IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2025] SGHCR 15

Originating Claim No 370 of 2022

Between

Fanco Fan Marketing Pte Ltd

… *Claimant*

And

Triple D Trading Pte Ltd

… *Defendant*

JUDGMENT

[Intellectual Property — Trade marks and trade names — Passing off — Remedies — Account of profits]

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Fanco Fan Marketing Pte Ltd
v
Triple D Trading Pte Ltd

[2025] SGHCR 15

General Division of the High Court — Originating Claim No 370 of 2022
Assistant Registrar Gerome Goh Teng Jun
15 and 16 October 2024, 21 May 2025

21 May 2025

Assistant Registrar Gerome Goh Teng Jun:

1 Prior to the commencement of this suit, HC/OC 370/2022 ("Suit"), the claimant was successful in invalidating the registration of the defendant's COFAN trademark (Trade Mark No. 40201904164S) in classes 9 and 11 on the ground of bad faith under s 7(6) of the Trade Marks Act (Cap 322, 2005 Rev Ed) in HC/S 464/2021 ("S 464"). On 16 September 2022, Dedar Singh Gill J ordered that the defendant's "COFAN" mark be expunged from the register (see *Triple D Trading Pte Ltd v Fanco Fan Marketing Pte Ltd* [2023] 3 SLR 1417 ("*the Invalidation Judgment*")).

2 In this Suit, the claimant claims against the defendant in passing off arising from the defendant's advertising, marketing, distributing, offering for sale and selling of a ceiling fan product under the sign "COFAN" and bearing

the model name "HALI".[1] The claimant sought an injunction to restrain the defendant from passing off their fans as the claimant's fans and an inquiry as to damages or an account of profit against the defendant.[2] On 29 September 2023, the claimant successfully obtained summary judgment against the defendant in HC/SUM 4552/2022 ("SUM 4552") for its claim in passing off. The claimant elected to seek an account of profits against the defendant.

3 The purpose of an account of profits is to disgorge the benefits which the tortfeasor ought not to retain. It seeks to prevent unjust enrichment but it does not seek to punish the tortfeasor (*Dart Industries Inc v Décor Corporation Pty Ltd and another* [1993] 179 CLR 101 ("*Dart Industries*") at 572). In line with this, the court is concerned with the profits (*ie*, all financial gains) actually made by the tortfeasor (*Main-Line Corporate Holdings Ltd v United Overseas Bank Ltd and another (First Currency Choice Pte Ltd, third party)* [2011] SGHC 268 ("*Main-Line*") at [23]). However, it is not uncommon that a claimant may experience difficulties adducing evidence of the defendant's revenue and costs and expenses as these would invariably lie within the scope of the defendant's knowledge. As such, what is required is essentially "a judicial estimation of the available indications" to assess the actual profits made. The court must do the best it can on the whole of the material before it (*Bosch Corp v Wiedson International (S) Pte Ltd and others and another suit* [2015] SGHC 105 ("*Bosch Corp*") at [29]).

4 The difficulty in this account of profits inquiry arises from the paucity of documentary evidence of the defendant's revenue and costs. Having carefully considered the evidence before me and the submissions made by the parties, I

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1 Statement of Claim filed on 2 November 2022 ("SOC") at paras 6 to 14.

2 SOC at pp 9 and 10.

find that the defendant is liable to pay the sum of **$316,590.18** to the claimant in account of the profits made in respect of its acts of passing off.

Background

5 The claimant, Fanco Fan Marketing Pte Ltd, and the defendant, Triple D Trading Pte Ltd, are companies in the business of selling fans in Singapore. The claimant was incorporated on 17 May 2013 but had been in the business since around 2002 as a partnership, Fanco Fan Marketing. The defendant was incorporated on 1 June 2017.[3]

6 The claimant's founders and only shareholders are Mr Quek Lip Ngee ("Mr Quek") and Mr Lim Boon Lee ("Mr Lim"). The claimant owns the "FANCO" mark in Class 11. As their business grew, Mr Quek became responsible for the Singapore operations and Mr Lim managed the Malaysia operations.

7 The defendant's sole director and shareholder is Mr Phua Kian Chey Colin ("Mr Phua"). Mr Phua is a former employee of the claimant. He worked for Fanco Fan Marketing since 2009 until it was incorporated as the claimant and continued working as a sales and marketing manager for the claimant until December 2016. Since the defendant's incorporation, Mr Phua has been its sole director and shareholder.

8 In August 2019, the claimant launched a new line of fans bearing the mark "CO-FAN". The first model was called "E-Lite" and the second model launched in November 2019 was "HELI".[4]

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3 SOC at paras 1 and 2.

4 SOC at para 3.

9 The defendant registered the COFAN trade mark (Trade Mark No. 40201904164S) in classes 9 and 11 on 27 February 2019. Apart from selling "BESTAR" fans, the defendant launched its "COFAN" brand of ceiling fans bearing the model name "HALI" in April or May 2021.[5]

10 In S 464, the defendant claimed that the claimant's use of the CO-FAN mark infringed the defendant's trade mark registration. It should be noted that in support of its claim, the defendant produced invoices of sales of "COFAN" fans from 23 April 2021 to August 2021 which have now been produced in evidence in these proceedings.[6] In turn, the claimant sought invalidation of the COFAN mark on the ground of bad faith and sought relief arising from the defendant's alleged groundless threats of trademark infringement. Gill J held that the claimant succeeded in its counterclaim for invalidation of the registration of the defendant's COFAN mark on the ground of bad faith under s 7(6) of the TMA. The learned judge dismissed the defendant's claim entirely and ordered that the defendant's COFAN mark be expunged from the register (see the *Invalidation Judgment* at [79]).

11 The defendant stopped selling and/or supplying COFAN fans on or around 1 November 2022.[7] During this period, the defendant operated from two

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5 SOC at para 4; Affidavit of evidence in chief of Quek Lip Ngee dated 14 August 2024 ("Quek's AEIC") at para 12.

6 Quek's AEIC at paras 42 to 44.

7 Affidavit of evidence in chief of Phua Kian Chey Colin dated 4 September 2024 ("Phua's AEIC") at para 21.

units at 11 Yishun Industrial Street 1 North Spring Bizhub Singapore 768089 ("Yishun Bizhub"),[8] #02-91 and #02-92.[9]

12 The claimant brought this Suit on 2 November 2022. In SUM 4552, it successfully obtained summary judgment against the defendant in its claim in passing off on 29 September 2023. Gill J granted an injunction restraining the defendant from passing off or attempting to pass off, by manufacturing, advertising, marketing, offering for sale, selling, distributing, supplying, importing or exporting fans by reference to the sign "COFAN" or any other sign identical or similar to the claimant's trade mark "CO-FAN", not being the claimant's fans, as and for the claimant's fans or as being connected to or associated with the claimant. Gill J also ordered an inquiry as to damages or, at the claimant's election, an account of profits, together with an order for payment of all sums found due to the claimant with interest and reserved costs until after the inquiry as to damages or the account of profits.

13 By way of letter dated 7 March 2024, the defendant disclosed an unaudited summary breakdown of its sales of "COFAN" fans in Singapore ("Summary Breakdown") from 1 August 2021 to 31 October 2022 to the claimant.[10] The Summary Breakdown states that the total revenue generated by the claimant was $235,448.62 for the sale of 1,558 "COFAN" fans, the costs was $144,894 and the gross profit was $90,554.62.[11] However, the defendant did not disclose any source documents for the Summary Breakdown because the source documents have allegedly been misplaced in a shifting of the

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8 Bundle of Affidavits Pre-election discovery volume 1 ("BA PDV1") at p 143.

9 Notes of Evidence ("NE"), 16 October 2024 at pp 90 (lines 27 to 31) to 92 (lines 1 to 30)).

10 Quek's AEIC at para 20; Exhibit "QLN-25".

11 Phua's AEIC at p 97.

defendant's office from Yishun Bizhub to 21 Bukit Batok Crescent #02-75 WCEGA Tower Singapore 658065 ("WCEGA Tower Premises").[12]

14 On 11 April 2024, the claimant filed HC/SUM 960/2024 ("SUM 960"), an application for disclosure of documents, so that it could make an informed election between damages and an account of profits. The claimant sought all the invoices issued by the defendant relating to its sales of "COFAN" fans, all invoices issued by manufacturers or suppliers to show the costs of "COFAN" fans and all other costs and expenses in relation to the manufacture, distribution and sale of "COFAN" fans sold in Singapore. The defendant contested SUM 960 on the basis that there were no further documents in its possession and control that may be disclosed.

