Goik Soon Guan *v* Public Prosecutor
[2015] SGHC 31

Case Number	: Magistrate's Appeal No 209 of 2013
Decision Date	: 30 January 2015
Tribunal/Court	: High Court
Coram	: Chao Hick Tin JA
Counsel Name(s)	: Zaminder Singh Gill (Hillborne Law LLC) for the appellant; Sanjna Rai and Goh Yi Ling (Attorney-General's Chambers) for the respondent.
Parties	: Goik Soon Guan — Public Prosecutor

Criminal procedure and sentencing – Sentencing

30 January 2015

Chao Hick Tin JA:

Introduction

1 This was an appeal by Goik Soon Guan ("the Appellant") against the decision of the district judge ("the DJ") in *Public Prosecutor v Goik Soon Guan* [2013] SGDC 301 ("the GD"). The Appellant faced 16 charges under s 49(*c*) of the Trade Marks Act (Cap 332, 2005 Rev Ed) ("the TMA") and s 136(2)(*b*) of the Copyright Act (Cap 63, 2006 Rev Ed) ("the CA") for the infringement of intellectual property rights. He pleaded guilty and was convicted of four charges, namely, the second, fourth, 11th and 14th charges (collectively, "the proceeded charges"). The remaining 12 charges were taken into consideration for the purposes of sentencing. The Appellant was sentenced to a total of 15 months' imprisonment with effect from 5 September 2013.

2 The Appellant appealed against the sentence, submitting that it was manifestly excessive. After hearing submissions from both the Appellant and the Prosecution, I allowed the appeal by reducing the sentence imposed for the second charge from 12 to six months' imprisonment. I did not, however, vary the sentences imposed by the DJ for the rest of the proceeded charges. This led to a reduction of the Appellant's global sentence from 15 to nine months' imprisonment. I gave brief oral grounds at the hearing, and now set out my detailed grounds of decision. For convenience, I shall hereafter use the term "infringing articles" to denote the goods and/or articles which are the subject of offences under s 49(*c*) of the TMA and s 136(2)(*b*) of the CA.

The facts

3 The facts of the case are set out in the Statement of Facts dated 17 August 2013, which the Appellant, a 43-year-old male Singaporean with no known antecedents, admitted to without qualification. At all material times, the Appellant was in the business of selling bedding products under the business name of "Jacky G Trading".

4 Sometime in 2009, the Appellant rented a shop at Block 18 Toa Payoh Lorong 7 #01-256 ("Unit 256"), which he used to sell bedding products such as bed sheets, mattresses, pillows and bolsters. These bedding products (referred to hereafter as "Infringing Articles") were infringing articles in that they either: (a) carried the trade marks of well-known brands which had been falsely applied

by the Appellant (see s 49 of the TMA); or (b) featured infringing copies of copyright-protected artistic works (*ie*, copies of copyright-protected artistic works made in breach of the copyright in the respective works). The well-known brands involved included, *inter alia*, Disney, Hello Kitty, Doraemon, Thomas and Friends as well as Manchester United Football Club. At the time, the Appellant obtained the Infringing Articles from Guangzhou, China, through an agent who would ship the articles to Singapore.

5 Sometime in October 2010, the Appellant rented a second shop at Block 18 Toa Payoh Lorong 7 #01-260 ("Unit 260") for a fee of $100,000 plus a monthly rental of $2,700. Thereafter, he used Unit 260 to sell Infringing Articles and Unit 256 for storage. The Appellant also operated his business at temporary makeshift stalls at night markets and outside shops situated in heartland areas. He would typically rent the space for these temporary stalls from shop owners at a rental fee ranging from $30 to $80 per half day, depending on human traffic. The Appellant employed one driver and four sales assistants to assist him in delivering and selling Infringing Articles.

6 From about September 2010 to July 2011, the Appellant also supplied Infringing Articles to his uncle, one Lau Teck Chee ("Lau"). Lau would obtain the articles from the Appellant's shop at Unit 260 and sell them at makeshift stalls at morning markets. According to the Appellant in his mitigation plea, he supplied Infringing Articles at cost price to his uncle, who was jobless and needed money to support his family.

