QB Net Co Ltd
v
Earnson Management (S) Pte Ltd and others

[2006] SGHC 183

High Court — Suit No 653 of 2005
Lai Siu Chiu J
15–19, 22–26 May; 17 October 2006

Tort *— Confidence — Whether breach of confidence existing — Whether plaintiff's information in question confidential nature — Whether information communicated in instances importing obligation of confidence — Whether use of information by defendants unauthorised*

Tort *— Conspiracy — Whether conspiracy existing — Whether combination or agreement between two or more defendants existing — Whether intent to injure existing — Whether damage to plaintiff existing*

Tort *— Passing off — Whether inverse passing off taking place — Whether goodwill attaching to plaintiff's services — Whether defendants misrepresenting themselves as commercial source of services in question — Whether plaintiff's goodwill damaged as consequence*

Facts

The plaintiff was a Japanese company which operated and offered licences to operate, ten-minute haircut salons trading as, *inter alia*, "QB House" in a few countries worldwide. A company ("QBHPL") was set up to operate the "QB House" outlets in Singapore. QBHPL entered into a licence agreement with the plaintiff on 7 December 2001 ("the First Licence Agreement"), under which the plaintiff granted QBHPL the right to operate haircut salons in return for royalties and licence fees paid to the plaintiff. The plaintiff and QBHPL subsequently entered into a Second Licence Agreement on 1 January 2004 ("the Second Licence Agreement"). It was common ground that the second defendant, who had acted for QBHPL in the negotiations for both licence agreements, was the *de facto* mind and will of QBHPL at all material times.

In January 2005, the first defendant, incorporated by the third defendant on 6 October 2004, entered into a sale and purchase agreement with QBHPL ("the S&P Agreement"), backdated to 1 October 2004, under which the first defendant acquired the business assets of QBHPL and took over the employment of its employees. The third defendant was a management consultant who was appointed the first defendant's sole non-executive director, while the second defendant was appointed as a consultant to the first defendant. The first defendant began operating ten-minute haircut salons in Singapore under the trade name "EC House" from 1 January 2005.

The plaintiff commenced an action against the first defendant for inverse passing off and an action against all three defendants for breach of confidence and conspiracy to injure the plaintiff's interests.

Held, dismissing the claim:

(1) To succeed in an action for inverse passing-off, a plaintiff had to prove that there was goodwill attached to their goods or services, that the defendants misrepresented themselves as the commercial source of the goods or services in question and that the plaintiff's goodwill was damaged as a consequence: at [16].

(2) While the plaintiff was correct to point out that goodwill might accrue in respect of the get-up of business premises and items used in trade, given that the threshold for establishing goodwill was high, a plaintiff who asserted goodwill in its get-up had to show the presence of particular features in its goods and services which were "capricious" but which had come to be associated with the plaintiff's goods. As the particular style or get-up in this instance was characteristic of the haircut trade, it was open for all in the trade to adopt the same as long as sufficient care was taken to distinguish the source of the services and products in question. Accordingly, since the plaintiff had not shown that its QB House get-up was a crucial point of reference for customers who wanted its services or that the QB House get-up was so closely associated with the plaintiff's services that it was distinctive of the plaintiff alone, it had not succeeded in showing the existence of goodwill in respect of its system, get-up and services: at [26], [28] and [29].

(3) In any event, the plaintiff's claim for inverse passing off had to fail for it had not shown that goodwill had accrued solely to it. In determining whether a licensee had acquired goodwill in respect of the licensor's business, regard had to be had to the evidence adduced by the parties on the facts. In the circumstances, as QBHPL played a significant role in promoting the QB House trade name and its haircut services in Singapore, it had acquired a shared ownership in the goodwill of the plaintiff's business. However, such a finding did not assist the first defendant because the goodwill acquired by QBHPL did not pass to the first defendant under the S&P Agreement: at [30], [35], [37], [40] and [41].

(4) The plaintiff had successfully shown from the first defendant's conduct that the first defendant was guilty of misrepresenting the plaintiff's goods and services as its own. The net effect of two letters sent by the first defendant to Seiyu Singapore was to hold out the first defendant as the commercial source of the plaintiff's QB House system and/or services. Similarly, given that it would lead a consumer to reasonably believe that the QB House outlets in Singapore had merely undergone a change of name and that the outlets had been created or were owned by the first defendant, the newspaper advertisement of 4 January 2005 amounted to a misrepresentation by the first defendant. On the evidence, there was also little doubt that the striking similarities between the plaintiff's and first defendant's conduct of their business was the result of the latter's intention to copy the former's QB House system and get-up: at [42], [48], [49], [52] and [55].

(5) On the facts, the first defendant's misrepresentation was likely to confuse consumers. There were striking similarities between the manner in which the plaintiff and the first defendant conducted business. Further, both the plaintiff and the first defendant operated in the same trade. Taken together with the fact that the addresses of the EC House outlets were largely identical to those of QB House outlets and the fact that the advertisement stated that QB House had

undergone a name change, the circumstances would cause a substantial number of customers or potential customers to be confused, even if they had exercised reasonable care, in the selection of an express haircut salon: at [56] and [60].

(6) Damage or the likelihood thereof to the plaintiff's goodwill would be inferred given that both the plaintiff and the first defendant were competitors in the same industry since they were in the same business of offering express haircut services at the same price and for the same duration: at [63].

(7) A plaintiff who alleged a breach of confidence had to prove three elements, namely the confidential nature of the information in question, that the information was communicated in instances importing an obligation of confidence and an unauthorised use of the information: at [65].

(8) The plaintiff had not satisfactorily established the confidential nature of the various manuals documenting the work processes of QB House ("the documents") as well as its QB House system as this information was known to the public at large. Furthermore, the plaintiff could not seek to invoke the law of confidence because the information sought to be protected had in fact been disclosed in the plaintiff's patent applications: at [78] to [80], [85], [87] and [94].

(9) Assuming that the first element for a breach of confidence had been established, the second element of a claim for breach of confidence, namely whether there was an obligation of confidence arising from the circumstances in which the information was imparted, would be satisfied in that the second defendant had received them as a third party and under circumstances which gave rise to an obligation of confidence. Where the first and third defendants were concerned, however, given the lack of direct evidence on their awareness that the documents were confidential in nature, the court would not be prepared to make a finding on inferences from the circumstances: at [95], [99] to [101].

(10) The crux of the plaintiff's case in relation to the misuse of confidential information was that the second defendant had misused it by setting up two unauthorised QB House outlets and facilitating the takeover of QBHPL's business and assets by the first defendant and also that such allegedly confidential information had also been passed onto the first and third defendants. As the efforts of the second defendant were the primary driving force behind the success of the QB House system in Singapore, the plaintiff did not show that the second defendant had put the allegedly confidential information to an unauthorised use. Consequently, it would also follow that the plaintiff's claim of misuse of confidential information against the first and third defendant must likewise fail: at [102] and [105].

(11) To succeed in an action for conspiracy, a plaintiff had to prove the existence of three essential elements, first, that there was a combination or an agreement between two or more individuals, second that there was an intent to injure and third, that there was damage to the plaintiff: at [112].

(12) The plaintiff had failed to show the essential elements of a conspiracy, both by lawful and unlawful means. First, given that the third defendant was not privy to any alleged agreement and the fact that the first defendant had not been incorporated at the time of the alleged conspiracy, the plaintiff failed to show the existence of a "combination" or "agreement" between the parties. In any case, given that there was a real and tangible advantage for QBHPL to enter into the

S&P Agreement with the first defendant, no predominant intent to injure was established: at [116] and [118].

