

At the time of writing the Court of Appeal has yet to provide its grounds of decision. However, based on the parties' submissions, it would appear that :-

- (a) in overturning the decision of the High Court on the issue of infringement, the Court of Appeal was of the view the learned trial judge had erred when she failed to consider that :-
- the Appellant's use of the JacMoli mark is not in relation to the goods in respect of which the JacMoli mark is registered
 - the Appellant's use of the JacMoli mark does not constitute use in the course of trade
 - the Appellant's use of the JacMoli mark is not likely to be taken as being used as a trade mark or in a trade mark sense
- (b) in overturning the decision of the High Court on the issue of passing-off, the Court of Appeal was of the view the learned trial judge had erred when she failed to consider that :-
- there was no misrepresentation by the appellant which gave rise to passing-off because, among others, the articles do not contain any false representation
 - the respondent has not established any goodwill in its business by reference to the JacMoli mark
 - there is no damage or likelihood thereof to the respondent

Further, the Court of Appeal allowed the appellant's counterclaim for the following :-

- (a) that the respondent's action is mala fide and / or is an abuse of process of Court for having been filed for a collateral purpose;
- (b) Registration of the JacMoli mark is liable to be expunged for non-use; and
- (c) the respondent is guilty of passing-off and / or causing a false association by changing its name to one containing the words "Star Gallery", albeit for a short period of time.

The Court of Appeal also awarded exemplary / aggravated damages to the appellant.

Companies

Perisai Wira Sdn Bhd v Harum Minat Sdn Bhd & Ors [2014] 5 CLJ 88 (High Court, Kuala Lumpur)

The plaintiff in this case sought specific performance of a resolution passed by the board of directors of the first defendant. Pursuant to the resolution, the board of directors resolved to sell the first defendant (together with its assets) to the plaintiff upon certain specified conditions.

There was no written sale and purchase agreement, although the plaintiff alleged that a director of the first defendant had issued a letter of undertaking to, inter alia, sell the first defendant's land for RM10 million. The land was to be alienated by the Selangor State Government to the first defendant although no title thereto had been issued at the material time, as the first defendant had not made the necessary payment of premium for the land. The plaintiff testified that all the necessary payments, including payment of the premium and the quit rent in respect of the land, had been made. The first defendant on the other hand testified that the parties had not agreed on the price of the said land.

The plaintiff submitted that the offer and acceptance to buy and sell the first defendant could be deduced from the oral arrangements between the parties and the payments made on behalf of the first defendant were corroborating evidence.

The Court dismissed the plaintiff's claim, on the following grounds:

- (1) The resolution was merely an authorisation to the directors of the first defendant to sell the first defendant company subject to certain express terms and conditions. The elements of an offer, acceptance and consideration were not present in the resolution. Further, the resolution itself stated that the price of the sale had yet to be determined and agreed between the parties, and hence the resolution was not capable of amounting to any agreement between the parties.
- (2) It was different if the plaintiff's pleaded case was that there was an agreement between the parties to buy and sell the company and that such an agreement was to be found partly in several material facts such as the resolution, the undertaking and the payments. That was not actually pleaded and it was not the function of the court to guess or improve on any parties' plea or case. The plea was quite clear in that the resolution houses the agreement which was sought to be specially enforced. However, the resolution did not contain an intention to create legal relationship in the terms sought to be enforced.
- (3) It could not be readily concluded what was the subject matter of the sale and whether there was any concluded agreement between the parties, be it for the sale of the company together with its assets or the said land alone. While the pleaded case stated about the company, the oral and documentary evidence was about the sale of the land.