45/07; [2007] VSC 483

SUPREME COURT OF VICTORIA

MORAGHAN & ANOR v COSPAK PTY LTD

Lasry J

12, 23 November 2007

CIVIL PROCEEDINGS – CONTRACT TO SUPPLY WINE BOTTLES – BOTTLES SUPPLIED WERE NOT SUITABLE FOR THE STORAGE OF TABLE WINE – LOSS INCURRED BY WINEMAKER – PARTIES MET WITH VIEW TO ASCERTAINMENT OF ANY LOSS INCURRED – CLAIM LATER MADE FOR AMOUNT UNPAID – FINDING BY MAGISTRATE THAT SUBSEQUENT DISCUSSIONS DID NOT AMOUNT TO AN ENFORCEABLE AGREEMENT – WHETHER MAGISTRATE IN ERROR – TERM OF ORIGINAL CONTRACT – WHETHER PARTIES AGREED THAT BOTTLES DELIVERED WOULD BE SUITABLE FOR THE STORAGE OF TABLE WINE – FINDING BY MAGISTRATE THAT NOT AN EXPRESS TERM OF THE CONTRACT – WHETHER MAGISTRATE IN ERROR – GST – IF GST PART OF THE COMMERCIAL RELATIONSHIP THEN MAY BE INCLUDED IN COURT'S ORDER – GST NOT RECOVERABLE WHERE CLAIM IN THE NATURE OF DAMAGES.

CP/L supplied glass bottles to M. a wine producer. M. intended that the bottles be suitable for the storage of table wine. The bottles supplied were not suitable for that purpose but for the storage of sparkling wine. As a result, some of the wine was spoiled. Subsequently, the parties met concerning the problem but no agreement was made as to quantifying any monetary loss. A claim was later made by CP/L for the cost of the bottles supplied and M. sought to set-off against any sum owing the calculation of loss based on wines discarded because of leakage and on wine declassified. The magistrate found that following the discussions between the parties about the problem with the bottles, no binding or enforceable agreement came into force. Further, the magistrate found that it was not an express term of the contract that CP/L would deliver wine bottles suitable for table wine. Finally, in making the order in CP/Ls favour, an amount for GST was included. Upon appeal—

HELD: Appeal allowed.
1. The evidence by objective standards of the subsequent discussions did not indicate that the parties had reached an agreement which they intended to be enforceable. Accordingly, it was open to the magistrate to conclude that whatever occurred in the subsequent discussions, the parties did not make an agreement at that stage by which they all accepted they were bound.

2. In relation to the terms and conditions attached to the credit application, the question was whether the bottles delivered were suitable for storage of table wine. The evidence which was given before the magistrate demonstrated that there was an obligation on CP/L to deliver table wine bottles and/or bottles fit for the purpose of storing table wine. In coming to a different conclusion, the magistrate fell into error.

3. Where a court is involved in determining the commercial relationship between parties and GST is part of that commercial relationship, then GST should be included in the order. However, GST is not recoverable where a claim is in the nature of damages rather than the supply of goods and services.

LASRY J:
Introduction
1. This is an appeal under s109 of the *Magistrates' Court Act* 1989 (Vic) ("the Act") from a decision of the Melbourne Magistrates' Court delivered on 13 November 2006.

2. On that date the Court delivered a decision in which the present respondent succeeded in obtaining judgment against the present appellants in the sum of $18,222.00. The order made by the Court was that the sum of $18,222.00 be paid by the appellants together with interest of $2,048.35 and costs fixed at $8,760.25.

3. A notice of appeal pursuant to s109 of the Act was filed in this Court and amended pursuant to an order made by Master Efthim on 5 February 2007. The amended notice of appeal refers to seven questions of law said to be raised on appeal. Two of those questions – whether or not the respondent owed the appellants a duty of care in negligence and/or contract, and whether there was a breach of such a duty by the respondent – were not argued before me. The remaining questions of law raised on this appeal can be identified in three categories:

(a) whether or not an enforceable agreement was reached between the parties in March 2004;

(b) whether it was an express term of the agreements between the parties in relation to the type of 3 litre bottles that would be supplied by the respondent to the appellants; and

(c) whether the sum awarded by the Magistrates' Court to the respondent should have been exclusive of Goods and Services Tax (GST) and whether, in calculating the quantum of the loss of the appellants, that amount should have been exclusive of GST.

Factual Background

4. The evidence before the learned Magistrate indicated that the plaintiff, Cospak Pty Ltd of Braeside, was a wholesale distributor of packaging products including glass wine bottles.

