WONG PARTNERSHIP

LAW WATCH

JUNE 2024

In Brief

WONG PARTNERSHIP

DEALS

WONGPARTNERSHIP LLP ACTED IN …
Sale of Eu Yan Sang International Ltd by its Majority Shareholder to a Consortium comprising Rohto Pharmaceutical Co., Ltd. and Mitsui & Co., Ltd for S$694.5 million

On 4 April 2024, Righteous Crane Holding Pte. Ltd. (**RCH**), the controlling shareholder of Eu Yan Sang International Ltd (**Eu Yan Sang**), entered into a conditional sale and purchase agreement to sell all of its shares in the capital of Eu Yan Sang (**Sale Shares**) to a special purpose vehicle (**Offeror**) jointly held by Rohto Pharmaceutical Co., Ltd. and Mitsui & Co., Ltd (**Acquisition**) for approximately S$694.5 million. The Sale Shares represent approximately 86% of all the ordinary shares in Eu Yan Sang.

Eu Yan Sang, a leading Singapore-based Traditional Chinese Medicine (**TCM**) maker, is a well-known unlisted public company founded in 1879. It operates over 170 retail outlets and 30 TCM clinics in its core Singapore, Hong Kong and Malaysia markets, with a significant network across 29 markets including manufacturing capabilities in Malaysia and Hong Kong.

RCH is an investment holding company managed by Tower Capital TCM Holdings L.P., Temasek Holdings' Blanca Investments Pte. Ltd. and certain members of the founding family of Eu Yan Sang.

The Acquisition was completed on 3 June 2024. The Offeror made a mandatory general offer on the same date for all the shares in Eu Yan Sang other than the Sale Shares, and it is intended that certain founding family members of Eu Yan Sang will reinvest partially in the Offeror to continue to hold a stake in Eu Yan Sang through the Offeror.

The Acquisition values Eu Yan Sang at about S$808 million and represents one of the largest transactions relating to a Singapore company in the health and wellness sphere.

The partners involved in the transaction were from the Mergers & Acquisitions Practice: Low Kah Keong, Quak Fi Ling and Chiang Yuan Bo acted for Eu Yan Sang, while Chan Sing Yee acted for RCH.

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Other recent matters that WongPartnership is or was involved in:

DESCRIPTION	PRACTICE AREAS
Acting in the the proposed acquisition by Relish Investments (**Offeror**) of all the issued and paid-up ordinary shares in the capital of RE7S Holdings Limited, by way of a scheme of arrangement, with DBS Bank Ltd as the financial adviser to the Offeror.	Corporate/Mergers & Acquisitions
Acted in the investment by a global investment firm in the US$14 million Series A funding round of Rize, an Agritech platform dedicated to making sustainable rice cultivation viable through innovative and data-driven practices.	Corporate/Mergers & Acquisitions
Acting in the sale by DBS Bank Ltd of its HDB shophouse and retail units.	Corporate Real Estate
Acting in relation to the early full redemption by Seatrium Offshore & Marine Limited of its S$500 million floating rate bonds due in 2026.	Debt Capital Markets
Acted in relation to the raising of S$100 million on 3 April 2024 by Titan Dining II LP, a private equity fund investing in Asia (managed by its general partner and investment manager), with the support of anchor investor, Jollibee Worldwide Pte. Ltd., which is part of the Jollibee Group from the Philippines.	Asset Management & Funds
Acted in the issuance by PepsiCo Singapore Financing I Pte. Ltd. (**PepsiCo Singapore**) of US$1.75 billion of notes, consisting of US$300 million Floating Rate Notes due 2027, US$550 million 4.650% Senior Notes due 2027, US$450 million 4.550% Senior Notes due 2029 and US$450 million 4.700% Senior Notes due 2034. PepsiCo Singapore is a subsidiary of PepsiCo, Inc.	Debt Capital Markets Tax
Acted in relation to the issuance by FLCT Treasury Pte. Ltd. (**FLCT**) of S$175,000,000 3.830 per cent notes due 2029 under its S$1,000,000,000 Multicurrency Debt Issuance Programme, unconditionally and irrevocably guaranteed by Perpetual (Asia) Limited (in its capacity as trustee of Frasers Logistics & Commercial Trust). The proceeds from the offering will be used to refinance existing borrowings and finance acquisitions, which may include FLCT's announced acquisition of 89.9% of the equity interests in property-owning companies which hold four logistics properties located in Germany.	Debt Capital Markets
Acted in the investment by Openspace Ventures into the US$15 million Series B funding round of Rukita, an Indonesia-based proptech group.	WPGrow: Start-Up/Venture Capital
Acted in the issuance by Thomson Medical Group Limited of S$155 million 5.25% Notes due 2027 under its S$1 billion Multicurrency Debt Issuance Programme.	Debt Capital Markets
Acted in the establishment of iFAST Corporation Ltd.'s S$300 million Multicurrency Debt Issuance Programme, with Oversea-Chinese Banking Corporation Limited as arranger and The Bank of New York Mellon, Singapore Branch as notes trustee.	Debt Capital Markets

