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IN THE MATTER of an appeal from a
determination of the
District Court at
Wellington

BETWEEN HARLEY LEONARD RUSSELL
of Wellington, Executive
Officer

Appellant

A N D MUTUAL RENTAL CARS
LIMITED a duly
incorporated Company
having its registered
office at Auckland

Respondent

Hearing: 27 February 1984

Counsel: M.P. Reed and Glenese Adams for Appellant
C.K. Steven and J.O. Upton for Respondent

Judgment: 30/3/84

JUDGMENT OF QUILLIAM J

This is an appeal by way of case stated from the decision of the District Court dismissing an information alleging a breach of the Motor Vehicle Dealers' Act 1975.

The information charged that the respondent, between 1 December 1980 and 28 May 1981, "not being a person licensed under the provisions of the Motor Vehicle Dealers' Act 1975, carried on business at Auckland, Wellington and Christchurch as a motor vehicle dealer under the name or style of Avis and/or Avis Rent-A-Car System and/or Avis Rental Cars". The information was laid on behalf of the Motor Vehicle Dealers' Institute by way of a test case and it was not sought that there should necessarily be entered any conviction or that any penalty should be imposed.

The findings of fact made by the District Judge are set out in the case and rather than attempt to summarise or edit those findings I think it better to repeat them in full.

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1. The Mutual Group of Companies (which includes the Defendant) operates a rental car business in New Zealand under the name or style of Avis and/or Avis Rent-A-Car System and/or Avis Rental Cars.
 2. The sole right to use the trade name 'Avis' in New Zealand rests with the Mutual Group of Companies, which includes the Defendant.
 3. It was admitted that there were approximately 4,000 cars owned by the Mutual Group, and that the entire fleet is replaced periodically over approximately a three year cycle for the purpose of purchasing a new fleet of vehicles.
 4. For the purpose of selling its fleet, the Defendant operated car sale yards under the name or style of Avis Car Sales and/or Avis Young Ex Rentals and/or Avis Used Cars and/or Avis Car Sales Young Used Cars and other similar names.
 5. The evidence established that the Defendant from time to time sold cars from such car sale yards operated by it at Wakefield Street, Auckland and Rongotai Airport, Wellington, and persons purchasing a car from either of these two yards were dealing with the Defendant.
 6. Cars offered for sale and/or which were sold through car sale yards operated by the Defendant under the name or style of Avis Used Cars or similar name during the relevant period were all ex rental cars. It was admitted by Mr Waller, called on behalf of the Defendant, that some of the cars sold by the Defendant belonged to it, and it was further admitted that in other cases the Defendant sold cars belonging to different companies within the Mutual Group. Although Mr Waller stated that the question of ownership may well have been a matter of convenience only within the various companies making up the group.
 7. It was admitted that in any one year period, in order to purchase the requisite number of new cars for its

fleet the Defendant would have to sell approximately 1,500 used rental cars. I found that the Defendant sold probably 1,500 such cars during a period of twelve months.

8. During the period specified in the information or during the period of twelve months preceding such period, more than six vehicles were or would have been sold at each of the premises described in (5) hereof by the Defendant.
9. At the car sales yards operated by it, the Defendant displayed cars for sale to members of the public. At the premises described in (5) hereof, there were advertising and other signs in the name of 'Avis Car Sales' and/or 'Avis Car Sales Young Used Cars' and/or 'Avis Young Ex-Rentals' or other similar names.
10. In addition, during the relevant period the Defendant placed advertisements in the 'Cars for Sale' sections of the New Zealand Herald (Exhibit 5) and The Evening Post (Exhibit 8) newspapers offering cars for sale during the relevant period. These advertisements included both box or display advertisements (in which a number of vehicles were listed for sale), as well as small classified advertisements described as 'spot' or 'run' advertisements (which usually related to the sale of one vehicle only).
11. In some of these advertisements placed by or on behalf of the Defendant, the Defendant indicated that it would withdraw a car from its fleet to meet a potential purchaser's requirements.
12. The scope of the operations carried on by the Defendant from the premises described in (5) hereof were reasonably substantial. That finding was supported by the admissions made at the hearing as to the number of sale of cars by the Defendant, and the evidence adduced on behalf of the Informant as to the scope of the

advertisements placed by the Defendant in the newspapers already referred to, and the motor vehicle particulars put in evidence (Exhibit 19 - Six Certificates of Registration relating to cars displayed for sale at Wakefield Street premises).

