IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA281/2018
[2019] NZCA 437

BETWEEN	WETA ESTATE LIMITED First Appellant
AND	TIROSH ESTATE LIMITED Second Appellant
AND	SAVVY VINEYARDS 4334 LIMITED First Respondent
AND	SAVVY VINEYARDS 3552 LIMITED Second Respondent

Hearing:	26–27 March 2019
Court:	Cooper, Clifford and Gilbert JJ
Counsel:	R E Harrison QC and W D Woodd for Appellants D P H Jones QC and C L Bryant for Respondents
Judgment:	18 September 2019 at 9 am

JUDGMENT OF THE COURT

A The appeal is allowed.

B The judgment of the High Court finding the appellants liable to the respondents on the second cause of action in the first amended statement of claim, the corresponding declaration and the order directing an inquiry into damages are set aside.

C The cross-appeal is dismissed.

D The respondents are to pay costs to the appellants for a standard appeal on a band A basis and usual disbursements. We certify for second counsel.

E Costs in the High Court are to be determined in that Court in accordance with this judgment.

REASONS OF THE COURT

(Given by Gilbert J)

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Introduction

[1] This appeal concerns the proper construction of an option to purchase grapes under long-term supply agreements and whether it was validly exercised.

[2] The appellants each purchased two blocks of land in Marlborough and entered into three interrelated agreements in respect of each one. These agreements provided for the development of the land into vineyards (the project management agreements), the subsequent management of the vineyards (the vineyard management agreements) and conditional agreements for the long-term supply of the grapes produced on the vineyards (the grape supply agreements). The respondents were later novated as the counterparties to the vineyard management and grape supply agreements. For convenience, we will refer to the appellants collectively as "Weta" and the respondents as "Savvy". Savvy is "the Buyer" and Weta is "the Grower" in the respective grape supply agreements.[1]

[3] The grape supply agreements conferred an option on Savvy to purchase the entire crop of grapes from each block. If the option was exercised in respect of any block, Savvy was obliged to purchase all grapes from that block for the term of the agreement. The initial term of the agreement expires on the completion of the harvest of the tenth fruit producing vintage. There are two rights of renewal, each for a further 20 fruit producing vintages. The first date on which the option could be exercised was the "Commencement Date", which was defined to mean 1 May of the year before the first planned harvest of grapes. It is common ground that the commencement date was 1 May 2009. The options were not exercised on that date. The options were again exercisable three years after that, on 1 May 2012. For reasons we will come to, the parties agreed to extend that date to 1 May 2013. Savvy did not exercise the options on that date either. However, it purported to exercise the options for all blocks under all agreements by notice given on 17 November 2014, claiming it had a further option effective on 1 May 2015. Weta responded on 8 December 2014 asserting that the options had lapsed when they were not exercised by notice prior to 1 May 2013.

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[1] The first respondent is the buyer in the agreements covering the two vineyards owned by the first appellant. The second respondent is the buyer in the agreements relating to the two blocks owned by the second respondent.

[4] The primary issue on this appeal is whether the options lapsed on 1 May 2013 and therefore whether Savvy's purported exercise of the options on 17 November 2014 was ineffective. This primarily turns on the interpretation of two clauses in the grape supply agreements. It is therefore helpful to set these out now:[2]

> 2. SUPPLY OF GRAPES
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> …
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> 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.
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> 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 all the Grapes from such Block or Blocks for the term of this agreement.

[5] Weta contends the options lapsed when they were not exercised on 1 May 2013 by notice served prior to that date. It says that on the expiry of that date, the options had not been exercised for two consecutive periods, the first being the three-year period commencing on the commencement date and the second being the three-year period commencing on the third anniversary of the commencement date (as extended). Savvy disagrees. It says it had six years from the commencement date to exercise the option meaning the option would only lapse if it was not exercised on the sixth anniversary of the commencement date, being 1 May 2015. It says the two consecutive three-year periods referred to in the agreement would not expire until then.

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[2] We note there is no cl 2.3 in the agreements.

Weta's appeal

[6] Savvy succeeded on the interpretation issue before Gordon J in the High Court and judgment was entered on the second of its five causes of action.[3] This cause of action was premised on Savvy being entitled to exercise the option on 1 May 2015 by notice served prior to that date and was based on two principal allegations: first, that Weta repudiated the agreements by asserting in December 2014 that the options had lapsed on 1 May 2013; and secondly, by reason of that repudiation, Savvy lost the opportunity to profit from the purchase and on-sale of grapes for the 2016 and subsequent harvests. The High Court found this claim proved. It made a declaration accordingly and ordered an enquiry into damages.[4] Weta appeals against those orders.

Savvy's cross-appeal

[7] Savvy cross-appeals against three aspects of the High Court judgment. To understand the issues raised by the cross-appeal, it is necessary to relate a little more of the background, including earlier proceedings commenced in 2010 concerning the same vineyard management and grape supply agreements.

[8] Weta had earlier purported to give three months' notice of termination of the vineyard management and grape supply agreements, by notices dated 17 February 2010. Weta asserted it was entitled to terminate under cl 2.6 of the grape supply agreements because no notice had been given under 2.4 by the commencement date:

> 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.

[9] Savvy considered these notices were ineffective. It affirmed the agreements and issued proceedings in the High Court (the 2010 proceedings) seeking a declaration that the agreements remained in force. It also applied for an interim injunction restraining Weta from acting on the notices until further order of the Court. By the time that application was heard, Weta had conceded that the notices were not

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3 *Savvy Vineyards 4334 Ltd v Weta Estate Ltd* [2018] NZHC 989 [High Court judgment].
4 At [306]–[307].

effective to bring the grape supply agreements to an end, but it maintained that the vineyard management agreements were terminated. In granting the interim injunction, Wylie J considered that Savvy's interpretation of cl 2.6 of the grape supply agreements was correct, namely the right of termination under cl 2.6 would not arise until the option under cl 2.2 had lapsed.[5] However, the Judge made it clear that he was not making any final determination of the issue and the injunction was both interim, pending further order of the Court, and conditional on appropriate undertakings as to damages being given.[6] Weta ultimately accepted that its purported termination of the agreements in reliance on the February 2010 notices was ineffective so that issue did not need to be (and was not) finally determined. Although it was not necessary for the Judge to decide the point, Wylie J expressed the view in the course of giving his reasons for granting the interim injunction that the option in cl 2.2 could be exercised on the commencement date or on the third or sixth anniversaries of the commencement date.[7]

Estoppel

[10] Savvy relied on Weta's failure to appeal against the interim injunction judgment in the 2010 proceedings, and its failure to notify Savvy that it disagreed with Wylie J's interpretation of cl 2.2, as giving rise to an estoppel precluding Weta from advancing its contrary interpretation in the present proceedings (the 2016 proceedings), both in its defence to Savvy's claims and in its counterclaim seeking rectification of the agreements to accord with its interpretation. Savvy failed on that argument before Gordon J.[8] Savvy cross-appeals against this finding to meet the prospect of Weta's appeal being allowed on the interpretation issue. This is one of the three aspects of Savvy's cross-appeal.

