IN THE SUPREME COURT OF NEW ZEALAND

SC 44/2013
[2014] NZSC 121

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

Hearing:	13 February 2014
Court:	Elias CJ, McGrath, William Young, Glazebrook and Arnold JJ
Counsel:	D P H Jones QC and C L Bryant for Appellants R E Harrison QC and W D Woodd for Respondents
Judgment:	5 September 2014

JUDGMENT OF THE COURT

A The appeal is allowed. The judgment of the Court of Appeal is set aside and the judgment of Andrews J is restored.

B In this Court, the appellants are entitled to costs of $25,000 together with disbursements to be fixed by the Registrar.

C In the Court of Appeal, the appellants are entitled to costs and disbursements to be fixed by that Court.

REASONS

ELIAS CJ and McGRATH J
(Given by McGrath J)

Background

[1] This appeal concerns the validity of the termination, on 20 December 2010, of agreements for the management of vineyards and supply of grapes.

[2] Kakara Estate Ltd and Weta Estate Ltd, which have common shareholders and directors, respectively purchased vineyard properties at 3552 and 4334 State Highway 63, in the Wairau Valley near Blenheim, from The Vines Development Management Company Ltd (The Vines). On settlement, The Vines also transferred to Kakara and Weta its interest in agreements that The Vines had entered into with Goldridge Estates Ltd for management of the vineyards and supply of grapes from them (collectively, the vineyard agreements). Although their precise terms differed, each agreement provided for termination by "either party" in the event of liquidation, insolvency or winding up of "the other party".

[3] The Vines and Goldridge were owned by the Vegar family who had expertise in viticulture and winemaking. Paul Vegar owned The Vines. Goldridge was owned by Peter and Helen Jean Vegar who were its directors. It was well established in the wine industry. Murray and Bruce Forlong were two of the three directors of Kakara and Weta and were also shareholders.

[4] In 2009, Goldridge decided to restructure. Peter and Helen Vegar incorporated two new companies which, following changes of name, became Savvy Vineyards 3552 Ltd and Savvy Vineyards 4334 Ltd (the Savvy companies). The numbers in the Savvy companies' names refer to the addresses of the vineyards to which they related. In July 2009, the Vegars informed the Forlongs that Goldridge intended to transfer its interests in the vineyard agreements to the Savvy companies. The Forlongs as owners of Kakara and Weta did not express any objection to their doing so.

[5] Goldridge prepared "deeds of assignment" to transfer its interests in the vineyard agreements with Kakara and Weta to Savvy 3552 and Savvy 4334

respectively. Under those agreements, Goldridge was permitted to assign its interests to a related company without the consent of Kakara and Weta. The deeds concerning the vineyard agreements[1] covering Kakara's property provided:

> [Savvy 3552] shall be substituted for [Goldridge] under the Agreement as if [Savvy 3552] had originally been a party to the Agreement instead of [Goldridge], and all references in the Agreement to [Goldridge] shall be read and construed as if they were references to [Savvy 3552] …

Provision for substitution of Savvy 4334 in place of Goldridge was included in the same terms in the deeds relating to Weta's vineyard agreements.

[6] The deeds were executed by Goldridge and the Savvy companies on 28 August 2009. On 11 September, Goldridge sent the deeds to Kakara and Weta. The letter from Peter Vegar accompanying the deeds relating to Kakara said:

> We write to notify you that Goldridge Estate Ltd is selling its business to [Savvy 3552]. This is a related company with the same directors and the same shareholders. The assignment took effect on the 28th August 2009.
>
> Although the grape supply agreement and the vineyard management agreement each state that Goldridge Estate Ltd is not required to obtain your consent to assign the agreements to a related company, we have prepared assignment documents that will require execution.
>
> …
>
> Please arrange for execution of these documents and return an original of each to us.

A covering letter in the same terms was sent to Weta along with the deeds relating to its vineyard agreements.

[7] As indicated, Goldridge was entitled under the vineyard agreements to assign its interests in the agreements to the Savvy companies as companies related to Goldridge. Under a simple assignment, however, Goldridge would remain a party to and liable under those agreements. It was presumably to avoid this outcome that Goldridge made provision in the deeds for substitution of Goldridge by the Savvy companies. Peter Vegar's letter did not draw attention to this provision.

