IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1999] SGHC 253

Suit 2387/1998, SIC 543/1999

Between

Tay Long Kee Impex Pte Ltd

… Plaintiff

And

Tan Beng Huwah trading as
Sin Kwang Wah

… Defendant

GROUNDS OF DECISION

Version No 1: 20 Nov 2026 (00:35 hrs)

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Tay Long Kee Impex Pte Ltd v Tan Beng Huwah trading as Sin Kwang Wah

[1999] SGHC 253

Suit 2387/1998, SIC 543/1999
G P Selvam J
30 September 1999

JUDGMENT:

GROUNDS OF DECISION

Introduction

1. The plaintiffs sell the kind of backpacks which one sees ubiquitously on the shoulder backs of school children and youngsters. They sell them under the brand name : "hayrer". They also sell bags under another brand name : "NEVE". The latter did not form the subject matter of this case. The defendant also sells bags similar to the "hayrer" type of backpacks. He sells them under the brand name: "devico". The plaintiffs formed the view that the defendant did damage to their goodwill by passing off bags copying the features of the plaintiffs "hayrer" bags. They obtained an *ex parte* injunction order against the defendant on 8 June 1999. On the defendant's application I set aside the *ex parte* injunction.

2. The essential terms of the order read as follows :

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> 1. an injunction is hereby granted restraining the defendant from selling, distributing, importing, manufacturing or otherwise dealing in bags bearing bar code prefix number "8887710" where such bags are not manufactured by or originate from the plaintiffs until trial or further order;
>
> 2. an injunction is hereby granted restraining the defendant from passing off back packs and waistpouches bearing the label shown in Annex A not manufactured by or originating from the plaintiffs until trial or further order;
>
> 3. an injunction is hereby granted restraining the defendant from infringing the plaintiffs' copyright in tags affixed to the plaintiffs' bags by reproducing the contents of the said tags until trial or further order;
>
> 4. the defendant within 14 days of this Order disclose to the plaintiffs full particulars of the following :
>
> (a) the place of manufacture of the defendant's "devico" brand bags; (b) to whom, in what quantities, at what prices and on what dates the defendant has supplied "devico" brand bags; and (c) the quantities of "devico" bags now in the defendant's possession.

3. The indorsement of claim in the writ sought reliefs in the manner of the first three terms of the order. In addition, there was a prayer seeking an inquiry into damages or an account of profits which did not form part of the interlocutory order. Although no order was sought directly in respect of this prayer the last term of the order was undoubtedly obtained on the assumption that they would have no difficulty in establishing their case for damages or profits against the defendant. Accordingly they were entitled to the information in order to calculate their damages or an account as to profits as the case may be.

Essential facts

4. I shall first set out the allegations of fact. The purpose of the action was to obtain protection of the features of bags which the plaintiffs manufactured and distributed under the brand name : "hayrer". They did so through a network of

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retailers in Singapore for sale in Singapore. It must be stated at once that the brand name played did not form any basis for any cause of action or the reliefs sought by them. Although the case related to bags bearing "hayrer" brand, none of the complaints the plaintiffs made was related to the brand-name. In fact the plaintiffs without difficulty distinguished their bags and the defendant's bag by using their respective brand names. The plaintiffs hung their case on four features, namely the bar-code prefix number which allegedly appeared on the bags, the get-up of the "hayrer" bags, the get-up of the "hayrer" logo and a warranty which appeared on a tag. I shall now elaborate these allegations.

5. (i) First, it was asserted that the plaintiffs had the bar code prefix number "8887710" exclusively assigned to them by the Singapore Article Number Council (SANC) assigned to them. The number was placed *on their goods* and served to identify the plaintiffs as the manufacturer of the bags. It will be explained later that there was an element of misrepresentation in this allegation.

(ii) It was asserted that the "hayrer" brand bags had developed a certain look or distinctive appearance even though they came in many designs and models. There was one primary dashing coloured fabric for the side and rear panels contrasted with a secondary light coloured fabric on the front panels. In addition they were made of rugged, waterproof material. Here again there was a misrepresentation and I shall explain it later.

