, the second plaintiff had placed advertisements in the **Straits Times**, **Berita Harian**, **The New Paper** and all the Chinese newspapers. It was reasonable to infer that some people would have seen those advertisements. Thirdly, in the course of their promotional work the plaintiffs had marketed pycnogenol directly to retailers, industry professionals and consumers, and the first plaintiff gave lectures and talks on the efficacy of pycnogenol to professional industry users. The plaintiffs also promoted Horphag pycnogenol to their personal friends and associates by giving away samples, flyers and brochures. Obviously, all these people whom the plaintiffs interacted with personally were aware that the plaintiffs were distributors of pycnogenol. In view of the volume of recent advertising and promotion undertaken by the plaintiffs, it was probable that when the advertisement appeared, their names would have definitely come to the minds of people in the trade as dealers in fake pycnogenol.

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24. Not only did the plaintiffs establish the above facts which would allow the court to infer the existence of individuals who would when reading the advertisement reasonably understand it as referring to the plaintiffs, but they also adduced extrinsic evidence to establish reference. Six persons gave evidence of their reactions when the advertisement appeared. First, there was Ms Chua Chwee Hong, a director of the second plaintiff. She was a good friend of Daniel Hwee and had gone into the pycnogenol business in reliance on his trustworthiness in business. Ms Chua testified that she understood the advertisement to refer to the first plaintiff and said that she was angry with Mr Hwee. She thought that he had sold her fake pycnogenol and she feared the affect on her business reputation and future sales. Ms Chua's evidence on this point was not challenged in cross-examination. She also testified that after the advertisement appeared she had telephone calls from both identified and unidentified persons querying the authenticity of the pycnogenol sold by the plaintiffs.

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25. Then there was Madam Wong Yiam Moi also known as Mrs Chan, the general manager of NTUC Healthcare. Mrs Chan is a pharmacist and she has known both Mr Hwee and Ms Chua for many years. In August 1996, NTUC Healthcare purchased pycnogenol from the second plaintiff. Mrs Chan had also previously been informed by Mr Hwee that he would be importing pycnogenol for sale in Singapore. Mrs Chan saw the advertisement when she read the ***Straits Times*** on the morning of 14 August 1996. She was taken aback because she had bought the pycnogenol in good faith and this advertisement told her that

she had been buying from someone who was not authorised to sell it. Mrs Chan immediately sent a copy of the advertisement to the second plaintiff by facsimile transmission and she subsequently telephoned Ms Chua to find out what was going on. Mrs Chan's evidence was sufficient to establish reference to both plaintiffs.

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26. Mr Cheng Kwong Ghee, a director of a company called Elite Healthcare Pte Ltd, testified that between June 1996 to early August 1996 Elite Healthcare purchased pycnogenol from the second plaintiff whom they had dealt with for some five years. On 14 August he saw the advertisement and to him it stated very clearly that the defendants were the only ones in Singapore who had the exclusive right to sell genuine pycnogenol or use the pycnogenol trademark. Since he knew that the plaintiffs were selling pycnogenol which was not the same as described in the advertisement, he concluded that the advertisement was referring to them. He immediately called Ms Chua to ask her whether the pycnogenol sold to him was genuine. Further evidence was given by one Jeffrey Chua Hwa Choo, one Muhammad Zaki, one Ong Lai Poh, one William Woo and one George Dua that when they saw the advertisement, they concluded that it was referring to the plaintiffs was not seriously challenged by the defendants.

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27. All in all, I was satisfied that the plaintiffs had discharged the burden on them of showing that the words in the advertisement referred to or were understood to refer to or were capable of referring to or of being understood to refer to each of the plaintiffs.

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28. *Third issue: were the words complained of false?*

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45 This issue did not arise in connection with the plaintiffs' claim for defamation since once the defamatory meaning has been established, the law presumes that the words complained of are not true. The plaintiffs, however, had an alternative cause of action for malicious falsehood relating to goods and in order to substantiate that action they had to show that the words complained of were false. This they were able to do.