BREACH OF CONFIDENCE

Singapore Court of Appeal Clarifies Law on Breach of Confidence

In our September 2023 update, we discussed the decision of the General Division of the High Court of Singapore (**High Court**) in *Amber Compounding Pharmacy Pte Ltd and another v Lim Suk Ling Priscilla and others* [2023] SGHC 241. The High Court clarified that a plaintiff bringing a claim for breach of confidence is, in the same action and in respect of *different sets of documents or information*, entitled to claim both: (a) the traditional broad range of remedies for wrongful gain under the principles laid down in *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41 (***Coco***); and (b) equitable damages for wrongful loss under the principles laid down in *I-Admin (Singapore) Pte Ltd v Hong Ying Ting and others* [2020] 1 SLR 1130 (***I-Admin***).

The *Coco* approach protects the wrongful gain interest, which is infringed when the defendant uses the plaintiff's confidential information to his advantage or to the plaintiff's disadvantage. The relief that a plaintiff can seek would be traditional damages for wrongful gain.

The *I-Admin* approach, on the other hand, protects a plaintiff's interest in avoiding wrongful loss. The wrongful loss interest is infringed when the defendant's conduct diminishes the confidentiality of the information, regardless of whether the information is used or not. The relief that a plaintiff can seek would be equitable damages for wrongful loss.

The Court of Appeal has, in *Lim Suk Ling Priscilla and another v Amber Compounding Pharmacy Pte Ltd and another* [2024] SGCA 16 (***Lim Suk Ling Priscilla (CA)***), affirmed the High Court's decision that a plaintiff is entitled to claim for wrongful gain and wrongful loss in respect of *different* sets of documents or information in the same action (**Narrow Issue**).

However, the Court of Appeal, in *obiter* comments, went on to consider whether a plaintiff would be entitled to claim for both wrongful gain interest and wrongful loss interest in respect of the *same document* (**Broad Issue**), and answered this in the negative. The Broad Issue was not argued before the High Court.

This update takes a look at *Lim Suk Ling Priscilla (CA)*.

Our Comments

It is important for plaintiffs in breach of confidence cases to plead their cases precisely. Where the facts permit, a plaintiff can mount a claim for wrongful gain interest as his primary case and wrongful loss interest in the alternative in respect of the *same* document, so as to seek a full measure of damages comprising equitable damages for the wrongful gain, as well as damages for the diminution of the confidentiality of the information through its wrongful use. However, the converse is not allowed, as a primary case of wrongful loss would be brought on the premise that there was no wrongful use (and hence no wrongful gain).

Further, parties have to be careful when consent judgments are entered into. The wording of the consent judgment has a direct impact on the types of damages that the plaintiff can seek at the assessment of damages stage. Here, while both the High Court and Court of Appeal took the view that a plaintiff is in principle entitled to claim for wrongful gain and wrongful loss in respect of *different* sets of documents or information in the same action, the Court of Appeal in *Lim Suk Ling Priscilla (CA)* held that the respondent

plaintiffs were not entitled to do so. This was because the consent judgment entered into between the respondent plaintiffs and the appellants was limited by an admission of unauthorised use; the type of damages that the respondent plaintiffs could seek was thus limited to that arising from unauthorised use (i.e., traditional damages for wrongful gain).

Background

The respondents brought an action for breach of confidence against the appellants, who were former employees of the respondents and had, in a consent judgment, unconditionally admitted to unauthorised access and use of the respondents' confidential information (**Confidential Information**).