Dismissal of claim based on 20 December 2010 notices

[11] On 20 December 2010, relying on different grounds from those specified in the February 2010 notices, Weta again purported to terminate the vineyard

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5 *Goldridge Estate Vineyards 3552 Ltd v Kakara Estate Ltd* HC Auckland CIV-2010-404-2838, 3 August 2010 [Interim injunction judgment] at [38].
6 At [3], [52], [88] and [90].
7 At [29], [36], [37] and [39].
8 High Court judgment, above n 3, at [229]–[251].

management agreements and the grape supply agreements. Savvy considered these notices were also ineffective and it again affirmed the agreements. Following trial in the 2010 proceedings, the High Court found in favour of Savvy that those notices were invalid and made a declaration that the agreements remained in force.[9]

[12] That judgment was delivered on 14 March 2012, shortly prior to the second option exercise date. In view of Weta's pending appeal from the judgment, the parties agreed in April 2012 to extend the option exercise date from 1 May 2012 to 1 May 2013. This Court allowed Weta's appeal on 12 April 2013, finding that the notices given by Weta in December 2010 were effective in bringing the agreements to an end.[10] Savvy says it would have exercised the options on 1 May 2013 had it not been for that judgment. However, it continued to pursue its rights under the agreements and was granted leave to appeal to the Supreme Court. In a judgment delivered on 5 September 2014, the Supreme Court allowed the appeal and reinstated the High Court judgment.[11] It was in this context that Savvy gave notice purporting to exercise the options on 17 November 2014. Weta's refusal to supply led to these, the 2016, proceedings.

[13] As noted, Savvy advanced five causes of action in the 2016 proceedings, only the second of which succeeded.[12] Savvy cross-appeals against the dismissal of its first cause of action. The reason for pursuing the cross-appeal on the first cause of action is that it was a claim for damages for the 2014 and subsequent harvests (founded on the 1 May 2013 option date) whereas the second cause of action (on which it succeeded) was confined to damages for the 2016 and subsequent harvests (founded on the alleged 1 May 2015 option date). Savvy pleaded in its first cause of action that:

(a) Weta repudiated the grape supply agreements by giving the notices of termination dated 20 December 2010.

(b) But for that repudiation, Savvy would have exercised its option to purchase the grapes from each and every block on 1 May 2013.

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9 *Savvy Vineyards 3552 Ltd v Kakara Estate Ltd* [2012] NZHC 416.

10 *Karaka Estate Ltd v Savvy Vineyards 3552 Ltd* [2013] NZCA 101, [2013] 3 NZLR 297 [Court of Appeal judgment] at [79].

11 *Savvy Vineyards 3552 Ltd v Kakara Estate Ltd* [2014] NZSC 121, [2015] 1 NZLR 281 [Supreme Court judgment].

12 The fourth and fifth causes of action were stayed prior to the hearing. See High Court judgment, above n 3, at [54].

(c) By reason of that repudiation, Savvy lost the opportunity to profit from the purchase and on-sale of those grapes for the 2014 and subsequent harvests.

Particulars

The Court of Appeal judgment on 12 April 2013 meant that the agreements "terminated before those options accrued or were inoperative and/or suspended".

[14] In dismissing the first cause of action, Gordon J found that Weta's wrongful repudiation of the agreements by the service of the December 2010 notices did not prevent Savvy from exercising its option prior to 1 May 2013.[13] The Judge also found that the Court of Appeal judgment did not as a matter of law prevent Savvy from giving notice of exercise of its option to purchase under the grape supply agreements.[14] Savvy challenges these findings and this is the second aspect of its cross-appeal.

Effect of Court of Appeal judgment

[15] The third aspect of Savvy's cross-appeal concerns a related issue that was pleaded as part of its second cause of action (on which it succeeded) but which it says the Judge found it unnecessary to determine. This pleading may be summarised as follows:

(a) The Court of Appeal judgment on 12 April 2013 meant that the agreements were "terminated" or "inoperative and/or suspended" "before the options accrued".

(b) The agreements were "reinstated on 5 September 2014" when the Supreme Court delivered its judgment.

(c) Following reinstatement:

(i) The options accrued on the next anniversary of the commencement date following reinstatement (1 May 2015); and/or

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13 At [81]–[97].
14 At [98]–[109].

(ii) The options accrued on the sixth anniversary of the commencement date (1 May 2015).

[16] In the event its primary argument on the interpretation question fails, Savvy states in its notice of cross-appeal, that it "seek[s] judgment on para 54(e)(i)" which is as quoted at [15(c)(i)] above.

The issues

[17] The issues on the appeal and cross-appeal may therefore be summarised as follows:

(a) Was Weta estopped from advancing its interpretation of cl 2.2?

(b) What is the correct interpretation of cl 2.2?

(c) Did the December 2010 notices prevent Savvy from exercising the options on 1 May 2013?

(d) Did the Court of Appeal judgment prevent Savvy from exercising the options on 1 May 2013?

(e) Were the agreements terminated, inoperative or suspended by the Court of Appeal judgment and reinstated by the Supreme Court judgment such that the options accrued on the next anniversary of the commencement date, 1 May 2015?

Was Weta estopped from advancing its interpretation of the option?

[18] It is logical to consider this question first because, if the answer is "yes", that would be determinative of the appeal.

Pleadings

[19] Savvy's notice of cross-appeal relevantly states:

> If and to the extent that it becomes necessary as a consequence of the appeal, the respondents: cross-appeal against the finding at paragraphs [230]–[251] of the Judgment that the appellants are not estopped from asserting an interpretation of cl 2.2 of the grape supply agreements that is inconsistent with Wylie J's judgment dated 3 August 2010; …

[20] These paragraphs of the High Court judgment address two quite distinct species of defence, issue estoppel and equitable estoppel. The pleading to support these defences is run together in Savvy's statement of defence to Weta's counterclaim seeking rectification of the grape supply agreements in the event its interpretation was rejected.[15] Savvy's statement of defence to Weta's counterclaim relevantly reads:

> 72 It admits that under clauses 2.2 and 2.4 of the Weta Grape Supply Agreement, options accrue on the Commencement Date, on the third anniversary of the Commencement Date and on the sixth anniversary of the Commencement Date. It says further that:
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> a. The wording of clauses 2.2 and 2.4 was agreed.
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> b. The natural and ordinary meaning of the words of clauses 2.2 and 2.4 is that the option accrues on more than one date after the Commencement Date.
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> c. [Savvy's] claim in [the 2010 proceedings] was made on that basis.
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> d. On 3 August 2010, Wylie J gave a judgment in [the 2010 proceedings] granting [Savvy] an interim injunction. In that judgment, he recorded that options under the … Grape Supply Agreements accrued on the Commencement Date, on the third anniversary of the Commencement Date and on the sixth anniversary of the Commencement Date.
>
> e. [Weta] did not appeal or otherwise contest Wylie J's judgment.
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> f. [Weta] did not, prior to 8 December 2014, notify [Savvy] that it disagreed with Wylie J's interpretation and/or that the option could only be exercised on or before 1 May 2013.
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> g. [Weta] is estopped from either:
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> i. asserting that [Savvy] cannot exercise an option on or before the sixth anniversary of the Commencement Date; and/or
>
> ii. seeking rectification of clause 2.2 and/or clause 2.4 of the [Weta] Grape Supply Agreement.

