

**IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY**

CIV 2008 409 2517

UNDER THE RECEIVERSHIPS ACT 1993

IN THE MATTER OF OF THE RECEIVERSHIP OF ANTHEM HOLDINGS LIMITED

BETWEEN PAUL GRAHAM SARGISON AND JOHN MAURICE LEONARD
Applicants

AND ANTHEM WINE COMPANY LIMITED
First Respondent

AND SECURED FINANCE LIMITED
Second Respondent

AND SECURED LENDING LIMITED
Third Respondent

Hearing: 18 June 2009

Appearances: S O McAnally for Applicants
A J Forbes QC and G W Smith for Respondents
S M Grieve with F R Goldsmith for Vinpro Limited (ordered to be served)

Judgment: 26 June 2009 at 4pm

**JUDGMENT OF ASSOCIATE JUDGE OSBORNE
As to Preservation Order**

Background

[1] The Anthem vineyard at Gibbston produces wine from grapes grown on land owned by a number of entities in the vicinity. Anthem Holdings Limited (In Receivership) (“AHL”) is one of the land owners.

[2] The receivers applied to this Court in October 2008 for directions as to their entitlement to have possession and sell quantities of wine in the possession of Vinpro Limited which is a wine maker and bottling and storage company based at Cromwell. The wine which is the subject of the application is set out in Schedule 1 to this judgment.

[3] The first respondent, Anthem Wine Company Limited (“AWCL”), took issue with the receivers’ claim. The substantive issues have yet to be resolved by hearing. AWCL claims to have bought the existing Anthem wine stocks in December 2007 and to have itself undertaken the Anthem vintages from the 2008 season. The second and third respondents, Secured Finance Limited and Secured Lending Limited (“Secured”), claim interests by way of a general security agreement from AWCL.

[4] AWCL and Vinpro wished to achieve the continued sale of the Anthem wine. The wasting nature of at least some varieties leads all the parties to the view that continued sale of the wine is appropriate. The parties have different goals in the sales process.

- Vinpro as winemaker and bottler has a lien over the wine it holds. It has unrecovered costs including in relation to continuing warehousing but also in relation to the time and cost incurred as a result of the dispute between the parties to this litigation. Vinpro wants to be paid and does not wish to release its lien without payment.
- AWCL (and Secured) want revenue continuing to come in from the sale of the wine, not least of all to support the continuing operation.

- The receivers, upon the basis of their view that they are entitled to possession of the wine, want to achieve the maximum cash recovery from sale of the wine towards payment of the AHL debt to the receivers' appointor Perpetual Trust Limited ("Perpetual"). There is evidence that the AHL/Perpetual debt at present stands at approximately \$1 million. Interest alone (without costs associated with the receivership) continues to accrue at 23% per annum.

The Anthem wine stock

[5] Vinpro holds less Anthem wine now than it did at the time of the receivership. It is common ground that quantities of the Anthem wine have been sold since receivership. All this judgment can deal with is that wine which remains at the date of the judgment which counsel asked me to assume was approximately as stated in my Schedule 1. In any event, my judgment is to affect such Anthem wine as Vinpro now holds.

[6] The evidence filed provided differing views as to the value of the wine. It is unnecessary for me, and certainly not in the commercial interests of the parties, to explore in any detail in this judgment the detail of the evidence filed. Understandably, it is common ground that the wine is ultimately more valuable to the parties if sold through normal retail means rather than by bulk. There is also recognition that AWCL is logically a party positioned to be involved in and achieve optimum sales. From the receivers' perspective any mechanism for sale needs to involve measures providing some security in relation to generated cash flow given the self-interest which AWCL will have in any cash flow.

Application for preservation order

[7] The receivers applied for an order that the Anthem wine stock be detained in the custody of Vinpro until further order of the Court on the following terms:

- (a) The ongoing reasonable costs and expenses incurred by Vinpro Limited for continued detention of the Wine in accordance with

these orders are payable to it from the proceeds of any sale of the Wine and are subject to the lien it holds in respect thereof.

- (b) Vinpro Limited may, with the agreement of the parties or the leave of the Court, sell any of the Wine the subject of these orders in which case it shall dispose of the proceeds of any such sale or sales as follows:
 - (i) First, in satisfaction of its reasonably incurred costs of such sale or sales.
 - (ii) Secondly, in satisfaction of any outstanding reasonable storage costs to which it is entitled to reimbursement and
 - (iii) Thirdly, by payment to the Registrar pending further order of the Court.
- (c) Any such proceeds paid by Vinpro Limited to the Registrar, in accordance with (b)(iii) above, are to be retained by the Registrar until determination of this proceeding at which time such funds will be paid to:
 - (i) The applicants should the Court make directions, in respect of the Wine, as sought by them at (a) and (b) or the originating application of 16 October 2008, or
 - (ii) Such party as the Court might direct in the event the Court refuses to make such directions as sought by the applicants; and
- (d) Leave is reserved to the parties, and to Vinpro Limited, to apply for further directions pertaining to these order on 3 working days notice.

