BARBADOS

IN THE SUPREME COURT OF BARBADOS

COURT OF APPEAL

Magisterial Criminal Appeal No. 3 of 2018

BETWEEN

GRENVILLE RICARDO DELPEACHE Appellant

AND

COMMISSIONER OF POLICE Respondent

Before: The Hon. Mr. Justice Rajendra Narine, the Hon. Mr. Justice Francis Belle, and the Hon. Mr. Justice Jefferson Cumberbatch, Justices of Appeal

2020: February 19
September 18

Mr. Andrew Pilgrim, QC in association with Ms. Rashida Edwards and Ms. Kamisha Benjamin for the Appellant

Ms. Olivia Davis for the Respondent.

DECISION

BELLE JA:

INTRODUCTION

[1] On 24 November 2017 the appellant was arrested and charged with three offences pursuant to the **Trade Marks Act, Cap. 319** of the Laws of Barbados. On the 26 February 2018 he was found guilty of the three counts by a Learned Magistrate and was sentenced to fines in the sum of $15,000.00 of which $3000.00 had to be paid forthwith or the appellant

would spend three months in prison. The remaining $12,000.00 was to be paid by 21 December 2018 failing which he would spend six months in prison.

SUMMARY OF THE FACTS

[2] On Saturday 13 May 2017, Ms. Monée Hope went to Ouch Boutique and purchased what she thought was a pair of Puma slippers. She asked the store assistant if they had Puma shoes and she purchased a pair of slippers from the said store having been assured that they were Puma slippers. She had seen the slippers on display in the store on the top of one of the clothes racks. Interestingly, according to Ms. Hope, the sales clerk told her that she did not have her size but she could wear them as "the size was a bit off." Ms. Hope went over to the cashier and the cashier told her the cost of the slippers was $100.00 as opposed to $200.00 which she saw on the shoe. She paid by debit card and was given a machine receipt. But she asked for a store receipt and put the slippers in the bag and left. She described the slippers as burgundy and furry on the top, with Puma stitched across the top of them.

[3] Monée Hope gave further evidence that when she got home she realized that the quality of the pair of slippers she had bought, did not match the quality of a pair she had. She described the pair she had at home as "the same

slipper to the one I purchased but a different colour" from the one purchased from Ouch Boutique. She had purchased a similar pair in New York, United States of America (USA), for one hundred and fifty dollars (US$150.00). Having noticed the difference, she thought about what to do with the slippers purchased from Ouch Boutique because she was not going to wear 'knock off shoes'.

[4] Monée Hope revealed an interesting coincidence in her evidence to the effect that the Puma representative in Barbados was her father Mark Hope. She got in touch with Mark Hope and spoke to him about the slippers purchased from Ouch Boutique. She was advised to contact the police, which she did. Ms. Hope attended the Fraud Investigation Unit of the Royal Barbados Police Force and gave them a statement which explained that she had purchased the shoes thinking that they were genuine Puma, but they were not. She presented the receipt given to her by Ouch Boutique to the officer to verify the transaction.

[5] After investigation of the matter, the police preferred three charges against the appellant (then accused) Grenville Ricardo Delpeache. Two of the charges were pursuant to section **50A Subsection (1) (a) and (b)** of **Cap. 319** of the Laws of Barbados and the other charge was pursuant to **section 50A subsection (1) (c)** of the said **Act**.

THE POLICE INVESTIGATION

[6] Sgt Rodney Holder No. 1700 of the Financial Crime Investigation Unit one of the Investigating Officers, obtained certificates of incorporation for Ouch Boutique and later Puma trade mark information, bearing registration numbers 16639-16642, 16555, 4596 and 3606. These documents were initialled and certified as true copies by the Registry of the Corporate Affairs and Intellectual Property Office.

[7] Apart from the pair of slippers handed over by Ms. Monée Hope, police found at Ouch Boutique seventeen (17) pairs of slippers, seven (7) single shoes and thirty one (31) haversacks which bore a sign identical to, or likely to be mistaken for, the PUMA Registered Trade Mark.

[8] Based on the information and items found the police charged the appellant with the three charges mentioned earlier.

[9] Based on the police investigation and the subsequent charges, officers from the Office of the Registrar of Corporate Affairs and Intellectual Property, gave evidence at trial in relation to the existence of the relevant registered PUMA trade marks and the registration of Ouch Boutique as a limited liability company.

[10] The Puma representative, Mark Hope, an attorney-at-law, gave evidence that he was familiar with the PUMA SE trade mark and with PUMA products such as shoes, bags, leather items and clothing.

[11] Also giving evidence for the prosecution was Mr. Luis Comvalius, who stated that he was a trade mark specialist. After providing his credentials, Mr. Comvalius was deemed an expert by the court. Mr. Comvalius gave evidence that he was familiar with PUMA brand since 2006. He is the director of a Brand Protection company known as DIASOSA. He provides brand protection services for products including pharmaceuticals, aircraft products, and all PUMA products. He averred that the PUMA brand was sold in Barbados and the PUMA trade mark is registered in Barbados.

When asked to comment on items shown to him in this case, which included the items taken from Ouch Boutique by the police, Mr. Comvalius, according to the court record, stated:

> "These are all false because they do not have the particulars of the genuine one; the quality is different, the fur not genuinely attached to the sole, the front of PUMA stamp is not incised in shape. The PUMA is off in shape and size on every slipper, the hand tag or label is not genuine PUMA, on the care tag the language is Chinese or Asian and PUMA does not use that language on the care label. The imprint of the (name) Fenty on the sole of the slipper is not straight, sometimes it bends; size of the slipper on the sole printed is not the actual size. The weight of the slipper is not in line with genuine PUMA products. The box (packaging is missing) no box".

[12] With respect to specific items, the witness Mr. Comvalius states:

> "I see my initials on seven (7) of the eight (8) shoes. The eight (8) item(s) I saw before. I need to have the other shoe to be sure that the shoe is genuine PUMA. The other single shoes are all counterfeit. The shoes have wrong labelling. Missing labelling and brand PUMA so it is easy to detect. They are all bad counterfeit, thank God, so they are easy to identify. The black one called the creeper is the most counterfeit shoe of PUMA."

[13] In relation to the haversacks the expert said:

> "I see my initials on these items. These are definitely fake – wrong label, it is not a PUMA label and it reads the wrong information. Hand tag full of spelling mistakes, typical Chinese mistake; in German, French and English. (It reads PUMA and everything is wrong)."

[14] Mr. Comvalius continued:

> 'Neil Narrinan, is Global Intellectual Property Director of PUMA. I spoke to him. I am authorised to speak on the behalf of PUMA by Power of Attorney. An affidavit was prepared by Mr Hope, attorney-at-law. Yes I signed it.'

[15] When asked about a certain corporation, Mr. Comvalius said:

> "**Lack Shoes Corporation** …. – I have heard the name before – they are not a recognised distributor for PUMA".

[16] When asked under cross-examination about the slipper's release, the witness said:

> "I do not know. The date of release is different per country; my expertise is not to know the release date but the product whether genuine or not".

