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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

1400

M.27/85

BETWEEN FRANCIS PETER EVANS

Appellant

A N D WILFRED PAULL HOLDINGS LIMITED

Respondent

[redacted]

Hearing: 7 March 1985

Interim Judgment: 10 May 1985

Written Submissions: 24 July 1985, 8 October 1985 and 14 July 1986

Counsel: S Moore for appellant
C B Littlewood for respondent

Final Judgment: 24 September 1986

FINAL JUDGMENT OF CHILWELL, J.

Appellant is the District Registrar of Companies at Auckland (the Registrar). On 2 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 28 July 1979 to the date of the information.

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

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

Following a guilty plea on 10 December 1984 the District Court Judge imposed a fine of $100.00 on each charge plus Court costs $20.00 and $30.00 solicitor's fee. The total penalty plus costs was $450.00. The Registrar appealed pursuant to section 115A of the Summary Proceedings Act 1957, having first obtained the consent of the Solicitor-General. The grounds for the appeal, which was against sentence, were :

> "(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."

The appeal came on for hearing before me on 7 March 1985. I delivered an interim judgment on 10 May 1985. I held that the offence, being a continuing offence, was punishable by a daily fine, that the sentencing Judge had not followed the method of calculation stipulated by section 463 thereby erring in law, that although he was aware of the per day method there was no outward sign that he had applied it, and that the default fines imposed were manifestly inadequate. In coming to those conclusions I found the judgment of Newman A.J. in the South Australian Supreme Court

case of Leydon v Palm Green Pty Ltd and Others (1979) 20 S.A.S.R. 304; [1978] ACLC 40-461, particularly helpful.

Instead of remitting the determination to the District Court for rehearing, I considered that the delay involved would not be just. I sought submissions from counsel to assist me in sentencing the Company. Because Mr Beuth, the controlling director of the Company, fell upon bad financial times and counsel for the Company was unable to obtain instructions, the last of the written submissions was not provided until 14 July 1986. In my interim judgment I had invited both counsel to make submissions on 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 10 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 15 November 1982?

Before considering the detailed submissions on behalf of the Registrar, I will restate such of the background of the Company as I consider relevant to sentence. Since incorporation in 1956, it has remained virtually dormant, so I was told on 7 March 1985. It was to have been a holding company for the business interests of Mr Beuth, but this never eventuated. At at the date of the appeal hearing there was

an application by Mr Beuth before the Registrar for the Company to be struck off the register as a defunct company. The Registrar would not strike off until satisfied on certain matters including, I suspected, the outcome of this prosecution. I was told by counsel for the Company that it could find the money to pay the fines imposed by the District Court, but not large fines; large fines would have resulted in the winding-up of the Company or payment by Mr Beuth so as to avoid the embarrassment of being associated with a company being wound up for inability to pay. A relevant matter is that this appeal has been brought by the Registrar as a test case for the purpose of establishing some sentencing principles. Sixty informations had been laid against various unrelated companies. They were all dismissed because of a mis-construction by the Judge of section 463 of the Act in relation to the minor offences procedure. The Registrar appealed against the dismissal only of the three informations the subject of this appeal. Sinclair J. determined that the informations should not have been dismissed. They were remitted to the District Court for rehearing. At the rehearing on 10 December 1984 the Company was convicted and the penalties imposed which are the subject of the present appeal. The Registrar could not revive the remaining fifty-seven informations because he did not appeal against their dismissal. He preferred to take these three informations to appeal as a test case.

Mr Beuth swore an affidavit on 4 July 1986 as to the Company's and his own means. He deposed that the Company has not traded since 1976, that the Company has no bank account, no cash, and is without assets, and that Mr Beuth was adjudged bankrupt on 2 July 1986. It follows that neither he nor the Company is in a position to pay any fine that I may impose. Mr Beuth stated his belief that because the Company had not traded since 1976 no harm had been done to any person by virtue of returns not being filed.

Counsel for the Company stated in a memorandum that he did not take issue with the submissions advanced by counsel for the Registrar in answer to the five questions. The submissions of counsel for the Company were directed to the fact that this was a test case. He contended that it would be grossly unfair to single out the Company for a very significant fine, especially in the light of an apparent tariff in the District Courts at Christchurch, Nelson and Blenheim to fine approximately $100.00 per charge, and not per day, for failing to file annual returns. He submitted that the expense to which the Company was put in arguing the appeal makes it inappropriate to impose any fine. He further submitted that this is an appropriate case to award costs to the Company under section 8 (6) of the Costs in Criminal Cases Act 1967.

