

IN THE HIGH COURT OF NEW ZEALAND  
WELLINGTON REGISTRY

M.582/83

BETWEEN WELD MOTORS LIMITED a duly  
incorporated company having  
its registered office at  
Palmerston North

APPELLANT

AND THE MOTOR VEHICLE DEALERS  
INSTITUTE INCORPORATED  
having its registered office  
at Wellington

RESPONDENT

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Hearing	9 February 1984
Counsel	R S Craddock Q.C. and T S Beattie for Appellant M P Reed for Respondent
Judgment	9 February 1984

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REASONS FOR JUDGMENT OF DAVISON C.J.

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The appellant's licence as a motor vehicle dealer was cancelled by the Motor Vehicle Dealers' Licensing Board ("the Board") on 8 November 1983 following the hearing of an application made by the respondent pursuant to s 112 of the Motor Vehicle Dealers' Act 1975 ("the Act").

At the conclusion of the hearing of this appeal I ordered :

1. That the order for cancellation of licence be quashed.
2. That in substitution for the order of cancellation the appellant's licence be suspended for a period of three months from 8 November 1983.
3. That the order for costs of \$750 made by the Board against the appellant remain.
4. That the respondent pay to the appellant by way of costs of those appeal proceedings the sum of \$500.

Owing to the desirability of giving the parties an indication of the result of the appeal at once and the strictures of time preventing me from giving reasons for judgment immediately, I advised that reasons would be given later. I now give those reasons.

#### THE FACTUAL SITUATION

The appellant was a licensed motor vehicle dealer carrying on business in Palmerston North. It had been in business for many years in the area and with the introduction of licensing of dealers it was issued with a licence in April 1977.

The record shows that William Wallis Weld and Lance Martin Weld were both designated as Managing Directors. For the licensing year 1981-82 only William Wallis Weld was shown as the Chief Executive Officer of the company - his brother Lance Martin Weld having left the company. The appellant employed a Mr Stewart as salesman in the company's business.

On about 12 June 1983 a Mr Michael David Howse made a complaint to the respondent's Palmerston North Branch about a dealing carried out by him with Mr Stewart. The complaint as signed by Mr Howse was as follows:

" Diff. noisy. Automatic transmission not changing properly. Uses a lot of oil. Window card shows \$4999. Price on invoice \$5990. Year shown as 1972 but is 1971. Window card not signed. "

The complaint was referred to the appellant which replied that the complaint had been resolved. Nevertheless Mr Russell, the respondent's executive officer, visited Palmerston North and interviewed Mr Weld at the appellant's premises. He also spoke to Mr Stewart.

As a result of inquiries made, it was learned that the Holden Statesman sold to Mr Howse was owned by Mr Stewart, not by the company; that it was displayed in

the appellant's yard and that the vendor was Mr Stewart not the appellant.

The respondent subsequently applied to the Board under s 112 of the Act for an order cancelling or suspending the appellant's licence upon the grounds :

- (a) That the licensee and/or its officers has been guilty of misconduct in the course of the licensee's business as a motor vehicle dealer and that by reason of that misconduct it is in the interests of the public that the licence be cancelled or suspended.
- (b) That the licensee and/or any of its officers is of such a character that it is in the interests of the public that the licence be cancelled or the licensee suspended.
- (c) That the licensee has failed to comply with any requirement of s 57 of the Act relating to the supervision, management, and control of the conduct of its business as a motor vehicle dealer.

Those grounds were based on the following provisions of s 112 of the Act :

"112(1) The Institute, the Disciplinary Committee, or any other person with leave of the Board, may at any time apply to the Board for an order cancelling a motor vehicle dealer's licence or suspending the licensee on any of the following grounds:

- (d) That the licensee, or, in the case of a licensee company, any officer of the company, has been guilty of misconduct in the course of his or the company's business as a motor vehicle dealer, and that by reason of that misconduct it is in the interests of the public that the licence be cancelled or the licensee be suspended:
- (e) That the licensee, or, in the case of a licensee company, any officer of the company, is of such a character that it is in the interests of the public that the licence be cancelled or the licensee be suspended:

- (h) That the licensee has failed to comply with any requirement of section 57 of this Act (relating to the supervision, management, and control of the conduct of his or its business as a motor vehicle dealer at any place of business). "

The relevant provisions of s 57 are as follows:

- "57(1) Every licensee (other than a licensee company) shall personally supervise, manage, and control the conduct of his business as a motor vehicle dealer at his principal place of business and at each subsidiary place of business named in the licence relating to his principal place of business.
- (2) Every licensee company shall ensure that its chief executive officer, or such other person as may be approved for the time being by the Board, personally supervises, manages, and controls the conduct of the company's business as a motor vehicle dealer at the company's principal place of business and at each subsidiary place of business named in the licence relating to its principal place of business.
- (3) Every licensee (including a licensee company) shall, in respect of each branch office, ensure that the branch manager personally supervises, manages, and controls the conduct of the licensee's business as a motor vehicle dealer at the branch office and at each subsidiary place of business named in the licence relating to the branch office.
- (4) For the purposes of subsections (1) to (3) of this section, a person shall not be deemed to be personally supervising, managing, and controlling the conduct of business at any place of business unless he is present and actively engaged in the conduct of business during a substantial part of the time when that place is open for business. "

THE BOARD'S DECISION

The Board, after hearing evidence and submissions, held on the facts that ground (b) relating to the character of the licensee and its officers had not been made out.

It did find, however, that the grounds relating to misconduct (under s 112(1)(d) and mismanagement (under s 57) had been made out.

The Board then considered the alternatives of cancellation or suspension of the appellant's licence and ordered that the licence be cancelled.

#### GROUNDS OF APPEAL

The appellant has appealed against that decision upon the grounds that it was wrong both in fact and in law. The particular matters raised by Mr Craddock on appeal were these:

1. The Board appears to have, in effect, reviewed the appellant's licence by way of general review which it could not properly do when dealing with an application under s 112.
2. The Board misconstrued the effect of Mackie's case.
3. That neither of the grounds set out in s 112(d) or (h) was proved on the evidence to the required standard. There was no misconduct on the part of the appellant; at worst, merely a mistake which did not amount to misconduct.
4. The order for cancellation was disproportionate to the circumstances of the case. At most, a short period of disqualification would have been appropriate.

#### DECISION

This appeal falls to be dealt with by way of rehearing. I have read the evidence before the Board and

without going into detail I am satisfied that both of the grounds in s 112(d) and (h) were made out.

In so far as the alleged misconduct is concerned, Mr Craddock submitted that Mr Weld had been mistaken in believing that Mr Stewart was entitled to sell up to six cars in any year as a private individual without becoming a motor vehicle dealer. Reference was made to s 4(3A) of the Act and to O'Connor v Palmer and Ors [1960] 1 F.L.R.397 where the Australian Commonwealth Industrial Court held that misconduct means more than mere negligence, error of judgment, or innocent mistake.

Even giving Mr Weld the benefit of being innocently mistaken as to Mr Stewart's right to sell up to six cars a year, there was other evidence justifying a finding of misconduct. In particular, Mr Stewart's motor vehicles were displayed on the appellant's licensed premises and offered for sale under the appellant's name when it was not the vendor. The car sale card of the Holden Statesman sold to Mr Howse bore the appellant's name.

At the hearing, Mr Weld acknowledged that he was aware of eight unlicensed transactions by Mr Stewart but that fact has to be put in proper perspective. After the initial sale to Mr Howse, that sale was cancelled and money refunded to Mr Howse, but the Holden Statesman and a Ford Escort Van which he had taken as a trade-in were exchanged with dealers and vehicles received were in turn exchanged until a total of some eight transactions in all were carried out by Mr Stewart.

I was invited to define what may amount to misconduct in terms of s 112(d) but I prefer to await until such may be necessary for the resolution of a particular case.

The other allegation which the Board found established was that of mismanagement. I agree with the Board that Mr Weld's conduct in the matter fell short of the standard to be expected of a chief executive officer

and that too much freedom in respect of the selling of his own vehicles was given to Mr Stewart. At the same time that situation was probably brought about by Mr Weld's mistaken belief relating to Mr Stewart's right to sell up to six cars a year. The Board's finding of mismanagement was justified on the evidence.

It is in relation to the penalty of cancellation imposed that I differ from the Board in this case.

Let me say at the outset that I do not in any way resile from what I said in Mackie's case (Mackie v The Motor Vehicle Dealers Institute Incorporated /1980/ 1 NZLR 536) about a licensee putting its house in order. The unusual circumstances relating to the putting of the house in order, however, have persuaded me that it would be unjust to the licensee to cancel its licence and not to merely suspend that licence.