(iii) Next, it was asserted that the "hayrer" brand was depicted as logo with distinctive characteristics. The plaintiffs said that the logo was placed on a central position in the front of the bag. The following were given as the distinctive characteristics of the plaintiffs' logo :

(a) a black rectangle enclosing

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> (b) a red-lined oval enclosing
>
> (c) the brand name in white lower-case letters
>
> (d) which letters are outlined in red
>
> (e) on a navy blue background
>
> (f) with the words "U.S.A." on the bottom right-hand corner
>
> (g) and a letter "R" signifying that the mark is registered as a trade mark

Once again this assertion contained an element of falsity because these features applied to one of several designs. This will be explained later.

(iv) Finally, it was alleged that there was reliance by consumers on a life-time warranty which appeared on a tag that was attached to the bag. It was further argued by copying the words of their warranty the defendant stole the plaintiff's goodwill. This guarantee also formed the subject matter of a claim for infringement of copyright.

6. The plaintiffs expounded the bar-code component of their case by asserting that the bar-code prefix number was affixed to the exterior of the bag and was plainly visible to the eye. I reproduce verbatim the relevant parts from the statement of claim. (Words in parenthesis are mine).

> "8. The plaintiffs' "NEVE" and "hayrer" bags are identified, inter alia, by means of the plaintiffs affixing a bar code prefix number "8887710" to the said bags. (By implication this means that the brand names play no part or no important part in distinguishing them). The said bar code prefix numbers are affixed to the exterior of the plaintiffs' "NEVE" AND "hayrer" bags and are plainly visibly to the eye.
>
> 12. The presence of bar code prefix number "8887710" on the defendant's goods constitutes a grave and deliberate misrepresentation by the defendant that the defendant's goods are manufactured by or originate from the plaintiffs when that is not the case. This conduct confuses and will continue to confuse the plaintiffs' customers." (There was no credible

> evidence that the consumers were concerned with this number).

7. In fact the number was printed not on the bag but the tag. The tag was attached to the exterior of the "hayrer" bag. On the tag were printed the bar-code, the bar-code number and a lifetime guarantee. The names as well as the telephone and fax numbers of the plaintiffs appeared on the hang-tag. The number was one of the several other printed contents of the tag. Everyone knows that the bar-code means nothing to the consumer. In any event any person who views the contents of the tags would have no difficulty in noticing the identities of the manufacturer or distributor.

8. On the basis of the allegations in the statement of claim the plaintiffs filed an application for an *ex parte* injunction. The application was supported by affidavits by the plaintiffs' sales executive and their general manager.

9. When the application was filed no reason was given to justify the urgency for an *ex parte* hearing. The Court asked for reasons and the hearing was adjourned to the following day to enable the plaintiffs to state the reasons. Their general manager filed an affidavit on 8 January 1999. He cast about and sought to justify the *ex parte* application on the following manner:

> (i) The matter is of greatest urgency to the plaintiffs. It was the period before Chinese New Year, and school had just started. Generally this was regarded by the industry as being the best time for sales.
>
> (ii) The plaintiffs feared that if the defendant was notified of this action before an injunction has been served on him, the defendant was not going to sit quietly and await the outcome of any hearing. The defendant was very likely to release all his stock into the market place at an even lower price. This can be done in a matter of one or two days. Thereafter, even if an injunction was subsequently granted, the defendant would have exhausted his stock and the injunction will have no effect.

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> The loss was incalculable and there was no guarantee that the defendant were able to make good any the plaintiffs' loss.
>
> (iii) The defendant's bags were inferior and cheaper. He was a serial-infringer of the plaintiffs' intellectual property rights intent on copying each and every model that the plaintiffs' produced. The defendants' bags were confusingly similar to the plaintiffs' bags and therefore their goodwill would be damaged.

