Counsel

Jud 8363

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

M.No.1632/83

BETWEEN BUSINESS CONSULTANTS LIMITED

Appellant

AND RONALD WILLIAM GEORGE BUTLER

Respondent

Hearing: 2 April, 1984.

Counsel: M.J. Ruffin for Appellant
D.J. White for Respondent

Judgment: 25th June, 1984.

JUDGMENT OF VAUTIER, J.

Four informations alleging commission by the appellant of offences in terms of ss.32(1)(b) and 32(2A) of the New Zealand Society of Accountants Act 1958 ("the Act") were heard in the District Court at Auckland on 20 September, 1983. At the conclusion of the evidence the Judge found the charges to have been proved and the appellant was convicted and a fine and order for payment of Court costs was imposed in respect of each of the charges. It was also ordered to pay $75 towards the respondent's costs. The appellant now appeals to this Court against those convictions.

Each information was in like form, the only difference being that each related to the display of signs located in different positions on and within the building in which the appellant carried on its business. It is necessary to set forth the wording adopted in the framing

of the charges. In each case it was alleged that by the particular sign identified in the charge the appellant -

> "did describe itself in writing as a chartered accountant in public practice when it was not for the time being so registered and classified in that not being a member or licence holder of the New Zealand Society of Accountants it did describe itself or did hold itself out publicly as an accountant, or did use an additional description indicating that it was an accountant in public practice ..."

The evidence adduced showed that the appellant was originally incorporated under the name Peter Nathan Associates Ltd., and its original directors and shareholders were Peter Nathan and his wife Tricia Beverly Nathan. In May, 1983 when the informations were sworn a number of additional directors had been appointed but both Mr Nathan and his wife remained directors and the latter held the office of secretary. The evidence also showed that neither the appellant company nor any of its directors was a member at the relevant time of the respondent Society although Mr Nathan had been a member up until June, 1979 when he resigned. The evidence as to the signs showed that three of the signs referred to in the informations carried under the name of the appellant the wording "Accounting, Taxation and Business Services". The fourth incorporated those same words but there was some mistake in the signwriting as regards the word "accounting" but Mr Ruffin agreed that nothing turned upon this as the casual observer would be unlikely to notice the repetition or transposition of letters at the end of the word having regard to its particular position on the windows of the building. Two of the signs carried wording relating to office hours and telephone number and a logo depicting

certain articles connected with exploration or navigation.

The prosecution evidence included that of Mrs Nathan herself who appeared on a subpoena issued against her by the respondent. Her evidence related to the shareholding of the appellant and the part played by Mr Nathan in operating the company. Objection was raised at the hearing on behalf of the appellant to Mrs Nathan being called in this way but the objection was disallowed and this ruling is the subject of one of the grounds of appeal which were advanced.

It is necessary to refer, first, to the statutory provisions creating the offences here alleged. Section 32(1)(b) of the Act (as amended by s.10(1)(a)(b) and (c) of the New Zealand Society of Accountants Amendment Act 1968) reads insofar as is relevant here, as follows:

> "Improper use of terms implying membership of Society - (1) Every person commits an offence and shall be liable on summary conviction in the case of an individual to a fine not exceeding $200 and in the case of a body corporate to a fine not exceeding $400 who, -
>
> (a) ...
>
> (b) Describes himself in writing as a chartered accountant or a chartered accountant in public practice or a cost and management accountant when he is not for the time being so registered and classified:"

The meaning to be given to this provision is, however, extended by subsection (2A) of s.32 which was inserted by s.27 of the New Zealand Society of Accountants Amendment Act 1963 and itself later amended by s.10(4) of the 1968 amending Act already referred to. This provision

reads:

> "Subject to the provisions of section 32A of this Act (as inserted by section 28 of the New Zealand Society of Accountants Amendment Act 1963) any person who, not being a member of the Society, describes himself or holds himself out publicly as an accountant or auditor or under any designation including those terms, or uses any name, title, additional description, or letters indicating that he is an accountant or auditor in public practice, whether by advertisement, by description in or at his place of business or residence, by any document, or otherwise, shall be deemed for the purposes of paragraphs (b) and (c) of subsection (1) of this section to have described himself in writing as a chartered accountant in public practice, unless it is proved that the manner in which he did the act which is proved was such as to raise no reasonable inference that he was referring to the public practice of accountancy:"
>
> (There then follow a number of provisions dealing with situations of no relevance in this particular case).

