IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1999] SGHC 239

Suit 514/1999

Between

S$ 1.99 Pte Ltd trading as One 99 Shop

… Plaintiff

And

Lifestyle 1.99 Pte Ltd

… Defendant

GROUNDS OF DECISION

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S$ 1.99 Pte Ltd trading as One 99 Shop v Lifestyle 1.99 Pte Ltd

[1999] SGHC 239

Suit 514/1999
Choo Han Teck JC
09 September 1999

JUDGMENT:

GROUNDS OF JUDGMENT

1. In 1996 Miss Chong Ying Ying, better known as 'Nanz Chong' in the world of fashion moved, from what appears to have been a long and successful career as a model, to the world of retail business. She set up a boutique called 'Klis' at the World Trade Centre, Singapore and was able to sell it at a profit after only 11 months. On 6 April 1997 she opened a shop called "One.99 Shop" at The Heeren. It was to become the trade name under which Miss Chong's company S$1.99 Pte Ltd (the plaintiffs in this action) established seven branches. Miss Chong's evidence was that all the goods sold in her One.99 shops were priced at $1.99. She set out in some detail media reports about the success and popularity of the shop and implicitly, the concept she created for it. It appears from her evidence, that this success was the result of a deliberate pricing of all goods at $1.99, and the store practice of "service with a smile". The object was to create a trendy image of her shop in order to persuade the public that buying inexpensive items can be chic.

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2. The popularity of this shop attracted widespread media attention and the shop began to be known variously as "One.99 Shop", "$1.99 Shop", "$1.99 Store", and "1.99 Shop". These terms were used by the media and eventually, the business world followed. Letters to the shop referred to it as "The $1.99 Shop" or "1.99 Shop". Substantial efforts were made to advertise the shop. Many of its advertisements emphasized the $1.99 price of the goods. By 1 April 1999 when the writ was issued the plaintiffs have outlets of their One.99 Shop at various locations namely, Great World City, Parkway Parade, Causeway Point, West Mall, and the original shop at The Heeren.

3. The defendants are a subsidiary of Rubber Band Enterprises Pte Ltd ("Rubber Band"). The story of their involvement in the creation of "Lifestyle 1.99" can be found in the evidence of Mr Mok Seow Hoon a director of the defendants, and Mr Simon Tan the operations manager. Mr Simon Tan stated that as far back as 1993 he knew of shops selling Sanrio products from Japan at affordable prices and he recommended to Rubber Band that they do the same. At that time, Rubber Band was also distributing Sanrio products but not those in the $2 range. In September 1997 Rubber Band decided that it will sell Sanrio products at $1.99 as part of their marketing strategy. Three reasons were given for the choice of this price. First, according to Mr Mok, it is the market norm to sell at $1.99, $2.99 or $9.99. Secondly, "99" can be translated to mean "everlasting" in Mandarin, which Mr Mok says would augur well for Rubber Band. Thirdly, $1.99 is more competitive than $2.

4. From January 1998, Rubber Band began holding $1.99 sales jointly with the Watson stores. Mr Mok stated that "Rubber Band has always been looking for an opportunity to enter the retail scene". They were monitoring the $1.99 promotions through "post-promotion reviews with the sales team". In the end, they felt that in the economic recession of that time the lower-end retail industry

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would be least affected. There were also logistical difficulties faced by the sales team in the joint promotions. So with these reasons, Rubber Band decided to commence retail business and consequently, incorporated the defendant company under the name of "Lifestyle 1.99 Pte Ltd".

5. Mr Mok also explained how the name Lifestyle 1.99 came to be chosen by the defendants. He stated that since February 1997 Rubber Band have been using the slogan "A leading lifestyle creator" on its posters promoting toys. Mr Mok found it desirable to have the word "lifestyle" as part of the subsidiary's name because it would give the subsidiary and the parent company a common identity. He also felt that "the name of the new company should be reflective and descriptive of the business of selling products at a fixed price of $1.99". He explained that the "$" sign was not used because "Lifestyle 1.99 is easier to pronounce".