High Court judgment

[21] The Judge found that the interim injunction judgment could not give rise to an issue estoppel on the interpretation of cl 2.2.[16] The Judge also rejected the defence

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15 The rectification claim was dismissed.

16 High Court judgment, above n 3, at [236]–[243].

founded on equitable estoppel, concluding that the absence of an appeal from the interim injunction judgment could not be relied upon by Savvy as an assurance that Weta accepted Wylie J's interpretation of cl 2.2.[17] The Judge also noted there was no evidence of any detrimental reliance on any such assurance.[18] The Judge concluded that the failure of Weta to appeal or raise its alternative interpretation with Savvy was not unconscionable precluding it from seeking rectification.[19] In any event, the Judge had already rejected the rectification claim on its merits so these defences did not strictly need to be considered.[20]

Issue estoppel

Submissions on appeal

[22] Savvy submits the interpretation of cl 2.2 was squarely before Wylie J in the 2010 proceedings, having been raised in the pleadings and in submissions. Savvy contends Weta was obliged in those proceedings, under the then equivalent requirement of r 5.19 of the High Court Rules 2016, to contest Savvy's interpretation if it disagreed with it, but it did not do so. Weta did not appeal the interim injunction judgment or plead an alternative interpretation of cl 2.2 in the statement of defence it filed after that judgment. Nor did Weta advise Savvy of its interpretation in correspondence or otherwise. Savvy submits it was unconscionable in these circumstances for Weta to challenge Wylie J's interpretation of cl 2.2 after the 2010 proceeding had been finally determined and after the date on which Weta argues the options lapsed.

Analysis

[23] A defence of issue estoppel was not pleaded in those terms. However, because it was dealt with in the High Court and raised again on appeal without objection, we will address it. An issue estoppel can only be founded on a final determination of an issue that was fundamental to the decision such that it could not stand without it.[21]

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17 At [248].
18 At [249].
19 At [250].
20 At [251].
21 *Talyancich v Index Developments Ltd* [1992] 3 NZLR 28 (CA) at 38.

The contention that the interim injunction judgment gave rise to an issue estoppel on the interpretation of cl 2.2 is misconceived and must fail for three interrelated reasons.

[24] First, no final determination of the correct interpretation of any provision in the grape supply agreements was required for the purposes of determining the application for the interim injunction. Wylie J merely needed to be satisfied Savvy had an arguable case and that the balance of convenience and overall interests of justice favoured the grant of an interim order preserving the position pending final determination of the dispute at trial. The Judge's conclusion that Savvy's claims were "neither frivolous nor vexatious, and there is a serious question to be tried" could not found an issue estoppel precluding either party from advancing its respective contentions on any pleaded issue at the substantive hearing.[22] We note that no statement of defence had even been filed by Weta at the time the interim injunction application was determined.

[25] Secondly, the February 2010 notices the subject of the 2010 proceedings were served in reliance on cl 2.6 of the grape supply agreements. This clause conferred a right to terminate the vineyard management agreement in respect of any block not the subject of a notice issued under cl 2.4 exercising the option conferred by cl 2.2 of the relevant grape supply agreement. Weta's contention was that because these options had not been exercised by the commencement date, 1 May 2009, the vineyard management agreements could be terminated under cl 2.6.[23] The issue as to whether there were one or two further rights to exercise the options was not directly in issue and did not need to be determined. The interim injunction judgment could stand perfectly well in the absence of any such determination. It could not be disputed that there was at least one further opportunity to exercise the option (1 May 2012) and that date had not arrived at the time the interim injunction judgment was delivered on 3 August 2010.

[26] Thirdly, Weta was not obliged to seek leave to appeal against the interim injunction judgment, even if it could not sensibly challenge the outcome, as the only way of preserving its position on a side issue on which the Judge had expressed an

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22 Interim injunction judgment, above n 5, at [52].
23 At [28].

unfavourable view. As this Court observed in *Joseph Lynch Land Co Ltd v Lynch*, interlocutory decisions, for example to sustain a caveat or to refuse an interim injunction, will not preclude either party from continuing to assert its rights at trial and are not capable of supporting an issue estoppel.[24]

[27] We add a final general comment. Issue estoppel is an entirely distinct defence from equitable estoppel. The defences share the word "estoppel" but have nothing else in common. Issue estoppel is concerned with the public interest in finality in litigation whereas equitable estoppel is based on the concept of unconscionability. If both defences were relied on, as was the case here, they should have been pleaded separately to make that clear and to ensure the elements of each defence are not conflated or obscured. Contrary to Savvy's submissions, the matters it pleaded to support an issue estoppel do not "apply equally to a defence based on equitable estoppel".

Equitable estoppel

Submissions on appeal

[28] Savvy says it reasonably understood that its interpretation of cl 2.2, supported by Wylie J, was not disputed by Weta. Savvy contends that it decided not to exercise the options by the third anniversary of the commencement date on the understanding this was the case. Savvy incurred the costs of appealing to the Supreme Court in the expectation that it would be able to exercise the options prior to the sixth anniversary if its appeal succeeded. In these circumstances, Savvy contends it is unconscionable for Weta to resile from "that position".

Analysis

[29] The first point to note is that the asserted equitable estoppel is not founded on any express representation by Weta. Rather, reliance is placed on Weta's failure to appeal the interim injunction judgment coupled with its failure to notify Savvy that it

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[24] *Joseph Lynch Land Co Ltd v Lynch* [1995] 1 NZLR 37 (CA) at 42–44.

disagreed with the interpretation advanced by Savvy and provisionally supported by Wylie J.

[30] For the reasons we have given, Weta was not obliged to appeal against the interim injunction judgment. Any such attempt would have been almost certain to fail. Weta's decision not to appeal against the interim injunction was entirely appropriate and cannot be characterised as a "failure". The absence of any appeal cannot reasonably be taken as encouraging Savvy to believe that Weta agreed with the Judge's assessment of the merits or his interpretation of cl 2.2. All issues remained at large for determination at trial.

[31] Savvy pleaded the terms of the grape supply agreements in its second amended statement of claim in the 2010 proceedings. Savvy alleged that: its initial right to purchase grapes was triggered on 1 May 2009; it "retains further rights to purchase the grapes from any block" in terms of cl 2.2; and was "next able to give notice" of "exercise of its right by 1 May 2012". In its statement of defence, Weta denied this paragraph in Savvy's statement of claim and stated that it relied on the grape supply agreements "according to their written terms". While this pleading may not have complied with the High Court Rules (because it did not set out its contrary interpretation), Weta's denial of Savvy's interpretation could not reasonably have been understood to mean Weta agreed with it.

[32] As can be seen from Savvy's pleading quoted at [20] above, no detrimental reliance was pleaded. However, Savvy contends it made its decision not to exercise the option on 1 May 2013 on the understanding that its interpretation (that there was one further exercise date) was not contested. However, this is not why Savvy did not exercise the option on that date according to the evidence. Peter Vegar, a director and shareholder of Savvy, explained that the options were not exercised because of the Court of Appeal judgment delivered on 12 April 2013:

> [Savvy] had every intention of exercising the option for all of the Weta and Tirosh Blocks prior to 1 May 2013.
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> However, on 12 April 2013 the Court of Appeal delivered its judgment and quashed the declarations made by Andrews J. The Court of Appeal made a declaration that the notices of termination dated 20 December 2010 were valid and the Weta and Tirosh Property Agreements had been terminated.