Case(s) referred to

Amway Corporation v Eurway International Ltd [1974] RPC 82 (refd)

Chiarapurk Jack v Haw Par Brothers International Ltd [1993] 2 SLR(R) 620; [1993] 3 SLR 285 (distd)

Coco v A N Clark (Engineers) Ltd [1969] RPC 41 (folld)

Commissioners of Inland Revenue, The v Muller & Co's Margarine, Limited [1901] AC 217 (refd)

Cranleigh Precision Engineering Ltd v Bryant [1965] 1 WLR 1293 (refd)

Crofter Hand Woven Harris Tweed Company, Limited v Veitch [1942] AC 435 (folld)

Franchi v Franchi [1967] RPC 149 (folld)

Gromax Plasticulture Ltd v Don & Low Nonwovens Ltd [1999] RPC 367 (distd)

J R Dalrymple's Application for a Patent, In the Matter of [1957] RPC 449 (refd)

Lonrho Plc v Fayed [1992] 1 AC 448 (refd)

Marengo v Daily Sketch and Daily Graphic Limited [1992] FSR 1 (refd)

McDonald's Corp v Future Enterprises Pte Ltd [2005] 1 SLR(R) 177; [2005] 1 SLR 177 (refd)

O Mustad & Son v Dosen [1964] 1 WLR 109 (refd)

Quah Kay Tee v Ong and Co Pte Ltd [1996] 3 SLR(R) 637; [1997] 1 SLR 390 (refd)

Pernod Ricard SA v Allswell Trading Pte Ltd [1993] 3 SLR(R) 817; [1994] 1 SLR 603 (refd)

Premier Luggage and Bags Ltd v Premier Company (UK) Ltd [2003] FSR 5 (refd)

Reckitt & Colman Products Ltd v Borden Inc [1990] 1 WLR 491 (refd)

Stratech Systems Ltd v Guthrie Properties (S) Pte Ltd [2001] SGHC 77 (refd)

Stratech Systems Ltd v Nyam Chiu Shin [2005] 2 SLR(R) 579; [2005] 2 SLR 579 (distd)

Tessensohn Denyse Bernadette v John Robert Powers School Inc [1994] 1 SLR(R) 470; [1994] 3 SLR 308 (folld)

Tong Guan Food Products Pte Ltd v Hoe Huat Hng Foodstuff Pte Ltd [1991] 1 SLR(R) 903; [1991] SLR 133 (refd)

Under Water Welders & Repairers Limited v Street and Longthorne [1968] RPC 498 (folld)

Vestwin Trading Pte Ltd v Obegi Melissa [2006] 3 SLR(R) 573; [2006] 3 SLR 573 (folld)

Andy Leck, Daniel Chia and Geoffrey Liem (Wong & Leow LLC) for the plaintiff;
Mark Lim and Leong Kit Wan (Tan Peng Chin LLC) for the first defendant;
Sukumar Karuppiah and Adrian Kwong (Ravindran & Associates) for the second defendant;
Alban Kang, Koh Chia Ling and Joyce Ang (Alban Tay Mahtani & de Silva) for the third defendant.

17 October 2006 Judgment reserved.

Lai Siu Chiu J:

Introduction

1 This case concerned an action brought by the plaintiff against three defendants for inverse passing off, breach of confidence and a conspiracy to injure the plaintiff.

2 The plaintiff, QB Net & Co Ltd, is a Japanese company which operates and offers licences to operate ten-minute haircut salons trading as "QB House", "QB Shell" and "QB Shell-type" in a few countries worldwide (including Singapore). The plaintiff first commenced its chain of ten-minute haircut salons in Japan in 1996, and appeared to be the first in the world to introduce a "no-frills" salon where a customer could get a quick haircut in ten minutes and at a low cost of ¥1,000. The plaintiff had achieved this by analysing each step in the process of cutting hair, and eliminating the time or resource-consuming steps. Thus, for instance, the plaintiff's hairdressers did not take reservations or accept cash. Instead, payment was made via a ticket-vending machine. The plaintiff also did not shampoo customers' hair after a haircut, preferring to use a special vacuum cleaner (called the "Air Wash"). Additionally, the plaintiff monitored traffic at each of its outlets in real time over the Internet.

3 In mid-2000, the second defendant, Koki Matsuda, came across "QB House" haircut salons while on a trip to Tokyo. He was intrigued by the plaintiff's "no-frills" concept and decided to obtain a franchise from the plaintiff to operate "QB House" haircut salons in Singapore.

4 QB House Pte Ltd ("QBHPL") was thus set up to operate the "QB House" outlets in Singapore, and QBHPL entered into a licence agreement with the plaintiff on 7 December 2001 ("the First Licence Agreement"). The directors of QBHPL were the second defendant, Masao Konno and Suwandi Kojodjojo. Under the First Licence Agreement, the plaintiff granted QBHPL the right to operate haircut salons in Singapore and Malaysia under the trade names "QB House" and "QB Shell", and to adopt the plaintiff's QB House system, QB House get-up and QB House marks. In return for such rights under the licence, QBHPL paid royalties and licence fees to the plaintiff.

5 The first "QB House" outlet in Singapore was opened at Hitachi Towers in April 2002. Subsequently, QB House Sdn Bhd, a related company of QBHPL, was incorporated on 4 October 2002 to operate haircut salons in Malaysia under an implied sub-licence from QBHPL. The plaintiff also established a fully-owned subsidiary in Singapore on 20 December 2002, known as QB Shell Pte Ltd (now known as QB Net International Pte Ltd).

6 The plaintiff and QBHPL subsequently entered into a Second Licence Agreement on 1 January 2004 ("the Second Licence Agreement") thereby allowing the latter to operate haircut salons in Singapore and Malaysia under the trade names "QB House" and "QB Shell". Under cl 8 of the Second Licence Agreement, when QBHPL opened QB House in Singapore, it agreed to pay the plaintiff an initial licence fee of ¥600,000 per shop which would be increased to ¥700,000 per shop between April 2005 and March 2006 followed by a further increase to ¥800,000 per shop from April 2006 onwards. In addition, under cl 9 of the Second Licence Agreement, when QBHPL opened QB Shell in Singapore, it agreed to pay the plaintiff an initial licence fee of S$2,000 per shop which sum would be increased to S$2,250 for the period April 2004 to March 2005 and further increased to S$2,750 from April 2006 onwards. Further, under cl 10 of the Second Licence Agreement, QBHPL agreed to pay the plaintiff a monthly royalty of S$800 per shop which would be reduced to S$400 per shop when the Second Licence Agreement was renewed.

7 The second defendant had acted for QBHPL in the negotiations for both licence agreements. As such, it was common ground that the second defendant was the *de facto* mind and will of QBHPL at all material times.

8 To support QBHPL, the plaintiff waived a substantial portion of the royalties and licence fees due from QBHPL under the Second Licence Agreement. However, despite the plaintiff's waiver of the same between April 2002 and March 2004, QBHPL still defaulted in its payments under the Second Licence Agreement. The final payment received by the plaintiff from QBHPL for the month of June 2004 was on 9 September 2004.

9 Sometime around this period, relations between the plaintiff and QBHPL started to sour. QBHPL raised several complaints relating to the plaintiff's performance under the Second Licence Agreement. Besides alleging that the plaintiff had given inadequate support to its operations, QBHPL felt that the licence fees and royalties under the Licence Agreements were overly high and the cost was bleeding the company.

10 Negotiations were thus conducted between the representatives of QBHPL and the plaintiff, in an attempt to resolve the parties' differences. The plaintiff and QBHPL then entered into a settlement agreement on 17 November 2004, whereby the second defendant agreed on behalf of QBHPL to make payment of specific sums of money to the plaintiff and QB Shell Pte Ltd ("the Settlement Agreement").

11 Matters, however, did not end there. In January 2005, Earnson Management (S) Pte Ltd, the first defendant, entered into a sale and purchase agreement with QBHPL ("the S&P Agreement"). Under the S&P Agreement, which was backdated to 1 October 2004, the first defendant acquired the business assets of QBHPL and took over the employment of its employees. The first defendant was a private limited company that had

been incorporated by the third defendant in Singapore on 6 October 2004, and its business was described as "franchises of hairdressing shop (including unisex salons)". The first defendant later commenced its ten-minute haircut business in Singapore on 1 January 2005. Since then, the first defendant has been operating haircut salons in Singapore under the trade name "EC House".

12 The third defendant was a management consultant who provided corporate-related support, pursuant to which he would assume non-executive directorship in his clients' companies. The third defendant had been appointed as the first defendant's sole non-executive director, by virtue of his management consultancy business. The second defendant was appointed a consultant to the first defendant by a letter dated 1 October 2004.

13 On the basis of the above facts, the plaintiff commenced the present action against the defendants for, *inter alia*:

(a) a claim against only the first defendant for inverse passing off;

(b) breach of confidence by all three defendants; and

(c) conspiracy to injure the plaintiff's interests.

14 I should point out at this juncture that QBHPL is currently being wound up. In January 2005, the plaintiff had sued QBHPL for trade mark infringement and passing off in Suit No 41 of 2005 ("the Suit"). In that action, the plaintiff obtained an *ex parte* injunction order against QBHPL. After finding out that the business had been sold in late 2004 to the first defendant, the plaintiff commenced contempt proceedings against the third defendant for the alleged breach of the injunction order. The plaintiff's application for committal was dismissed with costs.

15 The Suit was brought to an end when the plaintiff brought winding-up proceedings against QBHPL in Companies Winding Up No 59 of 2005 for the unpaid licence fees. QBHPL's application to strike out the Suit under O 18 r 19 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) was pending at the time of the winding up and was thus never heard on its merits.

