IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2012-404-007725
[2014] NZHC 903

BETWEEN	SAVVY VINEYARDS 3784 LIMITED formerly known as GOLDRIDGE ESTATE VINEYARDS 3784 LIMITED Plaintiff
AND	ARCK LIMITED Defendant

Hearing: 17-20 March 2014

Appearances: D P H Jones QC and N Penman-Chambers for the Plaintiff
T Sissons and S Gaines for the Defendant

Judgment: 5 May 2014

JUDGMENT OF GILBERT J

This judgment is delivered by me on 5 May 2014 at 5pm
pursuant to r 11.5 of the High Court Rules.

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Registrar / Deputy Registrar

Introduction

[1] There are two issues requiring determination in this proceeding. The first is whether the plaintiff (Savvy) exercised its option pursuant to two grape supply agreements to purchase the entire crop of grapes produced on the defendant's two vineyards in Marlborough, including the 2012 and subsequent vintages. The second issue concerns the basis for calculation of the purchase price for the grapes.

[2] Although these issues are quite narrow, it is necessary to briefly recount the relevant background to set the context for the agreements and the disputes that have arisen concerning them.

Background

[3] Savvy is part of a group of companies owned and controlled by Peter and Jean Vegar. These companies are all involved in the management and purchase of grapes from vineyards in Marlborough. The grapes are on-sold or used in the production of bulk wine.

[4] In 2006, Mr and Mrs Vegar were considering how to secure a long term supply of quality grapes for their operations. They were concerned that following the rapid expansion of vineyards in Marlborough, land suitable for vineyard development was becoming scarce They formulated a proposal to attract passive investors to purchase land suitable for vineyard development on the basis that Mr and Mrs Vegar, through one of their companies, would establish the vineyard, manage it once established and acquire the grapes pursuant to a long-term supply agreement.

[5] The defendant, ARCK, participated in the investment scheme by purchasing a 10 hectare block in June 2007 and a 30 hectare block in November 2007. ARCK was formed for the purpose of these investments by Tony and Jennifer Ebert who own and operate a real estate agency in Auckland. They were introduced to the prospect of investing by Paul Vegar, Peter's brother. Paul had worked for Mr and Mrs Ebert in their real estate business for a number of years.

[6] Separate vineyard management agreements and grape supply agreements were completed for each block. The agreements were for an initial term of 10 years with Savvy having the right to extend for two further terms of 20 years. Savvy has the option under the grape supply agreements, exercisable by notice in writing at specified times, to purchase part or all of the harvest for a minimum of three years.

[7] Target cropping levels are specified in each agreement. These range from 2.25 tonnes per hectare for the second vintage after planting to 9 tonnes per hectare for the fifth and subsequent vintages for the 10 hectare block and from 2.33 tonnes to 9.3 tonnes per hectare for the 30 hectare block. Both agreements provide that the purchase price is to be calculated on the lesser of the tonnes harvested or the target cropping level specified. The price per tonne is the Marlborough average price for each variety for the relevant vintage as published in the *New Zealand Grape and Wine Industry Statistical Annual* (or any replacement publication).

[8] Mr Vegar prepared a letter dated 27 April 2009 for the purpose of giving notice of the exercise of Savvy's option to purchase all grapes produced from the 10 hectare block starting with the first vintage anticipated in 2010 until termination of the grape supply agreement. Mr Vegar prepared a similar letter to ARCK the following year, on 26 April 2010, for the purpose of exercising Savvy's option to purchase all grapes produced from the 30 hectare block starting with the 2011 vintage. There is a dispute about whether either of these notices was served in accordance with the requirements of the grape supply agreements.

[9] The first harvest from the 10 hectare block was picked on 20 April 2010 and 91.16 tonnes of Sauvignon Blanc grapes were harvested. This represented a little over 9 tonnes per hectare as compared with the target cropping level in that year of 4.5 tonnes per hectare.

[10] On 24 May 2010, Mr Vegar sent Mrs Ebert an email asking her to send an invoice for 54.77 tonnes of Sauvignon Blanc at $1,650 per tonne. This was based on the target cropping level. Mrs Ebert responded by producing an invoice in these terms and it was duly paid.