15 The learned assistant registrar Reuben Ong ("the AR") granted the application on 28 May 2024 and ordered the defendant to disclose documents and information relating to its sales of "COFAN" fans in Singapore, costs and expenses attributable to the manufacture, distribution and sale of its "COFAN" fans sold in Singapore.[13] Notwithstanding that the defendant deposed on affidavit that the documents were not in its possession or control, the learned AR found that there was a reasonable suspicion that the documents were in the defendant's possession and control.

16 On 14 June 2024, Mr Phua filed an affidavit stating that the defendant did not have possession and control of the requested documents because they were misplaced and lost during the shifting of the defendant's office from its previous address at Yishun Bizhub to WCEGA Tower Premises in August

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12 Phua's AEIC at para 38.

13 Quek's affidavit at para 19.

2023.[14] The shifting was done by the defendant itself and there were no third-party movers involved.[15] The requested documents were placed in carton boxes during the shifting but could not be found despite searching and are now lost.[16] Further, the defendant does not have any copies of the documents in hardcopy or softcopy format.[17]

17 The claimant filed the Notice of Election on 28 June 2024 electing for an account of profits to be taken against the defendant.

The parties' cases

The claimant's case

18 The claimant's case is that the Summary Breakdown produced by the defendant which purports to contains the sales of "COFAN" fans from 1 August 2021 to 31 October 2022 is unreliable because it is unaudited, inaccurate and unsupported by source documents.[18] The Summary Breakdown does not include revenue of $124,500.40 derived from the sale of 793 "COFAN" fans from 23 April 2021 to 31 July 2021.[19] The Summary Breakdown is also not a complete record of the sales of "COFAN" fans by the defendant from 1 August 2021 to 31 October 2022 because there are 11 invoices showing sales of 96 "COFAN" fans which are not included and which show a total revenue of $15,168.00.[20]

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14 Phua's AEIC at p 98.

15 Affidavit of Phua Kian Chey Colin affidavit dated 13 June 2024 ("Phua's discovery affidavit") at paras 6 and 16.

16 Phua's discovery affidavit at paras 18 to 20.

17 Phua's discovery affidavit at paras 11 and 12.

18 Claimant's closing submissions dated 13 December 2024 ("CWS1") at para 5.

19 CWS1 at para 35(a) and Annex B.

20 CWS1 at para 35(b).

19 The claimant relies on the defendant's invoices spanning the period 23 April 2021 to 31 August 2021 which was disclosed by the defendant in S 464 (see [10] above). It submits that the defendant's average monthly sales figures for the period from 23 April 2021 to 31 August 2021 should be extrapolated over the material period of 23 April 2021 to 31 October 2022.[21] The claimant's proposed calculation for the total revenue for the material period is the addition of (a) revenue from the invoices for the period of 23 April 2021 to 31 July 2021 of $124,500.40;[22] (b) revenue recorded in the Summary Breakdown for August 2021 of $18,700;[23] and (c) invoices not recorded in the Summary Breakdown for August 2021 of $15,168.00.[24] This would give a total of $158,368.40.[25] The claimant submits that this should be extrapolated over the entire period of 23 April 2021 to 31 October 2022 to $680,052.54.[26]

20 The claimant also submits that no deductions for costs should be made since the defendant has not met its burden of proof show that there are costs and expenses that should be deducted from its revenue. Alternatively, any deduction should be limited to manufacturing costs of no more than $79 per fan and the sum liable to be accounted should be $326,527.54.[27]

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21 CWS1 at para 3.

22 CWS1 at Annex B.

23 Phua's AEIC at pp 80 to 81.

24 Claimant's core bundle of documents dated 8 October 2024 at p 23.

25 CWS1 at para 101.

26 CWS1 at para 2.

27 CSW1 at para 152.

The defendant's case

21 The defendant's position is that the material period in which the acts of passing off occurred is from 2 May 2021 to 31 October 2022.[28] However, its position on the profits generated in this period is inconsistent. In the Summary Breakdown, the defendant says that the "gross profit" is $90,554.62.[29] In Mr Phua's affidavit of evidence in chief ("AEIC"), he says that there were other costs incurred of $65,554.62 and the total profit made by the defendant is $25,000.00 to $35,834.00.[30] In closing submissions, the defendant takes the position that there are no profits made by the defendant given that it suffered losses on the sale of the "COFAN" fans.[31]

22 Alternatively, the defendant is not opposed to the extrapolation method being applied but contests that there should be deduction for costs.[32] However, the extrapolation of the material period from the claimant's figure of $680,052.54 should be such that the total revenue is $666,451.49 (547 days / 557 days x $680,052.24).[33] A 50% margin of error should be applied in favour of the defendant to bring the sum to $333,225.75 (50% of $666.451.49) because the Summary Breakdown was finalised without the source documents which were misplaced and profits could be overstated.[34]

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28 DWS1 at para 51.

29 Phua's AEIC at p 97.

30 Phua's AEIC at paras 35 and 60.

31 Defendant's closing submissions dated 13 December 2024 ("DWS1") at para 133.

32 Defendant's reply submissions dated 17 January 2025 ("DWS2") at para 14.

33 DWS2 at para 63.

34 DWS2 at paras 55 to 61 and 64.

23 Further, costs are to be deducted. The net profit margin of the sales ought to be calculated by taking the selling price (as 100%) and deducting the estimated cost of inventory as a percentage of sales (as 52%), estimated cost of other goods sold as a percentage of sales (as 9%) and estimated other variable costs as a percentage of sales (as 11%). In this regard, the above percentages are calculated as follows:

(a) The estimated costs of inventory as a percentage of sales of 52% is based on taking the average cost of $82 for manufacturing each fan as a percentage of the selling price of $158.[35]

(b) The estimated costs of other goods sold as a percentage of sales of 9% is based on taking the transport and logistic costs of each fan of $15 as a percentage of the selling price of $158.[36]

(c) The estimated other variable costs (rental costs, vehicle, staff costs and sample fans being given away)[37] as a percentage of sale of 11% is based on taking the variable costs of each fan to be $18 as a percentage of the selling price of $158.[38]

24 This would leave 28% as the estimated net profit which would be $93,303.21 (28% of $333,225.75).[39] Further, a reduction of 17% corporate tax should be applied such that the assessed net profit should be $77,441.66.[40]

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35 DWS2 at paras 22 to 27.

36 DWS2 at paras 28 to 42.

37 DWS2 at para 50.

38 DWS2 at paras 43 to 45.

39 DWS2 at paras 65 and 66.

40 DWS2 at para 68.

Issues to be determined

25 The central issues to be determined in this account of profits are as follows:

(a) What is the material period of the acts of passing off?

(b) Is the Summary Breakdown reliable?

(c) What is the revenue generated from the sale of the defendant's "COFAN" fans in Singapore in the material period?

(d) Should any costs and expenses be deducted?

My decision

The law

26 The authorities cited by the parties for the principles applicable to an account of profits were in the context of infringement of intellectual property rights. In my view, these principles are applicable by analogy to an account of profits for passing off. For purposes of clarity, while these authorities have referred to "infringing acts or products" and "infringement" of intellectual property rights, I will adopt the terminology of "tortious acts or products" and "tortious acts" of passing off in this judgment instead.

27 The court's approach in an account of profits is to determine the actual profit made by the tortfeasor which is attributed to the tortious acts. The costs and expenses (*ie*, outgoings) from revenue may be deducted in arriving at the quantum accountable as profits. As far as revenue is concerned, the burden of proof is on the claimant to prove the defendant's revenue (*Bosch Corp* at [21]). If the profits are generated by a chain of activities and the tortious acts occupy

a part of this chain, the tortfeasor need only account for the portion of profits attributable to the tortious acts (*Bosch Corp* at [10]; *Main-line* at [25] and [27]).

