



Neutral Citation Number: [2017] EWHC 276 (Comm)

Claim No: CL-2015-000086

IN THE HIGH COURT OF JUSTICE

QUEENS BENCH DIVISION

COMMERCIAL COURT

Date: 20 February 2017

Before:

HIS HONOUR JUDGE WAKSMAN QC

(sitting as a Judge of the High Court)

(1) J TOOMEY MOTORS LIMITED

(2) TOOMEY (SOUTHEND) LIMITED

Claimants

- and -

CHEVROLET UK LIMITED

Defendant

Thomas Grant QC (instructed by Jeffries Essex, Solicitors) for the Claimant
Elspeth Talbot Rice QC (instructed by Duane Morris, Solicitors) for the Defendant

Hearing dates: 16-19 and 24-25 January 2017

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

INTRODUCTION

1. The Toomey group of companies maintains a number of car dealerships in South Essex. The First Claimant, J Toomey Motors Ltd (“Toomey Basildon”) and the Second Claimant, Toomey Southend Limited (“Toomey Southend”) (collectively “Toomey”) had sold Chevrolet cars from their respective showroom premises since about 2006. They also serviced such vehicles and in addition, Toomey Basildon had body shop facilities. They also held franchises to sell Vauxhall cars which, as with Chevrolet, were at all material times owned by General Motors. The Defendant, Chevrolet UK Ltd (“Chevrolet”) was the Chevrolet distributor for the UK.
2. Toomey Basildon and Toomey Southend each signed identical written franchise agreements with Chevrolet operative as from 1 June 2013 (“the Agreements”). These replaced earlier similar agreements in broadly the same form.
3. On 9 December 2013, Chevrolet gave to all of its UK dealers, two years’ notice of termination of their franchises. This followed a decision made by General Motors shortly before, that it would no longer market the Chevrolet brand in Europe. By May 2014, the vast majority of such UK dealers had agreed terms of settlement with Chevrolet whereby, in exchange for a monetary payment, they agreed to cease their franchises in the course of 2014 rather than keeping them until the end of 2015 when the notice expired. However, Toomey did not settle with Chevrolet because it felt that the compensation offered for early termination was inadequate. By July 2014 there was only one remaining dealer other than Toomey, and that dealer settled in September 2014.
4. The result was that for most of 2014 and into 2015, Toomey effectively “went it alone” as a Chevrolet dealer. Since the end of 2013 the trading environment for Chevrolet cars, as far as Toomey was concerned, had changed significantly. In particular, following a national sale in early 2014 with very large discounts, Chevrolet, through its dealers, sold off all of its UK stock that is to say the stock which it kept in its compound at Portbury (which at times could amount to some 2,000 – 3,000 cars) and thereafter any purchases by dealers (now in effect only Toomey) would have to be by way of factory orders. The factory was in Korea and the lead time given in mid-2014 was around 3-4 months. In addition, financial incentives offered to dealers were much reduced in scope.
5. On 15 February 2015 Chevrolet announced that it would shortly be ceasing to supply Chevrolet cars into the UK altogether; any remaining factory orders had to be placed by (variously) 21 February and 3 March 2015.
6. As a result of all of these changes, by its solicitor’s letter dated 27 March 2015, Toomey contended that Chevrolet had, through its actions, withdrawn all facilities necessary to enable Toomey to effect sales of Chevrolet cars within the notice period. It said that this amounted to a repudiation of the Agreements which was accepted. By its solicitor’s letter in reply dated 2 April 2015, Chevrolet denied any repudiation. It said that the two-year notice period was designed to allow a gradual wind-down of each party’s sales operations (a legal point not pursued in these proceedings) and that the Agreements remained operative until 31 December 2015.
7. In these proceedings Toomey alleges, in summary, that by a series of express or implied terms of the Agreements, Chevrolet was obliged (a) to provide a number of financial incentives to Toomey, (b) to maintain its Portbury or similar UK compound containing a

sufficient amount of appropriate stock for Toomey to buy, (c) to maintain the existence of at least a sufficient and appropriate network of dealers across the UK and (d) to provide national advertising to support Toomey's sales operation. Chevrolet's failure to abide by these obligations in the notice period amounted to a clear breach of all such terms. Toomey further contends that such breach was repudiatory in nature. As a result it has claimed losses in the region of £700,000. This represents the profits which it says would have been made from the sale of new and used cars (and consequent profits from servicing and bodywork) which would have occurred but for these breaches.

8. For its part, Chevrolet denies that there were any such obligations whether express or implied and says that there was no breach, repudiatory or otherwise, and even if there had been, the losses sustained would be of a much reduced order.
9. Most of the key facts in this case are not seriously in dispute; the question is not whether there was a significant change in the trading position between Toomey and Chevrolet or that Chevrolet was seeking to wind down its operations overall, but whether their actions amounted to a breach of contract. Put another way, whether the way in which the parties had dealt with each other since inception of the Agreements and previously, were in fact the subject of contractual obligations on the part of Chevrolet - or not.

THE EVIDENCE

10. For Toomey I heard from Paul Plant, the CEO of MJT Securities Limited, the ultimate parent company of Toomey, Barry Ives, the Group Managing Director for Toomey Basildon, Stephen Decelis, Group Managing Director for Toomey Southend, Richard Webster, a Sales Executive at Toomey Basildon and Michael Briar, Toomey's accountant.
11. For Chevrolet, I heard from Les Turton, Managing Director of Chevrolet from December 2013 to December 2015.
12. I also heard from forensic accounting experts instructed by both sides: Ms Catherine Rawlin for Toomey and Mr Charles Lazarevic for Chevrolet. Helpfully, both before and during the trial, they were able to narrow considerably the issues between them.

THE AGREEMENTS

13. The agreements contained the following material terms to which I shall refer as appropriate below.

"PURPOSE OF Agreement

The purpose of this Agreement is to promote a relationship between Chevrolet and Dealer which encourages and facilitates cooperation and mutual effort to satisfy customers, and permits Chevrolet and Dealer to fully realise their opportunities for business success.

Chevrolet has established a quantitative selective distribution system network of Chevrolet Dealers operating within approved areas of responsibility to effectively sell Motor Vehicles and a qualitative selective distribution system network to effectively sell Parts and Accessories and to effectively service Motor Vehicles and Other Chevrolet Vehicles, The aim of these networks is to build and maintain customer confidence and satisfaction in Chevrolet Dealers and Chevrolet and to promote the Chevrolet brand. Consequently, each Chevrolet Dealer relies upon Chevrolet to provide sales and aftersales service support and to continually strive to enhance the quality and competitiveness of Motor Vehicles. At the same time, Chevrolet relies upon each Chevrolet Dealer to provide appropriate skill, capital, equipment, staff and facilities in accordance with this Agreement to properly sell Motor Vehicles and Parts and Accessories, service and repair Motor Vehicles and Other Chevrolet Vehicles and protect the reputation and satisfy the customers of Motor Vehicles and Other Motor Vehicles in

a manner that demonstrates a caring and professional attitude toward those customers. This mutual dependence requires a spirit of cooperation, trust and confidence between Chevrolet and the Chevrolet Dealers.

This Agreement (i) authorises Dealer to sell Motor Vehicles and Parts and Accessories and to service and repair Motor Vehicles and Other Chevrolet Vehicles and to represent itself as a Chevrolet Dealer; (ii) states the terms under which Dealer and Chevrolet agree to do business together; (iii) states the responsibilities of Dealer and Chevrolet to each other and to customers; and (iv) reflects the mutual dependence of the Parties in achieving their business objectives.

APPOINTMENT AS DEALER

- 1.1 Chevrolet grants Dealer the non-exclusive rights to (1) purchase Motor Vehicles and related Parts and Accessories; (2) provide repair services to Motor Vehicles and Other Chevrolet Vehicles; and (3) identify itself as a Chevrolet Dealer in the manner and at the Facilities set out in this Agreement.
- 1.2. Responsibility to Promote and Sell Products
 - 1.2.1. Dealer has the obligation to promote, advertise, market and sell Motor Vehicles and Parts and Accessories in accordance with this Agreement.
- 1.3. Dealer's obligation to purchase a minimum value of Motor Vehicles each Year is described in Annex 8 (Motor Vehicle Minimum Purchase Requirement),
- 1.4. Responsibility to service Motor Vehicles and Other Chevrolet Vehicles
 - 1.4.1. Dealer has the obligation to provide a courteous, convenient, prompt, efficient and quality aftersales service to owners of Motor Vehicles and Other Chevrolet Vehicles, regardless of where Motor Vehicles and Other Chevrolet Vehicles were purchased, in accordance with this Agreement
- 5.1. Area of Responsibility
 - 5.1.1. Dealer is responsible for effectively promoting, marketing and selling Products, marketing the aftersales support of Motor Vehicles and Other Chevrolet Vehicles, servicing Motor Vehicles and Other Chevrolet Vehicles, and otherwise representing Products as set out in this Agreement in and from the Area of Responsibility.

7. SALE OF MOTOR VEHICLES TO DEALER

- 7.1. Motor Vehicles
 - 7.1.1. Motor Vehicles which Dealer may order from Chevrolet or its designees are set forth in Annex 6 (Motor Vehicles). Chevrolet may change Annex 6 (Motor Vehicles) at any time by providing Dealer with a superseding Annex 6 (Motor Vehicles).
 - 7.1.2. Chevrolet may discontinue marketing any type or series of Motor Vehicle at any time provided Chevrolet delivers to Dealer accepted orders for such Motor Vehicles. If Chevrolet begins or discontinues marketing any type or series of Motor Vehicle, Chevrolet will provide Dealer with a superseding Annex 6 (Motor Vehicles). Chevrolet may change the design or specifications of any type or series of Motor Vehicle, including any optional equipment, at anytime without incurring any obligation to Dealer not expressly assumed under this Agreement.
- 7.2. Ordering Procedures

7.2.1, . Dealer shall submit orders for Motor Vehicles in accordance with the written or electronic procedures established by Chevrolet Dealer orders are subject to acceptance by Chevrolet.

7.2.2, There are numerous factors which affect the availability of Motor Vehicles and their distribution to Chevrolet Dealers. Among those factors are market demand, product availability, sold orders, turnover of stock or inventory, sales performance, weather and transportation conditions and government regulations. Chevrolet or its designees will use their best endeavours to allocate Motor Vehicles among Chevrolet Dealers on a fair and equitable basis.

7.2.3. Orders for Motor Vehicles will be binding on Dealer upon receipt by Chevrolet. Chevrolet may cancel orders confirmed by Chevrolet in the following circumstances:

- i. model year changes;
- ii. new model launches;
- iii discontinuation of production;
- iv. production shortages; and/or
- v. termination of this Agreement.