10. The plaintiffs were granted the *ex parte* injunction on 8 January 1999 by the duty Judge. Notwithstanding the "greatest urgency", the injunction was not served on the defendant until 13 January 1999.

The injunction is set aside

11. The defendant filed an application to set aside the injunction order. The application was eventually heard by me on 19 March 1999. I set aside the injunction. In doing so I said : "I hold that this was not a proper case for an interlocutory injunction let alone an *ex parte* injunction." The expression "interlocutory injunction" will be explained later.

12. Seven days after I made the order the plaintiffs wrote in for further arguments. Obviously they were not in a hurry. Further they did not apply for an expedited appeal even though they had asserted that there was the "greatest urgency". I heard the further so-called further arguments. After hearing the further arguments which were all a mere repetition of arguments previously advanced I re-affirmed my decision. The plaintiffs have appealed against my decision. So I shall state the reasons for my decision in some detail. In giving the reasons I make one point clear. The application by the defendant was to set aside an *ex parte* order. Accordingly it was my intention not to treat it as inter-partes interlocutory application. It would be wrong in principle to treat it as an interlocutory application for that would only encourage *ex parte* application

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even when there is no justification for it. Even if I had treated it as an inter partes application I would not have granted an order.

13. In brief the grounds of my decision were :

> (i) The plaintiffs, when they cried loud that there was greatest urgency, were less than honest. There was no good evidence of "the greatest urgency" they relied on.
>
> (ii) They blindfolded the Court by suppressing material facts which would have been pointed out to the Court by the defendant if notice of the application had been given to the defendant.
>
> (iii) The plaintiffs broke their faith to make full and frank disclosure to the Court.

The law

14. Now is proper time to state the trite principles of the applicable law. O 29 1 (1) and (2) of the Rules of Court empower the Court to issue injunctions before the trial. They read as follows :

> "1(1) An application for the grant of an injunction may be made by any party to a cause or matter before or after the trial of the cause or matter, whether or not a claim for the injunction was included in that party's writ , by originating summons or other originating process, or counterclaim or third party notice, as the case may be.
>
> (2) Such application may be made by summons supported by an affidavit and where the case is one of urgency, may be made *ex parte*."

Three distinct types of injunctions may be issued within the scope of those provisions. They are :

> (i) Interlocutory injunctions;
>
> (ii) Interim injunctions;
>
> (iii) *Ex parte* injunctions.

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Interlocutory injunctions

15. Interlocutory injunctions are issued essentially to maintain the status quo or restrain a threatened infringement of an alleged right until trial. The object is to prevent irreparable damage when it would be practically senseless to make an injunctive order after the trial if the Court considers it equitable to do so. It is a given that an order for an interlocutory injunction should be made only on an inter partes application after full affidavit evidence and in appropriate cases after it is tested on the anvil of cross-examination. If this practice is adhered to, an interlocutory injunction in intellectual property cases would usually make a full trial unnecessary. It would save time and money. It is therefore desirable that an interlocutory injunction is never granted *ex parte*.

16. An interlocutory injunction is different from a mareva injunction. Even though a mareva injunction is made before trial, its purpose and nature are different from the conventional interlocutory injunction. The principal difference is that the traditional interlocutory injunction is directly related to the rights and reliefs sought in the action as well as the principal cause of action. The object of the interlocutory injunction is the same as that of the final injunction. A mareva injunction has nothing to do with the rights and reliefs sought. It is to facilitate execution of a monetary judgment. It is ancillary to a claim for debt or damages. The basic principles of granting a mareva injunction differ from those on which the conventional interlocutory injunction is granted. It is important, therefore, not to confuse one with the other. This also applies to an anton pillar order. It should further be noted that the Courts are readier to hear *ex parte* applications for these orders and the absolute obligation rule to make full and frank disclosures to the Court is somewhat relaxed in the case of mareva and anton pillar orders.

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Interim injunction

17. An interim injunction, to be called so properly, is granted on notice but on the basis of less than full evidence and arguments. It is limited to be operative until a proper hearing in the manner above. It is granted in urgent cases until it could be heard as an application for interlocutory injunction.

