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Judgment 4-9, 1964

IN THE PRIVY COUNCIL

No. 2 of 1963

ON APPEAL

FROM THE COURT OF APPEAL OF THE STATE OF SINGAPORE

B E T W E E N

WHITE HUDSON & CO. LIMITED

(Plaintiffs) Appellants

and

ASIAN ORGANISATION LIMITED

(Defendants) Respondents

RECORD OF PROCEEDINGS

Linklaters & Paines,
Barrington House,
57-59 Gresham Street,
London E.C.2.

Solicitors for the Appellants.

Coward, Chance & Co.,
St. Swithin's House,
Walbrook,
London E.C.4.

Solicitors for the Respondents.

IN THE PRIVY COUNCIL No. 2 of 1963

ON APPEAL

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(Plaintiffs) Appellants

and

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RECORD OF PROCEEDINGS

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P.14.	New Magikof	
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IN THE PRIVY COUNCIL No. 2 of 1963

ON APPEAL
FROM THE COURT OF APPEAL OF THE STATE OF SINGAPORE

B E T W E E N : -

WHITE HUDSON & CO. LIMITED (Plaintiffs) Appellants

- and -

ASIAN ORGANISATION LIMITED (Defendants) Respondents

RECORD OF PROCEEDINGS

No. 1.
WRIT OF SUMMONS
O.2.R.3.

In the High Court

No. 1.

Writ of Summons

29th December 1958

IN THE HIGH COURT OF THE COLONY OF SINGAPORE
ISLAND OF SINGAPORE

Suit No. 1679 of 1958)

BETWEEN

WHITE HUDSON & CO. LTD.
.. Plaintiffs

AND

ASIAN ORGANISATION LTD
.. Defendants

ELIZABETH II, by the Grace of God of the United Kingdom of Great Britain and Northern Ireland and of Her Other Realms and Territories, Queen, Head of the Commonwealth, Defender of the Faith

To: Asian Organisation Ltd.,
26-B South Canal Road,
Singapore 1.

We Command you that within eight days after service of this Writ on you, inclusive of the day of such service, you do cause an appearance to be entered for you in a cause at the suit of White

In the High Court

No. 1.

Writ of Summons

29th December, 1958.

(continued)

Hudson & Co. Ltd. a Company incorporated under the laws of the United Kingdom of Globe Works, Shakespeare Street, Southport, Lancashire, England having limited liability and carrying on business as sweet manufacturers, and take notice, that in default of your so doing, the Plaintiffs may proceed therein to judgment and execution.

Witness The Honourable Sir John Whyatt Knight, Chief Justice of the Colony of Singapore, the 29th day of December, 1958.

Sgd. Donaldson & Burkinshaw
Solicitors for the Plaintiffs.

N.B. - This Writ is to be served within twelve months from the date thereof, or if renewed, within six months from the date of such renewal, including the day of such date and not afterwards.

The Defendant (or Defendants) may appear hereto by entering an appearance (or appearances) either personally or by Solicitor, at the Registry of the Supreme Court at Singapore.

A Defendant appearing personally may, if he desires, enter his appearance by post, and the appropriate forms may be obtained by sending a Postal Order $5.50 with an addressed envelope to the Registrar of the Supreme Court at Singapore.

The Plaintiffs claim is for :-

1. An injunction to restrain the Defendants (whether by themselves their servants and agents or any of them or otherwise) from passing off or attempting to pass off and from enabling others to pass of medicated sweets not of the manufacture of the Plaintiffs as and for the goods of the Plaintiffs

by selling offering for sale or in any manner dealing in medicated sweets of a similar size, shape and colour as those of the Plaintiffs in orange coloured wrappers got up in a manner similar to those in use by the Plaintiffs and invented and used by the Plaintiffs or wrappers merely colourably differing therefrom or in any other way.

In the High Court

No. 1.

Writ of Summons

29th December, 1958.

(continued)

2. Delivery up for destruction of all medicated sweets and wrappers in the possession or under the control of the Defendants got up in a manner similar to those in use by the Plaintiffs and invented by the Plaintiffs or wrappers merely colourably differing therefrom.

3. Damages or an account of profits

4. Costs

5. Further or other relief.

THIS WRIT was issued by DONALDSON & BURKINSHAW, of No. 9, Mercantile Bank Chambers, Singapore, Solicitors for the said Plaintiffs.

No. 2.

No. 2.

MOTION PAPER FOR INJUNCTION

Motion Paper for injunction

12th January, 1959.

MR. CHARLES LINDSEY DUFF of Counsel for the above named Plaintiffs moves for an order restraining the Defendants (whether by themselves their servants and agents or any of them or otherwise) from passing off or attempting to pass off and from enabling others to pass off medicated sweets not of the manufacture of the Plaintiffs as and for the goods of the Plaintiffs by selling offering for sale or in any manner dealing in medicated sweets the same size, shape and colour as those of the Plaintiffs in orange coloured wrappers got up in a manner similar to

In the High Court

No. 2.

Motion Paper for injunction

12th January, 1959.

(continued)

those in use by the Plaintiffs and invented and used by the Plaintiffs or wrappers merely colourably differing therefrom and in particular medicated sweets of the type which up to the date hereof have been sold by the Defendants in tins bearing the words "RED BAND" and purporting PECTO to be manufactured by the Redband Confectionery Works or in any other way pending the trial of this action and for costs. 10

Dated this 12th day of January, 1959.

Sgd. Donaldson & Burkinshaw.

Solicitors for the above named Plaintiffs.

No. 3.

Affidavit of K.A. Ahamed Maideen in support of Motion

12th January, 1959.

No. 3.

AFFIDAVIT OF K.A. AHAMED MAIDEEN IN SUPPORT OF MOTION

I, K.A. Ahamed Maideen, Manager of Messrs. Barkath Stores Ltd., of 27, Tanglin Road, Singapore affirm and say as follows:- 20

1. I have been fully authorised by the Plaintiffs in this matter to make this Affidavit on their behalf.

2. My Company are the agents and sole distributors in Singapore and Malaya of the Plaintiffs herein.

3. We import from the Plaintiffs Hack's Medicated Sweets.

4. My Company first imported the Hack's Medicated Sweets into Singapore in or about the month of August 1953 and we have imported them continuously thereafter. 30

5. The medicated sweets of the Plaintiffs are sold by us in Tins but never loosely and I crave leave at the hearing of this motion to refer to the said tins one of which is exhibited hereto and marked "A".

6. In August to December, 1953, we imported

for sale in Singapore 4,000 Tins of Hack's medicated sweets and the total wholesale price obtained from the sale was $24,000/-. Since 1954 up to the date hereof the sales of the Hack's medicated sweets has steadily increased and the particulars of sales and turnover for this period is as follows:-

Year	Quantity	Price
1954 Jan to Dec.	12,000 Tins	$73,200.00
1955 " " "	16,000 "	98,400.00
1956 " " "	20,400 "	124,440.00
1957 " " "	25,600 "	156,160.00
1958 " " "	26,100 "	159,210.00

7. The demand for these particular medicated sweets is very considerable in Singapore and Malaya and in fact we supply approximately 5,000 shops and stores in Singapore with the said medicated sweets.

8. The Hack's Medicated Sweets are however to my own knowledge information and belief taken out of the tins by the retail shops and stalls and sold loosely by the pound or for small amounts.

9. We have done extensive advertising in connection with the said medicated sweets and spend approximately not less than $10,000/- per year on advertising.

10. The sweets have always been sold in a wrapper a copy of which is exhibited hereto and marked "B".

11. The Defendants herein have since the popularity acquired by the Plaintiffs in their medicated sweets distributed in Singapore an imitation which is manufactured, I believe in Holland.

12. I exhibit hereto and mark "C" a copy of the wrapper around the sweets as used by the Defendants herein. A tin of the sweets sold by the Defendants is exhibited hereto and marked "D".

13. The sweets imported and sold by the Defendants are also taken out of the tins by the retail shops and stalls and sold loosely by the pound or for small amounts.

14. On the 15th day of October, 1958 I instructed my employee Karappa Mohamed Abdulla Abdul Wahid to visit as many retail shops as possible dealing in

In the High Court

No. 3.

Affidavit of K.A. Ahamed Maideen in support of Motion

12th January, 1959.

(continued)

sweets and to particularly ask for "HACK'S" sweets and to purchase a pound or half pound of the sweets being sold loosely by the retail shops and if possible to obtain receipts for the purchases. I crave leave to refer at the hearing of this Motion to the Affidavit made by the said Karappa Mohamed Abdulla Abdul Wahid and to the various documents and articles attached or exhibited thereto.

15. On behalf of the Plaintiffs I hereby undertake that should the Plaintiffs fail in this action for any reason whatever the Plaintiffs will pay to the Defendants all damage that may be suffered by the Defendants as a result of the interim injunction which is the subject of this application.

Affirmed at Singapore this 12th day of January, 1959.) Sgd: K.A. Ahamed Maideen

Before me,

Sg. M.V. Rajaram
A Commissioner for Oaths.

No. 4.

Affidavit of Karappa Mohamed Abdulla Abdul Wahid

12th January, 1959.

No. 4.

AFFIDAVIT OF KARAPPA MOHAMED ABDULLA ABDUL WAHID

I, KARAPPA MOHAMED ABDULLA ABDUL WAHID of 27 Tanglin Road, Singapore, affirm and say as follows:-

1. I am a Salesman employed by Messrs. Barkath Stores Ltd., of 27 Tanglin Road, Singapore.

2. On or about the 15th day of October, 1958 I was instructed by my employer to visit as many retail sweet shops as possible to purchase a pound or half pound of Hack's sweets. I was also instructed to obtain receipts from the various shops I visited for the amount paid by me for the medicated sweets if this was possible.

3. On or about the 15th day of October, 1958, I visited Messrs. Lian Tong & Co. of 137 New

Bridge Road, Singapore, Thong Soon & Co. of 81 Rochore Road, Singapore, and Hock Eng & Co. of 151 New Bridge Road, Singapore. All these shops were offering for sale various types of sweets contained in large glass jars. On entering the shops in question I asked for one pound, half pound and one pound respectively of Hacks sweets and the parcels now produced and marked "A", "B" and "C" respectively are the parcels of sweets in fact handed to me. The documents now produced and marked "D", "E" and "F" respectively are the receipts issued to me by the said firm in respect of the purchases.

4. On or about the 16th day of October, 1958 I visited Messrs. Shop Meng Heng of 51, Rochore Road, Hock Lam & Co. of 143 New Bridge Road and Tong Bee Company of 57 Rochore Road, and in each shop purchased a half pound of Hack's sweets at the price of 60 to 65 cents for a half-pound. In all these shops the sweets were placed in large glass containers. The parcels now produced and marked "G", "H" and "I" respectively are the parcels of sweets in fact handed to me. The salesman in each shop however would give me no receipt for the purchase.

Affirmed at Singapore this 12th day of January, 1959 through the interpretation of M.V. Rajaram a Sworn Interpreter of the Court) Sd. KMA. Abdul Wahid.

Before me,

Sg. M.V. Rajaram
A Commissioner for Oaths.

No. 5.

STATEMENT OF CLAIM

1. The Plaintiffs have for more than eight years sold through their Agents in Singapore medicated sweets under the registered trade mark "HACK'S" and which are wrapped in orange coloured wrappers and are of a particular size, oval shape and black in colour. The said medi-

In the High Court

No. 5.

Statement of Claim

13th January, 1959.

(continued)

cated sweets have through extensive advertising and sales become well known to the trade and public and recognised by the public by the particular size, shape, colouring and orange coloured wrapper. No other medicated sweets wrapped in orange coloured wrapper and of the particular size, shape and colouring are known to be sold in Singapore.

2. The Defendants are importers and merchants and are importing and distributing in Singapore medicated sweets purporting to be manufactured by the Redband Confectionery Works of Holland.

3. The Defendants have wrongfully distributed and sold and are distributing and selling medicated sweets not of the Plaintiff's manufacture which have been passed off and which are being passed off as and for the Plaintiffs medicated sweets. They sell and pass off these medicated sweets wrapped in orange coloured wrappers and of the same size, shape and colouring as the Plaintiffs medicated sweets and thus mislead the public into the belief that they are the Plaintiffs medicated sweets, and thereby cause injury both to the public and to the plaintiffs.

4. Particulars of such wrongful sale and passing off are as follows:-

Hereunder the Plaintiffs will rely upon sales made by the following firms on the 15th and 16th day of October, 1958 of medicated sweets wrapped in orange coloured wrappers and of the same size shape and colouring as the Plaintiffs medicated sweets such medicated sweets not being the Plaintiffs medicated sweets:

(a) Messrs. Lian Tong & Co. of 137 New Bridge Road, Singapore.

(b) Thong Soon & Co. of 81, Rochore Road, Singapore.

(c) Hock Eng & Co. of 151, New Bridge Road, Singapore.

(d) Chop Meng Heng of 51, Rochore Road, Singapore.

(e) Hock Lam & Co. of 143, New Bridge Road, Singapore.

(f) Tong Bee Company of 57, Rochore Road, Singapore.

All these firms on being requested for the Plaintiffs "Hack's" medicated sweets supplied the purchaser with the medicated sweets not of the Plaintiffs' manufacture mixed with the medicated sweets manufactured by the Plaintiffs and sold under the registered trade mark "Hack's".

The Plaintiffs are unable until after discovery to give particulars of all the instances of passing off committed by the Defendants but will seek to recover in respect of each of the same.

5. The Defendants intend to continue to sell the medicated sweets wrapped in orange coloured wrappers and of the same size shape and colouring as the Plaintiffs medicated sweets which are not in fact the Plaintiffs medicated sweets and to pass off as medicated sweets manufactured by the Plaintiffs medicated sweets which are not in fact manufactured by them.

And the Plaintiffs claim:-

1. An injunction to restrain the Defendants (whether by themselves their servants and agents or any of them or otherwise) from passing off or attempting to pass off and from enabling others to pass off medicated sweets not of the manufacture of the Plaintiffs as an for the goods of the Plaintiffs.

2. Delivery up for destruction of all medicated sweets wrapped up in orange coloured wrappers and of the same size, shape and colour as the Plaintiffs medicated sweets.

3. Damages or in the alternative an account of profits and payment of the amount shown to be due to the Plaintiffs on the taking of such account.

4. Costs.

5. Further or other relief.

Dated and Delivered this 13th day of January, 1959.

Sgd. Donaldson & Burkinshaw.
Solicitors for the Plaintiffs.

In the High Court

No. 6.

Affidavit of S. Kanagasabai in Opposition to Motion.

29th January, 1959.

No. 6.