A dispute arose as to the types of damages that the respondents could claim against the appellants, i.e., whether the respondents were entitled in the same action to claim both: (a) traditional damages for wrongful gain under the *Coco* approach; and (b) equitable damages for wrongful loss under the *I-Admin* approach. The Hight Court found that both damages were claimable in the same action in respect of different sets of documents.

On appeal, the Court of Appeal affirmed the High Court's approach. However, as the consent judgment provided that the appellants had "*unconditionally admit[ted] to the unauthorised use of [the] Confidential Information*" (i.e., there had been wrongful gain), the only damages that the respondents could claim were traditional damages.

The Narrow Issue was therefore moot. The Broad Issue was likewise academic since it contemplated a pending claim for both the wrongful gain and wrongful loss interests with respect to the same set of documents.

The Court of Appeal nevertheless took the opportunity, in *obiter dicta*, to provide valuable guidance on the Narrow and Broad Issues.

The Court of Appeal's Guidance

Narrow Issue

On the Narrow Issue, the Court of Appeal affirmed that there is no impediment to a plaintiff mounting a claim for breach of confidence under the *I-Admin* approach in relation to one set of documents or information and the *Coco* approach for another.

The Court of Appeal reasoned that the question whether there has been a breach of confidence is a fact-sensitive one. The answer turns not only on the fact of some information having been accessed or obtained without authorisation, but also on what this information is and whether the information is confidential. The court is not bound to find that the defendant is liable for breach of confidence in respect of all or none of the documents which are the subject of the claim. Aside from the question whether the information is confidential, the court may find that some information had been used without authorisation and others not.

The Court of Appeal also observed that the *I-Admin* approach was established to fill a gap in the law where no remedy was available in "taker" situations, i.e., where the defendant wrongfully accesses or acquires confidential information but does not use or disclose it. It is only in such cases that the *I-Admin* approach

applies to vindicate the wrongful loss interest. In situations where the *Coco* test is satisfied and the wrongful gain interest is vindicated, there is no gap and the *I-Admin* test does not apply.

A plaintiff is therefore entitled to claim for his wrongful gain interest under the *Coco* approach in respect of documents or information which have been used without authorisation to his detriment, as well as his distinct wrongful loss interest under the *I-Admin* approach in respect of other documents or information.

Broad Issue

As to the Broad Issue, the Court of Appeal observed that claims for the vindication of the wrongful gain interest are mutually exclusive with claims to vindicate the wrongful loss interest in respect of the same document or information.

Claims to vindicate the wrongful gain and wrongful loss interests are unique to the *Coco* and *I-Admin* tests respectively. Both tests cannot apply at the same time in respect of the same document or information; the application of the *Coco* test must mean that there is no gap that would engage the *I-Admin* test.

Thus, where the plaintiff's case is that the *Coco* test (which is geared towards the wrongful gain interest) is satisfied, he should proceed under that test. However, where the confidential information has not been used and/or there is no resulting detriment, but the confidential information was nevertheless accessed without authorisation, the plaintiff may proceed under the *I-Admin* test to seek a remedy to reflect the interest he has in preventing the wrongful diminution of the confidentiality of his information.

The Court of Appeal further noted that precluding the application of the *I-Admin* test in situations where the *Coco* test is satisfied would not deprive a plaintiff of the full measure of damages as the *Coco* test can also provide a remedy for the diminution of the confidentiality of the information through its wrongful use.

A plaintiff in an action for breach of confidence may therefore plead wrongful gain as his primary case and wrongful loss in the alternative as this accords with the gap-filling purpose of *I-Admin*. However, the converse does not apply. It would be incongruous for a plaintiff to plead wrongful loss as his primary claim and wrongful gain in the alternative, because the claim for wrongful loss is premised on the absence of unauthorised use and this would amount to an inconsistent case.

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CONTRACT I RESTRAINT OF TRADE

Restraint of Trade Clauses: Protecting Legitimate Proprietary Interests

In our March 2024 update on *Shopee Singapore Pte Ltd v Lim Teck Yong* [2024] SGHC 29 (***Shopee***), we discussed the dismissal by the General Division of the High Court of Singapore (**High Court**) of an e-commerce platform operator's bid to obtain interim injunctions to restrain a former employee from working for a competitor.

The High Court has, for a *second* time within months, rejected a similar attempt by a fintech company to prevent a former senior employee from assuming employment with a rival, thus underscoring the challenges faced by employers in demonstrating that their restraint of trade clauses protect legitimate proprietary interests: see *MoneySmart Singapore Pte Ltd v Artem Musienko* [2024] SGHC 94 (***MoneySmart***).

