Judgment 23.1.58

PC GE4.G6.

In the Privy Council.

No. of 1957

ON APPEAL FROM THE COURT OF APPEAL OF NEW ZEALAND

BETWEEN

JOHN NEIL MOUAT — Appellant

AND

BETTS MOTORS LTD. — Respondent

RECORD OF PROCEEDINGS

INDEX OF REFERENCE

PART I

PART II (Exhibits printed)

PART III (Exhibits not printed by agreement)

Description of Exhibit.	Exhibit Mark.	Date.
Certificate of Registration of Chevrolet Motor Vehicle	A	3rd March 1955
Change of ownership form (Mouat to Hazeldine)	B	30th May 1955
Change of ownership form (Hazeldine to Clayton)	C	2nd June 1955
Change of ownership form (Clayton to Gallagher)	D	16th September 1955
Certificate of Registration of Dodge Motor Vehicle	E	
Application for and Licence to Import and endorsed particulars of imports thereunder	J	(of licence) 20th April 1954
Defendant's application to purchase Dodge Motor Vehicle	N	27th October 1954

In the Privy Council.

ON APPEAL FROM THE COURT OF APPEAL OF NEW ZEALAND

BETWEEN

JOHN NEIL MOUAT of Punakaiki, Contractor ..... Appellant

AND

BETTS MOTORS LIMITED of Westport, Motor Garage Proprietors .... Respondent

RECORD OF PROCEEDINGS

No. 1
STATEMENT OF CLAIM

In the Supreme Court of New Zealand

No. 1 Statement of Claim 23rd January, 1956.

IN THE SUPREME COURT OF NEW ZEALAND.
WESTPORT JUDICIAL DISTRICT.
GREYMOUTH REGISTRY.

BETWEEN

BETTS MOTORS LIMITED of Westport, Motor Garage Proprietors .... Plaintiff

AND

JOHN NEIL MOUAT and THOMAS NEIL MOUAT both of Punakaiki, Contractors .... Defendants

The plaintiff says:—

1. The plaintiff is a duly incorporated Company having its registered office at Westport and carrying on there the busines of Motor Garage Proprietors and Motor Vehicle Retailers.

2. On the 12th day of October, 1954 the first named defendant signed an " Application for Purchase of a North American Motor Car under Conditions Established by the Government " (to which the plaintiff craves leave to refer) and requested the plaintiff to endeavour to procure for him a new Chevrolet.

3. By the said Application the first named defendant agreed in the event of a car being made available to him to be bound by the rules as laid down by the N.Z. Government one of such conditions being that the first named defendant should enter into an agreement with the plaintiff restricting dealing with or disposing of the said car within the space of two years from the date of delivery thereof.

4. In or about the month of March, 1955 the plaintiff was successful in having a Chevrolet Sedan Car allotted to the first named defendant and took steps to advise the first named defendant that the said Car was available at the plaintiff's garage in Westport.

5. On the 7th day of March, 1955 the second named defendant called at the plaintiff's office in Westport and was informed that the car could not be released until the first named defendant had signed the required Agreement.

6. The second named defendant thereupon informed the plaintiff's Manager that the first named defendant was away from Westport but that he (second named defendant) had authority by Power of Attorney to sign the said Deed of Covenant on behalf of the first named defendant and to pay the purchase price of the said car namely £1207 : 0 : 0.

7. Acting in reliance upon the statements of the second named defendant as set out in the preceding paragraph hereof the plaintiff's Manager prepared an Agreement (a copy of which is attached to this Statement of Claim) and the second named defendant signed the same as Attorney for the first named defendant and paid the purchase price as aforesaid.

8. The plaintiff relying upon the said representations thereupon gave delivery of the said Chevrolet Sedan Motor Car to the second named defendant as agent for the first named defendant.

9. The car delivered by the plaintiff to the second named defendant was a 1954 Chevrolet Sedan Motor Car Engine No. R43136 Chassis No. 4/1269/51647 Registered No. 401556.

10. In or about the month of June, 1955 the defendants or one of them sold or otherwise disposed of the said Motor Car to one G. W. Hazeldine.

11. Such sale or other disposal was in breach of the provisions of the said Agreement of the 7th day of March, 1955 and of the terms on which the plaintiff sold the said Motor Car to the defendant.

12. The said Agreement of the 7th day of March, 1955 provided that for every breach thereof the convenantor would pay to the plaintiff the sum of £1000 : 0 : 0 as and by way of liquidated damages and not as a penalty.

13. On the 5th day of December 1955 the plaintiff's Solicitors wrote to each defendant by registered post requesting confirmation of the authority of the second named defendant to sign the said Agreement on behalf of the first named defendant but no reply was received to either letter.

14. On the 22nd day of December, 1955 the plaintiff's Solicitor wrote to the Solicitor for the defendants (Mr A. A. Craig of Westport) requesting him to advise whether the second named defendant had authority to sign the said Agreement on behalf of the first named defendant but no reply has been made to that letter by or on behalf of the defendants or either of them.

15. By reason of the said breach the plaintiff has become entitled to payment of the said sum of £1000 from the first named defendant if the second named defendant had authority to sign the said agreement on behalf of the first named defendant and has suffered loss by reason of such breach.

16. The second named defendant by words and conduct represented to the plaintiff that he had authority to sign the said Agreement as aforesaid and if he had no such authority then he was guilty of a breach of Warranty of authority in consequence of which the plaintiff has suffered loss.

WHEREFORE the plaintiff prays for:—

(a) AS AGAINST BOTH DEFENDANTS, a Declaration that the second named defendant was lawfully acting as agent for the first named defendant in signing the said Agreement of the 7th day of March, 1955.

(b) AS AGAINST THE FIRST NAMED DEFENDANT—

(i) Judgment for the sum of £1000 by way of liquidated damages for breach of the said Agreement.

(ii) An order for the return of the said motor car to the plaintiff

In the Supreme Court of New Zealand

No. 1 Statement of Claim 23rd January, 1956 *continued.*

and in case such return cannot be had then judgment for such sum as may be just for the said breach.

(iii) The costs of this action.

(iv) Such further or other order as may be just.

(c) AS AGAINST THE SECOND NAMED DEFENDANT—

(i) The sum of £1000 or such other sum as the plaintiff may be entitled to for breach of warranty of authority.

(ii) The costs of this action.

(iii) Such further or other relief as may be just.

NOTE:—

(1) The copy of agreement referred to in paragraph 7 above as attached to the Statement of Claim is printed as Exhibit "I" on page 53.

(2) The action was discontinued at the hearing in the Supreme Court against the first named defendant in view of the admission of his authority contained in the Statement of Defence.

No. 2

No. 2 Statement of Defence 8th February, 1956

STATEMENT OF DEFENCE

The Defendants by their solicitor Peter Henry Thorwald Alpers say:—

1. They admit the allegations contained in paragraphs 1 and 2 of the Statement of Claim.

2. They admit that the First Defendant agreed to be bound as alleged in paragraph 3 of the said form of application by the rules laid down by the New Zealand Government but do not know and therefore deny that one of such conditions was that the First Defendant should enter into the agreement in the said paragraph described.

3. They admit that the Plaintiff was successful in having a Chevrolet sedan car allotted to the Defendant as pleaded in paragraph 4 of the Statement of Claim but deny that steps were taken to advise the First Defendant of the availability thereof.

4. They admit the allegations contained in paragraph 5 of the Statement of Claim.

5. While denying some details of the Plaintiff's version of the events described in paragraphs 6, 7 and 8 of the Statement of Claim the Defendants admit that the Second Defendant held out that he had authority to purchase the motor car in question from the Plaintiff on behalf of the First Defendant and to enter into a " deed of covenant " as therein mentioned and that he signed the said agreement or " deed of covenant " as attorney for the First Defendant and completed the transaction accordingly, receiving delivery of the motor car on behalf of the First Defendant.

6. The Defendants admit the allegations contained in paragraphs 9, 10, 12, 13 and 14 of the Statement of Claim.

7. The Defendants deny the allegations contained in paragraphs 11 and 15 of the Statement of Claim.

8. The Defendants say that the said alleged agreement dated the 7th day of March 1955 is an illegal agreement by virtue of Section 29 Sub-section (1) of The Control of Prices Act 1947 and is therefore void.

9. And for a further defence the Defendants say that, notwithstanding the express terms of the said alleged agreement of the 7th March 1955, the sum of £1000 which is now sought to be recovered, is fixed as and sought to be recovered as a penalty and not as liquidated damages and that as a penalty it is irrecoverable.

10. Further, the Defendants say that the Plaintiff, having suffered no injury, can recover no damages in this action.

11. The Defendants admit that the Second Defendant represented as alleged in paragraph 16 of the Statement of Claim that he had authority to sign the said agreement as alleged and such authority is not now repudiated by either Defendant.

In the Supreme Court of New Zealand

Plaintiff's Evidence: No. 3 Raymond Charles Bennett Examination

No. 3

NOTES OF EVIDENCE TAKEN BEFORE THE RIGHT HON. THE CHIEF JUSTICE, IN THE SUPREME COURT, GREYMOUTH, 1st MARCH, 1956.

RAYMOND CHARLES BENNETT.

Greymouth. Civil Servant.

Investigating Officer. I produce records of Motor Registration Branch, Chevrolet motor engine No. 401556 IN NAME OF John Neil Mouat, Farmer, Punakaiki. That certificate was issued on 3rd March 1955 at Westport Post Office. I produce also change of ownership form dated 30th May 1955 and lodged at Christchurch on 2nd June. That records change of ownership of the same vehicle in favour of Gordon Webb Hazeldine of Christchurch, Motor dealer. **(Exhibit B.)** That car was again transferred at Christchurch on 2nd June from G. W. Hazeldine to Stuart Clayton, of 251 South Road, Dunedin, **(Exhibit C).** There was a further transfer on 16th September 1955 when the same vehicle was transferred to Daniel Gallagher from Stuart Clayton. I produce change of ownership form. **(Exhibit D).** ...
No questions.

No. 4 Gordon Webb Hazeldine Examination

No. 4

GORDON WEBB HAZELDINE. Motor Dealer, Christchurch. I have been in the motor business at Christchurch some 20 years in business solely concerned with sale of motor vehicles.. I am well acquainted with the value of second hand motor vehicles. In May 1955 I purchased from John Neil Mouat of Punakaiki a motor car—Exhibit B is the notice of change of ownership in respect of the vehicle purchased by me from Mouat. I paid Mouat £1700 for the vehicle. I sold it in June 1955 to Stuart Clayton of Dunedin for £1900. In my opinion the fair market value in May or June 1955 of a 1954 Chevrolet was round £1900. In December 1955 I purchased another vehicle from John Neil Mout of Punakaiki. That was a 1954 Dodge. (Mr Alpers objects—question reserved) I produce certificate of registration of that Dodge motor vehicle. **(Exhibit E).**

Cross Examination

CROSS EXAMINED BY MR ALPERS. What mileage had this car done when you bought it—the Chevrolet? From memory approx. 4,000. Have you not thought about that Mr Hazeldine, since the matter has been brought to your attention? Have you not looked at records, or could you only rely on memory? Don't keep a record of mileage. What was the condition? In keeping with mileage of about 4,000. Did you yourself drive it? Yes. Have you any records at all to support your

statement you paid £1700 for this car? Yes, I have my day book where the amount was recorded, and the record of it being sold. Have you the day book here? Yes. No other records? Yes. My accountant has a record of it in his office. Did you get a receipt? Cash. It is your practise to give receipts? You don't have to give a receipt for cash. Would this amount appear in your banking, how was it paid? Mostly in 50's. It was quite a while ago. When he arrived in the car and I made the offer of £1700 he put a toll call in to Mr Mouat senr. You have your day book, that is the only written record here of the transaction? Yes, and a copy of the sale. I understand you to say the fair market value of this car was £1900? Yes. Was it for this car or for 1954 Chev's? This particular car for the mileage and year. You paid him £1700 and have no record other than a day book that you can produce? My day book is quite sufficient. Do you keep such sums as £1900 in your custody in your business premises ready to pay them out in cash. I usually have £4000 or £5000. Itdoesn't mean a thing.

No. 5

THOMAS GEOFFREY SLEE

Managing director of Betts Motors Ltd. of Westport, the plaintiff company in this action.

My company holds the franchise from General Motors N.Z. Ltd. for Chevrolet cars for the whole of the Buller area. The company has held this franchise since 1934. For some years past there have been restrictions on the persons to whom dealers may sell Chevrolet and other North American cars. That has been since the last 10 years. The purpose of those restrictions is to see that the purchasers shall be essential users of the vehicles. The conditions at present applying are known as the Board of Trade conditions to the trade. I produce a copy of the current Board of Trade conditions dated 30 July 1954, and attached to the conditions I also produce a letter dated 18 August 1954 from General Motors enclosing the conditions **(Exhibit F).** General Motors forwarded those conditions to me, and a copy of the letter which I have just produced. I draw attention to para. 9 of the conditions providing for the execution of an agreement by each purchaser of the vehicles to which the conditions apply. I also draw attention to Clause 10 of the conditions. Under Clause 10 there is a restriction placed upon my company as dealer in the event of my company buying back one of these North American cars within the period of two years. The restriction applies to the amount at which I may re-sell the vehicle. The

In the Supreme Court of New Zealand

Plaintiff's Evidence: No. 5 Thomas Geoffrey Slee Examination

defendant approached me for the allocation of a Chevrolet vehicle for him. That would be in October 1954. At that time I explained to him that Board of Trade conditions were laid down, that he must read those and fill in the necessary application form applying for the vehicle. The only condition I mentioned at that time was that if he were allocated a North American motor vehicle he would not be able to sell it within 2 years or if he did, he would be liable to pay Betts Motors Ltd. £1,000 damages. At that time I gave him the Board of Trade conditions and an application form to take home to read the conditions and complete the application form. He took the papers from my premises. He returned the application to me two days later and the Board of Trade conditions. The application form was duly completed.

Questioning by the Court.

COURT. He just handed them to you, not with a covering letter? Just handed them to me.