[8] It will be seen that the aim of the receivers' application (apart from having a preservation order in place) was to have the wine to be sold with Vinpro's sales and storage costs met but thereafter all proceeds of sale being held.

Vinpro's opposition

[9] On 5 June 2009 Vinpro filed a notice of opposition to the application. Vinpro said that it was inappropriate that it be involved in the sale of the wine as that would involve sale of the wine at bulk wine prices; Vinpro was concerned that it not have an exposure to damages given the competing positions of the parties; and Vinpro by virtue of its lien wanted to ensure payment of all costs it has incurred.

AWCL/Perpetual opposition

[10] On 11 June 2009 AWCL/Perpetual filed a notice of opposition. They denied that the receivers or Perpetual have any interest in the Anthem wine. They said that in the event that any preservation order was made (my summary):

- (a) It should be limited to the value equating to Perpetual's outstanding debt (plus interest and costs).
- (b) Wine to the value of \$1 million would be more than sufficient to cover such claims.
- (c) There is a dispute as to costs in the sum of approximately \$340,000.00 which should not be covered by any preservation order.
- (d) AWCL should be authorised to sell the wine so as to enable its business to continue.
- (e) The receivers should have to give an undertaking to the Court as to damages suffered or liability incurred by AWCL or Vinpro as a result of any preservation order, with satisfactory evidence of the receivers' ability to meet the undertaking (or failing that Perpetual should provide the undertaking without any need for evidence of ability).
- (f) Proceeds of sale should go first to meet Vinpro's claims; secondly to AWCL to enable David Henderson to meet his judgment debt (as guarantor) to Perpetual of \$156,752.22.
- (g) AWCL should be permitted immediately to sell the white wine varieties held by Vinpro.
- (h) Certain wine held by Maude Wines Limited should not be the subject of any preservation order.

- (i) There should be certain limits on specific orders sought by Vinpro in an interpleader application filed by Vinpro on 5 June 2009.

Preservation order – common grounds

[11] Although the parties filed a substantial volume of information in relation to the application, by the time of the hearing a number of matters had become common ground between the parties. I had counsel confirm these at the commencement of the hearing and they are as follows:

- (a) This is a proper case for the making of a preservation order.
- (b) The real issues between the parties is as to what conditions should attach to the preservation order.
- (c) The Court has power to impose appropriate conditions under rr 7.55 and 7.56 High Court Rules.
- (d) There are issues as to ownership between the parties which require determination at a substantive hearing.
- (e) The exact identification of current holdings of Anthem wines by Vinpro need not concern the Court – the orders the Court is to make are to concern all Anthem wines held by Vinpro other than for the 2008 (and any subsequent) vintage.

Preservation orders – the principles

[12] A Judge may at any stage in a proceeding make orders, subject to any conditions specified by the Judge, for the detention, custody, or preservation of any property - r 7.55(1) High Court Rules.

[13] Preservation orders are appropriately directed to tangible property capable of possession.

[14] The purpose of the rule is to preserve property (or a fund) involved in the litigation itself or evidence relating to the litigation. The rule is not intended to provide a means of attachment of the unrelated worth of defendants so as to ensure defendants remain “judgmentworthy” .

[15] There must be a proper basis for the making of an order – the jurisdiction arises where there is a dispute as to ownership of the property. It is not mandatory that the applicant establish an arguable case although that will clearly be relevant to establishing a dispute.

[16] The order is discretionary and may be refused or limited if:

- It is unduly burdensome on third parties affected.
- Limitation is necessary to enable the defendant to defend the action, or
- The property is liable to deteriorate.

Sale of perishable property before a hearing – the principles

[17] Rule 7.56 provides:

7.56 Sale of perishable property before hearing

- (1) A Judge may, on application, make an order authorising a person to sell property (other than land) in a manner and subject to any conditions stated in the order if—
 - (a) the proceeding concerns the property or raises, or may raise, questions about the property; and
 - (b) the property—
 - (i) is perishable or likely to deteriorate; or

- (ii) should for any other reason be sold before the hearing.

[18] In *Helicarr Helicoptours Limited v Watts* (1992) 6 PRNZ 61 at 68, the Court emphasised the desirability of the parties' agreeing to the mechanisms of any arrangement so as to ensure that the optimum commercial benefit is obtained from the property in the interim.

The contrasting positions in submission

Receivers' submissions

[19] At the hearing before me, Mr McAnally for the receivers emphasised that there was little "margin of error" between the debt to Perpetual as it now stands (approximately \$1 million) and the retail value of the wine stock (approximately \$1.4 million on some estimates).

[20] Mr McAnally noted that whereas the receivers' initial preference was to have Vinpro take charge of the sale of wine, it was inappropriate to pursue an application along those lines having regard to the resistance of Vinpro to any such order. Clearly this Court would not make an order of that kind against a third party in circumstances where the third party does not profess specific expertise or interest in such commercial activity.