> This was a very disappointing result for us. I was aware that there was no right of appeal to the Supreme Court, and that we would need to apply for leave. *We were obviously unable to exercise the options to purchase for the next three years (the Court of Appeal having held that we had no contracts).* Given the ongoing refusal of [Weta] to supply the grapes, we had no prospect of being able to on-sell the grapes for the 2014 vintage, even if leave to appeal was granted. However, I knew that we still had time to exercise our right to take the grapes, and was prepared to incur the legal cost of pursuing an appeal to the Supreme Court.
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> (Emphasis added).

[33] Mr Vegar said in cross-examination that there were two reasons Savvy did not give notice prior to 1 May 2013, the Court of Appeal judgment and the further right of exercise of the options (on 1 May 2015):

> A. Two reasons, (1) I believe what the Courts tell me. The Court had told me — I had a Court decision saying that my contracts were terminated, they were at an end. If I didn't know whether we'd be able to go to the Supreme Court, we'd have to apply to go to the Supreme Court and if that did happen, well I also knew I had another period to give notice but at that point in time, the Court had told me I have no contracts.
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> Q. And the second reason?
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> A. Sorry, I gave the second reason, also because if we manage to get the appeal — get the appeal accepted to go to the Supreme Court well I had another — I had until the second three-year period to then give notice.

[34] We consider the estoppel defence was rightly rejected by Gordon J as failing at every level of the analysis. In summary, Weta did not create or encourage any belief or expectation by Savvy that it agreed with its interpretation of cl 2.2 of the grape supply agreements. On the contrary, Weta denied this in its statement of defence. Weta also demonstrated by its conduct throughout that it would exploit any available opportunity to terminate the grape supply agreements and the vineyard management agreements. Savvy chose not to exercise the options on 1 May 2013 because of its assessment of the effect of the Court of Appeal judgment declaring the agreements to be at an end and its own interpretation of the grape supply agreements that it could exercise the options on 1 May 2015. These assessments were made independently of Weta and without any reliance on anything it did or did not do. In all the circumstances, there was nothing unconscionable about Weta maintaining its interpretation of the agreement despite its so-called "failure" to appeal against

the interim injunction judgment or to notify Savvy of its view that the options could only be exercised on or before 1 May 2013.

What is the correct interpretation of cl 2.2?

High Court judgment

[35] Gordon J considered that in the context of the agreements as a whole, the natural and ordinary meaning of cls 2.2 and 2.4 of the grape supply agreements was that Savvy had "two consecutive periods of three years, i.e. up to six years, in which to give notice of the exercise of the options".[25] The Judge regarded the reference in cl 2.2 to "2 consecutive periods of 3 years" as meaning that Savvy had up to six years from the commencement date to exercise the right.[26] The Judge considered this interpretation was consistent with the reference in cl 2.2 to the right of first refusal being "repeated on each third anniversary of the Commencement Date" and the reference in cl 2.4 to "the Commencement Date or 'such other date the right of first refusal is to be exercised'".[27] The Judge concluded that these words made it clear that notice could 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.[28]

[36] The Judge rejected Weta's submission that the options were exercisable only on the commencement date or on the third anniversary of that date. The Judge considered this interpretation would mean Savvy could only elect "not to exercise the right" for one period of three years; it would not be possible to elect "not to exercise the right" for a second three-year period because:[29]

> (a) If [Savvy] 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
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> (b) If [Savvy] 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.

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25 High Court judgment, above n 3, at [151].
26 At [152].
27 At [153].
28 At [154].
29 At [155].

[37] The Judge noted the parties' agreement that the three-year periods start from the commencement date. She considered that on Weta's interpretation, "the second consecutive period of three years does not exist".[30] The Judge was comforted that her interpretation was supported by the view expressed by Wylie J in the interim injunction judgment.[31]

[38] The Judge found that the evidence relied on by Savvy did not properly form part of the factual matrix and did not assist her in the interpretative exercise. She considered the words in cls 2.2 and 2.4 had a clear meaning and there was no ambiguity or uncertainty.[32] The Judge was also not assisted by the history of the negotiations or the evidence of subsequent conduct.[33] The Judge found that the evidence of post-contractual conduct relied on by Savvy did not fall within Tipping J's formulation in *Wholesale Distributors Ltd v Gibbons Holdings Ltd* as "shared conduct of the parties in the performance of their contract".[34]

Submissions

[39] Mr Harrison QC for Weta submits that the non-exercise of the right of first refusal "for 2 consecutive periods of 3 years" relates to the act of giving notice of exercise of the option. He submits cl 2.4 is ancillary, prescribing the manner and timing of the giving of notice and the long-term consequence of doing so. The start of the first of the two consecutive periods of three years is the commencement date. A failure to exercise the right of first refusal to purchase on or before the commencement date followed by a failure to exercise the right on or before the third anniversary of the commencement date literally and expressly results in the right not having been exercised "for 2 consecutive periods of 3 years".

[40] Mr Jones QC for Savvy supports the Judge's reasoning on the interpretation of cl 2.2. He argues that Savvy had up to six years from the commencement date to exercise the option for each block by giving notice in terms of cl 2.4. Mr Jones relies

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30 At [156].
31 At [162].
32 At [172].
33 At [173]–[181].
34 *Wholesale Distributors Ltd v Gibbons Holdings Ltd* [2007] NZSC 37, [2008] 1 NZLR 277 at [61].

particularly on the second sentence in cl 2.2 as demonstrating that the right accrued on each of the first two three-year anniversaries of the commencement date:

> 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.
>
> (Emphasis added).

[41] Mr Jones also relies on the reference in cl 2.4 to the right being exercisable by written notice at any time prior to the commencement date "*or such other date* as the right of refusal is to be exercised". He argues that "such other date" is typically used where there is a choice of possible dates.

[42] Mr Jones accepts that this wording is derived from an original template agreement which provided for rolling rights of renewal at three-year intervals throughout the term of the agreement. However, he contends the agreed modification was to limit those rolling rights so that they would lapse if they were not taken up before the end of the second three-year period. Mr Jones argues that the form of rectification sought by Weta demonstrates the extent of changes required to meet the interpretation it contends for. He says this requires rendering words redundant or ignoring their clear meaning. Weta sought rectification of cl 2.2 as follows:

> 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~~ the 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~~ on either occasion the right of first refusal shall be deemed to have lapsed…

[43] Mr Jones says the Judge found, in the context of considering Weta's claim for rectification, that at the time the agreements were negotiated and signed at Savvy's solicitors' offices, the parties agreed on the meaning asserted by Savvy. Mr Jones contends this gives rise to an estoppel by convention precluding Weta from asserting an inconsistent meaning. He relies particularly on the following passages in Tipping J's judgment in *Vector Gas Ltd v Bay of Plenty Energy Ltd*:[35]

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[35] *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5, [2010] 2 NZLR 444 (footnotes omitted).