5. The appellants conducted a business known as "Curly Flat Vineyard".

6. On 26 March 2001, or thereabouts, the appellants, whose vineyard was in the Lancefield vicinity, completed an application for credit with the respondent. That document appears to have come into existence at or about the time that the parties commenced their commercial relationship. The application for credit was accepted by the respondent and the parties then dealt with each other over time.

7. As the learned Magistrate noted in the reasons for his decision, the application for credit was in writing and contained a clause headed "Warranty and Liability of Supplier" which provided:

(a) If the goods are not of a kind ordinarily acquired for personal, domestic or household use the liability of seller for breach of any conditions or warranty implied by the *Trade Practices Act* 1974 (other than s69) and/or the *Sale of Goods Act* 1896 (as amended) shall be limited to one of the following at seller's option:
(i) the replacement of the goods or the supply of equivalent goods; or
(ii) the repair of the goods; or
(iii) the payment of the cost of replacing the goods or of acquiring equivalent goods; or
(iv) the payment of the cost of having the goods repaired.

(b) To the full extent permitted by law all other warranties or liabilities imposed or implied whether by law or by statute are expressly negatived.

(c) Buyer shall assume all risk and liability resulting from the use of the goods either alone or in conjunction with other goods or materials even if seller had or should have had prior knowledge of the use to which the goods would be put.

The significance of that clause and its effect on the commercial arrangements between the parties will become apparent in due course.

8. On 5 February 2002 the appellants placed an order with the respondent for a number of "Jeroboam" bottles which had a capacity of 3 litres. They also ordered some bottles with a capacity of 6 litres. That order, on the evidence, was placed with Denise Stead who was an employee of the respondent. The first appellant, Mr Moraghan, said in his evidence that he asked Ms Stead whether she could supply 3 and 6 litre bottles for the pinot noir that was being produced at the vineyard and she told him she could.[1] Bottles were delivered to Hanging Rock where the wine was to be bottled and corks were also ordered for the bottles.

9. On 7 February 2003 an email was sent by Mr Moraghan to Regina Murphy at an organisation known as "Jars Plus" which was a part of the respondent company. In that email Mr Moraghan confirmed a bottle order that he had sent through the previous day and in the course of the email he indicated the following:

This order covers our 2001 Pinot Noir and our 2002 Chardonnay – the next order will be the Model 2315 bottles for our 2002 Pinot Noir – that bottling will be later in the year – can you make a diary note to call me in July to ascertain where our bottling plans are up to.

10. On 3 July 2003 an invoice was forwarded to the appellants by the respondent company which included the 3 litre bottles which were to contain the appellants' pinot noir.

11. According to the evidence of Mr Moraghan, shortly after the bottling in November of 2003, when they went to place labels on the bottles, a problem was noticed in regard to the earlier bottles of the 2000 vintage.[2] The problem was that the bottles were leaking. When a torch was shone behind the cork it could be seen that only the first few millimetres of the cork were in contact with the inside of the bottle. Thus, it was clear on the evidence that the problem was caused by the bottles being inappropriate for the storage of table wine and the learned Magistrate so found.

12. In late November or early December 2003 contact was made with the respondent company concerning the problem and in March 2004 there were two meetings. The first of those meetings involved Ms Regina Murphy from the respondent company. She and Mr Shane Kelly, who was the sales manager and her supervisor at the time, went to the vineyard where they were shown the bottles. There was a second meeting which, as I follow it, occurred on 24 March 2004 and it was at this meeting that the appellants say an agreement was made between them and the respondent company through its representatives that the appellants would be able to set-off any amount it had lost as a result of the leaking bottles against money that was owed to the respondent.

Enforceable Agreement?

13. Whether or not an enforceable agreement was made at the meeting or meetings was very much in dispute. On behalf of the respondent it was argued before the learned Magistrate and before me that whatever was said on behalf of the respondent company could not have amounted to an enforceable agreement for reasons I shall come to in due course.