AFFIDAVIT OF S. KANAGASABAI IN OPPOSITION TO MOTION

I, S. KANAGASABAI of No. 5 Kingswear Avenue, Singapore, 19 make oath and say as follows:-

1. I am a clerk employed by Messrs. Hilborne & Co. Advocates and Solicitors of No. 9 Malacca Street, Singapore.

2. On the morning of the 29th January 1959 I was instructed by Mr. Hilborne to accompany Mr. Ng Eng Hua to various provision shops in Singapore, and to ask for Hacks Cough Sweets. I was also instructed to make a note of what happened after I had given my order for the sweets.

3. Accordingly Mr. Ng Eng Hua and myself went to the undermentioned shops and in each of them I asked for Hacks Cough Sweets by name. Mr. Ng Eng Hua did not ask for the sweets, nor did he do anything except accompany me into each shop.

4. We went to Messrs. M.S. Ally & Co. of Raffles Place and in response to my request I was given a ¼ pound of Hacks Cough Sweets which were put in a bag. I was also given a bill in respect of the sweets. All these sweets were Hacks Cough Sweets, and the paper bag produced and marked "A" is the one containing the said sweets, and the paper writing annexed hereto and marked "A-1" is the said receipt.

5. We then went to Messrs. Naina Mohamed & Co. of Raffles Place, and I there asked for ¼ pound of Hacks Cough Sweets. The first shop assistant did not know what I meant, but the second assistant stated that they did not sell Hacks Cough Sweets.

6. We then went to the confectionery department of Robinsons of Raffles Place, and I made the same request. The sales girl informed me that they did not have any Hacks Cough Sweets.

7. We then went to Messrs. Swee Soon & Co. of No. 17 Lorong Telok, Singapore, who did not sell the said Hacks Cough Sweets.

8. We then went to Messrs. Hiap Hoe & Co.

of No. 5 Havelock Road and they also did not sell the said Hacks Cough Sweets.

9. We then went to Messrs. Bian Tong & Co. of No. 137 New Bridge Road, and I asked for Hacks Cough Sweets, but the sales assistant said that they had no Hacks, but pointed to a glass jar and informed us that he sold the sweets in that jar which were as good as Hacks. I noticed that the cough sweets in the jar were Pecto Cough Sweets. I did not purchase any.

10. We then went to Hup Seng of No. 145 New Bridge Road and asked for ½ pound of Hacks Cough Sweets, and they sold them to us, and the paper bag produced and marked "B" is the one containing the said sweets, and we have a receipt annexed hereto and marked "B-1".

11. We then went to Hock Eng & Co. of 151 New Bridge Road. Before I gave my order I noticed that there were two tins in the shop side by side, one of which was a coloured tin advertising Pecto Cough Sweets, and the other was a coloured tin advertising Hacks Cough Sweets. There is no similarity between the two tins at all. I asked for ½ pound of Hacks Cough Sweets and the shop assistant opened the Hacks Tin and gave me half a pound of the sweets. The paper bag produced and marked "C" is the one containing the said sweets, and the paper writing annexed hereto and marked "C.1" is the said receipt.

12. We then went to Hock Lam & Co. of No. 141-143 New Bridge Road, Singapore and asked for ½ lb. Hacks Cough Sweets and I bought the sweets. The paper bag produced and marked "D" is the one containing the said sweets, and the paper writing annexed hereto and marked "D-1" is the said receipt.

13. We then went to Messrs. Kian Hoe Trading Co. of No. 75 Rochore Road, Singapore, I asked for ½ lb. Hacks Cough Sweets and he gave me ½ lb. of Hacks Cough Sweets. The paper bag produced and marked "E" is the one containing the said sweets, and the paper writing annexed hereto and marked "E.1" is the said receipt.

SWORN to at Singapore this)
29th day of January, 1959) Sd. S. Kanagasabai

Before me,
Sd. M.V. Rajaram.
Commissioner for Oaths & etc.

In the High Court

No.7.

Affidavit of Ng Eng Hua in opposition to Motion.

30th January, 1959.

No. 7.

AFFIDAVIT OF NG ENG HUA IN OPPOSITION TO MOTION

I, NG ENG HUA of 198 Prince Philip Avenue, Singapore make oath and say as follows:-

1. I am a Director of Asian Organisation Ltd. the Defendants in these proceedings.

2. I have read the Affidavit of S. Kanagasabai sworn and filed herein on the 29th day of January 1959, and the contents of that Affidavit are true.

3. After purchasing the Hacks Cough Sweets referred to in that Affidavit I returned to my Solicitors' Office, and I then accompanied Mr. K. E. Hilborne to the Office of Messrs. Donaldson & Burkinshaw, where in the presence of Mr. C.L. Duff of that firm, my Solicitor and I examined the exhibits marked "A", "B", "C", "G", "H" and "I" referred to in the Affidavit of Karappa Mohamed Abdulla Abdul Wahid sworn and filed herein on the 12th day of January 1959. The exhibits comprised of parcels which on being opened and the contents being examined were found to contain in every case a mixture of Hacks Cough Sweets and Pecto Cough Sweets. Having carried out this examination, the parcels were tied up again, and my Solicitor and I left Messrs. Donaldson & Burkinshaw's Office.

Sworn to at Singapore this)
30th day of January 1959) Sgd. Ng Eng Hua

Before me,
Sd. Low Hock Kiat
A Commissioner for Oaths, Singapore.

No. 8.

DEFENCE

No. 8. Defence

4th February 1959

1. The Defendants admit that the Plaintiffs have sold their "HACK" medicated sweets in Singapore for more than eight years. They do not admit that they have become well known to the trade or public or that they are recognised by in public by any particular size, shape, colouring or orange coloured paper. They do not admit that no other medicated sweet in orange coloured wrapper and of the particular size, shape or colouring is sold in Singapore. The Defendants require strict

proof of those allegations in paragraph 1 of the Statement of Claim which are not admitted to be true.

2. The Defendants admit paragraph 2 of the Statement of Claim.

3. Each and every allegation against the Defendants in paragraph 3 is denied and in particular the Defendants say that they have never passed off or attempted to pass off any medicated sweets or any sweets as those manufactured by the Plaintiffs and known as "HACKS". None of the particulars given in paragraph 4 are admitted and the Defendants put the Plaintiffs to strict proof thereof.

4. Part of paragraph 5 of the Statement of Claim is admitted, that is to say that the Defendants intend to continue to sell the medicated sweets imported into Singapore by them but in doing so they deny that they will be passing them off as the medicated sweets of the Plaintiffs.

5. The Defendants say that the Plaintiffs are not entitled to any of the reliefs prayed for in their Statement of Claim.

Dated and Delivered this 4th day of February, 1959.

Sgd. Hilborne & Co.
SOLICITORS for the abovenamed Defendants.

To:-

The abovenamed Plaintiffs and to their Solicitors, Messrs. Donaldson & Burkinshaw, Singapore.

In the High Court.

No. 8.

Defence

4th February, 1959.

(continued)

No. 9.

No. 9.

COURT NOTES OF OPENING OF TRIAL

Coram: Tan Ah Tah, J. 19th July, 1960

Duff for Plaintiffs
Hilborne for Defendants

Court Notes of opening of trial

19th July, 1960.

In the High Court

No. 9.

Court Notes of opening of trial.

19th July, 1960.

(continued)

Duff: Kerly on Trade Marks 7th Ed. p. 508, 520.

"2. Imitations of Trade Name, Get-up, etc." Plaintiffs' get-up has become distinctive and Defendants are using a similar get-up in a manner calculated to deceive. p.577 Proof of deception. Instances of actual deception need not be proved. p. 616 "What persons are to be considered." Plaintiffs are not alleging that retail dealers have been deceived. Retail dealers buy the sweets in large tins which are clearly distinguishable. But the ultimate purchasers - the public - never see the tins. All they see are sweets in a bottle. There is one important difference between the 2 kinds of sweets i.e. the name "Hacks" on Plaintiffs' wrappers and the name "Pecto" on Defendants' wrappers. I am not suggesting these names can be mistaken for each other. But I submit that in spite of that deception can occur.

Lever v Goodwin (1887) 36 Ch. D.1

Johnston & Co. v Orr Ewing & Co. (1882) 7 App. Cas. 219 at 225

William Edge & Sons Ltd. v Niccolls & Sons Ltd. (1911) A.C.693 at p.704, 709.

This case shows that the mere fact of using a name is not conclusive.

Iron Ox Remedy v. Cooperative Wholesale Society Ltd. (1907) 24 R.P.C.425

- No instance of actual deception need be proved - probability of deception is sufficient - p.433.

No.10.

No. 10.

Plaintiffs Evidence

K.A.Ahamed Maideen

(Examination)

19th July 1960

EVIDENCE OF K.A. AHAMED MAIDEEN

Duff calls :-

P.W.1. K.A. Ahamed Maideen a.s. in Tamil
27 Tanglin Road. Manager of Barkath Stores of the same address. We are wholesale and retail dealers in provisions and

sweets.

We deal in cough sweets. We are selling only Hack Sweets. We have been selling these sweets since 1953. We sell them in cases of 20 tins each, or by the tin, or in loose form either by weight in pounds or by the number required. Sometimes customers will buy 6 sweets. We sell to wholesale dealers, retail dealers such as cigarette stalls and members of the public.

Retailers sell the sweets at 2 for 5 cents or 4 for 10 cents. Retailers keep the sweets in glass jars or bottles after taking them out of the tins. They are kept loosely in the jars.

To my knowledge, there was no other cough sweet sold in loose form between 1953 and 1958.

Today 3 other brands are being sold -

Pecto sweets, Dance sweets, Magikof sweets.

The first time I saw Pecto sweets on the market was in September 1958.

The first time I saw Dance sweets was in January or February 1960.

The first time I saw Magikofs was in March 1959.

I produce a sample each of these 4 kinds of sweets. (Hacks sweet marked P1, Pecto sweet P2, Dance sweet P3, Magikof sweet P4).

The Magikofs sweet has a yellow wrapper. The original colour - when it first appeared - was yellow.

Recently the Magikofs have been wrapped in a red wrapper. By recently I mean from June this year.

From 1953 to 1959 we sold Hacks sweets to the following amounts:-

1953	$24,000.
1954	$73,200.
1955	$98,400.
1956	$124,440.
1957	$156,160.
1958	$159,210.
1959	$240,030.

In the High Court

No.10.

Plaintiffs Evidence K.A. Ahamed Maideen (Examination) dated 19th July, 1960.

(continued)

(Cross Examination)

In 1959 we spent $9,185-99 on advertisements in newspapers, through Rediffusion, cinema slides, short films in cinemas, free distribution of sweets 2 each for everyone going into a cinema, posters on vans belonging to dealers which travel through the streets of Singapore.

XXd by Hilborne

I have seen retail dealers selling Hacks sweets to customers. During my leisure hours I have gone to retailers' premises and seen them sell the sweets. I have visited the retailers since 1953. They invariably sell the sweets from glass jars. I have not seen them sell the sweets in any other manner. There are about 2,000 retail dealers in Singapore. I have visited about 1,500 retail dealers in Singapore. Not one of them sell the sweets in any container except glass jars.

We sell the sweets by retail either in pounds or 10 or 20 at a time. We keep the sweets in glass jars and sell them to the public. We have never sold them from the manufacturers' tins. We usually transfer the sweets from the tins to a jar so that the public can see the sweets. Each empty tin is sold for 15 or 20 cents.

Some other sweets could be kept and sold from Hacks tins. We keep all kinds of ordinary sweets in jars for sale to the public. These ordinary sweets come from Europe. They come in tins of various colours.

Magikofs are imported by Guthrie & Co. They are made by Horner. Last month they changed their wrappers from yellow to red.

(Shown Magikofs sweet) This is the red wrapper. (Magikofs sweet labelled P4A).

We have not taken legal action so far against Guthries. But we informed Plaintiff Co. about it a week ago.

A Chinese in Kuala Lumpur manufactures Dance sweets. We took legal action against him 4 months ago in Kuala Lumpur.

I don't know of any other make of cough sweet.

(Shown Thye Hong sweet) These are not being

sold as cough sweets. The wrapper is slightly different in colour. The shape is also different. (Thye Hong sweet labelled D1).

Retailers sell all other types of sweets in bottles and so they sell Hacks sweets in bottles.

(Shown Pascall sweet) We sell these in half pound jars (Pascall sweet labelled D2).

Boiled sweets are manufactured in different colours representing different flavours. They are in various shapes and wrapped up in various forms.

(Shown Welch's sweet) This is another brand sold in Singapore (Welch's sweet labelled D3). This is a boiled sweet similar to the Pascall sweet.

(Shown Pascall and Welch's sweet both in orange coloured wrapper) These sweets are also being sold in Singapore. They are also boiled sweets. (Pascall orange-coloured sweet labelled D4. Welch's orange-coloured sweet labelled D5).

I have heard of Fox glacier mints.

(Shown Blue Bird mint) This is being sold in Singapore. (Blue Bird mint labelled D6).

(Shown Thye Hong mint) This is sold in Singapore. (Thye Hong mint D7).

(Shown Horner's mint) This is sold in Singapore. (Horner's mint labelled D8).

I agree that all 3 mints are white and opaque - all wrapped in colourless wrappers with blue ends, with slight differences.

There is no difference between Hacks and Pectos except the name.

(Shown 2 labels) I agree that the Pecto wrapper is slightly darker.

(Shown Smarties box of sweets) These are sold in Singapore (Smarties box labelled D9).

(Shown Orion chocolate pebbles box) These

In the High Court

No.10.

Plaintiffs Evidence K.A.Ahamed Maideen (Cross Examination) dated 19th July, 1960.

(continued)

are sold in Singapore (Box labelled D10).

I sell tomato ketchup. There are various brands. They are sold in bottles but the bottles are of different sizes and shapes.

We expected better sales in 1959. Because of competition we sold fewer sweets. We expected to sell $300,000 worth of sweets in 1959. We have sold about $130,000 worth during the first 6 months of 1960.

(Para. 5 of witness' affidavit affirmed on 12/1/59 explained to him) It is a mistake to say that we never sold the sweets loosely. Instead of "by" the word should be "to".

My complaint is about Pectos' wrapper. If they change their wrapper we will sell more Hacks sweets. From 1953 to 1958 only Hacks sweets were sold in Singapore. Pectos have copied our wrapper.

I agree the ingredients are the same. I have no complaint about the colour of the sweet itself.

To those who can read English the words will appear different.

The retailers keep both types in one bottle. When they are asked for Hacks they supply both types to the customers. Some retailers do this - not all of them. I have told them not to keep the sweets in the same bottles. They don't keep them separately.

Adjourned to 2.30 p.m.

K.A. Ahamed Maideen

XXd by Hilborne

The whole object of advertising was to publicise the name Hacks. Sometimes customers ask for Hacks by name.

None of the retailers put a label with the name Hacks on the jars. It would be better for them to do so but they would not agree to it. They said if there was a label on the jars the public would not be able to see the sweets clearly.

They also said if we wanted them to do it we should supply them with the jars.

