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

**I TE KŌTI MATUA O AOTEAROA**
**TĀMAKI MAKAURAU ROHE**

**CIV-2016-404-2735**
**[2018] NZHC 989**

| | | |
|---|---|---|
| BETWEEN | SAVVY VINEYARDS 4334 LIMITED<br>First Plaintiff |
| | SAVVY VINEYARDS 3552 LIMITED<br>Second Plaintiff |
| AND | WETA ESTATE LIMITED<br>First Defendant |
| | TIROSH ESTATE LIMITED<br>Second Defendant |

Hearing: 12-14 March and 27-28 March 2018

Appearances: DPH Jones QC and CL Bryant for the Plaintiffs
R E Harrison QC and W D Woodd for the Defendants

Judgment: 9 May 2018

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**JUDGMENT OF GORDON J**

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This judgment was delivered by me
on 9 May 2018 at 10.00 am, pursuant to
r 11.5 of the High Court Rules

Registrar/Deputy Registrar
Date:

Solicitors: Hesketh Henry, Auckland
Boyle Mathieson, Auckland
Counsel: DPH Jones QC, Auckland
R E Harrison QC, Auckland

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## Introduction

[1] The plaintiff companies, Savvy Vineyards 4334 Limited[1] and Savvy Vineyards 3552 Limited[2] (separately Savvy 4334 and Savvy 3552; together the Savvy companies), were formed to manage vineyards in Marlborough and to purchase grapes from those vineyards.

[2] The defendants, Weta Estate Limited (Weta) and Tirosh Estate Limited (Tirosh),[3] each own two of those vineyards. Savvy 4334 managed the two Weta vineyards under two vineyard management agreements and had an option to purchase grapes from those two vineyards under two grape supply agreements. Similar agreements existed as between Savvy 3552 and Tirosh.

[3] Weta and Tirosh terminated the vineyard management agreements and the grape supply agreements, first in February 2010 and then again in December 2010. The Savvy companies succeeded in proceedings they brought to enforce the agreements.

[4] However, Weta and Tirosh have refused to supply grapes to the Savvy companies, claiming that those companies failed to exercise their options to purchase grapes under the grape supply agreements within the time specified in those agreements and accordingly, those options lapsed during the course of the earlier proceedings.

[5] The Savvy companies have brought the present proceedings claiming declarations that the agreements remain on foot and seeking damages.

[6] Weta and Tirosh have filed a joint counterclaim seeking declarations that the Savvy companies' exercise of options for the 2016 and all subsequent harvests were invalid and ineffectual; and that the Savvy companies' purchase options have permanently expired and lapsed.

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1 Formerly Goldridge Estate Vineyards 4334 Limited.
2 Formerly Goldridge Estate Vineyards 3552 Limited.
3 Tirosh Estate Limited was formerly Kakara Estate Limited. For ease of reference, the company will be referred to as Tirosh throughout the judgment.

[7] Second counterclaims made separately by Weta and Tirosh seek rectification of the grape supply agreements. Those counterclaims are contingent on the court accepting the Savvy companies' interpretation of the relevant clauses in the grape supply agreements. In that event, Weta and Tirosh assert that those provisions of the grape supply agreements do not reflect the agreement between the parties and they seek rectification of the relevant clauses to reflect the agreement which they say was reached.

**Background**

[8] This is now the ninth year of litigation between the parties. The history to the proceeding is "long and winding", to borrow an expression of Whata J in an interlocutory application in this proceeding.[4] That background, including a brief summary of the earlier proceedings, is as follows.

[9] The Savvy companies are part of a group of companies owned by Peter and Jean Vegar, who have worked in the wine industry for many years. They previously owned a wine-making business based in Matakana which produced wine under the labels Matakana Estate and Goldridge Estate.

[10] In 2006, Peter Vegar[5] identified and then developed the investor vineyard model. He saw an opportunity arising from the increasing scarcity of land in Marlborough that was suitable for viticulture. If no further land was to become available for development, the supply of Marlborough wine (particularly sauvignon blanc) would become fixed, and the value of both land and grapes would increase.

[11] Under Peter Vegar's business model, Goldridge Estate Limited (GEL) or one of its related companies would secure land in the Marlborough area. The land would then be on-sold to investors and a vineyard would be developed on the land by GEL through an associated company. That company would then manage the vineyard and would have the right to purchase grapes from the vineyard. GEL thus ensured the supply of quality grapes in the long term.

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4 *Savvy Vineyards 4334 Ltd v Weta Estate Ltd* [2018] NZHC 112 at [2].

5 I will refer to Peter Vegar using his Christian name as his brother Paul Vegar was also a witness in this proceeding.

[12] Peter Vegar's brother, Paul Vegar, had a property development company called The Vines Development Limited (Vines). It purchased farmland in the Upper Wairau Valley in Marlborough which was suitable for vineyard development and which was one of the few remaining areas of available land.

[13] Under the investment model, the land to be sold by Vines would be subject to three contracts with GEL. Under those contracts, GEL undertook to develop the land into vineyards (the project management agreement) and to manage those vineyards for investors (the vineyard management agreement). In return, GEL had options to purchase grapes from the vineyards under long-term supply agreements (the grape supply agreements).

[14] In August 2006, Peter and Paul Vegar were introduced to Murray Forlong by an investment advisor. They entered into negotiations for the purchase of land by Mr Forlong (for a company yet to be formed) at 3552 State Highway 63[6] in the Upper Wairau Valley in Marlborough from Vines. On 20 October 2006, Tirosh (then called Kakara Estate Limited) was incorporated with Mr Forlong, his brother Bruce Forlong and Christopher Weir as directors. The three directors are engineers who were looking for an investment with high capital growth.

[15] Also on 20 October 2006, Vines as vendor and Tirosh as purchaser executed a conditional agreement for the sale and purchase of two adjoining parcels of land, each approximately 75 hectares in area, for $4,800,000 plus GST. Each of those two parcels became a separate vineyard (Tirosh vineyards). As a condition of that agreement, and on the same day, Vines and GEL executed the following documents:

(a) Two grape supply agreements, one for each of the two Tirosh vineyards (Tirosh grape supply agreements);

(b) Two vineyard management agreements, one for each of the two Tirosh vineyards (Tirosh vineyard management agreements); and

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6 Hence the name, Savvy Vineyards 3552 Limited.

(c) One project management agreement in respect of the Tirosh vineyards (Tirosh project management agreement).

Collectively the Tirosh property agreements.

[16] The sale and purchase of the Tirosh vineyards settled on 30 July 2007. On settlement, Vines assigned the benefit of the Tirosh property agreements to Tirosh as owner.

[17] GEL then proceeded to develop vineyards on the land. There has been a significant increase in the value of the property as a result.

[18] As negotiated by the parties and as specified in the agreements, the land was divided into two vineyards. One vineyard could be sold without the vineyard management agreement and grape supply agreement (which could be terminated on 24 months' notice). The other vineyard could only be sold if those two agreements were transferred to the new owner.

[19] The final planting of the vineyards was in Spring 2008.

[20] A similar process was followed in relation to the vineyards purchased by Weta. On 13 December 2007, Weta was incorporated with Murray and Bruce Forlong and Christopher Weir as directors.

[21] On 14 December 2007, Vines as vendor and Weta as purchaser entered into two conditional agreements for the sale and purchase of two parcels of land at 4334 State Highway 63[7] in the Upper Wairau Valley, each approximately 98 hectares in area, for $9,800,000 plus GST. Each of the two parcels became a separate vineyard (Weta vineyards). As a condition of the sale and purchase agreements, on the same day, Vines and GEL entered into the following agreements:

(a) Two grape supply agreements, one for each of the two Weta vineyards (Weta grape supply agreements);

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7 Hence the name, Savvy Vineyards 4334 Limited.

(b) Two vineyard management agreements, one for each of the two Weta vineyards (Weta vineyard management agreements); and

(c) Two project management agreements for the two Weta vineyards (Weta project management agreements).

Collectively the Weta property agreements.

[22] Although there are some differences between the Tirosh grape supply agreements and the Weta grape supply agreements, the notice clauses which are in issue in this proceeding were unchanged.

[23] On 8 May 2008, the sale and purchase of the Weta vineyards settled and deeds of assignment were then executed by Vines as assignor, Weta as assignee and GEL. The planting of the Weta vineyards began in December 2008, with final planting completed in Spring 2009.

[24] Each vineyard comprised a number of blocks, as defined by the grape supply agreements. Each block had one variety of grape growing on it, although the vast bulk of the grapes was sauvignon blanc.

[25] Under the grape supply agreements, Savvy 4334 and Savvy 3552 had a right of first refusal to purchase grapes from Weta and Tirosh respectively. To exercise that right, the Savvy companies were required to give notice to Weta and Tirosh. Clause 2.2 of the grape supply agreements provided in part:

> … Such right of first refusal shall be deemed to be effective on the Commencement Date and to be repeated on each third anniversary of the Commencement Date provided that if the Buyer [the Savvy companies] does not exercise the right of first refusal in respect of any Block for 2 consecutive periods of 3 years the right of first refusal shall be deemed to have lapsed …

[26] The commencement date was defined in the grape supply agreements as 1 May of the year before the first planned harvest of grapes (Commencement Date). That date was 1 May 2009 for all the grape supply agreements.[8]

[27] The issue as to when the right of first refusal lapsed is the subject of disagreement between the parties and underlies the second cause of action.

[28] At this point in the narrative, it is sufficient to note that the Savvy companies did not exercise their right of first refusal prior to the Commencement Date for any of the blocks in the Weta or Tirosh vineyards.

[29] Under the grape supply agreements, once the option had been exercised for any block or blocks, the obligation to purchase all grapes from those blocks then continued and remained for the duration of the grape supply agreements. The agreements had an initial term of 10 years and two renewal periods of 20 years each. Accordingly, the potential term of the grape supply agreements was 50 years.

[30] On 30 July 2009, Savvy 4334 was incorporated. At that time, it was called Goldridge Estate Vineyards 4334 Limited. Its directors and shareholders are Peter Vegar and his wife Jean Vegar. On 28 August 2009, Savvy 3552 was incorporated. At that time, it was called Goldridge Estate Vineyards 3552 Limited. Its directors and shareholders are also Peter and Jean Vegar.

[31] On 28 August 2009, GEL assigned the Weta property agreements for the vineyards at 4334 State Highway 63 to Goldridge Estate Vineyards 4334 Limited, and the Tirosh property agreements for the vineyards at 3552 State Highway 63 to Goldridge Estate Vineyards 3552 Limited.

[32] The names of the plaintiff companies were changed to Savvy Vineyards 4334 Limited and Savvy Vineyards 3552 Limited on 11 November 2010.

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[8] The Savvy companies believed that the Commencement Date of the Weta grape supply agreements was 1 May 2010. The defendants believed the date to be 1 May 2009. In December 2010, the parties agreed that the Commencement Date was 1 May 2009.

[33] On 17 February 2010, Weta and Tirosh by letters from their solicitors served notices of termination purporting to terminate both the vineyard management agreements and grape supply agreements. Essentially, these were served on the basis that GEL had not exercised the option to purchase grapes under the grape supply agreements prior to the Commencement Date of 1 May 2009.

[34] The Savvy companies rejected the termination and issued proceedings. They also applied for an interim injunction. At the interim injunction hearing before Wylie J on 13 July 2010, Weta and Tirosh conceded that they were not entitled to terminate the grape supply agreements. The hearing proceeded in relation to the notices of termination of the vineyard management agreements.

[35] On 3 August 2010, Wylie J gave judgment granting the injunction restraining Weta and Tirosh from taking steps to terminate or effect termination of the grape supply agreements and/or vineyard management agreements.[9]

[36] In the course of his judgment, Wylie J expressed a view on the interpretation of cl 2.2 of the grape supply agreements as referred to in [25] above. The effect of Wylie J's decision on the interpretation of that clause was the subject of argument before me and is referred to later in this judgment.

[37] On 21 November 2010, GEL was put into voluntary liquidation.

[38] On 20 December 2010, Weta and Tirosh gave a second notice purporting to terminate both the vineyard management agreements and grape supply agreements. The basis of the termination was the liquidation of GEL and on the ground that the Savvy companies were mere assignees of the contracts.[10] This was refuted by the Savvy companies which then amended their statement of claim to seek relief from this second attempt to terminate the agreements.

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9 *Goldridge Estate Vineyards 3552 Ltd v Kakara Estate Ltd* HC Auckland CIV-2010-404-2838, 3 August 2010 at [90].

10 Provisions in the agreements entitled either party to terminate if "the other party" goes into liquidation.

[39] At the request of Weta and Tirosh, the Savvy companies continued to manage the vineyards. However, on 11 March 2011, Weta and Tirosh terminated what they referred to as a temporary arrangement and issued trespass notices. The Savvy companies then cancelled the vineyard management agreements on 14 March 2011.

[40] By judgment dated 14 March 2012, Andrews J found that GEL ceased to be a party to the grape supply agreements and vineyard management agreements, and that those agreements had been novated to the Savvy companies.[11] Andrews J made declarations that the notices of termination dated 20 December 2010 were invalid and that the grape supply agreements were binding on Weta and Tirosh.[12] Weta and Tirosh appealed to the Court of Appeal by notice of appeal filed on 27 March 2012.

[41] It was apparent that a decision on the appeal would not be given before the third anniversary of the Commencement Date, 1 May 2012. The parties therefore agreed on or about 30 April 2012 to extend the time for the exercise of the right of first refusal under cl 2.2 of the grape supply agreements, to purchase grapes, to 1 May 2013.

[42] On 12 April 2013, the Court of Appeal quashed the declarations made by Andrews J, and substituted a declaration in favour of Weta and Tirosh that the grape supply agreements and vineyard management agreements had been validly terminated.[13]

[43] The Savvy companies did not exercise their right of first refusal under cl 2.2 to purchase grapes by 1 May 2013. Their position is that they would have done so but for the repudiation by Weta and Tirosh on 20 December 2010, and in any event the judgment of the Court of Appeal, as a matter of law, meant they had no contractual rights which they could exercise at that time. Weta and Tirosh disagree. I refer to these issues later in this judgment.

[44] On 10 May 2013, the Savvy companies applied for leave to appeal to the Supreme Court. The application for leave was opposed by Weta and Tirosh, in submissions filed on 23 June 2013. Leave was granted on 17 July 2013 and the hearing

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11 *Savvy Vineyards 3552 Ltd v Kakara Estate Ltd* [2012] NZHC 416.
12 At [62].
13 *Kakara Estate Ltd v Savvy Vineyards 3552 Ltd* [2013] NZCA 101, [2013] 3 NZLR 297 at [79].

proceeded on 13 February 2014.[14] In a judgment dated 5 September 2014, a majority of the Supreme Court allowed the appeal stating "[t]he judgment of the Court of Appeal is set aside and the judgment of Andrews J is restored".[15]

[45] At no time during that earlier litigation did Weta and Tirosh claim the options under the grape supply agreements had lapsed on 1 May 2013.

[46] On 17 November 2014, the Savvy companies gave notice exercising the rights of first refusal under cl 2.2 to purchase all grapes from both vineyards for the 2016 harvest (the date of 1 May 2015 was the sixth anniversary of the Commencement Date for both the Weta and Tirosh vineyards).