Inverse passing off

16 Inverse passing off has been regarded as an actionable wrong in Singapore, as evidenced in the Court of Appeal judgment in *Tessensohn Denyse Bernadette v John Robert Powers School Inc* [1994] 1 SLR(R) 470 ("the *Tessensohn* case"). Inverse passing off is not a nominate tort in its own right but is an example of an actionable misrepresentation to which the normal principles of passing off apply. This is evident from the observations of the Court of Appeal in the *Tessensohn* case at [25]:

> It is clear to us that not only is it passing off to misrepresent that one's goods or services were those of another, but it is also passing off to misrepresent the inverse: that another person's goods or services are one's own. The three essential elements of passing off equally apply to such passing off as well. Therefore, to succeed in an action for inverse passing off, a plaintiff must prove that there is goodwill attached to their goods or services; that the defendants misrepresented themselves as the commercial source of the goods or services in question; and that the plaintiff's goodwill was damaged as a consequence.

17 It was the plaintiff's contention that all three elements of goodwill, misrepresentation and damage have been made out on the facts. Predictably, counsel for the first defendant took the contrary view and asserted that the tort of inverse passing off was untenable in the present case.

18 Given that all three elements of the tort were the subject of serious contention between the parties, I propose to examine each of the elements in turn.

Goodwill

19 The plaintiff asserted that there was goodwill associated with its name "QB House", as well as its QB House system and get-up. The first QB House outlet opened at Hitachi Towers in April 2002, and was the first of its kind (*ie*, a ten-minute express haircut salon) to operate in Singapore. The plaintiff claimed that it had incurred substantial costs in advertising and promoting its QB House system and get-up.

20 In the plaintiff's advertisements, emphasis had been placed on the name "QB House" as well as the hygienic and efficient methods used by the plaintiff's hairdressers. Because it was a novelty, QB House turned out to be very successful and received extensive media coverage. As a result, the plaintiff claimed that a great deal of public awareness had been created in relation to its business, such that the public would associate the trade name "QB House" and the distinctive nature and get-up of the QB House system with the plaintiff alone.

21 The first defendant, however, refuted the plaintiff's claims. The first defendant placed significant emphasis on the fact that it had not used the "QB House" name. The first defendant said that the plaintiff's claim was negated by this omission of an essential element in the QB House get-up, as well as the fact that the first defendant had not used other features of the QB House system. The first defendant further averred that the plaintiff did not enjoy any goodwill in the provision of ten-minute express haircut services, and could not enjoin other traders from offering similar services.

22 Two issues arose for consideration in relation to the element of goodwill:

(a) Did goodwill accrue in respect of the plaintiff's QB House system and get-up and services?

(b) If so, did such goodwill accrue solely to the plaintiff?

23 In the context of passing off, goodwill is often defined by reference to Lord Macnaghten's classic formulation in *The Commissioners of Inland Revenue v Muller & Co's Margarine, Limited* [1901] AC 217 at 223–224 as "the benefit and advantage of the good name, reputation, and connection of a business", and "the attractive force which brings in custom".

24 Undoubtedly, every case in which passing off is alleged turns on its own facts, especially where the ascertainment of goodwill is concerned. As such, the owner of a trade mark will usually prove the existence of goodwill by adducing evidence of sales turnover and/or advertising expenditure in relation to the goods or services bearing the trade mark in question. In addition, the trade mark owner may further buttress his case by evidence from members of the same industry or the public showing that a substantial proportion of the public would draw a correlation between him and the mark: Tan Tee Jim, *Law of Trade Marks and Passing Off in Singapore* (Sweet & Maxwell Asia, 2nd ed, 2005) at para 17.17.

25 Essentially, the plaintiff here sought to claim the existence of goodwill in respect of its QB House system, QB House get-up and services as defined in its statement of claim. The relevant portions of the statement of claim read as follows:

> 3. The QB House System is an innovative concept combined with the latest technology and trained staff whereby customers would purchase a ticket for a sum of S$10.00 for a hair cut.
>
> [Particulars of the QB House system were stated to include: (a) no cash register; (b) no reservations; (c) use of electronic sensors; (d) no frills]
>
> 4. To achieve a consistent look and feel, all "QB House" barber shops are equipped with (amongst others) the same distinctive get up ("QB House Get Up") adopting special know-how and operational information, the prominent features of which are as follows:-
>
> (a) Name, marks, device, insignias or commercial symbols bearing the words "QB House" and "QB Shell" for fixed-structures and movable barber shops respectively;
>
> (b) Layout design;
>
> (c) Ticket-vending machine;
>
> (d) Electronic sensors;
>
> (e) Air Wash System;
>
> (f) Cylindrical-shaped shell … for movable barber shops;
>
> (g) Uniforms for the barbers;
>
> (h) Tools and accessories for hygiene control …

26 The plaintiff was correct to point out that goodwill may accrue in respect of the get-up of business premises and items used in trade. However, it is also correct to say that the threshold for establishing goodwill in this respect is generally quite high. A plaintiff who asserts goodwill in its get-up must show the presence of particular features in its goods and services which are "capricious" (*ie*, not common to the trade) but which have come to be associated with the plaintiff's goods. A plaintiff thus faces a difficult task in proving goodwill and he will fail unless he can adduce "strong persuasive evidence" in this respect: *Law of Trade Marks and Passing Off in Singapore* at para 17.44.

27 The high threshold required to establish goodwill is evident from case law. The plaintiffs in *Pernod Ricard SA v Allswell Trading Pte Ltd* [1993] 3 SLR(R) 817 failed in their claim that they possessed goodwill in respect of their drink which had been marketed and sold in bulb-shaped bottles. Similarly, in *Tong Guan Food Products Pte Ltd v Hoe Huat Hng Foodstuff Pte Ltd* [1991] 1 SLR(R) 903, the Court of Appeal held that the appellants had failed to show that their aluminium foil packaging with a white and blue colour scheme was distinctive of their products.

28 Likewise, I am of the view that the plaintiff has not succeeded in showing the existence of goodwill in respect of its QB House system, get-up and services. While it is arguable that the plaintiff's use of a ticket-vending machine, electronic sensors and a no-reservations system are unusual features of a haircut salon, these factors in themselves are insufficient to warrant a finding of goodwill. It should be noted that the plaintiff's use of a special vacuum cleaner to remove freshly cut hair, the use of working cabinets which minimise the movement of hairdressers whilst at work and the ten-minute service offered by the plaintiff are insufficiently distinctive to support a finding of goodwill. After all, it can be argued that this particular style or get-up is characteristic of the haircut trade and open for all in that trade to adopt, as long as sufficient care is taken to distinguish the source of the services and products in question.

29 I therefore reject the plaintiff's claim for passing off of its get-up. The plaintiff has not shown that its QB House get-up is a crucial point of reference for customers who want its services, or that the QB House get-up is so closely associated with the plaintiff's services that it is distinctive of the plaintiff alone.

30 For completeness, I should also address the second issue on whether goodwill had accrued solely to the plaintiff. Again I would answer this question in the negative. Although it was a licensee, QBHPL had acquired a shared ownership in the goodwill of the plaintiff's business.

31 Counsel for the plaintiff, Mr Leck, submitted that any goodwill generated by QB House outlets in Singapore accrued to the plaintiff. According to Mr Leck, the performance of the First and Second Licence

Agreements led to the accrual of goodwill to the plaintiff, rather than QBHPL. This was because QBHPL was merely a licensee under the two agreements and any goodwill in the business carried on by QBHPL under the QB House system and get-up would therefore accrue to the licensor (*ie*, the plaintiff). Reliance was placed on the comments in Christopher Wadlow, *The Law of Passing-Off: Unfair Competition by Misrepresentation* (Sweet & Maxwell, 3rd Ed, 2004) at para 3-119:

> If the commercial purpose of an agreement is to license the use of a distinctive name or mark in respect of which the licensor has (or is agreed to have) goodwill, to a licensee with no such goodwill, and in circumstances where the licensee's use would otherwise be actionable as passing-off, then in the absence of agreement to the contrary or other supervening factors, the goodwill in the business so carried on by the licensee under the licensed name or mark will accrue to the licensor rather than the licensee. … The licensee acquires no interest in the licensed name or mark, and must cease using it on termination of the licence. … It is irrelevant whether the goodwill in the licensed business would otherwise have accrued to the licensee, the licensor, or both.