[21] Mr McAnally appropriately noted the evidence of Mr Kennedy for Vinpro indicating that AWCL is the party most likely to achieve appropriate retail prices. The focus of Mr McAnally's submissions then turned to the appropriate conditions to place on any arrangement involving AWCL as the vendor of the wine.

[22] The receivers' preference in that regard would have been for AWCL to purchase the wine stocks at 60% of the valuation attributed by a Mr Goodger who provided affidavit evidence on behalf of the respondents as to valuation. The

receivers' proposal was that the sum representing 60% be paid to Vinpro and the balance after deduction of Vinpro's costs be paid into Court.

[23] Yet again, this proposal ran into the difficulty that on this scenario AWCL would not agree to be involved.

[24] Against the background of those difficulties with his clients' preferred outcomes, Mr McAnally recognised that the most fruitful exploration of a workable set of conditions would lie in his adopting the approach if not all the detail of a set of conditions which Ms Grieve had set out in her written submissions. Somewhat ironically, while Ms Grieve's set out her summarised proposal upon the basis of what she understood the receivers were proposing, Mr McAnally indicated that the "Grieve summary" did not exactly mirror the receivers' wishes. However, it is a helpful basis of consideration in that Ms Grieve noted in her written submissions that Vinpro was not opposed to a proposal of this general nature. Her summary was:

- a. AWCL could sell the wine;
- b. Purchasers could have up to 90 days credit, subject to a trade letter of credit being provided;
- c. Payments would be made directly to VinPro;
- d. 60% of the value of the wine in a particular sales order, as attributed to it by Mr Goodger in his affidavit, would be set aside;
- e. VinPro's storage costs, excise duty, ALAC levies and VinPro's costs associated with the preservation orders, and presumably freight costs, would be deducted from the 60%; and
- f. The balance being the difference between the actual sale price and 60% of the value ascribed to that particular wine by Mr Goodger, will flow to AWCL.

[25] Mr McAnally in his submissions then addressed that set of conditions with the following response:

- (a) AWCL could sell the wine – accepted.

- (b) Purchasers could have up to 90 days credit, subject to a trade letter of credit being provided – no longer necessary as purchasers would be buying on normal retail terms.
- (c) Payments would be made directly to Vinpro – accepted.
- (d) Sixty per cent of the value of the wine in a particular sales order, as attributed to it by Mr Goodger in his affidavit, would be set aside – Mr McAnally submitted that a higher percentage (65% - 70%) would be appropriate having regard to revision of some of the figures in recent evidence).
- (e) Vinpro's storage costs, excise duty, ALAC levies and Vinpro's costs associated with the preservation orders, and presumably freight costs, would be deducted from the 60% - accepted (subject to the 60% figure being raised).
- (f) The balance, being the difference between the actual sale price and 60% of the value ascribed to that particular wine by Mr Goodger, will flow to AWCL – accepted (subject to the 60% figure being raised and the consequential figure for AWCL being reduced).

[26] In any mechanism, Mr McAnally indicated that the receivers acknowledge that the Vinpro lien has to be recognised and given effect to.

[27] Finally, Mr McAnally submitted that this was not a case for imposition of an undertaking as to damages upon the receivers. He noted that the imposition of an undertaking is discretionary. He noted that in the particular circumstances of this case the interests of both sets of parties were being compromised in order to achieve a workable commercial arrangement in the interim. He noted that the receivers work pursuant to obligations under the Receiverships Act 1993 and that it might be considered inappropriate that the receivers have to expose themselves to the

consequences of undertakings. His submission was that if the Court were to consider any form of undertaking then it would have to be an undertaking on the part of the appointor (Perpetual). He noted in that regard that Perpetual is a trustee company which should weigh against requiring an undertaking.

[28] Mr McAnally noted in relation to the other parties:

- (a) A relationship exists between AHL and AWCL, as both being companies with the “Henderson” group; and
- (b) Vinpro has indemnity and security from AWCL. (After the issues in this proceeding arose Vinpro had negotiated with AWCL and Mr Henderson a Deed of Indemnity).

[29] Mr McAnally noted with regard to Vinpro’s interpleader application, wherein Vinpro seeks an order that it have no further liability, that it would be “churlish” for the applicants to oppose such an outcome if no undertaking is required from the applicants at this point.