[47] By solicitor's letter dated 8 December 2014, Weta and Tirosh asserted that all options under the grape supply agreements had lapsed on 1 May 2013 and the notice of 17 November 2014 was of no effect. By solicitor's letter dated 23 December 2014, the Savvy companies responded that their options could be exercised prior to the third and sixth anniversaries of the Commencement Date, namely prior to 1 May 2013 (the extended date) and 1 May 2015. They claimed that Weta and Tirosh were repudiating their obligations and stated that the repudiation was not accepted. The Savvy companies reserved their rights.

[48] On 28 October 2016, the Savvy companies issued the present proceeding.

**Scope of hearing**

[49] The first amended statement of claim pleads five causes of action.

[50] The first cause of action pleads that but for the repudiation by Weta and Tirosh on 20 December 2010, the Savvy companies would have exercised the options to purchase grapes under cl 2.2 of the grape supply agreements by 1 May 2013 for each and every block of the Weta vineyards and the Tirosh vineyards. The Savvy companies seek an inquiry into damages for the loss of profit in relation to the 2014 and subsequent harvests, and judgment for the sum found to be due.

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14 *Savvy Vineyards 3552 Ltd v Kakara Estate Ltd* [2013] NZSC 71.
15 *Savvy Vineyards 3552 Ltd v Kakara Estate Ltd* [2014] NZSC 121, [2015] 1 NZLR 281 at [113].

[51] The second cause of action pleads that by the letter dated 8 December 2014, Weta and Tirosh repudiated the grape supply agreements and that by reason of that repudiation, the Savvy companies lost the opportunity to profit from the purchase and on-sale of grapes from the vineyards for the 2016 and subsequent harvests. They seek a declaration that the Savvy companies were entitled to purchase the 2016 harvest and are entitled to purchase subsequent harvests on the terms in the Weta grape supply agreements and the Tirosh grape supply agreements. The Savvy companies also seek an inquiry into damages and judgment for the sum found to be due.

[52] The third cause of action pleads that there was an implied agreement between the parties that the options accruing on 1 May 2013 would be exercisable on the first anniversary of the Commencement Date following the Supreme Court's decision, and/or Weta and Tirosh are estopped from denying that such an agreement was reached, and/or Weta and Tirosh are estopped from asserting that the Savvy companies were not able to exercise options to purchase grapes prior to the first anniversary of the Commencement Date following the Supreme Court's decision. The same relief is sought as for the second cause of action.

[53] There are also the counterclaims by Weta and Tirosh seeking declarations and rectification as referred to in [6] and [7] above.

[54] The fourth and fifth causes of action, which relate to unpaid invoices under the vineyard management agreements, were stayed on 26 May 2017, and the Savvy companies' claims and disputes in relation to those unpaid invoices were referred to arbitration.[16]

[55] On 17 August 2017, Associate Judge Matthews made orders by consent that issues of liability be heard and determined first, with claims for damages to be considered (if necessary) at a second stage.

[56] The hearing before me was the first stage, in other words, as to liability.

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16 *Savvy Vineyards 4334 Ltd v Weta Estate Ltd* [2017] NZHC 1111 at [90].

[57] As part of the consent order, Associate Judge Matthews set down the following preliminary questions for determination in this hearing:

(a) Are the defendants liable to the plaintiffs under the first, second and/or third causes of action in the statement of claim?

(b) Are the plaintiffs entitled to the declaration sought relating to the second and third causes of action in the statement of claim?

(c) Are the defendants entitled to the declaration sought in their joint counterclaim?

(d) Have the defendants established that orders for rectification should be made as sought?

**First cause of action: breach of the grape supply agreements: repudiation on 20 December 2010**

[58] The first cause of action which I set out in full is pleaded (after the general paragraphs) as follows:

> 51 Weta and Tirosh repudiated the Grape Supply Agreements in their notice of 20 December 2010.
>
> 52 But for that repudiation, Savvy 4334 and Savvy 3552 would have exercised the options to purchase grapes under cl 2.2 of the Grape Supply Agreements on 1 May 2013 for each and every Block of Weta Vineyard 1, Weta Vineyard 2, Tirosh Vineyard 1 and Tirosh Vineyard 2 (collectively **the Vineyards**).
>
> 53 By reason of that repudiation Savvy 4334 and Savvy 3552 lost the opportunity to profit from the purchase and on-sale of grapes and/or wine made from those grapes from the Vineyards for the 2014 and subsequent harvests.
>
> *Particulars*
>
> a. The Court of Appeal judgment on 12 April 2013 meant that the Property Agreements terminated before those options accrued or were inoperative and/or suspended.

[59] Mr Jones QC, appearing on behalf of the Savvy companies, submits that the issue on the first cause of action is the following question:

> But for the defendants' repudiation of the Grape Supply Agreements, would the plaintiffs have exercised the options to purchase grapes for the 2014 and subsequent harvests?

[60] Mr Jones submits that the question of the liability of Weta and Tirosh is primarily one of fact, with the Savvy companies bearing the burden of proof on the balance of probabilities. Mr Jones relies on the evidence of Peter Vegar, supported by the evidence of Dr David Jordan, an independent viticulture consultant, that he would have exercised the options prior to 1 May 2013. Mr Jones submits there has been no serious contest of Peter Vegar's evidence on this factual issue and that clearly the Savvy companies would have exercised the option prior to 1 May 2013, were it not for the adverse Court of Appeal judgment.

[61] Notwithstanding the pleading at para 53(a), set out in [58] above, Mr Jones submits that while the Court of Appeal judgment was, as a matter of fact and law, the reason why the options were not exercised by the Savvy companies, the legal effect of the judgment is irrelevant to the first cause of action.

[62] Mr Jones submits that it is common ground that Weta and Tirosh breached the contracts by repudiating their obligations on 20 December 2010. They maintained those repudiations until delivery of the Supreme Court judgment on 5 September 2014. In furtherance of their repudiations, they pursued declarations at each level of the Court that they had validly terminated the contracts. Mr Jones submits that if those repudiations had not occurred, the evidence establishes on the balance of probabilities that the Savvy companies would have exercised the options under the grape supply agreements and would have purchased grapes from the 2014 harvest.

[63] Mr Jones then refers to the argument on behalf of Weta and Tirosh that there was no causal nexus between their repudiatory breaches of contract and the Savvy companies' loss, because the Savvy companies chose not to exercise the options (having misunderstood, as Mr Harrison QC (for Weta and Tirosh) would say, the legal effect of the Court of Appeal's judgment).

[64] In response, Mr Jones submits that while it is correct that causation is relevant to a damages claim for breach of contract: the breach must be the effective or dominant

cause of the loss (although it need not be the only cause).[17] He submits that the chain of causation may be broken by an act or omission of the plaintiff, but this requires conduct that approaches recklessness. A defendant cannot escape liability if a plaintiff acts in a reasonable way when faced with a dilemma created by the defendants' breach.[18]

[65] Mr Jones principally submits that the conduct by Weta and Tirosh is the effective cause of the Savvy companies' lost opportunity to profit, not the Savvy companies' "choice". He submits this is apparent on an examination of the reasonableness of the Savvy companies' conduct.

[66] First, Mr Jones says there is Peter Vegar's evidence that the Savvy companies did not give notice as they understood that as a result of the Court of Appeal's judgment, the contracts were at an end. Peter Vegar's evidence was that he decided to pursue an application for leave to appeal, as there was still time before the sixth anniversary to challenge the judgment.[19]

[67] Mr Jones submits that for the avoidance of doubt, the Savvy companies' position as to the effect of the Court of Appeal judgment is entirely correct. I refer to that submission further below. But, Mr Jones submits regardless of how that issue is determined, the Savvy companies are entitled to claim damages for losses caused by Weta and Tirosh's repudiation of the grape supply agreements. The Savvy companies' conduct was based on a reasonable assessment of their rights following delivery of the Court of Appeal judgment.

[68] Second, Mr Jones submits that both the reasonableness of the Savvy companies' conduct, and the lack of causal potency, is apparent when assessed against the other "choices" the Savvy companies may have made. Mr Jones submits that if those companies were entitled to exercise the option in direct contravention of the Court of Appeal's judgment (which is denied), an election not to do so would be a

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17 HG Beale "Damages" in HG Beale (ed) *Chitty on Contracts: Volume 1 General Principles* (32nd ed, Sweet & Maxwell, London, 2015) 1797 at [26–058].

18 Beale, above n 17, at [26–063].

19 Whether in fact the right of first refusal continued up to the sixth anniversary on 1 May 2015 or whether it expired as at the third anniversary is the subject of the second cause of action.

reasonable commercial decision in the circumstances faced by the Savvy companies in April 2013. He says that having regard to the Court of Appeal decision, there was no contractual relationship so there was no ability to exercise an option, nor any obligation for Weta and Tirosh to supply grapes. There was, as a consequence, no possibility that the Savvy companies could on-sell the grapes from the 2014 harvest to third parties.

[69] Therefore, Mr Jones submits that it was the repudiation of the contracts by Weta and Tirosh which made the exercise of the option commercially unfeasible, and it was that repudiation that was the essential or dominant cause of the Savvy companies' inability or failure to exercise the options prior to 1 May 2013.

[70] Mr Harrison QC, appearing for Weta and Tirosh, says that the submissions for the Savvy companies represent a significant change of stance and a departure from their pleaded case, in that the contention in closing is that the repudiations were the effective cause of everything that followed (including the adverse Court of Appeal judgment and the failures to give notice). He submits that it is too late for the Savvy companies to change the entire focus of their first cause of action in this way. But he says, in any event, and without prejudice to that contention, this new approach completely ignores the critical fact of the Savvy companies' election to reject the repudiations and the important legal consequences from that election.

[71] In other words, Mr Harrison submits the (now) admitted wrongful repudiations by Weta and Tirosh are merely the starting point for analysis. He says what the Court is required to address is not merely that there was a wrongful repudiation, but it needs to determine whether there was a breach of contract by Weta and Tirosh which will only be the case if they were under an obligation to supply grapes for the harvests in question. He submits they would only have been under that contractual obligation if notice had been given by the Savvy companies in accordance with the contracts they were seeking to uphold. He emphasises what he describes as the Savvy companies' "critical election" to hold Weta and Tirosh to the contract. Having done so, the House

of Lords judgment in *Fercometal SARL v Mediterranean Shipping Co SA* demonstrates how that election plays out.[20]

**Discussion – first cause of action**

[72] I first consider the effect in law of the wrongful repudiation by Weta and Tirosh of the grape supply agreements, and the response by the Savvy companies that the grape supply agreements had not been validly terminated and that they continued in force. I do so first by reference to the *Fercometal* judgment relied on by Mr Harrison.

[73] In that case, the general principle was stated as follows:[21]

> … When A wrongfully repudiates his contractual obligations in anticipation of the time for their performance, he presents the innocent party B with two choices. He may either affirm the contract by treating it as still in force or he may treat it as finally and conclusively discharged. There is no third choice, as a sort of via media, to affirm the contract and yet to be absolved from tendering further performance unless and until A gives reasonable notice that he is once again able and willing to perform. Such a choice would negate the contract being kept alive for the benefit of *both* parties and would deny the party who successfully sought to rescind, the right to take advantage of any supervening circumstance which would justify him in declining to complete.

[74] *Fercometal* was cited with apparent approval by the Court of Appeal in *Kipling v Van Kan*.[22] It was also followed in the High Court in *Haden v Attorney-General*.[23]

[75] The dictum that an unaccepted repudiation ("a thing writ in water") has no legal effect, relied on in *Fercometal*,[24] was affirmed by the Supreme Court in *Paper Reclaim Ltd v Aotearoa International Ltd*:[25]

> [18] It is trite law that a repudiation, unless accepted, can have no legal effect on the existence of a contract. In the words of Asquith LJ in *Howard v Pickford Tool Co Ltd*, it is "a thing writ in water and of no value to anybody: it confers no legal rights of any sort or kind" …
>
> (Citation omitted)

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20 *Fercometal SARL v Mediterranean Shipping Co SA* [1989] AC 788 (HL).
21 At 805 per Lord Ackner. See also at 799-801.
22 *Kipling v Van Kan* [2012] NZCA 163 at [33].
23 *Haden v Attorney-General* (2011) 22 PRNZ 1 (HC) at [54].
24 At 800.
25 *Paper Reclaim Ltd v Aotearoa International Ltd* [2007] NZSC 26, [2007] 3 NZLR 169.

[76] The *Fercometal* principle and its exceptions are summarised by Ian Bassett in *Contract Law in New Zealand: Lawyers' Handbook*:[26]

> If in response to a repudiation the innocent party elects to affirm the contract, then the contract is kept alive for the benefit of both parties. The affirming/innocent party then has to be ready, willing and able to perform its obligations at the required time, failing which the affirming/innocent party will be in breach of contract.
>
> Except when:
>
> (a) The inability of the innocent party to perform has been caused by the conduct of the repudiating party.
>
> (b) The repudiating party represents to the innocent party that it need not perform and the innocent party acted in reliance.
>
> (c) The contract expressly or impliedly provides that performance by the repudiating party was to be:
>
> (i) Simultaneous with performance by the affirming party.
>
> (ii) A condition precedent to performance by the affirming party.
>
> (Citations omitted)

[77] On the basis that *Fercometal* is good law in New Zealand, I now apply the principle from that judgment and the exceptions, having regard to the circumstances of this case. In other words, I consider whether the repudiation by Weta and Tirosh in the letter of 20 December 2010 prevented the Savvy companies from giving notice of exercise of their options under the grape supply agreements prior to the extended date of 1 May 2013.

[78] The Savvy companies responded to the 20 December 2010 notices of termination by solicitor's letter dated 22 December 2010, which included the following:

> Our clients reject any right to terminate any agreements has accrued to your clients and reject the termination notices as invalid and of no effect. Our clients will continue to act on the basis the agreements remain on foot, as they do.

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[26] Ian Bassett *Contract Law in New Zealand: Lawyers' Handbook* (Southern Cross Publishing, Auckland, 2007) at 73-74.

[79] The *Fercometal* principle includes an exception to its application where the actions of the wrongfully repudiating party effectively prevent performance by the innocent party of the contractual obligation in question. In this case, the giving of notice of exercise by the Savvy companies of their grape purchase options was not a matter of contractual obligation. Rather, it was a contractual right or entitlement. However, the failure to give timely notice had contractual consequences that were favourable to Weta and Tirosh because their supply obligations would not be triggered.

[80] I accept Mr Harrison's submission that this exception is equally applicable to contractual rights as it is to obligations.[27]

[81] I also accept Mr Harrison's submission that on the facts of this case, Weta and Tirosh's wrongful repudiations of the grape supply agreements presented no practical or any other impediment to the unilateral act of giving timely notice of exercise of the grape purchase options. While Weta and Tirosh maintained a legal position (until the Supreme Court delivered its judgment) that the grape supply agreements had been validly terminated, that stance did not prevent the exercise by the Savvy companies of their grape purchase options before the agreed extended date of 1 May 2013.

[82] The evidential basis for that finding is contained in correspondence regarding the agreed extension to 1 May 2013. The Savvy companies sought the extension by letters to Weta and Tirosh dated 27 April 2012. At that time, Weta and Tirosh had filed their appeal in the Court of Appeal. In other words, this was at a time when Weta and Tirosh were continuing to maintain their repudiations of the grape supply agreements. The letters on behalf of each of the Savvy companies stated that they were "in a position to exercise the rights of purchase" "on 1 May 2012" "and will do so in accordance with the relevant provisions of the Grape Supply Agreement", but "would agree to a deferral of the option date from 1 May 2012 to 1 May 2013". Each of the letters stated:

> However, it is unknown at this stage when an appeal date will be set for the challenge to the High Court decision and when any appeal judgment might be available. It is also a possibility that the party which does not succeed in the Court of Appeal may wish to pursue the matter further … Should written confirmation from [Tirosh/Weta] that it agrees to such a course not be received

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[27] *Fercometal SARL v Mediterranean Shipping Co SA*, above n 20, at 805 per Lord Ackner.