The first ground of appeal advanced by Mr Ruffin is that the Judge was in error in declining to accede to an application made on behalf of the appellant at the outset of the hearing that the respondent, as informant, should be called upon to make an election in relation to each of the charges because the extended meaning to be given to s.32(1)(b) by s.32(2A), upon which provision the information showed the informant to be relying, had the effect of creating three alternatives..

Mr Ruffin in the argument before me did not really seek to press this ground but Mr White made detailed submissions and asked that I deal with the point because the informations here used follow the standard form adopted by the respondent for prosecutions of this nature. I think

Mr White is correct in his submission that no election was called for in that this is not a case of the charging more than one offence in the same information so as to make s.16(1) of the Summary Proceedings Act 1957 applicable. I agree with Mr White that on a proper construction of the statutory provisions the combined effect of s.32(1)(b) and s.32(2A) is to create one offence only, namely that of describing oneself as a chartered accountant, etc., which offence, however, can be committed in one or other of the artificially defined modes referred to in s.32(2A). The situation here is in my view no different to that pertaining in relation to s.57(b) and (c) of the Transport Act 1962. In respect of that section the Court of Appeal in Ebert v. Transport Department [1967] NZLR 459, held that an information alleging that the defendant drove a motor vehicle at a speed which was or might have been dangerous to any person "was not bad for duplicity" and created only one offence. A Divisional Court in Thomson v. Knights [1947] 1 All ER 112 had reached a like conclusion regarding an offence of being "unlawfully in charge of a motor vehicle ... whilst under the influence of drink or a drug." The Court of Appeal in Ebert's case did not dissent from the view expressed by Haslam, J. at first instance that the words I have quoted amounted only to "a comprehensive built in definition" or explanation of the adjective "dangerous". So here, in my view, the words in s.32(2A) simply amount to an extended definition or description of what is to be comprehended by the words used in s.32(1)(b). It is to be noted that s.16(2)(3) and (4) of the Summary Proceedings Act relate only to the situation provided for by the proviso to s.16(1) and those

subsections have no application here. It is well established, however, that in the event of the Court holding that an information does in fact embody two offences arising out of the same conduct the prosecutor should be called upon to elect. That was, I conclude, not the situation which here pertained. There was no question here, it should be noted, of Mr Ruffin on behalf of the appellant seeking an election by the prosecutor on the grounds that his client was embarrassed in the defendant in its defence.

The second point raised was that the Judge was in error in permitting the prosecution to call Mrs Nathan as a witness because of her being a director of the defendant company. Mr Ruffin relied upon the decisions in Tesco Supermarkets Limited v. Nattrass [1971] 2 All ER 127, Nordik Industries Limited v. Inland Revenue [1976] 1 NZLR 194 and R. v. Andrews Weatherfoil Ltd and others [1972] 1 All ER 65. These decisions relate to the question of corporate liability in criminal law. The key decision is the first - that of the House of Lords which is simply applied in the other two cases. For present purposes it is sufficient to note that the effect of the judgments in that case is to show that a company can be held liable if the default the subject of the charge against the company was something done by a person who can be said to have been "the directing mind and will of the company so that his actions can be said to be" the very action of the company itself, i.e. that that person can be identified with the company. In the second case abovementioned, Cooke, J. at p.199 quoted the following passage from the judgment of Lord Reid in the Tesco case