[30] In dealing with the costs which Vinpro seeks to recover pursuant to its lien, Mr McAnally dealt with those claims in this way:

- (a) Solicitor/client costs other than those incurred as a consequence of this application and compliance with it on the basis that:
 - (i) Vinpro appears to have taken steps at the behest of the first respondent and in response to an undertaking by the first respondent to meet Vinpro’s legal costs: Kennedy para 97(a). The applicants’ should not, at least pending the outcome of the proceeding, be liable for those costs,
 - (ii) It is apparent that a significant proportion of the costs incurred relate to Vinpro’s negotiations with the first respondent in order to secure an indemnity from it and also security over other wine stocks and pursuant to which Vinpro appears to have released wine, arguably, belonging to AHL: Kennedy para 103, Exhibits MK7 – MK9 and MK94 – MK96; and
 - (iii) Vinpro has, without the agreement of the receivers, used the proceeds of sale of 2006 pinot noir to Remarkable Wines

Ltd to meet some of its legal costs: Kennedy para 71, Sargison (reply) para 9(a); and

- (iv) Personnel and administration costs other than those it might incur complying with an preservation orders on the basis that, as deposed by Mr Kennedy at para 99 of his affidavit, much of those costs have been incurred through ‘many hours on the phone with Mr Henderson ... working with Vinpro’s solicitors to prepare indemnity arrangements and other documentation’ and, again, it is quite inappropriate for AHL to meet those costs should it be established, at trial, that AHL is the owner of the wine.

AWCL submissions

[31] Mr Forbes for AWCL submitted that the basis of the receivers’ application contained no commercial reality. His submission was that the proposals amount to a requirement upon AWCL to sell wine at the best prices for the benefit of the applicants.

[32] Mr Forbes noted that following the sale of one of the AWCL properties Perpetual had taken proceedings against Mr Henderson personally pursuant to its guarantee and had obtained a judgment by consent in the sum of \$156,752.22. This is part of the total sum owing by AWCL to Perpetual. Mr Forbes’ submission was that if the amount to be recovered by the receivers out of the wine sales does not take the judgment debt into account then in effect it would be inconsistent with the arrangement made between the parties when judgment was entered against Mr Henderson. Following the hearing I was provided with a copy of the memorandum filed in Court at the time of summary judgment and the relevant paragraph reads:

2. Judgment is entered on the basis that the plaintiff (now Perpetual) has agreed not to enforce it for at least 30 days from the date judgment is entered (to allow time for the defendant to attempt to resolve the sale of certain wine stocks, which are the subject of a separate proceeding filed in this Court.

I will return to this.

[33] Mr Forbes then introduced a written proposal as to the terms of a preservation order (in draft). He explained in advance that on the morning of the hearing this had been the subject of discussion between the respondents and Vinpro and that the “37% proposal” which it contains had the support of Vinpro.

[34] The proposal as provided, and as supplemented orally by Mr Forbes in the course of submissions, was as follows:

- (a) The receivers to give a waiver of liability in favour of Vinpro for any past or future claim in respect of the wine held by Vinpro.
- (b) The receivers to give an undertaking as to damages in favour of AWCL.
- (c) The Deed of Indemnity given by AWCL and others (supported by Mr Henderson’s guarantee) to Vinpro to remain in place.
- (d) Vinpro’s contractual and lien rights in respect of the wine to remain unaffected.
- (e) From the date of the preservation order the wine is to be released by Vinpro for sale by AWCL and the proceeds of sale to be dealt with as follows:
 - (i) The greater of the following is to be paid by AWCL to and held in Cousins & Associates’ trust account in the name of AWCL (“the indemnity fund”) subject to the terms of the order:

- (1) 37% of the value of all net wine sales; or

(2) (To establish a floor price). The amount equating to Vinpro's (Kennedy May 2009) per bottle valuation of the wine (Exhibit MK 11).

(ii) AWCL shall be entitled to retain the balance of all wine sales.

(iii) "Net wine sales" means net of freight, excise duty, ALAC levy and despatch costs ("sale costs").

(iv) AWCL is to pay Vinpro's storage costs separately.

(f) The 37% figure was struck as follows:

Vinpro's (Kennedy) wine stocks valuation May 2009, excluding 2008 whites and sale costs	\$475,299.00
AWCL's (Goodger) the equivalent valuation	\$1,283,555.00
Equals	37%

(g) The indemnity fund is to be applied:

(i) First, in payment of Vinpro's outstanding costs (excise duty, ALAC levy, storage, despatch, interest, legal (solicitor/client) and administration costs) subject to reasonable verification being provided by Vinpro to the other parties if required;

(ii) Secondly, to be retained and invested on bank term deposit pending the outcome of the receivers' substantive application or, at AWCL's option, to be paid to the receivers or Perpetual towards the satisfaction of the judgment debt of \$156,752.00

obtained by Perpetual against Mr Henderson (as guarantor) thereby reducing AHL's liability to Perpetual.

(h) AWCL is authorised to conduct and will be responsible for all wine sales and accounting in terms of the order. Copies of all sales and sale cost invoices to be available to the other parties by AWCL, together with any other information reasonably required by them.

(i) Leave is reserved to any party to apply to the Court further on any disputed issue which arises and which the Courts have endeavoured but have been unable to reach agreement on.

[35] Mr Forbes then made submissions to me which he accepted were in the nature of evidence from the bar. First, he indicated that Mr Kennedy of Vinpro would confirm as a general proposition that any wine business which was required to put aside 37% of its turnover would be placed in a difficult position and that any retention higher than 37% would not be viable. Mr Forbes accepted that he could not point to any information in the evidence filed which deals with the issue of viable margins.

