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IN THE SUPREME COURT OF NEW ZEALAND
I TE KŌTI MANA NUI

SC 114/2019
[2020] NZSC Trans 13

BETWEEN **SAVVY VINEYARDS 4334 LIMITED**
First Appellant

SAVVY VINEYARDS 3552 LIMITED
Second Appellant

AND **WETA ESTATE LIMITED**
First Respondent

TIROSH ESTATE LIMITED
Second Respondent

Hearing: 26 May 2020

Coram: Winkelmann CJ
William Young J
Glazebrook J
O'Regan J
Ellen France J

Appearances: D P H Jones QC and C L Bryant for the Appellants
R E Harrison QC and W D Woodd for the Respondents

CIVIL APPEAL

MR JONES QC:

May it please the Court, Jones, I appear with Ms Bryant for the appellant.

WINKELMANN CJ:

Tēnā korua.

MR HARRISON QC:

As Your Honours please, I appear with my learned friend Mr Woodd for the respondent.

WINKELMANN CJ:

Tēnā korua. Before counsel starts to address us, I thought there is a matter that the Court wished to raise. Having read all the materials and all the judgments in the lower Courts, we've been giving consideration to whether or not we should amend the leave to include consideration of the following questions. Whether pursuing this, and you don't need to take a note, well you may if you wish but we'll type it up and hand it to you later, whether pursuing this argument as to the interpretation of the clause is an abuse of process because the issue should have been pursued in the earlier proceeding. Whether pursuing this argument as to the interpretation of the clause, this is the second question, whether pursuing this argument as to the interpretation of the clause is an abuse of process because this Court should have been advised of this position on the interpretation when leave was sought to appeal. This was in the earlier proceeding. and the third issue is whether in light of findings in the earlier proceeding the respondent faced an issue estoppel. We want submissions both on whether leave should be amended to encapsulate those questions, and addressing the substance of them, and we'll provide that in writing. We're not asking for submissions at this point, we're just indicating, and also to ask for submissions on whether or not leave should be amended to include those issues, and addressing the substance of

them, and also whether the parties seek an additional oral hearing in relation to them.

MR JONES QC:
Thank you Ma'am. How, overall, does that then affect the hearing today?

WINKELMANN CJ:
We proceed today.

MR JONES QC:
In terms of, just so I'm clear in my own mind, does that, the abuse of process, does that relate to the position taken by the respondents?

WINKELMANN CJ:
Yes.

MR JONES QC:
Thank you.

WINKELMANN CJ:
Sorry, pursuing the argument, yes, quite right. Sorry, lack of clarity. Pursuing this argument is the interpretation. So it's the respondent's argument as to the interpretation of the clause.

MR JONES QC:
The belated nature of taking that argument will be referred to briefly in my submissions, as already has been in the written, but I'll be referring to it briefly in my oral –

WINKELMANN CJ:
Yes, I did note you do touch on it briefly, and also you should issue an issue estoppel also.

MR JONES QC:
Yes.

MR HARRISON QC:

I wonder if I can just… in effect that is to argue, re-argue estoppel grounds raised by the appellants rejected in both courts below on the facts and on the law and to completely reveres the basis on which leave to appeal was granted and in my respectful view that is a completely different appeal which, if permitted to proceed, cannot fairly or indeed usefully, so far as the Court is concerned, be pursued piecemeal by means of today's hearing followed by another hearing, which undoubtedly would have to occur. These are matters which, the abuse of process issue, for example, was raised in guise of estoppel and twice rejected. Never raised or pleaded as an abuse of process as such, and had it been raised and pleaded by the appellants then obviously it would have been addressed in evidence and by way of factual findings in the Courts below. So with the greatest of respect I see this as a development which is not only surprising but most unjust to the respondents for it to be raised in this way and at this late stage. So it's a can of worms, Your Honours, not simply an expansion of the scope of the appeal.

WINKELMANN CJ:

Yes, Mr Harrison, I did say you could raise these issues in your submissions as to whether leave should be amended, and we've discussed it and we are quite content the hearing can proceed and we'll hear you on the interpretation issues today, and the significance of the failing to serve notice but…

MR HARRISON QC:

If possible I would like those three proposed additional grounds in writing before I address the matter further. I haven't taken a note and I had some difficulty hearing precisely what they were.

WINKELMANN CJ:

Right. Mr Jones?

MR JONES QC:

Thank you Ma'am. The chronology which I'm reliably informed is document zero for some reason, sets out the history of the interaction between the

parties to this appeal. For over 10 years the respondents have sought to have the grape supply agreements and any other agreements with the appellants terminated by, with respect, whatever means. On the 17th of February, this is page 2 of the chronology, 2010 notices of termination were served in relation to both vineyard management agreements and grape supply agreements. It was belatedly accepted that the grape supply agreements could not possibly have been terminated, and this was at the injunction hearing before Justice Wylie. That is where Justice Gordon made the factual finding against Mr Forlong in the High Court in this matter that he had, in fact, been aware of the termination notices of the 17th of February because he was the contact person for Tirosh, which was then called Kakara, and Weta, and Mr Gilchrist, who was then counsel, had been taking instructions from him and so far as that is concerned that set the scene for the litigation and the interaction between the parties.

The part of Justice Gordon's decision where Her Honour deals with the factual findings and the adverse findings as far as Mr Forlong is concerned, that's at volume 1, it's 101.0123 and that's starting off as part of the rectification analysis at paragraphs 202 onward where Her Honour makes very direct findings that Mr Forlong is neither reliable nor indeed credible in a number of respects, and the evidence of the appellants was accepted and –

WINKELMANN CJ:
What paragraph is it?

MR JONES QC:
It's paragraph 202 Ma'am. You'll see there the heading "rectification analysis" and then Her Honour says she prefers the evidence of Peter and Paul Vegar and Ms Dorrington and says, 203, "I did not find Mr Forlong to be a reliable witness, both generally and on this particular issue." She then refers to Mr Gilchrist and Mr Forlong's evidence that he was unaware that the grape supply agreement had purportedly been terminated, and then she goes over the page to record the evidence of Mr Gilchrist at 204 and 205. So that's a direct finding against Mr Forlong, and then also at paragraph 206 Mr Forlong

asserted that Dr Jordan, the independent viticulturalist under the agreements, had advised him of certain aspects of the tonnages, and Her Honour found against Mr Forlong on that. The actual finding is at paragraph 211 and then Her Honour went on to find further factual findings against Mr Forlong. Importantly this relates to the tonnages that could be produced. Mr Forlong stated that he was unaware about the cap that was being placed on the tonnages in terms of per hectare. Mr Boyle, the very experienced commercial lawyer who was acting for Mr Forlong's interests, gave evidence contradicting that, and that evidential conflict is resolved at paragraph 216 where Her Honour considers that Mr Boyle's recollection, namely that he was aware of it, and he advised Mr Forlong about it, should be preferred. So as far as that's concerned Mr Forlong comes out as a person who cannot be relied upon and as far as the findings are concerned, concerning Mr Forlong's recollection of events, both unreliable and in my submission he was not found to be a credible witness either.

Now that's obviously relevant as far as the particular factual findings are concerned, but it's also relevant in terms of the context in which this litigation has evolved, and the way –

WINKELMANN CJ:
Could you just sketch that out for us?

MR JONES QC:
The way in which the litigation has evolved?

WINKELMANN CJ:
Yes, because it moves on from here, doesn't it.

MR JONES QC:
It does.

WINKELMANN CJ:

And the appellants accept the termination of the management agreements, is that what happens?

MR JONES QC:

The vineyard management agreements, yes. What happened was that we had the 17 February 2010 termination notices issued by Mr Gilchrist. The appellants took injunctive steps in May of 2010. That resulted in the decision of Justice Wylie on the 3rd of August of that year granting the injunction, and then after some further discussions between the parties, matters couldn't be resolved, and on the 20th of December of 2010 termination notices were issued which were based on the fact that Goldridge, the originally contracting party, had gone into liquidation in November of 2010. Goldridge, not having been involved with any of the interactions between the two sides, if you like, for well over a year. And the importance of that, of course, is that that was the first, well the second in fact, attempt at repudiation which then led to the decision of Justice Andrews, and then to the Court of Appeal decision of the 12th of April 2013 –

WINKELMANN CJ:

So the Goldridge liquidation sparked a new set of termination notices.

MR JONES QC:

Yes, they're dated the 20th of December 2010.

WINKELMANN CJ:

And they were only resisted in respect of the grape supply agreements?

MR JONES QC:

No, they were in relation to all but in March of 2011 trespass notices were issued against the Savvy entities, if you like, and so at that point the Savvy side terminated the vineyard management agreements and have been suing, and that's still outstanding for outstanding management fees. So the vineyard

management agreements are gone, everybody agrees with that, but the grape supply agreements are very much at issue. If Your Honour goes to –

O'REGAN J:
So were the vineyard management agreements gone before this Courts first, the earlier decision?

MR JONES QC:
Yes if I can take –

O'REGAN J:
Because it's not, was the Court told that because it –

MR JONES QC:
Yes. Undoubtedly yes. It's in the chronology at page 3 and you'll see the second entry there, 21 November 2010, Goldridge put into liquidation, then 20 December 2010 the notices of termination relying on the liquidation of Goldridge, and then you'll see 14 March, that the Savvy companies cancel the vineyard management agreements.

WINKELMANN CJ:
So they accepted repudiation is what they –

MR JONES QC:
Of the vineyard management agreements, yes.

WINKELMANN CJ:
Yes, that's what Justice Andrews reported.

MR JONES QC:
Yes, and what isn't included there is that there is a trespass notice issued a few days before the cancellation, and the Savvy companies thought this is all too hard, they are repudiating, we accept that repudiation of the vineyard management agreements only. Essentially it had been made impossible for them to actually carry out the vineyard management.

So what followed from there as far as the chronological sequence is concerned is that in March 2012 Justice Andrews gave her judgment declaring that the 20 December 2010 termination notices were invalid and remained in force. So there had been continuity throughout the termination notices of 20 December 2010 that repudiation had been rejected by Savvy. They said no, the agreements are on foot. The liquidation of Goldridge did not bring about an event by which termination could proceed. Justice Andrews agreed and said that the grape supply agreements remained in force and on foot and what then happened is that because there was an appeal lodged by the respondents, by Weta and Kakara, the parties reached an agreement whereby the third anniversary date, which was an effective date for exercising the option to purchase, would be deferred for a year from the 1st of May 2012 to the 1st of May 2013.

WINKELMANN CJ:
So this issue proceeding in front of Justice Andrews, even though the issues are now completely different, they still remain the same set of proceedings as Justice Wylie's set of proceedings?

MR JONES QC:
Look, the proceedings have morphed as the issues have changed.

WINKELMANN CJ:
But it's the same proceeding? It's the same intituling?

MR JONES QC:
Yes. What happened as far as that deferral is concerned, the respondents seemed to be making an issue of that in their written submissions, that in some way potentially it could be a different contract or a new contract for an extension of time. What in fact it is when one looks at the correspondence is a simple deferral of the date by a year and that, in my submission, is apparent when one looks at the documents. Yes, because there is an appeal and the certainty of supply was not there – it's probably best if I take the Court to

those documents. They're in volume 2.2 at 201.0630. So 201.0630, that's the letter from Savvy, they're the same in relation to each, 27 of April, the second paragraph, well the first paragraph talks about the option to exercise the right to purchase. The second paragraph talks about the company being in a position to exercise the rights and will do so but then goes on to talk about the uncertainty of when an appeal date will be set, one hadn't been set at that point, and then the third paragraph about the need to have certainty concerning the supply of grapes. The Savvy company would agree to a deferral of the option date for a year.

That was responded to, go over the page to 201.0632, and this is a letter dated the 30th of April. For reasons unknown at paragraph 3 the respondents solicitors contend at that point that neither company considers that any purchase option arises in 2012 but agree to the deferral.

ELLEN FRANCE J:
Can I just check Mr Jones, on 0631, that's the letter in relation to the other vineyard?

MR JONES QC:
Yes you'll see –

ELLEN FRANCE J:
So we have one in relation to –

MR JONES QC:
Kakara, which is now Tirosh is at 0630, and then the identical letter to Weta is at 0631.

ELLEN FRANCE J:
And then the two that then appear at 0634 and 0635, they're just copies, am I right? Just duplicates?

MR JONES QC:

Yes. I don't think I've seen a casebook yet that doesn't have duplicates, unnecessarily.

ELLEN FRANCE J:

I just want to be sure there's nothing missing.

MR JONES QC:

There's nothing else there. That's not new correspondence. So there's an agreement to the deferral and then if we go to 0636 just for completeness there's a letter there dated the 30th of April concerning a telephone conversation.

WINKELMANN CJ:

Sorry what number was that?

MR JONES QC:

0636, just the next page. And there seemed to be a misunderstanding on the respondents side as to when the right might in fact accrue. They though it was 1 May 2013, not 1 May 2012. But then matters are clarified over the page at 0637 where it's accepted on behalf of the respondents that their initial view is incorrect and that in fact the accurate date is 1 May 2012. So there is a deferral by agreement of that date for a year to 1 May 2013. So essentially the parties have varied the timing in terms of the third anniversary of the commencement date, deferred it by a year.

Now the appeal then proceeded and still going back to the chronology on the 12th of, this is page 3, second to bottom entry, on the 12th of April 2013 the Court of Appeal allowed the appeal and made declarations that the notices of termination were valid. So that's as at the 12th of April 2013. That situation endured until the decision of this Court on the 5th of September the following year, 2014, which set aside the Court of Appeal decision and restored the judgment of Justice Andrews. And the issue of what the legal status was of the parties and the contract is the first, or the issue was raised and the first

question where leave has been granted. Now I make the point immediately that when the agreement was entered into to defer the anniversary date from 1 May 2012 to 1 May 2013, the contract, the grape supply agreement was in force, had always been in force and was then supported by the decision of the High Court. So the contract was there and there were rights and obligations that were evident from the contract, and it's in that context that the agreement to defer was reached. This is completely different to the situation from the 12th of April 2013 when the Court of Appeal declared that the notices of termination were valid and therefore the contract was at an end, the grape supply agreement.

What then happened, and this is informative in my submission, is that the appellants, once the Supreme Court had given its decision, issued notices on the 18th of November exercising the option to purchase grapes from all blocks for all vineyards, and so under grape supply agreements, and we'll go to this in a moment, the vineyards were – there were two vineyards per property and they were broken up into blocks, some of them with different varieties of grapes, but essentially the notices in November of 2014 were, "We will purchase all grapes from all blocks in all vineyards." So it's comprehensive.

On the 8th of December the respondents replied and said, "No, we don't accept the notices given." That letters is at volume 2.1. The numbering is 201.0643.

GLAZEBROOK J:
Can you just give me that number again?

MR JONES QC:
201.0643. Now the letter goes for several pages but it seems to say that the notices weren't provided in time and that the options to purchase had lapsed. Now this probably feeds into the supplementary questions that have been posed but the first time that this was ever put forward is this letter, and it's not specifically articulated in the letter when one reads it closely exactly what is

being asserted other than a relatively generic this is where the respondents see the contract as stating there is an ability to serve notice.

And so the respondents are now saying – this evidence, of course, was rejected in the High Court by Justice Gordon in terms of the findings Her Honour made on the rectification claim and the evidence of the appellants was accepted. But for the first time in December of 2014 the respondents are saying, "Well, hang on, from the 1st of May 2013 your rights to purchase had lapsed," and the obvious question is, well, why on earth wasn't this stated before if that in fact was the case?

WILLIAM YOUNG J:
Can I just ask a question? Was there anything left of the grape supply agreement if the right to purchase grapes had been lost?

MR JONES QC:
There is to a point but it's quite limited. Essentially, the grape supply agreements are in place and there are certain obligations on the grower to maintain. There are obligations, for example, to plant and things of that sort.

WILLIAM YOUNG J:
But would they subsist – would they persist a failure to exercise the – where the option to purchase grapes had been lost?

MR JONES QC:
They would subsist but to a relatively negligible level.

WINKELMANN CJ:
Would they subsist at all because what would be the legitimate interest that the respondents have in that when they don't have the management agreements and they don't have a right to purchase?

MR JONES QC:

Well, the agreements, if there's no right to purchase then effectively they are meaningless but they might have some residual effect, but how that would actually affect the parties' rights, it doesn't actually matter.

WILLIAM YOUNG J:

Well, it might matter actually in terms of the point the Chief Justice raised at the start of the hearing.

MR JONES QC:

If I can take perhaps – well, perhaps if just deal with this issue first. Going back to the chronology, page 4, on the 10th of May 2013 application for leave to this Court from the Court of Appeal's decision was filed and then submissions were filed in opposition. Now there was no mention in the opposition to the leave about this interpretation that has now been put forward in December of 2014 and if the agreements had in fact lapsed the interests or the ability to give notice to purchase, one would have considered that that was a key element in terms of any leave application decision and indeed would have been raised at that point. So the appellants say, look, this is simply a further belated attempt by the respondents to terminate the arrangements between the parties effectively at any cost and this is what has happened, and that obviously is an issue which would sound as far as abuse of process. It's been argued as estoppel but I won't go further rather than to simply make the point it hasn't been raised before and the factual findings of Justice Gordon militate against that.

But perhaps if we can now go to the grape supply agreement itself, this is at volume 2.1, 201.0002. There are different agreements for the different vineyards. There are two for Tirosh and two for Weta but they are the same effectively so I'll just use this one as an example.

Now looking at 0002, that's the first page with the recitals under "Background", and there's a reference there to the buyer and the grower at C. "The buyer

and grower have agreed that the buyer will have the right from time to time to purchase the grapes on the terms and conditions set out."

On the next page we have the interpretation provision and at 1.2(b) talks about words referring to the singular include the plural and the reverse. That's a matter referred to in Justice Gordon's decision and something that can be relied upon as far as the appellants are concerned.

And then we get to the key provisions as far as the supply of grapes is concerned. Now you see at 2.1, there is what I'll call a residual obligation of the grower to plant all the plantable area which would have been completed by the time that we're talking about and that sets out the varieties and also the gaps between vine or between rows.

We then come to the clauses at issue and it talks about the grower granting to the buyer a right of first refusal to purchase the entire crop of grapes grown on each of the blocks, and "block" is defined under clause 1.1.

We then have the pivotal second sentence of that clause which says, "Such rights 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," and for the reasons Justice Gordon found in the appellants' submission this is clear, to use her term, that it means more than one occasion after the commencement date on each third anniversary.

WINKELMANN CJ:
Do you say that subsists throughout so you can actually give the notice within that three-year period?

MR JONES QC:
Exactly, and that is borne out by clause 2.4. So that says essentially if you have not – the commencement date is agreed as being 1 May 2009, so the appellants say, look, the clear wording of the clauses is that at any time in that three-year period to the 1st of May 2012 notice can be given, and then from

1 May 2012 it bites for every harvest after that and the reason it's 1 May is because grapes are habitually harvested in March and April. So the harvest is complete. 1 May of that particular year or a particular year is when things start to be organised for the following year's harvest and this is why the date is important.