[11] The grape harvest from ARCK's two blocks also exceeded the target cropping levels the following year. On 29 April 2011, Mrs Ebert prepared invoices in accordance with Mr Vegar's request based on the target cropping levels.

[12] In early 2012, Mr and Mrs Ebert became concerned that the Vegars were making significant profits from grapes harvested in excess of the agreed target cropping levels. They were also concerned that Savvy had harvested over 90 tonnes of grapes from the 10 hectare property in 2009 without disclosing this or paying anything for it. This was a misunderstanding arising out of an erroneous report prepared by the vineyard manager indicating that the first harvest from the 10 hectare block was in 2009, when in fact the first harvest was not until 2010.

[13] Following an exchange of emails between Mr Ebert and Mr Vegar, Mr Ebert purported to cancel both grape supply agreements by email on 10 February 2012. ARCK refused to supply the 2012 and subsequent vintages and has prevented Savvy and its agents from entering either block for the purpose of carrying out its obligations under the vineyard management agreements.

The pleadings

[14] Savvy commenced this proceeding to obtain a declaration that the purported terminations were invalid and that the grape supply agreements and vineyard management agreements remain binding. It also seeks damages for losses arising out of ARCK's alleged breach of these agreements.

[15] When the trial commenced, ARCK resisted Savvy's claim on the following bases:[1]

(a) Savvy has not exercised its option to purchase in terms of the grape supply agreements;

(b) the grape supply agreements are void for uncertainty because there is no method for fixing the price for grapes harvested in excess of the target cropping level;

[1] First amended statement of defence dated 18 April 2013.

(c) alternatively, the grape supply agreements are unenforceable to the extent that they apply to any grapes harvested in excess of the target cropping level because there is no consideration for the supply of such grapes;

(d) the grape supply agreements were validly cancelled by ARCK on 10 February 2012;

(e) ARCK is not liable for payment of vineyard management fees because payment is conditional on performance;

(f) ARCK was induced to enter into the grape supply agreements by misrepresentation by or on behalf of Savvy that it was necessary to cap the tonnage of grapes harvested from the land to the target cropping level to achieve quality grapes;

(g) ARCK was induced to enter into the deeds of assignment and novation of the grape supply agreements by a misrepresentation that it was necessary to assign the grape supply agreements to an independent third party;

(h) in entering into the grape supply agreements ARCK was influenced by a mistake that it was necessary to limit the harvest of grapes to the target cropping level to achieve quality grapes; and

(i) alternatively, Savvy and ARCK were both influenced in their respective decisions to enter into the grape supply agreements by the same mistake.

[16] All but one of these defences was abandoned during the course of the trial. The only one of these defences still pursued is that summarised in (a) above, namely that Savvy did not exercise its option to purchase under the grape supply agreements by serving the requisite notice in the prescribed manner. In place of the defence listed at (b) above, that the grape supply agreements are void for uncertainty because

there is no method of fixing the price harvested in excess of the target cropping level, ARCK now pleads:[2]

> on their true construction the Grape Supply Agreements do not entitle the plaintiff to take the defendant's grapes harvested in excess of the target cropping levels without paying for them.

[17] ARCK now acknowledges that it wrongfully purported to cancel the agreements. It is prepared to consent to the declarations sought by Savvy that all agreements remain in full force and effect.

[18] The parties reached agreement at the hearing that the quantum of any damages suffered by Savvy should be deferred pending the issue of this judgment which will determine whether the options were exercised and how the purchase price is to be calculated.

Were the options exercised?

[19] It is trite law that an option must be exercise strictly in accordance with the terms of the grant.

[20] Both grape supply agreements contain the following provisions relating to the exercise of the option, which is described as a right of first refusal in the agreement:

> 2.2 The Grower hereby grants to the Buyer a right of first refusal to purchase the entire crop of Grapes or any part of the entire crop of Grapes for the next 3 years. Such right of first refusal shall be deemed to be effective on the Commencement Date and to be repeated on each third anniversary of the Commencement Date, to the intent that the Buyer may on any such date elect whether it proposes to purchase any Grapes for the remaining term or any part of the remaining term of the Agreement.
>
> 2.3 Should the Buyer wish to exercise its right of purchase pursuant to this Agreement it shall first provide the Grower with notice of such exercise. Such notice may be given at any time prior to the Commencement Date or such other date as the right of first refusal is exercised. Any notice given pursuant to this clause must identify the number of hectares (and the rows included in the hectares) of each variety the Buyer wishes to purchase.