7.3, Terms of Sale

7.3.1. Prices, delivery charges, and other terms of sale applicable to purchases of Motor Vehicles by Dealer are set out in Annex 7 (Motor Vehicle Terms of Sale).

7.3.2. Annex 7 (Motor Vehicle Terms of Sale) may be changed by Chevrolet at any time and, except as otherwise provided in writing, such changes will apply to Motor Vehicles not invoiced to Dealer at the time the changes are made.

7.3.3. Chevrolet will provide Dealer with written notice of any price increases to Motor Vehicles before any Motor Vehicle to which such increase applies is invoiced, except for initial prices for a new model year or for any new model or body type which will be notified to Dealer at the appropriate time.

7.3.4. Chevrolet reserves the right to select the production and shipping locations and modes of transportation, carriers and delivery points for delivery of Motor Vehicles to Dealer.

11. BRAND PROMOTION

In recognition of Dealer's key role in promoting, advertising and marketing the Chevrolet brand, and selling Products, Dealer shall at all times:

11.1 comply with Chevrolet marketing and sales strategies and brand advertising guidelines and promote the sale of Products according to Chevrolet's marketing calendar;

11.2. maintain the minimum number of demonstrator Motor Vehicles for the purpose of providing test drives to potential customers according to the demonstrator program rules issued by Chevrolet;

11.3. maintain a minimum level of stock of Motor Vehicles according to Annex 10 (Sales Scaling Table);

12. QUALITY MARGIN STANDARDS AND QUALITY MARGIN

12.1 Provided Dealer has met all Dealer's obligations under this Agreement, where, Dealer meets a Quality Margin Standard as defined in Annex 11 (Quality Margin Standards and Quality Margins), Chevrolet shall grant Dealer a Quality Margin in relation to that Quality. Margin Standard.

12.2, Chevrolet may, at its absolute discretion, grant Dealer a Quality Margin in relation to one or more Quality Margin Standards, notwithstanding that Dealer

is not complying with one or more of Dealer's obligations under this Agreement, provided that Dealer:

12.2.1 has developed and agreed a remediation plan with Chevrolet to address the non-compliance; and

12.2.2 is implementing the said remediation plan according to its terms and timeline.

DEALER AND CHEVROLET EVALUATION

13.1. Dealer and Chevrolet recognise that Chevrolet is responsible for establishing a j network of Chevrolet Dealers and that the performance of each Chevrolet Dealer affects the overall success and image of the entire network of Chevrolet Dealers: /

13.2. To assist Dealer in evaluating its sales of Motor Vehicles and Parts and Accessories and its conduct and performance of Dealership Operations and in order to maintain or enhance the image of Chevrolet and the network of Chevrolet Dealers, Chevrolet will evaluate Dealer in accordance with this Article 13 and with Annex 16 (Dealer Evaluation). Chevrolet will provide Dealer with the results of the evaluation and any action plan that Chevrolet may require. Chevrolet reserves the right to change Annex 16 (Dealer Evaluation) at any time on not less than six (6) months prior written notice to Dealer. -

13.3. Without limiting the foregoing, Chevrolet or its designees may evaluate Dealer on ail or any of the following:....

21 TERM AND TERMINATION OF AGREEMENT

21.1. Term

The term of this Agreement shall begin on the Commencement Date and shall continue for an indefinite term until terminated in accordance with the provisions of this Agreement.

21.2. Termination by agreement

This Agreement may be terminated at any time by written agreement between Dealer and Chevrolet. The provisions of Article 23 relating to termination assistance will be applicable to the extent set forth in the written termination agreement. - '

21.3. Termination of Agreement on Notice

Dealer or Chevrolet may terminate this Agreement at any time by written notice to the other Party. Any termination will be effective on the date specified in the notice, which date will be not less than twenty four (24) months after receipt of the notice, provided that if, during the twenty four (24) month notice period, a termination notice of less than twenty four months is served by Chevrolet pursuant to Articles 21.4, 21.5, 21.6, 21.7, 21.9 or 21.10, such shorter notice period shall apply,

21.4. Termination of Agreement for Dealer's failure to comply with its obligations under this Agreement...

21.9. Reorganization of the network of Chevrolet Dealers

Chevrolet may terminate this Agreement by notice to Dealer to reorganize the whole or a substantial part of the network of Chevrolet Dealers, Any termination will be effective on the date specified in the notice, which date will not be less than twelve (12) months after receipt of the notice,

24. GENERAL PROVISIONS

24.1. No Agent or Legal Representative Status

This Agreement does not make either Party the agent or legal representative of the other for any purpose, nor does it grant either Party authority to assume or create any obligation on behalf of or in the name of the other. No fiduciary obligations are created by this Agreement.

24.2. Responsibility for Operations

24.2.1. Dealer is an independent business and as such is solely responsible for the success and profitability of all Dealer's business activities, Dealer enters into this Agreement based on its market analysis and its knowledge of the market. Any market analyses provided to Dealer by Chevrolet prior to the execution of this Agreement or during the term of this Agreement are for information purposes only and shall not be construed as the basis of Dealer's decision to enter into this Agreement or to continue this Agreement.

24.2.2. Except as provided In this Agreement, Dealer' is solely responsible for all expenditures, liabilities and obligations incurred or assumed by Dealer for the establishment and conduct of Dealership Operations.

ANNEX 7

Motor Vehicle Terms of Sale

1. TERMS OF SALE

1.1. The price to be paid by Dealer for each Motor Vehicle (including optional equipment) acquired from Chevrolet shall be Chevrolet's recommended retail price on the date it Is invoiced to Dealer, less base margin and quality margin, if applicable, plus transportation, handling and taxes ("Dealer Price")

1.2. Motor Vehicles order processing procedures

The method by which Dealer will submit orders for Motor Vehicles and Chevrolet will process such orders is described in the order processing procedures established by Chevrolet, which procedures may be set forth in bulletins, letters, data transmission and other notices from Chevrolet..."

THE FACTS

The position before December 2013

14. It was not suggested that the trading relationship between Toomey and Chevrolet in the first half of 2013 following the making of the Agreements was significantly different to their relationship during earlier periods since 2006.
15. The basic elements of the relationship can be shortly stated. Toomey was operating a Chevrolet sales franchise under which it had to conform to certain operational and customer-satisfaction standards imposed by Chevrolet. The franchise gave Toomey the right to sell new Chevrolet cars as an authorised dealer. It bought the cars as principal from Chevrolet and then resold them as principal to customers. As is common in the industry, they would buy and keep on site a number of cars without any identified purchasers; they would be on display in the showroom and also kept elsewhere on site. A showroom might hold 20 or 25 such cars but there would be many more outside the showroom. I shall refer to such collections of cars as "dealer stock". The best outcome would be if a customer bought directly from dealer stock because then the sale could be effected immediately or almost so.
16. In addition, and as noted above, Chevrolet maintained a large stock of cars at Portbury. This meant that if the customer's car of choice (by reference to model, colour, specification at set) was not *in situ* at Toomey's showroom, it might well be at Portbury which meant that it could be made available for inspection by, or sale to the customer usually within a few days. Sometimes (but this did not happen very often) another Chevrolet dealer might have the car that Toomey's customer wanted. In that case, there was the possibility that Toomey could swap one of its own cars for the other dealer's car and thereby satisfy its customers demand, again relatively quickly. But this depended on Toomey and the other dealer being able to

agree relevant financial terms and in practice, while there were some dealers with whom Toomey could do business, there were others with whom it could not.

17. Finally, cars could be ordered either to form part of dealer stock or to satisfy a particular customer, from the factory in Korea. Many of the cars sold to Toomey in this way were as part of its dealer stock. Provided that Toomey ordered a sufficient number in advance and chose carefully the cars it ordered, this would enable it to satisfy at least a significant part of its dealer stock.
18. Two further types of sale should be noted: First, all dealers had to maintain a number of demonstrator cars which could then be test-driven by customers interested in buying that model; but since they would be retained by the dealer for some time, they would be first-registered with the DVLA showing the dealer as owner. When they were later sold off, therefore, this was classed as a used car sale with an immediate element of depreciation as a result. For that reason, the dealer would not or might not make much from the sale of such cars. But there was no option but to have them; Chevrolet tended to give dealers special allowances on the purchase of demonstrators for that reason.
19. Secondly, like many other manufacturers, Chevrolet participated in the Motability scheme. This provided for the supply to drivers with particular disabilities who would lease their chosen car from the Motability Scheme which would itself purchase it from the manufacturer. Such cars would typically have various features and modifications to render them suitable for use by such customers. Motability typically drove a hard bargain with manufacturers and accordingly the potential for profit was small. Nonetheless, many manufacturers participate, because it is important to be seen to do this from a general market perspective. The vast majority of Motability vehicles would be factory-ordered precisely because they were not standard specification. A dealer would receive a payment from Chevrolet for Motability cars sold through it.
20. If one takes sales of new Chevrolets by Toomey Southend for the years 2012 and 2013 as an example,
 - (1) 131 were sold in 2012 of which 42% (55) came from dealer stock, 21% (27) from “resources” i.e. Portbury, 35% (46) from the factory and 2% (3) by way of transfer from other dealers;
 - (2) 132 were sold in 2013 and the relevant percentages were 57% (75) from dealer stock, 20% (26) from Portbury, 16% (21) from the factory and 8% (10) from other dealers.
21. For new car sales by Toomey Basildon for the period June 2012 to June 2013, total sales were 216 of which 25% (55) came from dealer stock, 20% (43) from Portbury 51% (111) from factory and 3% (7) from other dealers.
22. It should be added that all or virtually all the factory orders referred to above were Motability sales. Further, the dealer stock itself had to be sourced; a significant part of that came from factory orders but also from Portbury.
23. Generally speaking, the dealer will only first-register the car once it has been purchased by a customer so that the latter is the first registered keeper. Since first registration usually denotes a completed sale, the date of registration was often used for the purpose of various financial incentives. Toomey would usually not have to pay for the car until that first registration assuming that it had not held it for too long (see below).