I turn now to the submissions made by counsel for the Registar in answer to the questions posed in my interim judgment.

(1) The meaning of "since" as used in the information:

Each of the informations alleged offences being committed "since" specified dates. I expressed a doubt whether or not it was appropriate to impose a fine for the first date specified in each information. In other words, did the daily fine commence on the following day?

I have consulted the Shorter Oxford Dictionary and the Random House Dictionary of the English Language. There is no need to repeat what is stated there. It appears that, in its ordinary usage, when the word "since" is used in restrospect to refer to a stated time or event that stated time or event is excluded. This meaning is also reflected in the authorities cited to me by counsel for the Registrar: Raikes v Ogle [1921] 1 KB 576; W H Brakspear and Sons Ltd v Barton [1924] 2 KB 88; Marren v Dawson Bentley & Co Ltd [1961] 2 QB 135.

Putting this into the context of section 130 (1), as it was before the 1982 amendment, which came into force on 1 January 1984, it required a return within 30 days after the annual general meeting or the expiry of the time allowed for the annual general meeting or the making of entries in the minute book in accordance with section 362 (2). On the day following the expiry of the 30 day period allowed by section 130 (1), a company which had not filed its return would be in breach. To allow for a conviction and penalty for that

first day of breach, the information must allege an offence since the 30th day. Thus, assuming this principle has been applied correctly in the present case, the 28 July 1978 would be the 30th day. If a return had been filed on the 30th day it would have been filed within the 30 days allowed by section 130 (1) and there could be no conviction.

For the reasons given I find that the daily fines commence on 29 July 1979, 29 October 1980 and 28 January 1982.

(2) and (3) The date on which the continuous period of offending ceased:

Counsel for the Registrar dealt with questions 2 and 3 together. A number of authorities were cited in support of the proposition that this is a continuing offence, but they all related to the question whether an information was laid within statutory time limits. They did not decide the point in issue in this case, although they confirm that the offence continues so long as the statutory obligation remains unperformed. The cited authorities were: Re Wolter [1923] NZLR 328; Maintenance Officer v Griffin [1973] NZLR 429; R v Industrial Appeals Court [1965] VR 615, Brammer v Deery Hotels Pty Ltd [1974] 3 ALR 621 and Pratt v Samuels (1948) 5MCD 638. While it is correct that in the present case the offences in each information continued until each annual return was filed on 11 November 1982, I cannot see this as allowing a penalty for any time beyond the time specified in each information (without amendment).

O'Regan J., in his unreported decision of Super-Liquorman Hotels (Napier) Limited v Napier City Council (2 December 1982; M. No.98/82; Napier), dealt with an information which included the phrase "it being alleged that such an offence is a continuing offence". This was seen by the Judge as bringing directly to the defendant's notice the provisions of the relevant section, and notice that it was intended to seek the penalty provided for the continuing offence. He was reversed by the Court of Appeal, [1984] 1 NZLR 58, because it was wrongly assumed that the offence was a continuing offence whereas it was an offence completed on a particular day. In the present case, there is no doubt about the continuing nature of the offence and each information alleged the commission of an offence since a specified date "to the date hereof". Each information was sworn on 2 September 1982. The annual returns were filed on 11 November 1982, four days before the date of the first hearing.

Counsel for the Registrar contended that the penalty should run until 11 November 1982, but excluding that day. I do not agree. A Court is not entitled to convict a defendant upon a charge which has not properly been put before the Court. Here the particulars of each charge expressly limited the period of the offence to the date of the information. No notice was given of intention to seek any penalty beyond 2 September, as was given by the words which

appealed to O'Regan J. in the Superliquorman Hotels case. No application was made to amend the information. Section 17 of the Summary Proceedings Act 1957 requires that :

> "17. Every information shall contain such particulars as will fairly inform the defendant of the substance of the offence with which he is charged."

Insofar as there was an attempt by the Registrar to prosecute for any breach since 2 September 1982, there were not sufficient particulars as required by section 17.

I find no reason to exclude the day of swearing the information from the calculation of daily fines. The first information, for example, alleged an offence since 28 July 1979 "to the date hereof". Given the meaning of "since" this is an allegation that there was a continuing offence, first committed on 29 July. An information could have been sworn on 29 July in respect of the offence committed, alleging an offence since 28 July to the date hereof which, though maladroit, would clearly allege an offence on 29 July. If the annual return had been filed on 29 July that would not have avoided the commission of an offence as the time limit would have expired the previous day.