[36] Mr Forbes made submissions as to the wisdom of the respondents' proposal. It offers a good prospect of sale of the wine at retail values. The interests of the receivers are safeguarded to the extent of what might in the event of bulk sale be the sale value. In the meantime, the first respondent is able to "rekindle its business" without the commercially undesirable tying up of some wine stocks. Mr Henderson is able to satisfy his judgment debt to the benefit of the receivership.

[37] Overall, Mr Forbes submitted that the arrangement is a practical one which recognises that the receivers' full claim cannot be met and that a retention of proceeds at even a 60% level is not feasible. In such an event Mr Forbes indicated that the position of AWCL is that it would not be able to sell the wine on an economic basis and it would not be prepared to be involved in attempting to do so.

[38] Mr Forbes added that in the event that an arrangement was envisaged with the sale of the wine other than by AWCL, then labels would have to be striped off wine and cartons would not be available (as they are owned by AWCL). In a subsequent comment, Mr Forbes accepted that that may have been to overstate the position – I understood him to say that only a small percentage of the wine would be affected in that event.

[39] Finally, Mr Forbes advised from the bar that recent sales of the Anthem wine had been in line with (but not better) than the figures provided in his evidence by Mr Goodger.

Position of Vinpro

[40] Ms Grieve for Vinpro confirmed that the proposal advanced at the hearing by Mr Forbes achieves what Vinpro seeks to achieve, and that Vinpro therefore supports it.

[41] In discussion with the bench as to the nature of any waiver or undertaking in favour of Vinpro, Ms Grieve accepted that it might be unrealistic to expect the Court to impose a condition upon a forward looking preservation order that any claims held by the receivers for past actions should be waived. Ms Grieve emphasised that at the very least Vinpro wished to have the protection for the future.

[42] Ms Grieve had filed comprehensive submissions in relation to the scope of Vinpro's lien, the primacy of Vinpro's interests and the need for any exercise of discretion by the Court to take full account of that. Ms Grieve relied particularly upon the provisions of s 93 Personal Property Securities Act 1999. In the event, by reason of the positions adopted by the parties at the hearing – namely that the interests of Vinpro had to be recognised – Ms Grieve did not need to address further submissions to me on Vinpro's right of lien.

Basis of jurisdiction

[43] Counsel are agreed that the jurisdiction to make a preservation order in this case exists. That is plainly correct as:

- (a) The wine in question constitutes property.
- (b) The right to the property is in issue in the proceeding.
- (c) While an “arguable claim” may not be a strict requirement in this jurisdiction, the applicants clearly in this case have at least an arguable claim.
- (d) There is good reason to make the order having regard to the fact that without such order the wine stock could either be dissipated by AWCL or Vinpro.

[44] In the circumstances of this case, it is right that a preservation order be made under r 7.55. The Court is entitled to make such order subject to any conditions specified by the Judge (r 7.55(1)), or to attach to the preservation order rights of sale of property which is perishable or likely to deteriorate (r 7.56).

Sale of perishable property before the hearing

[45] Rule 7.56 authorises a Judge to make an order for sale of property if (in addition to the fact that the proceeding concerns the property) the property is perishable or likely to deteriorate or should for any other reason be sold before the hearing.

[46] I am satisfied on the evidence that in relation to a commodity such as the wine in this case “deterioration” is appropriate to describe wine which becomes harder to sell by reason of its increasing age. In any event, the parallel between

increased age and deterioration is so close that the matter would be caught by r 7.56(1)(b)(ii).

[47] I take into account also the provisions of r 7.57 which permits the Court to order a part of the property to be transferred or delivered to a person who has an interest in the property. This rule has its application where the Judge is satisfied that the part of the property to be transferred is not required for the provision that ought to be made to meet the claims on the property and the order is necessary or desirable to exclude the part of the property from an injunction or other order, or to protect the person who is to transfer or deliver the property.

[48] Rule 7.57 would have an obvious application where the wine stock is clearly more than sufficient to meet the AHL liability to Perpetual. The original concept proposed by the receivers (preservation of \$1 million worth of wine with the balance being released to AWCL) had within it the concept of r 7.57. However, the mechanisms proposed by the various parties have moved on from that time. In any event, on the evidence before the Court I would not have been satisfied that there was some part of the wine stock that would clearly not be needed to meet the receivers' claim.

The Court's discretion – the balancing exercise

[49] I must weigh the competing interests of different entities and people in relation to the wine stock. I have regard to the affidavit evidence filed but these particular matters form my discretion:

- (a) There is significant uncertainty as to the price which will be obtained for the wine stock as it is sold – there is also significant uncertainty in relation to the closely related issue of the accurate estimate of its present realisable value.
- (b) There is clearly a substantial difference between the value of the wine stock if sold in bulk (and worse if sold with urgency) than if

the component units of the wine stock are sold in a normal retail manner.

