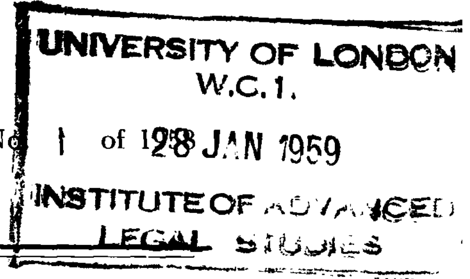
23, 1958



In the Privy Council.

52164

ON APPEAL

FROM THE COURT OF APPEAL OF NEW ZEALAND

BETWEEN

JOHN NEIL MOUAT — *Appellant*

AND

BETTS MOTORS LTD. — *Respondent*

Case for the Appellant

RECORD.

10 1. This is an appeal from a judgment of the Court of Appeal of New Zealand dated the 8th day of March, 1957, dismissing by a majority (Gresson and McGregor JJ., Adams J. dissenting) an appeal from a judgment of the Supreme Court of New Zealand (Barrowclough C.J.) dated the 26th day of June, 1956, awarding the respondents damages for breach of contract in an action brought by them against the appellant.

p. 41, ll. 12 to 34.

p. 25, l. 34 to p. 26, l. 4.

2. The case arises out of transactions affecting a 1954 model Chevrolet sedan motor car which was sold by the respondents to the appellant on the 7th day of March, 1955. The appellant's father acted on his behalf in connection with the purchase, and before delivering the car to the appel-
20 lant's father on that day the respondents required the latter to pay the cash price of £1,207 and to execute, as attorney for the appellant, a written agreement containing a clause (hereinafter referred to as " the covenant ") which provided:—

p. 8, l. 40 to p. 9, l. 21.
pp. 53 to 54, exhibit I.

" 1. THE COVENANTOR will not (except by will) during the space " of two years after the delivery of the said vehicle to the Covenantor " deal with the said vehicle in any manner whereby any other person " or corporation may become entitled to the possession or use of the " said vehicle other than for the private purposes of the Covenantor " or for the purpose of carrying on any profession trade or business of
30 " the Covenantor or whereby the property in the said vehicle (or any " charge thereon) is or may be or become liable to be transferred to

" or vested in any other person or corporation or whereby any mort-
" gage or charge thereon is conferred upon any other person or cor-
" poration WITHOUT first making an offer to the Dealer (irrevoc-
" able for fourteen days) to re-sell the said vehicle to the Dealer at
" the original sale price thereof set out in the Schedule hereto Less an
" allowance by way of depreciation calculated at the rate of Ten
" Pounds (£10) for every complete 1,000 miles run by the said vehicle
" since the date of delivery to the Covenantor but so that such allow-
" ance shall not be less than Fifty Pounds (£50) or more than One
" Hundred and Fifty Pounds (£150) AND at the time of making such 10
" offer delivering the said vehicle and leaving it for examination for
" a reasonable time with the Dealer."

p. 17, ll. 32 to 33.

p. 24, ll. 39 to 42.

3. Barrowclough C.J. found in his judgment that the appellant sold the car in June, 1955, for £1,700, without first offering it to the respondents. If the covenant was binding, the price at which the car should have been offered to the respondents at that date was £1,157. The learned Chief Justice held that the covenant was binding, rejecting the defence of illegality hereinafter mentioned, and further held that the proper measure of damages was the difference between £1,700 and £1,157. Accordingly he gave judgment for the respondents in the sum of £543 and costs. An appeal from 20 this judgment was dismissed with costs by a majority in the Court of Appeal as above-mentioned.

4. Two main questions arise in the case. The first is whether the covenant is illegal and unenforceable by reason of the provisions of the Control of Prices Act, 1947. The second, which only becomes material if the first be determined adversely to the appellant, is what is the true measure of damages.

5. As to the question of illegality, section 29 (1) of the Control of Prices Act, 1947, provides:—

" While a Price Order or a special approval in respect of any goods 30
" remains in force every person who, whether as principal or agent,
" and whether by himself or his agent, sells or agrees or offers to sell
" any goods to which the Order or approval relates for a price that is
" not in conformity with the Order or approval commits an offence
" against this Act."