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[1] Both Kakara and Weta's properties were divided into two blocks, with separate grape supply and vineyard management agreements in relation to each block.

[8] Kakara and Weta neither signed nor returned the deeds; nor did the Forlongs communicate an intention not to execute them. The Savvy companies did not follow up on the return of executed documents. Dealings under the vineyard agreements continued after September 2009, with the Savvy companies providing the vineyard management services and exercising rights under the grape supply agreements.

[9] The business relationship between the parties deteriorated to the point that, in 2010, Kakara and Weta attempted to terminate the vineyard agreements. They were prevented from doing so by an interim injunction issued by the High Court.[2] Matters came to a head after Goldridge went into voluntary liquidation in November 2010. Kakara and Weta then purported to terminate the agreements on the new ground that a party to them, Goldridge, had entered liquidation. The response from the Savvy companies was that Goldridge had been substituted and was no longer a party to the vineyard agreements whose liquidation could give rise to a right to terminate.

Issue in the appeal

[10] The present appeal turns on the nature of the legal relationships between Kakara, Goldridge and Savvy 3552 and between Weta, Goldridge and Savvy 4334 from September 2009 until the purported termination of the agreements by Kakara and Weta on the basis of Goldridge's liquidation. It is common ground that the terms of the "deeds of assignment" provided for novation of the vineyard agreements, substituting the Savvy companies for Goldridge and releasing Goldridge from any liability for future performance of its obligations. If Kakara and Weta had become parties to the deeds, a novation would have occurred. The issue comes down to whether, in all the circumstances, although Kakara and Weta had neither executed the deeds that would effect novation nor responded to the invitation to do so, they had by their conduct given their consent or in some other way had become parties to the deeds, with the result that novation occurred.

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2 *Goldridge Estate Vineyards 3552 Ltd v Kakara Estate Ltd* HC Auckland CIV-2010-404-2838, 3 August 2010.

High Court judgment

[11] The Savvy companies applied to the High Court for a declaration that the termination notices were invalid. Andrews J decided that, had the deeds been executed by Kakara and Weta, on their terms they would have effected novations of the vineyard agreements.[3] Turning to whether such contracts had been concluded by the parties, the Judge put aside evidence of the subjective intentions and understandings of the parties, which were almost invariably at odds. The question was whether, viewed as a whole and objectively, there was a concluded contract of novation.[4]

[12] The Judge placed some emphasis on the failure of the Forlongs to raise at any time their concern that Goldridge should remain a contracting party. Had this been important to them, it might have been expected that it would have been made clear from the moment that the assignments were first discussed. That was at a meeting in July 2009.[5] Also relevant was that the deeds did not introduce outsiders, because the Savvy companies were controlled by the same people as Goldridge and had continued to use the Goldridge name until November 2010.[6]

[13] Andrews J also saw it as significant that Kakara and Weta had dealt with the Savvy companies, rather than Goldridge, from September 2009 onwards.[7] They had received and paid invoices rendered by the Savvy companies and had referred to the Savvy companies rather than Goldridge in their correspondence. Kakara and Weta had also engaged in proceedings and disputes procedures initiated by the Savvy companies under the vineyard agreements without objecting on the ground that they were not brought by Goldridge. Finally, Kakara and Weta had issued notices to remedy defaults addressed to the Savvy companies in which they described them as "the present parties" to the vineyard agreements.[8]

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3 *Savvy Vineyards 3552 Ltd v Kakara Estate Ltd* [2012] NZHC 416 at [50].
4 At [52].
5 At [56].
6 At [57]. The Savvy companies were originally called Goldridge Vineyards 3552 Ltd and Goldridge Vineyards 4334 Ltd.
7 At [59].
8 At [40].

[14] Andrews J held that Kakara and Weta had not dealt with the Savvy companies as assignees but as parties to the vineyard agreements in substitution for Goldridge. Her Honour's view was that, if Kakara and Weta intended to deal with the Savvy companies as assignees only because they were obliged to, they should have voiced their discontent with the transaction and sought clarification whether Goldridge was still a party. They did not do so.[9]

[15] Overall, Andrews J concluded that the objective evidence clearly pointed to Kakara and Weta having unequivocally accepted that the Savvy companies had been substituted, in place of Goldridge, as parties to the vineyard agreements. She was satisfied that when the termination notices were issued on account of Goldridge going into liquidation, Goldridge was no longer a party to the vineyard agreements. It had been replaced as a party by way of novation. The termination notices were accordingly invalid.[10]

[16] In the High Court the Savvy companies also contended that Kakara and Weta were estopped from terminating the vineyard agreements on the basis of Goldridge's liquidation because they had dealt with the Savvy companies as the other party to the agreements. Andrews J did not address this submission, having found in favour of the Savvy companies on other grounds.[11] The argument was not pursued before this Court.