O'REGAN J:

But does – "each" can't mean "each" in the sense that it's on any third anniversary, so on the ninth anniversary, for example, if it hadn't already – either it had been exercised and was now irrelevant or it hadn't been exercised and two periods had gone by and it was gone. So it's not actually true that you could exercise it on each third anniversary, is it?

MR JONES QC:

Not – well, if that were it then that would be the case on each third anniversary so…

O'REGAN J:

Was there ever a circumstance in which it could have been exercised on the ninth anniversary which is a third anniversary?

MR JONES QC:

Not in accordance with the wording as we have it here.

O'REGAN J:

So it can't mean each commencement date then, can it?

MR JONES QC:

Well, it can, in my submission because –

O'REGAN J:

It means some of them but not all of them. Some third commencement dates but not all of them. Some third anniversary dates but not all of them.

MR JONES QC:

Yes, it's subject to what is later confined and that is the two three-year periods.

WINKELMANN CJ:

Is there any kind of magic in the – why do they – if it's constantly speaking this option to purchase through that first three years and then through the second three years, why is it expressed in this way with its – why is it three-yearly?

MR JONES QC:

Three yearly is to enable the grower to enter into supply agreements with somebody else if required so there's continuity of supply. Mr Vegar gave evidence about this in the High Court that the wineries who are buying the grapes like to have security not just for one harvest or two but three is considered to be a better way of doing it so they can make their plans and they know they're going to get the harvests for three years from this particular grower. So that was the rationale behind it and so that's why it's in three-year periods, so if it wasn't exercised by the 1st of April 2012 then there was an ability of the grower to enter into an agreement for a three-year period with another winery where they could guarantee three years of supply and then once the notice was then given prior to the next anniversary, three-year anniversary, the commencement date, they could say, well, we can't engage in any supply of grapes from this point on because the grape supply agreement has kicked in. So that was the very practical basis for having a three-year period.

Then if we look at the part, and it says, "Provided that if the buyer does not ex3rcise the right of first refusal in respect of any block for two consecutive periods of three years, the right of first refusal shall be deemed to have lapsed." Now of course when we look at the last sentence of 2.2 it says, "The buyer must purchase all grapes from any such block or blocks specified for the remainder of the term of this agreement." So what that means is that as soon as notice was given, or once notice was given, that was it, and the term of the agreement we can see at the top of page 0005 was for a period of

10 fruit producing vintages. So when the commencement date kicked in, 1 May 2009, you attend vintages after that that the agreement would be valid for, and then 3.2 there's an ability of the buyer to extend the term for two lots of 20 years. So it could endure for up to 50 years.

GLAZEBROOK J:
How do you say the right of first refusal works in those circumstances? You go back to 2.2?

MR JONES QC:
Yes, and also 2.4. 2.4 is important. I'll come to that now. It says, "Should the buyer wish to exercise its right of purchase… 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." Then again it says, "Once notice is given… there's an ongoing obligation."

So the qualifying words of 2.4 talk about when the notice is to be given, and the appellant says clearly 2.2 and 2.4 taken together mean that it's not a specified date. You don't have to actually give notice on the 1st of May. You have to give notice at some point in the preceding three-year period –

WINKELMANN CJ:
In the following three-year –

MR JONES QC:
Then it follows from the 1st of May. So if, for example –

WINKELMANN CJ:
So are you saying you have – so it's effective, that means the three years kicks off, the use of the word effective means, right, that's the start of your three-year notice period, you give your notice but your buying right accrues at the next three-year anniversary?

MR JONES QC:

Correct. So the commencement date was the 1st of May 2009. No notice was given. Notice could have been given in 2010 but the obligation to purchase and the obligation to supply would not have kicked in until the harvest after 1 May 2012, which was the third anniversary. So there's an ability to give notice at any time in the three-year period, when one looks at 2.2 and 2.4, and that allows people to plan and to make sure of continuity of supply and things of that sort.

O'REGAN J:

Was there ever a clause 2.3?

MR JONES QC:

There was but that got amalgamated so it got taken out.

GLAZEBROOK J:

So just looking at the extension, say a notice had been given before the commencement date, and then there was the supply for the 10 years, then the exercise to extend the term, and then you say notice could be given at any time during the following three-year periods until you had a period where you didn't exercise the option for two consecutive terms. Is that how you read the…

MR JONES QC:

Yes it is.

GLAZEBROOK J:

So there is actually multiple times, assuming that you extend the agreement, but you could have actually exercised on that three-year period, as long as you didn't leave two consecutive three-year periods without exercising.

MR JONES QC:

That is certainly one interpretation but it's not the one that's being put forward here because we don't need to. We're talking about two consecutive periods at the beginning of it.

GLAZEBROOK J:

No, I understand that but it's important if you're trying to make that argument, which you are, that they were contemplated a number of times when you could do it to see what would happen if you did extend.

MR JONES QC:

Well, that couldn't actually happen because once notice has been given then there's an enduring obligation to purchase and an enduring obligation to supply, so –

GLAZEBROOK J:

But not for the 50 years.

MR JONES QC:

Yes, it would be.

GLAZEBROOK J:

So you say once you do it the term extends to 50 years?

MR JONES QC:

Yes, because you look at the final sentences of both 2.2 and 2.4, the buyer must purchase the grapes for the remainder of the term of this agreement, and that's repeated in 2.4 and the term is either 10 –

GLAZEBROOK J:

So if the term is extended you say the obligation extends?

MR JONES QC:

The obligation continues. Yes, it does.

WINKELMANN CJ:

And the term is defined as meaning any initial term of this agreement as set out in clause 3 and any extension of the term?

MR JONES QC:

Yes. So once the obligation to purchase from particular blocks is – sorry. Once the option to purchase is exercised then the obligation endures for the complete term of the agreement, whether that be 10 or 30 or 50 years.

GLAZEBROOK J:

So what you said to me earlier was wrong, in other words?

MR JONES QC:

Yes, it's not a rolling right situation because of the, well, not the proviso, because of the condition that there's enduring obligations to purchase all the way through the term. So once you trigger it, it's gone, and so the only two three-year periods are between the commencement date and the third anniversary and the third anniversary and the sixth. So those are the only two periods.

WINKELMANN CJ:

And Mr Harrison's construction is that the first option date is the commencement date and then there's – and so it's based on it being days as opposed to three-year periods in which you can exercise the right, is it, as I read it?

MR JONES QC:

The argument for the respondents, and one that the Court of Appeal accepted, doesn't actually account for a second three-year period, not in the way that the contract is actually framed, because 2.4 is important. It seems to be conflating the issue of purchase with giving notice.

WINKELMANN CJ:

Yes, but on his interpretation as I understand it you get your first right and then, is on the commencement date, and your second right is three years afterwards and so those are two three-year periods for the purposes of the proviso, provided if the buyer does not exercise the right in respect of any block for two consecutive periods of three years.

MR JONES QC:

There's only one period of three years on the respondents' interpretation, there's not two.

WINKELMANN CJ:

Yes, well, and you say that's because the three years would be the purchase and that's a nonsense?

MR JONES QC:

The three years is the time period within which the notice to purchase has to be given and it says if the buyer doesn't exercise the right for two consecutive periods of three years. So what the appellant says is that must mean that the exercise of the right, looking at clause 2.4, it must mean that at any point in that three-year period the right to purchase can be notified and if it's not done in the first three-year period then it can certainly be done in the second because it's the notice which is important and then the obligation to purchase triggers after the third anniversary date harvest or the sixth anniversary date harvest.

O'REGAN J:

Why doesn't it just say must be exercised on any day before? Three-year periods mean nothing because they're not three-year options any more. So it's a bit of a nonsense, isn't it, the whole clause?

MR JONES QC:

Well, my submission it's not. It's simply looking at the practical reality of having three-year rests before so that if –

O'REGAN J:

Yes, but you could exercise it before the commencement date as well.

MR JONES QC:

Yes.

O'REGAN J:

So arguably there's a three-year period before the commencement date.

MR JONES QC:

There is not.

O'REGAN J:

Well, you'd the contract signed in 2006 and the commencement date's 2009. That's three years.

MR JONES QC:

Well, the contract was signed on the 20th of October 2006 and the commencement date is the 1st of May 2009, so that's two and a half years, so it's not a three-year period, and then the ones for Weta were executed in December of 2007, so that's an even more abbreviated period of time, so there's no three-year period other than between the commencement date and the third anniversary and the third anniversary and the sixth. There is simply no other three-year period. And the thing is, if the –

O'REGAN J:

It talks about not exercising for two consecutive periods of three as rather not exercising in two consecutive periods of three, so it does seem to be predicated on the basis that the rights of first refusal – well, actually, they're not rights of first refusal, are they? They are actually options to buy – are three-yearly options which was right in the template but is no longer right in this one, so it doesn't really make sense to me.

MR JONES QC:

In my submission it does make sense when one considers the rationale behind the three-year periods but also, importantly, the enduring obligation to buy once the notice is triggered. So we then have the six-year time limit from the commencement date, and so you've got the first three years to trigger the purchase and if you don't do it then you've got a second three-year period and that, in my submission, is what –

O'REGAN J:

On that basis you've got three, haven't you? You've got three because you can do it before commencement as well.

MR JONES QC:

Correct. But before commencement, as we can see –

O'REGAN J:

So referring to two consecutive dates seems an odd way of saying if you don't exercise this on the first three opportunities you've got to do it. It lapses. That's what the clause means on your interpretation. But it refers to two periods and not three.

MR JONES QC:

Well, it's two periods of three years.

O'REGAN J:

Well, there were three periods though. The period before commencement date, the period before the first anniversary, first third anniversary, and the period before the second one. So there were three opportunities but the clause says there's two.

MR JONES QC:

No, it doesn't, with respect. It says, the second sentence of paragraph 2.2, that, "Such right of first refusal shall be deemed to be effective on the commencement date," so that's number 1.

O'REGAN J:

Yes, but 2.4 says you can exercise it before the commencement date.

MR JONES QC:

Yes.

O'REGAN J:

So that's another period. It might not be a three-year one but it's certainly a period, the period before commencement date.

MR JONES QC:

That's correct but we then say, "and to be repeated on each third anniversary."

O'REGAN J:

Which we've agreed doesn't mean what it says because it can't be repeated on each third anniversary. It can only be repeated on either one or two.

MR JONES QC:

It can be subject to the proviso. So it could be to be repeat – if it's –

O'REGAN J:

If the agreement goes for 50 years there will be about 15 third anniversaries but only in fact two of them are relevant on your interpretation, aren't they?

MR JONES QC:

Well, if the sentence stopped, "Third anniversary of the commencement date," full stop, then it would go for the duration.

O'REGAN J:

Yes but it doesn't.

GLAZEBROOK J:

But your argument is the proviso is a true proviso and just puts a limitation on what would otherwise be a three-yearly right?

MR JONES QC:

Yes. So you've got rolling three-year rights up to that point after commencement date. If it's a full stop then it's every three years. Then provided if the buyer doesn't exercise the right of first refusal, the giving of the notice, in respect of any block for two consecutive periods of three years. And that, in the appellants' submission, is a six-year period all-up, and if it's not exercised within that six-year period then it lapses. Not after one. After two as it says here, and that is how this certainly can make sense and does make sense.

O'REGAN J:

It could have been expressed a lot more simply if that's what it means. I mean it's an absolute dog's breakfast if that's what it means. Why would you go to all this trouble if you meant you've got two shots at it, you've got three shots at it. One is commencement date, one is year 3 and one is year 6, that's all you had to say.

MR JONES QC:

Well that's true in one sense, but equally if it meant what the respondents say it meant, it could equally have been more directly said in a way –

O'REGAN J:

I agree, I'm not disputing that .

MR JONES QC:

You got it on the commencement date and on the third anniversary, full stop, and that would be it. But that isn't it and because those words haven't been included, we have to deal with the words that have been and when looking at the words of 2.2 and 2.4 we have a situation where, in my submission, the ability to give the notice is over a three-year, up to the third anniversary, and then over a three-year period, up to the sixth and that, in my submission, is the only logical meaning of those two provisions taken together. Because 2.4 qualifies the provision of the notice. The respondents' argument makes no

sense about two consecutive periods of three years. Where's the second consecutive period.

WINKELMANN CJ:

So you say it needs rectification. It needs rectification were they to be successful.

MR JONES QC:

Well they failed in their rectification claim.

WINKELMANN CJ:

Yes, and they failed in the rectification claim, but that's what your argument is, that the words just can't be that meaning. It's not an ambiguity, they can't be that meaning?

MR JONES QC:

Correct.

WINKELMANN CJ:

Unless you strike out parts of the rest of the clause.

MR JONES QC:

That's correct, or simply change the words, and indeed there's a somewhat inconvenient factual finding as far as the respondents are concerned about what the actual intention was. So they failed in a rectification claim looking at the wording in the rectification claim if that was the meaning why on earth wasn't it set out and there are words that needs to be taken out and can I just counsel caution when referring to the wording. There does not appear to be an exact replication of the wording of the clause, certainly at one part of the respondents' submissions. So if I could simply ask the Court to look at the actual agreement as opposed to looking at quotes from the submissions please.

WINKELMANN CJ:

The marked up version that the Court of Appeal sets out, were they merged, the negotiating version. It's quite hard to follow which is the, what are the new words or what are the struck out words. Am I right in that?

MR JONES QC:

It is but there are a number of drafts to and fro.

WINKELMANN CJ:

But the one set out in the Court of Appeal judgment.

MR JONES QC:

Well yes. The difficulty I suppose, and one that this Court has determined that leave should not be given on in terms of what should be looked at or not, there are a number of versions where words were included, taken out, changed, and the Court of Appeal elected to look at one version, or refer to one version, which in my submission is a dangerous thing to do. So it doesn't give the complete context. So as far as the wording of the contract that we have, we're looking at it in terms of the plain and literal meaning, if I can put it that way, as opposed to going back and looking at other drafts. Because if we look at other drafts we have to look at all of them. We can't just look at the ones that have, or the one that has been selected. That, in my submission, is probably something which tells against, well, in terms of precontractual negotiations it'd either have to be all in or all out as I understand the question that's been – even as far as leave is concerned the interpretation is to be determined all out, which is how the appellants have approached it. I think the Court of Appeal, with respect, fell into error by looking at one of the drafts and also circumventing the factual findings in the High Court.

WINKELMANN CJ:

The factual findings in what, because the factual finding was that they intended it to…

MR JONES QC:

Six years. That's in the decision of Justice Gordon. Your Honour this is at volume 1. Her Honour's reasoning in terms of the interpretation issue is at 101.0111, paragraphs 150 through to 165 and as far as the actual finding of fact is concerned this is in the context of the rectification claim. Those comments of the Judge, I've already referred in part to them, 101.0123, as far as the judgment is concerned, paragraph 202, that goes through to 228.

GLAZEBROOK J:

I'm sorry, can you give me the paragraph number?

MR JONES QC:

Sorry, paragraph 202 of the High Court judgment through to paragraph 228. That's the factual analysis.

O'REGAN J:

What's the factual finding you're asking us to take into account?

WINKELMANN CJ:

Which is the paragraph on the rectification?

MR JONES QC:

Rectification starts at 202.

O'REGAN J:

But you said the Court of Appeal –

ELLEN FRANCE J:

Don't you need to go back, Mr Jones, to 201. Don't you have to go back to paragraph 201?

MR JONES QC:

201, as I understand it, is reciting the evidence.

ELLEN FRANCE J:

Yes, but when the Judge says, “I prefer the evidence of,” you’ve got to identify what that evidence is relevantly in terms of rectification.

MR JONES QC:

Looking, well Her Honour goes through from page 202 through to 228. Within that at 226 Her Honour states in summary she found the Vegars 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.” So after reciting everything obviously Her Honour comes to a conclusion and then she says obviously that they’d had, it’s going back to what we talked about at the beginning. They first had cause to give evidence on this issue in 2010, and that was exactly what the appellants are saying now, is that the interpretation is what was put before Justice Wylie and which His Honour accepted.

WINKELMANN CJ:

The critical paragraph is 226 isn't it?

MR JONES QC:

Yes.

O’REGAN J:

I mean that’s their subjective view but does that help us much in interpreting?
1110

MR JONES QC:

Well, Her Honour makes a finding that, A, they are credible and, B, that their evidence on what was agreed…

O’REGAN J:

Yes, but that’s their view of what was agreed, isn’t it? I mean usually the subjective views of the parties is not really what’s in issue when you’re interpreting a contract. The fact that someone says, “I thought it meant that,”

doesn't really mean much. They might be honest when they say it, which she obviously thought they were.

MR JONES QC:
And reliable.

GLAZEBROOK J:
Well, it's relevant for rectification.

O'REGAN J:
So they give reliable evidence of what they thought.

MR JONES QC:
The factual finding was made in the context of the rectification argument by the respondents as they then weren't.

WINKELMANN CJ:
And you're bringing it up in response to the Court of Appeal's reference to the negotiations?

MR JONES QC:
Yes. Well, they refer to negotiations but also they essentially, or the Court of Appeal, circumvents that finding saying it was on a rectification issue and there wasn't a finding on the balance of probabilities. Well, with respect, when you have a Judge in the High Court who's seen and heard the witnesses, makes what can only be described as damning findings against Mr Forlong and who is then listening to Peter and Paul Vegar and Ms Dorrington and says, "I find them credible and I find their evidence to be reliable," in my submission that's compelling evidence. Those are compelling findings in terms of what the actual meaning is and completely supports what the meaning is that has been advocated by the appellants throughout.

GLAZEBROOK J:

That's only though if negotiations are admissible because negotiations are clearly admissible and were admissible in finding the right one in terms of rectification as to what was agreed and therefore no rectification. But if negotiations aren't admissible then it really doesn't matter in terms of that finding because you're bringing in negotiations that way.

MR JONES QC:

It's not so much a negotiation, it's them saying this is what it was agreed the clause meant.

WINKELMANN CJ:

You're responding to paragraph 51 of the Court of Appeal's judgment, I think.

MR JONES QC:

Yes.

WINKELMANN CJ:

And in that you've got a difficulty because they express themselves. That's what was agreed and you're saying, well, even if they could say that, that's not what the finding was.

MR JONES QC:

Yes.

WINKELMANN CJ:

But the point Justice Glazebrook and Justice O'Regan are making to you is it's actually not relevant. You know, we're not trying to find what people actually agreed. You're trying to find what the words of the agreement mean.

MR JONES QC:

Objectively?

WINKELMANN CJ:

Yes, objectively. But you are taking the point that what the Court of Appeal was saying there was wrong anyway as a matter of contractual principle, so you're adopting what Justice O'Regan and Justice Glazebrook are saying to you, I think.

MR JONES QC:

Yes.

WINKELMANN CJ:

But simply making the point that even if you were minded to take that look the High Court finding stands in it's way.

MR JONES QC:

Yes. It's always helpful if one has a factual finding and in the High Court there were factual findings a-plenty in favour of the appellants, and it is relating to what was agreed. We haven't got the evidence before us but in terms of what was agreed and what was said, that is something that Her Honour relied upon.

WINKELMANN CJ:

In rectification?

