IN THE DISTRICT COURT
AT HASTINGS

CIV-2015-041-000116
[2016] NZDC 11956

BETWEEN	ATA MARA ESTATE LIMITED Plaintiff	
AND	TE MATA ESTATE WINERY LIMITED Defendant	

Hearing: 27 June 2016

Appearances: G J C Carter and P R Allan for Plaintiff
M E MacFarlane for Defendant

Judgment: 8 July 2016

JUDGMENT OF JUDGE B A GIBSON

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[1] Te Mata Estate Winery ('Te Mata Estate') is a well-known and successful wine producer operating from Havelock North. As well as being a producer of wine for the domestic market it also exports much of its wine abroad so that over the past several years the majority of its wine has been sold in that way.

[2] At some point it discovered that a wine producer in Central Otago was marketing and selling wine under the name *Te Mara*, and accordingly proceedings were issued against Te Mara Estate Limited ('Te Mara') and its directors, Janiene Bayliss and David Pratt, in the High Court at Auckland.

[3] On 2 December 2010 the dispute between the parties was settled and the High Court proceedings discontinued with the terms of the settlement recorded in writing and executed by the parties. The agreement, which is undated, contained various terms and in particular the following provision:

> 2. Te Mata and Te Mara, Bayliss and Pratt have agreed to settle all issues arising out of the proceedings and other issues between them, on the following terms:
>
> (a) That as from the release of the 2010 vintage for reds and the 2011 vintage for whites they will cease all use of the names Te Mara/Te Mara Estate on or in relation to their production, sale or other dealings with wine. In particular they will:
>
> (i) change the name of Te Mara Estate Limited to a name which does not include the words "Te Mara", or any similar name;
>
> (ii) cancel or withdraw any trademark registration/application registered or filed on their behalf anywhere in the world for the Te Mara/Te Mara Estate names or any similar names;
>
> (iii) cancel any domain name registration which features the words "Te Mara";
>
> (iv) modify any website and any advertising or promotional materials relating to their business to remove reference to the words "Te Mara".

[4] The agreement further provided that it was the combination of the Maori words *Te* and *Mara* that was forbidden, but the defendants in the High Court proceeding were able to use the word *Mara* in any new name and any new trademark provided they did not use it in combination with the word *Te* or any similar word or combination. The agreement, by clause 2(h), also enabled Te Mara:

> "to trade out all of its stock that pre-date (including) the 2010 vintage for whites and the 2009 vintage for reds under the current "Te Mara" branding."

[5] The agreement further provided that Te Mata would make a payment of $55,000, with $30,000 to be paid within five working days of the date of the agreement, which was done, and a further $25,000:

> "on the receipt of a letter from Wynne Williams & Co on behalf of Te Mara that all stock already branded has been sold into the distribution chain in accordance with clause 2(h)."

Wynne Williams & Co were the solicitors acting for Te Mara, the defendant in the proceeding.

[6] Unfortunately the settlement agreement did not specify any date, other than the payment of the initial $30,000, by which the matters the subject of the agreement had to be completed. Mr Pratt for the plaintiff company gave evidence and said that

as it was clearly not the intention of the parties that the plaintiff not be able to continue to trade, he thought the plaintiff was entitled to a transition period during which it could sell the stock the subject of the agreement, obtain its new name, and then re-label new vintages of wine after those specified in the agreement were sold. There was no clause to this effect in the agreement but, whatever the plaintiff's reasons were, it could hardly be said to have fulfilled its obligations under the agreement with any sense of urgency.

[7] Mr Pratt and his fellow director decided that a Maori name was best suited to their company's purpose and on 15 August 2011, having decided to seek advice from Sir Tipene O'Regan, a well-known public figure, as to an appropriate name, he wrote acknowledging Sir Tipene's offer of assistance and stating "*I have been putting this off for months and now I have to get to grips with the outcome of the Court agreement*". A Maori name was selected with the assistance of Sir Tipene and an application was made to the Intellectual Property Office of New Zealand for registration of the trademark *Ata Mara*, the intended name of the new entity. A similar application was also made in the United Kingdom, but on 28 August 2012 Ata Rangi Limited, another wine producer, gave notice that it intended to oppose the plaintiff's trademark application. That matter was not resolved until February 2013 when Ata Rangi abandoned its objection, but in the meantime the plaintiff continued to use the words *Te Mara* in advertising and promotional material and retained the name in its domain name. The plaintiff company registered and displayed wines at a number of overseas wine fairs and the *Te Mara* name featured in the promotional and reference material at those fairs.