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29. Evidence was adduced by the first plaintiff of all the steps that he undertook to ensure that the Horphag pycnogenol which he was intending to deal in was authentic. The court was shown copies of various product reports which he had investigated. It was given a scientific dossier on pycnogenol and shown the numerous letters that passed between the first plaintiff and Horphag and between the first plaintiff and the Finnish supplier of the pycnogenol tablets. Also produced was a copy of the US patent certificate AO 4,698,360 for pycnogenol which stated that Jack Masquelier was the inventor of the product and that the patent in it had been assigned to two parties, one of whom was Horphag Overseas Ltd of Guernsey.

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30. The defendants called no evidence to contradict the plaintiffs' assertions that

the statements in the advertisement impugning the plaintiffs were false. Although they had originally pleaded justification in answer to the charge of defamation, they subsequently abandoned that defence. In court, no challenge was mounted to the plaintiffs' assertion that Horphag's pycnogenol was a genuine product and that the difference between it and the INC pycnogenol was source and price. It was telling that at the time of the trial the defendants themselves were selling Horphag's pycnogenol.

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31. It was also not disputed that at the relevant time there was no pycnogenol trademark registered in Singapore. The plaintiffs' evidence that they were authorised to use Horphag's pycnogenol trademark was not contradicted.

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32. *Fourth issue: were the defendants malicious in publishing the advertisement?*

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51 The plaintiffs had to establish malice as an ingredient of their second cause of action. The defendants made no effort to meet the plaintiffs' submissions on this point. They did not adduce evidence or put forward any rebuttal to the plaintiffs' points. I was satisfied on the evidence that the allegations of malice had been made out.

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33. At all material times, the defendants had actual or constructive notice that there was no registered owner of the pycnogenol trademark in Singapore. They, therefore, must have known that the plaintiffs were not fraudulently using that trademark in Singapore. As vendors of Horphag pycnogenol from 1989 to 1991, the defendants would have known that Horphag and INC were rivals worldwide in promoting pycnogenol and the issue of the rightful owner of the trademark was unresolved at the time of the advertisement.

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34. The defendants could have disproved malice by adducing evidence of honest belief but they chose not to do so. Neither did they lead any evidence to show that they checked the facts before placing the advertisement. An inference can also be drawn from the defendants' change of position once Cynthia Poa left them and took the INC business with her. At that stage, they started selling the Horphag pycnogenol and made unequivocal statements affirming the authenticity of this product. It would seem that at all material times they knew the advertisement was false but put it forward in order to ensure that they would maintain their market share in pycnogenol notwithstanding the plaintiffs' aggressive advertising of Horphag pycnogenol.

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35. One of the documents disclosed by the defendants in the course of the proceedings showed their motivation quite clearly. It was a letter written to the defendants by INC Agency BV in January 1996. Cynthia Poa wrote some comments on this letter and then re-sent it to Mr Schwitters. The relevant part of her message was 'GNC S`pore and another co, viz New Image, coming in very strong with their Pycno. What are our chances of stopping them? And, how

quickly, do you think?`. The defendants were obviously concerned with competition in the pycnogenol market and wished to eliminate such competition as quickly as possible.

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36. Malice could also be inferred from the terms of the libel itself. The emphasis of the advertisement was on fraud and danger. Its size and design appeared to be meant to draw full attention to the defamatory meaning. It contained a photograph of the defendants' INC pycnogenol to ensure that readers would be immediately able to distinguish it from all other brands of pycnogenol. The advertisement was placed in the main section of the ***Straits Times***. It was presented as a warning to the public since it was headed `BEWARE PYCNOGENOL` with these words printed in uppercase bold print in a large font size. Finally, it contained the false representation that the United States patent referred to belonged only to the defendants' supplier INC when in fact it also belonged to Horphag.