MR JONES QC:

Yes. The fact, with respect, that it's rectification and one side has the onus, the inverse of that, of course, is that if you haven't discharged the onus or you have positive findings of credibility and reliability against you, in my submission that is a factual finding that does have significance.

GLAZEBROOK J:

So perhaps further to your argument is that if the Court of Appeal was going to rely on one version and changes from one version, then they also had to look at the evidence given as to what was actually agreed between the parties and the findings of the High Court in respect of what had actually been agreed.

MR JONES QC:

Yes.

GLAZEBROOK J:

Because it wasn't a subjective finding, it was a finding that that was what was mutually agreed between the parties.

MR JONES QC:

Yes.

GLAZEBROOK J:

Ie a positive finding against rectification on that basis, not just on a failure of the onus, is that…

MR JONES QC:

Yes it is. And the difficulty is that, if I can use this term, the Court of Appeal was selective in what it referred to regrettably.

GLAZEBROOK J:

But just I suppose to bring back to the point that we have said we want this argued without the question of negotiations being brought forward so… apart from obviously the point that you make, which you say the Court of Appeal did rely on negotiations selectively and therefore that was where they went into error.

MR JONES QC:

Yes, one of the errors certainly, but as part –

GLAZEBROOK J:

Yes, apart from not reading the clause right in your submission.

MR JONES QC:

Yes of course. The other aspect, of course, is that as far as the finding of fact is concerned, it's what the clause meant as opposed to a negotiation to and fro. So in my submission the factual finding in the High Court is a little more

than simply a negotiation. It's actually what the deal was that was struck, as opposed to what people wanted or whatever, it's what the deal actually was.

GLAZEBROOK J:

I suppose so but that's still the, still subjective as against objective in the sense that that's used, because the objective says it doesn't really matter what the parties actually agreed, it's what they wrote down, considered against the factual matrix.

MR JONES QC:

Yes it is in the sense that if someone says, "Well this is what I understood it to mean," and somebody else says, "No, that's not what I understand." Then you've got your subjective views. But when you actually have a factual finding of the Court in my submission it elevates things past that because it's at the point where they have signed it and they're signing what they're agreeing to.

GLAZEBROOK J:

That's a bit of a Professor McLachlan view I think as against other views on what is actually happening. I'm not suggesting that's necessarily wrong as a view, because what he says, if you have actual evidence of what the parties actually agreed, then that prevails against what objectively you might find looking at the wording against the permissible factual matrix, which in his view would include negotiations but in other views does not include negotiations.

MR JONES QC:

Yes. I suppose looking at it the respondents' took the rectification claim and failed, and so they brought out the need for the evidence to be given, and on that basis if the rectification – they're essentially saying the clause doesn't mean what it apparently means. On that basis you'd have to say, well, the respondents, the growers are saying I means something different to the actual wording.

GLAZEBROOK J:

And I suppose you, just going back to the issue estoppel, if you did want to say the clause does mean what we say it means, looked at objectively, without the need for rectification, then you should have brought that up at that stage, and then they may say, well we did on that dual basis.

MR JONES QC:

Well, I suppose the timeline –

GLAZEBROOK J:

There's no point answering that, probably, because that might be for submissions afterwards, I was just bringing it up now as something that may need to be dealt with later.

MR JONES QC:

Indeed. I suppose the timeline tells the tale. Because the 8th of December 2014 after the notices were given was the first time the alternative interpretation was ever advocated.

Now if I can take the Court back to the grape supply agreement. This is at volume 2.1, page 201.0004, we have the key clauses, if you like, 2.2 and 2.4. Then just briefly going through the balance of the agreement in terms of the query made by Your Honour the Chief Justice and Justice Young, we have at page 0007 there start a number of obligations. We start off with the annual vineyard management plan, adjustment for seasonable climactic conditions, the vinicultural consultant –

WILLIAM YOUNG J:

Aren't they all meaningless unless there's a right to purchase?

MR JONES QC:

They are in the sense that they seem to be predicated on the basis that the right has been exercised and it bites. But for example looking at 9.1, vineyard management, there's talks about following standard viticultural practices, so if

the notice to purchase isn't given then the right lapses, then for all practical purposes the grape supply agreement is meaningless.

WILLIAM YOUNG J:
Probably for all legal purposes, could it really be said if there was no right to buy, that the grower is still obligated to the buyer to manage the vineyard in a particular way?

MR JONES QC:
In effect that would be right. I'm not sure if legally the contract would be at an end. For all practical purposes it would be.

WILLIAM YOUNG J:
Just to get to the point that was raised by the Chief Justice at the start, if the argument for the respondents is right, then at the time leave to appeal was applied for the first time around, your clients actually had no contractual rights under the grape supply agreements.

MR JONES QC:
Correct.

WILLIAM YOUNG J:
And there wasn't much point, if that argument was right, in us having a hearing about it and writing a judgment about it.

MR JONES QC:
Well there certainly wasn't any point in leave being granted, because it was all entirely academic.

WILLIAM YOUNG J:
And although the rectification argument couldn't have been dealt with, a relatively straightforward interpretation argument could possibly have been dealt with, had the issue been raised.

MR JONES QC:

Yes.

WILLIAM YOUNG J:

Although that's all probably for another day.

MR JONES QC:

Now the appellants' submissions, the written submissions, set out the basis for the interpretation argument background interpretation through the paragraph 17. I simply note the time. As far as the grape supply agreement is concerned the correspondence in the written submissions, I'm more than happy to rely on the written submissions for anything I haven't articulated in oral argument. So unless the Court has any additional questions, as far as the interpretation argument is concerned, I'll turn to the other issue.

WINKELMANN CJ:

Go ahead Mr Jones.

MR JONES QC:

Thank you Ma'am. Now the Court granted leave in terms of the effect of the earlier judgments on the legal status of the parties. The question is the effect on the parties legal positions of the two earlier judgments, namely the Court of Appeal decision and the Supreme Court decision, dealing with whether the contract had been terminated. Now the Court of Appeal in this instant proceeding made certain findings concerning the effect of the Court of Appeal decision delivered on 12 April 2013. That is contained at paragraph 75 of the Court of Appeal judgment. The Court of Appeal judgment is in volume 1, the pleadings volume, at 101.0150 and the relevant paragraphs are on –

WINKELMANN CJ:

I'm wondering, when I read your submissions on this point, I must say I found it quite hard to understand exactly what your arguments were, they seemed to move around quite a bit. I think that's a point that Mr Harrison makes too.

I see it's just about the morning adjournment, I wonder if it would be helpful before we launch into this if you could just give us an overview of your argument, and to assist you with that I thought we might just take the morning adjournment at this point and enable you to put together a little bullet point overview for us.

MR JONES QC:
Thank you Ma'am. Certainly.

COURT ADJOURNS: 11.28 AM

COURT RESUMES: 11.45 AM

MR JONES QC:
On the second ground as far as the sequence of submissions are concerned for the appellant, if I can first just go to the Court of Appeal's decision.

WINKELMANN CJ:
Can I just be clear on one thing about this, is this an alternative argument?

MR JONES QC:
Yes.

WINKELMANN CJ:
So it's not that you're trying to – are you trying to pursue a claim for damages because you didn't get the grapes for that period?

MR JONES QC:
Yes. That's cause of action one.

WINKELMANN CJ:
So it's not an alternative argument? It's not pursued just to give you, preserve a right, the right if the respondents are correct about their interpretation?

MR JONES QC:

Well, it's an alternative in one sense but it's also additional in part.

WINKELMANN CJ:

Yes, okay.

MR JONES QC:

So it is an alternative in that sense but it also adds. This is where the sequence of events is important. Now the Court of Appeal refers to this aspect at paragraph 75 of its judgment and the important date, of course, is the 12th of April 2013 because that was the date of the Court of Appeal decision, the delivery date and that pre-dated by some three weeks the extended date of the third anniversary, the 1st of May 2013. Now the appellants' submission is that the Court of Appeal decision meant that there was no grape supply agreement in place. There was no ability to give a notice because no right to purchase existed because the agreement, according to the Court of Appeal, had been validly terminated. So their right had been removed and they could not give notice. If some document had been forwarded in that period of time it would have had no legal effect in terms of the grape supply agreement, and we're dealing with the temporal issue of 12th of April 2013 through to the 5th of September 2014. In my submission the most that document could possibly have been if any notice was served, it could possibly have been construed as an offer to buy grapes on terms that had previously been agreed but no longer applied. But that would be a stretch.

WINKELMANN CJ:

Well, it could have been construed as an exercise of a right under the agreement consistent with the appellants' contention that the agreement had not been validly – that the agreement had been validly novated so remained on foot.

MR JONES QC:

In my submission that can't be the position because a court of competent jurisdiction has declared the right no longer exists. It's not a repudiation where a party to a contract has said the contract, as far a we're concerned, is done.

WILLIAM YOUNG J:

Say this is a simple case in the High Court, the plaintiff says I've got an option to purchase the defendant's property, I want a declaration. The case is heard before the option falls due for acceptance. The High Court Judge says, no you haven't. The plaintiff appeals. The plaintiff is perfectly entitled to give a notice accepting the option, which is predicated on the assumption that the appeal will be allowed. Why wouldn't such a notice be held to be effective if the appeal was allowed?

MR JONES QC:

Well in my submission Sir the parties are obligated to do what they are able to do at law and not to do what they're not entitled to do at law.

WILLIAM YOUNG J:

But it's only a provisional judgment. I mean I know it's final in a res judicata sense for the time being, but it's under challenge. I mean what would be wrong, it's not a contempt of court to give a notice.

MR JONES QC:

Well of course that's the respondent's argument, but what is the legal effect of giving such a notice –

WILLIAM YOUNG J:

Well the legal effect of it would be a matter that would depend on future events. If the respondent won the appeal in the Supreme Court then it would be nothing. If your clients won the appeal to the Supreme Court, as they did, then it would be effective.

MR JONES QC:

Well the difficulty with that, certainly in this circumstance, is that if notice had been given then there are various other buyer obligations that kick in under the grape supply agreement, various inputs and these are the ones that we referred to a little earlier this morning in terms of vineyard management, cropping levels, things of that sort.

WILLIAM YOUNG J:

But that would presumably have had to have been dealt with by agreement or fixed by the Court, wouldn't it?

MR JONES QC:

Well –

WILLIAM YOUNG J:

Give me a specific example of something that couldn't have been, wasn't practical to achieve in the context you're talking about.

MR JONES QC:

Well we're talking about parties who are at very much arm's length.

WILLIAM YOUNG J:

Yes I know but they have managed to agree to extend the 2012 date?

MR JONES QC:

Indeed yes. While there was a High Court decision saying that the agreement remained in force. So the agreement had never terminated either as far as the parties are concerned, because the repudiation had been rejected, nor as far as the Court is concerned. So that was the context of that extension.

WILLIAM YOUNG J:

Yes, okay, I understand it's the other way around on that…

MR JONES QC:

Well it's not the other way round. One of them you have rights, the other one you don't.

GLAZEBROOK J:

Was there any practical issue in terms of, because one, you didn't know whether leave would be granted I think at that stage.

MR JONES QC:

Yes.

GLAZEBROOK J:

Or, in fact, leave hadn't even been applied for at that stage.

MR JONES QC:

No, it was within the 20-day period.

GLAZEBROOK J:

So one, you didn't know whether leave would be granted. Two, you didn't know if so how long it would take, and is there a practical issue of there comes a time when it wouldn't be practical to exercise the option or is that not the case, given that you're saying these three-year timeframes.

MR JONES QC:

Well the difficulty is the 1st of May, if we take that as the date, everything has to be organised, including payment and supply, on-sale of the grapes by the March/April harvest, and so it would have been impossible for the Savvy companies to have A, had the various inputs under the grape supply agreements that they had under the –

WILLIAM YOUNG J:

So what are the inputs?

MR JONES QC:

If I can take Your Honour to –

WILLIAM YOUNG J:

Couldn't they have simply tendered performance –

MR JONES QC:

No.

WILLIAM YOUNG J:

– and if that had been refused claimed damages?

MR JONES QC:

If I can take the Court to 2.1, back to the grape supply agreement, 201.0007, we have a number of inputs that the buyer has. It starts off with the annual vineyard management plan, which has to be prepared by the grower.

WILLIAM YOUNG J:

Sorry, what number?

MR JONES QC:

Sorry, it's 101.0007.

WILLIAM YOUNG J:

Yes, sorry, clause 5.

MR JONES QC:

Yes. So we've got point 5, then got 6.2.

WILLIAM YOUNG J:

Well, 5 is the grower's problem.

MR JONES QC:

It is but it's also under the grape supply agreement. So if it's dead then the buyer doesn't have that obligation.

WILLIAM YOUNG J:

But this isn't a buyer's obligation. This is a grower's obligation.

MR JONES QC:

Sorry, the grower doesn't have the obligation if the agreement's dead.

WILLIAM YOUNG J:

Well, you'd give notice. Grower would say, "I don't have to because I've got a Court of Appeal judgment in my favour." You could say, "Well, you have for the moment but soon you won't because the Supreme Court is going to set aside the judgment we think."

MR JONES QC:

Yes, and after the laughter had stopped I'm sure that the respondents would have responded in the way that they have in the past, namely saying, "No, you haven't got any rights at all."

WILLIAM YOUNG J:

Okay, well, in that case in that, but you would still be – that would be probably a practical answer but you would still have given notice and whether they're in breach for failing to comply with it, it would be a matter for later determination.

MR JONES QC:

The thing is that they would say, "We're not in breach," because there was no contract in place at that time because of the Court of Appeal judgment.

WILLIAM YOUNG J:

No, they wouldn't. But if you'd given notice, after you won in Supreme Court you could have said, "Hey, where's that annual vineyard management plan you were meant to do and all this other stuff?" and they would have had no answer to that because they would have been in breach of their obligations.

MR JONES QC:

Well, they would then argue that they had simply been adhering to the Court of Appeal's judgment that there was no contract to comply with.

WILLIAM YOUNG J:

Well, to my way of thinking there would have been a fat lot of use in that argument because the law would be as stated by the Supreme Court. The Court of Appeal judgment would be written in water.

MR JONES QC:

It wouldn't be because it's not a repudiation. It's a change in the legal position because one Court has said one thing and then another Court has said another thing. It can't be looked at in my submission like a repudiation.

WILLIAM YOUNG J:

I'm not looking at it as a repudiation. I'm looking at it as they come up with a reason at the time, rather a solid one, for not performing but when their judgment is set aside that reason falls away and if they haven't been performing then they're in breach of contract.

MR JONES QC:

My argument is, or the appellants' argument, is that the respondents would simply say, "Well, we can't be committing ourselves to supply you grapes when the Court of Appeal has said there is no agreement to supply grapes," in a –

GLAZEBROOK J:

Isn't one of your back-up arguments on that that you don't have to tender anything if it's absolutely clear the other side isn't going to accept it?

MR JONES QC:

Yes.

GLAZEBROOK J:

So there was no point issuing it because it was absolutely clear because they'd been told by the Court of Appeal they didn't have to do it that they weren't going to comply with these obligations.

MR JONES QC:

Well, there was no contract more importantly to do it under.

WILLIAM YOUNG J:

Well, it's a slightly different point. I understand that in effect they're not well placed to complain about it when their position would have been that they wouldn't have accepted the notice. So that's a slightly different point, but in terms of the impossibility of giving notice, you've got a long way to get me convinced.

MR JONES QC:

It's factually possible. There's no issue but that it's factually possible. A letter or a piece of paper would –

WILLIAM YOUNG J:

And it would have had legal consequences once the Court of Appeal judgment was set aside.

MR JONES QC:

Well, that is another issue because then you're talking about retrospectivity in terms of a piece of paper that when issued meant nothing legally. That is the real difficulty because –

WINKELMANN CJ:

Is your argument really an estoppel argument because I know you're arguing that the law was one way one – your argument is that the law was one way for a period of time and then it was another. The status of the contract was one way for a period of time and then it was another.

MR JONES QC:

Yes.

WINKELMANN CJ:

And in taking that position you are arguing in the face of quite a lot of authority to say that that's not the case.

MR JONES QC:

Well, what the appellants are saying is we had to acknowledge, we didn't agree with it but we had to acknowledge the force of the Court of Appeal judgment and so we had no right to give notice for anything, and so we didn't. That is certainly a basis that no notice was given, and it seems on the authorities, for example, of *Hillgate House Ltd v Expert Clothing Service & Sales Ltd* [1987] 1 EGLR 65 (Ch) and the like that if you have a positive statement where, for example, a landlord has the right of possession, they cannot be taken to task later to be told, "You have acted in breach of the lease because you've actually done what a court, not what a court has said you have to do, but what a court has said you are able to do. So when a Court says there's nothing for you to actually give a notice about, that is the inverse of that proposition. A party is simply acknowledging that in the meantime that is the legal position.

GLAZEBROOK J:

So you say if the grower hadn't done an annual virtual management plan there wouldn't have been a right to damages because they were refusing to do it on the basis that at that stage there was no legal obligation for them to do so?

MR JONES QC:

That's certainly what their argument would be and in my submission that would be something that would be difficult to overcome because they would say at the time that we didn't do what was under this agreement, the agreement didn't exist at law. And there are other obligations too, for example under 6.2, consultation with the buyer.

WINKELMANN CJ:

It's quite a different thing, though, isn't it? Obligations that you have under an agreement. I think it's reasonably well settled that the party who is asserting the agreement are right – wrongfully asserts right to terminate or whatever, who ultimately is found to have been wrong on that, they can't complain of the other party's failure to form their obligations under the contract.

MR JONES QC:

Yes.

WINKELMANN CJ:

But it's quite a different thing in relation to exercise of option rights, notifying someone that you want to purchase something, because what is to notionally stop the appellants just sitting back on their rights and then five years down the track, when we're at the situation that we are, finding out actually it's a much better right than they thought it was. They wouldn't have exercised it back then but now they will exercise it.

MR JONES QC:

Well we don't have that problem here so much because in the letter of 27 April 2012 Mr Vegar stated very clearly that the Savvy companies were ready, willing and able to exercise the rights. But then that can be deferred for a year because of the uncertainty of supply. So we have a very clear declaration at that point that it would have been issued –

WILLIAM YOUNG J:

But he wouldn't – it might have been a declaration but had the Savvy companies decided in 2015 that they didn't really want to persist with this, he would no longer, they would no longer, they wouldn't have been bound, that wouldn't have been bound by that notice of intent.

MR JONES QC:

Well the Savvy companies have been consistent throughout. There's 27 April when they said, this is what we want to do, and we've already gone to the correspondence about that.

WILLIAM YOUNG J:

Yes.

MR JONES QC:

We've also got the factual finding in the High Court that the option would have been exercised in 2013 –

WILLIAM YOUNG J:

Okay, just come back a bit. Say two days after Supreme Court the respondents in that case has said, okay, well we lost, you've now got to take our – we're relying on this letter, you've got to take our grapes for the next 50 years, and the Vegars decided they're actually going out of the grape business, or they no longer wanted to. The respondents wouldn't have been able to hold them to that letter you took us to because it wasn't the exercise of the right of purchase.

MR JONES QC:

Agreed.