[8] The defendant, Te Mata Estate, had not, until 19 June 2013, on the evidence before me, raised any issue over the tardy compliance with the terms of the settlement agreement but on that date Mr Nicholas Buck, a director of the defendant, wrote to the plaintiff's directors and its solicitors drawing their attention to the terms of para 2(a) of the settlement agreement and noting breaches of the settlement agreement by the plaintiff continuing to use Te Mara Estate as its name and with advertising and promotional materials using the *Te Mara* brand and the *Te Mara* domain name also being used by the plaintiff.

[9] While not specifying a time within which the defendant regarded it as reasonable for the plaintiff to perform its obligations, or threatening repudiation in the event it failed, the letter appeared to spur some activity on the part of the plaintiff as on 10 October 2013 it filed a change of company name, thereby changing the name of the company from Te Mara Estate Limited to Ata Mara Estate Limited. Shortly thereafter it changed the email addresses for the directors of the plaintiff so as to remove the combined reference to *Te* and *Mara* and also closed the URL www.temaraestate.com and redirected traffic to URL www.atamara.com. The United Kingdom trademark relating to *Te Mara* was surrendered on 9 January 2014 and the stock of *Te Mara* branded wine existing as at the date of the settlement agreement reached, according to the plaintiff, 'library stock' levels, namely stock retained for personal use only, on 31 March 2014.

[10] On 22 February 2014, Mr Pratt wrote to Mr Nicholas Buck of Te Mata Estate, on behalf of the plaintiff advising that all of the terms of the settlement agreement had been fulfilled and calling for payment of the final instalment of the settlement monies, namely the sum of $25,000. In particular the plaintiff advised that all wine stock branded *Te Mara* had been sold into the distribution chain in accordance with clause 2(h) of the agreement.

[11] The defendant did not respond to the email but instead, on 31 July 2014, its solicitors wrote to the plaintiff's solicitors alleging the plaintiff had been in breach of the settlement agreement for a considerable time and continued to be in breach and alleged significant damage to it. The letter, in the form of an email communication, also asserted that as the plaintiff "*had no intention of complying with the settlement agreement it was treating the settlement agreement as being repudiated"* its repudiation was accepted. Accordingly it refused to pay the balance of the settlement monies.

[12] The plaintiff did not accept it had repudiated the agreement and sought recovery of the sum of $25,000 it believed was due to it and so issued proceedings. The defendant pleaded the alleged breaches of the agreement as if they constituted a repudiation and counter-claimed for the repayment of the initial $30,000 it had paid, and also 650 Euros paid as a result of a direction of the Office for Harmonisation in

the International Market (Trade Marks and Design), in the European Union, demand for which it is alleged was made by an invoice on 14 December 2010, shortly after the settlement agreement was entered into.

[13] Mr MacFarlane submitted that the various breaches set out in Mr Buck's email letter to the plaintiff of 19 June 2013, which were relied on by the defendant's solicitors in their assertion of a repudiation of the contract by the plaintiff, meant the defendant was entitled, as it did, to treat the contract as having been repudiated. The defendant's solicitor's letter of 31 July 2014 was sent as a response to written requests from the plaintiff's solicitors for final payment under the settlement agreement which hardly in itself evidences an intention on the part of the plaintiff to repudiate the contract. Nevertheless Mr MacFarlane submitted that s 7(4)(a) and (b) of the Contractual Remedies Act 1979 applied as essential stipulations in the agreement had not been performed by the plaintiff which had reduced the benefit of the contract to his client, and that accordingly there had been a repudiation.

[14] Repudiation is a doctrine of which Lord Wright said in *Ross Smythe & Co Limited v Bailey, Son & Co* [1940] 3 ALL ER 60 (HL) at 71 that:

> It must not be forgotten that repudiation of a contract is a serious matter, not to be lightly found or inferred.

[15] In that case Lord Wright said the case for repudiation was unsubstantial. The same comment is apposite here. The plaintiff had, in my view, done nothing to indicate it intended to repudiate the contract. Certainly it was slow in undertaking its obligations under the settlement agreement but there was no time specified with respect to that. The plaintiff's decision to seek advice on the obtaining of a Maori name was understandable, as was its decision to make that the first step in the process of implementing its obligations under the agreement given it needed to secure rights to the new name before committing to major expenses such as a website rebuild, email address changes, the company name change and rebranding of company property both in New Zealand and overseas. Matters were delayed by the challenge to the name by Ata Rangi Limited.