Ex parte injunction

18. This is an interim injunction granted without notice to the defendant. It is granted when circumstances establish extraordinary urgency and it should never be granted for an indefinite period. In this connection, the words of O'Sullivan JA in ***Griffin Steel Founderies Ltd v Canadian Association of Industrial, Mechanical and Allied Workers*** (1977) 80 DLR (3rd) 634 at 638, 639 and 640 give an invaluable guidance to the practice relating to *ex parte* interim injunctions :

> "The remedy of injunction is an extraordinary one. An *ex parte* injunction is even more extraordinary. The consequences of injunctions are so grave that the law has surrounded the exercise of the jurisdiction to grant them with safeguards against abuse.
>
> A *ex parte* injunction should be granted only in the most extraordinary circumstances and then only for such period of time as is necessary to enable notice to be served on those sought to be enjoined. The decision whether the circumstances are so extraordinary as to warrant an *ex parte* injunction is one within the discretion of the Judge before whom the application is made. In no case should an *ex parte* injunction be given for an indefinite period. It should be limited until the shortest possible time so that notice can be given to the parties affected by it. In the instant case, the material before Nitikman, J., satisfied him that an *ex parte* injunction should be given. However, he should have given the injunction only until the next day, since it must have been clear that the union was represented by counsel and that counsel could be available on the day following the application. It would have been possible,

> if necessary, to extend the injunction from day to day or from week to week. However, every *ex parte* injunction should be interim.
>
> Furthermore, an *ex parte* injunction must be dissolved promptly once it appears that material facts were not presented to the Judge who granted the *ex parte* injunction. This is not a mere matter of giving effect to technical objections. It is a question of safeguarding the very necessary power of granting *ex parte* injunctions from any possible abuse. He who obtains an *ex parte* injunction does so at the peril that if it turns out subsequently that all the available material facts were not presented, the injunction will be dissolved with costs. A plaintiff may still, on proper material, obtain a new injunction on motion, but the *ex parte* injunction will be dissolved with costs. It is essential that this practice be followed consistently by the Courts.
>
> So far as the affidavits are concerned, they should, if possible, be based on personal knowledge in accordance with the best evidence rule. On interlocutory matters – and an *ex parte* injunction is an interlocutory matter – it is expressly provided by the Rules of Court that affidavit evidence may be founded on information and belief, that is to say, on hearsay. But it is clear from the Rules and from the authorities that have interpreted them that it is essential to state the source of the information. The source of the information is a material fact."

19. An applicant for an *ex parte* injunction, as in every *ex parte* application is under a twofold obligation : First, he must make a full and frank disclosure of all material facts and circumstances. Nothing relevant must be suppressed. This is an absolute obligation. It is absolute because the obligation is not based on a corresponding right of the plaintiff. It is a duty based on a duty to keep faith with the Court to which the applicant comes without knowledge of the other party. Because the duty is absolute, even a minor breach will ordinarily will be a basis to aside the order. What the duty to make full and fair disclosure entails was succinctly summarised by Ralph Gibson LJ in ***Brink Mar Ltd v Elcombe*** [1988] 1 WLR 1350 at 1356-7 :

> "The material facts are those which it is material for the judge to know in dealing with the application as made: materiality is

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> to be decided by the court and not by the assessment of the applicant or his legal advisers.
>
> The applicant must make proper inquiries before making the application. The duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made such inquiries.
>
> The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including (a) the nature of the case which the applicant is making when he makes the application; and (b) the order for which application is made and the probable effect of the order on the defendant; and (c) the degree of legitimate urgency and the time available for the making of inquiries.
>
> If material non-disclosure is established the court will be "astute to ensure that a plaintiff who obtains [an ex parte injunction] without full disclosure . . . is deprived of any advantage he may have derived by that breach of duty."
>
> Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to the issues which were to be decided by the judge on the application. The answer to the question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty on the applicant to make all proper inquiries and to give careful consideration to the case being presented.
>
> Finally, it is not for every omission that the injunction will be automatically discharged. A locus poenitentiae may sometimes be afforded. The court has a discretion, notwithstanding proof of material non-disclosure which justifies or requires the immediate discharge of the ex parte order, nevertheless to continue the order, or to make a new order on terms. When the whole of the facts, including that of the original non-disclosure, are before the court, it may well grant . . . a second injunction if the original non-disclosure was innocent and if an injunction could properly be granted even had the facts been disclosed."