This update takes a look at the High Court's decision in *MoneySmart*.

Background

The claimant, MoneySmart Singapore Pte Ltd (**MSPL**), provided online financial product comparison services for consumers through its financial comparison platform. Products listed on the platform were localised and available in Singapore and Hong Kong. From late 2022, MSPL also, through its in-house insurance brand (**Bubblegum**), offered direct-to-consumer digital insurance products for only the Singapore market.

The defendant, Mr Artem Musienko (**Musienko**), was employed by MSPL as the Head of Technology in the Bubblegum division from July 2022 to 12 January 2024. He was tasked with leading the Design, Product and Technology department for only the Bubblegum division in the software development of the Bubblegum platform and mobile application.

Musienko resigned from MSPL and, on 15 January 2024, commenced employment as the Head of Engineering, Insurance with CAG Regional Singapore Pte Ltd (**CAGRS**), a subsidiary of MoneySmart's Nasdaq-listed rival, MoneyHero Limited (**MoneyHero**). Like MSPL, MoneyHero provided online financial product comparison services through its platforms and had its own in-house insurance brand, Seedly Travel Insurance. Musienko was at that time on 12 months' paid garden leave.

Musienko's employment agreement with MSPL included a cascading restraint of trade clause (**Non-Compete Clause**) which, among other things, sought to restrain Musienko from engaging with any business or organisation in Southeast Asia or any other country where MSPL (or its associated companies) operated which provided online financial product comparison services, thereby competing with MSPL (or its associated companies) for a period of twelve, six or three months from the date of termination of employment (depending on a competent court's determination as to enforceability, with cascading effect).

The employment agreement also included a confidentiality clause restraining Musienko from, other than for the benefit of MSPL, using or disclosing *to any third party confidential information of MSPL without* MSPL's *prior written consent.*

MSPL obtained two *ex parte* interim injunctions (**Injunctions**) based on the Non-Compete Clause and the confidentiality clause, with a caveat that the Injunctions must not be enforced until it was decided at an *inter partes* hearing that they should be maintained. Musienko applied to set aside the Injunctions.

The High Court's Decision

The High Court allowed Musienko's application and discharged the Injunctions, finding that:

(a) There was no good arguable case that the Non-Compete Clause was valid and enforceable (i.e., that it protected a legitimate proprietary interest and was reasonable in the interests of the parties and the public), or that it had been breached; and

(b) The balance of convenience did not lie in favour of granting the Injunctions.

No good arguable case that Non-Compete Clause was valid and enforceable and had been breached

It is trite law that, where protection of confidential information or trade secrets is covered by another clause in the contract, the employer must demonstrate that the restraint of trade clause in question (here, the Non-Compete Clause) covers a legitimate proprietary interest *over and above* the protection of confidential information or trade secrets.[1] Examples would include trade connections and maintaining a stable, trained work force.

The High Court found that the Non-Compete Clause did not protect any such other legitimate proprietary interest and was unreasonable. There was therefore no good arguable case that the clause was valid and enforceable.

It rejected MSPL's argument that the Non-Compete Clause protected a legitimate interest "*given the difficulty of policing any breach*" of the confidentiality clause. However difficult this might be, the fact remained that the legitimate proprietary interest to be protected by the Non-Compete Clause was *not over and above* the protection of confidential information or trade secrets.

The High Court also rejected MSPL's contention that the Non-Compete Clause protected its legitimate interest in maintaining a stable and trained workforce. Here, MSPL failed to establish that its digital insurance business operated in a "*specialised field*" of a small and highly consolidated industry, and that it had invested considerable time and resources in providing Musienko with *specialised* training, skills and expertise.

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[1] See *Man Financial (S) Pte Ltd (formerly known as E D & F Man International (S) Pte Ltd) v Wong Bark Chuan David* [2008] 1 SLR(R) 663.

In addition, the High Court found the Non-Compete Clause unreasonable in three respects:

(a) **Too wide in terms of prohibited activity**: The clause prohibited Musienko from engaging with any business which provided online financial product comparison services. However, only a very tenuous connection existed between that (broad) restriction and Musienko's work, which primarily involved digital insurance-related matters for MSPL.