[17] Asked how he identified the genuine "jumping cat "brand, Mr. Comvalius' evidence was:

> "I have seen, based on my experience, some six hundred thousand (600,000) shoes and I can separate the genuine from the false."

[18] Asked again about the significance of the "jumping cat" brand, this was the exchange:

> Q. "Unless you are provided with the jumping cat logo by PUMA you would not know if it genuine?"
>
> A. "There are other indications which show what makes it genuine."
>
> A. "Consumer can go to a store where genuine products are on offer - PUMA (PUMA Official Distribution)."
>
> Q. "Can a store, not a PUMA store, sell PUMA?"
>
> A. "Yes."
>
> Q. "A purchaser of shoes would not know what to look for like you in the area of expertise?"
>
> A. "in my field your client is not a general consumer. PUMA warns persons of the public what to expect."

[19] On re-examination the witness was asked:

> "Q. PUMA warnings are sent out you said to the consumers on email, online, about what to expect?
>
> A. "Yes."

THE MAGISTRATE'S FINDINGS

[20] At the end of the trial the learned magistrate summarized his findings as follows:

> 'Having reviewed the facts of each count separately and the evidence to support each of these three (3) counts separately, I must be sure before I can convict the accused. The accused gave evidence and I had a chance to observe his demeanour. He was in my view hesitant and evasive during cross examination. The accused at law has available to him a defence that he acted with reasonable belief the PUMA goods were genuine; however, any such reasonable belief must be honest.'
>
> 'I find that that the defendant was aware of the existence of a registered trade mark. He exposed for sale the goods stated in count number 1, these being- seventeen (17) pairs of slippers, seven (7) single shoes, and thirty (31) haversacks which bore a sign identical to or likely to be mistaken for a registered trade mark PUMA, contrary to **50 A (1) (a) and (b)** of the ***Trade marks Act 319***. He did this with a view to gain for himself or another, or with the intent to cause loss to another, and without the consent of the registered owner of the trade mark PUMA.'
>
> 'It was not an offence (a defence), the accused explanations in evidence that he just bought the goods in store fronts without checking or enquiring if they were genuine. He has the business twenty (20) years. The price he paid and labelling were factors which too should have informed a boutique owner or merchandiser of twenty (20) years to enquire or check. I do not accept his story that he was in a rush. He had ample time before displaying to check the goods, before labelling them and exposing them for sale. I find the defendant was aware the goods were counterfeits.'
>
> 'I reject the defendant defences and find him guilty as charged on all three (3) counts.'

[21] Just as an editorial comment, although counsel on neither side has raised it, we are of the view that the learned magistrate's statement "it was not an offence", stated after the finding declared by the learned magistrate, does not make sense, in the context in which it is stated. We believe he must have said or intended to say "it was not a defence." Counsel is at liberty to correct us on this, if they can clarify the statement based on their own notes. However, it does not make any difference to his conclusion.

CAP. 319

[22] It is of some importance at this juncture to review the scheme of the legislation and to indicate where it provides protection for the owner of a registered trade mark.

[23] **Section 4 of Cap. 319**, defines a trade mark as:

> "a visible sign used or to be used upon, with, or in relation to any goods for the purpose of distinguishing in the course of trade or business, the goods of one person from those of another person."

[24] **Cap. 319** goes on to identify the various means that are available for the protection of trade marks. It starts with **section 5** which states:

> (1) "The registration of a mark vests in the registered owner of the mark the exclusive right to prevent any other person
>
> (a) from using the mark or any sign so nearly resembling the mark as to be likely to mislead the public

(i) In respect of goods or services for which the mark is registered; or

(ii) In respect of other goods or services in connection with which the use of the mark or a mark resembling it is likely to mislead the public, or

(b) from using, without just cause or in circumstances likely to affect adversely the interests of the registered owner of the mark,

(i) the mark or any sign resembling it; or

(ii) any business name resembling the mark, that is to say, any name or style under which any business or profession will be carried on in Barbados, whether in partnership or otherwise, that resembles the mark.

[25] Having indicated that one of the concerns of **Cap. 319** is to prevent the use of a trade mark in a manner that would mislead the public, the legislation goes on to state at **(1A)** that "where an identical sign is used for identical goods or services it shall be presumed that the public is likely to be misled."

[26] After the trade mark is registered pursuant to **Section 19 of Cap. 319** its purpose according to law goes into effect.

[27] The purpose and effect of a trade mark (at least in United Kingdom (UK) law) is encapsulated in the case of **Canon Kabushiki Kaisha v. Metro Goldwyn Mayer Inc [1998] ECR I-5507**, where the court said:

> "… according to the settled case-law of the Courts, the essential function of the trade mark is to guarantee the identity of the origin of the marked product to the consumer or end user by enabling him, without any possibility of confusion, to distinguish the product or service from others which have another origin. For the trade mark to be able to fulfil its essential role in the system of undistorted competition …, it must offer a guarantee that all the goods or services bearing it have originated under the control of a single undertaking which is responsible for the quality."

[28] Trade marks are used by trade persons to differentiate their products from those of others and to ensure that other products are not 'passed off' as their products; in particular, products of a lower quality or which may not have a good reputation. See the definitions provided in **Kerly's Law of Trade Marks and Trade Names Fourteenth Edition paras 2-009 to 2-018** and **Trade Mark Law, A Practical Anatomy by Jeremy Phillips**, Oxford Press, December 2003, **paras 2.24** to **2.37**.

[29] Pursuant to the right to prevent the trade mark from being used in a manner likely to mislead the public, the registered trade mark owner may take legal action in the civil courts to enforce his rights. According to **section 38** of **Cap. 319** the registered owner of a trade mark whose rights under the **Act** are in imminent danger of being infringed, or are being infringed, may institute proceedings in the High Court for an injunction to prevent the infringement or for damages.

[30] Several sections provide for action to be taken where there are disputes in relation to the ownership of trade marks or licences for trade marks. This process demonstrates the importance of establishing ownership of a trade mark.

[31] Although the legislation provides civil remedies for infringement of trade marks, as this case indicates, **Cap. 319** goes further and creates criminal offences. It is this aspect of the legislation that is utilised by the Crown in this case.

CRIMINAL OFFENCES IN CAP. 319

[32] **Section 48** of **Cap. 319** speaks to trade practice offences.

[33] **Section 49** of **Cap. 319** declares that no person shall knowingly infringe any right vested in any other person under it (**Cap. 319**). It is therefore arguable that **section 49** prohibits infringement of the rights of a person who is the owner of a registered trade mark under the statute.

[34] But of greater import for the purposes of this case, **section 49C** defines expressions used in **Cap. 319** such as 'infringing good' and 'infringing material' and stipulates that goods are 'infringing goods' in relation to a registered trade mark, if they bear, or their packaging bears, a sign identical or similar to that mark and the application of the sign to the goods or their packaging was an infringement of the registered trade mark. Again this

section provides other examples of infringement which are not important for our purposes, but the significance of the section is apparent with regard to the facts of the case and the charges preferred.