WILLIAM YOUNG J:

Okay. So I mean one of the – so they were in a sense – there was a bit of a fork in the road there. If they wanted to commit themselves, they could have, I think, but if they didn't want to commit themselves then they wouldn't later be bound by it.

MR JONES QC:

Well, no, in my submission it's the following scenario. On the 27th of April they declare in writing, this is what we want to do, we want to exercise our options. But because of the uncertainty due to the litigation we consider a deferral to

the 1st of May 2013 is preferable, and that is agreed between the parties, so it's deferred. So it's a declaration of intent. We then have the factual finding by Justice Gordon that Mr Vegar but for the Court of Appeal decision would have exercised the option. So Your Honour's proposition, if you like, I understand where you're coming from, but the factual matrix doesn't support that, plus of course we then have the 17 November 2014 exercise of the notice, so all the way through from April of 2012 there's been a consistent, "We want to exercise this."

WINKELMANN CJ:

So the legal basis you say this on, you're advancing an argument. What's the legal underpinning for this argument that the agreement wasn't on foot until the Supreme Court – and in that you face the declaratory theory of…

MR JONES QC:

In the interregnum period between 12 April '13 and 5 September '14 legally there was no grape supply agreement in force.

WINKELMANN CJ:

As a matter of reality?

MR JONES QC:

As a matter of law and during that period, because we have to look at, in my submission, at the time.

WILLIAM YOUNG J:

Well, let's say there's a claim for damage. You have a claim for damages in the High Court for breach of contract. The High Court says no, there's been no breach of contract. There's actually no contractual obligation to do this at all. The plaintiff goes to the Court of Appeal, wins. Are you saying the plaintiff isn't entitled to damages that take into account events that occurred between the High Court and the Court of Appeal judgment?

MR JONES QC:

It depends on whether or not something happened before the declaration or not.

WINKELMANN CJ:

Is your argument not better to be put, well, it may be, I'm not sure about the status of this and I'd – you've referred us to the judgment of this Court in *Ingram v Patcroft Properties Ltd* [2011] NZSC 49, [2011] 3 NZLR 433, and they set out a passage from the judgment of Justice Priestly in the New South Wales Court of Appeal in *Nina's Bar Bistro*, it's at paragraph 34, who puts this argument you're putting, not in the context but as a matter of the law of estoppel by conduct. "…repudiatory conduct of a party at fault is a representation to the innocent party that so far as the party at fault is concerned the contract is at an end. If the innocent party thereafter takes some step to his detriment, the party at fault will not thereafter be heard to say that he is treating the contract as on foot." It's set out at paragraph 34 of *Ingram v Patcroft Properties*.

MR JONES QC:

And the *Peter Turnbull & Co Pty Ltd v Mundus Trading Co (Australasia) Pty Ltd* [1954] HCA 25; (1954) 90 CLR 235 (1 June 1954) decision, yes.

WINKELMANN CJ:

The quote is from, as I understand it, the *Nina's Bar Bistro Pty Ltd* decision.

MR JONES QC:

So paragraph 34 of *Ingram v Patcroft* talks about…

WINKELMANN CJ:

Yes.

WILLIAM YOUNG J:

The real question is whether that applies to something like the acceptance of an option, the exercise of an option. It certainly applies to where there are

mutual obligations going each way, but whether it means that there's no need to take a, exercise an option which is time limited and if so what impact it has on that option may be difficult. For instance, what was the extension of the option to, to what period?

MR JONES QC:

Well, I suppose the simple argument is that because of the Court of Appeal decision and then the restoration of the High Court decision by this Court that time is at large at that point because the timing falls within that period when there was no judgment – when there was no grape supply agreement in force. But the thing is, looking at the context as well, we have starting on the 17th of February 2010 a rejection of the contractual relationship unfounded completely as far as the grape supply agreement is concerned which is belatedly accepted and then we have repeated actions by the growers, the defendants, the respondents in this case, to what the appellants are trying to do. So it's in the face of that that on the 12th of April the Court of Appeal says the agreements are at an end. So in that situation, in my submission, there is no prospect at all that any sort of tendering of a notice is going to be complied with or be of any point at all. There's no legal basis to do it. There's no practical basis to do it. Has no prospect or hope of success.

WINKELMANN CJ:

Well, you're back to your argument. I was putting a different argument to you.

MR JONES QC:

Indeed. Look, the option as far as the…

WINKELMANN CJ:

Which I do think is woven in your submissions because that's why I asked you to put your bullet points. You do refer to it an estoppel kind of argument, don't you?

MR JONES QC:

Yes. But I suppose it depends on how it's classified in terms of whether it's an estoppel or something else. The Court of Appeal seemed to be singularly unimpressed with any estoppel that was put forward.

WINKELMANN CJ:

Perhaps it's because of how you pleaded it.

MR JONES QC:

Possibly. But the substance of the issue in my submission is important and it comes back to obviously the context in terms of the relationship between the parties but also importantly the legal effect of the Court of Appeal decision.

ELLEN FRANCE J:

Just on that legal effect, as you noted the judgment of this Court was to restore the judgment of Justice Andrews.

MR JONES QC:

Yes.

ELLEN FRANCE J:

Do you say that only takes effect from the date of the judgment going forward, if you like, from this Court's judgment going forward legally, is that what you say? Because if it's a declaration as to the law and that declaration is restored, why is that not the legal position as has applied?

MR JONES QC:

The reality is that there was a period of time when it wasn't the case. That must be right.

ELLEN FRANCE J:

Well, that may be so as a matter of reality. You're saying both reality and law.

MR JONES QC:

Yes.

ELLEN FRANCE J:

And it's the "and law" part that I'm questioning you about.

MR JONES QC:

Well, restoration on appeal of a judgment means that yes, it was right. The issue is what to do with the period in between when it was declared to be wrong and it's submitted that that must be, as far as a legal position is concerned, at the time there cannot be any legal rights or obligations under the grape supply agreement because it's been terminated. Now just as the parties can't be held to account for things that they have done in accordance with the declaration, a positive one if I can put it that way, because they are complying with the Court's order, neither should a party that has had rights taken away be prejudiced or disadvantaged because they have acknowledged the substance and the legal effect of that order taking the rights away.

WILLIAM YOUNG J:

I'm going to put to you another hypothetical. Say I want to do something and you say it's a breach of your right of – your, my contractual obligations, I'm a cautious chap so I seek a declaration saying I can do it and I win in the High Court. I start doing it. You appeal. You win in the Court of Appeal. Aren't I liable for damages? Isn't this just elementary that this is what the Chief Justice referred to, the declaratory theory of law?

MR JONES QC:

Well, the difficulty is that you'd be acting in accordance with what the Court had said.

WILLIAM YOUNG J:

Yes, I know, but it was always provisional. It was always subject to being overruled by another Court. I mean I would have thought it was so obvious I wouldn't even look for authority that if I carried out actions on the face of a judgment which I knew was able to be challenged and were wrong in law, I would be liable for those actions if a later Court held they were wrong.

MR JONES QC:

If that be the case then what is the – because we're dealing with the inverse here. We're dealing with you going to the Court and the Court saying, "No, you can't do that," and then you would go to the appeal Court and if it is then stated yes, you can do that, then and only then would you have any right to actually do what you wanted to do.

WINKELMANN CJ:

Right, so I think you're getting the sense that we find it difficulty to reconcile your argument with the authorities that Mr Harrison has referred us to which are quite clear about the effect of the declaratory theory of law but there is this other thread to your argument which I've attempted to take you to which is the notion that there is effectively an estoppel by conduct operating because throughout the respondents have been saying no, this is – contract's not on foot, contract's not on foot, and now they are saying, "Well, hang on, the contract was on foot and why didn't you do what you were meant to do?" and I have pointed out to you that there might be this difficulty that allowing that care of theory to operate in this context would just allow the appellants to sit on their rights and make a choice much later about whether or not they were going to exercise the option which (inaudible 12:15:54) and damages, and you haven't really answered that, but I think from something you said earlier your point is that the factual findings, was there a factual finding or is it just that you say there was evidence that Mr Vegar would have exercised this right but for the Court of Appeal decision?

MR JONES QC:

Factual finding. Yes, if I can take the Court to that, this is in volume 1, the pleadings. I'm sorry, just to answer Your Honour's question, I'm just concerned about straying into the area where it could be seen as part of the three questions that were put forward earlier about abuse. That tends to meld in together, that's the only –

WINKELMANN CJ:

Well, I don't think it is that. It's not that issue. It's what the legal effect of the judgments was. I think it falls within those issues that are reserved and it certainly is addressed in your submissions. You addressed this in your submissions, Mr Jones. I'm just taking you. You didn't refer us to that passage that I referred you to but you have addressed it in your submissions.

MR JONES QC:

Perhaps if I can take the Court to that part of the decision concerning Mr Vegar.

WINKELMANN CJ:

Because Mr Harrison had said, well, Mr Vegar would not have – the finding was actually that Mr Vegar would have exercised it. I think he says the finding is not as clear as you would have it.

MR JONES QC:

There were two bases for Mr Vegar saying – well, he says there were two reasons he did not exercise the right to or the option to purchase after the Court of Appeal decision and before the 1st of May. The first was the legal effect of the Court of Appeal's decision and the second was he considered he had until the 1st of May 2015. He had that second period of time. What Justice Gordon found was that if the Court of Appeal had not made the decision that it did that Mr Vegar would have exercised the option. Now, so I had it marked up. It's at page 101.0103, paragraph 110, and it goes through to paragraph 125.

WINKELMANN CJ:

Sorry, where are we at?

MR JONES QC:

This is Justice Gordon's decision. It's volume 1 of the pleadings. It's page 101.0103.

WINKELMANN CJ:

If you just can give us a paragraph would be helpful.

MR JONES QC:

110 of the judgment. That's where it starts. Her Honour then goes through the evidence and then at paragraph 125 Her Honour accepts Mr Vegar's evidence, certainly as far as – well, she did in any event throughout and found that he would have exercised the option in –

WINKELMANN CJ:

Where's that paragraph?

MR JONES QC:

125, Ma'am.

GLAZEBROOK J:

If you look at 121 I think that's the evidence that he would have exercised the option and then 125 is the acceptance of it.

ELLEN FRANCE J:

Does it matter for those purposes that the Judge found that the reason for not giving the notice was not because of any act, omission, et cetera, on the part of the respondents but rather related to the understanding of the legal effect?

MR JONES QC:

That comes back to the issues of the respondent's conduct throughout in terms of repudiatory behaviour and as far as the appellants are concerned they say, look, there was no quarter given, putting aside completely the extension of time which was to the benefit of both parties because there was a contract on foot, there was no basis for actually pursuing anything. He would have issued but for the Court of Appeal judgment which was obviously the immediate issue, so that has to be the more pressing issue as far as that is concerned. So in my submission the actions –

WINKELMANN CJ:

Are you trying to say that the Court of Appeal judgment wouldn't have been issued if the respondents hadn't been pursuing that legal position?

MR JONES QC:

Well, that has to be right because they issued the notices on the 20th of December 2010 and pursued the litigation seeking the very declaration that the Court of Appeal made. So their repudiation, their actions in that respect, were the very basis for the Court of Appeal coming to that decision. They pursued that declaration.

WINKELMANN CJ:

And her point is that the respondents made no representation the notice wasn't required?

MR JONES QC:

The difficulty is that at that time between the 12th of April and the 1st of May 2013 there was nothing to give notice about, and it's a fiction to say, well, you could've said, "Well, if we give notice what would you do?" or things of that sort. There's nothing to suggest that the respondents would in any way, shape or form have engaged when they had a declaration from the Court of Appeal saying the grape supply agreements were at an end. But the Court of Appeal decision effectively prevented any exercise of the option because they didn't exist any more.

GLAZEBROOK J:

Can I perhaps put it this way because it seems there might be two different points? The first one you make is that there was nothing to exercise at all because the Court of Appeal had gone.

MR JONES QC:

Yes.

GLAZEBROOK J:

The back-up point it seems to me is, well, there might have been something to issue. We could've perhaps issued some sort of conditional on the Supreme Court decision but in fact, because the respondents would not have taken any notice of it at all, we weren't obliged to do so, just in the same way that you're not obliged to tender money if in fact it's absolutely clear that that won't be accepted.

MR JONES QC:

If it's pointless. Yes. There's also the other very real aspect and that is this. The way in which the on-sale of grapes was dealt with by the Savvy companies, and this was in evidence before Justice Gordon, is that they would essentially be the entity that purchased the grapes, so they had the primary obligation to purchase, and then they would on-sell, and so they would buy the first nine tonnes or whatever the limit or the level was and they would pay the Marlborough average. So they'd make literally nothing on that but they would make on any additional tonnes. But they had to set up people to buy and there was no practical way in which a vineyard, because we're talking enormous amounts of grapes here, there's no practical way that those arrangements could be put in place. So if a notice is given, it's not just a piece of paper. There are other obligations, including the ones we've already looked at, we need to go into and they also need to arrange the on-sale.

WILLIAM YOUNG J:

It might be accepted. The risk is you've given notice it might be accepted.

MR JONES QC:

But that would have been wonderful because –

WINKELMANN CJ:

Well, no, you're saying it wouldn't have been wonderful because you'd have to put in place all the back-up arrangements and you couldn't do that without the certainty that it was going to be accepted or it wasn't going to be accepted. You need to know.

MR JONES QC:

Indeed, and the thing is that the respondents have in the past, certainly as far as certain aspects of the case are concerned, sat on their hands. They were –

O'REGAN J:

But if they had –

GLAZEBROOK J:

Well, and in this case probably would have been entitled to because they would have said, well, at the moment we have no obligation. It will only arise on the Supreme Court decision if it does.

MR JONES QC:

Yes.

GLAZEBROOK J:

And that was the point behind my question before was were there practical issues in respect of it not actually being practical to give notice at that stage in order for it to be at some stage in the future perhaps your client being vindicated, because it wouldn't have been able to take the grapes at that stage and put in place the arrangements that were contemplated by the parties. Is that…

MR JONES QC:

That's exactly right because the way in which the venture was arranged, or was constructed, was that the Savvy companies wouldn't do anything with the grapes themselves necessarily, they were normally going to on-sell, and so they had to arrange funding so that they could then buy and then on-sell and then hopefully obviously make a profit, and they simply couldn't put those financial arrangements in place in a situation where they had no grape supply agreement in force. It simply couldn't be done.

GLAZEBROOK J:

I can understand that submission but the question is was that the mutually agreed position or the matrix of fact that was being dealt with at the time these were entered into because – and I'm not sure it was.

MR JONES QC:

In terms of 2006/2007? I can't answer that. I'm not sure that it was actually the subject of evidence if that was what was discussed at the time because it was a different situation.

GLAZEBROOK J:

No, exactly.

MR JONES QC:

Goldridge had a vineyard.

GLAZEBROOK J:

Yes.

MR JONES QC:

And it was also looking to sell offshore. So there might have been a split between on-sale and actual use of the grapes themselves. But the model from certainly the Savvy perspective when they took over in 2009 was the on-sale.

GLAZEBROOK J:

You would say in any event, I suppose, that the reason you have those timeframes was actually related to the growing of grapes.

MR JONES QC:

Yes.

GLAZEBROOK J:

And so from the agreement itself you can see that time is effectively of the essence in respect of those provisions.

MR JONES QC:

It is in a sense but also looking at all the other obligations that there are as we go through, the inputs that the buyer has, the obligations that the grower has, the vineyard management, the pruning, the crop yields, all of those things are an ongoing thing that go through the rest of the year after the 1st of May and hopefully culminate the following year when harvest comes around and what's expected.

O'REGAN J:

The parties had agreed to deal with the uncertainty of an appeal to the Court of Appeal after the High Court decision.

MR JONES QC:

Yes.

O'REGAN J:

So why was there any problem in doing a similar arrangement as between the Court of Appeal and the Supreme Court?

MR JONES QC:

At that stage the agreement was in force and as the 27 April 2012 letter stated we're ready to go, we want to issue notices but we have a concern about supply.

O'REGAN J:

But what was to stop an approach saying, "Well, we're appealing to the Supreme Court and we now need to have a similar arrangement to deal with the uncertainty caused by a further right of appeal"?

MR JONES QC:

There's nothing factually to do there to prevent that happening but –

O'REGAN J:

Was there any request made?

MR JONES QC:

No.

O'REGAN J:

Was there any finding of fact as to what – when you say, "If we'd put forward the option it would've just been rejected," but was there any evidence on that? Were people asked about it?

MR JONES QC:

There was no – it's not suggested on behalf of the respondent and it wasn't put forward on behalf of the appellant that anything like that was ever considered or, indeed, would have floated as a realistic prospect.

O'REGAN J:

But you're asking us to accept that if a conditional exercise of the option had occurred the respondents would have just said, "It's meaningless. We're not going to do anything with it," but is there any evidence to indicate or did the Judge make any finding about that?

MR JONES QC:

There's no direct finding about that but in my submission it comes back to the point it's not a conditional anything. It's a piece of paper which has no legal basis.

O'REGAN J:

Well, you keep asserting that but I think you're getting a fair bit of pushback from the Bench on that, so you need to deal with that.

MR JONES QC:

At the time, in my submission, that is the only legal position there was. There was no contract in place.

O'REGAN J:

Yes, that's right, but there was every chance there was. Obviously, you thought there was a good enough chance that you appealed to the Supreme Court that it would be restored, so wouldn't it have been prudent to make provision for the possibility that it would be restored?

MR JONES QC:

Hindsight is a wonderful thing but at the time, in light – well, I can't go past the evidence. Mr Vegar's evidence is in the record and it's cited in the judgment. So I can't go past that. But he thought he was obeying the Court order, namely that there was no contract under which he could give a notice.

WINKELMANN CJ:

Okay, so Mr Jones, so far we've got your theory about how Judges operate. The back-up point I'm not sure that you responded to Justice Glazebrook on which is that quite apart from the – which is whilst the, I think it's the same point, whilst the respondents were maintaining their position that the agreements were not on foot, the appellants could not be prejudiced in any way by failing to exercise their repair option because there was no point in doing so. There was no point in doing so given the respondents' consistent position and also combined with the Court of Appeal judgment.

MR JONES QC:

Yes.

WINKELMANN CJ:

Does that combine the point that I set, referred you to with Justice Priestly or is that a separate point?

MR JONES QC:

Look, they tend to blend into one certainly from my perspective.

WINKELMANN CJ:

Yes, we did notice that in your submissions.

MR JONES QC:

There's an impossibility practically and legally to actually advance the position as a party to a grape supply agreement that has foundered, and the issue is, well, if you were obeying a Court declaration in the negative, why should you be put in a worse position than if you are obeying a Court declaration in the positive? In my submission you must be in a situation where you can't be prejudiced.

GLAZEBROOK J:

Have you finished on those two points now because there is the point made by the respondents about the letter, exchange of letters of 12 April, I think it's 12 April, which do envisage an appeal to the Supreme Court?

MR JONES QC:

Yes, that's floated certainly.

GLAZEBROOK J:

Yes, it is floated as – but as I understood the respondents' submission was that that was a separate agreement.