6. In this action the plaintiffs are suing the defendants for passing off Lifestyle 1.99 shops as their One.99 shops. Miss Chong made the point early in her testimony in court that the plaintiffs do not begrudge the defendants selling goods at a fixed price, be it $1.99 or some other. In her evidence, Miss Chong admits that there were one-price shops such as "Ichi, The Japanese One Price Shop" and "Kyun" in existence in Singapore. Mr John appearing on behalf of the plaintiffs goes so far as to say that they have no objection to the banner of Rubber Band which depict a hand, the price of $1.99, and some Japanese characters. His submission is that this logo causes no confusion with the plaintiffs' shop name because as a whole the said logo was clearly distinguishable from One.99 Shop. The plaintiffs' complaint is directed at the defendants' use of the name Lifestyle 1.99 as a shop name on the ground that it is the 1.99 which can and has been causing confusion with their One.99 Shop. It is patently obvious that visually, the respective logo and style of One.99 Shop,

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Lifestyle 1.99, and Rubber Band's $1.99 promotional banner with the picture of a raised index finger and Japanese slogan, "This Is Good", are distinctly different from one another; and thus if the issue of passing off is confined solely to visual impact, then the plaintiffs' case can scarcely take off once a comparison of the three logos and styles is made. However, a name has an aural dimension as well. It is in this respect that the issue of confusion becomes significant.

7. The law of passing off does not serve to protect a plaintiff's product from competition; nor is it intended to promote competition by squashing monopolies. The aim is to protect a trader from being harmed by a pretender; while, at the same time, maintaining an equilibrium of the seemingly divergent notions of competition and monopoly. The law of passing off thus requires a plaintiff to prove three things. First, that he has goodwill in his product; secondly, that the defendant had represented to the public in such a way as to mislead the public into thinking that the defendant's product is that of the plaintiff's; and thirdly, that he has suffered damage, or the likelihood of damage in the case of *quia timet* actions. I have been greatly assisted by counsel for both parties through the detailed arguments covering each of these issues. Counsel referred to a substantial number of authorities, some of which were helpful, but many turned on their respective facts, as is usually the case in passing off actions. It is therefore important to distinguish the general from the specific, and keep in constant focus two basic principles. The first is that the burden of proof lay with the plaintiff, and the second is that the law of passing off, in the words of Lord Oliver in *Reckitt & Colman Products Ltd v Borden Inc [1990] RPC 341, 406,* is summed up in the general proposition that no one may pass off his goods as those of another.

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8. Mr John concedes that the plaintiffs are not claiming a monopoly of the use of $1.99 as a price tag. He says that it is in the description "1.99" that the plaintiffs had over the period in question acquired a goodwill sufficient to found an action in passing off. Mr John, and Mr Hee who appears for the defendants, agree that the relevant date in which goodwill is to be ascertained is 9 September 1998, the date when the defendants started the company and commenced business under the name and style of Lifestyle 1.99. Mr Hee raised as his first contention the argument that the plaintiffs' name is a descriptive and not a fancy name. Therefore, he says that the plaintiffs cannot readily appropriate it to their exclusive use. He submits that One.99 is merely a description of the plaintiffs' business of selling goods at $1.99. Under cross-examination, Miss Chong rejected Mr Hee's suggestion that she had chosen that name because it represented the price of goods sold in her shops. She was reminded by Mr Hee that she was reported to have said during a media interview that One.99 "represents" the price of goods sold at the plaintiffs' shops. To keep this evidence in perspective, however, it is noted that Miss Chong did testify that her shop's name was chosen partly because in the Mandarin language "99" when spoken sounds similar to "everlasting". I can accept that "everlasting" is a propitious word and thus would have been a further reason to use it as part of a business name. The reason for the choice of name is not the sole or even principal test in determining whether a name is descriptive or fancy. In my view, the fundamental test in determining whether a name is a descriptive or fancy name is to see what ostensible meaning the name conjures in the context of its business. "Bags" as a name for a baggage shop is clearly descriptive (although it may possibly acquire a secondary meaning), whereas "Bags" as a name for a pet shop is not. In the present case, while I think that there is a connection between One.99 and the business of selling goods at $1.99 I hold the view that there is sufficient novelty and features in the idea for it to qualify as a fancy

