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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

AP. 202/88

BETWEEN EXOTIC MOTOR IMPORTS LIMITED

Appellant

AND MOTOR VEHICLE DEALERS INSTITUTE INCORPORATED

Respondent

LOW PRIORITY

Hearing: 20 March, 1989

Counsel: R.J. Asher for appellant
P.A. McKnight for respondent

Judgment: 20 March, 1989

(ORAL) JUDGMENT OF BARKER J

This is an appeal against conviction and sentence. The appellant was convicted in the District Court at Auckland on 1 December, 1987 on two charges under S.7(6) of the Motor Vehicle Dealers Act 1975 ('the Act') of carrying on business as a motor vehicle dealer when not licensed so to do.

The appellant was incorporated as a company on 3 October 1986. The first count relates to a period between 3 August, 1986 and 3 February 1987. How an informtion can be laid alleging conduct by a defendant when the defendant does not exist at the date on which the criminal conduct is said to have commenced is beyond me. However, no

express point was taken on this topic either in the Court below or in this Court.

The evidence related to six transactions in which it was said that the appellant had sold a motor vehicle which it had imported from Hong Kong and then on-sold to members of the public. The District Court Judge, against the submissions of counsel for the appellant, allowed evidence of three transactions which had occurred before the date of incorporation of the company.

With respect to the ruling of the learned District Court Judge, I cannot accept as a matter of logic that alleged criminal conduct occurring before the date of incorporation of a company can provide evidence against the company. Clearly there could have been a charge laid under S.462 of the Companies Act 1955 against any person holding out that a business was a limited company when it was not. The apparent transgressions of the Companies Act by the director Mr MacKay were compounded in that for five vehicles he procured registration from the Registrar of Motor Vehicles in the name of Exotic Motor Imports Limited prior to the date of incorporation of that company.

It was held by Turner J in Paris v Goodwin [1954] NZLR 823, that a certificate of registration of a motor vehicle is not like a certificate of title under the Land Transfer Act; it does not guarantee ownership.

Accordingly, as at the date on which the registration of these vehicles was procured, the appellant company could not have been their owner because the company did not exist. I cannot see any justification for admitting as evidence against the company evidence of transactions occurring before the incorporation of the appellant. In company law, evidence of pre-incorporation transactions can sometimes be admissible if there is later ratification or adoption of an agreement after incorporation; when considering criminal charges, where the onus of proof is high and there can be no justification for allowing evidence of pre-incorporation dealings, albeit conducted in the name of a then non-existent entity.

Mr McKnight submitted in the alternative that the 'similar fact' rule might provide a basis for admission of these pre-incorporation dealings. This point was not raised before the District Court Judge but I think as a matter of legal logic, that similar facts evidence against an accused must relate to similar facts which the accused has committed; since at the time these were alleged to have occurred, this particular accused did not exist, the pre-incorporation transactions are irrelevant.

So therefore the case against the appellant stands or falls on three transactions which occurred after the appellant was incorporated. There was no dispute as to the facts as found by the District Court Judge. I note that the appellant did not call evidence prior to its

conviction. Mr MacKay, a director of the appellant, gave evidence on the question of penalty. I reject the submission of Mr McKnight that the Court, when considering the evidence relating to conviction, take into account evidence given in mitigation of penalty. These are two quite separate matters. The duty of this Court is to decide, whether on the admissible evidence presented to the District Court, there was enough to justify a conviction. If there was enough evidence to justify conviction then, and only then, does one look at evidence given purely in mitigation of penalty in order then to assess the appellant's appeal as to penalty.

It was admitted that neither the company nor its two directors, Mr and Mrs McKay, was a licensed motor vehicle dealer. The first transaction concerned a Mr Kelly; he saw an advertisement in the 'New Zealand Herald' for a Peugeot 604 motor vehicle. There is no evidence as to who had placed the advertisement in the newspaper. As a result of this advertisement, he visited an address in Northcote where he met a person whom he identified as Mr McKay. He bought the car with a cheque for $13,000; he received a receipt made out in his name, issued by Exotic Motor Imports Limited and signed by Mr MacKay. He also obtained a notice of change of ownership from where the seller was described as 'Exotic Motor Imports Limited, per Anne McKay, director'.

The next transaction concerns a Mr Toussaint; he was

managing director of a licensed motor vehicle dealer. He sold on behalf of the appellant a Datsun motor vehicle to a member of the public. Contemporaneous with that sale, Mr Toussaint accepted a change of ownership from the appellant to his company to enable a transfer to the new owner to be signed. His company later issued a cheque to the appellant for its share of the proceeds of sale.

The third transaction concerns a Mr Murdoch who had known Mr MacKay. In March 1987, Mr Murdoch was given a Ford Granada vehicle by Mr MacKay for repair. Mr Murdoch took the vehicle to Palmerston North. Whilst the vehicle was in his possession, he was approached by a licensed motor vehicle dealer in Palmerston North. He gave the vehicle to this dealer for sale. Eventually the vehicle was sold to a Mr and Mrs Brice, via another motor vehicle dealer in Palmerston North; this latter firm sent a cheque to Mr Murdoch for the vehicle. Mr Murdoch asserted it should have been made out to Mr MacKay. Mr Murdoch banked the cheque himself and issued another cheque to Mr MacKay drawn on his own bank account.

