IN THE HIGH COURT OF MALAYA AT KUALA LUMPUR

(COMMERCIAL DIVISION)

IN THE FEDERAL TERRITORY OF KUALA LUMPUR

[CIVIL SUIT NO. WA-22IP-49-09/2018]

BETWEEN

SITI AISHAH AISIKIN BINTI RAZALI
(t/a PERFECT LADY TRADING) ... PLAINTIFF

AND

1. SERI ASMARA BINTI SALIMIN

2. AMIRUL AIMAN BIN AHMAD ZUBIR
(t/a RICHGLOW GLOBAL RESOURCES) ... DEFENDANTS

GROUNDS OF DECISION

Introduction

[1] This is a summary judgment application in respect of trademark infringement of health and cosmetic products.

[2] The Plaintiff is an individual trading as a sole proprietor in the style Perfect Lady Trading. She is also the registered proprietor of the following trademarks via registration no. 2013011380 in class 5, registration no. 2013011382 in class 25 and registration no. 2013015681 in class 35 respectively:

("Perfect Lady trademark")

[3] The Defendants are individuals trading as a partnership in the style Richglow Global Resources.

Salient Facts

[4] The Plaintiff in late 2017 discovered that the Defendants had in their course of trade used a trademark that is identical or similar to the Perfect Lady trademark by way of extensively promoting, offering for sale and selling their products in the social media particularly Facebook and Instagram.

[5] The Plaintiff notified the Defendant to cease and desist but the Defendants failed, refused or neglected to heed the Plaintiff's notification.

[6] As the result, the Plaintiff filed this Suit and later this application for summary judgment (enclosure 19) ("Application"). The reliefs sought in the Application are as follows:

> *"(i) Suatu Injunksi untuk menghalang Defendan-Defendan sama ada melalui dirinya sendiri, ejen-ejennya dan/atau pekerja-pekerjanya dan/atau sesiapa sahaja yang bertindak di bawahnya atau di bawah arahan-arahan Defendan-Defendan, ejen-ejennya dan/atau pekerja-pekerjanya, dari mengambil sebarang langkah dan/atau sebarang langkah lanjutan daripada, dalam apa cara jua sekalipun, menyebabkan dan/atau melakukan tindakan pelanggaran cap dagangan "Perfect lady" milik Plaintif;*
>
> *(ii) Perintah-perintah berkenaan dengan gantirugi-gantirugi yang dipohon seperti di bawah akan diputuskan melalui prosiding pentaksiran:*
>
> *(a) Gantirugi am dalam jumlah yang difikirkan patut oleh Mahkamah yang mulia ini;*
>
> *(b) Gantirugi teladan (exemplary damages) sebanyak RM2,000,000.00;*
>
> *(c) gantirugi teruk (aggravated damages) sebanyak RM1,000,000.00;*
>
> *(iii) Faedah pada kadar 5% setahun ke atas jumlah gantirugi yang diperintahkan oleh Mahkamah yang mulia*

ini dari pemfailan tindakan ini sehingga ke tarikh Penghakiman;

(iv) Faedah pada kadar 5% setahun ke atas jumlah gantirugi yang diperintahkan oleh Mahkamah yang mulia ini dari tarikh Penghakiman sehingga ke tarikh penyelesaian penuh;

(v) Kos atas dasar peguamcara-anakguaman; dan

(vi) Sebarang relif selanjutnya dan/atau relif lain sebagaimana Mahkamah yang mulia ini jangkakan sesuai dan patut."

[7] The affidavits that were filed for purposes of this Application are as follows:

(i) Plaintiff's affidavit in support affirmed by Siti Aishah Aisikin binti Razali dated 14 January 2019;

(ii) Defendants' affidavit in reply affirmed by Seri Asmara binti Salimin dated 4 February 2019; and

(iii) Plaintiff's affidavit in reply affirmed by Siti Aishah Aisikin binti Razali dated 19 February 2019.

[8] The Application came before me on 4 March 2019. After having read the cause papers and written submissions of the parties and hearing oral arguments of counsel, I allowed the Application by entering summary judgment in terms of prayers (i), (ii)(a) and (ii)(b) subject to assessment (iii) and (iv) of the Application and costs of RM8,000.00.

[9] I now furnish below the grounds of my decision.