24. A very important element in Toomey's trading operation (and this was not said to be unusual) was the opportunity after a sale to make more money (and usually at a much better margin) on servicing and repair work which Toomey, like other dealers, offered and the Agreements gave the official authorisation to do such work. An important aim for any dealer was to "convert" as many sales customers into regular users of its servicing and other post-sales facilities.
25. The basic profit element for Toomey on its purchase of cars from Chevrolet was set out in the Agreements as a maximum of 12% margin of which 3% had to be "earned" by Toomey demonstrating that its operation complied with the necessary standards - see Clause 12 set out above. It is not suggested that Toomey did not generally meet those standards. Hence one can assume that the working margin provided under the agreement was 12%. However, that 12% represented the difference between the recommended retail price of the car and the cost price to Toomey. It follows that it could only earn the full 12% if it sold the car at its full retail price which was rare. (Payment for Motability vehicles was calculated on a different basis).
26. In practice, one or more of the following financial incentives or discounts had always been offered by Chevrolet to Toomey in the past:
- (1) a registration allowance of a particular sum (often, it seems, about £600) which was available provided that Toomey registered (i.e. sold) the car by a certain date;
 - (2) sale or return: the aim of any dealer is to sell on the car it has bought from the manufacturer as soon as so as to make way for the next sale. A sale or return allowance would enable the dealer to return unsold cars to Chevrolet without having to pay for them, or being granted a refund, if the sale had not been achieved in a particular period;
 - (3) 0% finance: this was an offer which Toomey could make to customers to persuade them to buy the car. Since the customer paid no interest for the credit period its cost was in fact built into the price of the car; it was a cost to Chevrolet and/or its financing arm. Toomey did not get any direct financial benefit (like an allowance off the cost price) but on the other hand it could make the difference between a sale or not, especially since many customers could not even afford a deposit on the car. 38% of Toomey's sales in 2012/2013 had 0% finance attached;
 - (4) volume bonus: where Chevrolet set particular sales targets then, if they were met, certain bonus payments would be due to Toomey.
27. In evidence, however, Mr Plant clearly agreed that Chevrolet was not bound to provide registration allowances, volume bonuses, 0% finance or the ability to take part in the Motability scheme. The only sensible interpretation of that evidence is that as he saw it, there was in fact no contractual obligation on Chevrolet to provide these benefits to Toomey. Of course, the question of such obligation or not is for the court, but Mr Plant's concession is a significant reflection of what the commercial realities appear to have been. There is no reason to suppose that Mr Plant did not appreciate the distinction between what Chevrolet was obliged to do and what it did in practice.
28. Mr Turton, for Chevrolet, on the other hand, accepted that Toomey was unlikely to make its profit on the sale of the car simply from the 12% margin; other things would have to be

added like bonuses, registration allowances or finance deals. He added that registration allowances were “a way of life” for practically all manufacturers.

29. In this context it should be added, as Mr Plant pointed out, that apart from future servicing, there could be occasions when the profit on the vehicle sale could only be made through the commission earned on ancillary products like paint protection and GAP (guaranteed asset protection) insurance.
30. In terms of Toomey’s actual performance, they sold 339 new cars in 2012 and 262 in 2013. It has been pointed out that in 2012, Chevrolet marketed itself as having one of the “freshest line-ups in the industry”. However, in explaining lower sales figures for 2013, Mr Plant pointed to Chevrolet’s move away from a five-year warranty for customers previously included in the sales price as well as issues with its pricing strategy, lack of competitive offers and so on. That said, 10 new Chevrolet dealers came in during 2013 although some left as well. Chevrolet’s national market share was 0.5% nationally but its local share was 2-2 ½%.
31. Witnesses for both sides stressed the importance of Chevrolet and the dealers working together as partners (though not in any legal sense) and depending on each other to maximise sales. This of course is common sense. A manufacturer can only sell cars to its dealers in a territory if the dealers can sell them to retail customers. If customers will not buy, or buy insufficient numbers, then dealers will be unable to purchase significant quantities from the manufacturer. It is also why either party needed the ability to terminate the dealership without cause where, for example, it no longer thinks that the franchise is profitable.
32. According to Toomey’s Management Accounts in respect of new Chevrolet sales,
 - (1) in 2012, Toomey Basildon made a gross profit on car sales of £56,721 and a further gross profit of £61,581 principally made up of registration bonuses (I assume this means registration allowances) hire purchase, volume bonuses and Motability rebates, making a total profit of £118,302; after what the Management Accounts referred to as expenses of £118,352 and *pro rata* indirect expenses of £8,730, there was a loss of £8,780;
 - (2) in 2013, the total gross profit was £91,147 and after deduction of expenses was a loss of £19,252;
 - (3) for 2012 at Toomey Southend, the gross profit was £101,947 and after deduction of expenses there was a net loss of £9,877;
 - (4) for 2013 at Toomey Southend gross profit was £121,268 and after deduction of expenses there was a loss of £19,642.

DECEMBER 2013 ONWARDS

33. The decision by Chevrolet to terminate the dealership agreements of all of its dealers (approximately 70) was prompted by the decision of General Motors to stop marketing Chevrolet in Europe altogether. This appears to be because it was not considered financially viable to maintain that presence. Mr Turton observed in evidence that although the Chevrolets were good cars they simply were not selling enough of them. The local Chevrolet team in the UK was not told of General Motors decision much before they had to send out the termination notices on 9 December.

34. On 10 December, (and according to Mr Turton in line with all other European distributors) Chevrolet notified Toomey of an Early Termination Incentive Program ("ETIP") to be overseen by Mr Nigel Newton, the newly-appointed Dealer Transition Manager. In January 2014, Mr Newton presented the ETIP option to Toomey. The maximum payment offered - £81,432 - was conditional upon a termination by 30 June 2014 plus minimum sales of 91 cars, and the minimum payment, £27,144, was for a termination date of 31 December 2014. Beyond that no ETIP payment was available.
35. None of this was acceptable to Toomey who had forecasted increased profits from 2013, for 2014 and 2015. At the meeting, Mr Newton indicated that going forward, dealer orders would take a long time and there would be no marketing or sales programs or "huge monies off".
36. In the meantime, on 9 December 2013, Mr Turton had also sent a long email to all Chevrolet dealers to tell them about Chevrolets 2014 "Go To Market" plans. In summary, these were as follows:
- (1) The first half of 2014 would focus on selling existing dealer-owned or Chevrolet-owned stock and Chevrolet would have "aggressive commercial offers" to assist the dealers. Chevrolet's intention was that the majority of such stock would be sold by the end of June 2014. Dealer orders for production of new vehicles placed on or after 6 December 2013 would qualify for "regular incentive offers" to be communicated later in December;
 - (2) In the first half of 2014, Chevrolet would also supply advertising and marketing support to help with the sale of the stock but in the second half, there would be no major advertising campaigns given the "significant lower volume outlook" for that period;
 - (3) Given the difficulties in forecasting Chevrolet sales, now that the announcement had been made that it was withdrawing from the market, the production schedule for December 2013 at the factory was deferred to January 2014. Such cars would have the allowances applicable at the time of order but would not qualify for the enhanced incentives applied to the forthcoming stock sales. Customers should therefore be approached to see if they still wanted cars in the factory pipeline as opposed to from stock with the enhanced discounts. The dealers were free to cancel existing orders if they so wished;
 - (4) Chevrolet expected the announcement to affect demand for cars going forwards (and Mr Turton confirmed in evidence that this was their view). Accordingly, Chevrolet would move to a "build to order" approach. If the car was not readily available from stock, it would be produced only once an order was received at the factory and with a lead-time to delivery of 3-4 months. This change to vehicle ordering procedure would be implemented on 1 July 2014. So such orders placed in July might in certain cases not be delivered until October-November;
 - (5) Chevrolet wanted to work together with dealers to manage successfully the wind-down of Chevrolet sales.
37. I would make the following comments about this:

- (1) Chevrolet clearly saw that one effect of the announcements would be a reduction in customer demand; this could be offset to some extent by the enhanced incentives available to dealers in respect of selling existing stock;
 - (2) Since it was expected that most stock would be sold by the end of June, thereafter the only way a dealer could obtain a car was by a factory order. This could have a lead time of 3-4 months;
 - (3) However, I am quite satisfied that to the extent relevant, this email did not say, fairly understood, that factory orders could not be placed before 1 July 2014 nor did it in fact say that factory orders placed prior to 1 July 2014 would necessarily take 3-4 months. This observation is borne out by the sales documents that followed the email.
38. On 10 December 2013, Chevrolet also released a Sales Bulletin about pipeline stock i.e. factory orders in various stages of progress. For orders at stages 32 or 33 (i.e. orders given to the factory or which the factory had now scheduled to build) only units confirmed as sold i.e. (i.e. for particular retail customers or Motability or Fleet) and with full customer details as at 12 December 2013, would go forward. All other orders would be cancelled. The same would apply to orders at earlier stages. They could be cancelled at the instance of the dealer if no longer required. This reflects the earlier email.
39. The logic of this, as explained by Mr Turton (and as reflected in the email) was that if, for example, a dealer had ordered a number of cars from the factory to use as stock, it might wish to reconsider this in the light of the announcement and the possibility (seen as very real by Mr Turton) that there would be an immediate reduction in customer demand. Moreover, there was soon to be the national sale which was going to be called the Best Deals Ever (“BDE”). Dealers were likely to want to source further supply from UK-held stock at very competitive prices rather than those which would be implicit in the factory orders; accordingly, this measure was for the benefit of dealers. The cancellation did not mean that factory orders could not be placed for the future. In fact, no complaint as such is made by Toomey about this cancellation. Indeed, Mr Webster said that Toomey Basildon cancelled some orders precisely because they would get a better deal in the BDE.
40. On 23 December 2013 Chevrolet terminated Motability sales for the UK.
41. Then, by a Sales Bulletin dated 2 January 2014 BDE was launched. In respect of cars bought by dealers from Portbury or which had been built at the factory and were ready for shipment, extremely generous savings would be available between 1 January and 31 March. For example, the Chevrolet Spark would attract an increased registration allowance of £2,700 and an offer price of £6,395 and on a Cruise H/B an allowance of £5,000 and an offer price of £9,570. All the cars had to be registered by 31 March 2014, 0% finance would not be available, nor any other incentives, although the 12% margin would remain. The object was to get rid of existing stock in or destined for the UK as quickly as possible.
42. The BDE had the desired effect. It was supported by a substantial nationwide marketing and advertising campaign, and by the end of March, nearly all the UK stock was gone. Dealers were scrambling to get what cars they could and unsurprisingly, there was little cooperation between them. It is fair to say of course that most of the other dealers (who had taken a settlement under ETIP by the end of March) had no interest in maintaining any level of cooperation with Toomey - they were, colloquially, going to “take the money and run” and start afresh with another franchise. Mr Turton did not expect the stock to go quite as quickly as it did because he expected a more immediate drop in demand due to the announcement.