> by 1 pm on Monday 30 April 2012, Savvy [3552/4334] will proceed with notices in relation to the purchase of grapes from the [Tirosh/Weta] vineyard.

[83] The proposal for extension was accepted by both Weta and Tirosh. In other words, both sides agreed that notwithstanding the ongoing litigation as to the validity of the purported termination of the grape supply agreements by Weta and Tirosh, and also the pending appeal and the prospect of a further appeal, the Savvy companies were contractually entitled (if ultimately successful) to give notice of exercise of their grape purchase options on or before 1 May 2013.

[84] Accordingly, between extending the date for the exercise of the option and 1 May 2013 (leaving aside for the moment the effect of the Court of Appeal decision), Weta and Tirosh had done nothing that prevented the effective exercise by the Savvy companies of their grape purchase options. Nor, in that time period, had Weta and Tirosh conveyed to the Savvy companies that the giving of notice prior to 1 May 2013 would be ineffectual.

[85] In cross-examination, Peter Vegar gave two reasons for not giving notice prior to the agreed extension date of 1 May 2013. The first was an understanding based on legal advice following the Court of Appeal decision that the grape supply agreements were not on foot so that no notice could be given. Second, he had until the end of the second three-year period, i.e. up to 1 May 2015, to give notice.

[86] In my view, the Savvy companies did not refrain from giving notice of the exercise of their options prior to the 1 May 2013 deadline by reason of any act, omission or representation on the part of Weta or Tirosh. They refrained from doing so on the basis of their assessment of their legal position. In other words, by analogy with *Fercometal*,[28] the Savvy companies viewed their grape purchase options to be "fully operative" and their not giving notice prior to the agreed extended date of 1 May 2013 was their own decision, and was not induced by the conduct of Weta and Tirosh.

[87] I turn now to a second exception to the *Fercometal* principle where, in the words of Lord Ackner, innocent party A is in a position:[29]

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[28] At 806.
[29] At 805.

> … to contend that in relation to a particular right or obligation under the contract, [the repudiating party] B is estopped from contending that he, B, is entitled to exercise that right or that he, A, has remained bound by that obligation. If B represents to A that he no longer intends to exercise that right or requires that obligation to be fulfilled by A and A acts upon that representation, then clearly B cannot be heard thereafter to say that he is entitled to exercise that right or that A is in breach of contract by not fulfilling that obligation …

[88] We are here concerned with whether there were any representations *prior to* 1 May 2013 by Weta or Tirosh. We are not concerned with the implied agreement/estoppel pleaded in the third cause of action, namely a failure *subsequent* to the expiry of the extended date of 1 May 2013 "to allege that the options under the grape supply agreements had lapsed and the appeal (to the Supreme Court) had been rendered nugatory".

[89] The issue of whether, by reason of a representation or other conduct of the wrongfully repudiating party, the innocent party who keeps the contract alive is entitled to be excused its own non-performance of a contractual obligation is seen to arise in relation to contracts for the sale and purchase of land. The obligation in question is generally that of the innocent purchaser party to tender payment of the purchase price upon settlement. The purchaser party may be excused from formal tender of the purchase price if the vendor has, by words or conduct, demonstrated that a "contractually proper tender by the purchaser would be futile".[30] The conclusion that going through the motions of tendering would have been a futile exercise is not one which is lightly to be drawn.[31]

[90] The Supreme Court decision in *Bahramitash v Kumar*[32] was applied by the Court of Appeal in *Official Assignee v Kingston Developments Group Ltd*,[33] where the Court of Appeal saw *Bahramitash* as turning on estoppel principles. In *Kingston Developments*, there was a failure by the vendor's lawyer to speak up, which led the Court of Appeal to address "estoppel by silence". The Court of Appeal accepted that

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30 *Bahramitash v Kumar* [2005] NZSC 39, [2006] 1 NZLR 577 at [18].
31 At [20].
32 *Bahramitash v Kumar*, above n 30.
33 *Official Assignee v Kingston Developments Group Ltd* [2016] NZCA 415.

a "precondition to the duty to speak is actual knowledge by the silent party that the other party is relying on a false assumption".[34]

[91] I accept the submission made by Mr Harrison that regardless of whether the complaint on behalf of the Savvy companies asserts a representation by Weta and Tirosh that the Savvy companies need not perform their part of the contract (by giving notice of exercise of the grape purchase options), or that to do so would be "futile", neither test is satisfied on the facts of this case. Maintaining the repudiations (later determined to be wrongful) throughout was not a representation of anything other than the legal stance adopted by Weta and Tirosh. Additionally, by rejecting the attempted terminations, the Savvy companies were rejecting the stance by Weta and Tirosh, and so placed no reliance (for estoppel purposes) on any representations conveyed by the wrongful repudiations.

[92] Further, by agreeing on or about 30 April 2012 to the extension of the date for exercise of the grape purchase options to 1 May 2013, Weta and Tirosh gave an assurance to the opposite effect of a statement that the Savvy companies' taking of that step on or before the agreed extended date was dispensed with, or futile.

[93] There is also no evidence that Weta and Tirosh had any actual knowledge that the Savvy companies were relying on an unstated false assumption, so as to give rise to a duty on their part to speak out in the lead up to the expiration of the 1 May 2013 agreed extended date for the exercise of the options.

[94] Mr Jones refers to, and places reliance on, the Supreme Court judgment in *Ingram v Patcroft Properties Ltd*.[35] I acknowledge that the Supreme Court in that case does not mention the *Fercometal* principle, but there is a discussion[36] of the principle relied on in *Fercometal* and referred to in [75] above, namely that an unaccepted repudiation is a "thing writ in water and of no value to anybody; it confers no legal rights of any sort or kind".[37] The discussion by the Supreme Court is concerned with the wrongfully repudiating party's lack of entitlement to cancel the contract, either

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34 At [121].
35 *Ingram v Patcroft Properties Ltd* [2011] NZSC 49, [2011] 3 NZLR 433.
36 At [31]-[40].
37 At [31].

under statute or at common law, by reason of the innocent party's own breach of contract.[38]

[95] I accept the submission made by Mr Harrison that cases involving an election by the innocent party to affirm the contract in the face of a wrongful repudiation (as now accepted in this case) fall into a different category than cases where the innocent party either elects to cancel or makes no (immediate) election either way (as in *Ingram*).

[96] I also accept Mr Harrison's submission that it does not follow from the fact that the wrongfully repudiating party may be precluded from itself cancelling on grounds of the innocent party's own breach of contract that the innocent party, having unequivocally elected to affirm and enforce the contract, is either excused from its own contractual performance thereafter, or excused from not exercising rights conferred on it by the contract.

[97] It follows that the Savvy companies have not made out their case that the wrongful repudiation by Weta and Tirosh has caused or contributed to the Savvy companies not giving notice of exercise of their grape purchase options prior to the agreed extended date of 1 May 2013. The reason the Savvy companies did not give notice was as a consequence of their own view of their legal position as referred to in [85] above.

*Court of Appeal judgment*

[98] I now turn to the effect of the Court of Appeal judgment in favour of Weta and Tirosh, and whether that judgment prevented, as a matter of law, the Savvy companies from giving notice of exercise of their grape purchase options prior to the agreed extended date of 1 May 2013.[39]

[99] The Savvy companies plead that as a result of the Court of Appeal's judgment on 12 April 2013, the grape supply agreements terminated before the options accrued or were inoperative and/or suspended so that the options to purchase could not be

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38 At [35]-[40].
39 *Kakara Estate Ltd v Savvy Vineyards 3552 Ltd*, above n 13, at [42].

exercised. The Savvy companies accordingly did not (and could not) exercise the options that would have otherwise accrued on 1 May 2013.

[100] As noted above, Mr Jones submits that the legal effect of the Court of Appeal judgment is irrelevant to the first cause of action. He did, however, refer to the legal effect of the judgment in the context of his submissions on the second and third causes of action. He submitted that the authorities relied on by both parties make it clear that for so long as the Court of Appeal judgment remained in force, it was binding on the parties and had to be obeyed.[40] Mr Jones submits that if a Court has ordered that a contract has been terminated, parties are not permitted to exercise rights under that contract on the assumption or hope that the contract may be restored on appeal.[41]

[101] As from 12 April 2013, when the Court of Appeal delivered judgment, until 15 September 2014, when the Supreme Court delivered judgment, there was in force between the parties a declaration (by the Court of Appeal) to the effect that the notices of termination were valid, with the consequence that the grape supply agreements had been terminated. The language of the Supreme Court judgment was that the "judgment of the Court of Appeal is set aside and the judgment of Andrews J is restored".[42]

[102] The decision in *Hillgate House Ltd v Expert Clothing Service & Sales Ltd* is of assistance.[43] An order for possession had been obtained by the plaintiff landlords on the grounds of forfeiture of the lease and the tenant had been evicted. The order was reversed on appeal and the tenants claimed damages for wrongful eviction. Responding to an argument similar to that advanced on behalf of the Savvy companies, Sir Nicholas Brown-Wilkinson VC stated:[44]

> Certainly, in my judgment, the correct analysis is this. The claim in the present case was a claim to forfeit the lease. The order of Judge Baker declared that the tenants had forfeited. When the case went to the Court of Appeal, the

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40 *Hillgate House Ltd v Expert Clothing Service & Sales Ltd* [1987] 1 ELGR 65 (Ch) at 66: "… when an order is in force and so long as it is in force, it is to be obeyed and is in law correct". See also *Official Custodian for Charities v Mackey* [1985] Ch 168 (Ch) at 178; *Mandic v The Cornwall Park Trust Board (Inc)* [2011] NZSC 135, [2012] 2 NZLR 194 at [8]-[9].

41 *Official Custodian for Charities v Mackey*, above n 40, at 178.

42 *Savvy Vineyards 3552 Ltd v Kakara Estate Ltd*, above n 15, at [113].

43 *Hillgate House Ltd v Expert Clothing Service & Sales Ltd*, above n 40.

44 At 66.

> Court of Appeal declared that they had not forfeited. In my judgment, as the Court of Appeal's judgment discloses, the true view all along was that the lease had remained in existence. What was in doubt was what was the true legal effect.
>
> Therefore, in my judgment, [Counsel for the landlord] is wrong on the first ground. In my judgment, throughout the period between Judge Baker's judgment at first instance and the Court of Appeal judgment the lease was in existence and the obligations under it remained. Pending the decision of the Court of Appeal there was a misunderstanding of what the law was. But once the Court of Appeal had spoken, the true position which had existed throughout was disclosed.

[103] The judgment then goes on to confirm a second and separate principle, namely that acts done under a judgment or order, so long as it is in force, are lawful.[45]

[104] However, in my view, that second proposition goes no further than that court orders must be complied with unless and until overturned on appeal, and equally, that acts done pursuant to a court order while in force will be lawful.

[105] I do not consider that the judgments in *Hillgate House Ltd*, and *Official Custodian for Charities v Mackey*,[46] stand for the proposition advanced on behalf of the Savvy companies, namely that a Court declaration that a contract has been validly terminated of itself means that the parties are not permitted to exercise rights under that contract on the assumption or hope that the contract may be restored on appeal.

[106] In my view, the Savvy companies are seeking to have it both ways in their interpretation of the interim effect of the Court of Appeal judgment. The logic of their argument that grape supply agreements were effectively non-existent in law, or suspended so that neither party could assert rights under them, must equally apply to the obligations on the part of Weta and Tirosh to supply grapes to the Savvy companies throughout the period following the Court of Appeal judgment until the Supreme Court judgment.

[107] The express effect of the Supreme Court judgment in favour of the Savvy companies was that the "judgment of the Court of Appeal is set aside and the judgment

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45 At 86.
46 *Official Custodian for Charities v Mackey*, above n 40.

of Andrews J is restored".[47] In my view, the ultimate conclusion at Supreme Court level, that the 20 December 2010 notices of termination were invalid, necessarily meant that they had been invalid all along. The grape supply agreements had therefore, in law, remained in full force and in effect throughout.

[108] I accept the submission made by Mr Harrison that a view that the grape supply agreements either did not exist, or were in suspense, while the Court of Appeal judgment was in force, and despite the ultimate outcome in the Supreme Court, would produce serious anomalies and potentially work injustice on the innocent party to the contract. For example, had either Weta and Tirosh sold its vineyards to a third party while the Court of Appeal judgment was in effect, without assigning its rights and obligations under the grape supply agreements to the new purchaser as required by cl 25.4 of the grape supply agreements, on the argument on behalf of the Savvy companies, that could not, following the Supreme Court judgment, be complained of as a breach of the grape supply agreements. Also, any cessation or discontinuation of the operation of the vineyards during the relevant period, so as to limit or prevent subsequent grape growing or cropping, could not ultimately have been complained of by the Savvy companies.

[109] I therefore conclude that the Court of Appeal judgment in favour of Weta and Tirosh did not, as a matter of law, prevent the Savvy companies from giving notice of exercise of their options to purchase under the grape supply agreements prior to the agreed extended date of 1 May 2013.

*Would the Savvy companies have exercised their options to purchase?*

[110] Notwithstanding my decision that it was not the acts of repudiation by Weta and Tirosh in their notices of 20 December 2010 that prevented the Savvy companies from giving notice of exercise of the grape purchase options prior to 1 May 2013, and notwithstanding my decision on the effect of the Court of Appeal decision in relation to the exercise of the options prior to 1 May 2013, I now go on to consider whether the Savvy companies would have exercised the options to purchase grapes for the 2014

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47 *Savvy Vineyards 3552 Ltd v Kakara Estate Ltd*, above n 15, at [113].

and subsequent harvests. This is a question of fact, with the Savvy companies bearing the burden of proof on the balance of probabilities.

[111] Mr Harrison submits that the evidence of Peter Vegar that the Savvy companies would have undoubtedly exercised the grape purchase options for each and every block of the defendants' vineyards prior to 1 May 2013 should be rejected as unsafe and unsatisfactory.

[112] Mr Harrison submits that those assertions need to be set against what he says was the Savvy companies' inaction in the lead up to the 1 May 2013 deadline. He says it is surprising that as from March 2013 at the latest, the Savvy companies made no attempt to get on-sale contracts for the grape crops from the Weta and Tirosh vineyards in place. Mr Harrison submits that it was a crucial aspect of the Savvy companies' business operation that such on-sale contracts be in place before purchase options were exercised.

[113] Mr Harrison further submits that the real explanation for the Savvy companies not seeking to put in place on-sale contracts for the grape crops lies in the serious financial difficulties faced by Peter Vegar, his wife and their various companies in the lead up to the 1 May 2013 deadline. At the time of the creditors' proposal by Mr Vegar and his wife on 13 June 2013, they listed all companies in which they were involved as having a nil value and no assets. Equally, Mr Harrison submits that during 2012 and early 2013, Mr Vegar had "a huge amount on his plate".

[114] Accordingly, Mr Harrison submits that all these matters taken in their entirety mean that the Savvy companies have not proved their contention that "but for" the wrongful repudiations by Weta and Tirosh, or, because of the effect of the Court of Appeal judgment (if it had the effect contended for by the Savvy companies), they would have exercised their grape purchase options on or before the agreed extended deadline on 1 May 2013.