7 On 13 July 2011, officers from the Intellectual Property Rights Branch of the Criminal Investigation Department carried out raids at Unit 260 and Unit 256, as well as on a motor lorry with Registration No GQ7413Z driven by the Appellant's driver and a motor lorry with Registration No GW2951M driven by Lau. In total, 8,957 Infringing Articles were seized following these raids. Representatives of the respective trade mark/copyright owners confirmed that the Infringing Articles were counterfeit.

The proceeded charges

8 Of the proceeded charges, the second charge was under s 49(*c*) of the TMA (hereafter referred to as "the TMA charge"); the fourth and 11th charges were under s 136(2)(*b*) of the CA; and the 14th charge was under s 136(2)(*b*) of the CA read with s 109 of the Penal Code (Cap 224, 2008 Rev Ed) ("the PC"). The details of these charges and the sentence imposed by the DJ for each charge are as follows:

Charge	Offence	No. of articles	Sentence imposed
Second charge	Possession, for trade purposes, of infringing articles to which a registered trade mark is falsely applied (s 49(*c*) of the TMA)	3,015	12 months' imprisonment (consecutive)
Fourth charge	Possession of infringing articles for the purpose of distributing them for trade (s 136(2)(*b*) of the CA)	2,701	3 months' imprisonment (consecutive)
11th charge	Possession of infringing articles for the purpose of distributing them for trade (s 136(2)(*b*) of the CA)	256	1 month's imprisonment

14th charge	Abetment in the possession of infringing articles for the purpose of distributing them for trade (s 136(2)(*b*) of the CA read with s 109 of the PC)	443	1 month's imprisonment

9 The prescribed punishment for an offence under s 49(*c*) of the TMA (a "s 49(*c*) TMA offence") is:

> … a fine not exceeding $10,000 for each goods or thing to which the trade mark is falsely applied (but not exceeding in the aggregate $100,000) or … imprisonment for a term not exceeding 5 years or … both.

10 The prescribed punishment for an offence under s 136(2)(*b*) of the CA is:

> … a fine not exceeding $10,000 for the article or for each article in respect of which the offence was committed or $100,000, whichever is the lower, or … imprisonment for a term not exceeding 5 years or to both.

The decision below

11 In the GD, the DJ first noted (at [10]) that in *Ong Ah Tiong v Public Prosecutor* [2004] 1 SLR(R) 587 ("*Ong Ah Tiong*"), the sentencing tariff upheld by Yong Pung How CJ for a s 49(*c*) TMA offence was at least 12 months' imprisonment for offences involving 1,000 or more infringing articles. The DJ also noted (at [11]) the legislative intention behind the punishment provisions for trade mark infringements as stated in *Ong Ah Tiong* at [22].

12 The following aggravating factors were considered by the DJ (see the GD at [12]–[14]):

> (a) the substantial number of Infringing Articles involved under the proceeded charges and the remaining 12 charges which were taken into account for sentencing purposes (*viz*, 8,957 Infringing Articles);
>
> (b) the "well planned" and "large scale" nature of the Appellant's offences;
>
> (c) the number of charges taken into consideration for sentencing purposes (*viz*, 12 charges); and
>
> (d) the fact that the Infringing Articles covered a wide variety of bedding products and were sold at various locations.

13 With regard to the mitigating factors tendered by the Defence, the DJ appeared to reject the Appellant's submission that the Infringing Articles had been sold at a low price, stating that the Appellant had nevertheless committed "a transgression of the original trade mark and copyright goods" (see the GD at [14]). The DJ also rejected as a mitigating factor the fact that the Appellant had pleaded guilty, pointing out (likewise at [14] of the GD) that he had been "caught … dealing with the [Infringing Articles] red handed [*sic*] and a deterrent sentence [was] warranted". The DJ did, however, take into consideration the fact that the Appellant had made compensation of $100,000 to various trade mark/copyright owners.

14 As a result, the DJ imposed a sentence of 12 months' imprisonment for the TMA charge, which

he said was in "the lower range of the sentencing benchmark … for infringement of trade mark offences involving 1000 articles and above" (see the GD at [14]). For the rest of the proceeded charges, the DJ sentenced the Appellant as shown in the table at [8] above. The sentences in respect of the TMA charge and the fourth charge were ordered to run consecutively, making a global sentence of 15 months' imprisonment with effect from 5 September 2013.