Court of Appeal judgment

[17] The Court of Appeal saw the starting point as being that Peter and Paul Vegar had addressed with the Forlongs the issue of novation and had sent Kakara and Weta documents which would have that effect on their execution. Kakara and Weta did not, however, sign and return the documents as requested. But nor did they inform the Savvy companies that they were refusing to do so.[12]

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9 At [58].
10 At [60].
11 At [61].
12 *Kakara Estate Ltd v Savvy Vineyards 3552 Ltd* [2013] NZCA 101, [2013] 3 NZLR 297 (O'Regan P, Randerson and Asher JJ) at [63].

[18] Kakara and Weta's position in the Court of Appeal was that the Savvy companies had effected the assignment of the vineyard agreements but had failed to turn this into a novation. The Savvy companies had failed to get Kakara and Weta to execute the deeds, leaving the Savvy companies with the standing of assignees only. The Court should be slow to find that subsequent conduct of Kakara and Weta amounted to agreement to the proposed novation.

[19] The Savvy companies' position was that they had asked Kakara and Weta to agree to the substitution for Goldridge when the deeds were sent for execution. The subsequent conduct of Kakara and Weta in continuing thereafter to deal with the Savvy companies amounted to treating the Savvy companies as having become parties, in substitution for Goldridge, to the vineyard agreements. That was particularly so because Kakara and Weta should have known from the deeds sent to them that the Savvy companies were intended to replace Goldridge as a party under the agreements. The subsequent conduct of Kakara and Weta relied on included paying invoices issued by the Savvy companies and attempting to terminate the contract.

[20] The Court of Appeal saw the argument for Kakara and Weta as the more compelling.[13] Having asked for Kakara and Weta's formal agreement to novation and not having received it, the Savvy companies were seen to have a "considerable" burden in establishing that Kakara and Weta's later conduct amounted to agreement to novation.[14]

[21] In considering whether that burden was discharged, the Court of Appeal did not attribute the same significance to the failure of Kakara and Weta to respond to the request to sign the deeds. The evidence was that Kakara and Weta had been asked to accept terms amounting to a novation but, by not executing the deeds, did not do so.[15] Much of Kakara and Weta's later conduct, including the payment of the invoices, was consistent with the reality that the Savvy companies were providing the services and with the position that would apply if the vineyard agreements had

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13 At [66].
14 At [66].
15 At [67].

merely been assigned, as had been accomplished without Kakara and Weta's consent.[16]

[22] A factor which the Court saw as supporting the Savvy companies' position was that Kakara and Weta issued notices to remedy defaults to the Savvy companies. These formal documents had omitted any reference to Goldridge and had described the Savvy companies as "the present parties" to the vineyard agreements. The Court did not, however, regard the terms of these notices as sufficient to amount to agreement to the deeds proposed 12 months earlier which Kakara and Weta did not then agree to.[17]

[23] Finally, the Court of Appeal said that the orthodox position was that when a party refused to sign a written agreement that was a strong indication that it did not wish to be bound, in the absence of clear evidence to the contrary.[18] The Savvy companies must have realised thereafter that they did not have Kakara and Weta's agreement to the proposed novation.[19] The Court of Appeal therefore allowed the appeal and made a declaration that the termination notices were valid.