[115] It is, however, necessary to examine the evidence of Peter Vegar more closely. His evidence was that the payment terms under the grape supply agreements, which included both a cap on price and payment by instalment, meant that the Savvy

companies had an opportunity to make substantial profits if they could on-sell the grapes.

[116] Peter Vegar said that by 1 May 2013, the yield potential of the Weta and Tirosh vineyards was proven. He also said that market conditions meant that the Savvy companies could be confident that they could on-sell the grapes on terms that would provide sufficient cash flow for the Savvy companies to meet their payment obligations to Weta and Tirosh under the grape supply agreements. He further said that the Savvy companies already had buyers lined up for the 2014 harvest.

[117] The Savvy companies called evidence from Dr Jordan, an independent viticulture consultant, who was familiar with the Weta and Tirosh vineyards. Dr Jordan gave evidence that Peter Vegar's assessment of their yield potential, of general market conditions in 2012 and 2013, and of the standard payment terms for supply agreements was correct.

[118] In relation to the submission by Mr Harrison that there were no on-sale agreements in place as at 1 May 2013, Peter Vegar's evidence was that his discussions with potential purchasers prior to 1 May 2013 meant that he was confident that he would be able to on-sell the grapes. In specific terms, Peter Vegar had an assurance from Constellation, the largest wine company in New Zealand, that they would buy grapes on the same terms as contracts already in place at other investor vineyards. That evidence is supported by correspondence.

[119] Another major vineyard, Delegat, was also ready to purchase grapes and had provided Peter Vegar with its draft terms of purchase. Correspondence at the relevant time also supports Peter Vegar's position. It is clear from contemporaneous documents that Delegat remained interested in purchasing the grapes up to and after the Court of Appeal judgment.

[120] There was also evidence from a witness, Gerrard Grant of NZ Premier Wines Ltd, that he wanted to purchase the grapes.

[121] Peter Vegar's evidence was that he had exercised options to purchase in respect of other investor vineyards prior to finalising on-sale agreements and he would have done so in the case of the Weta vineyards and the Tirosh vineyards. He said that once the options were exercised, he would have had 11 months, if in fact that length of time was needed, to complete negotiations with potential purchasers.

[122] In relation to Mr Harrison's submission as to the serious financial difficulties faced by Peter Vegar and his wife leading up to the 1 May 2013 deadline, Peter Vegar said that the expected profit from the on-sale of grapes would have radically changed the financial outlook for shareholders and creditors, and this was an additional incentive for him to exercise the options to purchase under the grape supply agreements.

[123] Peter Vegar said the potential for profit was at the forefront of his mind in the lead up to the delivery of the Court of Appeal decision (and also subsequently when the Savvy companies were deciding whether to apply for leave to appeal the Court of Appeal judgment).

[124] Support for Peter Vegar's position can be seen from the fact that when the Savvy companies did give notice exercising their options after the Supreme Court judgment, they did so without on-sale agreements in place.

[125] I accept Peter Vegar's evidence. Accordingly, had I found in favour of the Savvy companies as to the effect of the wrongful repudiations by Weta and Tirosh, and as to the effect of the Court of Appeal judgment, then the Savvy companies would have succeeded on the first cause of action.

**Conclusion on first cause of action**

[126] However, because I have determined that the wrongful repudiation by Weta and Tirosh did not prevent the Savvy companies from exercising the options prior to 1 May 2013, nor did the Court of Appeal judgment have that effect in law, the first cause of action fails.

**Second cause of action: breach of the grape supply agreements: repudiation on 8 December 2014**

[127] The statement of claim pleads:

> 54. By its letter dated 8 December 2014, Weta and Tirosh repudiated the Grape Supply Agreements.
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> …
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> 55. By reason of the repudiation on 8 December 2014, Savvy 4334 and Savvy 3552 lost the opportunity to profit from the purchase and on-sale of grapes from the Vineyards for the 2016 and subsequent harvests.

[128] This cause of action is pleaded (mostly) as a claim for breach of the grape supply agreements based on the Savvy companies' interpretation of cls 2.2 and 2.4 of the grape supply agreements.

[129] However, one of the particulars set out under paragraph 54 of the statement of claim, in [127] above, is that certain identified conduct of the parties evidences a *consensus ad idem* (a mutual intention), namely that the options to purchase should extend until after the Supreme Court decision. That pleading appears to be irrelevant to the overall pleaded claim alleging breaches of obligations under the grape supply agreements. It belongs rather as part of the third cause of action and I will consider it in that context.

[130] The issue to be determined under this cause of action as defined by the parties is:

> Do the plaintiffs' rights to exercise options to purchase grapes lapse on the third anniversary of the Commencement Date or the sixth anniversary of the Commencement Date?

[131] The relevant terms of the grape supply agreements are cls 2.2 – 2.6:

> 2.2 The Grower hereby grants to the Buyer a right of first refusal to purchase the entire crop of Grapes grown on each of the Blocks. Such right of first refusal shall be deemed to be effective on the Commencement Date and to be repeated on each third anniversary of the Commencement Date provided that if the Buyer does not exercise the right of first refusal in respect of any Block for 2 consecutive periods of 3 years the right of first refusal shall be deemed to have lapsed. If the Buyer elects to purchase part of the crop of Grapes only

then the Buyer must at the time of giving notice as provided in this agreement specify the specific Block or Blocks in respect of which the Buyer wishes to purchase Grapes. The Buyer must purchase all Grapes from any such Block or Blocks specified for the remainder of the term of this agreement.

…

2.4 Should the Buyer wish to exercise its right of purchase pursuant to this Agreement it shall give written notice of that exercise in the manner hereinbefore specified at any time prior to the Commencement Date or such other date the right of first refusal is to be exercised. Once notice is given to purchase Grapes from any Block or Blocks then the Purchaser shall have an ongoing obligation to purchase of all the Grapes from such Block or Blocks for the term of this agreement.

2.5 The terms of such sale and purchase shall be as set out in this agreement, unless otherwise agreed between the parties.

2.6 The Buyer acknowledges that the Grower (as owner pursuant to the Vineyard Management Agreement) shall have the right to terminate the Vineyard Management Agreement in respect of the Block or Blocks not the subject of a notice pursuant to Clause 2.4 by written notice of not less than three (3) months given to the Buyer.

[132] The Growers are Weta and Tirosh, while the Buyers are the Savvy companies.

[133] Each of the blocks for the Tirosh vineyards was approximately 25 hectares and for the Weta vineyards approximately 50 hectares.

[134] As already noted in [26], the Commencement Date was defined in the grape supply agreements and the date agreed between the parties was 1 May 2009 for all the grape supply agreements.

[135] Again, as already noted in [29], once the Buyer has exercised an option for a block, the Buyer is required to purchase the grapes from that block for the term of the agreement. The initial term runs from the Commencement Date to the completion of the tenth fruit producing vintage.[48] The Buyer may extend the term for two further terms of 20 fruit producing vintages.

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[48] 'Fruit producing vintage' is defined in the grape supply agreements as a year that culminates in the harvest of grapes.

[136] Clause 26.1 of the vineyard management agreements gives some additional background. It states:

> 26.1 Subject to the provisions as herein provided if the Buyer has not been in breach of this agreement and has not given to the Grower notice in writing to extend this Agreement at least 6 calendar months before the end of the initial term, the Grower will extend the Agreement for the next further term set out in clause 3.

[137] The parties advanced submissions based on the words of the grape supply agreements, the factual matrix, the history of negotiations and the subsequent conduct of the parties.

*The competing interpretations – the text of the agreements*

[138] Mr Jones submits that the Savvy companies have up to six years from the Commencement Date to exercise the option for each block. In other words, cl 2.2 specifies the period of time the Buyer has in which to exercise the options, namely two periods of three years from the Commencement Date (six years in total). The options for each block can therefore be exercised:

(a) Any time prior to the Commencement Date (1 May 2009 for the first planned harvest in March/April 2010); or

(b) Any time prior to the third anniversary of the Commencement Date (1 May 2012[49] for the March/April 2013 harvest); or

(c) Any time prior to the sixth anniversary of the Commencement Date (1 May 2015 for the March/April 2016 harvest).

[139] As Mr Jones puts the Weta and Tirosh argument, they say that the option for a block must be exercised prior to the third anniversary of the Commencement Date, or the option is deemed to have lapsed. In other words, Weta and Tirosh say the parties agreed the number of options that could be exercised, namely two, one option arising on the Commencement Date and a second on the third anniversary.

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[49] Extended by agreement to 1 May 2013.

[140] The way Mr Harrison puts it, is that what is specifically at issue is the true meaning of what he calls the proviso to cl 2.2, namely the words:

> … if the Buyer does not exercise the right of first refusal in respect of any Block for 2 consecutive periods of 3 years the right of first refusal shall be deemed to have lapsed …

[141] Mr Harrison frames the competing arguments in this way. The Savvy companies' argument is that the non-exercise of the right relates to the act of giving notice of exercise of the options. Thus, there was no failure to give notice of exercise of the options for two consecutive periods of three years as notice had been given within six years from the Commencement Date.

[142] The competing argument for Weta and Tirosh is that the exercise of the right refers to undertaking actual purchase of the grape crop necessarily triggered by prior notice. As the Savvy companies had not utilised their options to purchase the two consecutive periods of three years from the Commencement Date, any further option is deemed to have lapsed.

[143] Mr Harrison submits that it is cl 2.2 which defines and then limits the scope of the Buyer's "right of first refusal to purchase". He submits cl 2.4 is ancillary.

[144] The "right of first refusal to purchase" is subject to an express contractual limitation introduced by the proviso. Mr Harrison submits the focus is on the actual exercise of the "right of first refusal" or the Buyer's "right of purchase pursuant to this Agreement" using the words of cl 2.4.

[145] Mr Harrison submits that a failure to exercise "the right of first refusal to purchase" on or before the Commencement Date, followed by a second failure to exercise "the right of first refusal to purchase on or before the third anniversary", literally and expressly results in the right in question not having been exercised "for 2 consecutive periods of 3 years".

[146] In relation to the words "repeated" and "each" in the phrase "and to be repeated on each third anniversary of the Commencement Date" in cl 2.2, Mr Harrison says

that "each third anniversary" contains no stated limit on a number of occasions. That being so, why stop at three occasions?

[147] As to the words "to be repeated", Mr Harrison submits that expression in itself is neutral. It is consistent with the meaning for which Weta and Tirosh contend.

[148] As a matter of contractual interpretation, Mr Harrison submits that the words "on each third anniversary of the Commencement Date", having been carried through from GEL's template clause, should be discounted as against the express wording of the proviso to the second sentence, which can properly be done in relation to an inconsistent or anomalous "boilerplate" contractual provision.[50]

[149] Finally, Mr Harrison submits that the use of the word "date" rather than "dates" in cl 2.4 does not support the Savvy companies' interpretation.

*Analysis - text of the agreements*

[150] I start with the text of the contract as being of central importance.[51] If the language at issue, construed in the context of the contract as a whole, has an ordinary and natural meaning, that will be a powerful, albeit not conclusive, indicator of what the parties meant.[52]

[151] In my view, the natural and ordinary meaning of the notice clauses within the context of the agreements as a whole is consistent with the interpretation advanced on behalf of the Savvy companies, namely that the Buyer has two consecutive periods of three years, i.e. up to six years, in which to give notice of the exercise of the options.

[152] The reference in cl 2.2 to the option lapsing if the Buyer fails to exercise the right "for 2 consecutive periods of 3 years" must mean that the Buyer has up to six years from the Commencement Date to exercise the right.

[153] This interpretation is supported by the references in cls 2.2 and 2.4 to:

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50 *Totara Investments Ltd v Crismac Ltd* [2010] NZSC 36, [2010] 3 NZLR 285 at [31]-[32].
51 *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* [2014] NZSC 147, [2015] 1 NZLR 432 at [63].
52 At [63].

(a) The right of first refusal being "repeated on each third anniversary of the Commencement Date"; and

(b) Being exercised at any time prior to the Commencement Date "or such other date the right of first refusal is to be exercised".

[154] These words make it clear that notice can be given prior to any of the three dates referred to in cl 2.2, namely the Commencement Date, the third anniversary of the Commencement Date and the sixth anniversary of the Commencement Date.

[155] Weta and Tirosh submit that the Buyer has two opportunities to exercise the option, namely on or before the Commencement Date and on or before the third anniversary of that date. However, if that were the case, the Buyer could only elect "not to exercise the right" for **one** period of three years. It would not be possible for the Buyer to elect "not to exercise the right" for a second three-year period because:

(a) If the Buyer exercises the option prior to the third anniversary (i.e. after one period of three years), it is committing to purchase the grapes for the remainder of the term of the grape supply agreement. This is at least seven years (of a 10-year term); and

(b) If the Buyer does not elect to exercise the option before the third anniversary (and purchase the grapes for the remainder of the term of the agreements), it will not be purchasing the grapes at all.

[156] The parties agree that the periods of three years must start from the Commencement Date. On the interpretation advanced by Weta and Tirosh, the second consecutive period of three years does not exist.

[157] I do not accept Mr Harrison's submission that the words "on each third anniversary of the Commencement Date" should be discounted as an inconsistent or anomalous "boilerplate" contractual provision.

[158] It is the case that that expression was carried over from the template agreement which had allowed for rolling rights of three years each. However, the rolling rights

of three years are retained so that the Buyer can elect not to purchase grapes for two consecutive periods of three years for any particular block (i.e. up to six years). In the case of this agreement, there is a limit placed on the rolling rights. But they still exist.

[159] This is not a case where, to use the words of the Supreme Court in *Totara Investments Ltd v Crismac Ltd*:[53]

> [31] In the documentation of commercial transactions the drafter will frequently, out of caution (belt and braces) or perhaps without thinking about function in the particular case, incorporate boilerplate provisions which have little or no work to do. While a court will strive to find a role for such general provisions to play, their presence should not be permitted to lead to distortion of the objective intention of the parties which can be discerned from a reading of the whole contract (or in this case, combination of documents), and in particular of a clause which has been marked out by the parties as an important element of the bargain … This is a case like *Walker v Giles* where "effect ought to be given to that part which is calculated to carry into effect the real intention, and that part which would defeat it should be rejected".
>
> (Citation omitted)

[160] In my view, the words "on each third anniversary of the Commencement Date" do not defeat the meaning of the proviso. They support it.

[161] Mr Harrison's submission is that the word 'date' in cl 2.4, being singular, does not support the Savvy companies' interpretation. The Buyer is required to give notice "at any time prior to the Commencement Date or such other date the right of first refusal is to be exercised". However, in the Interpretation section of the grape supply agreements, "words referring to the singular include the plural".

[162] I am further supported in my view of the meaning of cl 2.2 by a judgment in the earlier proceeding. In *Goldridge Estate Vineyards 3552 Ltd v Kakara Estate Ltd*,[54] Wylie J also considered the meaning of cl 2.2. The judgment was given on the interim injunction application by the Buyers under the grape supply agreements (then Goldridge Estate Vineyards 3552 Limited and Goldridge Estate Vineyards 4334 Limited) when Tirosh (then Kakara Estate Limited) and Weta gave notice on

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53 *Totara Investments Ltd v Crismac Ltd*, above n 50.
54 *Goldridge Estate Vineyards 3552 Ltd v Kakara Estate Ltd*, above n 9.