43. By a Sales Bulletin also dated 2 January 2014 Chevrolet announced that for the first quarter of 2014, the 3% qualifying margin would be guaranteed (as it was in subsequent quarters). By a Sales Bulletin dated 3 February 2014, Chevrolet announced the termination of the previous sale or return scheme whereby dealers could return the car to Portbury if unsold and unregistered and less than 160 days old, in exchange for a fee of £500 plus VAT. The last return date before cancellation of the scheme was 28 February.
44. On 1 April 2014 the BDE program was extended to 30 June 2014. As noted above, in fact there was little UK stock left anyway after March. As for factory orders, the Sales Bulletin dated 1 April provided for registration allowances but at more modest non—BDE rates “on all factory orders placed from 1 April-30 June 2014”. On the second page it said that “all new factory orders placed from 1 April-30 June 2014 will attract this support”. That was in contrast to the BDE registration allowance which had depended on registration by 30 June 2014. On the face of that document, it contemplated dealers being able (if they wished) to place factory orders in that period which would then attract the stated allowance.
45. Some confusion however appears to have occurred at Toomey about when factory orders for dealer stock could be placed. Mr Webster said he thought this could only be done after June 2014 (and had apparently been told this by Mr Decelis and Mr Ives) but there was nothing on the documents to indicate this restriction. Indeed, the factory orders Sales Bulletin of 3 January 2014 (quarter 1) and 1 April 2014 (quarter 2) assumed the contrary. Mr Ives confirmed nonetheless that his understanding was that factory orders could not be placed until 1 July.
46. It is true that in his email of 9 December 2013 Mr Turton referred to 1 July 2014 as the implementation date for the change to the ordering procedure. But, as noted above, that was concerned with the “build to order” facility which would be the only one after 1 July. It did not say that no factory orders could be placed beforehand. In cross-examination, Mr Ives accepted that although this is what he thought at the time, properly read, Chevrolet’s document did not actually prevent earlier orders and he may have misinterpreted the position. To the extent that he had taken that view because of the initial cancellation (in fact deferment) of existing factory orders, that was wrong because again, on a fair view of the document, Chevrolet was just giving dealers the opportunity to think again given the changed position.
47. Toomey did not place any factory orders until after August 2014. To the extent that they said this was because they could not place them earlier, that was a mistake on their part and the documents are clear (see above).
48. However, a separate reason was advanced which was that in respect of the registration allowances set by the Sales Bulletin of 1 April 2014 and later, there would be no point in placing orders because delivery from the factory (and hence the opportunity to sell and register) would be around 4 months and this meant that the registration would be after the 30 June when the allowance offer expired. As it so happens, the registration allowance notified by the sales bulletin of 1 April 2014 was expressly based on order date not registration date so this problem would not arise in relation to that particular period
49. On 1 July 2014 the quarter 3 Sales Bulletin offered further registration allowances but here it made it plain that this was dependent on registration.
50. However Mr Turton said that had any car ordered in the relevant 3 month period been delivered later (as was contemplated) then Chevrolet would nonetheless have honoured the

allowance. Just as it apparently had in the past where for example a sale (and hence registration) of the car was imminent but could not be completed by the end of the registration allowance period.

51. I agree that such a concession for orders placed after 1 July 2014 does not appear in the relevant sales documents but there is no reason not to accept Mr Turton's evidence on the point. All it would have taken Toomey was a telephone call to explain why it thought that the allowances would not work because of the timing problem. Later on, when this point was raised at a meeting with Ms Dick (see below), that concession was duly made.
52. The 1 July 2014 Sales Bulletin was then superseded by a further Sales Bulletin dated 28 July 2014 which increased the registration allowances with immediate effect.
53. On 12 August, there was a meeting between Mr Ives and Ms Dick, Chevrolet's National Sales Manager. Among other things, she confirmed the four-month delivery time for factory orders but also that the promotions (i.e. the registration allowances) would be extended which they were. In cross-examination, Mr Ives accepted that in the follow-up email Ms Dick confirmed that the registration allowance offers would be honoured for the cars ordered in the relevant period even if delivery came later and that he had misunderstood the position. He later said that if he had known that the allowances were available in this way, even though none of the other incentives were available Toomey might have ordered some more cars at an earlier stage since there was then at least some money to deal on. Following the meeting, Toomey did in fact place an order for 4 cars but they were the last ones it bought.
54. On 20 August 2014 a Sales Bulletin extended the enhanced allowances for cars registered between 1 October and 31 December 2014 and this was then extended into the period 1 January-31 March 2015 by the Sales Bulletin issued on November 2014. Then by a Sales bulletin dated 2 March 2015, these were extended into the next quarter save for the Captiva car which no longer had an allowance.
55. Meanwhile, on 18 February 2015 there had been the "End of Production Dates" Marketing Bulletin. It is not clear if the enhanced registration allowances would have continued after 30th June in respect of any such orders but of course the point never arose here since Toomey purported to accept Chevrolet's repudiation on the 27 March 2015.
56. The overall position of Toomey was that a major problem (though it benefited from it very significantly at the time, selling more cars than it had in the whole of the previous year) was the BDE because after it ended, it would be very difficult to interest a customer in a Chevrolet which would now cost very considerably more than it had done earlier in the year. Moreover it would not be readily available. In reality, its complaint was that it needed something approaching the BDE terms to offer later on and this was simply not available.
57. In practical terms, and although Mr Turton was reluctant to admit it at first, the reality was that Chevrolet was seeking to dismantle its UK operation as far as it could within the notice period. It could not do so entirely because (no doubt contrary to its hopes) not all the dealers agreed the early termination. After mid-2014 it sought to maintain a balance between servicing Toomey's requirements as the sole remaining dealer, while not operating as if it still had a network of dealers. That commercial reality was plain to me from the evidence. But the question remains whether what Chevrolet did or not do at this time was a breach of contract.

58. That completes my overview of what happened after December 2013; any other factual issues relating to liability (or quantum) will be dealt with in context below.

TOOMEY'S CLAIM

59. Toomey claims that Chevrolet effectively wound-down or dismantled its dealer network and sales operation in the UK and that this amounted to a wholesale breach of a number of express or implied terms of the Agreement.

60. As refined in argument, the key terms relied upon by Toomey were:

- (1) The provision of financial incentives to include discounts beyond the 12% margin, such as registration allowances, volume bonuses, sale or return and the offer of 0% finance for customers;
- (2) The maintenance of a ready supply of UK stock,
- (3) The maintenance of a dealer network; and
- (4) National advertising and other advertising support for dealers.

61. This is what was focused upon in the evidence and at trial. In the Particulars of Claim the main terms alleged are set out at paragraph 14. With regard to that paragraph,

- (1) the term as to incentives is captured by paragraph 14 (vi) and (vii);
- (2) the term as to the holding of UK stock is captured by paragraph 14 (iv) and (viii),
- (3) the term as to dealer network is captured by paragraph 14 (iii); and
- (4) the term as to advertising is captured by paragraph 14 (iv).

62. The terms at paragraph 14 (i) and (ii) do not really add anything to the above terms save to allege further impossibly broad obligations which cannot be justified either as express or implied terms, for example “to do all things reasonably required to effectively promote the sale of new Chevrolet cars” or to “do all things necessary to enable [Toomey] to be able to effectively and successfully sell” the cars.

63. Further versions of the terms pleaded in paragraph 14 are then expressed negatively at paragraph 15. I do not consider that they add anything. Unless the relevant positive terms pleaded in paragraph 14 can be established, then the terms alleged in paragraph 15 have no prospect of success. And if the relevant paragraph 14 terms are established, then there is no need for paragraph 15. But for the sake of completeness, I should say that I do not accept that to seek to persuade dealers to terminate early as Chevrolet did here through ETIP could possibly be a breach of any express or implied term by itself. Nor was this argued, save as part of the general argument that Chevrolet was seeking to dismantle its operation in the UK, but whether that was a breach depended on the inclusion of the paragraph 14 terms. If Chevrolet was otherwise acting in compliance with the Agreement, the fact that it was in the process of dismantling its UK operation is neither here nor there.

64. Accordingly, Toomey's case turns on the four key terms set out above.

65. Further, it is important to appreciate that in truth Toomey's case is all or nothing. It needs the establishment expressly or impliedly of all of the claimed obligations as to incentives,

UK stock dealer network and advertising in order to succeed on its damages claim. Or at the very least, it must establish the terms as to incentives and UK stock. This is because its claim for losses is based, very simply, on the difference between its expected net profits from its various activities in 2014 and 2015 as against its actual net profits for those years. While Toomey claims that the difference between the two is because of the breaches of the alleged obligations, the loss claimed is not itself tied to the breach of any one of the alleged obligations, nor (understandably) is there a range of loss scenarios depending on which obligation was broken.

66. Accordingly, the absence of either the term as to incentives or ready stock would in my view be fatal to Toomey's case and Toomey did not argue to the contrary. In fact, it is clear from the evidence that the principal difficulty encountered by Toomey was the lack of any incentives following the end of the BDE. The existence or otherwise of the alleged term concerning incentives is therefore critical.

CONTRACTUAL OVERVIEW

67. The Agreements are extensive, detailed and carefully drafted. As can be seen from the terms quoted in paragraph 13 above, they have precise sets of terms dealing with terms of sale (including the 9%/3% margin), the responsibilities of the dealers as against Chevrolet and marketing and advertising, among other things. It is not suggested that their predecessors were materially different nor that such agreements were unusual having regard to the car trade generally.
68. It might be thought surprising if, notwithstanding these detailed terms, there could be further express terms not immediately apparent from these provisions, or alternatively implied terms dealing with the same subject-matter as is covered by express terms.
69. An overarching point made by Toomey in support of its case is that it is, in effect, a contractual nonsense if the Agreements did not prescribe all or at least most of the various financial incentives which Toomey say were necessary in addition to the basic 12% margin, because otherwise the dealer would be at the "whim" of Chevrolet in that regard. I do not agree. I can see no reason why parties such as these should not adopt a business model in which certain basic financial terms of sale were in effect guaranteed and the others not. After all, both are in the business of selling cars and if the dealers cannot profitably sell cars to customers they will not buy from Chevrolet. There is an element of risk for the dealers here but it does not make such a model commercially implausible or unworkable, especially where either side can give notice to terminate without cause. And as noted above, dealers would sometimes be prepared to sell a car for little or no profit because of the profits which could be made from "add-on" services or products or future servicing.
70. As against that, it is said that this view is not valid in relation in particular to the implied term arguments because otherwise it could always be said that an implied term was not necessary since for most of the time the contract operated perfectly well without it. I take that point but it can hardly be a general rule. It all depends upon the context, the claimed term and how the parties appear to have allocated risk. In this context, Mr Plant's acceptance that Chevrolet was not obliged to provide the various financial incentives beyond the 12% margin is significant, likewise the point accepted by Mr Turton that the 12% margin by itself was unlikely to create a profit. But this is not a point which helps Toomey - rather what it means is that the parties entered into the Agreement in the full knowledge that the express obligation to provide a 12% margin would or might not be enough. Yet they did not provide for anything further. That, in fact, is a strong point in favour of Chevrolet.

