IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1995] SGHC 119

MA 263/94/01, 263/94/02, 263/94/03, 263/94/04

Between

Trade Facilities Pte Ltd

… *Appellant*

And

Public Prosecutor

… *Respondent*

GROUNDS OF DECISION

Trade Marks and Trade Names — Infringement; Trade Marks and Trade Names — Infringement; Companies — Incorporation of companies — Lifting corporate veil; Words and Phrases; Words and Phrases; Words and Phrases

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Trade Facilities Pte Ltd and Others v Public Prosecutor

[1995] SGHC 119

MA 263/94/01, 263/94/02, 263/94/03, 263/94/04
Yong Pung How CJ
03 May 1995

1 Cur Adv Vult

2 This case involves appeals and cross-appeals. The defendants in the trial below (the first and second appellants, and the third and fourth respondents here) were Trade Facilities Pte Ltd (Trade Facilities) and Looi How Wah @ Peter Looi (Looi). The complainant was Socieacute;teacute; Jas Hennessy & Co, acting through the Public Prosecutor (the third and fourth appellant, and the first and second respondent here). Trade Facilities and Looi were each convicted by the learned magistrate Lee Teck Leng on two charges under s 73 of the Trade Marks Act (Cap 332, 1992 Ed) (the Act).

3 The first count against each of the respondents charged Trade Facilities and Looi separately with selling to Nissan Trading Co Ltd (Nissan) of Japan 100 cases of `Hennessy XO`, each case containing 12 bottles. The bottles were alleged to contain counterfeit `Hennessy XO` cognac and alleged to bear counterfeit Trade Mark Registration No. S/77727 or a colourable imitation thereof falsely applied to or impressed on them, contrary to s 73 of the Act. The

second count against each of the respondents charged them separately with importing 97 cases of the same, also contrary to s 73 of the Act.

4 **The facts**

5 It was not disputed before me that the bottles contained adulterated `Hennessy XO` cognac and that the `Hennessy` mark was affixed without the authority of the complainant or its agents.Nor was it disputed that neither the complainant nor its agents sold any Hennessy XO to Trade Facilities or Looi. The events leading to this action are as follows.

6 On 26 October 1993, Keiji Ueno (Ueno) of Nissan received a fax from one Higa of Universal Trading Co Ltd (Universal) of Japan stating that there were 300 cases of Hennessy XO available for sale at US$718 per case, with loading in Singapore; and asking Ueno to consider the offer, adding that an order for 100 cases was acceptable.Ueno placed an order for 100 cases.

7 On 28 October 1993, Ueno received another fax from Universal confirming the order and stating:

> *... the seller asked that we inquire of the buyer whether it would be possible for the seller to ship another 100 cases two weeks after the first shipment, as the seller has 200 cases. The original B/L and invoice will be sent by DHL after the shipment.Payment will be made by telegraphic transfer after the receipt of the documents.*

8 On 29 October 1993, Nissan issued a purchase order to Universal for 100 cases of Hennessy XO at US$718 per case.Nissan thought they were buying genuine Hennessy XO, albeit at lower prices than the usual US$750 to $760 per case for parallel imports.Nissan later received an invoice and a packing list dated 5 November 1993 issued by Trade Facilities. The invoice stated that

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payment should be made via telegraphic transfer into Looi`s bank account.On 17 November 1993, Nissan remitted the sum of US$71,800 in accordance with the instruction.

9 The 100 cases of Hennessy XO arrived in Tokyo on 23 November 1993.On 1 December 1993, a Japanese law firm TMI Associates (TMI) informed Nissan that the 100 cases of Hennessy XO were suspected to be counterfeit.On 5 December 1993, after examining the goods, TMI advised Nissan to stop distributing them.Nissan only managed to recover 12 cases and five bottles out of the 15 cases already distributed.

10 Ueno contacted Universal and requested them to inquire into the matter.On 14 December 1993, Nissan received through Universal a letter from Trade Facilities saying that Trade Facilities would accept a return of the 97 cases and that Trade Facilities would arrange to refund the money in January 1994.In January, Nissan received a letter of credit issued in their favour by Sun Tat Textiles (Sun Tat).As Nissan was afraid that they might be perceived as selling the 97 cases, they queried Trade Facilities and was assured by a letter dated 1 February 1994 explaining that Sun Tat issued the letter of credit because Trade Facilities`s own cash-flow was tight and confirming that Sun Tat issued the letter of credit as a financier and not purchaser.Nissan arranged for the 97 cases to be returned to Trade Facilities. The goods were shipped on 8 February 1994 and arrived in Singapore on 19 February.On 22 February they were seized. Trade Facilities was named as the consignee in the bill of lading.

11 A copy of the bill of lading for the seized consignment of counterfeit Hennessy XO was produced in court.Nissan was the shipper and Trade Facilities was stated to be the consignee and the party to be notified. This suggests that the goods were consigned directly to Trade Facilities instead of a

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bank. The whereabouts of the three original bills of lading are not known. The goods would only have been released on production of the original bill of lading.

12 Also produced was a letter sent by Trade Facilities to TSK Lines giving them instruction on what to do with the shipment, and a faxed copy of the original bill of lading.Both of these had `Peter Looi Trading` printed on them by the fax machine.

13 Ueno testified that parallel imports are legal in Japan.He testified that the terms of the agreement were as reflected in the documents.He denied that there were other terms.He admitted that it was common practice in Japan for goods to be shipped on a consignment basis so that the importer can inspect the goods first and then pay only if satisfactory.However, he denied ever dealing with Universal on a consignment basis.It was also not Nissan`s usual mode of trading. They had only done a deal on consignment basis once before, and that was not with Universal.In this case, he could not recall any oral agreement that Nissan would pay for the goods only upon inspection.As far as he was concerned, Nissan was to pay by telegraphic transfer once they received the documents.He explained that Nissan could have paid before receiving the documents because they had been dealing with Universal for many years and that Universal had probably sent Nissan copies of the documents.He believed his staff arranged for the telegraphic transfer after ascertaining that the goods were loaded.

14 The telegraphic transfer was made on 17 November 1993 and inspection of the goods in Japan was made on 28 November 1993.Nissan seldom used telegraphic transfers, their normal practice being `letter of credit on sight`.

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15 He admitted that Trade Facilities was very ready to refund Nissan the money for the goods.Originally the consignee was requested to be Horizon Impex and the party to be notified was Shantou Wanxing Trading Co in China.Ueno was not happy with the terms and insisted that Trade Facilities be made the consignee and the party to be notified because he was worried that Nissan might be construed as selling the counterfeit liquor.He was not the only one communicating with Universal concerning the return of the goods.A colleague, Yamamoto, was also dealing with it.Both of them were concerned about this. The arrangement was not made so as to entrap Trade Facilities.

16 The defence`s case was that the counterfeit Hennessy XO belonged to someone called Chan Ah Kow (Chan) and that Looi did not know that they were counterfeit.Looi had met Chan about three times.Chan lived in Batu Pahat. The first time was at Dynasty Nite-club at Kallang Leisure Drome.A Mr Teo, Mr Bache Loo and about five or six other Indonesians were also present.Looi formed the impression that they were big businessmen.Chan asked Looi what business he was in and Looi said he was in general trading.Looi mentioned beer and alcohol and Chan said that he could supply liquor like Martell and Hennessy.