> [25] A private dictionary meaning is a meaning the words linguistically cannot reasonably bear. It is, nevertheless, open to a party to show that, despite that fact, the parties intended their words to have that special meaning for the purposes of their contract. This represents a consensual parallel with cases in which words have a special meaning by trade custom. It can also be regarded as a linguistic example of estoppel by convention. The estoppel prevents the accepted special meaning from later being disavowed. Estoppels can also arise in interpretation cases not involving a special meaning. They are then normally based on a common assumption or representation as to meaning.
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> …
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> [32] If the parties have reached agreement on what meaning an otherwise ambiguous word or phrase should have for their purposes, that definitional agreement is itself an objectively determinable fact. When the issue is which of two possible meanings is objectively the more probable, the existence of a definitional agreement is obviously relevant, indeed it should be decisive. There is no logic in ascribing a meaning to the parties if it is objectively apparent they have agreed what that meaning should be.

Analysis

[44] Savvy did not plead estoppel by convention or that the words used in cls 2.2 and 2.4 bore a private dictionary or special meaning that differed from their ordinary and natural meaning. To the contrary, as can be seen from its pleading quoted at [20] above, Savvy contended that its interpretation was the natural and ordinary meaning of the words. This explains why Gordon J did not make any finding that the words had a private dictionary or special meaning. Nor did the Judge consider estoppel by convention; that had not been pleaded or argued. The Judge found there was no ambiguity in the words of the contract and the natural and ordinary meaning of the words was as contended for by Savvy.[36] The Judge considered that the evidence of the parties' negotiations did not assist on the question of contractual interpretation and fell to be considered only in the context of the rectification counterclaim.[37] Savvy did not seek rectification of the agreements in the event its contention as to the meaning of cl 2.2 was rejected.

[45] It was in this context that the Judge considered the evidence of the various witnesses concerning the negotiations, particularly what was said at a critical meeting on 20 October 2006 when modifications to the template agreement were discussed and

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36 High Court judgment, above n 3, at [151], [154] and [176].
37 At [176].

agreed. The high point for Savvy on this part of its argument is that in finding that Weta had not made out its counterclaim for rectification, the Judge said this:[38]

> In summary, I found Peter and Paul Vegar and Ms Dorrington [Savvy's solicitor] to be credible witnesses. I also consider their evidence on what was agreed on 20 October 2006 as to the meaning of cl 2.2 is reliable.

[46] However, the Judge's finding that the evidence of these witnesses was reliable merely formed part of her reasons for rejecting Weta's claim, on which it bore the onus of proof, that the parties held a common intention, subsisting to the time of execution of the agreements, that accorded with Weta's asserted meaning of the words chosen to capture the agreed amendment. That Savvy's witnesses were found to be reliable is not the same as an express finding of fact that there was an outward expression of accord by both parties that the words were intended instead to have the meaning contended for by Savvy, a special meaning different from their natural and ordinary meaning. The Judge said she was not assisted by the evidence of the parties' negotiations for the purposes of interpreting objectively what the agreement meant. We agree with that assessment. It must be appreciated that these witnesses were being asked to recall the detail of discussions that took place at a meeting held 12 years earlier. We consider little weight can be given to those recollections, no matter how earnestly they may have been held. Ms Dorrington, Savvy's solicitor at the time, candidly acknowledged at the hearing that she could no longer remember all the details of the meeting. The Judge's finding that this evidence did not assist in interpreting the agreement would not be correct if she had found as a fact that the parties agreed the special meaning asserted by Savvy. Nor do we consider Savvy can be permitted to raise an argument on appeal based on an agreed private dictionary or special meaning giving rise to an estoppel by convention when this was not pleaded in the High Court and, more significantly, the necessary factual findings to support such a claim were not made.

[47] We turn to consider the meaning of the agreement construed in context. The proper approach is to determine objectively what the agreement would convey to a reasonable person having all the relevant background knowledge that would have

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[38] At [226].

been available to the parties at the time they concluded their agreement.[39] The language must be interpreted in its overall context.[40] The focus must be on interpreting the agreement rather than particular words, but that does not mean the text is not of central importance.[41] If the language at issue has an ordinary and natural meaning, that will be a powerful indicator of what the parties meant.[42]

[48] It is common ground, as was understood by the parties at the time, that the grape supply agreements were based on a standard form template that had been prepared by solicitors acting for the Vegar interests and used by them for other investors on other vineyard developments. It is also common ground that Weta was not prepared to accept the open-ended option exercise rights provided for under the standard template and Savvy was prepared to compromise by cutting back those rights to some extent. The question is as to the compromise reached, determined objectively. However, the fact that the parties were working from a standard form template forms part of the relevant context in which the agreement is to be interpreted. Clause 2.2 of the template was as set out below with the deletions in the final form shown as struck through and the additions shown in bold:

> 2.2 The Grower hereby grants to the Buyer a right of first refusal to purchase the entire crop of Grapes ~~or any part of the entire crop of Grapes for the next 3 years~~ **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~~, to the intent that the Buyer may on any such date elect whether it proposes to purchase any Grapes for the remaining term or any part of the remaining term of the Agreement~~ **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.**

[49] It will be seen that the standard form template provided for recurring rights of first refusal accruing on the commencement date and again on each third anniversary

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39 *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* [2014] NZSC 147, [2015] 1 NZLR 432, at [60].
40 At [61].
41 At [63].
42 At [63].

of the commencement date until expiry of the term of the agreement. This explains the inclusion of the words "to be repeated on each third anniversary of the Commencement Date".

[50] Clause 2.4 in the final version was an adaptation of cls 2.3 and 2.4 in the standard template. Again, it is helpful to highlight the relevant amendments to show the genesis of the words "such other date as the right of first refusal is to be exercised":

> 2.4 Should the Buyer wish to exercise its right of purchase pursuant to this Agreement it shall ~~first provide the Grower with notice of such exercise. Such notice may be given~~ **give written notice of that exercise in the manner hereinbefore specified** at any time prior to the Commencement Date or such other date ~~as~~ the right of first refusal is **to be** exercised. …

[51] As noted, the parties agreed to depart from the standard form template and prepared bespoke amendments to it. They agreed there would not be recurring rights of exercise at three-yearly intervals throughout the term of the agreement. The legacy provisions were not re-written from scratch and this explains the somewhat awkward wording of the final form. In discerning objectively what the parties must be taken to have agreed, it is appropriate not to accord primacy to the legacy and ill-fitting wording at the expense of focusing on the wording of the specifically agreed amendments, particularly the wording of the proviso shown above in bold that was added at the end of cl 2.2 to capture the compromise the parties each finally signed up to as to when the option would lapse.[43]

[52] Paying due regard to the wording of the proviso, we consider the meaning is plain. The proviso defines when the right of first refusal lapses by reference to the non-exercise of the right for two consecutive periods of three years. There are two key points to note. The first is that the lapsing of the option results from its non-exercise *for* two consecutive periods of three years. The second point is that the right of first refusal must be exercised prospectively for the following three years by serving notice prior to the effective option date in respect of the relevant crops.

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[43] *Totara Investments Ltd v Crismac Ltd* [2010] NZSC 36, [2010] 3 NZLR 285 at [31]; *Louis Dreyfus et Cie v Parnaso Compania Naviera SA* [1959] 2 QB 498 at 513. See also H G Beale (ed) *Chitty on Contracts* (33rd ed, Sweet & Maxwell, London, 2018) vol 1 at [13-068].

