IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

File

M.No. 27/85

BETWEEN FRANCIS PETER EVANS

APPELLANT

A N D WILFRED PAULL HOLDINGS LTD.

RESPONDENT

Hearing : 7th March 1985

Counsel : S. Moore for appellant
C.B. Littlewood for respondent

Judgment : 10 May 1985

INTERIM JUDGMENT OF CHILWELL J.

Appellant is the District Registrar of Companies at Auckland (the Registrar). On 2nd September 1982 he laid three informations against respondent (the Company) alleging three offences against sections 132 and 463 of the Companies Act 1955 for failing to comply with section 130, namely, the requirement to file an annual return containing the specified particulars for the years 1979, 1980 and 1981. The alleged dates of the offences were :-

1979 year : Since 28th July 1979 to the date of the information.

1980 year : Since 28th October 1980 to the date of the information.

1981 year : Since 27th January 1982 to the date of the information.

On 10th December 1984 the Company entered a plea of guilty. The District Court Judge imposed a fine of $100 on each charge plus Court costs $20 and $30 solicitor's fee. The total penalty plus costs was $450. The Registrar appealed pursuant to section 115A of the Summary Proceedings Act 1957, having first obtained the consent of the Solicitor-General.

The Company was formed in 1956, and has since remained virtually dormant. A Mr. Beuth controls the Company. It was to be a holding company for a number of Mr. Beuth's then business affairs which were relinquished several years ago. Through his solicitors he has requested the Registrar to strike the Company off the register as a defunct company. See section 336 of the Act. The Registrar has advised the need to be satisfied on certain matters. I suspect that the conclusion of this litigation is one of them. While the Company can find the money to pay the fines and costs imposed in the District Court, counsel advised this Court from the bar that the Company could not pay large fines. In that event either the Company will have to be wound up or Mr. Beuth might have to pay the fines in order to avoid the personal embarrassment of a winding up based on inability to pay.

The three informations were part of a group of sixty laid against several unrelated companies as part of a campaign to compel compliance with the filing and registration requirements of the Act. The inference is that some companies and their officers had fallen into bad habits. The complicity (if any) of the office of the Registrar in this state of affairs was not debated at the hearing of this appeal. The sixty informations were first called on 1st November 1982 and adjourned to 15th November. On that day the District Court Judge dismissed them because he had formed the opinion that the offences alleged were minor offences to which the special procedure in section 20A of the Summary Proceedings Act applied. In reaching that opinion he misconstrued section 463 of the Companies Act which provided until 31st March 1981, a daily fine not exceeding $10, and from 1st April 1981, a daily fine not exceeding $100. The increased daily fine was enacted by the Companies Amendment Act 1980 which came into force on 1st April 1981. The Judge's misconstruction was that section 463 prescribed a maximum global fine of $100 and, by inference, $10 before the amendment. The Registrar selected these three informations for the purpose of an appeal by way of case stated on a question of law. The Company has suffered by being chosen for a test case because the remaining fifty seven informations against other unrelated companies remain dismissed. The Registrar cannot revive those informations because he did not appeal them. On the other hand the case stated (M.No. 1291/83) certified that the Company questioned

the jurisdiction of the Judge to hear and determine the informations. It was in response to that submission that he dismissed the informations as "nullities". On the 9th August 1984 Sinclair J. allowed the appeal. He took the view, based on the plain wording of section 20A of the Summary Proceedings Act and section 463 of the Companies Act, that the Company was liable on conviction to a fine exceeding $500. Sinclair J. said in his judgment :-

> "On a plain reading of that section it provides for a fine of $100 per day for every day during which the default continues and if one reads the information that explains why the information was issued in the way it was."

The questions of law were answered favourably to the Registrar, the appeal allowed and the informations remitted to the District Court for re-hearing. There were then several adjournments in the District Court so that the informations could be heard by the same District Court Judge. That was achieved on 10th December 1984. When the informations were called a plea of guilty to each was entered, counsel for the Company made submissions in mitigation of penalty, the Judge entered a conviction on each information and imposed the fines and costs referred to. On 21st December 1984 the Registrar gave notice of appeal against sentence, on the following grounds :-

> "(1) In terms of the maximum penalty provided by Section 463 Companies Act 1955 the penalty imposed is manifestly inadequate, and

(2) That the penalty imposed has not been based upon a daily rate in accordance with the requirements of Section 463, and

(3) In all the circumstances the sentence imposed was manifestly inadequate and/or inappropriate."

Because of the potentially very large penalties now faced by the Company, and out of deference to counsels' submissions, I reserved judgment.