20. An additional rationale for making the obligation absolute is that a duty judge who hears urgent applications has neither the time nor the facility to determine whether the *ex parte* application is well-formed. He cannot be sure

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whether *all* the facts and circumstances are fully and frankly disclosed. The other side or its counsel is not there to expose falseness and weakness of the application. The Court inevitably relies on the applicant and his counsel to act in good faith and state all points which can be fairly made against the application. The basis of urgency, if there is one must be supported by good evidence. Unless the breach of duty entails some effective sanction, human nature will tempt the applicant to angle his case in his own favour.

21. For the same reason it is wrong in principle to treat an application to set aside an *ex parte* order as a fresh hearing of an inter partes hearing and ignore the principles outlined above. However, in a case where there is ample justification for an *ex parte* application, a different procedure would naturally be followed.

22. All these principles have been accepted and applied in Singapore. See ***Png Siaw Luan v Wong Tui San*** [1990] 3 MLJ 340 where an *ex parte* order was set aside on the dual grounds of failure to make full and frank disclosure of all the material facts and the absence of good evidence to justify the urgency for an *ex parte* hearing. See also ***Chiarapurk Jack & Ors v Haw Par Brothers International Ltd*** [1993] 3 SLR 285 where the Court of Appeal affirmed the proposition that application for interlocutory injunctive relief should not be made on an *ex parte* basis unless the purpose of such application would be defeated by giving notice to the other party. In the latter instance, reasons should be given, on affidavit, to the Court as to why notice has not been given. Needless to say any reason given must never be contrived or concocted.

23. Before ***American Cyanamid Co v Ethicon Ltd*** [1975] AC 396 the practice of Courts in granting interlocutory and interim injunctions was to avoid taking

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the plaintiffs' case through a successive series of hurdles for the applicant to surmount, some more difficult to leap than others. In 1979 the House of Lords introduced new principles. However what Megarry J said in ***Pickwick International Inc (G.B.) Limited v Multiple Sound Distributors Limited*** [1972] RPC 786 at 796-7 continues to obtain even today : "The remedy of an interlocutory injunction is to be kept flexible and discretionary, rather than being the subject of strict rules; the basis is one of fairness, justice and common-sense in relation to all the relevant law and facts". The spirit of that observation has not been abandoned even though the practice and the principles were changed by ***American Cyanamid***. See ***The Law of Passing Off***, by Christopher Wadlow, 2nd Edition, 1995. That spirit directs a purposive approach and it was in that spirit that I dealt with this application and set aside the *ex parte* order .

24. The following observations should be noted to complete the picture. The practice in Singapore, unfortunately, is not exactly the same as what has been outlined above. *Ex parte* orders are granted to continue until trial unless the defendant moves and sets it aside. Further interim orders are obtained in such terms as to decide the issue. There is great laxity in applying the urgency requirement. This is partly due to the fact that the principles and practice which are peculiar to mareva injunctions and anton pillar orders have become infused with traditional interlocutory injunctions. It would be prudent to treat mareva injunctions as a class of their own. It would also be prudent not to grant *ex parte* orders in such a form as would decide the issue. For example an interim injunction should not restrain a defendant from "passing off". Whether the defendant is passing off can be determined only after full evidence and submissions at inter-parties hearing.