28 Turning to costs and expenses, the defendant bears the burden of persuading the court, by evidence, what costs should be properly deducted from revenue in order to determine the actual profits made (*Bugatti GMBH v Shine Forever Men Pty Ltd* [2014] FCA 171 ("*Bugatti*") at [14]). Outgoings may take the form of direct or indirect costs. Direct costs are those associated solely with the tortious product such as manufacturing costs or delivery costs of delivering the tortious product. The defendant is entitled to seek a deduction of these direct costs from revenue to arrive at the profits to be accounted for. Indirect costs take the form of general overheads which cannot be allocated to any specific product but may support a range of products. This could include rent, plant, taxes, insurance, equipment and other office and managerial costs (*Main-Line* at [26]; *Bugatti* at [14] citing *Unilin Beeher BV v Huili Building Materials Pty Ltd (No 2)* [2007] 74 IPR 345 at 366 ("*Unilin Beeher*"); *Dart Industries* at 581; *OOO Abbott v Design and Display Ltd* [2017] EWHC 932 ("*OOO Abbott*") at [57]). For general overheads, the court will need to consider whether the overhead is attributable to the tortious acts and the proportion which ought to be allowed (*Main-Line* at [26] citing *Dart Industries* and *Main-Line Corporate Holdings Ltd v United Overseas Bank Ltd* [2010] 2 SLR 986 at [24] and [26]). That said, it has been observed that it is notoriously difficult in cases involving the sale of a range of products to isolate those costs and expenses which are attributable to the tortious products and those which are not so attributable (*Dart Industries* at 572).

29 The majority of the High Court of Australia in *Dart Industries*, comprising Mason CJ, Deane, Dawson and Toohey JJ, held that it would ordinarily be appropriate to attribute to the infringing product a proportion of

general overheads which sustained the capacity that would have been utilised by an alternative product and that was in fact utilised by the infringing product. However, if no opportunity was forgone and the overheads involved were costs that were incurred in any event, then it was not appropriate to attribute them to the infringing products. If not, the defendant would be in a better position that it would have been in if it had not infringed. It is not relevant that the product could not have been manufactured or sold without these overheads and nor is it relevant that the absorption method of accounting (*ie*, a costing method whereby general overheads are apportioned by some appropriate means such as sales or volume to the manufacture or sale of each product) would attribute a proportion of the overheads to the infringing product (at 574 and 575).

30 An example of an instance where it was not appropriate to allow a deduction for general overheads can be found in Windeyer J's decision in *Colbeam Palmer Ltd v Stock Affiliates Pty Ltd* [1972] RPC 303 ("*Colbeam Palmer*") at 312. This was a case of trade mark infringement in which Windeyer J ordered an account of profits and held that costs directly attributable to the sales of the infringing product may be deducted but general overhead costs and managerial expenses of the defendant's business should not be deducted because all these would have been incurred in any event in the ordinary course of business and the evidence showed that the infringing products were a "side line". The majority in *Dart Industries* explained that the reasoning in *Colbeam Palmer* was that there appeared to have been unused capacity in the defendant's business in the form of overheads which would have been incurred whether or not the infringing products had been sold or delivered. The sale and delivery of the infringing products took up that surplus capacity or some of it and none of the overhead costs was attributable to the infringing activities because those costs would have been incurred in any event (at 574).

31 I note that McHugh J, in his dissenting opinion in *Dart Industries*, appears to have taken a different view. His view was that the absorption method of cost accounting is the appropriate method of accounting for general overheads (589 and 590). The learned judge held that the test was that any part of the general overheads of the infringer which assisted in deriving gross revenue from the infringing articles would be a relevant cost of that article and a deductible expense (at 582). This is based on the assumption that a rational entrepreneur who cannot produce a product because it infringes property rights will choose the next best alternative and the general overheads will be partially absorbed into the cost of the substitute product. Even if the next best alternative is to produce nothing, the defendant still has the option of reducing some of its overheads (at 582). Any smallness of the sales volume is not a ground for refusing to allocate any proportion of overheads to the infringing product. Further, the plaintiff must take the business of the infringer as it is and it is irrelevant that the defendant could have used their resources in a more efficient way (at 590). In considering *Colbeam Palmer*, the learned judge opined that the argument that overhead is a necessary element of production of any good and the concept of opportunity cost is as applicable to "side line" activities as to other activities. If the infringer can prove that its overhead assisted the production or sale of the sideline product and can provide a fair and reasonable method of allocation, it is difficult to see why a proportion of overhead should not be allowed (at 591).

32 I am more persuaded by the reasoning of the majority in *Dart Industries* over that of McHugh J in his dissenting opinion. Notwithstanding that it appears intuitively attractive to deduct a proportion of the overheads incurred if it can be shown to have assisted in the production or sale of the infringing/tortious product, the better question to ask is whether the general overhead is attributable

to the tortious acts as per the reasoning of the majority in *Dart Industries*. If the overhead would be incurred in any event and no opportunity cost was forgone, then it may be just not to attribute any part of the overhead to the tortious acts even if the overhead can be said to have assisted in the generation of revenue from the tortious acts (at [29] above). This would guard against the unjust enrichment of the defendant by placing it in a better position that if it had not infringed. The concept of attribution therefore appears to be better placed to evaluate the evidence in support of each proposed deduction of general overheads.

33 The majority opinion in *Dart Industries* has since found favour with the English courts which have recognised that an allowance for deduction of general overheads will not be permitted where: (a) overheads would have been incurred anyway even if the tortious acts had not occurred; and (b) the sale of tortious products would not have been replaced by sale of the non-tortious products (*Hollister Inc v Medik Ostomy Supplies Ltd* [2013] FSR 24 ("*Hollister*") at [74] to [87] and OOO *Abbott* at [57] citing *Jack Wills Ltd v House of Fraser (Stores) Ltd* [2016] EWHC 626 (Ch) at [22]).

34 From a review of the authorities, the courts will consider these two weighty considerations in deciding whether a particular overhead is attributable to the tortious acts (*Blizzard* at [29]; *OOO Abbott* at [57]; *Dart Industries* at 578):

> (a) First, whether the overhead would have increased or reduced as a result of the manufacture or sale of the tortious product or if the overhead would have been incurred in any event.

(b) Second, whether the defendant's business had surplus capacity such that the sale of tortious products would not have been replaced by the sale of non-tortious products.

35 Turning to the first consideration at [34(a)] above, where the defendant can adduce evidence to establish that the overhead increased by a certain amount as a result of the manufacture or sale of the tortious product or reduced had the tortious product not been produced, it may be appropriate to attribute the deduction in overhead costs to the tortious product. However, if the overhead would have been incurred in any event, it may not necessarily be appropriate to attribute it to the manufacture or sale of the tortious product (*Dart Industries* at 575). In the rather unlikely scenario that the overhead reduced by a certain amount because of the manufacture or sale of the tortious product, it is arguable that the reduction of costs of the non-tortious products ought to be attributable to the tortious products and accounted for appropriately as well.

36 As for the second consideration at [34(b)] above, whether the defendant's business is running to capacity allows the court to draw an inference as to whether the defendant had forgone an opportunity to make and sell other non-tortious products in substitution of the tortious products. Opportunity costs refer to the value of the alternative forgone by adopting a particular strategy or employing resources in a particular manner (*Dart Industries* at 574). If the defendant's business is not running to capacity and the defendant has not foregone an opportunity to make and sell other non-tortious products by reason of the acts of passing off, attributing a proportion of such overheads to the tortious acts may allow the defendant to profit from its unlawful activity (*Hollister* at [85] and [86]). However, if the defendant's business is running to capacity, it would be easily inferred that the defendant would have replaced the sale of the tortious products with non-tortious products and the tortfeasor would

have incurred the opportunity cost to sell non-tortious products because of the tortious acts. This would weigh in favour of attributing to the tortious product a proportion of the general overheads which would have sustained the opportunity (*Dart Industries* at 575; *OOO Abbott* at [54]).

37 These two considerations are by no means exhaustive and all will ultimately depend on the facts and circumstances of each case (*Hollister* at [85]). No fast and hard rules should or can be stated to guide the application of the general rule – the ascertainment of actual profits – to the infinite variety of fact situations developed in every particular case (*Levin Bros v Davis Manufacturing Co* [1934] 72 F.2d 163 at 165). In such situations, the court will consider all the circumstances to determine whether it is appropriate to allow a reduction of a proportion of any general overhead incurred.

38 It should be emphasised, however, that the onus is on the defendant to show that the overheads are attributable to the tortious acts and provide a reasonable acceptable basis for the allocation of overheads to the tortious product (*Dart Industries* at 578 and 590; *OOO Abbott* at [56]). In my view, this would usually require the defendant to: (a) adduce evidence of the amount of overhead incurred; (b) show that the overhead is attributable to the tortious acts; and (3) propose a reasonably acceptable basis for the proportion of the overhead to be allocated to the tortious products. In cases where the defendant makes no allowance for the overheads, produces no documentation and information necessary to allow for such a calculation to be made and provides incomplete documentation, the court may rightly decline to allow a deduction of the overheads (*Unilin Beeher* at [72] to [73]).