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name. Mr Hee made a forceful submission that the plaintiffs' shop name was purely descriptive. The essence of his point is that the name can only relate to the price of $1.99. The connection between One.99 and the price of goods sold in the store is not straightforward. The name is made up of numbers, even the word "One". In my view, numbers may connect, indicate, and represent ideas, but it is straining the language to say that they "describe". In this context, figures are no different from pictures or symbols. It was not argued before me whether mere figures or alphabets may be appropriated for exclusive use such that an action in passing off may accrue against a competitor. I think that in such cases (of which the present is not one) it is a question of proof as to whether the user had acquired sufficient goodwill in the numbers or alphabets. In the present case, the name in question has to be examined as a whole. It is a hybrid of word, punctuation, and figure, and considered together with the way it is pronounced or known. The name "One Point Nine Nine" as it is read and pronounced does not immediately lead one to think of the shop as a $1.99 shop. The connection becomes obvious after a while, and therein lies the subtlety that makes it, in my view, a fancy name. I am of the view that the words "One.99" in text or spoken form create no impression of any description whatsoever. The omission of the "$" sign in both cases is thus significant. In the plaintiffs' case it shears the descriptive character from the name. In the defendants' case, the omission draws it closer in similarity to the plaintiffs' name. I should point out that the witnesses from both sides have referred to the existence of shops such as "100 yen store", "dollar shop" and the "pound shops". However, there is no evidence to show that there is a type of industry in Singapore known as the "$1.99 shops" such that a reference to "1.99" or One.99" is a ready reference to such a shop in the industry. The mere existence of some shops such as Ichi or Kyun is not sufficient proof of a widespread industry.

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9. The extent of media publicity concerning the One.99 Shop over one and a half years is an indication that the plaintiffs have acquired some goodwill in the name One.99 and its variants "1.99 Shop" and "$1.99 Store". I note Miss Chong's evidence that One.99 Shop is pronounced "One Point Nine Nine Shop". This evidence was emphasized by Mr John in order to persuade me that the name is not descriptive in nature. Mr Mok's evidence at page 14 of his affidavit of evidence-in-chief states that the defendants' shop name is referred to as "Lifestyle One Point Nine Nine". His emphasis was that unlike the plaintiffs' shop, there are no variations to their name. The evidence from both sides as to how their shop names are pronounced makes it clear that neither the plaintiffs nor the defendants are using 1.99 or One.99 to describe or relate to the $1.99 price since $1.99 is not ordinarily pronounced as "one point nine nine". It seems to me that there must be inevitable confusion if both shops are referred to as the "One Point Nine Nine Shop'. It does not matter that the word "Lifestyle" is added as a prefix in one and not the other. The evidence suggests that the allure of the name lay in "One Point Nine Nine", and not in "Lifestyle" nor in "Shop".

10. The plaintiffs retail goods entirely at $1.99 an item whereas the defendants have various prices although most, if not all, are under $10, but each price invariably includes 99 cents. It seems to me, therefore, that the choice of 1.99 as part of its name was influenced by two facts. They are, not necessarily in order, first, the success of their own $1.99 promotions; and secondly, the success of the plaintiffs' One.99 shops which Mr Mok admitted that he was aware of. On the evidence available before me I find that at the material time when the defendants were incorporated, the field of play was in a state of gestation where there was no known industry widely known as the "$1.99 stores" (although there were one priced stores in existence). Hence, the

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plaintiffs' toe-hold earned itself substantial goodwill in its name. It is this goodwill that entitles it to protection. The defendants must have intended to benefit from this goodwill in their choice of 1.99 as part of their shop name.

11. In my view, it is the identical pronunciation of the names "1.99" and "One.99" in this case that distinguishes it from the case of *Deane v Schofield [1962] RPC 179*, that was relied upon by Mr Hee. In that case Plowman J dismissed the plaintiff's application for interlocutory relief because he found that there was no passing off by the defendant. The plaintiff in that case carried on a business called "The Under Six Club", which looks after children under the age of six. The defendant ran a similar operation but called hers "The Over Six Club" which caters to children over the age of six. It is true that the learned judge took the view that the name was purely descriptive, and there being no evidence of a secondary meaning to assist the plaintiff, he held that the differences in the names were sufficient to disentitle the plaintiff of her claim. It was also obvious from his judgment that he was greatly influenced by the fact that the defendant's business had been running for five years prior to the action and the evidence of confusion "was thin in the extreme".