17 February 2010 seeking to terminate both the grape supply agreements and the vineyard management agreements. Wylie J held that:[55]

> [36] … If they do not exercise the right of first refusal to purchase on the commencement date, the grape supply agreements still apply because there are two further rights of first refusal which fall to be exercised on the third and sixth anniversaries of the commencement date. The agreements only lapse, either in whole or in part, once the second three yearly period has passed without notice being given …

[163] Wylie J refers to the exercise of the right of first refusal **on** the Commencement Date. It seems to me that cl 2.4 requires the Buyer to give notice exercising the right at any time **prior to** the Commencement Date or such other date, with that notice then becoming effective on the Commencement Date in terms of cl 2.2. However, nothing turns on that distinction.

[164] I note at this point that the effect of the judgment of Wylie J will be considered in the context of the second and the third causes of action.

[165] I now turn to the arguments advanced in relation to the factual matrix to see whether that supports my interpretation. I also look at whether recourse can be had to the history of negotiations and subsequent conduct as part of the exercise of contractual interpretation.

*Factual matrix*

[166] In *Firm PI 1 Ltd v Zurich Australian Insurance Ltd*,[56] there is the following:

> [60] … While there is no conceptual limit on what can be regarded as "background", it has to be background that a reasonable person would regard as relevant. Accordingly, the context provided by the contract as a whole and any relevant background informs meaning.
>
> (Citations omitted)

[167] Mr Jones submits that the interpretation of cl 2.2 by the Savvy companies is consistent with background matters known or reasonably available to both parties, as well as commercial sense.

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55 See also at [29], [37] and [39].

56 *Firm PI 1 Ltd v Zurich Australian Insurance Ltd*, above n 51.

[168] Mr Jones refers to the evidence that the grape supply agreements were entered into as part and parcel of an investment package. GEL undertook to develop and manage the vineyards at cost, without any opportunity to profit for up to five years. It did so in return for a long-term agreement for the supply of grapes, which could run for up to 50 years. Mr Jones refers to evidence that the stated intention of GEL was to purchase the grapes for use in its wine-making business and to expand that business into overseas markets. GEL's existing operation took grapes from 100 hectares of land. The investor vineyards were more than 500 hectares in total. To consume this entire volume, production and sales of the wine-making business would need to increase by 600 per cent.

[169] This expansion of the wine-making business could not begin until the vineyards came into production at the first harvest after the Commencement Date. The vines would then take another two years to mature to their full production.

[170] Mr Jones submits that the most optimistic businessman would want more than three years to achieve an expansion of that scale and be confident that the company could meet its purchase obligations in future years. He submits it is inherently improbable that GEL would agree to a structure whereby, after years of hard work for no profit, it had only three years to commit to the purchase of all grapes it intended to buy or lose the options forever. He also refers to the breaking of the purchase options into blocks as evidence of the graduated basis upon which the options might be exercised.

[171] Mr Harrison submits that the matters referred to above by Mr Jones as constituting the "factual matrix" are in dispute. He says the assertions as to what "the most optimistic businessman would want" (or not want) and as to a six-year period being "more than reasonable" are both unfounded and irrelevant. He submits that what is plain is that the parties reached a compromise position between their opening negotiating stances.

[172] It seems to me that, given the dispute, the matters relied on by Mr Jones are not properly part of the "factual matrix". But, in any event, this is not a case where the wider context (the matters relied upon by Mr Jones) point to some interpretation

other than the most obvious one.[57] The matters submitted by Mr Jones are in fact consistent with the obvious interpretation. It is not necessary to refer to the factual matrix to determine the meaning intended as I have found that the words have a clear meaning and it is not a "[case] of ambiguity or uncertainty".[58]

*Recourse to the history of negotiations*

[173] Evidence of pre-contractual negotiations is only admissible if it reflects the objective intentions of both parties. Evidence of what one party was thinking or was hoping to achieve is irrelevant and inadmissible.[59] While the Court did hear evidence about the negotiations, that evidence is relevant in the context of the rectification counterclaims. However, there is part of that evidence which Mr Harrison submits is arguably admissible for the purposes of contractual interpretation.

[174] The principle Mr Harrison relies on, under which that evidence is said to be arguably admissible to support the defendants' interpretation, is on the basis that on the evidence (if the defendants' version is upheld), the parties had agreed above all else to ascribe to the proviso to the second sentence of cl 2.2 a "specialised meaning" for the words in question (also known as the "private dictionary principle").

[175] Mr Harrison continues that, it can properly be said that the proviso in its plain and natural meaning (as advanced by Weta and Tirosh) was "the way that consensus [was] expressed … based on an agreement as to meaning [of that clause] reached during negotiations".[60]

[176] I have already held against Weta and Tirosh in relation to the natural and ordinary meaning of the words of the contract. It therefore seems to me that any consideration as to the parties' negotiations and agreement as to the number of options falls to be considered in the context of the rectification counterclaim, rather than for the purposes of contractual interpretation.

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57 *Firm PI 1 Ltd v Zurich Australian Insurance Ltd*, above n 51, at [63].
58 At [63].
59 *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5, [2010] 2 NZLR 444 at [14] per Blanchard J (with whom Gault J agreed), at [27]-[37] per Tipping J, at [122] per Wilson J.
60 *Vector Gas Ltd v Bay of Plenty Energy Ltd*, above n 59, at [28] per Tipping J.

*Subsequent conduct*

[177] Evidence of the parties' conduct following entry into the contract is admissible, if that conduct sheds light on the intended meaning of a contractual term at the time the contract was executed.[61] The conduct is assessed from the point of view of an objective third party and the subjective intention of a party is irrelevant.

[178] Mr Jones relies on the following in support of his submission that in this case the subsequent conduct of the parties is admissible for the purpose of determining the intended meaning of the contractual terms:

(a) In the notice of application by Weta and Tirosh for an interim injunction in the earlier proceedings, it was clearly stated that "the right to purchase" remains for two further periods of three years, at least from the Commencement Date, being 1 May 2015 for Tirosh and 1 May 2016[62] for Weta.

(b) In the affidavits of Peter Vegar and Debra Dorrington, solicitor for the Savvy companies, save for one admitted error in one paragraph of Peter Vegar's affidavit, the evidence of those two witnesses was that they had up to six years to exercise the options to purchase.

(c) The oral submission made on behalf of the Savvy companies, as recorded in the judgment of Wylie J, was that the rights do not lapse until they have not been exercised for two consecutive periods of three years, and that in effect they do not lapse until six years after the Commencement Date.[63]

(d) That unchallenged interpretation of the lapsing provisions was upheld by Wylie J in his judgment.[64]

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61 *Wholesale Distributors Ltd v Gibbons Holdings Ltd* [2007] NZSC 37, [2008] 1 NZLR 277.
62 Later agreed to be 1 May 2015.
63 *Goldridge Estate Vineyards 3552 Ltd v Kakara Estate Ltd*, above n 9, at [30].
64 At [35]-[38].

(e) Following delivery of the judgment, Weta and Tirosh did not appeal and did not raise or reserve their right to assert a different interpretation of cls 2.2 and 2.4.

(f) The third anniversary of the Commencement Date went past during ongoing litigation between the parties as to whether the contracts were still on foot (having regard to the liquidation of GEL). Both parties continued the appeal process without any suggestions by Weta and Tirosh that the litigation was now redundant.

[179] Mr Jones therefore submits that the parties' mutual conduct points irresistibly to the conclusion that the Savvy companies' interpretation of the contract reflects the understanding and agreement of the parties at the time the contract was entered into, and that the interpretation now relied on by Weta and Tirosh is a belated attempt to escape their contractual obligations.

[180] In *Wholesale Distributors Ltd v Gibbons Holdings Ltd*,[65] Tipping J stated as follows:

> [60] For these reasons, it is now appropriate to allow the traditional date of assessment to come forward to the date of hearing so as to enable the court to take into account how the parties have behaved in the performance of their contractual obligations and in the administration of their contract generally. The focus must still be on objective conduct rather than expressions of subjective intention or understanding. But if the parties have together conducted themselves in the performance of their contract in a way that is relevant to the meaning of the disputed provision, the court should be able to take that into account.
>
> [61] There are connotations of estoppel involved in this approach, albeit the issue is not one of estoppel in any strict sense. Estoppel by convention or otherwise is a separate issue. It can fairly be said that when the issue is examined as at the date of the court hearing, the shared conduct of the parties in the performance of their contract is a part of the surrounding circumstances. The only difference is that post-contract conduct cannot have informed the meaning of the parties' words at the time they contracted, but it can retrospectively have a legitimate bearing on that meaning. There is insufficient reason in principle to insist on a date of contract focus, albeit the ultimate criterion for ascertaining contractual intention remains the objective meaning of the words of the contract at that date. The horizon has expanded but the subject of the search remains the same.

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65 *Wholesale Distributors Ltd v Gibbons Holdings Ltd*, above n 61.

[181] In my view, the matters referred to by Mr Jones set out in [178] are not matters that fall within "shared conduct in the performance of the contract". They are therefore not matters that the Court could properly take into account in interpreting the meaning of the contractual words. However, I shall return to at least some of those matters in the context of the counterclaim for rectification and in the context of the third cause of action.

**Rectification counterclaims**

[182] It is necessary to consider the two rectification counterclaims, having decided in favour of the Savvy companies on the interpretation of cl 2.2.

[183] There are separate counterclaims for Weta and Tirosh. With one exception, the Weta rectification counterclaim is on all fours with the Tirosh rectification counterclaim. The difference arises out of the fact that the Weta property agreements were entered into some 14 months after the Tirosh property agreements, with no further negotiation of most of the contractual terms, in particular cls 2.2 and 2.4 of the grape supply agreements. The relevant provisions, including those two clauses, were simply carried across from the Tirosh grape supply agreements.

[184] The Tirosh counterclaim includes the pleading that:

> 64. During the course of negotiations, Goldridge and those representing that company and Tirosh and those representing that company agreed that the purchase options (referred to in clause 2.2 as "a right of first refusal to purchase the entire crop of Grapes grown on each of the Blocks") would under the Tirosh Grape Supply Agreements only be available to Goldridge as options to be exercised by it as of right on two consecutive occasions, namely prior to the Commencement Date under the Tirosh Grape Supply Agreements and prior to the first three year anniversary of the Commencement Date.
>
> 65. The agreement reached during the negotiations referred to in the immediately preceding paragraph represented the common intention of Goldridge and Tirosh as the contracting parties to the Tirosh Grape Supply Agreements, both at the time those agreements were executed, and subsequently.
>
> 66. Savvy 3552 now alleges (in particular, in para 10.c.v of the statement of claim) that clause 2.2 read with clause 2.4 of the Tirosh Grape Supply Agreements bears the meaning that the purchase options conferred by clause 2.2 "accrue[d] on the Commencement Date, the

> third anniversary of the Commencement Date and the sixth anniversary of the Commencement Date".
>
> 67. If (which is denied) the meaning now advanced by Savvy 3552 is the correct interpretation of clause 2.2 read with clause 2.4 of the Tirosh Grape Supply Agreements, Tirosh seeks rectification of clause 2.2 (and if necessary clause 2.4) of the Tirosh Grape Supply Agreements to reflect the agreement as to the total number of purchase options reached during the negotiations, referred to in para 64 above.

[185] The order sought is for rectification of cl 2.2 of the Tirosh grape supply agreements (see at [131] above) by:

(a) The substitution of the word "the" for the word "each" in the second sentence of cl 2.2 of those agreements; and

(b) The substitution in that sentence of "on either occasion" for "for 2 consecutive periods of 3 years".

[186] Savvy 3552 denies the allegations and opposes the order for rectification. It also pleads an estoppel based on the judgment of Wylie J[66] and the fact that Tirosh did not appeal or otherwise contest that judgment, nor did it, prior to 8 December 2014, notify Savvy 3552 that it disagreed with Wylie J's interpretation and/or that the option could only be exercised on or before 1 May 2013.

*Rectification - the law*

[187] In *Krukziener v Hanover Finance Ltd*,[67] the Court of Appeal stated as follows:

> [32] Where the terms of an agreement do not accurately reflect the mutual intention and agreement of the parties, equity may rectify the record of the agreement so that it reflects the parties' true intention, and not that imperfectly recorded by the contract. The common intention must persist right up until the contract is signed … Proof of it may be established by reference to pre-contractual negotiations between the parties, and by other surrounding circumstances … but if the proof put forward is inconclusive, then there is no sufficient material from which to find a common intention with which to rectify the contract.

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66 *Goldridge Estate Vineyards 3552 Ltd v Kakara Estate Ltd*, above n 9.

67 *Krukziener v Hanover Finance Ltd* [2008] NZCA 187. See also *Swainland Builders Ltd v Freehold Properties Ltd* [2002] EWCA Civ 560, [2002] 2 EGLR 71 at [33]; *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] AC 1101 at [48]; *Davey v Baker* [2016] NZCA 313, [2016] 3 NZLR 776 at [37]; *Hanover Group Holdings Ltd v AIG Insurance New Zealand Ltd* [2013] NZCA 442 at [30].

[188] An additional feature of this case is that the Savvy companies are not original parties to the grape supply agreements. However, no issue is taken by those companies in relation to the rectification counterclaims, based on the Savvy companies' status as assignees and/or contracting parties by novation. In any event, the rectification is available against an assignee of contractual rights.[68]

*Rectification - process followed by the parties*

[189] The terms of the Tirosh grape supply agreements were negotiated over the period from 12 October 2006 to 20 October 2006. It is the discussions which occurred on 20 October 2006, immediately prior to the signing of the agreements, which are at issue.

[190] At an earlier date, Debra Dorrington of Alexander Dorrington, solicitors, had worked with Peter and Paul Vegar to develop a sale and purchase agreement, a grape supply agreement and a vineyard management agreement, which were then ready to be presented to prospective purchasers. Under the terms of the precedent grape supply agreement, GEL had a rolling right to purchase grapes in three year cycles.

[191] On 12 October 2006, Ms Dorrington emailed a copy of the draft property agreements to Boyle Matheson, solicitors, who represented Mr Forlong and subsequently Tirosh on its incorporation. On 17 October 2006, Mr Boyle emailed the agreements with amendments back to Ms Dorrington.

[192] Those amendments would have required GEL to commit to the purchase of grapes at least three months prior to the Commencement Date, either from the whole vineyard, or from specified 25 hectare blocks. The right to purchase lapsed in respect of any block where notice had not been given. The grape supply agreement effectively came to an end in respect of those blocks and the owner could cancel the vineyard management agreement in respect of those blocks on three months' notice. If the right

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[68] *Green Growth No 2 Ltd v Queen Elizabeth the Second National Trust* [2016] NZCA 308, [2016] 3 NZLR 726 at [67]. I note that leave to appeal to the Supreme Court was granted in *Green Growth No 2 Ltd v Queen Elizabeth the Second National Trust* [2017] NZSC 127. However, the issue on which leave has been granted does not arise in this case.

to purchase was exercised in respect of any blocks, GEL was committed to purchasing the grapes from those blocks for the entire term of the agreement (up to 50 years).

[193] Peter and Paul Vegar had a telephone discussion with Ms Dorrington on 19 October 2006 to discuss the amendments made by Mr Boyle. They discussed those amendments they would accept and those they would not.

[194] Following that discussion, on the evening of 19 October 2006, Ms Dorrington emailed Mr Boyle copies of the grape supply agreements and vineyard management agreements with proposed amendments. Some of the amendments suggested by Mr Boyle had been accepted, some had not and further amendments had also been made. The 19 October 2006 revised drafts were before the parties the following day.

[195] On 20 October 2006, a meeting was held at the offices of Alexander Dorrington. It was attended by Peter and Paul Vegar, Ms Dorrington, Mr Forlong and Mr Boyle.