Contentions and Findings

[10] As far as the Plaintiff is concerned, this is a clear cut case of trademark infringement whereby the Defendants without authorization used the Plaintiff's Perfect Lady trademark in their course of trade in the social media and the Defendants have admitted to so using it to the Plaintiff.

[11] The Defendants have now recanted by contending that the trademark(s) used by them was (were) of minor similarity if not dissimilar to the Perfect Lady trademark and that the words "Perfect Lady" are common generic words. The Defendants principally sold juices unlike pills that are sold by the Plaintiff. There was thus no deception or confusion caused to the public consumers. That notwithstanding, the Defendants also contended that they used the words "Perfect Lady" in good faith to illustrate the character or quality of their goods but not being a description made in advertisement of their goods that imported a reference to the right to use the Perfect Lady trademark. The Defendant emphasized that they were only advertising and selling their goods for sale online in the social media whereas the Plaintiff's goods were sold via retailers, agents and distributors as well as online in the social media.

[12] As the Application is a summary judgment application, the relevant provisions are in Order 14(3) and (4) of the Rules of Court 2012 on summary judgment as follows:

*"**3. Judgment for plaintiff (O. 14 r. 3)***

(1) Unless on the hearing of an application under rule 1 either the Court dismisses the application or the defendant satisfies the Court with respect to the claim, or the part of a claim, to which the application relates that there is an issue or question in

dispute which ought to be tried or that there ought for some other reason to be a trial of that claim or part, the Court may give such judgment for the plaintiff against that defendant on that claim or part as may be just having regard to the nature of the remedy or relief claimed.

(2) The Court may by order, and subject to such conditions, if any, as may be just, stay the execution of any judgment given against a defendant under this rule until after the trial of any counterclaim made or raised by the defendant in the action.

4. Leave to defend (O. 14 r. 4)

(1) A defendant may show cause against an application under rule 1 by affidavit or otherwise to the satisfaction of the Court.

(2) Rule 2(2) applies for the purposes of this rule as it applies for the purposes of that rule.

(3) The Court may give a defendant against whom such an application is made leave to defend the action with respect to the claim, or the part of a claim, to which the application relates either unconditionally or on such terms as to giving security or time or mode of trial or otherwise as it thinks fit.

(4) On the hearing of such an application the Court may order a defendant showing cause or, where that defendant is a body corporate, any director, manager, secretary, or other similar officer thereof, or any person purporting to act in any such capacity-

(a) to produce any document; and

(b) if it appears to the Court that there are special circumstances which make it desirable that he should do so, to attend and be examined under oath."

[13] The law on summary judgment is plainly set out in *Bank Negara Malaysia v. Mohd Ismail Ali Johor & Ors* [1992] 1 CLJ 627; [1992] 1CLJ (Rep) 14 wherein Mohd Azmi SCJ held as follows:

> *"Under an O. 14 application, the duty of a Judge does not end as soon as a fact is asserted by one party, and denied or disputed by the other on affidavit. Where such assertion, denial or dispute is equivocal, or lacking in precision or is inconsistent with undisputed contemporary documents or other statements by the same deponent or is inherently improbable in itself, then the Judge has a duty to reject such assertion or denial, thereby rendering the issue as not triable. In our opinion, unless this principle is adhered to, a Judge is in no position to exercise his discretion judicially under an O. 14 application. Thus, apart from identifying the issues of fact or law, the Court must go one step further and determine whether they are triable. This principle is sometimes expressed by the statement that a complete defence need not be shown. The defence set up need only show that there is a triable issue.*
>
> *Where the issue raised is solely a question of law without reference to any facts or where the facts are clear and undisputed, the Court should exercise its duty under O. 14. If the legal point is understood and the Court is satisfied that it is unarguable, the Court is not prevented from granting a summary judgment, merely because "the question of law is at first blush of some complexity and therefore takes a little longer to understand".* (See *Cow v.*

Casey [1949] AER 197; and *European Asian Bank AG v. Punjab & Sind Bank [1983] 2 AER 508 at 516).”*

[14] In respect of intellectual property cases particularly on trademark infringement, Zakaria Yatim J (later FCJ) held in *Fabrique Ebel Societe Anonyme v. Syarikat Perniagaan Tukang Jam City Port & Ors* [1988] 1 MLJ 188 as summarized in the following headnotes:

“(1) The court has jurisdiction to enter summary judgment under Order 14 of the Rules of the High Court for an injunction;