14. The learned Magistrate made the following findings about the meetings in March 2004:

> The first defendant [Mr Phillip Moraghan] contacted Murphy [from Cospak] about the leakage of wine from the three litre bottles. She came and inspected and saw that wine was leaking from bottles. Murphy was non-committal. She spoke to the plaintiff's sales manager, Shane Kelly (Kelly). Murphy returned to the defendants' winery in early March 2004. She was accompanied by Kelly. They were shown bottles and discussions took place. It was agreed that the 120 bottles and their contents would be examined. In conjunction with his winemaker, Moraghan prepared a written document entitled "Protocol for the quality check and transfer of Curly Flat pinot noir wines from 3 litre sparkling wine bottles to 3 litre Burgundy table wine bottles – vintages 2000, 2001 and 2002". A meeting was arranged for 24 March. It was anticipated that wines from the affected bottles would be tasted in order to determine which was re-usable and which was not. The purpose of the meeting was to ascertain the extent of the defendants' loss.
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> On 24 March 2004, Murphy and Kelly returned to the defendants' winery. After testing ten bottles and concluding that at least seven of them had deteriorated, Kelly decided that the process was proceeding too slowly and left. I accept that Kelly advised Moraghan that it looked as though the defendants had suffered a loss; they must work out their loss; the plaintiff would work out the credit; and the defendants would pay the balance of their account.[3]

15. In early 2006 a statement of claim was filed in the Melbourne Magistrates' Court which was amended pursuant to leave granted on 4 April 2006. In that statement of claim the respondent as plaintiff sought orders for the payment of sums outstanding pursuant to invoices of 6 November 2003 and 15 March 2004. The statement of claim sought the payment of $18,222.62. By a defence dated 16 June 2006 the defendants sought to set-off against any sum owing to the plaintiff the sum of $17,930.00, which represented a calculation of loss based on wines discarded because of the leakage and on wine declassified.

16. In dealing with the effect of the meeting on 24 March 2004 the learned Magistrate came to the following conclusion:

> It was not submitted that the parties reached an enforceable agreement on 24 March 2004 during the discussion between Kelly and Moraghan. If it had been raised, I would have found that their agreement was unenforceable because an essential aspect was unresolved. As Lord Dunedin said in *May and Butcher v R* [1934] 2 KB 17 at 21; 103 LJKB 556:
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> > "To be a good contract there must be a concluded bargain, and a concluded contract is one which settles everything that is necessary to be settled and leaves nothing to be settled by agreement between the parties. Of course it may leave something which still has to be determined, but then that determination must be a determination which does not depend upon the agreement between the parties."

> What was unresolved was the extent of the defendants' claim. That would have required an agreement between the parties. This never occurred.[4]

17. The appellants submitted in this Court that the learned Magistrate fell into error in coming to that conclusion. In the submissions before me the test in *May & Butcher Ltd v R*[5] was described as the "restrictive test" and it was submitted that in more recent times the courts in commercial transactions should strive to give effect to the expressed arrangements and expectations of those engaged in business. The appellant placed reliance on *Vroon BV v Foster's Brewing Group Ltd*,[6] and also on the principles summarised in Greig and Davis, *The Law of Contract*.[7] The submission made was that this was not an agreement to agree but a valid enforceable agreement which had in fact been reached by the appellants and the respondent. All that remained unresolved was the extent of the appellants' claim. That, it was argued, should not have prevented the Court from concluding that an agreement had been reached. As it was put to me, it was that if the respondent is found to have been at fault then a "proper"[8] but yet to be agreed amount will be paid.

18. The respondent submits that the learned Magistrate came to the correct conclusion and adds that until the respondent had agreed to pay a sum of money for the loss to the appellants as a result of the leaking bottles, a completed agreement had not come into existence. Ground one of this appeal asserts that the learned Magistrate "erred in law" in finding that the parties did not reach an enforceable agreement. That issue required the learned Magistrate to make factual findings. I take this ground of appeal to be aimed at the proposition which can be distilled from the learned Magistrate's reasons that, in the formation of an enforceable contract, unless price is finalised, there can be no binding or enforceable agreement. I have come to the view that although the principle applied by the learned Magistrate is more flexible than he stated it to be, it was nonetheless open to him to come to the conclusion he did on the evidence before him, and no error has occurred which should vitiate his conclusion.