- (c) The bulk price realisation would plainly be insufficient and even retail sales may be only marginally sufficient to clear the debt claimed by the receivers – the witnesses (with varying estimates) are by necessity providing estimations which themselves contain predictions.
- (d) Vinpro professes neither the expertise nor the inclination to be involved in the sale of the wine.
- (e) The receivers are not positioned to undertake retail sales of the wine.
- (f) AWCL's association with the "Anthem" brand and marketing, and its business focus in relation to wine sales establish it as the most qualified amongst those represented to undertake retail wine sales.
- (g) AHL entered into financing arrangements with Perpetual's predecessor in title which had the effect upon AHL's default of entitling receivers to take possession of AHL property (including wine stocks it owned) and to dispose of them – in such event the receivers were under no obligation to continue AHL's business or to assist in the continuation of any related business (whether AWCL or otherwise).
- (h) Mr Henderson is personally liable to Perpetual for the judgment debt of \$156,752.22, although that sum is a part of the total debt owing to Perpetual by AHL. While it is clear from the terms of his consent to judgment that Mr Henderson was to have 30 days to attempt to resolve the sale of the wine stocks, there is nothing in

the terms of consent which requires Mr Henderson's liability to be covered out of realisation of the wine stocks in all events. If 100% of the proceeds of sale of the wine stocks were going to Perpetual that would be a matter to be taken strongly into account in the Court's discretion. If the proportion of proceeds going to Perpetual reduces substantially, there is nothing in the terms of the consent memorandum to preclude Perpetual from insisting that Mr Henderson meet his obligations in a timely way from his own resources, either wholly or partially.

- (i) Vinpro has the legal rights which flow from its contractual services and from its lien in particular. Vinpro was expressly granted a lien "to secure all monies owed (including any excise duties) to Vinpro and to secure all other obligation of the Customer under or arising out of this agreement" (the agreement being the wine making agreements between Vinpro and AHL and between Vinpro and AWCL). The lien is expressly not to be released until all payments due to Vinpro have been made in full. Some of the costs claimed by Vinpro are beyond contractual dispute – excise duty and ALAC levies; storage and handling costs of continued retention of wine; and default interest on unpaid invoices. Some of the costs – personnel and administration costs relating to this dispute and solicitor/client costs relating to the proceedings in the underlying dispute (including negotiation of an indemnity from AWCL) – are not demonstrably within contractual entitlement. But the legal costs are within the range of costs which an interpleader, acting responsibly, can expect to have met (see rr 4.64 and 14.6(1)(b)). As Mr McAnally himself conceded, the sum involved for legal costs as now quantified by Vinpro's solicitors is modest. On the other hand the Vinpro management time/cost is not a usual cost

recovered in interpleader proceedings or other proceedings unless fully documented in evidence and pursued as a form of damage.

- (j) While the starting point from the receivers' perspective as applicants is that an order for the preservation of property should fully preserve the property, in the circumstances of this case full preservation is not appropriate having regard to the provisions of r 7.55 (it would be unduly burdensome on third parties affected) and of r 7.56 (the wasting nature of the property requires realisation). As soon as realisation is required, there is a need to address the rights of Vinpro pursuant to its lien, the costs of the party undertaking the realisation and the reasonable expectation of the receivers in not having the proceeds from the realised assets unnecessarily disbursed.
- (k) The Court has jurisdiction to impose an order under r 7.55 upon a third party such as Vinpro – see *Peerless Carpets Limited v Moorhouse Carpet Market Limited (In Receivership)* HC Christchurch, CP76/91 15.3.91, Fraser J at p 7.
- (l) The discretionary nature of preservation orders, combined with Vinpro's lien rights, suggest strongly that Vinpro should recover the debt owed to it and its reasonable solicitor/client costs as a first charge from the proceeds of sale of the wine (i.e., ahead of both the receivers and of AWCL). Vinpro should thereafter continue to recover as a first charge from the proceeds of sale the costs incurred in relation to the wine referred to in Schedule 1. Such condition would not apply to other wine (i.e. wine outside scheme).

[50] There is no evidence to suggest that any costs of production associated with the costs of production of the wine itself remain to be incurred. The evidence indicates that what remains is some labelling, packaging, and sales and despatch

costs (to the extent not covered by Vinpro). There does not appear to have been any evidence provided to me by the respondents as to the estimated cost of production per bottle or otherwise in absolute dollar terms, or in terms of a percentage of sales value.

[51] On the other hand, all the earlier costs of production occurred at a time when the Perpetual financing was in place, out of which period the claimed debt of approximately \$1 million arises. Without the complicating factor of deterioration of the wine stock there would have been a strong case for a simple and full preservation order in favour of the receivers.

[52] But the need to move the wine to market requires a consideration of the reasonable needs of AWCL as it so moves the wine. The 63% figure proposed for the respondents (i.e. 37% of net wine sales goes to the indemnity fund and 63% of net wine sales goes to AWCL) is mathematically arrived at by reason of figures provided in the evidence as to retail and bulk sale estimates. The 63/37 split does not derive from evidence adduced in this proceeding as to workable margins in the market place.