The essential issue is the correct approach to be taken in calculating the fines. The opposing propositions were, calculation on a "per-day" basis or assessment on a "global" basis. Sections 132 and 463 of the Companies Act at the date of each information provided :-

"132. Time for completion of annual return - (1) Each annual return of a company required to be made under section 130 or section 131 of this Act shall be completed, signed by both a director and the secretary of the company, and delivered to the Registrar by the company within the time prescribed by section 130 or section 131 of this Act, as the case may be; and the Registrar shall register the same.

(2) If a company fails to comply with this section, the company and every officer of the company who is in default shall be liable to a default fine. For the purposes of this sub-section the expression 'officer' shall include any person in accordance with whose directions or instructions the directors of the company are accustomed to act."

"463. Provision with respect to default fines and meaning of 'officer in default' - (1) Where by any enactment in this Act it is provided that a company and every officer of the company who is in default shall be liable to a default fine, the company and every such officer shall, for every day during which

the default, refusal, or contravention continues, be liable to a fine not exceeding such amount as is specified in the said enactment, or, if the amount of the fine is not so specified, to a fine not exceeding $100.

'(2' For the purposes of any enactment in this Act which provides that an officer of the company who is in default shall be liable to a fine or penalty, the expression 'officer who is in default' means any officer of the company who -

'(a) Knowingly and wilfully authorises or permits the default, refusal, or contravention mentioned in he enactment; or

'(b) Knew or ought to have known of the default, refusal, or contravention and did not take all reasonable steps to secure compliance by the company with the requirements specified in or imposed under the enactment.'"

For the information periods prior to 1st April 1981 the maximum default fine was $10 and subsection (2) was confined to wilful in contrast to negligent defaults. Application of the maximum fines would have yielded the following results as at 15th November 1982 (date of first District Court hearing).

1979 year	28/7/79 to 31/3/81 612 days @ $10	$ 6,120	
	1/4/81 to 15/11/82 594 days @ $100	$59,400	
			$65,520.
1980 year	28/10/80 to 31/3/81 154 days @ $10	$ 1,540	
	1/4/81 to 15/11/82 594 days @ $100	$59,400	
			$60,940
1981 year	27/1/82 to 15/11/82 291 days $ $100		$29,100
			$155,560

The amounts given to the District Judge were greater. Counsel then appearing for the Registrar overlooked that the maximum default fine prior to 1st April 1981 was $10. He gave the following amounts to the Judge (E & O.E. I suspect) :-

1979 year	$120,500
1980 year	$ 71,500
1981 year	$ 28,900
	$220,900

Counsel for the Registrar contended that the District Judge ought to have imposed a separate penalty for each default day. He complained that the Judge failed to turn his mind to the correct application of default fine liability and that nothing in his sentencing remarks reveals the basis for his determination to impose a global fine of $100 on each charge. He observed, by way of example, that a daily rate applied to the 1981 year yields 34.602 cents per day :

$$\left(\frac{\$100}{291} = \$.3436\right)$$

Similar calculations for the 1979 and 1980 years with adjustment for the $10 periods would yield less. Counsel could find no New Zealand authority directly in point. He relied substantially on the South Australian Supreme Court decision in Leydon v Palm Green Pty. Ltd. (1979) 20 S.A.S.R. 304 (completely reported in [1978] A.C.L.C. 40 -461). In

that case several unrelated companies were separately convicted of an offence against section 158 of the Companies Act 1962-1974. Material parts of that enactment and of sections 379 and 380 read :-

> "158. (1) Every company having a share capital shall make a return containing the particulars referred to in Part I of the Eighth Schedule and accompanied by such copies of documents as are required to be included in the return in accordance with Part II of that Schedule and such of the certificates and other particulars prescribed in that part as are applicable to the company.
> .....
> (6) If a company fails to comply with this section, the company and every officer of the company who is in default shall be guilty of an offence against this Act.
> Penalty : Two hundred dollars. Default penalty."
>
> "379.(2) A person who is guilty of an offence against this Act shall be liable on conviction to a penalty or punishment not exceeding the penalty or punishment expressly mentioned as the penalty or punishment for the offence, or if a penalty or punishment is not so mentioned, to a penalty not exceeding one hundred dollars.
>
> (3) The penalty (other than a default penalty) or punishment, pecuniary or other, set out in, or at the foot of, any section or part of a section of this Act shall indicate that the offence is punishable upon conviction by a penalty or punishment not exceeding that so set out and where the penalty or punishment is expressed to apply to a part only of the section, it shall apply to that part only.
>
> "380. (1) Where in, or at the foot of, any section or part of a section of this Act there appears the expression 'Default Penalty', it shall indicate that any person who is convicted of an offence against this Act in relation to that section or part shall be guilty of a further offence against this Act if the offence continues after he is so convicted and liable to an additional penalty for each day during which the offence so continues of not more than the amount expressed in the section or part as the amount of the default penalty or, if an amount is not so expressed, of not more than twenty dollars.