6. Section 2 (1) of the same Act provides inter alia:—

" In this Act, unless the context otherwise requires,—

" 'Price', in relation to the sale of any goods or to the performance
" of any services, includes every valuable consideration whatsoever,
" whether direct or indirect; and includes any consideration which in 40
" effect relates to the sale of any goods or to the performance of any
" services, although ostensibly relating to any other matter or thing."

7. It is common ground between the parties that, by a special approval applying to such a contract of sale as that between the respondents and the appellant, the Price Tribunal constituted under the said Act, acting by its delegate the Director of Price Control, fixed £1,207 as the maximum retail selling price for 1954 Chevrolet sedan cars.

pp. 56 to 57, exhibit M.

8. The question of illegality thus appears to turn on whether the covenant was a valuable consideration relating to the sale of the car, within the meaning of section 2 (1) of the Control of Prices Act; for, if so, by requiring the covenant as well as the cash price, the respondents sold 10 the car for a price not in conformity with the approval, thereby committing an offence under section 29 (1).

9. The views of the learned Judges who have held that the covenant was not a valuable consideration relating to the sale are based on the ground that the Board of Trade conditions relating to the distribution of North American cars included the following paragraph:

pp. 43 to 45, exhibit F.

> "9. In order to assist in ensuring distribution for essential needs, "each dealer will require the purchaser to sign a deed of covenant or "an agreement that in consideration of the payment of, say, 1/- by "the dealer the purchaser will not within a period of two years from 20 "the date of purchase of the new car sell or transfer or otherwise dis- "pose of the car except to resell it to the dealer at the price which the "car has been sold, less depreciation at a fixed rate."

p. 45, ll. 5 to 11.

10. The origin and bearing of the Board of Trade conditions are as follows: The car was imported into New Zealand by General Motors New Zealand Limited under a licence granted to that company by the Minister of Customs pursuant to the Import Control Regulations, 1938, which were made under the Customs Act, 1913, and its amendments. Regulation 11 empowers the Minister to grant any licence subject to such conditions as he thinks fit to impose. This licence was made subject to the 30 condition that the vehicles were to be distributed in accordance with conditions to be determined by the Board of Trade. A copy of the conditions so determined was sent by General Motors to the respondents, who hold a dealer franchise from General Motors for Chevrolet cars. Section 46 (10) of the Customs Act (inserted therein by section 3 of the Customs Acts Amendment Act, 1953) provides inter alia that where any goods have been imported pursuant to a licence subject to a condition, and any person commits any breach of that condition or fails in any respect to comply with it, or is knowingly concerned in any such breach or non-compliance, he shall be liable to a penalty of £200 or the value of the goods, whichever is 40 the greater, and the goods shalls be forfeited.

p. 12, ll. 25 to 29.
pp. 55 and 56, exhibits K and L.
pp. 46 to 50, annexure to exhibit F.
p. 7, ll. 21 to 22.

11. In their judgments the learned Judges in New Zealand reached the following conclusions on the question of illegality:—

p. 19, ll. 6 to 19.

(a) The trial Judge, Barrowclough C. J., held that the pre-emptive right given to the respondents by the covenant was a valuable consideration but that it did not "relate to the sale" in the sense contemplated by the Control of Prices Act, as its purpose was not to benefit the respondents, but to prevent the appellant from defeating Government policy aimed at black-market dealings. The giving and taking of the covenant were, he held, things that were imposed ab extra on the respondents and the appellant alike, and the benefit which in fact resulted to the respondents from the breach of the covenant was not a consideration which induced the respondents to part with the car. Although in the written agreement itself the parties had said that the covenant was given partly in consideration of the sale of the car, no inference was justified that the sale was made partly in consideration of the giving of the covenant.

p. 19, l. 20 to p. 23, l. 21.

p. 53, ll. 37 to 40.

p. 27 to p. 28, l. 12.

(b) In the Court of Appeal, Gresson J. said that he was in general agreement with the reasoning of McGregor J. but would be prepared to go further and hold that the giving of the covenant was not valuable consideration at all, because a person in the situation of the appellant was under an obligation as a matter of law to enter into the covenant. As well as being restricted in the amount he might pay in money, he was obliged to covenant as he did. The law compelled it. It was true that the covenant did not in the form in which it was drawn comply exactly with what the law required but it was substantially to that effect.

p. 28, l. 16 to p. 32, l. 20.