Material period

39 I begin with the material period in which the defendant sold "COFAN" fans in passing off. The claimant submits that the material period begins on 23 April 2021 while the defendant submits that it begins on 2 May 2021. Parties agree that the acts of passing off ceased on 31 October 2022.[41] In light of the invoices adduced before me, it is clear to me that the material period is 23 April 2021 (instead of 2 May 2021) to 31 October 2022. While I note that Mr Quek may have agreed that the defendant started selling COFAN fans from "around" 2 May 2021,[42] it is understandable that Mr Quek may not have been remembered the exact date the defendant started selling "COFAN" fans when he gave evidence on the stand. Given that the earliest invoices issued by the defendant is dated 23 April 2021,[43] I have no hesitation in agreeing with the claimant that 23 April 2021 to 31 October 2022 is the material period for this account of profits inquiry.

Reliability of the Summary Breakdown

40 As regards the Summary Breakdown produced by the defendant, the main difficulty is that it was produced without any source materials supporting the figures therein. The defendant's position is that the source documents were misplaced and lost during the shifting of the defendant's office sometime in August 2023 from Yishun Bizhub to the WCEGA Tower Premises. The claimant submits that the defendant deliberately withheld the source documents relied upon to prepare the Summary Breakdown because there was no shifting

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41 CWS1 at para 35; DWS1 at para 46.

42 NE, 15 October 2024 at p 46 (lines 1 to 10).

43 CWS1 at para 86 and Annex B; Quek's AEIC at pp 118 to 120, 131 to 132, 239, 252, 260, 268, 274 to 276.

of the defendant's office and, even if there was, the documents were still in the defendant's possession after the purported office move.[44]

41 I reject the Summary Breakdown as a reliable account of all the revenue generated by the defendant in selling "COFAN" fans. Not only is it entirely unsupported by source documents, but it is also unclear why this document was prepared. When Mr Phua was cross-examined on why he prepared the Summary Breakdown, he was evasive. He first said that it was just to see the selling structure and to prepare "in terms of orderings" to see if the fan was well-known in the market or how it was running in the market.[45] However, when confronted with the fact that he claims to have stopped selling "COFAN" fans in October 2022 and that he created the Summary Breakdown in August 2023, he alleged that the breakdown was prepared when "COFAN" was still in the market[46] and then said it was just for his reference and denied that it was because his lawyers told him that it may be needed for this Suit.[47] His responses raises questions on the provenance of the Summary Breakdown and the accuracy of the figures therein.

42 Mr Phua also claims that the defendant is in the practice of keeping only physical copies of its commercial documents because it adopts traditional methods of doing business and it only keeps an electronic record of the summarised information vis a vis the Summary Breakdown which has been provided.[48] However, his explanation is unconvincing. The invoices generated

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44 CSW1 at paras 41 to 42.

45 NE, 15 October 2024 at p 137 (lines 5 to 10).

46 NE, 15 October 2024 at p 137 (lines 11 to 31).

47 NE, 15 October 2024 at p 137 (lines 14 to 21).

48 BA PDV1 at p 105 (para 68).

by the defendant are electronically generated and it begs belief that the defendant's staff did not save an electronic copy of the invoices after it had been generated. Furthermore, if it is true that the defendant only keeps an electronic record of the summarised information, one would expect that the invoices and sales made are recorded in a summarised manner from time to time during the material period instead of only being prepared in August 2023, some ten months after the defendant allegedly stopped selling "COFAN" fans.

43 Turning now to the purported shifting of the defendant's office, I am not persuaded by the defendant's evidence that all the source documents were lost during the shifting of the defendant's office sometime in August 2023. On a balance of probabilities, I find that the defendant's version of events is more likely to be a self-serving fabrication to obstruct an account of profits for the following reasons.

44 First, the purported office move was in August 2023 which was after the commencement of this Suit on 2 November 2022. The defendant must have known that the invoices would be important for the legal proceedings. After Gill J held in the *Invalidation Judgment* that the defendant's "COFAN" mark was invalidated on 16 September 2022, the claimant filed the statement of claim in this Suit. The defendant entered notice of intention to contest the claim on 8 November 2022. In August 2023, SUM 4552 had been heard by Gill J and judgment had been reserved. It should be highlighted that one of the claimant's prayers in SUM 4552 is for an "inquiry as to damages, or at the [c]laimant's election, an account of profits". In the premises, the defendant must have known that if summary judgment was granted, an account of profits may well commence thereafter.

45 Mr Phua even agreed that his solicitors had informed him that he had an obligation to keep the documents carefully as they were relevant to this Suit.[49] In this context, a purported office move in August 2023 that was handled only by the defendant without any third party movers which ultimately resulted in all the source documents being lost is suspicious. In his testimony, Mr Phua was unable to remember what happened to the boxes after they were allegedly moved to the WCEGA Tower Premises. He said that he simply "chucked" the boxes of documents to one side or may have accidentally thrown the boxes away.[50] I find this careless behaviour to be quite unbelievable given Mr Phua's participation in and knowledge of the Suit.

46 Second, Mr Phua's evidence on the preparation of the Summary Breakdown is internally inconsistent and undermines his version of events that the invoices were misplaced in the shifting of the defendant's office. While Mr Phua claims that the Summary Breakdown was prepared in August 2023 before the defendant's office move in the same month,[51] this is contradicted by the file properties of the electronic copy of the Summary Breakdown which reflects the creation date of the Summary Breakdown as 10 January 2024.[52] Mr Phua's response to this is that the digital time stamp is consequent to the "finalising" of the Summary Breakdown in January 2024.[53] However, this response is merely an afterthought. The electronic file properties show a "Created" date of 10 January 2024 and a "Last Modified" date of 27 March 2024. This undermines Mr Phua's assertion that the Summary Breakdown was

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49 NE, 15 October 2024 at p 152 (lines 1 to 5).

50 NE, 15 October 2024 at pp 152 (lines 6 to 8) and 153 (lines 9 to 14).

51 BA PDV1 at p 101 (para 55).

52 Quek's AEIC at para 43.

53 BA PDV1 at p 101 (para 55).

prepared in August 2023 and only finalised in January 2024. There is no cogent explanation offered by Mr Phua for this discrepancy. If the Summary Breakdown was indeed created on 10 January 2024, it must mean that the invoices were not in fact misplaced during the office move in August 2023 because Mr Phua gave evidence that he had prepared the Summary Breakdown by manually populating the details captured in invoices evincing sales of "COFAN" fans into the spreadsheet.[54]

47 Third, Mr Phua was inconsistent in his position on when the defendant first discovered that the source documents were missing. While Mr Phua claims in his affidavit dated 24 April 2024 that he attempted to locate the source documents after the Registrar's Case Conference on 14 February 2024 and realised only then that it had been misplaced, he also says within the same affidavit that he had "no choice but to finalise the Summary Breakdown [in January 2024] to the best of [his] recollection" which suggests that he knew in January 2024 that the invoices were missing.[55] This inconsistency raises questions on the reliability and cogency of Mr Phua's evidence that all the source documents were misplaced in the alleged shifting of the defendant's office.

48 Fourth, it is unclear whether the source documents were actually moved to the WCEGA Tower Premises. Mr Phua gave evidence in examination of judgment debtor proceedings in another suit, HC/S 189/2022 (HC/SUM 2901/2023), on 23 February 2024 that the defendant had no access to the WCEGA Tower Premises and he borrowed the address from a friend to use as the defendant's registered address. If there were mail or letters sent there, he

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54 NE, 15 October 2024 at p 143 (lines 9 to 19).

55 BA PDV1 at pp 97 (para 43) and 100 (para 52).

would go to take it.[56] However, in his AEIC for these proceedings, he claims that the defendant has access to the WCEGA Tower Premises.[57] When cross-examined on this point, Mr Phua testified that he had misinterpreted the questions in the examination of judgment debtor hearing.[58] I do not believe Mr Phua's convenient assertion that he had misinterpreted the questions asked of him in the examination of judgment debtor proceedings.

49 Further, considering that the WCEGA Tower Premises is only 171 square meters[59] and was used by six other companies as their registered address,[60] this supports Mr Phua's explanation that the WCEGA Tower Premises is only used as a registered address and he has no access to it. This is buttressed by the fact that Mr Phua had digitally altered a photograph showing the outside of the WCEGA Tower Premises which was exhibited in his affidavit dated 14 June 2024 to remove the signs of three other companies beside the front door of the unit.[61] This was admitted to at trial[62] and Mr Phua's explanation is that he thought that these other companies were not relevant to the proceedings.[63] In my view, this is an unacceptable excuse to digitally alter evidence and adduce it in court without giving any explanation of any modifications done. The court takes a dim view of such conduct, and this raises serious doubts as to whether this was done to convey the impression that the

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56 Agreed Bundle of Documents Volume 2 at pp 12 to 13.