THE EXPRESS TERMS CLAIM

71. The foundation for all of the alleged express terms is said to be the Purpose Clause set out above. On Toomey's own case, absent such a clause, there could not be the alleged express terms because their content is simply not stated anywhere else in the Agreements (with the possible exception of the dealer network term by virtue of clause 13.1 thereof). Accordingly, one turns to the meaning and effect of that clause.
72. Toomey's general case is (and has to be) that the alleged express terms can be drawn or spelled out of the Purpose Clause. In order to assist in that exercise, Toomey then relies upon "the factual matrix" which it claims here to be the parties' prior dealings. However, the latter is irrelevant if the Purpose Clause is not in fact an operative contractual provision anyway and so I deal first with that point.
73. Although headed "Purpose of the Agreement" these un-numbered provisions appear before the definitions section which itself precedes the numerous numbered paragraphs of the Agreement. In those circumstances it can fairly be regarded as a recital. That said, I accept that as a matter of law, the fact that a provision is a recital does not mean that it cannot contain operative provisions. See *Lewison - The Interpretation of Contracts* at paragraph 10.15. The case of *Aspidin v Austin* (1844) 1 QB 671 is an example of where the court so found. The provisions following the recital spoke only of maintaining the contemplated new mill but the express obligation to build it was not there and could only be found in the introductory words. *Lewison* points out that there should be a degree of caution before finding operative provisions in recitals since they are not in the most obvious place. All the more so if the part of the recital relied upon deals with subject matter which is also dealt with in the main body of the agreement. See also in this regard *Chitty Vol. 1* at paragraph 14-028.
74. Looking first at how the Purpose Clause reads, the first paragraph does just that; it says what the purpose of the agreement is. The second is a broad description of the network of Chevrolet dealers and that they and Chevrolet are expected to promote the brand. The final sentence thereof refers to the required spirit of co-operation. The third paragraph then says in summary what the Agreement does and that it reflects the mutual dependence of the parties. Thus, in total, the rationale of the Agreement is set out. The final paragraph in particular can be read as saying colloquially "what you will see in the terms of the agreement that follow" are authority to sell, business terms and responsibilities.
75. Toomey relies on the fact that in cross-examination, Mr Turton agreed that the Purpose Clause summed up what the parties were doing "on the ground". But I fail to see how such a generalised observation can assist on the question as to whether the Purpose Clause is operative contractually and if so, how.
76. On a fair reading, the Purpose Clause is indeed an explanatory preamble but its whole function is simply to act as an introduction to the detailed terms which come later. For that reason, I cannot see why the Purpose Clause should be regarded as containing specific operative terms at all. And unlike *Aspidin* there does not appear to be an obvious gap in the detailed provisions of the Agreement.
77. Moreover, the express terms which Toomey seeks to draw from it for the most part cover subject matter which is already dealt with in the numbered terms. For example financial incentives to help dealers sell the cars including registration allowances, impinge on the terms of sale and in particular the defined margin as set out in paragraph 7.3.1 and paragraph 1.1. of Annex 7. Mr Grant QC for Toomey contends that this is not so because the "new" express term does not contradict those provisions - it just adds to them. I do not accept that.

It is still dealing with the same subject-matter, namely sale terms which were covered in the Agreements. All the more so where, objectively, the parties had the opportunity to put into Clause 7 and Annex 7, other financial terms on which they had often operated in practice previously but did not do so. And this is in a context where the existence of incentives “offered by” Chevrolet is adverted to in paragraph 7.3.9 but without containing any obligation to provide them.

78. Although it is a case on very different facts I consider that *Mackenzie v Duke of Devonshire* [1896] AC 400 is of some assistance. In the recital, the settlor declared that he was providing for his second son and the heirs succeeding him. But in the dispositive part, he stated that the trust funds would go to his second son and his “heirs female” if there were no male heirs. The second son died leaving only two daughters. Although the second son’s heir was the elder daughter (as contemplated by the initial narrative) the phrase “heirs female” in the dispositive part meant, as a matter of law, females as a class. This took precedence over the testator’s statement of intent so that the two daughters shared the remainder of the estate equally, as opposed to only the elder daughter taking it. The House of Lords reach that view on the footing that the statement of intent could not override the clear words to be found later on. At page 407 Lord Watson observed that

“the narrative words come to no more than this: “My intention is to do” so and so, and you may add this, “and I have accomplished that purpose by the provisions which follow.” In such a case, the safer and only legitimate course is to look to the provisions which follow, and to read them according to their natural and just construction.”

79. In my view, that is also the sense of the Purpose Clause here.

80. Nor is it as if there is some ambiguity in the relevant express terms which could be resolved by having recourse to the Purpose Clause because there is no ambiguity and none is suggested.

81. Accordingly, and without going any further, I do not accept that in the Agreement, the Purpose Clause contains any operative provisions. It might just be possible to spell out an overarching duty to act in good faith towards each other (although on balance I think not since the Purpose Clause is saying that the Agreement (already) reflects their mutual dependence in the numbered clauses); but even if there were such a term, it is not relied upon here; moreover, it could not give rise to the specific alleged express terms and there is no claim or evidence that Chevrolet acted in bad faith.

82. If one then has recourse to the parties’ previous “course of dealing” this cannot change the position especially since the Purpose Clause does not for example recite their previous dealings or any feature of them. And to the extent that Toomey here is just making the general point that it would be commercially odd if the Agreements do not somehow incorporate the alleged express terms, I have already rejected that argument above.

83. Moreover, there is a further and insurmountable obstacle to the use of the Purpose Clause to found the alleged express terms which is that they the express terms are very specific while the Purpose Clause is very general. It is quite impossible in my view to leap from the latter to the former.

84. Accordingly, whether read by itself or in context, I do not accept that the Purpose Clause gives rise to the alleged express terms

85. The only other provision relied upon is Clause 13.1. I do not accept that this imposes a specific obligation on Chevrolet to establish a network of dealers. Rather it is a (correct) statement of fact that this is what Chevrolet has done. The descriptive nature of this clause is reflected in the rest of it - the performance of each dealer affects the success of the network as a whole. The reason for this sub-paragraph, as the remainder of clause 13 clearly shows, is to set out the justification for the various obligations on the dealers that follow, and the right of Chevrolet to evaluate them. It is simply impossible on a fair reading to spell out of Clause 13.1 a positive obligation to maintain a dealer network. Accordingly, for all of the reasons set out above I reject the alleged express terms however they might be put. I turn, therefore, to the case on implied terms.

IMPLIED TERMS

Introduction

86. Toomey's alternative case is that if there were no such express terms, then they were implied instead. I agree with its preliminary point that if the terms ought to be implied, Chevrolet cannot rely upon the "Entire Agreements" clause in paragraph 24.12 of the Agreements. Such a provision cannot oust the jurisdiction of the Court to imply terms.
87. The law on the implication of terms has recently been restated by the Supreme Court in *M & S v BNP Paribas* [2016] AC 742. At paragraph 18, Lord Neuberger rehearsed the well-known observations of Lord Simon in *BP Refinery v Shire of Hastings* (1977) 180 Lloyd's rep. 266 at p283, namely:

"for a term to be implied, the following conditions (which may overlap) must be satisfied: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that 'it goes without saying'; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract".

88. In paragraph 21, Lord Neuberger added 6 comments to this:

"... If one approaches the question by reference to what the parties would have agreed, one is not strictly concerned with the hypothetical answer of the actual parties but with that of notional reasonable people in the position of the parties at the time at which they were contracting. Secondly, a term should not be implied into a detailed commercial contract merely because it appears fair or merely because one considers that the parties would have agreed if it had been suggested to them.... However, and thirdly, it is questionable whether Lord Simon's first requirement, reasonableness and equitableness, will usually, if ever, add anything:... Fourthly,... Although Lord Simon's requirements are otherwise cumulative, I would accept that business necessity and obviousness... Can be alternatives in the sense that only one of them needs to be satisfied... Fifthly, if one approaches the issue by reference to the officious bystander, it is "vital to formulate the question to be posed by [him] with the utmost care"... Sixthly, necessity for business efficacy involves a value judgment. It is rightly common ground that... The test is not one of "absolute necessity", not least because the necessity is judged by reference to business efficacy. It may well be that a more helpful way of putting Lord Simon's second requirement is, as suggested by Lord Sumption JSC in argument, that a term can only be implied if, without the term, the contract would lack commercial or practical coherence."

89. In the context of this case, I consider that the following observations made by Lord Bingham MR in *Philips v BSB* [1995] EMLR 477 at p482 are also apposite:

"The question of whether a term should be implied, and if so what, almost inevitably arises after a crisis has been reached in the performance of the contract. So the court comes to the task of implication with the benefit of hindsight, and it is tempting for the court then to fashion a term which will reflect the merits of the situation as they then appear. Tempting but wrong.... It is not enough to show that had the parties foreseen the eventuality which in fact occurred, they would have wished to make

provision for it, unless it can also be shown either that there was only one contractual solution or that one of several possible solutions would with without doubt have been preferred...”

90. In his submissions, Mr Grant QC placed particular emphasis on Lord Neuberger’s reference in his paragraph 21 to the business efficacy test not being one of absolute necessity but where, without the term, the contract would lack “commercial or practical coherence” and he focused on those latter words when dealing with the facts of this case. I think the point which Lord Neuberger was making was the common-sense one which is that if a term could be implied only where the contract could not work at all i.e. it would, colloquially, grind to a halt without it, that would set the bar too high and I agree.
91. But if the touchstone is practical or commercial coherence, then it is necessary to define what that coherence is, on the facts of any given case. Thus the fact that without the term the contract might potentially work to the disadvantage of one party in certain circumstances, in that it does not make a profit it might have made other times, does not necessarily render the contract as a whole incoherent. The Agreements are on any view clear, detailed and highly coherent in their own right. The problem for Toomey’s case is that its definition of coherence assumes a particular allocation of financial risk in its favour. But that begs the very question as to what the underlying commercial model here is, as discussed in paragraph 69 above.
92. In other words the commercial coherence appealed to has to be ascertained objectively not simply from the perspective of one party - which is why, of course, there is the appeal to the “officious bystander”.
93. And a good starting point for the ascertainment of the contract’s intended objective coherence is the contract itself which here consists of all of the express terms as well as the Purpose Clause.
94. I agree that simply to say that the term is not necessary in some circumstances of the contracts operation is not conclusive against its implication. The contract and its operation must be looked at as a whole. But conversely, the fact that without the term the contract may work to the financial disadvantage of one party, or that in such circumstances it would be much better for that party if the term was implied is not conclusive in favour of implication.
95. In his closing submissions, Mr Grant QC made a further point, which had been expressed by Lord Sumption in argument in *M & S* which was that, simply to say that the term is not necessary because it will often be the case during the operation of the contract that both parties’ commercial interests coincide and there is no need of any further term, is not conclusive against implication. For otherwise it might make it difficult ever to imply a term on the grounds of business efficacy. I follow that, but, as noted in paragraph 70 above, it all depends upon the context.
96. Finally, I should deal with the law (such as it is) of the implication of terms by reason of a so-called course of dealing. I can see that the factual context in which an agreement is made may well be relevant to the question of whether a term should be implied or not and this might in an appropriate case take into account how the parties were operating beforehand. But I see no separate “head” of implied terms by reason of (or, in reality, to give effect in contractual terms to) any such prior dealing.
97. In this regard, Mr Grant QC relies upon the following passage from Chitty Volume 1 at paragraph 14-025:

“When implied from previous course of dealing.