MR JONES QC:

Yes, that's an interesting proposition. It seems to be saying that those letters constitute a discrete contract which in my submission it can't. It is simply an agreement to extend the third anniversary to the fourth anniversary.

GLAZEBROOK J:

Well, whether it's a separate contract or whether it amends the other contract, what difference does that make?

MR JONES QC:

It seems that the respondent is attempting to say this was a separate contract which stood even though the grape supply agreement had been terminated. That seems to be what – there is a suggestion certainly in the submissions

which in my submission simply can't be right. The purpose of those letters was simply to change a date in the existing grape supply agreement.

GLAZEBROOK J:
Against a background where there may be two appeals, a further appeal after the Court of Appeal?

MR JONES QC:
In the hierarchy of Courts, yes, and as –

GLAZEBROOK J:
Well, in the contemplation of the parties in those letters.

MR JONES QC:
Yes, but that's the purpose of looking for the deferment until the 1st of May because there's uncertainty as to timing and things of that sort.

WINKELMANN CJ:
Those submissions on that point, Mr Jones?

MR JONES QC:
Yes. It's not in the bundle but there's a wonderful Privy Council decision which is referred to in the *Hillgate* decision. It's called *Rodger v Comptoir d'Escompte de Paris* (1871) LR 3 PC 465 and it states that in Their Lordships' opinion one of the first and highest duties of all Courts is to take care that the act of the Court does no injury to any of the suitors, and when expression "act of the Court" is used it does not mean merely the set of the primary Court or of any intermediate Court of Appeal but the act of a Court, of the Court as a whole.

WINKELMANN CJ:
So what is the citation for that?

MR JONES QC:

It is quoted in *Hillgate*. Perhaps it's easier if I take the Court to *Hillgate*. It's reported (1871) LR 3 PC 465, and it states, "It is the duty of the aggregate of those tribunals, if I may use the expression, to take care that no act of the Court in the course of the whole of the proceedings does an injury to the suitors in the Court." So *Hillgate* refers to that decision at page 67B of the *Hillgate* decision and does not seek to differ from it.

So the appellants' position is that but for the Court of Appeal decision the factual findings are that the notice for all of the vineyards, all of the grapes, would have been given and that is the finding of the High Court, and but for the decision of the Court of Appeal on the 12th of April 2013 that would have happened. It didn't, and the appellants say, well, we've done what is correct at law and therefore we should be put back into the position we would have been in had the decision of the Court of Appeal not been as it was.

Now the decision of the Privy Council is, of course, a statement of overarching principle. The issue, of course, is how that actually can be applied in a situation such as the present.

WINKELMANN CJ:

Right. I'm just worried about the time.

MR JONES QC:

Yes, I just noticed the time as well. It's simply what's said in the written submissions, that time can be set at large, and that the giving of the notice in 2014 would have been within time for any enlarged period, or any enlargement of time.

O'REGAN J:

What would it's effect have been?

MR JONES QC:

Sorry Sir?

O'REGAN J:

If a notice had been given in 2014 are you saying it would have taken effect from the 1st of May 2013, or are you saying it would only have been for the rest of the period up until the 1st of May 2015?

MR JONES QC:

No, it wouldn't have retrospective effect because it was only given at that point.

O'REGAN J:

So it would have applied from the next May the 1st?

MR JONES QC:

May 1 2015 yes. But it would have been –

O'REGAN J:

Right. So it wouldn't have helped you with your argument in relation to the period before 2015?

MR JONES QC:

It would in that the enlarged period would still be within that time.

WINKELMANN CJ:

Can you just be precise. When would the right to buy the grapes spring up?

MR JONES QC:

Once the Supreme Court resurrected the High Court decision.

WINKELMANN CJ:

No, well that's not right. If you'd given your notice, I'm asking if you'd given your notice, as Mr Vegar wanted to.

MR JONES QC:

In 2013?

WINKELMANN CJ:

Yes. When were the purchase of the grapes – when the right to purchase the grapes started.

MR JONES QC:

It would have started from 1st of May 2013. So thought would mean 2014 harvest onward.

O'REGAN J:

So your first cause of action is only in relation to one harvest, is that correct?

MR JONES QC:

Two harvests.

O'REGAN J:

Well if it took place in one – oh I see.

MR JONES QC:

2014 harvest, 2015 harvest…

O'REGAN J:

And then the new notice took effect from 2015, I see.

MR JONES QC:

Yes, which is the 2016 harvest.

O'REGAN J:

Right.

MR JONES QC:

Because the 1st of May date is obviously, is always the year before the prospective harvest. Sorry, I see the time.

WINKELMANN CJ:

Right, we'll let Mr Harrison address us now. We also want to give counsel a provisional, it's a version of the minute we're going to issue. It sets out the essence of what we outlined this morning but it just hasn't been reviewed by us, so I thought it would be useful to distribute that, Mr Harrison, because I think you want to see it before you address?

MR HARRISON QC:

Sorry Ma'am, I'm not hearing you very well.

WINKELMANN CJ:

I think you want to read this minute before you address and I'm saying I've got it in draft here because the Court hasn't reviewed it, but I thought I'd distribute it to you now.

MR HARRISON QC:

Yes, thank you.

WINKELMANN CJ:

And perhaps you might like to read it just while the registrar – well we could take an early lunch if you wanted us to and then come back at 2 pm?

MR HARRISON QC:

I'm happy with that Your Honour.

COURT ADJOURNS: 12.44 PM

COURT RESUMES: 2.03 PM

MR HARRISON QC:

I wonder if I could just raise one query about the Court's minute. I'm relieved to see paragraph 2. I hadn't understood what was at issue was subsequent written submissions on the question of expanding the grant of leave. But as to paragraph C, whether in the light of findings in the earlier proceeding, could I just seek to clarify what is meant by "findings in the earlier proceeding"?

Justice Wylie, on an interim injunction application, made a few statements about the meaning of clauses 2.2 and 2.4. Neither in the substantive judgment of Justice Andrews, nor in the Court of Appeal, nor in this Court's judgment were there any findings that I'm aware of. So I just want to clarify that under C all we're talking about is the judgment of Justice Wylie?

WILLIAM YOUNG J:
No, this Court.

WINKELMANN CJ:
No C. Carry on?

WILLIAM YOUNG J:
For my own part I'm talking about the judgment of this court which proceeds on the basis that the grape supply agreements are still on foot.

MR HARRISON QC:
Well proceeds on the basis isn't, with respect, the finding in the earlier judgment –

WILLIAM YOUNG J:
Well the judgment of Justice Andrews which was to that effect was reinstated.

MR HARRISON QC:
Well, yes.

WILLIAM YOUNG J:
I mean I'm just trying to say what the point is, I don't really want to argue the toss with you.

MR HARRISON QC:
Right.

WILLIAM YOUNG J:

But if that contract had in effect come to an end before leave to appeal had been applied for, and before our case had been heard, I'm inclined to think that it might have been more appropriate to put that to the Court because we were dealing with the case by way of re-hearing.

MR HARRISON QC:

Well my clients have a response to make to that but I'll save it for the submissions.

WILLIAM YOUNG J:

Yes, no, that's right. But that is the issue.

MR HARRISON QC:

I was contrasting B where it says abuse of process because the Court should have been advised at the leave stage and when considering the substantive appeal. That seemed to me to be directed towards the position of this Court whereas C, when it referred to findings, I was trying to identify what comprising a finding, which usually is, appears in a judgment, what findings I was to address there.

WILLIAM YOUNG J:

What was the judgment that Justice Andrews gave? A declaration the contract was on foot?

MR HARRISON QC:

Yes.

WILLIAM YOUNG J:

Right, well there's a finding to that effect.

MR HARRISON QC:

Well of course by…

WINKELMANN CJ:

So it would extend, Mr Harrison, I think to Justice Wylie's interpretation of the contract, because that's the point that was made –

MR HARRISON QC:

Extend but include all stages of that proceeding.

WINKELMANN CJ:

Yes.

MR HARRISON QC:

That's all I needed, just some clarification around that thank you.

GLAZEBROOK J:

We can perhaps make that in the final minute, just make that a bit clearer in terms of…

MR HARRISON QC:

Thank you Your Honours. There are the two issues that I first of all want to spend a little bit of time, my page 2 of the written submissions, I'll adopt the approach of speaking to my written submissions. My discussion of the scope, the limited scope of the grant of leave in respect of both issues, and my submission, the grant of leave really sets the goalposts in place for an appeal in this Court, and they're not to be moved without formal amendment, but there's certain been an attempt at creep so far as the appellants are concerned. So I begin by emphasising the limited scope of the grant of leave. As I develop in some detail with chapter and verse in the submissions which follow, there are concurrent findings of fact in the two Courts below on all issues to the extent that I would submit there are no issues of disputed fact and none that are actually challenged by the Savvies either in their grounds of appeal, which survived and received leave, or in their written submissions. So the facts as found below, relevant to the issues the subject of the grant of leave, are neither challenged by the Savvies nor open to challenge under the terms of the leave as granted. We have, in other words, a contract

interpretation issue stripped of any issues other than effectively the meaning of the words themselves, I'll come back to that obviously, and we have a purely legal issue, what was the effect of the Court of Appeal judgment, what I call the first Court of Appeal judgment, and then the subsequent flow-on effect of this Courts' judgment.

This is the position, so that I fail to understand, with respect, why my learned friend began by taking you through a series of adverse credibility findings made against our witness, Mr Forlong. That's neither here nor there. Justice Gordon's findings are simply not challenged in any shape or form by either party to this appeal as I apprehend it. So that sets the scene. Now on page 3 I identify, set out the terms of the grant of, qualified grant of leave in respect of the interpretation issue, and noting particularly that this case was not the appropriate vehicle to deal with broader questions about the approach to such negotiations and conduct. However, and I'm interpolating here, there's a kind of elephant lurking in the room here which is the Court of Appeal's reliance on the drafting history, which may or may not be part of what is excluded from consideration. So there's two questions really, and I'm not saying – I want to address the first of these in particular. Was it permissible for the Court of Appeal to rely on the drafting history at all. Is the drafting history within the rule that excludes evidence of negotiations leading to the contract and in respect of that question, as I apprehend it, neither side – well in respect of that question, both sides in both courts below relied on it but to different ends, and in this Court neither side –

WILLIAM YOUNG J:
Sorry, relied on the bit that's in the Court of Appeal judgment?

MR HARRISON QC:
That in particular, yes.

WINKELMANN CJ:
Well did they both rely on the bit that's in the Court of Appeal judgment or did they both rely on the drafting process?

MR HARRISON QC:

They both relied on the drafting process and the history and ultimately that distilled into just the one piece of prior drafting which –

WINKELMANN CJ:

Distilled by the Court of Appeal but not by both parties?

MR HARRISON QC:

Well two propositions. My first proposition is that in the Courts below both sides drew upon the drafting history and supported their competing interpretations. In this Court neither party is accusing the Court of Appeal of error in having recourse to that drafting history. The second point is –

WINKELMANN CJ:

I don't think that's right Mr Harrison.

MR HARRISON QC:

The second point, no if I may Your Honour, the second point is whether the Court of Appeal made correct use of the drafting history in the way it relied on it and to a limited extent reasons from it. That second question is in dispute and I just wanted to bring this elephant out in the sense that it's actually a question which I've not been able to find a definitive answer to, certainly at appellate level in this country, whether drafting, previous drafts as distinct from negotiating history are admissible. So I'm proceeding on the basis that there's no legal error attributed to the Court of Appeal in respect of the first issue.

WINKELMANN CJ:

But they are caught within the general rule as to the admissibility of prior negotiations, aren't they?

MR HARRISON QC:

Well no, that's what I'm saying. I don't accept that that is necessarily the case. As argued in this appeal neither side is raising that error on the part of the Court of Appeal.

GLAZEBROOK J:

What the leave says is you're not allowed to do it. We want you to give us the submissions without dealing with any of those questions because the Court did not want to make any findings in this as an unsuitable appeal for it, about prior negotiations and prior drafts.

MR HARRISON QC:

So it boils down that we're arguing about the interpretation in contractual language only.

GLAZEBROOK J:

And on the normal way that you can look at background but not negotiations and that includes the prior drafts, but we won't say anything one way or the other about whether the Court of Appeal was right or wrong in that. Is that everybody else's understanding.

WINKELMANN CJ:

Well…

ELLEN FRANCE J:

I'm not sure.

GLAZEBROOK J:

In terms of the grant of, in terms of the grant of leave, whether –

WINKELMANN CJ:

Because there was a separate question as to whether even on its own terms if you are going to admit prior negotiations it's appropriate just to pick out one thing out of it, which the Court of Appeal has apparently done.

MR HARRISON QC:

Bearing in mind – I'm just submitting that that's a question which this Court either should directly address with full submissions or not, and you're not getting full submissions. I mean for a simple, a simple example, and this isn't this case, if the first draft of a contract included an option to purchase and the final draft excluded it, an argument that there as an implied term or some other representation operating in the final version, which seemed to be precluded if you had recourse to that drafting history. So drafting history, in terms of previous physical drafts of written contracts, might arguably fall into a different category. But I don't want to run that argument, I'm just suggesting that it can feature here adversely to the interpretation which the Court of Appeal reached. In other words it can't be used – the fact that they relied on that cannot be used as a means to attack the result. I don't want to prolong the agony, that's just the position I'm proceeding on.

Now if we go to the scope of the grant of leave, page 4, in respect of the second matter, I set out the Court of Appeal issues and my paragraph 16, and you'll note that the issues that were identified as arising (c) and (d) are frame din terms of whether the notices of cancellation prevented Savvy, so the word "prevent" is used, the Court of Appeal judgment prevented Savvy, and then there's (e). So the grant of leave I interpret as not extending to (c) and that was a factual issue which –

GLAZEBROOK J:

Sorry can –

WINKELMANN CJ:

I must say I found this submission very difficult because however the Court of Appeal chose to formulate its issues doesn't constrain us in terms of how we granted leave, and I think that's what you're trying to suggest?

MR HARRISON QC:

Well what I'm suggesting is that those were the issues that were addressed by the Court of Appeal and answered in favour of the respondents and when the

leave judgment formulated the permitted question, which is at 18, it was in effect it was not granting leave in respect of (c) however you treat it, which was the effect of the repudiations –

GLAZEBROOK J:
Can I just find out where your (c) is sorry?

MR HARRISON QC:
Paragraph 16, I'm quoting from the Court of Appeal's –

GLAZEBROOK J:
That's what I thought. So that's the top one, did they prevent?

MR HARRISON QC:
Yes. So all I'm saying is that what we end up, what the Court ends up reviewing is the way the Court dealt with its issues (d) and (e) effectively.

WINKELMANN CJ:
Well for my part I see that as quite a broad grant of leave so you have to look at how the Courts' judgments operated within the factual situation. So I wouldn't be cutting out things to the extent that you are.

MR HARRISON QC:
Well anyway I'll push on Your Honour. I don't resile from that analysis and I do adhere to the proposition that both grants of leave to appeal were significantly constrained and in terms of this Court's own leave judgment wording, they are constrained grounds and –

WINKELMANN CJ:
Mean the Court of Appeal chose to articulate its issues in a very peculiar way. Well it seems to me prevent because that's a factual issue and doesn't physically prevent them. I imagine they mean legally prevent. That's not how it was argued.

MR HARRISON QC:

No, they meant physically prevent because that was the case that was run, as we will see form my submissions, the case that Savvy was permitted to run was both that it was physically prevented and that it was legally prevented by the Court of Appeal judgment. It only pleaded that it was legally prevented but it ran both limbs. So if we –

ELLEN FRANCE J:

Sorry by physically you meant as a matter of practicality?

MR HARRISON QC:

Yes, it ran –

ELLEN FRANCE J:

No, I just want to be clear what you meant by that.

MR HARRISON QC:

It did run that and it ran it both by way of an unproved assertion and by way of raising estoppel prevention which is to say the estoppel exception to *Fercometal SARL v Mediterranean Shipping* [1981] 1 AC 788 dealing with an unaccepted repudiation has an exception based on an estoppel when the repudiating party does an act which prevents performance by the innocent party. So preventing was run both generally and in the context of the estoppels which the Savvies sought to raise.

So I deal with the contractual background issue at pages 5 and 6, and I make the point at 22 that neither Justice Gordon nor the Court of Appeal placed reliance on the factual matrix, contractual background, and our position is that the contractual background casts no light on this particular disputed interpretation issue in the sense of favouring one competing interpretation against the other.

I go through the contractual background and I note that what does emerge, my paras 27 and 28, is that those involved on the Goldridge, now Savvy, side

were highly experienced operators in the New Zealand wine industry and those involved with first Tirosh and later Weta were investors, which is what the model was for Goldridge, without experience of the wine industry so that, my 28, against that background, the background would have been that Goldridge wanted flexibility throughout the entire life of the GSAs in terms of whether or not they would purchase. They wanted to be able to pick and choose between years or groups of years, if you like, and Weta and Tirosh as investors for capital gain wanted in effect a passive investment but also maximum certainty so that they wouldn't have to be, as passive investors, going out into the market to find a buyer for their crops year after year.

So that certainty for the investor party could be achieved either by Goldridge committing to being the buyer or forfeiting that opportunity.

So, textual analysis, page 8, and this is the engine room of this particular leg of the appeal. My submission, paragraph31, is clause 2.2 defines and limits the scope of the buyer's purchase option. 2.4 is ancillary or subordinate and the critical issue here is the true meaning of the proviso and the parties are advancing conflicting interpretations of the wording of the proviso. And I have noted with interest that my learned friend, when he was taking Your Honours through the actual wording, which I'll come to in a moment, said, "Right, this is the early part of clause 2.2. Now we come to the proviso," and he immediately sped on to clause 2.4. So he never actually addressed you on the interpretation of what I call the proviso portion of 2.2 itself.

Now at 32 and 33 I outline the contest in simple terms. The Savvies say that the wording, particularly of the proviso, relates to the act of giving notice of the options. So it's the giving of notice which is addressed and they've got three opportunities, and under the Savvies' interpretation, this isn't in writing there, under the Savvies' interpretation the Savvies could pass up upon the first six grape harvests. So in this contract where you had passive investors with the vineyard being managed by the Savvies as well as the Savvies as buyers, these passive investors, on the Savvies' interpretation, could have to wait for

six years and only on the seventh harvest would they know where they stood one way or another.

WINKELMANN CJ:

Yes, but only for a part of that would the grapes actually be harvestable. They are in development.

MR HARRISON QC:

No, that's not so. The commencement date is defined in the agreement, if we go to the specimen agreement which is at the beginning of volume 2.1 and the commencement date is defined in clause 1.1. It's 1 May of the year before the first planned harvest of grapes so that, as my learned friend explained, 1 May gives time for people to get themselves in order for the harvest in March/April of the year following. So there was a planned harvest in March/April of the year following the agreed commencement date. So that means that there was a harvest or it was extremely likely, subject to a natural disaster, that there would be a harvest for the vintage following in the year immediately following the commencement date, so that's why I say they pass up six years whereas under our interpretation they can only pass up the first three years.

