IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2011-404-002246

BETWEEN	BURVLE EDWARD SWINDLE AND CAROLIE ANN TERPENING SWINDLE First Plaintiffs
AND	AORANGI FORESTS LIMITED Second Plaintiff
AND	VINTAGE 2009 (A) LIMITED (IN RECEIVERSHIP) Third Plaintiff
AND	VINTAGE 2009 (B) LIMITED (IN RECEIVERSHIP) Fourth Plaintiff
AND	MATAKANA ESTATE LIMITED (IN LIQUIDATION) First Defendant
AND	DIGBY JOHN NOYCE AND KEITH MAWDSLEY Second Defendants

Hearing: 11-13 July 2011

Counsel: G P Blanchard with P C Murray for Plaintiffs
S M Kilian with A E Liew for First Defendant
J N Bierre with E M Tobeck for Second Defendants

Judgment: 28 October 2011 at 4.00pm

JUDGMENT OF THE HON JUSTICE KÓS

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Introduction

[1] A case about wine. Not in bottles, but unbottled stock held in bulk vats and barrels. The winemaker is now in liquidation. To whom does the bulk wine belong?

[2] The wine was in the possession of the winemaker, the first defendant ("Matakana"), when it was put into liquidation on 21 November 2010. Now what is left of it is held by the liquidators. They are the second defendants. But the third and fourth plaintiffs ("the Vintage companies") say they, not Matakana, owned the wine at the time of liquidation. They are associated companies of Matakana, created to help fund the winemaking process. Since Matakana's liquidation, they have fallen into different control. They are now controlled by receivers appointed by their ultimate funder, the second plaintiff ("Aorangi"). If the Vintage companies owned the wine, then Aorangi has a security interest in it.

[3] Funds from Aorangi, channelled through the Vintage companies, paid for the grapes with which the wine was made. The essential issue is whether, as a result of these transactions, property in the bulk wine passed to the Vintage companies or stayed with the winemaker, Matakana. Property is at the heart of the case because the plaintiffs' claim is brought in conversion.

[4] Additional evidence was filed by the parties, jointly, after the hearing. That happened on 5 August 2011. I gave the parties time to make further submissions on the new evidence. I received these on 9 and 16 September 2011.

Facts

[5] The Vegar family own the Matakana Estate and Goldridge Estate labels. Two companies feature prominently in the marketing of Matakana and Goldridge wine. One is Matakana, the first defendant. It is the winemaker. The other is its sister company, Goldridge Estate Limited ("Goldridge"). Goldridge buys wine made by Matakana. It sells it on as "Matakana Estate" (the premium label), "Goldridge Premium Reserve" and "Goldridge Estate".

[6] The directors and shareholders of both companies are Peter and Helen Vegar. They are a married couple. Functionally, Matakana and Goldridge stand alongside each other. They have different emphases. One concentrated on making wine. The other marketed it.

Financing arrangements

[7] The economics of the wine industry meant the Vegars needed external funding. They needed to cover the high, early cost of paying for grapes and grape juice from growers. Also, costs of the winemaking process itself through to bottling. Only at that point could the winemaker and wine marketers obtain a return on their enterprise.

[8] In 1999 or 2000 the Vegars met Mr Kingsley Turner. He is a director of a finance company, Orakei Securities Limited. Orakei had access to funds from third

party funding sources. Aorangi was one such source. Mr and Mrs Swindle, the first plaintiffs, were another.

[9] Orakei and the Vegar family then devised the following structure:

(a) They established some further companies, known as the "Vintage companies". Two of those companies, Vintage 2009 (A) Limited and Vintage 2009 (B) Limited, are the third and fourth plaintiffs. The shareholders and directors of the Vintage companies were Mr and Mrs Vegar.

(b) Each company was responsible for a single vintage. The A company would handle the slower stock runs – pinot noir, chardonnay and merlot. The B company managed the faster moving varietals – sauvignon blanc and pinot gris.

(c) The company names would change to a new vintage year when the earlier run had been completed – i.e. every three years. So Vintage 2009 (A) Limited was formerly called Vintage 2003 (A) Limited. And, subsequently, Vintage 2006 (A) Limited. The same for the B company. Every three years their names were changed.

[10] Three core instruments were entered by each Vintage company on 9 March 2009:

(a) a term loan facility agreement, under which Orakei advanced funds (ultimately sourced from Aorangi);

(b) a supply agreement under which the Vintage company agreed to sell wine "produced" by them, to Goldridge; and

(c) a general security deed securing all obligations of the Vintage company against the assets of that company.

I will now discuss each of these briefly.

Term loan facility agreement

[11] Under the term loan agreements, Vintage 2009 (A) Limited received a credit facility of up to $600,000, and Vintage 2009 (B) Limited, $900,000. Each facility was to be drawn down to meet certain qualifying costs incurred in the production of wine.

[12] Each advance was to be "applied solely for the purposes of meeting costs detailed in the costs schedule and not for any other purpose, nor for any unlawful purpose". The costs schedule allowed for the following expenses: purchase of juice, bottling and set-up costs. So, for example, the costs schedule annexed to the Vintage 2009 (A) Limited loan agreement provided for the following qualifying costs:

(a)	Cost of grape juice:	$453,110
(b)	Bottling:	$210,689
(c)	Set-up costs:	$ 18,500
	Total:	$682,299

[13] The list did not include other expenses associated with the remainder of the winemaking process: blending, storage and so forth. Production costs not covered by the schedule (and the total of the list above exceeded the advance in any case) were to be "met by the input of equity or advances from [the Vegars] or Goldridge". So the funds advanced could be used for some (but not all) of the winemaking expenses.

[14] Orakei's advances had to be paid into a nominated bank account established solely to meet the costs specified in the schedule. An independent accountant was to oversee payments.[1] The accountant was to be a mandatory signatory to costs payments. And he was required to give a written undertaking that the advances

[1] In fact the nominated chartered accountant was not independent. He also acted for the Vegars.

would be used solely to meet production costs specified in the schedule. Such an undertaking was given for each Vintage company.

Supply agreement

[15] A supply agreement was entered between each Vintage company and Goldridge. Matakana was not a party. The agreement provided that the Vintage company sell the whole of the wine it "produced" in the period April 2009 to April 2011 to Goldridge. It clearly presupposes that the Vintage company has property in the wine it is selling to Goldridge.

[16] Three unusual features of the supply agreement should be noted:

(a) the wine could be supplied as and when the Vintage company saw fit during the term of the agreement;

(b) no minimum quality obligations are provided, in part reflecting the fact that the wine would be produced by Matakana, a sister company under the common control of the Vegars;[2] and

(c) the agreement provided a fixed payment schedule regardless of delivery date or total volume[3] supplied.

[17] The sums payable were loosely related to repayments that had to be made to Orakei. So Vintage 2009 (A) Limited, for instance, borrowed $600,000 under its loan agreement, and had to repay a total of $746,000 to Orakei by June 2011. It was to do so in irregular quarterly instalments. But the payments from Goldridge – which were to total $828,418 – were staggered so that the Vintage company would have enough cash available to it to pay Orakei. Although there was a margin, it would be needed to meet costs over and above the sum borrowed from Orakei.[4]

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2 But see [22] – [24] below.
3 Although a minimum caselot number applies.
4 See [12] – [13].

[18] As a result the Vintage companies were not expected to make a profit. Mr Turner explained:

> The Vintage entities were only established to make wine at a price which covered interest costs back to Orakei and the wine was sold to Goldridge at an aggregate of those costs ... there was a margin left to be made by the selling entity, Goldridge.
>
> ....
>
> The Vintage entities were not intended to make a profit, correct. They were intended to only meet their costs of production for the wine ...

[19] The supply agreements were assigned by the Vintage companies to Orakei by way of security for the indebtedness under the loan agreements.

The general security deeds

[20] The security deeds granted a fixed charge over the assets of each Vintage company in favour of Orakei. It expressly extended to "all ... right, title and interest (present and future, legal and equitable)" in the Vintage company's entire assets and undertaking.

[21] The deeds also contained a negative pledge preventing the Vintage companies from establishing or granting other securities. Significantly, they also prohibited the Vintage companies from lending money to any other person without Orakei's prior written consent.

A fourth agreement

[22] Notably, there was no formal agreement governing the winemaking process, as between Matakana and the Vintage companies.[5] Plainly there must have been an unwritten agreement of some sort. The Vintage companies were incurring "production costs" (authorised under the term loan agreements). The supply agreements proceeded on the basis that the Vintage companies would sell "product" to Goldridge. The "product" was wine "produced by [the Vintage companies]". There was no question that Matakana was undertaking the winemaking contemplated

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5 As noted earlier, Matakana was not party to the supply agreements.

by these arrangements. All that is missing is the piece of paper specifying the terms on which it was to do so.