(at p.132 of the All England report) as to the test or tests for identification:

> "Normally the board of directors, the managing director and perhaps other superior officers of a company carry out the functions of management and speak and act as the company. Their subordinates do not. They carry out orders from above and it can make no difference that they are given some measure of discretion. But the board of directors may delegate some part of their functions of management giving to their delegate full discretion to act independently of instructions from them. I see no difficulty in holding that they have thereby put such a delegate in their place so that within the scope of the delegation he can act as the company. It may not always be easy to draw the line but there are cases in which the line must be drawn. Lennard's case [1915] AC 705 was one of them. (ibid., 171; 132)."

In reliance upon s.5(1) of the Evidence Act 1908 whereunder it is provided that the person charged with an offence is not a compellable witness for the prosecution and s.2 of the Acts Interpretation Act 1924 defining "person" as including a corporation, it was Mr Ruffin's submission that Mrs Nathan, being a director and a person who spoke for the company, could not be treated as a compellable witness. The evidence of Mrs Nathan showed in my view, however, that she did not in fact occupy a position in the company warranting the conclusion being drawn that she should be identified with the company on the basis of the principles established by the cases to which I have referred. She admitted that her husband, Mr P.B. Nathan, was the person in day to day control of the affairs of the company and the person who made decisions for the company and spoke on behalf of the company. Mr Ruffin on the argument before me submitted that in any case the Judge should have proceeded, first, on the basis of evidence being led before him in the nature of a voir dire,

in order that he should be able to determine properly the question of the compellability or otherwise of Mrs Nathan as a witness. I think that this would be taking an over-technical view as regards the proper procedure to be followed having regard to the fact that the hearing was before a Judge alone and not a Judge and jury. In any case, moreover, as Mr White submitted, the record shows that the only purpose of calling Mrs Nathan was to show that her husband was the person really controlling the company and the significance of this was that evidence was also to be called to show that Mr Nathan had previously been a member of the Society and would thus be fully aware of the requirements of the statute. The evidence, therefore, really only had importance as regards the question of penalty. I take the view that no valid objection can be taken to the Judge's findings on the basis of this procedural point.

Mr Ruffin indeed conceded that the main thrust of the appeal was not directed to the two questions I have so far discussed but to the question of whether or not the evidence adduced went far enough to establish the commission of an offence within the meaning of the section. As to this aspect Mr Ruffin relied, first, upon a description which was given by Darling, J. in a case O'Connor and Ould v. Ralston [1920] 3 KB 451 at 456 of the word "accountant" as "a person who is paid for investigating accounts and certifying as to their accuracy". He also referred to the definitions to be found in the Shorter Oxford Dictionary, 3rd Ed. of "accountant and "accounts":

"accountant": one who accounts, a calculator; one who professionally makes up accounts.

"accounts": a statement of moneys received and paid with calculation of the balance; also one of the heads under which accounts are kept in a ledger; preparing a statement of money transactions."

He pointed out that it was relevant to note that in terms of s.32(2A) proviso (b) nothing in the section is to operate to prevent a person from practising publicly and describing himself as a secretary, bookkeeper or cost consultant under any designation not associated with or conveying the impression that he is an accountant or auditor. It also, I think, is worthy of note that in the preceding sub-paragraph (a) it is provided that a person who is not offering his services to the public as an accountant or auditor or under any similar designation is not prevented from using such a designation in relation to his salaried employment. It was proved, Mr Ruffin agreed, that the appellant was not registered or classified as a chartered accountant or chartered accountant in public practice as referred to in s.32(b) and, accordingly, the only question for consideration was whether or not the evidence established that the appellant had so described itself bearing in mind the extended meaning given to the words just mentioned by subsection (2A). It was clear here, of course, that the prosecution could only succeed by reliance upon the extended meaning given to these words and indeed on the facts the only question was whether the appellant here had "used a name, title or additional description ... indicating that it was an accountant or auditor in public practice, by

description in or at its place of business". The signs here used did not of course actually describe the appellant as a chartered accountant or a chartered accountant in public practice within the meaning of those terms as defined in s.2. Mr Ruffin pointed out that with reference to the relevant provisions in s.32 of the primary rule of instruction referred to, Maxwell, Interpretation of Statutes, 12th Ed., p.28:

> "The first and most elementary rule of construction is that it is to be assumed that the words and phrases of technical legislation are used in their technical meaning if they have acquired one and otherwise in their ordinary meaning, and second is that the phrases and sentences are to be construed according to the rules of grammar."

