

28/12

NELA

IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

AP.208/89

**LOW
PRIORITY**

2175

BETWEEN

HAYWARD

AND

JURISICH

Appellant

AND

POLICE

Respondent

Hearing and
Judgment:

19 December 1989

Counsel:

J.A. Faire for the Appellant Hayward
P.R. Gorringe for the Appellant Jurisich
C.T. Gudsell for the Respondent

ORAL JUDGMENT OF DOOGUE J

These are two appeals against conviction, both Appellants having been convicted of an offence against section 13(c) of the Fair Trading Act 1986 ("the Act"), namely that they

"Did in connection with the possible supply of services namely the sale at auction of a Holden Belmont motor vehicle falsely represent to REGAN that a particular person namely a friend of HAYWARD had agreed to acquire the said vehicle."

That charge was introduced into the informations against the Appellants by the District Court Judge of his

own motion at the end of the hearing of the cases for the Respondent and the Appellants, that hearing taking place on the days of 21 and 24 August 1989. None of the counsel involved in the present hearing appeared in the District Court and are unable to assist me as to what lay behind that amendment of the informations. The informations, as laid, had charged false pretences contrary to section 246(1) of the Crimes Act 1961.

The primary facts of the matter were not really in dispute, although it is true that there were various matters in dispute of some importance.

A Mrs Regan owned a motor vehicle which she wished to dispose of. It was a 1974 Holden Belmont motor car which had travelled some 196,000 kilometers. She had gone to a motor vehicle dealer and had learnt that all she would get from the dealer would be \$2,000. She then went to Auto Auctioneers (Hamilton) Limited, where she spoke to the Appellant Jurisich. He and the Appellant Hayward were directors and managers of that company. He accepted the vehicle for auction upon the basis that there would be a reserve of \$3,000, with the auction being that evening. Later that day Mrs Regan was approached by the Appellant Hayward. In her evidence, she said this:-

"Later that same afternoon a gentleman rang from Auto Auctioneers and said that a friend of his wanted to buy the car for \$3,000.00 and would we accept that and I said yes, we would and he said all right, I

will bring a cheque around straight away. Later on he brought the cheque around and he said is that genuine mileage and I said no, it has been around the clock once. I said I told the other man that."

Mrs Regan then identified Mr Hayward as being the person bringing around the cheque and went on:-

"When the defendant, this person phoned me prior to that person coming around with the cheque, that person said to me that a friend of his wanted to buy it for \$3,000.00. He said that if the man could not come up with the money did I realise that they would put it in the auction that night. When the defendant Hayward brought me the money I was in the kitchen at home. He paid for this by cheque. The cheque was for \$2,750.00. I thought they had bought the vehicle, they gave me the cheque."

The cheque was that of Auto Auctioneers (Hamilton) Limited.

There was a dispute at the hearing as to whether or not the Appellant Hayward had approached Mrs Regan with the intention of seeing the car bought by a brother of his. The District Court Judge specifically found against that suggestion and nothing turns on that, nor on certain other disputes about the mileage that the vehicle had done.

The essential issue in this appeal is whether or not the Respondent had proved the necessary ingredients to establish an offence against section 13(c) of the Fair Trading Act 1986. There is a secondary issue as to whether or not the Respondent had proved that the Appellant Jurisich

was a party to what went on between Mrs Regan and the Appellant Hayward.

The findings of the District Court Judge are sufficiently expressed in the following passage:-

"In my view, what happened here was a straight out scam on the part of the two defendants. The sale itself was obviously a sale of rather decrepit vehicles and this particular vehicle stood out like a jewel, certainly to the two dealers who were called as witnesses. The defendants obviously felt that they could make more out of this vehicle than they were letting on to Mrs Regan and I reject out of hand the story that there was a possible buyer in the form of the brother or anybody else. This was a way in which the defendants could make more profit out of this deal than they could otherwise make simply by selling the vehicle at auction for Mrs Regan. There was not any person who had agreed to acquire the vehicle and the means by which the defendants arrived at the sale was devious in the extreme. That aspect of this particular information has been proved and there will be a conviction."

It is only necessary to add to that background that the car was purchased at the auction on the night after Mrs Regan had sold it to the Appellant Hayward, with it being purchased by a Mrs Rutherford for the sum of \$4,200. A dispute subsequently arose between her and the Appellants, which led to the Police being involved and the present proceedings.

Section 13(c) of the Act reads:-

"13. False representations - No person shall, in trade, in connection with the supply or possible supply of goods or services or with the promotion by any means of the supply or use of goods or services, -
(c) Falsely represent that a particular person has agreed to acquire goods or services;"

Reference was also made to section 14 of the Act. That section, although not in identical terms to section 13, provides for situations where there are false representations in respect of the sale or grant or possible sale or grant of an interest of land.