(2) Where any offence is committed by a person by reason of his failure to comply with any provisions of this Act by or under which he is required or directed to do anything within a particular period, that offence, for the purposes of subsection (1) of this section shall be deemed to continue so long as the thing so required or directed to be done by him remains undone, notwithstanding that such period has elapsed.

(3) For the purposes of any provision of this Act which provides that an officer of a company or corporation who is in default is guilty of an offence against this Act or is liable to a penalty or punishment, the phrase 'officer who is in default' or any like phrase means any officer of the company or corporation who knowingly and wilfully -

(a) commits or is guilty of the offence; or

(b) authorizes or permits the commission of the offence."

After convictions the offences continued. The companies were subsequently fined additional penalties for having continued to fail to lodge returns. In particular Papers and Publications Pty. Ltd. was fined $85 additional penalty for being in default for 223 days. The Registrar appealed to the Supreme Court on the grounds first that the penalty involved a default penalty and that the Magistrate had failed to take into account the provisions of section 380 as to the calculation; secondly that the penalty was manifestly inadequate. Newman A.J. selected this particular appeal out of forty-eight in order to enunciate principles to be applied to all the appeals. He commented upon the limits of his appellate jurisdiction and stated the available grounds for interfering with the penalty :-

"As I understand the principles which I must apply, I cannot simply substitute my own ideas of penalty for the ideas of the learned Special Magistrate. Before I can in any way interfere, I believe it must be shown that he has made a mistake in law in the interpretation of sec. 380 or, alternatively, that the penalty is so inadequate that one is drawn irresistably to the conclusion that he must have made a mistake." (page 310)

Compare in New Zealand section 121 of the Summary Proceedings Act. The New Zealand Court of Appeal has prescribed certain principles for determining sentence appeals.

1. "The Court should not consider increasing a sentence unless either on a review of the facts and circumstances it is clearly of opinion that the sentence imposed was manifestly inadequate, or the Crown is able to point to some error in principle into which the sentencing Judge has fallen." R v Pue [1974] 2 N.Z.L.R. 392, 393.

2. "..... we think it correct to say that in practice the court requires the considerations justifying an increase to speak more powerfully than those which ordinarily might justify a reduction. In other words the court is more reluctant to increase than it is to reduce a sentence." R v Wihapi [1976] 1 N.Z.L.R. 422, 424.

3. "Moreover, this court must always be careful that it does not discourage the exercise of the fundamental right and responsibility of a trial judge, in appropriate cases, to allow the promptings of mercy to operate and, even in cases which normally call for a deterrent sentence, to conclude that the state is best served by taking a form of action calculated to encourage reformation." R v Wihapi 424.

4. "Two considerations must be kept in balance when sentencing an offender: the first is to impose a sentence which serves as a deterrent to others and demonstrates society's condemnation of the offender's conduct; the second, is to ensure that the sentence imposed is not markedly greater than the level of punishment imposed by other Judges in similar

cases." R v Pui [1978] 2 N.Z.L.R. 193 head note.

In considering the first ground of appeal in Leydon Newman A.J. held that section 380 of the South Australian Act provided for :-

> "an additional penalty for each day during which the offence so continues of not more than $20." (page 310)

The period involved was 223 days. The Magistrate had imposed a fine of $85. On the somewhat simple, but not necessarily inevitable, basis that 223 does not divide equally into 85 (the resulting daily fine being 38.1166 cents), the Judge considered it to be plain that the Magistrate had misapplied his mind to the penalty to be imposed under section 380 :-

> "It appears quite obvious that he has not considered the number of days nor has he applied his mind to the appropriate amount of money which should be imposed as a penalty for each day. This being so, I consider that he was wrong in law in his approach to this penalty, in that he did not direct his mind to the words of sec. 380 at all. I would allow this appeal." (page 310)

Counsel for the Registrar in the present appeal submitted that the same reasoning should apply here; nowhere did the District Court Judge turn his mind to section 463. He was aware of the fine being a daily one because Sinclair J. had so advised him. He was aware of the size of the potential

fine because he referred to the high penalties.

> "The penalties that have been calculated are in the very high figures."

Nevertheless the Judge did not apply any express daily basis: he simply fined the Company $100 on each charge. Counsel contended that the Judge ought to have imposed a different penalty for each day. As with Leydon there is no prima facie connection between the days elapsed and the fine imposed.