[53] While the 63% was proposed by AWCL on the day of the hearing as the minimum percentage of turnover which a wine business could afford receive out of its sales proceeds, that assumption (particularly in the absence of evidence on the point) has to be regarded as potentially generous to AWCL having regard to all the circumstances of this case and in particular:

- (a) The division of proceeds of the wine sales will be occurring after a substantial amount of accrued debt (as against current billings) owing to Vinpro has been paid;
- (b) A good deal of the production of the wine in question has already been undertaken, possibly with the assistance of Perpetual's funding.

- (c) By recovering up to 63% of net proceeds of sale AWCL in part seeks to finance its continuing operations in relation to vintages which are not directly affected by this interlocutory proceeding, given that the 2008 vintage and thereafter will effectively be to AWCL's credit only. No evidence has been provided by AWCL or Secured as to why it would be unreasonable to expect AWCL its related entities and its financiers to meet some of the working capital requirements of AWCL. The fairest balance I believe this Court can strike is to preserve 50% of the proceeds of sale on stakeholding and to permit AWCL to receive the other 50%.
- (d) No evidence has been provided by Mr Henderson as to an inability to meet the judgment debt he incurred pursuant to his guarantee.

Disposition

[54] I now turn to the orders which I will make. They take into account the evidence and the specific factors I have listed above.

[55] They have substantial regard to the nature of structure put forward at the hearing itself by the respondents, with support from Vinpro. They are ultimately structured on what I consider to be a simpler approach as any arrangement involving a number of parties with steps to be implemented in the future needs to be kept as simple as possible. I also have regard to the fact that although the respondents' 37% proposal was presented at the hearing upon the basis of what was said to be economically workable for the respondents, the respondents did not provide the Court with the evidential basis in support of the viability of a particular percentage, nor did they provide the Court with any evidential reasoning as to the inability of AWCL's related entities (be they Mr Henderson himself or his other related companies) to assist AWCL while AWCL is also deriving proceeds from the sale of

the 2006 and 2007 vintages in the wine stock. Against this background, the Court does its best with the information that has been provided.

[56] Subject to my comments in the following paragraphs, I am minded to make the following orders (with the figures in (5)(b) to be completed):

- (1) The wine stock referred to in Schedule 1 to this judgment pursuant to r 7.55 High Court Rules shall be preserved and be held in the custody of Vinpro Limited and shall be dealt with only by further order of this Court, or strictly in accordance with the provisions of this order.
- (2) Vinpro Limited is authorised to despatch directly to customers of AWCL such of the wine stock in Schedule 1 as is expressly identified in sales invoices rendered by AWCL to customers in which the full retail cost of each sale is recorded.
- (3) AWCL is authorised to enter into sale contracts for items appearing in Schedule 1 provided:
 - (a) Such sales are to be in the normal course of business to arms-length customers and not to related parties of AWCL or of Mr Henderson or of Secured.
 - (b) The payment terms for such sales are to be on normal terms and are not to involve extended credit;
 - (c) The sales are not to be subject to any set-off or credit for any goods or services or other benefits received by AWCL or any other party from the customer.
- (4) Upon implementation of this order –

- (a) The receivers and their appointor shall have no claim against Vinpro Limited for any action or inaction by Vinpro Limited or for any conduct by Vinpro Limited from the date of this order in dealing with the wine held by Vinpro Limited (save any necessary claim to enforce the terms of this order);
- (b) AWCL's indemnity and Mr Henderson's guarantee in favour of Vinpro Limited shall remain unaffected by this order and such indemnity and guarantee are to be left in place by AWCL and Mr Henderson (as offered by them).
- (5) All invoices rendered by AWCL to customers are to require payment of the invoiced sum directly to Vinpro Limited and Vinpro Limited shall in respect of such payments –
- (a) Provide promptly details of the receipt of each payment to AWCL and the receivers.
- (b) As a first charge on the sums received reimburse itself (Vinpro Limited) the amount owing on account of the following expenses in the following sums namely:
- Excise Duty and ALAC levies payable in respect of the wine stock referred to at Schedule 1 - \$
 - Storage and handling costs incurred in relation to the retention of the wine in Schedule 1 to date - \$
 - Default interest on the above at ____% per annum -\$
 - Solicitor/client costs relating to these proceedings and the resolution of issues to date - \$

- TOTAL \$
(Plus interest as above)

(cumulatively the “lien total”).

- (c) Immediately after each reimbursement of any part of the lien total, Vinpro shall copy to AWCL and the receivers details of the payment or payments made.
- (d) Upon completion of payment of the lien total shall remit a summary of the monies received and shall remit as and when funds become available – 50% of the available funds to AWCL and 50% of the available funds to the trust account of Cousins & Associates to be held on a stakeholding in the joint names of AWCL and the receivers.
- (6) Cousins & Associates, if they accept the stakeholding role referred to in the order 5(d) above, shall within 5 working days provide to the receivers a stakeholding undertaking to the reasonable satisfaction of the receivers, and shall thereafter hold such funds on a term bank deposit; the ultimate disbursement of which is to follow the outcome of the substantive application (or its earlier resolution by agreement).
- (7) In the event of election of AWCL, AWCL and the stakeholder are to contribute equal payments towards or in full satisfaction of the judgment debt of Mr Henderson to Perpetual (inclusive of judgment interest) provided that no payment shall be made by the stakeholder until the stakeholder receives written proof that AWCL has paid its equal share to Perpetual.
- (8) Nothing in this order shall affect the continuing accrual of interest on the judgment debt of Mr Henderson to Perpetual until its date of payment.