13. The sale and/or offer for sale of cars by the Defendant was carried on by a separate sales division of the Defendant. In selling or offering to sell cars, the Defendant offered to arrange finance for purchasers in connection with sales of such cars.
14. It was also admitted that the Defendant assisted prospective purchasers of its cars to sell their vehicles but only to the extent that it put such persons in touch with licensed motor vehicle dealers who would or might be interested in purchasing such vehicles. "

Having set out the findings of fact in that way it will be convenient to continue to refer to the respondent as the defendant.

It is to be noted that the Mutual Group replaced a total fleet of about 4,000 cars over a three year period. There is also a finding that the defendant company (which is only one of the Mutual Group) had admitted selling approximately 1,500 cars in any one year period. These findings appear to be inconsistent but that may not be a matter of any particular significance as it seems that, upon any basis, the defendant company sold a substantial number of cars each year and the precise number may not be important.

Upon the basis of the findings made the District Judge set out his conclusions in this way:

- " 1. The activities of the Defendant in assisting potential purchasers of its cars to sell their existing vehicles did not bring it within the definition of 'car consultant' contained in Section (2)(1) of the Act.

2. The word 'deemed' appearing in Section 4(4) of the Act relates to all of the provisions of that section, and not merely to sub-section (2) of that section, so that if a person who otherwise might be a motor vehicle dealer comes within Section 4(4) (and particularly, paragraph (e)), he is not to be deemed to be a motor vehicle dealer unless there is advanced some other fact or facts which will take the matter further than the mere reselling of vehicles after being used in the course of carrying on any other business.
3. To constitute the business of a motor vehicle dealer there must be present the element of reward arising out of the business, whether or not, in fact the reward does arise. I determined that, in selling cars, the Defendant was selling off capital assets and that it was not doing so for commission or other valuable consideration or for the primary purpose of gain and that, accordingly, the Defendant was not carrying on, nor did it hold itself out to the public as being ready to carry on, the business of a motor vehicle dealer.
4. If, contrary to the determination in (3), the Defendant was either carrying on business as a motor vehicle dealer or held itself out as being ready to conduct such business, it was saved by the provisions of Section 4(f) (sic) of the Act. I determined that the peripheral activities of the Defendant - i.e. the arranging of finance and putting prospective purchasers in touch with licensed dealers for the sale of their own cars - did not take the Defendant outside the ambit of that provision. "

The questions for determination were these:

- " 1. Whether the sale or potential sale of its cars by the Defendant in the course of advising prospective purchasers in connection with the sale or other disposition of their

existing vehicles constituted a 'rent, fee, commission, or other valuable consideration' for the purposes of the definition of 'car consultant' in Section 2(1) of the Act and, if so, whether, on the evidence admitted or proved, the activities of the Defendant brought it within the definition of 'car consultant' contained in the Act.

2. Whether the word 'deemed' appearing in Section 4(4) of the Act relates to all the provisions of Section 4 or merely to sub-section (2) of that section.
3. Whether to constitute a 'motor vehicle dealer' for the purposes of the Act, there must be present the element of reward arising out of the business carried on, whether or not in fact that reward does arise.
4. If the answer to (3) is 'yes', does the concept of 'reward' require that the Defendant receive some profit commission or gain arising out of the sale or offering for sale of its cars, or is it sufficient that some valuable consideration is received by the Defendant on the sale of its cars, whether or not a profit or gain is, in fact, made?
5. If the answer to (3) is 'yes', then on the evidence admitted or proved, was there an element of reward arising out of the Defendant's sale or offering for sale of cars?
6. Whether, on the evidence admitted or proved as to the advertising by the Defendant of vehicles for sale in the newspapers referred to in (10), the nature and scope of the car sale yards operated by the Defendant, and the display of cars for sale to members of the public, the Defendant held itself out to the public as being ready to carry on the business of, inter alia, selling motor vehicles for the purposes of Section 4(2) of the Act.
7. Whether, on the evidence admitted or proved, the activities of the Defendant in selling or offering for sale

motor vehicles fell within Section 4(4)(e) of the Act and, in particular, whether any or all of the following activities of the Defendant took it outside the scope of that provision:

- (a) The scope and nature of advertising in newspapers by the Defendant of cars for sale by it; and/or
- (b) The scope and nature of the car sale yards operated by the Defendant; and/or
- (c) The size and scale of car sales by the Defendant; and/or
- (d) The public display by the Defendant of cars for sale to members of the public; and/or
- (e) The sale or offering for sale of cars belonging to different companies within the Mutual Group; and/or
- (f) The arranging of finance by the Defendant for purchasers in connection with the sale of cars; and/or
- (g) The giving of assistance by the Defendant to prospective purchasers of its cars in selling their existing vehicles by putting such persons in touch with licensed motor vehicle dealers who would or might be interested in purchasing such vehicles. "

The disposal of the information does not require answers to be given to all of these questions. The matter can really be disposed of by the answers which must be given to Questions 6 and 7. But as the parties are anxious to have some guidance from the Court I will deal fairly briefly with the other questions.