[196] At the meeting, the parties discussed and negotiated changes to the draft agreements. The meeting took around four hours and as the negotiations proceeded and matters were agreed on, Ms Dorrington would leave the room to type up agreed amendments.

[197] At the end of the meeting, Vines as vendor and Tirosh as purchaser executed a conditional agreement for the sale and purchase of the land that became the Tirosh vineyards. It was a condition of the sale and purchase agreement that Vines enter into the vineyard management agreements and grape supply agreements with GEL. Those agreements were also signed at the 20 October 2006 meeting and were attached to the sale and purchase agreement.

[198] Mr Forlong left the meeting before it ended and Mr Boyle executed the documents on behalf of Tirosh. However, Mr Forlong says the terms of cls 2.2 and 2.4 had been finalised and agreed before he left the meeting.

[199] The evidence of Mr Forlong and Mr Boyle in relation to cls 2.2 and 2.4 was that the agreed position reached by both sides during the course of the negotiations on 20 October 2006, in relation to the meaning and intended effect of cls 2.2 and 2.4, was that GEL, as Buyer, would have two contractual opportunities to exercise its options to purchase all or part of the Tirosh grape crop, one on or before the Commencement Date and the other on or before the first three-year anniversary of the Commencement Date.

[200] Mr Boyle said he was clear that that was what was agreed between the parties on 20 October 2006.

[201] That evidence was strongly disputed by Peter and Paul Vegar. Their position was that it was understood and agreed that the Buyer had until the end of the second period of three years after the Commencement Date, i.e. until 1 May 2015, to exercise the right of first refusal. That was what was agreed and that was what was reflected in the contractual wording in cl 2.2.

*Rectification - analysis*

[202] In determining issues of credibility and reliability, I bear in mind that it is Tirosh which has the burden of proof. But, in any event, I prefer the evidence of Peter and Paul Vegar and Ms Dorrington.

[203] I did not find Mr Forlong to be a reliable witness, both generally and on this particular issue. I first refer to his evidence under cross-examination on two other topics. Mr Forlong was asked about the first termination of the grape supply agreements and vineyard management agreements on 17 February 2010. At that time, Andrew Gilchrist, barrister, was instructed. Mr Forlong's evidence was that he had not instructed Mr Gilchrist to terminate the grape supply agreements. He said he only became aware of that subsequent to Wylie J's decision. Mr Forlong accepted that he was the person who was giving Mr Gilchrist instructions. But, on this issue, Mr Forlong said this was a case of Mr Gilchrist going off on his own by including the grape supply agreements in the notice of termination (in addition to the termination of the vineyard management agreements). Mr Gilchrist was not instructed to do that.

[204] Not only did such conduct on the part of Mr Gilchrist seem inherently unlikely, it was also contradicted by Mr Gilchrist, who was called as a witness for Weta and Tirosh. Under cross-examination, he said that it was his clients' instructions that he was to give notice to terminate both the grape supply agreements and vineyard management agreements. He also said Mr Forlong was his primary contact.

[205] Mr Gilchrist was referred to his letter of 30 April 2010 to Hesketh Henry, the solicitors for GEL. That letter confirmed that Weta and Tirosh would not confirm that the terminations in relation to the management and supply agreements were withdrawn. The letter continues that "those notices have been given, and at the end of the three-month period, those contracts will come to an end". That letter was copied to Weta and Tirosh for the attention of Mr Forlong. Mr Gilchrist confirmed that those were his instructions from his client at that time.

[206] The second topic related to the evidence given by Dr Jordan regarding the cropping level for the vineyards. By way of background, Peter Vegar's evidence was that the Savvy companies' profit is made on additional tonnages of grapes over and above the target cropping level specified in the grape supply agreements. Peter Vegar referred to the clauses in the grape supply agreements under which the Savvy companies get the benefit of additional tonnages, which they can either on-sell to third parties or use to produce wine at a lower cost. If in any particular year the harvest does not exceed the target cropping level, the Savvy companies may not make a profit. They will not make a loss on the grapes, however, as they only have to pay Weta and Tirosh for the tonnes actually harvested in those years.

[207] Mr Forlong's evidence was that both Peter and Paul Vegar's position in the early part of the negotiations was that they said in order to achieve premium quality grapes, it was essential not to crop at greater than the contractual target tonnages per hectare, otherwise quality would drop off. Peter and Paul Vegar deny that they said this. I address the contest between the evidence of Peter and Paul Vegar and Mr Forlong later in this judgment. For present purposes, I am considering the evidence of Dr Jordan.

[208] Mr Forlong said that he checked this with the independent viticulturalist proposed by Peter and Paul Vegar, Dr Jordan. Mr Forlong said Dr Jordan confirmed to him that cropping above the contractual target would result in loss of grape quality.

[209] Dr Jordan gave evidence and Mr Forlong's evidence on this issue was put to him. Dr Jordan said he did not recall the detail of the phone call with Mr Forlong, but he said he certainly knew that he would not have said that the target yields as set out in the grape supply agreements if exceeded would be detrimental to the wine quality. He denied that he would have said that to Mr Forlong, particularly in relation to sauvignon blanc.

[210] As to the reason why he would not have said that, Dr Jordan said at the time he had a range of clients which were cropping their vineyards well in excess of that level and he understood the yield quality relationship with sauvignon blanc. He said in terms of the range for Marlborough yields, the extreme end would be 25 tonnes per hectare, so in the order of two and a half times the cropping level in the grape supply agreements.[69] He said that caps imposed post 2008 were at 12 tonnes per hectare. They then increased and now sit at about 15 tonnes per hectare.

[211] I accept the evidence from Dr Jordan that he would not have told Mr Forlong that it would have been detrimental to the grape quality to crop at a level above the target cropping level. He is an independent expert and the subject matter is within his area of expertise.

[212] In addition to the above two matters of reliability, there is the following matter as to Mr Forlong's reliability in relation to what the grape supply agreements meant. Mr Forlong's purported understanding of what was agreed in relation to another aspect of the Tirosh grape supply agreements (and the Tirosh vineyard management agreements) was inaccurate. In his affidavit sworn 25 May 2010, filed in opposition to the application for an interim injunction in the earlier proceedings, while not commenting directly on his understanding of the meaning of cl 2.2, Mr Forlong deposed as follows:

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[69] The target cropping level for sauvignon blanc in the Tirosh vineyards is 9.0 tonnes per hectare for the fifth vintage after planting and all vintages thereafter. For the Weta vineyards, it is 9.5 tonnes.

> 22. It was my understanding at the time of signing, and has been my understanding throughout, that Goldridge/3552 had the first option to purchase the fruit from each vineyard block, but if it chose not to exercise that right before the "commencement date" as defined under the grape supply agreements, then [Tirosh] would have to find its own buyer for the crop, *and [Tirosh] had the right to terminate the vineyard management agreements*, so that we have the option [sic] offer the management of the vines to prospective purchasers of the crop. If the purchaser wanted the right to manage, [Tirosh] would be in a position to make up its own mind about whether to terminate Goldridge's right to manage and may do so if it chose to.
>
> (Emphasis added)

[213] That "understanding", as italicised, is clearly incorrect and was conceded to be incorrect before Wylie J.

[214] I also note that Mr Forlong did not comment directly on the meaning of cl 2.2 in his 2010 affidavit evidence. He was therefore required to recall discussions from 20 October 2006, some 11 and a half years before the signing of his brief for this proceeding in February 2018.

[215] Further, I note that in his evidence, Mr Boyle described Mr Forlong as "not particularly a details man".

[216] I am therefore not inclined to accept Mr Forlong's evidence as to what he said was agreed at the meeting on 20 October 2006 as to the meaning he now claims for cl 2.2. In addition to my findings in relation to his reliability generally, I do not find Mr Forlong's evidence on this specific issue to be reliable.

[217] I turn now to the evidence of Mr Boyle. I found him to be an honest witness. His evidence was given in a direct and forthright manner. He was very clear that it was agreed and understood by all the parties present at the negotiation on 20 October 2006 that the right of renewal arose on only two occasions, namely prior to or on the Commencement Date and prior to or on the first three-year anniversary (1 May 2012).

[218] While Mr Boyle was a credible witness, I cannot go so far as to accept that his evidence was sufficiently reliable. Mr Boyle was recalling events of 20 October 2006, some 11 and a half years before the signing of his brief of evidence. He did not have any file notes of the meeting. Mr Boyle did swear an affidavit dated 25 May 2010 in

opposition to the interim injunction. However, as he acknowledges, other than a mere reference to the words of cl 2.2, he did not address the course of negotiations between the parties in relation to cls 2.2 and 2.4 of the Tirosh grape supply agreements in his affidavit. Mr Boyle was therefore relying on his memory of the discussions.

[219] I turn now to the evidence of Peter and Paul Vegar and Ms Dorrington. First, I refer to the case advanced on behalf of the Savvy companies in the interim injunction proceeding. At the time of that application, being before the first three-year anniversary of the Commencement Date, it would not have been necessary for the Savvy companies to assert an expiry date of the rights of renewal, being 1 May 2015. However, that was the case advanced. The notice of application dated 7 May 2010 contains as a ground that the right to purchase remains for two further periods of three years, at least from the Commencement Date, being 1 May 2015 for Savvy 3552 and 1 May 2016[70] for Savvy 4334.

[220] As to the affidavits filed by each of those witnesses for the interim injunction proceedings, I find, contrary to the submission made by Mr Harrison, that they are consistent with the Savvy companies' interpretation in this proceeding that they had up to six years to exercise the option (that is with the exception of one admitted error in one of Mr Vegar's three affidavits). For example, in his reply affidavit of 11 June 2010, Peter Vegar deposed:

> Our position at the meeting at Alexander Dorrington on 20 October was still that we had no obligation to purchase fruit (for the first 6 years of fruit production) and this remained so at the end of the negotiations, as evidenced by clauses 2.2 and 2.4 remaining in the signed contracts.
>
> …
>
> I explained to Murray [Forlong] at the time that even if we did not take all the fruit in the first six years, if we kept managing the vineyard for them through that period (until we took all the fruit later on) it would provide for them to remain hands off for the day to day management. While I accept that Murray did not want to be involved in the day to day running of the vineyard I do not recall him saying he did not want anything to do with selling the grapes.
>
> It was necessary to ensure there was flexibility in terms of the supply to make sure that the volume from the investor vineyards could be matched progressively over the next 6 years to the growth rate in our international

[70] It was later accepted that the relevant date was 1 May 2015 (as the Commencement Date was accepted as being 1 May 2009, not 1 May 2010).

> distribution and sales over the same period. That is why two rights of renewal were negotiated into the Grape Supply agreements, rather than committing to the full production automatically from year 1.

[221] The reference to two rights of renewal leads me to the file note made by Ms Dorrington during the course of her telephone discussion with Peter and Paul Vegar on 19 October 2006, referred to in [193] above. Mr Harrison made much of this file note, both in cross-examination of Ms Dorrington and in submissions. The handwritten file note records in part:

> **Page 3, Clause 2 Supply of grapes**
>
> Pete ? Ok.
>
> At the meeting they might have (a) owner operator (b) tenant by term. They need to know that parts of the land fit into either. We can elect to take fruit. If we don't for 2X (not 1X) we lose the right, and we can't reduce the amount. Then Murray was still concerned about that. Murray and Paul then agreed the property would be split. For 75ha we have the right to take – they can sell without the contract. They can give us two vintages notice or 24 months, whichever is the longer, like clause 24.1. 75ha – we have got the right to take blocks up to 75ha and contracts stay in place. Therefore, we have 2x ROR, still can't go backwards. Neither party can go backwards once the exercise has happened to take the block. Both VMA and supply apply.

[222] I first comment that the note is not a shared communication between the parties which sheds light on their mutual intentions on the following day, 20 October 2006. It is simply a jotted note of a telephone call between Peter and Paul Vegar and Ms Dorrington.

[223] I also note that Ms Dorrington's evidence was that she had no independent recollection of the conversation and was accordingly being asked to interpret her notes without that independent recollection. Mr Harrison was insistent that "1X" represented Mr Forlong's initial position that the right of first refusal could only be exercised on or before the Commencement Date. Mr Harrison's reasoning was that if that was the meaning of "1X", then "2X" must mean two occasions to exercise the option, namely on or before the Commencement Date and on or before the first three-year anniversary.

[224] Ms Dorrington was not willing to accept that "1X" and "2X" meant "occasions" rather than say a three-year period. Further, she interpreted "1X" and

"2X" in the light of "2x ROR". In the context of her file note, she said "2x ROR" must refer to the exercise of options rather than any later renewal of the term of the agreement after the initial 10 years. If that was the case, she said "2x ROR" would indicate that the option is renewed at the end of two three-year periods after the Commencement Date.

[225] In my view, this provides a logical interpretation of the file note.

[226] In summary, I found Peter and Paul Vegar and Ms Dorrington to be credible witnesses. I also consider that their evidence on what was agreed on 20 October 2006 as to the meaning of cl 2.2 is reliable. They first had cause to give evidence on this issue in 2010. Their evidence before me was consistent with the evidence given at that time.

[227] Another matter which I consider is inconsistent with the claim for rectification is the fact that at the meeting on 20 October 2006, the Tirosh vineyards were divided into three 25 hectare blocks as Tirosh had proposed. As Buyer, GEL could exercise the right to purchase fruit from the whole vineyard, or for particular blocks. This is consistent with the interpretation advanced on behalf of the Savvy companies as it would have allowed GEL to give notice to take 25 hectares on or before the Commencement Date, a further 25 hectares three years later and then the final 25 hectares another three years after that.

[228] I accordingly conclude that Tirosh has not made out its counterclaim for rectification on the balance of probabilities. There being no separate negotiation in relation to those clauses in the Weta grape supply agreements, the Weta counterclaim for rectification similarly fails.

**Estoppel based on the judgment of Wylie J**

[229] Having made that determination, it is not strictly necessary to address the estoppel defences by the Savvy companies to the rectification counterclaims. I will do so, but only briefly. The Savvy companies rely on both issue estoppel and equitable estoppel.

*The competing arguments*

[230] Before Wylie J, the Savvy companies argued that the vineyard management agreements could not be terminated under cl 2.6 until all options under cl 2.2 had lapsed. Mr Jones submits that the availability of future options under cl 2.2 was an essential part of the Savvy companies' claim and was pleaded as such.

[231] Mr Jones says that in evaluating whether there was a serious issue to be tried, Wylie J was required to consider first the Savvy companies' argument that the right to terminate the vineyard management agreements under cl 2.6 arose only after all options under cl 2.2 of the grape supply agreements had lapsed and second, that the Savvy companies retained further options under cl 2.2.

[232] Mr Jones submits that the interpretation of cl 2.2 is central to the judgment that on a plain reading of both the grape supply agreements and the vineyard management agreements, it is only when the grape supply agreements lapsed that the right to terminate under cl 2.6 arises.

[233] Finally, Mr Jones submits that Weta and Tirosh had an obligation to contest the Savvy companies' interpretation under r 5.19 of the High Court Rules if they objected to it, but have never done so. They did not appeal or raise any concerns.

[234] Mr Harrison submits that the meaning of cl 2.2, read with cl 2.4, was neither a matter argued out nor a matter in contest before Wylie J. The evidence of Mr Gilchrist, who appeared for Weta and Tirosh at the hearing, was that neither party's written submissions addressed the issue. A second point Mr Harrison makes is that Wylie J's decision was an interim injunction focussed on a particular set of issues.