(b) **Too wide in geographical scope**: Musienko's work concerned Bubblegum which offered products to only Singapore residents. It was thus unreasonable to bar him from engaging in any business throughout Southeast Asia where MoneySmart operated. There must be a "*close connection*" between the geographical scope of the restriction and the employee's work prior to leaving.

(c) **Too wide in temporal scope**: While the Non-Compete Clause had been drafted in a cascading manner apparently calculated to accommodate or invite the court to apply the doctrine of severance and arrive at the longest permissible restraint period, this nevertheless left "*the vulnerable employee uncertain as to which cascading restriction binds him in law until the issue is actually determined by a court*". Such a covenant would have an *in terrorem* effect on a reasonable employee in Musienko's position and give MSPL multiple bites of the cherry in determining the duration of the Non-Compete Clause. This was unfair to Musienko.

The High Court rejected MSPL's submission that the doctrine of severance could be invoked to remove the unreasonable portions of the Non-Compete Clause, leaving only the reasonable prohibitions. It was not possible to amend the scope of the prohibited activities in the Non-Compete Clause from "online financial product comparison services" to "digital insurance products". This would result in an entirely *different* scope, changing the fundamental character of the restriction and converting it into something different in kind, and not just limiting it. It would also be contrary to the underlying public policy in employment contracts.

The High Court therefore concluded that the Non-Compete Clause could not be saved either by MSPL's election of what to enforce or through severance. Even if it protected a legitimate proprietary interest, it was neither reasonable in the interests of the parties nor reasonable in the public interest. As such, the question of a breach of the Non-Compete Clause did not arise. There was thus no good arguable case that the Non-Compete Clause was valid and enforceable or that it had been breached.

Balance of convenience

Finally, the High Court found that the balance of convenience was in favour of Musienko, who had already commenced employment with CAGRS. Damages would not be an adequate remedy for Musienko if the Injunctions were granted. It would be difficult to assess the impact on Musienko's future career development given his senior position of providing technical support for digital insurance services and the real risk of stagnation of skills which would make him less marketable. The High Court also ruled that it would be inequitable and not in the interests of justice to allow the Injunctions to continue and become enforceable, as this would disrupt the *status quo*.

Concluding Observations

Following the unsuccessful outcomes for the employers in *Shopee* and *Moneysmart*, it may now be all the more necessary for employers to revisit their existing restrictive covenants with their employees and consider whether the scope and the application of such covenants to appropriate employees require updating. Further, insofar as cascading restrictive covenants are concerned, it does appear that the Singapore courts remain unreceptive towards such covenants, which should be carefully reconsidered in light of this decision in *Moneysmart*.

If you would like information and/or assistance on the above or any other area of law, you may wish to contact the Partner at WongPartnership whom you normally work with or any of the following Partners:

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TRADE MARKS

Podiatric Trade Mark Claim Falls Flat: Google Advertisements Did Not Result In Likelihood Of Confusion

The General Division of the High Court of Singapore (**High Court**) has, in *East Coast Podiatry Centre Pte Ltd v Family Podiatry Centre Pte Ltd* [2024] SGHC 102, held that there was no trade mark infringement in a claim involving two podiatry centres because the advertisement that the defendant had put up on Google advertisements would not result in a likelihood of confusion.

Comments

This decision is instructive in outlining the approach taken in relation to trade mark infringement on the internet, and in particular, Google advertisements.

In determining whether there is a likelihood of confusion for the purposes of section 27(2) of the Trade Marks Act 1998 (**TMA**), the High Court affirmed the test to be applied in the specific context of internet keyword advertising to determine whether the alleged infringing use had adversely affected, or was liable to adversely affect, the origin function of a trade mark. The key question to be answered was "*whether the advertisement does not enable normally informed and reasonably observant internet users, or enables them only with difficulty, to ascertain whether the goods or services referred to in the advertisement originate from the proprietor of the trade mark or an undertaking economically connected to it or, on the contrary, originate from a third party*". Interestingly, the High Court also noted, in *obiter*, that this test could apply to situations where section 27(1) of the TMA operates, even though confusion is not required under the provision.