Thus, the first right of first refusal for the first three-year period must be exercised by serving a notice prior to the commencement date. If no notice is given prior to the commencement date, the option will not have been exercised for the first three-year period. The option for the second (consecutive) three-year period is effective on the third anniversary of the commencement date. The right of first refusal for that three-year period must be exercised prior to the third anniversary of the commencement date. Savvy lost its right of refusal to purchase the grapes for the second three-year period of the agreement when it did not exercise the option prior to 1 May 2013. It follows that on 1 May 2013 it was known that Savvy had "not exercise[d] the right of first refusal in respect of any Block for 2 consecutive periods of 3 years" (the first commencing on the commencement date and the second commencing on the third anniversary of the commencement date) and therefore "the right of first refusal shall be deemed to have lapsed".

[53] Clause 2.4 does not create the right of first refusal, it deals with the manner of its exercise and the consequences of it being exercised, including the terms on which the grapes are to be bought and sold. The right of first refusal is created by cl 2.2. It follows that the words "such other date the right of first refusal is to be exercised" in cl 2.4 must be interpreted by reference to cl 2.2. "[S]uch other date" in cl 2.4 therefore means any date prior to the third anniversary of the commencement date in respect of which notice is given exercising the option, or any other date the parties may subsequently agree it may be exercised, such as occurred when they agreed to extend the option date for the second three-year period to 1 May 2013.

[54] Contrary to the Judge's statement noted at [35] above, cl 2.2 does not refer to "three dates". The second period of three years does exist, contrary to Savvy's submission accepted by the Judge and summarised at [36] above. It appears to have been overlooked that the option must be exercised prospectively for the next three-year period. The option lapses for all time if no notice of exercise is given prior to the effective option date for the second three-year period, being the third anniversary of the commencement date. Savvy cannot choose not to exercise the option on the commencement date for the first three-year period and then again on the first three-year anniversary of the commencement date for the second three-year period and then purport to exercise it for the third three-year period commencing on the sixth

anniversary. In short, we accept Mr Harrison's submissions as to the correct interpretation of cl 2.2. Subject to Savvy's arguments on its cross-appeal addressed below, Weta's appeal must be allowed.

Did the December 2010 notices prevent Savvy from exercising the options on 1 May 2013?

High Court judgment

[55] The Judge found that Weta's wrongful repudiation of the grape supply agreements by serving the December 2010 notices presented no impediment to Savvy taking the unilateral step of giving timely notice of its exercise of the options.[44] This was demonstrated by the parties' agreement to the extension of the option date to 1 May 2013. Savvy wrote seeking an extension on 27 April 2012 stating that it was in a position to exercise the right of purchase on 1 May 2012 and would do so unless a deferral was agreed.[45] After agreeing to that extension, Weta did nothing to prevent Savvy from exercising the options, nor did it suggest that giving notice would be ineffectual.[46] The Judge concluded that Savvy did not refrain from giving notice by reason of anything Weta did or did not do. Rather, it refrained from giving notice based on its assessment of the legal position following delivery of this Court's judgment.[47]

Submissions on appeal

[56] Mr Jones submits that the failure by an innocent party to fulfil a condition precedent when faced with a repudiation of contract does not disqualify that party from claiming damages for a lost opportunity to perform the contract in two circumstances. The first is where the innocent party is prevented from fulfilling the condition by the conduct of the defaulting party. The second is where performance of the condition by the innocent party would be pointless because the defaulting party has made it clear it will not perform the contract if the condition is fulfilled. For these propositions, he

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44 High Court judgment, above n 3, at [81].
45 At [82].
46 At [84].
47 At [86].

relies particularly on the decision of the High Court of Australia in *Peter Turnbull and Co Pty Ltd v Mundus Trading Company (Australia) Pty Ltd*.[48]

[57] Mr Jones also relies on the Supreme Court's judgment in *Ingram v Patcroft Properties Ltd*. There, a lessor was held to be disqualified by its wrongful repudiation of a lease by re-entry from relying on the lessee's subsequent non-payment of rent as justifying cancellation.[49]

[58] In such cases of prevention or futility, Mr Jones says the defaulting party is assumed to have waived performance of the condition or is estopped from relying on it as a bar to a claim for damages. He says, citing *Peter Turnbull* and *Foran v Wight*, that the claim for damages is based on the lost opportunity for performance.[50] Mr Jones acknowledges that the innocent party must nevertheless prove that it would have performed its side of the bargain but for the defaulting party's conduct.

[59] Mr Jones also refers to this Court's judgment in *Wallace v Herron* which affirmed "a generally implied obligation by a contracting party not to impede another from achieving a condition on which depends some contractually provided-for outcome or benefit".[51] This proposition was drawn from a long line of authority commencing with *Stirling v Maitland* and more recently applied by this Court in *Vickery v Waitaki International Ltd*.[52]

[60] Mr Jones submits these principles apply here. He says Weta, as the defaulting party, made it clear to Savvy, the innocent party, that it would not supply grapes even if Savvy exercised the option. Had that not been the case, Savvy would have served notice exercising its option prior to 1 May 2013. He says the reason the sale and purchase of the 2014 crop did not proceed was simply because of Weta's steadfast insistence that the agreements had been terminated.

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48 *Peter Turnbull and Co Pty Ltd v Mundus Trading Company (Australia) Pty Ltd* (1954) 90 CLR 235. See also *Bahramitash v Kumar* [2005] NZSC 39, [2006] 1 NZLR 577.

49 *Ingram v Patcroft Properties Ltd* [2011] NZSC 49, [2011] 3 NZLR 433.

50 *Peter Turnbull and Co Pty Ltd v Mundus Trading Company (Australia) Pty Ltd*, above n 49, at 252–253 per Kitto J; and *Foran v Wight* (1989) 168 CLR 385 at 397 per Mason CJ.

51 *Wallace v Herron* [2017] NZCA 346 at [49].

52 *Stirling v Maitland* (1864) 5 B & S 840 (QB); and *Vickery v Waitaki International Ltd* [1992] 2 NZLR 58 (CA).

Analysis

[61] We see this case as being distinguishable from the authorities relied on by Savvy. *Peter Turnbull*, *Foran v Wight*, *Ingram v Patcroft Properties Ltd* and the authorities referred to in those cases were all concerned with executory contracts for sale and purchase giving rise to interdependent obligations. None of those cases concerned unexercised options. While in *Savvy Vineyards 3784 Ltd v Arck Ltd*, this Court considered the grape supply agreements could be described as conditional agreements for purchase, they can also be thought of as constituting offers by Weta, which Weta was contractually bound not to revoke, to sell to Savvy all of the grapes produced on any block for specified crops.[53] These irrevocable offers were capable of acceptance by Savvy by serving a notice exercising the relevant option, thereby bringing into existence an agreement for sale and purchase of specified crops of grapes from specified blocks. However, unless and until the option was exercised at Savvy's sole election, Weta had no obligation to sell any grapes from any block, nor did Savvy have any corresponding obligation to purchase them.