The appellant has been in the motor trade for a lengthy period of time and apparently built up a good reputation. There is no evidence of any irregularities before Mr Stewart came on the scene and although there were some eight motor vehicles involved, all the transactions stemmed from the one sale by Mr Stewart to Mr Howse.

The obvious thing to do once the position was made clear to Mr Weld was for him to take legal advice and act upon it. Mr Weld took such advice and acting upon it he dismissed Mr Stewart. If that situation had remained then the appellant could have approached the Board with evidence of a situation where the major cause of the problem had been removed. The appellant's past record and plans which it would have to have made for the future selling of cars and evidence of supervision would then probably have been sufficient to satisfy the Board that it had put its house in order.

However, for reasons which are not clear but which in all probability stem from Mr Stewart also consulting the same solicitor and discussing matters with him, that

solicitor changed his mind and advised the appellant to re-employ Mr Stewart because he thought that the dismissal was too severe. I suspect that the solicitor may not have been aware of or had due regard to the provisions of the Motor Vehicle Dealers Act or to the provisions of Mackie's case. However, Mr Weld cannot be unduly criticised for acting on his solicitor's advice.

It was for those reasons that Mr Weld appeared before the Board with Mr Stewart still employed as a salesman of the company. Mr Weld did tell the Board, however, for reasons which he gave, that he could not have Mr Stewart working for the company any longer and that he was leaving it until after the hearing to tell him to find another job. In fact, Mr Stewart's services were terminated the day after the Board hearing. The present appeal being one by way of rehearing, the fact of Mr Stewart's dismissal is one which I am entitled to weigh in the balance in arriving at my decision.

The Board based its decision to cancel the licence upon ground that the appellant had not put its house in order for two reasons:

1. It ought to have taken steps to dismiss Mr Stewart prior to the Board hearing.
2. Mr Weld should have demonstrated greater knowledge of motor vehicle dealing and Acts of Parliament - other than the Motor Vehicle Dealers Act - which may relate to motor vehicle transactions.

For the reasons which I have briefly set out I have come to the view that the fact that Mr Stewart was still employed by the company at the date of hearing should not be weighed heavily against the appellant. It did dismiss Mr Stewart: it re-engaged him on legal advice: it told the Board it was going to dismiss him the following day and did so.



The continued employment of Stewart from the time of the inquiry by the respondent in July until the hearing in November resulted in nothing adverse being discovered to have occurred.

The other factor which weighed with the Board was what may be referred to as Mr Weld's inexperience or inadequacies in his knowledge as chief executive officer resulting in lack of supervision.

The requirements of s 57 for supervision are:

- (a) The chief executive officer must personally supervise the conduct of the company's business.
- (b) The chief executive officer must be present and actively engaged in the conduct of the business during a substantial part of the time when the business is open.

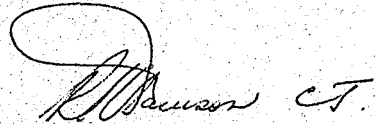
On the evidence, Mr Weld did personally supervise the appellant's business and did attend usually daily from 7.30 am to 5 pm. It appears to me that it was not so much the failure to supervise which was established in this case but rather Mr Weld being mistaken as to Mr Stewart's right to sell up to six cars a year without being a motor vehicle dealer, and what I suspect was Mr Stewart's somewhat underhand way of dealing with his own vehicles.

This was not a review of the approval given previously by the Board of Mr Weld as chief executive officer. He was approved and presumably the criteria required for approval were met.

I do not think Mr Weld's ability to act as chief executive officer was sufficiently investigated in this matter so as to enable the Board to reach the conclusion that he was unsuitable for that purpose, and that further steps should have been taken by Mr Weld to improve his position before the date of hearing.

Whilst it is for the licensee to show that it has put its house in order, I think that it has now done so in so far as Mr Stewart is no longer employed by the company. In so far as management is concerned, Mr Weld was approved as chief executive officer and the position is no worse than existed before the Howse transaction and actions of Mr Stewart and probably a good deal better so far as Mr Weld's knowledge of the Act and his responsibilities is concerned. There is good reason to treat the Stewart episode as an aberration in the otherwise good record of the company in the expectation that the appellant has now returned to acceptable operation. The unusual circumstances here justify my believing that such will be the case.

For the foregoing reasons I allowed the appeal and substituted the order of suspension and made the order as to costs to which I have referred.

 R. Dawson C.J.

Solicitors for the appellant: Jacobs, Florentine & Partners  
(Palmerston North)

Solicitors for the respondent: Scott, Morrison, Dunphy & Co.  
(Wellington)