DAMAGES FOR FAILURE TO SUPPLY GOODS UNDER PRICE CONTROL

MOUAT v. BETTS MOTORS LIMITED [1957] N.Z.L.R. 380

For some years past the number of American cars imported into New Zealand has been limited and the distribution of those that are imported has been controlled. The exercise of control has been through regulations made by the Board of Trade requiring dealers to sell only to certain approved classes of buyer and to extract from those buyers a covenant not to dispose of the car within two years thereafter without first offering it back to the dealer at the original price less an allowance for depreciation. The dealers themselves were prohibited from reselling at a price higher than the price of a new car plus reconditioning costs.

In March 1955 one Mouat bought from Betts Motors Limited a Chevrolet motor car for £1,207 after having executed the required covenant. In June of the same year he sold it again for £1,700. Betts Motors Limited issued a writ claiming liquidated damages and an order for the return of the car, or, if such an order could not be made, judgment for damages in respect of the breach of covenant. In the Supreme Court the defendant was held liable and damages of £543 were awarded against him. The judgment was upheld on appeal.

For the defendant it was contended that the benefit of the covenant was a valuable consideration obtained by the seller in addition to the sale price and that the sale was therefore illegal. Before the liability of the defendant for breach of covenant could be established it was necessary to show that the "first refusal" given over the car to Betts Motors Limited was not "valuable consideration" which, added to the cash price, would bring the total price in excess of the permitted maximum. If the covenant were "valuable consideration" and part of the price, then the plaintiff would have been guilty of an offence under section 29 (1) of the Control of Prices

Act 1947, in which case the covenant would have been void. Barrowclough C.J. in the Supreme Court held that although it was "valuable consideration" the covenant was not part of the price and the covenant was therefore binding. On the appeal, despite a strong dissenting judgment by F.B. Adams J., this was upheld.

Liability being established, it remained to fix the measure of damages. It was decided that the plaintiff should receive the value of the car less what he would have had to pay for it. But what was to be the value of the car - the price for which it was sold by Mouat, or the price for which Betts Motors Limited could have sold it after repurchasing it from Mouat? Damages on the former basis would be £543; on the latter, about £50. It was held that the price on the open market was the value for the purpose of this claim, and accordingly damages were awarded at £543.

It is with the mode of determining the measure of damages, and not with the existence of liability, that this note is concerned.

In contract, (and it was on the basis of a breach of contract that damages were assessed by the Court) damages are generally awarded in a measure sufficient to place the injured party in the position in which he would have been if there had been no breach - at least as far as money can do that. The principle is thus one of compensation. Considerations peculiar to the injured party, such as an agreement for the resale of goods which have not been delivered, are generally considered irrelevant. But special circumstances of which both parties are aware and which would be contemplated by reasonable men as giving rise to injury in the case of breach are to be taken into account.

That it is a principle of compensation was laid down by Viscount Haldane L.C. in British Westinghouse Electric and Manufacturing Co. Ltd. v. Underground Electric Railways Co. of London Ltd. [1912] A.C. 673, 689, thus: ". . . he who has proved a breach of a bargain to supply what he

contracted to get is to be placed, as far as money can do it, in as good a situation as if the contract had been performed." In Rodocanachi, Sons and Co. v. Milburn Brothers, (1886) 18 Q.B.D. 67, 76, approved in Williams Brothers v. Ed. T. Agius Ltd. [1914] A.C. 510, Lord Esher considered the case of a buyer who did not receive the goods the seller had contracted to supply but who would have incurred incidental expenses before obtaining delivery. He said that the buyer would get, as damages, the value of the goods upon their arrival at the port of discharge less what he would have had to pay in order to get them. "But what is to be the rule in getting at the value of the goods? If there is no market for such goods, the result must be arrived at by an estimate, by taking the cost of the goods to the shipper and adding to that the estimated profit he would make at the port of destination. If there is a market . . . the value will be the market value when the goods ought to have arrived. But the value is to be taken independently of any circumstances peculiar to the plaintiff." This means, he said, independently of any contract made by the buyer for the resale of the goods. Lindley L.J. at page 78 supported this view.

There are several cases which could be cited as examples where damages have been awarded to compensate for injury contemplated by both parties as likely to flow from special circumstances within their knowledge. Thus in Patrick v. Russo-British Grain Export Co. Ltd. [1927] 2 K.B. 535, 540, (referred to at page 400 of Mouat's case) Salter J. says: "Hammond v. Bussey (20 Q.B.D. 79) is authority for holding that it is not necessary, in order to entitle the buyer to recover loss of profit on resale, that the seller should have known, when he sold, that the buyer was buying to implement a contract already made, or that the buyer would certainly resell; it is enough if both parties contemplate that the buyer will probably resell and the seller is content to take the risk." In The Hydraulic Engineering Co. Ltd. v. McHaffie, Goslett and Co., (1878) 4 Q.B.D. 670, 674, Bramwell L.J. puts it: ". . . where at the time of entering into the contract both parties know and contemplate that if a breach of the contract is committed some injury will accrue, in addition to the natural and

ordinary consequences of the breach, the person committing the breach will be liable to give compensation in damages upon the occurrence of that injury . . . ."

In Mouat's case the Rodocanachi case was held to be authority for assessing damages as the difference between the value of the car on the open market - the price which Betts Motors Limited would have had to pay if they were to buy a car similar to the one in dispute - and the price they would have had to pay to Mouat. The restriction placed on Betts Motors Limited by the Board of Trade regulations prohibiting them from selling at a price above the new price plus reconditioning costs was considered to be a special circumstance within the Rodocanachi rule and therefore to be disregarded. But both parties were well aware of the restriction upon Betts Motors Limited and could not have contemplated otherwise than that upon a resale to them their profit would be so limited. It would therefore seem that the case should more properly have been considered as coming within the exception dealt with in the Hydraulic case (supra) and damages awarded to compensate for the actual loss suffered. To put the plaintiff company in the position in which it would have been if there had been no breach it would have been necessary to give it a car with the same restrictions upon its resale as the one it should have received from Mouat - one that could be sold only at a controlled price. To put the plaintiff in that position as far as money could do it would have been necessary to award about £50.

It therefore would appear that the rules by which damages for breach of contract are ascertained were in this case improperly applied.

(The judgment of the Court of Appeal in this case has since been affirmed by the Judicial Committee of the Privy Council: see [1959] A.C. 71 and [1959] N.Z.L.R. 15.)