17 Looi testified that he contacted Higa by fax to look for buyers.Higa indicated he could get buyers.Having found a market in Japan, Looi asked Chan what quantity he could supply.Chan said over the phone he could supply 100 to 200 cases of Hennessy XO, subject to Chan`s confirmation.Chan asked about the price.Looi asked Higa, who told him that it was about US$720 per case.Looi told Chan this over the phone.

18 After a few days, Looi met Chan at Peninsular Hotel sometime around the end of the first week of October 1993.Chan gave Looi a sample bottle as a

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gift.Looi said that he did not examine the bottle carefully to see if it was a counterfeit.Subsequently, Looi agreed over the phone to deal with Chan. The terms were that Chan would ship the goods to the buyer.After Looi was paid by the buyer Looi would pay Chan.Looi was to pay the freight first but Chan would reimburse him.Looi also had to use a bonded warehouse to handle the transhipment from Batam to Singapore and thence to Japan.Looi`s commission was US$20 per case and he had to split this with Higa.

19 On 3 November 1993, Looi went over to Batam and witnessed the loading of the goods.He took out a bottle to ensure that it was the right brand.

20 Looi said that one of the terms he made with Higa was that the buyer could inspect the goods first before paying Looi.He told Higa to ask the buyer to pay into his bank account. The sum of $114,233.80 was paid to his account on 16 or 17 November.Looi issued a cheque for $40,000 to Bache Loo because he owed Looi about $60,000.Looi told Bache Loo to arrange the payment to Chan.Looi knew that Bache Loo would arrange for a Mr Teo Cai Long to pay the money to Chan.Chan called up to confirm he had received the money.Looi deducted several thousand for the freight and storage expenses.Looi paid Higa his half share of the US$2,000 commission.

21 A few weeks later, Higa contacted Looi to say that the buyer suspected the goods to be counterfeit and wanted to return the goods.Looi did not have the money and had to contact Chan, who became angry.Chan agreed to refund the money if the goods were returned to him.As Looi had no money, Sun Tat Textiles was asked to open the letter of credit.Bache Loo was apparently known to Sun Tat.Looi agreed to pay a 6% commission.

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22 Horizon Impex was, to use the words of Looi, a `friend` of Sun Tat.Looi believed that Sun Tat requested the consignee and the party to be notified to be Horizon Impex and Shantou Wanxing Trading Co respectively.Nissan wanted the goods to be shipped back to Singapore and Looi agreed even though he thought it was unreasonable. The wording in the letter in which Trade Facilities agreed to indemnify Nissan and stating that Nissan was not selling were drafted by Nissan.He testified that he had never seen the original bill of lading.His clerk, Wendy, and Kerry Bonded Warehouse did all the paperwork.

23 Looi gave evidence that when he heard of Alain Barboteau, it was the first time that he learnt how to tell if the goods were counterfeit.Alain Barboteau was the complainant`s expert who gave evidence in court on how to distinguish the genuine Hennessy XO from the counterfeit ones.

24 Looi agreed that he was the owner of 5,002 out of 5,003 shares in Trade Facilities.He admitted that Universal had never made a mistake in his previous dealings with them. They had never done one thing when Looi told them to do another. The papers in the file concerning this transaction were thrown away when Looi closed down his office in Peninsular Plaza in March or April 1994.So he did not have the originals to the documents.Looi said that he did not have to keep the documents because Trade Facilities was inactive. Trade Facilities also did not have to file accounts for income tax.

25 He confirmed that the letter to the carrier was sent on his instructions.A bill of lading for a similar consignment of 100 cases of Hennessy XO sent to Kobe was also opened on his instructions. These were shipped to Wing Trading of Nara. There was no trouble with this consignment.

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26 Looi testified that he did not have to report the commissions for income tax purposes because these were not chargeable to income tax.He claimed that his accountant told him this.He said he earned the commission and not Trade Facilities.His daughter was the one who filed his income tax return, so he did not know what the amount filed was.He did not know whether he told her to fill the commissions in.

27 According to Looi, he had started out on his own in 1977.He had since seen people cheated and had on one occasion also been cheated.He was therefore aware of the dangers of trading.However, if one was overly careful one would not trade at all.

28 Looi did not exchange name cards with Chan. They merely exchanged mobile telephone numbers.Chan told Looi that he was from Batu Pahat. The second time they met was in Peninsular Hotel where Chan presented a bottle of Hennessy XO to Looi. They did not exchange name cards, but Looi gave Chan his and took him up to his office. The third time they met was in Batam, at the Puri Garden Hotel.In between the three meetings they had contacted each other by phone.Chan did not give him a name card then either.By then, Looi knew that Chan was from Torina Sdn Bhd. The number of Chan`s mobile phone was 730762.

29 Looi could not remember if he told his first set of lawyers, Rayney Wong & Co, about Chan.He said that he did tell them he was merely a broker.He did not instruct them to protest about the seizure because he was waiting for them to guide him.Looi claimed that the instructions to Nissan to pay by telegraphic transfer after receipt of the documents were not in accordance with what he told Higa.

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30 In the meantime, there had been a civil suit between the authorized distributor of Hennessy XO for the Asia Pacific region, Moet-Hennessy Asia Pte Ltd, and the complainant on the one hand, and Looi and Trade Facilities on the other.Looi explained that the reason for the discrepancies between his testimony and what was said in his affidavits and answers to requests for further and better particulars in the civil suit was because he had left everything to his lawyers.I note here that the appellants used three sets of lawyers.Rayney Wong was instructed initially.Darshan & Partners were then instructed to take over in the civil proceedings and Spencer Gwee & Co were instructed to take over in the criminal proceedings.Looi`s allegations against his lawyers appear to extend to at least the first two firms.

31 Looi said that he did not give the details then because his lawyers did not ask.He did not tell his lawyers Chan was from Torina Sdn Bhd because they did not ask. The same was for the mobile phone number.Likewise, he did not tell his lawyers about the meetings with Chan because they did not ask. The statement that he was acting as a commission agent was left out of the earlier affidavit and appeared only in the affidavit of 11 July 1994 because earlier the lawyers also did not ask.He did not initially give his lawyers Chan`s full name because they did not ask.In short, all the discrepancies and omissions were allegedly due to the fault of his lawyers, who did not ask him the pertinent questions.

32 Looi also testified that he never knew that there was counterfeit Hennessy XO in the market.So it never crossed his mind to address the issue.However, he later said that he probably asked Chan if the goods were genuine and he replied `yes`.When asked to make up his mind he said that he was not sure.He believed in Chan because of his standing.In his affidavit, Looi

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had also said that he obtained assurances from Chan that the goods were genuine.

33 Looi`s explanation (for the fact that the $40,000 he made out to Bache Loo and the $60,000 Bache Loo allegedly owed Looi only amounted to $100,000, while the amount to be remitted to Chan after deducting commission and expenses should be $108,000) was that he kept the $8,000, as this `small little money` could be settled in the future. This was so even though it amounted to 21/2 times the total commission paid by Chan.Looi testified that this was done without Chan`s consent as it was very commonly done.He did not find out Chan`s source because it was a supplier`s secret.Otherwise there would be no need for brokers.

34 Looi`s diary in which he recorded Chan`s and Teo Cai Long`s telephone numbers was tendered in the court below. The learned magistrate noted that Chan`s name was not under `C` but at `K`, squeezed above another entry. There was no space left under `C`. Teo Cai Long`s name was also squeezed at the top under `T`.However, other names were also similarly squeezed in elsewhere. The learned magistrate noted that only Chan`s and Teo Cai Long`s names were written in a similar black ink and that, as Looi knew Teo Cai Long earlier, they should not have been written at the same time.