The second ground in Leydon was regarded Newman A.J. as an alternative. He approached it intuitively: the maximum penalty provided was $20; it should be considered in isolation and not compared with the penalty for the original offence. The Judge thought that an ordinary company continuing offender (i.e. one who offended continually because of the neglect of an officer) ought to be fined between $3 and $6 per day; that range would not be manifestly wrong. He said :-

> "It seems to me that an appropriate penalty would be considerably less than half of the maximum in the circumstances as suggested. I would think that the range which one would consider to be an appropriate penalty for the ordinary offence against this section would be between $3 and $6 per day. In other words, a penalty within that range would, to my mind, for the ordinary offence against this section be neither manifestly excessive nor manifestly inadequate." (page 310)

The Judge's arithmetic suggested a penalty range of between $669 and $1,338. Given that the respondent had been fined $85, the Judge was of the opinion that the penalty was manifestly inadequate. He decided that he was in as good a position to assess the fine as the Magistrate, split the difference, assessed a fine of $4.50 per day and imposed a default penalty of $1003.50.

Applying that "rule of thumb", but substituting a maximum fine of $100 for $20, the following would be the result for the 1981 year, for 291 elapsed days :-

Lower end of range: $15 per day = total penalty of $4,365.
Upper end of range: $30 per day = total penalty of $8,730.
Middle of range: $22.50 per day = total penalty of $6,547.50.

Therefore, counsel submitted, a default fine of $100 was manifestly inadequate for that year and similar calculations for the two earlier years lead to the same conclusion.

The District Court Judge's sentencing remarks do not encourage the conclusion of a day by day approach to default penalty although he was aware of the proposition. The material part of his remarks are :-

> "The penalties that have been calculated are in the very high figures and the fact that the company has not been trading publicly must be relevant so far as penalty is concerned. If the company was going to be wound up I think it would probably be to its advantage on penalty. Is that going to happen Sir?

DEFENCE COUNSEL.- Yes. I understand moves have been made with the company's accountants to have that done.

THE COURT.- I have no doubt if they do not follow that through other prosecutions will follow. I feel there must be some penalty imposed to discourage this failure by other companies, and I am going to impose fines of $100 on each charge, Court costs $20, Solicitors fee $30 on each charge."

With respect to him it can hardly be considered a deterrent to other companies to impose the equivalent of a maximum default fine of $100. for one day times three when two thousand two hundred and forty five days of default had elapsed by the time of the first hearing on 15th November 1982. If the method adopted by Newman A.J. is appropriate for assessment of default penalties in New Zealand the Court must inevitably conclude that the District Judge was in error in the same way as was the Magistrate in South Australia.

It is appropriate to mention other matters referred to by counsel for the Registrar. I accept his advice that there appear to be about sixteen instances in the Companies Act where the $100. maximum set by section 463 would apply and about twenty one other instances where a default fine is provided for and an amount expressly given. That is an indication of the importance attached by Parliament to continuing offences and of the importance of this particular case. The default fine prescribed when section 463 was enacted in 1955 was five pounds. This became $10 in 1969 (consequent upon decimalisation). It remained at that figure

until 31st March 1981. There were apparently no other increases in default penalties in the Companies Amendment Act 1980. Counsel submitted that the inference to be drawn from a ten fold increase is that Parliament intended that the relevant offences covered by section 463 be viewed seriously. Any enactment prescribing default penalty for a continuing offence will usually be regarded by the Court as a serious matter. In Waikato Carbonisation Ltd. v Waikato Valley Authority (1983) 4 N.Z.A.R. Barker J. regarded such an enactment as negativing Parliamentary intent that liability should be absolute. A ten fold increase in the daily rate must be significant, in my view. The Company's ability to pay a fine was not overlooked, as is apparent from the Judge's inquiry of counsel. That inquiry was required by section 45 of the Criminal Justice Act 1954 :-

> "45. Means of offender to be taken into consideration in fixing amount of fine - In fixing the amount of any fine to be imposed on any offender, the Court shall take into consideration, amongst other things, the means of the offender so far as they appear or are known to the Court."

Counsel for the Company invited this Court to consider the merits, in particular the history of the Company, the purpose of incorporation, the fact that it had never been in business and to consider the unfortunate Mr. Beuth, a man of good reputation, who will inevitably be tainted by association with a company unable to pay debts to the extent of the default fines advocated by following