The decision

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25. I now turn to the present case. The plaintiffs, according to the defendants, were not truthful when they alleged that he was a manufacturer of the "devico" bags for he was only an importer and distributor of the bags. He merely imported the "devico" bags from a manufacturer in Hong Kong. I did not delve into this as I could not make a finding on that issue on affidavit evidence. It was unnecessary for me to do so.

Urgency issue

26. On the question of urgency it must now be mentioned that the school term had commenced on 4 January 1999 two days before the injunction was applied for. Purchase of bags for and by school children would have been completed in December. The peak sale period for school bags therefore had ended by then. Next, Chinese New Year fell on 16 February 1999 that is five weeks from the application. In any event, bags of the kind which are of concern in this case are not a principal item of purchase for Chinese New Year. The allegation that the defendant would exhaust all his stock at even cheap price was spurious if not absurd. Thus the reasons for the "greatest urgency" were no good reasons. They were contrived to blindfold the Court. The other reasons could be a reason for an interlocutory injunction but not for an *ex parte* application based on urgency. In any case the plaintiffs asked for damages or account of profits. Damages therefore were an adequate remedy. This belied their case for urgency.

The barcode prefix number

27. The affidavits in support of the application repeated the case shaped in the statement of claim but an important assertion foisted into the statement of claim was omitted. As pointed earlier, it was insinuated in the statement of claim that

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the bar-code prefix number was *affixed to the exterior of the "hayrer" bags and was plainly visible to the eye*. The "eye" of course must mean the eye of the consumer meaning the end-purchaser who views the bags displayed in retail shops. The affidavit, however, said that the bar-code prefix number was printed on a paper tag called "hang tag". In other words, the bar-code prefix number was not "affixed to the exterior of the bags" as stated in the statement of claim. There was accordingly a misrepresentation. In any event the sole purpose of the barcode as a whole is to facilitate scanning. It had nothing to do with goodwill.

28. The plaintiffs had no cause of action based on the barcode because there can be no goodwill based on the barcode. No consumer buys an article by the barcode prefix number. The retailer would know the manufacturer or distinguish would from whom he can buy a particular brand of goods. No retail trader can conceivably confuse the "hayrer" bags from "DEVICO" bags. It was no surprise to me that several retailers filed affidavits that they do not concern themselves with the bar-code or the bar-code number. Their evidence went unchallenged by the plaintiffs.

Get-up of the bags

29. The case stressed in the affidavit was that the overall impression made by the "devico" brand bags of the defendant by reason of their similarity to that of the "hayrer" bags was confusing. In other words the defendant’s bags would be mistaken for the plaintiffs’. It was not stated that any reasonable purchaser, especially school children and other youngsters, would have no difficulty in distinguishing "hayrer" bags from "devico" bags by reason of the words themselves.

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30. The plaintiffs pitched their case on the allegation that the "hayrer" bags had a unique get-up and common characteristics by reason of their shape, colour and design. It was asserted that the defendant's bags used "the same colour combinations as the plaintiffs' bags". At first glance, an overall impression was that the plaintiffs bags were made by the same party which made the defendants' bags. The plaintiffs' assertion was untrue. The defendant did not use the same colour design combinations because the plaintiffs had no common characteristics because there were several colour combinations and in one case there was only a single colour of black. Again two colour combinations are a common feature of bags of the kind in question. In fact the defendants produced photographs to substantiate this point. What stood out and distinguished their bags was the brand name : "hayrer".

31. The defendant's counsel pointed out that the plaintiffs were wrong when they said that bags carrying the "devico" brand name were and could be mistaken for bags displaying the "hayrer" brand name. The two brand names "devico" and "hayrer" in themselves were more than distinguishing features to avoid any confusion. To quote the defendants "By no stretch of imagination can any customer or retailer even be confused with the said different brand name." The brand names appeared on the outside and the inside of the bags. Hence no one can ever possibly confuse the "hayrer" bags with the "devico" bags." In my view this was such an obvious fact that the plaintiffs in all honesty should not have suppressed the fact they were not placing any reliance on the brand names at all. It came out only when I asked the plaintiffs' counsel point-blank during the hearing before me. This contention of the defendant was substantiated by the photographs of the plaintiffs' bags. I also saw several "hayrer" and "devico" bags which were exhibited before me. The effect of this was dramatic. They leapt to the eye. At once, shops that sell the bags of the kind in question came