I have told Plaintiff co. that the retailers have not been selling the sweets out of the tins. I have not seen retailers selling the sweets out of the tins.

Re-Xd by Duff

If illiterate customers come to buy sweets they would ask for red paper cough sweets.

(With leave of the court, Hilborne not objecting)

When Pecto sweets first came on the market they were wrapped in white cellophane paper. In September 1958 they changed to the red wrapper. Prior to that they had been on the market for 5 or 6 months.

Sgd. Tan Ah Tah.

No. 11.

EVIDENCE OF ROSITA MARIE HOGAN

P.W. 2 Rosita Marie Hogan Sworn states in English

7 Roseburn Avenue, Stenographer employed by Donaldson & Burkinshaw.

I bought various brands of cough sweets on 14/7/60 from Naina Mohamed of Raffles Place. I produce them. These were the only cough sweets sold by that firm. I had asked the salesman for all the various brands of cough sweets. The firm is a very large store. The sweets were all in these tins when they were handed to me. (nine tins produced, put in and labelled P5).

I left the firm and went to A. Naina Mohamed & Co. of Chulia Street. There I bought a bottle of Hacks cough sweets. The man said he did not sell any other cough sweets. I produced the bottle of sweets (put in and labelled P6).

In the High Court

No.11.

Plaintiffs Evidence
Rosita Marie Hogan

(Examination)

19th July, 1960.
(continued)

(Cross Examination)

I have heard of Dance cough sweets. Messrs. Donaldson & Burkinshaw have received instructions from Potts & Co. of England to commence legal proceedings against a firm in Kuala Lumpur who are known to be the distributors of Dance sweets.

XXd by Hilborne

Potts & Co. act for Plaintiff Co.

I don't normally buy cough sweets.

(Shown Pecto bottle) I have never seen this kind of bottle (Pecto bottle labelled D11).

I have seen a Hacks bottle of sweets. I had heard of Hacks when the trade marke was registered. I don't think I had heard of Hacks before that.

No. re-Xn

No.12.

No. 12.

EVIDENCE OF TAY YEW JOON.

Plaintiffs Evidence
Tay Yew Joon

(Examination)

19th July, 1960.

P.W. 3 Tay Yew Joon Sworn states in Hockchiu

401 Changi Road. 5½ mile. Dealer in all kinds of sweets. My shop is at the same address.

I sell Hacks cough sweets. I first started to sell them in or about 1954. At first the sales were not so good but for the past 2 years the sales have been good.

Between 1954 and 1958 I sold the sweets in tins and in loose form. I took them round in Hacks tins to the shops. I am a wholesaler.

Recently I heard of Pecto sweets. I heard of them in 1958. If a new sweet came on the market I am likely to hear of it. I have heard of a sweet Magikofs. They came on the market in 1959. When they first came out the wrapper was coloured yellow.

I have been in the sweet business for 8 or 9 years.

Hacks sweets are well known to the retailers who are my customers. They ask for them. I supply about 100 retailers.

I have heard of Dance sweets but have not seen them. I first heard of them at the beginning of this year.

(Cross-Examination)

XXd by Hilborne

Most of my retailers are Chinese - they don't read English - they ask for red paper cough sweet. I don't speak English myself. I speak to my retailers in Chinese or Malay. In Malay they would call it "Merah Kretas Punya Hacks" (Red paper Hacks).

I deliver the sweets in my van. I see the retailers selling the sweets. They put the sweets in glass jars. I have looked into the jars. They contained Hacks sweets.

Very few of them sell the sweets out of the tin. The majority of them sell the sweets out of the jars.

No. re-Xn.

Sgd. Tan Ah Tah

No. 13.

EVIDENCE OF CHOO KOK CHENG

P.W.4 Choo Kok Cheng affirmed states in Hokien

49 Rochore Road. Dealer in sweets. I am a retailer.

I heard of Hacks cough sweets a long time ago. I sell them. I first started to sell them in 1954. I sold them in quantities of one pound or several tens of cents. I put them in glass jars. The jars are not labelled. Many of my customers cannot speak English. They ask for "red paper cough sweets". Some of them ask for cough

In the High Court

No.13.

Plaintiffs Evidence

Choo Kok Cheng

(Examination)

19th July, 1960 (continued)

sweets and when they get the wrong kind they would come and create a row.

In 1954 no other brand of cough sweet was sold in Singapore.

I came to know of Pecto sweets when a customer bought them from some other dealer and came to complain to us saying that he had been given the wrong sweets. He had been given Pecto sweets. He said we had given a false kind of sweet. He wanted "red paper cough sweet". By that I understood he wanted "Hacks cough sweets old man brand".

Everyone of my customers refers to Hacks sweets as red paper cough sweets. Those who know English ask for "Hacks". Those who don't know English ask for red paper cough sweets.

About 25 customers ask for red paper cough sweets per day.

I have heard of Magikof cough sweets. I first heard of them last year. The wrapper was of a different colour.

I have heard of Dance cough sweets. I first heard of them in January this year.

Except for Hacks, Pecto, Dance and Magikofs I have not heard of other cough sweets having been sold in loose form in jars between 1958 and the present moment.

Before February 1958 there were more customers - about 30 per day - who asked for red paper cough sweets.

(Cross-Examination)

XXd by Hilborne

I have seen Hacks advertised in the cinema. The slide would have the name and would show the Hacks tin and would also show a pile of sweets wrapped in red paper beside the tin. There was no commentary.

I have not heard Hacks sweets advertised on Rediffusion.

Some vans carry the advertisement. This would show the tin and sweets wrapped in red paper beside the tin.

(Show tin) This is the Hacks tin (Tin labelled D12).

I sell other kinds of sweets.

I sell glacier mints, boiled sweets.

Many customers complained they had been given the wrong sweets. They asked ignorant children to buy the sweets and these children had been given a false kind of sweets. Their parents came to complain. I had not sold the false kind. The neighbouring shop had sold them. The parents thought I had sold them. On an average this happened 3 or 4 times per week. The complaint was that the sweets were different, were false and not genuine. They said they had tasted Hacks sweets and that the false kind had a different taste which was not so good. They all said that. I can tell the difference between Hacks and other kinds of sweets.

No re-Xn.

Signed. Tan Ah Tah.

No. 14.

EVIDENCE OF GAN KIAN HEOK.

P.W. 5 Gan Kian Heok affirmed states in Hokkien

303 Tanjong Pagar Road, Dealer in sweets and other things. I am a retailer.

I have heard of Hacks cough sweets. I sell them. I started to sell them in 1954. Sometimes I sell them in quantities of half a pound, sometimes 5 or 10 cents. I keep them in this kind of jar (indicating P6).

Between 1954 and 1958 only one other kind was sold. That was the Pecto sweet. I first heard of it in 1958.

Those who know English ask for Hacks and those who don't know English - and most of them are Chinese - ask for red paper cough sweets because they are wrapped in red paper. Very few of my customers know English. Most of them are Chinese-speaking.

In the High Court

No.14.

Plaintiffs Evidence
Gan Kian Heok

(Examination)
19th July,1960
(continued)

Prior to 1958 we sold the equivalent of one tin per day. I don't know how many customers that would represent - it is a long time ago - more than 5. I cannot remember if it was more than 10. There were between 30 and 40 customers per day.

I have never heard of Magikofs or Dance sweets.

I have been in the sweet business for 11 or 12 years.

XXn No questions.

Sgd. Tan Ah Tah.

No.15.
Plaintiffs Evidence
S.M.Abdul Ahad

(Examination)

19th July, 1960.

No. 15.

EVIDENCE OF S.M. ABDUL AHAD

P.W. 6 S.M.Abdul Ahad affirmed states in English

86, Robinson Road. Sole proprietor of provision shop at same address.

I sell Hacks, Lakerol and many other kinds of cough sweets. I have sold Hacks for 4 or 5 years. I usually keep the sweets in jars like P6. I am a retailer.

I only keep Hacks sweets in jars.

I don't sell any other cough sweets loose in jars. I have been in the sweet business for 10 years.

I have heard of Pecto sweets. I first heard of them 2 years ago.

I have not come across Magikofs. I have seen Dance sweets in other shops. I don't sell them. I first saw them about a month ago.

Before 1958 30 or 40 persons bought Hacks sweets per day at my shop. Some customers point to the jar. Some ask for Hacks by name. Some ask by a Chinese name, - but this does not contain the word "Hacks". Most of my customers

point to the jar without mentioning the word "Hacks". Some of them who point to the jar use the Chinese name.

XXn. No questions.

Sgd. Tan Ah Tah

Adjourned to a date to be fixed by the Registrar

Sgd. Tan Ah Tah

In the High Court

No. 15.
Plaintiffs Evidence
S.M.Abdul Ahad
(Examination)
19th July,1960
(continued)

No. 16.

EVIDENCE OF GAN CHIN CHOO

No.16.
Plaintiffs Evidence
Gan Chin Choo
(Examination)
30th August, 1960.

Suit No. 1679 of 1958 Pt. Heard Cor: Tan Ah Tah,J.
30th August 1960

White Hudson & Co. Ltd .. Plaintiffs

v.

Asian Organisation Ltd .. Defendants

Counsel as before

P.W. 7 Gan Chin Choo a.s. in Hokkien

137 New Bridge Road. I am a shop assistant in Chop Lain Tong, a confectionery business at the same address. I have been working in this firm for more than 7 years. We sell Hacks cough sweets. We have been selling these sweets between 5 and 6 years. They are put in glass bottles and sold. Non-English speaking customers call them red paper cough sweets.

I have heard of Pecto cough sweets. These have been on the market for between 2 and 3 years. The wrappers are now red. Originally the wrappers were white. They changed from white to red in 1958 - after September 1958.

In 1958 between 30 and 40 customers came to buy Hacks sweets per day.

XXd by Hilborne

(Cross Examination)

My shop used to sell Pecto sweets wrapped

In the High Court

No.16.

Plaintiffs Evidence
Gan Chin Choo

(Cross Examination)

30th August, 1960

(continued)

in white paper but not in red. We don't sell them now. I have business connections with other business men - I used to visit them - they sold Pecto sweets - that is how I came to know the change from white to red took place in September 1958. Apart from this some of my customers brought Pecto sweets intending to change them into Hacks. We did not effect the exchange. These were customers who used to buy Hacks sweets from us - they bought Pecto sweets from other shops - they brought these sweets to our shop to exchange for Hacks sweets. I thought this was strange. This has not happened in respect of other sweets.

Between 20 and 30 customers made this request to exchange the sweets. None of them had bought Pecto sweets from us because we did not sell them. They were our regular customers.

Some of them brought a few sweets, some brought 1 lb. for exchange. They were in paper packets. Some of them were mixed - both Pecto and Hacks. They wanted to exchange Pecto for Hacks. Some of them said it was difficult to sell Pecto sweets. These persons were retailers. Twelve or 13 of them were retailers. They brought both the Hacks and Pectos because they were mixed together.

Besides the 12 or 13 retailers the others were members of the public. They said the Pecto sweets did not taste so good. I can tell the difference. I have tasted both. We are in the sweet business; if you taste them carefully you will find out the difference. I can tell the difference without tasting the sweets if the wrappers are taken off. There is no difference in the colour - the ingredients are different.

The 12 or 13 retailers bought the sweets from other retailers. They were our regular customers.

All non-English speaking customers asked for "red paper cough sweets". None of them asked for "old man brand". None of them asked for "Hacks". None of them pointed to the sweets without saying anything - they all said "red paper cough sweets".

I get all my Hacks sweets from Barkath

Stores. They asked me to give evidence 2 or 3 days ago.

In the High Court
No.16.
Plaintiffs Evidence
Gan Chin Choo
(Cross Examination)
30th August, 1960.
(continued)
(Re-examination)
(By the Court)

Re-Xd by Duff

We sold Pecto sweets in white paper until June or July 1958. They were not very saleable.

By Court:-

When I said glass bottles I meant glass jars.

sgd. Tan Ah Tah.

No. 17.

No.17.

EVIDENCE OF HUSSAIN BIN IBRAHIM

Plaintiffs Evidence
Hussain bin Ibrahim

P.W. 8 Hussain bin Ibrahim a.s. in English

4 Seria Crescent. Investigator of Commercial and Private Inquiry Agency of Room 605, Shaw House, Orchard Road.

(Examination)

30th August 1960

On 15 and 16th July 1960 I went to 30 sweet shops. Eighteen shops sold Hacks sweets. Seven shops sold Pecto sweets. All the sweets were sold in loose form and they were kept in jars.

Only 1 shop sold both Hacks and Pecto sweets. Both types of sweets were mixed in one jar.

XXd by Hilborne

(Cross Examination)

I have a list of the shops.

I did not go to Chop Hong Eng of 151 New Bridge Road. I went to other shops in New Bridge Road - No. 145, 157, 165, 167, 205, 235 New Bridge Road - on 15/7/60 I visited them consecutively. I can't say why I missed the shop at 151. I must have missed it, that's all.

Re-Xd by Duff

(Re-Examination)

On 16/7/60 I did not go to shops in New

In the High Court

No.17.
Plaintiffs Evidence
Hussain bin Ibrahim
(Re-Examination)
30th August 1960
(continued)

By the Court

Bridge Road.

I went to 81, 57, 51, Rochore Road on 15/7/60.

By Court:-

I did not enter every sweet shop in the roads which I went to - I just went at random.

I could have missed sweet shops in New Bridge Road because there were so many sweet shops.

Sgd. Tan Ah Tah.

No.18.
Plaintiffs Evidence
Abdul Hamid S/O Mahamed Abdullah
(Examination)
30th August 1960

No. 18.

EVIDENCE OF ABDUL HAMID S/O MAHAMED ABDULLAH

P.W. 9 Abdul Hamid s/o Mahamed Abdullah a.s. in Tamil
27 Tanglin Road, Salesman in Barkath Stores of same address.

On 15/10/58 I sold Hacks sweets to various shops. I was also a salesman at Barkath Stores. I went to the following shops: - Lian Tong & Co. 137 New Bridge Road, Hock Eng & Co. 151 New Bridge Road, Thong Soon & Co., 81 Rochore Road.

I bought Hacks sweets from these 3 shops. I did not examine the sweets. I handed them to P.W. 1 (identified).

On 16/10/58 I sold Hacks sweets to various shops. On 16/10/58 I bought Hacks sweets from the following shops:-
Chop Mang Hen 51 Rochore Road, Hock Lam & Co. 143 New Bridge Road, Thong Bee Co. 57 Rochore Road.

I handed the sweets to P.W. 1

I signed a document in the Registry.

(Shown affidavit affirmed on 12/1/59) I identify my signature on this affidavit when I

signed in the Registry.

In the High Court

No. 18.

Plaintiffs Evidence Abdul Hamid S/O Mahamed Abdullah

(Examination)

30th August, 1960.

