Privy Council Appeal No. 1 *of* 1958

John Neil Mouat – – – – – – – – – *Appellant*

v.

Betts Motors Ltd. – – – – – – – – *Respondent*

FROM

THE COURT OF APPEAL OF NEW ZEALAND

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 20TH OCTOBER, 1958

Present at the Hearing:
VISCOUNT SIMONDS
LORD MORTON OF HENRYTON
LORD KEITH OF AVONHOLM
LORD SOMERVELL OF HARROW
LORD DENNING

[*Delivered by* LORD DENNING]

In this case Betts Motors Ltd. sued John Neil Mouat in the Supreme Court of New Zealand for damages for breach of contract. At the trial Barrowclough, C.J., gave judgment for the plaintiffs for £543 and costs. The defendant appealed to the Court of Appeal of New Zealand who, by a majority (Gresson and McGregor, J.J., with F. B. Adams, J., dissenting), dismissed the appeal. The defendant appeals to Her Majesty in Council.

In 1954 and 1955 the motor car trade in New Zealand was faced with a problem. There was a big demand for new motor cars from North America: but there were not enough dollars available to pay for them all. So the number imported had to be strictly limited. The problem was how to ensure that this limited number was fairly distributed. To secure this, the Board of Trade introduced a licensing system under which no person could get one of these new cars unless he could show a special case for it. He might, for instance, be a doctor who needed it for his work. But it is obvious that, unless there were safeguards, such a system would be open to abuse. A person might put forward a plausible case for a new car and so get it from an authorised dealer at the list price: but then soon afterwards resell it at a much higher price to someone else, thus making an undeserved profit. In order to protect the trade and the public from such abuses, the dealers in New Zealand used to require the purchaser of a new car to enter into a special covenant not to resell the car within two years unless he first offered it back to the dealer at the original price less depreciation. The present case concerns one of these special covenants.

On 7th March, 1955, Mr. John Neil Mouat, a farmer, bought a new 1954 Chevrolet motor car for £1,207. He bought it from dealers called Betts Motors Ltd. and at the same time he entered into a special covenant with them in these terms:

> " 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 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 mortgage or charge thereon is conferred upon any other person or corporation WITHOUT first making an offer to the Dealer (irrevocable for fourteen days) to resell 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 vehicles since the date of delivery to the Covenantor but so that such allowance shall not be less than Fifty Pounds (£50) or more than One Hundred and Fifty Pounds (£150) AND at the time of making such offer delivering the said vehicle and leaving it for examination for a reasonable time with the Dealer.

2. THE COVENANTOR will for every breach of his Agreement with the Dealer hereinbefore contained 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 hereunder) the sum of One Thousand Pounds (£1,000)."

The price paid by Mr. Mouat was £1,207: but in breach of the covenant Mr. Mouat, three months later, sold the car for £1,700. Betts Motors Ltd. thereupon sued him for damages for breach of covenant. They admitted that they could not recover the £1,000 because it was a penalty, but they sought to recover damages assessed on the following basis: Mr. Mouat, instead of selling the car for £1,700, ought to have offered to resell it to Betts Motors Ltd. for £1,157 (being £1,207 less £50 depreciation): and they claimed £543 (being the £1,700 he got less the £1,157 at which he ought to have offered it to them). Mr. Mouat pleaded that the covenant was illegal and unenforceable. Alternatively, he said that the damages recoverable were not £543 but only £50.

Their Lordships propose first to consider the legality of this covenant. It is said to be illegal because it offended against the Statute which controlled prices. The controlled price for this car was £1,207 which was the maximum which could be charged for it: and it is said that, by taking the special covenant, the dealers were taking a valuable consideration in addition to the price. The dealers replied that they were compelled to take the covenant. The Board of Trade only allowed the car to be imported on condition that the dealers insisted on such a covenant. These contentions make it necessary for their Lordships to set out the two forms of control exercised over cars at this time by the authorities in New Zealand.

The one control was exercised by the Board of Trade under the authority of section 46 of the Customs Act, 1913, as amended by section 8 of the Customs Act Amendment Act, 1939, and section 3 of the Customs Act Amendment Act, 1953. Under those sections no cars could be imported without licence, and the Board of Trade could grant licences subject to conditions. The import licence in this case was given by authority of 4th June, 1954, to General Motors Ltd. They were allowed to import cars from Canada and the U.S.A. subject to a series of conditions which included, in particular, these two—

"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 the date of purchase of the new car sell or transfer or otherwise dispose 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.

10. Upon a purchase by a dealer under the preceding paragraph, the dealer will not resell the car at a price exceeding the price at which the car was sold new, plus any necessary reconditioning cost charged at ordinary rates . . . On any resale, the dealer will require the purchaser to enter into a deed of covenant or agreement of the kind set out in the preceding paragraph to cover the unexpired balance of the original period of 2 years."

Under the Customs Act, it was provided that if any person committed any breach of the conditions or was knowingly concerned in any such breach, he was liable to a penalty of £200 or the value of the goods.

In view of those conditions it is plain that the dealers Betts Motors Ltd. had no option but to insist on Mr. Mouat signing a covenant as a condition of getting the car.

The other control was exercised by the Price Tribunal set up under the Control of Prices Act, 1947. Under sections 15 and 16 of that Act the Tribunal were empowered to make price orders fixing the maximum prices that could be charged for goods or to give special approval to a selling price in respect of the sale of any goods. The maximum price in this case was fixed by a special approval contained in a direction which the Director of Price Control issued by a letter to General Motors Ltd. in these terms:

> " 1954 and 1955 Chevrolet Sedans
>
> In pursuance of a recent decision by the Price Tribunal regarding maximum prices for motor cars imported completely knocked down from North America, Dominion wide maximum retail selling prices are now approved for Chevrolet Sedans as follows: —
>
> 1954 £1,207 each
>
> 1955 £1,238 each."