Examination *continued.*

I produce application form which defendant handed to me. The form was signed by defendant and declared before a solicitor, Mr Craig. **(Exhibit G).** On receipt of that application form I forwarded the application, together with other applications, to General Motors Ltd., Wellington. In forwarding the application forms to General Motors I am required to fill in a dealer recommendation report on the application. I did so in this case, and produce it signed 13th October 1954. The company's name and my signature is on it **(Exhibit H).** Very late in December I received from General Motors the approved recommendation sheet for the applicants. Included in those was Mr Mouat the defendant. The portion at the foot of Exhibit H dated 20 December 54 is filled in by General Motors.

Having received the approval on Exhibit H from General Motors I communicated with defendant. I notified that he had been allocated a 1954 Chevrolet. I notified him verbally in my premises. His reply to my notification was that he thought he could probably get a Dodge motor car and to that I replied that I would require to know fairly urgently whether or not he intended taking the Chevrolet as I was compelled to notify General Motors. Later I had another interview on this matter. The interview was with defendant's Father who stated in answer to my question whether a Chevrolet was required that a Chevrolet was definitely required. The car arrived in Westport about 3rd March 1955 and I went to Mr Mouat's business premises and as he was absent I notified his sister that the car had arrived, and asked her to notify her brother. When the car arrived there was necessary servicing which I did, and registered the vehicle for the owner. Approximately 2 days later, on 7th March Mr Mouat's Father called to take delivery of the vehicle. I stated to him that I had to have his son to sign the necessary papers. He had to sign the papers before delivery. He stated he had Power of Attorney to act and sign the necessary papers on behalf of his son. I produced the form of agreement which had been filled in and

asked him to sign it in front of my senior clerk who witnessed it. I produce agreement dated 7th March 1955 signed " J. N. Mouat per T. N. Mouat Power of Attorney ". J. Riddler, my senior clerk, was the witness. The document was afterwards executed by my company under seal. **(Exhibit I).** Before that document was signed by Mr Mouat senr. I think he read it fairly completely, but in conversation I did tell him that it was a document, an agreement, that his son could not dispose of the vehicle within 2 years. I told the Father that if the vehicle was disposed of without first being offered back to Betts Motors within the 2 year period we would hold his son to the £1,000 damages under the agreement. Immediately the agreement was completed the Father, T. N. Mouat, paid his cheque in settlement for the vehicle, together with fee for registration. The sale price of the car was £1207 and the registration fee was £4. 2 . 4. I received £1211. 2. 4. The agreement speaks of a consideration of a shilling. I offered the Father a shilling and he jokingly laughed and did not accept the shilling. It was not paid over. He said " Go and have a beer ". The particulars on Exhibit A relate to the Chevrolet car we are speaking of. That form was filled in by me and the form relates to the car supplied to Mouat. The registration application was signed by me on behalf of defendant. The car was then delivered by our service manager to Mr Mouat senior. I later received information that this car had been sold by defendant. Several months later I received this information. It had not been offered to my company by defendant in terms of the agreement, not at any time. I then commenced these proceedings. My company has had the Chevrolet franchise for 21 years past. It is a franchise of extremely great value to our company. Since the sale of this car by the defendant I have had complaints from customers of my company. Customers applied for Chevrolets and did not get them, another party applied got a Chevrolet and re-sold it. By another party I mean Mr Mouat.

The complaints refer to the sale of the Chevrolet by Mr Mouat. Some of these complainants have taken their custom from my company. I do know of four specific cases of applicants who have purchased other large motor vehicles and we have completely lost their business. They have been customers of Betts Motors from 10 to 15 years. These four were among the complainants to the company. The sale of the vehicle was made in Christchurch. The fact that a vehicle like this leaves our territory affects my company. We have lost the possibility of replacement parts, the major servicing that would have gone with the vehicle had it stayed in our territory. It is always hoped with the sale of every new vehicle that it will turn out to be a trade-in on another vehicle, and that will be another re-sale of a used vehicle. After the delivery of the Chevrolet in March 1955 I have seen defendant with another car. A few months after delivery of the Chevrolet I saw defendant driving a 1954/55 Dodge. That car has been in my garage. (Mr Alpers objects to this question on same ground as previously. Decision reserved).

I have produced as current Board of Trade conditions the conditions

In the Supreme Court of New Zealand

Plaintiff's Evidence: No. 5 Thomas Geoffrey Slee *continued.* Cross Examination

dated 30 July 1954. Those were not the first Board of Trade conditions about North American Cars. There were Board of Trade conditions for three years prior to those conditions. The earlier conditions were not quite so rigid as the later conditions. They were conditions determined by the Board of Trade as were the latest ones. I received them as I received the later ones, from General Motors.

You say you have lost some business; you imply you have lost the business of some customers who would otherwise have bought expensive cars? I had hoped to retain them as business clients. Had they bought these cars from you? No, they have left our business. Had you cars available for them? We also happen to be Vauxhall dealers and we would have made an earnest effort to make a Vauxhall available to them had they been inclined. That is a matter of priority is it not? These customers required large cars. Do you think you would be able to get them to buy Vauxhall? I doubt if I could. They got larger vehicles elsewhere? Quite right. Those motor vehicles they have got are vehicles in respect of which there are priority lists? I would not say that. Certain vehicles are big-price vehicles; there is no waiting list for them. Do you suggest, then that what you have lost is the opportunity of inducing them to buy Vauxhalls rather than buying cars elsewhere? I've lost their business for all time because they have bought cars elsewhere. Do you seriously suggest that is because of this matter of Mr Mouat? I think they were all very annoyed that Mouat got a Chevrolet and sold it. They would know that was not your fault? It is very hard to convince the public. Have you not told them it was not your fault? I have told them it was not our responsibility. You say there are four of these customers? Four particular customers I have taken note of. You say you know they are annoyed about Mr Mouat and you know they have gone elsewhere; have any one of them told you the reason for their going elsewhere was their being annoyed about the Mouat affair? They were annoyed that Chevrolets were allocated and sold and their applications were not granted. They are annoyed their applications were not granted? Annoyed their applications were not granted yet people who were allocated Chevrolets were allowed to sell them. Apart from that, you have suffered a loss of £50 at the most in your right of re-purchase and re-sale; if the mileage of 4,000 is accepted your loss is £50? £50. Can you point to any other loss that you have suffered as a result of this? Yes as I stated before I have lost a lot of customers. It is not possible to estimate the damage my company has suffered,—it is a small territory—over the lax way I was supposed to have allocated Chevrolets. What has that got to do with Mr Mouat's breach? No answer. Can you point to any other loss you have suffered? None other than I can estimate other than the damage we have suffered in the eyes of the general public. Has it been in fact open to anyone to criticise the allocation of this car to the Mouats on the facts known to you from the application? No, I think the allocation was correct on the face of the application he made.

When this car became available, did it become available specifically for Mr Mouat or did it become available for any one of your applicants? All vehicles were labelled by General Motors for delivery to a specific person, the applicant in this case. Was it not the case you told Mr Mouat senr. this car had already been turned down by two or three others who stated they did not want it? I have never stated that. This car was not offered back to you—did you form any opinion of the market value of this car in Westport at the time when the first sale was made? I had not considered that; the car should have been offered back to Betts Motors. I had not considered the market value at that time.

No. 6

HENRY ARTHUR PENNY. Customs Officer, Wellington.

In 1954 I was officer in charge of Import Licensing Section of the Wellington District Office of the Customs dept. As such officer the Minister of Customs had delegated to me his powers in respect of the granting, revoking and modifying of licenses to import goods. That delegation was made on 30 August 1940 by the Minister. It was in force in 1954. It is still in force. On 20 April 54 I issued to General Motors NZ Ltd, a licence to import goods under the number 12639. I produce that licence. It appears from the back of the licence that goods pursuant to this licence were brought in on the Port Wyndham amongst other vehicles. **(Exhibit J).** On 4th June 1954 I wrote to General Motors stating that the licence which is Exhibit J was issued subject to the conditions that the vehicles will be distributed in accordance with conditions to be determined by the Board of Trade. I produce that letter. **(Exhibit K).** On 5th August 1954 the Controller of Customs wrote to General Motors forwarding a copy of the conditions settled by the Board of Trade dated 30th July 1954. I produce letter signed by the Comptroller. I know his signature and this letter is signed by him. **(Exhibit L).** I refer to the second sentence of the Comptroller's letter stating that the import licence available for North American cars is subject to compliance with the attached conditions. I refer to third paragraph in which it is stated that the Board wishes to stress that it is the importers who are responsible for ensuring that the conditions of distribution are faithfully complied with.

In August 1954 there was in force a delegation dated 1 May 54 from the Minister to the Comptroller who signed the letter referred to, of the Minister's powers under the regulations of 1938 in respect of licensing imports.

No questions.

In the Supreme Court of New Zealand

No. 7
Plaintiff's Evidence: Maurice Charles Smith

No. 7

MAURICE CHARLES SMITH. Employed by General Motors N.Z. Ltd. as Manager, sales staff.

In 1954 I was engaged in that part of the Company's activities which was concerned with the distribution of imported American cars. These cars are imported by my company from Canada in a completely knocked-down condition, and assembled by my company at Petone. Thereafter they are sold to our different dealers throughout the country for distribution. There has been control for some years past as to the class of persons to whom Chevrolet cars can be sold. Conditions imposed by Board of Trade since late 1951. Those were the first conditions imposed by the Board of Trade—on the recommendation of the Board of Trade. I am aware of the present conditions dated 30 July 54. The conditions state at the top under the word "Note" that they were drawn up in consultation with the importers concerned. My company was in consultation with the Board of Trade on the settlement of these conditions. I received a letter of 5 August 1954 from Comptroller of Customs forwarding these conditions. The third paragraph states that responsibility for complying with the conditions is upon the importer, and secondly that if there is a breach of the conditions the Board will take this into account when considering the grant of future licenses. In view of those statements, my company attaches importance to the compliance with the conditions laid down by the Board of Trade —very great importance. It is the policy of the company to ensure honest compliance with the conditions. I have consulted the records of the company as to the importation of the Chevrolet car which was sold by plaintiff to Mr Mouat. That car was brought into the country in the "Port Wyndham". The Port Wyndham brought goods imported pursuant to the licence produced, Exhibit J.

From the entry on the back of the licence it appears that the Port Wyndham's cargo was imported pursuant to that licence. The Port Wyndham arrived in N.Z. in the latter part of 1954. By the order of the date stamps I would place date of clearance as 21st October 1954. I can check that by looking at the Customs entry for the Port Wyndham "72 Chevrolets. 22nd October 1954". Letter of August 1954 (18th) was sent by General Motors to all Chevrolet dealers and the purpose of the letter was to set out the procedure for the allocation of the cars pursuant to Board of Trade conditions and to instruct dealers as to their duties. I was concerned in the sending out of these instructions. I am aware that my company received an application signed by Mr Mouat through plaintiff company, together with a recommendation of the plaintiff company. Those papers were considered by my company in Petone, and I was one of the people concerned with the consideration of that application. Exhibit H shows the application was approved. The signature at the foot of Exhibit H is that of Mr P. H. Meakin of General

Motors. He is one of my associates who was concerned in the approval of these applications. I produce letter dated 24 August 55 from Director of Price Control to my company notifying the maximum price for 1954 Chevrolet Sedans as £1207. **(Exhibit M.)** There was no suggestion in your evidence that Betts Motors committed any breach of the conditions imposed on them by the Board of Trade? No. Consequently you wouldn't suggest that in any way their franchise is in danger by this transaction? There is nothing known to me within this transaction which would make that so.

No. 8

GORDON WILLIAM FAIRWEATHER. Managing Director of Blackwell Motors of Christchurch.

My company is the holder of the Chevrolet franchise from General Motors for Canterbury District. I have been in the retail motor business for 35 years. There is an association known as N.Z. Retail Motor Trade Association, which, as its name implies, comprises in its membership all dealers, garage proprietors and the like engaged in the retail sale of motor vehicles.

I have lately been President of that association—last year. I am still a member of the executive. As part of my business I keep in touch with the market for second hand vehicles. I am familiar as a Chevrolet dealer with the covenant system operating in respect of Chevrolet cars. At the present time the market price of new Chevrolet cars is greater than the controlled price. That applies to low-mileage used cars. A low-mileage car is anything under 5,000. The demand for this type of car has existed since 1946. The premiums over the list price obtainable in earlier years were greater than is obtainable now. The premium was at its highest in 1949 to 1950. In 1949 a low mileage Chevrolet car would bring £2,000, £2,050. At that time the list price was, in 1949, £840. In my opinion the market value of a 1954 Chevrolet in June 1955, assuming the car had not done more than 5,000, would be between £1700 and £1800.

Is that the Christchurch market you are talking about? Yes. Does it differ between various centres? Yes it does. Do you know what the difference is between Christchurch and Westport? No. It differs from North to South, rather than east to west. You don't know whether it differs from east to west? No, we haven't sold any vehicles on the West Coast.

In the Supreme Court of New Zealand

No. 9

DEFENDANT'S EVIDENCE:

Defendant's Evidence: No. 9 Edgar Thomas Lockington

EDGAR THOMAS LOCKINGTON. Company Director, Westport. Managing Director of Westport Car Sales Ltd., and West Coast Car Sales Ltd., which operates in Greymouth. Both are second hand car dealers.

My Company does a fairly high proportion of the second hand car business on the West Coast. Also Managing Director of E. T. Lockington Ltd which has a garage in Westport and is local agent for Morris cars. There is most certainly a difference in the price ranges between West Coast and Canterbury and further afield. I've heard figures here tonight which have fairly amazed me. In Westport firstly I'd have to find somebody worth a couple of thousand pounds. I should not think a 1954 Chevrolet is worth, to a dealer, £1700 mentioned. I should think the value in 1954 of this car which I knew and had driven. My valuation would be not better than £1300. After hearing evidence I do not know what a dealer in Canterbury would pay.

If a Westport dealer had paid £1200 for the car I think we would have been lucky to get £1300 for it.

My earlier reference to £1300 refers to the re-sale value.

I should imagine I should not pay more than £1200 for that car, due to the shortage of money in a small area, or the fewness of people with sufficient money to purchase such cars.