[62] *Peter Turnbull* was not a case involving an unexercised option to purchase. It concerned an agreement for sale and purchase of a specified quantity of oats at a specified price to be loaded on a ship in Sydney to be nominated by the purchaser. Before the purchaser was required to nominate a particular ship, the seller made it clear that it could not supply the oats in Sydney and requested the purchaser to consider substitute performance by delivery in Melbourne. This was not acceptable. The purchaser chose not to accept the anticipatory breach of contract and left the contract on foot. It arranged an alternative supply in Sydney at a higher price and sued for the difference. The seller unsuccessfully attempted to rely on the purchaser's failure to nominate a particular ship, a condition precedent to its supply obligation. It was in this context that Kitto J expressed the following statement of general principle:[54]

> The principle, which applies whenever the promise of one party, A, is subject to a condition to be fulfilled by the other party, B, may, I think, be stated as follows. If, although B is ready and willing to perform the contract in all respects on his part, A absolutely refuses to carry out the contract, and persists

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53 *Savvy Vineyards 3784 Ltd v Arck Ltd* [2015] NZCA 534 at [36].

54 *Peter Turnbull and Co Pty Ltd v Mundus Trading Company (Australia) Pty Ltd,* above n 48, at 250.

> in the refusal until a time arrives at which performance of his promise would have been due if the condition had been fulfilled by B, A is liable to B in damages for breach of his promise although the condition remains unfulfilled.
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> …
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> … If A persists in his refusal, B may at any time while the refusal continues elect to treat the contract as at an end and sue for damages; but unless and until he does so the contract remains on foot, and A may withdraw his refusal and require B to perform the contract on his part, subject only to giving B reasonable notice of his change of intention.

[63] Kitto J considered there were essentially two questions, "first whether [B] was ready and willing to do all that the contract required it to do, and secondly, whether [A] discharged [B] from doing what remained for it to do".[55] In the present case, there is no question of Savvy being ready and willing to do all that it was required to do (such as tendering payment for the grapes harvested from the specified blocks). Savvy was not *required* to do anything. Savvy had no *obligation* from the performance of which it sought to be excused.

[64] These statements of principle are not directly applicable in a case such as this where there is an unexercised option, equivalent to an unaccepted offer to sell but not yet any commitment to buy, and therefore no enforceable agreement for sale and purchase of anything. To illustrate this, Weta, "A" in the example given by Kitto J above, could not withdraw its refusal and "require B [Savvy] to perform the contract on its part". Unless and until Savvy chose to exercise the option, Savvy had no contractual obligation it must be ready, willing and able to perform and there was accordingly nothing Weta could require Savvy to do.

[65] We also do not consider the *Stirling v Maitland* line of authority is relevant here. In that case, Cockburn CJ famously stated:[56]

> I look on the law to be that, if a party enters into an arrangement which can only take effect by the continuance of a certain existing state of circumstances, there is an implied engagement on his part that he shall do nothing of his own motion to put an end to that state of circumstances, under which alone the arrangements can be operative.

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55 At 254.

56 *Stirling v Maitland*, above n 52, at 1047.

[66] This passage was referred to with approval by this Court in *Vickery v Waitaki International Ltd*.[57] That case was concerned with terms that could be deduced by implication or interpretation from the express terms of a contract. There it was held that a contract to provide catering and cleaning services at the defendant's freezing works was breached when the defendant closed the freezing works before the expiry of the term of the agreement. No such implication is available in this case. The question here was whether an express right of termination had been validly exercised by Weta. If the circumstances giving rise to that right of termination had occurred, there would be no room for the implication of a term preventing its exercise.

[67] Lord Ackner explained the consequences of a wrongful repudiation in *Fercometal v Mediterranean Shipping Co* in these terms:[58]

> 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 unsuccessfully sought to rescind, the right to take advantage of any supervening circumstance which would justify him in declining to complete.
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> … Of course, it is always open to A, who has refused to accept B's repudiation of the contract, and thereby kept the contract alive, to contend that in relation to a particular right or obligation under the contract, 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.

[68] Weta wrongfully repudiated the option agreements. Savvy rejected that repudiation and chose to keep the option contracts alive. This is not a case of Weta representing to Savvy that it no longer intended to exercise a right under that agreement. Nor was it representing to Savvy that it no longer required Savvy to fulfil an obligation. As noted, there was no such right for Weta to exercise nor any obligation

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57 *Vickery v Waitaki International Ltd*, above n 52, at 63 per Cooke P, at 66 per Richardson J and at 67 per Gault J.

58 *Fercometal v Mediterranean Shipping Co* [1989] 1 AC 788 (HL) at 805.

on Savvy to fulfil. We consider the real question is whether Weta somehow prevented Savvy from exercising the option such that it could be said to be seeking to take advantage of its own wrongdoing.

[69] In agreement with Gordon J, we do not consider Weta prevented Savvy from exercising the option if it had wished to do so. Savvy's solicitors responded to the December 2010 notices purporting to cancel the agreements by saying that these notices were rejected as being invalid and of no effect and stating that Savvy "will continue to act on the basis the agreements remain on foot". Until the Court of Appeal judgment, Savvy had the backing of a High Court judgment confirming that its rights under the grape supply agreements remained intact. Weta's December 2010 notices, which Savvy correctly disregarded as invalid and ineffective, did not prevent Savvy from serving its own notice exercising the option if it wished to do so. Until it did, Weta had no obligation to supply.

[70] Further, Weta did not intimate that service of a notice exercising the option would be pointless or futile. Plainly, all parties understood that service of such a notice would result in the formation of an unconditional agreement for the sale and purchase of all grapes from the relevant block for the remainder of the term of the contract, subject only to the final determination by the courts of the parties' dispute over the validity of the termination notices. This point is illustrated by the parties' agreement in April 2012 to extend the option exercise date to 1 May 2013. This agreement, which expressly recognised the "possibility that the party which does not succeed in the Court of Appeal may wish to pursue the matter further", was reached long after the notices of purported termination had been served by Weta and without any change in its stance.

[71] In summary, we agree with the Judge's assessment of this issue.[59] The evidence shows that Savvy's decision not to serve the notice was the result of its assessment of the effect of the Court of Appeal judgment and its belief that the option would again be exercisable on 1 May 2015, not because Weta prevented such notice being given or because of any insistence by Weta that serving a notice exercising

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[59] High Court judgment, above n 3, at [81]–[86].

the option would be futile. Both parties understood throughout that the effectiveness of any notice exercising the option, thereby bringing into being an agreement for sale and purchase of all grapes from a particular block for subsequent harvests, would depend on the final outcome of the appeal process which had not at that point been exhausted.

Did the Court of Appeal judgment prevent Savvy from exercising the options on 1 May 2013?

