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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

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A.P. 197/87

BETWEEN FITZGERALD

Appellant

AND CUSTOMS DEPARTMENT, AUCKLAND

Respondent

LR 31

Hearing: 7 December, 1987

Counsel: A.W. Grove for appellant
Miss C.S. Cull for respondent

Judgment: 25 February, 1988

JUDGMENT OF BARKER J

This is an appeal against conviction and sentence.

The appellant was convicted in the District Court at Auckland on 10 July, 1987 and fined $1,500 and costs; he had been charged with an offence under S.16A(2) 16B(1)(a) of the Trade and Industry Act 1956 and Ss 2 and 299 of the Customs Act 1966 of importing into New Zealand an MGB-GT motor vehicle without a licence or import permit.

S.16C(1) of the Trade and Industry Act states

> "Every person commits an offence who -
> (a) Imports into New Zealand or unships or lands in New Zealand any goods whose (sic) importation is prohibited by any Order-in-Council made under

S.16B and in force at the time of importation."

S.16B empowers the Governor-General by Order-in-Council to prohibit in the public interest the importation into New Zealand of (inter alia) ...(b) Goods of any specified class or classes.

Under this particular power the Import Control Regulations 1973 were issued; regulation 3 prohibits the importation into New Zealand of any goods except

> "(b) importation pursuant to an exemption granted by the Minister under Regulation 17 thereof."

Under Regulation 17, an import control exemption notice was issued in 1978 which provided that goods of certain specified classes were exempt from requirements of an import licence. Included in this category were motor vehicles subject to such conditions as the Minister may prescribe,

> "... are imported by a person who satisfies the Collector -
>
> 1. That he intends to become a permanent resident of New Zealand;
>
> 2. That for the whole of the period of 21 months preceding his arrival he has resided outside New Zealand or has been domiciled outside New Zealand;
>
> 3. That, in respect of every such vehicle, he has personally owned and used the vehicle for at least one year before the date of his departure for New Zealand or the date of shipment of the vehicle, whichever is the earlier."

The appellant sought to import his motor vehicles into New Zeland. The background facts are set out in the decision of the learned District Court Judge; it is not necessary to repeat them. The important fact is that the appellant presented to a customs officer documents which persuaded the customs officer to the view that the conditions under Regulation 17 had been satisfied in respect of the MGB vehicle; in particular that the appellant had personally owned and used the vehicle for at least one year before his departure for New Zealand or the date of the shipment of the vehicle.

The document that he produced to the customs officer showed the date of purchase of the MGB vehicle was 12 June, 1983 - more than a year before the prescribed time. The customs officer accepted this document at its face value and issued the appellant with an authority to register the vehicle in New Zealand. The document was presented to a clerk in the Post Office who noticed that the year of manufacture in the document appeared to have been altered. Enquiries were then triggered; in the course of the search of the vehicle, documents were found indicating that the representation by the appellant as to the length of time he had owned the vehicle was untrue. Under questioning, he conceded that he had bought the vehicle in February 1984 and was therefore not entitled to the benefit of the exemption.

Mr Grove submitted that the Collector of Customs was in

fact "satisfied" in terms of Regulation 17, albeit on an erroneous document. He submitted that the appellant should have been charged under S.16C(3), which relates to using a false document and that the learned District Court Judge had convicted the appellant of an offence other than that for which he was charged.

I consider this submission is without merit. On normal interpretation principles, the word "satisfied" must be read so as to mean satisfied based on lawful fulfilment of statutory criteria; to read otherwise would be perpetrating injustice and would make a mockery of the intention of the legislature.

The presumption of statutory interpretation against permitting advantage from one's own wrong is well established.

Maxwell on the Interpretation of Statutes (12th Ed) 212 states -

> "On the general principle of avoiding injustice and absurdity, any construction will, if possible, be rejected (unless the policy of the Act requires it) if it would enable a person by his own act to impair an obligation which he had undertaken, or otherwise to profit by his own wrong."

The author quotes Fletcher Moulton, L.J. in Kish v Taylor (1911) 1 KB 625, 634 -

> "A man may not take advantage of his own wrong. He may not plead in his own interest a self-created necessity."