35 Bache Loo was not called by the defence.Apparently he had gone to Amsterdam. The defence did not ask for the trial to be adjourned for Bache Loo to be called.Higa was also not called.Apparently he was unwilling to give testimony for Looi or Trade Facilities as he did not want to be seen siding with them.No reason was given why Teo Cai Long was not called.

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36 It was also argued that the respondents did not sell the offending articles.Alternatively, if they had, the sale took place in Japan and not in Singapore.Accordingly, the court in Singapore does not have jurisdiction to hear the charges of selling.It was further argued that there was no importation of the goods into Singapore.

37 **The decision below**

38 The magistrate held that `sell` in s 73 of the Act is not to be construed according to niceties of the contract law of sale, but is to be understood in the popular sense of the word.Reliance was placed on . He relied on the following to find that Trade Facilities, acting through Looi, did sell the counterfeit Hennessy XO in Singapore:

> (1) Universal was only acting as an intermediary and could not be regarded as selling the spurious goods;
>
> (2) Trade Facilities was registered in Singapore and had a Singapore registered address;
>
> (3) the 100 cases were loaded on board the vessel Bunga Terasek in Singapore, and Trade Facilities was the shipper of these goods as shown by the shipping documents;
>
> (4) the invoice and the packing list for the shipment were issued by Trade Facilities on their letterhead, both bearing Trade Facilities`s company stamp;
>
> (5) the payment of US$71,800 was remitted by Nissan into Looi`s bank account in Singapore.

39 The magistrate decided that `import` in s 73 of the Act did not have the same meaning as in s 3(1) of the Customs Act (Cap 70).Just because the goods were dutiable did not mean that `import` had the same meaning. The definition of `import` in the Customs Act was for the purpose of determining when customs duties were payable and was not of general application.Furthermore, it

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would lead to an absurd dichotomy between dutiable and non-dutiable goods under s 73 of the Act.Instead, the meaning of `import` should be that as found in s 2(1) of the Interpretation Act (Cap 1), which simply means `to bring or cause to be brought into Singapore by land, sea or air` as applied to statutes like the Misuse of Drugs Act in . Trade Facilities and Looi had therefore imported the 97 cases into Singapore.

40 The argument that Trade Facilities and Looi were entrapped was rejected by the magistrate on the ground that there was no such defence. The principle in was followed. The fact that the 97 cases were returned goods made no difference as this should be seen in isolation.

41 On the question of whether it was Trade Facilities or Looi who committed the offence, the magistrate relied on . He decided that as Trade Facilities had no mind of its own, Looi was just as guilty as he was the person directing and controlling its affairs.Both the company and the human agent could be charged and convicted.Otherwise it would be easy to evade responsibility as a company cannot be imprisoned.

42 The magistrate was satisfied that Trade Facilities did sell the goods in Singapore.He rejected Looi`s allegation that it was a sale on consignment as it was not supported by the documents. There was also no need for Nissan to pay Looi so early if that was the case, nor was there a need for Nissan to raise a purchase order on 29 October 1993 or for Trade Facilities to issue the invoice and packing list dated 5 November 1993, which was before the shipment set sail on 8 November 1993.It was also too much of a coincidence that Higa`s first error would happen to be in this transaction.

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43 The magistrate rejected the defence that Trade Facilities and Looi were merely agents for Chan, on the ground that it made no difference. The case of was relied on.

44 Furthermore, Looi was not a credible witness. The magistrate disbelieved the defence that Trade Facilities was merely acting as an innocent agent of Chan. There was an absence of documentary evidence.Also, Looi`s account of Chan`s involvement was improbable. There were numerous inconsistencies between Looi`s oral evidence and his documentary account. The magistrate took the view that the entries in Looi`s diaries were more likely to have been made at the same time and were concocted.It was very convenient that Looi had discarded all of Trade Facilities`s files. The absence of documentary evidence of Chan`s existence indicated that he was nothing more than a figment of Looi`s imagination.

45 The convoluted manner in which it was alleged Chan was paid as well as the way in which Looi claimed he could retain the $8,000 meant that the account could not bear close scrutiny. Teo Cai Long and Bache Loo were not called as witnesses.Also, Trade Facilities went a long way, to the extent of paying some US$4,200 in commission, to facilitate the return of the goods by issuing a letter of credit for US$70,000 when the commission earned was only half of US$2,000.

46 Looi also wavered when asked whether it was Trade Facilities or Looi who was acting as agent and earned the commission.His evidence during cross-examination that he acted in his own capacity was also contradictory to his defence filed and his examination-in-chief answers that it was Trade Facilities which was the agent.His evidence that he had inspected a bottle in Batam was also inconsistent with his defence filed.Looi also said Chan assured him that the

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goods were genuine but he could not say how.In any event, there was no reason for Looi to seek assurance as he claimed not to know there was counterfeit Hennessy in the market.

47 Furthermore, Looi never mentioned that Chan lived in Batu Pahat and was from Torina Sdn Bhd until he gave evidence.Neither did he mention the three meetings or Chan`s telephone number. The magistrate observed that Looi was eager to evade responsibility for the affidavits and the reply to the complainant`s request for further and better particulars filed in the civil suit.

48 Accordingly, the defence had failed to prove on a balance of probabilities that Trade Facilities and Looi were merely innocent agents.In any event, Looi had failed to show that he had taken all reasonable precautions against committing the offence and had not given all information in his power in respect of Chan despite the complainant`s relentless demands for it.[See .]

49 **The appeal**

50 Largely the same issues were canvassed before me.Before dealing with them, it would be convenient to set out the relevant statutory provision.Section 73 of the Act states:

> *Any person who imports, sells or exposes or has in his possession for sale or for any purpose of trade or manufacture, any goods or thing to which a counterfeit trade mark is applied or to which a registered trade mark is falsely applied, shall, unless he proves that -*
>
> *(a) having taken all reasonable precautions against committing an offence under this section, he had, at the time of the commission of the alleged offence, no reason to suspect the genuineness of the mark and on demand made by or on behalf of the prosecution, he gave all the information in his power with respect to the persons from whom he obtained the goods or things; or*

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(b) he had acted innocently,

be guilty of an offence and shall be liable on conviction to a fine not exceeding $10,000 for each goods or thing to which the counterfeit trade mark is applied or the registered trade mark is falsely applied (but not to exceed in the aggregate $100,000) or to imprisonment for a term not exceeding 5 years or to both.

51 **The meaning of `sell`**

52 Counsel for the respondents argued that the magistrate misapplied the principle behind the case of . The case dealt with s 13 of the English Markets and Fairs Clauses Act 1847. The facts of were as follows. There a farmer contracted with one Trebble at the farmer`s house for the sale of two pig carcases to be delivered at Trebble`s shop. Trebble`s shop was within the limits of a marketplace.Pigs were tollable items and the farmer was convicted by the justices of selling tollable items in a market place. This was because the justices found that the risk in the pigs did not pass until delivery in Trebble`s shop.On appeal, the court quashed the conviction.Ridley J said at p 44:

This question arises upon an Act of Parliament the use of the word `sell` in which is, according to previous decisions, not to be construed with reference to the niceties of the law of contract of sale, or to the distinction between a sale and an agreement to sell, or to the question whether the property in the goods has passed, but is to be understood in a popular sense; and although if a lawyer were asked where the sale of these pigs took place he might say that in the legal sense it took place at the butcher`s shop because, until they were delivered there and weighed the sale was not complete, any ordinary person, not a lawyer, who was asked the same question would unhesitatingly say that the sale took place on December 9 at the farmhouse.