Leydon. He assured the Court that the concession in regard to ability to pay made by counsel below was in relation to fines for single, i.e. non continuous, events. That concession was now withdrawn. It may be, but this is speculation on my part, that the District Court Judge was inspired by that concession to impose the maximum fine for one day in regard to each information. He may have seen that as the deterrent to other companies. At least it can be inferred that, if he had in mind amounts greatly in excess, he would have required evidence of the Company's means. There was none; nor is there for this Court. I suspect that these three informations were deliberately chosen out of sixty to take to appeal because the Court would be put to a very real test in prescribing principle in the face of the merits which prima facie support the approach of the District Court Judge. Specific submissions of counsel included first that a distinction is to be drawn between the schemes of the South Australian and New Zealand legislation. The South Australian enactment distinguishes a failure to file a return, and a continuing failure to file a return after conviction. The New Zealand enactment, by contrast, adopts a more general approach and makes no such distinction, secondly Leydon is distinguished because the companies involved were all actively trading; the public importance of accurate records is lessened in the case of dormant companies with little to no consequential harm to any one, thirdly this company has been specifically selected to provide a precedent and be held out as an example, fourthly the prosecution has

taken three years; it ought now to be treated as stale. Counsel helpfully drew attention to the United Kingdom parallel provision in section 440 of the Companies Act 1948 and to other New Zealand Statutes providing for default fines :-

> ~~Sections~~ 683 and 698 local Government act 1974,
>
> Section 34 Water and Soil Conservation Act 1977.
>
> Sections 172 and 173 Town and Country Planning Act 1979.
>
> ~~Section~~ 68 Marine Pollution Act 1974.
>
> ~~Section~~ 242 Public Works Act 1981.

Counsel were invited to inquire from sources such as Harbour Boards and The Marine Department of cases involving default fines for continuing offences. Counsel for the Company responded, after inquiry, that the Auckland Harbour Board is not aware of any such cases. Neither he nor appellant's counsel, from separate inquiries made of other counsel in Auckland, were able to find any unreported decisions of this Court concerning continuing offences, with the exception of the unreported judgment of Ongley J. in Superliquorman Hotels (Napier) Limited v Napier City Council (M.98/82, Napier Registry) which concerned an offence against section 173 of the Town and Country Planning Act 1977 which at that time read :-

> "173. Penalties for offences - Every person who commits an offence against this Act is liable on

> summary conviction to a fine not exceeding $2,000, and, if the offence is a continuing one, to a further fine not exceeding $100 for every day or part of a day during which the offence has continued."

In respect of one of the informations in the Court below a primary fine of $400 was imposed plus costs and solicitor's fees. For the continuing offence the District Court Judge used the inappropriate mechanism of ordering "costs" at a daily rate of $30 per day. On appeal, O'Regan J. noted in regard to that information :-

> "The order in respect of breach of the condition as to signs, if valid, would have applied each day from the 13th April 1982, the date of the alleged offence until the 3rd of September 1982, the date of hearing - 143 days. The daily rate was $30.00 so that the total penalty for the continuing offence was $4290. The continuing breach was flagrant. In commercial terms it was cheap advertising until, of course, nemesis descended. It is a heavy penalty but when the maximum prescribed by the statute is considered I find myself unable to hold that the amount is excessive. Accordingly I set aside the order made by the Judge in this behalf and in terms of subs (6) of s 121 of the Summary Proceedings Act 1957 I impose the further fine of $30 per day for the days between 13 April 1982 and 3 September 1982." (pages 13 & 14)

Subsequently the Court of Appeal ([1984] 1 N.Z.L.R. 56) quashed the imposition of the daily fine because the informations did not allege continuing offences; also because the offender had not been heard in mitigation. On the latter point Woodhouse P. noted that in the absence of any plea in mitigation the sentencing decisions of the District Court

Judge on all the informations involved $11,000. Unfortunately guidance so near to hand slipped away.

My own research has failed to unearth New Zealand authority directly in point. There are a few reported cases touching upon the continuing offence provisions in the Local Government Act, the Water and Soil Conservation Act 1977, and the Town and Country Planning Act 1977. Those relating to section 172 of the Town and Country Planning Act (Tokoroa Borough Council v Schuler [1984] 2 D.C.R. 206; Superliquorman Hotels v Napier City Council [1984] 1 N.Z.L.R. 58) and to section 34 of the Water and Soil Conservation Act (Wright v N.Z. Paper Mills 10 NZTPA 1; Waikato Carbonisation Ltd. v Waikato Valley Authority) do not assist. Barker J., in Waikato Carbonisation did note, at the end of his judgment, that the size of the default fine ($10,000 per day) was some indication of how seriously the legislature viewed the particular offence concerned, namely, pollution of streams and rivers. There are two early authorities in the local government legislative field. Russell v Watson (1907) 2 M.C.R. 142, concerned section 408(1) of the Municipal Corporations Act 1900 :-

> "..... every person guilty of a breach of any by-law made under this Act shall be liable to a penalty not exceeding twenty pounds; or where the breach is a continuing one, then to a penalty not exceeding five pounds for every day or part of a day during which such breach continues."