(2) In order to succeed in its application for summary judgment under Order 14, the plaintiff must satisfy three conditions as laid down in the order: firstly, the defendants must have entered appearance; secondly, the statement of claim has been served on the defendants and, thirdly, the application for summary judgment must be supported by affidavit. In this case, the plaintiff has satisfied all the three conditions;

(3) In order to establish infringement of the trade mark, the plaintiff has to satisfy the following five requirements: (a) the defendants used the mark identical with the plaintiff's mark (b) the offending mark was used by persons who have not been authorised or licensed by the plaintiff (c) the defendants were using the offending mark in the course of trade (d) the defendants used the offending mark in relation to goods in respect of which the trade mark is registered (e) the defendants used the offending mark in such a manner as to render the use of the mark likely to be taken as being used as a trade mark. In this case, the plaintiff has satisfied all the five requirements;

(4) Since the plaintiff is applying for summary judgment against the defendants on an action for infringement comparison must be made between the plaintiff's registered mark and the mark used by the defendants. Having made the comparison and having considered the evidence in the affidavits, the court was satisfied that the defendants had infringed the plaintiff's registered trade mark under section 38(1)(a) of the Trade Marks Act, 1976;

(5) From the affidavits and the statement of defence filed by the defendants, they have not disclosed any triable issue at all. Their defence is a bare denial without giving any particulars at all;

(6) The plaintiff's application for final judgment under Order 14 must therefore be allowed."

Additionally in *Abercrombie & Fitch & Anor v. Fashion Outlet KL Sdn Bhd & Ors* [2008] 7 CLJ 413, Ramly Ali J (now FCJ) held as follows:

*"**[42]** In order to succeed in their application under O. 14 RHC 1980, the plaintiffs in the present case must on merit establish their cause of action against the defendants for trade mark infringement and that the defendants have not raised any defence to the plaintiffs' claim or any triable issue for that matter. Once the plaintiffs succeed in making out a prima facie case against the defendants, the onus then shifts to the defendants to show to this court as to why summary judgment should not be entered against them. What constitute a triable issue in an application for summary judgment?*

Triable issue means issue raised by the defendants which is fit to be tried. The defendants must provide answers on oath which constitute evidence that they have defence which is fit to be tried. Denial in a defence does not constitute evidence (see: Chen Heng Ping & Ors v. Intradagang Merchant Bankers (M) Berhad [1995] 3 CLJ 690; and Acushnet Company v. Metro Golf Manufacturing Sdn. Bhd. (supra). A mere bare assertion by the defendants would not be sufficient. The duty of the court is quite onerous in the extreme. The court must be vigilant and must view in prospective at the whole scenario in order to ascertain whether the defendants have a real or what is commonly known as a bona fide defence.

(see: Renofac Builder (M) Sdn. Bhd. v. Chase Perdana Bhd. [2001] 5 CLJ 371).

***[43]** At the end of the day, to borrow the phraseology used in the Acushnet Company case, the only issue for the Court to determine in the present case is one of law, i.e., whether based on the facts available there has been an infringement of the Plaintiff's registered trade mark…"*

[15] Premised on the above, I have carefully reviewed the affidavits filed by the parties. The Plaintiff in its supporting affidavit has exhibited cogent documentary evidence illustrating the infringing products of the Defendants as well as their admission of infringement as captured in their Whatsapp responses to the Plaintiff whereas the Defendants in their affidavit in reply have instead only attempted to compare the differences in their product packaging.

[16] As to the 5 litmus tests that have to be met by the Plaintiff following *Fabrique Ebel Societe Anonyme v. Syarikat*

Perniagaan Tukang Jam City Port & Ors (*supra*) to establish infringement, it is plainly undisputed that the Plaintiff is the registered proprietor of the Perfect Lady trademark. The requisite certificates of registration have been adduced unchallenged by the Defendants. Thus the Plaintiff has the exclusive rights to use the trademark in relation to goods of the registered classes. It is provided as follows in s. 35 of the Trade Marks Act 1976 ("TMA"):

> *"**35. Rights given by registration***
>
> *(1) Subject to the provisions of this Act, the registration of a person as registered proprietor of a trade mark (other than a certification trade mark) in respect of any goods or services shall, if valid, give or be deemed to have been given to that person the exclusive right to the use of the trade mark in relation to those goods or services subject to any conditions, amendments, modifications or limitations entered in the Register.*
>
> *(2) Where two or more persons are proprietors of registered trade marks which are identical or nearly resembling each other rights of exclusive use of either of those trade marks are not (except so far as their respective rights have been defined by the Registrar or the Court) acquired by any one of those persons as against any other of those persons by registration of the trade mark but each of those persons have the same rights as against other persons (not being registered users) as he would if he were the sole registered proprietor."*

It is immaterial that the Perfect Lady trademark might have comprised of common generic words because the Defendants did

not challenge nor apply by way of counterclaim to expunge the trademark at all material times.