[35] **Section 50A (1) (b)** of **Cap. 319** states that "a person commits an offence who, with a view to gain for himself or another, or with intent to cause loss to another and without the consent of the registered owner of a trade mark:

> "Sells or lets for hire, offers or exposes for sale or hire, or distributes goods which bear, or the packaging of which bears, a sign referred to in paragraph (a)".

[36] But **subsection 50A (5)** creates a defence in the following terms:

> "It is a defence for a person charged with an offence under this section to show that he believed on reasonable grounds that the use of the sign in the manner in which it was used, was not an infringement of the registered trade mark."

[37] It can be gleaned from these excerpts from the statute, that for the offence to be proved in a criminal court, the prosecution would have to prove the following:

> i. "That the relevant trade mark "PUMA "is registered in Barbados;
>
> ii. That the appellant acquired goods bearing a mark similar to the registered trade mark and had them for sale, on display and in his possession at Ouch Boutique;
>
> iii. That the appellant did not have the consent of the owner of the registered trade mark to use the trade mark in the way he did or to use a mark that was almost identical;

iv. That the appellant did not have reasonable grounds to believe that the use of the sign in this manner was not an infringement of the registered trade mark."

APPELLANT'S ARGUMENTS AND COURT'S REVIEW

[38] I now turn to the arguments of counsel on appeal and submissions for the appellant and respondent. The appellant's grounds of appeal were:

i. That admissible evidence substantially affecting the merits of the case has been rejected by the magistrate;

ii. That inadmissible evidence has been admitted by the magistrate and there is not sufficient admissible evidence to sustain the decision on rejecting such inadmissible evidence;

iii. The decision of the learned magistrate is against the weight of the evidence;

iv. The decision is erroneous in point of law; and

v. The unavailability of the electronic record of the trial, infringed the appellant's constitutional right to a fair trial.

[39] The appellant's counsel submitted that the appellant should not have been found guilty and sentenced in the manner that the learned magistrate did. He argued that the appellant could not have known that the items sold were fake. Secondly, inadmissible evidence was admitted while admissible evidence was denied. Counsel for the appellant also argued that the appellant should have been acquitted because the charge should have been brought against the company and not Mr. Delpeache.

[40] Counsel also referred to the test to be applied to determine whether a person who breaches **Section 50A** of **Cap. 319** commits an offence. The applicable parts of the section read:

> "***50A (1)*** A person commits an offence who, with a view to gain for himself or another, or with intent to cause loss to another, and without the consent of the registered owner of a trade mark,
>
> (a) applies to goods or their packaging a sign identical to, or likely to be mistaken for, a registered trade mark;
>
> or
>
> (b) sells or lets for hire, offers or exposes for sale hire, or distributes goods which bear, or the packaging or which bears, a sign referred to in paragraph (a)".

[41] The appeal was initially lodged on four grounds against the conviction of the appellant. However, at the hearing counsel informed the court that he wished to add a fifth ground which is listed above. Counsel proceeded first with a submission on the statutory defence set out at **Section 50A (5)** of **Cap. 319**.

MAGISTRATE'S VERDICT AGAINST THE WEIGHT OF THE EVIDENCE

[42] Counsel noted the learned magistrate's reliance on the case of **Essex Trading Standards v Singh (2009) EWHC 520** but argued that the case is distinguishable because in that case, the rules with respect to counterfeit goods were strictly and frequently applied in their jurisdiction. Counsel

argued that the respondent in that case, was selling the items on behalf of a Mr. Hooper out of a vehicle that was not his own and sold them at extremely low prices. The respondent's sole basis for his purported belief that the items were legitimate, was the word of a drug addict, who at the time when asked if they were genuine, was suffering from an overdose and unwell. In these circumstances, it was held that the respondent did not seek independent evidence such as documentation relating to the goods' supply or their provenance.

[43] Counsel argued that in the case at hand, the appellant purchased the mentioned items from a store front in Broadway, New York which is governed by the laws of the United States of America. Counsel submitted that the USA has extremely stringent trade mark laws and penalties. This is to distinguish the purchase from street vendors who are blatantly selling counterfeit items and running at the sight of law enforcement. Counsel did not cite the laws he was referring to.

[44] The essence of the appellant's argument is that he did enough to ensure that the goods were not counterfeit. Starting with the location of the purchase, a storefront, from persons he knew, who prior to this situation had not been known to pass off counterfeit goods. The appellant does not specialize in selling PUMA brands. The goods were such good counterfeit products, that

they initially fooled the purchaser, Ms Monée Hope. Therefore, they were of a standard and kind that could legitimately be believed to be authentic by a reasonable man.

[45] Counsel for the appellant rejected the suggestion, arguably relied upon by the learned trial magistrate, that the appellant was operating and purchasing merchandise for Ouch Boutique for twenty (20) years. Counsel was of the view that this question was not relevant to the issue at hand, which is whether he ought to have known that the merchandise was counterfeit, since it was never established nor did the court ever seek to confirm how long the appellant was travelling to purchase Puma items for the store.

THE TRADE MARK SPECIALIST

[46] The appellant's counsel spent a significant amount of time trying to discredit the evidence of the trade mark specialist Mr. Comvalius. Mr. Comvalius was deemed an expert by the court. Counsel argued that the evidence of the expert should not have been accepted at all. He also raised the issue whether a **specialised area of knowledge** exists, in relation to trade mark identification.

[47] Counsel further argued that the learned magistrate must initially be satisfied that the merchandise exposed for sale are indeed counterfeit. Once the

learned magistrate is so satisfied, he must then address his mind to the defence available by law pursuant to **Section 50A (5)**.

[48] Counsel relied on a statement found in the Judgement of Lord President Cooper in **Davie v the Lord Provost, Magistrates and Councillors of the City of Edinburgh 1953 SC 34 at 39-40** quoted by Priestly JA in the case **Makita (Australia) Pty Ltd v Sprowles [2001] NSWCA 305 revised - 17/09/2001**, to the effect that, "expert witnesses, however skilled or eminent, can give no more than evidence. They cannot usurp the functions of the jury or judge sitting as a jury, any more than a technical assessor can substitute his advice for the judgment of the Court… Their duty is to furnish the judge or jury with the necessary criteria for testing the accuracy of their conclusions, so as to enable the judge or jury to form their own independent judgment by the application of these criteria to the facts proved in evidence."

PIERCING THE CORPORATE VEIL

[49] In pursuance of his submission that the company Ouch Boutique should have been charged rather than the appellant, counsel submitted that the learned magistrate erred in point of law when he allowed the corporate veil to be pierced. Counsel relied on well-known authorities which established that a limited liability company has a separate personality from its officers and shareholders. This meant that the company could not be responsible for

the act of an employee or vice versa. In support of this legal proposition, he cited the cases of **Saloman v Saloman [1897] A.C. 22** and that of **Prest v Petrodel Resources Limited and Others [2013] UKSC 34**.