The parties' arguments on appeal

15 Before this court, the Appellant argued that his sentence of 15 months' imprisonment was manifestly excessive in the circumstances. [note: 1] However, as pointed out by the Prosecution, the Appellant did not make it clear whether he was dissatisfied with the individual sentences imposed for each of the proceeded charges or the global sentence of 15 months' imprisonment.

16 In rebuttal, the Prosecution submitted that the global sentence of 15 months' imprisonment was not manifestly excessive. It highlighted that the dominant sentencing principle for intellectual property offences was general deterrence, and contended that the facts of the present case justified a sentence based on general deterrence. [note: 2] The Prosecution also argued that the sentence imposed in respect of each of the proceeded charges (whether under s 49(*c*) of the TMA or s 136(2)(*b*) of the CA) was not manifestly excessive, and sought to distinguish cases where the court had imposed a fine instead of a custodial sentence primarily on the basis that those cases involved a smaller number of infringing articles and a smaller scale of operations. Finally, the Prosecution submitted that: (a) the DJ had given adequate weight to the Appellant's mitigating factors; and (b) the global sentence of 15 months' imprisonment did not breach the "totality principle" and was appropriate, given the aggravating factors in the present case.

The issue before this court

17 The only issue before me was whether the sentence imposed on the Appellant was manifestly excessive. After considering the arguments of the parties, I was satisfied that the sentence imposed in respect of the TMA charge was manifestly excessive for the reasons which will be elaborated below. I deal, first, with two preliminary points.

Two preliminary points

Deterrence as the dominant sentencing principle

18 At the outset, I will acknowledge that the Prosecution rightly submitted that the primary sentencing consideration in cases of trade mark or copyright infringement is deterrence. Strong intellectual property protection is an integral component of Singapore's economic and industrial policy, and is vital to our economic success. This was recognised right from the start when we began developing our intellectual property laws. As explained (in the context of developing copyright law) by Prof S Jayakumar, the then Second Minister for Law, at the third reading of the Copyright Bill 1986 (Bill 8 of 1986), which subsequently became the earliest predecessor of what is now the CA (see *Singapore Parliamentary Debates, Official Report* (26 January 1987) vol 48 at col 986):

> In the Second Reading speech that I made in May, I was candid enough to mention that the Bill would also remove a significant source of friction with our major trading partners, especially the United States. But it would be wrong if Members of the House felt that the only justification for this Bill is to take care of this concern with our major trading partners. As with all legislation, so too the copyright legislation must find its justification in our national interest. So the question is, does the new Copyright Bill serve our national interest? I would like to emphasize that it does,

> because with the passage of this Bill conditions are created which are advantageous for the development of our publishing industry, for the growth of our computer software industry, and for the development of Singapore as an information centre. With the passage of this Bill, one can expect investors would have greater incentives to come to Singapore than would have been the case if they felt that our copyright legislation would jeopardize their interests. And, of course, the other point which I have mentioned is the removal of the source of friction with our major trading partners. That is the context in which we must view the Copyright Bill – that it aids and serves our national interest in the long run on many fronts.

19 The value of a robust intellectual property protection framework cannot be overstated as intellectual property continues to increase in strategic importance against traditional business advantages such as geographical location and abundance of natural resources. As we strive to develop our intellectual property laws to suit an increasingly global environment (see, for example, George Wei, "A Look Back at Public Policy, the Legislature, the Courts and the Development of Copyright Law in Singapore: Twenty-Five Years On" (2012) 24 SAcLJ 867, which traces the development of and the many amendments to our copyright legislation since it was first enacted), it is crucial that strict measures are enforced so as to send a strong deterrent message to the public lest these efforts be undermined.

20 That deterrence is the central consideration for copyright and trade mark infringement offences is also highlighted by the authors of *Sentencing Practice in the Subordinate Courts* (LexisNexis, 3rd Ed, 2013) ("*Sentencing Practice*") at vol 2, pp 1427 and 1442 respectively. Likewise, this has been recognised in numerous cases (see, for instance, *Public Prosecutor v Md Hapiz bin Tahir* [2007] SGDC 40 at [11]–[14]; *Public Prosecutor v Koh Eng Kian* [2007] SGDC 166 at [9]–[10] and [14]; and *Public Prosecutor v Kwan Eddy Shu Kin* [2005] SGDC 163 ("*Kwan Eddy*") at [15]). Accordingly, the DJ did not err in considering that the present case warranted a deterrent sentence (see the GD at [14]).