High Court judgment

[72] Gordon J considered the effect of the Supreme Court judgment that the 20 December 2010 notices of termination were invalid meant that they had been invalid all along. Therefore, the grape supply agreements had remained in full force and effect throughout.[60] The Judge concluded that, as a matter of law, the Court of Appeal judgment did not prevent Savvy from giving notice of exercise of its option to purchase prior to the agreed extended date of 1 May 2013.[61]

Submissions on appeal

[73] Mr Jones commences by noting that a declaratory judgment is binding on the parties.[62] That must remain the position until the declaration is reversed. He relies on *Official Custodian for Charities v Mackey*.[63] There, the Court of Appeal had declared a lease to have been forfeited. Despite that, the receivers appointed under a mortgage of the lease granted by the lessee continued to collect rents from the sublessees and manage the building as if the lease remained on foot. This was because the lessee intended to petition the House of Lords for leave to appeal against the forfeiture order. The owners applied for and obtained an injunction restraining the defendants from demanding or receiving rents from sublessees or interfering with the owner's management of the property and their right to receive the rents. Scott J observed that once the lease had been determined by forfeiture, the basis of the receivers' entitlement to collect the rents disappeared.[64] On the other hand, if

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60 At [107].
61 At [109].
62 Declaratory Judgments Act 1908, s 4.
63 *Official Custodian for Charities v Mackey* [1985] 1 Ch 168 (Ch).
64 At 178.

the House of Lords allowed the appeal, the lease would stand as though it had never been forfeited. For the same reason, Mr Jones contends that after the Court of Appeal judgment declaring the grape supply agreements to have been validly terminated, Savvy could not exercise rights under those agreements or assert any right to the grapes. Had it attempted to do so, Weta would have been entitled to an injunction preventing this.

[74] Mr Jones submits that irrespective of whether the Court of Appeal judgment was a legal barrier to the giving of notice, it removed Savvy's ability to obtain the grapes and on-sell them to third parties at a profit. He argues that purporting to give notice in the hope it might retrospectively obtain legal effect was not a feasible or rational course of action for Savvy to take. If Savvy had served notice and succeeded on appeal, it risked finding itself in the untenable position of having to purchase the grapes without having the time or opportunity to secure a buyer for them.

Analysis

[75] Subject to any further appeal, the Court of Appeal judgment was conclusive as to the legal consequence of Weta's termination notices, namely that the grape supply agreements were at an end. However, that determination was provisional in the sense that appeal rights had yet to be exhausted. The Supreme Court set aside the Court of Appeal judgment and restored the High Court judgment which declared that the grape supply agreements remained in force. The effect of the Supreme Court judgment was to confirm what the legal position had been all along, namely that Savvy's rights subsisted throughout.[65]

[76] It is true that because of the subsequently reversed Court of Appeal judgment, Savvy could not, until the judgment was corrected by the Supreme Court, compel Weta to supply the grapes or exercise any proprietary rights over them. Nevertheless, as a matter of law, the Court of Appeal judgment did not prevent Savvy from giving notice exercising the rights it continued to assert it had under the grape supply agreements, thereby protecting its position in the event its appeal was successful. Had it given

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[65] At 178; and *Hillgate House Ltd v Expert Clothing Service & Sales Ltd* [1987] 1 EGLR 65 (Ch) at 66.

notice, Weta would have been required to assess whether to supply the grapes without prejudice to its position that it had no obligation to do so because it maintained the grape supply agreements had been validly terminated, or refuse to supply and accept the risk that the Supreme Court might allow Savvy's appeal leaving it vulnerable to a claim for specific performance or damages if performance was no longer possible. It could not be said that serving notice would inevitably be a futile exercise.

[77] Nor could it be said that Savvy would be acting in disobedience of the Court of Appeal judgment if it had served notice exercising the option against the prospect the Supreme Court would allow its appeal. It would be different if the Court of Appeal had made an order restraining Savvy from taking any steps under the grape supply agreements. We agree with the Judge that the Court of Appeal judgment, which was declaratory of the legal position subject to any contrary final determination by the Supreme Court, did not operate as a matter of law to prevent notice being given.

Were the agreements terminated, inoperative or suspended by the Court of Appeal judgment and reinstated by the Supreme Court judgment such that the options accrued on the next anniversary of the commencement date, 1 May 2015?

High Court judgment

[78] The Judge rejected Savvy's contention that the effect of the Court of Appeal judgment was that the grape supply agreements were terminated, inoperative or suspended so that the option could not be exercised from the time the Court of Appeal judgment was delivered until the Supreme Court judgment was delivered.[66] The Judge did not specifically address the contention that the option exercisable on 1 May 2013 (said to have been suspended by the Court of Appeal judgment delivered on 12 April 2013) accrued on the next 1 May date after the Supreme Court judgment was issued. The Supreme Court judgment was delivered on 5 September 2014 so the exercise date of 1 May 2013 was said to become 1 May 2015.

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66 High Court judgment, above n 3, at [107].

Submissions on appeal

[79] Counsel for Savvy acknowledged they had been unable to find any authority to support their submission that the option exercisable on 1 May 2013 was deferred to 1 May 2015 as a consequence of the Court of Appeal and Supreme Court judgments. Three possibilities are nevertheless advanced. The first is that a "reasonable interpretation" of the Supreme Court's order restoring the judgment of the High Court is that Savvy's rights were restored from 5 September 2014 "with a necessary adjustment in time for the intervening period when the Court of Appeal judgment was in force". The second possibility is that Weta is estopped by reason of its repudiation "from demanding performance within the contractual time limit". The third suggestion is that the proposed deferment of the exercise right is justified because "prevention of the exercise of the contractual right sets time at large". This argument is based on the principle that where a party is prevented by the other party from performing a contractual obligation within a specified time, the act of prevention sets time at large and the innocent party is required to complete within a reasonable time. Mr Jones submits there is no logical reason why this principle should not apply equally to the exercise of contractual rights as well as to the fulfilment of contractual obligations.

Analysis

[80] The Supreme Court judgment overturned this Court's judgment and restored the High Court judgment. The High Court made a declaration that the grape supply agreements remained in full force and effect. It is not possible to interpret the Supreme Court judgment as amending the grape supply agreements so that the third anniversary of the commencement date shifted from 1 May 2012 (amended by agreement of the parties after the High Court judgment to 1 May 2013) to 1 May 2015. The Supreme Court judgment says nothing of the sort and it cannot be interpreted in that way.

[81] The second submission, founded in yet another estoppel, is also untenable. An immediate difficulty is that the asserted estoppel is said to have prevented Weta from "demanding performance" within a contractual time limit. This is misconceived because, for the reasons already given, there was no obligation on Savvy to "perform".

Weta did not and does not demand performance. To the contrary, Weta did not want Savvy to exercise the option, a right, not an obligation, but could do nothing to prevent that occurring.

[82] A contractual obligation to complete performance by a stipulated time may be set at large if the other party prevents such performance, as often occurs for example in construction contracts. The obligation is then to complete within a reasonable time. This principle has no application here. Savvy had no performance obligation under the grape supply agreements until it served notice exercising its option to purchase. We have already explained why Weta did not prevent Savvy from exercising its option by serving notice if it had wished to do so.

Result

[83] The appeal is allowed.

[84] The judgment of the High Court finding the appellants liable to the respondents on the second cause of action in the first amended statement of claim, the corresponding declaration and the order directing an inquiry into damages are set aside.

[85] The cross-appeal is dismissed.

[86] The respondents are to pay costs to the appellants for a standard appeal on a band A basis and usual disbursements. We certify for second counsel.

[87] Costs in the High Court are to be determined in that Court in accordance with this judgment.

Solicitors:
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Hesketh Henry, Auckland for Respondents