[50] There is no contesting that there is a settled legal principle that the lawfully incorporated company has a "separate legal personality' from its shareholders and directors.

[51] Counsel submitted that the so-called legal fiction of the separate personality of the limited liability company is the whole foundation of English company and insolvency law. Counsel in our view has stated the law correctly here, the separate personality of the company is the foundation of English company and insolvency law.

[52] Counsel argued that beyond the well-established principle of company law, pursuant to **Section 17(1) of the Companies Act, Cap. 308** the "company has the capacity, and, subject to **Cap. 319**, the rights, powers and privileges of an individual."

[53] In **Prest** the UK Supreme Court examined the issue as to whether **section 24(1) (a)** of the UK **Matrimonial Causes Act, 1973** was to be construed in the manner interpreted by several judges in order to make matrimonial property awards to spouses. In a number of these cases the issue of piercing

the corporate veil was raised. *Lord Sumption* in explaining the relevant legal principles pronounced that:

> "In ***Salomon v Salomon***, the House of Lords held that these principles applied as much to a company that was wholly owned and controlled by one man as to any other company. In ***Macaura v Northern Assurance Co Ltd [1925] AC 619***, the House of Lords held that the sole owner and controller of a company did not even have an insurable interest in property of the company, although economically he was liable to suffer by its destruction."

[54] **Lord Sumption** also stated under the rubric "Piercing the corporate veil" that:

> "I should first of all draw attention to the limited sense in which this issue arises at all. "Piercing the corporate veil" is an expression rather indiscriminately used to describe a number of different things. Properly speaking, it means disregarding the separate personality of the company. There is a range of situations in which the law attributes the acts or property of a company to those who control it, without disregarding its separate legal personality. The controller may be personally liable, generally in addition to the company, for something that he has done as its agent or as a joint actor. Property legally vested in a company may belong beneficially to the controller, if the arrangements in relation to the property are such as to make the company its controller's nominee or trustee for that purpose. For specific statutory purposes, a company's legal responsibility may be engaged by the acts or business of an associated company. Examples are the provisions of the Companies Acts governing group accounts or the rules governing infringements of competition law by "firms", which may include groups of companies conducting the relevant business as an economic unit. Equitable remedies, such as an injunction or specific performance may be available to compel the controller whose personal legal responsibility is engaged to exercise his control in a particular way. But when

> we speak of piercing the corporate veil, we are not (or should not be) speaking of any of these situations, but only of those cases which are true exceptions to the rule in **Salomon v Salomon**; that is, where a person who owns and controls a company is said in certain circumstances to be identified with it in law by virtue of that ownership and control."

[55] Counsel went on to extend his argument by quoting the words of **Lord Sumption** in **Prest** in order to establish that the corporate veil is only pierced in certain circumstances.

> "The difficulty is to identify what is a relevant wrongdoing. References to a "façade" or "sham" beg too many questions to provide a satisfactory answer. It seems to me that two distinct principles lie behind these protean terms, and that much confusion has been caused by failing to distinguish between them. They can conveniently be called the concealment principle and the evasion principle. The concealment principle is legally banal and does not involve piercing the corporate veil at all. It is that the interposition of a company or perhaps several companies so as to conceal the identity of the real actors will not deter the courts from identifying them, assuming that their identity is legally relevant . In these cases the court is not disregarding the "façade", but only looking behind it to discover the facts which the corporate structure is concealing. The evasion principle is different. it is that the court may disregard the corporate veil if there is a legal right against the person in control of it which exists independently of the company's involvement, and a company is interposed so that the separate legal personality of the company will defeat the right or frustrate its enforcement . Many cases will fall into both categories, but in some circumstances the difference between them may be critical. This may be illustrated by reference to those cases in which the court has been thought, rightly or wrongly, to have pierced the corporate veil."

[56] Counsel argued pursuant to the aforesaid authoritative statements that the court could only pierce the corporate veil if the evasion or concealment principles applied. If neither principle applies, the simple fact that a corporate personality is used to incur a liability and shield the individual is not sufficient, it must be to protect the individual from a claim (or enforcement of a claim) pre-dating the involvement of the company.

[57] As an example of the company being used to protect an individual from a claim, counsel cited the case of **Jones v Lipman [1962] 1 WLR 832** in which an individual entered into a contract for the sale of property before changing his mind. In order to avoid a claim for specific performance of the contract, he sold the property to a company he had purchased, hoping to protect himself from an action for specific performance. In the case, the evasion principle allowed an order for specific performance to be made against the company. The individual's attempt to avoid his contractual obligations meant that the legal distinction between the two could be pierced and the same remedy ordered against each.

[58] On the concealment principle, counsel submitted that this occurs where a corporate personality is being used to hide the true position. Further, the court will not be deterred by the legal personality of a company from enquiring into the legal relationship between a company and an individual. It

is of importance to note that the concealment principle does not rest on a finding of impropriety, but simply the fact of concealment.

[59] Counsel also stated that this principle applies where a company is acting as agent or nominee of an individual and receiving property on their behalf. A common example is where a director sets up a limited company to receive secret profits, or monies obtained in breach of fiduciary duty. Where this occurs, there will be an equitable claim for the money against both the company and the individual. The principle will also be seen where an individual tries to use a company to hide actions that are actually his.

PREST PRINCIPLES APPLICABLE IN CRIMINAL CASES

[60] In support of his submission that the principle of lifting the corporate veil applies to criminal cases, counsel cited the case of **R v Boyle Transport (Northern Ireland) Limited [2016] EWCA Crim 19**. In this case, the court accepted that the principles laid down in **Prest** were applicable to criminal cases.

[61] Pursuant to these principles, counsel for the appellant submitted that in order to pierce the corporate veil and hold the appellant liable for the acts of the company, the Crown would have had to offer evidence to satisfy the learned magistrate that the evasion or concealment principle applied. Counsel argued that there was nothing in the evidence advanced by the Crown to

support the contention that the appellant was using Ouch Boutique to conceal the true facts that the company was the agent or nominee of the appellant. Further, there was no evidence to suggest that the appellant was under an existing legal obligation or liability to or subject to an existing legal restriction, which he deliberately evades or whose enforcement he deliberately frustrates, by interposing the company under his control.

[62] Counsel also argued that in this case there was no evasion or concealment. The principal of the company was unable to hide his role in the acts judged to be criminal.

[63] Counsel concluded that piercing the corporate veil was a remedy of last resort. Ouch Boutique is a person pursuant to laws of Barbados and referred to in section **50A (1)** of **Cap. 319** and the **Companies Act, Cap. 308**.