[23] Mr Turner explained:

> The explicit arrangement in each Vintage entity was that once the juice and grapes had been purchased by the Vintage entity then Matakana was obligated to turn that juice and grapes into bottled wine which could be sold to Goldridge.

[24] The plaintiffs' evidence included an affidavit from Alistair King. He is an expert business adviser in the wine industry, based in Wanaka. He has experience as a receiver of companies involved in the wine industry. The evidence that he gave on the nature of the arrangements between Matakana and the Vintage companies is not answered by the evidence adduced by the defendants. He describes a meeting that he attended in December 2010 with one of the liquidators and Mrs Vegar. This is how the processing arrangements between Matakana and the Vintage companies were explained to him:

> At the meeting we looked at an example of how the purchase and sale process between Vintage Companies, Matakana Estate and Goldridge Estate worked. In the example discussed we looked at Sauvignon Blanc purchased from Tohu Vineyards. Matakana Estate has the grape supply agreement with Tohu. Matakana Estate would arrange for the fruit to be purchased from Tohu in the name of Matakana Estate and have the grapes delivered to the winery for processing. Matakana Estate would receive the grapes at the winery and immediately commence the wine making process. Up to one to two months later the grapes would be on sold to one of the Vintage Companies. I understood that the grapes are invoiced at the same cost price that Matakana Estate purchased the grapes from Tohu at.
>
> Once the grapes have finished the wine making process and the order has been placed from a consumer for finished bottled wine product, at that point either Matakana Estate or Goldridge depending on which brand required the product would get the wine bottled. Once bottling has finished Matakana Estate would then invoice the Vintage Company that had purchased the grapes for the bottling, packaging and wine making charges.
>
> The Vintage Company would then invoice, again depending on who required the product, either Matakana Estate or Goldridge Estate for the sale of the finished wine product at cost plus a percentage of interest on top of that, which was to be the Vintage Company's margin. Matakana Estate or Goldridge Estate would then on sell to the final consumer and charge a margin.

[25] The nature of the winemaking arrangements between the parties is of considerable importance when we come to consider the issues arising in this case.[6]

Execution and registration under the PPSA

[26] As already noted, all three written agreements were executed on 9 March 2009. The deeds were duly registered under the Personal Property and Securities Act 1999 ("PPSA") register on 12 March 2009. On the same date Orakei assigned Aorangi all its rights and interests in the loans and securities held by Orakei in relation to the Vintage companies.

[27] So the effect of all this was supposed to ensure:

(a) a cash-flow adequate to fund repayments to Orakei/Aorangi; and

(b) that assets acquired by the Vintage companies were ring-fenced, and not ensnared by other securities granted by Matakana and Goldridge.

[28] As Mr Turner put it in evidence:

> The Vintage companies were there to provide a single entity that made and owned a parcel of wine that could then be encumbered by us by way of our GSD. Goldridge had to buy the wine at a pre-determined price, regardless of market conditions.
>
> ....
>
> The Vintage companies were created to produce a single year, stand-alone entity that did nothing other than make x number of bottles of wine and, for example, this year they made, 32,000 cases between the two of them in 09 and therefore ... those companies wouldn't be involved in activities other than making that wine and our securities would effectively encumber the assets of those single year companies.
>
> ....
>
> Q: Is there any reason why the OSL who provided this funding didn't go directly to Matakana or to Goldridge rather than create the Vintage company?

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6 See at [52].

A: We wanted a single purpose, stand-alone entity where we were not competing with other GSA creditors.

What actually happened

[29] As we have seen:

(a) Orakei's advances could be used solely to meet production costs specified in the costs schedule (and for no other purposes); and

(b) the Vintage companies were prohibited from lending money to any other person without Orakei's prior written consent.

But that was not the way things were then done.

[30] The advances from Orakei were not paid out from the nominated bank account as qualifying costs were incurred. Instead, almost all of the combined $1.5 million loan funds were transferred immediately[7] from the Vintage companies to the bank accounts of Matakana and Goldridge. These payments were effectively unsecured advances by the Vintage companies to Matakana and Goldridge. They were repaid by deduction, as grapes or juice were invoiced, and winemaking services were performed and charged.

[31] So neither condition (a) nor (b) in [29] above was honoured.

The grapes come to Matakana

[32] The grapes with which we are concerned arrived (either whole or in juice form) at the Matakana Winery in March and April 2009. The growers generally invoiced Matakana or Goldridge on or about the delivery date.

[33] Save in one instance, the growers supplied the grapes under a standard form supply contract. The contract contained a "retention of title" clause. It provided that the entire ownership of the grapes remained vested in the grower until full payment.

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7 On 13 March 2009.

But, consistent with the PPSA,[8] it also provided that the buyer (here Matakana and Goldridge) could sell the grapes, and their product, in the ordinary course of business. In that case ownership would vest in the acquiring customer. The proceeds, however, were still to belong to the growers. The grower supply contract also provided that the growers' rights would not be affected if the goods were mixed with other goods by Matakana or Goldridge. If inseparable, the grower was to be "the co-owner of the resultant product in shares that are in proportion to the proportion of the goods in that product".

[34] It is common ground that this retention of title clause gave rise to a purchase money security interest under the Act, but that none of the security interests were registered in time in accordance with the Act.

The Vintage companies are invoiced for the grapes

[35] The grower invoices to Matakana or Goldridge are all dated between February and May 2009. Matakana and Goldridge then generated back-to-back invoices for identical amounts to the Vintage companies. Apart from one invoice, all were dated 19 May 2005.[9] By the date of the invoices, all grapes the subject of the Vintage invoices had been converted to juice. The juice was stored in vessels by Matakana.

[36] The invoices to the Vintage companies are, on their face, either for specified tonnages of grapes or else simply refer to the underlying grower invoice. The transaction was described by Mr Vegar in his affidavit for the defendants, in these terms:

> Matakana and Goldridge purchased grapes/juice from a variety of growers. After pressing the juice was all put into tanks for processing into wine. After the juice was in the tanks Matakana and Goldridge invoiced Vintage for the costs of the grapes/juice. This wine was then stored as bulk wine until such time that it was bottled for resale. Vintage was billed for processing costs at the time the wine was bottled.

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8 Section 53.

9 The other invoice was dated 20 May 2009.

It is common ground that at no point did the Vintage companies take physical possession of the juice.

[37] A critical question arising in the case is whether the effect of the dealings between Matakana and Goldridge on the one hand, and the Vintage companies on the other, was to transfer property in the juice to the Vintage companies.

Winemaking process

[38] The juice must of course be converted into wine. The process is described by Mr Robson, the winemaker, in these terms:

> Grapes are harvested by hand or by a mechanical grape harvester. The grapes are crushed and pressed, and different fractions of juice from the pressing are sent to different tanks called the free run juice and pressings juice. At this stage blending can and does occur depending on the final wine product that those grapes are designated for and the flavour profiles that those juices are exhibiting. As juice; during fermentation; and as wine additions may be made in the form of yeast for fermentation; acid; finings for clarity and bitterness removal; preservative and anti oxidants for preservation and protection.
>
> The wine making process can take from 2 months to 2 years and longer depending on the style of wine being produced and the level of quality.
>
> Matakana has a number of labels that it sells wine under. For each label 2 or more batches of wine from different grower origins may be blended together to make the final wine.

Status at 19/20 May 2009

[39] Despite blending, it remains possible to trace where any particular consignment of juice is now held, and where it has been blended. Mr Robson explains:

> Despite the various juices/wines being mixed, I can identify which juice came from which grower's grapes, whether they are stored in bulk or bottled form. This identification process is possible, as a result of the EziWine computer program that we use. This program allows me to follow the 'route' of the grapes or juice, for auditing purposes, and to ensure that I can identify how much of each growers grapes or juice, is in each tank. This is a requirement under the Wine Act 2003, for which we are audited annually.

[40] As noted at [4], the parties provided further evidence to the Court on 5 August 2011. What they provided was a spreadsheet. It records the total litres of wine stock held by Matakana on 19/20 May 2009. Those of course were the dates of the invoices to the vintage companies. The spreadsheet is based on the Matakana EziWine record system. It is accepted by both parties to be an accurate statement of the wine stockholding. I use the expression "wine stock" here, because some of the product may still have been unfermented juice; the rest would have gone some way further in the winemaking process.