Notably, the High Court held that, in the specific context of Google advertisements, the advertiser's website can be considered when assessing whether the use of sign(s) results in a likelihood of confusion. Such an approach accords better with the purchasing practices of the relevant consumers when faced with sponsored links which are "*intrinsically linked*" to the advertiser's website. Accordingly, the confusion analysis would also take into account whether the relevant consumer would think that the advertiser's goods and services originated or are associated with the claimant if the consumer were to visit the advertiser's website. This decision will be of particular interest to proprietors of trade marks who are concerned that their marks are being infringed when used in Google advertisements.

Background

East Coast Podiatry Centre Pte Ltd (**Claimant**), a provider of podiatric services, was the registered proprietor of the following trade marks containing the words "East Coast Podiatry" (**ECPC Marks**):

(a) 

(**First Mark**);

(b) 

(**Second Mark**); and

(c) 

(**Third Mark**).

The First Mark and Second Mark were registered under Classes 5, 10, 25 and 44, and the Third Mark was registered under Classes 10, 25 and 44.

The Claimant opened its first podiatry centre in the Kembangan area of Singapore and later opened podiatry centres at other locations. These centres were named "East Coast Podiatry", regardless of their location.

Family Podiatry Centre Pte Ltd (**Defendant**) operated a separate podiatric centre and intended to open a new branch in the East Coast region, which the Defendant advertised. The Claimant discovered in three instances, advertisements on Google that had been listed by the Defendant (**Advertisements**) which contained the words "east coast podiatry", "Podiatry East Coast" and "Podiatrist East Coast".

The Claimant filed claims against the Defendant for both trade mark infringement under sections 27(1) or 27(2)(b) of the TMA and for passing off.

The High Court's Decision

The issues for the High Court to determine were as follows:

(a) Whether the Advertisements infringed the ECPC Marks under sections 27(1) and/or 27(2)(b) of the TMA. In this regard, the analysis was restricted to the Second Mark which contained the fewest additional elements to the words "East Coast Podiatry", and hence had the greatest likelihood of similarity to the Advertisements; and

(b) Whether the elements of an action for passing off had been proven.

Operations of Google's search engine and Google advertisements

Preliminarily, the High Court held that expert evidence was not necessary for the court to conclude how an average consumer might perceive Google advertisements, given the current level of internet literacy of the general public and the rampant use of search engines such as Google. It noted that Google's search engine and advertisements generally operated as follows:

(a) Internet users who enter words into Google's search engine (**search words**) are presented with a list of search results (**search results**), each of which includes a headline that functions as a hyperlink to a corresponding website, the Uniform Resource Locator (**URL**) of that corresponding website, and a short commercial message.

(b) In addition to natural results, search results also display advertisements created under Google's advertising system in response to internet users entering similar search words (**sponsored links**) that are generally headed with the words "Sponsored Link" or "Ads" or variations of them. Similar to a natural search result, a sponsored link comprises a "headline", a short commercial message, and the URL of the advertiser's website. Advertisers create sponsored links by typing in keywords, drafting the commercial message, and inputting the link to their website.

Section 27 of the TMA

The Claimant alleged that the Advertisements infringed the ECPC Marks under section 27(1) of the TMA or alternatively, section 27(2)(b) of the TMA.

Infringement under section 27(1) of the TMA would be established if the allegedly infringing sign and the trade mark are identical and used in the course of trade in relation to goods or services which are identical with those for which it is registered. Here, the High Court found visual differences between the Second Mark and the signs in the Advertisements. The claim under section 27(1) of the TMA was therefore not made out.

In the alternative claim, infringement under section 27(2)(b) of the TMA would be established if: (a) the alleged infringing sign is similar to the trade mark; (b) the alleged infringing sign is used in relation to goods or services identical with or similar to those for which the trade mark is registered; and (c) as a result, a likelihood of confusion exists among the public. The High Court found no likelihood of confusion among the relevant public and thus no infringement of the Second Mark under section 27(2)(b) of the TMA.

The High Court ascertained that the relevant public was the "*general public in Singapore who uses Google's search engine*", and the target consumers "*include actual or potential consumers of podiatry services*". In deciding whether the alleged infringing use had adversely affected, or was liable to adversely affect, the origin function of a trade mark, the High Court applied the test for internet keyword advertising in *Google France SARL v Centre National de Recherche en Relations Humaines (CNRRH) SARL and others* [2011] All ER (EC) 411. Under this test, the key question was "*whether the advertisement does not enable normally informed and reasonably observant internet users, or enables them only with difficulty, to ascertain whether the goods or services referred to in the advertisement originate from the proprietor of the trade mark or an undertaking economically connected to it or, on the contrary, originate from a third party*".