SECTION 22 OF THE INTERPRETATION ACT, CAP. 1

[64] At the hearing of the matter, counsel for the appellant drew to the court's attention the provisions of **section 22** of the **Interpretation Act, Cap. 1** of the Laws of Barbados. **Section 22 (2)** and **(3)** of **Cap. 1** state:

> "**22 (2):** Where an offence under any enactment passed after the 16th June, 1966, has been committed by a body corporate the liability of whose members is limited, then notwithstanding and without prejudice to the liability of that body, any person who at the time of such commission was a director, general manager, secretary or other like officer of that body or was purporting to act in any such capacity shall, subject to subsection (3), be liable to be prosecuted as if he had personally committed that

> offence and shall, if on such prosecution it is proved to the satisfaction of the court that he consented to, or connived at, or did not exercise all such reasonable diligence as he ought in the circumstances to have exercised to prevent the offence, having regard to the nature of his functions in that capacity and to all the circumstances, be liable to the like conviction and punishment as if he had personally been guilty of that offence.
>
> **22 (3):** A person shall not be charged under subsection (2) except upon the direction of the Director of Public Prosecutions."

[65] It was not patently clear why counsel for the appellant drew the court's attention to this section of the **Cap. 1**. We assume that it could have been for two reasons. Firstly, counsel wanted to draw attention to the conditions prerequisite to charging the appellant because he personally committed the offence, or consented to, connived at, or did not exercise all such reasonable diligence as he ought in the circumstances to have exercised to prevent the offence, having regard to the nature of his functions in that capacity and to all the circumstances, he would be liable to the like conviction and punishment as if he had personally committed the offence.

[66] Secondly, we assume that counsel was indicating that the prosecution was required to seek the direction of the Director of Public Prosecutions (DPP).

THE UNRELIABILITY OF THE RECORD

[67] Counsel for the appellant submitted that the state of the record was so defective that the appellant could not be afforded a fair hearing in the Court

of Appeal. Counsel referred to a couple of instances when the record seemed to be incomplete or unclear. Counsel did not argue that these defects had an impact on matters which should be of concern in the appeal. As to the matter of the unreliability of the record, counsel is unable to go beyond a few documents to demonstrate how this "unreliability" affected his ability to present his case.

GROUND 1 OF NOTICE OF APPEAL

[68] We assume that counsel did not wish to address Ground 1 of the Notice of Appeal which was not specifically canvassed at the hearing and was not included in his written submissions.

RESPONDENT'S SUBMISSIONS AND COURT'S REVIEW

THE DECISION OF THE LEARNED MAGISTRATE IS AGAINST THE WEIGHT OF THE EVIDENCE

[69] Counsel for the Crown referred to **section 50 A (5)** of **Cap. 319** as one which provided a defence to the offences in **section 50A** of **Cap. 319**.

[70] In analysing the application of this subsection of **Cap. 319**, counsel argued that it is the equivalent of **section 92** of the **Trade Marks Act, 1994** of the UK; therefore, the case law that has developed in that jurisdiction, is instructive. In arriving at an understanding of how the UK has dealt with circumstances such as that before the court, the Crown relied upon a number

of cases including, **Torbay Council and Satnam Singh [1999] EWCA Civ J06 16-14**; **R v Steven John Rhodes [2002] EWCA Crim 1390**; **Roger Silney v London Borough of Havering [2002] EWCA Crim 2558**; **R v Johnstone [2003] UKHL 28**.

[71] Counsel for the Crown noted that **Torbay v Singh et al** is an authority which establishes the ingredients of the offence. So that the offence is made out if the prosecution proves:

> "i. the fact of registration of a trade mark to which a sign on goods which the defendant exposes for sale is identical or for which it is likely to be mistaken;
>
> ii. that he does so with the view to gain for himself or with intent to cause loss to another; and,
>
> iii. without the consent of the proprietor. It is not necessary to prove knowledge of or intent to infringe a registered trade mark".

[72] Counsel submitted that the learned judge in **Torbay** stated that:

> "if the regime introduced by the Act is to operate as an effective protection both to registered proprietors of trade marks and consumers, it cannot sensibly depend on proof in every case of the trader's knowledge of the existence of the registration of the trade mark allegedly infringed, or on rebuttal of his assertion that he was unaware of the registration or its detail. Whilst that may be a workable approach for large retailers with sophisticated administrative and legal controls, it would not be so where protection is most needed, against market traders and other small retailers who may obtain their wares from disreputable and/or as in this case untraceable, suppliers."

[73] In relation to the matter of an honest belief that the appellant was selling genuine **PUMA** goods, counsel submitted that in the **Rhodes** case, Mr Justice Andrew Smith noted that, "it goes without saying that whether the person genuinely so believed and if so whether he did so on reasonable grounds, is a question of fact to be determined in each particular case."

[74] Also, in the latter case, it was established that it is no defence to argue that the counterfeiting is "so convincing that they, on reasonable grounds, believed that they were selling goods which were genuine…goods and not counterfeits…"

[75] Counsel referred to **Silney,** cited earlier, where the facts were strikingly similar to the case at Bar, to support the view that **section 92(5)** of the UK Act (which is similar to **s 50A (5)** of **Cap. 319**), imposes a legal (persuasive) burden on the accused, since it utilizes the classic language for imposing such a burden. In **Silney** the court went further to state that they saw no distinction between the words "to show" and "to prove" and the legal persuasive burden is to be imposed as a matter of ordinary statutory construction. Such a construction was consistent with the presumed policy and intention of Parliament.

[76] This meant according to the respondent's submission, that a person may be properly convicted under **section 92** (UK) even if he acted honestly and it is

not necessary to prove intent to infringe the trade mark. Dishonesty then is not the gravamen of the offence.

[77] The court in **Silney's** case went on to conclude that based on the policy of the law and the mischief at which it is directed, it was neither unprincipled nor arbitrary for the **section 5** defence to be outside of the essential elements of the offence, and the presumption of innocence was therefore not infringed by this section.

[78] This did not mean that important matters did not have to be proved by the prosecution beyond reasonable doubt, before any liability could attach to the accused and it is only if these elements are proved, that the potential defence under section **92(5)** of the **UK provisions**, or Section **50A (4)** of **Cap. 319**, arises.

[79] Very much appropriate to the arguments in this matter before this Court, the Court in **Silney** stated that:

> "… it would not necessarily take that much for an issue to be raised by a Defendant in this context. It might be capable of being raised , for example, by an assertion in interview that he believed the goods were genuine , because they looked it or because they had come from a supplier whom he believed reputable. The issue once sufficiently raised, it would be for the Crown to prove beyond reasonable doubt the negative of an absence of belief, and the more elusive negative of an absence of reasonable grounds for such belief. This would be likely to give rise to potentially considerable practical difficulties at trial, including but not limited to a potential need to obtain the co-operation of a witness concerned in the supply chain. Fewer

> investigations in consequence would be undertaken; fewer prosecutions would result; and the interests of the economy, of innocent consumers and of legitimate business would suffer."

[80] Having made this point, the court determined that the burden upon the accused in the **section 92(5)** defence was a reverse legal burden and not just an evidential burden and this was necessary, justified, proportionate and strikes a proper balance between the interests of the public and the interest of the accused.

[81] Counsel submitted that a similar decision was arrived at in the case of **R v Johnstone [2003] UKHL 28**, in which the House of Lords held that section **92(5)** (Barbados **s.50A (4)**), "should be interpreted as imposing on the accused person the burden of proving the relevant facts on the balance of probability."