32 Additionally, Mr Leck submitted, any publicity undertaken by QBHPL did not detract from the plaintiff's ownership of the goodwill of the business. He cited the decision of Lindsay J in *Gromax Plasticulture Ltd v Don & Low Nonwovens Ltd* [1999] RPC 367 ("*Gromax*") for the proposition that a licensor's ownership of its goodwill would not be undermined by the licensee's activities, if these were merely reasonably incidental to the maintenance or promotion of commercial interests under the licence.

33 Indeed, this proposition is well founded in logic and sits well with the concept of a licensing agreement. As aptly noted by the author of *The Law of Passing-Off: Unfair Competition by Misrepresentation* at para 3-119:

> It is the parties' contractual agreement, not some extrinsic legal fiction or equitable doctrine, which operates to vest the goodwill in the licensor, unless otherwise agreed, because no other outcome is consistent with the ordinary licensor-licensee relationship.

34 However, one must remember the context in which Lindsay J's comments in *Gromax* were made and the manner in which such a proposition ought to be applied. Before expressing that the touchstone was that of "reasonably incidental" activities by the licensee, Lindsay J had alluded to the fact-based nature of the inquiry in this respect. It would not be rigidly assumed that a licensee could not acquire goodwill in respect of the business. Rather, regard had to be had to the facts of each case, to determine if the licensee had gone above and beyond its duties, such as to acquire goodwill in the business. At 388, Lindsay J held as follows:

> *Whilst I recognise that the courts would not wish to undermine the utility of distributorship agreements (and exclusive distributorship agreements would be the most vulnerable) I am loth in this area, which*

> *is to some extent one of fact and degree, to endorse a proposition which is, as framed, so inflexible, so free of regard to the terms of the particular licence, to the state of affairs when the licence was made and to whether the licensee has, for example, promoted the name in ways beyond such as may have been incidental to his obligations under the agreement or beyond preservation or enhancement of such interests as he acquires under the agreement.* I would, however, be content for present purposes with a proposition which stated that subject to special circumstances being proved to the contrary and to the terms of the particular licence, as between licensor and licensee as competitors for the ownership of the goodwill at the termination of a licence, the position of the licensor should not be taken to be weakened nor that of the licensee enhanced by such activity on the licensee's part during the currency of the licence as was respectively either required of him or conferred upon him by the licence or, as to activity of his known to the licensor, was such as could be fairly regarded by the licensor as no more than reasonably incidental to the maintenance or promotion of such commercial interest in the name as the licence had conferred upon the licensee. [emphasis added]

35 Bearing this caution in mind, it would be unwise to rigidly adhere to the general rule that a licensee does not acquire goodwill in respect of the licensor's business. Instead, regard must be had to the evidence adduced by the parties on the facts.

36 In *Gromax*, the plaintiff had marketed a plastic crop cover manufactured by the defendant. It was agreed that the product would be marketed under the name "Gro-Shield" and that the parties would co-operate in the promotion of Gro-Shield. In the initial period, the product was sold in a way which identified the defendant as the manufacturer. However, all subsequent publicity served to link the product with the plaintiff alone. The relationship between the parties later deteriorated and the defendant registered a trade mark under the "Gro-Shield" name. The plaintiff applied for an injunction against the defendant, and asserted an exclusive right to use the name "Gro-Shield". This application was refused. Lindsay J held that, at the beginning, the factors pointed both ways as to who was responsible for the character and quality of the product. Lindsay J found that the plaintiff had performed a more significant role than that expected from a mere distributor. For instance, the plaintiff had suggested and implemented improvements to the product. The plaintiff had also helped to procure machinery for the manufacture of the product in ways which made it suitable for customers' needs and distinctive in the market. On its part, the defendant had also played a significant role by formulating advertisements to promote the product, making substantial contributions towards the cost of advertisement and ensuring the quality of the product. Accordingly, Lindsay J held that the goodwill associated with the Gro-Shield name had been vested in the parties jointly. The plaintiff thus could not show that it had the sole right to use the name "Gro-Shield".

37 I am of the opinion that the facts of the present case are similar to those in Gromax. QBHPL played an equally (if not more) significant role in promoting the QB House trade name and its haircut services in Singapore.

38 It was in dispute between the parties as to whether QBHPL had acted in such a way that goodwill could be shared between the plaintiff and QBHPL. The plaintiff naturally sought to downplay the role of QBHPL (and that of the second defendant) in promoting the QB House trade name and services in Singapore. I found the testimony of the second defendant more credible in this respect. Granted, the plaintiff had provided numerous instruction manuals to impart operational know-how to the first defendant. Several hair stylists employed by QBHPL had also been sent to Japan for the purposes of undergoing training by the plaintiff. However, I am inclined to agree with the second defendant that such efforts were insignificant to the success of the QB House trade name in Singapore.

39 The instruction manuals provided by the plaintiff were unsuitable to the local context; they had to be substantially modified by the second defendant before they could be adapted for use in Singapore. The second defendant thus had to rely on his staff as well as his own experience in the hairdressing industry to modify these manuals. The second defendant had managed three traditional hair-cutting saloons for his friend, Masao Konno, since 1999; he was not a novice to the business. QBHPL had also contributed substantially to publicity efforts in Singapore, by coming up with the idea of screening video clips of hair cutting carried out by QB House Singapore hairstylists. This was implemented by the second defendant in the form of screenings on television sets, which were displayed for public viewing in each of the QB House outlets.

40 Although the evidence showed that QBHPL had acquired shared ownership in respect of the plaintiff's business, this finding does not assist the first defendant. This is because the goodwill acquired by QBHPL did not pass to the first defendant under the S&P Agreement.

41 Even so, what was fatal to the plaintiff's claim was its inability to establish goodwill in its QB House system and get-up. Accordingly, the plaintiff's claim for inverse passing off must fail, because the plaintiff has not shown the essential element of goodwill.

Misrepresentation

42 As regards misrepresentation, the plaintiff must establish that the first defendant had misrepresented the plaintiff's goods and services as its own. Such misrepresentation must relate to the capacity of the first defendant to produce the goods and services in question. In this regard, I find that the plaintiff had successfully shown that the first defendant was guilty of such misrepresentation.

43 Essentially, the substance of the plaintiff's complaint can be traced to four specific instances of conduct by the first defendant. The first was in relation to two letters written to Seiyu Singapore. QBHPL had sent a letter dated 30 November 2004 to Seiyu Singapore ("the first letter"). The first letter was in the following terms:

> **Re: Take Over of the Business of QB House Pte Ltd by [the first defendant]**
>
> …
>
> Please be informed that the takeover of the business of QB House is part of the company's plans for expansion … Further, our Japanese counterpart is in the midst of finalising their listing on the Japanese stock market. …
>
> Please note that management and operation staff of the business will remain unchanged save that the business will henceforth be under the management of [the first defendant].
>
> …
>
> [The first defendant] will continue to honour all agreements made between yourselves and QB House regarding the tenancy of the property …

44 This was followed by a subsequent letter from the first defendant dated 15 December 2004 which notified Seiyu Singapore of a change in trade name ("the second letter"):

> **Change of Trade Name**
>
> …
>
> Please be informed that with effect from 1st January 2005, the trade name of "QB House" will be changed to "Express Cut" for all outlets in Singapore.

45 Second, the first defendant had placed an advertisement in *The Straits Times* on 4 January 2005 stating that "QB House is now known as EC House" and listing the various locations of EC House islandwide. These locations were, for the most part, identical to those of QB House outlets.

46 Third, the first defendant's employees had misrepresented to the public that the first defendant was the commercial source of the plaintiff's QB House system and/or services. The plaintiff relied on the evidence obtained by its operatives, who had visited several EC House outlets and confirmed misrepresentations by the first defendant's employees that the only change was to the name, everything else remained the same and that "QB House" and "EC House" were one and the same.

47 Fourth, the first defendant's act of continuing to operate "QB House" outlets using the plaintiff's equipment and without doing anything more than changing the logos in the signages, uniforms and combs amounted to a misrepresentation.

48 Clearly, the first defendant had made a misrepresentation that the plaintiff's goods and services were its own. The net effect of the first and second letters was to hold the first defendant out as the commercial source of the plaintiff's QB House system and/or services. I would agree that the reference to the continuance of the tenancy and the change of name amounted to an implied representation that the first defendant was associated with, if not the successor of, the plaintiff. The contents of both letters to Seiyu lead to the reasonable inference that the changes were merely cosmetic and superficial in nature, that there was merely a change of name and that the plaintiff continued to be the ultimate owner of the QB House system.

