10/06; [2006] VSCA 28

SUPREME COURT OF VICTORIA — COURT OF APPEAL

HARDY WINE COMPANY LTD v JANEVRUSS PTY LTD & ORS

Callaway, Eames and Ashley JJ A

7, 24 February 2006

CIVIL PROCEEDINGS – CONTRACT AGREEMENTS TO PURCHASE WINE GRAPES FOR 10-YEAR PERIOD – BUYER OBLIGED BY AGREEMENT TO PAY "THE PRICE LIKELY TO BE REALISED FOR THE MAJORITY OF FRUIT BEING PURCHASED FROM A PARTICULAR AREA" – BUYER TO ADVISE "THE PRICE" PRIOR TO DELIVERY – WHETHER ADVICE BINDING IF NOT DISPUTED BY SELLERS – INCONVENIENCE OF PROVISIONS AGREED TO BY PARTIES – WHETHER COURT AUTHORISED TO MAKE A BETTER CONTRACT FOR THE PARTIES – FINDING BY MAGISTRATE THAT BUYER BOUND BY THE TERMS OF THE AGREEMENT – CLAIMS BY SUPPLIERS OF GRAPES UPHELD – WHETHER MAGISTRATE IN ERROR.

Cl 5 of a written agreement between grape growers and a wine producer (buyer) was that the producer would pay a fair market price which was defined "as the price likely to be realised for the majority of fruit being purchased from a particular area." Following the delivery of grapes to the producer, Janevruss P/L and another grower were not paid the full amount in accordance with the agreement. Subsequently they took action in the Magistrates' Court seeking full payment pursuant to the agreement. The magistrate made an order in favour of the claimants. An appeal to the Supreme Court was dismissed. Upon appeal—

HELD: Appeals dismissed.
The essential provisions of cl5 of the agreement were that the buyer shall pay the price likely to be realised for the majority of fruit being purchased from a particular area and the buyer shall advise the price and payment terms to the growers no later than seven (7) days prior to a delivery taking place. The buyer's obligation was not to advise an estimate of the price it was to pay but the price itself. The price likely to be realised, which can only be an estimate of the price in fact realised, was the price the buyer had to pay in accordance with the agreement. Whilst the result of the words used may be inconvenient, this does not authorise the court to make a better contract for the parties. When the growers accepted the price advised by the buyer and proceeded to delivery, the price was binding and the buyer was required to pay in accordance with the agreement.

***Hardy Wine Company Ltd v Janevruss Pty Ltd and Ors*, [2005] VSC 41, VSC, unrep, Hansen J, 4 March 2006, affirmed.**

CALLAWAY JA:

1. These appeals, which were heard together, concern claims in contract by Janevruss Nominees Pty Ltd ("Janevruss") and Robert and Lidia Mazza ("Mr and Mrs Mazza") against Hardy Wine Co Ltd, formerly BRL Hardy Ltd. ("Hardy"). They began as proceedings in the Magistrates' Court at Mildura, in which the learned magistrate found in favour of Janevruss and Mr and Mrs Mazza. Hardy appealed to the Supreme Court pursuant to s109 of the *Magistrates' Court Act* 1989. Those appeals came on for hearing before Hansen J, who ordered that they be dismissed on 4th March 2005. The present appeals are brought against those orders, Hardy having been granted leave to appeal pursuant to s17A(3A)(b) of the *Supreme Court Act* 1986.

2. The facts are set out, comprehensively and with clarity, in Hansen J's reasons.[1] This judgment should be read in conjunction with them but, for convenience, I shall set out again an example of the critical provision, clause 5, in the agreements between Hardy and Janevruss and Hardy and Mr and Mrs Mazza:[2]

> "5. PRICE AND TERMS OF PAYMENT
> The Company shall pay to the Grower for the grapes, a fair market price. The fair market price for each variety is defined as the price likely to be realised for the majority of fruit being purchased from a particular area (e.g. Sunraysia or Riverland). An indicative price range for each variety is normally published in December of each year after negotiations have taken place between winemakers and growers. The Company shall advise the price and payment terms to the Grower no later than seven (7) days prior to a delivery taking place. The price and terms of payment are subject to the provisions

of any statute that may apply from time to time to grapes purchased for wine in any specified region. The minimum payment terms the winery agrees to pay will be 1/3 of the purchase price within 30 days of the month of delivery and the balance in two equal payments prior to the last day in months of June and September following delivery of the grapes.
Special Conditions
Minimum prices for the following varieties are guaranteed for the vintages:

	1999	2000-2002	2003-2006	2007-2008
Shiraz	$600/tonne	$550/tonne	$500/tonne	$400/tonne
Merlot	$600/tonne	$550/tonne	$500/tonne	$400/tonne"

3. The outline of submissions filed on behalf of the appellant advanced three contentions: first, that Hansen J misconstrued the terms of a letter dated 19th December 2001[3] by finding that, in that letter, Hardy advised the price and payment terms to Janevruss and Mr and Mrs Mazza as required by clause 5; secondly, that his Honour misconstrued the terms of the agreements by finding that the price and payment terms advised in the letter were determinative of the "fair market price" referred to in clause 5; and, thirdly, that his Honour erred in finding that Janevruss and Mr and Mrs Mazza had established that they had not been paid the "fair market price" for the grapes they delivered to Hardy.

4. Dr Pannam rightly, if I may say so, abandoned the first contention. The third contention need be considered only if the second is decided in favour of the appellant.

5. Two matters are of particular importance in construing clause 5. The first is that the "fair market price" is exhaustively defined in the second sentence of the clause. The first and second sentences may therefore be read, and should be construed, as if they said, "The Company shall pay ... the price likely to be realised for the majority of fruit being purchased from a particular area". (It may be that it is impermissible to take the words "fair market price" into account at all in construing the words "the price likely to be realised for the majority of fruit being purchased for a particular area".[4]) Dr Pannam agreed that, in the light of the definition in the second sentence, it was that sentence, rather than the first, on which attention should be focused.

6. The second important matter relates to the timeframe and uncertainty of "the price likely to be realised for the majority of fruit being purchased from a particular area". Hansen J emphasised the word "likely", as pointing to a future price that could not be known, not just in 2001, but in any year when Hardy gave the advice required by the fourth sentence of clause 5. I agree with his Honour, but that conclusion would follow even without the word "likely". When Hardy advises the price and payment terms no later than seven days prior to the first delivery of the season taking place,[5] the price that will be realised for the majority of fruit being purchased from a particular area in that season necessarily lies in the future and is uncertain.

7. Dr Pannam argued that "likely" did not relate to a future time but to an hypothesis. Attention was then directed to the nature of the hypothetical price. For example, was it the price likely to be realised for the majority of fruit being purchased by Hardy from a particular area or by all purchasers? Was the fruit, in the case of merlot, the total quantity of merlot irrespective of quality or merlot of the quality being offered by the grower to Hardy? What was the hypothetical market? Those questions need not be decided, because Janevruss and Mr and Mrs Mazza accepted the price advised by Hardy and proceeded to delivery.[6] Counsel also argued that "being purchased" imported the present tense, but I think that is to read too much into those words. The second sentence refers, colloquially or proleptically, to the majority of fruit being (in the sense of "to be") purchased from a particular area.

8. The third sentence of clause 5 may be put to one side, although not wholly ignored. It has an historical explanation that ceased before the agreements commenced. A similar observation may be made in relation to the fifth sentence.[7] The essential provisions of clause 5 are therefore, "The Company shall pay ... the price likely to be realised for the majority of fruit being purchased from a particular area. The Company shall advise the price and payment terms to the Grower no later than seven (7) days prior to a delivery taking place." The price referred to in the second of those two sentences is obviously the price referred to in the first. It is the price that Hardy is to pay. Hardy's obligation is not to advise an estimate of the price it is to pay but the price itself.

9. To put the point another way: Hardy did not contract to pay an amount equal to the price in fact realised for the majority of fruit being purchased from a particular area (whatever the last ten words may mean), but an amount equal to the price likely to be realised. The price likely to be realised, which can only be an estimate of the price in fact realised, is the price that "[t]he Company shall pay" in accordance with the first and second sentences of clause 5. Hardy is thus obliged to pay the price it estimates.

10. Dr Pannam submitted that it would be an extraordinary interpretation of clause 5 if the price estimated and advised by Hardy, prior to the delivery of the grapes and prior to the season, were conclusive of the price to be paid. It would lead to unreasonable, inconvenient and unjust consequences. In particular, it would leave Hardy largely in control of the price to be paid to the growers for a period of ten years[8]. Hardy would have to act in good faith and make a reasonable estimate of the price likely to be realised for the majority of fruit being purchased from a particular area, but there could be a very wide range of prices falling within those parameters.

