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J Toomey Motors Limited and Toomey (Southend) Ltd v. Chevrolet UK Ltd
[2017] EWHC 276 (Comm)

Article by David Bowden

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Executive speed read summary

In December 2013, General Motors made a decision to exit the market in the UK for its Chevrolet cars. All franchisees were given 2 years notice of the early termination and all but 1 dealership accepted an early termination payment. Toomeys rejected Chevrolets' offer of £81k to terminate early and instead it brought a claim for breach of contract against Chevrolet. Judge Waksman sitting in the Commercial Court has rejected all claims Toomeys made for any express or implied breaches of contract by Chevrolet. He said the franchise contract was '*extensive, detailed and carefully drafted'* and no further terms needed to be implied into it. The recital dealing with the purpose of the contract could not be read as an operative provision. If he were wrong, then the judge ruled in any event that Toomeys had not suffered any loss from the terms it sought to imply. Although not required to do so, the judge said if the claim had succeed he would have assessed compensation at just over £384k.

J Toomey Motors Limited and Toomey (Southend) Limited v. Chevrolet UK Limited
[2017] EWHC 276 (Comm) 20 February 2017
High Court of Justice, QBD, Commercial Court (HHJ Waksman QC)

What are the facts?

Chevrolet UK Limited ('Chevrolet') distributed its cars in the UK via a network of dealers. The 2 claimant companies ('Toomeys') had a Chevrolet franchise at their garages in Basildon and Southend. The franchise arrangement was set out in an agreement between Chevrolet and Toomeys dated 1 June 2013. This replaced an earlier agreement in substantially the same form. On 9 December 2013 Chevrolet gave all its UK dealers 2 years' prior notice of its intention to terminate their franchises. Chevrolet is owned by General Motors which had made a business decision to no longer market the Chevrolet brand in Europe. Chevrolet offered dealers an '*Early Termination Incentive Program'* ('ETIP'). If a dealer agreed to the ETIP, Chevrolet would pay it a lump sum and the franchise agreement would terminate earlier than the envisaged long stop date of 9 December 2015. Every UK Chevrolet dealer except Toomeys agreed to an ETIP payment. Toomeys was offered an ETIP payment of £81,432 in January 2014 but it rejected it.

What were the claims made by the dealer against the manufacturer?

Instead of accepting an ETIP payment, Toomey brought a claim against Chevrolet alleging that there had been a repudiatory breach of contract in the way that Chevrolet had sought to exit the UK market.

What was the value of this claim?

Although the judge said there may need to some 'fine tuning in this calculation', at its highest he assessed the quantum of any claim (subject to liability being proved) at £465,944. The judge labelled Toomey's claim '*an all or nothing claim'*. In the end as Toomey failed on liability it recovered nothing.

What did the agreement with the manufacturer provide?

The judge described Toomey's franchise agreement with Chevrolet as '*extensive, detailed and carefully drafted*'. Although it is not dealt with in the judgement both sides had the benefit of independent legal advice when it was being negotiated. The franchise agreement contained a recital dealing with the '*Purpose of the Agreement'* ('the Recital') and a number of annexes including Annex 7 which set out '*Motor vehicles terms of sale'*.

In addition the judge found there were 7 critical conditions in the franchise contract dealing with:

- Appointment of dealer (condition 1),
- Sale of motor vehicles to dealer (condition 7),
- Brand promotion (condition 11),
- Quality margin standards and quality margin (condition 12),
- Dealer and Chevrolet evaluation (condition 13)
- Term and termination of the agreement (condition 21), and
- General provisions (condition 24).

What were the issues the judge had to resolve at trial?

Toomey claimed 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. The 2 issues for the judge were whether there was an:

- Express breach of the franchise agreement, or
- Implied breach of the franchise agreement

What did the judge make of Toomeys' witnesses?
Toomeys called 5 witnesses to give evidence:

- Mr Plant, the Chief Executive of Toomeys' parent company (MJT Securities Limited),
- Mr Ives, Toomey Basildon's Managing Director,
- Mr Decelis, Toomey Southend's Managing Director,
- Mr Briar, Toomey's accountant, and
- Mr Webster, a salesman at Toomey Basildon.

Of these witnesses the judge made the following assessments.

Mr Plant
The judge found that 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'* and that 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'*. As to this the judge found that '*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*'. The judge also found that '*Mr Plant's acceptance that Chevrolet was not obliged to provide the various financial incentives beyond the 12% margin is significant'*. More damningly, in the context of providing financial incentives, the judge found that '*Mr Plant for his part did not even believe that Chevrolet was so obliged'*. As to Chevrolet's exit announcement, the judge found that Mr Plant '*tried to row back from it on occasion'* but in the end he '*really accepted in cross-examination that the announcement did have a negative impact*' on Toomeys' business.