49 Similarly, the newspaper advertisement of 4 January 2005 amounted to a misrepresentation by the first defendant. In its submissions, the first defendant sought to downplay the statement in the advertisement that QB House would henceforth be known as EC House ("the offending words"). The first defendant contended that the offending words were in very small print, were placed innocuously in the advertisement, and could only be seen on close examination. With respect, the first defendant's arguments were untenable. The offending words were easily seen upon a reasonable reading of the advertisement. Furthermore, the incontrovertible evidence was that all the listed shops in the advertisement were previously QB House shops, save for the outlet at Raffles Exchange. Taken together, these two factors would lead a consumer to reasonably believe that the QB House outlets in Singapore had undergone a change of name, and that the outlets had been created or were owned by the first defendant.

50 As for misrepresentations made by the first defendant's employees, the first defendant contended that such evidence was inadmissible in court. The testimony of the plaintiffs' chief investigator, Philip Tan was mere hearsay as he had not been present at any of the outlets and had merely viewed the investigations through a video recording. In any case, even if the evidence were admissible, the first defendant criticised the evidence as wholly unreliable on the premise that Philip Tan had merely extracted brief snippets of the alleged conversations between the plaintiff's investigators and the first defendant's employees.

51 Having questioned Philip Tan myself, I agree that he did not carry out any of the investigations nor did he personally visit any of the outlets of the first defendant. However, the lack of primary evidence in this respect was not fatal to the plaintiff's claim.

52 There was little doubt from the evidence alluded to earlier in [45] and [47] above that the first defendant intended to copy the plaintiff's QB House system and get-up. There were striking similarities between the manner in which QB House and EC House operated their businesses. This was conceded by the defendants' witnesses themselves, who testified there were no changes other than to the logos on the signages, uniforms and

combs and that the layout and equipment used in the various outlets remained unchanged. This can be seen from the following extracts of the cross-examination of Png Eng Khoon Kenneth, the general manager of the first defendant and one of the pioneer members of QBHPL:

> Q: But the way in which the EC House outlets cut the customer's hair, the way in which they use the air-wash, give out the comb at the end of the haircut, greet the customer, do you confirm that there was no change to that, at least during the period of the changeover not arising out of the changeover. There was no change?
>
> A: No change.
>
> Q: You confirm that the staff were not sent for training as EC House hairstylist?
>
> A: No.

53 The testimony of Zann Soh Sow Hoon, who was the first defendant's current marketing manager, was to like effect:

> Q: You agree that the cutting capes, uniforms and combs in use by EC House barbershops today are similar to those used by QB House barbershops at the end of December 04, with the exception of the change in logo?
>
> A: Yes.
>
> Q: Going to item (c) of paragraph 12 of your AEIC, liaising with designers and contractors for the design of the outlets. At paragraph 16 of your AEIC, you have confirmed that you also liaise with the same contractors who renovated the outlets for QB House Pte Ltd. My question is, did you provide these contractors with detailed blueprints and plans belonging to QB House Pte Ltd on how to set up the barbershop?
>
> A: No.
>
> Q: It therefore follows that with the transition from QB House Pte Ltd to the 1st defendant, there was no change in the layout and design of the outlets apart from the signages?
>
> A: No change.
>
> Q: And you – can you confirm that between December 04 and January 05, when QB House became EC House, the equipment and the system used in the barbershops was the same?
>
> A: The furniture are all the same, most of them.

54 The policy statement at the plaintiff's outlets also appeared to have been copied wholesale by the first defendant. Indeed, there were only two minor and insignificant points of difference between both policy statements. First, references to "QB House" had been replaced with "EC

House". Second, the plaintiff's "Just Cut" policy had been substituted with the first defendant's "Express Cut" policy.

55 These striking similarities between the plaintiff's and the first defendant's conduct of their businesses constituted a material misrepresentation on the part of the first defendant. The first defendant had continued to use the plaintiff's trading style, and was effectively holding itself out as an associated party to the plaintiff. I find that the adoption of the plaintiff's trading style by the first defendant together with the first defendant's claim of a name change amounted to misrepresentation for the purpose of passing off.

56 Having established the existence of a misrepresentation, it now behoves me to consider whether confusion had been caused by the first defendant's misrepresentation, or whether there was a likelihood of confusion occurring in the normal course of trade.

57 The authorities are clear that confusion *per se* is insufficient to found a passing-off action. The confusion must arise as a result of an association with the plaintiff's business and damage. This is evident from the judgment of Lord Greene MR in *Marengo v Daily Sketch and Daily Graphic Limited* [1992] FSR 1 where he held (at 2) that:

> No one is entitled to be protected against confusion as such. Confusion may result from the collision of two independent rights or liberties, and where that is the case neither party can complain; they must put up with the results of the confusion as one of the misfortunes which occur in life. The protection to which a man is entitled is protection against passing off, which is quite a different thing from mere confusion.

58 Likewise, Chadwick LJ in *Premier Luggage and Bags Ltd v Premier Company (UK) Ltd* [2003] FSR 5 at [37] observed that:

> The relevant question, in the context of an action for passing off, is not whether there is a risk of confusion because the defendant's name is similar to the claimant's name; the relevant question is whether the defendant's use of his name in connection with his goods or his business will be taken as a representation that his goods or business are, or have some connection with, the goods or business of the claimant – so giving rise to harm, or the risk of harm, to the goodwill and reputation which the claimant is entitled to protect. A risk of confusion is not enough …

59 On the facts, I find that the first defendant's misrepresentation was likely to confuse consumers. It may be argued that one should be slow to think that the average person would be easily deceived or hoodwinked, given the widespread education in Singapore and a public that is constantly exposed to the world either through travel or the media (see *McDonald's Corp v Future Enterprises Pte Ltd* [2005] 1 SLR(R) 177 at [64]).

60 However, the above argument does not assist the first defendant's case. There were striking similarities between the manner in which the plaintiff and the first defendant conducted business. Further, both the plaintiff and the first defendant operated in the same trade – that of providing express haircut services. Regard should also be had to the fact that the addresses of the EC House outlets were largely identical to those of QB House outlets and the fact that the advertisements stated that QB House had undergone a name change. Taken together, it is my view that the circumstances would cause a substantial number of customers or potential customers to be confused, even if they had exercised reasonable care, in the selection of an express haircut salon.

Damage

61 I now turn to consider if the plaintiff has shown that the misrepresentation had caused or was likely to cause damage to its goodwill. The first defendant has sought to refute any allegations of damage. Citing *Reckitt & Colman Products Ltd v Borden Inc* [1990] 1 WLR 491, the first defendant argued that customers frequently buy whatever is available, irrespective of the brand. The first defendant asserted that the plaintiff had failed to adduce evidence that it had suffered damage as a result of the alleged misrepresentations. In its closing submissions, the first defendant alluded to the fact that no diversion of business or sales would arise – it did not follow that a customer would otherwise refuse to cut his hair at the first defendant's outlets but for the misrepresentation. This was because the nature of the plaintiff's business was such that price would be a very important factor in the consumer's decision.

62 In my view, this argument was unsustainable. While price may be a relevant factor in the choice of an express haircut salon, this does not detract from the fact that business would be diverted to the first defendant as a result of the latter's misrepresentation. As the plaintiff rightly pointed out, the court would readily infer damage or the likelihood thereof if the plaintiff and defendant are in competition with each other. This proposition was affirmed by the Court of Appeal in *Tong Guan Food Products Pte Ltd v Hoe Huat Hng Foodstuff Pte Ltd* ([27] *supra*) at [31]:

> … If the goods in question are in direct competition with one another, the court will readily infer the likelihood of damage to the plaintiff's goodwill, not merely through loss of sales but also through loss of the exclusive use of his name or mark in relation to the particular goods or business concerned. …

63 Given that both the plaintiff and first defendant were in the same business offering express haircut services at the same price ($10.00) for the same duration (ten minutes), they were direct competitors in the same industry and, consequently, I would infer damage or the likelihood thereof to the plaintiff's goodwill.

64 However, while the plaintiff has shown the existence of a material misrepresentation and damage, it failed as stated earlier (at [28] above), to show the existence of goodwill in respect of its QB House system, get-up and services.

Breach of confidence

65 The seminal case of *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41 ("*Coco*'s case") makes it clear that a plaintiff who alleges a breach of confidence must prove three elements:

(a) the confidential nature of the information in question;

(b) that the information was communicated in circumstances importing an obligation of confidence; and

(c) an unauthorised use of the information.

66 These principles were cited with approval in the recent case of *Vestwin Trading Pte Ltd v Obegi Melissa* [2006] 3 SLR(R) 573 at [34].