21 That having been said, it must be stressed that a deterrent sentence need not always take the form of a custodial term. In *Public Prosecutor v Cheong Hock Lai and other appeals* [2004] 3 SLR(R) 203, Yong CJ stated at [42]:

> … [A] deterrent sentence may take the form of a fine if it is high enough to have a deterrent effect on the offender himself ("specific deterrence"), as well as others ("general deterrence").

22 It is also important to bear in mind that the sentence imposed must, at the end of the day, be fair to the accused, bearing in mind all the relevant mitigating factors. The principle of proportionality "acts as a counterbalance to the principles of deterrence, retribution and prevention", in that "the sentence must be commensurate with the gravity of the offence, … the sentence must fit the crime, and … the court should not lose sight of the 'proportion which must be maintained between the offence and the penalty and the extenuating circumstances which might exist'" (see, respectively, *Muhammad Saiful bin Ismail v Public Prosecutor* [2014] 2 SLR 1028 at [21] and *Public Prosecutor v Saiful Rizam bin Assim and other appeals* [2014] 2 SLR 495 at [29]).

23 I had earlier made similar observations in *Ong Chee Eng v Public Prosecutor* [2012] 3 SLR 776 ("*Ong Chee Eng*"), where I remarked (at [23]) that "the punishment imposed should fit the crime and the criminal". I also stated that a practical manifestation of this principle was in the use of benchmark sentences (at [24]):

> The principle of tailoring the punishment to the crime and the criminal also extends to the use of benchmark sentences. Benchmarks usually arise from the steady accretion of the decisions of the courts. They are the result of the practical application of statutory penal laws, but should not be

> mistaken for those laws themselves. Benchmarks play a crucial role in achieving some measure of consistency of punishment. But the principle of treating like cases alike also means that unlike cases should *not* be treated alike. The court must resist an unhesitating application of benchmark sentences without first thoroughly considering if the particular factual circumstances of a case fall within the reasonable parameters of the benchmark case. Ultimately, where Parliament has enacted a range of possible sentences, it is the duty of the court to ensure that the full spectrum is carefully explored in determining the appropriate sentence. Where benchmarks harden into rigid formulae which suggest that only a segment of the possible sentencing range should be applied by the court, there is a risk that the court might inadvertently usurp the legislative function. [emphasis in original]

24 It was, therefore, not incorrect of the DJ to take the approach of adopting a benchmark sentence in coming to his decision. However, I was of the view that the benchmark sentence which the DJ adopted was inaccurate for the following reasons.

The sentencing benchmark applied by the DJ

25 In *Ong Ah Tiong*, the accused (who had no antecedents) was the managing director of a company selling electronic goods. Pursuant to a raid, more than 25,000 counterfeit PlayStation and Nintendo Gameboy items were seized. The accused pleaded guilty to three charges under s 49(*c*) of the then version of the TMA (namely, the Trade Marks Act (Cap 332, 1999 Rev Ed) ("the 1999 Rev Ed of the TMA")), with three similar charges taken into consideration for sentencing purposes. The trial judge imposed custodial terms of ten to 20 months for each of the three charges to which the accused pleaded guilty, resulting in a global sentence of 32 months' imprisonment. After reviewing a number of case precedents, the trial judge concluded (see *Public Prosecutor v Ong Ah Tiong* [2003] SGDC 264 at [20]):

> … [T]he starting tariff for … offences involving 1,000 infringing articles and above would attract a sentence of 12 months' imprisonment and upwards. Whether the actual sentence is higher or less severe will have to depend on the circumstances of the case.

The accused appealed against the sentence, but his appeal was ultimately dismissed by the High Court in *Ong Ah Tiong*.

26 In the present case, the DJ relied on *Ong Ah Tiong* in holding that as a benchmark, a sentence of 12 months' imprisonment and above should be imposed for s 49(*c*) TMA offences involving 1,000 or more infringing articles. It was on this basis that the DJ held (at [14] of the GD) that "[t]aking all the circumstances of the case, the court decided to impose the lower range of the sentencing benchmark for the charge under the TMA for infringement of trade mark offences involving 1000 articles and above", and sentenced the Appellant to 12 months' imprisonment for the TMA charge (as mentioned earlier, that charge involved 3,015 Infringing Articles).