It is, however, clear that a term may be implied in any given case from the circumstances of the parties having consistently on former and similar occasions adopted a particular course of dealing. Thus, a covenant to pay interest or to allow interest to be added to principal at stated periods and to pay interest on the whole, has been held to be implied from the fact that on former occasions the accounts between the parties have been stated and settled on that footing. And it has been held that an oral contract between the buyer and seller of goods incorporated by a long course of dealing conditions printed on the back of "sold notes" as conditions of sale, in so far as a condition was appropriate to the oral contract."

98. However, Mr Grant QC did not rely on any particular authority to this effect. The problem with this extract from *Chitty* is that what it really refers to is the long and well-established line of cases where parties' standard terms which had passed between them in previous dealings, could be said to form part of the instant (often oral) agreement, even if as a matter of offer and acceptance on that contract they were not operative. Hence printed terms on prior invoices or sales notes were incorporated. It is in my judgment something of a misnomer to see these terms as being implied on any conventional basis. Rather, it is a question of what terms are to be incorporated as express terms. Implication only arises for consideration once the express terms have been identified and considered.

99. The problem is illustrated by the penultimate sentence of the extract referring to cases concerning interest. Leaving aside the first footnoted cases as of some antiquity, in the *Marquis of Anglesey* [1901] 2 Ch 548, the issue was whether the testator had agreed to pay interest on certain sums claimed. Collins LJ said this:

"the bills were sent in to the testator; in those bills the claim for interest was made and payments were made by him thereupon... It seems to me that the reasonable inference from the facts is that the deceased dealt with the claimants on the footing that he was to pay them interest after the lapse of 3 years..."

100. I quite see that, but it is simply an analysis of what in fact the parties had agreed by reference to their earlier conduct. That is wholly different from this case and not just because one can easily see how a debtor in truth assumes an obligation to pay interest being an entirely common adjunct to the underlying debt where not paid immediately. If the course of dealing analogy had been apposite here, the argument would be that by conducting itself as it did, since Chevrolet had for example provided incentives like registration allowances, 0% finance or sale or return in the past, it had clearly assumed a contractual obligation in so doing and one which must be imported into the Agreements. But in the context of a highly detailed written agreement which deals among other things with price, by itself such a contention is hopeless. Indeed, as noted above, Mr Plant for his part did not even believe that Chevrolet was so obliged.

101. What the parties did historically (or even under the current Agreements) is not the issue; the issue is whether, applying the test for implied terms set out above, it is right on objective grounds to import an obligation in the terms of what they did.

102. For all the above reasons, I reject the statement of principle set out in paragraph 12 of Toomey's written closing submissions, itself said to be based on the extract from *Chitty* referred to above.

103. Accordingly, I now turn to consider each of the alleged implied terms.

Implied term as to incentives

104. For this purpose, I consider together the terms pleaded at paragraph 14 (vi) and (vii) of the Particulars of Claim. The term alleged is that:

“The defendant was obliged to continue to provide stock-financing, demonstrator-financing and other sales support to the Claimant as it had previously done since each claimant became a Dealer... And was obliged to continue to provide beneficial financing arrangements for the retail purchases of new Chevrolet motor vehicles.”

105. It is not clear from this precisely what financial support Toomey says Chevrolet was always obliged to provide. Was it a permanent obligation to provide 0% finance and sale or return and a registration allowance (and at what level) and a volume bonus? If so, while these might be highly desirable from the dealer’s point of view it is impossible to say that the Agreements were incoherent or could objectively be said to be commercially unworkable without them. And it is very hard to say that the official bystander would clearly say that they were obvious when on its face, the parties here knowingly entered into a detailed contract which provided only a 12% margin.
106. Moreover, any such implied term could properly be described as conflicting with Clause 7 and Annex 7 for the reasons given in the context of the discussion of express terms above. And again, there is the conflict with Clause 7.3.9 which assumes the possibility of Chevrolet offering incentives but without being obliged to provide them.
107. In fact, what Toomey would really need here would be even more incentives than it had received in the past and in effect, a continuation of the BDE deal beyond the sale of all the UK stock-or something like them. But it is extremely difficult to read such elements into the Agreement.
108. Mr Grant QC seeks to avoid these difficulties by saying that if the term was simply to provide reasonable or reasonably sufficient incentives over and above the 12% margin, then what that entailed in concrete terms would simply be a matter of analysis or evidence in any given case. I reject that. Such an exercise would be inherently uncertain and subjective. Mr Grant QC sought to counter this by saying that implied terms in the past have often been upheld which contain a “reasonableness” criterion. I agree, but again, it is all a question of context. For example, if the implied term was to the effect that one party would take reasonable steps to cooperate with the other to enable it to perform its obligations, one can see why that term would be phrased in that way and would be unobjectionable. The steps to be taken would be various and wholly dependent on the circumstances arising. The same would be true of “reasonable notice”. But conversely, the cost of the cars is a core term of the Agreement - one of its most important - and if it is to have any value it needs to be clear and precise.
109. Nor do I accept that the Agreements lack commercial coherence without the alleged term. This goes back to what, objectively speaking, must have been the business model adopted by the parties. In my judgment it is one whereby the parties rely on their own commercial interests generally coinciding so as to produce terms which are satisfactory to both sides. But the risk that this may not always be the case (and it may not always be in the interest of Chevrolet to provide some or all of the additional incentives), is borne by the dealer.
110. For the sake of completeness I should say that in closing Mr Grant QC suggested that as part of the range of incentives, Chevrolet was obliged to maintain its Motability operation (and thus its dealings with Motability Scheme) which it in fact cancelled in December 2013 because it was too expensive. This suggestion had not featured in any significant way before trial, nor is it alleged specifically in the Particulars of Claim. It was made to counter a point on loss made by Chevrolet, and dealt with in paragraph 147 below. But in my view it is impossible to imply such an obligation into the Agreements for all the reasons given above. That is particularly so since the opportunity to make Motability sales was not simply a feature of the trading as between Chevrolet and Toomey; it depended on a contractual

relationship being in place between Chevrolet and the Motability Scheme. If that proved too expensive for Chevrolet, it is very hard to see why it should not be entitled, as against Toomey, to end it.

111. For all of those reasons I reject the implication of the terms relating to incentives.
112. That disposes of Toomey's claim as a whole, because its case at its lowest (and on the basis of Mr Ives' evidence though not its other witnesses) was that at the very least, registration allowances would have to be provided and that might have been enough to persuade him to purchase some cars for the purpose of making sales after the "BDE". But it is no part of Toomey's case that even if there was no implied term as to incentives, it could and would have continued to buy and sell on Chevrolets and make a profit. Further, the damages claimed are calculated by reference to expected sales in 2014 and 2015, not by reference to what further sales would have been made had registration allowances alone been available and were taken up.
113. However, in deference to the arguments made about the other implied terms I deal with them below.

Implied term as to stock availability in the UK

114. The alleged term is that:

"the Defendant was obliged to continue to maintain a "delivery pipeline" as described above and a sufficient stock of new Chevrolet vehicles within the UK as it had previously done (or alternatively to make such other arrangements as would ensure that Dealers and their customers would have access to a promptly-available supply of new Chevrolet vehicles)".

115. As already noted, Chevrolet kept a large stock of cars in the UK at Portbury to service the requirements of its network of around 70 dealers. Dealers could of course, and did, order direct from the factory but this was not the only source. Factory orders were mainly for Motability customers. Factory orders would take longer to process but a dealer could be expected to plan ahead. Indeed, Mr Turton suggested in evidence that a reason why there may have been such a large stock of cars at Portbury was because dealers were not advance planning as much as they should have done.
116. Notwithstanding that, and that a dealer needed to have at least 20-25 cars on the forecourt and more elsewhere on its site, it would be very odd if Chevrolet was not under some sort of obligation to supply dealers with at least standard specification, popular and in-production Chevrolet models reasonably promptly following the placing of an order by the dealer. Such an order would only be necessary where the dealer did not already have in stock the particular car which the customer wanted. In practice Chevrolet had been able to satisfy that demand, in most cases, by having the relevant car at the Portbury compound.
117. Apart from arguing that the pleaded implied term was not necessary for business efficacy or obvious, Chevrolet also argued that such a term would be inconsistent with its rights to termination under Clause 21 and also the sale terms set out in Clause 7 and Annex 7.
118. As to Clause 21, since I have already found (and Chevrolet accepts) that the termination period of 2 years does not itself lessen or change any of Chevrolet's obligations (since it would be "business as usual" from a contractual point of view) I cannot see how the proposed term would conflict with any right of termination.