He relied also upon the rule that a penal statute must be construed strictly and he referred to the statement of Esher, M.R. in Tuck & Sons v. Priester [1887] 19 QBD 629 at p.638:

> "If there is a reasonable interpretation which will avoid the penalty in any particular case ... we must adopt that construction. If there are two reasonable constructions, we must give the more lenient one. That is the settled rule for the construction of penal sections."

With regard to the general effect of the provision under consideration he referred to the case of McDonald v. Sullivan [1978] 1 NZLR 702 and the statement of Mahon, J. at p.705 in that case reading as follows:

> "Before proceeding to consider the facts of the present case, an explanatory word is needed as to the text of subs (2A). In contrast with the statute law relating to the medical and

> legal professions, which prohibits a person practising medicine or law unless appropriately qualified, the New Zealand Society of Accountants Act does not prohibit a person carrying on the business of accountancy. Any unqualified person can do accounting work for gain or reward without committing an offence. What the Act does, however, is to prohibit a person who is not registered and classified under the Act from describing himself or holding himself out as a chartered accountant or a cost and management accountant. The purpose and intent of subs (2A) of s.32 is to aid that sanction by proscribing various types of advertisement which would indirectly tend to create the impression in the mind of the reader that the advertiser was suitably qualified and registered."

In that case the respondent had sent out to members of the public a circular containing the words "Accounting fees too high? If you would like to hear about an Accounting Service that offers more but costs less," (there followed the name, address and telephone number of the respondent). In that case the decision of the Magistrate that the wording of the circular did not disclose an offence against the section was reversed on appeal and a conviction entered. Mr Ruffin submitted that this case should be distinguished from the present case. It had to be inferred, he said, from the wording used in that case that the respondent was comparing himself with other accountants and implying that his accounting service was better than anyone elses. This comparison, he submitted, brought the matter within the definition provided in the section. It was his submission that in the present case, applying the objective test which was referred to by Mahon, J. in the decision just mentioned, the signs the appellant displayed in relation to his business would not naturally convey to members of the public the existence of any of the three situations referred to in s.32(2A). He submitted that the

name "Business Consultants Limited" emphasised the nature of the appellant's work as being just that; that the word "accounting" was used as an adjective in a phrase with two other adjectives describing the services to be provided and the definitions of "accountant" previously mentioned were, he submitted, inconsistant with the additional names or descriptions "taxation services" and "business services". He pointed out that the logo on two of the signs comprising a globe, theodolite, stamps, book and quill pen were not symbolic of accounting in any way. It also had to be borne in mind, he said, that it was not possible for a limited company to qualify for membership under s.14 of the Act or obtain a Certificate of Public Practice in accordance with s.14 A . It could also be inferred, he submitted, that members of the public were aware of the distinction between accountancy services and those of chartered accountants (i.e. those of members of the New Zealand Society of Accountants) and that this was exemplified by the adoption in the Yellow Pages of the current Auckland Telephone Directory of the two headings "Accountancy Services" and "Accountants - Chartered (Members New Zealand Society of Accountants)" and the copy advertisements produced at the hearing wherein grocery wholesalers referred to providing "accounting services" and "accounting advice" to those who joined their co-operative organisations.