67 A preliminary point raised by all three defendants was that the plaintiff's claim ought to have been dismissed at the outset, by reason of the plaintiff's failure to establish with particularity what was alleged to be confidential; this objection was unmeritorious. In my view, the plaintiff has adequately discharged its burden of proof.

68 A plaintiff who alleges a breach of confidence must define the allegedly confidential information with precision. As a corollary, the courts have applied the principle that a defendant's use of information cannot be restrained by injunction unless the injunction is drafted in sufficiently specific terms to enable the defendant to know with certainty what he can and cannot do. The rationale for this was elucidated by Brightman J in *Amway Corporation v Eurway International Ltd* [1974] RPC 82 at 86–87:

> I asked the plaintiffs' counsel if he could point in his literature to some particular piece of information which he said was confidential and which he claimed the defendants were wrongly using. He told me that he pointed to nothing in issue here but to the entirety of the plaintiffs' documentary material which is in evidence.
>
> It seems to me that a claim for abuse of confidential information cannot really be dealt with in that way. If I made an order restraining the defendants from using for their own purposes any of the documentary material contained in the plaintiffs' business literature, but did not identify the particular information that the defendants are not to impart, they would be placed in a most embarrassing situation. I do not know how they could decide what business methods, literature and paper-work to avoid using in order to keep clear of contempt of court; and I think that that is an insuperable difficulty in the plaintiffs' claim under this head.

69 Our courts have espoused a similar approach in the local context. Thus, in *Chiarapurk Jack v Haw Par Brothers International Ltd* [1993] 2 SLR(R) 620 ("*Chiarapurk*") and *Stratech Systems Ltd v Nyam Chiu Shin* [2005] 2 SLR(R) 579 ("*Stratech*"), the Court of Appeal rejected the plaintiffs' claim on the basis of insufficient particularisation.

70 The defendants sought to rely on both authorities in support of their contention that the plaintiff's claim was woefully deficient in its details; the reliance was misplaced. Both *Chiarapurk* and *Stratech* can be distinguished on their facts. In *Chiarapurk*, the parties had entered into a joint venture for the manufacture of pharmaceutical products under the "Tiger Brand" trade mark. However, the appellants subsequently began to manufacture and distribute a new medicinal balm under the label "Golden Lion Shield". The respondents thus commenced suit and obtained an interlocutory injunction on the basis that a breach of confidence had occurred (amongst other grounds). In their statement of claim, the respondents had simply stated that the details of the manufacturing process were confidential. No further particulars were given even though these had been requested.

71 On appeal, the Court of Appeal discharged the interlocutory injunction because the respondents' claim had not been sufficiently particularised. It is pertinent to note that the respondents had not disclosed the manufacturing process in detail and merely provided a very basic and general description in this respect. Also, the court was unable to establish any details as to the manufacturing process from the evidence itself. This was because the respondents' witness was unfamiliar with the manufacture of the balm, and did not state the source of his belief as to why the manufacturing process was confidential. The court thus dismissed the respondents' case, on the basis of a "double failing" – there had been insufficient particularisation and the little information which existed emanated from a source that claimed no familiarity with the manufacture of the product (at [34]).

72 The facts of *Chiarapurk* are far removed from the present case. As the plaintiff rightly pointed out, the plaintiff's confidential information had disclosed the relevant operational information relating to the QB House system. It is also pertinent to note that the plaintiff had called its President, Kazutaka Iwai ("Iwai"), to testify on the nature and specifications of the QB House system.

73 In *Stratech*, the plaintiff, Stratech, sought to bring an action for breach of confidence against numerous defendants, in respect of a computer software named "V116". One of the causes of action was for the wrongful retention and use of confidential information belonging to Stratech, namely V116. At first instance, Choo Han Teck J (see [2004] SGHC 168) dismissed Stratech's claim in respect of trade secrets and confidential information, on the basis that Stratech had not particularised what it deemed as confidential information and trade secrets belonging to it. All that had been divulged

was that the V116 was the program developed to integrate the vehicle entry permit system and the electronic road pricing system. Stratech had not disclosed what aspect or part of V116 was confidential, or why it was confidential. This aspect of Choo J's decision was upheld on appeal.

74 The facts of the present case can likewise be distinguished from those in *Stratech*. Besides identifying the various manuals that constituted the confidential information, the plaintiff had adduced evidence to show how such information was confidential in nature. Therefore, the plaintiff's claim was adequately particularised.

75 I now turn to consider the three requisite elements of an action for breach of confidence.

Confidential nature of the information

76 The confidential information as listed in the statement of claim and the Second Licence Agreement was said to comprise the following (collectively "the Documents"):

(a) basic business operational manual;

(b) sales and administrative and liquidation manual;

(c) equipment and fixture installation manual;

(d) cleaning manual;

(e) design manual; and

(f) other start-up information, experience, advice, supervision, guidance and know-how with respect to management, operation and promotion as part of the QB House system.

77 The QB House system was defined in the statement of claim to have elements such as no cash register, no reservations, an electronic sensor to automatically notify customers of a barber's availability and the customer's anticipated waiting time and the use of an air wash system to remove loose, freshly-cut hair.

78 Counsel for the plaintiff repeatedly sought to argue that the Documents, as well as the QB House system, were confidential in nature; I disagree.

79 At the outset, the plaintiff was correct in its contention that the mere simplicity of an idea will not detract from its confidential nature. In *Cranleigh Precision Engineering Ltd v Bryant* [1965] 1 WLR 1293, Roskill J rejected the argument that the secret processes in question did not possess the necessary quality of confidence solely because of their simplicity. Roskill J's view has been endorsed in *Coco*'s case ([65] *supra*), where Megarry J held at 47 that "the simpler an idea, the more likely it is to need protection". Therefore, the mere fact that the plaintiff's QB House system

may involve apparently simple components such as the compact design and layout of the haircut salons does not *ipso facto* preclude a finding as to its confidential nature.

80 Likewise, I am in agreement with the plaintiff that the confidential nature of the Documents can derive from the information taken as a complete package, even if it is doubtful whether each document is confidential when taken separately. The observations of Buckley J in *Under Water Welders & Repairers Limited v Street and Longthorne* [1968] RPC 498 at 506–507 are helpful in this regard:

> The fact that all the individual units of equipment that are employed in a particular operation may be articles that can be obtained in the general market and the fact that systems are well known to those concerned in whatever sort of activity is involved, does not mean that there cannot be some degree of confidentiality about the way in which they are used to achieve a particular result.

81 Therefore, while the components of the QB House system may not be confidential in themselves, the manner in which they were combined and the technical "know-how" in relation to its operation can potentially be confidential in nature.

82 However, a closer examination shows that the plaintiff's claim of confidentiality cannot succeed. First, the QB House system and its concept of the ten-minute express haircut service was information that was unmistakably in the public domain. The plaintiff cannot possibly claim confidentiality in relation to its concept for ten-minute express haircut services. This is evident when one considers *Stratech Systems Ltd v Guthrie Properties (S) Pte Ltd* [2001] SGHC 77 ("*Stratech v Guthrie*"), where the High Court held that the plaintiff's concept of a "cashless" and "ticketless" car park system did not in itself possess the requisite quality of confidence. This was because the car park system could be easily observed by anyone who visited the car park once the system had been set up.

83 Admittedly, the High Court in *Stratech v Guthrie* subsequently went on to hold that other technical information (such as the functional description, system and software specifications, system architecture, layout and design) in relation to the car park system was confidential in nature. This was because most of such information would not be observable by the public when they visited the car park.

84 However, the ruling is of no assistance to the plaintiff's case that its QB House system was confidential. The plaintiff's QB House system is unlike the "Intelligent Car Park System" developed by the plaintiffs in *Stratech v Guthrie*. There was hardly any secrecy in the procedures of the QB House system, and this was conceded by Iwai himself under cross-examination. For instance, Iwai conceded that the layout of a QB House outlet would/could be easily seen by any customer who visited the outlet.