19. In *May & Butcher*, the appellant was a company of general contractors. The company alleged that it had entered an agreement with the Controller of Disposals Board for the purchase of the whole of the tentage which might become available in the United Kingdom for disposal up to 31 March 1923. The agreement provided that the sale would occur on particular terms including the following:

> The price or prices to be paid, and the date or dates on which payment is to be made by the purchasers to the Commission for such old tentage shall be agreed upon from time to time between the Commission and the purchasers as the quantities of the said old tentage become available for disposal, and are offered to the purchasers by the Commission.[9]

The judge at first instance, Rowlatt J, held that the various documents constituted no contract because the price, date of payment and period of delivery still had to be agreed. The Court of Appeal affirmed that decision. Both the learned Magistrate and the respondent before me placed reliance on the following passage in the judgment of Viscount Dunedin:

> To be a good contract there must be a concluded bargain, and a concluded contract is one which settles everything that is necessary to be settled and leaves nothing to be settled by agreement between the parties.[10]

A little further on in his judgment Viscount Dunedin observed:

> What are the essentials may vary according to the particular contract under consideration. We are here dealing with sale, and undoubtedly price is one of the essentials of sale, and if it is left still to be agreed between the parties, then there is no contract.[11]

20. It was submitted on behalf of the appellants in these proceedings that those principles no longer represented the law – certainly not in Australia – and Mr Harris of counsel on behalf of the appellants, referred to the judgment of Ormiston J in *Vroon*.[12] In particular reliance was placed on his Honour's analysis of the topic "incompleteness of agreement in business transactions".[13]

21. *Vroon* concerned an action for specific performance of a joint venture agreement in relation to the acquisition of a ship and its conversion to a live sheep carrier. There was also an agreement for the management of the ship by the plaintiff and for a subsidiary of the defendant to charter it

to export live sheep to the Middle East. At the time of the joint venture no ship had been agreed on although one was found subsequently. It was more expensive than had been contemplated and the financial details were renegotiated. In answer to the claim for specific performance the defendant denied the existence of the joint venture agreement. His Honour concluded that as a matter of principle in commercial transactions the Court should strive to give effect to the expressed arrangements and expectations of those engaged in business notwithstanding that there were areas of uncertainty and notwithstanding that particular terms had been omitted or not fully worked out. His Honour referred to the judgment of the Court in *May & Butcher*.[14]

22. In *The Law of Contract* it is suggested that a change of attitude took place in England soon after *May & Butcher* was decided.[15] Referring to authority, the authors note that courts have a duty to construe documents fairly and broadly without "being too astute or subtle in finding defects".[16] It is noted by the authors that the House of Lords, in *Hillas & Co Ltd v Arcos Ltd*,[17] had gone further in repairing defects in the parties' arrangements than had occurred in *May & Butcher*.

23. Ormiston J in *Vroon* came to the following conclusion:

> Where parties have deliberately written the terms upon which they wish to bargain but have omitted or inadequately expressed a term which might in other circumstances have been expressly or more precisely stated, the courts will endeavour to give effect to the fact that the parties did not see the absence or deficiency of such a term as preventing them from reaching agreement. The significance of each term omitted or inadequately expressed will doubtless depend upon the nature of the contract. It is by no means uncommon, although perhaps less common than in earlier years, for parties to omit the price of goods sold, particularly when they are dealing in a market where the standard or fair price is easily ascertainable. It does not follow, however, that the omission of a series of terms, each of significance, can ordinarily be overcome and the courts will be less likely to overlook the deficiencies where they have good reason to doubt that the parties have set down or expressed the whole of the terms upon which they wish to deal.
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> For myself I would doubt that businessmen would see it to be commercially unrealistic that there could be no contract where a "vital" term had not been agreed upon or was omitted. However, they might well see it as unrealistic if the court were to treat as uncertain a term which they had agreed upon though in language which would not appeal to equity conveyancers. It is unreasonable to look at a business transaction and try to see how many difficulties could arise in the working-out of the contract where some minor term or other had not dealt with all of those eventualities.[18]

24. I am not considering this matter afresh. However I must say the evidence to which I was referred does not create an impression of a completed agreement between the parties. Some of the evidence given on behalf of the respondent denied the existence of any agreement.[19]

25. In the evidence of Mr Kelly he indicated that upon being provided with a documented claim they would make some assessment, but in particular he said:

> *... we didn't know what Phillip's [Moraghan's] claim was going to be for so we had to have a starting point.*[20]

26. Subsequently in his evidence the situation was expressed as a contingency on the basis that "if we were at fault" some arrangements might be made,[21] and that he had "no idea of value".[22] Mr Kelly also gave evidence that he was reluctant to agree to the supply of bottles "free of charge" because he regarded that as "an admission of guilt",[23] and subsequently,

> [i]f Cospak were at fault in any transaction with a customer we would honour our end of the bargain by admitting that we were at fault but we usually wait until we have together factual evidence to see exactly who and what caused the problem.[24]