Mr Ruffin also placed considerable reliance in the decision Kennedy v. Police [1982] 1 NZLR 689 where the Court of Appeal in relation to s.69(3) of the Medical Practitioners Act 1968 held that it was an essential

ingredient of an offence under this section that the offender should have actually represented that he was a medical practitioner in the sense that he was currently qualified and entitled to practise medicine or surgery.

Mr White for the respondent contended that the present case was really indistinguishable from that under consideration in the case of McDonald v. Sullivan (supra) and the distinction drawn by Mr Ruffin did not really amount to a valid distinction. He submitted that the definition of "accountant" given in the case to which Mr Ruffin referred was much too narrow in the light of present day practice.

I have considered these opposing submissions and in the end concluded that I should accept those of Mr White and that there is no proper basis for disturbing the decision arrived at by the Judge in the District Court to convict the appellant. It is indeed, I think, important to note, adopting what was said by Mahon, J. in McDonald v. Sullivan (supra) that the publication complained of having been established the only remaining question was the meaning which would reasonably be given in this case to the signs displayed by members of the public who saw them. It is indeed of importance, I think, to note that two of the signs displayed the appellant's telephone number and the times of which the office was open for business making it quite plain that the services were being offered to the public generally. Like Mahon, J. I adopt the view of the full Court of South Australia in Thompson v. Ewens [1958] SASR 193 showing that

the reasonably attributable meaning of the description complained of is to be decided objectively. It is true that Mahon, J. did, as Mr Ruffin submitted, place some emphasis upon the comparison drawn in the circular in that case between the services offered by the respondent and those available elsewhere. He did, however, as Mr White pointed out, go on to say this:

> "Even if the contents of the circular fell short of describing the respondent as an accountant they would, in my opinion, still amount to an 'additional description indicating that he was an accountant in public practice'. The phrase 'additional description' occurs in a context which might at first sight suggest the application of the eiusdem generis rule, but that particular aid to construction must be placed on one side in a case where the word or phrase has an unmistakeable statutory meaning. I think this is the case here. This branch of subs (2A) covers not a direct description but the use by an unqualified person of some designation indicating that he is an accountant in public practice and I think that the term 'additional description' must include any words or phrases used in conjunction with the name of the person concerned. The intention of the legislature, as I see it, was not to limit the 'additional description' to titles or letters, but to include in that term the written context, no matter how extensive, in which the offender's name might appear."

I do not gain any assistance in this matter from the Court of Appeal decision to which Mr Ruffin referred, Kennedy v. Police (supra). As McMullin, J. delivering the judgment of the Court said (at p.696):

> "We have been referred to various statutes said to be in pari materia relating to restrictions imposed on practice in other professions and vocations. While these statutes may provide a pattern we think that each must be construed on its own particular wording."

The statutory provision here under consideration is framed from quite a different viewpoint from that which the Court of Appeal was considering. The offence there consisted in the offender holding himself out as a medical practitioner. Here, as is pointed out in McDonald v. Sullivan (supra) the wording employed is wider in some respects and narrower in others and in essence the offence consists simply in the using of a description or descriptive words which, viewed in an objective manner, are to be regarded as indicating to members of the public that the person thus describing himself is in public practice as an accountant or auditor. Giving the words here used their ordinary meaning any person reading them would in my view be fully entitled to conclude that among the services provided by the appellant was an accounting service as ordinarily understood. When that word is coupled with the words "Taxation Services" that impression would in my view not be lessened but would be further enhanced in that the average person in my view, particularly the operators of small businesses, customarily look to accountants to prepare their accounts and annual balance and statement of profit or loss and put these in proper form specifically for their use in the compilation of taxation returns.

The narrow definition given by Darling, J. in O'Connor & Ould v. Ralston (supra) is certainly not in my view appropriate at the present day to describe the services made available to the public by persons practising as chartered accountants. It is to be noted that the Judge in that case simply put forward the definition in question to support

the view he had formed that the plaintiffs, a firm of bookmakers, could not successfully claim that they had complied with the requirements of the Registration of Business Names Act 1916 by describing themselves as "accountants" notwithstanding the fact that a practise had developed among bookmakers of styling themselves as turf accountants. He was certainly not considering the matter in the way which arises here.