It was agreed by counsel that that direction must, for present purposes, be taken to have been in force on 7th March, 1955, before Betts Motors Ltd. made the sale to Mr. Mouat. The question is whether it was legitimate for Betts Motors Ltd., in the face of that direction, not only to charge £1,207 for the car, but also to take the special covenant. This depends on the true application to this case of the following provisions of the Control of Prices Act, 1947: —

> " Section 2 (1). ' 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 effect relates to the sale of any goods or to the performance of any services, although ostensibly relating to any other matter or thing.
>
> Section 29 (1). While a Price Order or a special approval in respect of any goods 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."

In applying those sections to the present case, the first question is: What was the " price " charged for this Chevrolet car? Was it £1,207 alone, or was it £1,207 plus the special covenant? Their Lordships are of opinion that, under the statutory definition, the only kind of valuable consideration which comes within the " price " is a valuable consideration " which in effect relates to the sale ". The special covenant in this case was, in a sense, valuable consideration—just as any collateral contract is consideration for the making of a main contract—but it did not relate to the sale. It is of the essence of a sale that the property in the goods should be transferred from the seller to the buyer: and a valuable consideration only relates to the sale if it is given as the inducement—or one of the inducements—for the transfer of the property. In this case the sole and entire inducement for the transfer was the cash sum of £1,207. The special covenant was not given for the property but for something different. It was given for the privilege of being allowed to buy a new car. It was not expected to yield any benefit to the seller. Its purpose was to stop the purchaser taking advantage of his privileged position contrary to the interests of the trade and the public. It was a pre-requisite to the transfer of the property and not part of the consideration for it. In these circumstances their Lordships think it cannot properly be said to form part of the " price " within the statutory definition.

Even if the "price" did include the special covenant, their Lordships think there was no illegality. The only document fixing the maximum price of £1,207 was contained in a letter from the Director of Price Control to the importers, General Motors Ltd. Their Lordships agree with McGregor, J., in thinking that, when the Director of Price Control sent this letter, he must be presumed to have been aware of the conditions imposed by the Board of Trade—which required the dealers to exact this special covenant. It would be a strange thing if one Government Department—the Director of Price Control—was unaware of what another Government Department—the Board of Trade—was doing in relation to the self-same cars. The Board of Trade on 4th June, 1954, gave the import licence and imposed the conditions. The Price Control in 1955 fixed the maximum price of £1,207. Each was contained in a letter to the self-same importers, General Motors Ltd. The importers who received those letters were entitled to assume that the right hand of Government knew what the left hand was doing, and therefore to assume that the Director of Price Control knew that dealers had to exact a special covenant and fixed the maximum price on that basis. In other words, the letter fixing the maximum price must be read as if there was added to it the words: "It is understood, of course, that in selling at this price the dealers will be exacting a special covenant as required by the Board of Trade conditions". So read, it is clear that the price charged by the dealer, even if it is to be regarded as including a special covenant, was in conformity with the price fixed by the Price Control.

It was pointed out that this special covenant is somewhat different in its terms from that required by the Board of Trade conditions: but the differences are not so substantial as to affect the matter. The £1,207 plus this special covenant was still in conformity with the Price Direction.

Their Lordships are of opinion, therefore, that this special covenant was not illegal, and they turn to the question of damages. It is said that the damages suffered by the dealers only amounted to £50. If Mr. Mouat had performed his covenant and offered to resell the car to the dealers Betts Motors Ltd. for £1,157 (£1,207 less £50 depreciation) the dealers, under the Board of Trade conditions (which their Lordships have set out), could only have resold it for £1,207. So their loss, it is argued, is only £50. The result of this argument, if right, is that Mr. Mouat would benefit to the extent of nearly £500 by breaking his covenant. He made a profit on resale of £543 (£1,700 less £1,157) and would only have to pay £50 damages.

In the opinion of their Lordships the argument is not well-founded. It does not lie in Mr. Mouat's mouth to say that, if he had fulfilled his covenant, the dealers could only resell the car for £1,207. That was a matter peculiar to the dealers which was no concern of his. The dealers were entitled in law to be put into as good a position as if he had fulfilled his covenant: and to do this they were entitled to go into the market and buy a similar car at the market price, see *Williams* v. *Agius* 1914 A.C. at p. 531 by Lord Moulton. This rule applies even though the only available market is a surreptitious market which is fed by persons who have broken their covenants, see *British Motor Trade Association* v. *Gilbert* 1951 2 T.L.R. 514. The market price of this car in that market was £1,700. At any rate, Mr. Mouat can hardly deny that that was its market price, since that is the sum for which he sold it: and the damages should be the difference between that market price of £1,700 and the contract price of £1,157.

Their Lordships find themselves, therefore, in agreement with the decision of Barrowclough, C.J., and the majority of the Court of Appeal in New Zealand and will humbly advise Her Majesty that the appeal should be dismissed. The appellants must pay the costs.

(39532) Wt. 8021—25 100 11/58 D.L.

In the Privy Council

JOHN NEIL MOUAT

v.

BETTS MOTORS LTD.

DELIVERED BY LORD DENNING

Printed by HER MAJESTY'S STATIONERY OFFICE PRESS,
DRURY LANE, W.C.2.

1958