For the foregoing reasons, I find that the continuous period in each information ceased on 2 September 1982.

(4) Scale of fines generally imposed as at 10 December 1984 and now:

Counsel for the Registrar submitted a helpful table of all the fines imposed in the District Courts at Christchurch, Nelson and Blenheim for prosecutions under sections 132 and 463 over 1983 and 1984. Registrars of Companies in other areas have not been prosecuting because they await the outcome of this appeal. Counsel for the Company did not take issue with the table. It shows that the fines imposed ranged from $25.00 (with $20.00 costs and $40.00 solicitor's fees) up to $200.00 with similar costs and fees. The most common penalty appears to be $100.00 for each charge, with costs and fees. For example, in Christchurch four companies were fined in March 1984 $100.00 plus costs $20.00 and solicitor's fees $40.00 on each of 6, 8, 6 and 2 charges respectively; two presumably related companies were fined $25.00 on each of 8 charges; and five presumably related companies were fined a total sum of $775.00 on 10 charges.

Throughout the three Court Districts the penalties do not appear to have been assessed on a daily basis. If each information alleged a continuing offence the apparent global basis would be erroneous in law. The table does not persuade me that the District Courts have set a daily tariff; they appear to have set an annual tariff of $100.00 which is the maximum daily rate. The sentencing Judge in the present case seems to have followed that tariff. For the reasons given in my interim

judgment, that was the wrong approach. Given that Registars are withholding prosecutions pending my decision there are no fines being imposed now; so there is no answer to the second part of question 4.

(5) Relevance of delays in filing Informations and since first hearing in November 1982:

Counsel for the Registrar submitted that an important element is whether a defendant is likely to suffer serious prejudice by reason of the delay. Such prejudice may take the form of a dimming of the memories of witnesses, which is not present here because the Company pleaded guilty, or the action hanging over the head of a defendant indefinitely, where a long delay may in itself be prejudicial. He cited, by way of analogy, Fitzgerald v Beattie [1976] 1 NZLR 265 (C.A.) which was a civil claim for damages for personal injuries. The question of delay in regard to sentencing is referred to by Thomas: Principles of Sentencing 2 Ed. in the chapter on Mitigation. Under the sub-title Grievances Arising in the Course of the Proceedings p.220 he states :

> "Other aspects of the conduct of proceedings which may justify some mitigation of a sentence include long delays between the discovery of the offence and the commencement of the prosecution, with the result that the offender suffers a prolonged period of suspense and anxiety."

Insofar as a company can be affected by suspense and anxiety, there was no evidence that the Company suffered any.

It was submitted that any delay in filing the informations was explicable and excusable and did not prejudice the defendant because each offence was still being committed and continued to be committed until four days before the first hearing in the District Court. No reason was supplied for the delay, nor any evidence tendered. I do not accept that a delay in regard to a continuing offence necessarily produces no prejudice for a defendant. If that principle were accepted it would follow that no matter how long the delay might be in laying an information, so long as the offence was still being committed, the delay would be irrelevant. While not suggesting it is present here, there are certain financial advantages to the Registrar to allow a delay to continue. Moreover, because the offence is a continuing one, rather than a series of separate daily offences, an information laid more than three years after the commencing day of the offence is not barred by the operation of section 465 (2) of the Companies Act. That section is an indication of the intention of the Legislature that an information be laid within three years of the facts constituting the offence. Any unexplained delay beyond three years is to my mind prima facie excessive and, in the absence of explanation, can be taken into account in mitigation. Whether or not it would justify a nominal daily penalty for any period of the breach proved to have occurred earlier than three years before the laying of the information must depend on the circumstances of the particular case. In the present case the three year period goes back to 2

September 1979; so only the first information contains days outside the period - i.e. from 28 July 1979 to 2 September 1982 = 35 days.

I do not consider that the longer a company continues in its failure to file an annual return, its degree of culpability increases through time or that the mere flow of time is any reason to increase the daily penalty. A penalty increase arises with the flow of time by the fact of the penalty being charged daily. The Legislature has imposed a system of annual returns and appointed officials to police the system. In particular, section 11 of the Act empowers the Registrar to apply to the Court for an order directing a company or its officers to make good any default after the service of a notice requiring compliance with any provision of the Act. There are grounds for the opinion that the Legislature expects Registrars of Companies to take action in respect of annual returns relating to any one year before the returns for the next year are due. In the absence of any explanation it is my opinion that a delay of more than one year in laying an information could be relevant to the penalty to be imposed. I do not mean to suggest that there is a duty imposed upon Registrars of Companies to lay an information within a year, but failure to do so could be a matter to be considered in mitigation in all the circumstances of a case.