(9) Leave is reserved to apply for further directions if necessary to implement this order.

[57] I decline to make an order as to an undertaking as to damages against the receivers. Any right to damages as may exist will still exist but in the context of the balancing of competing interests which this judgment represents it would in my judgment be unfair and inappropriate to require the receivers to provide an undertaking as to damages.

[58] In making such an order as set out above, I am conscious that it meets the precise aspirations of neither the applicants nor the respondents. AWCL is intent on securing a “viable” sales process. I have to have regard to the facts that:

- (a) The case for a preservation order of the full wine stock is made out;
- (b) The evidence provided to me as to viable sales margins is slim;
- (c) AWCL can be expected in the circumstances of this case to forego some of what might otherwise be a normal margin.

If for any reason the balancing I have arrived at is viewed by AWCL as too difficult for AWCL, then to alter it (against the receivers’ interest in preservation) would become unfair on the receivers. To avoid such an occurrence full preservation would in my judgment become the just outcome in place of the draft order set out at [56] above, and the parties could work to diminish the detriment of preservation by co-operation towards an early substantive hearing.

[59] The proposed order at [56] above is a draft order. As I discussed with counsel at the conclusion of the hearing, I am conscious that the ultimate framework on which argument took place was different to that earlier advanced by each party. I have a clear view as to the substance of the draft order. In the event there are matters which require better definition or amendment to assist the implementation of the

substance of the order, I invite counsel to confer with a view to filing a joint memorandum. I also require a memorandum identifying the sums and figures to be included in sub-paragraph (5)(b) of the order. If agreement is not possible, I invite separate memoranda. All memoranda are to be filed by *5pm Tuesday 30 June 2009*. If any party considers a reply is required, counsel may file a reply by *5pm Wednesday 1 July 2009*. I will then finalise my order on the papers.

Interpleader timetable

[60] Vinpro has before the Court an application to interplead. Counsel advise that a hearing of up to one hour may be required to resolve that application.

[61] The Court is in a position to allocate *3.45pm 7 July 2009* for such hearing. That hearing is being allocated on an urgent basis and it would be difficult to allocate any other similarly early date. Counsel are to file by *1 July 2009* preferably a joint memorandum defining such interpleader issue/s as remain and advising whether the default rules (especially r 7.39) require any amendment for the hearing.

Substantive hearing

[62] Counsel for the applicants and respondents have agreed upon directions for timetabling. By consent I direct:

- (a) Pursuant to r 7.9(2) the parties are to file a statement of claim and statement of defence respectively.
- (b) The applicants are to file and serve their statement of claim by *17 July 2009*.
- (c) The respondents are to file and serve their statement of defence by *7 August 2009*.

(d) The parties are to file and serve any further interlocutory applications by *14 August 2009* with the Registrar to allocate *9.00am 10 September 2009* as the first hearing date (by telephone).

(e) I allocate *9am 10 September 2009* for a further case management conference. I direct counsel to file preferably a joint memorandum three working days before the conference dealing with the disposal of any interlocutory issues and the timetabling of pre-trial attendances.

[63] I direct that the Registrar allocate a hearing date (5 days reserved) upon consultation with counsel. The directions for trial are to be dealt with at the conference on 10 September 2009.

Solicitors
Keegan Alexander, Auckland for Applicants
A J Forbes Q C Christchurch for Respondents
Anderson Lloyd Caudwell, Dunedin

Schedule 1

Anthem 2007 Gewurztraminer 6 pack	6pk	117.83
Anthem 2007 Pinot Gris	6pk	685.83
Discover 06 Pinot Noir 6 pack	6pk	1,000
Discover 2006 Pinot Noir 12 pack	doz	342
Anthem 2007 Sav Blanc	6pk	670
Anthem 2006 Pinot Noir	6pk	888.66
Anthem 2008 Riesling (AW) Cleanskin	doz	235
Anthem 07 Pinot Gris L2 Cleanskin	doz	123.33
Anthem 07 Pinot Gris L1 Cleanskin	doz	1
Anthem Pinot Noir 06 B3 Cleanskin	doz	1,420.33
Anthem Pinot Noir 06 Batch 4 Cleanskin	doz	4.16
Anthem 2007 Pinot Noir Cleanskin B2	doz	1,267.41
Discover 2007 Pinot Noir Cleanskin	doz	2,786.92
Anthem 2007 Sav Blanc Cleanskin	doz	134

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