It is submitted on behalf of the Appellants that there has to be a link between the representation made and the possible supply of services involved. It is submitted that in this case there is no such link because Mrs Regan had agreed to provide the vehicle for auction by Auto Auctioneers (Hamilton) Limited and the subsequent representation by Mr Hayward therefore had nothing to do with the possible supply of services by way of the auction as there was already agreement between the parties in respect of that. Indeed the representation by the Appellant Hayward resulted effectively in Mrs Regan selling the car and it not being placed in the auction on her behalf, notwithstanding that it was subsequently sold on behalf of the Appellants either directly or indirectly.

Mr Gorringe on behalf of the Appellant Jurisich draws my attention to a decision in the Federal Court of Australia which, whilst on a different provision in the Australian Trade Practices Act 1974, notes the need for there to be a sufficient link between the representation and

the supply, and notes further that that is a matter of fact. See Ducret v Chaudhary's Oriental Carpet Palace Pty Ltd, [1987] 9 ATPR 40-804.

Mr Gudsell on behalf of the Respondent has been unable to answer that particular submission. He submitted that the connection with the possible supply of services related to the auction and that the representation also related to the auction. With all respect both to the District Court Judge and to that submission, there is no substance to it. The facts as disclosed showed clearly that Mrs Regan had agreed to the vehicle entering the auction substantially before the Appellant Hayward's representation to her. That representation was to induce Mrs Regan to sell the vehicle there and then. Mrs Regan was happy with the price offered and so sold. The result was the car was not entered in the auction on her behalf and there was no supply of services to her by way of the auction. She did, however, pay the commission sought by Auto Auctioneers (Hamilton) Limited on the basis the sale was through their agency, although it appears the company itself bought the vehicle. Neither the Respondent nor the District Court Judge relied on that. The sale may have been induced by the Appellant Hayward's representation which may, as the District Court Judge found, have been a false representation. Nevertheless, if there was anything achieved as a result of the representation it was the sale of the car to the

Appellant Hayward or the company and that had nothing to do with the possible supply of services relied upon, namely the sale at auction of the vehicle.

On this primary point therefore I have to find in favour of the Appellants.

They also raised other points which do not require specific determination in the present proceedings.

They submitted that there had been no representation that a particular person had agreed to acquire the car in terms of section 13(c). Some point was made of the evidence of Mrs Regan already cited, namely that she was merely informed that someone wanted the vehicle rather than there being any representation that there was an agreement to buy the vehicle.

So far as the suggestion that a particular person has to be a named person is concerned, Mr Faire on behalf of the Appellant Hayward submitted that that was the case and cited Hill and Jones, Fair Trading in New Zealand, Butterworths, 1989, 107, 13.8.1, where it is stated:-

"particular person" - Tradestock v TNT Management Pty Ltd, (1985) ATPR 40-152 a restrictive trade practice case, the words "particular person" were, in effect, held to mean a named person and not a class of persons."

As in this particular case it is unnecessary for a view to be expressed on that issue it is preferable that I do not express one.

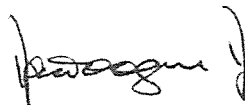
Nor is it necessary for me to express any view on whether it was established that the Appellant Jurisich was a party to the Appellant Hayward's representation. The District Court Judge drew an inference from all the circumstances of the case that that must have been so and I am not suggesting that he was wrong in that conclusion but it is inappropriate that I express any final view on that point as it does not arise for determination having regard to the manner in which I have determined the central issue.

Mr Gudsell invited me, if the appeal was to be allowed, to consider re-amending the information to allege the original offence alleged under section 246(1) of the Crimes Act 1961 and to remit the matter back to the District Court under the powers given to this Court under section 121 of the Summary Proceedings Act 1957. I do not think that that is an appropriate course to follow. That is the charge that the Appellants originally faced and which they went to Court to meet. The charge was deliberately altered at the end of the hearing before the District Court Judge to that already referred to under section 13(c) of the Act. It would, in my view, be entirely inappropriate that this Court on appeal, in such circumstances, should reinstate the

original charge and remit to the District Court which has seen fit to dispose of the matter in the way that it did. If the Respondent seeks to do so it may re-commence the proceedings under whatever section it sees fit.

Before leaving the appeal, I would acknowledge that I have some sympathy with the position of the District Court Judge in respect of these proceedings. It is apparent that he was endeavouring to ensure that the crime alleged fitted the facts. If he has erred in the course taken by him it is an understandable error. It seems entirely clear that, at the very least, the Appellant Hayward took steps to ensure that Mrs Regan's car would be obtained on a basis which he hoped and expected would be favourable to him and to his company.

However, for the reasons already stated, the appeal must be allowed and the convictions and sentences imposed upon the Appellants quashed.

A handwritten signature in dark ink, appearing to be 'F. M. ...', is written in the lower right quadrant of the page.

Solicitors for the Appellant Hayward:

Stace Hammond Grace &
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Hamilton

Solicitors for the Appellant Jurisich:

Tanner Fitzgerald Getty
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Solicitor for the Respondent:

Crown Solicitor
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