[41] What is helpful is that the EziWine records demonstrate that by and large the juice invoiced to the Vintage companies was still held separately from other wine stock held by Matakana. As at 19/20 May 2009:[10]

(a) Matakana held 503,611 litres of wine stock from grapes and juice purchased from 11 different growers.

(b) 400,933 litres of this wine stock was invoiced to the Vintage companies on 19/20 May 2009.

(c) The remaining 102,678 litres was *not* invoiced to the Vintage companies.

(d) Of the 400,933 litres of Vintage invoiced wine stock, 291,488 litres (or 73 per cent) had not been mixed or blended with any other wine stock. That is, with (1) wine stock belonging to Matakana, or (2) with any other wine stock invoiced to Vintage.

(e) 75,764 litres of wine stock invoiced to Vintage had been intermixed (i.e. across invoiced consignments). It was not yet commingled with Matakana wine stock. So that blended wine stock can be added to the 291,488 litres of unblended stock, to produce a total of 367,252 litres of unblended and blended wine stock invoiced to Vintage companies.

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10 The dates the Vintage companies were invoiced for the grapes and juice.

(f) Just 33,681 litres of the wine stock invoiced to the Vintage companies had been commingled with Matakana wine. That wine stock was contained in six vessels. In two cases the proportion of Matakana wine blended with Vintage was relatively low: 1.88 per cent in one instance, and 15.16 per cent in the other.

[42] The above information can also be set out in a different fashion,[11] again, as at 19/20 May 2009:

Varietal	Vintage Company	What stock invoiced to Vintage Companies?	Any stock mixed with Matakana?
Pinot noir	A	All stock held (69,232 litres) invoiced to Vintage A.	No
Cabernet franc	A	All stock held (8,825 litres) invoiced to Vintage A.	No
Chardonnay	A	Split. Some vessels Vintage A-invoiced stocks (49,275 litres), some Matakana.	One vessel, containing 3,400 litres, was mixed: Vintage A-invoiced stocks accounted for 648 litres (19.06%).
Merlot	A	Split. Some vessels Vintage A-invoiced stocks (36,566 litres), some Matakana.	One small vessel, containing 225 litres, was mixed: Vintage A-invoiced stocks accounted for 175 litres (77.78%).
Sauvignon blanc	B	Almost the entirety of the sauvignon blanc stocks (193,104 litres) had been invoiced to Vintage B.	One vessel, containing 13,201 litres, was mixed: Vintage B-invoiced stocks accounted for 11,200 litres (or 84.84%).
Pinot gris	B	The pinot gris wine stock was the other way around: there was a single vessel containing 10,250 litres of unblended pinot gris that had been invoiced to Vintage B. Apart from the blended stock (see right), the rest of the pinot gris wine stock was clearly Matakana's.	Three large vessels containing blended pinot gris (of which the Vintage proportions were 98.12% (15,700 litres), 26.45% (2,835 litres) and 14.83% (3,123 litres).

[11] See also the table at [90] depicting juice invoiced to Vintage companies which had already been mixed with Matakana stocks.

Insolvency: 21 November 2010

[43] Matakana and Goldridge were placed into liquidation on 21 November 2010, by resolution of their shareholders. The second defendants were appointed liquidators. Their initial report on Matakana explains the background to its insolvency:

> The business experienced a rapid growth in volumes of wine being produced particularly for the Goldridge label. The rapid growth placed the company's working capital funding under pressure. The current oversupply of wine in the industry has caused wine selling prices to drop significantly putting the company's margins under further pressure. After exhausting their personal sources of equity the directors engaged in a specialist to assist them in finding an equity investor to recapitalise the business. When negotiations of the last investor failed the shareholders resolved to liquidate the company. The two associated companies Goldridge Estate Ltd and Green Bay Ltd were also placed into liquidation at the same time.

[44] The Vintage companies were then placed in receivership on 9 December 2010. By that stage Matakana's liquidators had taken possession of the premises, and all equipment, raw materials and wine stock stored there.

[45] The receivers took the view that some of the wine stock was the property of the Vintage companies, and subject to Orakei/Aorangi's security interests. So on 13 December 2010 the receivers sent a letter to the liquidators. On behalf of his fellow receiver, Mr van Delden wrote:

> I understand that certain property held by you belongs to these companies (ie Vintage) and I shall be pleased if you will confirm that the property is held by you to my order, and that no action in relation to it will be taken without my prior consent.

[46] The liquidators demurred. They said the wine stock was the property of Matakana. And that the Vintage companies were merely unsecured creditors of the now liquidated companies.

[47] These proceedings followed.

Claim and pleadings

[48] Aorangi is entitled under its security to possession of the Vintage companies' property on default. There being default, it claims that its security interest attaches to the wine stock, (as at the date of liquidation), continues thereafter, entitles it to possession and extends to any proceeds of sale of such stock. Aorangi pleads that it made demand (on 28 February 2011) for an accounting and delivery of the wine stock and proceeds, but that the liquidators declined to do so. As a result, Aorangi pleads "by their actions, Matakana and the liquidators have converted the property of Aorangi". Aorangi seeks orders that Matakana and the liquidators "deliver up the wine stock and its proceeds in their power or possession" and for an inquiry into damages.

[49] The defendants deny that Aorangi has any secured interest in the wine stock at all, or that they have converted Aorangi's property. They admit demand for delivery, and their non-compliance therewith.

[50] The plaintiffs plead in the alternative that the wine is the property of the Vintage companies, and that the defendants have converted that property. The defendants deny this and plead that the Vintage companies are, at most, unsecured creditors in the liquidation.

[51] The first plaintiffs no longer pursue their claims in the proceeding. They too were funders of the Vintage companies. Although not pursuing their claims, no formal discontinuance by the first plaintiffs was filed.

Issues

[52] The following issues arise:

(a) Issue 1: What wine stock did the Vintage companies own on 19/20 May 2009 (the alleged dates of sale)?

(b) Issue 2: What wine did the Vintage companies own on Matakana's liquidation?[12]

(c) Issue 3: What security rights did Aorangi have on liquidation (and were they converted)?

(d) Issue 4: If the plaintiffs succeed, what remedies should be ordered?

[53] A number of issues fell away during the course of the trial. Two in particular may be mentioned.

[54] First, a counterclaim by Matakana to a possessory lien over the wine stock. It arose from fees claimed by Matakana for work allegedly done in relation to the wine stock. In closing, Mr John Bierre (who appeared for the liquidators) accepted that the possessory lien claim had to fall away. Certainly the basis for computation of the fees was not clear on the evidence. But even more fundamentally, a possessory lien can only be asserted over retained goods in relation to which the holder has performed services and has not been paid.[13] The fees claimed by Matakana related to stock already sold, rather than to the retained wine stock.

[55] Secondly, an affirmative defence – consent to dealing – also fell away. The alleged consent arose from a meeting that occurred on 5 May 2011. At that stage an application for interim injunction had been lodged by the plaintiffs. The meeting followed the application. Ultimately the defendants accepted that they could not rely on the events at that meeting, covered as they were by "without prejudice" privilege. The relevant conversion, if it occurred at all, occurred as from liquidation in October 2010. Whatever was agreed to in May 2011 (and it is far from clear what was) did not ratify any prior conversion. The affirmative defence was abandoned.

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[12] 21 November 2010.

[13] *Leeward Holdings Ltd v Douglas* [1982] 2 NZLR 532 (HC) at 537.

Issue One: What wine stock did the Vintage companies own on 19/20 May 2009?

[56] The parties' theories of ownership end up at the same point. As they have to. It is clear that under the supply agreements the Vintage companies of necessity must come to own the bottled wine that they sell under those agreements to Goldridge. But the parties reach that common point from opposing theories.

[57] The disagreement concerns *when* the wine (or wine stock) is sold to the Vintage companies.

Submissions

[58] The plaintiffs say the Vintage companies gained property in the wine stock (i.e. juice) when they paid for it on 19/20 May 2009. To the extent, then, that other wine stock belonging to Matakana was mixed with it (or, as in a few cases, the vessels were already mixed as at 19/20 May 2009) the Vintage companies say that the ownership is as tenants in common, relying on the decision of the Court of Appeal in *Coleman v Harvey*.[14] The plaintiffs submit:

(a) the juice was sold pursuant to contracts for the sale of goods; they gained title on 19/20 May when invoiced (and paid by deduction from current inter-company indebtedness);

(b) at the time of sale (on 19/20 May) the goods were ascertained. This was "clearly" the case where the juice was unmixed as at those dates. Mixture thereafter does not affect the analysis. Where *pre*-mixed, "the end result should be the same ... [W]hat they sold under the contracts for the sale of goods must have been part ownership, in common, of the total mixture of the grapes and juice contained in the relevant tanks";[15]

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[14] [1989] 1 NZLR 723 (CA).