On that test, the High Court found that the Defendant's website *in addition* to the Defendant's URL could be considered in the confusion enquiry, for the following reasons:

(a) Whether there was a likelihood of confusion must be assessed in light of how the advertisement was "*presented as a whole*". Accordingly, the High Court held that the Defendant's URL was admissible as it was considered part of the sponsored link; and

(b) The Defendant's website formed an integral part of the advertisement. The intended function of Google advertisements was for consumers to click on the sponsored links and be redirected to the advertiser's website. As such, the Defendant's website was "*intrinsically linked to the sponsored link in which the sign is used*", and the relevant consumer was "*likely to make an assessment in totality as to the origin of the goods or services offered, before purchasing the good(s) or service(s)*".

The High Court therefore found no infringement under section 27(2)(b) of the TMA because, upon clicking on the Advertisements, the relevant public would be redirected to the Defendant's website which clarified that the Defendant's podiatry services did not originate from the Claimant.

Passing off

A successful claim in passing off requires proof of goodwill, misrepresentation, and damage. Here, the requisite element of misrepresentation was not established, i.e., the Claimant had not shown that there was a

false representation that would give rise to confusion. For the same reasons that the likelihood of confusion was not made out in the claim under section 27(2)(b) of the TMA, there was likewise no confusion under this tortious claim. Consequently, the claim for passing off failed.

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LEGAL HIGHLIGHTS

APRIL 2024	
9 April 2024	**Latest Updates to the Regulatory Regime under the Payment Services Act** The past week has seen various developments in the payments regulatory regime, particularly for digital payment token (**DPT**) service providers (**SPs**). First, the Monetary Authority of Singapore (**MAS**) has announced that the amendments to the Payment Services Act 2019 (**PSA**) that were passed in 2021 will come into force in stages, starting from 4 April 2024. These amendments will expand the scope of activities regulated under the PSA to include custodial services for DPTs, facilitation of transmission and exchange of DPTs, and facilitation of cross-border money transfers between different countries (even where moneys are not accepted or received in Singapore). At the same time, the MAS issued its response to feedback to its consultation on various proposed amendments to the Payment Services Regulations and accompanying Notices issued under the PSA (accessible here), many of which are required for the operationalisation of the PSA amendments described above. In particular, impacted entities which are currently conducting activities that will become regulated under the PSA must, in order to continue their activities while the MAS reviews their licensing applications: (a) notify the MAS within 30 days of 4 April 2024; (b) submit to the MAS a PSA licence application within six months of 4 April 2024; and (c) submit to the MAS an attestation report (on the entity's business and the entity's compliance with AML/CFT requirements) made by a qualifying auditor within nine months of 4 April 2024. Lastly, the MAS has also issued Guidelines on Consumer Protection Measures by Digital Payment Token Service Providers [PS-G03], which set out the MAS' expectations of the measures that DPTSPs should have in place to ensure greater protection for customers. These measures include: (a) an opt-in regime that will require DPTSPs to obtain express consent from customers (who meet the relevant accredited investor wealth thresholds) to be treated as accredited investors for purposes of the guidelines (which then disapplies certain aspects of the guidelines); (b) segregation of customers' assets; (c) implementation of robust risk management controls to safeguard customers' assets; (d) certain disclosures to customers; and (e) restrictions on dealing with assets belonging to retail customers. These Guidelines can be accessed here and will take effect on 4 October 2024. **Related information:** • Response to Feedback Received on Proposed Amendments to Payment Services Regulations 2019, Notices issued under the Payment Services Act 2019 or MAS Act, and Proposed New Regulations on Exemptions for a Specified Period • Guidelines on Consumer Protection Measures by Digital Payment Token Service Providers [PS-G03] **Contact our Partners:** Elaine Chan | Rosabel Ng | Chan Jia Hui | Tian Sion Yoong