The final submission of counsel for the Registrar, and very fairly advanced by him, was that delay

subsequent to the hearing is relevant to the imposition of penalty. Counsel referred to the fact that this appeal has been brought as a test case; the Company was specifically selected from many others, against which the informations had been dismissed and were not now capable of revival. This has the result that the Company stands alone nearly four years after similar offenders were discharged. The lapse of time between 15 November 1982 and the filing of this appeal on 16 January 1985 is somewhat more than normal, and is very relevant to penalty. It highlights an unjust disparity between the treatment of these three charges and 57 others involving other companies. Those companies suffered no penalty because the informations remained dismissed on a technical procedural ground.

(6) The Penalty in this Case:

In my interim judgment I dealt at some length with the decision of Newman A.J. in Leydon v Palm Green Pty Ltd (supra). Under the South Australian Act, the default penalty was $20.00. It is helpful to cite a passage from the judgment, part of which appears in my interim judgment :

> ".... one must consider the ordinary case of a company which has been prosecuted and which has simply failed to put in its return through the default of a person whose responsibility it was to attend to such a task whoever that person may be. 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 his section be neither manifestly excessive nor manifestly inadequate." (page 310)

Thus for an ordinary offence against the South Australian equivalent of section 130 (1), with no special factors going either way, the Judge decided to impose a penalty substantially less than half the maximum. The penalty finally imposed in each of the 48 appeals was $4.50 per day as against a maximum of $20.00. He determined that each offender committed what he described as an ordinary breach of the enactment. $3.00 was 15%, $6.00 30%, and $4.50 25% of the daily penalty of $20.00. It seems to me that in choosing a range between 15% and 30%, to be applied to a relatively small amount of $20.00, the Judge made sufficient room for sensitivity on the party of the Court to respond to the circumstances of the offending and to the reasons advanced by the various companies for non-compliance.

As previously mentioned, in Leydon the Judge dealt with 48 appeals against various companies. All received the same penalty of $4.50 notwithstanding that in some cases specific reasons were advanced for the failure to file returns and that in some cases the company was not represented. In one case the company had relied upon an accountant, who had assisted the Companies Office and the Attorney-General's Office in relation to companies prosecutions and so had a reputation for reliability. He had failed to file annual returns for companies for whom he did spare time work, and lied to the directors of the

company, saying the annual returns had been filed. This was not regarded as relevant to penalty; the case was regarded as ordinary. But the Judge observed that there was no attempt to defeat the revenue authorities because annual income tax returns were filed. In another case a director was said to be careless when there had been a complete change in the shareholders and directors of the company and, being unaware of the breach, the director still did not become aware after the summons had been served on the company. In circumstances of that type of irresponsibility, one could be excused for applying the higher range of the tariff. Reasons given in other cases included the sickness of those responsible for the company, or the replacement of secretarial staff without advising the new staff the return had not been filed. It may be thought that such factors are relevant to the penalty and that the Judge failed to make use of the flexibility of his tariff range. Deserving and less-deserving companies appear to have been treated alike. The judgment indicates that the Judge had in mind the concept of an ordinary offence. He did not consider that the individual factors raised affected his concept of the ordinary offence. That was, of course, a decision entirely within his discretion and made within the context of judicial sentencing policy in South Australia. The Judge could not have been criticised for varying individual sentences within the limits of the range, but he clearly decided that there were insufficient individual circumstances to justify treating the offences

differently. It is implicit in his judgment that he regarded each offence as average within the range: he fixed the penalty at the mean between $3.00 and $6.00.