119. As to clause 7, the starting point is what Chevrolet's obligations were. Clause 7.2.1 says that dealer orders were "subject to acceptance" by Chevrolet. In so far as the point might be relevant, Toomey said that this could not be an unrestricted right on the part of Chevrolet to refuse any order, otherwise there would be no point in having the dealership at all. Chevrolet disagreed. In my judgment, Toomey is correct and this is not only because Chevrolet's interpretation would make no sense. It is also because of Clause 7.2.2. This gives examples of factors which affect the "availability" of cars. That suggests that if the ordered car was "available" for the dealer, then it should be supplied. If there is limited availability at the time of ordering, then Chevrolet will use its best endeavours to allocate stock fairly and equitably among all the dealers. Of course, in normal circumstances, it would be absurd for Chevrolet to refuse to supply a dealer any available car but in this particular context, that does not obviate the need to construe Clause 7.2.1 as I have done above. Clause 7.2.3 emphasises that Chevrolet could only thereafter cancel orders in limited circumstances. It is accepted that the word "termination" at sub- paragraph (v) thereof is a reference to the end and not the start of the two-year notice period.
120. If that analysis is right, then it follows that there must be an obligation upon Chevrolet to supply vehicles ordered reasonably promptly given that the customers for this "value" brand would wish to obtain the car they want reasonably quickly - otherwise they may go "down the road" and buy a different model from another dealer. These were not high-end or special order vehicles. I accept that dealers could be expected to purchase some of their stock in advance from the factory, based upon careful planning of what customer demand would be, but I do not consider that this removes the need for the obligation upon Chevrolet to deliver reasonably promptly. It must be expected (and it clearly was by Chevrolet) that there will be a significant number of customers attending dealers whose particular choice of car was not at that site (and in practice, could only rarely be obtained through a dealer "swap"- see above) and so the dealer would have to go to Chevrolet for that particular car. On the assumption that it was a popular standard specification model I can see no reason why Chevrolet should not be obliged to deliver it in a short timescale. The evidence suggests cars from Portbury might come within a few days-certainly a week or two would seem to be the most time it should take.
121. So the implied term in my view which was necessary and obvious here focuses upon the obligation to supply reasonably promptly (i.e. the words in parentheses) in paragraph 14 (iv) of the Particulars of Claim, rather than in relation to a particular UK compound. Thus the problem of definition - precisely how many cars should be held - does not arise. I accept that "reasonably promptly" is a generic expression but here I consider that this is no bar to its implication. First, timing clauses, sometimes even as express terms use reasonableness as a touchstone. Secondly, it appears to be workable here, given the evidence about existing practice.
122. However, all of that said, and as set out below, even if this term was broken, by itself its breach led to no loss here. For the reasons explained above, the critical alleged term was that as to financial incentives - without it, the fact that a customer could buy a car reasonably quickly but only at a price which would be much too high, goes nowhere.

Implied term as to dealer network

123. The term pleaded at paragraph 14 (iii) states that:

"the Defendant was obliged to maintain its national Dealership Network in the UK, consisting of numerous Chevrolet Dealers, selling and promoting the sale of new Chevrolet vehicles; the performance of this obligation would have the effect of materially assisting the First and Second

Claimant to achieve their own sales of new Chevrolet motor vehicles and thereafter to obtain after-sales servicing work in respect of new Chevrolet motor vehicles sold by the First and Second Claimant as well as in respect of those new Chevrolet vehicles which had been sold by the other Dealers in the Dealer Network;”

124. There were two ways in which it was said that the national dealer network was relevant to Toomey’s dealership. First it promoted national awareness of the Chevrolet brand which in general terms would or might promote Toomey’s sales locally and second, it enabled Toomey, on the odd occasion, to source particular cars by way of swaps from other dealers-though as the figures cited in paragraph 20 above this was relatively infrequent.
125. I agree that in normal circumstances it would be odd if there was not a national dealer network for a brand like Chevrolet-because it would make little financial sense for Chevrolet not to have one. But on the other hand, I do not see that it was necessary in order for the Agreements to work or to have commercial coherence. Nor do I consider that if clause 13.1 did not generate an express term to this effect (my conclusion in paragraph 85 above) it must give rise to an implied one.
126. Nor, given that Toomey has the primary obligation to advertise do I consider that the dealer network was necessary to promote Chevrolets. Nor was it necessary as a source of supply given the infrequency with which this happened. The Agreements were workable and coherent without it.
127. Further, the term is of uncertain scope. The question arises as to how many dealers nationally and/or how many per area. Toomey has not sought to put a number on this, on the basis that if there is no network left at all, there must be a breach. But that does not remove the requirement that in order to be implied in the first place, the term must be capable of clear expression. The need for the latter was emphasised by Andrews J in *Greenclose v NatWest* [2014] 1CLC 562 at paragraph 148, albeit in a different context.
128. Finally, if there was such a term, it would indirectly fetter the ability of Chevrolet to terminate its contract with any particular dealer in practice, even though under each such contract there is an unrestricted right to terminate without cause on 2 years notice. Mr Grant QC argues that there is no such fetter because Chevrolet was free to terminate; it is just that (assuming that the number of dealers fell below the relevant number, whatever that was) there would be a requirement to replace the terminated dealer with another one. That would be so even though the finding of a suitable replacement dealer was not entirely within Chevrolet’s control. In my view, that would be an effective restriction on Chevrolet’s rights of termination and this counts against implication.
129. For all of those reasons, I do not accept the implication of this term. However, if I am wrong on this point, the implication goes nowhere because any breach thereof caused no loss in the circumstances of this case, alternatively any such loss was *de minimis*. That is because of the very limited number of dealer swaps in the first place and the importance of the inclusion of the implied term as to incentives which I have already rejected.

Implication of a term as to national advertising

130. Paragraph 14 (v) of the Particulars of Claim states that:

“The defendant was obliged to continue to provide a continuum of substantial national advertising campaigns in the UK media and of sales promotions to promote the sale of Chevrolet motor vehicles by its Dealership Network, including the First and Second claimant’s, as it had previously done since each Claimant became a dealer;”

131. While I can see the advantages to dealers (and Chevrolet) of such national advertising and recognising that it had happened in the past, I do not accept that such a term must be implied.
132. First, Clause 1.2.1 of the Agreements place the advertising obligations squarely on Toomey. Second, Clause 5.1.1 again places the responsibility on Toomey for promoting and marketing the cars. And clause 11 recognises Toomey's "key role" in promoting and advertising the brand and complying with Chevrolet's marketing strategy.
133. Where advertising has been dealt with so specifically in the Agreements, I cannot see the basis for a further set of obligations about advertising upon Chevrolet. Moreover, in this contractual framework, I cannot see how it can possibly be said that any national advertising by Chevrolet is necessary for business efficacy or to make the Agreements commercially coherent, nor is it obvious.
134. In so far as it is said that Chevrolet had a separate obligation to support financially Toomey's own advertising campaigns, this should be treated in the same way as financial incentives- there is no basis for implication.
135. Finally, and most particularly, here any lack of national advertising was not in any sense causative of Toomey's loss. That was primarily due to the lack of financial incentives.

Conclusion on implied terms

136. For all the reasons given above, there is no basis for the implication of the set of terms contended for by Toomey nor is there any basis for the implication of at least both the terms as to incentives and as to UK stock. The fact that in isolation, there was an implied term as to supplying cars reasonably promptly, goes nowhere, for the reason given above.

BREACH

137. Putting to one side the implied term as to reasonably prompt supply, Toomey's case on its alleged express or implied terms has essentially failed. I accept that there could have been a breach as to the term about supply although since Toomey did not place any orders after the BDE, save four in late 2014, there was no actual breach. One would have to characterise the new "build to order" procedure when promulgated as an anticipatory breach of some kind, although by itself I would not have regarded it as repudiatory. But in fact, and for the reasons given in paragraph 122 above, no loss flowed. As for the other alleged terms, the question of breach simply does not arise.
138. Had Toomey succeeded on all the claimed terms I would accept that Chevrolet had been in breach. Moreover, given what happened, it would then be difficult to avoid the conclusion that any such breach was repudiatory since this entailed Chevrolet's wholesale failure to comply with them. (It is true that in respect of incentives Chevrolet did in fact continue to offer registration allowances but in reality, the incentives term sought by Toomey went far beyond this.)
139. In respect of any repudiation, I would not have found there to be any affirmation of the Agreements on the part of Toomey or any other bars to its ability then to claim damages on the repudiatory basis. This would have meant that Toomey would have been entitled to damages for the losses it incurred by reason of these breaches for the whole of the remaining notice period, as well as the period between December 2013 and February 2015.

140. For the sake of completeness I should add that there is no basis for saying that the BDE itself was a breach of the Agreements. First, Toomey participated in and profited from the BDE. Secondly, Toomey's real complaint remains the absence of incentives outside of the BDE and the breaches of the other alleged terms. Absent such breaches, the BDE itself could not itself constitute a breach.
141. Given my findings on liability, damages do not arise but in deference to the evidence and arguments presented on the question of loss, I deal with that matter briefly below.

LOSS

142. Toomey's damages claim consists of 4 elements:
- (1) Loss of profit on the sale of new cars ("New Cars");
 - (2) Loss of profit on the sale of used cars ("Used Cars");
 - (3) Loss of profit from future servicing ("Servicing"); and
 - (4) Loss of profit from future bodywork services ("Bodywork").
143. As noted above, in one form or another, all heads of loss proceeds on the basis that, absent the alleged repudiation, Toomey would have earned what it expected to have earned in 2014 and 2015, had the trading situation remained as it was previously.

New Cars

144. The starting point is the number of cars sold by Toomey in the years 2012 and 2013. Chevrolet says 621 which is the figure in the Management Accounts, but Ms Rawlin was informed by Mr Plant that there was an error with 20 of those sales being wrongly shown and that the correct total was 601. It is somewhat unsatisfactory to have this evidence emerge in this way but having considered the matter I shall proceed on the basis of 601 sales.
145. The total gross profit for 2012 and 2013 is agreed at £432,664.
146. Toomey's case is that going forward, there would have been an increase in sales of 4.6% for 2014 and then a further 8.8% for 2015. On the basis of an average number of sales for 2012 and 2013 of 301 cars, this becomes 327 for 2014 and then 342 for 2015. These percentages are based on the upward trend for car sales in the non-premium brand sector as a whole. I do not agree that this uplift should be applied here. 2013 was a worse year for Toomey than 2012 and it was already saying that Chevrolet had not given enough incentives (see paragraph 30 above). And according to Mr Turton the Chevrolet market was already in decline by then. Accordingly, the only prudent assumption in my view would be to keep the estimated car sales for 2014 and 2015 at their 2012/2013 average.
147. One reason why sales would have been less in 2014 and 2015 anyway is because of the cessation by Chevrolet of its involvement with the Motability Scheme. Toomey's sales through the scheme were not insignificant: 62% of all sales from Basildon in 2012 (103 cars) were Motability sales, with 30% (38 cars) in 2013, and 37% of all sales from Southend in 2012 (49 cars) were Motability sales, with 16% (21 cars) in 2013. And it is no answer to say that Chevrolet was obliged, as against Toomey, to stay in the scheme because it was not – see paragraph 110 above. So some reduction in sales going forward must be assumed. Of course, if I was wrong on this point and there was a term to maintain Motability sales as well, then there would be no such reduction. The calculations below do not assume any reduction so as to reflect Toomey's loss if it succeeded on all of its breach of contract claims.

But had it succeeded on everything but the alleged Motability breach, I would have made a 10% reduction at this stage.