27. Even in the evidence of Gillian Ryan who was the winery manager for the appellants' winery and who was present on 24 March 2004, she described the purpose of the meeting as being to "assess the damage of the wine and to come to an agreement about, you know, paying for the wine or whatever".[25] She later said that Regina Murphy and Shane Kelly had agreed there was a definite problem with the wine and this was said when Mr Moraghan was present.[26]

28. The appellants' case at its highest was the evidence of Mr Moraghan himself in relation to

these matters. In his evidence he said that Mr Kelly agreed that the problem had to be quantified and that it had to be "fixed up". He said that the loss had to be worked out and a credit calculated so that the balance of the account could be paid. Mr Moraghan said that he then indicated that he would establish a protocol and work through the bottles.[27] Mr Moraghan said as to the second meeting that Mr Kelly said something to the effect that he had seen enough to know that there was a "really big problem here" and that he would "just leave it for you to work your way through it just the way you're doing and just let us know what the loss is".[28]

29. In asserting that Mr Kelly had agreed to an off-set against money owing by the appellants to the respondent Mr Moraghan indicated that Mr Kelly said that it would be necessary to determine what the credit was and "so the essence was to put a process together to determine that".[29]

30. As I have already said, it does not seem to me that the learned Magistrate was wrong in concluding that the meetings of March 2004 did not produce an enforceable agreement. In *F & G Sykes (Wessex) Ltd v Fine Fare Ltd*,[30] Lord Denning MR said:

> In a commercial agreement the further the parties have gone on with their contract, the more ready are the Courts to imply any reasonable term so as to give effect to their intentions. When much has been done, the Courts will do their best not to destroy the bargain. When nothing has been done, it is easier to say there is no agreement between the parties because the essential terms have not been agreed. But when an agreement has been acted upon and the parties, as here, have been put to great expense in implementing it, we ought to imply all reasonable terms so as to avoid any uncertainties.[31]

This passage is referred to by Ormiston J in *Vroon*,[32] and his Honour notes that the importance of the passage would appear later in the course of his judgment, but observed that he would accept:

> ... that in those circumstances where the court is satisfied that the parties have reached agreement, judged by objective standards, then it should be more generous in giving effect to what is necessary to achieve business efficacy and the parties' intentions, although their communications may have had an air of uncertainty and incompleteness about them.[33]

31. For my part, albeit summarily stated, I do not believe the learned Magistrate erred in concluding that whatever occurred in the discussions of 24 March 2004 was unenforceable. The evidence does not seem to me, by objective standards, to indicate that the parties had reached an agreement which they intended to be enforceable. It may well be the case that the law has developed since *May & Butcher*. However, if it was the view of the learned Magistrate as he assessed the evidence that the parties did not make an agreement at that stage by which they all accepted they were bound, that finding was, in my view, open to him on the evidence and not inconsistent with the developments in the law since *May & Butcher*. It follows that in my opinion this aspect of the appeal must fail.

Express Term

32. I turn now to consider the agreements entered into between the appellants and the respondent for the purchase of the 3 litre bottles, and whether or not the learned Magistrate was correct in the manner in which he dealt with this issue. The ground of appeal complains that the learned Magistrate erred in finding that the express term of each of the agreements was that the respondent would deliver 3 litre wine bottles when the only reasonable finding open to him was that it was an express term that the respondent would deliver 3 litre table wine bottles or 3 litre wine bottles fit for table wine.

33. It is this issue that concerns the exemption clause contained in the terms and conditions annexed to the credit application. In his reasons for the decision, the learned Magistrate said:

> The defendants sought to overcome the effect of the exemption clause contained in the terms and conditions annexed to the credit application by submitting that there was an express term of the agreements that three litre bottles would be fit for the purpose of storing their Pinot Noir wine. They relied upon a passage in *Metal Roofing and Cladding Pty Ltd v Amcor Trading Pty Ltd* [1999] QCA 472 where at [34] McPherson JA said:
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> > "Failure to deliver the goods contracted to be sold or, what is the same thing, delivery of goods that do not answer, correspond or conform to the contract description, is a breach not of an implied, but of an express condition (if it is properly considered to be a condition at all) or term of the contract."