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[2] Second amended statement of defence dated 18 March 2014 at para 14(ii).

[21] The Commencement Date under both agreements is defined to mean 1 May of the year before the first planned harvest of grapes.

[22] Clause 38 of both agreements deals with the service of notices:

> 38 **NOTICES**
>
> 38.1 Any notice or other communication ("notices") given under this agreement must be in writing.
>
> 38.2 It may be served personally or sent to any of the relevant party's communication points listed below.
>
> 38.3 Each party will notify the other in writing of any changes.
>
> [Addresses are the listed for the Grower and Buyer but these relate to the original parties to the agreements, prior to them being assigned to the current parties].
>
> 38.4 Notices are deemed served at the following times:
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> (a) when given personally, upon delivery;
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> (b) when sent by post (other than airmail) or document exchange, 3 business days after posting;
>
> (c) when sent airmail outside New Zealand, 5 business days after posting;
>
> (d) when sent by facsimile or email upon receipt of the correct answerback or receipt code.
>
> 38.5 Any notice which has been served on a Saturday, Sunday or public holiday is deemed to be served on the first business day after that day.
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> 38.6 A notice may be given by an authorised officer, employee, or agent.
>
> 38.7 Notice may be given personally to a director, employee or agent of the party at that party's address or to a person who appears to be in charge at the time of delivery or according to section 387 to section 390 of the Companies Act 1993.
>
> 38.8 If the party is a natural person, partnership or association, the notice may be given to that person or any partner or responsible person. If they refuse to accept the notice, it may be brought to their attention and left in a place accessible to them.
>
> 38.9 Time shall be of the essence in respect of all notices given under this agreement.

[23] As noted, Mr Vegar purported to give notice exercising Savvy's option to purchase the entire crop of grapes from each block for the full term of the agreements. The notice relating to the 10 hectare block is dated 27 April 2009 and the notice relating to the 30 hectare block is dated 26 April 2010. Apart from the reference to the particular vineyard and the first vintage to which the notice related, the notices are in identical terms. The notice relating to the 10 hectare block is as follows:

> 27 April 2009
>
> Tony Ebert
> Arck Ltd,
> C/- Withers Tsang & Co. Ltd,
> 24-26 Pollen Street,
> Ponsonby,
> AUCKLAND
>
> Dear Tony
>
> **RE: NOTICE OF EXERCISE OF RIGHT TO PURCHASE GRAPES**
>
> Goldridge Estates Limited hereby gives notice that it exercises its right of purchase pursuant to clauses 2.2 and 2.3 under the Agreement for the Supply of Grapes and will purchase all the fruit from the 2010 vintage from the Arck (10 hectare) vineyard. The purchase of all fruit will accordingly commence from and including the 2010 vintage until the termination of the Grape Supply Agreement.
>
> Yours sincerely,
>
> Peter Vegar
> Managing Director
> Goldridge Estate Ltd.

[24] Goldridge Estate Limited subsequently changed its name to Savvy. The address shown on both letters is ARCK's registered office.

[25] Mr Vegar did not refer expressly to the service of these notices in his principal brief of evidence. He simply stated:[3]

> The fruit from the 2010 harvest was purchased by Goldridge Estates Vineyards 3552 Limited in accordance with the GSA, the right of first refusal having duly been exercised.

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[3] At [61].

[26] In his reply brief of evidence, Mr Vegar stated:[4]

> The letters to ARCK exercising GEL's first right of refusal to take the fruit were addressed to the registered companies office for Arck. I cannot recall whether these letters were in fact sent to the registered companies office address or whether they were sent directly to the Eberts at their business address. GEL and later Savvy used to forward on other documents addressed to Arck to the Erbert's business address that GEL/Savvy had received on its behalf (as vineyard manager all suppliers went all invoices and most correspondence to GEL/Savvy to approve or action on behalf of Arck). However, I am certain that the letters were produced and sent. The Eberts acknowledged to me in conversation that they had received notification that we were taking the fruit and in recognition of this notification they supplied the fruit from their vineyards to Savvy 3784 from the 2010 and 2011 vintages.
>
> Savvy took the fruit for the 2010 and 2011 vintages. The supply was under the GSAs. The purchase rights had to have been triggered for Arck to supply the fruit.