While the equipment and fixture installation manual described the layout of a QB House outlet, a customer who visited the outlet could just as easily observe the layout without reference to the manual. Additionally, components of the QB House system, such as the ticket-vending machine which only accepts $10 bills and the lack of a cash register were visual features which were easily observed by members of the public. Hence, as Iwai himself testified, there were "copycats" in the market, including Miyabi Cut, Junior League, Speed Cut, Aki Family Salon and Kojimaya. I should point out that the plaintiff's solicitors wrote letters all dated 5 September 2005 to these establishments, alleging that they used and demanding that they cease using, the plaintiff's QB House system, apparently to little or no effect as only two recipients responded. Junior League responded through its solicitors' letter dated 12 October 2005 stating, *inter alia*:

> [W]e are instructed that there is no truth to your client's claim to have special features to your client's operation of barbershops. It is the simple utilization of tickets, sensors and vacuum cleaners. It is prevalent everywhere in many contexts and in many industries, including the hairdressing industry. It is merely an administrative feature and does not yield any prominent and distinct feature in relation to the hairdressing industry.

while the Japanese proprietor of Kojimaya replied rejecting the plaintiff's demands, asserting that the "face [*sic*]" of the outlet, the ticket-vending machine and the cabinet with air wash system that he used were all originally designed by him, and his business was not a "10 minutes service". The other establishments appeared to have simply ignored the plaintiff's demands. I do not believe it is a coincidence that the plaintiff's solicitors wrote to all the "copycats" nine days before the writ herein was issued on 14 September 2005; it was a move to lend credence to the plaintiff's claims against the defendants.

85 Even if the court accepts that the features of the QB House system involved technical details, the extent of its technical details was far less than that in *Stratech v Guthrie*. Viewed in its entirety, the QB House system cannot, in my opinion, be said to comprise of confidential information, as this information was known to the public at large; it was not rocket science. Accordingly, the plaintiff's claim that the information was confidential in nature must fail.

86 The availability of numerous publications describing the plaintiff's QB House system lends further support to my view that the information was available in the public domain. As the first defendant rightly pointed out, the details of the QB House system had been outlined in great detail in an article dated 29 September 2003 entitled "Looking at your business from the inside out" and in a case study by Nihon University Graduate School of Business and the mini case study on "QB House – 10 minutes just cut" from

a course by the National University of Singapore's Business School. The content of the case study warrants further comment; it described in great detail how Kuniyoshi Konishi had first come up with the concept of a ten-minute express haircut service and the manner in which he had modified existing practices to ensure that getting a haircut became a speedy and efficient affair. It is also pertinent to note that the case study included labelled diagrams showing the series of steps by which customers were served from the point of payment to the end of the haircut, as well as a cross-section view of the cabinets used by QB House outlets and the position of the various equipment located in its compartments.

87 Finally, it is my view that the plaintiff cannot seek to invoke the law of confidence because the information sought to be protected had in fact been disclosed in the plaintiff's patent applications. The protection afforded by the law of confidence is lost once a patent is granted. Instead, the proprietor of the information should sue for infringement in relation to the acts done after the date of publication of the patent. The House of Lords in *O Mustad & Son v Dosen* [1964] 1 WLR 109 at 111 expressed the rationale for this as follows:

> [T]he important point about the patent is not whether it was valid or invalid, but what it was that it disclosed, because after the disclosure had been made by the appellants to the world, it was impossible for them to get an injunction restraining the respondents from disclosing what was common knowledge. The secret, as a secret, had ceased to exist.

88 The plaintiff had initially filed two patents in Japan in 2000 and these were published in 2002. The first patent application No 2002-307094 disclosed the QB House concept and business model, while the second patent application No 2000-403169 set out the layout and design of a QB House outlet. Both patents described in extensive detail the QB House system, such as the manner in which the components of the QB House system were integrated to form a cohesive whole and the precise details of the different compartments in each workstation. In fact, Iwai himself conceded that it was possible for a person to set up a similar business on the basis of the information disclosed in the patent applications.

89 In deciding whether publication had occurred, it is my view that the filing and publication of the patents in Japan are relevant. While the patent applications were made in Singapore after 2000, it could be argued that publication and disclosure had already occurred as a result of the patents having been filed in Japan and overseas.

90 In *Franchi v Franchi* [1967] RPC 149, Cross J was faced with similar circumstances. The Belgian equivalent of the plaintiff's British patent application was published in Belgium in June 1963, although it took another two years before the Belgian specification became available to the public in the United Kingdom on the shelves of the Patent Office library.

The plaintiff subsequently brought an action for misuse of confidential information in respect of the interim period from June 1963 to June 1965 (the plaintiff did not sue in respect of the period after June 1965 as the Belgian specification had become available in the United Kingdom). An issue thus arose as to whether the secrecy of the plaintiff's information had been destroyed by its publication in Belgium in 1963.

91 Cross J held that the element of knowledge by persons in another country could potentially be relevant when deciding if the information had lost its secrecy. The inquiry was ultimately one of degree, depending on the particular case. On the facts, Cross J held that the information had ceased to be secret by 1963 for two reasons. First, patent agents in the United Kingdom often inspected overseas patent specifications as soon as they were published. Second, by applying for the Belgian patent, the plaintiff had set in train a process which would, in the ordinary course of events, lead to the process becoming known to its competitors at or shortly after the publication date in Belgium.

92 The principles set out by Cross J are equally applicable to the present case. The plaintiff had started a process which would result in the disclosure of the allegedly confidential information in the ordinary course of events. This is evident from the fact that the plaintiff went on to file corresponding patents in the United States, the European Union, China, Korea, Taiwan and Singapore between 2001 and 2004. Having done so, the plaintiff can no longer claim the protection conferred by the law of confidence, simply because the information had ceased to be confidential.

93 At this point, I pause to address an objection raised by the plaintiff. The plaintiff alleged that the disclosure of confidential information to the public only occurred after 2002, when the plaintiff's patent registrations were published. The plaintiff appeared to be suggesting that it should thus be able to sue for breach of confidence in respect of the information disclosed before 2002. With respect, this is untenable. The second defendant had pointed out that the allegedly confidential information had been in the public domain since 1999, thus pre-dating the supposed communication of confidential information to the second defendant and QBHPL after May 2001. Many of the distinctive features of the QB House system had been disclosed to the public via an article in the October 1999 issue of the *Far Eastern Economic Review*, which commended the plaintiff's speedy haircut system and its components (such as the absence of a cash register and ticket-vending machines).

94 Taking all the circumstances into consideration, I hold that the plaintiff cannot succeed in this claim. The plaintiff has not satisfactorily established the confidential nature of the documents identified in the statement of claim, as well as its QB House system.

Importing an obligation of confidence

95 I shall now consider the second requirement in *Coco's* case ([65] *supra*) – that there must be an obligation of confidence arising from the circumstances in which the information was imparted.

96 I shall first make a preliminary observation. One of the arguments put forth by the second defendant was that the Documents, which he had been given access to, were not marked as "confidential". The second defendant sought to rely on this as a factor which negated the confidential nature of the Documents. This is logically flawed – the issue of confidentiality is to be ascertained by reference to the substance of the information for which protection is sought. Thus, the mere fact that a document has been labelled "confidential" will not automatically confer confidentiality on it if it has been made generally available: *In the Matter of J R Dalrymple's Application for a Patent* [1957] RPC 449. Conversely, the mere failure to label a document "confidential" should not detract from its confidential nature (if it is indeed the case).

97 Moving now to the submissions, the plaintiff alleged that the second defendant had received the Documents and information in circumstances which imported an obligation of confidence because they had been communicated for a specific purpose (*ie*, the two Licence Agreements). The second defendant had received the Documents and information because he had been acting on his own behalf as well as that of QBHPL. As such, the second defendant was not entitled to use the Documents and information for purposes which did not fall within the ambit of the Licence Agreements.

98 The second defendant sought to refute this contention, by arguing that the Documents and information had been given to QBHPL and not to the second defendant *per se* (or in his personal capacity). Rather, they had been communicated to the second defendant in his capacity as the *de facto* mind and will of QBHPL.

99 I reject the second defendant's contention. Assuming *arguendo* that the Documents and information were indeed confidential in nature, it could be said that the second defendant had received them as a third party and under circumstances which gave rise to an obligation of confidence. This was because the second defendant had actual knowledge of their confidential nature. The second element of a claim for breach of confidence would therefore be satisfied as against the second defendant.

100 Where the first and third defendants were concerned, the plaintiff had not adduced direct evidence showing their awareness that the documents and information were confidential in nature. Instead, the plaintiff sought to persuade the court that this could be inferred from the circumstances. For instance, the plaintiff alleged that the first and third defendants ought to have been aware of the confidential nature of the documents and information, by virtue of the plaintiff's position as the creator and owner of

the QB House system and the second defendant's appointment as a consultant to the first defendant. The plaintiff further claimed that this would have been discovered by the first defendant had it conducted its due diligence before entering into the S&P Agreement.

101 I am not prepared to make any finding against the first and third defendants on this point, given the lack of direct evidence on this aspect.

Unauthorised use

102 The final ingredient in an action for breach of confidence requires that the confidential information be misused, or the threat thereof. In this regard, the plaintiff has not proved its case against all three defendants.