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to my mind. They all come in different designs and colour get-up. But generally they all roughly look alike. What leaps to the eye and differentiates one brand bag from another is the brand name. The brand name itself comes in different colours and sometimes different frames. At the same time I also remembered shoe stores. The shoes come in different designs and colours. Like the bags, they all look roughly the same and it cannot be otherwise. However, there is one element that distinguishes one brand from another. It is the brand name which leaps to the eye. One brand name that came to my mind was the "NIKE" brand bags and shoes. This observation fully applied to the present case. What distinguished the plaintiffs' bags was their brand name not their design or colour combinations. It also distinguished the plaintiffs' bags from the defendant's bags. The plaintiffs' counsel conceded that the brand names were distinct and therefore their case was not founded on the names. On that basis the plaintiffs had hardly any ground to stand on.

32. Next, the defendants said, the plaintiffs made a false claim when they said that the "hayrer" brand was depicted as *a logo* as described in 5 (iii). The impression given was that there was only one type of logo as described in 5 (iii). It followed that their multimillion dollars sales were spawned by that logo alone. The defendant demonstrated that the "hayrer" brand name itself was "depicted in numerous different ways, colours and shapes". Other brand bags display similar features and they had been in the market for a longer time. Once again there was a misrepresentation or suppression of vital facts.

Life-time warranty

33. (i) I shall consider the case based on the "lifetime warranty " and that there was goodwill connected with it. The average customer does not read the

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warranty. In any event, a warranty of the kind in this case is a mere market gimmick to decorate the merchandise. Even a cursory reading of the warranty reveals that it covers only manufacturing defects. An average customer will not purchase a bag with such a defect. Further no respectable manufacturer would permit his goods to leave his factory if there are any defects in them. He would send such goods to a "factory rejects" retailer. This is not a purchase of a camera or electronic items which might need after-sale service. The case for goodwill based on the warranty in the circumstances was a non-starter.

(ii) Although the relief sought was for "infringement of the plaintiffs' copyright" there was no assertion of "authorship", "ownership" or "originality" which are essential ingredients of an action for infringement of copyright. Additionally, even if the plaintiffs asserted these elements there would be no reasonable cause of action in respect of the warranty standing on its own. It must relate to the bags in question. When so related it meant nothing.

34. The defendant filed an affidavit by one Tan Yang Ming who made a purchase of a "hayrer" bags from the plaintiffs' own outlet. Before it was delivered to her the "hang tag" was torn off. This customer did not even have the opportunity to peruse the bar code and the warranty. She was not given a substitute warranty. This made a nonsense out of the plaintiffs' case based on the bar code prefix number and the warranty. The plaintiffs did not disclose this fact. When caught red handed they did not deny such a practice but tried to wiggle out of it by saying that they were doing stock-taking. They failed to impress me.

35. In the final analysis, therefore, the plaintiffs case was falsely stated. There was misrepresentation. There was suppression of material facts. This was

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especially so in respect of the get-up of the bags and the logo of the label. The fact of the matter was there was no single theme get-up as to the bag or the label. The only common feature was the brand name, as to which there was no confusion and misrepresentation. The only common denominator was the brand name. Admittedly the plaintiffs' brand name and the defendant's brand name could not be confused. In short the plaintiffs had no plausible case. So they dressed-up a false case. They made their application *ex parte* order because they feared, perhaps unconsciously that the defendant would expose their weakness and falseness of their case.

Dated this 30th day of September 1999.

G P SELVAM

JUDGE

G P Selvam J

Adrian Tan (Drew & Napier) for the plaintiffs
Alagappan Arunasalam with Toh Wee Jin (Anthony & Wee Jin) for the defendants

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