[82] In **Johnstone**, the House of Lords justified its position by indicating that the defence related to facts which are within the accused person's own knowledge: his state of mind, and the reasons why he held the belief in question and further noted that his source of supply is known to him.

[83] In sum, counsel for the crown has asked the court to be guided by the persuasive decisions of the England and Wales Court of Appeal and the House of Lords, to the effect that there is a reverse burden on the accused,

and the defence in **section 50A (5)** of **Cap. 319** must be proved on a balance of probabilities. We concur with counsel on this principle of law.

[84] Counsel argued that the court reflected on the accused's evidence in his denial that the receipt from Monée Hope was from the cashier at Ouch Boutique, and rejected the accused's position that it was not a receipt from Ouch Boutique. Counsel also noted that the accused did not examine the haversacks even though he had sufficient opportunity to do so before offering them for sale. The learned magistrate was of the view that the accused was evasive when answering questions about the fact that he sold brand and no brand items at the same price. Of note is that the learned magistrate had the opportunity to observe the demeanour of the defendant/ appellant while he gave evidence.

THE DECISION WAS ERRONEOUS IN POINT OF LAW

[85] On this ground of appeal, the respondent's brief submission was that the magistrate adopted the correct procedure in deeming the witness Luis Comvalius an expert in the area of trade marks, and counsel for the defendant/appellant made no objection at the time. The defendant never asked for his own expert to examine the items nor opposed the expert's conclusions about the goods being counterfeit.

[86] Counsel further argued that the defendant's defence was that he had a reasonable belief that the goods were genuine Puma merchandise, since he had purchased them in New York and made no personal examination of the items. Counsel argued that the prosecution's position that the goods were counterfeit was not a point in issue at trial and should not constitute a ground of appeal.

WHETHER THE LEARNED MAGISTRATE ERRED IN POINT OF LAW WHEN HE ALLOWED THE CORPORATE VEIL TO BE PIERCED

[87] Counsel for the respondent submitted that proceeding against the appellant in person was appropriate, since the company was small and the defendant was the directing mind and will of the company. Counsel submitted further, that criminal liability becomes useful with respect to large companies, where it is difficult to attach liability to one particular person, as it may be difficult for the directors to determine who actually committed the crime. In this case, counsel argued there is no difficulty identifying who committed the crime.

[88] Counsel concluded that the charge was not brought against the wrong person and should not be deemed a nullity. Counsel insisted that the appellant, Mr. Delpeache, had been the directing mind and will, so the *mens rea* and *actus reus* were his, and that liability also attaches to the company by virtue

of him acting in the company's behalf. However the aim was not to punish the company but to punish the individual who is involved in the operation of the clothing store, for infringement of intellectual property rights of a well-recognised brand.

INADEQUACY OF THE RECORD

[89] Counsel for the respondent argued that the law on adequacy of the record was discussed in **Chabedi v The State**, Supreme Court of Appeal of South Africa, case 497/04, delivered in 3rd March 2005 (**S v Chabedi (497/04) [2005] ZASCA 5**). That court noted that "the requirement is that the record must be adequate for proper consideration of the appeal, not that it must be a perfect recordal of everything that was said at the trial. As has been pointed out in previous cases, records of proceedings are often still kept by hand, in which event a verbatim record is impossible."

[90] Counsel further argued that the court in **Chabedi** was careful to point out that the question whether 'defects in a record are so serious that a proper consideration of the appeal is not possible, cannot be answered in the abstract. It depends, *inter alia*, on the nature of the defects in the particular record and on the nature of the issues to be decided on appeal.'

[91] Counsel asked the court to refer to the germane portions of the record of the evidence of the customer Monée Hope and the evidence of the appellant.

The evidence does not suffer from any incoherence or incompleteness as may be the case with the sections which were pointed out, in the submissions of the appellant at paragraphs 68 to 72. And even though the attorney-at-law for the appellant was not present at the magistrate's court proceedings, there is sufficient material on which this appeal may properly proceed, and this court can hear the appeal on the record as it stands.

[92] In **Chabedi** it was noted that the magistrate's microphone was not working with the result that significant parts of the judgment were incomprehensible. In essence, the court held that:

> "The contention on behalf of appellant that the shortcomings in the record rendered a proper consideration of the appeal impossible, was based on the submission that we are dependent on the magistrate's judgment on conviction to assess his evaluation of the evidence. I do not agree with this submission. As indicated the matter can, in my view, be decided on the inherent probabilities which can in turn be determined on the record as it stands. If the magistrate based any credibility findings on the demeanour of the respective witnesses, those findings could, in the circumstances, only have been adverse to the appellant. Logic therefore dictates that the appellant could suffer no prejudice through this court's lack of knowledge whether demeanour findings were indeed made by the trial court."

[93] In this appeal counsel for the appellant has not referred to any incorrect or incomplete parts of the record which would have had an impact on his ability to argue the appeal.

FURTHER ANALYSIS OF THE COURT

[94] In relation to the Crown's reliance on the case **Essex Trading Standards v Singh [2009] EWHC 520 (Admin)** that case is useful as a guide to how the matter of honest belief is to be distinguished from reasonable belief, since in **Essex Trading Standards** it was held the respondent did not do enough to ensure that he was not selling counterfeit goods. In similar fashion, the appellant Delpeache in this case, failed to ensure that he was not selling counterfeit goods. Therefore even if he thought that they were genuine he failed on a balance of probabilities to show why he held this belief.

WHERE NEITHER THE EVASION NOR CONCEALMENT PRINCIPLES APPLY

[95] For completeness, it is necessary to refer again to the case of **R v Boyle Transport (Northern Ireland) Ltd**. In this case, the issue before the English Court of Appeal was whether the courts below properly applied the law relating to lifting the corporate veil to justify the assessment of benefit reaped by the defendants via the operation of the Companies, namely the Old Company and the New Company. The court embarked upon an in-depth exposition of the law relating to the lifting of the corporate veil, in order to clarify the powers which the Court had under the Proceeds of Crime Act of 2002, to identify benefit from proceeds of crime and confiscate the said

benefit in cases where the defendants who were charged with various crimes, may have used the companies to benefit from the proceeds of the said criminal activity.

[96] The UK Court of Appeal described the concealment principle and the evasion principle, which could be relied upon by a trial court to pierce the corporate veil, without acting in breach of the company's legitimate personality, which is separate from its shareholders or directors. However, the court also identified cases which were neither concealment nor evasion cases, where the court could "rip off" the corporate veil because the liability of the perpetrator of crime was never concealed and the defendant never used the corporate veil to evade anything. Indeed everything was done in the open.

[97] To illustrate this point it is necessary to submit **Boyle** to further scrutiny. This is what the England and Wales Court of Appeal had to say about the circumstances in **Boyle**:

> "It follows that, as the judge accepted and as this court accepts, the inquiry had and has to be whether the turnover and assets ostensibly belonging to the Old Company in truth were to be regarded as the property of Patrick and Mark Boyle. If the turnover of the Old Company did not belong to them as individuals then such turnover could not represent benefit obtained by them. If the assets held in the name of the Old Company did not belong to them as individuals then such assets could not represent part of the available amounts. That is

> precisely where the argument relating to lifting or piercing the corporate veil kicks in."