> In that case the goods were expressly described in the contract as "PVC resin". In this case the description of the goods was three litre wine bottles. They were not described as three litre bottles fit to contain a Pinot Noir wine. What was delivered in each instance answered the description of a three litre wine bottle.[35]

34. As was submitted on behalf of the appellants, it may be significant to note that in dealing with expert evidence which had been given before the learned Magistrate, his Honour expressed the following opinion:

> Accordingly, I am satisfied as follows:
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> (a) the supplied three litre bottles were unsuitable for filling with Pinot Noir wine;
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> (b) the 25mm cork was unsuitable for use in these three litre bottles. Each expert agreed with that proposition.[35]

35. The learned Magistrate had therefore found that the wine bottles supplied to the appellants by the respondent were unsuitable for filling with pinot noir wine. That consequence, in his opinion, nonetheless fell foul of the exemption clause in the application for credit to which I have already referred. In particular, it was arguably caught by paragraph 9(b) of that document which reads:

> To the full extent permitted by law all other warranties or liabilities imposed or implied whether by law or by statute are expressly negatived.

36. It was accepted by both parties in the Magistrates' Court and before me that if it was an express term of the agreement that the bottles would be suitable for the purpose intended by the appellants, then that exemption clause would not apply.

37. On behalf of the appellants it was put simply that the evidence of Stead, Murphy and Moraghan could only lead to one conclusion, namely that the appellants expressly contracted with the respondent for a 3 litre table wine bottle or a 3 litre bottle fit for the purpose of storing table wine to the extent that those two phrases are different.

38. In particular Denise Stead, who was the area manager for the respondent, gave evidence in the following terms:

> Q: Ok. It's fair to say that you knew, did you not that the wine that was to go into these bottles, the 3 litre bottles and the 6 litre bottles, were for a table wine? That is not a champagne or sparkling wine?
> A: Correct.
> Q: And that's so because you were specifically asked for a burgundy shaped bottle?
> A: Yes.
> Q: Ok. And you said that one of your jobs is that you would discuss with the customers different alternatives, different types of bottles that they could use?
> A: Yes.
> Q: So it's fair to say you did have some knowledge, some extensive knowledge about wine bottles and what wine could go in some bottles and what wine couldn't go in other bottles?
> A: Yes.[36]

39. That evidence alone demonstrates that the respondent had been specifically requested to supply a bottle of a particular type and that the difference between a bottle appropriate for still wine and a bottle appropriate for sparkling wine was significant. To the extent that it was submitted to me on behalf of the respondent that in order for this to be an express term the parties "must bring it home by express conversation ...", this fulfils the requirement.[37]

40. In the evidence of Regina Murphy, who was the area manager on behalf of the respondent, she was asked about her state of knowledge:

> Q: Are you aware prior to that order that Curly Flat had ordered and obtained from Cospak 3 litre bottles? A: Yes.
> Q: Ok. And is it fair to say that you knew these 3 litre bottles were to be used for burgundy wine? Didn't you? A: Yes.
> Q: You knew they weren't to be used for a sparkling wine. A: No.[38]

41. The first appellant, Mr Phillip Moraghan, gave evidence that he asked Denise Stead to supply 3 and 6 litre bottles for the pinot noir and that she said she could.[39] Later in his evidence Mr Moraghan said that the only bottles he ordered were either burgundy bottles or bordelaise bottles, which were still wine bottles.[40]

42. In my opinion, the learned Magistrate made an error in concluding that it was not an express term of the agreement between the parties that the bottles would be fit for the storage of still wine as opposed to sparkling wine. With respect, I do not consider that the learned Magistrate's finding was open on the evidence before him.

43. In *Metal Roofing & Cladding Pty Ltd v Amcor Trading Pty Ltd*,[41] McPherson JA stated:

> Failure to deliver the goods contracted to be sold or, what is the same thing, delivery of goods that do not answer, correspond or conform to the contract description, is a breach not of an implied, but of an express condition (if it is properly considered to be a condition at all) or term of the contract. In the present case, the form of the exemption conferred by para (c) of cl D is almost identical with, and probably modelled on, that in *Andrews Brothers (Bournemouth) Limited v Singer and Company Limited* [1934] 1 KB 17, which, like this, expressly excluded "all conditions whether imposed by statute, common law or otherwise". In holding that such an exemption did not protect a seller who delivered a Singer car, which had been driven some 550 miles, instead of the "new Singer car" required by the contract, Scrutton LJ said:
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> > Where goods are expressly described in the contract and do not comply with that description, it is quite inaccurate to say there is an implied term. The term is expressed in the contract.