[17] I find that it is also plain the Defendants used the Plaintiff's Perfect Lady trademark as evidenced by images of the packaging of the Defendants' products extracted and downloaded from the Defendants social media websites as exhibited in the Plaintiff's supporting affidavit. There is the unmistaken conspicuous reference to the words or mark "Perfect Lady" therein. In the Supreme Court case of *Tohtonku Sdn Bhd v. Superace (M) Sdn Bhd* [1992] 1 CLJ Rep 344, Mohd. Yusoff Mohamed SCJ held as follows:

> *"The "tests" which Wan Adnan J was referring to were contained in Parker J's judgment in The Pianotist Co. Ltd. [1906] 23 RPC 774, in the following terms:*
>
> *You must take the two words. You must judge them, both by their look and their sound. You must consider the goods to which they are to be applied. You must consider the nature and kind of customer who would be likely to buy those goods. In fact you must consider all the surrounding circumstances; and you must further consider what is likely to happen if each of those marks are used in a normal way as a trade mark of the goods of the respective owners of the marks."*

The words used by the Defendants are in sound exactly the words in the Perfect Lady trademark.

[18] Moreover I find that the "Perfect Lady" words or mark were used by the Defendants primarily in health juice products which is dietetic food within the class 5 registration of the Plaintiff.

[19] It is also plain and undisputed that the Plaintiff neither authorised nor licensed the Defendants to use the Perfect Lady trademark or even the "Perfect Lady" words and I so find accordingly too.

[20] It is common ground that both parties traded in the social media. By the undisputed fact that the Defendants were advertising by offering for sale and selling their products in the social media, I also find and hold as I have recently so held in *30 Maple Sdn Bhd v. Siti Safiyah binti Mohd Firdaus* KLHC Civil Suit no. WA-22IP-31-05/2018 (unreported) that they were using the "Perfect Lady" words or mark in the course of trade in breach of s. 38(1)(b) of the TMA that reads:

> *"**38. Infringement of a trade mark***
>
> *(1) A registered trade mark is infringed by a person who, not being the registered proprietor of the trade mark or registered user of the trade mark using by way of permitted use, uses a mark which is identical with it or so nearly resembling it as is likely to deceive or cause confusion in the course of trade in relation to goods or services in respect of which the trade mark is registered in such a manner as to render the use of the mark likely to be taken either-*
>
> *(a) as being use as a trade mark;*
>
> *(b) in a case in which the use is use upon the goods or in physical relation thereto or in an advertising circular, or other advertisement, issued to the public, as importing a reference to a person having the right either as registered proprietor or as registered user to use the trade mark or to*

goods with which the person is connected in the course of trade; or

(c) in a case in which the use is use at or near the place where the services are available or performed or in an advertising circular or other advertisement issued to the public, as importing a reference to a person having a right either as registered proprietor or as registered user to use the trade mark or to services with the provision of which the person is connected in the course of trade."

[21] In the circumstances, I further conclude and objectively find that the public consumers would be deceived or confused between the Defendants' products and the Plaintiff's products. It is trite law as held in the Federal Court case of *Ho Tack Sien & Ors v. Rotta Research Laboratorium SpA & Anor and Another Appeal; Registrar of Trade Marks (Intervener)* [2015] 3 MLRA 611 that the question whether or not there is real likelihood of deception of the public is ultimately for the court and not for the witnesses to decide.