[98] In arriving at its conclusion that the assets of Patrick and Mark Boyle were separate from the assets of the Old Company and New Company, the court relied heavily on the decision in **R v Seager; R v Blatch [2009] EWCA Crim 1303**, in which the English Court of Appeal, differently constituted, engaged in an extensive review of the authorities and statutory provisions and of the competing arguments. The court in **Boyle** quoted from **Seager and Blatch** where the following was said at page 76 (of **Seager and Blatch**):

> "There was no major disagreement between counsel on the legal principles by reference to which a court is entitled to "pierce" or "rend" or "remove" the "corporate veil." It is "hornbook" law that a duly formed and registered company is a separate legal entity from those who are its shareholders and it has rights and liabilities that are separate from its shareholders. **Saloman v A Saloman & Co Ltd Ltd [1897] AC 2**; referred to by *Rose LJ* in Re **H and others (restraint order: realisable property): [1996] 2 All ER 391 at 401F**. A court can "pierce" the carapace of the corporate entity and look at what lies behind it only in certain circumstances. It cannot do so simply because it considers it might be just to do so. Each of these circumstances involves impropriety and dishonesty. The court will then be entitled to look for the legal substance, not just the form. In the context of criminal cases the courts have identified at least three situations when the corporate veil can be pierced. First if an offender attempts to shelter behind a corporate façade, or veil to hide his crime and his benefits from it: see **Re H and others**, per *Rose LJ* at **402A**; **Crown Prosecution Service v Compton and others [2002] All ER (D) 395, [2002] EWCA Civ 1720**, paragraph **44-48**, per *Simon Brown LJ*; **R v**

> **Grainger**, paragraph 15, per *Toulson LJ*. Secondly **where an offender does acts in the name of a company which (with the necessary mens rea constitute a criminal offence which leads to the offender's conviction, then "the veil of incorporation is not so much pierced as rudely torn away": per Lord Bingham in Jennings v CPS, paragraph16 (our emphasis).** Thirdly where the transaction or business structures constitute a "device", cloak or "sham", ie. an attempt to disguise the true nature of the transaction or structure so as to deceive third parties or the courts: **R v Dimsey [2000] QB744 at 772(per Laws LJ), applying Snook v London and West Riding Investments Ltd [1967] 2 QB 786** ,at **802** , per *Diplock L.J*"

[99] The cases cited by counsel along with other relevant authorities are indicative of different strands of legal proceedings in which the issue of piercing the corporate veil arises. In the cases referred to by counsel for the appellant, the strands represent the tendency of judges in family law matters falling to be adjudicated pursuant to sections 23, 24 and 25 of the Matrimonial Causes Act 1973 (UK), to find their support for ignoring the corporate veil in the statutory provisions dealing with the distribution of matrimonial property. In the cases of **Boyle** and others, the statutory provisions in the **Proceeds of Crime Act** going after benefit of crime obtained by individuals were used to support judges' reliance on what is referred to as "the interest of justice in seizing assets of companies." In the case of **Prest** previously referred to, the learned Judge was of the view that the defendant was using a company to dishonestly hide assets from his

spouse to avoid a judicial decision in favour of his wife. In **Boyle** the trial judge assumed that the assets of the Old Company and the New Company were the assets of the Boyles and therefore were the proceeds of ill-gotten gains. The English Court of Appeal would have none of it. That court rejected the lifting of the corporate veil in those circumstances.

[100] The question arises then, what bearing does this exposition of the law have on Delpeache's case? The answer is that Delpeache was acting as an agent of the Company and committing the charged offences himself. There was therefore no need under the statutory provisions of **Cap. 319** to find evidence of benefit, either by Depeache or Ouch Boutique. There was no need to determine whether the property belonged to Ouch Boutique. The prosecution followed the evidence, some of which was given by the appellant himself, to the effect that he travelled to New York to obtain the offending goods, to place in his store. He mounted the goods for sale and was responsible for the sale of the goods in the store Ouch Boutique.

[101] It is not because he is a director of a one-man company that this matters. Rather it is because he actually committed the *actus reus* and had the *mens rea* of the offences charged. There was therefore no need for the prosecution to prove concealment, evasion, shelter or the existence of a cloak or sham and lift the corporate veil.

[102] We thank the appellant's counsel Mr. Pilgrim QC for his arguments on the matter of piercing the corporate veil. We find it particularly important because indeed we accept that it is very easy to presume that the acts of a company and the property of a company, are automatically the acts and property of a director or principal officer or the controlling mind of the company.

[103] In our view though, jurisprudence emerging from the authorities on "piercing the corporate veil" establishes that there is no need to pierce the corporate veil in a case such as the appellant's. Even though we do not agree with counsel for the Crown that the appellant should have been prosecuted because the company Ouch Boutique was a small company and the appellant was the directing mind, we do hold that the appellant was clearly acting as an agent of the company when he purchased the goods, delivered them to Ouch Boutique, displayed them in the store for sale, and actually sold a pair of the counterfeit shoes. This was sufficient in our view to justify his prosecution.

ERROR OF LAW/THE EXPERT

[104] Counsel for the appellant has complained that the learned magistrate simply adopted what the expert, Mr. Comvalius concluded about the Puma merchandise, without applying certain mandatory principles of analysis in

the circumstances. Counsel relied on an opinion from the case **Makita (Australia) Pty Ltd v Sprowles**, to the effect that, "expert witnesses, however skilled or eminent, can give no more than evidence," *inter alia*.

[105] Our interpretation of the reasoning in **Makita (Australia) Pty Ltd v Sprowles** is that an evaluation of the expert's evidence is a matter for the magistrate. In the case before us, the magistrate accepted the expert's evidence. There was no alternative to the expert's evidence and the expert's expertise was based on his knowledge of the brand, having examined over 600,000 PUMA shoes, *inter alia*.

[106] In our view, the trade mark expert's opinion on the issue of the genuineness of the goods found at the Ouch Boutique, could do no more than to establish that he could see the difference between the genuine Puma goods and the goods sold by the appellant. He explained in detail how he was able to do so. However, this evidence on its own, cannot establish that the appellant reasonably knew that the goods were counterfeit.

[107] At this point the learned magistrate had to consider Delpeache's explanation for being in possession of the Puma shoes and putting them up for sale. To fully comprehend the expert's role in the case one has to reflect on the court' comment in **Canon Kabushiki Kaisha v. Metro Goldwyn Mayer Inc** *cited at* ***paragraph 2*** *above* . The expert in this case is the mechanism by which

the identity of the goods can be ensured, and the quality of the goods guaranteed. This serves the interest of both the trade mark owner and the consumer public.