Discussion

[24] In cases involving the passing on of contractual obligations there is often difficulty in deciding whether the old party continues to be bound or the new party has been accepted in place of the old. Novation of a contract takes place where contracting parties agree that a third party, who must also agree, is to take the place of one of them.[20] The substituted party is released from its obligations so that the remaining original party is able to enforce the contract only against the new party. It is essential to novation that the remaining original party releases the other original party from liability either entirely or at least from the date of the novation.[21]

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16 At [70].
17 At [74].
18 At [74].
19 At [77].
20 *Lambly v Silk Pemberton Ltd* [1976] 2 NZLR 427 (CA) at 434 per Cooke J. See also *Rasbora Ltd v JCL Marine Ltd* [1977] 1 Lloyd's Rep 645 (QB) at 650; *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85 (HL) at 103; and *The "Tychy" (No 2)* [2001] 1 Lloyd's Rep 10 (QB) at [65].
21 See *Re European Assurance Society (Miller's Case)* (1876) 3 Ch D 391 (CA); and *Lorentzen v White Shipping Co Ltd* (1942) 74 Lloyd's Rep 161 (KB) at 165 and 167.

[25] This distinguishes novation from other means of transferring contractual rights and obligations. An assignor remains as a party to the contract and continues to be bound. Another means of passing on contractual obligations, which does not appear to have featured in the arguments in this case, is where a contracting party arranges to have obligations performed by a third party on its behalf as a form of delegation or vicarious performance.[22] Such a transferor, too, remains liable.

[26] Another distinguishing feature of novation is that, whereas assignment or delegation of contractual terms can be effected by one original party unilaterally, novation requires the agreement of the remaining original party to the contract (as well as the transferee). In substance, novation thus involves the formation of a new contract.[23]

[27] To succeed in the appeal, the Savvy companies must establish that they became transferees of the rights of Goldridge under the vineyard agreements on a basis that included their substitution as parties in place of Goldridge. This will have been effected if, by their conduct, Kakara and Weta agreed to the terms of the deeds submitted to them for signature. If so, Goldridge would not then be a party to the vineyard agreements and its voluntary liquidation would not be a valid ground for termination by Kakara and Weta.

[28] On this issue, we disagree with the majority of this Court. In agreement with the Court of Appeal, we would hold that no agreement providing for novation of the vineyard agreements was concluded. Goldridge remained a party liable under those agreements at the time Kakara and Weta terminated them, validly, on the ground of Goldridge's liquidation.

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[22] See the discussion of Justine Kirby in "Assignments and Transfers of Contractual Duties: Integrating Theory and Practice" (2000) 31 VUWLR 317 at 328 and following. Given that contractual obligations can be transferred in this way, it is not necessary in this case to determine the effect of s 11 of the Contractual Remedies Act 1979.

[23] See *Lambly v Silk Pemberton Ltd* [1976] 2 NZLR 427 (CA) at 434 per Cooke J; *Todd Petroleum Mining Co Ltd v Shell (Petroleum Mining) Co Ltd* CA155/05, 23 September 2005 at [98]; *Hela Pharma AB v Hela Pharma Australasia Ltd* CA165/03, CA206/03, 17 February 2005 at [54]–[56].

[29] Whether or not novation of a contract has occurred must be decided on ordinary contractual principles concerning formation of a contract. On that, as Cooke J once put it:[24]

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

In applying this test the background must be borne in mind. As well, while this is not determinative, difficulties in the traditional approach of analysing the circumstances in terms of offer and acceptance may tell against a contract.[25]

[30] In the present case, where formal documents were submitted for execution releasing Goldridge from liability without any prior negotiation, it is helpful to start by treating the provisions of the deeds proffered on behalf of Goldridge and the Savvy companies as an offer that was capable of acceptance by the actions and conduct of Kakara and Weta.

[31] In submitting to Kakara and Weta deeds providing for the replacement of Goldridge as a party and substitution of the Savvy companies, which Goldridge and the Savvy companies had already executed, Goldridge and Savvy indicated their expectation as to when and how a binding contract effecting a novation would be formed. That was to be achieved by formal execution of the documents tendered.[26]

[32] Kakara and Weta did not respond to this offer and the deeds remained unsigned and were not returned. Novation therefore was not effected in the manner expected by the offerors.

[33] Agreements, including novations, can be concluded informally where, on an objective assessment, the parties' conduct evidences an intention to be bound on certain terms.[27] An offer submitted in writing can thus be accepted by actions and

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[24] *Meates v Attorney-General* [1983] NZLR 308 (CA) at 377; citing *Boulder Consolidated Ltd v Tangaere* [1980] 1 NZLR 560 (CA).

[25] *Meates v Attorney-General*, above n 24, at 377.

[26] These circumstances bring the case within the third class of cases recognised in *Masters v Cameron* (1954) 91 CLR 353 at 360.