Greer LJ agreed, saying that the phrase "new Singer car" was an express and not an implied term.[42]

44. In *The Law of Contract*, Greig and Davis deal with this issue, observing that:

> In the case of a contract of sale, the seller is under a duty to deliver the goods contracted for, and the tender of different goods constitutes a non-performance of the contract. ...
>
> It is not satisfactory to regard that the requirement that a supplier of goods should perform the central obligation of the contract as an implied term, and one that can be readily negatived by an exemption clause. It would, on any objective assessment of the reasonable expectations of a buyer, be regarded as a normal assumption, distinct from and external to, the contract itself, that a contract should be carried out in this regard. That such a attitude was recognised by the common law is demonstrated by a long series of cases that went beyond the classic example given by Lord Abinger CB in *Chanter v Hopkins* [1838] EngR 34; 4 M & W 399; 150 ER 1484:
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> If a man offers to buy peas off another, and he sends in beans, he does not perform his contract. But that is not a warranty that he should sell him peas; the contract is to sell peas, and if he sends him anything else in their stead, it is a non-performance of it.[43]

45. On behalf of the respondent before me, it was submitted effectively that the learned Magistrate was correct in rejecting the contention that it was an express term of the agreement that the respondent was obliged to deliver 3 litre table wine bottles to the appellants. It was submitted that there was no evidence on which the learned Magistrate could have found that it was expressly agreed by the parties that the wine bottles would be fit for the purpose of storing pinot noir. For reasons set out above, I reject that submission. The evidence that I have referred to above demonstrates that indeed the finding that the obligation to deliver table wine bottles and/or bottles fit for the purpose of storing table wine to the appellants was an express term of the agreement was the only reasonable finding open to the learned Magistrate. His Honour came to a different conclusion and, in doing so, in my opinion, fell into error.

46. Accordingly I would uphold the appeal on that basis.

GST

47. The appellants submitted that the judgment awarded to the respondent did not attract GST under Division 9 of Part 2.2 of the A New Tax System, *Goods and Services Tax Act* 1999 (Cth) and therefore the judgment sum ought to have been exclusive of GST. The respondent's submissions were to the contrary effect.

48. The appellants' submission is based on the observations of Hunter J of the New South Wales Supreme Court in *Walter Construction Group Ltd v Walker Corp Ltd.*[44] In that case an application was made for a declaration that the first defendant was liable to indemnify the plaintiff in respect of the GST, if any, which may be payable by the plaintiff on any amount paid to it by the first defendant pursuant to the orders of the Court.

49. His Honour in *Walter Construction* took the view that the imposition by a court upon a party to pay a judgment debt does not constitute a supply in the form of a supply of goods or services, or advice or information, such as to attract GST. He observed:

> Further, in order to make the supply a "taxable supply", it must be one which "you make ... for consideration". I have been unable to see any room for "consideration" in the supply said to be, or arise out of, the judgment in these proceedings.[45]

His Honour declined to make the declaration sought.

50. On the other hand the submissions of the respondent in this case are to the effect that Cospak's claim was for goods sold and delivered under a contract which contained a term obliging the purchaser to pay GST on any sums payable to Cospak. In their submission therefore Cospak was entitled to a judgment inclusive of GST. The invoiced amounts which make up the respondent's claim were inclusive of GST.

51. In my view, and despite the observations of his Honour in Walter Construction, it appears that in a case such as this where a court is involved in determining the commercial relationship between the parties and GST is part of that commercial relationship, then GST was correctly included in the order made by the learned Magistrate if it were appropriate to have made such an order.

52. The second half of the debate in relation to GST concerned the calculation of the appellants' loss.

53. In the course of the learned Magistrate's judgment he, "as a matter of completeness", examined the question of the appellants' loss.[46] The learned Magistrate observed:

> This loss was placed at $19,449 and was calculated on the basis of the quality of the wines. Some of the wine was thrown away because of the loss of quality and the rest was mixed with other wine, the 2004 Williams Crossing Pinot Noir. In the former category they calculated the loss at $11,838 for 56 bottles over three years (2000 to 2002). With the latter, the loss was $7,611 for 49 bottles over the same period. In cross-examination, the first defendant conceded the possibility that 6 of these bottles would have been given to charity. Neither the cross-examination nor re-examination explored the possibility of which of the bottles would be disposed of in that fashion. Nevertheless, I will treat the possibility as a fact and reduce each category by three bottles. The defendants calculated their losses by including the incidence of the goods and services tax (GST). Since it is their loss which is at issue, the exclusion of the GST component is reasonable.[47]

54. In their submissions the appellants accept that any sum awarded to them should be exclusive of GST based on the decision in *Walter Construction*. The appellants also submit that the GST was incorrectly calculated and that the correct figure is $16,680.00 after the deduction of GST rather than $16,513.20. I accept that correction.