Cross Examination

For years past throughout N.Z. it is a well known fact that nearly new American cars have commanded high prices above the control prices? Nearly new American cars and also nearly new English cars. You agree they have commanded high premiums over the list prices? Yes. Are Westport or Greymouth the only places in N.Z. where that does not obtain? I'm telling the truth what I could do with this vehicle. You heard of this car being taken to Christchurch and being sold to a Dealer and then to another dealer in turn? Yes. That is in conformity with what you know takes place right through the country? Since 1946 there has been a black market in cars. This sort of thing is typical? Yes. Do you mean to suggest that a Westport dealer or a Greymouth dealer if he could buy one of these cars for £1100 or £1200 would not take it at once to Christchurch and sell it for £1800 or £1900? That is not my habit. I do not buy from Christchurch or sell to Christchurch. What I buy or handle is local business, whereby we know the average person knows more about what we pay and what we get than we do. That is my business; I don't know what happens elsewhere. Isn't it a common thing for West Coast people to take their cars to Christchurch for sale? Yes, it has happened. It commonly happens? No, just the isolated case. Did your company, E. T. Lockington Ltd., receive an application dated 27 October 54 from John Neil Mouat for a new Dodge vehicle?

Yes. This is the application? Yes, definitely. In this application he states he has already applied to Betts Motors for a new car and he undertakes that if Lockingtons supply him he will withdraw his application for a Chevrolet. Yes. **(Exhibit N).** On that application a Dodge car was allocated to Mr Mouat? Correct. It was delivered to him in May 1955? I could not say that. About May 1955? About May 55. What was the price of that new Dodge car? There again I'll have to approximate, approximately £1450.

That car has since been sold by Mr Mouat, hasn't it? Yes. To Mr Hazeldine? I don't know to whom. Weren't you here when that evidence was given? Yes. You accept that? Yes. So Mr Mouat didn't come to a West Coast dealer to sell his new Dodge? No. Though he got it from him? No, he did not. Why did he go to Christchurch, because he could get a better price than from you? You'd have to ask Mr Mouat. I do not know. Did you know at the time this Dodge car was delivered to Mr Mouat that he had a Chevrolet car? I knew Mr Mouat senr. to the best of my knowledge had a Chevrolet car. Did you think the Chevrolet belonged to Mr Mouat senr.? Yes. Why, who told you that? I do not know who told me. I do not know—the impression was in my mind. You had an impression it was Mouat senior's car.? I saw Mouat senior driving it. If it had been Mouat senior's car you would'nt have sold him a Dodge would you? No. Why did you not make inquiries and make sure? I thought we had a Board of Trade where we send applications. If you had known that Mouat had a Chevrolet you would not have let him have the Dodge? Mr Mouat junior? No. you made no inquiries? No. You just had an impression? Yes.

No. 10

REASONS FOR JUDGMENT OF BARROWCLOUGH C. J. GIVEN 1st JUNE 1956

This is an action which raises matters of considerable interest to importers of and dealers in certain types of motor vehicles and members of the public who have recently purchased or who may be desirous of purchasing such motor vehicles. For many years there has been in this country an extensive demand for motor vehicles of North American manufacture. Because of the difficulty of obtaining sufficient dollar funds, it is now and has for some time been impossible to meet that demand in full. Only a limited number of North American vehicles can be imported, and accordingly there arises the problem of determining who shall be the specially favoured persons who are to receive the limited number of such vehicles as are from time to time

available. The Government is in control of import licenses, and it is natural that the Government should be concerned in the distribution of cars that are imported under licenses issued under Government control. Furthermore it is obvious that when such cars are delivered to selected purchasers in New Zealand they will immediately command a higher resale price than the price that was paid for them on delivery. Selected purchasers who were fortunate enough to obtain North American cars will find themselves in the additionally fortunate position of being able to dispose of them at a handsome profit to themselves. In these circumstances the Government, through the agency of the Board of Trade, prescribed certain "Conditions Relating to Distribution' which will presently be referred to in more detail and which were intended, inter alia, to define the method by which a limited number of cars should be distributed amongst the much larger number of applicants for them, and which were also intended to prevent successful applicants from making an unwarranted profit out of resale to persons who might have substantial financial resources, but who on no other grounds ought to be given the advantage of being the owners of these specially sought after North American cars. The relevancy in the present action of those Conditions Relating to Distribution will appear from history of events which now follows.

In October 1954 John Neil Mouat approached Betts Motors Ltd., Westport for the allocation to him of a Chevrolet motor car. Betts Motors Ltd., were the distributors of Chevrolet cars in the whole of the Buller district. The conditions relating to the distribution of North American motor cars as laid down by the Board of Trade were explained to Mouat, and he was given a copy of the document issued by the Board of Trade which set them out in full. He was requested to read it. At the same time he was handed a printed form which was headed "Application for purchase of North American Motor Cars under conditions established by the Government" and which contained a number of blank spaces which were required to be filled in by the applicant. Mouat took both these documents away with him. The conditions referred to set out at some length the principles which were to be followed in distributing fairly amongst the many applicants the limited number of cars available. No one who read them could fail to appreciate that North American cars could be sold only to persons who possessed the qualifications therein set out. Such cars were not for the ordinary run of persons who might desire to purchase them. The conditions also set out that "in order to assist in ensuring distribution for essential needs" each dealer was required to obtain from each of his purchasers a deed of covenant or agreement whereby the purchaser undertook not to sell the car within two years of the purchase of it except to the dealer at the price at which it had originally been sold less depreciation at a fixed rate. This was clearly aimed at subsequent "black market" dealings with the car.

Two days after receiving the application form and the " Conditions " Mouat returned to Betts Motors Ltd., and handed back both documents. The application form had in the meantime been filled in. It began with a statement that Mouat had read the " Conditions " and that he qualified thereunder for consideration for purchase of a North American car. It ended with a duly completed statutory declaration by Mouat that " the contents of the foregoing statements, so far as they relate to matters of fact, are true and correct ". It is clear therefore that Mouat had read the conditions and was forewarned that he would be required to sign a deed of covenant or agreement to the effect mentioned.

In due course Mouat's application was approved; the car arrived and was delivered to Mouat's father on payment of the controlled price namely £1,207. At the same time Mouat senior signed, as attorney for his son, an agreement that John Neil Mouat would not within the space of two years sell the car.

> " Without first making an offer to the dealer, i.e. Betts Motors " Ltd., (irrevocable for 14 days) to re-sell the said vehicle to " the dealer at the original sale price thereof . . . less an " allowance by way of depreciation calculated at the rate of £10 " for every complete 1000 miles run by the said vehicle since " the date of its delivery to the covenantor, but so that such " allowance shall not be less than £50 or more than £150 . . . "

It was agreed at the hearing of this action that Mouat senior was his son's authorised agent to acceptdelivery of the car and that he had a power of attorney from his son enabling him to sign on the son's behalf the above mentioned agreement. I shall hereafter refer to that agreement as " the Covenant " to distinguish it from any other agreement that may have been entered into with the transaction. The delivery of the car, the payment of the purchase price and the execution of the Covenant were all effected on or about the 7th March, 1955.

Not withstanding the solemn undertaking given by him in the Covenant, Mouat sold the car in June 1955 for £1,700. It had then run 4,000 miles. Not only did Mouat break his word and violate the conditions upon which he was given this special privilege, denied to others, of acquiring an American car, and of which he was well aware; but he made a profit of £500 out of the transaction. It is not surprising therefore, that Betts Motors Ltd should wish to sue on the Covenant, and scarcely less surprising that that company should have, as it appears to have had, all the support and encouragement that the Government could give it.

The present action was accordingly brought. The Covenant contained the following clause:

> " (2) The convenantor will for every breach of his agreement " with the Dealer hereinbefore contained pay to the Dealer as

In the Supreme Court of New Zealand

No. 10
Reasons for Judgment of Barrowclough C.J.
1st June 1956.
continued.

" and by way of liquidated damage and not as a penalty (but " without prejudice to any other rights and remedies of the " Dealer hereunder) the sum of £1,000 ".

Betts Motors Ltd., issued a writ claiming judgment for the sum of £1,000 by way of liquidated damages, an order for the return to it of the said motor car, and in case such return could not be had, then judgment for such sum as might be just in respect of the breach of the Covenant. At the hearing of the action the defendant did not deny the facts as I have stated them, nor did he attempt to justify the standard of commercial morality which his conduct had revealed. His first ground of defence was that the Covenant was an illegal agreement by virtue of s.29(1) of the Control of Prices Act 1947 and was therefore void, and that no action for breach of it would lie.

Section 29(1) of The Control of Prices Act 1947 is as follows:

> " 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 of approval commits an offence against this Act ".

It was proved that the maximum approved price for a car such as was sold to the defendant was £1,207. " Price for the purpose of The Control of Prices Act 1947 is defined in s.2(1) of that Act as follows:—

> " Price, in relation to the sale of any goods or to the performance " of any service, includes every valuable consideration whatever " 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 ".

For the defendant Mr Alpers submitted that the price at which Betts Motors Ltd had sold the car in question was a price compounded of the cash payment of £1,207 plus the additional consideration involved in the right which was reserved to Betts Motors Ltd. to have the car offered to it (in the event of the purchaser deciding to sell within two years) at a stipulated price. That stipulated price was in this case less than the price which the car would command on the open market. The actual sale at £1,700 is proof enough of that. The known demand for such cars and the very raison d'être of the conditions Relating to Distribution would also be evidence, if other evidence were needed, of the fact that the pre-emptive right given to Betts Motors Ltd., by the Covenant was a " valuable consideration ". Mr Alpers submitted that it came within the above quoted definition of " Price ": that the price at which this car was sold to the defendant was therefore the cash sum of £1,207 plus the value of that consideration: that this was in excess

of the maximum approved price and that Betts Motors had therefore been guilty of an offence under s.29(1) of the Control of Prices Act 1947. Parenthetically it may be observed that, if Betts Motors Ltd., were guilty of an offence, the defendant also would appear to have been guilty of an offence under s.29(3) of the same Act.

I should say at once that in my opinion the pre-emptive right given to Betts Motors Ltd., was a valuable consideration. In saying this I am not overlooking the fact that if this car had been offered to them in terms of the Covenant and if they had elected to purchase it, they would have had to pay the original price less only £50. By the Conditions Relating to Distribution they were themselves precluded from reselling the car at a price exceeding that at which the car was sold when new, plus any necessary reconditioning costs. In respect of this car they could not therefore lawfully have received on any re-sale, a profit in excess of £50. Notwithstanding that, it cannot be suggested that the benefit which would accrue to Betts Motors Ltd., on a breach of the Covenant was not a valuable consideration. There may have been other advantages for Betts Motors Ltd., which would have made the consideration still more valuable; but I need not consider them.

In considering whether the sale was illegal I must look at the terms of the Covenant which Mr Alpers submission were part and parcel of the sale. The only relevant provisions in the Covenant which have not already been quoted are recitals and para. (1) thereof, both of which I now set out in full:

> " WHEREAS the Dealer is a retailer of motor vehicles of the " make referred to in the Schedule hereto AND WHEREAS " there is a shortage of the said motor vehicles for present " sale and delivery in New Zealand and the Dealer is restricted " from supplying such motor vehicles except to selected and " approved persons who (inter alia) are prepared to enter into " and execute this Agreement AND WHEREAS the " the Convenantor has requested the Dealer to sell to the " Convenantor the motor vehicle particulars whereof are set out " in the Schedule hereto (hereinafter referred to as ' the said " ' vehicle ') AND WHEREAS in consideration of the Dealer " agreeing to sell the said vehicle to the Covenantor and to " make present delivery thereof and for the further consideration " hereinafter appearing the Covenantor has agreed to enter " into and execute this Agreement NOW in consideration of the " premises and of the payment of One shilling (1/-) by the " Dealer to the Covenantor (the receipt whereof is hereby " acknowledged) IT IS HEREBY AGREED by and between " the parties hereto as follows—
>
> " 1. THE COVENANTOR will not (except by will) during " space of two years after the delivery of the said vehicle to the " Convenantor deal with the said vehicle in any manner

In the Supreme Court of New Zealand

No. 10
Reasons for Judgment of Barrowclough C.J.
1st June 1956.
continued.

" whereby any other person or corporation may become entitled " to the possession or use of the said vehicle other than for " private purposes of the Covenantor or for the purpose of " carrying on any profesion trade or business of the " Covenantor or whereby the property in the said vehicle (or " any charge thereon) is or may be or becomes 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 vehicle since date " of its 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."

Notwithstanding the term of the Covenant Mr Cleary submits that the consideration involved in it should not be regarded as part of the price at which the car was sold, and that there was no breach of s.29 of the Act. In its ordinary meaning, the word " price ", in the case now under review, might well mean and refer to the cash sum of £1,207 and nothing more; The interpretation clause in the Act extends the meaning so as to include considerations (if any) that are given in addition to the cash that was paid. **In Craies on Statute Law** 5th Edn. at P.197 attention is drawn to two forms of interpretation clause.

" In one, where the word defined is declared to ' mean ' so and " so, the definition is explanatory and prima facie restrictive. " In the other, where the word defined is declared to ' include ' " so and so, the definition is extensive."

The definition in the control of Prices Act is in the latter form and therefore would ordinarly be regarded as extensive. Mr Cleary submits, however, that an extensive interpretation is not always coercive and that in the present case the definition should not be extended so as to include in the price at which this car was sold, the value of any advantage that might accrue to the seller as the result of the Covenant. He cited **Craies** (supra) at p.200, and **Auckland City Corporation v. Guardian Trust and Ors.** 1931 N.Z.L.R. 914. I have carefully considered these authorities, and also **Meux v. Jacobs** 1875 L.R.7.H.L. 481 which is cited in the passage in Craies; but I do not find in them any justification for treating the definition of " price " in the Control of Prices Act other than as an extending definition. In my opinion the word " price " in s.29 of the Act means exactly what it is defined to mean in the

interpretation section, and the Court is not justified when considering s.29 in giving it a more restricted meaning.