53 Ridley J followed the earlier case of . There the agreement to sell was made outside the town limits and the delivery inside.It was held that the contract to supply was a sufficient sale and hence the butter was sold outside the town limits.

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54 Counsel submitted that the difficulty in this case was that, even if there was a sale, the agreement to sell was clearly made in Japan. The offer was communicated by Universal to Nissan in Japan.Ueno accepted the offer in Japan. The goods were also delivered in Japan.So, leaving aside the question of where the property in the goods could be said to pass (which was not in Singapore anyway), a layman would most probably have said that the sale took place in Japan. The greatest obstacle in the way of finding that the sale took place in Singapore was that until the agreement was reached, all the negotiations were done between Higa and Ueno in Japan, albeit Higa did consult Looi by way of telephone or fax. Therefore, even if the popular sense of the word `sell` was used, the sale took place in Japan. The fact that Trade Facilities and Looi were in Singapore was clearly irrelevant, for Higa was in Japan.Similarly, the fact that the goods were shipped from Singapore was irrelevant.Likewise, the fact that the payment was effected in Singapore was irrelevant. It would have been irrelevant in whether the payment was made in the farmhouse or Trebble`s shop, just as it was irrelevant where the pigs were delivered. Where the invoice and the packing list was issued were also irrelevant because these matters occurred only after the sale.

55 I was initially attracted to this argument.However, I have come to the conclusion that the approach used in cannot be adopted in interpreting s 73 of the Act.Section 73 says that any person who `sells` commits an offence.It does not prohibit the sale itself. The prohibition is aimed against the person and the act of selling, and not the transaction of sale or the agreement to sell. Thus, although the word `sells` must be given its ordinary English meaning, it is the meaning of the word as a verb that is required.1 used a transactional approach.It determined that the agreement to sell was made at the farm, and hence a layman would say that the sale took place at the farm.In my view, regardless of whether

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the case was rightly or wrongly decided, it has no application so far as s 73 of the Act is concerned.Section 73 of the Act prohibits the act of selling.Where the sale took place and where the agreement to sell was made is not conclusive.I would go further and say that whether a sale or an agreement to sell is reached is also not conclusive.A fishmonger can be said to have been selling fish on Tuesday even though on the day itself nobody bought or agreed to buy any fish from him.If he set up the stall and made the sales pitch, then he sold fish that day even if at the end of the day he did not manage to sell any of the fish.

56 The question whether a person `sells` must be looked at from the point of view of the seller and not the buyer.It is the act of selling that is crucial, not the transaction.In order to determine whether a person has sold goods, the court must look at all the circumstances of the case. The same goes where the court has to decide where the act of selling takes place.In deciding these questions, it is the acts which the person does that is relevant, not the resulting transactions, if any.

57 **The meaning of `import`**

58 The Act itself does not provide a definition of the word `import`.In my view, the proper approach in interpreting the word is to start from s 2(1) of the Interpretation Act. This is because s 2(1) states quite clearly:

> *In this Act, and in every written law enacted before or after the commencement of this Act, the following words and expressions shall, without prejudice to anything done prior to the commencement of this Act, have the meanings respectively assigned to them unless there is something in the subject or context inconsistent with such construction or unless it is therein otherwise expressly provided:*

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60 `import`, with its grammatical variations and cognate expressions, means to bring or cause to be brought into Singapore by land, sea or air;

61 Thus, the interpretation in s 2(1) will apply unless there is something in the subject or context which is inconsistent with such a construction or it is otherwise expressly provided. There is no question of there being an express provision giving the word `import` in the Act a different meaning. The question then is whether there is something in the subject or context which is inconsistent with the meaning assigned to the word by s 2(1).

62 Counsel for the respondent`s argument was that as liquor are dutiable goods, the meaning assigned to the word `import` by s 3(1) of the Customs Act (Cap 70) should apply.In my view, this argument has no merit. The Customs Act is concerned with the imposition of customs duties. Thus, whether something is dutiable or not is of utmost importance. The Trade Marks Act has nothing to do with customs duties.Whether something is dutiable or not is therefore irrelevant.It cannot be the case that there is one test for `import` under s 73 for dutiable goods and another for non-dutiable goods.

63 There is therefore nothing in the subject or context of s 73 which requires the use of the special meaning assigned to the word `import` in the Customs Act.In coming to this conclusion, I have kept in mind the consideration that Singapore also relies on entrepot trade. There may thus be very good policy reasons why Singapore should or should not police the transhipment of goods bearing counterfeit trade marks or the like as they pass through Singapore`s free trade zone.However, that is something that Parliament must deal with.If Parliament is of the view that transhipments through Singapore should not be caught by s 73, then it is open to it to amend the Act by expressly incorporating the Customs Act definition of `import` into the Act.

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64 That is not to say that the meaning of `import` in s 73 is necessarily as wide as that provided for in s 2(1) of the Interpretation Act.If the word `import` in s 73 means simply to bring or to cause to be brought into Singapore, then it would appear that any person who brings into Singapore a counterfeit branded handbag, wallet, watch or the like would have committed an offence under s 73.He or she would then have the burden of proving on a balance of probabilities the defences provided for in s 73. Thus, a Singaporean vacationing with her family in, say Hong Kong, who visits Stanley and purchases a counterfeit branded handbag from one of the stalls there will run foul of s 73 if she takes it with her when she returns with her family to Singapore.I cannot imagine that Parliament intended such an absurd result.

65 Section 73 states that an offence is committed by a person if he `imports, sells or exposes or has in his possession for sale or for any purpose of trade or manufacture` the offending articles.In my view, s 73 is directed at persons who deal in the course of business, in one way or another, in goods to which a counterfeit trade mark is applied or to which a registered trade mark is falsely applied.It is not aimed at the consumer who uses or merely possesses these goods.Similarly, it cannot be invoked against the same consumer when he brings the offending article into Singapore merely because he happens to have purchased it abroad. Thus, the words `for sale or for any purpose of trade or manufacture` applies equally to the word `import` in s 73.A person therefore does not `import` something into Singapore within the meaning of the word in s 73 of the Act unless it is done for the purpose of sale or for any purpose of trade or manufacture.

66 **The statutory defences**

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67 I now come to the question of the statutory defences provided for in s 73. There are two defences.For convenience, I shall refer to them as the s 73(a) defence and the s 73(b) defence.

68 The s 73(a) defence is relatively straightforward. There are three elements in this defence, all of which must be satisfied. Thus, in order to avail himself of this defence, it is quite clear from the plain language of s 73(a) that the accused must prove: (1) that he took all reasonable precautions against committing an offence under s 73;(2) that at the time of the alleged offence he had no reason to suspect the genuineness of the mark; and (3) that on demand by or on behalf of the prosecution, he gave all the information in his power with respect to the persons from whom he obtained the goods or things.

69 The question of the defence in s 73(b) is more difficult. The issue is made more complicated by the legislative history of s 73(b).Until 1991, the word `otherwise` appeared in the predecessors to s 73, so that the defence read `otherwise he had acted innocently.`The word `otherwise` was in s 73(b) of the Trade Marks Act (1985 Ed).When this was repealed in 1991 by the Trade Marks (Amendment) Act 1991 and replaced by the present s 73, the word was omitted.It is not clear if the omission of this word was deliberate or accidental.All the cited cases dealt with provisions where the word `otherwise` appeared.