(continued)

(Shown 6 parcels of sweets) These are the 6 parcels bought by me (6 parcels marked A,B,C,G, H,I). "A" "B" and "C" were bought on 15/10/58 and "G" "H" "I" bought on 16/10/58.

In each of the 6 parcels Hacks and Pecto sweets were mixed together.

XXd by Hilborne

(Cross-Examination)

My manager instructed me to visit these 6 shops - he did not give me the names of these shops - he just told me to go to retail shops - he did not mention the number of shops I should visit. I picked these 6 shops.

There was no special reason for choosing these 6 shops except that they were selling Hacks sweets.

There were about 50 retail shops selling Hacks sweets in October 1958. Many of them sold Hacks sweets in jars unmixed with other sweets.

I visited more than 6 shops on those two days. I have only mentioned those shops which sold Hacks and Pectos mixed. The majority of shops sold Hacks sweets unmixed.

On 15/10/58 Lian Tong & Co. were selling Hacks and Pectos mixed in one jar.

Re-Xd by Duff

(Re-Examination)

There were 50 wholesale dealers selling Hacks sweets in October 1958. There would have been about 500 or 600 retailers. I had visited them. There may be more than 500 or 600 retailers.

By Court :-

(By the Court)

When I visited the 6 shops I asked for Hacks sweets. I spoke in Malay. They were all Chinese shops with Chinese salesmen. I said "Shaya satu pound Hacks mau" (both counsel agree this means "I want 1 lb of Hacks sweet").

Duff applies for leave to recall Mrs. Hogan to give evidence regarding a shopping expedition since last hearing.

Hilborne has no objection.

No. 19.

In the High Court

EVIDENCE OF ROSITA MARIE HOGAN (RECALLED)

No. 19.

Plaintiffs Evidence Rosita Marie Hogan (Recalled)

(Further Examination)

30th August, 1960.

Rosita Marie Hogan recalled; a.s. in English

Last night I went to Changi village.

Last Friday I went to Changi for a swim and I noticed 1 stall and 1 chop in Changi village which were selling Hacks and Pectos mixed together. I told Mr. Duff about this yesterday.

Yesterday I went to Changi village on Mr. Duff's instructions. I went to the shop in Changi village. I asked for sweets in red wrappers. I saw only Pecto sweets in the jar. That was the same jar in which I had seen Hacks and Pectos mixed together. I bought 20 cents worth of the Pectos. When I was in the taxi on my way back home I saw one Magikofs sweet in the parcel consisting of 8 sweets including the Magikofs. I produce the parcel (marked P7).

I went to the stall. But I found the jar empty. The lady said she didn't have any left.

XXn. No questions.

Sgd. Tan Ah Tah.

Plaintiffs' case.

Hilborne applies for leave to recall P.W. 1 and P.W. 7 for further cross-examination.

Duff has no objection.

No.20.

Plaintiffs Evidence K.A.Ahamed Maideen (Recalled) (Further Cross Examination) 30th August, 1960

No. 20.

EVIDENCE OF K.A. AHAMED MAIDEEN (RECALLED)

K.A. Ahamed Maideen recalled; a.s. in Tamil

XXd by Hilborne

(Shown pp. 11, 13 and 14 of press cutting

book).

In the High Court

No.20.

Plaintiffs Evidence K.A.Ahamed Maideen (Recalled)

(Further Cross Examination)

30th August, 1960. (continued)

These are examples of advertisements published by me. (Press cutting book marked P8).

(Shown cinema slide) This is one of our slides (Slide marked P9).

(Shown cinema slide) This is another slide in various languages (Slide marked P10).

(Shown script of announcements on Rediffusion) This was announced on Rediffusion after 1959. (By consent, script marked P11).

I agree that the emphasis is on the name Hacks, except for the picture of the tin and the old man and a few sweets displayed beside the tin.

All our vans have the name Hacks and a picture of the tin with the old man on it.

On Rediffusion in Tamil the phrase "red paper cough sweets" is not used. I don't know the Chinese version.

(Shown packet of Hacks sweets) We have sold Hacks sweets in packets since June 1960 (Packet marked D13).

I don't know whether Pectos are sold in similar packets.

Re-Xd by Duff

(Further Re-Examination)

Between 1954 and 1957 we used this announcement on Redifussion - red paper cough sweets is mentioned.

(Hilborne not objecting, English version used between 1954 and 1957 marked P12).

I also produce handbills distributed at cinemas together 2 Hacks sweets given away to members of the public (by consent, handbills marked P 13. Malay and Tamil versions marked P13A. Counsel agree that the latter are translations of the English version in P13).

We spent more on handbills and free distributions of sweets, secondly Rediffusion, not so much on newspaper advertisements.

Sgd. Tan Ah Tah.

In the High Court

No.21.

Plaintiffs Evidence Gan Chin Choo (Recalled)

(Further Cross Examination)

30th August, 1960.

No. 21.

EVIDENCE OF GAN CHIN CHOO (RECALLED)

Gan Chin Choo recalled on former affirmation

XXd by Hilborne

We sold Pecto sweets in white wrappers until June or July 1958. We never sold them in red wrappers.

Q. Abdul Hamid says he bought sweets on 15/10/58 from your shop - Hacks and Pectos mixed together. What do you say?

A. Towards end of September 1958 I went to Federation to collect bills. I was away for 1 month. I don't know what happened in Singapore. During the period I was in the shop we never sold Pectos in red wrappers.

I don't go often to the Federation. My last visit was in the beginning of this year - to collect bills.

Sgd. Tan Ah Tah.

No.22.

Court Notes on opening of Defendants case.

30th August, 1960.

No. 22.

COURT NOTES ON OPENING OF DEFENDANTS CASE

Hilborne: No member of the public has given evidence. The only witnesses have been trade witnesses. The complaint concerns the colour of the wrapper.

The issue is whether Defendants have passed off their sweets as the Plaintiffs' sweets. I submit this is not a case of passing off.

Plaintiffs have not established passing off either in fact or in law.

The names are quite different. This is a vital factor.

Nobody has the exclusive right or

monopoly to any particular coloured wrapper or a get-up.

Different kinds of sweets tend to assume certain shapes.

The colour of the wrapper is important in this case. In this case the get-up is the wrapper.

In law Plaintiffs have failed to establish a case of passing off.

Name - Pectos is filled in. Hacks is outlined.

The sweets are imported in tins - quite different kinds of tins.

Kerly p.575 - it is generally material whether the plaintiffs' and defendants' names appear distinctly on their respective goods.

It is the name which becomes known to the public - Plaintiffs seek by their advertisements to make the name Hacks well known to the Public.

P.W. 1 said the whole object of advertising was to publicise the name Hacks.

Plaintiffs must show that the public associate their get-up with their product and nobody else's.

Kerly p. 574 rely on the name "Hacks".

Kerly p. 572.

The get-up is not striking.

Kerly p. 575.

No clear evidence of deception.

No question of retailers being deceived.

Washing-soap, soups, tomato sauce

In the High Court

No.22.

Court Notes on opening of Defendants case.

30th August, 1960.

(continued)

all sold with similar get up. What is important is the get-up.

Clerk & Lindsell on Torts 11th ed. 966 para 1708.

Payton & Co. v Snelling, Lampard & Co. (1899) 16 T.L.R. 56.

Payton & Co. v. Snelling, Lampard & Co. (1901) A.C. 308.

Plaintiffs have not produced one member of the public who has been deceived.

Wilkinson v Griffith 8 R.P.C. 370 - this is a much stronger case than the present case.

Schweppes Ltd. v. Gibbens 22 R.P.C. 113.

Clark v Sharp 1898 15 R.P.C. 141.

Saper v Spectar's 1953 70 R.P.C.173

Coleman v Smith 1912 29 R.P.C. 81

31st August, 1960.

31st August 1960 Coram: Tan Ah Tah, J.

Suit No. 1679/58 continued.

Counsel as before

Hilborne continuing

Trade Marks & Law of Unfair competition.by Blanco White 2nd Ed. p. 56

Imperial Tobacco Co. v Purnell & Co. (1904) 21 R.P.C.598) - "narrow red band cigars".

Williams v Bronnley (1909) 26 R.P.C. 765.

Illiteracy is ignorance. But we now have Broadcasting, Rediffusion. In addition there are the vans and cinema advertisements and press advertisements stressing the name "Hacks". Very few persons would be unaware of the name Hacks.

Jones v Anglo-American Optical Co. (1912) 29 R.P.C. 361

Wilkinson v Griffith Bros & Co. (1891) 8 R.P.C. 370 - very important differences in this case from the present case:-

(i) I do not admit Hacks sweets have obtained a high reputation in Singapore. Reputation of that kind means household words.

(ii) Evidence was adduced by Plaintiffs as to deception caused by Griffith's new label - in present case no such evidence has been adduced.

(iii) The offending polish was proved to have been passed off for the Plaintiffs' polish.

The High reputation had become attached to 1 manufacturer alone. The case was decided before the days of radio, rediffusion and advertising by vans. All the facts have to be taken into consideration.

Cordes v R. Addis & Son (1923) 40 R.P.C. 133

Saper v Specter's etc. (1953) 70 R.P.C. 173

Plaintiffs are asking for a monopoly in the present case.

No. 23.

EVIDENCE OF ANTHONY NG ENG HUA

D.W. 1 Hilborne calls :-

Anthony Ng Eng Hua a.s. in English

39, Siang Lim Park. Joint Managing director of Defendant Co.

Defendant Co. was formed in 1953. Before

In the High Court

No.23.

Defendants Evidence Anthony Ng Eng Hua

(Examination)

31st August, 1960.

(continued)

that I was a partner in N.T. Young & Co.

Pecto sweets are manufactured by Red Band Confectionery Works, of Rosendaal, Holland. They manufacture all kinds of confectioneries. N.T. Young & Co. were their agents. The partnership was terminated. In 1953 when Deft. Co. was formed, we became the agents of the manufacturers.

In January 1958 they sent me a sample of Pecto sweets. From March 1958 we have been selling Pecto sweets in Singapore. They come in tins of 5 lbs, 10 tins to a carton.

(Shown Pecto tin) This is the tin (marked D 14).

Early this year they came also in 2 lb polythene bags - in addition to the 5 lb tins. Four 2 lb bags to a box.

The sweets go out to our wholesalers and retailers in cartons and boxes. We advertise the sweets by means of cinema slides, vans with a picture on them, free samples distributed at cinemas and trade fairs.

(Shown cinema slide) This is one of our slides (marked D15). The chinese characters are a transliteration of the word "Pecto" (Court interpreter says the 2 characters are pronounced Pek To in Tiochiu).

(Shown photo) This shows our vans (photo marked D16).

The slide is exhibited in turn at all the cinemas belonging to the Shaw and Cathay organisations, about 10 cinemas in all.

(Shown packet) This is a packet of 2 sweets - our free samples for distribution (Packet marked D17).

(Shown packet) We employ 4 girls who go round from house to house. They sell each of these packets at 50 cents in the houses as well as in bars at night (Packet marked D18).

(Shown D11) Empty bottles like this with the label on are given free to wholesalers and retailers with a request that they should put Pecto

sweets in them for sale. These are 2 lb bottles.

The contents of each polythene bag is put into the bottle.

Our intention is to establish the name Pecto in the market.

We import 20,000 cartons of condensed milk - Liberty milk- per month. Condensed milk always comes in 14 ozs. tins. We spend $100,000 a year on advertising Liberty milk alone. We have 5 vans of our own advertising the name "Liberty".

Usually retailers put our sweets in jars like P6. Some put them in bottles like D11.

Some retailers sell Hacks - some sell Pectos - a few shops sell both types. Most retailers sell only one type - either Hacks or Pectos. Only a very small minority sell both types.

(Shown Broncs sweet) This is manufactured by Red Band Confectionery Works (marked D19). This is not sold here - it is sold in Europe and Africa.

(Shown Chest wrapper) This is manufactured by the same company. It is used to wrap a cough sweet - a similar red wrapper (marked D20). This is sold in Europe and Iraq but not in Singapore.

(Shown Red Band Sweet) This is manufactured by the same company (marked D21). This is sold in Singapore and all over the world.

(Shown van Melle sweet) This is manufactured by van Melle Confectionery Works of Holland (marked D22) This is sold in Singapore and all over the world.

Both D21 and D22 are Croquant sweets.

(Shown Savoy fruit drop) This is manufactured by an English company (marked D23)

(Shown Halls fruit drop) This is manufactured by another English company (marked D24)

(Shown packet) This is a medicated oil manufactured by Hoe Hin & Co. (marked D25).

In the High Court

No.23.

Defendants Evidence
Anthony Ng Eng Hua

(Examination)

31st August, 1960.

(continued)

(Shown packet) This is a medicated oil manufactured by Tai Wah Medical Hall (marked D26).

(Shown bottle) This is Tiger balm manufactured by Eng Aun Tong (marked D[illegible]).

(Shown bottle) This is a similar kind of balm called Cock balm manufactured by Boon Chai Hoe (marked D28).

(Shown small tin) This is Tiger balm manufactured by Eng Aun Ton (marked D29).

(Shown small tin) This is a similar balm called Temple of Heaven balm manufactured by Tjing Liang Yu, China (marked D30).

(Shown packet) These are Churchman cigarettes manufactured by Churchman of England (marked D31).

(Shown packet) These are 7 Up cigarettes manufactured by Asia Tobacco Co.Ltd., Singapore (marked D32).

I have heard Hacks sweets referred to as red paper cough sweets only in this court room, but never anywhere else. I have heard them referred to as "old man brand".

We have never tried to pass off Pecto sweets as Hacks sweets. We have to build up our name Pecto.

I have never heard of a case where a person has bought Pecto sweets under the impression that he was buying Hacks.

(Cross Examination)

XXd by Duff

I have never travelled in Europe but my associate has. He told me about sweets being sold in Europe.

I had been in the sweet business for some years. I was familiar with the Hacks sweet. The sample of Pecto I received had a white wrapper with the words "Red Band" on it. The first sample they sent was a brown sweet wrapped in white cellophane paper. The manufacturers told us they could produce any coloured wrapper we wanted.

In May 1958 we changed from white to a red wrapper. The manufacturers sent me a sample of the red wrapper. Most sweets sent out by the manufacturers had the words "Red Band" printed on white wrappers. But we were trying to establish the name Pecto in the market.

Adjourned to 2.30 p.m.

Q: Could you not establish the name Pecto without changing the paper?

A: The white paper will sweat on the sweet - the sweating shows through the white paper.

The manufacturers sent me a sample and I approved it.

A sweet is only a sweet - it is the name of the brand that counts.

I don't think there was a danger of confusion, because we used the word "Pecto" in white block letters.

Q: Did you notice that apart from the name the 2 sweets are practically identical?

A: Yes; it is the same with all sweets of the same category.

Q: How do you expect illiterate people to distinguish between the 2 sweets?