[15] Relying on *Marson v Short* (1835) 2 Bing NC 118, 132 ER 47 (Ct CP) and *Cochrane v Moore* (1890) 25 QBD 57 (CA).

(c) intermixture of the juice with other Matakana-owned stock meant that the Vintage companies became co-owners in common (with Matakana) of the resulting blended wine stock;

(d) to the extent the wine stock was owned by the Vintage companies, Matakana (who possessed it throughout) was bailee; and

(e) the processing of the wine stock by Matakana (including the addition of additives such as yeast and preservatives) did not deny extant property rights. Rather, the subordinate components "vested in the Vintage companies as co-owners by accession".[16]

[59] The defendants, on the other hand, say that in effect the payments made by the Vintage companies for grape and juice at the outset (plus final payments made at the end) were progress payments towards a finished product. There was no sale of juice to the Vintage companies on 19/20 May 2009. The defendants submit:

(a) properly construed, the contracts were for the sale of finished wine, not components. Property only passed when the wine was finished and bottled stock was allocated to meet the Vintage companies' obligations to Goldridge under the supply agreements;

(b) if Matakana thereafter failed to provide the bottled wine, the remedy was for the Vintage companies to apply for specific performance or claim damages for breach. But "it is not a right to possess the ingredients for which they have paid";

(c) the grapes (or juice) were not ascertained goods as at 19/20 May 2009. "Vintage was simply a passive recipient of what Matakana chose to purchase to fulfil its contract with Goldridge." No appropriation of the grapes took place; appropriation only occurred when specific bottles of finished wine were allocated (by Matakana) to meet Vintage companies' supply obligations to Goldridge;

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16 Relying on Bridge (ed) *Benjamin's Sale of Goods* (8th ed, Sweet & Maxwell, London, 2010) at [1-060] and *Jones v De Marchant* (1916) 28 DLR 56 (CA Man).

(d) while some vessels were filled only with juice invoiced to Vintage companies, that was "a matter of complete coincidence and not a matter of plan";

(e) the issuing of invoices (and payment) did not signify the passing of title. The defendants contrasted *Re Goldcorp Exchange Ltd*[17] where neither invoicing nor payment aided the claimants;

(f) while the EziWine system identified source, that was not to be confused with ownership. That merely served an ultimate accounting function, so it could be known "exactly how much Vintage wine is in each bottle". The fact that the winemaker, Mr Robson, was indifferent as to source in making his wine suggested the wine stock was the property of Matakana until final allocation of bottles for sale to Goldridge; and

(g) there was no intention to enter co-ownership arrangements (contrasting *Coleman v Harvey*).[18]

Analysis

[60] This issue in turn depends on two sub-issues:

(a) Were the arrangements between the parties *sales* of juice?

(b) If so, when did property pass?

Sales of juice?

[61] The plaintiffs' case is based on the proposition that the juice invoiced to the Vintage companies on 19 and 20 May 2009 constituted "goods" and were thereby sold on those dates to those companies. As to the first, there can be no doubt. Water,

17 [1994] 3 NZLR 385 (PC).
18 [1989] 1 NZLR 723 (CA).

for instance, has been held to be "goods" for the purposes of the Sale of Goods Act 1908.[19] The more difficult question is whether the juice was sold.

[62] Section 3(1) of the Act provides:

> **3 Sale and agreement to sell**
>
> (1) A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called "the price".

The essence of sale is the transfer of property. Where the contract has the effect of passing property, it is a sale.[20] Where transfer remains conditional (dependent on the passage of time, payment or some other event) the contract is an agreement to sell.[21] As in any contract, intention is fundamental. But also, as in any contract, the law supplies a series of objective principles to govern the position where the parties have not made themselves clear. In the case of sales of goods, these principles are primarily statutory in nature. Parliament saw fit to express these principles first in 1895[22] following passage of similar legislation in the United Kingdom in 1893. That legislation was expressed to be a code. The purpose of settling principles in this way was to create rules of common application. These rules are calculated to diminish uncertainty as to whether property in particular goods has, or has not passed where the parties' contract has not made the matter clear. The rules are robust. They are designed to be able to be relied upon by contracting and third parties alike.

[63] It is unfortunate the arrangements between Matakana, Goldridge and the Vintage companies were not reduced to writing. As I have noted[23] there clearly is some form of agreement governing the winemaking process, as between Matakana and the Vintage companies. The supply agreements with Goldridge only deal with the end of that process. The Court must, therefore, draw inferences from the parties' conduct at the time of their dealings. It may also refer to later conduct between them to the extent admissible to shed light on the terms of their transaction.

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19 *Hamilton v Papakura District Council* [2000] 1 NZLR 265 (CA).
20 See e.g. s 3(4) and (5) of the Act.
21 S 3(4).
22 The Sale of Goods Act 1895 (NZ).
23 At [22].

[64] We have to start with the obvious and undenied fact that the Vintage companies were to own the wine at some point. They had agreed to sell it to Goldridge in the supply agreement. If the defendants are right, their ownership tenure would have been very brief. It would commence only when the bottles (for which the Vintage companies were to receive credit) were appropriated for sale to Goldridge, right at the end of the winemaking process. The Vintage companies would never take possession. But that prospect is common to the theories of all parties.

[65] We also need to recognise that the grapes and juice were sold to Matakana (or Goldridge) by the growers. As we have noted already,[24] the grower contracts reserved title until payment in full. But they also permitted sales of grapes or juice by Matakana (or Goldridge) in the ordinary course of business. In that case title would pass to the buyer, but (pending payment in full) the proceeds were to belong to the grower. So Matakana and Goldridge were certainly capable of conveying property in the juice as at 19/20 May 2009.

[66] Next, it is necessary to examine the invoices. On their face they command payment in exchange for goods – being for the most part specified tonnages of grapes that had been supplied to Matakana or Goldridge by their growers. In one case (which we may put to one side) the invoice relates to services – picking costs – paid to the grower. But the rest are for grapes (by then, juice), either in specified tonnages or identified by cross-reference to prior grower invoices. They are not expressed to be anything other than they appear to be. They are not, for instance, expressed to be financing instalments. Nor are they expressed to be progress payments for bottled wine to be sold and supplied later. On the face of things they are invoices for goods being purchased by the Vintage companies. Just as they were when (expressed in similar form) they were issued by the growers to Matakana and Goldridge.

[67] The question begged by the invoices is whether good reason exists to infer that they are *not* evidence of what they appear to show: a transaction for the sale of

[24] At [33].

grapes (or the juice therefrom), for a price. I do not think there is. In fact, quite the contrary.

[68] The key purpose underlying the formation of the Vintage companies, and their participation in the winemaking process, was to secure funding. That was on the basis that effective security would be given. But for that security, the funds would not have flowed. Without Orakei's funds, the growers' grapes could not be paid for. The general security deed is expansive in effect, granting Orakei a security interest over the whole of the Vintage companies' interest, inter alia, in any personal property acquired by them.[25]

[69] If the defendants' argument is correct, little effective security would have been given in exchange for the funds. Ownership in the grapes, juice and wine stock would have been postponed to the very last moment when Matakana finally set about allocating bottled stock notionally to the Vintage companies, to enable them to meet their supply obligations to Goldridge. Throughout the period leading up to that moment, the Vintage companies' ownership interests would have been postponed – and Orakei[26] would have been without effective security. I cannot conceive that that is what the Vintage companies and Orakei thought they were doing, or what they would have agreed to do. And if that is the case, then nor is it what the Vintage companies, Matakana and Goldridge must be taken to have agreed in the unwritten agreement governing the payments made by the former to the latter circa 19/20 May 2009.

[70] Certainly it is clear enough that Mrs Vegar's lay perspective was that the Vintage companies were *buying* the grapes and juice from the outset. Cross-examined by Mr Greg Blanchard (who appeared for the plaintiffs):

> Q: Do you agree that the money advanced by OSL to the Vintage companies was supposed to be used by it to purchase grapes and juice?

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25 The security interest is a fixed charge, expressed to be in personal property "not acquired for disposal in the ordinary course of [Vintage companies'] business". The defendants' submissions do not suggest that if the property in the wine stock passes to the Vintage companies, this clause does not apply. Indeed their submissions are quite the contrary: second defendants' closing submissions para 10.

26 Now, in effect, Aorangi.

A: Yes I do.

...

Q: So at the beginning the Vintage companies were to buy the grapes and juice, is that correct?

A: Yes.

