

UIULOLOA DAIRY CO. LTD v. MINISTER OF HEALTH

HIGH COURT. 1961. 2, 16, November. MARSACK C.J.

Sale of goods - goods supplied and not paid for - absence of agreement as to price - course of dealing between parties - reasonable price - Sale of Goods Act 1908 (N.Z.).

In the absence of a definite agreement between the parties as to the price to be paid in respect of a delivery of goods - and there being an established business relation between them - the ascertainment of the price is to be resolved in accordance with section 10 of the Sale of Goods Act 1908 (N.Z.), which is in force in Western Samoa, and pursuant to which such price is to be determined by having regard to the course of dealing between the parties or what is the reasonable price to be paid by the customer for such goods in the circumstances of the parties' dealing.

Judgment for the plaintiff

CLAIM to recover a sum of money due in respect of delivery of goods.

Metcalf, for plaintiff.
Molineaux, Attorney-General, for defendant.

Cur adv. vult.

MARSACK C.J.: This is a claim for the sum of £60 representing a balance alleged to be due in respect of the supply of milk by the plaintiff Company to the Apia Government Hospital for the month of April 1961. It is common ground that 2,400 quarts of milk were supplied by the plaintiff Company to the Hospital for that month. Defendant has paid the sum of £480 and contends that that represents his full liability. This amount is calculated on the basis of 1/6d per quart, the price payable up to and including the month of March. The plaintiff Company claims that the price correctly payable as from the 1st April is 2/- per quart. During the month of March application was made on behalf of the plaintiff Company to the Price Tribunal for an increase in the maximum price which could legally be charged for fresh pasteurized milk sold to the public. On the 29th March 1961 the Price Tribunal gave public notice of a Price Order fixing the maximum price for the sale of fresh pasteurized milk in the Apia area at 1/- per pint. This Order was made under the provisions of the Control of Price Emergency Regulations, 1939 and until that Order was made and notified by the Price Tribunal, any increase in the price of milk over that previously obtaining, namely 1/6d per quart, would have been illegal.

On the 27th March a circular letter from the Company, addressed to each customer individually, was prepared, notifying the customers of the increase in price to 2/- per quart, and giving some reasons for the increase. The method adopted for the circulation of this letter was unsatisfactory and I find as a fact that the letter did not reach any person in authority at the Hospital. It was stated that the circulars were handed to the driver of the delivery vehicle with instructions to leave them, together with the monthly bill for March, at each customer's place with the milk. The normal practice is for the bills for one month to be sent out early the following month. No evidence of the actual delivery of any circular was given, and at least one private customer, Mr Levestam, deposed that he had not received such a circular himself.

It was thus not until early in May that any responsible officer of the Hospital knew of the increase in price as from the 1st April. The Managing Director of the plaintiff Company, Afoafouvale Misimoa, gave evidence that he considered the formal notification in the Press News to be sufficient notice to all his customers, and in particular the Minister of Health, of

the pending increase in price. The official notification in the Press News, however, does not in fact amount to an intimation that customers of the plaintiff Company would be required to pay 2/- per quart for milk purchased from the Company as from the 1st April. The notification in the Press News is merely one that the Price Tribunal had authorised vendors of milk to charge a price not exceeding 1/- per pint.

The question then arises as to whether the plaintiff Company was entitled, without notice to the Hospital authorities, to increase the price of milk delivered to the Hospital from 1/6d to 2/- per quart as from the 1st April. The answer to this question must depend upon the terms of the business relation between the parties.

It was contended by the Attorney-General that there was a definite contract or agreement for the supply of 80 quarts a day at 1/6d per quart, and that no alteration in that contract or agreement could be made unilaterally; any alteration in the terms of the agreement would require consent of both sides. I am unable, however, from the evidence to spell out any form of contract or agreement, an alteration in which would be, as the Attorney-General contends, a novation. No evidence was given on either side of any form of arrangement whereby a stated quantity of milk was to be supplied by plaintiff to defendant for a stated term at a stated price. An officer of the Hospital staff would from time to time notify the Company of the Hospital's requirements in the way of milk, and the Company would in due course supply the milk ordered. There is no evidence that an agreement was entered into on the subject of price. There is in fact evidence that there had been price rises previously, and these had been paid without question. Counsel for plaintiff contends that this is the ordinary case of a day-to-day supply, and that, despite the fact that the Hospital is substantially the plaintiff's largest customer, the defendant is in no different position from that of any other customer. There is some support for this contention in the evidence of Mr Davis, the Managing Secretary of the Apia Hospital, to the effect that there was no agreement that the Company should supply the Hospital with so many gallons a day, for any term such as a month or anything of that sort. There is further support for this contention in the fact that Mr Davis wrote on 16th May to the Secretary of the plaintiff Company, that as from the 25th May the daily supply was to be reduced to fifteen gallons until further notice.