70 In , s 2(2) of the English Merchandise Marks Act 1887 contained a similar defence to that found in s 73.Section 2(2)(a) and s 2(2)(b) contained the defence found in our s 73(a).Section 2(2)(c) provided a defence to the accused if `otherwise he had acted innocently.`The court rejected the argument that the defence in s 2(2)(c) could be relied on in a case where no reasonable precaution

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had been taken even though there was no reason to suspect the genuineness of the trade description.Lord Hewart CJ said at p 133:

> *What defences are open to the defendant?There is a clear division of a twofold nature: the defendant may prove the matter contained in paras (a) and (b), which are united by the conjunction `and`; but apart altogether from those paragraphs, he may prove para (c), the language of which is not `that he had acted innocently,` but `that otherwise he had acted innocently`; in other words, there is the clearest possible dichotomy.If the defendant proposes to prove that which is contained in paras (a) and (b), that is one line of defence, but if the circumstances are such that while his defence is of that nature it is built upon materials that are incomplete, he cannot have recourse to para (c) for the purpose of establishing a portion of that which is alleged in paras (a) and (b). To hold the contrary would be destructive of this part of the section and would involve what appears to me to be at least two absurdities; first, it would involve the conclusion that paras (a) and (b) contain a mere illustration of the kind of defence which may be put forward, and secondly, that the word `otherwise` is to be omitted from para (c). The subsection, as I understand it, means that if a defendant seeks to excuse himself upon the ground that he had no reason to suspect the genuineness of the trade description he must lay the foundation of that defence by establishing that he has taken all reasonable precautions; in other words, the section in effect says that it is no excuse for the defendant to say that he had no reason to suspect the genuineness of the trade description unless he shows that he has taken all reasonable precautions.*

71 In my view, upon reading ss 73(a) and 73(b), the natural inference is that even without the word `otherwise`, the intention of the legislature is that the defence in s 73(b) does not apply to the situation where the elements in the s 73(a) defence are only partially satisfied. The observations of Lord Hewart CJ on this aspect of the defence in is just as applicable with or without the word `otherwise`.Section 73(a) cannot be a mere illustration of s 73(b), for otherwise there would be no need to lay down such stringent requirements.It cannot be the intention of the legislature that if a defendant cannot satisfy s 73(a) because one or more elements of the defence is missing, he can nevertheless rely on s 73(b). This will make nonsense of the requirements of s 73(a).

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72 Therefore, the s 73(b) defence requires more than just an incomplete s 73(a) defence.In other words, if ***a*** , ***b*** and ***c*** make up the s 73(a) defence, the defence under s 73(b) cannot be satisfied by only ***a*** and ***b*** , or just ***b*** and ***c*** , or ***a*** and ***c*** .It must at least require this incomplete defence and something else.

73 However, it seems to me that Lord Hewart CJ placed too much emphasis on the word `otherwise` that was found in that provision.I do not see how the presence of the word `otherwise` must lead necessarily to the conclusion that, if a defendant seeks to excuse himself upon the ground that he had no reason to suspect the genuineness of the trade description, then he must lay the foundation of that defence by establishing that he has taken all reasonable precautions.In my view, this proposition is too wide.It is also not one which must follow from the mere presence of the word `otherwise`.

74 The word `otherwise` appears to me to serve only the purpose of emphasizing the point that, even if a defendant cannot establish the first defence, he can nevertheless still rely on the second defence.It also emphasizes the fact that the second defence cannot merely be an incomplete first defence.Apart from that, the word is really quite superfluous.

75 If Lord Hewart CJ was right, then it follows that similarly, if an element of a defence includes the fact that the defendant has taken all reasonable precautions, then he cannot argue that `otherwise he had acted innocently`.More absurdly, if part of the defence is that he had, on demand by the prosecution, given all the information in his power with respect to the persons from whom he obtained the goods or things, then he similarly cannot say that otherwise he had acted innocently. This must be so, for the word `otherwise` draws no distinction between one element of the s 73(a) defence and another.Yet, it is

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often the case that an innocent person will wish to cooperate with the prosecutor.In fact, this is frequently the very mark of innocence.

76 It cannot be the case that if the proposed proof of innocence includes an element of the first defence, then in no circumstance can the second defence be established and the defendant must prove all three elements of the first defence regardless of the weight of the other circumstances which tend to show that he had acted innocently.In that case, the defendant will be better off if he had taken no care at all, has all the reasons in the world to suspect the genuineness of the mark, and refuses to give any information to the prosecutor!I cannot believe that this was the intention of Parliament.

77 The absurdity that follows from the line of reasoning in is vividly illustrated by the local case of . In that case, the appellant, who could only be said to have imported socks, was found guilty under s 12 of the Merchandise Marks Ordinance (the precursor to s 73 of the Act). The appellant did not know and had no reason to suspect that the socks contained counterfeit trade marks or any trade mark at all.In fact, he had not even ordered socks.He could not check the goods until he accepted delivery of the goods by handing in the bill of lading.However, if he accepted delivery, the offence of importing would be complete.As the court found, no reasonable precaution could be taken.And because no precaution could be taken, none was in fact taken. The first defence therefore could not be satisfied.As the appellant was relying on the fact that he had no reason to suspect the genuineness of any mark on the socks, it was held that he could not rely on the second defence.With the greatest respect, it appears to me that such a result is quite indefensible and McElwaine CJ was rightly justified to feel reluctance in arriving at it.

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78 A perusal of the cases reveals the confusion that was thrown up. There appear to have been two conflicting lines of authorities. The first line stemmed from . In that case, Christie, Manson & Woods had described in their catalogue as Dresden china something which was not Dresden china.Before the sale, the seller`s attention was drawn to this.Accordingly, at the sale, the sellers said to those present that it was doubtful whether the items were Dresden china and that they would only sell it for what it was. The court held that the conviction under s 2(2) of the above English Act must be quashed for they were not putting forward the untrue marks as true marks.

79 Grantham J held in that case that, although the sellers could not show that they had no reason to suspect the genuineness of the trade mark, their actions were nevertheless bona fide and that it is wrong to say that they could not be innocent unless they were free from all suspicion as to its genuineness.Channell J expressed the view that the gist of the defences must be that there are other cases of innocence beside absence of knowledge or of suspicion.Channell J thought that it would be open to set up the defence of absence of mens rea and that innocence means `innocence of any intention to infringe the Act of Parliament` and not innocence of any intention to defraud.

80 In the accused stocked a children`s elixir called Dongre`s Balamrit.He also had a spurious concoction called Domre`s Balamrit. The complainant, the manufacturer of Dongre`s Balamrit, tried to entrap the accused by asking for Dongre`s Balamrit.He was offered the real thing at 12 annas a bottle.When asked if there was something cheaper, the accused offered him another make, namely, Domre`s, for 8 annas a bottle.It was held that the trade mark of Dongre`s Balamrit was counterfeited.However, it was held that the accused had a defence, in that he had acted innocently, to a charge under s 486 of the Indian

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Penal Code, which is similar to and was the predecessor to s 73.It was held at p 113 that:

> *That the provisions of s 486 of the Indian Penal Code are aimed at retailer [sic] who connives with a fraudulent wholesaler or manufacturer in palming-off on an unsuspecting public goods which purport to be other than what they are. The accused does not come within this category.No attempt at substitution was made and the Domre`s bottles were offered at a lower price as being a different and cheaper article.*

81 was cited with approval by Chan Sek Keong JC (as he then was) in , which was in turn followed in

82 The other line of cases originated from . In that case , was distinguished.However, it is not apparent from the various judgments pronounced what the exact grounds of distinction were.In this case, the appellant had filled bottles embossed with the name of the Felinfoel Brewery Co with beer from the Bass C.He put Bass`s labels on the bottle. The court upheld his conviction under s 2(2) of the Merchandise Marks Act 1887.A perusal of the three judgments will show that no satisfactory reason was given for the decision despite a surfeit of dicta.