(c) In his dissenting judgment in the Court of Appeal, Adams J. held that the respondents indubitably sold the car in consideration of a cash price plus a covenant. What led them to do so was irrelevant. There was no law binding the appellant to execute the covenant, and the respondents rightly conceded that the sale by the appellant, in respect of which the action was brought, was not a breach of any statutory duty but only a breach of the covenant. The obligations imposed by the Board of Trade conditions were imposed on the importer and the dealers, with none directly imposed on purchasers from dealers, except for a requirement that each applicant for a car must sign a statutory declaration as to the accuracy of the information given in his initiating application for the allocation of a car. In their direct application, the compulsive statutory operation of the conditions stopped short of the purchaser, and as against him the only machinery of enforcement was the covenant which he was required to sign before being allowed by the dealer to buy a car. The respondents conceded this. Moreover, the covenant actually taken differed materially from the covenant which the dealer was bound by the conditions to exact from a purchaser.

p. 32, l. 21 to p. 33, l. 11.

p. 33, l. 22 to p. 35, l. 42.

Adams J. also held that there was no conflict between section 29 (1) of the Control of Prices Act and the conditions. The conditions

were silent as to price, except in so far as they required the taking of a covenant. It remained for the Price Tribunal to determine what total price it should be permissible to exact in covenant, cash and other considerations. The special approval could not be construed as permitting sales at the fixed maximum price plus the covenant, and the Court had no right or power to indulge in assumptions as to what the Director of Price Control may have known or intended, in order to control or qualify his legislative act in accordance with such assumptions.

(d) In his judgment in the Court of Appeal, McGregor J. held that the respondents were bound by the legal direction of the Board of Trade not to sell without first obtaining from the appellant a promise substantially in the terms contained in the deed of covenant. The value of the promise at the time of sale would be entirely incapable of estimation, and the parties must have regarded the promise as of no value to the vendor. The Director of Price Control must be presumed to have been aware of the conditions attached to the import of these cars, and the approved prices must apply to sales permitted by law, and in accordance with the legal obligations already imposed on the parties to any such sale. The appellant was required to establish the necessary qualifications to enable him to purchase the car and the giving of the deed of covenant was required by law in an endeavour to ensure the honesty of the proposed purchaser. The taking of the deed of covenant by the respondents was a compliance with the obligation imposed on them by authority. The making of the promise was not a "consideration which in effect related to the sale" of the car, but was pursuant to a legal obligation compliance with which was a prerequisite to any bargain between the seller and the purchaser, and was not in effect part of such bargain.

p. 38, l. 10 to p. 39, l. 16.

12. As to damages, clause 2 of the written agreement provided that for every breach of his agreement with the dealer thereinbefore contained the covenantor would pay to the dealer as and by way of liquidated damages and not as a penalty (but without prejudice to any other rights and remedies of the dealer thereunder) the sum of £1000. By their statement of claim in the Supreme Court, the respondents claimed £1000, but at the trial they did not contend that this sum was recoverable and conceded that it was a penalty.

p. 54, ll. 22 to 26.

p. 3, ll. 35 to 36.
p. 23, ll. 22 to 28.
p. 32, ll. 34 to 39.

13. In terms of the covenant, the appellant should have offered the car to the respondents for £1,157. The Board of Trade conditions provided in paragraph 10, that upon a purchase by a dealer under paragraph 9 (the paragraph relating to covenants) the dealer would not re-sell the car at a price exceeding the price at which the car was sold new, plus any necessary reconditioning cost charged at ordinary rates. Therefore, if the covenant had been complied with, the profit that the respondents could have made on a re-sale would not have exceeded £50.

p. 45, ll. 12 to 22.

p. 23, l. 22 to p. 25, l. 13.

14. Barrowclough C.J., while expressing the view that there was some anomaly in resorting to the open market value in such a case, held that he should assess the damages at the difference between the price at which the respondents could have purchased the car if it had been offered to them in accordance with the covenant and the then market value. Fixing the market value at £1,700, the price for which the appellant sold the car, the learned Chief Justice gave Judgment accordingly for £543.

p. 39, l. 31 to p. 40, l. 11.