A: I have not thought of the answer. I am just trying to establish the brand. The sweets were to be sold to everybody - not illiterate people only. When we sell a product we expect everybody to buy it.

Q: How do you expect illiterate people to distinguish between the 2 sweets?

A: Most illiterate people are not as illiterate as you think. Most of them can make out the letters of the alphabet.

(Shown Chest wrapper). Both this wrapper

In the High Court

No.23.

Defendants Evidence
Anthony Ng Eng Hua

(Cross Examination)

31st August, 1960.

(continued)

and pectos wrappers are red - it does not matter which I choose.

Our cinema slide was made in 1958. It has been shown at Capitol, Odeon and so on - as I said. It was made by the Ace Advertising Co.

It may be we showed the slides 6 months after importing the sweet. We imported the sweet in March 1958.

We never sell to individual members of the public - except for sales made by the 4 girls.

I am in the confectionery trade - I must know how the public buy the sweets. I obtain information from my salesmen. I go round the market myself to find out how things are being developed. I go to the retailersand find out how the goods are being sold, how they suit the market, what customers say.

(Re-Examination)

Re-Xd by Hilborne

(Shown letter dated 26/7/60) I received this letter from our manufacturers (marked D33 - admitted only to show how witness obtained his information).

We import foodstuffs - tinned food - as well. We do not use 2 get-ups for illiterate and non-illiterate people.

(By the Court)

Our vans first went round Singapore at the beginning of 1959. We have never advertised on Rediffusion. We gave away free samples at the 3 trade fairs - 2 at Great World and one at the old Kallang Airport - 2 at Great World in 1958 and 1959 and the one at Kallang in February 1959. The free samples were similar to D17, including the polythene bag with the words "Red Band" on it. The 1st of the 2 fairs at the Great World was held in July, August or September 1958.

The 4 girls went round selling sweets this year.

We distributed calendars with pictures of Pecto sweets and the name Pecto at the top in December 1958 and January 1959.

Sgd. Tan Ah Tah.

In the High Court

No.24.

(Agreed statement of facts)

31st August, 1960.

No. 24.

AGREED STATEMENTS OF FACTS

Hilborne : The following is an agreed statement of facts:-

At the time when advertisements came over the air on Rediffusion there are about 180,000 to 200,000 listeners. There are 44,900 Rediffusion sets in Singapore. From 6 p.m. to 9 p.m. 75% of the subscribers are listening. For every set 5 or 6 persons are listening over the air.

Duff : I agree the facts stated by Mr. Hilborne.

Sgd. Tan Ah Tah

No.25.

Defendants Evidence

Lee Ik Su

(Examination)

31st August, 1960.

No. 25.

EVIDENCE OF LEE IK SU

D.W. 2 Lee Ik Su a.s. in English

Certified interpreter, Supreme Court.

(Shown P.14 of P8) The Chinese characters mean :

"If you want to take precautions against influenza please take 'Kat Sik' as 'Kat Sik' is most effective in preventing influenza."

The 2 large characters next to the word "Hacks" which I have pronounced "Kat Sik" are a transliteration of the word "Hacks".

It is frequently most difficult to make an exact transliteration in Chinese of an English word.

(Shown P10) The same 2 characters are there in inverted commas. The whole phrase means:

"Hack's" medicated sweet soothes lungs and

In the High Court

No. 25.
Defendants Evidence
Lee Ik Su
(Examination)
31st August, 1960
(continued)

and stops cough. World famous."

(Shown D15) The Chinese characters mean:

" 'Peh Tai' stops cough sweets." The words "Peh Tai" are a transliteration of the word "Pecto".

XXn N.Q.

Sgd. Tan Ah Tah.

No.26.

No. 26.

Defendants Evidence
Koh Kok Eng
(Examination)

31st August, 1960.

EVIDENCE OF KOH KOK ENG

D.W. 3 Koh Kok Eng a.s. in English

38 Killiney Road. Salesman employed by Guthrie & Co.

I have been in charge of Horner's confectionery for about 10 years. We are agents in Singapore for Horner's, an English Company.

One of Horner's brand is Magikofs cough sweets.

(Shown 7 lb. bag) This is how they are packed (marked D34).

We have been importing these sweets since towards the end of 1958 - since August 1958.

Magikofs are sold all over the world in the same wrapper. This is the standard wrapper for all overseas markets.

(Cross Examination)

XXd by Duff

Since 1958 we have changed the colour of the wrapper. It was changed in June 1960 from yellow to red - I think it was in December 1959.

We have definitely not changed the shape of the sweet.

(Shown P4 and new Magikofs) I agree these are different in shape (new Magikofs marked P14).

I cannot explain why the wrapper was changed in 1959. I cannot explain why the shape was changed. P14 is the latest shipment - arrived in mid-June this year.

I am familiar with Hacks. I agree it is quite well known to a certain extent - for many years. There is definitely no confusion at all between Magikofs and Hacks. It did not occur to me there might be confusion. The name Magikofs is clearly marked on the wrapper. There is no resemblance at all.

Re-Xd by Hilborne

(Re-Examination)

I am in the market every day. I have certainly not received any reports about confusion between Magikofs and Hacks. I have never heard of Magikofs or other cough sweets being passed off as Hacks.

(By the Court)

I have never heard anybody refer to Hacks cough sweets as red paper cough sweets. I seldom come into contact with the public but I have never heard that name given to it by Chinese. I come into contact with dealers. The dealers refer to them by the name Hacks. Chinese dealers pronounce the name "Hacks" with a Chinese accent. I never come into contact with the occasional buyer. The small stallholders call them "Hacks". Cough sweets are eaten by adults not by children. I don't know how a buyer who is not a dealer would refer to the sweets.

Sgd. Tan Ah Tah

No. 27.

EVIDENCE OF LIM CHAI BOON

D.W. 4 Lim Chai Boon a.s. in Hokkien

63-A Smith Street. Salesman employed by Hak Huat & Co. of 62 Rochore Road, wholesale dealers in confectionery. It is one of the biggest dealers in Singapore. We sell all kinds of confectionery including Pecto cough sweets. We have sold them since Defendants imported them in 1958.

I know Hacks sweet. We don't sell them at

In the High Court

No.27.
Defendants Evidence
Lim Chai Boon
(Examination)
31st August, 1960
(continued)

present.

We supply both wholesalers and retailers.

Members of the public ask for Pecto sweets. As for Hacks, those who know the name would ask for "Oldman who coughs" brand.

Pectos come in cartons and tins.

(Shown D14) This is the tin. We pass them the tins or cartons containing 10 tins each. If they want a carton I would not break open the carton.

A retailer would place the sweets in a glass jar for sale.

I havenever heard of Pectos and Hacks being confused.

(Cross Examination)

XXd by Duff

I have seen individual customers buying sweets. I have been to shops to buy things myself e.g. cigarettes and have heard people ask for the brand.

I have never heard anyone asking for red paper cough sweets.

No. Re-Xn.

Sgd. Tan Ah Tah.

No.28.
Defendants Evidence

No. 28.

EVIDENCE OF S. KANAGASABAI

S.Kanagasabai
(Examination)
31st August 1960

S. Kanagasabai a.s. in English

5 Kingswear Avenue. Clerk, Hilborne & Co.

On 29th January 1959 I swore an affidavit in connection with this case, I did all the ordering. Mr. Ng Eng Hua accompanied me. He did not speak.

I went to M.S. Ally of Raffles Place. I asked for ½ lb Hacks cough sweets and I got sweets which were all Hacks.

(Witness is taken through his affidavit and confirms the contents thereof.)

At Hock Eng & Co. of 151 New Bridge Road I found D12 and D14 side by side.

(All the exhibits referred to in the witness's affidavit put in and labelled D35).

XXd by Duff

(Cross Examination)

Hilborne instructed me to make this expedition. He did not tell me which shops to go to. I went to shops near my office. We first went to Indian shops and then to Chinese shops. I knew Ng was our client. I went to shops at random. I went to various shops in various localities.

No re-Xn

Sgd. Tan Ah Tah.

Case for Defendants.

Adjourned to a date to be fixed by the Registrar.

Sgd. Tan Ah Tah.

No. 29.

COURT NOTES OF DEFENCE COUNSELS CLOSING SPEECH

Cor: Tan Ah Tah J.

Counsel as before.

I concede that it is not an essential part of Plaintiffs' case they they should prove instances of actual deception. But if Plaintiffs allege that only illiterate persons are deceived then some evidence should have been adduced of actual deception. Plaintiffs started off by alleging that there was general deception, both of literate and illiterate persons.

In the High Court

No.29.
Court notes of Defence Counsels closing speech

15th September, 1960.

(continued)

At Page19of Notes of Evidence, in K.A. Ahamed Maideen's re-examination, for the first time illiterate persons are mentioned and the phrase "red paper cough sweets" is used.

No real evidence that customers ask for "red paper cough sweets".

No doubt a retailer can say that customers ask for "red paper cough sweets". That is proof that customers did utter those words. But the evidence is only heresay if it is sought to establish that customers knew Hacks sweets by that name or phrase.

At page 21 P.W. 3 said Malay customers called the sweets "Red paper Hacks"in Malay.

At page43 D.W. 3 said dealers refer to it as "Hacks".

D.W. 1 said he was trying to establish the name Pecto.

P.W. 4 and P.W. 7 give evidence about people coming back to exchange Pecto for Hacks - this is incredible. P.W. 7 gave tutored evidence. P.W. 8 said that only 1 shop out of 30 sold both Hacks and Pectos together.

P.W. 9 said that the majority of shops sold Hacks sweets unmixed. He had carefully selected 6 packets all of which were mixed.

I concede that Plaintiffs were the first to use red paper wrapper - at least 4 years ahead of everybody else.

Hacks, Pectos, Magikofs, and Dance sweets use the red wrapper.

Plaintiffs cannot succeed until they establish that the public associate "red paper wrapper" with their goods alone. Four years is a very short time. If Plaintiffs had used a striking get-up that would be a stronger case. A red wrapper is not a striking get-up. I submit Plaintiffs have come no where near establishing their case.

Even if it is held that the red wrapper is associated with their goods and only their goods

we have a defence in that the name Pecto is used on Defendants' sweets.

D.W. 1's evidence is important.

As to the question of illiteracy, new advertising media are being used which were not used when the older cases were decided.

On 29.1.59 D.W. 5 went to 6 shops.

The question of common get-up was brought up early on the 1st day of the trial. I submit that whether it should have been pleaded or not Defendants have had notice of the point.

No.29.
Court notes of Defence Counsels closing speech

15th September, 1960.

(continued)

No. 30.

COURT NOTES OF PLAINTIFFS' COUNSELS REPLY

No.30.
Court notes of Plaintiffs Counsel's reply

15th September, 1960.

I admit there is a difference in the names. But in Lever v Goodwin (1887) 36 Ch.D.1. an injunction was granted.

Cough sweets had not been sold in loose form before.

The get-up is important. The name is insignificant. Kerly p.575.

In the newspaper cuttings the picture of the sweets is prominent. It is the same in the handbills and cinema slides.

I cannot explain why the phrase "red paper cough sweets" was abandoned in the latest Rediffusion script.

But I submit the phrase "red paper cough sweets" is not important. The desire of the Plaintiffs is to publicise the name "Hacks". Large numbers of people listen to Rediffusion. So far as illiterate persons are concerned the word "Hacks" is only a sound. He cannot associate the name "Hacks"with the sweet because he cannot read.

In the High Court

No.30.

Court notes of Plaintiffs Counsel's reply.

15th September, 1960.

(continued)

If the court finds that the get-up is associated with Hacks, that is enough whether the name "Hacks" or some other phrase e.g. "red paper cough sweets" is used to order the sweets. Whatever phrase they employ is irrelevant because they are getting what they think is Hacks.

Rediffusion advertisements are completely beside the point.

As to the cinema slides, there are representations of the sweet.

If the court finds that the public knew the sweet by its get-up before Pecto came on the market then it is irrelevant whether they stress the name Pecto or not so long as there is no distinguishing feature on the sweet.

The name "Pecto" does not appear in Chinese on the sweet.

Only 1 slide was shown in each cinema at one time. This started only a few months before action commenced. No significant section of the public could have been affected.

Defendants' vans went out only after legal proceedings had commenced.

Only 1 distribution at a Trade Fair before action commenced.

Kerly p.575 et seq. "Probability of deception".

I am relying on the fairly large number of instances where the 2 sweets have been mixed in 1 bottle and sold as Hacks sweets.

Adjourned to 2.30 p.m.

Duff (continuing):

I agree that retailers were not deceived.

Payton & Co. v. Snelling etc. is referred to at p.573 of Kerly. In this case it was found as a fact that all the similar features were common to the trade and that there was no probability of deception. The get-up had not been long on the market. The features were on

the tin but in different sequence.

Imperial Tobacco Co. v. Purnell 21 R.P.C. 598 is distinguishable. Defendants hadsold cigars with red bands for many years and other traders had also done so. Se p.572, 573 of Kerly. The red band had been common to the trade for years.

If the band had not been common but had become associated with Plaintiffs' cigars, the position would have been different.

In Williams v. Bronnley, the defence that the features were common to the trade was established.

In Jones v. Anglo-American Optical Co. 29 R.P.C. 361 the articles were found to be dissimilar - case is distinguishable.

Wilkinson v Griffiths 8 R.P.C. 370 -

(i) D.W. 4 admitted Hacks were well-known.

(ii) I am not entitled to rely on actual deception but there are several instances of attempts at deception in this case. I will deal with this later.

(iii) The case was decided before days of modern advertising.

In Saper v Specter's etc., all the features were found to be common to the trade. It was held to be impossible to acquire a reputation in 3 weeks.

Illiterate persons - a large number of the buying public are illiterate - pages
They are a substantial section of the public.

P.W. 7 (Gan Chin Choo) could not have given tutored evidence. His examination-in-chief shows that. It should be noticed that the previous two witnesses had not been cross-examined. The retailers who came back to P.W. 7 were his regular customers and might have thought they would have a better chance of getting Hacks sweets in exchange. P.W. 7 might have done it to please a regular customer.

In the High Court

No.30.

Court notes of Plaintiffs Counsel's reply.

15th September, 1960.

(continued)

If anybody is going to do it, it is P.W. 7.

D.W. 5 went with D.W. 1 to buy sweets on 29.1.59. No mixture. This is not surprising. Sequence of events. In October 1958 Abdul Hamid (P.W. 9) went out to buy sweets. In December 1958 the writ was issued. An injunction was asked for. P.W. 9 made an affidavit. Not surprising that the passing-off ceased when D.W. 5 made his purchases on 29.1.59.

Mrs. Hogan saw 2 kinds of sweets in the same jar at Changi. She did not notice a Magikofs, until she was on her way home.

Even if a dealer sells Pectos only and a customer asks for "Hacks" or "red paper cough sweets" or "Old man brand" and the dealer sells him Pectos that is passing off.