*Issue estoppel - the law*

[235] In *Talyancich v Index Developments Ltd*, the Court of Appeal held:[71]

> As is pointed out by Spencer Bower & Turner at p 179, para 210, an issue estoppel can only be founded on determinations which are **fundamental to the decision and without which it cannot stand**. Other determinations cannot support an issue estoppel however definite the language in which they

[71] *Talyancich v Index Developments Ltd* [1992] 3 NZLR 28 (CA) at 38.

> are expressed. What is emphasised in the judgments cited is that for the decision on any matter to give rise to an issue estoppel that matter must be one which it was necessary to decide and which was actually decided …
>
> (Emphasis added)

*Analysis*

[236] Although it appears that the written submissions did not address the meaning of cl 2.2, its meaning was clearly raised, both in the notice of application and in the oral submissions of Mr Jones which are recorded in the judgment.[72] There is no reference in the judgment to any oral submissions made in opposition. So, in that sense, the matter may not have been "argued out". But it was clearly an issue raised by the Savvy companies.

[237] However, I do accept Mr Harrison's submission that the claim sought to restrain an attempted termination of the property agreements in reliance on cl 2.6 of the grape supply agreements, and the decision was not dependent on the contested interpretation of cl 2.2 (because the right to terminate the grape supply agreements, even on the Weta and Tirosh interpretation of cl 2.2, had not yet arisen). For that reason, the determination by Wylie J as to whether the rights of first refusal continued to the sixth anniversary of the Commencement Date was not fundamental to the decision.

[238] The decision in *Joseph Lynch Land Co Ltd v Lynch*[73] is of assistance in relation to Mr Harrison's argument that the decision was on an application for an interim injunction. In that case, the decision relied on as giving rise to an issue estoppel was an interlocutory judgment declining to sustain a caveat. In relation to interlocutory decisions, the Court stated:[74]

> In principle a sufficiently final and certain conclusion can no doubt be found in what is effectively an interlocutory judgment so as to found a subsequent issue estoppel. We consider, however, that considerable caution is necessary before coming to such a conclusion …

[239] In this case, there is no reason to depart from the above statement of principle.

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72 *Goldridge Estate Vineyards 3552 Ltd v Kakara Estate Ltd*, above n 9, at [30].
73 *Joseph Lynch Land Co Ltd v Lynch* [1995] 1 NZLR 37 (CA).
74 At 42.

[240] In relation to Mr Jones' submission regarding a failure to appeal the decision of Wylie J, the Court of Appeal in *Talyancich* also addressed the question of whether failure to appeal the earlier pronouncement could support or give rise to an issue estoppel. The Court noted that:[75]

> … If there can be no effective appeal against the particular determination, it is impossible to regard it as fundamental to the judgment …

[241] The Court of Appeal in *Joseph Lynch* also rejected both reliance on a "theoretically open" appeal and a "fruitless appeal to avoid an issue estoppel".[76]

[242] In my view, Weta and Tirosh could not have appealed Wylie J's determinations concerning cls 2.2 and 2.4, while accepting his interpretation of cl 2.6 (as they did).

[243] Accordingly, in my view, no issue estoppel arises.

*Equitable estoppel*

[244] Mr Jones submits the matters relied on by the Savvy companies in relation to formation of an issue estoppel apply equally to a defence based on equitable estoppel. He submits that the Savvy companies had a reasonable expectation that their interpretation of the contracts in the earlier proceeding, as recorded in the judgment of Wylie J, was accepted by Weta and Tirosh.

[245] Mr Jones submits that the Savvy companies incurred the cost of the appeal to the Supreme Court in the expectation that they would have an opportunity to exercise the options under the grape supply agreements in due course. He says it is unconscionable for the defendants to resile from that position.

*Equitable estoppel – the law*

[246] In *Wilson Parking New Zealand Ltd v Fanshawe 136 Ltd*,[77] the Court of Appeal discussed the principles in relation to equitable estoppel:

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75 *Talyancich v Index Developments Ltd*, above n 71, at 38.
76 *Joseph Lynch Land Co Ltd v Lynch*, above n 73, at 44.
77 *Wilson Parking New Zealand Ltd v Fanshawe 136 Ltd* [2014] NZCA 407, [2014] 3 NZLR 567.

> [72] The doctrine of equitable estoppel has undergone much change, particularly over the last three decades …
>
> [73] Our review of the authorities suggests that the focus of the inquiry into an appropriate equitable remedy has moved away from the removal of detriment (if that term is construed in a narrow sense) to an inquiry into what is necessary in all the circumstances to satisfy the equity arising from a departure from the expectation engendered by the relevant assurance, promise or conduct on the part of the defendant …
>
> …
>
> [114] … The three main elements relevant to relief stem from the ingredients necessary to establish equitable estoppel in the first place. These are the quality and nature of the assurances which give rise to the claimant's expectation; the extent and nature of the claimant's detrimental reliance on the assurances; and the need for the claimant to show that it would be unconscionable for the promisor to depart from the assurances given.

[247] The Court of Appeal observed that when assessing the appropriate remedy, all the relevant circumstances are to be considered in order not to necessarily satisfy the plaintiff's expectation, but to satisfy the equity that has arisen in the plaintiff's favour.[78] While observing that some authorities continue to refer to relief as being the minimum necessary to satisfy the equity, the Court of Appeal considered that the emphasis should be on a broad assessment of all the relevant circumstances, and a broad consideration of the relief necessary to achieve a just and proportionate outcome.[79]

*Analysis*

[248] The assurances which are said to give rise to the expectation in this case are the fact that Tirosh did not appeal or otherwise contest the judgment of Wylie J and it did not, prior to 8 December 2014, notify Savvy 3552 that it disagreed with Wylie J's interpretation of cl 2.2. However, as I have already found in relation to issue estoppel at [242], Weta and Tirosh could not have appealed Wylie J's determinations concerning cls 2.2 and 2.4, while accepting his interpretation of cl 2.6 (as they did). I therefore do not consider that the absence of an appeal provides an assurance that Weta and Tirosh accepted Wylie J's interpretation of cl 2.2.

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78 At [116].
79 At [117]-[118].

[249] As to the extent and nature of the Savvy companies' detrimental reliance on the assurances, there was no evidence from Peter Vegar on this issue.

[250] It therefore cannot be said that the failure of Weta and Tirosh to appeal or raise its alternative interpretation with the Savvy companies is unconscionable so as to give rise to an equitable estoppel precluding Weta and Tirosh from advancing its rectification argument.

[251] But, in any event, I have already decided against Weta and Tirosh on its counterclaim for rectification.

**Conclusion on second cause of action**

[252] I find in favour of the Savvy companies and will make a declaration that Savvy 4334 and Savvy 3552 were entitled to purchase the 2016 harvest and are entitled to purchase subsequent harvests on the terms set out in the Weta grape supply agreements and the Tirosh grape supply agreements.

[253] The joint counterclaim is essentially the reverse of the Savvy companies' claim. Weta and Tirosh seek a declaration that the Savvy companies' exercise on or about 17 November 2014 of options to purchase grapes are invalid and ineffectual, and they seek a further declaration that the Savvy companies' purchase options under the grape supply agreements have now permanently expired and lapsed. Having found in favour of the Savvy companies, I will decline to make that declaration.

**Third cause of action: implied agreement to extend the options**

[254] The third cause of action is headed "Implied agreement to extend the options", but it also pleads two separate estoppels. The pleading is that by virtue of the conduct of Weta and Tirosh:

(a) The plaintiffs and defendants agreed that the options accruing on 1 May 2013 would be exercisable on the first anniversary of the Commencement Date following the Supreme Court's determination of

the issue of whether the property agreements had been validly terminated on 20 December 2010; and/or

(b) The defendants are estopped from denying that such agreement was reached; and/or

(c) The defendants are estopped from asserting that the plaintiffs were not able to exercise options to purchase grapes from the vineyards prior to the first anniversary of the Commencement Date following the Supreme Court's judgment.

[255] The relief sought is the same as the relief in the second cause of action.

[256] This cause of action is framed on the basis that the correct interpretation of cl 2.2 is that the options lapsed on the third anniversary of the Commencement Date (which is denied) and on the basis that the options were not suspended or deferred as a result of the Court of Appeal judgment (which is also denied).

[257] I have found that the options did not lapse on the third anniversary of the Commencement Date and the Court of Appeal judgment did not suspend the operation of the contract. But I will, nevertheless, consider the cause of action on the basis on which it is framed.

[258] Mr Jones relies on the line of authority that allows the date for exercising an option to be extended in circumstances where the conduct of the parties demonstrates a mutual intention (*consensus ad idem*) that the option will accrue at a later date.[80] In particular, Mr Jones relies on *Bruner v Moore*.[81] That was an early case where the Court found that, despite an option not being formally exercised, there was nothing to prevent the parties from coming to a subsequent agreement extending the period of the option.[82] Any such agreement did not need to be in writing, but might be implied from a course of conduct that led one of the parties to suppose the strict provisions in

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80 *Bruner v Moore* [1904] 1 Ch 305 (Ch)*; Morrell v Studd & Millington* [1913] 2 Ch 648 (Ch)*; Bowman v Durham Holdings Pty Ltd* [1973] HCA 55, (1973) 2 ALR 193; and *Savvy Vineyards 3784 Ltd v Arck Ltd* [2015] NZCA 534 at [59]-[63].

81 *Bruner v Moore*, above n 80.

82 At 312.

the contract would not be enforced. The judgment refers to *Hughes v Metropolitan Railway Co*, where Lord Cairns LC concluded the strict contractual provisions could not be used "where it would be inequitable having regard to the dealings which have thus taken place between the parties".[83]

[259] Mr Jones submits that the conduct of the parties in this case demonstrates a mutual intention and understanding that the enforceability of the grape supply agreements was a live issue, and that the Savvy companies' options to purchase would be extended until the issue had been determined by the Supreme Court. Mr Jones submits that regardless of whether this amounts to an implied agreement for an extension, or whether the conduct of Weta and Tirosh, in allowing the Savvy companies to incur the time and cost of proceeding with the litigation, raises an equity against them, the result is the same. That is that Weta and Tirosh cannot be heard to say the options were not validly exercised in November 2014.

[260] The conduct Mr Jones relies on is as follows:

(a) Weta and Tirosh did not dispute the Savvy companies' interpretation of the contract in the earlier proceeding.

(b) Weta and Tirosh did nothing to indicate that they believed the options expired on 1 May 2013.

(c) On 10 May 2013, the Savvy companies applied for leave to appeal the Court of Appeal's judgment to the Supreme Court.

(d) If the present contention by Weta and Tirosh is correct and all the options had lapsed, the proposed appeal was pointless and the leave application did not meet the requirements for leave under s 13 of the Supreme Court Act 2003.

(e) Weta and Tirosh continued to conduct themselves in that litigation as if the options under the grape supply agreements were a live issue, with

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[83] At 313; citing *Hughes v Metropolitan Railway Co* (1877) 2 App Cas 439 (HL) at 448.

the result that the Savvy companies expended considerable time and cost in pursuing an appeal to the Supreme Court.

(f) It was only after judgment had been given by the Supreme Court in favour of the Savvy Companies, and notice was given to buy all grapes under the grape supply agreements, that Weta and Tirosh asserted that the options had lapsed.

[261] Mr Jones submits that all of the above conduct indicates the parties had reached a *consensus ad idem* that the options would not lapse on 1 May 2013.

[262] Mr Harrison, while accepting the line of authority referred to by Mr Jones in [258], submits that the issue nonetheless remains whether a contract to extend time had been formed. He submits it had not. The dealings between the parties in the cases relied upon by the plaintiffs were far more extensive and in this case, they were minimal if non-existent.

*Contract formation – the law*

[263] The approach to contract formation was discussed by the Court of Appeal in *Savvy Vineyards 3784 Ltd v Arck Ltd*.[84] That case was an appeal against the decision of the High Court in which Gilbert J found that another of Peter Vegar's companies, Savvy Vineyards 3784 Ltd (Savvy 3784), had not exercised its options to purchase grapes from Arck Ltd (Arck) in accordance with two grape supply agreements. On appeal, Savvy 3784 did not challenge the finding that the option notices were not served. But it argued that despite the lack of notice, a contract was formed for the ongoing supply of grapes through the parties' communications and dealings, or alternatively, the requirement of notice was waived or an estoppel arose precluding Arck from relying on the notice requirement.

[264] As in this case, agreements to purchase were in place, but they depended on notice being given "to bring them to life".[85] In that case, while the notices were prepared, it was not proven that they were sent. However, despite the lack of notice,

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84 *Savvy Vineyards 3784 Ltd v Arck Ltd*, above n 80.
85 At [28].

all of the grapes were supplied from the 10-hectare block in 2010 and 2011, and from the 30-hectare block in 2011. No grapes were supplied in 2012 and thereafter.[86]

[265] The Court described the grape supply agreements as conditional contracts.[87] It said the agreements can therefore be seen as contracts for the supply of grapes conditional upon the sending out of notices as prescribed in the relevant clause of the agreement in that case.[88]

[266] There was a helpful discussion of the approach to contract formation in that case and also the relevant case law which I set out in full:

> *Approach to contract formation in this case*
>
> [55] Before considering these exchanges we note the words of Lord Cairns LC in *Brogden v Metropolitan Railway Co*:
>
> > My Lords, there are no cases upon which difference of opinion may more readily be entertained, or which are always more embarrassing to dispose of, than cases where the Court has to decide whether or not, having regard to letters and documents which have not assumed the complete and formal shape of executed and solemn agreements, a contract has really been constituted between the parties.
>
> [56] We also refer to Lord Hatherly's conclusion in *Brogden*, referred to by the majority of the Supreme Court in *Savvy Vineyards 3552 Ltd v Kakara Estate Ltd*, that a written agreement signed by one party and proffered to but never executed by the other was of contractual effect if:
>
> > … the course of dealing and conduct of the party to whom the agreement was propounded has been such as legitimately to lead to the inference that those with whom they were dealing were made aware by that course of dealing, that the contract which they had propounded had been in fact accepted by the persons who so dealt with them.
>
> [57] The majority in *Kakara Estate* also quoted Cooke J's comments in *Boulder Consolidated Ltd v Tangaere*:
>
> > But … I would respectfully keep it in mind as a reminder that a mechanical analysis in terms of offer and acceptance may be less rewarding than the test whether, viewed as a whole and objectively, the correspondence shows a concluded agreement. On either approach the point of view of the

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86 At [29].
87 At [36].
88 At [37].

> reasonable man in the shoes of the recipient of each letter is of major importance.

[58] The minority relied on a statement by Cooke J in a later case, which, in citing the above statement, propounded the acid test relied on by both counsel:

> The acid test … is whether, viewed as a whole and objectively from the point of view of reasonable persons on both sides, the dealings show a concluded bargain.

[59] As these authorities show, the common law adopts an objective approach to assessing the existence of a contract. Although the courts often refer to consensus ad idem or a meeting of the minds as a requirement, it is clear an apparent consensus will suffice. It is permissible when examining whether a contract has been formed to consider the words and conduct of the parties towards one another subsequent to the alleged formation.

*Relevant case law*

[60] The issue of contract formation has arisen in other cases where the parties have agreed on a prescribed method of concluding a contract through the exercise of an option or some other specified act and then despite the specified act not occurring have proceeded as if there were a contract.