[16] Secondly, when Mr Buck wrote to the plaintiff in June 2013 to express the defendant's concern that the plaintiff was continuing to use the *Te Mara* name, steps were taken to implement the changes required by the agreement. That is hardly consistent with an intention to repudiate and the plaintiff was not accused of that, in any event, by Mr Buck in his email correspondence. The plaintiff's position was that it disposed of the wine stock referred to in the agreement, other than the 'library stock', as agreed and, although not strictly in terms of the method specified by the agreement for seeking the final payment, Mr Pratt wrote to the defendant stating that the plaintiff had complied with its obligations under the agreement. Again, that is hardly consistent with the actions of a party seeking to repudiate an agreement. The correspondence was ignored until the plaintiff began pressing for payment when the defendant then wrote and insisted that the plaintiff had repudiated the agreement.

[17] In any event, the process for repudiating a contract which does not specify time for completion is well settled. In *Law of Contract in New Zealand, 5th Ed, Burrows, Finn & Todd* at p 687 it is said, with reference to the judgment of Cooke J in *Hunt v Wilson* [1978] 2 NZLR 261 (CA), that:

> If the original contract specifies no time for completion the law implies that the time will be a reasonable time. However, the contract cannot be immediately discharged on the expiry of what the innocent party regards as a reasonable time: the innocent party must give notice requiring the other to complete within a further reasonable, but specified, time. The reason for this is that "it is undesirable that the rights of the party should rest definitely and conclusively on the expiration of a reasonable time, a time notoriously difficult to predict." As Cooke J said, the requirement of notice "makes for clarity in justice".

[18] The law is discussed in the various judgments in *Steele v Serepisos* [2006] 1 NZLR 1 (SC) where Tipping J described the compass of what Cooke J determined in *Hunt v Wilson*, in his own earlier judgment of *Mt Pleasant Estates Co. Limited v Withell* [1996] 3 NZLR 324 at p 330 as:

> It is inequitable to have the axe falling without warning except perhaps in an extreme case. Certainty and fairness to both parties will be promoted if the law requires the party contemplating cancellation for delay to give a notice expressly warning the party said to be in default that in the absence of performance within the time stated by the notice, which itself must be a reasonable time, the party serving the notice will regard itself as entitled to cancel. Of course the notice must not itself be premature.

[19] The letter of 31 July 2014 from the defendant's solicitors was not one alleging delay, but was an allegation of breaches of the agreement amounting to a repudiation. Mr K McLeod, the author of the letter, acting at that time for the defendant, asserted his client had on a number of occasions drawn the breaches to the plaintiff's attention but "*got no response*". The only occasion on which breaches were drawn to the plaintiff's attention in the evidence before me, was the allegation contained in the letter of 19 June 2013 of the plaintiff continuing to use the Te Mara name. That letter did not assert any fundamental breach amounting to repudiation, or specify a time within which the terms of the settlement agreement needed to be completed by the defendant. What it did was note the breaches and reminded the defendant and its directors of their obligations under the agreement.

[20] Section 7(5) of the Contractual Remedies Act 1979 provides that a party is not entitled to cancel a contract if he has affirmed it. Mr Carter, for the plaintiff, said, somewhat tentatively, that the letter of 19 June 2013 affirmed the settlement agreement but affirmation must be unequivocal, and the letter is not written in those terms. What the letter clearly did was alert the plaintiff to the breaches, which the plaintiff subsequently took steps to largely remedy, and to preserve the defendant's position in the sense that it kept its options open.

[21] By the time the defendant did take unequivocal steps the plaintiff had changed its name, as it was required to do by the agreement, and had cancelled both the trademark registration in the name *Te Mara* and domain name registrations using the same words.

[22] The defendant's letter of 19 June 2013 also complained about advertising of the plaintiff's products using the name *Te Mara* at the Toronto, Ottawa and Prowein International Wine Fairs in December 2011, March 2012 and May 2012. Prior to those wine fairs the plaintiff had applied for and received confirmation of registration of its new trademark in the *Ata Mara* name in the United Kingdom and had also applied for registration of its new trademark in New Zealand. It was continuing to release Te Mara Estate branded wines into the distribution chain as the agreement entitled it to do. This was the stock that pre-dated the 2010 vintage for whites and the 2009 vintage for reds, as well as the release of the 2010 vintage for

reds and 2011 vintage for whites which were the subject of clause 2(a) of the agreement. It was only from the release of those wines that the plaintiff was obliged to cease using the names *Te Mara/Te Mara Estate*. Consequently I do not agree there was any breach of the agreement through the display or advertising of the plaintiff's wines at those wine fairs.