Counsel did not address any argument to me as to the law applicable to the transaction between plaintiff and defendant. The Attorney-General emphasised that the Minister of Health cannot spend more money than is provided in his estimates, and that therefore he could not legally pay the increased price for the same supply thenceforth, as an extra expenditure of £720 per annum would be involved. I can, however, find no authority for the proposition that the price properly payable by the Minister to a milk vendor in respect of milk supplied must, as between vendor and purchaser, depend upon the departmental estimates which have been prepared by the Department and approved by the Assembly; nor did learned Counsel refer me to any such authority. Great stress was laid in the Attorney-General's argument on the point that previous increases in price had been extremely small, but that involved in the present action was a major increase amounting to 33 $\frac{1}{3}$ % of the price previously charged. I am unable to see in what manner the amount of the increase can affect the principle to be applied in determining whether or not the increase became payable, and if so, when.

My findings of fact amount to this. No agreement, contract or arrangement was entered into between the Director of Health on behalf of the Minister on the one hand and the Company on the other, specifying the quantity of milk to be supplied by the Company to the Hospital, the period during which the milk was to be supplied, and the price to be paid. Although Mr Davis says that the supply was generally kept at a uniform level, I find that there was no legal obstacle in the way of the ordering by the Hospital of a different quantity from day to day. There is no evidence that the question of price was ever discussed between the parties, either before the deliveries commenced, or at the time of any particular order for

milk. The Department would thus be in the same position as any other customer of the plaintiff Company; an officer of the Hospital would from time to time inform the Company of the daily requirements, and these would be supplied. In accordance with the usage which is common in Apia, the supplies of milk would not be paid for daily but monthly on receipt of an account from the Company.

In the absence of a definite agreement between the parties as to the price to be paid in respect of each delivery of milk to the Hospital, this question would appear to be governed by section 10 of the Sale of Goods Act 1908 (N.Z.), which is in force in Western Samoa. This section reads:

"Ascertainment of price - (1) The price in a contract of sale may be fixed by the contract, or may be left to be fixed in manner thereby agreed, or may be determined by the course of dealing between the parties.

(2) Where the price is not determined in accordance with the foregoing provisions the buyer must pay a reasonable price.

(3) What is a reasonable price is a question of fact, dependent on the circumstances of each particular case."

I have held that there was no agreement fixing the price. If the price is to be determined by the course of dealing between the parties, then the only price which would be consistent with my view of the course of those dealings, as disclosed in the evidence, would be the current market price. That I find to be 2/- a quart.

If subsections (2) and (3) are to apply, then it is for the Court to ascertain what is a reasonable price, which is a question of fact dependent upon the circumstances of the case. No argument was directed to me to the effect that the price of 2/- per quart is not reasonable. The Price Tribunal's approval of the price was publicly notified on the 29th March. The defendant is hardly in a position now to argue that the price was unreasonable, as he has paid it without question for all milk supplied since 1st May. It is true that the Hospital order has been reduced from twenty to fifteen gallons a day in order to keep the expenditure within the authorised budget; but the reasonableness of the price of goods supplied is not determined by the ability of one particular customer to pay. In my view, the reasonableness of the price of 2/- per quart has been recognised, not only by the Price Tribunal, but by the defendant himself; and no evidence was produced, or argument submitted, to the contrary.

The real burden of the Attorney-General's argument is that proper notice of the proposed increase in price should have been given, so that the Director of Health could have given consideration to the matter of reducing his order so as to keep his expenditure under this head within proper bounds. I agree that the giving of such notice would have been most desirable, particularly in view of the long business association between the Company and the Hospital. But what I have to determine is the legal rights and obligations between the parties. I have already found that there is no specific agreement containing all the terms regulating the rights and obligations of the parties, and that the ordinary supplier-and-customer relation exists between plaintiff and defendant. The law affords what is considered adequate protection of a customer against arbitrary increases in price by the vendor, in the provision that where there is no agreement as to the price, then that price must be what is reasonable in all the circumstances of the case.

I can find nothing in the evidence to establish any agreement, express or implied, that an increase in price would not become effective until adequate notice thereof was given; and no authority was cited to me for the proposition that there must be a specified period of notice in such

circumstances when there is a normal tradesman-and-customer relation between the parties. It is true that eight days' notice was given by the Hospital that the supply of milk was to be reduced from twenty to fifteen gallons a day, but I can find no obligation on the part of defendant to give even that length of notice, such an obligation that a breach of it would give plaintiff a right to damages.

In the result I am impelled to hold that the question of the price payable is to be determined in accordance with section 10 of the "Sale of Goods Act, 1908"; and whether that price is the current market price or a reasonable price, the figure is the same, namely 2/- per quart.

Accordingly the plaintiff is entitled to succeed. There will be judgment for plaintiff for the amount claimed £60, with costs.