[61] An early case was *Bruner v Moore*, where Farwell J found that, despite an option not being formally exercised, there was nothing to prevent the parties from coming to a subsequent agreement extending the period of the option. Such an agreement did not need to be in writing but might be implied from a course of conduct that led one of the parties to suppose the strict provisions in the contract would not be enforced. He quoted the judgment of Lord Cairns LC in *Hughes v Metropolitan Railway Co*, in which he concluded the strict contractual provisions could not be used "where it would be inequitable having regard to the dealings which have thus taken place between the parties".

[62] In *Goodwin v Temple* the High Court of Australia considered an option in writing to purchase a sugar cane farm that was exercisable by a certain date. The option was never exercised, but the purchaser proceeded to occupy the property and paid the agreed price over a number of years. It was held there was a contract to purchase formed even though the specified conditions had not been fulfilled. The option was treated as a form of conditional contract. It was stated:

> … the inference is irresistible that the parties agreed to treat the conditional contract constituted by the option as absolute and did so because they knew that [the purchaser] had elected unconditionally to become the purchaser.
>
> When a vendor sells land the consideration which the contract secures for him is payment of the purchase money for which he stipulated. It is indeed a legal incongruity for the vendor to

> receive and retain the whole of the purchase money and then complain that conditions of the contract operating pending completion have not been performed and on that ground claim to be relieved of his obligation to transfer the land.
>
> [63] In *Bowman v Durham Holdings Pty Ltd* there was an option to purchase an interest in coal and minerals under certain land. The appellants did not take the steps prescribed in the contract to extend the term of the option. It was held to nevertheless remain on foot as the parties' conduct after the notice of extension was sufficient evidence of an agreement to extend the option for a period of 12 months.
>
> [64] We are conscious this case involves not a single purchase, but an annual supply and purchase of grapes. However, these cases show a contract can be inferred from conduct when an option or other initiating process has been ignored.
>
> (Citations omitted)

[267] The Court concluded that, viewed as a whole and objectively from the point of view of both sides, the dealings showed a concluded bargain.[89]

*Analysis – implied agreement*

[268] In this case, as in *Savvy Vineyards 3784 Ltd v Arck Ltd*, the alleged agreement is an agreement to extend the already expired options. In that context, the alleged implied acceptance by Weta and Tirosh of the Savvy companies "three times" or "six year" interpretation of cl 2.2 is not relevant. In other words, the conduct relied on by Mr Jones in [260](a) and (b) above, namely that Weta and Tirosh did not appeal or otherwise dispute the judgment of Wylie J, is not relevant for the present purposes. Even, and for the present purposes, accepting that Weta and Tirosh chose to be silent about their position on the number of options, in the face of Wylie J's decision, being silent about their view cannot give rise to an implication that they were agreeing to extend the previously expired options. In my view, that complaint does not belong in this third cause of action, whether it be an issue of an implied agreement or estoppel.

[269] The conduct of the parties in this case may be contrasted with the dealings between the parties in *Savvy Vineyards 3784 Ltd v Arck Ltd*. In that case, the Court of Appeal noted that it was clear that the parties signed the grape supply agreements,

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89 At [76].

acted consistently with their terms, and in 2010 and 2011 proceeded as if they were bound by them.[90] In the 2010 season, grapes were supplied by Arck and purchased by Savvy 3784 despite no option notices being served. The same happened in 2011. The detailed contractual terms of the grape supply agreements were treated as activated and applicable for both years.[91] In those circumstances, the Court of Appeal stated that the only issue was whether the contract formed was for the duration of the whole term or a portion of the term.[92] In holding that it was for the whole term, the Court of Appeal noted that in March 2011, Arck did not contest and by its conduct impliedly accepted Savvy 3784's assertion that Arck's fruit would be on-sold in future years. There were express references by Arck to the 2013 harvest, which was beyond the expiry of any initial three-year period, which also suggested that it was bound for the long term.[93]

[270] Savvy also acted as if it were bound to purchase the grapes not only in 2010 and 2011, but also in the future.[94]

[271] The Court of Appeal also noted the parties' actions once the dispute arose in February 2012 as being explicable only in terms of a binding long-term supply agreement.[95]

[272] By contrast, the conduct of the parties in this case is much more limited. Effectively, what Mr Jones' submission boils down to is that Weta and Tirosh "allowed" the Savvy companies to go through the process of a Supreme Court appeal. By that conduct, he says the parties impliedly agreed that the options to purchase under the grape supply agreements would be extended until after the Supreme Court decision.

[273] I do not consider that there is a course of conduct here that demonstrates a form of consensus or implied agreement between the parties as to a further extension of time. I note the following:

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90 At [65].
91 At [65].
92 At [66].
93 At [67].
94 At [68].
95 At [71].

(a) As part of the background, it is necessary to recall that on or about 30 April 2012, when an appeal to the Court of Appeal was already underway and the prospect of further appeal to the Supreme Court was in contemplation, the parties expressly agreed to extend the date from 1 May 2012 to 1 May 2013.

(b) There is no evidence from Peter Vegar that following that express agreement, the Savvy companies were led to believe that a further extension of time beyond that date was contemplated.

(c) The appeal process was not completely redundant. The challenge by Weta and Tirosh was to the validity of the termination of both the vineyard management agreements and the grape supply agreements. I do not overlook Mr Jones' submission that the grape supply agreements were more valuable in monetary terms, but nevertheless the overall claim by the Savvy companies that Weta and Tirosh had wrongfully repudiated all of the Tirosh property agreements and the Weta property agreements, and its potential liability consequences, went beyond the implications of the lack of notice under the grape supply agreements before the agreed extended date of 1 May 2013.

*Analysis – (first) estoppel*

[274] The conduct relied on for the first estoppel in this cause of action is the same conduct as is relied upon for the implied agreement. If no such implied agreement existed, as I have found, are Weta and Tirosh estopped from denying its existence?

[275] In *Bruner v Moore*,[96] the Court stated that "even if no such agreement can be implied, the conduct may be of such a nature as to raise an equity against the party resisting".[97] The Court held that a letter from the defendant to the plaintiff mentioning a date for payment of the purchase money (which was after the date in the contract) coupled with the expenditure of time, work and money by the plaintiff in the belief

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96 *Bruner v Moore*, above n 80.
97 At 312.

that the option had been extended, operated in equity to prevent the defendant from asserting that the option had expired.[98]

[276] However, in *Meates v Attorney-General*, Cooke J observed:[99]

> The doctrine of estoppel seems an unnecessary importation into this case. The appellants rely for the estoppel on the same factual foundation as they use to try to show implied contracts. If a contract is to be inferred from this material, estoppel is superfluous; if not, there is no apparent reason why the Crown should not be heard to say so.

[277] In *Savvy Vineyards 3784 Ltd v Arck Ltd*, the Court of Appeal decided the case on the basis of an implied agreement rather than on waiver or estoppel given that, in their dealings, the parties at no stage specifically addressed the requirements of the exercise of the option or turned their minds to the issue.[100] The Court of Appeal also referred to the above passage from *Meates v Attorney-General*.[101]

[278] In this case, the comments of the Court of Appeal in *Meates* are directly applicable. The Savvy companies rely on the same conduct for the first estoppel as they relied upon for the implied agreement. That is insufficient to establish an estoppel.

*Analysis – (second) estoppel*

[279] It is not clear whether the second pleaded estoppel is broader than the first. It relies on the same conduct as is pleaded for the implied agreement and the first estoppel. Further, Mr Jones, in his submissions, addressed estoppel in a general way without distinguishing between the two.

[280] As at [278] above, the conduct relied upon by the Savvy companies is insufficient to establish an estoppel.

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98 At 315.
99 *Meates v Attorney-General* [1983] NZLR 308 (CA) at 377.
100 *Savvy Vineyards 3784 Ltd v Arck Ltd*, above n 80, at [74].
101 At [74].

**Conclusion on third cause of action**

[281] I find against the Savvy companies on the third cause of action.

**Additional findings of fact sought**

[282] Mr Jones asks the Court to make findings of fact that:

(a) at the time of entry into the grape supply agreements, Weta and Tirosh were aware:

(i) that the purchase price of the grapes was restricted by the target cropping level in cl 12.1 of the grape supply agreements; and

(ii) the Savvy companies hoped to make a profit on surplus tonnages; and

(b) Weta and Tirosh had not been told by Peter or Paul Vegar or by Dr Jordan, that the vines could and would not be cropped above the target cropping level in cl 12.1.

[283] Mr Harrison opposes the Court making factual findings on this issue.

[284] I consider it is appropriate to do so because any such findings may well be relevant to damages in the second phase of the hearing. There was evidence on these issues and cross-examination. Determining the dispute now will avoid unnecessary duplication in the second phase of the hearing.

*Target cropping level – restriction on purchase price – awareness by Weta and Tirosh*

[285] The target cropping level in cl 12.1 of the grape supply agreements acts as a cap on the purchase price, and under the agreements the Buyer has the benefit of any surplus tonnages.

[286] Mr Boyle says this was known to Mr Forlong prior to the 20 October 2006 meeting. This evidence was contained in his brief of evidence and was confirmed by Mr Boyle in cross-examination.

[287] It was put to Mr Forlong in cross-examination that under the grape supply agreements, it was clear that anything over and above the cropping level set out in the agreements would be picked up by the Savvy companies at no cost to them. Mr Forlong said he was not aware up to the point of signing the agreements on 20 October 2006 that, under the grape supply agreements, excess tonnages (above the target cropping level) would be obtained by the Savvy companies for no cost.

[288] I do not accept Mr Forlong's evidence on this issue. The wording of the grape supply agreement is clear. Mr Forlong's evidence is also contradicted by the evidence of Mr Boyle.

[289] I find that at the time of entry into the Tirosh grape supply agreements on 20 October 2006, Mr Forlong, a director of Tirosh and the person who was negotiating for that company, was aware that the purchase price of the grapes was restricted by the target cropping level in cl 12.1.

*Profit on surplus tonnages*

[290] Peter Vegar's evidence addressed the benefit to both the owners (i.e. the investors) and GEL (later the Savvy companies) under his investor model. Under that model, the owner does not need to find land, manage the development of the vineyard or manage the vineyard itself. GEL did that on a cost recovery basis. The investors benefited from the capital gain on their properties which went from bare land to vineyards and from the income from grapes once the vineyards went into production.

[291] The benefit for GEL was that it secured a long-term supply of grapes and it was able to manage the quality of those grapes. Under the payment terms of the grape supply agreements, GEL paid the investor the average market price up to an agreed number of tonnes per hectare. The financial benefit to GEL lay in the profit that could be obtained from any additional tonnages per hectare above the target cropping level.

If additional tonnes are harvested, GEL obtains the benefit of a discounted price, either when it on-sells or uses them to make its own wine.

[292] In taking on the contractual burden to develop and manage the vineyards, GEL faced at least three years of development and management work before it could start to earn a profit, and five years before full product and profitability was reached.

[293] Peter Vegar said GEL only undertook to do this work on a cost recovery basis in return for the rights and opportunity for profit under the grape supply agreements. He said that GEL could otherwise have simply continued to enter into grower contracts with vineyards in the Marlborough region.

[294] I accept the evidence from Peter Vegar that GEL hoped to make a profit on surplus tonnage above the target cropping level, and that this was made clear to Mr Forlong. It was that prospect that made the investor model work from GEL's perspective.

[295] The real issue is whether either Peter or Paul Vegar or Dr Jordan told Weta and Tirosh that the vines could not and would not be cropped above the target cropping level in cl 12.1. I now turn to that issue.

*What was said about cropping above the target cropping level?*

[296] I have already made a finding in [209]-[211] that in his telephone discussion with Mr Forlong, Dr Jordan would not have told him that it would have been detrimental to the grape quality to crop at a level above the target cropping level.

[297] Both Peter and Paul Vegar say that the issue of surplus tonnages was discussed with Mr Forlong and agreed earlier on in the negotiations. Peter Vegar says that Mr Forlong had assessed the projected return on the investment based upon the agreed cropping level price cap and was satisfied with that return.

[298] Mr Forlong disagrees with that evidence. He says he was told by Peter and Paul Vegar on 20 October 2006 that the vineyards could not be cropped above the

target cropping level without adversely affecting the quality of grapes. Mr Boyle also agrees that this was said on 20 October 2006.

[299] Peter Vegar denies that he and his brother said this on 20 October 2006. The allegation was not put to Paul Vegar or Ms Dorrington.

[300] I accept the evidence of Peter Vegar for three reasons:

(a) The clauses that deal with the target cropping level and pricing structure were unchanged from the initial draft of the grape supply agreements.

(b) Included within those clauses are specific provisions as to payment for grapes where the target cropping level is exceeded by up to and over 40 per cent:

> 4.5 If the target cropping levels outlined in clause 12.1 are exceeded by up to 40%, the Buyer will purchase and receive the entire crop of Grapes at the price calculated using the price per tonne outlined in clause 4.1 and the target cropping level outlined in clause 12.1.
>
> 4.6 If the target cropping levels outlined in clause 13.1 are exceeding by 40% or more, the Grower will still offer them to the Buyer for purchase on a first refusal basis at a price to be negotiated in good faith by the Buyer and the Grower.

Given that provision is made for those two events, it does not seem likely that Peter and Paul Vegar would say they could not and would not crop in excess of the target cropping level; and

(c) Finally, for the Savvy companies to restrict themselves to the target cropping level is contrary to Peter Vegar's investor vineyard model. There would be no reason for Peter and Paul Vegar to say otherwise.

[301] I therefore find that Mr Forlong (for Tirosh) was not told by Peter or Paul Vegar either before the meeting on 20 October 2006 or at that meeting that the vines could and would not be cropped above the target cropping level in cl 12.1.

[302] Turning to the position on the three factual matters in [282] in relation to Weta, Peter Vegar's evidence is that as a result of Weta paying a higher price per hectare for its land, GEL agreed to a higher cap price, i.e. an increase to the cropping levels in cl 12.1, to keep the return to Weta at an adequate level.

[303] Clauses 4.5 and 4.6 were removed from the Weta grape supply agreements as by that time Peter Vegar had come to the view that as they were Manager as well as Buyer, they could control the cropping level.

[304] There was no evidence regarding any discussions on cropping levels above the target level prior to the Weta grape supply agreements being signed. My findings in relation to the three matters in [282], as they apply to Tirosh, therefore apply equally to Weta.

**Conclusion**

[305] The answers to the preliminary questions for determination in this hearing are as follows:

(a) (i) The defendants are liable to the plaintiffs under the second cause of action in the statement of claim.

(ii) The defendants are not liable to the plaintiffs under the first and third causes of action in the statement of claim.

(b) The plaintiffs are entitled to the declaration sought relating to the second cause of action in the statement of claim.

(c) The defendants are not entitled to the declarations sought in their joint counterclaim.

(d) The defendants have not established that orders for rectification should be made as sought.

**Orders**

[306] I make a declaration that Savvy 4334 and Savvy 3552 were entitled to purchase the 2016 harvest and are entitled to purchase subsequent harvests on the terms set out in the Weta grape supply agreements and the Tirosh grape supply agreements.

[307] I order that there be an inquiry into damages.

[308] The joint counterclaim by Weta and Tirosh is dismissed.

[309] The two separate counterclaims by Weta and Tirosh seeking rectification of the grape supply agreements are each dismissed.

**Costs**

[310] Costs are reserved. The Savvy companies have partially succeeded in their claims. I would hope that the parties can agree costs. In that case, they should file a joint memorandum within 20 working days of the date of this judgment. If agreement cannot be reached, the Savvy companies are to file their memorandum within 25 working days of the date of this judgment, and Weta and Tirosh within a further five working days. Memoranda should not exceed five pages.

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Gordon J