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37. The defendants' conduct after litigation had been commenced was further evidence of malice. The defendants maintained the pleas of justification and qualified privilege though they knew that those defences had no merit. They continued to maintain the justification plea even after they started selling the Horphag pycnogenol and withdrew at an extremely late stage, ie in July 1998 when they filed the substituted defence. Further, the defendants maintained the qualified privilege argument right up to the trial even though in a separate action, Suit 1915 of 1997, which they had started against Cynthia Poa, they had

stated that the advertisement was published against their interest and/or was published by Cynthia Poa for a collateral purpose.

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38. Malice can also be inferred if a defendant refuses to apologise even after he is aware that the statement is false. See **Mathieson v Schneideman** [1930] NZLR 151. Here the defendants refused to apologise or acknowledge that the advertisement was false even after they had: 1. started to sell Horphag pycnogenol; and

58 2. unequivocally represented in their product literature that the pycnogenol trademark belonged to Horphag.

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39. *Fifth issue: quantum of damages*

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61 Under s 6(1)(a) of the Defamation Act (Cap 75) it is provided that the plaintiff in an action for slander of goods or other malicious falsehood does not have to allege or prove special damages if, inter alia, the words upon which the action is formed are calculated to cause pecuniary damage to the plaintiff and are published in writing. The words `calculated to` according to **Gatley** (at p 499) mean simply `likely to produce the result`.

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40. In the present case, the plaintiffs had difficulty in showing special damage as their sales of the product had just started at the time the advertisement appeared. They therefore did not have a track record of sales taking place before the advertisement which could be compared with the sales after the advertisement. Also, although the first plaintiff had alleged that plans of his to expand into other countries in South East Asia had been stymied by the suspicion and mistrust sown by the advertisement, he was not able to substantiate those allegations. The plaintiffs' witnesses did give some evidence of loss of business arising from the advertisement though the plaintiffs were not able to parlay those facts into large figures. Notwithstanding the foregoing, it was clear to me that the plaintiffs were still entitled to damages for the malicious falsehood since an advertisement of the nature of the one complained of was likely to cause pecuniary loss to both of them. It was also apparent that the defendants' intention in publishing the advertisement was to take away business from their rivals including the plaintiffs by putting forward the false allegation that the latter were dealing in fake pycnogenol.

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41. For both causes of action, the plaintiffs were entitled to damages to vindicate their reputations and to compensate them for injury to their feelings and business. The nature of the defamation was a very public one and calculated to cause maximum damage. There were aggravating factors which were relevant to the quantification of the damages payable. First, quite apart from the advertisement being placed in the most widely read newspaper in Singapore, the defendants also displayed posters of it at their retail outlets. The plaintiffs' evidence on this was not contradicted nor challenged. Secondly, five of the plaintiffs' witnesses had testified that after the advertisement appeared, they

became more cautious about the plaintiffs and/or their products. This showed the very real effect that the defamation had on the reputations of the plaintiffs.

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42. It was relevant to the damages that the defendants pleaded justification and abandoned this plea only at a very late stage. They also continued to maintain their plea of qualified privilege notwithstanding the diametrically opposed position which they had taken in Suit 1915 of 1997 in relation to the publication of the advertisement. This plea was only withdrawn when the documents in that later suit were disclosed at the trial. As a result of the pleas of justification and qualified privilege, the litigation was unnecessarily prolonged.

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43. The malice involved in the defendants' actions was also an aggravating factor. The defendants were aware of the falsity of their statements from the start and yet persisted in refusing to apologise for the defamation. At no time did they show any contrition. They published a false statement in order to obtain commercial benefit and to injure the reputations of their competitors.

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44. Having weighed all the circumstances and having taken into account various authorities cited to me by the plaintiffs, I considered that the appropriate level of damages would be \$80,000 for each plaintiff. I therefore gave judgment for each of the plaintiffs in the sum of \$80,000 and costs.

Judith Prakash J

Thio Shen Yi and Ernest Lau (Thio Su Mien & Partners) and
Tasneem Haq (Haq & Namazie Partnership) for the plaintiffs
Rabi Ahmad and Mylene Chia (PK Wong & Advani) for the
defendants