So paragraph33, the competing argument for Weta/Tirosh is that exercise of the right of first refusal in respect of any block in the proviso refers to initially actual purchase of the grape crop necessarily triggered by prior notice. So that, I submit, is the nub of the difference of approach and with that difference of approach firmly in mind I want to just walk you through clauses 2 –

GLAZEBROOK J:

Can I just check beforehand, where are the two consecutive periods under your interpretation? What are the two consecutive periods?

MR HARRISON QC:

They're two consecutive periods of three years during which the grape crop is not taken. If there's an entitlement to give notice prior to the commencement date, which there is, and that notice is not given, then the first three-year period when the right is not exercised to the three years running from the commencement date, and then the next three-year period is the period running from the anniversary three years from the commencement date, so…

GLAZEBROOK J:

But the option had to be exercised before the end of that second year three-year period, is that the…

MR HARRISON QC:

On our interpretation?

GLAZEBROOK J:

Yes.

MR HARRISON QC:

Yes, and that would then mean that the Savvies, well, Goldridge then but the Savvies now, would have started purchasing the grape crop after failing to do so for six years and from the seventh –

GLAZEBROOK J:

All right, so the difference between the interpretations is that your friend is looking at the two time periods where the option can be exercised and you're looking at what it's exercised over, ie, the purchase of the grapes?

MR HARRISON QC:

Yes, and when my learned friend says under our interpretation that there aren't two consecutive periods, well, I think I've just answered that. But if we –

GLAZEBROOK J:

I mean you have a slight difficulty relying on these are passive investors, don't you, with the finding that your friend's interpretation was actually what the parties agreed in fact.

MR HARRISON QC:

Well, I don't accept that that was the finding. The finding was that we hadn't proved our case on balance of probabilities.

GLAZEBROOK J:

Well, they said that, then she said, "But I would have believed that evidence anyway and accepted the evidence that that was actually the agreement."

MR HARRISON QC:

Well, no, I don't – I deal with this in my –

GLAZEBROOK J:

All I'm really saying is that I'm not sure that you can ask us to look at the fact these people are passive investors and, of course, they wouldn't have agreed to something like this when in fact you've got a finding that they did or at least you didn't prove they didn't.

MR HARRISON QC:

If we're going to deal with this argument on the footing that I thought I managed to establish earlier which is we're interpreting the words of the contract against the background, the background remains that they were passive investors and the Goldridge side were offering an investment model and were the ones offering the skill and industry knowledge. So they were passive. That's the background.

WINKELMANN CJ:

You said there was no relevant background, actually, is what your starting proposition was before you then went on to say the matrix facts was relevant and that they were passive investors.

MR HARRISON QC:

I'm saying that it doesn't – I'm saying that is the background. I agree that it provides no particular guidance either way. I suppose at that point in my submissions I was attempting to rebut the written submissions for the appellants which suggested that the background militated in their favour. So I'm saying, well, no, at the best it – it doesn't help either way and at the best for the appellants.

So if we can go to page 201.004 which is the specimen agreement for sale and purchase and just with the contest that I have identified in mind, difference between the provisions addressing the act of giving notice rather than an actual initiation of purchase triggered by prior notice, then let's just look at this wording. We can actually start before. The burden of my submission taking up particular turns of phrase is that indeed these provisions were concerned about actual exercise within the time limit, not the mere administrative act of giving notice, and if we start –

GLAZEBROOK J:

So that can't be right because the exercise of the option is the giving notice. You mean actually fulfilling the purchase?

MR HARRISON QC:

Sorry, exercise of the – of actual purchase.

GLAZEBROOK J:

Actual purchase is what you mean?

MR HARRISON QC:

Yes. Well, I think that and that's what I've tried to put. And if we just go to recital, page 2, recital C, we'll see that these provisions are about purchase where C says, "The buyer and grower have agreed that the buyer will have the right form time to time to purchase the grapes on the terms and conditions." Then if we go to 2.2 the first sentence is a grant of, "A right of first refusal to purchase the entire crop of grapes grown on each of the blocks."

The “right of first refusal” expression is, at best, infelicitous because strictly speaking a first refusal, right of first refusal, is triggered when the vendor decides he, she or it proposes to sell and then the right of first refusal is conferred so that the other party gets first shot at the transaction. This isn’t really a right of first refusal at all. It’s an option to purchase exercisable by the would-be purchaser. So it’s initiated by the buyer party and not by any action on the part of the seller party. But it is a right of first refusal to purchase. Then again second line you’ve got this right of first refusal language, but then when you get to the proviso, which was added into the template agreement, the language moves to exercising the right of refusal in respect of any block and for two consecutive periods of three years. Then just going to, on this same theme, you go to 2.4, the language changes from right of first refusal to the buyer’s right of purchase. So it says, “Should the buyer wish to exercise its rights of purpose it shall give written notice of that exercise as herein before specified,” actually I don’t think it is herein before specified, and then the final sentence, “Once notice is given to purchase grapes,” so these are all indicia in favour of my interpretation, I submit, that the clause –

WINKELMANN CJ:
I'm finding it hard to understand the point.

MR HARRISON QC:
I beg your pardon?

WINKELMANN CJ:
I find it hard to understand how their indicia in favour of ours. But you’re going to explain that to us are you Mr Harrison?

MR HARRISON QC:
Well, if the choice is between the language of the proviso exercise of the right of first refusal in respect of any block meaning actually undertaking or at least putting in place an actual purchase of the grape crop –

GLAZEBROOK J:

But don't you do that as soon as you give notice? You have a binding contract at that point and if they try to pull out of it they wouldn't be able to.

MR HARRISON QC:

I accept that, and at the end of the day the…

GLAZEBROOK J:

You don't need any further contract, other than you give notice and then your side comes along and says here they are and I want payment. There's no further contract comes into place.

MR HARRISON QC:

That's correct.

GLAZEBROOK J:

It's just settlement of what is already in place.

MR HARRISON QC:

I agree but if there had been a giving of notice but it was not followed through on, that would also be a failure to exercise the right of purchase under this provision.

WINKELMANN CJ:

Are you saying that clause 2.4 is something different to the exercise of the option? Are you saying clause 2.4 is dealing with the purchase of the grapes? I'm just finding it hard to follow what you are saying about clause 2.4.

MR HARRISON QC:

Well I'm saying that basically the language of the proviso is directed to purchasing of the grape crop and that has to be undertaken, and it is to be undertaken by the giving of notice as the triggering event, that has to be undertaken within a timeframe and in particular if it's not undertaken for two consecutive periods of three years, which starts running at the time of the

commencement date, therefore following from the commencement date the first period is the first three years from the commencement date. No notice/no grape purchase for that first three period, that's your first of two consecutive periods of three years. The first anniversary of the commencement date, no notice/no purchase of grapes, for the second three years, that sorts the proviso out and the language of the other provisions of the agreement that focus on a right of purchase rather than the mere giving of notice support that interpretation. But whether Your Honour the Chief Justice thinks I'm right in saying it supports that interpretation or not, that's the –

WINKELMANN CJ:
I'm just trying to understand Mr Harrison.

MR HARRISON QC:
That's the interpretation of the proviso using its –

WINKELMANN CJ:
So are you saying the proviso then limits the option by reference to whether or not the grapes have been bought during the six-year period?

MR HARRISON QC:
Bought in the sense of the obligation to purchase being triggered, yes.

GLAZEBROOK J:
But isn't that trigger – if you look at the proviso it says, "If the buyer does not exercise the right of first refusal," and you exercise the right of refusal by giving notice and nothing further happens after that, so you exercise that right before the commencement date and then you're obliged to provide them for that first three-year period, you exercise it for the second period by giving notice at the end of that first three-year period. I'm just not quite sure where you get actual purchase as against exercise of the right from the proviso, because you've agreed that you exercise the right by giving notice.

MR HARRISON QC:

Yes, well, I may be making a rod for my own back in advancing that submission. The point still is that if you treat the opportunity to give notice prior to the commencement date, triggering purchase with effect from the vintage immediately following the commencement date, that is your first of two consecutive periods. Then if you have failed to exercise that right in the period leading up to the commencement date, you have one second opportunity to do so leading up to the first three-year anniversary of the commencement date and that is your second consecutive period.

GLAZEBROOK J:

I understand what you're saying. I just can't get it out of the words of the proviso I suppose is what I'm putting to you.

MR HARRISON QC:

Well, because if we accept that the Savvies had the right to give a notice in the lead-up to the commencement date, that was one potential exercise of the right of first refusal. Can I proceed on that basis, that prior to the commencement date there was an occasion on which there could be either an exercise or a non-exercise of the right of first refusal. So that's your first of two consecutive periods.

GLAZEBROOK J:

I understand that but it's not a three-year period I think is what your friend would say. The only three-year periods are the ones after the commencement date.

MR HARRISON QC:

It's a non-exercise of an option which, if exercised, would relate to that first three-year period.

WINKELMANN CJ:

Is the difference between you and Mr Jones that you would say you have that one right prior to commencement date then you have another right three years

afterwards, whereas Mr Jones says, well, actually that commencement date, the option becomes effective and runs for three years and then at the next three-year anniversary it's effective and runs for another three years, and you say that's not so?

MR HARRISON QC:

Yes, and I think that's really how I'd express the difference between us. The non-exercise of the option prior to the commencement date means in effect that it's not been exercised for a period of three years. Then the next and last opportunity is the next anniversary three years from the commencement date if you –

WINKELMANN CJ:

So there are only two days on your analysis that the option can be exercised?

MR HARRISON QC:

There are two opportunities to give notice, one before the commencement date and one before the first three-year anniversary.

GLAZEBROOK J:

Can you just relate that to the wording of the proviso for me?

MR HARRISON QC:

Yes, well, this is what I've been attempting to do. The –

GLAZEBROOK J:

You've just been repeating the submission rather than linking it to the wording, so that's why I was just asking how you read the wording in order to get to that.

MR HARRISON QC:

The buyer had an opportunity to give notice of exercise of the option prior to the commencement date. Not doing so meant that the three years following the three grape harvests following were not subject to the purchase offering.

So that's the first of two consecutive periods of three years. Then on the three-year anniversary of the commencement date the buyer had another option to give notice.

GLAZEBROOK J:
You're still, with respect, not pulling it back to the wording.

MR HARRISON QC:
Well I'm trying to because the – following the failure to give notice prior to the commencement date, as provided for in clause 2.4, there was a non – and I'm literally reading from the proviso, there was a non-exercise of the right of first refusal in respect of all blocks for a period of three years. The first such period. Following the failure to give notice three years later, prior to the first three-year anniversary of the commencement date, there was a, and I'm reading again, a non-exercise of the right of first refusal in respect of all blocks for a second, therefore two consecutive periods of three-years. Now that's the best I can do in terms of the language, and that was the interpretation of course that found favour with the Court of Appeal.

Now the rest of those submissions are all set out, and I deal with the other matters relied on by the appellants in their written submissions, so that can be taken as read. I do want to refer to – I deal also, I'm conscious of the time, I deal with the criticisms of the Court of Appeal judgment, the response to that, that's all set out in the written submissions and I rely on that. Page 12 at the bottom I do invoke the contra proferentem rule if necessary. That's to say if there is a genuine ambiguity so that the clause could be interpreted either way, and I submit that in effect the contra proferentem rule is available and can operate as in effect a tiebreaker mechanism where there is a genuine ambiguity and if applied, as I say in my paragraph 54, page 13, it resolves ambiguities not only against the interest of the person who prepared the document in which the clause appears, or it resolves them against the person for whose benefit the clause operates, here the Savvies.

WINKELMANN CJ:

Isn't there a difficulty with the submission though, Mr Harrison, which the amendments to the clause were at your clients' instigation?

MR HARRISON QC:

I beg your pardon?

WINKELMANN CJ:

Weren't the amendments to the clause at your clients' instigation, so it's hard to see how you can rely on contra proferens?

MR HARRISON QC:

Parts of the clauses are the original template agreement and parts were introduced during negotiations, but if we're going to get into the drafting and negotiating history then of course perhaps you can do for the purposes of the contra proferentem rule. My answer would be Goldridge was the one pushing for the inclusion of an option to purchase, so in that sense, even in terms of the drafting, Goldridge was the party proferens against whom the interpretation should be decided. But that is why I have in paragraph 54 emphasised the words "or against the person for whose benefit the clause operates", so regardless of who proffered the clause Savvies here are the party proferens because they are seeking the benefit of the clause and seeking that its benefit be greater than would be the case under the competing interpretation.

Now I footnote the source of that in my paragraph 33, which is Burrows, Finn and Todd, which is in the bundle of authorities. Burrows, Finn and Todd, as my footnote 33 notes, for that precise proposition, the one I've highlighted in bold, about against the person for whose benefit the clause operates, they cite two English Court of Appeal cases, *Nobahar -Cookson v The Hut Group Ltd* [2016] EWCA Civ 128 and *Transocean Drilling UK Ltd v Providence Resources PLC* [2016] EWCA Civ 372, and they are in the electronic bundle I supplied as my tabs 9 and 14, so there's authority for that. Of the New Zealand cases the leading, or the most extensive discussion of the

contra proferentem is *DA Constable Syndicate 386 v Auckland District Law Society Inc* [2010] NZCA 237, [2010] 3 NZLR 23, which is in my bundle at tab 1. That confirms the proposition that the rule applies outside the sphere of insurance contracts and contains a helpful discussion, and *DA Constable* was cited with approval by this Court in *Firm Pl 1 Ltd v Zurich Australian Insurance Ltd* [2014] NZSC 147, [2015] 1 NZLR 432. So that's a quick survey of the jurisprudence range of the rule and we rely on it for the reasons I've outlined if necessary.

So I go on now to the second issue, which is the legal effect of the two prior judgments, and I take time to note that the context in which this issue arises, particularly the way in which the Savvies responded to the, this is my paragraph 58, the 20 December 2010 notices of termination, they forthrightly said, and never wavered form, rejecting the respondents' right to terminate and proclaiming that the clients would continue to act on the basis that the agreements remain on foot. Then my learned friend took you to this, the agreed extension. The terms of that are set out and at the bottom of paragraph 60 on page 15 I say that with the extension in place there was an independent contractual right to give notice of exercise of the purchase options. Now my learned friend claims that what we're saying here is that there was a separate contract. Nothing, that I argue, turns on whether it was a separate contract or a variation. My only point is that it was a legally – it was an extension that was legally binding on the respondents. They could not have got out of it. They had bound themselves to accept a notice of exercise of the purchase option up to 1 May 2013.

WINKELMANN CJ:

They hadn't bound themselves to accept it, they'd bound themselves not to take the point that it was late.

MR HARRISON QC:

No they extended –

WINKELMANN CJ:

Well they weren't going to supply the grapes in response to it, were they?

MR HARRISON QC:

I'm not prepared to accept that for one moment. The position was there was an approaoch by the Savvies saying we'll give notice but it's better all round, given the ongoing litigation, if we agree to extend. There was no statement from the respondents, well if you give notice we'll disobey it. At this point in time they, when this was agreed, the Savvies had a High Court judgment in their favour. They initiated the approach. All I'm saying is that obviously contingent upon the outcome of further appeals, and that was how it was expressed, the respondents bound themselves contractually, whether by variation of the GSAs or by separate contract, they bound themselves to accept notice up to 1 May 2013, and so then –

GLAZEBROOK J:

But they didn't, just to be clear, they didn't bind themselves to be bound to perform that unless they were told to by the Court on appeal.

MR HARRISON QC:

They bound themselves to do what was asked of them.

GLAZEBROOK J:

Well, did they though because it was subject to the outcome of the appeal and if the outcome of the appeal to this Court had been as it was in the Court of Appeal then they certainly weren't binding themselves to do it no matter what the Court said, were they?

MR HARRISON QC:

Of course, yes. That's what I thought I said a minute earlier. That is certainly the case. My point is that on the Savvies' premise that the agreements had been wrongfully repudiated, on their premise my clients were bound unless the ultimate outcome was in my client's favour. So that was a contractually binding thing and not only was it contractually binding it's binding effect was

not altered by the first Court of Appeal judgment. It remained binding in the terms that this was the agreement that applied while the parties went through as much appellate litigation as they chose to.

Now the position then is that once that agreement was in place there was literally no correspondence, certainly no statement from the respondents, to suggest that was not an arrangement that still applied. That is to say, despite – the respondents didn't, once the Court of Appeal judgment came out, say, "All bets are off. You've lost, so there. You can't give notice." There was simply silence on both sides and this can be seen from volume 2.2 of the case on appeal where you've got the exchange in April 2012.

WINKELMANN CJ:
What page, Mr Harrison?

MR HARRISON QC:
It starts at 2.1, 0630 that's the approach applying for the extension of time. Then all that is done and dusted by page 0637, the clarifying letter of 1 May 2012, and the next –

WINKELMANN CJ:
Sorry, what was the page? I can't –

MR HARRISON QC:
Page 0637. Bundle 2.1, page 0637. So my learned friend took you through this correspondence. All I'm saying is that that's the correspondence in April/May 2012 where the extension was grant. Then the next event, other than the conduct of litigation itself, was the Hesketh Henry letter after the Supreme Court judgment of 18 November 2014 which is at page 0638. So nothing happened. There was no conduct other than engagement in litigation on the part of either the appellants or the respondents during that period leading to any possible conclusion that that extension agreement that I've referred to in paragraph60 was not in full force and effect. So that's the position there.

Then I go through the findings and the evidence from page 15 on. Paragraph 62, Justice Gordon's finding in reliance on the Savvies' own evidence that they did not refrain from giving notice of the exercise of their option prior to the deadline by reason of any act, omission or representation on the part of Weta or Tirosh. They did so on the basis of their assessment of the legal position.

And then as I note in 63, the evidence that Justice Gordon is referring to is actually set out in the Court of Appeal judgment. The Court of Appeal confirms Her Honour's findings and says, as quoted at the top of page 16, "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." So there's concurrent factual findings on these issues and as I note at 35 that the Court of Appeal looked at the "somehow prevented Savvy from exercising the options such that it could be seeking to take advantage of its own wrongdoing." That was not the case.

Now can I just step back from the various alternative ways that the appellants have put this second question argument and some of the estoppel and other related arguments that have been raised in debate. There are some reasonably profound questions of principle underlying all this but they've scarcely been touched on. The first is that what we have is a wrongful repudiation which the innocent party has rejected, claiming to hold the wrongdoer party to the contract. Now that is a particular paradigm contractual scenario from which established consequences flow and to which authorities dealing with situations where the innocent party accepts the repudiation and treats the contract as at an end. The remedial consequences of the first scenario are quite different from the second scenario encapsulated in the well known proposition that an unaccepted repudiation is a thing writ in water, and so this takes us back, and we can't avoid facing up to, the House of Lords decision in *Fercometal* which as I say in my paragraph67 is actually directly on point and –

WINKELMANN CJ:

Is there a difference though between this situation and others in which the thing that's been repudiated is in fact the right to purchase the option? So the very thing that's been persisted, that the respondents were successful in the Court of appeal finding, was that there was no right to purchase. So it's a…

MR HARRISON QC:

Well, what they said was that the contracts had been validly terminated. Well…

WINKELMANN CJ:

Well, the only thing of substance in this contract was the right to purchase.