[23] There was a further wine fair at Warsaw on 12 March 2013. Following that wine fair the defendant began to initiate enquiries as to compliance with the agreement. The plaintiff's position was that it had only, in the previous month, been advised of the abandonment by Ata Rangi of its challenge to the use by the plaintiff of the *Ata Mara* name and so it was necessary, for the process of exhibiting its wines, that their association with the *Te Mara* brand be known. Ata Mara was at that point an unknown winery and brand. The wines advertised in the brochure for that wine fair from the plaintiff were a pinot noir from 2010, and whites from 2010 and 2011. They therefore fell within the exception in clause 2(a) of the agreement which prevented use of the *Te Mara/Te Mara Estate* names in dealings with wine as from the release of the 2010 vintage for reds and 2011 vintages for whites. The plaintiff's argument was that the wines were only being exhibited in any event, and not released to the market.

[24] Until the 2010 vintage for reds and the 2011 vintage for whites were released the prohibition on the use of the name *Te Mara* or Te Mara Estate Limited did not apply. There was evidence that third parties, such as for instance Central Otago Wine Growers Association, were continuing to use the *Te Mara* name and website in their promotional material. I accept Mr Pratt's evidence that the plaintiff's website has been changed and that it did not have control over third parties continuing to possess, advertise, or sell stock under the plaintiff's earlier name. Mr Pratt also said, in evidence which I accept, that the Central Otago Winegrowers Association brochure referred to by Mr N B Buck was out of date and the current version does not reference *Te Mara Estate*. Neither do I accept the Ata Mara current website contains the words *Te Mara* in its source code. I accept Mr Pratt's evidence that the underlying search engine, over which the plaintiff does not have control, means that two of the three words in Ata Mara's current website title, namely *Mara* and *Estate*

lead to *Te Mara* but do not consider that to be a breach of the agreement. The search engine is under the control of Google, and not the plaintiff.

[25] Consequently the defendant could not assert in July 2014 that there had been a fundamental breach of the agreement as to amount to repudiation or that, by implication, the delay in implementing the agreement meant the agreement was repudiated. Not only was there an absence of written notice requiring breaches to be remedied by a specified date, but the defendant had largely complied with the terms of the settlement agreement by 31 July 2014 having changes its name, disposed of the wine to 'library stock' level, cancelled its domain names featuring the name *Te Mara*, and withdrawn or surrendered its trademarks in that name.

[26] The plaintiff's demand for final payment was not made in the way required by para 2(i) of the agreement. Mr Buck's evidence was the reason for the insertion of the requirement that the letter from Wynne William & Co was that gave the defendant some comfort that the stock had actually been sold into the distribution chain, presumably to wholesalers or retailers of wine or sold directly by the plaintiff to third parties. Clause 2(h) entitled the plaintiff to trade all of its stock pre-dating the 2010 vintage for whites and the 2009 vintage for reds under its then current branding, and once these had been sold into the distribution chain demand the payment to complete the agreement.

[27] As at 20 February 2015 the plaintiff's stock levels for wine the subject of clause 2(a) and (h) of the agreement, which Mr Pratt described as 'library stock' for the plaintiff and its directors' own personal use, amounted to some 920 bottles. Mr Pratt said as at May 2015, the February 2015 stock of 438 bottles of Te Mara 2010 pinot gris had been reduced to 177 bottles, and the 300 bottles of Te Mara 2010 riesling had been reduced to 274 bottles. By April 2016 they had been further reduced to 80 and 208 bottles respectively. The defendant did not accept that the volume of wine described by the plaintiff could be said to be 'library stock'. There was neither cross-examination on the point nor expert evidence called as to what might be a reasonable amount to retain for personal consumption, presumably by the plaintiff's directors. It is for the plaintiff to establish on the balance of probabilities that it has complied with the terms of the settlement agreement so as to entitle it to

the final payment. The evidence does not satisfy me that as at the time demand was made for payment and the proceedings issued, all stock the subject of clause 2(i) of the agreement had been sold into the distribution chain as a substantial amount of stock was still retained.

Summary

[28] I am not satisfied, on the balance of probabilities, that clause 2(i) had been satisfied by the plaintiff prior to calling for payment of the balance of the monies. Accordingly the plaintiff's claim fails and the defendant is entitled to judgment. However, given I have found the plaintiff did not repudiate the agreement, as the defendant asserted, it was not entitled to treat the agreement as having been repudiated. If it wished to repudiate the agreement itself it needed to make time of the essence, which it did not do. Therefore the defendant's counter-claim fails and the plaintiff is entitled to judgment in that respect.

[29] Given the respective measure of success of the parties, costs can lie where they fall.

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Gibson, DCJ