Whilst I am unable to accept Mr Cleary's submission that the word "price" as it appears in s.29 should be read in a more restricted sense than is given to it in the interpretation clause; I am of opinion nevertheless that, even though it be read with the extended meaning contemplated in that clause it still does not include the benefit which might, in certain events, result to Betts Motors Ltd. as a result of the Covenant. The definition makes it clear that every consideration which relates to the sale of any goods is included in the price whether that consideration be direct or indirect, and even though it ostensibly relates to some other matter or thing. This wide definition was necessary if the purpose of the Act was not to be circumvented; but there is nothing in it which purports to alter the broad general connotation of the word. Included in that broad general connotation I conceive to be not every valuable consideration which the seller receives or may receive as the result of parting with his goods, but something which has relation to the value, even though it be an artifically controlled value, of the goods themselves. Thus when a vendor sells a motor car he may have expectations that he will be employed to service it that the purchaser may afterwards purchase from him a new model of the same car, and that he may get the first car back again as a "trade in". All these expectations may be realised in whole or part and may result in material advantages to the seller, and they may, in one sense, be said to relate to the sale; but they cannot, in any common sense view of the Act, be regarded as part of the price or "valuable consideration in relation to the sale". They are incidental sequelae of the sale; but they are not part of the price. It would indeed be a strange thing if Parliament intended that the value of such advantages should be regarded as included in the price. If they were, how could they be assessed and how could any seller know what amount of cash he could lawfully accept in addition to their value? I cannot read the Act as showing any intention to make such valuable considerations a part of the price even though in one sense they "relate to the sale . . . though ostensibly relating to some other matter or thing". They do not relate to the sale in the way that the price of an article relates to its sale.

What then of the advantages that accrue or might in certain events accrue to Betts Motors Ltd., as a result of the observance of or the breach of the Covenant referred to? Are they part of the price as that word is defined in the Act? The question is not solely one of law. It involves also questions of fact. The relevant facts I find to be as follows. Betts Motors Ltd., were quite content, so far as their own business was concerned, to sell the car for £1,207 and nothing more. They took the Covenant, not because they hoped to derive any benefit from it; but because they were required to do so by a Government direction the flouting of which would have involved serious consequences to themselves, and would have resulted in Mouat not getting possession

In the Supreme Court of New Zealand

No. 10 Reasons for Judgment of Barrowclough C.J. 1st June 1956. *continued.*

of the car. They had no grounds for thinking it likely that Mouat would want to dispose of the car within two years, and therefore no reason to suppose that the Covenant would be likely to operate in their favour. Its purpose was not to benefit them but to prevent Mouat from defeating Government policy aimed at black-market dealings in such cars. That it has benefited them in the events which have happened is entirely fortuitous. The giving and the taking of the Covenant were things that were imposed on Betts Motors Ltd., and on Mouat alike, and they were imposed **ab extra.** These being the facts of the matter, I cannot accept Mr Alper's submission that the benefit which has in this case resulted from the breach of the Covenant is in law within even the extended definition of the price. That particular benefit lacks the essential elements of a price **which,** in the Control of Prices Act, I conceive to be all those considerations whether cash or otherwise which induce the vendor to part with the article which he has to sell. They include not only direct but indirect considerations, but they must be considerations which relate to the sale in the sense that they induce the seller to make the sale. It is not enough that they " ostensibly relate to some other matter or thing ". They must also " relate to the sale " in the sense contemplated by the Act.

In arriving at this conclusion I have not overlooked that passage in the Covenant which runs:

> " AND WHEREAS in consideration of the Dealer agreeing to " sell the said vehicle to the Covenantor and to make present " delivery thereof and for the further consideration hereinafter " appearing the Covenantor has agreed to enter into and " execute this agreement **NOW** in consideration of the premises " and of the payment of One Shilling (1/-) by the Dealer to the " Covenantor (the receipt whereof is hereby acknowledged) **IT** " **IS HEREBY AGREED** etc."

The consideration for the giving of the Covenant was thus expressed by the parties to be the agreement to sell the car and give immediate possession of it, plus payment of One Shilling. Both these considerations moved from Betts Motors Ltd., to Mouat and not vice versa. They could not possibly be included in the price. On the other hand, the parties have not said that the giving of the Covenant was a consideration for the sale of the car. At first glance it might be inferred that the considerations on both sides were mutual, and that if the Covenant was given partly in consideration for the sale of the car, so also the sale was made partly in consideration of the giving of the Covenant. Upon the facts of the transaction, however, I am of opinion that this is not so, and that no such inference is justified. When the facts are examined it is clear that the giving of the Covenant by Mouat was a sine qua non of a successful application for preferential treatment in the allocation of North American cars. The allocation to him of such a car could not have been implemented unless he gave the Covenant.

He gave it only for that purpose and not as part of the price of the car. That Betts Motors Ltd., might get a benefit from the observance of the Covenant in the contemplated but somewhat unlikely event of Mouat wishing to sell the car within two years was incidental. It was not a circumstance which induced the sale and cannot be regarded as a part of the price. That Betts Motors Ltd., might get an even greater benefit from a breach of the Covenant by Mouat was the very thing which the Covenant was expected to avoid. Still less was it a circumstance which induced the sale. The benefit which was contemplated from the giving of the Covenant was really a benefit accruing to the Government, which hoped by this means to implement its policy as revealed in the Conditions Relating to Distribution. Though the Covenant did confer the possibility of a benefit to Betts Motors Ltd., and though it must be regarded as "Valuable", I am unable to say that it "related to the sale". It related to the obtaining of an allocation which would be in accord with Government policy. It was not therefore included in the price even within the extended meaning of that word. I hold, therefore, that the sale of the car, though accompanied by the taking of the Covenant as part and parcel of the whole transaction, was not an offence under s.29 of the Control of Prices Act and that the breach of that Covenant gives rise to a cause of action at the suit of the aggrieved party.

There remains the question as to the damages that should be awarded in respect of that breach. It was not contended by Mr Cleary that he could recover the sum of £1,000 mentioned in the Covenant as "liquidated damages and not as a penalty". The sum mentioned clearly so exceeds the damage reasonably likely to result from the breach for which it is to be paid that I must regard it as a penalty and therefore not recoverable. Mr Cleary relied principally on British Motor Trade Association v. Gilbert (1951) 2 All E.R. 641 in which case the measure of damages in very similar circumstances fell to be considered. Danckwerts J. had also to consider whether the covenant in that case might not have been objectionable as being in unreasonable restraint of trade. He decided that question in favour of the plaintiff; but I need not consider it in this case as it was not raised by Mr Alpers. I am concerned with the judgment of Danckwerts J. only in so far as it deals with the question of damages. In that case, as in the present case, there were restrictions on the price at which the dealer could resell the car after he had repurchased it when offered to him pursuant to the Covenant. Mr Alpers suggested that this was not so, and he attempted to distinguish **Gilbert's** case on that as well as on other grounds. That there was such a restriction in the English covenant then in use appears to be established by the passage which appears in 94 **Solicitors' Journal** at the foot of p.785 and the top of p.786. And, though Danckwerts J. does not specifically refer to any such restriction as is imposed in New Zealand by the Conditions Relating to Distribution, nevertheless the whole of that part of his judgment which deals with the measure of damages is understandable only on the assumption that there was a

In the Supreme Court of New Zealand

No. 10 Reasons for Judgment of Barrowclough C.J. 1st June 1956. *continued.*

restriction of some sort on the price at which the car then in question could have been resold if it had been offered to the Association in terms of the Covenant. In England, that part of the Covenant which is now material is taken in favour of the British Motor Association. Another part is in favour of the Association and the Dealer. In New Zealand it is in favour only of the dealer. That distinction is not relevant to the present enquiry. The decision of Danchwerts J. is therefore directly in point.

Mr Alpers pointed out that in **Gilbert's** case there was no appearance, and therefore no argument, on behalf of the defendant, and that is a circumstance which should be taken into account. Another distinction between that case and this was that there was not in the Covenant then under consideration any provision for payment of a sum said to be liquidated damages. As I have held that sum in the Covenant I have to consider to be a penalty, nothing turns on that distinction. It was proved that in Gilbert's case that the car in question would command a price of £2,500 on the expiration of two year period mentioned in the Covenant. Discounting that price at 7½ per cent, Danckwerts J. reduced it to à present value of £2,100. He said:

> " One way and another, therefore, it seems that, if I am to take " the value in the open market, whether I treat it as what can " be obtained surreptitiously at the present time or a legitimate " purchase price in 1953 discounted, I would come to the " conclusion that the market value would be £2,100."

That method of arriving at the market value was forced on the Court in Gilbert's case because of the lack of evidence as to the price at which the offending purchaser sold his car. No such difficulty confronts me, for it is proved that Mouat sold his car for £1,700. There were two subsequent sales, one of which was at £1,900; but I do not think I can regard them as evidence of the market value of this car at the date when the Covenant was broken. There was evidence, which rather surprises me, that the car if sold in Buller district, would not have fetched more than £1,300. But even if that were so, it would afford no evidence of the market value of the car which could readily be sold in Christchurch, as the facts prove, at a much higher price. I do not think I shall err if I fix its market value at the price actually paid at the relevant time by a dealer in used cars in Christchurch. Accordingly I find that the market value of the car at the time of the breach of the Covenant was £1,700. The price at which Betts Motors Motors Ltd., could have obtained the car, if Mouat had offered it to them as he convenanted to do, was £1,207 less depreciation allowance of £50 which would have reduced it to £1,157. The difference between this and £1,700 is £543.

I share with Danckwerts J. the feeling that there is some anomaly in resorting to the open market value to assess the damages in a case where, if the Covenant had been honoured. the profit that the plaintiff could

have made would not have exceeded £50. I have read the cases to which he referred in this connection, and with respect I agree with the conclusion at which he arrived. (The citation in the All E.R. of **Williams Brothers v. Ed. T. Agius** is wrong. It should be (1914) A.C. 510.) Notwithstanding the fact that this car could not have commanded a price of £1,700 if the Covenant had been observed, and notwithstanding the fact that it was sold by Mouat in the very manner which the Covenant was designed to prevent, I think I should assess the damages at the difference between the price at which Betts Motors Ltd. could have purchased the car if it had been offered to them in accordance with the Covenant and the then market value of the car—that is at £543. This follows the decision in **Gilbert's** case where, however, there was no evidence of depreciation as there is in this case.

Mr Cleary submitted that there was some additional damage sustained by the plaintiff in respect of loss of goodwill, loss of profit on a possible re-sale of the car as a "trade in", and loss of profit in servicing it. No evidence was given, and I assume no evidence could have been given, which would assist me in estimating the value of what the plaintiff may have lost in respect of those matters. Moreover, damages having been assessed on the basis of the difference between the price at which Betts Motors Ltd. could have acquired the car and its market value, I am precluded, I think, from awarding even nominal damages in respect of them.

Judgment will accordingly be for the plaintiff for £543 together with costs as per scale with disbursements for fees of Court and witnesses' expenses. Owing to the exigencies of a somewhat crowded provincial circuit the hearing extended over parts of two days with a gap of one day between. I certify for one extra day at £21 and for extra counsel for two days at £7. 7. 0. per day.

Solicitors:

Joyce and Taylor, Greymouth, for plaintiff.

P. H. T. Alpers, Christchurch, for defendants.

No. 11

FORMAL JUDGMENT

This action coming on for trial on the 1st and 3rd days of March, 1956 before The Right Honourable The Chief Justice, after hearing the plaintiff and defendant and the evidence then adduced **IT IS ADJUDGED** that the plaintiff do recover against the first-named

In the Supreme Court of New Zealand

No. 11 Formal Judgment 26th June 1956. *continued.*

defendant, John Neil Mouat £543 : 0 : 0 and £169 : 19 : 10 for costs.

DATED the 26th day of June 1956

L.S. (Sgd) T. J. Kennedy
Deputy Registrar

No. 12

In the Court of Appeal of New Zealand.

No. 12 Notice of Motion of Appeal to Court of Appeal of New Zealand 17th July 1956.

NOTICE OF MOTION OF APPEAL TO COURT OF APPEAL OF NEW ZEALAND

IN THE COURT OF APPEAL OF NEW ZEALAND

BETWEEN

JOHN NEIL MOUAT of Punakaiki, Contractor ..... Appellant

AND

BETTS MOTORS LIMITED of Westport, Motor Garage Proprietors ..... Respondent

TAKE NOTICE that this Honourable Court will be moved by Counsel for the Appellant on Tuesday the 11th day of September 1956 at 11 o'clock in the forenoon or so soon thereafter as Counsel may be heard on appeal from the whole of the Judgment of the Supreme Court of New Zealand delivered by the Right Honourable the Chief Justice at Greymouth on the 1st day of June 1956 in this action wherein the above-named Respondent was Plaintiff and the above-named Appellant was one of the defendants UPON THE GROUNDS that the said Judgment was erroneous in law.

Dated at Christchurch this 17th day of July 1956.

P. H. T. ALPERS
SOLICITOR for Appellant

To : The Registrar of the Court of Appeal of New Zealand.

and to : The Registrar of the Supreme Court of New Zealand at Greymouth

and to : The Respondent and its Solicitor William Douglas Taylor of Joyce & Taylor, Solicitors Greymouth.

No. 13

In the Court of Appeal of New Zealand.

No. 13 Reasons for Judgment: (a) Gresson J. 8th March 1957.

REASONS FOR JUDGMENT:

GRESSON, J.

I have had the opportunity of reading the judgment to be delivered by McGregor J., and find myself in general agreement with its conclusions and reasoning. But, for myself, I would be prepared simply to hold that the giving of the covenant by the appellant was not part of the "price" within the meaning of the Control of Prices Act 1947. The term "price" is defined as including:

> "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:"

If the giving of the covenant amounted to a "valuable consideration" it would operate to increase the "price" above a permitted maximum. But, in my view, the giving of the covenant did not constitute a "valuable consideration" within the meaning of the Control of Prices Act 1947. The question is substantially one of interpretation of a statute.

The term "valuable consideration" is a technical term well known to the law. The traditional definition—derived from **Currie v. Misa** (1875 L.R. 10 Exch. 153, 162,) is—some right, interest, profit, or benefit accruing to "the one party, or some forebearance, detriment, loss, or responsibility, "given, suffered, or undertaken by the other." But it must be a promise to do, forbear, suffer or promise more than one is legally bound. A promise to perform or the actual performance of something which the promisee is legally bound to perform independently of contract or is already under a legal obligation to the promisor to perform does not constitute a valid consideration (**8 Halsbury's Laws of England** 3rd ed., p. 117, para. 203). Neither the promise to do a thing nor the actual doing of it will be a good consideration if it is a thing which the party is already bound to do either by the general law or by a subsisting contract with the other party (**Pollock on Contract** 10th Ed. 181), or, as it is put shortly in **Leake on Contracts,** 7th Ed. 455, "a "promise to perform an existing legal obligation is not a valid "consideration".