[27] See, for example, *Brogden v The Directors of the Metropolitan Railway Co* (1877) 2 AC 666 (HL).

conduct as well as by formal execution of the document tendered. Whether or not Kakara and Weta accepted the offer to novate in this way is to be determined from the totality of their conduct.[28] Particular care is required in this case to distinguish between conduct that is properly referable to the assignments which, according to the covering letter, had already occurred between Goldridge and the Savvy companies and to which no assent by Kakara and Weta was required, and conduct that can objectively be taken as acceptance of the release from liability, which was necessary for novation to occur.[29]

[34] Kakara and Weta's conduct in not executing and returning the deeds submitted to them was itself significant. Failing to respond is usually equivocal as to whether an offer has been accepted. As Lord Goff once said:[30]

> … silence and inaction by a party … are, objectively considered, just as consistent with [the party] having inadvertently forgotten about the matter; or with [the party] simply hoping that the matter will die a natural death if [the party] does not stir up the other party[.]

Surrounding circumstances, including subsequent conduct, may often, however, be of assistance in ascertaining the objective significance of a failure to respond to an offer or execute documents.

[35] Following their submission of the deeds, the Savvy companies proceeded to perform Goldridge's obligations, in their own names, without objection from Kakara and Weta, who also referred to the Savvy companies in correspondence. Objectively there are several explanations for these actions. One is that Kakara and Weta were accepting the offer made in the deeds of a contract involving a novation. Another is that Kakara and Weta were acting on the basis that the Savvy companies were performing the vineyard agreements merely as assignees,[31] a status which did not require the consent of Kakara and Weta.

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28 *Canterbury FM Broadcasting Ltd v Daniels* (1988) 2 NZBLC 103,535 (HC) at 103,541 per Hardie Boys J.

29 See *Vickery v Woods* (1952) 85 CLR 336 at 344–345 per Dixon CJ.

30 In *Allied Marine Transport Ltd v Vale do Rio Doce Navegacao* SA [1985] 1 WLR 925 (CA) at 937.

31 As earlier mentioned, a further possibility could have been performance by the Savvy companies as delegates of Goldridge.

[36] In this respect, the submission of the Savvy companies that these circumstances point strongly to acceptance of a novation in the terms of the deeds loses force when regard is had to the representation in the covering letter accompanying the deeds that assignments had already been effected in accordance with Goldridge's rights under the vineyard agreements. Kakara and Weta had no alternative but to acquiesce in the assignments.

[37] The absence of any reference by Kakara and Weta to the absence of Goldridge as a party to the litigation in 2007, while the Savvy companies were assignees, is neutral.

[38] Of more significance is the positive references to the Savvy companies in the notices to remedy defaults, issued by Kakara and Weta on 10 September 2010. These were sent "C/- Goldridge Estate Ltd" and stated that:[32]

> By virtue of certain *assignments* [Savvy 3552] … and Kakara … are *the present parties* to two vineyard management agreements.

The notice sent by Weta to Savvy 4334 was in similar terms. The letter accompanying the notices sent by Kakara and Weta explained that notice was given care of Goldridge to meet formal requirements in the vineyard agreements. Accordingly no inference can reasonably be drawn that Kakara and Weta were intending to assert continuing involvement on the part of Goldridge.

[39] The strongest indication in the notices that Kakara and Weta had accepted the substitution of the Savvy companies in place of Goldridge, and thus agreed to novation, is the description of Kakara and Savvy 3552 (and, in the other notice, Weta and Savvy 4334) as "the present parties" to the vineyard agreements. In the context of a notice to remedy default, however, the description of the assignees[33] as "the present parties" is less than compelling evidence of an intention to release an original party from contractual liability, especially 18 months after the deeds constituting the offer to novate were received. The description is more consistent with recognition of the practical reality that it was to the Savvy companies that Kakara and Weta had to

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[32] (Emphasis added.)

[33] The notices also referred to the involvement of the Savvy companies as by reason of "assignment".

look for performance at the time of the defaults.[34] Overall, the reference to "the present parties" is not a strong indication of agreement that another party, Goldridge, was released from the vineyard agreements after having assigned its interests.