Question 1

This concerns the interpretation to be given to the expression "car consultant" which is defined in s 2 (1) of the Act in this way:

" 'Car consultant' means a person ... who, for rent, fee, commission, or other valuable consideration is engaged by any other person (not being a licensed motor vehicle dealer) to advise or to act as agent for that other person on any matter relating to the purchase, sale, exchange, or lease of any motor vehicle by that other person, not being a matter relating solely to the structural, material, or mechanical condition of the motor vehicle. "

The District Judge found that the defendant assisted prospective purchasers by putting them in touch with licensed motor vehicle dealers who might be interested in purchasing their cars and by offering to arrange finance for purchasers in connection with the sale to them of a car. He concluded, however, that these activities did not bring the defendant within the definition of "car consultant". I find myself in agreement with that conclusion.

The argument advanced for the informant was that the two activities to which I have referred amounted to valuable consideration because there was a mutual advantage resulting to vendor and purchaser. I do not think that is the way in which the expression "car consultant" is to be interpreted. That expression occurs only once in the Act apart from the definition. That is in s 4 (1) where it is included in order to ensure that the expression "motor vehicle dealer" is wide enough to catch a particular class of persons who might not otherwise be caught. That clause embraces those persons who, for a reward of some kind, act in an advisory capacity to others in respect of the purchase, sale and other dealings in motor vehicles. I do not consider this can be made to extend, for instance, to a seller who is simply prepared to leave money owing on the security of the vehicle being sold or who is able to indicate

a possible purchaser for the buyer's existing vehicle. I do not consider, therefore, that the facts of the present case bring the defendant within the definition of car consultant.

Question 2

This concerns the provisions of s 4 of the Act. Those parts of that section which are relevant for this case are:

- " 4. (1) Subject to the succeeding provisions of this section, and to Section 5 of this Act, in this Act the term 'motor vehicle dealer' means any person who carries on the business of purchasing, selling, exchanging, or leasing motor vehicles (whether as principal or agent), whether or not that person carries on any other business; and includes a car consultant.
- (2) Without limiting the definition in subsection (1) of this section, every person who holds himself out to the public as being ready to carry on the business of purchasing, selling, exchanging, or leasing motor vehicles shall be deemed to be a motor vehicle dealer for the purposes of this Act.
- (3) Every person who, in any period of 12 consecutive months commencing after the commencement of this Act, purchases, sells, exchanges, or leases more than 6 motor vehicles shall be presumed to be a motor vehicle dealer for the purposes of this Act, unless he proves that he did not purchase, sell, exchange, or lease the motor vehicles for the primary purpose of gain.
- (4) Notwithstanding the foregoing provisions of this section, no person shall be deemed to be a motor vehicle dealer for the purposes of this Act by reason only of the fact that -
- (e) In the course of carrying on any other business (not being the business of a motor vehicle dealer) he -

(i) Purchases any motor vehicle for use in connection with that business, with or without the intention of reselling it after such use; or

(ii) Resells any such vehicle after using it as aforesaid. "

Notwithstanding the form of the question which limits the enquiry to subs (2), counsel were agreed that subs (4) must also be capable of applying to subs (3). The matter in issue was whether subs (4) related also to subs (1). As a matter of construction I do not think it does. The word "deemed" is a very familiar one in statutory drafting and is used to include a concept which might not otherwise be included. That is the context in which it is used in subs (2). I have little doubt that the use of the same word in subs (4) was intended to have the same meaning and implications, that is, it was intended to relate back to those of the foregoing provisions of the section where it had been necessary to include a special circumstance because it might otherwise have been regarded as excluded.

Having reached the conclusion that the answer to Question 2 is that the word "deemed" in s 4 (4) applies only to subs (2) and (3) I am bound to say that I do not think this answer is any particular assistance in the overall context of the case.