A person in the situation of the appellant was under an obligation as a matter of law to enter into the covenant. There was, of course, no obligation to buy any more than there is any obligation to become a purchaser of land. But, if the parties decide to enter into such a relationship, certain obligations attach as a matter of law, e.g., in regard to the purchase of land a liability on both parties to pay stamp duty and in regard to the purchase of the car in question in this action a

In the Court of Appeal of New Zealand.

No. 13 Reasons for Judgment: (a) Gresson J. 8th March 1957. *continued.*

liability to enter into such a covenant as was given. The position of the appellant under the law was that, 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 is 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.

In my opinion, though I assent to the views expressed by McGregor J., I would be prepared myself to go further and to hold that the giving of the covenant was not valuable consideration at all within the meaning of that term and consequently no part of the price. I accordingly concur with him in dismissing the appeal, and in the order as to costs proposed in his judgment.

No. 13 Reasons for Judgment: (b) F. B. Adams, J. 8th March 1957.

F. B. ADAMS J.

The general facts and the relevant documents and statutory provisions are sufficiently set out in the judgment under appeal.

The question is whether, by taking the so-called covenant in addition to the full permitted price of £1,207, respondent committed a breach of s.29 (1) of the Control of Prices Act 1947. If so, the covenant is void, no matter what one may think in regard to the demerits of appellant's conduct. If the covenant was a " valuable consideration " forming part of the " price " within the extended meaning given by the statute to the word " price " there can be no doubt that a breach was committed.

There is a passage in the judgment of the learned Judge which suggests that the covenant was merely a **sine qua non** of appellant's application for the car, and not a consideration for the sale of the car. This amounts to treating the covenant as a separate and independent matter, not forming part of the transaction of sale. It was, of course, a collateral contract, complete in itself, and in a sense separate from the contract of sale; but its recitals link it to the sale, and there can be no doubt that the sale and the covenant were in substance, and for all practical purposes, a single transaction. In my opinion, on the facts, and putting aside for the moment all questions arising on the interpretation of the statute, the covenant was clearly one of the considerations for the sale; and it is impossible to say that a consideration ceases to be such because it is embodied in a collateral contract. If that were so, evasion of the statute would be easy.

There can be no doubt that, if the covenant was a consideration for the sale, it was a " valuable " consideration. The judgment under appeal is itself sufficient evidence of value if such evidence were needed.

The learned Judge has said that the word " price " in s. 29 (1) of the Act means exactly what it is defined to mean in the interpretation section, and that the Court is not justified in giving it a more restricted meaning. I respectfully agree that the definition applies to the full ex-

tent of its meaning, so as to bring in all that it includes. But the learned Judge has nevertheless held that the covenant was not part of the price. He relied on the broad general connotation of the word " price " as excluding matters having no relation to the value of the goods themselves, and, in particular, as excluding a covenant taken, not with a view to any benefit the seller might anticipate receiving from it, but because he was bound to take it by reason of the conditions of the import licence and solely for the purpose of preventing the covenantor from defeating Government policy. The benefit which respondent was seeking to derive by suing on the covenant was described as entirely fortuitous, and the covenant as a thing imposed on both dealer and purchaser ab extra; and the only " considerations " to be taken into account were said to be those which induced the seller to sell. The foregoing sentences are only a brief summary of a lengthy argument embodied in the judgment, but I think they contain the essential points.

I have on more than one occasion ventured to express the view that the primary duty of the Court in construing a statute is to adhere to its words in their natural sense where there is no ambiguity. The occasions, if any, when a different course is permissible are in my opinion rare. In the present case, I agree with the learned Judge in regarding the words themselves as unambiguous but disagree respectfully from the view that the matters mentioned in the last preceding paragraph justify a departure from the primary and natural meaning of the words. It seems to me, with respect, that an artificial meaning is attributed by him—and, as I now find, by my brethren in this Court—to the words of the statute, with the result that valuable considerations are excluded which are clearly within the plain meaning of the words. In effect, there has been engrafted on the statute an exception or qualification, the general purport of which is that nothing is to be regarded as a consideration forming part of the price unless it motivates or induces the sale, being wanted by the seller for his own benefit. What the ultimate effects of such a construction may be in other cases I do not pause to consider. In my opinion, motive, purpose, and inducement are irrelevant; and it matters not that the seller may have been under a duty imposed ab extra. Here we have the indubitable fact that the seller sold the car in consideration of a csh price, plus a covenant. What led him to do so is irrelevant. In selling the car, the respondent stipulated for and obtained a valuable consideration over and above the permitted cash price. A sale on those terms was clearly prohibited by s. 29 (1), and it is unnecessary —and, in my opinion, improper—to go behind those simple facts and to inquire what it was that led respondent to commit the breach.

Mr Cleary, in his argument, did not suggest that the covenant was not in its nature a valuable consideration, but relied on the contentions that it was in the circumstances a compulsory stipulation imposed by competent authority for a collateral purpose having no relation to price; that the parties had no freedom of stipulation on the point; and that, therefore, it was not part of the " price ". He conceded, in answer to a

In the Court of Appeal of New Zealand

No. 13
Reasons for Judgment: (b) F. B. Adams, J.
8th March 1957.
continued.

question from me, that his argument amounted to saying that, if compulsion of the kind described be present, a valuable consideration which would otherwise be part of the price ceases to be such. To uphold this contention would, in my opinion, amount to amending, and not to construing, the statute, and would be tantamount to saying that the statute might lawfully be infringed in the special circumstances. Those circumstances would, of course, be relevant to penalty in the event of a prosecution, but are irrelevant to the question of breach; and I am not prepared to strain the words of the Act for the purpose of taking this case out of the statute.

I am, of course, not overlooking the well-known rule of law, to which reference was made at the hearing, that a promise to perform, or the actual performance of, something which a party is legally bound to perform independently of contract, or is already under a legal obligation to the promisee to perform, is no consideration for the promise of the other party (8 **Halsbury's Laws of England,** 3rd ed. 117). But, with all respect to my brother Gresson, that rule has, in my opinion, no bearing here. The question is not whether the covenant was a good consideration moving from appellant such as would bind the contract, and enable a party to sue thereon. It was, in fact, unnecessary for that purpose, there being a further good consideration in the appellant's promise to pay for the car. It is within that sphere only that the rule in question applies. The question here is whether a covenant was part of the total consideration moving from appellant, and, as such, a "valuable consideration" within the meaning of the Act. I can see no reason to doubt that, where there is independent good consideration, an accompanying promise to observe the law, or to perform some existing obligation, is a valid and enforceable part of the contract. Such promises are by no means uncommon in certain types of contracts; as, for instance, the covenant of a mortgagor to perform the covenants contained in a lease or prior encumbrance, or the covenant of the lessee of an hotel to observe the provisions of the Licensing Act. Where such promises are made they are undoubtedly part and parcel of the total consideration moving from the promisor. On a sale of goods to which s.29 of the Contract of Prices Act 1947 applies, any such promises must, in my opinion, be regarded as part of the "price" as defined, though the question may remain whether they possess any independent value such as would, in the words of s. 29, cause the "price" to be "not in conformity with the Order or approval". In a case where the promise in question gives rise, as here, to a monetary judgment for £543 to be recovered by the seller for his own personal use and benefit, in addition to the fixed maximum price of £1,207, it seems to me, with respect, impossible to argue that the covenant from which that liability arose was not a valuable consideration additional to the fixed price.

I think it possible that if the law had imposed on the appellant, automatically, and quite apart from any express stipulation, the same liability as is now sought to be enforced, the position might have been

different; and that there might even have been a difference if the giving of the express stipulation had been specifically required by the law. The reasons, however, would not have been ones depending on the rule that a promise to perform an existing obligation is not of itself a sufficient consideration to create a binding contract, but would have rested on other grounds. Those questions ,however, do not arise, and I prefer to express no opinion about them. There was no law binding the appellant to execute the covenent, or binding him to act as required by the covenant, or exposing him to the liabilities created by the covenant; and Mr Cleary rightly conceded that the sale by the appellant, in respect of which this action was brought, was not a breach of any statutory duty but only a breach of the covenant.

It is desirable to examine with some care the legal positions of the parties at the time when the appellant bought the car. The licence under which the car was imported was issued under the Import Control Regulations 1938 (S.R. 1938/161); and, in pursuance of Reg. 11, certain conditions were imposed. Though formulated by the Board of Trade those conditions derived their force from the regulations and the statutes which support those regulations, and not from any powers vested in the Board of Trade. The conditions so imposed are within s. 46 of the Customs Act 1913, with the result that subs. (10) of that section (as enacted by s. 3 of the Customs Acts Amendment Act, 1953) is applicable; and breaches of them are punishable accordingly.

The scheme of the Conditions was that each importer of new North American cars was required to distribute them in such a way that only essential users should be the ultimate purchasers. The contemplated chain of disposal was from the importer through his dealers to the users, the obligations imposed by the conditions being 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. Among the obligations imposed on dealers, however, was one binding them to require each purchaser to sign a covenant or agreement to the effect that he would not, within two years, dispose of his car except by resale to the dealer at the price at which the car had been sold to him, less depreciation at a fixed rate. Resales by dealers of cars sold back to them as aforesaid were also controlled, both as to price and as to the persons to whom they might be made, and as to the obtaining of similar covenants or agreements from the new purchasers covering the residue of the two-year period.

In my opinion, the general purpose of the conditions was to control sales and resales, (a) by means of obligations imposed directly on importers and dealers and operating with statutory force as against them, and (b) by means of covenants or agreements entered into by ultimate purchasers and binding them contractually but in no other way. A purchaser might perhaps be indirectly guilty of an offence against s. 46

In the Court of Appeal of New Zealand.

No. 13 Reasons for Judgment: (b) F. B. Adams, J. 8th March 1957. *continued.*

(10) of the Customs Act 1913 by being "knowingly concerned in", or in some other way a party to, a breach of the conditions committed by an importer or a dealer; but he would be otherwise beyond the reach of the penalties imposed by s. 46 (10). 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 or agreement which he was required to sign before being allowed by the dealer to buy a car. As I have said, Mr Cleary conceded this. If, on the other hand, appellant had brought himself indirectly within the statutory operation of the conditions by being knowingly concerned in, or otherwise a party to a breach, the consequences for him would have been purely penal, and not contractual. In other words, he would not have been liable contractually, or, indeed, in any other way, in terms of the covenant which he had not given, but would have been liable only to the penalties prescribed by the statute. This does not mean, I may add, that he would have been any better off, as the Act imposes a "penalty" equal to the value of the goods, and is thus much more severe than the covenant. It has not been suggested that the appellant committed even an indirect breach of this statute.

To return to the narrative, the importer of the particular car we are concerned with sent a copy of the Conditions to respondent, and, in an accompanying letter, intimated that

> "The same Deed of Covenant as previously used must be completed by every purchaser prior to delivery of the new car."

This stipulation as to the form of the covenant was not part of the Conditions, but only part of the means adopted by the importer in the performance of his duties under the Conditions. Printed forms of covenant were supplied by the importer, one of which was signed by the appellant. It does not comply strictly with the requirements of the conditions as stated above, in that it does not absolutely prohibit any disposition except by resale to the dealer. It permits disposal by will, and, as to other dealings, its purport is merely to require that the vehicle shall first be offered to the dealer. On the other hand, it goes beyond the requirements in that it stipulates for the payment of a sum of £1,000, not as a penalty but by way of liquidated damages, in respect of every breach of the agreement. It was conceded, however, both in the Court below and before us, that this provision is in law a penalty, and that the dealer can recover only such damages as are proved. A covenant in this modified form cannot be said to be a covenant which the dealer was bound by the conditions to exact from a purchaser. He was bound to exact a covenant, but not this particular covenant. Respondent may, indeed, have been guilty of an offence in taking a covenant in this form, but it has not been suggested that the covenant is void for illegality on that ground. Nevertheless I emphasize that the compulsion of the conditions did not extend to the taking of a

covenant of the precise kind that was taken. I differ respectfully from the suggestion that this covenant was "substantially" in the form required by the conditions. I have indicated the differences, and they seem to me to be substantial. But, even if I be wrong in that view, a covenant which differs in any material respect is a different covenant. There might be differences so immaterial that the law would ignore them; but this apart, it is not enough to say that the covenant was substantially the same. There is no half-way house and either appellant was bound to enter into this covenant, or he was not. An obligation, if any existed, to enter into a different covenant would not suffice.

In any event, as shown above, the circumstances here were such that the law did not impose any specific obligation upon the appellant, and that the giving of the covenant was, and had to be, a matter of stipulation between the parties. It was a **sine qua non** in a practical sense to the purchase of the car by the appellant, but was not such in any legal sense. Subject only to s. 46 (10) of the Customs Act 1913, he was legally free to buy the car, if he could, without giving any such covenant or any undertaking of any similar kind. I am, with respect, entirely unable to understand the suggestion that the appellant was bound in law to enter into the covenant.

Now, in selling the cars, the dealers were bound to comply, not only with the above-mentioned conditions, but also, if a price order or special approval were in force, with s. 29 (1) of the Control of Prices Act 1947. The evidence is not clear on the point; but is was common ground that there was in force at the relevant time a special approval fixing the maximum price to be charged for this car at £1,207—the price in cash which was actually paid by appellant. It is not suggested that the conditions of the import licence purport to override the requirements of s. 29 (1); and, in my opinion, they could not do so. I do not say that a condition as to price would necessarily have been invalid, but only that any such condition would be subject to s. 29 (1) in the sense that, if compliance with it would be a breach of the section, then it could not lawfully be complied with unless and until the necessary sanction had ben obtained in the form of a new special approval. I see no conflict whatever between s. 29 (1) and the Conditions we are concerned with, or the legislative provisions under which they were imposed. The two things belong to different legislative spheres, the jurisdictions of the Price Tribunal and of the Customs authorities being distinct and independent. If a thing is prohibited in either sphere, it may not be done, and it is immaterial that the other jurisdiction may permit or even stipulate that it be done. If the conditions of an import licence had required that this car should not be sold at a lesser price than £1,300, and a special approval had fixed £1,207 as the maximum price, it would presumably have been unlawful to sell the car at any price until one or other of the two co-ordinate authorities gave way. This would have been an unfortunate position, but not one raising any legal problem. There is no statutory conflict, and no occasion to resort

In the Court of Appeal of New Zealand.