27 With respect, I find that the DJ erred in reaching the above conclusion as to the benchmark sentence for s 49(*c*) TMA offences. A more detailed scrutiny of the High Court's judgment in *Ong Ah Tiong* will show that Yong CJ *did not explicitly* endorse the benchmark sentence of 12 months' imprisonment and above adopted by the trial judge. Rather, Yong CJ only stated that the starting sentence for intellectual property offences should be determined by reference to the number of infringing articles involved, and that there was "no 'hard and fast rule' with regard to starting tariffs" (at [24]–[25]):

> 24 … The trial judge concluded from his review of the cases that custodial sentences are the

norm unless the quantity of infringing articles is quite small, which is patently not the case here. **He also determined that the starting tariff for offences involving 1,000 infringing articles and above is a sentence of 12 months' imprisonment and upwards.** The appellant contested this, arguing that the cases showed that the starting tariff is in fact three to four months' imprisonment per charge.

25 I do not think it necessary to reproduce the facts of each case for the purposes of this judgment. Suffice it to say that, when I considered the cases as a whole, I did not find any support for the appellant's contention. Instead, I noted that a number of these cases had occurred some time [*sic*] back, and that the trend of the courts, especially the appellate courts, is to take a progressively more stringent stance on the infringement of intellectual property rights. Moreover, I am of the view that it is overly simplistic to determine the sentencing tariff by reference to the jail term awarded per charge. A charge may deal with just three infringing articles or with thousands of articles, as in the present case. It would hardly be just for the starting tariff to remain the same in both situations. **Indeed, justice would be better served if the starting tariff is determined by reference to the number of infringing articles involved, which was the approach taken by the trial judge. Even so, examination of the cases shows that there is no "hard and fast rule" with regard to starting tariffs, which only goes to emphasise the point that various decisions made by the courts cannot be taken in isolation, but that it is still incumbent upon the sentencing court to have regard to all the circumstances of the case when deciding on the sentence** …

[emphasis added in bold]

28 Although Yong CJ dismissed the appeal in *Ong Ah Tiong* and upheld the sentence imposed by the trial judge, his observations above do not inexorably lead to the conclusion that he thereby endorsed a benchmark sentence of 12 months' imprisonment and above for s 49(*c*) TMA offences involving 1,000 or more infringing articles. This is reinforced by the fact that this benchmark is not plainly evident from the sentence imposed by the trial judge in *Ong Ah Tiong* – the sentence imposed in respect of the third charge in that case, which involved (*inter alia*) some 1,225 pieces of PlayStation 2 game controllers, was only *ten* months' imprisonment, and similarly, the sentence imposed for the first charge, which involved infringing articles greatly exceeding 1,000 in number (*viz*, 8,056 infringing articles), was only 12 months' imprisonment.

29 A survey of a number of decisions of the State Courts shows that there have also been other cases of s 49(*c*) TMA offences where, although more than 1,000 infringing articles were involved, less than ten months' imprisonment was imposed. For instance, in *Public Prosecutor v Tan Yan Tong* [2003] SGMC 30 ("*Tan Yan Tong*"), the accused, who was a first-time offender, faced six charges under s 49(*c*) of the 1999 Rev Ed of the TMA and 24 charges under s 136(2)(*a*) of the then version of the CA for selling more than 4,000 pieces of counterfeit Sony software. For the first two charges under the 1999 Rev Ed of the TMA, which concerned 1,532 counterfeit PlayStation CD-ROMs and 1,656 counterfeit PlayStation 2 CD-ROMs respectively, the trial judge imposed a custodial term of four months' imprisonment for each charge (the global sentence was 18 months' imprisonment). Another example is *Public Prosecutor v Hong Wing Kam* [2005] SGDC 198 ("*Hong Wing Kam*"), where the accused pleaded guilty to two charges of possession, for trade purposes, of infringing articles and a third charge of abetment by intentionally aiding others in similar criminal acts. A sentence of seven months' imprisonment was imposed in respect of the third charge, which concerned some 1,245 infringing articles (*viz*, counterfeit Burberry apparel). To be fair to the DJ, these decisions were made before or around the same time as the decision in *Ong Ah Tiong*, meaning that the trial judges in these cases did not have the opportunity to apply *Ong Ah Tiong*. That having been said, these cases, as well as a number of other cases which will be discussed in detail below, do illustrate, at the very

least, that the sentencing benchmark applied by the DJ was not entirely consonant with precedents.