[27] In his closing submissions, Mr Jones QC accepted that neither of these notices was sent to the registered office of ARCK. He also accepted that neither notice was served personally on Mr or Mrs Ebert or anyone else. Although the agreements permitted service by post, facsimile or email, this had to be to an address provided in the agreements or some other address notified in writing by the parties. As noted, the addresses set out in the agreements relate to predecessor parties, before they were assigned to the present parties. Neither party gave notice to the other of any new address where notices could be served. Accordingly, even if the notices were sent to Mr Ebert at his real estate agency, this would not have met the service requirements set out in the agreements.

[28] In any event, I accept Mr and Mrs Ebert's evidence that they did not receive either of these notices. Mr Vegar has no specific recollection of sending either letter and he was unable to provide any proof that the letters were sent by email or otherwise. It appears that Mr Vegar overlooked the need to serve the notices in accordance with the notice requirements set out in the agreements. This is likely to be explained by the fact that, at that time, both parties simply assumed that Savvy would purchase the entire harvest of grapes in accordance with their mutual expectation when the agreements were signed. Certainly, this is what the Eberts

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[4] At [46] and [47].

expected; they did not contemplate trying to find another purchaser for their grapes until after the dispute arose.

[29] Mr Vegar said that the Eberts acknowledged in conversation that they had received notification of Savvy's intention to purchase the grapes and this is why the initial harvests were supplied. Mr Vegar could not be precise as to when this discussion occurred. I find that Mr and Mrs Ebert did not acknowledge receipt of these letters although it is likely that their willingness to supply the harvest to Savvy was confirmed in conversation, as Mr Vegar suggests.

[30] Mr Jones submits that the purchase of the 2010 and 2011 harvests must have proceeded on the basis of the grape supply agreements and that notice must therefore have been given. I accept that the purchase of the initial harvests was made on the terms, including as to price, set out in the grape supply agreements. However, it does not follow that notice was given in accordance with those agreements triggering an obligation to buy and sell. I find that ARCK supplied these harvests to Savvy at the price set out in the agreements without considering whether it was strictly obliged to do so. I am satisfied that Mr and Mrs Ebert did not give any thought to the need for notice under the agreements until after the dispute arose and they obtained legal advice. I accept their evidence that they did not see either notice until they were provided by Savvy on discovery.

[31] I conclude that Savvy has failed to discharge the onus on it of proving on the balance of probabilities that it served notice under either agreement exercising its option to purchase. However, there is nothing to prevent it from doing so for future harvests.

How is the price to be calculated?

[32] The grape supply agreements are in all material respects the same, save for the stipulated target cropping levels and the requirement to advise ARCK if target cropping levels are not achieved in any particular year. The first agreement, relating to the 10 hectare block, requires Savvy to provide a written weighbridge record of the tonnes of each variety of fruit harvested from the vineyard. This requirement, in cl 4.5 of the agreement, was modified by the time the second agreement relating to

the 30 hectare block was signed. Under that agreement, Savvy is obliged to advise ARCK whether the harvest is less or more than the target cropping level and to provide a written weighbridge record of the tonnage of grapes harvested only when the harvest is less than the target cropping level.

[33] Both agreements define "Purchase Price" as follows:

> **"Purchase Price"** means the price payable in each year for the Grapes which shall be the Marlborough average price per tonne of each variety of the Grapes as published in the New Zealand Grape and Wine Industry Industrial Statistical Annual (or any replacement publication) and shall be assessed in accordance with clause 4 of this agreement.