MR HARRISON QC:

If the contracts are validly terminated then the right to purchase had gone. But the first thing, the starting point for analysis has to be that this was a wrongful repudiation which was not accepted by the innocent party so that the innocent party is saying as per *Fercometal*, "I am holding you to your bargain," and the *Fercometal* principle, and I think I really am better taking Your Honours to this, *Fercometal* is at tab 6 of my bundle of authorities. Page 99 of the volume or the paginated electronic volume. And as I said, *Fercometal* is actually on its facts directly on point. What you had was a charter party which gave the charterers an option of cancelling the charter party should the chartered vessel not be ready to load at a particular point in time. Now what happened was that, and this can be seen from Lord Ackner's speech at page 795, if I can use the numbering of the report, the charterers, being advised that the vessel wouldn't be available to load in time, gave notice of cancellation and as the report says at page 796, just below C, that was premature. The charterers had to wait until in fact the vessel did not present itself to load. So Lord Ackner says, "It is common ground that the action of the charterers in giving the notice purporting to cancel the contract was premature." It was anticipatory breach and repudiation because the right of cancellation could not be exercised until the arrival of the cancellation date, and the repudiation was not accepted by the owners. That's at C to D.

Then the vessel arrived, claimed it was ready to load but was, in fact, not ready to load. So the charterers gave a second notice of repudiation and the argument was – so gave a second notice of cancellation, rather, and the question was whether they were precluded from relying on their second notice by reason of their earlier wrongful repudiation, and the discussion of principle is primarily at page 799C, "The innocent parties option." "When one party wrongly refuses to perform obligations, this will not automatically bring the contract to an end. The innocent party has an option. He may either accept the wrongful repudiation…and sue or may ignore and reject," and then there's a quote from Chief Justice Cockburn at F to G.

WINKELMANN CJ:

What page are you at, sorry, Mr Harrison?

MR HARRISON QC:

Page 799 of the report, 110 of the electronic volume. So at C, the innocent party's option, and then there's a fuller discussion of the point and at F Lord Cockburn is saying but if the innocent party holds the wrongful party to contract, "In that case he keeps the contract alive for the benefit of the other party as well as his own; he remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised…but also to take advantage of any supervening circumstance that would justify him in declining to complete it," and so then at the bottom of the next page, page 800 at G there's a reference to Lord Asquith's comment about an unaccepted repudiation. Then over the page, we go to page 805 D, "When A wrongfully repudiates his contractual obligations –

GLAZEBROOK J:

Sorry, can you give me the page again?

MR HARRISON QC:

805 D, page 116, a few lines in that middle paragraph, "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." Now then there's the qualification on the *Fercometal* principle as I put it, those propositions, and it starts from F onwards. The suggestion by way of a new point was, "That the charterers' conduct had induced or caused the owners to abstain from having the ship ready prior to the cancellation date." And Lord Ackner says it's open to A, the innocent party, "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, A acts on that representation, then clearly B cannot be heard to say he is entitled to exercise the right." So in effect there are exceptions, relevantly the estoppel one just mentioned and the preventing performance one which has featured in discussions of the *Fercometal* principle.

Now my point is this. In the case where there is a wrongful repudiation which is not accepted, the *Fercometal* principle governs the contract is alive for the benefit of both sides and the balancing exceptions are listed in Justice Gordon's judgment in a passage from a text book which I have supplied, Ian Bassett's texts, and that is what I refer to in my paragraph 67, but the exceptions balance out, achieve the balance whereby the party wrongfully repudiating does not take advantage of his own wrong. That's the proposition.

WINKELMANN CJ:

So none of these cases –

MR HARRISON QC:

The general legal proposition is the party in the wrong cannot be allowed to take advantage of his wrong as against the innocent party. The *Fercometal* principle with its exceptions is the balancing mechanism to achieve that in respect of the scenario where the wrongful repudiation is not accepted. We don't need anything more than that.

GLAZEBROOK J:

I just wondered what exactly was your client taking advantage of in the contract?

MR HARRISON QC:

Well, nothing.

GLAZEBROOK J:

Well, then I don't quite understand why we're within that principle, because what you have is the repudiation saying I'm not going to perform anything. Leave aside, because I think that's a different issue, the letters of the 12th of April. So if your client says, "Well, I'm not doing anything with this because I think the contract's at an end," then there isn't much point in exercising an option that your client said they're not going to fulfil, and what then is the new thing that you're taking advantage of because the appellants have said, "Well, we think the contract's still on foot."

MR HARRISON QC:

Well, my short answer is nothing, but the appellants are arguing that there was an own wrong and they haven't quite formulated what it was but it seems to be –

GLAZEBROOK J:

Well, the wrong is saying, "I'm not going to perform anything," on your client's part, isn't it? "So whether you exercise the option or not I'm not selling you these grapes," and I'm leaving aside that 12 April letter.

MR HARRISON QC:

We haven't. We never actually said that, whether you exercise. We simply cancelled and we –

GLAZEBROOK J:

Well, clearly if you cancelled then whether – if you've got a cancelled contract and no contract then you're obviously saying you can't exercise the option, aren't you?

MR HARRISON QC:

With respect, let's be exact here. We did not say, "If you give notice we will not perform." What we did was a couple of years earlier give notice of termination which at one stage was held to be valid notice but ultimately three/two in this Court was held not to be. We didn't say literally in these terms, "Further down the track if you give notice we will not accept it." All we did was, when asked to agree to a year's extension gave it. So let's, with respect, be accurate about what the respondents actually said. They gave their original notice and then they litigated to the best of their ability in favour of their position that the termination was valid. Came out against them at the end but that's it. So what I'm saying is to the extent that the appellants seem to be wafting estoppels by conduct or own wrong, there's no own wrong other than, I don't accept, other than a postulated continuation of the litigation and Court of Appeal outcome in their favour. So if you look at it just from –

GLAZEBROOK J:

So what was the notice of termination then? That has to have been the wrongful repudiation, doesn't it?

MR HARRISON QC:

No, the notice of termination stated that the contracts were at an end pursuant to a provision of the contract which said that if one contracting party went into liquidation there was a right of termination. Goldridge, who was the nominated contracting party, had gone into liquidation and then the litigation, the way it developed and ended up in this Court, was deciding whether

Goldridge had had assigned to the Savvies the presented balance or there had been a novation of contract so that the Savvies had replaced Goldridge. So that was the issue. It was always around the exercise of a contractual right of termination and basically had it not been for the finding that there'd been a novation that would have been a valid exercise of the right of termination. But they never said, "We are refusing to provide grapes." They said, "We are giving notice of termination because the opposing party's in liquidation."

WILLIAM YOUNG J:

A purported cancellation can sometimes be treated as repudiation. Sometimes it's not. A person is entitled to stand on rights and take an incorrect position without necessarily being held to have repudiated the contract which is what you're saying, although, you know, it may. It probably all depends.

MR HARRISON QC:

Yes. What I'm trying to address –

GLAZEBROOK J:

So I suppose if it's not a termination, if it's not a repudiation, I have difficulty seeing why we're looking at, I'm not sure how they pronounce, *Fercometal* or *Fercometal*, I suspect.

MR HARRISON QC:

Well, it was a cancellation which this Court ultimately held was a wrongful repudiation. I mean, I –

WINKELMANN CJ:

It was a repudiation which was not accepted, wasn't it?

WILLIAM YOUNG J:

We held it was a purported cancellation which wasn't effective. I don't think we described it as a repudiation.

WINKELMANN CJ:

Well, a wrongful cancellation is a –

MR HARRISON QC:

I'm using the terminology by way of saying a cancellation which is held to be wrongful is in effect a repudiation and a wrongful –

WILLIAM YOUNG J:

Well, it may be.

MR HARRISON QC:

But that's the sense in which *Fercometal* uses it where you cancel and you had no –

WINKELMANN CJ:

It's a repudiation which may or may not be accepted.

WILLIAM YOUNG J:

Well, it may not even be a repudiation. That's the pedantic point I'm taking. It probably is here.

MR HARRISON QC:

Once the cancellation is rejected by what turns out to be the innocent party, in terms of the *Fercometal* principle it's a repudiation. Now my only point is this. The appellants are casting around for some kind of principle of equity or overarching principle based on some kind of moral judgment that wrongdoers should not profit. We say there was no act we did. So in terms of the physical –

GLAZEBROOK J:

No what, sorry? I just missed what you said. There was no?

MR HARRISON QC:

There's no action we took.

GLAZEBROOK J:
Okay, thank you.

MR HARRISON QC:
I mean in terms of the physical analysis, and I'm coming to the legal effect of the judgment in just a moment, I'm trying to set the scene, in terms of the physical analysis there is quite simply nothing we did to prevent the giving of notice by the agreed extended date. Nothing at all. Nothing. We didn't mislead. We didn't represent. The under – leaving aside the Court of Appeal judgment under *Fercometal* the contract, even though it was a wrongful repudiation, the contract enured for the benefit of both parties so we could take advantage of the proviso if it means what we say it did. We were entitled to do that. Having held us to the contract, the Savvies had to give notice in terms of clause 2.2. they failed to do so. The contract for our benefit enabled us to say no further notice could be given. Now that's the position. Now what about the issue of – and I deal with *Fercometal* and the authorities on dealing with it at the top of page 17. I ask what they're arguing here and don't get any particular clear answers. And then, at the bottom of page 18, I look at issue D. This is the Court of Appeal's issues, Your Honour, the Chief Justice. Issue D, and I outline that.

Now I think if I can take my submissions as read, I'm conscious of the time, I think the best way I can add value is actually spending a few minutes on some of these authorities because the discussion is actually wider than you might think in terms of plaintiffs casting around for a remedy when a judgment at first instance or intermediate appeal has gone against them and then they ultimately win. So it's not just saying we want damages. A whole range of remedies, equitable and otherwise, have been canvassed and rejected and this will take us full circle to the old Privy Council decision that my learned friend referred Your Honours to.

So if we start with *Hillgate* and we go to tab 12 of the appellant's bundle, a short judgment but obviously a very eminent Judge, Sir Nicolas Browne-Wilkinson as he then was. So what happened there was

tenants were made the subject of a forfeiture order so that the landlords went back in. That was at first instance. On appeal to the Court of Appeal the forfeiture order was overturned so that the tenants had been in the right all along, the landlord in the wrong all along. As noted in the judgment there was then a claim for damages against the landlords, a strike out application by the landlord and the Vice-Chancellor instead reframed it as a preliminary point of law which appears at page 66, column 1, just above D. His Lordship declined to deal with it by way of striking out, directed a preliminary issue and it was this. "Can an action for trespass, and/or breach of covenant for quiet enjoyment and/or derogation from grant, be maintained by a tenant against his landlord," et cetera.00

So then there's a discussion of *Official Custodian for Charities v Mackey* [1985] 1 Ch 168 which is really the only authority that the appellants attempt to rely on and I'll come back to that. But basically at 66, column 2, line J, the Vice-Chancellor rejects the interpretation of *Official Custodian v Mackey* which the appellants are urging on Your Honours as being what that case means. So the Vice-Chancellor is saying no, the case doesn't stand for that proposition, being the proposition that you're invited to draw from *Mackey* and I'll come to that. So His Lordship is saying, "I do not think," that the Judge in *Mackey*, this is at J, "is saying that if the House of Lords should have reversed the Court of Appeal decision there would, during the time in question, never have been any title or right or lease in existence during the intermediate period…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." Went to the Court of Appeal. 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 the true legal effect."

So then, down the bottom of that column, His Lordship looks at the other possible grounds. That's quiet enjoyment and derogation from grant. That's at the paragraph beginning, "Similarly," and over the page he says at the top, "Since the landlords were acting under an order of the Court, any interruption

was lawful at the time it took place and cannot retrospectively be made unlawful. Similarly, on derogation from grant, in my judgment the doctrine of derogation from grant cannot apply to acts done pursuant to a Court order. If the case were otherwise, there would, in my judgment, be very great confusion. Please must be able to act in pursuance of a Court order without being at risk…Public policy requires it. I am not in any sense casting doubt on, or seeking to cut down, those cases to which I have been referred which indicate that where a judgment is reversed, the objective of the Court should be to put the litigants back into the position in which they should all along have been had the law been properly appreciated," such as the Privy Council decision. "Those cases are concerned," and this is my point, "Those cases are concerned with reimbursing to the parties moneys lost as a result of the execution of the judgment by the payment of money. They are not cases, such as the present, in which it is sought to found a separate cause of action on the carrying out of the Court order." So there's a special category of restitution where under the judgment below that's later overturned money is paid over, and that passage and the Privy Council and other cases I'll take you to says there's a restitutory remedy if you're forced to cough up under a judgment which is later overturned, but that's the extent of the Court's remedial par.

Now there are two other decisions which again illustrate my point, approve *Hillgate House* and show how in different ways people, litigants in the position of these appellants, have tried to craft a remedial jurisdiction based on the proposition that loss has been suffered by an intermediate judgment later overturned.

The first is *Smithkline Beecham PLC v Apotex Europe Ltd* [2007] Ch 71 and that's at tab 2 of my bundle – sorry, it isn't. It's at tab 12, sorry.

WINKELMANN CJ:

What page?

MR HARRISON QC:

Page 118. I'm taking you to these because I submit these are actually very instructive cases in terms of grappling with this interim effect of judgment issue. Now *Smithkline Beecham* was pretty complicated but in essence Smithkline had brought a claim for infringement of patent and obtained an interim injunction which was later overturned. They had given what we call an undertaking as to damages and what in this judgment is called a cross-undertaking. "Cross-undertaking" is simply a plaintiff's undertaking as to damages. The interim injunction stood until the substantive hearing where the plaintiff, Smithkline Beecham, failed substantively. So the question was what recovery was available at the suit not only of the defendant, and this is where it becomes complicated, but two Canadian pharmaceutical manufacturing companies linked with the defendants, Apotex, who were not parties to the litigation, and so it was claimed that beyond the scope of the undertaking as to damages there was a remedial jurisdiction to deal with the loss suffered by the Canadian companies.

So that was the issue and the attempt was made to frame it in restitution, damages and estoppel and every which way it was framed the claim was unsuccessful.

WINKELMANN CJ:

Do we really need to go through all these cases, Mr Harrison, because I think we've got the point?

MR HARRISON QC:

All right. But I just do want to take you to, if I may, the proposition at page 36 which is the *Hoffmann-La Roche* Lord Diplock proposition. This relates to interim relief.

GLAZEBROOK J:

Of? 36 of what?

MR HARRISON QC:

Paragraph36.

GLAZEBROOK J:

Of *Smithkline*?

MR HARRISON QC:

Of *Smithkline*. This is the Lord Diplock proposition from *Hoffmann-La Roche*. "If [the plaintiff] should fail [to succeed at trial] the defendant may have suffered loss as a result of having been prevented from doing it while the interim injunction was in force; and any loss is likely to be damnum absque injuria for which he could not recover damages from the plaintiff at common law." So no damages. Then there was an attempt to raise restitution, paragraph40, to claim a general power of the Court to remedy the situation, and there's a careful examination of that at paragraph50. *Hillgate* is referred to and at page 89, first half, basically the Court is saying the only restitutionary remedy, the only equitable remedy, is where moneys are paid over under the later overturned judgment and the Court will order restitution and interest thereon which is the proposition in the Privy Council case. So that's –

GLAZEBROOK J:

Sorry, could you just give me the paragraph number that you were referring to? Is that paragraph 38?

WINKELMANN CJ:

51. Is it 51?

MR HARRISON QC:

Yes, and 48 on the restitutionary remedy. 50 is *Hillgate House*. And really I mean it needs a careful reading, but the ultimate proposition appears at the top of page 97 of the report. It's within paragraph73 but it's at B on page 97. "It is settled beyond doubt that no action lies, save for very limited exceptions in the nature of abuse of process, for recompense for damage caused by litigation itself."

WINKELMANN CJ:

Yes, but we're not considering this Mr Harrison, whether a cause of action arises because a wrongful judgment has been given.

MR HARRISON QC:

With respect, we are considering it because what the appellants are saying here is that the Court of Appeal judgment caused them loss for which the respondents, as the party who obtained it, are answerable. There is a claim for damages and the alternative claim is a kind of equitable claim, extend the time. So damages or equity, the theme of these cases is that there is no right of redress beyond the narrow, nor estoppel, there's no right of redress beyond the narrow repayment of what you've paid over pursuant to the overturned…

GLAZEBROOK J:

Can I just give you an alternative scenario which I think is the alternative argument of your friend? Is it in fact the damages arise from the wrongful repudiation so that in fact what you have, and let me take it to a totally different contract, so you have a contract that you will supply a dozen eggs to somebody for the next five years? After the first supply the party who is supposed to supply the eggs says, "Well, I'm not going to do it any more," for whatever reason, "I'm repudiating the contract." It takes some time to get that overturned and the other party says, "Well, I still want my eggs but I don't want the rotten eggs that have been sitting there for the time it's taken this to – and in fact you can't even supply the rotten eggs because you can't supply them on time and I want damages for that, and I also want you to continue supplying them according to the contract in the future." So why can't you just look at this as being, well, you wouldn't have actually supplied those in any event especially because the Court of Appeal told you you didn't have to and therefore now, because it's turned out to be a wrongful repudiation, you have to supply, you have to pay damages?

MR HARRISON QC:

The two cases are analogous. In your eggs case I am assuming that in effect there was a wrongful repudiation that wasn't accepted. There was then an

obligation to supply the eggs even of there was an intermediate judgment that said not. The obligation to supply the eggs in kind only arises once the litigation position becomes clear. In the meantime there is a continuing legal obligation to supply the eggs and a right to sue for damages. In our case there was no right to a grape crop. There was no continuing right to a grape crop throughout. The purchase right only accrued on the giving of notice.

WILLIAM YOUNG J:
Well, effectively, that's slightly more complex than this but the real contract is formed when the option is exercised.

MR HARRISON QC:
I'm sorry, when the?

WILLIAM YOUNG J:
Although it's called a grape supply agreement it's not really. It's actually an option to enter into a grape supply agreement.

MR HARRISON QC:
Yes, and I cite –

WILLIAM YOUNG J:
And that contract grape supply agreement option was never exercised, from which it might be thought that there isn't a grape supply contract.

MR HARRISON QC:
But in one sense there's a contract but it isn't a contract for the supply of grapes. So there's no –

WILLIAM YOUNG J:
It'd be a contract to give an option. I mean options are contractual. But the real contract here is the contract to supply the grapes once the option is exercised. That's the contract the Savvy companies want to insist on.

MR HARRISON QC:

Yes, and we've never breached or, at least, during the period down to the first Supreme Court judgment we were never in breach of an obligation to supply grapes because notice had never given to trigger that obligation.

WILLIAM YOUNG J:

And you say the time for accepting the option, exercising the option, expired?

MR HARRISON QC:

Well, we do say that but this is –

WILLIAM YOUNG J:

Yes, so there's no contract. It's a simple argument.

MR HARRISON QC:

Yes, but that's under the interpretation point. Here –

WILLIAM YOUNG J:

Sorry, but this actually runs into this argument. I'm not aware of any case where the right to accept an option has been varied because one of the parties has been saying, "Well, I don't agree I'm subject to an option."