As to pleading common get-up, I concede that Hilborne mentioned that defence at the close of the first day's hearing. To that extent I cannot say I havebeen taken by surprise but I submit it should be pleaded.

Kerly p.580. Defences.

I concede the point is academic in the present case.

Kerly p.378.

In this case Plaintiffs had used the get-up since 1953. Defendants were the only manufacturersto use it before action commenced. Dance sweets were sold in January 1960. No evidence of anybody having bought one.

Kerly p.379, Character and extent of trade of infringers - Hussain found only 1 dealer in Magikofs - they changed from yellow to red in December 1959 or January 1960 - a year after action commenced - that is a relevant point. Magikofs have since been changed in shape.

Kerly p. 563. Names may become publici juris.

It was shown that red bands were commonly used.

Maybe tomato ketchup and balms and ointments are sold in similar get-up but we don't know whether there might have been passing off in law.

Plaintiffs must prove 2 things :-

(i) His get-up has become distinctive of his goods. Evidence of P.W. 1, the sole importer, who gave details of sales and turnover. The sweets are cheap. In view of amounts realised the sales must have been enormous. 2000 retailers.

Gone on for 5 years before Pectos appeared. Maybe the public know the sweet by the name "Hacks", maybe they don't. But a larger number don't read or speak English and can only recognise the get-up -- the name has no significance for them.

When D.W. 1 was asked how illiterate people are to distinguish between the 2 sweets he could not think of an answer.

Plaintiffs have called persons who are actually selling to the public and they have said non-English speaking people ask for "red paper cough sweets". I am not suggesting that the whole of the public have come to refer to the sweet by that phrase. But I do say that by using that phrase they show clearly that they do not identify the sweet by the name printed on it. They identify the sweet by the get-up. Even if no such evidence has been called the inference can still be drawn.

(2) Probability of deception.

Abdul Hamid (P.W. 9) made some purchases. Showerings Ltd. v. Cheltenham etc. Breweries 1958 R.P.C. 446.

In the statement of claim the names and addresses of the shops were set out. Not one of the shop-keepers have come to deny what is alleged to have happened.

P.W. 9 has given 6 separate instances of passing off. He asked for Hacks and got Pectos and Hacks mixed up. The 6 dealers could have easily remembered whether they ever sold Hacks

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and Pectos mixed together in the same jar.

Mrs. Hogan's evidence is also relevant.

Hussain went to shops after action commenced. Not so easy to find mixture of sweets then.

32Halsbury's Laws 2nd ed. page 661 para 973.

How closely do these articles resemble each other.

W. Edge v Niccolls & Sons (1911) A.C. at p.701.

If all the features are combined together as to be calculated to deceive then there is passing off.

C.A.V.

Sgd. Tan Ah Tah.

No.31.

JUDGMENT

The Honourable Mr. Justice Tan Ah Tah.

11th August, 1961.

No. 31.

JUDGMENT OF THE HONOURABLE MR. JUSTICE TAN AH TAH

Coram: Tan Ah Tah, J.

The Plaintiffs are a company incorporated in England and are manufacturers of medicated cough sweets. These sweets have been sold by the plaintiffs through their agents in Singapore since 1953. Each sweet is wrapped in an orange coloured wrapper on which is printed the name "Hacks" and a list of what are called active constitutents of the sweet. At the time of importation into Singapore, the sweets are contained in tins, but when they are distributed to retailers the sweets are usually taken out of the tins and placed in glass jars and are thus displayed for sale. According to the evidence, the vast majority of retailers display the sweets for sale in this manner; only a few retailers sell the sweets out of the tin.

The defendants are a company incorporated in Singapore and carry on the business, inter

alia, of manufacturers' agents. In March 1958 they commenced to sell in Singapore medicated cough sweets manufactured by the Red Band Confectionery Works, Holland. At the beginning the sweets were wrapped in white cellophane paper, but in May 1958 this was changed and from that time onwards each sweet was wrapped in an orange coloured wrapper on which was printed the name "Pecto" and a list of ingredients purporting to show the composition of the sweet. The manner in which "Pecto" sweets were wrapped in their wrappers was very similar to the way in which "Hacks" sweets were wrapped.

The Plaintiffs' claim is for an injunction to restrain the defendants from passing off or attempting to pass off and from enabling others to pass off medicated sweets not of the manufacture of the plaintiffs as and for the goods of the plaintiffs and for consequential relief.

In order to succeed, one of the points the plaintiffs must prove is that their get-up has become distinctive of their goods and that by using it and making it known in relation to their goods, they have caused it to be associated or identified with those goods. On this point I find that the following facts have been proved. The plaintiffs commenced to sell "Hacks" sweets in 1953, five years before "Pecto" sweets came on the market. It was the first time that medicated cough sweets were sold in loose form, and not by the tin or bottle, in Singapore. Customers therefore came to recognise the sweets by their wrappers. The vast majority of non-English speaking customers, who were unable to read the words printed on the wrappers, asked for the sweets by describing them as "red paper cough sweets". In 1953 the amount realised from the sale of "Hacks" sweets was $24,000. In 1957 the amount realised from such sales had risen to $156,160. In 1959 the amount had risen still further to $240,030. There was a large number of retailers, about 2000 in all selling these sweets in Singapore. Considering that four sweets only cost 10 cents it is obvious that an enormous number of sweets have been sold. Having regard to all these facts, I find it proved that the plaintiffs' get-up became distinctive of their goods and that it was associated or identified at all material times

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with the plaintiffs' goods and no others.

The next point that the plaintiffs must establish is that the get-up of "Pecto" sweets is such that in the circumstances of this case there is a probability of deception. I have already stated that the vast majority of retailers display "Hacks" sweets for sale in loose form by putting them in glass jars. There are no labels on these jars and the only way in which the ordinary customer can recognise the sweets is by their wrappers. Most non-English speaking customers, as I have already stated, describe the sweets as "red paper cough sweets". Evidence was given by witnesses called by the plaintiffs to the effect thatsome retailers kept both "Hacks" and "Pecto" sweets in the same glass jar and displayed them for sale in that manner. One of these witnesses whose name is Abdul Wahid said that he went to a number of shops and asked for "Hacks" sweets and that at six of these shops he was sold "Hacks" and "Pecto" sweets mixed together. I accept the evidence of this witness and of the other witnesses to whom I have just referred. It is in my opinion clear from such evidence and from the other facts and circumstances which have been proved in this case that there is a probability of confusion between "Hacks" and "Pecto" sweets. I find that the similarity of the get-up of "Pecto" sweets to that of "Hacks" sweets is such as to be calculated to deceive and I am satisfied that what the defendants have done has given rise to a probability of deception.

It is significant that when Mr. Anthony Ng Eng Hau, who was then a joiht managing director of the defendant company, was asked in cross-examination how he expected illiterate people to distinguish between the two kinds of sweets he replied that he had not thought of the answer to that question. In my opinion he found himself in this difficulty because in truth non-English speaking people, who formed the majority of the purchasers of "Hacks" sweets, could not be expected to distinguish between the two kinds of sweets in the circumstances in which they were sold by retailers. In this connection it should be noted that neither the name "Hacks" nor the name "Pecto" is printed in Chinese characters or any other Asian language on the wrappers.

It is contended by counsel for the defendants that the get-up used by the plaintiffs was common to the trade. On this point it is relevant to observe that medicated cough sweets were sold in loose form, as I have said, for the first time in Singapore in 1953 and that the orange coloured wrapper used for "Hacks" sweets was not imitated by any other firm or company until 1958, when it was imitated by the defendants. During the period of five years, therefore, "Hacks" sweets were the only medicated cough sweets which were sold in orange coloured wrappers in Singapore. In these circumstances there is, in my opinion, no justification for saying that the get-up was common to the trade.

Counsel for the defendants has referred to the evidence which shows that the name "Hacks" has appeared in newspaper advertisements and on vans and cinema slides and has been announced on Rediffusion. He relies on the statement made by one of the witnesses called on behalf of the plaintiffs that the whole object of the advertising campaign is to publicise the name "Hacks".

In doing so, he contends that it is the name "Hacks" which is significant and that intending customers know the plaintiffs sweets by that name. He further contends that as the name "Pecto" is clearly printed on the defendants' wrappers and has also been widely advertised, the defendants have done all that can be expected of them to distinguish their goods from the plaintiffs' goods. In considering these arguments it must be borne in mind that the majority of purchasers of the sweets are unable to read English and as there are no Chinese characters or any other Asian script on the wrappers, there is nothing to assist such purchasers to distinguish "Pecto" sweets from "Hacks" sweets. In the circumstances in which the sweets are sold such purchasers cannot associate the name "Hacks" with the plaintiffs' sweets because they cannot read English. In short, so far as non-English speaking members of the public are concerned, the get-up is all important in this case, while the name is insignificent. I have already stated my view that the similarity of the get-up of "Pecto" sweets to that of "Hacks" sweets is such as to be calculated to deceive.

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For the reasons which I have indicated the plaintiffs have, in my judgment, established their claim to relief against the defendants. There will be an injunction restraining the defendants their servants and agents from offering for sale, selling or otherwise dealing in medicated cough sweets not manufactured by the plaintiffs and wrapped with the defendants' "Pecto" wrapper without clearly distinguishing such wrapper from the plaintiffs' "Hacks" wrapper. The defendants will deliver up their "Pecto" wrappers to the plaintiffs for destruction. The Registrar will hold an inquiry as to what damages the plaintiffs have sustained by reason of the acts of the defendants the repetition of which is restrained by the foregoing injunction. The defendants will pay the plaintiffs' costs of this action, but the costs of the inquiry as to damages are reserved.

TAN AH TAH

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ORDER

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ORDER

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THIS ACTION coming on for trial on the 19th day of July 1960, 30th day of July 1960, 31st day of July 1960 and the 15th day of September, 1960 before The Honourable Mr. Justice Tan Ah Tah in the presence of Counsel for the Plaintiffs and for the Defendants AND UPON READING the pleadings AND UPON HEARING the evidence and what was alleged by Counsel for the Plaintiffs and for the Defendants THIS COURT DOTH ORDER that the Defendants, Asian Organisation Limited their servants and agents be restrained from offering for sale, selling or otherwise dealing in medicated cough sweets not manufactured by the Plaintiffs, White Hudson & Company Limited and wrapped with the Defendants' "Pecto" wrapper exhibited in these proceedings without clearly distinguishing such wrapper from the Plaintiffs' "Hacks" wrapper also exhibited in these proceedings AND IT IS FURTHER ORDERED that the

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Defendants do deliver up to the Plaintiffs for destruction all "Pecto" labels in their possession or under their control AND IT IS FURTHER ORDERED that the following inquiry be made by the Registrar that is to say :-

An inquiry what damages the Plaintiffs have sustained by reason of the acts of the Defendants the repetition of which is restrained by the foregoing injunction AND IT IS FURTHER ORDERED that the Defendants do pay to the Plaintiffs the costs of this action but that the costs of the inquiry as to damages be reserved and that the parties be at liberty to apply.

Entered this 16th day of August, 1961 at 12.30 p.m. in Volume LXXXIII Pages 414 and 415.

Sgd. Goh Heng Leong
DEPUTY REGISTRAR

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Judgment of Buttrose J.

19th January, 1962.

No. 33.

JUDGMENT OF BUTTROSE J.

Coram: Buttrose J.
Wee Chong Jin J.
Ambrose J.

This is an appeal from a judgment of Tan Ah Tah J. granting an injunction restraining the defendants their servants and agents from offering for sale, selling or otherwise dealing in medicated cough sweets not manufactured by the Plaintiffs and wrapped with the Defendants' "Pecto" wrapper without clearly distinguishing it from the Plaintiffs' "Hacks" wrapper.

What a plaintiff must prove in a passing-off action such as this was clearly laid down by Cozens-Hardy M.R. in the case of J.B.Williams & Copy. v. H. Bronnley & Co. Ltd. (1909) 26 R.P.C. 771 What was there said by the Master of the Rolls was this : "It seems to me that in the first place he (the plaintiff) must, in order to succeed, establish that he has selected a peculiar - a novel - design as a distinguishing feature of his goods, and that his goods

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are known in the market and have acquired a reputation in the market by reason of that distinguishing feature, and that unless he establishes that, the very foundation of his case fails. If he takes a colour and a shape which are common to the trade the only distinctive feature is that which he has added to the common colour and the common shape and unless he can establish that there is in the added matter such a similarity as is calculated to deceive, I think he must fail."

This case followed the House of Lords decision in Schweppes Ltd. v. Gibbens (1905) 22 R.P.C. 601. I do not propose to go through the evidence. I have come to the conclusion here that the plaintiffs have failed to make out a case of passing-off.

The name "Pecto" is set out clearly and distinctly in white lettering in three separate places on the defendants' wrapper and in quite a different manner to than in which the name "Hacks" appear on the plaintiffs' wrapper. The gist of the plaintiffs' case as I understood it, was that notwithstanding this the "Pecto" wrappers were of the same orange colour and identical with their own "Hacks" wrappers and that this constituted a passing-off.

But there was nothing either in the colour, shape, size or mode of wrapping which, in my opinion, constituted a peculiar - a novel or capricious - design as a distinguishing feature of the sweet. The plaintiff in a passing-off action is claiming a monopoly, a thing which the law will only allow him if he proves conclusively in the words of Harman J. in M.Saper Ltd. v. Specter's Ltd. and Boxes Ltd. 1953 70 R.P.C. at p. 178, "that owing to the merits of the matter, he ought to be protected, in the interests of honest trading and general commercial morality."

The Plaintiffs, in my opinion, have no right to a monopoly of orange, red or other coloured paper for wrapping sweets - cough or otherwise - because as it seems to me they are common things in, and well known feature of, the trade.

The defendants were only using what was a

common device, namely, coloured wrappers for their cough sweets. There was nothing unusual in the way the sweets were wrapped and they were of a normal size and shape and the plaintiffs cannot have any of those claims to monopoly which alone would entitle them to an injunction. This is sufficient to dispose of the matter in the defendants' favour.

With regard to the other matters raised on this appeal, there was, in my view, no substance in them. The evidence given on behalf of the plaintiffs was unsatisfactory and fell far short of establishing either reputation or deception. A considerable amount of the evidence was hearsay and inadmissible, and the learned trial judge's finding as to illiteracy was not, in my opinion, supported by the evidence.

The appeal must accordingly, in my judgment, be allowed with costs both here and in the Court below.

Sgd. MURRAY BUTTROSE.
JUDGE.

No. 34.

JUDGMENT OF WEE, J.

This is an appeal in a passing-off action. The fundamental and indeed the only principle of law involved in such an action is this, that nobody has any right to represent his goods as the goods of somebody else. From this cardinal principle it has been laid down that for a plaintiff in a passing-off action to succeed he must establish first, that the particular get-up which he has been using has become associated exclusively with his goods i.e. he must establish reputation and secondly that the defendant's get-up is such as is likely to deceive or cause confusion. Therefore whether a defendant has violated this principle or not is a question purely of fact.