[40] We do not accept the view of the majority that the only way in which the Savvy companies intended to transfer the vineyard agreements was on terms that included release of Goldridge from liability, so that, by acting on the basis that the agreements had been transferred, Kakara and Weta must be taken by their dealings to have concluded a bargain involving the release of Goldridge from liability. The Savvy companies in fact represented to Kakara and Weta in the covering letter that assignment of the vineyard agreements had already been effected by the time the deeds were forwarded for execution. Kakara and Weta were entitled to proceed on the basis of that transfer, without such conduct being held to accept the offer, represented by the deeds, to transfer the agreements on terms including release of Goldridge from liability. This is especially so because the parties had contemplated that the terms of the deeds would be accepted by execution of the documents.

[41] Finally, some reliance was placed by Kakara and Weta on the clause in the vineyard agreements providing that the agreements could not be altered except in writing. As already identified, novation involves the formation of a new contract rather than amendment of an existing agreement,[35] so this clause is not directly applicable to the current issue before the Court. The clause is, however, an indication that the parties contemplated that their dealings would be formalised in writing and, to that extent, it lends support to our view that, in the absence of execution of the deeds, Kakara and Weta cannot be said objectively to have demonstrated an intention to be bound by the term releasing Goldridge from liability.

[42] Overall, we have reached the conclusion that an analysis of the circumstances in terms of offer and acceptance does not point to a concluded contract of novation in terms of the proffered deeds. We are satisfied that reasonable persons on both sides would take the view that a contract was not concluded. It must be borne in mind that, objectively, there was no commercial reason why Kakara and Weta would

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[34] The vineyard agreements defined "parties" to include assignees. An issue as to the interpretation of this definition was not pursued before this Court.

[35] See the authorities cited above at n 23.

wish to release Goldridge from liability. The key indicative circumstances in this case are that Goldridge and the Savvy companies sought to contract on a basis contemplating execution of the formal deeds. Kakara and Weta did not respond to the tender of deeds in terms that would release Goldridge and subsequent events have not affected that position.

[43] For these reasons we would dismiss the appeal.

WILLIAM YOUNG, GLAZEBROOK and ARNOLD JJ

(Given by William Young J)

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The appeal

[44] The appeal concerns vineyard management and grape supply agreements relating to vineyards owned by the respondents, Kakara Estate Ltd and Weta Estate Ltd. Kakara and Weta were at the relevant times in common ownership and their managing director is Murray Forlong. They acquired the vineyards from The Vines Development Company Ltd (Vines) which was owned and controlled by Paul

Vegar. It was intended that the vineyards would be developed (under project management agreements) and managed (under vineyard management agreements) by Goldridge Estates Ltd and that Goldridge would have first right to acquire the grapes produced (under grape supply agreements). Goldridge was controlled by Peter and Jean Vegar. Peter and Paul Vegar are brothers.

[45] The two appellants, Savvy Vineyards 3552 Ltd (originally called Goldridge Estate Vineyards 3552 Ltd) and Savvy Vineyards 4334 Ltd (originally called Goldridge Estate Vineyards 4334 Ltd) are companies controlled by Peter and Jean Vegar. The numbers in their names refer to the addresses of the two vineyards (3552 State Highway 63 in the case of Kakara and 4334 State Highway 63 in the case of Weta). We will refer to the appellants as Savvy 3552 and Savvy 4334 respectively, and together as the Savvy companies. Savvy 3552 took over the vineyard management and grape supply agreements in respect of Kakara and Savvy 4334 did the same in the case of Weta. The case turns on the mechanisms by which this was effected. The Savvy companies maintain that it was by novation so that they replaced Goldridge as the contracting party. The position of Kakara and Weta is that the Savvy companies are assignees of Goldridge and that Goldridge remained a party to the agreements.

[46] Whether the transfer was effected by novation or assignment is significant because the agreements permit termination if a party to them is placed in liquidation. Goldridge has been placed in voluntary liquidation and Kakara and Weta, in reliance on this liquidation, have purported to terminate the agreements.