11. I accept that the result of the words used is inconvenient. It could work to the disadvantage of a grower just as much as it has in the present case to the disadvantage of Hardy. The difficulties are that "the price likely to be realised for the majority of fruit being purchased from a particular area" is quite different from the price in fact realised and that there are no provisions in the agreements for adjustments. The parties could easily have stipulated for a provisional price to be adjusted later, but they did not do so. The provision for payment by instalments does not supply the deficiency. The inconvenience of the provisions on which the parties agreed does not authorise the Court to make a better contract for them.

12. It is unnecessary to decide the precise nature of the limitations on Hardy when it advises the price and payment terms to a grower pursuant to the fourth sentence of clause 5, or even whether that sentence does enable Hardy to fix the price within the limits set by the agreement. (If that is the effect of the sentence, Hardy is clearly not at large. It must act in good faith and, at the very least, the price must be such that a reasonable person could think that it was likely to be realised for the majority of fruit being purchased from the relevant area.) Those questions should be decided in a case where a grower does not accept that the price advised by Hardy is in conformity with clause 5. In the present case Janevruss and Mr and Mrs Mazza were content with the price advised by Hardy and proceeded to delivery. In those circumstances the price is binding.

13. The inconvenience should not be surprising. That is what often happens when a party, in this case Janevruss and Mr and Mrs Mazza, decides to enforce a flexible long-term framework as if it were a short-term contract. Such a decision needs to be taken with caution and, because of the built-in contradiction between the short term and the long term, it should be reviewed at every stage of the proceedings. I express no opinion about the wisdom of Janevruss and Mr and Mrs Mazza having brought the present proceedings. That is not the issue presented for our decision, nor do we know the facts necessary to express such an opinion, but this judgment would be incomplete if I did not stand back at the end to assess the conclusion in its proper context.

14. I would dismiss the appeals.

EAMES JA:

15. I agree that these appeals should be dismissed, for the reasons given by Callaway JA.

ASHLEY JA:

16. I agree with Callaway JA, for the reasons which his Honour gives, that these appeals should be dismissed.

17. I should add this. Whilst it does not directly bear upon the issue of construction which determines the fate of these appeals, clause 5 of the Janevruss and Mazza agreements only required Hardy to advise the price and payment terms to the grower "no later than seven (7) days prior to a delivery taking place." It seems that Hardy entered into a discrete agreement with each of the many growers who supplied it in the Sunraysia. It can be assumed that each agreement contained a clause akin to clause 5. It seems that, as a practical matter, Hardy sent all the growers the price advice letter of 19 December 2001. The consequence of it doing so was to lock in prices well before

deliveries began, and even longer before they ended. Absent any mechanism for adjustment, there was evident potential for prices which it set to be well off the mark if deliveries did not fit the anticipated pattern. But clause 5, relevantly cast in terms of a delivery by the particular grower, did not oblige Hardy to fix prices as it chose to do in late 2001. At least in some measure, the dire consequences of the December 2001 price advice, as described by Dr Pannam, were of Hardy's own making.

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[1] *Hardy Wine Co Ltd v Janevruss Nominees Pty Ltd* [2005] VSC 41.
[2] This example comes from the agreement with Mr and Mrs Mazza.
[3] An example of the letter is set out in the reasons of Hansen J at [25].
[4] See the *Owners of the Ship "Shin Kobe Maru" v Empire Shipping Co. Inc.* [1994] HCA 54; (1994) 181 CLR 404 at 419; 125 ALR 1; 68 ALJR 907. I express myself cautiously because, with great respect, I do not think that the proposition on that page is universally true. See, however, *Wacal Developments Pty Ltd v Realty Developments Pty Ltd* [1978] HCA 30; (1978) 140 CLR 503 at 507; (1978) 20 ALR 621; 52 ALJR 615.
[5] It was common ground below and again before us that nothing turns on the indefinite article.
[6] Compare [12] below.
[7] Reasons of Hansen J at [11] – [15].
[8] Counsel referred to *Lewis Construction (Engineering) Pty Ltd v Southern Electric Authority of Queensland* (1976) 11 ALR 305 at 315; (1976) 50 ALJR 769; (1976) 38 LGRA 242 and *Murray Goulburn Co-Operative Co Ltd v Cobram Laundry Service Pty Ltd* [2001] VSCA 57 at [18] and [26]; [2001] Aust Contract Reports 90-137, as well as to Cheshire and Fifoot's *Law of Contract* (8th Aust. ed. 2002) at [10.35].

APPEARANCES: For the appellant Hardy Wine Co Ltd: Dr CL Pannan QC with Mr RHM Attiwill, counsel. Piper Aldeman, solicitors. For the respondents: Mr RC Gillard QC with Mr JM Connellan, counsel. Ryan Maloney Anderson, solicitors.