In New Zealand, section 463 prescribed a fine of $10.00 per day until 31 March 1981 and $100.00 per day thereafter. Although the penalties are now undoubtedly severe, they are simply avoided by filing an annual return and paying the annual return fee, which at the time those returns were required to be filed was $15.00 per $10,000.00 of share capital, or, if in doubt, by making a search at the Companies Office. The Legislature has provided for a continuing penalty variable from nil to $100.00 per day. The intention is that in the worst possible example of the offence a Judge will consider it appropriate to impose a daily fine of $100.00. There will be the most minor possible examples where the Judge might determine to convict and discharge or to apply section 19 of the Criminal Justice Act 1985. There will be typical examples of the offence, such as was envisaged by Newman A.J., where the circumstances of the offending and the reasons advanced in mitigation have a common theme. And there will be examples of the offence which are not sufficiently minor to warrant discharge but which do not qualify for the lower range of the tariff. The range within the tariff should reflect the gravity of the offender's conduct. The choice of the range can be nothing more than intuitive. I would fix the limits of the range at 5% and 35%, i.e. at between 50 cents

and $3.50 per day for offences up to 31 March 1981, and between $5.00 and $35.00 per day for offences after that date.

In the present case the periods under consideration are as follows :

1979 year:	28/7/79 to 31/3/81	612 days
	1/4/81 to 2/9/82	520 days
1980 year:	28/10/80 to 31/3/81	154 days
	1/4/81 to 2/9/82	520 days
1981 year:	27/1/82 to 2/9/82	217 days

In regard to the 1979 year, I regard the delay in laying the information outside the normal three year limitation period as excessive. I would impose a nominal fine of 10 cents per day for the period of 35 days. In fixing the tariff for the remaining days in the three informations, it is my opinion that, putting aside other factors yet to be considered, the facts of this case bring it within the middle of the range. The fact that the Company ceased to trade in 1976 does not, in my view, require a tariff assessment of less than the median. That fact does not seem to me to have any real relevance to the difficulty or otherwise of complying with the statutory duty. For the periods up to 31 March 1981 I would fix the daily fine at $2.00 and for the ensuing periods at $20.00. I consider that, in the absence of any explanation by the Registrar for his failure to prosecute at the end of the first year, the tariff should in this case be reduced by one half for the days

in the second year before the date of the information and by half again for the days in the third year before the date of the information. On that basis the daily fines in the first year immediately before the date of the information will be $2.00 and $20.00, in the second year before the date of the information $1.00 and $10.00 and in the third year before the date of the information 50 cents and $5.00. Applying the foregoing amounts to the schedule the result is :

1979 YEAR:			
	28/7/79 to 31/3/81	$	$
	35 days at 10 cents	3.50	
	366 days at $0.50	183.00	
	211 days at $1.00	211.00	
	612 days		
	1/4/81 to 2/9/82		
	155 days at $10.00	1,550.00	
	365 days at $20.00	7,300.00	
	520 days		$ 9,247.50
1980 YEAR:			
	29/10/80 to 31/3/81		
	154 days at $1.00	154.00	
	1/4/81 to 2/9/82		
	155 days at $10.00	1,550.00	
	365 days at $20.00	7,300.00	
	520 days		$ 9,004.00
1981 YEAR:			
	27/1/82 to 2/9/82		
	217 days at $20.00		4,340.00
			$22,591.50

The means of the company have to be considered. On the evidence they are nil with no real likelihood of recourse to Mr Beuth, given his state of bankruptcy. The

Criminal Justice Act 1985 is applicable to offences committed before the Act came into force on 1 October 1985. This is a rehearing in the High Court in terms of my interim judgment. Section 27 (1) states :

> "27. (1) In fixing the amount of any fine to be imposed on an offender, a court shall take into consideration, among other things, the means and responsibilities of the offender so far as they appear or are known to the court."

Given that the uncontested evidence is that the Company has no assets and no real prospect of acquiring any, and given that striking-off is imminent, I find it difficult, in taking those factors into consideration as required by section 27 (1), to impose any fine. As a matter of practicality there is no point in fining the company.

Having said that, there is another special factor which has brought me to the conclusion that no fine ought to be imposed. I refer to the delay since the first hearing in the District Court on 15 November 1982 and the concomitant effect of this Company being the only company taken to appeal when 60 informations were dismissed on 15 November 1982. I have previously referred to the disparity occasioned by this Company being fined on a daily basis and the other companies suffering no penalty and no conviction. That, coupled with the fact that the Company has no means with which to pay a fine or even costs, brings me to the conclusion that the proper order is to direct, in terms of section 20 of the Criminal Justice Act 1985, that the defendant be discharged.

The appeal against sentence is allowed, the sentence of the District Court is quashed and, while the respondent's convictions stand, I direct that the respondent be discharged on each information.

The question of costs to the respondent is reserved. If the application is to be pursued, counsel may submit memoranda and I request that counsel attend to the matter expeditiously.

McF. Chilwell J

23rd September, 1986

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