Mr Ives
The judge found that some '*confusion however appears to have occurred at Toomey about when factory orders for dealer stock could be placed'* and found that Mr Ives '*confirmed nonetheless that his understanding was that factory orders could not be placed until 1 July'*. However the judge found that Mr Ives '*may have misinterpreted the position'* on factory orders and that his view '*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*'. Following a meeting with Chevrolet's national sales manager in August 2014, the judge found that Mr Ives follow up email showed '*he had misunderstood the position'*.

Mr Decelis
As to Toomeys' claim for lost servicing income, the judge said that 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'* and that whilst '*Mr Decelis accepted that this exercise could have been done from Toomey's records' that 'it was not attempted at all*'.

Mr Webster
The judge noted that '*Mr Webster said that Toomey Basildon cancelled some orders precisely because they would get a better deal in the BDE'*. Like Mr Ives the judge found Mr Webster to be confused about the placing of factory orders noting '*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'*.

What did the judge make of Chevrolet's witness?
Chevrolet on the other hand called only 1 witness its Managing Director, Mr Turton. The judge found that he '*accepted that Toomey was unlikely to make its profit on the sale of the car simply from the 12% margin'* because '*other things would have to be added like bonuses, registration allowances or finance deals*' and that '*registration allowances were "*a way of life*" for practically all manufacturers*'. The judge accepted Mr Turton's evidence that '*although the Chevrolets were good cars they simply were not selling enough of them'*. Similarly the judge accepted his evidence that he '*had also sent a long email to all Chevrolet dealers to tell them about Chevrolets 2014 "*Go To Market*" plans'*.

Mr Turton candidly confirmed in his evidence that '*Chevrolet expected the announcement to affect demand for cars going forwards'*. As to Chevrolet's 'Best Deals Ever' promotion to dispose of its UK stock, the judge remarked that '*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'*. The judge noted another significant concession made by Mr Turton when he said in his evidence that '*had any car ordered in the relevant 3 month period been delivered later*' that '*Chevrolet would nonetheless have honoured the*

allowance. Just as it apparently had in the past' with the judge saying '*there is no reason not to accept Mr Turton's evidence on the point*'.

Mr Turton came in for some mild criticism because he was '*reluctant to admit it at first*' but that '*the reality was that Chevrolet was seeking to dismantle its UK operation as far as it could within the notice period'*. Tellingly Mr Turton was forced to concede that the 12% margin on the retail sale price of a car over the wholesaler price was '*by itself was unlikely to create a profit'*.

What expert evidence was before the court?
Each side called 1 forensic accounting expert to deal with the issue of quantifying Toomeys' claimed losses. These were:

- Ms Catherine Rawlin for Toomeys, and
- Mr Charles Lazarevic for Chevrolet.

In addition to their reports both experts had to attend the 6 day trial for cross-examination although the judge noted that '*helpfully, both before and during the trial, they were able to narrow considerably the issues between them'*.

What were the main financial provisions in the dealer franchise?
The judgement sets out quite fully the financial provisions in the Chevrolet franchise agreement. Although individual items may have been negotiated at different rates by dealers with sufficient negotiating power, it would seem that these financial terms were common to all Chevrolet franchisees. The main provisions were:

- A maximum margin of 12% over Chevrolet's wholesale price to Toomey's forecourt retail price,
- However 3% of that margin had to be earned by '*Toomey demonstrating that its operation complied with the necessary standards*',
- A £600 registration allowance where Toomeys had sold and registered a car by a certain date,
- A '*sale or return'* allowance,
- A 0% finance offer so that Toomeys could persuade its customers to buy cars on credit. The judge noted that this '*was a cost to Chevrolet'* and that Toomeys '*did not get any direct financial benefit*',
- A volume bonus if particular sales targets of Chevrolet were met, and
- Motability rebates.

Where were the cars sourced from?
Where Toomeys did not have a car on its forecourt to sell, then it could obtain a car a customer wanted from 3 other sources:

- Chevrolet's compound at Portbury, near Bristol which held up to 3000 cars,
- Ordering a new car to be built to order at Chevrolet's factory in Korea, or
- Having another Chevrolet franchisee transfer a car to Toomeys.

How did Toomeys participation in Motability affect this case?
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 buy the car from Chevrolet. However the judge noted that '*Motability typically drove a hard bargain with manufacturers and accordingly the potential for profit was small*'. The judge found that Chevrolet participated because it was '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. Toomeys received a payment from Chevrolet for any Motability cars it sold.

Separately to its main UK exit announcement, on 23 December 2013 Chevrolet terminated all Motability sales for the UK. This announcement hit Toomeys especially because 62% of all its sales from its Basildon site in 2012 were Motability cars. Toomeys claimed that this Motability exit had a big impact on the losses it was claiming from Chevrolet and no doubt influenced its decision to reject the ETIP payment.

What was Toomey's financial position?
Toomeys' management accounts for 2013 show that its 2 sites together made a gross profit of £212,415. However after deduction of expenses this translated to a combined loss for the 2 sites of £38,894.