15. The only judgment on appeal in which the question of damages was discussed was that of McGregor J. He referred to section 52 of the Sale of Goods Act, 1908 (which is identical with section 51 of the English Sale of Goods Act, 1893) as stating the ordinary rule as to the measure of damages when the seller wrongfully neglects or refuses to deliver the goods to the buyer. By section 52 (2) this measure is the estimated loss directly and naturally resulting, in the ordinary course of events, from the seller's breach of contract. By section 52 (3), where there is an available market for the goods in question the measure of damages is prima facie to be ascertained by the difference between the contract price and the market or current price of the goods at the time when they ought to have been delivered.

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p. 40, l. 12 to p. 41, l. 2.

16. Treating the above section as applicable to the present case, McGregor J. said that in the event of the respondents desiring to re-sell, the profit on re-sale of this particular car was limited. This feature was the result of the terms under which the car was imported and was a feature at least peculiar to this particular car. But the respondents were not bound to re-sell. The learned Judge thought that they could have retained the car for use in their business or until the expiration of two years from the original sale, at which time, he said, the restricted price would no longer have had any application. If the respondent desired to re-sell at any early date, the value of the car to them was diminished owing to the fact that the respondents were as sellers subject to restrictions imposed by legal authority. That was a restriction peculiar to the respondent, and the value of the car must be taken independently of any circumstances peculiar to the plaintiff. The ordinary measure of market value should be applied and the learned Chief Justice in the Court below had therefore applied the correct test as to damages.

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17. The appellant humbly submits that the judgment of the majority of the Court of Appeal should be reversed and judgment entered for him with costs here and below, for the following among other

REASONS

(1) FOR the reasons given by Adams J.

(2) BECAUSE the covenant was a valuable consideration relating to the sale of the car and so formed part of the price, within the meaning of the Control of Prices Act, 1947, and is accordingly illegal and unenforceable by virtue of section 29 (1) thereof.

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(3) BECAUSE the method by which the Board of Trade conditions sought to restrict re-sale was by directing that the dealer should require from the purchaser a contractually binding promise in favour of the dealer; and the appellant's promise constituted a right, interest or benefit accruing to the respondents and a detriment or responsibility suffered or undertaken by the appellant in respect of the respondents' agreement to sell the car to him.

(4) BECAUSE the fact that a party may be legally bound to require a certain benefit for himself if he enters into a contract does not alter the fact that what is so required is consideration moving from the other party.

(5) BECAUSE in order to make it lawful to take a covenant as well as a cash price, it was necessary to obtain the approval of the Price Tribunal under section 16 of the Control of Prices Act, 1947, or section 29A thereof (inserted therein by section 30 of the Finance Act (No. 2) 1952); but the necessary approval was not obtained.

(6) BECAUSE the covenant taken was in any event materially different from that referred to in the Board of Trade conditions.

(7) BECAUSE the judgment of the majority of the Court of Appeal is erroneous and ought to be reversed.

18. In the alternative the appellant submits that the judgment of the majority of the Court of Appeal should be varied by reducing the damages awarded to £50; and that the appellant should have costs here and in the Court of Appeal; and that the respondents should have costs in the Supreme Court as on a judgment for £50 only; for the following among other

REASONS

(i) BECAUSE the true measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the appellant's omission to offer the car to the respondents for £1157.

(ii) BECAUSE, in the ordinary course of events, the restrictions to which dealers were subject would result in the respondents' loss not exceeding £50.

(iii) BECAUSE, under paragraph 10 of the Board of Trade conditions, the restriction of the cash price at which dealers might re-sell was not limited to a period of two years.

(iv) BECAUSE the measurement of damages by reference to market price is inappropriate in the circumstances.

(v) BECAUSE there is no evidence that there was an available market in which the respondents could buy a similar car.

(vi) BECAUSE the judgment of the majority of the Court of Appeal is erroneous and ought to be varied.

R. B. COOKE.

No. 1 of 1958

In the Privy Council

ON APPEAL

From the Court of Appeal of New Zealand

BETWEEN

JOHN NEIL MOUAT *Appellant*

AND

BETTS MOTORS LTD. *Respondent*

Case for the Appellant

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