[71] Mrs Vegar understood that the Vintage companies jointly owned the wine in the vats until the last point at which the wine was bottled:

> Q: All of the wines in Matakana's possession are controlled, but was it your understanding that it was effectively jointly owned by Matakana and the Vintage companies, at least up until the point of bottling?
>
> A: Yep because they paid for the grapes with the invoice yes.

[72] Mrs Vegar is not a lawyer. But she was called by the defendants, and hers is a straightforward account of what she thought the arrangements were. As she was at the time a director of each of Matakana, Goldridge *and* the Vintage companies, what she has to say is significant. Her husband, the other director, shed no different light on the situation. Indeed, he was not asked about it at all. But in his affidavit[27] he observed "if [grapes were] purchased through Goldridge, which was not able to make wine, the grapes was [sic] sold on to Matakana or the Vintage companies." So he and Mrs Vegar seem to have shared the same lay perception of a sale of grapes or juice being made to the Vintage companies.

[73] It is true, as Mr Bierre pointed out, that no tanks were marked specifically for the Vintage companies' use. It is true, too, the winemaker (Mr Robson) used wine stocks available to him, as he thought fit, to make the wine ultimately sold to Goldridge. But that is, at the end of the day, a neutral consideration.

[74] First, the law clearly permits co-ownership of mixed goods, subject to an obligation to account. One such case was *Coleman v Harvey*[28] – a 1989 decision of a New Zealand Court of Appeal comprising Cooke P, Richardson and Somers JJ. Mr Harvey had some 330 kilograms of silver coins. Refined, they could produce

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27 Dated 1 July 2011. It formed the basis of his evidence before the Court at trial.

28 [1989] 1 NZLR 723 (CA).

166 kilograms of fine silver. Mr Coleman owned a small refinery. The two men agreed that Harvey would supply his coins, Coleman would refine them (along with other scrap silver that Coleman owned), and that from the resultant commingled product, Coleman would set aside and hold 166 kilograms for Harvey. The fine silver was produced, but only 49 kilograms had been delivered back to Harvey by the time Coleman's company went into receivership. The rest had been sold by Coleman's company. Harvey sued Coleman personally on the basis that he was liable as a joint tortfeasor with his company for the conversion of his 117 kilograms of silver. The High Court found for Mr Harvey, as did the Court of Appeal. A preliminary issue was whether Mr Harvey had in fact simply sold his coins to Coleman's company.[29] Cooke P did not think so:[30]

> In its first stage the transaction was much more like intermixture. That term and the Roman commixtio, and the distinction between these concepts and confusion, are not drawn altogether uniformly in the textbooks. I adopt the usage in *2 Halsbury's Laws of England* (4th ed) para 1537:
>
> > "**1537. Intermixture of chattels.** Where the chattels of two persons are intermixed by consent or agreement, so that the several portions can no longer be distinguished, the proprietors have an interest in common in proportion to their respective shares."
>
> ...
>
> Until the company performed its contract to appropriate to Mr Harvey specific ingots, he should be treated as having a proprietary interest in any silver to which his coins contributed. Until then he had a share as a co-owner of each ingot in the proportion of his total contribution to the refined silver.

Nor did Somers J:[31]

> The product of the refining process, an admixture of the silver of both, was owned by both; as to 166 kilograms by Mr Harvey, as to the balance by the company. They were co-owners in common in shares proportioned to the silver each contributed.

Ownership in this form was consequential on consensual commingling, rather than necessarily the intended outcome.[32]

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29 So that he was simply an unsecured creditor. The argument for Mr Coleman has certain parallels in the argument for the defendants in this case.

30 [1989] 1 NZLR 723, 725-726.

31 Ibid, 728-729.

32 Cf the defendants' submission at [59(g)] above.

[75] Secondly, the fact that one co-owner is given determinative control (for instance as to use made of the common property, or its sale) does not diminish or delete the more passive co-owners' property right. Such arrangements are not uncommon, for instance in joint ventures. Which, in effect, this was. Indeed the grower contracts with Matakana and Goldridge expressly contemplated the possibility of consequential mixed ownership as between parties to those contracts.[33]

[76] Thirdly, the fact that in this case the EziWine system enabled the parties (and enables this Court now) to "follow" the wine stock as between its contributors suggests that the parties would have been perfectly comfortable throughout with co-ownership. And indeed, that clearly was Mrs Vegar's appreciation of the situation.

[77] For the foregoing reasons, I conclude that the intention of Matakana, Goldridge and the Vintage companies was that the former sell to the latter the juice invoiced to the Vintage companies.

When did property pass?

[78] The essential starting point is s 19 of the Sale of Goods Act 1908:

> **19 Property passes when intended to pass**
>
> (1) Where there is a contract for the sale of specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.
>
> (2) For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties, and the circumstances of the case.

[79] Section 19 (which gives priority to party intention) is however subject to s 18:

> **18 Goods must be ascertained**
>
> Where there is a contract for the sale of unascertained goods, no property in the goods is transferred to the buyer unless and until the goods are ascertained.

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[33] See [33] above.

Section 18 overrides contracting party intention. It is a rule of general mercantile and societal convenience. It recognises the inconvenience that would arise from allowing claims to be advanced in cases where goods, purportedly transferred, in fact remained unascertained.

[80] Section 20 of the Act then provides rules for the ascertainment of intention under s 19. They are subject to contrary contractual provisions. They do not override s 18. The relevant parts of s 20 are as follows:

> **20 Rules for ascertaining intention**
>
> Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer:
>
> Rule 1. Where there is an unconditional contract for the sale of specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery, or both, is postponed.
>
> Rule 2. Where there is a contract for the sale of specified goods, and the seller is bound to do something to the goods for the purpose of putting them into a deliverable state, the property does not pass until such thing is done, and the buyer has notice thereof.
>
> Rule 3. Where there is a contract for the sale of specified goods in a deliverable state, but the seller is bound to weigh, measure, test, or do some other act or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until such act or thing is done, and the buyer has notice thereof.
>
> ...
>
> Rule 5. –
>
> (1) Where there is a contract for the sale of unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be expressed or implied, and may be given either before or after the appropriation is made.
>
> (2) Where, in pursuance of the contract, the seller delivers the goods to the buyer, or to a carrier or other bailee (whether named by the buyer or not) for the purpose of transmission to the buyer, and does not reserve the right of disposal, he is

deemed to have unconditionally appropriated the goods to the contract.

[81] New Zealand does not have the extended rules in the United Kingdom Sale of Goods Act 1979, ss 18(3) and 20A and B, dealing in more detail with unascertained and mixed goods. Section 20A provides that, in certain circumstances, a pre-paying buyer of a specified quantity of unascertained goods in bulk may nonetheless acquire a property interest in that bulk. The result is that the buyer becomes "an owner in common of the bulk". The reform has proved a valuable one in the commodities trade. But it has not been adopted in New Zealand. The result is that difficult issues continue to arise in this jurisdiction as to whether there has been an appropriation where commodities remain in bulk.

[82] In *Re Stapylton Fletcher Ltd*[34] a wine merchant stored stock paid for (but not collected) by customers (in some cases they planned to resell it). The merchant's own stock was rigorously separated from the customers', but one customer's stock was not separated from another's. Good records were kept. The specific entitlement of each customer was known. Just not which particular case was theirs. Judge Baker QC (sitting as a High Court Judge) held that the common intention of the parties was that property pass from the merchant. The end result was that where cases were attributable to more than one customer, they owned them as tenants in common in proportion to contribution. Although the Judge analysed this as a case of contrary intention to the equivalent of the s 20 rules, the facts could perhaps be analysed as an appropriation, followed by mixture.[35]

[83] Contrast, then, the result in *Re Goldcorp Exchange Ltd*[36] where, contrary to representation, bullion which claimants thought they had purchased (and for which they had received a "certificate of ownership") had never been adequately appropriated. Save, that is, in the case of the "Walker & Hall" claimants.[37] In their

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[34] [1994] 1 WLR 1181 (ChD).

[35] Gault (ed) *Gault on Commercial Law* (online looseleaf ed, Brookers) at para 3A.4.03(2)(b). The difficulty with this analysis, however, is that there was never an appropriation of the "customers' bulk" as between the customers. The supposed subsequent "mixture" is therefore something of a fiction. Cf *Re London Wine Co (Shippers) Ltd* [1986] PCC 12 (ChD), discussed at [84] below and in Bridge (ed) *Benjamin's Sale of Goods* (8th ed, Sweet & Maxwell, London, 2010) at [1-108].

[36] [1994] 3 NZLR 385 (PC).