[47] Both the High Court and Court of Appeal construed the termination clauses as giving Kakara and Weta the right to terminate if Goldridge had assigned the agreements to the Savvy companies and therefore remained a party to the agreements.[36] In the High Court, Andrews J held that the agreements had been novated with the Savvy companies replacing Goldridge as the contracting party. So by the time Goldridge was placed in liquidation, it was no longer a party to the agreements. She accordingly upheld the Savvy companies' challenge to the

[36] *Savvy Vineyards 3552 Ltd v Kakara Estate Ltd* [2012] NZHC 416 (Andrews J) [*Savvy* (HC)] at [26]; and *Kakara Estate Ltd v Savvy Vineyards 3552 Ltd* [2013] NZCA 101, [2013] 3 NZLR 297 (O'Regan P, Randerson and Asher JJ) [*Savvy* (CA)] at [30].

termination of the agreements.[37] The Court of Appeal, however, held that there had been assignments to the Savvy companies by Goldridge and that the agreements had not been novated. Goldridge was still a party to them at the time of its liquidation and Kakara and Weta were accordingly entitled to terminate the agreements.[38]

[48] On appeal to this Court, the Savvy companies have put in issue the conclusion of the Court of Appeal on the assignment or novation question but have not challenged the conclusions of the Court of Appeal (and High Court) on the construction of the agreements.

Preliminary comments

[49] A complicating feature of the case is that the parties sometimes used the language of assignment in an unorthodox way, as encompassing the transfer not only of contractual rights but also of obligations. We will generally follow the usage of the parties as to this but, where material, will note that what the parties actually envisaged was not an orthodox assignment.

[50] As will become apparent, resolution of the appeal requires detailed analysis of the vineyard management and grape supply agreements and the associated context. Such analysis makes for dispiritingly dense reading. For this reason, we think it best at this point to provide an overview in which we summarise the key features of the case, the critical issues between the parties and our reasons for concluding that the appeal should be allowed.

Overview of the case

The contractual and commercial context (see [63]–[76] below)

[51] The vineyard management and grape supply agreements were entered into between Goldridge (as manager and buyer) and Vines (as owner and grower). Under the vineyard management agreements, Goldridge was to manage the vineyards and under the grape supply agreements, Goldridge had the right to acquire the grapes which were produced. It was always intended that Kakara and Weta would step into

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37 *Savvy* (HC), above n 36.
38 *Savvy* (CA), above n 36.

the shoes of Vines and, more generally, the agreements were sufficiently long term in character as to make it likely that some or all of the parties might be replaced by others. The agreements were prepared on the basis that they would endure despite such replacement occurring.

[52] The Vegar parties wanted the agreements to run with the land in the sense that, in the event of the sale of a vineyard, the purchaser would step into the shoes of the vendor (being Kakara or Weta). This was seen by the Kakara and Weta parties as too restrictive and in the end, a compromise was reached under which each of the vineyards could be sold in two parts, with the vineyard management and grape supply agreements running with the land as to one part (the tied parts) in the sense just described. But in respect of the other parts (the untied parts) the agreements would terminate on sale of the vineyards.

[53] Each of the agreements provided that Goldridge could not assign its "interest" in the agreements without the written consent of Vines, unless assignment was to parties related to Goldridge.

[54] Kakara and Weta acquired the vineyards from Vines and Vines assigned the vineyard management and grape supply agreements to Kakara and Weta. In the case of Kakara this was recorded in a document which was styled as a deed of assignment but operated, at least substantially, by way of novation. In the case of Weta, the corresponding document provided for Vines to assign its interest in the agreements to Weta and for Weta to covenant with Goldridge to perform the obligations of Vines.

[55] The Savvy companies became involved in August 2009. Deeds of assignment were prepared on the basis that they would be signed in each case by Goldridge, the relevant Savvy company, and Kakara or Weta. These provided for the Savvy companies to be substituted for Goldridge. They were executed by Goldridge and the Savvy companies but not by Kakara and Weta. From this point on, the Savvy companies assumed what had previously been the responsibilities of Goldridge and this was not challenged by Kakara and Weta.

The events leading to the purported termination of the agreements (see [77]–[79])

[56] From February 2010, there were difficulties between the Savvy companies and Kakara and Weta. These difficulties resulted in litigation in which the Savvy companies were plaintiffs. Further difficulties developed from August 2010 which resulted in Kakara and Weta asserting that the Savvy companies were in breach of their obligations. While this was going on, Goldridge was placed in voluntary liquidation and this resulted, in December 2010, in Kakara and Weta purporting to terminate the agreements on the basis that Goldridge had remained a party to them and that its liquidation gave them the right to terminate.