83 The most relevant of these dicta was the one which adopted Channell J`s view in that innocence means innocence of any intention to infringe the Act of Parliament and not innocence of any intention to defraud. This was interpreted to mean that there must not have been any intention to do the acts proscribed by the statute.So, in order to avail oneself of the second defence, it must be shown that what was done was done either inadvertently or because of a mistake of fact.

84 In an earlier Irish case of , the facts were quite similar to . The defendant filled bottles embossed with the plaintiff`s trade mark with its own mineral

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water. It then affixed its own labels to the bottles and sold them as the defendant`s mineral water. It was held that s 2 of the Merchandise Marks Act 1887 was nevertheless infringed even though there was no intention to defraud.In the High Court, Porter MR agreed with the view that innocence does not mean innocence of an intention to defraud but means innocence of an intention to violate the statute.He was of the view that:

> *Several states of facts, besides those in sub-ss (a) and (b), may be suggested which would render a sale under a false trade mark innocent, eg if the vendor bona fide believed that he had the authority and consent of the owner of the Trade Mark, or if, in spite of all reasonable precautions, a sale had taken place of a bottle, or even a few bottles, bearing a trade mark, but not believed or suspected to bear it.Possibly even a reasonable belief that the trade mark had been abandoned, or assigned to some one who did not intend to use it, or the like, might amount to innocence in its use within the Act.But where a man knows that another is the owner of a trade mark, and he intentionally uses it by applying it to his own goods, from motives of personal convenience or profit, I am of the opinion that he cannot, under the statute, claim immunity on the ground of innocence.*

85 In the Court of Appeal, it was held that the second defence cannot simply be parts of the first defence.Fitzgibbon LJ said at p 401:

> *In my opinion, the words `otherwise acted innocently` apply to cases similar to those described in (a) and (b), where a defendant can prove that he was innocent of any intention to infringe the Act: for instance, that he was unaware that the mark applied to the goods was the trade mark of another manufacturer, or that the act was done by some other person for whom he was not responsible;but they cannot apply to a case like the present, where the defendant admittedly knew that the embossments on the bottles were registered trade marks, which he wilfully applied to goods not manufactured by the proprietors of those marks.*

86 In the view was expressed by Viscount Caldecote CJ at p 55 that:

> *I agree with that statement of the position by Lord Hewart CJ.Precisely the same argument is true and should prevail if a defendant seeks to come under (c) by proving, not the first part of (a), but the second part only of (a).*

87 This supports my view that there is no distinction between one element in the s 73(a) defence and another.

88 It will be noted that the view that `otherwise` acted innocently means that the defendant had acted in some way by inadvertence or mistake of fact gained further ascendance. To escape responsibility under the second defence, it was necessary for the defendant to prove that there was no intention to do the act in question, that is, to sell the offending article.

89 In , the approach in , which was apparently approved of in was cited with approval. This was a case where the accused was saying that he had no reason to suspect that the trade marks were counterfeit.

90 Coming back to , McElwaine CJ in that case was driven by the and line of authority to comment at p 49 that:

> *I find it difficult to imagine how an importer who does not get possession can ever have any defence such as the legislature intends him to have if in such a case `acted innocently` is to be confined to an act of inadvertence.On the other hand it seems to me to be impossible to give cl (c) one interpretation when applied to the word `imports` and an entirely different interpretation when applied to the next three verbs in the same section.*

91 It can thus be seen from this case that the example given by Fitzgibbon LJ in about one who was unaware that the mark applied was a trade mark of another was not a case where a defendant could be said to have otherwise acted innocently, as interpreted by and .

92 In my view, the line of cases following from , which has been impliedly adopted by this court in and when it approved of , is the correct one to follow. There are two reasons for this.

93 First, if we are to follow the line of authorities as interpreted by , it would mean that the second defence is not open to a defendant who knows or has reason to suspect the genuineness of the mark.However, if he has no reason to suspect the genuineness of the mark, then he cannot rely on the second defence because of the word `otherwise`.So, regardless of whether he has or has not reason to suspect the genuineness of the mark, he cannot rely on the defence of acting innocently.With respect, this is patently ludicrous.

94 Secondly, selling and importing are hardly acts that can be done inadvertently.None of the cases have been able to show how one can sell or import without respectively the intention of selling or importing.It is difficult to see how this can be done.Similarly, as exposing or possession must be for the purpose of sale or for some other purpose of trade or manufacture, these acts similarly cannot be done inadvertently. The upshot of this is that the defence of innocence is only available if the acts are done inadvertently.However, the acts proscribed by s 73 can hardly be done inadvertently. The result is that, for all practical intent and purpose, the `inadvertence` limb of the s 73(b) defence is emasculated.

95 I am supported in my view by the passage from cited above. I have already said that if is right, then it is not possible to rely on the s 73(b) defence unless one has not taken all reasonable precautions, had reason to suspect the genuineness of the trade mark and has proffered no information to the complainant.However, if that is the case, I am at a loss as to how, apart from mistake of fact, the defendant can possibly be said to have acted innocently.

96 Thus the only meaning that can be attributed by the inexorable logic of following this line of authorities is that the s 73(b) defence only relates to mistake of fact.It was suggested that this defence can also apply in the case

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where the act was done by somebody for whom the defendant has no responsibility.However, if the act was done by somebody for whom the defendant has no responsibility, then the short answer is that it was not, even vicariously, the act of the defendant.In my view, the conclusion that the s 73(b) defence is nothing more than the defence of mistake of fact cannot be supported in Singapore. This is because there is already a general defence for mistake of fact under s 79 of the Penal Code (Cap 224).So, if this interpretation of the s 73(b) defence is right, the conclusion must be that the s 73(b) defence is superfluous.If mistake of fact is the only instance possible where the defendant can be said to have acted innocently, then there is simply no point in enacting s 73(b).

97 It must be remembered that s 2 of the English Merchandise Marks Act 1887 is not as wide as our s 73.Most notably, it does not cover the act of importing.We should therefore not blindly follow the English authorities on s 2 and transplant them to our s 73. I can think of some instances where someone who consciously imports an offending article which he suspects to bear a counterfeit trade mark nevertheless can be said to have acted innocently.Suppose a foreign buyer suspects that certain bottles of Hennessy XO he purchased were counterfeit.In order to confirm this, he sends a bottle to the Singapore Institute of Standards and Industrial Research (SISIR) for testing.SISIR accepts the bottle knowing that it is suspected to be counterfeit.SISIR would have imported the bottle, for part of its trade is the testing of products.Can it be said that SISIR has not acted innocently?I do not think that in such a case, SISIR can be said to have committed even a technical offence under s 73.It makes no difference if instead of SISIR, it was a private laboratory.

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98 Hence, I conclude that the , as interpreted by , line of cases cannot be followed in Singapore.For this reason, I decline to follow them.Similarly , should not be followed.In any event, it can easily be distinguished.