55. The respondent in dealing with this issue submits, I think correctly, that the reason GST is not recoverable because the claim was in the nature of a damages claim rather than the supply of goods or services.

56. I therefore make the following orders:

> 1. That the appeal be allowed.
> 2. That the order made by the Magistrates' Court on 13 November 2006 be amended to provide that Phillip John Moraghan and Jennifer Moraghan (trading as Curly Flat Vineyard) pay Cospak Pty Ltd the sum of $1442.00 for its claim and interest and costs of $6024.05.
> 3. That the respondent pay the costs of this appeal to be taxed on a party-party basis.

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[1] Transcript of Proceedings, *Cospak Pty Ltd v Phillip John Moraghan & Jenifer Moraghan, t/as Curly Flat*

Vineyard (Melbourne Magistrates' Court, Magistrate Lauritsen, 11 October 2006) at 191 (hereinafter "Transcript of Proceedings of 11 October 2006").
[2] Ibid at 208.
[3] *Cospak Pty Ltd v Moraghan & Anor* (Melbourne Magistrates' Court, Magistrate Lauritsen, 13 November 2006) at 3-4.
[4] Ibid at 4.
[5] *May & Butcher Ltd v R* [1934] 2 KB 17; 103 LJKB 556 (hereinafter "*May & Butcher*").
[6] [1994] 2 VR 32 at 67-8.
[7] D W Greig and J L R Davis, *The Law of Contract* (1987) 354-63.
[8] Transcript at page 14
[9] *May & Butcher* [1934] 2 KB 17, 17; 103 LJKB 556.
[10] Ibid at 21.
[11] Ibid.
[12] [1994] VicRp 53; [1994] 2 VR 32 (hereinafter "*Vroon*").
[13] Ibid at 67.
[14] Ibid.
[15] Grieg and Davis, *The Law of Contract* (1987) 359.
[16] Ibid at 360, quoting *Hillas & Co Ltd v Arcos Ltd* [1932] UKHL 2; [1932] All ER 494; (1932) 147 LT 503;; (1932) 38 Com Cas 23, 36-7; (1932) 43 Lloyds Rep 359 (per Lord Wright).
[17] [1932] UKHL 2; [1932] All ER 494; (1932) 147 LT 503;; (1932) 38 Com Cas 23, 36-7; (1932) 43 Lloyds Rep 359.
[18] [1994] VicRp 53; [1994] 2 VR 32 at 68.
[19] See, for example, the evidence of Regina Murphy: Transcript of Proceedings of 12 November 2007 at 93-4, 97-8, 105-7, 111-12, 115-18.
[20] Ibid at 133.
[21] See, for example, ibid at 137.
[22] Ibid at 138.
[23] Ibid at 149.
[24] Ibid at 150.
[25] Ibid at 173.
[26] Ibid at 175.
[27] Ibid at 211.
[28] Transcript of Proceedings of 12 November 2007 at 218.
[29] Ibid at 250.
[30] [1967] 1 Lloyd's Rep 53.
[31] Ibid at 57.
[32] [1994] VicRp 53; [1994] 2 VR 32 at 71.
[33] Ibid.
[34] *Cospak Pty Ltd v Moraghan & Anor* (Melbourne Magistrates' Court, Magistrate Lauritsen, 13 November 2006) at 5.
[35] Ibid.
[36] Transcript of Proceedings of 12 November 2007 at 73.
[37] Transcript of Proceedings, *Phillip John Moraghan & Jenifer Moraghan, t/as Curly Flat Vineyard v Cospak Pty Ltd* (Supreme Court of Victoria, Lasry J, 12 November 2007) at 53.
[38] Transcript of Proceedings of 12 November 2007 at 101-2.
[39] Ibid at 191.
[40] Ibid at 233.
[41] [1999] QCA 472.
[42] Ibid at [35] (citations omitted).
[43] Grieg and Davis, *The Law of Contract* (1987) 636-7.
[44] [2001] NSWSC 283; (2001) 47 ATR 48 (hereinafter "*Walter Construction*").
[45] Ibid at [480].
[46] *Cospak Pty Ltd v Moraghan & Anor* (Melbourne Magistrates' Court, Magistrate Lauritsen, 13 November 2006) at 9.
[47] Ibid.

APPEARANCES: For the Appellants Moraghan & Anor: Mr R Harris, counsel. Settle Legal, solicitors. For the respondent Cospak Pty Ltd: Mr M Stirling, counsel. Monahan + Rowell, solicitors.