57 Phua's affidavit at para 52.

58 NE, 16 October 2024 at pp 5 (line 9) to 7 (line 3).

59 Quek's AEIC at paras 36 and 37.

60 Quek's AEIC at paras 32 and 34.

61 Bundle of Affidavits (Pre-election Discovery) Volume II at p 376.

62 NE, 15 October 2024 at p 128 (lines 4 to 22).

63 NE, 16 October 2024 at p 16 (lines 11 to 25).

defendant had access to the WCEGA Tower Premises when it did not in fact have such access.

50 Finally, I note that Mr Phua made the unequivocal statement in his affidavit that dated 24 April 2024 that the entirety of the defendant's sales of the "COFAN" fans are captured in the Summary Breakdown.[64] This is clearly false given the existence of invoices highlighted by the claimant that are not accounted for in the Summary Breakdown. This undermines Mr Phua's credibility. Accordingly, I reject the Summary Breakdown as a reliable account of all the profits generated by the defendant in selling "COFAN" fans.

Revenue generated

Methodology of calculating revenue

51 Turning to the methodology of calculating the revenue generated by the defendant in the material period, I agree with the claimant that the revenue generated over the period starting 23 April 2021 to 31 August 2021 (for which actual invoices are available) may be extrapolated over the material period starting 23 April 2021 to 31 October 2022. As I have rejected the Summary Breakdown as a reliable estimate of all the actual sales of "COFAN" fans made by the defendant, the only objective evidence before the court is the invoices of sales of "COFAN" fans by the defendant that were disclosed in S 464. There is also no evidence that suggests that the sales of "COFAN" fans in the period starting 23 April 2021 to 31 August 2021 is not representative of the sales of "COFAN" fans in the material period.

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64 BA PDV1 at pp 102 and 103.

52 I accept the claimant's calculation of the revenue generated from 23 April 2021 to 31 August 2021 by taking the sum of: (a) invoices from 23 April 2021 to 31 August 2021 (as listed in Annex B to the claimant's written submissions dated 13 December 2024) of $124,500.40; (b) the revenue recorded in the Summary Breakdown for August 2021 of $18,700; and (c) 11 invoices not included in the Summary Breakdown for August 2021 of $15,168.00. This amounts to the sum of $158,368.40. To calculate the total revenue generated by the defendant over the material period, I extrapolate the total revenue generated based on all the invoices before the court of $158,368.40 over 131 days (*ie*, 23 April 2021 to 31 August 2021) to 557 days (*ie*, 23 April 2021 to 31 October 2022) which gives the sum of **$673,367.93**. This would be for the sale of 4337 "COFAN" fans which is similarly extrapolated from the 1010 fans sold from 23 April 2021 to 31 August 2021.[65]

Margin of error

53 I reject the defendant's submission that a 50% margin of error should be applied in favour of the defendant because the Summary Breakdown was finalised without the source documents which were misplaced and profits could be overstated. The defendant relies on the observations of Tay Yong Kwang J (as he then was) in *Bosch Corp* to support its submission. In that case, there was a paucity of documents because the defendant (who infringed the trade mark) did not disclose any documents of its revenue and costs and the plaintiff was limited to a few hundred of documents seized in a raid (at [3], [11] and [15]). The plaintiff submitted that 5.5% of the total revenue over the infringement period were attributable to infringement sales because 5.5% of the total revenue from sales in the seized documents were attributable to infringement sales (at

65 CSW1 at paras 101 and 102.

[24]). Tay J held that this extrapolation assumed that the proportion of infringement sales in the seized documents was not materially different from the proportion of overall infringement sales. However, this assumption may not be completely correct because the raid was conducted in a targeted fashion and the profits could be overstated. The learned judge applied a 50% margin of error in favour of the defendants which he observed was a generous margin "more than adequate to correct any over-estimation of profits" (at [27] and [28]).

54 I decline to apply an adjustment by way of a margin of error in favour of the defendant in this case. There is no indication on the evidence why the revenue generated in the period starting 23 April to 31 August 2021 would not be a reasonable estimation of the revenue generated in the material period (*ie*, 23 April 2021 to 31 October 2022). On the contrary, Mr Phua's evidence is that "there were generally no sales of COFAN fans in the first 3 months after launch save for samples and promotion sales of COFAN fan" and "the general sales of "COFAN" fans would be on or about 1 August 2021 until 31 October 2022.[66] If this is to be taken at face value, the extrapolation would be a rather conservative one and there would in fact be a greater risk of under-estimation of the revenue instead. This considered with the fact that the invoices before the court may not even be the complete set of invoices of "COFAN" fans sold by the defendant given that documents were purportedly lost in the office move [67] fortifies my conclusion that there is no justification for applying any adjustment in favour of the defendant similar to that done in *Bosch Corp*.

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66 Phua's AEIC at para 44; BA PDV1 at p 102 (para 59).

67 CWS1 at paras 96 and 97.

Costs and expenses

55 The claimant submits that no deduction ought to be permitted for the defendant's costs and expenses in the absence of supporting documents from the defendant but, alternatively, any deduction should not be more than $79 per fan to account for the manufacturing costs of the fans.[68]

56 I observe that the defendant's conduct in these assessment proceedings can only be described as lackadaisical. It fails to adduce any supporting evidence evidencing its costs and expenses in relation to the manufacture, sale and distribution of "COFAN" fans. Instead, Mr Phua merely makes bare assertions of the estimated costs or relies on estimates given by Mr Quek. As I explain below, these information is well been within the defendant's knowledge and control. It can reasonably be expected to gather supporting documents to support its own case on the costs incurred for the sale of the "COFAN" fans but the defendant inexplicably chose not to do so. It goes without saying that the court would be reticent to accept bare assertions as the gospel truth as that would effectively allow the defendant to manipulate the account of profits inquiry to its benefit.

57 That said, having regard to the rationale of an account of profits which is not to penalise the defendant but to disgorge the actual profit made by the tortfeasor, the court will also be mindful not to unduly punish the defendant even in cases where there is a paucity of evidence arising from the defendant's conduct. In my view, allowing reasonable deductions for costs and expenses that is justified on the evidence before me would strike the appropriate balance.

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68 CSW1 at paras 107 and 108.

I therefore proceed to consider each of the costs and expenses sought to be deducted by the defendant in turn.

Manufacturing costs

58 The defendant's Summary Breakdown states that $93 is the "average cost per unit" but Mr Phua averred in his AEIC that the cost price of each fan is $85.[69] No supporting documents were adduced by the defendant and no explanation was given for this discrepancy. Mr Quek testified that the cost price of each fan for the claimant is between $79 and $82.[70] In view of this, the defendant submits that a fair estimate should be $82.[71]

59 I note that the figures submitted by parties are quite close and it is clear that the defendant must have incurred manufacturing costs in order to sell the "COFAN" fans. Despite the fact that the defendant could have but inexplicably chose not to adduce evidence of its cost price, I grant an indulgence to the defendant and assess the cost price of manufacturing each fan at $79 on the basis that the range of manufacturing costs for the claimant's "CO-FAN" fans is not likely to be different from the defendant's "COFAN" fans. I reject the claimant's submission that a discount should be given since the defendant fails to adduce evidence that their "COFAN" fans are similar in quality to the claimant's fan such that the claimant's cost price of $79 per fan may be used to approximate the defendant's cost price. I am of the view that it would be speculative to say that the defendant's quality of fans is inferior to the claimant's quality of fans which would justify a discount. Further, the "COFAN" fans appear to be nearly identical to the claimant's HELI fans in this case

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69 Phua's AEIC at para 54.

70 Certified Transcript Day 1, p 50 (lines 14 to 18).

71 DWS2 at para 25.

(*Invalidation Judgment* at [54]). Thus, the costs to be deducted for manufacturing costs is **$342,623** based on $79 per fan multiplied by 4337 fans (see [52] above).