148. The next question is whether there should be a further reduction in assumed sales by reason of the very fact of Chevrolet's announcement that it was going to be pulling out of the European market shortly. That announcement by itself was not of course a breach of contract on the part of Chevrolet. Mr Lazarevic suggested a year-on-year reduction of 40% to take account of this. That figure was made up as follows: first, the figure of 30% which was taken from the fall in sales of Suzuki vehicles in Canada in early 2013 said to have been due to the announcement in 2012 of its withdrawal from the US market. Mr Lazarevic has adopted that figure by way of analogy here. Second, he makes a further reduction of 9% which represents the annual reduction in Chevrolet sales applicable to the UK as a whole. In addition he noted that Chevrolet lost a significant share of that market. The total of 39% is then rounded up to 40%.
149. There was very considerable debate and time spent on this issue, which both experts agreed at the end of the day was a matter of fact for the court to decide. Accordingly, a number of the lay witnesses pronounced upon it as well.
150. In my judgment, it is very difficult to draw any hard and fast conclusions from other cases where products or sales of cars were going to cease in a particular area. Much depends on what accompanied the announcement at the time it was made for example as to immediate availability or otherwise. What I think cannot be doubted is that any such announcement is bound to have a dampening effect on demand even if there are assurances about continued after-sales support. Potential customers will still have concerns about buying a brand which is no longer going to be available in the future. Indeed, Chevrolet itself saw this as a problem and the only way it felt sure of being able to sell its remaining stock was to discount it very heavily. It is simply unrealistic to assume that the announcement would have no effect at all.
151. Toomey submitted that nonetheless there was really no evidential foundation for any reduction in estimated sales here. I do not accept this. First, in paragraph 16 (ii) of the Particulars of Claim, Toomey itself pleaded that:

"the decision was taken in the knowledge that its decision and public announcement would have the effect of almost immediately removing any market for new Chevrolet motor vehicles in the UK"

and Mr Plant was not prepared to disown this statement, when asked about it in cross-examination.

152. Further, in the January meeting with Mr Newton, Toomey argued that:

"we didn't even need to tell our customers if you were going to carry on for two years. The customers wouldn't have needed to know at that point that you were thinking of pulling out. But you have gone out to all the customers and told them that we are not there anymore. Then of course they just disappear. They are going to go everywhere else."

153. And again at the meeting in August 2014,

"..but the brand has been devalued because you wrote to every single Chevrolet customer and it's been in the press to say that you were pulling out and 99 per cent of everyone has pulled out. But again I go back to the side of a human being or a general member of the public, wanting to buy Chevrolet brand, knowing or being notified in the press by a direct marketing piece that Chevrolet are pulling out of the market."

154. And overall, although he tried to row back from it on occasion, Mr Plant really accepted in cross-examination that the announcement did have a negative impact. In the short term of course customers did not disappear but that was because of the BDE.
155. All of that said, I think that Mr Lazarevic's discount figure of 40% is much too rigid. I consider that in the round, the appropriate reduction is 25% and the same for 2015. Accordingly, for each year the estimated number of sales will reduce from 301 to 225. Over the 2 years, then, the total expected sale becomes 450 and not 669 as Toomey contends.
156. The next step is to calculate gross profit per car. From the agreed gross profit 2012 and 2013 of £432,664, it is further agreed that salesman's commission of £70,762, introductory commission of £1100, employers NIC of £7186 and credit card service charges of £2734 must be deducted, by way of variable costs.
157. However, there are two items which are not agreed between the experts and they are (1) stocking charges and advertising costs and (2) an uplift for Toomey Southend to replace a per car cleaning charge of £35 ("the Southend Uplift"). I deal with each of these in turn.

Stocking charges

158. It is agreed that Toomey incurred stocking charges on cars that remain unsold after a particular period; these charges equate to interest on the purchase price which it will not pay until the car is sold. There are also advertising and marketing costs incurred by Toomey for its Chevrolet operation as a whole. Mr Lazarevic treats both of these as fully variable costs and using the figures supplied by Ms Rawlin they total £120,474 which must "come off the top" as it were. This is the entire stocking and advertising cost incurred in 2012 and 2013.
159. On the other hand, Ms Rawlin says that these are fixed costs albeit with some reduction must be assumed and given credit for, but only off the bottom line figures for the damages claim as a whole. Moreover Ms Rawlin would deduct from the total costs for 2012 and 2013 the actual costs which were incurred in 2014 and 2015. She does this exercise for both new and used car sales and as can be seen from her Schedule 13, the result is a total net saving for both types of sale of £81,445.
160. As a matter of principle, I prefer Ms Rawlin's approach. Obviously, stock charges and advertising are more related to the cars as such than, say rent, but beyond that, there is no real direct connection. I accept that the Management Accounts treated stocking charges as a direct expense but these are not conclusive for present purposes. Accordingly, I make no further deduction for such costs at this stage but there will be a further deduction to make at the end.

The Southend Uplift

161. Toomey Southend engaged one or more people on a self-employed flat fee basis to clean whatever cars were on site every day. That is a continuous process. A notional sum of £35 for new cars and £75 for used cars was treated as a variable cost for the purpose of its Management Accounts. Ms Rawlin has added this figure back on the basis that it is not really a variable cost-although there is not much evidence on the point, it seems that at all times, those engaged to clean cars in 2012 and 2013 remained in post until at least March 2015. There is no real evidence of any saving here due to the reduction in sales and accordingly, for both new and used cars, the relevant figure should be added back in. She also points out that there was no similar charge at Basildon. On the basis of a 50/50 split between Toomey

Basildon and Toomey Southend sales, it follows that 225 expected sales over 2014 and 2015 must be attributed to Toomey Southend and at £35 per car, the figure to add back is £7,875. Leaving that to one side for the moment, the implicit net profit figure per car is £584. On the basis that there were 450 expected sales, this gives a total net profit anticipated of £262,800. One then adds the £7,875 to give a final figure of £270,675.

162. From this must be deducted the actual gross profit for 2014 and 2015 (principally as a result of the BDE) of £243,694. This then leaves a net loss in respect of new cars of £26,981.

Used Cars

163. Here the starting point is the number of “lost” used car sales. Both experts eventually agreed that the correct way to calculate this was to take 37% of the number of “lost” new car sales. The percentage is the number of expected part exchange deals which would supply used Chevrolet cars. The expected sales of new cars was 450 and the actual number of new cars sold in 2014 and 2015 was 180. So the “lost” new car sales were 270. 37% of this is 100. The agreed gross profit figure per car on used car sales was £351. This gives a total loss of £35,100. One then needs to add back the Southend Uplift as it applies to used cars at the rate of £75 per car across half of those lost sales (representing Southend). That gives £3,750. That makes the total loss figure for used car sales £38,850.

Servicing

164. Both experts agree that the potential servicing revenue from a sold car could extend for 10 years. They also agree that the various average revenues per customer, depending on the year etc is as set out in Schedule 3 to Ms Rawlin’s Supplemental Report of 25 November 2016 and which in fact is drawn from Vauxhall servicing revenue figures contained in Schedule 8 to that report.
165. Before taking account of the fact that I have concluded a lower lost sales figure for both new and used cars (in total 370 as opposed to 558) there is the question as to what proportion of “lost” customers will come back to Toomey for servicing.
166. The logical calculation would have been to take from historical data, the number of actual Toomey sales customers in a given year and see how many of them returned to Toomey for servicing in subsequent years. Mr Decelis accepted that this exercise could have been done from Toomey’s records although it might have taken a little time. But in fact it was not attempted at all. The fact that this was far from an impossible exercise became clear when, after this issue was raised in the middle of the trial, Toomey produced some figures along these lines although not over a ten-year period and far too late to be the subject of any proper examination. But there is little doubt that had this exercise been undertaken at the correct time, it could have been completed.
167. Instead Toomey and Ms Rawlin worked on the basis of the figures in her Schedule 8 which come from underlying Vauxhall figures which show the percentage of Vauxhall customers in the Toomey franchising areas who then came to Toomey for servicing. There are several problems with this information as a starting point. First, these are Vauxhall and not Chevrolet customers. Secondly, the “penetration rate” is of Vauxhall owners (whether they bought their cars from Toomey or not) rather than Toomey customers.
168. Chevrolet’s primary position is that this head of loss and the average implicit conversion rate to be derived from the Vauxhall figures of 30% (see Schedule 8) is wholly unreliable since it is not addressing the right question. Moreover, Mr Lazarevic did point out the lack of more

focused information in paragraph 4.1.3 of his first report dated 27 September 2016. That said, he did then go on to use and analyse Ms Rawlin's model; he concluded that its results were overstated because it produced a significantly higher servicing revenue from 2015 than Toomey's actual revenue. As a result of this, he considered it appropriate to reduce the total revenue from lost servicing by 45%. I think that this is too aggressive. As a matter of common sense, one is entitled to assume that customers who bought Chevrolets from Toomey and who at least stayed in the area might very well go back to Toomey for servicing. However, Ms Rawlin's figures do need to be softened somewhat to take account of the lack of directly correlating data. I think the right reduction is not 45% but 15%.

169. I have not fed back into Schedules 3 or 8 my particular lost sales figures. However on the basis of 558 lost sales and Ms Rawlin's percentages of converting customers going forward, she arrives at a total lost servicing revenue of £662,219. If one reduces that figure by 15%, one arrives at £562,886. One then has to reduce it further to take account of the fact that in my judgment the correct number of lost sales is 370 and not 558. On a proportionate reduction, that leaves a final lost servicing revenue figure of £371,907.

Bodywork

170. Both experts agree that over a 10 year period the average revenue per customer from bodywork services would be £815. Ms Rawlin calculate from this a lost profit figure of £56,920 as set out in her Schedule 4. Mr Lazarevic makes the point that while some cars did come back to Toomey for bodywork and which were more than 5 years old, they were much reduced in number-see page 13 of the Joint Statement dated 9 November 2016. So he would in fact adopt a cut-off point at 5 years. Ms Rawlin says that if this is done, then the average revenue would go up from £815 since this was the figure calculated on an average over 10 years.
171. I think that Mr Lazarevic has a point here. I propose to take it into account by reducing Ms Rawlin's final figure by 25% making it £42,690. One then needs to reduce it proportionately to reflect the lost sales figure of 370. This yields a net loss of £28,205.9.

Total loss figures

172. If one adds the 4 loss figures of
- (1) New Sales: £26,981;
 - (2) Used Sales: £38,850;
 - (3) Servicing: £371,907; and
 - (4) Bodywork: £28,205.9
- one reaches a total of £465,944.
173. From this, finally, one needs to deduct the savings on stocking charges and advertising in the total sum of £81,445. This produces a net total loss figure of £384,499.
174. Apart from any mathematical errors, there might have had to be some fine tuning in this calculation since I have not inserted back into the operative schedules the relevant lost sales but have applied my findings on a broader percentage basis; however I believe that the final figures are in the right region. That is on the footing that Toomey would have succeeded either on all of the alleged terms or at least on those as to incentives and stocking.

CONCLUSION

175. In the event, however, this claim must fail for the reasons given above in relation to liability. I am most grateful to both Counsel for their assistance and excellent submissions and I will deal with all consequential matters upon the handing down of this judgment.