103 The crux of the plaintiff's case was that the second defendant had misused the allegedly confidential information to set up two unauthorised QB House outlets and facilitate the takeover of QBHPL's business and assets by the first defendant. Besides using such information in the course of his employment as the first defendant's consultant, the second defendant had also passed the allegedly confidential information onto the first and third defendants. This constituted misuse as the second defendant had received the information for the sole purpose of performing the Licence Agreements.

104 However, the plaintiff's allegations were unsupported by the evidence adduced at trial. The plaintiff did not show that the second defendant had put the allegedly confidential information to an unauthorised use. It bears highlighting that the plaintiff and the second defendant have taken opposing stances in relation to the plaintiff's role under the terms of the Licence Agreements. Iwai had alleged that the plaintiff provided a significant amount of support to QBHPL, in the form of manuals and disseminating technical know-how associated with the QB House system. The second defendant, on the other hand, contended that the plaintiff's contribution was minimal as the information disseminated could not be readily applied in the Singapore context.

105 Having considered the testimony of both Iwai and the second defendant, I find that the latter was a more credible witness. Earlier at [40] above, I had observed that the efforts of the second defendant were the primary driving force behind the success of the QB House system in Singapore. The second defendant had drawn upon his experience in the local hairdressing industry to adapt and create a system which was suited to the Singapore context. On the other hand, Iwai, who hails from Tokyo, had no personal knowledge of our local conditions and was therefore not in a position to refute the second defendant's testimony based on the latter's experience and first-hand knowledge in Singapore. Consequently, it follows that the plaintiff's claim of misuse of confidential information against the first and third defendant must likewise fail.

106 For completeness, I shall now consider the position of the first and third defendants. Where the first defendant was concerned, the plaintiff sought to rely on indirect evidence of misuse. This is an accepted practice, for the reasons expressed by the High Court in *Stratech v Guthrie* ([82] *supra*) at [42]:

> … [Stratech had] not adduced any direct evidence of misuse but that is hardly unusual in cases of this kind. A plaintiff in a position such as Stratech would often find it difficult to prove the actual commission of the breach or actual misuse and the way to establish one's case would be through highlighting the tell-tale signs of striking similarities, especially in unique features, that exist between the plaintiff's and the defendant's products. …

107 Indeed, this was what the plaintiff had attempted to do. The plaintiff alleged that the first and third defendants had simply taken over the business and assets of QBHPL in their entirety, and continued to run the outlets without any changes except to the logos, as well as the fact that the first defendant's employees had been QBHPL's former employees.

108 At first blush, these factors may lead to an inference of misuse. However, these factors cannot withstand close scrutiny. There were critical differences between the systems used by the plaintiff and first defendant, such as to negate any finding of misuse. Two examples will suffice in this respect. First, the first defendant used a more rudimentary system for performing express hair-cut services in comparison to that used by the plaintiff. The first defendant's system lacked two of the four key features of the QB House system – the ticket-vending machine and the electronic sensors which were integrated into a computer management system.

109 Second and far more significant, the first defendant did not use a special vacuum cleaner, or what the plaintiff referred to as "Air Wash", to remove freshly-cut hair. It bears noting that the plaintiff had placed special emphasis on the unique nature of the "Air Wash" as its "own practically development equipment". Indeed, it was undisputed that the plaintiff's founder, Kuniyoshi Konishi, had commissioned electrical appliance manufacturers to manufacture special vacuum equipment for use under the QB name. This was because he had been advised that an ordinary machine with a vacuum suction would be unable to remove loose hair. This should be contrasted with the first defendant's haircut system, which used an ordinary vacuum cleaner for the same purpose.

110 Where the third defendant was concerned, there was no evidence that he was directly involved in the day-to-day operations of the second defendant. In the light of his testimony, the plaintiff's claim against the third defendant for procuring or knowingly allowing the first defendant to receive and use the allegedly confidential information must fail.

111 Accordingly, the plaintiff's action for a breach of confidence cannot be sustained.

Conspiracy

112 To succeed in an action for conspiracy, a plaintiff must prove the existence of three essential elements:

(a) a combination or an agreement between two or more individuals;

(b) an intent to injure (where a conspiracy by lawful means is alleged, there must be a predominant intention to injure the plaintiff); and

(c) damage to the plaintiff.

113 In its (re-amended) statement of claim, the plaintiff had pleaded both a conspiracy by lawful and unlawful means in the alternative. The present case hinged primarily on the relationship between the plaintiff and the second defendant. There are two main areas of this relationship that are particularly pertinent:

(a) how the assets and business of QBHPL were transferred to the first defendant via the S&P Agreement; and

(b) the role of the second defendant in the execution of the S&P Agreement.

114 The plaintiff relied on the manner in which the S&P Agreement was executed as one of the fundamental premises for its conspiracy claim. The linchpin of the plaintiff's complaint was that the sale of the business from QBHPL to the first defendant constituted a sham transaction, and had been created as an afterthought in response to the plaintiff's demand letter dated 28 December 2004. The plaintiff also alleged that the sale of the business had occurred at an undervalue and had been part of a sinister scheme by the second defendant to steal the plaintiff's business and misappropriate the plaintiff's goodwill and reputation. The first defendant had allegedly been incorporated to facilitate the execution of this scheme and the third defendant was privy to the entire scheme.

115 As is evident, the plaintiff came up with a litany of allegations against all three defendants. However, these allegations remain unsubstantiated simply because the plaintiff had failed to show the essential elements of a conspiracy, both by lawful and unlawful means.

116 At the outset, the plaintiff failed to show the existence of a combination or an agreement between the three defendants. Having regard to the evidence, I find that the third defendant was not privy to the alleged agreement due to his minimal involvement in the affairs of the first defendant. Thus, any claim of a combination or agreement must be

between the first and second defendants only. It is here that the plaintiff was faced with another insurmountable obstacle – the first defendant had not been incorporated at the time of the alleged conspiracy. In its opening statement, the plaintiff alleged that the conspiracy had been devised in June 2004. Given that the first defendant was only incorporated later in October 2004, the first defendant would not have been in existence at the time that the alleged conspiracy was hatched. Accordingly, any claim as to the existence of a "combination" or "agreement" between the defendants must fail.

117 In any case, the plaintiff's case was doomed to fail because of its failure to show the existence of a predominant intention to injure. Certainly I would not set the threshold as high as counsel for the second defendant had suggested – that the plaintiff had to show that the defendants' actions were "spiteful and malicious". The House of Lords in *Crofter Hand Woven Harris Tweed Company, Limited v Veitch* [1942] AC 435 has clarified the position in this respect, by establishing that spite, vindictiveness or malevolence is not necessary, although such elements are often present. Instead, a predominant intent to injure will suffice to found a conspiracy claim, unless the defendants can show some justification for their actions. Such justification will be found if the combination is proved or admitted to be inspired by self-interest: see *eg*, *Lonrho Plc v Fayed* [1992] 1 AC 448. As was observed by the Court of Appeal in *Quah Kay Tee v Ong and Co Pte Ltd* [1996] 3 SLR(R) 637 at [50], the conspirators' actions must serve none of their own commercial purpose.

118 The existence of a commercial purpose and justification was indeed borne out on the facts. I believe the second defendant's testimony that the substantial licence fees imposed by the plaintiff was a significant factor in QBHPL's decision to enter into the S&P Agreement. Evidence was adduced that QBHPL was in dire financial straits due to its low profits, and questions were raised as to the continuing viability of the business. In comparison, the sale contemplated under the S&P Agreement presented a far more promising prospect. The investors of QBHPL stood a greater chance of recovering their capital if the sale went through, as opposed to the situation where QBHPL was liquidated. Also, a sale of the business as a going concern would ensure the continued employment of the existing staff employed by QBHPL whose welfare was utmost in the mind of the second defendant. Thus viewed, there was a real and tangible advantage for QBHPL to enter into the S&P Agreement with the first defendant. Therefore, no predominant intent to injure was established.

119 The plaintiff's claim of an unlawful conspiracy can therefore be disposed of quite readily. As the plaintiff failed to show the commission of an unlawful act such as the commission of a crime or tort pursuant to the conspiracy, its claim must accordingly fail.

Conclusion

120 In the event, the plaintiff has failed to prove its claims for (a) inverse passing off, (b) breach of confidence and (c) a conspiracy to injure. Consequently, I dismiss the plaintiff's action with costs to the three defendants to be taxed on a standard basis unless otherwise agreed.

Reported by Mohamed Faizal.