Transport and logistic costs

60 The defendant submits that the transport and logistics cost for each fan to be shipped from China to Singapore is $15 taking into account that market conditions and seasonal changes may affect the price.[72] This is based on Mr Phua's estimation as stated in his AEIC but the defendant again did not provide any evidence supporting this assertion.[73] In its written submissions, the defendant included a graph named "World Container Index" (see Figure 1 below) developed by a maritime research and consulting firm that provides freight rates on eight major routes to/from the US, Europe and Asia.[74]

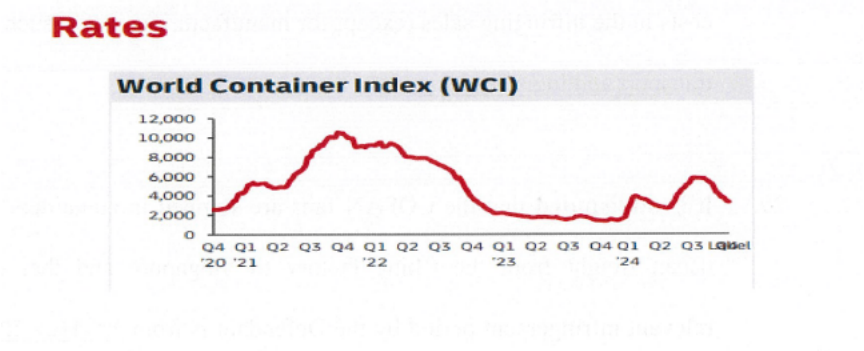

Figure 1

72 DWS2 at para 40.

73 Phua's AEIC at para 54.

74 DWS at paras 31 and 33.

From Figure 1, the defendant submits that the material period corresponds to Q3 2021 to Q3 2022 of the graph and that shows an average ocean freight rate per container of around USD9,000 or $10,800.[75]

61 The claimant submits that Figure 1 should be disregarded given that it is evidence from the bar and the defendant fails to adduce any supporting evidence. It also points out that the footnote to Figure 1 states the following: "Source: Drewry, in USD/40ft container, including BAF & THC both ends, 8 individual routes, excluding intra-Asia routes" and that all the eight routes referred to are long-haul cross-continental routes and China to Singapore is not amongst them.[76] Under cross-examination, Mr Quek testified that the transport and logistics costs incurred by the claimant would be $1,200 containers for 1600 fans such that each fan would incur $0.75.[77]

62 In my view, the defendant is not entitled to rely on the graph in Figure 1 to discredit Mr Quek's proposed estimate as it is evidence from the bar. I agree with the claimant that, even if Figure 1 was adduced in Mr Phua's AEIC, this does not assist the defendant as it does not provide an estimated freight cost for a shipment from China to Singapore during the relevant time period. Yet, it is not disputed that the defendant would have incurred shipping costs to import the "COFAN" fans to Singapore. As the true freight costs of the shipments paid by the defendant is within the defendant's knowledge, its inexplicable failure to produce any supporting documents to support its estimate of $15 means that the court ought to view its estimate with greater circumspection. Even if the receipts or invoices issued by the defendant's suppliers were lost or misplaced, the

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75 DWS2 at para 35.

76 Claimant's written submissions dated 17 January 2025 ("CWS2") at paras 51 to 57.

77 NE, 15 October 2024 at pp 52 (lines 9 to 31) and 53 (lines 1 to 9).

defendant could have contacted its counterparts and adduced evidence from them to support its version of events. Since it chose not to do so, it is an indulgence towards the defendant to nonetheless allow a deduction for shipping costs based on Mr Quek's estimated costs of $0.75 per fan as a reasonable estimate of the defendant's costs. Accordingly, the costs to be deducted for shipping costs is **$3,252.75** ($0.75 multiplied by 4337 fans).

Rental, hire vehicle and staff costs

63 In respect of general overheads, the defendant's case is that $35 should be deducted for each fan to account for other variable costs such as rental, staff salary and other incidental expenses.[78] The defendant submits that these costs are not shared despite the defendant selling BESTAR fans and other lines. Considering Mr Quek's testimony that the storage, transportation, warranty and other expenses would be $1 for each fan,[79] the defendant suggests taking the average of $18 per fan to account for variable costs.[80]

64 The claimant argues that there should be no deduction for any variable costs given the absence of any supporting documents or even a cogent explanation of how these figures have been arrived at.[81] In any case, all these variable costs have not been shown to be attributable to the defendant's sale of "COFAN" fans because these costs would have been incurred even if the defendant was not selling "COFAN" fans.[82] The claimant relies on Mr Phua's testimony that 90% of the defendant's business is attributed to "BESTAR"

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78 DWS2 at para 43; Phua's AEIC at para 54.

79 NE, 15 October 2024 at p 61 (lines 20 to 27).

80 DWS2 at para 44.

81 CWS1 at para 134.

82 CSW1 at paras 135 to 136.

while "COFAN" only made up a small part of the business[83] to argue that the defendant's overheads (be it rental, staff costs or delivery costs) would have been incurred anyway even if the defendant was not selling "COFAN" fans.[84]

65 I disregard the defendant's estimate of $35 for variable costs since it fails to even break down the components of this estimate or provide any evidence to support it. It is also rather arbitrary and unsatisfactory to simply adopt the midpoint of $18 dollars based on estimates from Mr Phua and Mr Quek. The proper approach is to consider whether the defendant has discharged its burden of proof to show the quantum of overhead incurred, the overhead incurred is attributable to the sale of the "COFAN" fans and there is a reasonably acceptable basis for the allocation of a proportion of the overhead to the "COFAN" fans (see [29]–[37] above).

(1) Rental costs

66 For rental costs, Mr Phua testified that the rent for each unit at Yishun Bizhub, namely #02-91 and #02-92, was $3,500 at the material time.[85] There are no shared costs between "COFAN" and "BESTAR" because #02-91 is used for "BESTAR" and #02-92 is used for "COFAN". Alternatively, he estimates that the rental costs should be apportioned in a 70-30 ratio in favour of "BESTAR".[86] The defendant seeks a deduction of $37,800 of rental costs based on rent of $3,500 multiplied by two units over the material period of 18 months and at a 30% apportionment to "COFAN".[87]

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83 NE, 15 October 2024 at pp 135 (lines 29 to 32) and 136 (lines 1 to 9).

84 CSW1 at para 137.

85 NE, 16 October 2024 at p 101 (lines 13 to 17).

86 NE, 16 October 2024 at p 87 (lines 7 to 26).

87 DWS1 at paras 119 to 122.

67 The claimant submits that there were no premises exclusively used for "COFAN". Mr Phua initially took the position that it rented two different premises to operate its "BESTAR" and "COFAN" businesses.[88] However, Mr Phua admitted under cross-examination that #02-91 was used to store "BESTAR" fans while #02-92 was used as the defendant's office premises and to store both "COFAN" and "BESTAR" products.[89]

68 I disbelieve Mr Phua's evidence that there was a strict allocation of the two units such that #02-91 was used exclusively for "BESTAR" and #02-92 was used exclusively for "COFAN". Mr Phua's averment in his affidavit dated 13 June 2024 is vague as to what exactly the "two different premises" refers to. He does not even say that the defendant rents two units at Yishun Bizhub or identifies the unit that was exclusively used for "COFAN". Nor does he set out any supporting documents or evidence to support his allegation that the alleged rental sum for one unit is $3,500 and that #02-91 was used exclusively for "COFAN".

69 At trial, Mr Phua initially testified that #02-92 was used for "COFAN" and #02-91 was used for "BESTAR".[90] However, when he was confronted with evidence of his testimony given earlier that only 10% of the defendant's sales come from "COFAN", he admitted that #02-92 was not "really one full unit" of "COFAN" fans but also used to store "BESTAR" fans.[91] He later also conceded

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88 Phua's AEIC at p 122 (para 27(b) of his affidavit dated 13 June 2024); NE, 16 October 2024 at p 93 (lines 2 to 6).

89 NE, 16 October 2024 at p 93 (lines 5 to 21).

90 NE, 16 October 2024 at p 93 (lines 1 to 6).

91 NE, 16 October 2024 at p 93 (lines 7 to 28).

that #02-92 was used to store both "COFAN" and "BESTAR" fans and the offices of his staff.[92]

70 In my view, Mr Phua's position that #02-92 was used for "COFAN" and #02-91 was used for "BESTAR" is untenable. It is contradicted by even his own testimony at trial. There is no evidence to suggest that #02-92 was only rented when the defendant began selling "COFAN" fans such that the rental overheads could be said to have increased as a result of the tortious acts or that the storage space in #02-92 was required for the storage of the "COFAN" fans. As such, I find that the rental costs are shared between "BESTAR" and "COFAN". However, this does not mean that rental costs must invariably be attributed to "COFAN".