No. 13
Reasons for Judgment: (b) F. B. Adams, J. 8th March 1957. *continued.*

to the doctrine expressed in the maxim **generalia specialibus non derogant**; and I need express no opinion as to the direction in which that maxim might have applied here. I am by no means satisfied that in the event of a conflict on a question of price, it would have been proper to regard the Control of Prices Act 1947, as a general statute and the Import Control Regulations 1938 (S.R. 1938/161) as "special" provisions. However, no conflict or difficulty arises here, as the Conditions in question were silent as to price, except in so far as they required the taking of a covenant. All that can be said is that, if the covenant was part of the "price" within the meaning of s. 29 (1), with the result that price was controlled by the Conditions to the extent that the covenant must necessarily form part of the price, nevertheless it still remained for the Price Tribunal to determine what total price it should be permissable to exact in covenant, cash and other considerations.

Even if the Conditions had required respondent to sell for the combined considerations of a covenant and a cash payment of £1,207—which they did not, in fact, require him to do—a sale in accordance therewith would still have been a breach of s. 29 (1), as the Customs authorities cannot conceivably be regarded as possessing any power to dispense with compliance with that section.

In support of the contention that the covenant was not part of the "price", it has been suggested that, if it were such, a seller who was prohibited from selling at a price exceeding a fixed sum would have had difficulty in valuing the covenant in order to arrive at the balance of the price which he could demand in cash. But, if the relevant price order or special approval could be construed as leaving it open to the seller to dissever a monetary fixed price into two items, one of which would represent the value of the covenant, and if the seller chose to embark on the hazardous task of valuing the covenant, he would be free to do so. The only objection to his doing it would be that he must do it at his peril; and, if he wished to avoid the peril, his only proper course would be to refer the matter to the Price Tribunal. If the price order or special approval did not leave him free to value the covenant, then he must not attempt it, and the difficulty as to valuation disappears. But, in any event, if there were a difficulty, it would be a matter for the Price Tribunal to consider; and I am not prepared to hold that, where a seller stipulates, either under compulsion or otherwise, for an additional consideration of uncertain value, he is thereby released from the necessity of taking that consideration into account in determining for the purposes of s. 29 (1), whether his "price" is in conformity with an order or approval. I point out, however, that no difficulty of valuation arises in this case, as the full permitted cash price was taken in addition to the covenant.

As for possible indirect benefits accruing to a dealer from the selling of a car—those referred to in the judgment as 'expectations" or "incidental sequelae" (such as profit from future servicing or from "trading in" the car on the sale of a second car)—there is no occasion

to adopt a forced construction of the statute with a view to excluding them. Nothing that is not expressly or implied stipulated for as part of the contract of sale can be regarded as a " valuable consideration " forming part of the " price ". If such things are stipulated for, they are part of the price, and the parties to the contract must be regarded as voluntarily accepting any risk that arises from any difficulty in valuing such stipulations.

I need not elaborate further the point already mentioned that there was here in fact no compulsion to sell in breach of s. 29 (1), and no compulsion to exact the particular covenant that was taken. There can be little doubt that, had respondent taken the proper steps, the necessary authority would have been given, and the car could have been sold lawfully on the desired terms, or, if the Price Tribunal were not satisfied with the form of the proposed covenant, at least on modified terms acceptable to the customs authorities.

It is suggested in the judgment under appeal that the covenant enured, in reality, not for the benefit of respondent, but for the benefit of the Government. But one cannot shut one's eyes to the fact that the covenant was with respondent, and with respondent alone, and that any pecuniary or other material benefits derivable from it were enforceable at the suit of respondent, and of no other person, and would necessarily enure to the profit of respondent. What the position would have been if the covenant had in fact been in favour of some third party is a question that does not arise, and might have been one of considerable difficulty.

Since writing what appears above, I have had the privilege of reading the judgment about to be delivered by my brother McGregor **(infra)**. I am unable, with respect to accept his view that the special approval under the Control of Prices Act 1947 can be construed as permitting sales at the fixed maximum price plus the covenant. It merely fixes the maximum price at £1,207, and the statute, when applied to it, prohibits the taking of any additional consideration. Like any other instrument, the approval must be construed in acordance with its terms, and one has no right to conclude that anything was intended to the contrary of what it means when read in the light of the statute under which it originated. So read, its meaning clearly is that no valuable consideration may lawfully be taken in addition to the fixed price; and, in my opinion, we have 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.

In my opinion, there was clearly a breach of s. 29 (1), and the covenant is accordingly unenforceable; and the appeal should be allowed. In view, however, of his deliberate and profitable breach of a solemn undertaking, I would allow appellant not costs in either Court.

In the Court of Appeal of New Zealand.

No. 13 Reasons for Judgment: (c) McGregor, J. 8th March 1957.

McGREGOR J.

The respondent carries on the business of a motor garage proprietor at Westport, and is a dealer in Chevrolet motor cars. On March 7, 1955, the respondent sold to the appellant a new Chevrolet car for £1,207. Chevrolet cars, as in the case of most American cars are imported into New Zealand under licence. The Import Control Regulations 1938 (S.R. 1938/161) prohibits the importation into New Zealand of any goods except pursuant to a licence granted by the Minister (Reg. 4); and Reg. 11 empowers the Minister to attach to such licence such conditions as he thinks fit to impose. Regulation 13 of the same Regulations empowers the Minister to delegate his powers under the Regulation to a licensing officer.

The car in question was imported by General Motors of New Zealand Ltd., pursuant to a licence under the Import Control Regulations 1938, which licence was made subject to a condition

> " that the vehicles will be distributed in accordance with the " conditions to be determined by the Board of Trade.' '

On July30, 1954, the Board of Trade prescribed Conditions relating to Distribution. In so far as they are material to the matters with which the Court is concerned, the Conditions imposed certain qualifications as to purchasers of cars and their allocation by dealers only to purchasers having such qualifications. The degree of preference was intended to be regulated by the nature of the intended usage of the car. The Conditions further prescribed:—

> " 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."

On August 24, 1955, the Price Control Division of the Department of Industries and Commerce, pursuant to the Control of Prices Act 1947, fixed the maximum retail selling price of Chevrolet cars of the model with which we are concerned at £1,207.

It is agreed by the parties that all the acts and directions to which I have referred were done by the authorities in conformity with their respective powers and authorities, and are in order and binding.

When the appellant desired to become a purchaser of the Chevrolet car he signed an application form entitled " An Application for Purchase of North American Motor Car under Conditions established by the Government ". The form contained a statement in the form of a

statutory declaration that the appellant had read the conditions governing the distribution of North American cars as laid down by the New Zealand Government and should a car be made available to him he agreed to be bound by the rules as laid down by the New Zealand Government. The sale to the appellant was approved. The appellant paid to the respondent the cash price of £1,207 and executed a deed of covenant pursuant to Condition 9 of the Conditions of Distribution to which I have referred. The relevant provisions of the deed of covenant are set out in full in the judgment of the learned Chief Justice from whose judgment this appeal is brought (**ante,** p. 382 l. 40). On payment of the cash price, and on execution of the deed of covenant on March 7, 1955, the appellant received delivery of the car.

In breach of Condition 9 of the Board of Trade conditions, and notwithstanding the terms of his covenant, in the month of June, 1955, some three months after the purchase, the appellant resold the car for £1,700. The present action claiming damages against the appellant for breach of his agreement with the respondent has resulted.

The action was heard before the learned Chief Justice and in his judgment, delivered on June 1 last, the learned Chief Justice found for the plaintiff, now the respondent **(ante,** p. 381 l. 11). From this judgment the present appeal has been brought. The appellant's contention is substantially that the agreement of March 7, 1955, is an illegal agreement by virtue of s. 29 of the Control of Prices Act 1947.

Section 29 (1) of this Act reads as follows:—

> " 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 " 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 under the Act."

It is accepted that the fixation of the maximum retail selling price of £1,207 by the Director of Price Control on August 24, 1955 is a price order, or special approval, within the meaning of this section. The appellant therefore submits that the consideration for the transfer of the car by the respondent to the appellant was the cash price of £1,207, together with the benefits conferred on the respondent and the detriment suffered by the appellant by the terms of the agreement of the same date already referred to.

" Price " is defined by s. 2 of the Control of Prices Act 1947 as follows:—

> " ' 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 ":

In the Court of Appeal of New Zealand.

No. 13
Reasons for Judgment: (c) McGregor, J.
8th March 1957.
continued.

The question therefore arises as to whether the giving of the deed of covenant by the appellant to the respondent was a valuable consideration relating to the sale of the car. It is argued for the appellant that the consideration for the sale was the sum of £1,207 agreed to be paid by the appellant, together with the giving of the deed of covenant also required by the respondent, that the covenant was of value to the respondent and a detriment to the appellant. If so, the valuable consideration moving to and from the respective parties exceeded the maximum approved selling price.

In my view, the real question to be decided is whether the giving of the covenant was a consideration which in effect relates to the sale. The respondent was bound by the legal direction of the Board of Trade not to sell without first obtaining from the respondent a promise substantially in the terms contained in the deed. The promise could be of value to the respondent only if the appellant should be prepared to resell within a period of two years. What the value of this promise was at the time of the sale would be entirely incapable of estimation, as it depended on the happening of a future event — if such contingency which depended on the future unilateral act of the promisor never did happen, the promise would be entirely valueless. Can such promise made under a legal obligation, and of a value impossible of estimation or of no value at all, have been an inducing factor in the sale? In my opinion, the answer must be in the negative and the parties must have regarded the giving of the promise as of no value to the vendor. Sir Frederick Pollock (**Pollock on Contracts,** 13th ed. p. 133) has summarized the effect of consideration thus:

> "an act of forbearance of the one party, or the promise "thereof, is the price for which the promise of the other is "bought and the promise thus given for value is enforceable."

Here, the effective promise for which the respondent agreed to sell the car was the promise of the appellant to pay £1,207, and not the giving of the covenant. Moreover, if such promise must be regarded as of value, how could it be possible for any person to estimate the quantum of value, to decide what deduction should be made from the maximum permitted selling price of £1,207 to bring the total consideration within such permitted price of £1,207? The Board of Trade Conditions requiring the taking of the deed of covenant were promulgated on July 30, 1954. The licence to import was made subject to the importer being bound by the Conditions. The price approval fixing maximum retail selling prices was in reference to imported cars and was given on August 24, 1955. In my opinion, 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. In other words, the price was approved in respect of sales subject to conditions already imposed by

other legal authorities. The purpose of the Conditions is set out in para. 1 of the conditions:

> " the desirability of providing some vehicles of that type to meet
> " the needs of essential users who will keep the vehicles and will
> " not resell them except as stated below."

In other words, 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 respondent was a compliance with the obligation imposed upon it by authority. For these reasons, 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 purchaser of the car, and it does not seem to me was in effect part of such bargain. I therefore agree with the judgment of the Chief Justice on this aspect of the appeal.

The next question that arises is in regard to the quantum of damages to which the respondent is entitled. In the circumstances which arose the appellant had contracted to offer the car to the respondent at a price of £1,157. He resold it for £1,700. The respondent claims that the measure of damages is the difference between £1,700, representing the real or market value of the car at the date of the breach, and the price at which he was entitled to purchase, £1,157. The Court below upheld this contention. But by virtue of Condition 10 of the Board of Trade Conditions the respondent was precluded in the event of a repurchase from the appellant from reselling at a price exceeding the price at which the car was sold when new. Therefore, the appellant contends that in any event the respondent's loss should be assessed on this basis, namely, £50, the difference between the price the respondent would have paid the appellant, £1,157, and the new price, £1,207.

The ordinary rule as to the measure of damages when the seller wrongfully neglects or refuses to deliver the goods to the buyer is the estimated loss directly and naturally resulting, in the ordinary course of events, from the seller's breach of contract. When there is an available market the measure of damages is prima facie to be ascertained by the difference between the contract price and the market price when the goods ought to have been delivered: Sale of Goods Act 1908, s. 52.

Rodocanachi Sons & Co. v. Milburn Brothers (1886) 18 Q.B.D. 67 was a case of lost goods. There, the Court of Appeal held that, in estimating the loss the value will be the market value when the goods ought to have arrived, and this value is to be taken independently of any circumstances peculiar to the buyer. The circumstances that the buyer had agreed to resell at less than the market price was treated as an accidental circumstance peculiar to the plaintiff, which should be disregarded. This case was approved in **Williams Brothers v. Ed. T.**

Agius Ltd. (1914) A.C. 510, where it was held that the true measure of damages for failure to deliver goods agreed to be sold was the difference between the contract price and the market price at the time of the breach. In **Patrick v. Russo-British Grain Export Co. Ltd.** (1927) 2 K.B. Salter J. held that, in the circumstances of the case, the seller was entitled to recover loss of profit on resale, such reselling price being higher than the market price at the date of the defendant's failure to deliver. But, in this case, when the contract was made it was in contemplation of both parties that the goods were to be resold. This was treated as a special circumstance taking the case out of the ordinary rule.

Here, in the event of the respondent's desiring to resell, the profit on resale of this particular car is limited. This feature is the result of the terms under which the car was imported, and is a feature at least peculiar to this particular car. But the respondent was not bound to resell. The car could have been retained for the use of the respondent in its business, or it could have been retained until the expiration of two years from the date of the original sale, at which time the restricted price would no longer have had any application. It may well be said that the price at which the appellant had resold was a "black market" price. But the test seems to be what was the real market value at the time of the breach. In my view, this market value must be determined by the general market for a similar article. The real value of the car is determined on a comparative basis, taking into account the value of other comparative cars which are or may be, free from restrictions. The ultimate purchaser who purchased the car for £1,700 had an open market and would not commit a breach of any contract or contravene any statute or regulation by again reselling. The purchaser from the appellant, one Hazeldine, in evidence, described himself as a motor dealer and stated that in June, 1955, the month following the purchase from the appellant, he resold the car for £1,900 and that in his opinion the fair market value in May or June, 1955, was £1,900. It seems a reasonable inference that the market value of the car in the hands of any person other than the respondent is at least £1,700. The value in so far as the respondent is concerned in the event of its retention of the car until the expiry of the period of restriction must, in my view, be the real value of the car which can be measured only by its ordinary market value. If, however, the respondent desires to resell at any early date, the value of the car to it is diminished owing to the fact that the respondent is a seller, subject to restrictions imposed by legal authority. This, to my mind, is a restriction peculiar to the respondent. As in accordance with the principles established in **Rodocanachi's** case the value is to be taken "independently of any circumstances peculiar to "the plaintiff" I would hold this particular factor must be set aside and the ordinary measure of market value should be applied. I

agree, therefore, that the learned Chief Justice in the Court below applied the correct test as to damages.