The plaintiffs in this action are a

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company incorporated in England and are manufacturers of medicated cough sweets. On the evidence these cough sweets were exported from England by the plaintiffs and sold in this country through their agents since the year 1953. These cough sweets were imported into this country contained in tins (one of which is an exhibit in this case) and sold by the plaintiffs' agents to wholesale and retail dealers still in their original tin containers. The retail dealers, that is those who sell to the consuming public, generally display them for sale, not in their original tin containers, but in glass jars (one of which is also exhibited in this case). Prior to the appearance of the plaintiffs' sweetsin this country in 1953 no other medicated cough sweets had been sold in this country in loose form, that is to say the plaintiffs were the first in the field in Singapore to sell medicated cough sweets in loose form and displayed to the consuming public in glass jars. An intending purchaser could therefore see the get-up of the article before making a purchase. The plaintiffs continued to be the sole manufacturers in medicated cough sweets field to sell cough sweets in loose form in Singapore from the period 1953 to 1958. Each sweet is wrapped in an orange coloured wrapper on which is printed the name "Hacks" and a list of active constituents of the cough sweets.

Prior to the appearance of Hacks cough sweets for sale in loose form the trade in Singapore in this particular type of sweet was solely insmall tins or bottles (many such tins are exhibited in the case) and the public could only purchase such sweets by the tin or by the bottle. Although not expressly stated in the evidence it can properly be inferred that the article itself in these small tins or bottles had no get-up and was not wrapped in any shape or form.

In March 1958 the defendants' company commenced to sell in Singapore medicated cough sweets manufactured in Holland. The Defendants' cough sweets were also imported into Singapore in tin containers and were also sold to the consuming public in loose form and displayed in glass jars. When they were first imported into Singapore the defendants' cough sweets

were wrapped in white cellophane paper but in May 1958 this get-up was changed and from that time onwards each sweet was wrapped in orange coloured paper on which was printed the name "Pecto" and a list of so called ingredients. The manner in which "Pecto" sweets were wrapped in the wrappers was similar to the manner in which "Hacks" sweets were wrapped.

On the evidence, from 1953 onwards till 1959 (this action having been commenced on the 29th December 1958 but did not come up for trial until July 1960) there was a substantial increase in the yearly sales in respect of the plaintiffs' cough sweets and from the figures for these years, which figures are not in dispute, an enormous quantity of sweets had been sold and - this being a fair inference from the retail price of each sweet - to a considerable number of the population.

As regards reputation the learned Judge came to the conclusion that the vast majority of non-English speaking customers, who were unable to read the words printed on the plaintiffs' wrappers asked for the plaintiffs' cough sweets by describing them as "red paper cough sweets". There is evidence on the Record that there were about 2,000 retail dealers in Singapore who sell the plaintiffs' cough sweets to the consuming public. There is evidence that these retail dealers were not only persons who sell the plaintiffs' goods to the public in shops but also persons who sell the plaintiffs' goods to the public in stalls which is a familiar sight in Singapore. There is the evidence of 2 Chinese retailers who gave evidence in a Chinese dialect, namely Hokkien, as to the number of customers per day who purchased the plaintiffs' sweets from them, that the majority of them were Chinese speaking and asked for plaintiffs' cough sweets by describing them in the Hokkien dialect in words which translated into English mean "red paper cough sweets". It is no doubt correct that there is nothing in the Record to indicate that a substantial proportion of the population of Singapore is illiterate in so far as English is concerned but it must be a matter of which judicial notice can be taken that the population of Singapore is almost entirely composed of Malays, Chinese and Indians with the other

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races comprising only a very small minority and it is therefore a fair inference to make that the vast majority of customers are non-English speaking and are unable to read the words printed on the Hacks or the Pecto wrapper. I am of the opinion that the finding of the learned trial Judge (who, be it remembered, had the advantage of seeing all the witnesses) that the plaintiffs have proved that their get-up became distinctive of their goods and that it was associated or identified at all material times with the plaintiffs' and no others is justified on the evidence.

As regards likelihood of confusion or deception there is evidence on the Record that some retailers kept both Hacks and Pecto sweets in the same glass jar and displayed them for sale in that manner, and the learned trial judge accepted the evidence of one of the witnesses that when he went to a number of shops and asked for Hacks sweets by name that at six of these shops he was sold Hacks and Pecto sweets mixed together. The learned trial Judge on that evidence and from the other facts and circumstances which he found to have been proved in the case came to the conclusion that there was a probability of confusion between Hacks and Pecto sweets and that the similarity of the get-up of these two cough sweets was such as to be calculated to deceive and that what the defendants had done had given rise to a probability of deception.

On this aspect of the case, bearing in mind, as I have said that the learned trial Judge had the advantage of seeing the witnesses, I myself am unable to come to a different conclusion on the evidence in the Record. Indeed I find it difficult to accept the evidence of the managing director of the defendant company that the change of the colour of the Pecto wrapper from the original white to one identical for all intents and purposes to that of the Hacks wrapper was due solely to the fact that such sweets wrapped and sold loose over the counter sweated thereby making white an unsuitable colour and that the choice of the orange colour for the wrapper was fortuitous as being one of several sample colours sent out by the manufacturers. I myself cannot help but come to the conclusion, if it was necessary to do so for the purposes of arriving at my decision in this appeal, that

this change was not for the reasons as stated by the defendants but from some motive not consistent with innocence in that they expected to derive some commercial advantage from the use of the same colour for their wrapper as that of the plaintiffs' wrapper. Counsel for the defendants laid great stress on the fact that by printing the name Pecto on the wrapper they had done all they could to differentiate their cough sweets from the plaintiffs' but I would have thought that the most convincing proof of this would have been to use any colour but orange which could have been done at no extra cost to them or the manufacturers.

It was contended by counsel for the defendants that unless the plaintiffs claim a monopoly for the use of that particular colour of their wrapper, which they could and did not, then their action failed in limine. In my opinion the fact that the plaintiffs neither at the trial nor before us claimed such a monopoly matters not and so long as any other trader used a similar colour so as to mislead or to be likely to mislead purchasers as to whose the goods were, they were entitled to have an injunction to restrain such use.

In the result I would dismiss the appeal with costs.

Singapore, 19th January, 1962.

Sd. Wee Chong Jin
JUDGE.

No. 35.

JUDGMENT OF AMBROSE, J.

This is an appeal by the Defendants from a judgment granting the plaintiffs an injunction and other relief in an action for passing-off. The action was brought to restrain the defendants from passing off medicated sweets not of the manufacture of the plaintiffs as and for the sweets of the plaintiffs.

The circumstances giving rise to the

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action are these. The Plaintiffs, White Hudson & Co. Ltd., are manufacturers of medicated sweets, which they, through their agents, have sold in Singapore under the registered trade mark "HACKS" since 1953. These sweets were and are of a particular size, oval in shape, black in colour, and wrapped in orange-coloured cellophane wrappers with the word "HACK'S" printed on them. The defendants, Asian Organisation, Ltd., are importers and distributors of "PECTO" medicated sweets manufactured in Holland by the Redband Confectionery Works. In March, 1958, the defendants started to sell "PECTO" medicated sweets in Singapore: these were then wrapped in white cellophane paper with the word "PECTO" printed on them. In May, 1958, the colour of the wrappers of the "PECTO" medicated sweets was changed from white to a shade of orange similar to that of the wrappers of the "HACK'S" medicated sweets. This led to the institution of the action on the 29th December, 1958.

In so far as imitation of get-up is concerned, the gist of the action for passing-off is this. The plaintiff by using and making known a particular get-up in relation to his goods, and thus causing it to be associated exclusively with his goods, acquires a quasi-proprietary right to the exclusive use of the get-up in relation to goods of that kind. And this right is invaded by any person who, by using some deceptively similar get-up in relation to other goods of that kind but not of the plaintiff's manufacture, induces customers to buy from him such other goods as goods of the plaintiff's manufacture, thereby diverting to himself orders intended for and rightfully belonging to the plaintiff. That is the view expressed by Jenkins, L.J., in Oerti AG v. Bowman (London) Ltd., (1957) R.P.C. 388 at p. 397.

It is essential for the plaintiff in an action for passing-off to prove that he has selected a peculiar or novel design as a distinguishing feature of his goods, and that his goods are known in the market and have acquired a reputation in the market by reason of that distinguishing feature. That essential was stressed by Cozens-Hardy, M.R., in Williams v. Bronnley, (1909) 26 R.P.C. 765, at p.771 What does "reputation" mean in this context? The

meaning is to be found in the following passage from the judgment of Lord Evershed, M.R., in Tavener Rutledge Ltd. v. Specters Ltd., (1959) 76 R.P.C. 355 at p. 362 :

> " It was laid down many years ago that the first necessity for a plaintiff trying to make out a case of passing-off is that he must establish that the particular get-up which he has been using has become associated exclusively with his business; what, in brief, is called reputation."

What does "get-up" mean? In my opinion, the get-up of goods is the general appearance presented to purchasers. It includes the size and shape of packages, the material, colour and decoration of their wrappers, and the lettering and arrangement of their labels: see Kerly's Law of Trade Marks and Trade Names (8th Edition) p.376.

The first question to consider is therefore

(a) what peculiar or novel design was selected by the plaintiffs in this case as a distinguishing feature of their sweets, and

(b) whether by reason of that distinguishing feature the plaintiffs' sweets have acquired a reputation in Singapore, or, in other words, the particular get-up which the plaintiffs have been using in relation to their sweets has become associated exclusively with their sweets.

In the statement of claim the plaintiffs alleged that the medicated sweets sold by them in Singapore under the registered trade mark "HACK'S" have through extensive advertising and sales become well known to the trade and public and recognised by the public by the particular size, shape and colouring of the sweets, and their orange-coloured wrappers. According to the evidence of K.A. Ahamed Maideen, the manager of Barkath Stores, the plaintiffs' agents, the plaintiffs' only complaint is that the defendants copied the orange colour of the wrappers used for wrapping "HACK'S" sweets.

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It seems to me that the wrappers of the plaintiffs' sweets served also as lables: and that the novel design selected by the plaintiffs to serve as a distinguishing feature of their sweets was the word "HACK'S" printed on wrappers of a particular shade of orange colour. In view of the extensive advertising of the plaintiffs' sweets, the increase in the sales from $24,000 in 1953 to $ 159,210 in 1958, and the fact that the word "HACK'S" was printed on the Plaintiffs' wrappers, I think it is indisputable that the particular get-up which the plaintiffs have been using has become associated exclusively with their sweets. The plaintiffs admit that the object of the advertising was to publicize and emphasize the name "HACK'S". There were advertisements in English, Chinese, Malay and Tamil in newspapers, on the screen at various cinemas and on Rediffusion. After having dinned into the ears of the public that what earmarks their goods is the word "HACK'S", the plaintiffs now make the extraordinary claim that the plaintiffs sweets have acquired a reputation in Singapore solely by reason of the colour of their wrappers.

This claim appears to have been accepted by the learned trial judge. He came to the conclusion that the plaintiffs' get-up became distinctive of their goods and that it was associated or identified at all material times with the plaintiffs' goods and no others. By "get-up" he appears to have meant the orange-coloured wrappers without the word "HACK'S". For in coming to that conclusion the trial judge found this as a fact:

> " The vast majority of non-English speaking customers who were unable to read the words printed on the wrappers asked for the sweets by describing them as "red paper cough sweets".

In my judgment, the plaintiffs' sweets acquired a reputation in Singapore not only by reason of the colour of the plaintiffs' wrappers but also by reason of the trade name printed on them both of which the plaintiffs selected to serve as a distinguishing feature of their sweets. It follows therefore, that the plaintiffs by acquiring a reputation in that way acquired a quasi-proprietary right to the exclusive use of their particular get-up in

relation to sweets. In my opinion, even if the vast majority of such customers as did not speak English referred to "HACK'S" sweets as "red-paper cough sweets" that could not give the plaintiffs a monopoly as regards the colour of their wrappers.

The second question to consider is whether the defendants invaded the quasi-proprietary right of the plaintiffs by using a similar get-up in relation to the defendants' sweets and thereby causing a probability of deception in the minds of purchasers. My view is that by imitating the orange colour of the wrappers of the plaintiffs' sweets the defendants did not invade the quasi-proprietary right of the plaintiffs. As was said by Russel, J., in Dunhill v. Bartlett & Bickley, (1922) 39 R.P.C. 426 at p. 438:

> " Apart from monopolies conferred by patents, and apart from protection afforded by registration, it is open to anyone to adopt the ideas or devices of his neighbour and apply them to his own goods provided he clearly distinguishes his goods from those of his neighbour".

Here I must refer to the words of Lord Halsbury in Schweppes Ltd. v. Gibbens, (1905) 22 R.P.C. 601 at p. 607 :

> " The whole question in these cases is whether the thing - taken in its entirety, looking at the whole thing - is such that in the ordinary course of things a person with reasonable apprehension and with proper eyesight would be deceived."

And I must also cite the following passage from the judgment of Romer, L.J., in Payton v. Snelling, (1900) 17 R.P.C. 48 at p. 57:

> " It seems to be a sort of popular notion .... that in considering whether customers are likely to be deceived, you are to consider the case of an ignorant customer who knows nothing about, or very little about the subject of the action. That is a great mistake. The kind of customer that the Courts ought to think of in these cases is the cus-

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tomer who knows the distinguishing characteristics of the Plaintiff's goods ..."

It is pertinent to add here what was said by Lord Macnaghten in the same case when it went before the House of Lords (at page 635 of 17 R.P.C.) :

" I entirely agree with the judgments of the Court of Appeal, and particularly with the very instructive judgment of Lord Justice Romer."

In my view, if a "HACK'S" sweet is placed side by side with a "PECTO" sweet and the wrappers are looked at fairly no person with reasonable apprehension and with proper eyesight could be deceived. Furthermore, a customer who knows the distinguishing characteristics of the plaintiffs' sweets, but does not see the plaintiffs' sweets and the defendants' sweets placed side by side and trusts to his memory, is not likely to be deceived. The difference is obvious and is not concealed. The defendants state on their wrappers in the clearest manner that they are selling "PECTO" sweets.