71 I disallow a deduction based on rental costs for the following reasons. First, the defendant fails to discharge its evidential burden to prove the amount of rent incurred as a general overhead (see [68] above). Second, the rental costs are not attributable to the sale of "COFAN" fans. Given that "COFAN" only represents 10% of the defendant's sales and #02-92 also contains the offices of the defendant's staff, I am of the view that the rental costs for #02-92 would have been incurred in any case even if the defendant did not sell "COFAN" fans. This is also supported by the fact that even after the defendant ceased selling the "COFAN" fans on 1 November 2022, it is Mr Phua's evidence that the defendant did not stop renting #02-92.[93] There is also no evidence that the defendant was operating at full capacity such that it had forgone the opportunity to sell more "BESTAR" fans because there was no storage space in the units or that, but for the sale of "COFAN" fans, it would have sold more "BESTAR"

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92 NE, 16 October 2024 at pp 94 (lines 17 to 32) to 96 (lines 1 to 12).

93 NE, 16 October 2024 at p 77 (lines 2 to 28).

fans. The defendant has not established that it incurred any opportunity cost as a result of the storage of "COFAN" fans and there is nothing to indicate that the sale of "COFAN" fans would have been replaced by the sale of other fans. Finally, I see no reasonable basis for Mr Phua's estimate that 30% of the rental for both units be attributed to "COFAN".

(2) Hire vehicle costs

72 Mr Phua testified that the defendant had two vehicles on hire purchase that each cost $1200 or $1250 a month and incurred other costs such as petrol and parking that add up to more than $1000 each month during the material period.[94] He also testified that there is one dedicated van for COFAN and therefore there is no shared costs.[95]

73 The claimant submits that Mr Phua's assertion that one van was dedicated exclusively for COFAN was unbelievable. Given that "COFAN" fans represent only 10% of the defendant's sales, his explanation that this was done for easier accounting even though it would lead to increased costs is unbelievable.[96]

74 In my view, Mr Phua's evidence in this respect is incredulous. When he was asked what would happen if one of his customers ordered four "BESTAR" fans and two "COFAN" fans, he responded that the customer would receive deliveries from the two different vehicles because it is "easier to do all the accounting" notwithstanding that this would increase costs.[97] I find his response

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94 NE, 16 October 2024 at pp 101 (line 32) and 102 (lines 1 to 18).

95 NE, 16 October 2024 at pp 100 (lines 5 to 10) and 103 (lines 10 to 18).

96 CWS1 at paras 145 to 146.

97 NE, 16 October 2024 at pp 80 (lines 4 to 30).

to be illogical. While businesses have divergent practices and some businesses may well be inefficient, the court will be less likely to believe self-serving explanations that are commercially impractical. It would not make commercial sense for there to be such a strict demarcation of the use of the two vehicles on hire purchase especially given that "COFAN" sales only amount to 10% of the defendant's sales. Again, the defendant fails to adduce any evidence supporting this version of events such as whether one of the vehicles was hired only at the time the defendant started selling "COFAN" fans. I find his explanation contrived and have no hesitation in rejecting his evidence. The hire purchase costs of the two vehicles are therefore shared costs.

75 I disallow a deduction for vehicle costs for the following reasons. First, the defendant fails to discharge its evidential burden to prove the quantum of hire purchase costs incurred as a general overhead. Again, the defendant fails to adduce any evidence of the quantum of monthly hire purchase payments or petrol or parking costs and merely makes a bare estimate of $1200 or $1250 a month for each vehicle. Second, the vehicle costs are not attributable to the sale of "COFAN" fans. Considering that the sales of "BESTAR" fans amounts to 90% of the defendant's sales and Mr Phua's testimony that the defendant retained the two vehicles even after it stopped selling "COFAN" fans,[98] I find on a balance of probabilities that the costs of the two vehicles would have been incurred in any event even if the defendant did not sell "COFAN" fans. The defendant also fails to adduce any evidence that it was operating at full capacity such that the use of the vehicles for delivery of "BESTAR" fans was limited because of deliveries of "COFAN" fans which may have raised the possibility that the defendant had forgone the opportunity to make more deliveries of

[98] NE, 15 October 2024 at pp 135 (lines 29 to 32) and 136 (lines 1 to 9); NE, 16 October 2024 at pp 104 (lines 31 to 32) and 105 (lines 1 to 4).

"BESTAR" fans. Finally, the defendant fails to offer a reasonably acceptable basis for the proportion of the overhead to be allocated to the "COFAN" fans.

(3) Staff costs

76 Mr Phua testified at trial that the defendant had three staff for "COFAN" namely San, Hui Fen and Michael who were in charge of delivery, issuing invoices, and sales respectively.[99] The average salary for each of these staff is around $2,000 to $3,000.[100]

77 The claimant contends that these staff were shared resources that do work for both "BESTAR" and "COFAN" lines on the basis of the existence of invoices in which there are purchases of both "BESTAR" and "COFAN" fans and the presence of dedicated sales staff for each distributor. Further, the three staff were not laid off after the defendant stopped selling "COFAN" fans but were redeployed to support "BESTAR".[101]

78 I reject the defendant's submission that the three staff members worked solely on "COFAN". Mr Phua testified that each distributor would have a dedicated staff responsible to attending to all its enquiries.[102] This means that if Michael was doing sales and his customers wanted to enquire about "BESTAR" fans, he would have to answer queries and place orders on it. In my view, this is practical and commercially sensible. There are several invoices that are "mixed" in that they contain orders for both "BESTAR" fans and "COFAN"

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99 NE, 16 October 2024 at pp 103 (lines 22 to 28), 104 (lines 5 to 15) and 105 (lines 10 to 22).

100 NE, 16 October 2024 at pp 105 (lines 24 to 32) to 106 (lines 1 to 9).

101 CWS1 at paras 141 to 144.

102 NE, 16 October 2024 at pp 81 (lines 1 to 27).

fans and were issued in a single invoice.[103] This shows that there is unlikely to be a strict demarcation of staff responsibilities to only "COFAN". Further, given that "COFAN" sales only make up 10% of the defendant's sales, it is unpersuasive to suggest that the defendant would limit Michael's role to only "COFAN" sales. The defendant fails to adduce sufficient evidence to establish that the work functions of the other two staff were solely for "COFAN". It is telling that the defendant chose not to detail the names of these staff in Mr Phua's AEIC or call any of these employees to give evidence that their work functions were solely limited to "COFAN". As such, there is no basis for me to accept Mr Phua's bare assertions given at trial that the salary costs of the three staff members are solely for "COFAN".

79 Despite the defendant's claims that it maintained separate accounts and separate invoicing,[104] it fails to produce even a shred of evidence to show that staff salary was accounted for in that manner, invoices were issued in that manner or that delivery of goods were effected in that manner. I accept on a balance of probabilities that it is more likely that the defendant did not have a strict separation of responsibilities for the three staff such that they only did work for "COFAN". I consider the costs of salary for all the defendant's staff to be shared between "BESTAR" and "COFAN".

80 I disallow the deduction of salary costs as well. The defendant fails to adduce evidence of the staff's salaries. It is also not appropriate to attribute the costs of staff's salaries to the sale of "COFAN" fans. I note that the defendant did not lay off the three staff after the defendant stopped selling "COFAN" fans

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103 DWS1 at para 130.

104 NE, 16 October 2024 at pp 112 (lines 1 to 6).

but redeployed them to support "BESTAR".[105] In my view, considering that "COFAN" fans represent only 10% of the defendant's sales, the staff expenses would have been incurred in any case even if the defendant had not been selling "COFAN" fans as they would be working on the "BESTAR" sales. There is also no evidence that the defendant's staff was operating at full capacity such that it forgone the opportunity to sell more "BESTAR" fans because there was a lack of capacity of staff to manage the sales of "BESTAR" fans. No reasonably acceptable basis for the proportion of the staff salaries to be allocated to the sale of "COFAN" fans has been provided by the defendant as well.

Fans gifted to customers

81 The defendant submits that the costs of the sample fans that were given away to customers are accounted for as part of the $35 of variable costs it seeks.[106] I note from Annex A of the claimant's closing submissions that the defendant gave away 138 "COFAN" fans free of charge as recorded in the invoices and this figure is not disputed by the defendant. In my view, this is a direct cost of marketing for the sale of "COFAN" fans as these costs were incurred as part of the launch period of the "COFAN" fans. Thus, I allow a deduction of **$10,902** ($79 multiplied by 138 fans).

Corporate tax

82 The defendant submits that a reduction of 17% corporate tax should be applied to the assessed net profit.[107] He relies on Mr Quek's answer in cross-examination that a deduction should be taken for corporate tax as well. On the

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105 NE, 16 October 2024 at p 83 (lines 18 to 19).

