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IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

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BETWEEN ELGIN MOTORS LIMITED a duly
incorporated company having
its registered office at
Auckland

Plaintiff

AND MOTOR VEHICLE DEALERS INSTITUTE
(INCORPORATED) an incorporated
society having its registered
office at Wellington

Defendant

Hearing 1 October 1985
Counsel R P G Haines for plaintiff
M P Reed for defendant
Judgment 4 October 1985

JUDGMENT OF DAVISON C.J.

BACKGROUND

At the half yearly meeting of the Institute held on 29 and 30 April 1985 it was resolved that the Institute would mount an advertising campaign at a cost of \$480,000. The campaign was proposed to be financed by way of a levy upon members of \$200 each. The following resolution was passed:

" That we proceed with the campaign presented by Carlton-Carruthers du Chateau Ltd at a cost of \$480,000 and that a levy of \$200 per member be struck for the financial year commencing 1 July 1985. "

At the same meeting it was also decided that a further levy of \$30 be struck on all members in view of the expected shortfall in the Fidelity fund.

The following was the resolution passed covering both the national subscription and the Fidelity fund levy:

" That the national subscription rate for the year commencing 1 July 1985 be set at \$170 per member and that a Fidelity Fund levy of \$30 be struck for the year commencing 1 July 1985. "

The plaintiff (Elgin) which is a member of the Institute has challenged the validity of both the advertising levy and the Fidelity Fund levy upon the grounds:

1. The decisions of the Institute to impose the said levies have not been made in accordance with the Rules of the Institute and/or the Motor Vehicle Dealers Act 1975 and therefore the said decisions are invalid in that in respect of the advertising levy -

(a) The consent of the Minister of Justice to a levy in excess of \$100 was not obtained prior to the fixing of the said \$200 levy by the Council of the Institute.

In the alternative:

(b) The consent of the Minister of Justice was obtained by misrepresentation:

(i) The Minister was not told that prior to his consent being sought, the Council had already fixed the advertising levy.

(ii) The Minister was falsely told that the rule which was annexed to the Executive Director's letter had been registered with the Registrar of Incorporated Societies.

2. In respect of the Fidelity Fund levy, the requirement by the defendant that the plaintiff pay the \$30 Fidelity Fund levy is contrary to the terms of s.37(2) of the Motor Vehicle Dealers Act 1975.

3. The defendant's rules are invalid and of no effect as they have not been approved by the Minister of Justice.
4. Rule 21 of the defendant's rules is void on the grounds that the rule as published and acted on by the defendant has not been registered pursuant to s 21 of the Incorporated Societies Act 1908.

Elgin seeks by way of relief:

- (a) A declaration that the decision by the defendant to impose the levies as aforesaid was invalid.
- (b) An injunction restraining the defendant from making demand upon the plaintiff for payment of the \$200 advertising levy.
- (c) The costs of and incidental to this action.

DECISION

A. ADVERTISING LEVY

The Institute is an Incorporated Society incorporated under the provisions of the Incorporated Societies Act 1908 on 11 November 1975. Section 24 of the Motor Vehicle Dealers Act 1975 requires licencees to be members of the Institute. Section 29 authorises the Institute to make rules for the purposes therein stated, and sections 30 to 53 provide for the establishment of the Fidelity Fund and for its administration. The Rules of the Society were duly registered by the Registrar of Incorporated Societies in accordance with s 8 of the Incorporated Societies Act 1908 on 11 November 1975 and those rules remain the rules of the Institute.

The Institute subsequently in June 1977 took steps to alter its rules by adding a proviso to Rule 21 relating to levies (which rule will be referred to later). The approval of the Minister to the alteration which is required under

s.147 of the Motor Vehicle Dealers Act 1975 was duly given on 9 June 1977 but by oversight the Institute failed to register that alteration as required by s 21 of the Incorporated Societies Act 1908. The purported alteration was therefore of no effect and Rule 21 remains as originally registered. It provides:

" 21. Levies

In addition to the annual subscription provided for in Rule 19 the Council may in any year fix a levy to be paid by members, the terms and conditions upon which it is payable, and whether payment is to be made by all members, or by members of any one or more of the Divisions or by the members of any one or more of the Branches of the Institute. "

The purported amendment was designed to add to Rule 21 a proviso in the following words:

" Provided that no such levy shall exceed the sum of \$100 unless the prior consent of the Minister of Justice shall have been obtained. "

The chronology of events relating to the imposition of the advertising levy is this:

- 29/30 April 1985: The resolution was passed by the Institute "that a levy of \$200 per member be struck for the financial year commencing 1 July 1985".
- 3 May 1985: The Institute, in the belief that the proviso to Rule 21 was valid and that the approval of the Minister of Justice to the increase of the maximum levy from \$100 to \$200 was required, wrote seeking such approval.
- 16 May 1985 The Minister of Justice granted his approval.
- 14 June 1985 and subsequently notices of the levy were sent to members of the Institute.