12. Mr Hee next submitted that if there was any misrepresentation it was caused by the media and not the defendants. His point is that it was the media which caused the plaintiffs' shop to be widely known as "The 1.99 Shop". This interesting submission overlooks the simple truth that anyone using "1.99" as part of his shop or business name after more than a year of media and other publicity invented for another shop is bound to benefit from it notwithstanding that the publicity was attributed by a third party. In this regard, I accept Mr John's submission that it would be reasonable to conclude that the defendants must have appreciated this fact. Mr Hee protested that neither fraud nor an intention to deceive was pleaded, but I think that he is mistaken. Paragraph 11

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of the Amended Statement of Claim avers that the defendants' use of their name "is calculated to deceive or mislead or misrepresent the trade and/or the public...". This pleading is sufficient support for Mr John's submission. Mr Mok has testified that the defendants were aware of the 100 yen shops in Japan as well as the plaintiffs' shops in Singapore. The success of these shops is plain to see from the evidence, admitted without challenge, of the media reports, as well as the accounts of the plaintiffs' company. For a business selling all items at $1.99, the plaintiffs' business had a fairly considerable turnover of about $3,500,000 in its first year. This is not to say that the law only protects businesses with a high turnover, but obviously, the greater the business the greater the goodwill is likely to be and it is that which qualifies for protection. The media reports included in the Agreed Bundle were accepted as having been made although Mr Hee makes no admission as to the truth of the contents. But no matter, the nature of these reports is such that the truth of the contents is not the relevant point. The relevance lies in the existence of the media publicity alone. In my judgment, the plaintiffs have proved that by 9 September 1998 they had earned sufficient goodwill in the name One.99. That goodwill comes from the association of selling quality products at the fixed price of $1.99 in a setting that is trendy and in which service was provided "with a smile". Miss Chong stated in her affidavit of evidence-in-chief that she is so fastidious about this aspect of quality service that she penalizes her staff if they deviate from it. In my judgment, the defendants joined in the plaintiffs' trail, already redolent with success, and chose a name for themselves as close as it gets to that of One.99. Mr Hee disputes the assertion that the public patronized the plaintiffs' shops because it was trendy or that they provided good service. In this regard, I think that it is sufficient for the plaintiffs to establish evidence of confusion among members of the public. The evidence of confusion is amply set out in Miss Chong's affidavit of evidence-in-chief which, in the absence of any reasonable

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contradiction, I accept. The element of confusion that is relevant in this case does not directly involve a confusion of the goods or items sold by the parties (referred to by Lord Diplock in *the Erven Warnink* case as "the classic form"), but in the name of the shop itself. It falls into the extended form of passing off as that in the "Jumbo Seafood" restaurant and the "Millenia" hotel cases. (See *Jumbo Seafood Pte Ltd v Hong Kong Jumbo Seafood Restaurant Pte Ltd (Suit 1992 of 1996, unreported*; and *CDL Hotels International Ltd v Pontiac Marina Pte Ltd [1998] 2 SLR 550*).

13. Finally, I will consider the question of damage. Mr John and Mr Hee both take the view that damage need not be proved. Mr John, relying on *Econlite Manufacturing Pte Ltd v Technochem Holdings Pte Ltd [1994] 2 SLR 454*, submitted that damage may be presumed. Mr Hee, relying on *Erven Warnink BV v J Townend & Sons (Hull) Ltd [1979] 2 All ER 927*, says that "although damage does not have to be proved, the plaintiffs must show that they are really likely to suffer damage to their property in the goodwill". The true position, in my view, is that damage is an indispensable element in proving the tort of passing off. In special circumstances, the law admits proof of a likelihood of damage to be sufficient. *Quia timet* actions is an obvious example. The *Econlite* case referred to by Mr John was a such a case. Generally, in other cases, the plaintiff has to show that he has suffered actual damage. If the plaintiff commences action before any harm occurs his action may be treated as a *quia timet* action unless the passage of time (between the wrong and the time of action) has been so great that it is fair to conclude that if no harm had been caused thus far none is therefore likely to ensue, and the burden of proving otherwise shifts back to the plaintiff. In the present case, the action by the plaintiffs was instituted about six months after the defendants had commenced their business under the disputed name. I would expect to see some evidence of