106 DWS2 at paras 50 to 51.

107 DWS2 at para 68.

other hand, the claimant submits that no deduction should be made for corporate tax in the absence of any evidence showing that the defendant paid such tax.[108] The claimant relies on the decision of the High Court of Justice (Chancery Division) in *Hotel Cipriani SRL & others v Cipriani (Grosvenor Street) Ltd and others* [2010] EWHC 628 ("*Hotel Cipriani*) at [15] where the court declined to allow a deduction for tax because there was no evidence adduced that the defendant actually paid any tax in relation to the revenue.

83 I note that the High Court of Justice (Chancery Division) in *Blizzard Entertainment v Bossland* [2019] EWHC 1665 (Ch) ("*Blizzard*"), a decision cited by the defendant, allowed a deduction for tax for the period of account even though evidence of tax actually paid was only adduced for two years and there was no evidence of tax paid in the other remaining years (at [75]). The court considered it evident that the defendant was a tax payer in respect of its business and that the profits made will have to be taxed. There was a broad relationship between the actual tax paid in the two years and the notional tax shown in a document produced by the defendant and the court decided to make a significant deduction for the tax paid in the two years to reflect the proportion of tax for activities not related to the tortious product and allow for a proportionate reduction of tax paid in respect of the rest of the period of account.

84 In my view, the decision in *Blizzard* is distinguishable because the defendant in that case had adduced evidence of actual tax paid in two years and other documentation for the notional tax to be paid for the other years based on German tax rates. There was some evidential basis for the court to allow the deduction there. However, this case bears greater similarity to *Hotel Cipriani* in that there is absolutely no evidence before the Court on tax payable or paid. If

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[108] CWS1 at paras 149 to 150; CSW2 at paras 42 to 48.

the defendant wished to seek such a deduction, it would have easily been within its ability to seek the relevant documentation from the Inland Revenue Authority of Singapore to show that tax that it had paid. In the premises, I decline to allow a deduction for corporate tax.

Costs and disbursements

85 As regards costs and disbursements, the claimant seeks indemnity costs at one-third more than the costs sought on a standard basis. The claimant submits that indemnity costs is justified because the defendant was unreasonable in its conduct before and during the proceedings and its conduct in relation to amicable dispute resolution. The main points it raises are: (a) the defendant's attempt to obfuscate its profits has resulted in costs wastage and delay to proceedings; (b) Mr Phua had altered digital photographs and adduced it as evidence in court; (c) Mr Phua gave inconsistent evidence in the examination of judgment debtor proceedings and these proceedings; and (d) the defendant unreasonably refused to accept the claimant's offer to settle the claim by stopping the acts of passing off before the commencement of the Suit on 28 September 2022 and another offer to settle for $120,000.00 in October 2023.

86 It is trite that the court will only award indemnity costs in exceptional circumstances "when it is clearly just or appropriate to do so" and it is the exception rather than the norm. The court must ask itself whether the party's conduct was so unreasonable (as opposed to conduct that attracts moral condemnation) such as to justify indemnity costs. Such conduct must reflect a high degree of unreasonableness and cannot merely be wrong or misguided in hindsight. However, it need not rise to the level of dishonesty or moral iniquity for it to attract indemnity costs (*QBE Insurance (Singapore) Pte Ltd and another v Relax Beach Co Ltd* [2023] SGCA 45 at [35]–[38]; *GTMS*

Construction Pte Ltd v Ser Kim Koi (Chan Sau Yau (formerly trading as Chan Sau Yan Associates) and another, third parties) [2021] SGHC 33 at [10]–[14] and *Airtrust (Hong Kong) Ltd v PH Hydraulics & Engineering Pte Ltd* [2016] 5 SLR 103 at [17], [23] and [50]).

87 I decline to award indemnity costs because I am not satisfied that the defendant's conduct had such a high degree of unreasonableness as to justify an award of indemnity costs. While I accept that the claimant had made reasonable offers to settle the proceedings and the fact that the amount awarded in these proceedings significantly exceed those offers must surely be taken into account for costs, I am unable to say that the defendant was highly unreasonable in its conduct in the settlement negotiations. I note that it made an offer to settle the proceedings on 31 July 2024 at the sum of $165,000.00 but this was not accepted by the claimant. As for the conduct of Mr Phua and the defendant, I have explained above at [43]–[50] that I do not believe the defendant's explanations regarding the source documents that were allegedly lost during the shifting of the defendant's office, the alteration of the photographs of the units at the WCEGA Tower Premises, and the inconsistent evidence given by Mr Phua regarding access to the WCEGA Tower Premises, I do not find that the evidence before me shows that this Suit was an abuse of process on the part of the defendant or that any unreasonableness of the defendant's conduct rises to the high threshold required for indemnity costs.

88 In terms of the quantum of costs, the claimant seeks a total of $161,000, based on $90,000 for pre-trial costs, $36,000 for trial and $35,000 for post-trial work. The defendant submits that $15,000 for pre-trial costs, $$12,000 for trial and $15,000 for post-trial costs is appropriate. Given that Gill J had reserved costs of SUM 4552 until after these proceedings (see [12] above), parties agree

that any pre-trial costs sought should be limited to costs incurred after summary judgment.

89 I consider that fixing costs at $60,000 comprising $20,000 for pre-trial costs (which is limited to pre-trial costs incurred after SUM 4552 was decided), $20,000 for trial (based on $10,000 per day for two days) and $20,000 for post-trial work is appropriate for the following reasons:

(a) First, parties agree that pre-trial costs are to be limited to the work done after SUM 4552 was decided. $20,000 is an appropriate sum for the work done in correspondences between parties, the six case conferences attended and the preparation of AEICs prior to trial.

(b) Second, considering the complexity of the matter and that only three witnesses gave evidence, a daily tariff of $10,000 per day for the two days of trial is appropriate.

(c) Third, in terms of the work done post-trial which includes the closing submissions, I note in particular that the parties (and particularly the claimant) cited various helpful authorities which was of assistance to the court. There were also two rounds of submissions from parties which totalled to more than 180 pages, and the claimant produced annexes of the invoices that assisted in supporting its submissions. I am satisfied that $20,000 is a reasonable sum for the work done by the claimant after trial.

(d) Finally, in formulating the figures above, I take into account all the circumstances of this case including the defendant's conduct in the proceedings as detailed above at [43]–[50], lackadaisical conduct in failing to adduce evidence of its costs at [56] above, and the fact that the

defendant did not accept the claimant's offer to settle at the sum of $120,000.00 in October 2023 until it made an offer to settle at the sum of $165,000.00 on 31 July 2024 (which the claimant then chose not to accept).

Parties agree on the sum of $14,750 for disbursements.

Conclusion

90 In sum, I find that the total revenue generated by the defendant for the sale of "COFAN" fans during the material period is $673,367.93 (see [52] above) and the costs to be deducted are $342,623 (see [59] above), $3,252.75 (see [62] above) and $10,902 (see [81] above). The defendant is accordingly liable to pay the sum of **$316,590.18** to the claimant in account of the profits it made in respect of its acts of passing off.

91 In terms of interest, I order interest of 5.33% per annum to be paid on the sum of $316,590.18 from the midpoint of the material period (*ie*, 1 February 2022) to the date on which the sum is paid by the defendant to the claimant. While the defendant contends that the interest should be payable from the date that SUM 4552 was decided, I disagree that this is appropriate since the relevant date at which the cause of action accrues is 23 April 2021 (*ie*, the beginning of the material period). I accept the claimant's submission based on *Hotel Cipriani* at [27] that it would be fair to calculate the full amount of profits from a mid-point in the material period if the evidence suggests that the profits are broadly level across the material period. By applying the extrapolation method to assess the profits generated by the defendant, my analysis proceeds on the assumption that the revenue made from 23 April 2021 to 31 August 2021 is broadly level

throughout the entire material period. Thus, interest ought to run from the midpoint of the material period.

92 Costs is fixed at $60,000.00 and disbursements is fixed at $14,750 (as agreed by parties) (see [89] above) to be paid by the defendant to the claimant forthwith.

Gerome Goh Teng Jun
Assistant Registrar

Oh Ping-Ping, Loy Ming Chuen Brendan and Isaac Ray Pereira (Bird & Bird ATMD LLP) for the claimant;
Sarbrinder Singh s/o Naranjan Singh and Nicholas Say Gui Xi (Sanders Law LLC) for the defendant.