MR HARRISON QC:

Quite, or indeed that there's an intermediate Court decision that confirms that. I mean the –

GLAZEBROOK J:

So the argument is even if you say there's a contract which contains and option and if your client says, "I'm not, I don't agree that's a contract," the contract's at an end, but because – well, I'm trying to work it through actually because I can't –

WILLIAM YOUNG J:

So the option's never exercised.

GLAZEBROOK J:

– because you must have repudiated that and therefore you're not subject to damages if in fact the person would have exercised the option had you accepted that the contract was still on foot? Well, they somehow have to exercise the option knowing that your clients will say, "I'm not going to sell any grapes under it because I don't recognise there's a valid option still available."

MR HARRISON QC:

They have to exercise the option under the *Fercometal* principle which says if you reject a wrongful repudiation and hold the wrongful party to the contract, the contract continues for the benefit of both parties. That's why the charterer was allowed –

GLAZEBROOK J:

Where's the benefit of both parties in this if you've said – I mean I can understand it in the case where you've got a charter party and then a later issue but that's why I said to you where's the later thing here that wasn't done that you're now relying on, because the very thing you said was there's no option, therefore nothing to exercise, your client said.

MR HARRISON QC:

We said that we'd validly terminated and we did not, I'm repeating myself, we did not actually say anything about the non-existence of an option. It's implicit but that's not what we said. This is the position, in my submission. Leaving aside the effect of the Court of Appeal judgment, the first Court of Appeal judgment, the Savvies were holding the respondents to the grape supply agreements. They had to give notice by a deadline or their options lapsed. We didn't do anything to prevent them or represented they couldn't give the notice. In fact, what we did was expressly agreed when they could. So that was what was in place between the parties. Under *Fercometal* they can and should have given timely notice of option. Now, secondly, and coming back to the –

GLAZEBROOK J:

But you would've said, your clients would've said, "No, because there isn't an option, because the contract's at an end."

MR HARRISON QC:

What we might have said or would've said if notice had been given is, with respect, entirely irrelevant here. Notice wasn't given. End of story. What we're dealing with is not the second cause of action. Can I just return us to the pleadings? The second cause of action says we duly gave notice after, immediately after the Supreme Court judgment. We had three chances. We duly gave notice on the third chance. We claim damages. We claim to be entitled going forward but we claim damages from and including the 2016 harvests. So damages claim starting in 2016. The first cause of action says we want damages from 2014 and the reason we want damages from 2014 is that we would have given notice three years earlier, or two years at the agreed extended date, but the Court of Appeal judgment prevented that. That's what's at issue here. So they say damages from 2014 harvest because we were stopped and it only arises, well, it arises in the alternative as my learned friend accepted. But then there's a twist on that. They also say, well, if not damages, there's an equitable extension of time because of our wrongdoing, and I'm looking at the equitable extension of time principle here and saying that the authorities on the interim effect of an adverse judgment don't permit any such redress, whether in damages or based on the effect of the judgment as distinct from any physical act the respondent's done. That's what *Hillgate House* says. That's what *Smithkline* says and that's what the other authority I've been wanting to take you to –

WINKELMANN CJ:

So wrapping it up though, Mr Harrison, you say that the judgment can't create rights?

MR HARRISON QC:

It can't create a right to redress. The wrongful judgment can't do that.

WINKELMANN CJ:

Yes, the wrongful judgment, and there was nothing beyond that in the way of the respondent's conduct to create an estoppel?

MR HARRISON QC:

Correct, and can I just go to the bottom of my page 22? So we've got *Hillgate House*, we've got *Smithkline Beecham* –

GLAZEBROOK J:

Can I just check before? So my point and the point that actually was obliquely made, that it wasn't any point exercising the option because it wouldn't have been, you're saying that is not available on the pleadings, is that right?

MR HARRISON QC:

Well, no, I'm saying that it's irrelevant whether it would have been pointless. It's not an issue that was explored in evidence. I don't think it was pleaded. The right, if –

GLAZEBROOK J:

But it's very hard for you to say, "Our client said there wasn't a contract at all but actually we would've accepted the exercise of the option and the obligations under it."

MR HARRISON QC:

Look, if the appellants had given notice by the agreed extended date then they had a right to damages for the interim period of the Court of Appeal judgment once the Supreme Court reversed that judgment with retrospective effect. They had a right to damages. No problem with that. That's –

GLAZEBROOK J:

But you say they had to give the notice in order to do that?

MR HARRISON QC:

Yes, because otherwise there was no obligation to supply grapes.

GLAZEBROOK J:

And what do you say about the argument that says we don't have to tender the settlement money if we know that you're not going to accept it? You say it doesn't apply to options because there's something funny about options or what?

MR HARRISON QC:

Well, the tender cases turn on a similar analysis to the *Fercometal* exceptions. Has the party in the wrong stated that tender would be futile or prevented a tender? That's the principle that comes out of the tender cases, not –

WILLIAM YOUNG J:

You're saying that we are not – your clients never said it's a waste of time exercising the option. What they might have said is exercise the option if you like but you'll have to litigate to enforce it. I mean that's the worst that could be said against them, isn't it?

MR HARRISON QC:

Well, we actually said, and this is the exchange of correspondence –

WILLIAM YOUNG J:

Yes, I know what you've said.

MR HARRISON QC:

Yes.

WILLIAM YOUNG J:

I mean we've gone through it quite a bit.

MR HARRISON QC:

Yes, quite.

WILLIAM YOUNG J:

But I mean that worst that can be said of them is that they said, were implying, "It's fine for you to purport to exercise the option. In all reality you'll probably have to litigate if you want to enforce it."

MR HARRISON QC:

What both parties said is we're already litigating.

WILLIAM YOUNG J:

Yes, and had they exercised the option then your client would have been liable for damages for two…

MR HARRISON QC:

Following the Court of Appeal – following the Supreme Court judgment. I'm not trying to escape that proposition, but the fact is they didn't and under *Fercometal* they had to.

WILLIAM YOUNG J:

And there might have been a bit of argy-bargy about what would happen in the meantime while the Supreme Court appeal was pending. But that sometimes happens in commercial cases.

MR HARRISON QC:

Yes, there wasn't any argy-bargy because they didn't give the notice and to assume that there would have been or it would have taken a particular form is, with respect, unwarranted. So the –

WINKELMANN CJ:

All right, so I think we've got that –

MR HARRISON QC:

I just wanted to refer to the other case, English case, which is referred to at the bottom of my page 22 which is *Brightsea UK Ltd v Drachs Investments No. 3 Ltd* [2012] EWCA Civ 516 and it's actually worth reading from

paragraph 56 on, not just at 65. I won't take Your Honours to that but it's similar to *Smithkline*, an analysis of whether there is any remedial jurisdiction to deal with a wrongful judgment, damages or anything else, and the answer is only by way of the restitutionary part order, what's been paid across to be refunded with interest.

WINKELMANN CJ:
What case was that?

MR HARRISON QC:
This is at the bottom of page 22 of my submissions, *Brightsea*.

GLAZEBROOK J:
Note 66.

MR HARRISON QC:
It's my tab 2, page 27, and it's at paragraph 56 on. I can take Your Honours to it if you like but…

WINKELMANN CJ:
No, that's all right.

MR HARRISON QC:
So there's the three judgments all going the one way. I deal with *Official Custodian for Charities v Mackey* at page 24. The Savvies' submissions quote from this judgment and absolutely miss out the critical part. At page 20 of the Savvies submissions they quote from this judgment in two paragraphs with dots to show something is missed out. Well, what is missed out is precisely against them and that's the point when I discussed the Vice-Chancellor's dealing with this case in his judgment in *Hillgate* it's not support. So the Savvies basically have no authority in support of their proposition, and at page 26 we're talking about the nature of the options in this case. Well, at paragraph 105 there was an earlier Court of Appeal

decision, not between these parties but it analyses helpfully the notice, the kind of option we've got.

So there's various other grounds here raised and at the end of the day I suppose what we've got is, and I'm going to try and wrap this up as quickly as I can, what we've got is in terms of the appeal process and the idea that somehow the respondents have committed an own wrong of some kind by pursuing the litigation which they are taking advantage of, bear in mind what happened was that the respondents pursued an appeal to the Court of Appeal but pursuing that appeal did not itself cause the Savvies any injury or loss. It's the Court of Appeal ruling that then occurred but there was no act following the Court of Appeal ruling on the part of the respondents, nothing shown to have occurred. The next act was engaged in by the Savvies and that was appealing to this Court. So there's no own act on which the, to which the respondents, which can be attributed to the respondents.

Secondly, and just dealing with the *Ingram v Patcroft Properties*' argument, I analysed *Ingram v Patcroft* in some detail, starting at page 29 of my written submissions. This is again the own wrong argument. My submissions is that *Ingram* doesn't lay down a blanket own wrong principle of redress. It's concerned with the opposite of the *Fercometal* situation which is where there's a party who breaches a contract and the innocent party doesn't say, "I am holding you to the contract," or indeed in that case, "I am accepting your breach as a repudiation and terminating it." The wrongdoing by the party in the wrong occurred right at the outset before the contract was affirmed or terminated by the innocent party and that's the analysis that *Ingram* was concerned with and I develop that.

Now, so I argue in the closing part of that there's no overarching principle, certainly that none that operates to expand the categories of exception to the *Fercometal* principle in a case such as the present. Indeed, in *Ingram* v *Patcroft* there is a discussion of categories of own wrong at page 447, I think it is, of the judgment which is quite interesting. Page 447, tab 13. This is Justice Priestley in the Australian case. A few lines in on

page 447. "The purpose of the common law rule requiring that a cancelling be ready and willing to perform the contract…was to ensure the party in question could not benefit from its own wrong," and then there's one illustration in the quote of a party which could be seen as benefiting from its own wrong, "If it seeks by cancellation to deprive the other party of the benefit of the contract in circumstances where the other party's breach," for which the cancellation is occurring, "is a direct result of breach committed by the party seeking to cancel the contract. … A party could also be seen as benefiting from its own wrong where it is unable or unwilling to perform its own obligations under the contract and seeks to avoid liability for its own breach by cancelling the contract." So the own doctrine just doesn't apply.

WINKELMANN CJ:
I think that's a quote from Justice Glazebrook, isn't it?

MR HARRISON QC:
I'm just saying the own wrong doctrine simply doesn't apply in the *Fercometal* scenario where the innocent party is holding the wrongdoer to the contract.

And those are my submissions.

WINKELMANN CJ:
It's the quote at the top of page 447 you're relying on?

MR HARRISON QC:
Sorry, Your Honour, could I have that again?

WINKELMANN CJ:
Is it the quote at the top of page 447 of *Ingram* that you're relying on?

MR HARRISON QC:
Yes, I'm just saying those are illustrative of what this "own wrong" rule comprises.

WINKELMANN CJ:

Yes.

MR HARRISON QC:

It's when you're in breach and your breach induces a breach by the other party.

WINKELMANN CJ:

I understand that. I just wasn't quite sure what –

MR HARRISON QC:

Yes, that's the passage. So unless I can be of any further assistance those are my submissions.

WINKELMANN CJ:

Thank you, Mr Harrison.

MR HARRISON QC:

Thank you.

WINKELMANN CJ:

Now I think we just have to – how long are your submissions in reply, Mr Jones?

MR JONES QC:

Ma'am, Ms Bryant and I discussed this last week and she will be doing the reply, if it pleases the Court, so…

WINKELMANN CJ:

All right.

GLAZEBROOK J:

And how long are her submissions going to be?

MS BRYANT:

I'll be with you no more than 10 minutes. Your Honours, I wish to touch very briefly on the issue of contra proferentem harm which was raised in my friend's submissions. A point that was already made by the Chief Justice was in relation to the changes that were made to this contract, essentially to introduce a lapsing right in relation to the options. As was pointed out, that was in fact a request of the respondents so to that degree it was a – they were the proferens for that purpose.

The other issue I wish to raise there, however, is in relation to the nature of the lapsing right itself which is, of course, a form of time bar. So it's a limitation which has been placed on a right. The *Nobahar-Cookson* case which is referred to in my friend's bundle, but only the electronic bundle, at number 9, makes it very clear that clauses of this nature which put a time bar or a time limitation are a form of exclusion cause and therefore the –

WILLIAM YOUNG J:

But an option that has to be exercised by a particular date.

MS BRYANT:

Yes, Sir.

WILLIAM YOUNG J:

That's not an exclusion clause.

MS BRYANT:

It's a –

WILLIAM YOUNG J:

If I give you an option to buy my house in consideration for a dollar, the option is to be exercised by the 1st of April, if you don't exercise by the 1st of April that's end of story. There's no exclusion clause. It's just a definition of the right.

MS BRYANT:

Sir, the question there would be whether or not this is a conditional contract for the exercise of right. So it's an option that takes the form of a conditional contract and that was the view that was taken by the Court of Appeal in the Savvy decision of *Savvy Vineyards 3784 Ltd v Arck Ltd* [2015] NZCA 534 or whether or not it is an option which is a collateral contract effectively not to withdraw a contract within a specific time period, but you've still got a time limit on that particular option that was introduced from the template agreement, if I may call it that, in the second draft of this agreement to say it had to be done by a certain time period, and if that particular line of argument doesn't find favour, Your Honour, I would point out also that because it was introduced by the respondent very much to add certainty to the contract, that was their desire, again it was something that was inserted for the benefit of the respondents there. It would be fair to say though, Your Honour, that the overwhelming tenor of both of the authorities on which the respondents rely is that in commercial cases of this sought contra proferentem will usually have a, it will be at the very bottom of the tools which are available to the Court for interpretation of a contract, precisely because it can be very difficult to decide who is the proferens and who is not.

While we're on the subject of options though, Your Honour, earlier you mentioned that this is, the GSA is a contract which could more properly be described as an option to enter into a grape supply agreement rather than a grape supply agreement itself. While that is true an option, of course, in itself a valuable form of property as well, so an option can be traded, an option has value, and an option can be impaired. In this situation if the parties had entered into an agreement similar to the agreement that was entered into in 2012 to defer until the completion of the Supreme Court judgment, and that judgment had come out, there would still have been an impairment of that purchase option. It would have gone from being an option that was available for seven years at that period down to five years. So there was a loss that was going to be suffered, in any event, even if that discussion had taken place, and that is an issue which needs to be taken into account when one is considering the point of damages. What the appellants have been arguing in

relation to their first cause of action is that the right to purchase, the option that they had, was impaired, prevented, they couldn't go ahead with it because of the circumstances that were in place at that particular time, so leaving aside the legal effect of what the Court of Appeal judgment had, there was a practical effect, what my friend described as a physical effect of the Court of Appeal judgment. The ability to sell the option was obviously gone. The ability to raise finance was also impaired, and there was no ability to put on-sale agreements in place. So if, for example, we've gone to the Supreme Court –

WINKELMANN CJ:

This seems to be a new whole line of reasoning that you're advancing here, which doesn't feature in any of the judgments below, the notion that somehow the asset was impaired. What we're really concerned with was whether the option should have been exercised to preserve your position, so I'm not sure how this point relates to that.

MS BRYANT:

Well yes Your Honour because the argument that was put forward was that the appellants were prevented from exercising the options by the Court of Appeal judgment. They were prevented from doing so because had they exercised the options or attempted to exercise by issuing a notice, the situation that they would have been put in was frankly untenable. They weren't going to be in a position where they could put their on-sale agreements in place, and if we had gone through the Supreme Court process, the hearing was in February, if a judgment had come out within a couple of months, the reality is is that the appellants in those circumstances would not have been able to meet their contractual obligations. So the ability of the parties, sorry of the appellants to proceed with the contracts, once the Court of Appeal judgment was out, was effectively at an end.

O'REGAN J:

Is there any evidence on that? On what they would have done if –

MS BRYANT:

Yes, Your Honour, there was. So there was a finding of fact, as my learned friend brought to you this morning, about the fact that they had put on-sale agreements in place for the 2014 harvest.

O'REGAN J:

No, no, evidence about what would have happened if a notice had been given?

MR BRANCH:

Had a notice been…

O'REGAN J:

How do we know that they would have said we're not prepared to supply on a sort of provisional basis pending the outcome of a Supreme Court decision. Did you ever ask them that?

MS BRYANT:

No Sir, but that would have been a commercially ludicrous position, and the reason for that –

O'REGAN J:

Well they did extend after the High Court judgment.

MS BRYANT:

They did extent the option Sir, but again if the option had been extended that wouldn't have allowed the appellants to receive the 2014 harvest.

O'REGAN J:

You could have extended the end date as well. You could have just pushed –

MS BRYANT:

If the negotiation was there.

O'REGAN J:

– the whole contract back one year.

MS BRYANT:

The power really had completely moved by that point Sir. In the 2012 situation the appellants held all the cards.

O'REGAN J:

You can't really complain about their response when you didn't ask them. I mean their case is they did nothing wrong. They didn't cause this, it was just the decision of the Court of Appeal kicked in, and your clients took the view that that meant they couldn't do anything.

MS BRYANT:

Well, from both a practical and a legal perspective, yes, that's the view they took.

O'REGAN J:

And that's probably right but that doesn't necessarily create a right of damages against Mr Harrison's client, does it, if they didn't do anything wrong?

MS BRYANT:

Well, the initial – the reason we're all, of course, in the Court of Appeal, Your Honour, is that a notice of termination had been given.

O'REGAN J:

But the reason you were in the Supreme Court was because you appealed. They had to respond, didn't they? They couldn't just let the Supreme Court case go without –

MS BRYANT:

I'm sorry, I didn't –

O'REGAN J:

The reason they were fighting the case in the Supreme Court was because your clients appealed. Of course they had to be here.

MS BRYANT:

Yes, Sir, but they didn't need to file the notice of termination to start with and then they didn't need to pursue an order through the High Court and then to the Court of Appeal seeking a declaratory order that the contracts were at an end.

WINKELMANN CJ:

No, it's fair to say we –

WILLIAM YOUNG J:

It's not going very far, is it?

WINKELMANN CJ:

No. Yes, and we are on a little bit of a time limitation today so we probably only have about another five or 10 minutes maximum for your reply, so perhaps you could focus it down to your critical points.

MS BRYANT:

My apologies, Your Honour. I wont spend any time on this but in relation to the 2012 agreement just to briefly recap at page 201.0637 is the end letter, if I can put it that, of the chain of correspondence which led to that agreement. I'd refer Your Honours to the final sentence which really encapsulates the terms of what that agreement was which is that there was a deferral of the purchase option date to the 1st of May 2013 only. I won't spend any more time on that. Thank you, Your Honour.

WINKELMANN CJ:

Are those your submissions?

MS BRYANT:

Those are my submissions.

WINKELMANN CJ:

Thank you, Ms Bryant. Well, thank you, counsel. In terms of the timing of those submissions, suggested dates, was the timing suitable? Fifteen days for you, Mr Jones, and then 10 working days for the response?

MR JONES:

It's suitable certainly for the appellants, Ma'am.

WINKELMANN CJ:

All right, excellent. We'll retire. This matter is therefore adjourned part-heard at this point in time.

ADJOURNED PART-HEARD