Question 3

The question of what constitutes a business is one which has been considered in a variety of contexts on many occasions. A good deal of help may be gained from the cases which have been decided in the field of taxation. It must be recognised at once that those decisions have generally stressed that what have been held to be (or not to be) businesses have been so regarded in the particular context of the taxation legislation. Nevertheless, the analogies are clear enough. The most recent case of this kind is the decision of the Court of Appeal in Grieve v Commissioner of Inland Revenue (unreported, 16 December 1983, No. CA 115/82). That was the case of a husband and wife

who were respectively a chartered secretary and a medical practitioner and who had acquired a farm property which they farmed in partnership. Losses incurred for several years were offset against other income for tax purposes, but eventually the Commissioner declined to allow the losses for subsequent years on the basis that this could no longer be regarded as a business. This view was upheld by Sinclair J but the Court of Appeal regarded the matter differently. The principal judgment was delivered by Richardson J and the relevant part of that judgment for present purposes is at pp 22 - 23:

" It is not for the Courts or the Commissioner to confine the recognition of businesses to those that are always profitable or to do so only so long as they operate at a profit. In my view there is no warrant in the definition of business in its statutory context for reading in a requirement that there must be a reasonable prospect of profit before the gross income derived is assessable under s 88 (1) (a) and the deductions sought are allowable under s 111 (b) and under the specific deduction provisions requiring the taxpayer concerned to be carrying on a business.

It follows from this analysis that the decision whether or not a taxpayer is in business involves a two-fold inquiry - as to the nature of the activities carried on, and as to the intention of the taxpayer in engaging in those activities. Statements by the taxpayer as to his intentions are of course relevant but actions will often speak louder than words. Amongst the matters which may properly be considered in that inquiry are the nature of the activity, the period over which it is engaged in, the scale of operations and the volume of transactions, the commitment of time, money and effort, the pattern of activity, and the financial results. It may be helpful to consider whether the operations involved are of the same kind and are carried on in the same way as those which are characteristic of ordinary trade in the line of business in which the venture was conducted. However, in the end it is the character

and circumstances of the particular venture which are crucial. Businesses do not cease to be businesses because they are carried on idiosyncratically or inefficiently or unprofitably, or because the taxpayer derives personal satisfaction from the venture. "

As I have said, and as is made clear in the passage cited, that decision was given in the context of a taxation case and by reference to the definition of "business" in s 2 of the Land and Income Tax Act 1954, namely, "includes any profession, trade, manufacture, or undertaking carried on for pecuniary profit". The significance of the judgment for present purposes is that even where the definition of business includes an undertaking carried on for pecuniary profit the Court of Appeal was able to say that it was not a necessary requirement that there should be a reasonable expectation of profit. It would be inconsistent with this to say that in order to constitute a business there must be present the element of reward. I therefore arrive at a different conclusion from that of the District Judge but, of course, in doing so I observe that Grieve's case was not decided until long after the judgment at first instance was delivered in this case.

Questions 4 and 5

These only require to be answered if Question 3 was answered "Yes", and so I need consider them no further.

Question 6

I regard this as the most important question in arriving at a final conclusion in this case. It relates to the effect of s 4 (2) of the Act which I have already set out.

The District Judge determined that the defendant "did not hold itself out to the public as being ready to carry on the business of a motor vehicle dealer". He made that determination, however, on the basis that "in selling cars the defendant was selling off capital assets and that

it was not doing so for commission or other valuable consideration or for the primary purpose of gain". With respect I consider that the reasons given for the determination were not reasons which ought properly to have been taken into account. The enquiry under s 4 (2) is simply whether the defendant held itself out to the public as being ready to carry on the business of purchasing, selling, exchanging or leasing motor vehicles. Such an enquiry is not, I think, related to those matters which would not be disclosed to the public such as whether the cars were capital assets or not, and whether there was any gain resulting from their sale. The enquiry is a subjective one, namely, as to the impression made upon the public by the way in which the undertaking was conducted. The District Judge has not addressed himself to this and so has made no determination upon it. Having regard, however, to the findings of fact which he has made I have little doubt that I am able to draw the inference myself

The sale of the cars was conducted from several different car yards. These were operated under such names as "Avis Car Sales", "Avis Young Ex Rentals", "Avis Used Cars", "Avis Car Sales Young Used Cars" and the like. There was nothing in these names or in the nature of the car yards themselves (containing, as they did, cars displayed for sale) which could have distinguished them in the minds of the public from any other car sales yard or used car business. Moreover, the defendant advertised its cars for sale in the same way as any other business seeking to sell cars. I do not consider that there is any other reasonable hypothesis open than that the defendant was holding itself out to the public as carrying on the business of selling used cars. It was plainly competing for the public's custom with other firms seeking to sell cars. The member of the public who was minded to buy a car and who saw the defendant's advertisement or its car yards could have gained no other impression. The fact that there may in some cases have been a reference to the fact that the cars were "ex rental" would not have affected or diminished that impression. I accordingly conclude that the inference drawn by the District Judge was one which was not open to him on the facts but that instead the only available inference was that the defen-

dant was holding itself out to the public as being ready to carry on the business of selling motor vehicles. The answer to Question 6 must therefore be "Yes".