[34] Clause 4 relevantly provides:

> 4 PURCHASE PRICE
>
> 4.1 The Buyer shall pay the Purchase Price to the Grower. Payment must be made without set-off or retention and paid in accordance with clause 4.8. The Purchase Price shall be assessed as follows:

	Sauvignon Blanc
Price Schedule for the target brix range	21.50 to 24.0 brix = market average price per tonne for Marlborough Sauvignon Blanc plus GST
Price Schedule for the lower quality levels in a poorer season	21.00 to 21.49 brix = 95% of the market average price per tonne for Marlborough Sauvignon Blanc plus GST

> 4.2 The market average price per tonne shall in each case be the Marlborough average price per tonne for each variety for the current vintage as published in the *New Zealand Grape and Wine Industry Statistical Annual* (or any replacement publication). The Purchase Price shall be calculated based on the tonnes harvested or the target cropping level outlined in clause 12.1, whichever is the lesser.
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> …
>
> 4.5 The Buyer will weigh the Grapes using an appropriate industrial standard weigh-bridge commonly used for weighing grapes and provide the Grower with a written weigh-bridge record of the tonnes of each variety of fruit harvested from the Vineyard. The weigh-bridge record shall be prepared by the Buyer. The price of the

> Grapes shall be assessed based on the tonnes of fruit of each variety as set out in the written weigh-bridge record. [For the 10 hectare block].
>
> 4.5 The Buyer will weigh the Grapes using an appropriate industrial standard weigh-bridge commonly sued for weighing grapes. The Buyer will advise the Grower whether the tonnes of Grapes harvested is less or more than the target cropping levels specified in clause 12. Where the tonnes of Grapes harvested is less than the target cropping level specified in clause 12 the Buyer will provide the Grower with a written weigh bridge record of the Grapes harvested. [For the 30 hectare block].
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> …

[35] Mr Sissons submits that, properly interpreted in the light of the relevant background, the words "whichever is the lesser" in cl 4.2 refer to harvests less than target cropping levels but do not apply to harvests exceeding these levels. He submits that any other interpretation flouts business commonsense and would mean that in a good year, when target cropping levels were substantially exceeded, Savvy would be entitled to the excess tonnages without making any additional payment. Mr Sissons illustrated this with reference to the fact that 91.16 tonnes were harvested from the 10 hectare block in 2010 and yet the purchase price was calculated on the basis of the target cropping level of 54.77 tonnes.

[36] I do not consider that there is any room to read the agreement in the manner urged by Mr Sissons. The wording of cl 4.2 is clear; the price is to be calculated on the lesser of the target cropping level or the actual harvest. This was a benefit Savvy secured as part of the overall arrangements which included requirements that Savvy establish the vineyards at cost and purchase the harvest at the index price regardless of the on-sale price it could achieve. Mr and Mrs Ebert should have understood that this is how the price was calculated because their solicitor advised them of this before they signed the agreements.

[37] The real problem is not the wording of cl 4.2 but with the setting of the target cropping levels. Mr and Mrs Ebert regard a target as something to strive for and celebrate when achieved. They did not appreciate when they signed the agreements that the specified target cropping levels were conservative. However, this is what they agreed to. The fact that the target cropping levels were conservative cannot

justify disregarding the plain and ordinary meaning of the words used by the parties in cl 4.2.

[38] I conclude that the purchase price is to be calculated in the manner contended for by Savvy, namely on the basis of the lesser of the target cropping level or the harvest tonnages.

Result

[39] By consent, I make the declarations sought by the plaintiff, namely that the grape supply agreements and the vineyard management agreements remain legally binding and on foot.

[40] I find that the plaintiff did not give notice of the exercise of its option to purchase in accordance with either of the grape supply agreements.

[41] The plaintiff's claim for loss relating to the non-supply of the 2012 and 2013 vintages is dismissed.

[42] The purchase price for the grapes is to be calculated on the basis of the lesser of the target cropping level or the harvest tonnages.

[43] The plaintiff is entitled to damages following the defendant's wrongful repudiation of the vineyard management agreements. If the parties are unable to agree on the issue of quantum, a further hearing will be required to determine this.

[44] My preliminary view is that the plaintiff is entitled to costs on a 2B basis. If either party contends for a different outcome, a memorandum seeking costs is to be filed and served within 21 days of the date of this judgment. Any memorandum in response is to be filed and served within 14 days thereafter.

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M A Gilbert J