I would dismiss the appeal with costs to the respondent on the highest scale, together with 50 per cent. additional as on a case from a distance. I would allow a sum of ten guineas for second counsel.

Appeal dismissed.

Solicitor for the appellant: **P. H. T. Alpers** (Christchurch).

Solicitors for the respondent: **Joyce and Taylor** (Greymouth).

No. 14

FORMAL JUDGMENT

BEFORE:

THE HONOURABLE MR. JUSTICE K. M. GRESSON

THE HONOURABLE MR. JUSTICE ADAMS

THE HONOURABLE MR. JUSTICE McGREGOR

Friday the 8th day of March 1957

This appeal coming on for hearing on Thursday the 18th of October 1956 **AND UPON HEARING** Mr. P. H. T. Alpers of Counsel for the Appellant **AND UPON HEARING** Mr T. P. Cleary and with him Mr W. D. Taylor of Counsel for the Respondent **THIS COURT DOTH ORDER** that the appeal from the judgment of the Supreme Court be and the same is hereby dismissed and that the Appellant do pay to the Respondent its costs of this appeal on the highest scale together with an additional sum of 50 per centum thereof as upon a case from a distance and the sum of £10. 10. 0 for Second Counsel.

By the Court.

L.S. V. J. HITCHCOCK.
Deputy Registrar.

No. 15

ORDER OF COURT OF APPEAL OF NEW ZEALAND GIVING FINAL LEAVE TO APPEAL TO PRIVY COUNCIL

BEFORE:

THE RIGHT HONOURABLE THE CHIEF JUSTICE
THE HONOURABLE MR. JUSTICE ADAMS
THE HONOURABLE MR. JUSTICE McGREGOR

Friday the 28th day of June 1957

UPON READING the Motion filed herein and the Affidavit of Peter Henry Thorwald Alpers filed in support thereof **AND UPON HEARING** Mr Hamilton Mitchell of Counsel for the Appellant and Mr T. P. Cleary of Counsel for the Respondent **THIS COURT DOTH ORDER** that the Appellant do have final leave to appeal to Her Majesty in Council from the judgment of this Honourable Court pronounced herein on the 8th day of March, 1957 **AND THIS COURT DOTH FURTHER ORDER** by consent that execution of the judgment of the Supreme Court in this action be suspended pending this appeal upon the Appellant giving security by the 12th day of July, 1957 for the due performance of the said judgment of the Supreme Court such security to be approved by the Registrar.

By the Court.

L.S. V. J. HITCHCOCK.

Deputy Registrar.

EXHIBIT F

Exhibit F
Board of Trade Conditions relating to distribution of North American cars 30th July, 1954.

BOARD OF TRADE
WELLINGTON
30th July, 1954

NORTH AMERICAN MOTOR CARS CONDITIONS RELATING TO DISTRIBUTION

NOTE: 1954 and 1955 import licenses available for new North American were issued subject to compliance with conditions relating to the sale of those cars which were to be drawn up in consultation with the importers concerned.

Hereunder are those conditions.

1. It is recognised that the importation of North American cars under 1954 and 1955 import licenses is based solely upon the desirability of providing some vehicles of that type to meet the needs of essential users who will keep the vehicles for such use and will not resell them except as stated below.

2. In pursuance of this object, it is understood by the importers that the normal considerations affecting distribution require modification and that they will in respect of the new cars in question be guided by the following.

3. Each importer will allocate at least one-eighth of his available new cars for supply to taxi and private hire services and rural mail delivery services. In the allocation of cars to these uses importers will have regard, subject to the conditions stated in paragraph 4 hereunder, to the following principle of distribution:—

> Is the condition of the car which the applicant uses for the above essential purposes so clearly defective that it requires replacement by a new North American car in order to enable the essential use to be continued with due regard to efficient and economical operation?
>
> (Note: Where there is difficulty in making a decision on the relative merits of conflicting cases for new cars for these uses, the assistance of the local Vehicle Inspector may be sought in determining the allocation).

4. The allocation under paragraph 3 above will be applied irrespective of the type of road or roads on which the car is used but it will be applied only in the most exceptional circumstances in favour of an applicant who has had a new North American car since **31 December 1951.**

Exhibit F
Board of Trade Conditions relating to distribution of North American cars 30th July, 1954.
continued.

5. Each importer will allocate the remainder of the available new cars—

(i) To persons who comply with **all** the conditions stated hereunder in sub-paragraphs (a), (b) and (c), or

(ii) To persons, firms, companies or corporations who desire to purchase such cars for the use of persons who comply with **all** the said conditions, or

(iii) To persons who comply with the conditions stated in sub-paragraph (d), or

(iv) To persons, firms, companies or corporations, who desire to purchase such cars for the use of persons who comply with the conditions in sub-paragraph (d):

(a) persons who use their cars for essential purposes in country areas such as back country farmers, county engineers or others in similar public utility services, doctors, clergy, veterinary surgeons, and employees of stock and station, meat freezing, dairy, sawmilling or mining companies.

(b) Persons who use roads other than sealed or concrete to the extent of at least 25% of their total annual running. **Among such persons, those who use the worst roads shall have preference.**

(c) Persons who have not had a new North American car since **31st December 1949,** or if they have had such a car, then only in the most exceptional circumstances.

(d) Persons who, not being qualified under (a), (b) and (c) above, have nevertheless a strong claim for special consideration on such grounds as:

(i) exceptionally high annual mileage; or (ii) nature of roads necessarily used; or (iii) nature of loads carried.
Provided that no importer shall allocate under this sub-paragraph more than one twentieth of his total available new cars.

6. It will at all times be recognised that it is the nature of the intended usage of the car and not the occupation of the claimant which shall determine the degree of preference among those intitled to claim to participate in the distribution under the preceding paragraph.

7. The selection of successful applicants must not be influenced by the fact that an applicant is unable to offer a motor vehicle as a " trade-in " or can only offer as a " trade-in ", a motor vehicle of low value.

8. Each dealer will deal reasonably and fairly with respect to a car " traded in " for a new car and will not resell the car " traded in " at any price exceeding that of a corresponding new car, plus any necessary reconditioning costs charged at ordinary rates.

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. The dealer will sell the car only to a person who comes within the conditions laid down for the sale of new cars either under paragraphs 3 and 4 or under paragraphs 5 and 6 above, but it shall not be necessary for the dealer to sell the car to a person of the same class as first purchased it. 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 two years.

11. When an applicant for a new North American car, or any purchaser referred to in paragraph 10 above, completes a dealer's application form, he must also sign a statutory declaration as to the information given in his application.

12. Any importer licensed to import c.k.d. motor cars from North America may retain not more than two cars for its own use. Any other importer may apply to the Board of Trade for permission to keep one car for its own use. No dealer shall be entitled to any new car.

Annexure to Exhibit F

Letter from General Motors Ltd to Betts Motors Ltd. forwarding & explaining Board of Trade Conditions 18th August 1954.

ANNEXURE TO EXHIBIT F

GENERAL MOTORS NEW ZEALAND LIMITED
VEHICLES DEPARTMENT

P.O. Box 1999
Wellington, C.1.

PETONE
NEW ZEALAND

Telephone 63-969
Telegrams: "Genmotor"

The Manager,
Betts Motors, Ltd.,
WESTPORT

August 18th, 1954.

ALL CHEVROLET DEALERS:

Dear Sir,

We have now received the Board of Trade conditions covering the distribution of the Chevrolet cars we will be producing in January next. A copy of these conditions is attached.

In a covering letter, the following paragraph was included:—

> " First, the Board wishes to stres that it is the importers who
> " are responsible for ensuring that the conditions of distribution
> " are faithfully complied with. The license to import the cars
> " is subject to compliance with the procedure for distribution
> " now laid down. If the attention of the Board of Trade is
> " drawn to any breaches of the conditions of distribution it will
> " regard such breaches as an indication that the demand from
> " essential users (as described in the conditions of distribution)
> " for the particular make of car concerned is not as great as
> " is provided for by the amount of the license. The Board will
> " take this into account when considering the granting of
> " future licenses for North American motor cars.

With the very clear responsibility placed on this Company as the importers of Chevrolet cars, and with so much at stake so far as future license availability is concerned, it is necessary that we control the actual distribution at retail. We have given very considerable thought to the problems involved and have decided upon the following procedure:—

PROCEDURE:

Each dealer will have the Application for Purchase of North American Motor Car form completed by every person who applies and who in the dealer's opinion qualifies under the conditions laid down.

Every such Application for Purchase will be submitted together with the Dealer's Recommendation form in duplicate, to the Manager, Sales Operations, Vehicles Department.

Each dealer should indicate clearly the order of priority which he recommends for the applications he submits. This order of priority is to be established on the basis of necessity under the Board of Trade conditions.

All Application for Purchase and Dealer Recommendation forms must be in this office by not later than October 31st.

The above applications apply to the 1954 models only. Details regarding the distribution of 1955 models will be advised at a later date.

We will decide out of the many applications we receive to whom the available cars will be sold, having full regard for the terms of the Board of Trade conditions.

NOMINAL ALLOCATION:

Your nominal allocation of the cars arriving under 1954 licence is 5.

Our approvals of retail sales will not necesarily coincide with individual dealer nominal allocations. Where sales in excess of a dealer's nominal allocation are approved, the additional deals will provide to that dealer a small share of the Dealer Gross Profit, and this share we have established as £20. 0. 0. The balance of the Dealer Gross Profit will be held in a pool account for distribution proportionately to those dealers whose nominal allocations have not been covered by our approvals.

SALES AGREEMENT:

The terms of the Direct Dealer's Sales Agreement will apply to all sales made under these conditions.

BOARD OF TRADE CONDITIONS:

Referring to the Board of Tade conditions, we direct your attention to the following points:—

Clause 3:

This requires " at least " one-eighth of the cars to be allocated to taxis, private hire services, and rural mail delivery services. It will obviously be open to those who wish to do so, to submit for approval applications covering more than one-eighth of their allocation. Please note particularly the principle of distribution which is to apply to such sales. In submitting your Dealer Recommendations full details must be included to explain why the particular case is recommended in terms of this principle of distribution.

Annexure to Exhibit F
Letter from General Motors Ltd to Betts Motors Ltd. forwarding & explaining Board of Trade Conditions 18th August 1954. *continued.*

Clause 5 — Sub-paragraphs (a), (b), and (c):

It is important for you to check carefully from the statements on the customer's application form that the user qualifies under **all** the conditions under sub-paragraphs (a), (b), and (c), of Clause 5.

Sub-paragraph (b) reads " persons who use roads other than sealed or concrete to the extent of at least25% of their total annual running. **Among such persons, those who use the worst roads shall have preference".** Greatly increased stress has now been laid on this last factor. The underlining is the Board of Trade's, and we are bound to recognise the requirement.

" Most exceptional circumstances " must not be loosely defined. If a car is irreparably damaged, a replacement can clearly be recommended. If the case rests on high mileage, or high repair costs, they must be **really high,** not merely fairly substantial. **We do not want any border-line applications under this clause–**the issue must be clear-cut. This comment also applies to applications under Clause 4.

Clause 5—Sub-paragraph (d):

This will cover only the most unusual cases. Under (i), " exceptionally high annual mileage " will be interpreted by us as a minimum of 25,000 miles.

(ii) " Nature of roads necessarily used " would cover only such cases in which a sizeable annual mileage is done on very bad roads but which represents less than 25% of the user's total annual mileage. As an example, a farmer may live many miles from a shopping centre, more than 75% of the distance being sealed road, but the remainder being extremely rough, perhaps unformed, for a substantial number of miles.

(iii) " Nature of loads carried " must again be interpreted as an unusual circumstance. The fact that an applicant has a large family cannot be interpreted as coming under this category. On the other hand, it may be that in an outback area, but one that is served in the main by good roads, the applicant has an arrangement with an Education Board to bring some children in and out to school each day. In appropriate circumstances, that might be construed as a case with a strong claim for special consideration.

As dealers must appreciate, the number of such applications that can be approved will be very small indeed. We are restricted to " no more than 1/20th of the total available new cars ", and any such application will therefore, have to be supported by a very strong and clear-cut case.

Clause 6:

This clause reaffirms that it is the nature of the intended usage of the car and not the occupation of the claimant which is the predominant factor in determining the degree of preference.

Annexure to Exhibit F

Letter from General Motors Ltd to Betts Motors Ltd. forwarding & explaining Board of Trade Conditions 18th August 1954. *continued.*

Clauses 7 and 8:

These clauses cover fair dealing on trade-ins and you are aware of General Motors' views on this subject.

Clause 9:

The same Deed of Covenant as previously used must be completed by every purchaser prior to delivery of the new car. Further supplies of this form are available from us if dealers require them. Please advise us what your requirements are.

Clause 10:

This clause remains the same as in the previous Board of Trade conditions.

Clause 11:

This clause requires that every applicant for a new car completes an application form and must sign the statutory declaration before a Justice of the Peace or Solicitor as to the truth and accuracy of the information given. Attention should be drawn to the fact that under Section 302 of the Justices of the Peace Act 1927:—

> " If any declaration made under this Act is false or untrue in any " material particular the person wilfully making such false " declaration is liable to 2 years' imprisonment with hard " labour ".

Clause 12:

An application was made by this Company for the release of one new car for each exclusive Chevrolet dealer out of their 1952 supply or out of the 1954 license. The industry also made an application for the release of one car for each franchise holder out of the 1954 license. Unfortunately, the Board of Trade did not see fit to grant either application and have further stated that no dealer may keep a car for his own use out of the 1955 license.

Registration:

To comply with the Board of Trade conditions, dealers must ensure that when a sale is made the car is registered in the same name as appears in the Customer's Application for Purchase and Statutory Declaration form. If registration is in another name (e.g. wife or employee) the sale is not covered by the Statutory Declaration and our approval.

You are requested to keep copies of all customer's application forms, together with the duplicates of your Dealer Recommendation forms which we will return to you whether the application is approved or not.