[22] The Defendants have now claimed that the "Perfect Lady" words or mark had been used by them to illustrate the attainment of the outlook of toned female physique after consuming their products. I objectively find this a feeble afterthought made in attempt to raise a defence pursuant to s. 40 (1)(b) of the TMA which reads:

*"**40. Acts not constituting infringement***

(1) Notwithstanding anything contained in this Act, the following acts do not constitute an infringement of a trade mark-

(a) the use in good faith by a person of his own name or the name of his place of business or the name of the place of business of any of his predecessors in business;

(b) the use in good faith by a person of a description of the character or quality of his goods or services, and in the case of goods not being a description that would be likely to be taken as importing any reference as is mentioned in paragraph 38(1)(b) or paragraph 56(3)(b);

(c) the use by a person of a trade mark in relation to goods or services in respect of which he has by himself or his predecessors in business, continuously used the trade mark from a date before-

(i) the use of the registered trade mark by the registered proprietor, by his predecessors in business or by a registered user of the trade mark; or

(ii) the registration of the trade mark, whichever is the earlier;

(d) in relation to goods connected in the course of trade with the registered proprietor or a registered user of the trade mark if, as to those goods or a bulk of which they form part, the registered proprietor or the registered user in conforming to the permitted use has applied the trade mark and has not subsequently removed or obliterated it or has at any time expressly or impliedly consented to the use of the trade mark;

(d) the use by a person of a trade mark in relation to goods or services to which the registered proprietor or

registered user has at any time expressly or impliedly consented to;

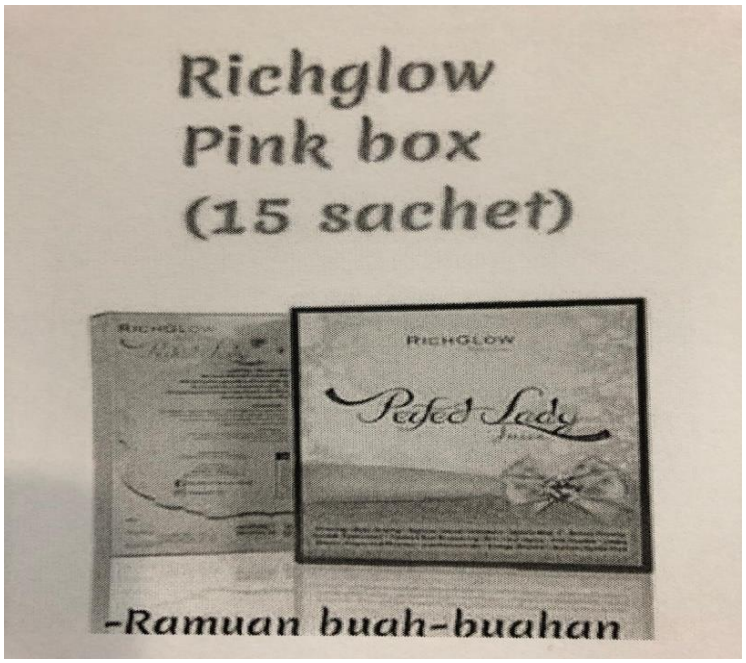
(e) the use of the trade mark by a person in relation to goods or services adapted to form part of, or to be accessory to, other goods or services in relation to which the trade mark has been used without infringement of the right given or might for the time being be so used, if the use of the trade mark is reasonably necessary in order to indicate that the goods or services are so adapted and neither the purpose nor the effect of the use of trade mark is to indicate otherwise than in accordance with the facts a connection in the course of trade between any person and the goods or services; and

(f) the use of a trade mark, which is one of two or more registered trade marks which are substantially identical, in exercise of the right to the use of that trade mark given by registration as provided by this Act.

(2) Where a trade mark is registered subject to conditions, amendments, modifications or limitations, the trade mark is not infringed by the use of the trade mark in any manner in relation to goods to be sold or otherwise traded in in a place or in relation to goods to be exported to a market or in relation to services to be provided in a place or in any other circumstances to which having regard to those conditions, amendments, modifications or limitations the registration does not extend."

In this respect, I do not distinctly see a connection between the Defendants' juice products and the after-effect results as that claimed by the Defendants in the usage of the "Perfect Lady" words or mark on the Defendants' product packaging. Moreover

I see from the packaging as reproduced below that the words "Perfect Lady" has even outshone the Defendants' product brand Rich Glow.



The irresistible objective conclusion to me is that it was probably done to ride on the popularity of the Plaintiff's product if not also passing off as the Plaintiff's product. This claim of the Defendants here is therefore not *bona fide*.