99 McElwaine CJ in reluctantly followed . Rightly or wrongly, Lord Hewart CJ in that case was greatly influenced by the presence of the word `otherwise` in the second defence. The word no longer appears in s 73(b).

100 The learned magistrate in this case came to the conclusion that the omission of the word `otherwise` in s 73(b) was inadvertent.He was persuaded by the fact that the records of the parliamentary debates reveal that there was no debate on the scope of the statutory defence that would lead to a deliberate deletion of that word.I am of the view that just because there was no debate in Parliament over the omission of the word `otherwise` does not necessarily mean that its deletion was unintended.In my view, when the legislature deletes a word from a piece of legislation, the presumption must be that there is a reason for so doing.Unless therefore it is very clear that the deletion was inadvertent, one must presume that it was deliberate. This is especially so when the repeal and re-enactment of s 73 has the effect of changing the scope of the provision and the penalty under it.For this reason, if I am wrong about not following , I hold that can be distinguished on the grounds that the word `otherwise` no longer appears in s 73.

101 The s 73(b) defence is not limited to inadvertence or mistake of fact.Nevertheless, in order to prove innocence under s 73(b), it is not sufficient to just show an incomplete s 73(a) defence.However, the mere fact that in order to prove a s 73(b) defence, a defendant has to rely on facts which are also elements of a s 73(a) defence, is not by itself a sufficient ground for saying that the s 73(b) defence cannot be relied on. Moreover, the mere fact that a defendant

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cannot establish an element of the s 73(a) defence does not mean that he cannot have acted innocently.It is permissible in certain circumstances to point to other additional facts which can turn an incomplete s 73(a) defence into a s 73(b) defence.

102 It may well be that for a case like that in , the fact that no precaution can be taken is sufficient to make good the failure to take all reasonable precautions, so that the incomplete s 73(a) defence is transformed into a perfected s 73(b) defence.After all, if no reasonable precaution can be taken, then all reasonable precautions in that case would mean no reasonable precaution.All of nothing is, after all, nothing.However, there is no need to decide this.Similarly, it may well be the case that the decisions in and are correct on the facts of those cases even though the reasoning cannot be wholly accepted.I express no opinion on this.At the end of the day, much will depend on the facts of each individual case.

103 **Application of the principles to the facts**

104 In this case, Looi had admitted to instructing Higa by fax to look for buyers in Japan.When Higa found the buyer, Looi negotiated for the price through Higa.His instructions to Higa were over the telephone and the fax machine.Adopting the ordinary English meaning of `sell`, there can be no doubt that Looi did do the act of selling the Hennessy XO in question.Hence, whether or not the transaction was a sale by consignment is immaterial.It is the act of selling that is caught by s 73, not the transaction.A trader no less sells goods when he sells them by using the sale by consignment method.Even if the prospective buyer decides at the end of the day not to accept the consignment so that no sale took place, the trader has no less committed the act of selling the goods for the purpose of s 73.

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105 Similarly, there can be no doubt that Looi did the acts of selling the Hennessy XO in Singapore. The fact that the actual offer received by Nissan was communicated by Higa in Japan is immaterial.So is the fact that the acceptance was made in Japan so that the agreement to sell is most likely to have been concluded in Japan.Where the contract was concluded in law and where the property passes is not conclusive. There is no doubt that Looi called up Higa from Singapore. There is also no doubt that the faxes were sent from Singapore.All the acts of selling done by Looi were done in Singapore. The inevitable conclusion therefore is that Looi was selling the Hennessy XO and he was doing it in Singapore. Therefore, the Singapore courts have jurisdiction over the matter.No doubt the actual communication with Ueno of Nissan was made by Higa in Japan.In all likelihood, Higa was also selling the Hennessy XO.However, this fact is immaterial, for there is no reason why both of them cannot be selling the same goods at the same time.Of course, Higa did his acts of selling in Japan, and the Singapore courts have no jurisdiction over this.Similarly, even if Looi`s evidence that he was acting for Chan is accepted, this does not detract from the fact that Looi was nevertheless selling the Hennessy XO.He may have been selling as an agent for somebody else, but he was nonetheless selling.

106 For these reasons, it is not material whether the magistrate believed Ueno`s or Looi`s evidence on this aspect of the case.So far as the question of selling is concerned, Looi had for all relevant purposes admitted to doing the prohibited act.On the basis of either version, it is quite clear that Looi was selling the counterfeit Hennessy XO and he was doing it in Singapore.Calling Higa to give evidence would not have made any difference whatsoever.

107 Turning to the question of the importation of the 97 cases into Singapore, again, there can be no question but that the 97 cases have been imported into

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Singapore so far as the Interpretation Act definition is concerned.It is not, and cannot be, disputed that the goods were seized when they were in Singapore territory. The question then is whether they were imported into Singapore for the purpose of sale or for any purpose of trade or manufacture.

108 The counterfeit Hennessy XO here were returned by Nissan. They had been rejected by Nissan because it suspected them of being counterfeit.In my view, the acceptance of the return of goods sold in the course of trade is something done for a purpose of trade.It is a necessary incident of the trade of selling the goods. The 97 cases of counterfeit Hennessy XO had therefore been imported into Singapore for the purpose of s 73.

109 The question then is whether Looi or Trade Facilities imported these 97 cases.In my view, it is again quite clear that Looi or Trade Facilities or both have done this.While Nissan was the sender of the goods, it was Looi who had arranged for the financing of their return.He was the one who procured the letter of credit from Sun Tat.On the basis of this letter of credit, Nissan sent the goods to Singapore. Therefore, Looi had caused the 97 cases to be brought into Singapore. They were caused to be brought into Singapore for a purpose of trade. Therefore Looi had imported the goods.

110 I now come to the issue of whether it was Looi or Trade Facilities who did the acts of selling and importing.In my view, the magistrate was right to apply the principles behind to the facts of this case.If the evidence shows that Looi`s mind and will were behind Trade Facilities, then Looi cannot hide behind the corporate veil of Trade Facilities.Otherwise, the Act can be evaded with impunity by the simple device of incorporating a $2 company to carry on the trading.In this case, the evidence does show that Trade Facilities was nothing more than the alter ego of Looi.It was nothing more than a vehicle that Looi

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employed as and when it suited him.All but one of Trade Facilities`s shares were held by Looi and the single directing mind behind Trade Facilities belonged to Looi. This was an appropriate case to lift the corporate veil and the magistrate was correct when he did so.

111 On the other hand, the fact that the corporate veil has been lifted does not absolve Trade Facilities of all liability. The acts and intentions of a company`s managers can be attributed to that of the company.In this case, Trade Facilities allowed itself to be used as a vehicle of Looi`s. Thus when Looi used Trade Facilities to sell and to import counterfeit Hennessy XO, Trade Facilities was just as liable. Trade Facilities was more than a passive employer. The invoices were sent by Trade Facilities. The fax messages were sent using Trade Facilities`s machine.When the goods were sent to Japan, Trade Facilities was the shipper.Similarly, when they were returned, Trade Facilities was the consignee and the party to be notified. Trade Facilities had taken an active part in the acts of selling and importing. Therefore, Trade Facilities is also culpable.

112 Then, there is the question of whether the respondents can rely on the statutory defences.So far as the selling is concerned, it seems clear to me that neither of the respondents can rely on the s 73(a) defence. The evidence shows that Looi had clearly not given all information in his power with respect to Chan, assuming Chan exists, to the complainant despite repeated demands by it.I do not for one instance believe that this is because Looi had left everything to his lawyers and the lawyers had not asked.