What was Chevrolet's 'Best Deals Ever'?
To speed up its exit from the UK market, Chevrolet announced its '*Best Deals Ever'* ('BDE') promotion in January 2014 to sell all its stock at its Portbury compound. Dealers still retained their 12% sales margin

but whilst 0% finance could not be offered, dealers were offered increased registration allowances. This BDE promotion was meant to end on 31 March 2014 but owing to its success it was extended to 30 June 2014. Toomeys claimed that when BDE ended, the cost of Chevrolet vehicles increased, it made it harder for them to see them and this correspondingly increased the losses it was seeking to claim from Chevrolet. The judge found that '*Toomey did not place any orders after the BDE, save four in late 2014'*.

What did the judge rule on express breach?
This claim was rejected.

Toomeys sought to build a case on the '*Purpose*' Recital saying that certain new express terms could *'be drawn or spelled out of*' it. Although the judge found that '*as a matter of law, the fact that a provision is a recital does not mean that it cannot contain operative provisions'* that there '*should be a degree of caution before finding operative provisions in recitals since they are not in the most obvious place'*. Toomeys tried to persuade the judge that the contract should reflect what Toomeys and Chevrolet '*were doing on the ground*'. This was rejected by the judge who ruled that he could not '*see why the Purpose Clause should be regarded as containing specific operative terms at all*' and that there did '*not appear to be an obvious gap in the detailed provisions of the Agreement*'. He noted that a '*statement of intent could not could not override the clear words to be found later on*'. He also observed that the Recital did '*not for example recite their previous dealings or any feature of them*'.

He said '*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'* and that in his view it was '*quite impossible in my view to leap from the latter to the former'*. For this reason the judge concluded that '*accordingly, whether read by itself or in context, I do not accept that the Purpose Clause gives rise to the alleged express terms'*.

How did the judge differentiate the claimed implied breaches of contract?
The judge determined that the implied breaches fell into 4 distinct categories and he deal with them all separately. These were implied terms as to:

- incentives,
- UK stock availability,
- Dealer network, and
- National advertising.

Are there any other prior authorities of relevance?
These authorities are relevant in this case:

Philips v. BSB **[1995] EMLR 477** (Court of Appeal – Lord Bingham MR)
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.

Marks and Spencer v. BNP Paribas **[2015] UKSC 72** (Supreme Court – Lord Neuberger PSC and Lords Clarke, Sumption, Carnwath and Hodge JJSC))
For a term to be implied the following conditions 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, and 5. it must not contradict any express term of the contract.

Chitty on Contracts **[2016] 32nd edition**, volume 1 paragraph 14-025 (Professor Hugh Beale)
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.

What did the judge rule on implied breach?
These claims were also rejected.

As to whether any additional financial incentives could be implied into Toomeys' franchise agreement, the judge was clear ruling that he did not '*accept that the Agreements lack commercial coherence without the alleged term'* and that this went *'back to what, objectively speaking, must have been the business model adopted by the parties*'. As to whether Chevrolet was under any implied obligation to maintain the Motability scheme, the judge was equally scathing ruling that '*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*.'

As to UK stock availability whilst the judge ruled that '*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'* he went on to say that '*I cannot see how the proposed term would conflict with any right of termination'*. He noted that all dealer orders were '*subject to acceptance'*. The only implied term was an '*obligation to supply reasonably promptly*' which he said was '*a generic expression'*. Finally even if he was wrong on this the judge ruled that '*even if this term was broken, by itself its breach led to no loss here*.'

As to implying a term that Chevrolet would maintain a UK dealer network, although the judge noted 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'*. He also noted that Toomey had '*the primary obligation to advertise'* and so he did not '*consider that the dealer network was necessary to promote Chevrolets'*. Again if he were wrong on this the judge ruled that '*the implication goes nowhere because any breach thereof caused no loss'*.

Finally as to whether Chevrolet had any implied obligation to conduct national advertising, the judge rules that the advertising obligations were placed '*squarely on Toomey'*. Because of this the judge said that 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'* and that he could not '*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*'.

How did the car dealer quantify its losses?
Toomeys quantified its losses of profit under these 4 heads:

- New car sales,
- Used car sales,
- Future servicing income, and
- Future bodywork service income.

What ruling did the judge make on the value of the claimed losses?
Although the judge ruled that Toomeys claim against Chevrolet failed, as he had heard expert evidence on the losses he went on to consider what damages he would have awarded if Toomey had succeeded. He looked at the 2012 and 2013 financial years' accounts and considered these 4 income streams separately. His conclusion was that if Toomeys had succeeded it would have recovered damages of £384,499 against Chevrolet.

Will there be an appeal?
Toomeys has until 13 March 2017 to lodge an application with the Court of Appeal seeking permission to appeal.

20 February 2017

David Bowden is a solicitor-advocate and runs David Bowden Law which is authorised and regulated by the Bar Standards Board to provide legal services and conduct litigation. He is the cases editor for the Encyclopedia of Consumer Credit Law. If you need advice or assistance in relation to consumer credit, financial services or litigation he can be contacted at info@DavidBowdenLaw.com or by telephone on (01462) 431444.