[23] This lack of *bona fide*s in the Defendants' current stance as claimed is seen in the following contemporaneous WhatsApp exchanges between the parties in late 2017:

> "*P: Assalamualaikum, Saya Siti, staff company PERFECT LADY TRADING. Saya ingin meminta Tuan/Puan supaya Tuan/Puan menukar nama 'PERFECT LADY' kepada nama lain kerana syarikat mempunyai hakcipta @ trademark dan copyright terhadap nama PERFECT LADY. Saya berharap Tuan/Puan boleh bekerjasama untuk berbuat demikian dalam tempoh 3 hari*

atau syarikat kami terpaksa mengambil tindakan undang-undang dan melaporkan kepada pihak KPDNKK untuk tindakan rampasan. Tuan/Puan boleh merujuk Perbadanan Harta Intelek Malaysia untuk maklumat lanjut kerana selain trademark dan paten, kami juga mempunyai copyright untuk lain-lain kelas. Terimakasih.

D: Terima kasih sbb info saya berkenaan hal ini ya. Kami pihak Richglow minta maaf atas perkara ini, sebab tak tahu ttg pendaftaran trademark ni. Dan kami dah ambik tindakan sertamerta tukar nama dari PERFECT LADY JUICE kepada RUN CHENG juice (insyallah, masih dalam perbincangan nama baru) berkenaan gambar2 promosi kami di internet yg lepas, kami mintak tempoh masa untuk edit semula gambar tersebut. Mohon pihak cik berikan kami sedikit masa apapun kami dah ambik tindakan utk daftar nama baru serta merta.

D: Tak boleh lulus maknanya mmg tak boleh digunakan langsung ke? OK saya cuba semak. Saya baru bgtahu agen2 supaya gunakan nama RPL saja buat masa ni. Tak guna Perfect Lady buat sementara waktu. Sementara kami dalam proses tukar nama. Macam tu pihak awak bole terima? Kena bagi kami sikit masa sbb kami baru sehari launch.

P: Tak boleh sis… Sbb mengelirukan pengguna sekalipun ltk perkataan pendek RPL sbb dekat box tu terang2 ada PERFECT LADY. Pendek kata produk tu tak boleh dijual terus.

D: Ok macam box tu kan sy dah print banyak 10 ribu. Boleh tak kalau sy habiskn dulu kotak sedia ada lepas tu sy akan buat kotak baru dgn nama baru.

P: Tak boleh sis… Memang tak boleh sebab company blh ambil tindakan. Mmg kena print baru. Cari brand yg unik dan lulus trademark bila daftar.

Subsequently in January 2018, the following WhatsApp exchanges took place between the parties:

"P: Assalamualaikum… Pihak kami dapati puan masih lagi menggunakan BRAND PERFECT LADY dan masih lagi membuat urusan jual beli menggunakan jenama kami yang telah dilindungi hakcipta. Kami di HQ PERFECT LADY akan mengambil tindakan undang-undang dan akn membuat report polis serta report kepada pihak KPDNKK kerana puan telah menjual barangan/produk PERFECT LADY tiruan. Kami telah memberikan masa kepada puan tetapi pihak puan TIDAK mengambil endah dengan teguran kami. HQ akan juga akan mengambil tindakan undang-undang dan akan menyaman pihak puan, Harap maklum.

*D: Assalamualaikum cik aisyah. Sy seri owner produk rich glow. Minta maaf andai sy menganggu pagi2 ni. Sebenarnya saya nak berbincang dgn cik aisyah ttg kes saman tu, dari hati ke hati, dari ibu kepada ibu, dan sy juga tahu cik aisyah mommy twin… sama spt saya juga… Tujuan saya mesj ni adalah untuk meminta maaf kpd cik aisyah atas apa yg terjadi ttg pggunaan nama *perfectlady…Ya saya tahu kes ni dah di tangan lawyer. Dan cik aisyah akan minta saya berurusan dgn lawyer… tapi saya nak mesej utk bg tahu apa yg telah terjadi di sebalik company dan keluarga saya sekarang. Kerana saya sesungguh2 sungguhnya ingin meminta jasabaik pihak cik untuk kasihani saya, dan anak2…Pertama… Sekali lagi*