113 As for the s 73(b) defence, it seems to me that so far as the selling is concerned, the respondents also cannot establish this defence.Even if Looi`s evidence about Chan is accepted, and even if it is accepted that Looi had no reason to suspect the genuineness of the trade marks on the Hennessy XO and

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had taken all reasonable precautions, there is nothing in Looi`s evidence which can be used to show innocence. The mere fact that Looi was acting as an agent (assuming it is true) is not something that can be used to show innocence when Looi had consciously refused to provide information about his principal to the complainant.I am of the view that, barring exceptional circumstances, the fact that one is a mere agent is not something that can be used to establish innocence when the agent has failed to give all the information in his power with respect to the principal to the complainant when so demanded.

114 Apart from the allegation that Looi was an agent of Chan, there is no additional fact which can establish innocence. That being the case, the respondents` alleged s 73(b) defence is nothing but an incomplete s 73(a) defence. Therefore, the respondents have not satisfied me that they have acted innocently when they sold the Hennessy XO.

115 The reason why, in relation to the charges of selling, the respondents cannot rely on the s 73(a) defence applies equally to the charges of importing. The respondents have not provided the complainant with all the information within their powers about Chan.It is not sufficient in the case of goods returned by buyers to just provide the complainant with information about the buyer who rejected the goods. The seller accepting the return of the goods must provide information about the person he got the goods from in the first place.

116 Apart from this, I am of the view that in normal circumstances, the fact that the importation of goods resulted from a rejection of the same goods sold by a seller to a foreign buyer can be used to show innocence.If the seller is able to establish a defence in relation to the original act of selling to the foreign buyer, then it can be sufficient to show that the subsequent importation of the same goods was because the buyer had decided to return them. This is so even

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if the ground for the rejection of the goods is that the buyer alleges that the goods are counterfeit.Where this happens, a normal and quite innocent reaction of the seller is to accept the return of the goods. This can be done for no reason other than to ascertain the truthfulness of the buyer`s complaint.It makes no difference that, by now, the seller obviously has reason to suspect the genuineness of the trade mark, as the buyer had complained about them. The contrary position would make no commercial sense, for the seller would then either have to abandon the goods in a foreign land or send somebody over to check the goods.Redirecting the goods to another place will not avail the seller, for then he can be said to sell them again.

117 I am therefore of the view that where a seller sells goods to an overseas buyer which are discovered to be counterfeit, and the seller is able to establish a defence to the original act of selling, he can normally be said to act innocently when he imports the same goods back to Singapore because the foreign buyer has rejected the goods. The fact that when he imports those goods he now has reason to suspect the genuineness of the trade mark applied to them is not sufficient by itself to defeat the defence of innocence.

118 The contrary position is not necessarily true.It may be that in certain circumstances, even if the seller is unable to establish a defence to the original act of selling, he may nevertheless be able to show that he acts innocently when he imports them upon rejection by the buyer. This may be so even if the ground of the rejection is that the goods are counterfeit.I express no view on this because it appears to me that much depends on the facts of the particular case.It would therefore be premature to dismiss the possibility that the defence of innocence can still be established even though there was no defence to the original act of selling.

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119 In the present case, the primary reason why the respondents cannot establish a defence to the charges of selling the Hennessy XO was because they have refused to provide all information that was in their power about the source of the counterfeit goods.In my view, this refusal sufficiently taints the subsequent import so that, in relation to the import, when the respondents persist in failing to provide the information asked for by the complainant, they cannot avail themselves of the defence of innocence.In the absence of some special circumstance, this is so even if, at the time of the original act of selling, the seller had taken all reasonable precautions and had no reason to suspect the genuineness of the mark.

120 In my view, although the element of providing information about the person from whom the defendant obtained the goods, when requested for by the complainant, is not an indispensable element of the s 73(b) defence, it is nonetheless often of great importance.Only exceptional facts can displace this element of innocence, even in respect of the s 73(b) defence.

121 There is no such special circumstance in this case.No good reason was offered to the court, explaining why the respondents had failed to give all the information in their power with respect to the persons from whom they had obtained the goods, when demanded by the complainant. Therefore, in this case, this failure is fatal to both the s 73(a) and the s 73(b) defences in respect of the charges of selling and also of importing.

122 That being the case, whether the magistrate ought or ought not to have accepted the respondents` evidence about Chan is neither here not there.Even if Looi`s story about Chan and what transpired is accepted, it does not have any material bearing on whether the respondents did sell the counterfeit Hennessy XO.Similarly, it does not have any bearing on whether the respondents imported

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the 97 cases.More significantly, it does not establish any defence to the charges of selling and importing.I am therefore of the view that the respondents were rightly convicted.

123 **The sentences**

124 Trade Facilities was fined $40,000 and $15,000 respectively for selling and importing the counterfeit Hennessy XO.Looi was fined $80,000 and $30,000 respectively for selling and importing. The respondents are appealing, and the complainant is cross-appealing, with the consent of the Public Prosecutor, against the sentences imposed on Trade Facilities and Looi.

125 The maximum penalty for an offence under s 73 of the Act is a fine of $10,000 for each article to which the counterfeit trade mark is applied, but not exceeding $100,000 in the aggregate, or imprisonment for a term not exceeding five years, or both.

126 In sentencing the respondents, the magistrate appeared to have been influenced by the fact that there was no evidence to link the respondents to any syndicate that would have produced the counterfeit Hennessy XO.In my view, the legislature has not drawn a distinction between someone who counterfeits a trade mark, makes a die or other instrument for counterfeiting trade marks, and someone who violates s 73 by selling, importing or the like.In all cases, the maximum penalty is a $100,000 fine or five years` imprisonment or both. The only difference is that, in the case of s 73, where the number of offending articles is few, then the maximum fine is $10,000 per article. That being the case, someone who infringes s 73 can in certain circumstances be no less culpable than one who counterfeits the trade mark. The trader is subject to the same sanctions as a manufacturer or counterfeiter.

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127 On the facts of this case, although it is not necessary for the purpose of dismissing the respondents` appeal against conviction to examine the magistrate`s finding of fact on the Chan Ah Kow story, it is necessary to do so for the purpose of sentencing. The magistrate`s finding was that Looi`s account about Chan was an afterthought and a figment of Looi`s imagination.He also found that Looi was not a credible witness. The rejection of his defence on this ground is in my view wholly justified by the evidence. This amounts to a finding that Looi`s story about Chan Ah Kow was nothing but a tissue of lies. That being the case, it is quite inconsistent to then say when sentencing Looi that the court will not make any finding beyond the fact that Looi had not established his defence. The fact that a defendant has all but spun an entire fairy tale in court is a relevant consideration when sentencing.

128 Taking into account the seriousness of this case and the manner in which the respondents have conducted the defence, I am of the view that there is no merit in the respondents` appeal against the sentences imposed.On the other hand, I agree with the complainant that a custodial sentence should be imposed on Looi. Therefore, in addition to the fines that have been imposed on the respondents, I will sentence Looi to three months` imprisonment for each offence. The sentences will run concurrently.

129 I will therefore dismiss the respondents` appeal and allow that of the complainant`s.

130 ***Respondents` appeal dismissed. Complainant`s appeal allowed.***

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Yong Pung How CJ

Spencer Gwee (Spencer Gwee & Co) for the first and second appellants in the appeal, and the third and fourth respondents in the cross-appeal
Jimmy Yim, S Sivananthan and Anil Sachdev (Drew & Napier) for the Public Prosecutor in both appeals

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