Instances of the principle in action include Re A Debtor, (1964) 1 WLR 807; a bankrupt whose "expansive modus operandi was in large part to obtain short-term credit to finance his increasing acquisition of shares quoted on the stock exchange" acquired a dormant company, dealings in the shares of which were later suspended by the Stock Exchange. He sought a "certificate to the effect that the bankruptcy was caused by misfortune without any misconduct on his part" within the meaning of the Bankruptcy Act 1914, s26(4). The Court of Appeal refused to grant a certificate, (Russell,L.J. said at 817) -

> "He deliberately placed himself in a position of vulnerability to insolvency should those shares become unmarketable due to action by the stock exchange ... for a longer period than his creditors would tolerate. When the bankruptcy resulted, the cause of it was the position of vulnerability in which he had deliberately placed himself, and that is not "misfortune"."

In Woodcock v South Western Electricity Board (1975) 1 WLR 983; (1975) 2 All ER 545, the plaintiffs were squatters who had unlawfully occupied adjoining premises, and who had applied for and been accepted for the supply of electricity by the defendants. On discovering the plaintiffs' basis of occupation, the defendants cut off the supplys of electricity; The plaintiffs sought an injunction to require the Electricity Board to connect the power pursuant to their duty to supply electricity to the

"occupier of any premises" under the Electric Lighting (Clauses) Act 1899, s.27(1). Counsel for the defendants submitted that the Courts should not construe statutes so as to give legal rights to wrongdoers unless the words of the statute impelled that construction citing -

> R. V Hulme (1870) LR 5 QB 377
> Adlam v Law Society (1968) 1 WLR 6
> McPhail v Persons, Names Unknown (1973) Ch 447

Dunn J dismissed the application, holding that the word "occupier" in the section did not include a person whose original entry upon the premises was unlawful and forcible. The defendants were thus not under a duty to supply them electricity.

In Holden v Nuttall (1945) VLR 171 the Court was required to take into account, upon an application for the possession of leased premises, the question of whether an order would cause the lessee "hardship". Evidence showed that the lessee had acted in a manner specifically designed to enable him to take the benefit of this "hardship" provision in the Landlord and Tenant Act (Victoria). Herring C.J. at 178 held that the word "hardship" should be limited as a matter of construction -

> "So as to avoid attributing to the regulation-maker the intention of bringing about an injustice or allowing a man to benefit from his own wrong."

In Re Prenn's Settlement, (1961) 1 WLR 569, an Act had exempted a company from disclosing its balance sheets. The principal shareholder had executed two settlements for members of his family; on the same day, he had ensured that the company resolved to capitalise its undivided profits and applied it in shares to current shareholders. He then allotted his shares to the settlements. The effect was that a large sum was taken out of the company, placed into the settlements, and the company lost its privilege as an exempt private company under the Companies Act. On a summons by the company to determine whether it had lost its status, Lord Evershed MR held (at 572) that -

> "It is, I think, fair to say that when an exemption of that kind is found in an Act the Court must see that anyone claiming the benefit of it does, without reasonable doubt, bring himself within the language conferring the exemption."

This dictum is particularly applicable to the present case. The appellant claimed an exemption which bar his unlawful act, would have been denied to him. The Prenn case stands for the principle, that anyone claiming a benefit or privilege, must prove to the Court that he is entitled to it Since, by his own admission, the defendant does not come within the statutory criteria required by the Act that he is not entitled to the privilege bestowed by the regulation.

Because of the view I have taken, it is unnecessary to

consider the alternative submission that the appellant should have been convicted of another offence.

On the question of appeal against penalty, the District Court Judge stated he had given some thought to discharging the appellant without conviction; he indicated that the Customs Department should have given the appellant some opportunity to make amends. He expressed the view that compassion ought to be exercised.

The District Court Judge rightly categorised the appellant's conduct as an act to evade the revenue and to obtain an exemption to which he was not entitled. In my view, the penalty of $1500 for a deliberate attempt to defraud the revenue was not manifestly excessive; the appeal against sentence must also be dismissed.

R. D. Barker J.

Solicitors: Grove Darlow & Partners, Auckland, for appellant
Crown Solicitor, Auckland, for respondent