I do not think, either, that it can truly be said, as Mr Ruffin submitted, that the advertisements to which I earlier adverted, can be taken as indicating that members of the public have become accustomed to distinguishing between the services offered under the description "accounting services" and the services provided by chartered accountants. In the case of the Yellow Pages advertisements the Post Office have made the distinction fairly clear by providing two entirely separated sets of listing. It was also brought out that the respondent had made objection to the Post Office and changes to this part of the directory were under discussion. As regards the other advertisements, the evidence did not reveal just how the wholesalers placing these advertisements in fact provided the services referred to. Certainly no one would be likely to assume that the companies referred to were themselves indicating that they were in business as chartered accountants.

I accordingly find myself unable to conclude that the Judge was wrong when she made the finding that in the context in which the defendant has placed its sign in

relation to its business an ordinary member of the public would attribute one meaning only and that was that the defendant company was in the business of accounting and available to provide those services.

The appeal against conviction must accordingly be dismissed.

An appeal was also advanced as regards the penalty imposed which was the imposing of a fine of $100 and Court costs in respect of each of the four informations and in respect of one of the informations witness's expenses of $32.50 and solicitor's costs of $75. The maximum penalties in respect of this particular offence are, in the case of an individual, a fine of $200 and in the case of a body corporate a fine not exceeding $400. Mr Ruffin pointed out that the Judge, when imposing the penalties, said that in relation to the matter it probably would be reasonable to regard the four signs as "to a degree being all part and parcel of the one offence ... it is not as if the four signs before the Court related to four separate business premises or were four notices to the public by way of circular or something of that kind." The submission advanced by Mr Ruffin was that although there was this indication of the four informations being properly regarded as relative only to a single offence the effect of the Judge's decision was to impose the maximum penalty for this offence.

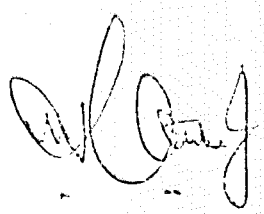
Mr White submitted that the penalties should not be disturbed because in fact the maximum was appropriate

because of the fact that the person controlling the company, Mr Nathan, had been a former member of the Society and he should be regarded as trying to "get around" the prohibition provided for by the statute.

I observe, however, that the Judge did not advert to any circumstances which, in her view, made the offence a particularly serious one of its kind. I note, also, that in McDonald v. Sullivan (supra) a very similar sort of case, Mahon, J. thought it appropriate to impose a fine of $50 in lieu of the maximum of $200 although he ordered in addition a payment of $100 towards the cost of the prosecution. There could clearly in my view be much more flagrant breaches than this of the requirements of this particular statutory provision. Moreover, although I do not regard, for the reasons I have mentioned, the notation adopted in the telephone directory, etc., as having any real relevance to the question of whether or not the present appellant should have been convicted, it could well, I think, have reasonably led people like Mr Nathan to conclude that the Society was prepared to condone to some degree such usage or regard the concluding words of s.32(2A) of the Act, as enabling such descriptions of accounting services to be used without persons so doing being in breach of the statute. The "disclaimers" used in some of the advertisements referred to, such as those in the Yellow Pages may well have been regarded, as Mr White said, as enabling this fact to be successfully advanced in answer to any charge brought in respect of those uses.

In all the circumstances, therefore, I think that what in effect I agree should be regarded as the maximum fine as imposed in this case was not justifiable. This would leave no scope for the imposing of a properly proportionate penalty for a much more flagrant breach than is here disclosed. I accordingly allow the appeal against sentence to the extent that the fines of $100 imposed in each case are remitted and I substitute a fine of $50 in each case.

There will be no order as to costs of the appeal.



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