APRIL 2024	
4 April 2024	**Proposed Notice on Prevention of Money Laundering and Countering the Financing of Terrorism for Organised Market Operators Formed or Incorporated in Singapore** The MAS has published a consultation paper proposing to impose anti-money laundering and countering the financing of terrorism (**AML/CFT**) related obligations on Approved Exchanges and Recognised Market Operators formed or incorporated in Singapore (**Singapore organised market operators**). These obligations are proposed to be imposed by way of a notice issued under the Financial Services and Markets Act, which is similar to how AML/CFT obligations are currently imposed on other types of MAS-regulated financial institutions. Singapore organised market operators have not been required to perform AML/CFT checks on investors who trade on their markets – the rationale being that such investors would typically trade through capital markets intermediaries (**CMI**) which facilitate their access to such markets, and such CMIs would be responsible for conducting AML/CFT related checks pursuant to the relevant requirements imposed on them. However, the MAS has observed an increasing trend of organised market operators with business models that allow investors who are not regulated financial institutions (**non-FIs**) to trade directly on their markets without the need for CMIs. As these investors are not subject to AML/CFT checks by CMIs, organised market operators that take on such investors are exposed to higher ML/TF risks. Recognising the risk, the MAS proposes to issue an AML/CFT notice to Singapore organised market operators requiring them to perform AML/CFT checks on non-FI market participants who trade directly on their markets without facilitation by a CMI. The consultation period ended on 29 April 2024. The consultation paper may be accessed here. **Related information:** Consultation Paper on the Proposed Notice on Prevention of Money Laundering and Countering the Financing of Terrorism for Organised Market Operators Formed or Incorporated in Singapore **Contact our Partners:** Elaine Chan | Rosabel Ng | Chan Jia Hui | Tian Sion Yoong
2 April 2024	**Repeal of Regulatory Regime for Registered Fund Management Companies** The MAS has published its response to feedback provided on its Consultation Paper on the repeal of the regulatory regime for Registered Fund Management Companies (**RFMC**). In its response, the MAS has indicated that it is targeting to repeal the existing RFMC regime on 1 August 2024. Existing RFMCs which intend to continue to conduct fund management activities must apply to be a licensed fund management company (restricted to serving accredited and institutional investors) by submitting the prescribed Form 1AR. The MAS will inform RFMCs on the outcome of their application within a month and expects to issue Capital Markets Services licences to successful applicants by the end of July 2024.

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As the transition process (from a RFMC to a licensed fund management company) has been simplified, the MAS will also impose a cap on the assets under management (AUM) of these newly licensed fund management companies *via* a licence condition. The fund management company may subsequently apply to the MAS for this cap to be lifted and, in considering the application, the MAS will take into account various factors, including the applicant's compliance track record, internal controls, risk management and compliance arrangements, stability of its board and senior management team, and the extent of any changes to the applicant's business model and investment strategy. To provide guidance on the transition process, the MAS will organise a virtual briefing in April 2024 for existing RFMCs. The MAS' response to the feedback can be accessed here.

Related information:

Response to Consultation on Repeal of Regulatory Regime for Registered Fund Management Companies

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OTHER UPDATES

DATE	TITLE
13 June 2024	The Model AI Governance Framework for Generative AI
12 June 2024	Explicit Language in Subsequent Dispute Resolution Clause Needed to Affect Existing Arbitration Proceedings
30 May 2024	A Set of Set-offs or Just the One: Insolvency Set-off in Liquidation
14 May 2024	Jurisdictional Location of Cryptoassets: Recent Decisions Involving Three Arrows Capital Ltd
24 April 2024	Evidence of Intention is Key: Taxation of Real Property Gains under Section 10(1)(g) of the Income Tax Act
23 April 2024	Singapore Court Permits for Use in Foreign Proceedings, Documents and Information Protected by *Riddick* Undertaking
22 April 2024	Antitrust and Investment Screening in Singapore – Key Developments in Q1 2024
19 April 2024	Data Protection Quarterly Updates (January – March 2024)
18 April 2024	New Tripartite Guidelines on Flexible Work Arrangement Requests Effective December 2024
15 April 2024	Unpacking Directors' Duties to Creditors: A Close Look at the OP3 International Decision
8 April 2024	SGX RegCo Requires Large Issuers to Take Lead to Reduce AGM Crunch, Reserve AGM Slots in Advance
28 March 2024	PRC Provisions on Promoting and Regulating Cross-border Transfer of Data

RECENT AUTHORSHIPS

DATE	AUTHORSHIPS	CONTRIBUTORS / PARTNERS
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9 April 2024	Lexology Panoramic - Banking Regulation 2024 (Singapore)	Elaine Chan | Chan Jia Hui

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