saya ingin minta maaf jujur ikhlas dari hati saya ttg silap saya mnggunakan nama perfect lady. Saya mmg tak tahu ttg produk cik aisyah yg telah didaftarkan dgn trademark. Saya tahu selepas produk saya dah siap printing 10 ribu kotak... itu pun sebab staff cik aisyah wasap saya. Di situ saya ada minta dia sedikit masa untuk saya tukar packaging dan label. Dan masa pun berlalu. Ketika ini jualan saya tidaklah banyak. Sebulan cuma 500 hingga 1000 kotak sahaja cik. Sy Cuma peniaga baru kecilan, saya pun tak de kedai, meniaga dari rumah dgn bantuan agen dan stokis. Produk saya tak masuk pemborong…sebab pemborong tak ambil produk yg tak popular mcm righglow…Itulah realitinya cik…produk saya cuma 500-1000 kotak sahaja terjual sebulan, sekotak rm30 saya supply pada master stokis sy, untung bersih cuma rm5 selepas tolak belanja. Saya supply direct kod master stokis. Master saya ada 6 org, tapi yg aktif, cuma 3 org…sekali diorg oder minimum rm6000 termasuk mekap dan satu lagi produk supplemen richglow sunnah supplemen…itu pun 2 bulan sekali baru oder cik…tak banyak income saya cukup utk saya bayar hutang piutang dan anak2."

[24] I noted that these are not without prejudice communications; see *South Shropshire District Council v. Amos* [1986] 1 WLR 1271. From their contents, I find and hold that they are open admissions by the Defendants that they have infringed the Plaintiffs' Perfect Lady trademark. In addition, they do not also bear out their purported defence under s. 40(1)(b) of the TMA as claimed.

[25] In *Acushnet Company v. Metro Gold Manufacturing Sdn Bhd* [2006] MLJU 412, Ramli Ali J (now FCJ) held as follows:

"In order to succeed in it's application under Order 14 RHC 1980, the Plaintiff in the present case must establish its cause of action against the Defendant for trade mark infringement and that the Defendant has not raised any defence to the Plaintiff's claim or any triable issue for that matter. Once the Plaintiff succeeds in making out a prima facie case against the Defendant, the onus then shifts to the Defendant to show to this Court as to why judgment should not be entered against it.

What constitute a 'triable issue' in an application for summary judgment?

Triable issue mean issue raised by the Defendant which is fit to be tried. The Defendant must provide answers on oath which constitute evidence that they have defence which is fit to be tried. Denial in a defence does not constitute evidence, (see: Chen Heng Peng & Ors v. Intradagang Merchant Bankers (M) Bhd [1995] 3 CLJ 690).

A mere bare assertion by the Defendant would not be sufficient. The duty of the Court is quite onerous in the extreme. The Court must be vigilant and must view in prospective at the whole scenario in order to ascertain whether the Defendant has a real or what is commonly known as a bona fide defence, (see: Renofac Builder (M) Sdn. Bhd. v. Chase Perdana Bhd [2001] 5 CLJ 371)."

[26] Accordingly and based on the facts that have been adduced before me from the affidavit evidence, there are neither triable issues nor necessity for a trial. The Plaintiff has satisfactorily discharged its burden that the Defendants have infringed its Perfect Lady trademark pursuant to s. 38 (1)(b) of the TMA.

Conclusion

[27] It is for the foregoing reasons that I allowed the Application as so ordered.

Dated: 8 MARCH 2019

(LIM CHONG FONG)
Judge
High Court Kuala Lumpur

COUNSEL:

For the plaintiff - Habizan Rahman; Rahman Rohaida

For the defendants - Suzana Farikah Mohd Yusof & Nik Raihan Nik Jafar; Suzana Farikah & Co

Case(s) referred to:

Bank Negara Malaysia v. Mohd Ismail Ali Johor & Ors [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14

Fabrique Ebel Societe Anonyme v. Syarikat Perniagaan Tukang Jam City Port & Ors [1988] 1 MLJ 188

Abercrombie & Fitch & Anor v. Fashion Outlet KL Sdn Bhd & Ors [2008] 7 CLJ 413

Tohtonku Sdn Bhd v. Superace (M) Sdn Bhd [1992] 1 CLJ Rep 344

30 Maple Sdn Bhd v. Siti Safiyah binti Mohd Firdaus KLHC Civil Suit no. WA-22IP-31-05/2018

Ho Tack Sien & Ors v. Rotta Research Laboratorium SpA & Anor and Another Appeal; Registrar of Trade Marks (Intervener) [2015] 3 MLRA 611

South Shropshire District Council v. Amos [1986] 1 WLR 1271

Acushnet Company v. Metro Gold Manufacturing Sdn Bhd [2006] MLJU 412

Legislation referred to:

Trade Marks Act 1976, ss. 35, 38(1)(b), 40 (1)(b)

Rules of Court 2012, O. 14(3), (4)