[37] See at 406 – 409.

case there had been separate storage following purchase, with stock kept apart from Goldcorp's own stock, much as in *Re Stapylton.* In the case of those claimants alone, there was:[38]

> ... a sufficient ascertainment and appropriation of goods to the individual contracts to transfer title to each customer; and ... thereafter the customers as a whole had a shared interest in the pooled bullion, which the vendors held on their behalf.

[84] But in the more common case, where there is a purported sale of an unascertained proportion of a bulk consignment, no proprietary interest will pass. That was the fate of the unallocated claimants in *Re Goldcorp Exchange Ltd.* Likewise it was the fate of the wine merchant's customers in *Re London Wine Co (Shippers) Ltd.*[39] There – as in *Goldcorp* – "certificates of title" were issued, recording the customers as "sole and beneficial owner" of certain consignments. But there had been no appropriation of any kind by the vendor from his general stock (unlike in *Re Stapylton*).

[85] It needs also to be noted that in this situation the pre-paying buyer of an unascertained proportion of a bulk consignment gains neither legal nor equitable interest in the goods (or the bulk).[40] As *Benjamin* puts it:[41]

> Attempts to establish an equitable interest by way of trust, lien, assignment or the equitable remedy of specific performance have met with no success. If the goods agreed to be sold form part of an identified bulk, property in an undivided share in the bulk will pass to him if the conditions specified in s 20A(1) of the Act are satisfied; but otherwise the fact that the goods form part of an identified bulk does not confer upon him any equitable rights over the bulk.
>
> ...
>
> As a normal rule, a buyer who has pre-paid the price has no claim in equity to trace the money paid. If the seller becomes insolvent, any claim by him for the return of the purchase price is a personal claim and not a proprietary claim which ranks prior to other unsecured creditors of the seller. He will have pre-paid the price in order to perform his side of the bargain under which he would in due course have been entitled to claim delivery, and the money would have become, and been intended to become, part of the seller's

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38 At 407.

39 [1986] PCC 12(ChD) – but decided in 1975, before the 1979 United Kingdom amendments.

40 *Re Wait* [1927] 1 Ch 606 (CA); *Re Goldcorp Exchange Ltd* [1994] 3 NZLR 385 (PC).

41 Bridge (ed) *Benjamin's Sale of Goods* (8th ed, Sweet & Maxwell, London, 2010) at [5-064]. New Zealand does not, as I noted at [81], have the United Kingdom s 20A amendment.

> general assets. It is not impressed with a trust, nor, as a general rule, can any fiduciary relationship between buyer and seller be extracted from the contract of sale. In *Re Goldcorp Exchange Ltd* the Judicial Committee of the Privy Council rejected the plea that it should create a residual restitutionary right to allow the buyer to assert a proprietary interest over the purchase price paid.

[86] It is necessary in this case to distinguish between juice invoiced to Vintage companies:

(a) that had not been blended at all;

(b) that had simply been blended with other Vintage-invoiced stock; and

(c) that had been blended with Matakana stock:-

in each case as at 19/20 May 2009.

(a) Unblended stock

[87] The first issue the Court must consider is whether the wine stocks the subject of the 19/20 May invoices were specific or unascertained goods. The question whether goods are "specific goods" for the purposes of the Act depends on whether they have been "identified and agreed on". That is, there is a uniquely identifiable subject matter, so that no question of selection or substitution can arise. For example, a sale of "all the crops growing on Blackacre Farm" would meet that requirement, even though the exact volume of product is not yet known.[42] Specific goods can therefore include future goods, so long as no question of selection from a greater pool arises.[43]

[88] In this case no such difficulty arises. In each case the invoices addressed to the Vintage companies related to a delivery of grapes or juice that (1) was a distinct and actual consignment received by Matakana or Goldridge in the first place and (2) remained identifiable at the time of the invoice because they were held in distinct vessels traceable by use of Matakana's EziWine recording system. No question of

42 *Rendell v Turnbull & Co* (1908) 27 NZLR 1067 (SC).
43 Bridge (ed) *Benjamin's Sale of Goods* (8th ed, Sweet & Maxwell, London, 2010) at [1-114].

selection or substitution could, therefore, arise. The fact that the ability to identify may have been "a matter of complete coincidence and not a matter of plan" (as the defendants submitted) does not affect the analysis.

(b) Wine stock already blended with other Vintage wine stock

[89] As we have seen, there were some instances where invoiced consignments were mixed with other wine stock invoiced to a Vintage company. It may be taken that this occurred with the Vintage company's consent. No difficulty arises as to passage of property where there is unity of ownership, even if there is a mingling of consignments. The notion that the mingling of a single purchaser's consignments could somehow preclude the passage of property need only be stated to demonstrate its falsity. The issues here are simply ones of practical convenience, not proprietary conveyance.

(c) Stock already blended with Matakana stock

[90] In a small number of cases some of the invoiced juice had already been blended with other stock belonging to Matakana. This was confined to just six vessels, although two were very large. The wine involved, (and relative proportions) are depicted in the following table:

Varietal	**Vessel**	**Vintage litres**	**Vintage %**	**Matakana %**
Sauvignon Blanc	H1503	11,200	84.84%	15.16%
Chardonnay	F302	648	19.06%	90.94%
Pinot Gris	E2202	3,123	14.83%	85.17%
	H1502	2,835	26.45%	73.55%
Merlot	9114	175	77.78%	22.22%
Pinot Gris	D31	15,700	98.13%	1.88%
Total		**33,681**		

[91] The Vintage companies submit that where the volumes of Matakana wine stock added to the Vintage wine stock were "very low", it:

> ... can reasonably be said that what was sold to the Vintage companies was all of the contents of a vessel containing substantially only the grapes and juice purchased on behalf of the Vintage companies.

[92] I disagree. Although I have found that the intention underlying the contractual arrangement between Matakana, Goldridge and the Vintage companies was that the Vintage companies were to acquire property in wine stocks at the date of invoice, that was not possible in relation to mixed wine stocks where there was no unity of ownership.

[93] The problem here is simply one of ascertainment and appropriation. The relevant comparisons are with *London Wines* and *Goldcorp*[44], not *Stapylton.* The wine in the vessels tabulated above was, at the relevant date, all the property of the vendor – Matakana. To sell part of it, selection (and separation) was necessary, so as to ascertain the relevant "goods" being transferred.[45] A contract for the transfer of an undivided share in unascertained goods does not, in New Zealand, convey property in those goods.[46]

[94] Section 18 prevents passage of property of unascertained goods until they have become ascertained. As noted[47] it is a rule of general convenience. Distinct appropriation is required, even where goods are "quasi-specific" – i.e. form part of an identifiable larger bulk.[48] The point was emphasised by the Privy Council in *Re Goldcorp*[49] when Lord Mustill said:

> ... common sense dictates that the buyer cannot acquire title until it is known to what goods the title relates. ... It makes no difference what the parties intended if what they intend is impossible: as is the case with an immediate transfer of title to goods whose identity is not yet known.

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44 That is, to the unallocated claimants in *Goldcorp.*

45 Bridge (ed) *Benjamin's Sale of Goods* (8th ed, Sweet & Maxwell, London, 2010) at [5-110].

46 Bridge (ed) *Benjamin's Sale of Goods* (8th ed, Sweet & Maxwell, London, 2010) at [1-081]; *Re Sugar Properties (Derisley Wood) Ltd* (1987) 3 BCC 88.

47 At [79].

48 Gault (ed) *Gault on Commercial Law* (online looseleaf ed, Brookers) at para 3A.4.01(2).

49 *Re Goldcorp Exchange Ltd* [1994] 3 NZLR 385 at 393.

[95] *Marson v Short*,[50] on which the plaintiffs placed some reliance, concerns the distinct and different issue of transfer of an undivided interest in goods (there, a half share in a horse) where the whole is always intended to continue to be jointly owned. Indeed, in the case of a live creature, there is no other option.[51] In such a case division and appropriation is neither intended nor possible. There is of course no doubt that a horse, a car or an aircraft (for instance) may be owned jointly. But where what is intended is separate property, which the purchaser is free to deal with as it wishes, the rule in s 18 continues to apply. In that case property in mixed bulk is retained by the vendor until the purchaser's interest has been ascertained.

Conclusion

[96] I therefore conclude that to the extent the invoiced wine stocks on 19/20 May 2009:

(a) remained distinctly identifiable in separate vessels; or

(b) had been blended, but the blending comprised only stock being purchased by that Vintage company:

property in those wine stocks passed to the Vintage companies no later than the date of invoice.

Issue Two: What wine did the Vintage companies own on Matakana's liquidation?