Question 7

Accepting that the defendant did hold itself out and was accordingly, in terms of s 4 (2), deemed to be a motor vehicle dealer, Question 7 asks whether it escapes from that result by reason of the provisions of s 4 (4) (e).

The argument for the defendant was that it fell precisely within the terms of s 4 (4) (e) because, in the course of carrying out another business (namely, that of a rental car operator) it was, in respect of each vehicle, merely reselling that vehicle after using it in connection with that other business. I am unable to accept that argument.

Section 4 (4) is of limited application. It takes out of the category of motor vehicle dealer those persons who have engaged in the purchase, sale, exchange or leasing of motor vehicles in special and restricted circumstances. The purpose of s 4 (4) is to be seen by reference to those other paragraphs which I have not earlier set out. It excuses, for instance, a solicitor acting as such and receiving no additional remuneration for the dealing with the motor vehicle. It excuses manufacturers or wholesalers selling to the Crown or to other wholesalers or licensed dealers. It excuses second-hand dealers purchasing a vehicle for wrecking or dismantling and also a finance company dealing in motor vehicles in the course of its business as a finance company.

It is important to observe that s 4 (4) provides that no person shall be deemed a motor vehicle dealer by reason only of the fact that he comes within one of the paragraphs that follow. Plainly, if such a person falls within one of those categories and there are other circumstances as well which are inconsistent with his being deemed not to be a dealer, then the provisions of s 4 (4) will not necessarily apply. It is easy to see that s 4 (4) (e) will properly apply to those many persons and companies

which use motor vehicles in the course of their business and need to change them for new ones at intervals. A simple example would be the small contractor who uses a single truck which he must replace from time to time. Once that process has been expanded into a separate operation of its own with all the outward appearances of a car sales business, then s 4 (4) (e) must cease to have any application.

Upon the facts, as found, the defendant was not only reselling vehicles after their use in another business. It was doing so with all the additional trappings of a separate business and had established a separate sales division within its own organisation for the purpose. In my view all this took it out of the provisions of s 4 (4) (e).

I am fortified in the view I have formed by a consideration of the plain purpose of the Motor Vehicle Dealers' Act. It is expressed in the long title as "an Act to make better provision for the licensing and disciplining of motor vehicle dealers and their staff, and to reform the law relating to contracts for the sale of motor vehicles by dealers, in order to promote and protect the interests of consumers". The Act contains detailed and extensive provisions regarding the licensing of motor vehicle dealers and of the standard of conduct required of them and as to their duties in the manner in which they represent motor vehicles to the public for sale. It would be intolerable if a person could engage in the sale of motor vehicles on a large scale with all the outward appearances of a motor vehicle dealer but with none of the restrictions imposed on motor vehicle dealers. I cannot accept that the legislature ever intended to achieve such a result. There is, of course, the possibility that the legislature overlooked a situation such as exists here, but I do not think that it has. I consider the proper interpretation to be given to s 4 (4) (e) is the narrow and restrictive one I have indicated.

I should mention that one of the facts found by the District Judge was that some of the vehicles sold by the defendant belonged not to the defendant but to other companies within the Mutual Group. Some attempt was made, on

behalf of the defendant, to suggest that in the circumstances which existed here it was proper to lift the corporate veil and look in a realistic way at the fact that this was really a Group operation so that no distinction ought to have been drawn between the defendant and the other members of the Group. Whatever liberties may be taken with the corporate veil in civil matters, I have no doubt that they do not extend to the criminal law. It was the defendant in its sole corporate identity which was charged with the offence. It would be a surprising thing to contemplate that upon proof of that offence a conviction could then be entered against each of the other companies as well as the defendant. That, however, would be the kind of result which would follow if this argument were sound. I am satisfied it is not, and that in respect at least of those vehicles which belonged to other companies s 4 (4) (e) could not possibly enable the defendant to escape from the consequences of its holding out. This would have been a complete answer to the defence offered to the information and would, in itself, require a finding that the information was proved. But I have regarded it as only an incidental feature because that would not resolve the real problem which the proceedings were designed to settle.

I have not dealt separately with each of the paragraphs of Question 7. It may well not be possible to give a clear answer to each but when taken together the answer is, I think, undoubted.

SUMMARY

I answer the questions as follows:

- Question 1 The defendant was not a "car consultant" as defined in the Act.
- Question 2 The word "deemed" in s 4 (4) of the Act relates only to subss (2) and (3) of s 4.
- Question 3 No.