Mr. S.E. McCarthy S.M. summarized the principles to be applied to a case under that section, as follows :-

> "If the offence is once for all complete by some act or omission, then you are confined to the day on which that act or omission was committed. If, on the other hand, the offence is running on from day to day, there is not a separate offence giving rise to distinct penalties for each day that the offence continues, but one offence extending from the time when the unlawful state of things commenced until it ceases, and the penalty is to be determined by multiplying the number of days by the quantum of penalty per diem fixed by the Court." (page 144)

See now Channell v Statistics Department [1980] 1 N.Z.L.R. 448 and Malungahu v Department of Labour [1981] 1 N.Z.L.R. 668. The Magistrate also considered how to apply the enactment if, otherwise construed, it created separate daily offences :-

> "..... clearly section 408 engrafts an exception on section 47 of 'The Justices of Peace Act, 1882,' and on our assumption the result is for all practical purposes the same because section 408 contemplates the alleging of more than one offence in the same information. The question is merely one of procedure, and not of principle, and the balance of convenience would seem to be in the direction of dealing with a continuing offence in so far as the matters given in evidence at the hearing are concerned once and for all in the one information." (page 144)

The Magistrate's choice of language in imposing penalty is noteworthy :-

> "The defendant is convicted as for a continuing

offence and fined 3d for each one of 96 days during which the offence was proved to have continued, in all 24s. She will also be ordered to pay the informant's costs as follows, namely 7s costs of Court, and 42s solicitor's fee." (page 144)

Pratt v Samuels (1947) 5 M.C.D. 638 concerned section 370(1) of the Municipal Corporations Act 1933. The main issue was whether the enactment empowered the Court to inflict a continuing fine "in futuro". It was held that it did not. In the course of his judgment Mr. R. Ferner S.M. cited the following extract from section 257 of the English Local Government Act 1933 (his italics) :-

> "By-laws to which the last preceding section applies may contain provisions for imposing on persons offending against the by-laws reasonable fines, recoverable on summary conviction, not exceeding such sum as may be fixed by the enactment conferring the power to make the by-laws, or, if no sum is so fixed, the sum of five pounds, and in the case of a continuing offence a further fine not exceeding such sum as may be fixed as aforesaid, or, if no sum is so fixed, the sum of forty shillings for each day during which the offence continues after conviction therefor." (page 640)

Dealing specifically with the italicised words, the Magistrate was of the opinion that :-

> "..... the words relied upon mean no more than that, for every day upon which the breach is proved to continue, a person is liable to a daily penalty. Even if there were doubt about it, the benefit of the doubt must be given to the defendant." (page 640)

Emphasis is added because of a doubt I have whether the calculations can in this case extend beyond the date of each information.

Because informant's counsel relied upoon it the Magistrate discussed the English by-law case of James v Wyrill (1884) 48 J.P. 725. The relevant by-law was to the following effect :-

> "..... if the owner or person intending to construct any new building fail to give notices, etc, or construct a building contrary to the bye-laws, he shall be liable, for each offence, to a penalty not exceeding five pounds, and shall pay a further sum not exceeding 40 shillings for each day such building shall continue or remain contrary to the said bye-laws." (page 726)

Lord Coleridge C.J, Stephen J. concurring, upheld a lower Court conviction and penalty of 40 shillings and costs and a further sum of 20 shillings for every day during which such work should continue or remain contrary to the provisions of the bye-laws. A point was taken that the conviction was bad because one offence only had been charged whereas the conviction in reality amounted to two distinct penalties. Lord Coleridge C.J. saw no difficulty in the conviction including a fixed sum and a further sum according to the number of days :-

> "That is merely a matter of computing the total sum which the penalty is to amount to, and they are not to be broken into two parts and called separate penalties or separate offences. I think, therefore,

there is nothing wrong in this conviction." (page 726)

The importance of James v Wyrill lies in acceptance of assessment by daily rate. Another case cited by Mr. R. Ferner S.M. was Airey v Smith (1907) 76 L.J.K.B. 766 (Lord Alverstone C.J., Darling & Phillimore JJ.) which approved James v Wyrill. The precise conviction approved in Airey v Smith was :-

> "..... to pay a penalty of five pounds, and a further penalty of one hundred pounds, being two pounds for each day for fifty days - namely, from August 18, 1906, to October 8, 1906."

The New Zealand and English authorities assist if only because they show a consistent pattern in dealing with penalties for continuing offences in a commonsense way.

The suggested distinction between the New Zealand and South Australian enactments under consideration in this appeal is not in my opinion material to the issue. Plainly there are differences in wording. The duty to file a return is imposed by section 158 of the South Australian Companies Act, and the provision dealing with a failure to file states :-

> "158 (6) If a company fails to comply with this section, the company and every officer of the company who is in default shall be guilty of an offence against this Act.