[97] From the analysis consideration in Issue One, it becomes possible to answer this issue succinctly:

(a) The Vintage companies remained sole owners of any of the wine sold to them on 19/20 May 2009 that had not yet been commingled with Matakana wine stock.

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50 (1835) 2 Bing NC 118, 132 ER 47 (Ct CP). Similarly *Cochrane v Moore* (1890) 25 QBD 57 (CA).

51 1 Kings 3 : 16 – 28.

(b) Where the Vintage company wine stock had, after 19/20 May 2009, been commingled with Matakana wine stock, it owned the joint product as tenant in common with Matakana, in proportion to the relative contributions of each to the joint product. The respective proportions are readily capable of calculation using the EziWine system.

[98] I have not received submissions on the effect of the non-wine stock additives introduced by Matakana in the winemaking process. I would have thought that:

(a) if paid for (or to be paid for) by the Vintage companies, they would be credited to their contribution;

(b) if paid for by Matakana, would be credited to its contribution.

However, I will reserve leave for the parties to address submissions on this or any other issue[52] directly consequential to the delivery of this judgment, to the extent necessary to carry this judgment into effect.

Issue Three: What security rights did Aorangi have on Matakana's liquidation (and were they converted)?

Submissions

[99] It is common ground that Aorangi's security interest must include any wine stock owned by the Vintage companies. The defendants accept that the effect of s 82 of the PPSA is that if collateral has become commingled with other goods owned by Matakana, the security interest continues in the combined product. Section 84 limits the extent of the security interest to the value of the secured component at the time of commingling.

[100] The defendants submit however that the effect of ss 82 – 84 is to "change the nature of the interest that Aorangi has to one of a chose in action". Mr Shane Kilian

52 For instance, the position as to proceeds of sale, and recompense for services improving the Vintage companies' wine stock.

(who argued this part of the case for the defendants) submitted that Aorangi has only a security interest over:

> ... the Vintage companies' contractual rights to call upon Matakana to process and deliver the requisite number of bottled wine/wines to Goldridge in pursuance of the supply agreements, and ultimately for the proceeds of sale thereof.

Because these rights are choses in action, say the defendants, there can be no conversion as against Aorangi. They rely on a House of Lords decision in *OBG Ltd v Allan*.[53] The defendants submit that "Lord Nicholls held that, at paragraph 222, 'Conversion applies to choses in possession, not choses in action'".

[101] The defendants also submit that Aorangi's rights are subordinated to prior security interests. In particular, to the unperfected interests of growers and a prior security interest of ANZ National Bank Ltd. ANZ National appears to be a creditor of Matakana. The nature of its interest was not the subject of any illuminating evidence. It received brief reference in the second affidavit of Mr Noyce, one of the liquidators. However, it is apparent from the liquidator's report that a number of Matakana's creditors, including ANZ National, had secured interests under general security agreements.

[102] The essential point advanced by the defendants is that s 53 of the PPSA should not apply. It provides that goods sold in the ordinary course of business are conveyed free of registered security interests, unless the buyer is aware that the sale is in breach of the security agreement under which the interest was created. The defendants submit that Matakana's ordinary course of business was the *purchase* of grapes and juice, and the production and selling of wine. The *sale* of grapes and juice, on the other hand, was not part of its ordinary course of business. They rely, also, on the fact that the Vintage companies were directed by the same people, Mr and Mrs Vegar, who created the security interests given by Matakana. So the Vintage companies knew exactly what Matakana's business, and securities, were.

[103] Aorangi demurs. It says its rights attached to wine stock (whether or not commingled), on the basis that the Vintage companies were (as I have now found)

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[53] *OBG Ltd v Allan* [2008] 1 AC 1 (HL).

tenants in common in the commingled stock.[54] Aorangi holds general securities over the assets of each of the Vintage companies. These attached to their wine stock, and continued in the commingled wine stock.[55] By selling the wine stock subject to Aorangi's security interest without its consent, the defendants committed conversion.[56]

[104] As far as the growers go, Aorangi submitted that had they perfected their securities, the Vintage companies would still have acquired the juice free of their securities, under s 53. Aorangi submits that sale of juice by Matakana and Goldridge was in the ordinary course of their business. It relies in particular on the decision of the Court of Appeal in *Tubbs v Ruby 2005 Ltd*.[57] Aorangi submits that it had been the practice of Matakana and Goldridge to sell grapes and juice to the Vintage companies since 2001. Accordingly those sales should be considered to be in the ordinary course of their businesses.

Analysis

[105] I have found that the Vintage companies acquired property interests in the wine stock sold to them on 19/20 May 2009, to the extent that they constituted specific goods. Thereafter those goods were commingled, the principle in *Coleman v Harvey* applied and the Vintage companies' property interests were not lost. They continued as tenants in common, in proportion to contribution. The factual position, and extent of contribution, can (as Mr Robson confirmed in evidence) readily be ascertained at any point because of the EziWine recording system. It follows that I accept Aorangi's submissions in [103].

[106] I also accept Aorangi's submissions that, on passage of property in the juice to the Vintage companies on 19/20 May 2009, Aorangi acquired security interests in that juice – and thereafter in the commingled stock. By s 82 of the PPSA, those security interests continued as the wine stock secured was blended with other stock,

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54 Other than stock commingled before 19/20 May 2009: [90] – [95].

55 In accordance with ss 82 – 85 of the PPSA.

56 Relying on *Dunphy v Sleepyhead Manufacturing Co Ltd* [2007] NZCA 241, [2007] 3 NZLR 602.

57 *Tubbs v Ruby 2005 Ltd* [2010] NZCA 353, (2010) 9 NZBLC 103,151 at [33] – [36].

or with additives introduced in the usual course of the winemaking process. The priority is subject to a maximum limit in accordance with s 84. But the underlying property values may still rise or fall, in the ordinary way that market values change.

[107] For reasons given in [90] – [95], however, Aorangi obtained no security interest in juice (and subsequent wine stock) commingled *in advance* of sale with stock belonging to Matakana.

[108] I accept Aorangi's submission in [104] that the juice was sold to the Vintage companies in the ordinary course of business of Matakana and Goldridge. As Mr Blanchard said, these arrangements have been in place since 2001. Sales have been made in this way, each year, to each Vintage company, since then. The grower contracts (entered annually) were with Matakana and Goldridge. In effect they acquired grapes and juice as intermediaries for the Vintage companies. The arrangement could as easily have been restructured, so the Vintage companies bought direct from the growers. It is noteworthy that the grower contracts provided that Matakana and Goldridge could resell grapes before payment in full.[58] The reality is that, but for the arrangements whereby the Vintage companies acquired the juice from Matakana and Goldridge, Matakana and Goldridge would never have obtained the grapes in the first place.

[109] There is no violence done here to the interests of other secured creditors. The course of transactions since 2001 have served their interests, as well as those of Matakana and Goldridge. But for the transactions with the Vintage companies, the injection of cash from those companies would not have occurred. Moreover, to state the obvious, the sales were at market value (the same price paid by Matakana and Goldridge in the first place).

[110] The fact that the buyer and seller were related is a neutral consideration. Obviously it calls for inquiry as to value, and payment, but no issue arises on either score in this case. Likewise, it means there is a greater possibility that the buyer will know the terms of the seller's security agreement. There is a greater prospect of knowledge of breach of that agreement. In the present case, the parties' knowledge

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[58] Notwithstanding the growers' reservation of title: see [33] above.

was probably co-extensive, as they had the same directors. But there is no basis in the evidence to infer breach of any third party security agreement for these sales. The defendants led no evidence to that effect. As I have said, taken in their full context, these transactions clearly worked to the benefit of Matakana and Goldridge's general creditors.

[111] *Orix New Zealand Ltd v Milne*,[59] relied upon by the defendants, does not assist them. It establishes a useful general approach to be taken in evaluating whether sales under the PPSA are in the ordinary course of business. But the facts in *Orix* are not a near analogue to those in this. Rodney Hansen J noted that the fact sales were made infrequently, and formed only a small part of the debtor's business, did not affect his conclusion that the sales there were in the ordinary course of business. The particular transaction "did not greatly affect the nature of Comquip's business", and in fact it continued to hold itself out as selling the equipment concerned.[60]

[112] *Tubbs v Ruby 2005 Ltd*[61] is more analogous. A company, Waimate, was incorporated to mill logs brought from forests in the Canterbury area. It struggled financially. Four years later an associated company, Ruby, was incorporated to ease Waimate's financial condition. There was a common shareholding and directorship. The case is relatively comparable to the present case. Timber sales were made by Waimate to its associate purely to assist its financing position. The sales by Waimate to Ruby were at market value. They occurred as and when Waimate required, in order to achieve target sales results. Ruby had no staff of its own. The entire exercise was undertaken on its behalf by Waimate. The transactions fell into two categories. First, routine transactions effecting the arrangement just described. These occurred from 2005 to 2008. Secondly, a special transaction in 2009. It was not paid for in cash, but by deduction. And it was done in order to meet a debt that had occurred between the two companies as a result of Waimate's management unlawfully selling some of Ruby's timber stocks without authority.[62]

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[59] *Orix New Zealand Ltd v Milne* [2007] 3 NZLR 637 (HC).
[60] At [68].
[61] *Tubbs v Ruby 2005 Ltd* [2010] NZCA 353, (2010) 9 NZBLC 103,051 (CA).
[62] Making Ruby an unsecured creditor of Waimate.