30 Specifically, I was satisfied that the DJ erred in holding that there was a benchmark sentence of 12 months' imprisonment and above for s 49(*c*) TMA offences involving 1,000 or more infringing articles. As this was the very basis upon which the DJ went on to impose the 12-month imprisonment sentence on the Appellant for the TMA charge, I found that appellate intervention was warranted (see *Public Prosecutor v Kwong Kok Hing* [2008] 2 SLR(R) 684 at [13]–[14]).

My decision

Developing a sentencing framework for s 49(c) TMA offences

31 A survey of the case law shows that the courts have yet to enunciate a principled approach on the appropriate sentence or sentencing benchmark for s 49(*c*) TMA offences. This is, to some extent, understandable, given the wide spectrum of facts that can sustain a charge under s 49(*c*) of the TMA. Therefore, instead of seeking to lay down any sentencing benchmark, it may be more appropriate to develop a systematic framework which the court can apply in considering the various facts of a s 49(*c*) TMA offence. In this regard, I am of the view that the court should: (a) first, consider "the nature and extent of the infringements, and the manner in which the infringements were carried out" (as observed in *Ong Ah Tiong* at [23]); and (b) second, examine whether there are any other relevant aggravating or mitigating factors. This approach of developing a sentencing framework for a particular offence is not a foreign one, and we have in many instances adopted sentencing frameworks for other offences (see, for example, the sentencing frameworks prescribed for, respectively, drink driving in *Edwin s/o Suse Nathen v Public Prosecutor* [2013] 4 SLR 1139 and the smuggling of tobacco products in *Yap Ah Lai v Public Prosecutor* [2014] 3 SLR 180 ("*Yap Ah Lai*")). As observed by Sundaresh Menon CJ in *Yap Ah Lai* at [12]:

> … The essential value of such a framework is to guide the sentencing judge towards an appropriate sentence that is generally consistent with sentences imposed in other like cases; that has due regard to the sentencing range available to the judge; and of critical importance, that has due regard to the particular facts that are presented.

I agree with these observations, and adopt a similar approach in deciding the appropriate sentencing framework for s 49(*c*) TMA offences.

32 The authors of *Sentencing Practice* (at vol 2, p 1142) identify the following factors as relevant to the sentence which ought to be imposed in respect of a s 49(*c*) TMA offence – the quantity of infringing articles involved, the value of the infringing articles, whether a syndicate was involved, the duration of the infringement, the role which the offender played and whether compensation was made. Having examined the precedents, in my judgment, an appropriate *starting point* would be the offender's level of involvement in the whole operation relating to the s 49(*c*) TMA offence. There is a need to distinguish between, for example, a distributor of infringing articles and an individual lower down in the supply chain, such as a mere runner or a stall attendant.

33 A case illustrative of **high involvement** on the offender's part is *Ong Ah Tiong*, the facts of which were briefly described above at [25]. The accused in that case was the managing director of a company, and was heavily involved in sourcing for, distributing and selling infringing articles. He also hired two other persons to promote the sale of those articles. Another example would be *Public Prosecutor v Yap Boon Hian* [2007] SGDC 271 ("*Yap Boon Hian*"), where the accused operated a business dealing in motor vehicle filters and spare parts. In response to demands from his clients, who were mostly from other countries, for spare parts from well-known brands, the accused began to print

the trade marks of those brands on his own goods, pack the goods into cartons imprinted with the respective brand names and then sell them to his customers. Notably, "the accused was himself responsible for applying the infringing trademarks to the [goods] and for obtaining cartons and packaging imprinted with the respective brand names" (see *Yap Boon Hian* at [18]).