Penalty: Two hundred dollars. Default penalty."

The default penalty section in its material parts reads :-

> "380.(1) Where in, or at the foot of, any section or part of a section of this Act there appears the expression 'Default Penalty', it shall indicate that any person who is convicted of an offence against this Act in relation to that section or part shall be guilty of a further offence against this Act if the offence continues after he is so convicted and liable to an additional penalty for each day during which the offence so continues of not more than the amount expressed in ther section or part as the amount of the default penalty or, if an amount is not so expressed, of not more than twenty dollars.
>
> (2) Where any offence is committed by a person by reason of his failure to comply with any provisions of this Act by or under which he is required or directed to do anything within a particular period, that offence, for the purposes of subsection (1) of this section shall be deemed to continue so long as the thing so required or directed to be done by him remains undone, notwithstanding that such period has elapsed."

I cannot recognise any difference of substance between that scheme and the New Zealand version. It is clear, notwithstanding the difference pointed out by counsel for the Company, that the continuing offence is punishable by a daily fine. And it is the continuing offence with which the present case is concerned.

The corresponding Statute in the United Kingdom was re-enacted in 1980 by section 80(2) of the Companies Act of that year. It is instructive to compare the old and the new. The old section (section 440 Companies Act 1948) was

virtually identical with the New Zealand enactment :-

> "440. Provision with respect to default fines and meaning of 'officer in default'
>
> (1) Where by any enactment in this Act it is provided that a company and every officer of the company who is in default shall be liable to a default fine, the company and every such officer shall, for every day during which the default, refusal or contravention continues, be liable to a fine not exceeding such amount as is specified in the said enactment, or, if the amount of the fine is not so specified, to a fine not exceeding five pounds.
>
> (2) For the purpose of any enactment in this Act which provides that an officer of a company who is in default shall be liable to a fine or penalty, the expression 'officer who is in default' means any officer of the company who knowingly and wilfully authorises or permits the default, refusal or contravention mentioned in the enactment."

The material parts of the new section read :-

> "80(2) Where any enactment to which this subsection applies imposes liability to a default fine on conviction of an offence after continued contravention, then, if after a person has been summarily convicted of that offence the original contravention is continued, he shall be liable on a second or subsequent summary conviction of that offence to the fine specified in the enactment for each day on which the contravention is continued instead of to the penalty which may be imposed on the first conviction of that offence."

That enactment is closer to its South Australian than its New Zealand counterpart. Like the South Australian Act it clearly distinguishes the first contravention from the continuation of that contravention, making the two events

separate offences. The distinction does not help the Company. It tends to add weight to the argument of counsel for the Registrar that if the offence is a continuing one it must be punished on a "per-day" basis.

Leydon's Case is central to the submissions of the Registrar's counsel. In my respectful opinion the reasoning of the Judge on the first of the two grounds considered is sound. While perhaps the route used by him was not the most scientific, there can be no doubt that the result achieved was correct. The then statutory scheme in South Australia precluded a conclusion that the penalty could be assessed on a global basis. With reference to the second ground, namely that the penalty is manifestly inadequate, such is the nature of the individual value judgment involved that no one case can safely serve as a precedent for another. It is possible to approve of the method used while disputing the result achieved. In the end, a New Zealand court must decide what level of daily fine is appropriate, in all the circumstances. Those circumstances will include the number of elapsed days, the circumstances of the company, the seriousness of the offence, the degree of culpability and the amount of the resulting total fine. The Court will choose the appropriate amount for the relevant equation. The method of choosing the amounts in Leydon does not necessarily apply to the instant case.

I am satisfied that the default fines should have

been assessed on a daily basis. Section 463 contains no ambiguity. The language is plain. Such authorities as I have consulted support that conclusion; in particular Leydon. There is no material distinction between the South Australian and New Zealand enactments. Nothing of which I am aware empowered the District Court Judge to impose a global fine. In my judgment the Judge ignored the method of calculation stipulated by section 463, thereby erring in law. He was aware of the per day method but there is no outward sign that he applied it. Indeed it was not seriously contended that he had.