[113] The Court of Appeal said of the 2005–2008 transactions (which are those analogous to the juice sales here):[63]

> The "business of the seller", Waimate, was to sell timber. Between 2005 and 2008, Waimate sold Ruby timber, for cash, at full market value. The practical effect of these transactions was that Waimate sold its timber earlier than it would otherwise have done. This was wholly in the interests of Waimate and its creditors; the transactions removed Waimate's inventory from the reach of the Bank's security, but replaced that inventory with cash. The fact these sales were to a related party is here immaterial. There was no suggestion there was otherwise a breach of the security agreement. In these circumstances, the receivers cannot realistically impugn the sales between 2005 and 2008.

The reasoning is directly applicable to the transactions in this case. Ultimately, when the matter returned to the High Court, Chisholm J held that the 2009 transaction was also in the ordinary course of Waimate's business. He said:[64]

> ... the word "sale" [in s 53] should be given a liberal interpretation in recognition of the multiple ways in which commerce is transacted.

[114] For completeness, I say something about *OBG Ltd v Allan*.[65] This omnibus House of Lords decision concerned a number of separate intentional tort proceedings. The decision is better known for another case wrapped within it, *Douglas v Hello! Ltd (No. 3)*, the case concerning the privacy interests of Mr Michael Douglas and Ms Catherine Zeta-Jones in their wedding photographs. However, far away from Hollywood, top billing in the House of Lords was given to an action between a civil engineering company and some chartered accountants who had been appointed its receivers. Invalidly as it later transpired. The engineering company's main customer, North West Water, treated the receivership as an event of default and terminated its contracts. The receivers, exercising their apparent powers, terminated other contracts themselves, and settled claims under existing contracts, including claims and counterclaims with North West Water. As a matter of fact it was found they did so less efficiently than the plaintiff or its later liquidators would have done. The resultant losses were claimed, in part, on the basis that the receivers had converted the plaintiff's assets and undertakings – including its contractual

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63 At [36].
64 [2011] 3 NZLR 551 at [60].
65 [2008] 1 AC 1 (HL).

rights. The receivers defended on the basis that contractual rights, as choses in action, could not be converted.

[115] I simply note three things. First, the decision is a split one; three of the Law Lords found that contractual rights were not capable of conversion; two found contra. Secondly, one of those contra was Lord Nicholls. Contrary to the defendants' submissions in this case, His Lordship did *not* hold that "conversion applies to choses in possession, not choses in action." That quotation was simply an encapsulation of the receivers' argument. But Lord Nicholls did not agree with that argument. What Lord Nicholls in fact said was:[66]

> The better approach today is to discard the fictional significance of a piece of paper. Instead one should seek to identify the common characteristic of the intangible rights in respect of whose misappropriation English law, as a matter of reality, already provides the remedy of conversion. The common characteristic, it seems to me, is that the rights protected in this way are contractual rights. No principled reason is apparent for attempting, for this purpose, to distinguish between different kinds of contractual rights.
>
> The time has surely come to recognise this and, additionally, to recognise that the tort of conversion applies to contractual rights irrespective of whether they are embodied or recorded in writing. I would so hold. This would be a modest but principled extension of the scope of the tort of conversion. It would rid the law of an artificial limitation derived from the limited scope of an enabling legal fiction.
>
> Whether the law on conversion should extend beyond contractual rights and embrace other forms of intangibles is not a matter to be pursued on this occasion. This further step has been taken elsewhere in some parts of the common law world. But other forms of intangible rights, such as intellectual property, raise problems of their own. These problems are best considered when they arise.

But Lord Nicholls was in the minority. Thirdly, this aspect of the *OBG* decision is yet to be considered in New Zealand by any Court.[67] For the reason I am about to give, I do not intend to embark on that exercise here.

[116] The short point is that the question of whether choses in action can be converted does not arise here. I have held that Aorangi's security interest attaches to actual and continuing property rights in the Vintage companies' wine stocks, and

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66 *OBG Ltd v Allan* at [232] – [233] and [237].

67 See the discussion of the decision in Todd (ed), *Law of Torts in New Zealand* (5th ed, Brookers, Wellington, 2009) at [12.1].

continues post-commingling with Matakana wine stock after 19/20 May 2009. But the Vintage companies gain no property rights at all (including equitable rights) in stocks pre-commingled with Matakana stock.

Conclusion

[117] I conclude Aorangi held a secured interest in the original and commingled wine stock to the extent that the Vintage companies acquired title to the stock. By dealing with the stock in disregard of those interests, the liquidators committed conversion.

Issue Four: If the plaintiffs succeed, what remedies should be ordered?

[118] I have found that part (but not all) of the wine stock sold by Matakana and Goldridge to the Vintage companies in May 2009 became and remained the property of the Vintage companies. It follows that, to the extent it remained (regardless of commingling) in Matakana's possession at the date of its liquidation in November 2010, Matakana's liquidators were required to deal with it in accordance with the directions of the Vintage companies (and, following their appointment by Aorangi, the receivers).

[119] However, the extent of stock remaining, which stock it was, and the apportionment as between the Vintage companies and Matakana was not the subject of detailed evidence before me. That evidence (as counsel for the defendants correctly point out in their 16 September 2011 submissions) was very much focused on status as at 19/20 May 2009, some 18 months earlier. Despite that fact, the relevant volumes and necessary apportionments should not be a difficult exercise using the EziWine accounting system. That system has provided a clear picture of the position as at 19/20 May 2009. No one has suggested to me that it cannot do so again for 21 November 2010, the date of liquidation.

[120] I will therefore make orders declaratory as to liability, but hear further from the parties on what other remedial orders should be granted to carry this judgment

into effect and resolve any remaining issues between them arising from the judgment.

Conclusion

[121] In this judgment I have found:

(a) Juice for which the Vintage companies were invoiced on 19/20 May 2009, and which at that date remained unblended in identifiable, separate vessels, became the property of those companies.

(b) Juice for which the Vintage companies were invoiced on 19/20 May 2009, which had been commingled with other juice invoiced to those companies, but which otherwise remained in identifiable, separate vessels, also became the property of those companies.

(c) Juice for which the Vintage companies were invoiced, but which by date of invoice had already been commingled with Matakana wine stock, did not become the property of the Vintage companies.

(d) Where juice belonging to the Vintage companies was later mixed with Matakana wine stock, the contributors to the joint wine stock owned it as tenants in common, in proportion to contribution (in accordance with the decision of the Court of Appeal in *Coleman v Harvey*).[68]

(e) Aorangi held a secured interest in the original and commingled wine stock in which property had passed to the Vintage companies.

(f) In dealing with that stock in disregard of Aorangi's interest, the liquidators of Matakana committed conversion.

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[68] [1989] 1 NZLR 723 (CA).

Disposition

[122] A declaration is made that the defendants, in dealing in wine stock in which the Vintage companies held sole or common title (and, thereby, Aorangi a secured interest), in disregard of those interests, converted the plaintiffs' property.

[123] I will hear from the parties on what remedial orders are now necessary to:

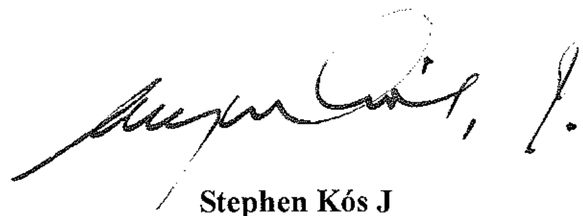
(a) carry this judgment into effect; and

(b) otherwise resolve any remaining issues of property, possession or remedy as between the parties.

Counsel are to confer with the Registrar to fix a date for a telephone conference to timetable further steps.

[124] The plaintiffs participating at trial are to have costs on a category 2 band B basis.

[125] I thank counsel for their assistance.



Stephen Kós J

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