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damage. Keeping in mind that the burden of proof is on a balance of probabilities, proof of a probability of damage will suffice. The nature of passing off actions being such as it is, I do not expect the plaintiff to prove the full nature, character or extent of damage. It is sufficient if he can establish that some reasonable harm has been done to his business. In this case, as in *Reddaway v Banham [1896] AC 199*, the damage in my view takes the form of a diversion of potential customers from the plaintiffs' One.99 shops to the defendants' 1.99 shops. There is enough evidence from Miss Chong's evidence that many of her customers had mistaken the defendants' shop for hers. I am mindful that incidents of such confusion can be staged although this was not suggested by Mr Hee. However, in this case I find that the incidents were documented in a way which I accept as probably true. I note also Mr Hee's submission that these were largely hearsay evidence in that the persons concerned (save for Mr Wong Chin Meow) were not called as witnesses. But it is clear that the evidence were received by Miss Chong in the course of her business. Such evidence would therefore be admissible through her and the remaining issue concerns only the question of the weight to be attached to them. The letters and receipts from the agreed documents need no embellishment. There was obvious confusion in the public mind. AB346 is an example. A potential supplier responded in writing to an enquiry from Miss Chong but wrongly referred to her shop as "Lifestyle 1.99". Even flowers sent to the plaintiffs on account of their opening a new outlet were accompanied by a congratulatory note addressed to "Lifestyle 1.99". Mr Hee submitted that the plaintiffs called no other witnesses apart from Mr Wong Chin Meow to prove the element of confusion and damage, but it is axiomatic that evidence is evaluated on the strength of its quality, rarely on its quantity. In any event, Mr Hee's protest is not justified because the plaintiffs have put in the evidence of Ms Tan Kee Huan from Asia Marketing Intelligence (S) Pte Ltd whose

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company conducted a market survey to determine whether there was confusion between the names of the parties' shops in the public mind. Ms Tan's company had conducted similar surveys in other suits including *Saga Foodstuffs Manufacturing Pte Ltd v Best Food Pte Ltd [1995] 1 SLR 739*. Mr Hee declined to cross-examine Ms Tan, and confined his submission to pointing out what the survey does not say. But proof that some people were not confused is not evidence that there was no confusion. Unchallenged, the survey's findings that 48% of those surveyed thought that "One.99" and "Lifestyle 1.99" were connected or associated with each other, must stand, but one ought to bear in mind the counsel of Warren Khoo J. in the *Saga Foodstuffs* case. The learned judge there cautioned against the blind acceptance of market surveys. I agree with him entirely that it is the court's impression that counts. The survey results in this case was helpful for the few points there established, and which I have taken into account in the overall assessment of the evidence. In my judgment, it is clear even from just the evidence of Mr Wong and Miss Chong that the public have mistakenly assumed the two shops to be part of the same chain. I note from the evidence that in many of the incidents the customers were looking for items in the plaintiffs' shop when those items were in fact being sold by the defendants. The plaintiffs were naturally, not in a position to ascertain the reverse without the co-operation of the defendants, but I think that it is reasonable to conclude that there would have been instances where customers looked to the defendants for products sold in the plaintiffs' shop. Of course, evidence of confusion is not necessarily evidence of damage, but in the circumstances of this case, I find that there were, in all probability, instances of diversion of business, borne from confusion, and that, is clearly damage. I think that it is not practical, to ask customers whether they had purchased sundries from a Lifestyle 1.99 shop thinking it was the One.99 shop. It may not be possible to ascertain how many such customers there were unless a

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comprehensive search is made to seek them out and even so, there may be no response for one reason or another. As I have stated, visually, the names may not create a great deal of confusion, but phonetically, tonal bias aside, they are indistinguishable. It is unlikely that a customer will say to another, "I bought this brush from the One Point Nine Nine Shop, spelt O-N-E".

14. For the reasons above, I am satisfied that the plaintiffs have proved their case and I grant them an order in terms of prayers a, b, and c of the amended statement of claim as well as an inquiry into damages.

Choo Han Teck

Judicial Commissioner

Choo Han Teck JC

Morris John, Jupiter Kong and Yvonne Tang [Drew & Napier] for the plaintiffs
Hee Theng Fong and Chua Ai Chun [Hee Theng Fong & Co] for the defendants

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