The District Court Judge also heard evidence from an official from the Motor Registration Centre at Palmerston North who produced certificates relating to certain particulars of motor vehicles pursuant to The Transport (Vehicle and Driver Registration and Licensing) Act 1986. He also produced application forms. There was some argument as to the admissibility of these forms. I

do not need to decide that matter in the light of my conclusion as to the fate of the appeal.

However, the following points seem clear -

(a) Registration of six motor vehicles was in the name of Exotic Motor Imports Limited; five were so registered prior to the date of incorporation of the company;

(b) The six vehicles, with one exception, were give consecutive registration numbers, which fact indicates that the applications were all made at the same time.

I do not think that too much can be taken from the fact that after the appellant was incorporated, the transfer papers were signed by Mr or Mrs MacKay as agents for this company. There is no evidence of any adoption agreement or the like whereby the company took over assets from Mr and Mrs MacKay after incorporation. As I have earlier said, as at the date of the procurement of this irregular registration the company could not own the vehicles because the company could not exist. Presumably they were owned legally by Mr MacKay wrongly using the name of a limited company. There was no evidence that they were transferred from his ownership into the appellant's ownership.

Consequently, an inference can be (and it has only to be a reasonable possibility) that Mr MacKay was perpetuating his own error by using the name of the company in signing the transfer documents of cars which did not legally belong to the company. It should be borne in mind that the company did not exist at the time the registration was procured.

The learned District Court Judge held that the evidence disclosed a pattern of dealing which provided the irresistible conclusion that the appellant was carrying out business as a motor vehicle dealer and had contravened the provisions of S.4(1) and (3) of the Act. He considered the fact that the registrations were procured in the name of the defendant company prior to the registration indicated involvement with motor vehicles; as did the very name of the appellant; and the involvement of Mr MacKay.

With respect I cannot agree. I have already indicated my view of the fact of the vehicles being registered in the name of the appellant; the fact that Mr MacKay was involved was open equally to the inference that he was acting in his own personal capacity.

S.4(1) (2) and (3) of the Act provided as follows -

> (1) Subject to the succeeding provisions of this section, and to S.5 of this Act, in this Act the term "motor vehicle dealer" means any

> person who carries on the business of purchasing, selling, exchanging, or leasing motor vehicles (whether as principal or agent), whether or not that person carries on any other business; and includes a car consultant.
>
> (2) Without limiting the definition in subsection (1) of this section, every person who holds himself out to the public as being ready to carry on the business of purchasing, selling, exchanging, or leasing motor vehicles shall be deemed to be a motor vehicle dealer for the purposes of this Act.
>
> (3) Every person who, in any period of 12 consecutive months commencing after the commencement of this Act, purchases, sells, exchanges, or leases more than 6 motor vehicles shall be presumed to be a motor vehicle dealer for the purposes of this Act, unless he proves that he did not purchase, sell, exchange, or lease the motor vehicles for the primary purpose of gain."

Because of the view I have taken as to the pre-incorporation transactions, subsection 4(3) can have no possible application; nor can S.4(2). There is no evidence that insufficient evidence that the appellant was holding out as a licensed motor vehicle dealer. I rely on the decision of the Court of Appeal Mutual Rental Cars Limited v Russell (judgment 14 August, 1985) and the decision of Woodhouse J (as he then was) in Raine v Police [1963] NZLR 702, 703.

The question is whether there is sufficient evidence to bring into play s.4(1). Richardson J delivering the judgment of the Court of Appeal in Mutual Rental Cars case stated

> "The definition provision (s4) reflects that central role of licensed dealers when drawing the line between activities which are to be subject to that scheme of statutory protection and obligation and vehicle transactions which fall outside that regime. Subsection (1) is directed at persons who carry on the business of dealing in motor vehicles. Tht requires proof of the continued engaging in actual transactions."

There is only proof of the appellant engaging in two transactions at most; i.e. the Kelly transaction and the transaction with Mr Tuissant. The indications of the other transaction in Palmerston North are that it was really Mr MacKay who was involved; clearly this was the view of Mr Murdoch, because when he eventually received the money for the vehicle, knowing it was not his he issued a cheque to Mr MacKay, whom he considered the true owner.

I agree with Mr McKnight in the Toussaint transaction that the fact that the appellant may have given the vehicle to a licensed motor vehicle dealer for sale on its behalf does indicate a lack of dealing. However, with only that transaction and with the Kelly transaction, I find it insufficient a continual engagement in actual transactions by the appellant company to constitute dealing.

So far as S.4(2) is concerned too, I note there is no 'holding out' as in the Mutual Rental case. The only possible holding out was the newspaper advertisement. Despite Mr Asher's submissions, it could be an inference that because a receipt was given to Mr Kelly in the name

of the appellant company, the original trigger for the whole transaction - the newspaper advertisement - may well have been inserted by or on behalf of the appellant.

My feeling which I indicated to counsel is, that had Mr MacKay been prosecuted, the result may well have been different. But the time has passed for a further prosecution.

It therefore follows that the appeal againt conviction must be allowed and the convictions and sentence quashed which means.

R. D. Barker J.

Solicitors: C.J. Frost, Auckland, for appellant
Izard Weston & Co, Wellington, for respondent