34 Cases illustrative of **moderate involvement** on the offender's part would include *Hong Wing Kam* and *Public Prosecutor v Goh Chor Guan* [2010] SGDC 336 ("*Goh Chor Guan*"). In *Hong Wing Kam*, the accused, a supplier and retailer of fashion accessories and apparel, obtained the infringing articles himself from China and distributed them to only one other company. In *Goh Chor Guan*, the accused, together with his wife (the co-accused), operated a business selling infringing articles (in the form of apparel) out of a shop unit; the accused also sourced for HDB shops with shop fronts available for daily rental where he could set up makeshift stalls to sell infringing articles.

35 Cases illustrative of **low involvement** on the offender's part would include *Tan Yan Tong* and *Teo Boon Hui v Public Prosecutor* (Magistrate's Appeal No 352 of 1999, unreported) ("*Teo Boon Hui*"). In both of these cases, the accused was an employee who merely manned a shop selling counterfeit CD-ROMs.

36 For completeness, I should point out that in cases where only a fine (as opposed to a custodial term) was imposed, one or more of the following factors was present: (a) the offender operated only from a temporary stall; and/or (b) the infringing articles numbered significantly less than 1,000; and/or (c) there were other relevant mitigating factors (see, for example, *Public Prosecutor v Lin Dunai* [2009] SGDC 328 and *Kwan Eddy*). Taking this approach, one factor which might be useful to start with in deciding whether a fine or imprisonment (or both) should be imposed is whether the offender had some sort of permanence in dealing with the infringing articles. In the present case, given that the Appellant had a shop front and some sort of permanence in dealing with the Infringing Articles in the course of his business, the DJ was, was my judgment, correct in holding that a mere fine would not be an appropriate sentence.

37 The table below briefly sets out the other relevant facts of each of the cases which I discussed above at [33]–[35]:

Case	Degree of involvement/ aggravating factors	No. of articles	Sentence imposed (term of imprisonment)
Ong Ah Tiong	**High** – Offender was a large-scale distributor and was also the head of an organised operation	8,056 Nintendo cartridges	12 months
		18,000 Sony PlayStation accessories	20 months
		1,300 other PlayStation accessories	10 months
Yap Boon Hian	**High** – Offender was the owner of the business and was himself responsible for sourcing for the equipment and materials used to carry out the offences	69,290 car filters and 24,400 car filters respectively from the two raids held	12 months (for each charge)

Hong Wing Kam	**Moderate** – Offender was a supplier of counterfeit fashion accessories and apparel	1,245 items of Burberry apparel (for the relevant charge)	7 months (global sentence of 8 months)
Goh Chor Guan	**Moderate** – Offender persistently set up makeshifts stalls to sell infringing articles	4,073 items of counterfeit apparel	6 months (for charges involving 886 items), and 1 month (for charges involving 261 items) (global sentence of 13 months)
Tan Yan Tong	**Low** – Offender was merely manning a shop	3,188 CD-ROMs	4 months (for each charge) (global sentence of 18 months)
Teo Boon Hui	**Low** – Offender was merely manning a shop	3,400 CD-ROMs	2 months (for each charge) (global sentence of 8 months)

38 From the above table, considering only the degree of involvement of the offender and not the number of infringing articles concerned, it can be seen that for cases with **low involvement** by the offender, the sentencing range would be from two to four months' imprisonment for each charge. For cases with **moderate involvement** by the offender, the sentencing range would be from six to seven months' imprisonment for each charge. For cases with **high involvement** by the offender (such as *Ong Ah Tiong*), the sentencing range would be from ten to 20 months' imprisonment for each charge.

39 In this regard, the complexity and scale of the whole operation involved would be a critical factor – for example, the owner of a small shop front may be heavily involved in running his own business, but he cannot be compared with the owner of a large-scale company involved in distributing infringing articles. Factors relevant in determining the scale of the whole operation involved would include the size of the company concerned, the number of employees which it has and its financial figures. After considering this, the sentence should be revised either upwards or downwards depending on the number of infringing articles as well as their value. The sentence should then be further adjusted depending on the relevant aggravating and/or mitigating circumstances of the case and other unique circumstances which the trial judge might find relevant.