Elgin raised two grounds upon which it is said that the advertising levy is invalid as not being made in accordance with the Institute Rules and/or the Motor Vehicle Dealers Act. They were:

1. The consent of the Minister was not obtained prior to the fixing of the levy at \$200 as required by the proviso. Alternatively:
2. The consent of the Minister was obtained by misrepresentation.

Neither of those grounds is sustainable. The proviso has no application because the purported alteration incorporating it was never registered and the proviso is of no effect. The consent of the Minister was not required under R.21 as it stands even though the Institute mistakenly thought such consent was required and in fact obtained it.

Fortunately, as it happened, the Institute in fixing the advertising levy acted quite properly in accordance with Rule 21 as it stands.

I do not need to deal with the arguments advanced by Mr Reed based on partial invalidity and severance as dealt with in Wade, Administrative Law (5th ed) p 302 and de Smith (4th ed) p 105. Section 21(3) of the Incorporated Societies Act 1908 makes it plain that an alteration of the rules takes effect only on registration and the proviso was never registered. It must be disregarded.

B. FIDELITY FUND LEVY

The resolution imposing the levy stated that "a Fidelity Fund levy of \$30 be struck for the year commencing 1 July 1985". The chronology of events in relation to that levy is as follows:

29/30 April 1985: The resolution was passed fixing the levy. At that time s 37(1) and (2) of the Motor Vehicle Dealers Act were in force. These subsections provided:

"s.37 (1) If at any time the Fund is not sufficient to satisfy the liabilities of the Institute in relation thereto, the Council may, by resolution, impose on every licensed motor vehicle dealer, for payment into the Fund, a levy of such amount as it thinks fit, not exceeding \$30.

(2) Notwithstanding subsection (1) of this section, no motor vehicle dealer shall be required during the whole period while he is carrying on business as a motor vehicle dealer, to pay by way of levy under this section a total sum exceeding \$150. "

11 June 1985: The Motor Vehicle Dealers Amendment (No.2) Act 1985 became law. It repealed subs (2) thereby removing the limit of \$150 on the total levies which could be levied on a member.

1 July 1985: The levy struck became payable in accordance with the resolution for the year commencing 1 July 1985.

On behalf of Elgin it was argued that the making of the levy was contrary to s 37(2) of the Motor Vehicle Dealers Act in that the levy of \$30 per member took the total Fidelity Fund levies paid by some members over the \$150 total limit.

At the time the levy was made on 29/30 April 1985 it is true that the Institute could not have compelled payment of the levy by some members because of the provisions of s 37(2). But the levy was not imposed forthwith. It was imposed for the year commencing 1 July 1985 by which date the Institute anticipated - correctly - that s 37(2) would be repealed and that thereafter there would be no total limit on the amount of a Fidelity Fund levy which could be imposed on all members. Section 37(2) was in fact repealed, as indicated earlier, on 11 June 1985.

The relevant point of time in relation to the argument advanced on behalf of Elgin is the date when the levy became payable, namely, 1 July 1985. The restriction in

the previous s 37(2) was on the dealer being required to pay a total sum of more than \$150. A dealer was not required to pay anything more before 1 July 1985 by which date s 37(2) no longer applied.

In my view, the Fidelity Fund levy was lawfully imposed.

C. RULES INVALID (Not approved by Minister of Justice)

Section 147 of the Motor Vehicle Dealers Act provides:

" No rules made by the Institute under any of the provisions of this Act shall come into force unless and until they are approved by the Minister. "

I am satisfied on the evidence before me that the Rules were approved by Mr Martyn Finlay, Q.C. the then Minister of Justice on 6 November 1975 prior to the Rules being registered on 11 November 1975.

D. RULE 21 VOID AS RULE AS ACTED ON NOT REGISTERED

The amendment to R.21 to add the proviso was not registered. The purported amendment was of no effect. The original R.21 remained. The Institute was entitled to rely upon the original R.21 as authorising the advertising levy. The fact that it thought it was acting under the amended Rule and that it obtained the approval of the Minister unnecessarily does not invalidate the Institute's action. It can rely upon the old Rule and on the evidence it has complied with it.

CONCLUSION

I find there are no grounds for holding that either the advertising levy or the Fidelity Fund levy were unlawfully imposed.

The plaintiff's application is dismissed. The defendant is entitled to costs. I will receive memoranda from counsel as to quantum.

D. Dawson Esq.

Solicitors for the plaintiff

T.J.Doole & Partners
(Auckland)

Solicitors for the defendant

Scott Morrison Dunphy & Co
(Wellington)