A separate file must be set up for each customer to whom a sale

Annexure to Exhibit F
Letter from General Motors Ltd to Betts Motors Ltd. forwarding & explaining Board of Trade Conditions 18th August 1954. *continued.*

is made. In this file, in addition to the copy of the Customer's Application for Purchase and the duplicate of the Dealer Recommendation form, a copy of the Covenant and a signed Retail Order must be kept. In addition, appropriate records to show allowance, reconditioning cost, and resale price of any vehicle taken in trade, must be included in the file.

These files will be held by you and will be made available for inspection by the Board of Trade or by a representative of this Company if any inquiry is instituted.

We will expect all dealers to take every care to ensure that all applications forwarded to us are within the conditions as laid down by the Board of Trade, not only in the letter but in the spirit of those conditions. Any breach would be detrimental to the interests of General Motors as well as of the dealers, and would be regarded by us as an extremely serious matter.

We are confident that we will have your full co-operation and support in this difficult situation.

We attach sample copies of:—

1. Board of Trade conditions
2. Customer's Application for Purchase Form
3. Dealer Recommendation Form
4. Covenant

Full supplies of the first three forms will be forwarded under separate cover. We are holding supplies of the Covenant form, and can supply further copies to dealers upon request. In the meantime, this letter together with the sample forms should give you all the necessary information to enable you to answer queries following on the Minister's Press statement.

Yours sincerely,
(Sgd.) A. R. WRIGHT,
A. R. Wright, Manager,
Vehicles Department.

Exhibit G
Defendant's Application to purchase North American car 12th October 1954.

EXHIBIT G

APPLICATION FOR PURCHASE OF NORTH AMERICAN CAR UNDER CONDITIONS ESTABLISHED BY THE GOVERNMENT

(To be filled in by proposed buyer)

I/WE have read the conditions governing the distribution of North American Motor Cars as laid down by the New Zealand Government and declare that I/We qualify thereunder for consideration for purchase of

Exhibit G
Defendant's Application to purchase North American car 12th October 1954.
continued.

a North American car and in support of my/our application I/we submit the following:—

SHOULD A CAR BE MADE AVAILABLE TO ME/US, I/WE AGREE TO BE BOUND BY THE RULES AS LAID DOWN BY THE NEW ZEALAND GOVERNMENT.

1. Name JOHN NEIL MOUAT Address PUNAKAIKI Occupation FARMER & OWNER OF HILLSIDE MINE Name of Employer — — Address — — Nature of Business — —

2. I/We now own/possess the following motor car:— (If more than one car, supply details in an attached schedule) Make CHEVROLET Model 1937 Year 1937 Mileage 96616 Condition WORN OUT

3. Have you owned/possessed and sold a North American motor car since December 31, 1949? NO If answer is Yes: Make — — Model — — Year — — Was it traded-in on car now owned and included above? — — Which one? — —

4. The new car if allocated, will be:— (a) Additional to car(s) noted above? (b) in replacement of CHEVROLET car above

5. I/We have made a similar application(s) under the same terms of qualification to — — (Name and address of Dealer)
I/We agree to withdraw such application(s) if allocated a car in respect of this application.

6. The new car if allocated—
(a) Will be operated by JOHN NEIL MOUAT
(b) Will be located PUNAKAIKI & WESTPORT
(c) The area of operation will be MOSTLY GREYMOUTH-WESTPORT BUT GENERAL USE ON WEST COAST
(d) Will be used for TRANSPORT TO MY CONTRACT JOBS & TRANSPORT TO FARM
(e) Will be run an estimated annual mileage of 30,000
(f) Will be run a minimum percentage of annual mileage on other than tar-sealed or concrete roads of 80%
State location, nature and usage of particularly bad roads regularly used:
PUNAKAIKI-WESTPORT HIGHWAY. NARROW, TWISTING, UNSEALED COASTAL ROAD WITH STEEP GRADES. ALSO PUNAKAIKI-GREYMOUTH HIGHWAY.

7. Special circumstances which the applicant feels should be taken into consideration I HAVE NOT HAD A POST WAR CAR, HAVING MADE DO WITH OLDER MODELS UNTIL NOW. MY

Exhibit G
Defendant's Application to purchase North American car 12th October 1954.

CONTRACTING BUSINESS TAKES ME ALL OVER THE WEST COAST, I AM AT PRESENT DOING A BULLDOZING JOB ON KARAMEA BLUFF

8. I, JOHN NEIL MOUAT (Full name) of PUNAKAIKI, VIA GREYMOUTH (Place of abode) FARMER & CONTRACTOR (Occupation)
a Director/Partner of (delete it not applicable)
the above-mentioned proposed buyer do solemnly and sincerely declare that the contents of the foregoing statements so far as they relate to matters of fact are true and correct and so far as they relate to matters of opinion, belief or assurance I believe them to be true.
AND I make this solemn declaration conscientiously believing the same to be true and by virtue of the Justices of the Peace Act, 1927.

J. N. MOUAT

DECLARED at WESTPORT this 12th day of October 1954 before me:
A Justice of the Peace for the Dominion of New Zealand E. NIXON

Exhibit H
Dealer's Recommendation 13th October 1954.

EXHIBIT H

DEALER RECOMMENDATION

Application for release of one Chevrolet car for sale to the customer specified, under the conditions governing the distribution of these vehicles.

(THIS FORM MUST BE SUBMITTED IN DUPLICATE AND ATTACHED TO CUSTOMER'S APPLICATION FOR PURCHASE)

THE PROPOSED BUYER:

Name J. N. Mouat Occupation Farmer and Farm Contractor
Address Punakaiki via Westport
Date of Statutory Declaration 12. 10. 54

TRADE IN (If any)

Make Chevrolet Model Sedan Year 1937 Mileage 216,000 probably more
General condition Purchased by present owner second hand, full mileage not known. In poor condition.
Proposed Allowance £ Estimated Reconditioning Cost £
Estimated Resale price £ Not interested

ESSENTIAL NEED:

Explain why this customer is particularly recommended. If proposed

Exhibit H
Dealer's Recommendation 13th October 1954.

sale is covered by clause 4 of the Board of Trade conditions, include condition of existing car:
Resident 40 miles from Westport on Westport-Greymouth main highway Class II. Nearest centre or Doctor at Westport or Greymouth. Applicant, with dozer, also carries on farm clearing and land development which necessitates long travel on back area roads, very rough and sometimes only partly formed.
Does high annual mileage.

DEALER'S RECOMMENDATION:

I/We recommend that a Chevrolet car be released to this customer.
My/Our investigation of the customer's circumstances as outlined in the foregoing, and in the Customer's application for Purchase form, shows that the conditions as established by the Board of Trade are fully complied with.
Date 13. 10. 54 Dealer's Signature BETTS MOTORS LTD. G. Slee
Dealership WESTPORT
Town

(DO NOT FILL IN THIS SECTION)
APPROVED
NOT APPROVED Assistant Sales Manager
Date 20 Dec. 1954

EXHIBIT I

Exhibit I
Agreement with covenant in restraint of resale by Defendant 7th March 1955.

AN AGREEMENT made the 7th day of March 1955
BETWEEN John Neil Mouat of Punakaiki (Hereinafter called "the Covenantor" which term shall include the Covenantor's executors and administrators) of the One Part AND Betts Motors Ltd. of Westport (hereinafter called "the Dealer" which term shall include the successors in business of the Dealer) and of the Other Part WHEREAS the Dealer is a retailer of motor vehicles of the make referred to in the Schedule hereto AND WHEREAS there is a shortage of the said motor vehicles for present sale and delivery in New Zealand and the Dealer is restricted from supplying such motor vehicles except to selected and approved persons who (inter alia) are prepared to enter into and execute this Agreement AND WHEREAS the Covenantor has requested the Dealer to sell to the Covenantor the motor vehicle particulars whereof are set out in the Schedule hereto (hereinafter referred to as "the said vehicle") AND WHEREAS in consideration of the Dealer agreeing to sell the said vehicle to the Covenantor and to make present delivery thereof and for the further consideration hereinafter appearing the Covenantor has agreed to enter into and execute this Agreement NOW in consideration of the premises and of the payment of One Shilling (1/-) by the Dealer

Exhibit I
Agreement with covenant in restraint of resale by Defendant 7th March 1955.
continued.

to the Covenantor (the receipt whereof is hereby acknowledged) IT IS HEREBY AGREED by and between the parties hereto as follows:—

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 maner 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).

IN WITNESS WHEREOF this Agreement has been executed the day and year first before written.

SCHEDULE

Make and Type of Vehicle: 1954 Chevrolet Sedan
Engine No.: R 43136 Chassis No.: 4.1269.51647
Registration No.: 401556
Date of Delivery: 7. 3. 55
Original Sale Price: £1207 1/3 stamp 7/3/55

SIGNED by the said John Neil Mouat
J. M. MOUAT
per T. N. Mouat Power of Attorney

in the presence of J. Ridler

or

THE COMMON SEAL of the said Betts Motors Ltd. was hereto affixed by and in the presence of: L.S.
T. G. Slee Chas. E. Betts

EXHIBIT K

Exhibit K
Letter from Collector of Customs to General Motors N.Z. Ltd.
4th June 1954.

CUSTOMHOUSE, Wellington.
4th June, 1954

MB
No. Wn. 26/2/308

Gentlemen,

With reference to licence No. E12639 for £478,300 issued to you to import motor vehicles from non-scheduled countries, I have been directed to advise you that the licence in question has ben made available for the importation of cars from Canada and U.S.A. (as specified on the face thereof) subject to the condition that the vehicles will be distributed in accordance with the conditions to be determined by the Board of Trade.

Yours faithfully,
H. A. PENNY
(H. A. Penny)
for Collector of Customs

Messrs General Motors Ltd.,
Bouverie Street,
PETONE.

EXHIBIT L

Exhibit L
Letter from Comptroller of Customs to General Motors N.Z. Ltd.
5th August 1954.

Customs Department,
Wellington, C.1.
5th August, 1954

The General Manager,
General Motors N.Z. Ltd.,
P.O. Box 1999,
WELLINGTON, C.1.

Dear Sir,

With reference to licenses authorised for the importation of motor cars from North America, I am attaching a copy of the conditions, as laid down by the Board of Trade, relating to the distribution of such cars imported under 1954 and 1955 import licenses. These conditions have been approved by the Government and the importation of cars by your Company under its 1954 and 1955 import license available for North America motor cars is subject to compliance with the attached conditions..

The Board of Trade has asked me to refer to certain matters which, I understand, the Board discussed with representatives of the importers but which it did not consider necessary to refer to in detail in the conditions of distribution.

Exhibit L
Letter from Comptroller of Customs to General Motors N.Z. Ltd. 5th August 1954. *continued.*

First, the Board wishes to stress that it is the importers who are responsible for ensuring that the conditions of distribution are faithfully complied with. The license to import the cars is subject to compliance with the procedure for distribution now laid down. If the attention of the Board of Trade is drawn to any breaches of the conditions of distribution it will regard such breaches as an indication that the demand from essential users (as described in the conditions of distribution) for the particular make of car concerned is not as great as is provided for by the amount of the license. The Board will take this into acount when considering the granting of future licenses for North American motor cars.

Secondly, the Board desires to emphasize that compliance with the conditions will require particular attention to any allocation proposed for a metropolitan area.

Finally, although no reference has been made in the conditions of distribution to a particular application form the Board understands that the importers will be using a standard application form along the lines of the one handed in to the Board at a meeting with representatives of the New Zealand Motor Vehicle Importers' Association.

The above matter is to be the subject of an announcement by the Hon. Minister in Charge of Import Licensing. Such announcement is being delayed for about a fortnight to enable importers to prepare instructions for dealers. It is desired that the condition regarding distribution of the cars should be regarded by importers as **confidential,** and for their information only, until such time as the Minister makes his announcement.

Yours faithfullv,
(Signed)
(J. P. D. Johnsen)
Comptroller of Customs

EXHIBIT M

Exhibit M
Letter from Director of Price Control to General Motors N.Z. Ltd. advising maximum price 24th August 1955.

PRICE CONTROL DIVISION
(DEPARTMENTS OF INDUSTRIES AND COMMERCE)

Gen/1798
JRB:HML
24th August, 1955

The Acting Treasurer,
General Motors Limited,
P.O. Box 1999,
WELLINGTON.

Dear Sir,

1954 & 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 American, Dominion Wide maximum retail selling prices are now approved for Chevrolet Sedans as follows:—

1954	1269x5	£1207 each
1955	1219/6x5	£1238 each

Yours faithfully,
H. L. WISE
(H. L. Wise)
Director of Price Control

Exhibit M
Letter from Director of Price Control to General Motors N.Z. Ltd. advising maximum price 24th August 1955.
continued.

CERTIFICATE OF REGISTRAR OF COURT OF APPEAL AS TO ACCURACY OF RECORD

I, GERALD RONALD HOLDER, Registrar of the Court of Appeal of New Zealand **DO HEREBY CERTIFY** that the foregoing 57 pages of printed matter contain true and correct copies of all the proceedings evidence, judgment, declarations and orders had or made in the above matter so far as the same have relation to the matters of appeal and also correct copies of the reasons given by the Judges of the Court of Appeal of New Zealand in delivering judgment therein such reasons having been given in writing **AND I DO FURTHER CERTIFY** that the appellant has taken all the necessary steps for the purpose of procuring the preparation of the record and the despatch thereof to England and has done all other acts matters and things entitling the said appellant to prosecute this appeal.

AS WITNESS my hand and the Seal of the Court of Appeal of New Zealand this 26th day of November, 1957.

G. R. HOLDER.

Registrar.

In the Privy Council.

No. of 1957.

ON APPEAL FROM THE COURT OF APPEAL OF NEW ZEALAND.

BETWEEN

JOHN NEIL MOUAT ..... *Appellant*

AND

BETTS MOTORS LTD. .... *Respondent*

RECORD OF PROCEEDINGS

ROSE, JOHNSON & HICKS,
9 Suffolk Street,
Pall Mall,
London, S.W.1,
Solicitors for the Appellant.

WRAY SMITH & CO.,
3 & 4 Adelaide Road,
Strand,
London, W.C.2,
Solicitors for the Respondent.

Printed at The Caxton Press, Christchurch, New Zealand