Application of the sentencing framework to this appeal

40 I earlier noted that the Appellant operated his business from two shop units (one of which was used for storage), and also set up makeshift stalls at night markets as well as outside shops in heartland areas. He also employed a driver and four sales assistants. Given that the Appellant ran his own business and sourced for the Infringing Articles himself, this would place his degree of involvement somewhere in the **moderate** to **high involvement** band. However, I did not fully agree with the DJ's view (at [13] of the GD) that the Appellant's business was "well planned and conducted

on a large scale". Simply put, the Appellant imported the Infringing Articles from China and then proceeded to sell them in Singapore. The whole business was effectively contained within this single operation, which stands in stark contrast to an extremely organised operation or a large-scale distributorship such as that in *Ong Ah Tiong*.

41 There were 3,015 Infringing Articles involved in the TMA charge. The only other person to whom the Appellant supplied Infringing Articles was his uncle, Lau. The Appellant's profit margin, while indeed going up to 90% in absolute terms, only amounted to $9.00. While the Appellant would have spent some effort in coordinating the whole operation and his business, it was clear that he was "not part of a syndicate or an organised criminal effort concerned with the manufacture, sale or distribution of counterfeit items" (see *Kwan Eddy* at [22]). Instead, to a large extent, the Appellant's business was relatively self-contained. I also noted that the Appellant had voluntarily made compensation of $100,000 – a not insubstantial sum – to various trade mark/copyright owners. Such compensation should be recognised as a mitigating factor and was rightly so regarded in *Public Prosecutor v Liu Chia-Shih and Another* [2005] SGDC 161 at [24]. It is trite law that restitution of ill-gotten gains or, alternatively, the offering or actual payment of compensation to a victim is a relevant mitigating factor as it reflects genuine remorse by the offender (see *Angliss Singapore Pte Ltd v Public Prosecutor* [2006] 4 SLR(R) 653 at [74] and *Lim Seng Soon v Public Prosecutor* [2014] SGHC 273). There is no reason why, in logic, payment of compensation to a trade mark/copyright owner whose interests are adversely affected by the offender's activities cannot be similarly regarded.

42 Taking into account all the relevant circumstances in this case and the totality of the sentence which should be imposed on the Appellant, it was my judgment that the sentence for the TMA charge should be reduced from 12 to six months' imprisonment, thereby reducing the global sentence from 15 to nine months' imprisonment.

Conclusion

43 In concluding, I would stress that sentencing frameworks and benchmarks should not be applied as "rigid formulae which suggest that only a segment of the possible sentencing range should be applied by the court" (see *Ong Chee Eng* at [24]). It must also be recognised that a sentencing framework for a particular offence need not necessarily be applicable in all situations. This would be so especially for more complex cases, where a myriad of actions led to the offence. In such a situation, the court must be careful not to artificially regard a sentencing framework as applicable if, on the facts of the case, it is not appropriate to do so. In the same vein, while a sentencing framework would undoubtedly guide the court to ensure consistency in its decisions, the court must constantly be alive and sensitive to the differences in precedent cases, and should depart from the applicable sentencing benchmark if the situation calls for it.

44 To recap, I summarise the main points of my grounds of decision:

(a) The DJ erred in holding that there was a benchmark sentence of 12 months' imprisonment and above for s 49(*c*) TMA offences involving 1,000 or more infringing articles.

(b) A useful starting point for the sentencing framework for s 49(*c*) TMA offences would be the degree of involvement on the offender's part. The general sentencing range to start with for cases involving low, moderate and high involvement by the offender would be imprisonment of, respectively: (a) two to four months; (b) six to seven months; and (c) ten to 20 months. The sentence should then be adjusted to take into account other relevant factors. In this regard, payment of compensation to the trade mark/copyright owner is a relevant mitigating factor.

(c) On the facts of this appeal, the appropriate benchmark sentence for the Appellant, whose degree of involvement was moderate to high, would be between six to seven months' imprisonment.

45 For the reasons stated above, I allowed the appeal where the sentence for the TMA charge was concerned and reduced the sentence for that charge from 12 to six months' imprisonment. I did not, however, make any changes to the sentences imposed by the DJ for the rest of the proceeded charges. Consequently, the global sentence to be served by the Appellant was reduced from 15 to nine months' imprisonment. I also ordered the Appellant's term of imprisonment to commence on 13 June 2014.

[note: 1] Record of Proceedings at p 68 (Petition of Appeal at paras 3–4).

[note: 2] Respondent's Submissions dated 5 February 2014 at paras 26–37.