[108] We therefore assume that the learned magistrate assessed the facts as presented to him and deemed the expert's evidence to be credible, which he was entitled to do. Indeed it is possible to draw the inference from the expert's evidence, that he can look at counterfeit and know that it is counterfeit, because of the quality of the work and errors made in the work done, such as spelling errors along with languages used on the tags, inter alia. In our view, if left unchallenged, this is sufficient to establish expertise, conclusions based on the expertise and the safeguards alluded to earlier.

[109] In our view, it appeared that if the learned magistrate just adopted the expert's evidence, it was partly as a result of defence counsel's failure to test the expert's evidence, by raising some of the issues now being raised by counsel on appeal. However, based on the record there was no contest at trial to the veracity of the expert's conclusions on the factual allegation, that the goods being sold at the appellant's establishment were counterfeit. In the circumstances there is no good reason why this Court should attempt to reconsider the factual finding of the trial magistrate.

[110] The record shows that the expert's evidence was unchallenged and we are unable to conclude that it should now be challenged at the level of appeal without good reason, which must go beyond expressed dissatisfaction with the scientific basis of knowledge.

[111] And, as was stated earlier, trade marks are used by trade persons to differentiate their products from those of others and to ensure that other products are not passed off as their products, in particular, products of a lower quality or which may not have a good reputation.

[112] The expert is therefore saying that the quality of the goods shown to him, is not the quality known to represent the goods legally entitled to carry the PUMA trade mark symbol, and they do not display the quality of work known of PUMA goods. Unless this assertion can be challenged, the learned magistrate would be almost obliged to accept it. In this case he did.

[113] Accordingly, the Court does not find any good reason to upset the decision to deem Mr. Comvalius an expert and the conclusions of fact arrived at on this matter by the learned magistrate based on the expert findings.

SECTION 22 OF THE CAP. 1

[114] During this hearing, the Court was presented with a copy of **section 22** of **Cap. 1**. We are grateful to counsel for the appellant for drawing this section

to our attention as he was duty bound to do. The actual words of the section have already been quoted supra.

[115] Counsel for the Crown responded to the section by saying that it bore no application to this case. But she provided no further detail or argument.

[116] We assess **section 22** in the following manner: **Section 22** starts by declaring the circumstances in which it is applicable; that is, when an offence has been committed by a body corporate. This is a statement that relies on a totally subjective answer. It has to be subjective because the commission of a crime is a matter for a court to decide. All that the legislation can do is to set out the ingredients of the offence.

[117] It is a matter for the investigators at first instance, to determine whether the ingredients of an offence have been seen to be present in the factual matrix of any investigation of such an offence. But even at this point, the investigation can be proven wrong if for any of several possible reasons, one of the ingredients cannot be proved. In any event, a prosecutor has the right to determine that a likelihood of being correct about the presence of the ingredients of an offence is greater, if one scenario is presented rather than another. In making that decision, the investigator or prosecutor is rightly looking at the likelihood of conviction. At the end of the day the prosecutor may consider that a body corporate is much more difficult to link to the

mens rea and the *actus reus* of an act, than a human person doing the same act.

[118] We believe that in practical terms, the legislative intent of **section 22** cannot be that the theoretical determination by an investigator or prosecutor, that a body corporate has committed an offence gives rise to an obligation to seek the DPP's direction as to whether the director of the said company should be prosecuted, if the prosecutor determines that prosecution of the body corporate is unnecessary or undesirable because it is less likely to secure a conviction. Consequently, the prosecutor cannot be compelled to seek the DPP's direction if indeed the corporate body is not prosecuted for the offence, since the words "committed an offence" by itself in the legislation, cannot be a legislative directive that is mandatory, if the body corporate is not prosecuted for the offence. If this were the case, the court would be called upon to determine the obligation of a prosecutor in a case where the "direction of the DPP" is nothing but academic. We do not think that the legislation could have had this intent.

[119] We believe that guidance on this issue can be gleaned from the **Magistrate's Courts Act, Cap. 116A** where it outlines the steps to be taken in bringing criminal proceedings before the Magistrate's court, which is the applicable court in this matter before us. Indeed, we note that **Section 12(1)** of the

Magistrate's Courts Act, Cap. 116A of the Laws of Barbados uses the words 'that any person has, or is suspected of having committed an offence, the magistrate may':

> "(a) issue a summons directed to that person….;
>
> (b) issue a warrant to arrest that person…..;

[120] Further, **Section 12(2)** states that 'a magistrate for any district may issue a summons or warrant under this section':

> "(a) if the offence was committed or is suspected to have been committed within the district.

[121] **Section 13 (1)** and **(2)** of the said **Cap. 116A** states the following:

> "**13 (1)** A magistrate shall have jurisdiction to try all summary offences committed within the district or districts to which he has been assigned in accordance with **section 7**.
>
> **13 (2)** Where a person charged with a summary offence appears or is brought before a magistrate in answer to a summons issued under paragraph **(b)** of **section 12 (2)** or under a warrant issued under that paragraph, the magistrate shall have jurisdiction to try the offence".

[122] It is also instructive to note that the magistrate's role is defined in the definition of "court" under **section 2(1)** of the **Magistrate's Court's Act**:

> "**2 (1)** "court" or "summary court" or "court of summary jurisdiction", unless the same is expressly or by implication qualified, means a magistrate or a magistrate sitting as an examining magistrate to hear and determine any matters within his power and jurisdiction, either under this Act or under any other enactment".

[123] Based on the review of the aforesaid legislation, the magistrate would have had no jurisdiction over the hearing of an offence not charged under the relevant Act, which would be covered by **section 22** of **Cap. 1**, since no corporation was charged or brought before him and therefore the question of a directive from the DPP in relation to prosecution of the director or officer of the body corporate, would not have arisen before the learned magistrate. The prosecution was therefore entitled to proceed with a charge that does not fall under **section 22** in any event, pursuant to the law relevant to the **Trade Marks Act** and the procedural guidelines laid down in the **Magistrate's Court Act**. Such a charge would not be subject to any stricture arising under **section 22**.

[124] In conclusion **Section 22** of **Cap. 1** provides a way around the corporate veil but only in circumstances where the prosecutor wishes to proceed against officers of the company**,** having concluded that the company committed the offence, but it raises the question whether evidence of consultation with the DPP must be provided to the court in those circumstances.

THE RECORD

[125] As far as the issue of the record is concerned, we do not see any reference to defects in the record which made it impossible for the appellant to enjoy a fair hearing in this appeal. We are not persuaded by the record of the

evidence of the witnesses for the prosecution and for the defence on many of the important points raised, that any defects exist which would make it impossible to determine why the learned magistrate decided the case as he did or made it inadequate for the proper consideration of the Appeal: See **Chabedi** referred to above.

[126] We therefore find no merit in this ground, although we would encourage counsel to do everything possible to expose defects in future, and to ensure that shoddy work is exposed and fixed before it comes before this Court, if possible.

[127] We thank counsel for their diligent research in this matter.

DISPOSAL

1. In the premises we dismiss this appeal.

Justice of Appeal

Justice of Appeal Justice of Appeal