It is conceded by counsel for the plaintiffs that retail dealers were not deceived by the similarity of the defendants' wrappers to the plaintiffs' wrappers as regards colour. It is contended, however, that the defendants' get-up enables retail dealers to deceive the ultimate purchasers. Abdul Wahid a salesman employed by the plaintiffs' agents, testified that on the 15th and 16th October, 1958, he visited a number of Chinese retail dealers; that six of them displayed for sale both "HACK'S" and "PECTO" sweets kept in the same glass jar: and that at each of the shops he asked for a pound of "HACK'S" sweets in Malay, referring to them by their trade name "HACKS", and was given a pound of "HACK'S" and "PECTO" sweets mixed. In my opinion, this evidence does not prove that the defendants' get-up enables retail dealers to deceive the ultimate purchasers. I consider that retail dealers who mix up defendants' sweets and plaintiffs' sweets in a glass jar are not treating the defendants' sweets fairly and are not showing them fairly to the ultimate purchasers. In

my judgment, to supply "HACK'S" sweets and "PECTO" sweets mixed when asked for "HACK'S" is clearly deception on the part of retail dealers for which the defendants are not responsible.

Choo Kok Cheng and Gan Chin Choo were called by the plaintiffs to give evidence as to other alleged instances of actual deception by retail dealers where both kinds of sweets were mixed in one jar and sold as "HACK'S" sweets to customers who asked for "red-paper cough sweets". Their evidence is hearsay and has to be ignored. The actual purchasers should have been called to give evidence as regards the actual circumstances of the sales.

For the above reasons I would allow the appeal with costs here and in the Court below and reverse the judgment of the High Court.

Sgd. J.W.D. Ambrose.
JUDGE

No. 36.

ORDER.

19th day of January, 1962.

This Appeal coming on for trial on the 11th and 12th days of December 1961, before the Honourable Mr. Justice Murray Buttrose, the Honourable Mr. Justice Wee Chong Jin and the Honourable Mr. Justice James Walter Davy Ambrose in the presence of Counsel for the Defendants/Appellants and for the Plaintiffs/Respondents and upon reading the Record of Appeal filed herein and what was alleged by Counsel aforesaid THIS COURT OF APPEAL DID ORDER that this Appeal should stand adjourned for judgment and this Appeal standing for judgment this day in the presence of Counsel aforesaid IT IS ADJUDGED that this Appeal be allowed AND IT IS ORDERED that the Judgment be set aside AND IT IS FURTHER ORDERED that the costs of this Appeal and of the Court below be taxed as

In the Court of Appeal

No. 36.

O R D E R

19th January, 1962.

(continued)

between Party and Party under the Higher Scale of Costs and be paid by the Plaintiffs/Respondents to the Defendants/Appellants AND IT IS LASTLY ORDERED that the sum of $500-00 paid into Court by the Defendants/Appellants be paid out to the Defendants/Appellants or their solicitors Messrs. Hilborne, Chung & Company.

Entered this 25th day of January, 1962, at 3.30 p.m. in Volume LXXXV at page 103.

Sd. Goh Heng Leong.
Dy: REGISTRAR.

No.37. Order granting leave to appeal to the Privy Council

12th October, 1962.

No. 37.

ORDER GRANTING LEAVE TO APPEAL TO THE PRIVY COUNCIL

BEFORE THE HONOURABLE THE CHIEF JUSTICE OF THE STATE OF SINGAPORE — IN CHAMBERS

UPON the adjourned application of the above named Plaintiffs/Appellants made by way of Summons in Chambers No. 1108 of 1962 coming on for hearing this day and upon hearing the Solicitors for the Appellants and for the Respondents and upon reading the Affidavit of Charles Lindsey Duff sworn on the 9th day of October 1962 and the exhibit therein referred to IT IS ORDERED that pursuant to Order LVII Rule 12 of the Supreme Court 1934 the appeal be admitted AND IT IS FURTHER ORDERED that the costs of and incidental to this application be costs in the cause.

Dated this 12th day of October, 1962.

SGD. T.C. Cheng

DEPUTY REGISTRAR

COPY

Translation of Receipt - Exhibit "D" to Affidavit of Karappa Mohamed A. A. Wahid

Appellants Exhibits

Translation of Receipt - Exhibit "D" to Affidavit of Karappa Mohamed A.A. Wahid

15th October, 1958.

Translation No. 205
1963

(Letter head of)

Lian Tong & Coy., Singapore

Delivered to Messrs/Mr. Cash

1 lb "? SI" cough sweets $1.30

15/10/58

Lian Tong Coy's bill

_____ day _____ month, 195____

Translated by me

(Sgd) Leong Chi Fook

A Sworn Interpreter,
Supreme Court, Singapore.

Translation of Receipt - Exhibit "E" to Affidavit of Karappa Mohamed A. A. Wahid

Translation of receipt - Exhibit "E" to Affidavit of Karappa Mohamed A.A. Wahid

15th October, 1958.

Translation No. 206
1963

(Letter head of)

Thong Soon & Coy., Singapore

Appellants Exhibits

Translation of receipt - Exhibit "E" to Affidavit of Karappa Mohamed A.A. Wahid

15th October, 1958.

(continued)

Purchased by Messrs./ Mr. Cash

Cough Sweets, half lb @ $1.10 - 55¢

One item 55¢

Thong Soon & Coy's bill

____ day _____ month, 19 ____

Translated by me

(Sgd) Leon Chi Fook

A Sworn Interpreter,
Supreme Court, Singapore.

Translation of Receipt - Exhibit "F" to Affidavit of Karappa Mohamed A.A. Wahid

15th October, 1958.

Translation of Receipt - Exhibit "F" to Affidavit of Karappa Mohamed A. A. Wahid

Translation No. 207
1963

(Letter head of)

Hock Eng & Coy

Delivered to Messrs/Mr. Cash

1 lb. Sweets @ $1.25 - $1.25

$1.25

Hock Eng & Coy's bill

15th day 10 month, 1958.

Translated by me

(Sgd) Leong Chi Fook

A Sworn Interpreter,
Supreme Court, Singapore

EXTRACT FROM EXHIBIT "P8"
"PRESS CUTTING BOOK" PAGE
13.

Appellants
Exhibits

Extract from
Exhibit "P8"
Press Cutting
Book, Page 13

SEE REVERSE

Sunday Times 19-5-57

EXTRACT FROM EXHIBIT "P8" PRESS CUTTING BOOK", PAGE 14.

Appellants Exhibits

Extract from Exhibit "P8" "Press Cutting Book", Page 14

SEE REVERSE

Kampong Kuing Lau 23-5-57

要預防流行性感冒

請服咳適 HACKS

以「咳適」防止流行性感冒最有效

總代理：

BARKATH STORES LTD

星加坡●吉隆坡●柴城●

SCRIPT OF ANNOUNCEMENTS ON REDIFFUSION EXHIBIT "P11"

Appellants Exhibits

Script of Announcements on Rediffusion Exhibit "P11"

JINGLES

Rediffusion Spot Announcement (English).

Ease your throat and ease your pain
From coughs and colds broughtby the rain
Hacks cough sweets they are the best
For fifty years they've stood the test.

Hacks. Hacks. for singers and teachers
Hacks. Hacks. for smokers and speakers
For coughs will beat a swift retreat
From Hacks - the best cough sweets.

Rediffusion. SPOT ANNOUNCEMENTS

Have you tried HACKS. HACKS is a sweet. HACKS is a medicine. You will find the tingling flavour of HACKS equally enjoyable as it is effective for cure of cold and bronchial ailments.

GET SOME HACKS TODAY

For more than 30 years now, people all over have sought relief in HACKS cough sweets. Incessant coughing and cold disappear like magic for HACKS' formula ensure instant relief for congested and inflamed chests.

ALWAYS REMEMBER HACKS MEDICATED SWEETS

Whether you are a singer, public speaker, or for that matter, someone who values his or her voice, you will find HACKS indispensable - for HACKS active ingredients clear congested throat instantly.

HACKS is available anywhere.

Appellants Exhibits

SCRIPT OF ANNOUNCEMENT ON REDIFFUSION EXHIBIT "P12"

Script of Announcements on Rediffusion Exhibit "P12"

HACKS COMMERCIALS FOR "TOP TUNES OF THE WEEK" PROGRAMMES.

Have you tried Hacks Sweets? Do you know why so many people ask for Hacks? Hacks is a sweet - Hacks is a medicine. Hacks is a boon companion of smokers and songsters. Hacks cures throat and chest pains. For more than thirty years Hacks has helped the people of Britain and countries the world over, to face the winter months free from harassing attacks of coughing. Instead of being left weak and tired by incessant coughing, they find that as soon as an attack comes on, Hacks gives them instant relief. Prepared under guaranteed medical formula Hacks Sweets are sold everywhere wrapped with red paper. Barkath Stores Ltd., are sole agents for Hacks Cough Sweets.

Do you smoke, do you suffer from colds, sore throats or a chest cough? Try HACKS. HACKS will give you instant relief. Sleepless nights and throat irritations disappear. Buy HACKS prepared under guaranteed medical formula. HACKS the cough cure wrapped with red paper sold everywhere. Barkath Stores Ltd. are sole agents for HACKS.

Thirty years experience has proved the value of HACKS. For bronchial ailments, coughs, sore throats and chest complaints ..... secure instant relief with HACKS. Prepared under guaranteed medical formula Hacks Cough Sweets have been a boon to people in Britain and countries the world over. Hacks Cough sweets are wrapped with red paper sold everywhere. Freshen up with Hacks! The mild action and fine flavour of Hacks Cough Sweets freshens the mouth and keeps the breath sweet. Barkath Stores Ltd., are the sole agents for HACKS.

SPECIMEN OF HANDBILLS
DISTRIBUTED AT CINEMAS
EXHIBIT "P13"

Appellants
Exhibits.

Specimen of
Handbills
distributed
at cinemas.

Exhibit "P13"

Undated

SEE REVERSE

P 13

HACKS - HACKS - HACKS.

SHOULD YOU WISH TO KNOW

SOMETHING ABOUT HACKS!

It is a wonderful medicated sweet, so delicious to taste even a child would crave for it. Hacks is a great companion for smokers Singers and in general for all class of workers. Hacks checks throat and chest pains and is a lightning remedy for coughs, colds and other bronchial ailments.

Hacks has been popular in Great Britain for more than Forty years and it has been the sole protector from winter attacks of cold and cough. Hacks has just come to Malaya to fight against all colds and coughs and save people from becoming sick.

Hacks is a family remedy. It has no aggressive elements but very mild and pleasant taste for consumers.

Try Hacks today - it costs very cheap - every pocket can afford it.

OBTAINABLE AT EVERY PLACE

Sole Agents For Federation of Malaya, Singapore, British North Borneo and Siam.

BARKATH STORES, LTD.

1, UNION STREET, PENANG.	221, BATU ROAD, KUALA LUMPUR.	27, TANGLIN ROAD, SINGAPORE.

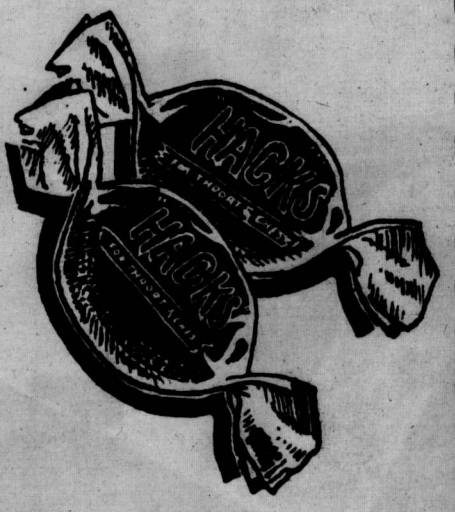
合克氏！合克氏！！合克氏！！！

你要知道甚麼叫做合克氏嗎？這是奇妙的喉糖，甜蜜可口，連孩童也喜歡吃。合克氏是吸煙者及歌唱者以及一般工人的良友，立止喉痛，胸痛，立愈咳嗽，感冒及其他支氣管發炎症。

合克氏在英風行逾四十年，冬季可防感冒咳嗽。這次介紹來馬，協助人民抵禦感冒咳嗽。

合克氏是家庭良藥，藥性溫而不燥，潤肺醒神請試一下，價錢極廉，人人樂購。

新嘉坡登牙冷律廿七號
吉隆坡谷都律二二一號
檳城土庫街門牌一號
各結商行獨家代理



Printed at The Ganesh Printing Works. 10, Penang Street, Penang.

RECEIPT - EXHIBIT A1" TO AFFIDAVIT OF S.KANAGASBAI.

Respondents Exhibits

Receipt - Exhibit "A1" to Affidavit of S.Kanagasabai

29th January, 1959.

SEE REVERSE

Date	Amount of Transaction	Sale Number

M. S. Ally & Co.

ESTABLISHED 1900

25, RAFFLES PLACE, SINGAPORE, 1.

BRANCH: 62, SERANGOON GARDEN WAY

PROVISIONS — MEDICINES — TOILETS — LIQUORS

PHONES: 36791, 35587 & 29586

29/1/ 195 9

Quantity	PARTICULARS	$	cts.
1	Thumb Tape		50

This is the exhibit marked "A 1"
referred to in the affidavit of S. Kanagasabai
and sworn before me this 29 day of
January 1959 in the City No. 1671 of 1958

Before me,

A Commissioner for Oaths

THANK YOU, PLEASE CALL AGAIN

LEADING GROCERS SINCE 1900

CUSTOMER'S COPY

F No 4029

RECEIPT - EXHIBIT "E1" TO AFFIDAVIT OF S. KANAGASABAI

Respondents Exhibits

Receipt - Exhibit "E1" to Affidavit of S.Kanagasabai

29th January, 1959.

SEE REVERSE

№ 1829

Dealers in Sugar
Fruit Candy
Biscuit Toy Melor
Sead Peanut
Importers &
Exporters Retail
& Wholesale.

建和貿易公司

新嘉坡小坡梧槽律門牌七十五號
（諒班路）

KIAN HOE TRADING CO.,

No. 75, Rochore Road, Singapore.
Tel: 36551 電話：三六五五一

糖菓蜜料餅乾
玩具瓜子花生
兼出入口批發
零沽一律歡迎

Date, 29/1/1959

M Lush

數量 Quantity	名貨 PARTICULARS	價格 Price	元 $	角 cts.
1 x dz. Stack'a		1.40		70

This is the exhibit marked "E1"
referred to in the affidavit of S. Kanagandrai
and sworn before me this 29th day of
January 1959 in Suit No. 1679 of 1958
Before me,
A Commissioner for Oaths

Seven cts only

Paid

現款交易 Terms Cash	E. & O. E.	合計 TOTAL.	70

No. 2 of 1963

IN THE PRIVY COUNCIL

ON APPEAL
FROM THE COURT OF APPEAL OF THE
STATE OF SINGAPORE

BETWEEN

WHITE HUDSON & CO. LIMITED
(Plaintiffs) Appellants

and

ASIAN ORGANISATION LIMITED
(Defendants) Respondents

RECORD OF PROCEEDINGS

Linklaters& Paines,
Barrington House,
57-59 Gresham Street,
London E.C.2.

Solicitors for the Appellants.

Coward, Chance & Co.,
St. Swithin's House,
Walbrook,
London E.C.4.

Solicitors for the Respondents.