If the default fines at $100 per information are converted to a daily basis by dividing each fine by the elapsed days in no instance does a daily fine come up to 50 cents. On the sentencing information before the District Court Judge, outlined to me on this appeal, I am clearly of the opinion that the default fine on each information was manifestly inadequate. Some reduction for the Company's lack of means may have been justifiable. In that regard the principles of sentencing are clear. In aid of section 45 of the Criminal Justice Act 1954 the following passages in Thomas Principles of Sentencing 2 Ed. are relevant in New Zealand :-

> "When the sentencer has determined that the offence does not require a custodial sentence, and the facts of the offence considered in the abstract would justify a fine of a given amount, the next question is whether the proposed fine can be paid by the offender within a reasonable time. Although the

principle is not expressed in statute so far as the Crown Court is concerned, a fine should not normally be imposed without an investigation of the offender's means, and the amount appropriate to the offence considered in the abstract should be reduced, where necessary, to an amount which the offender can realistically be expected to pay. The Court has stated that 'it is axiomatic that where it is decided not to impose a custodial sentence, the court should be careful in imposing a fine not to fix that fine at such a high level that it is inevitable that that which the court has decided not to impose, namely a custodial sentence, will almost certainly follow'." (page 320)

"In assessing the means of the offender the Court may have regard to his expected income over the likely period of payment, but the period of payment should not be allowed to extend over an excessive duration. While no precise limit has been recognized (although the Court has stated that a period of eight years is excessive) it appears to be unusual to allow the period of payment to exceed twelve months. The sentencer may also take into account any capital assets which the offender possesses, but must bear in mind any charges against those assets." (page 321)

"It is wrong in principle to assess a fine on the assumption that someone other than the offender will provide the means to pay it." (page 322)

"Although the sentencer is under an obligation to ensure that the fine is reasonably related to the offender's income and resources, he is entitled (although not bound) to rely on information provided by the offender. Where the offender provides information which leads the sentencer to over-estimate his resources, he cannot complain that the fine or other financial order is excessive." (page 322)

See also 11 Halsbury's Laws of England 4 Ed. paragraph 520 footnote (1), Archbold, Criminal Pleading Evidence & Practice 41 Ed. paragraph 5-108 and (1984) 1 Stone's Justices' Manual

574-576. This Court has nothing to assist it on this question. If the potential fines were not as large as they are, it may have been proper to have assumed ability to pay but, as it seems to me, the sentencing of this Company was not given proper attention, either in regard to the correct approach to daily rates or to the Company's means. If the Judge had fixed a daily rate and mutliplied it by the days elapsed it would have become plain that the assertion that this dormant Company, in a condition of incipient winding up, had ability to pay, was given inadvisedly or by the application of a wrong principle. I have considered remitting the whole question of sentencing to the District Court for re-hearing in terms of section 131 of the Summary Proceedings Act, but the delay involved would not be just. I propose to give the Company the opportunity to educate the Court in terms of section 45 of the Criminal Justice Act. Because this will involve a further hearing I invite further assistance from both counsel generally and specifically upon the following questions :-

1. Does the word "since" in each information exclude the first offence date specified?

2. Did the continuous period in each information cease on the date each information was sworn?

3. If the answer to 2 is in the negative on what date did the continuous period cease?

4. What was the general scale of fines imposed for offences of this character on 10th December 1984 and now?

5. What relevance, if any, is the delay in filing the informations and the further delay since the first hearing on 15th November 1982?

In regard to questions 2 and 3 the word "since" may be of some relevance in the context "..... I have just cause to suspect and do suspect that ..... (the Company) ..... within the space of three years last past, namely since 28th day of July 1979 to the date hereof", to take one information as an example. The chapter in Thomas Principles of Sentencing 2 Ed. commencing at page 29 "The Principles of the Tarriff" may assist counsel with question 4. Section 11 of the Companies Act may be relevant to question 5. The only way to achieve justice in this case is to re-hear it in this Court.

The question of delay aside, it is my judgment that the correct formula in respect of each information is to fix the appropriate daily rate, multiply it by the appropriate number of days, arrive at the total fine and make such adjustment as the Court considers proper in terms of section 45 of the Criminal Justice Act. The question of delay may have a bearing on the daily rate or it may go further than that. For example, counsel for the Company invited this Court to regard the prosecution as stale and to dismiss the

appeal on that ground alone. Authority for that proposition should be researched.

I order a re-hearing of each information in regard to sentence. The re-hearing will commence de novo. The Registrar is required, after consultation with counsel, to make a fixture. Meantime my determination remains reserved for further consideration.

9th May 1985.

Solicitors :

Appellant : Crown Solicitor, Auckland.

Respondent : Greig, Bourke, Kettelwell & Massey, Auckland.

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

M.No. 27/85

BETWEEN FRANCIS PETER EVANS

APPELLANT

A N D WILFRED PAULL HOLDINGS LTD.

RESPONDENT

Com Apt
Pet Nom Wellington
L Jones

JUDGMENT OF CHILWELL J.

Reserved decision delivered this 10th May 1985 at 12 pm by me:-

L Mackenzie

Copy decision received

VA Weaver
P.P. Mr Moore

Shannah Soanes
Mr Littlewood