Interpretation of the agreements (see [80]–[100])

[57] In the agreements, the language of assignment is used, at least on some occasions, in the unorthodox sense as presupposing a transfer of not only the contractual rights, but also the obligations of the assigning party. On the conventional approach to assignment which we propose to adopt, rights but not obligations can be assigned. For reasons which we will explain, this approach has not been abrogated by s 11 of the Contractual Remedies Act 1979. It is, however, conceptually possible for a party to a contract to have a contractual right to novate by nominating a successor, who, by accepting the novation, becomes a party to the contract in succession to the novating party.

[58] We are also inclined to construe the terminations provisions in the manner contended for by the Savvy companies in the High Court and Court of Appeal as not giving rise to a right of termination where an assignor is placed in liquidation. But, because the conclusions of the High Court and Court of Appeal on this issue were not challenged before us, it would not be right to resolve the appeal on the basis of this interpretation of the agreements, at least without providing further opportunity for argument.

Were the contracts novated with the Savvy companies replacing Goldridge? (see [101]–[112])

[59] On the basis of our preferred interpretation of the agreements, Goldridge, by reason of its right to novate, was entitled to substitute the Savvy companies for itself

and the assent of Kakara and Weta was not required. But, given the way the case was argued, we think it is appropriate to resolve the appeal by reference to whether Kakara and Weta did assent to the novation.

[60] It is clear, and common ground, that the Savvy companies assumed not merely the rights but also the obligations of Goldridge. Such result could not be achieved by assignment. There was thus necessarily a novation to which Kakara and Weta assented and, that being so, the only issue is as to the terms of the novation, and in particular, whether those terms resulted in Goldridge no longer being a party to the agreements.

[61] As will become apparent, Goldridge agreed to being replaced by the Savvy companies and the Savvy companies agreed to such replacements only on the basis that Goldridge was no longer a party to the agreements. This was known to Kakara and Weta, which nonetheless accepted the Savvy companies as being in contract with them and did not challenge the terms proposed as to how this should happen. It follows that they therefore accepted those terms. Such acceptance is further apparent from various notices which they issued and other conduct.

[62] That deeds of assignment proffered to Kakara and Weta and not executed by them is not of controlling significance. Likewise the "no amendment unless in writing" clauses are not conclusive.

The contractual and commercial context

Overview of the vineyard management and grape supply agreements

[63] Under the vineyard management agreements, Goldridge was to manage the vineyards. In the course of doing so, it was to prepare annual vineyard management plans into which Kakara and Weta were to have input. A dispute resolution process was provided to cover the possibility of disagreement. The grape supply agreements provide in some detail for Goldridge to have rights of "first refusal to purchase" the grapes produced. The agreements are capable of lasting until the completion of the 50th fruit producing vintage. As we have noted, each of the vineyards was acquired in two parts and separate vineyard management and grape supply agreements were

entered into in respect of each part. These were identical save as to what should happen in the event of an on-sale by the vineyard owner (that is Kakara or Weta). In the case of each vineyard, the agreements in relation to the tied part required the owner to assign the benefits and burdens of the agreements to the purchaser. In the case of the untied part, the agreements permitted termination of the agreements upon such sale.

[64] As will be apparent, there are four agreements in respect of each vineyard – two vineyard management agreements and two grape supply agreements.[39] In the case of Kakara, the vineyard management and grape supply agreements were entered into on 20 October 2006, which is the same date that Kakara agreed to buy its vineyard. The vineyard management and grape supply agreements referable to Weta's vineyard were entered into on 14 December 2007, which is the same day as the agreement for sale and purchase for Weta's vineyard.

The grape supply agreements

[65] In the grape supply agreements, Vines is described as "the Grower" and Goldridge as "the Buyer". There is an interpretation clause which provides:

> 1.2 In this agreement:
>
> …
>
> (c) any reference to any of the parties includes that party's executors, administrators or permitted assigns, or if a company, its successors or permitted assigns or both[.]

[66] The agreements contain a termination clause in these terms:

> 24.2 Either party shall have the right, in addition to all other rights, which it may have in law or equity, to terminate this Agreement as follows:
>
> …
>
> (b) if in respect of the other party an order is made or a resolution is effectively passed for the appointment of … a provisional liquidator or for the winding up of the other party (other than for sole purpose of reconstruction) or the other party ceases or threatens to cease to carry on business

[39] There was also a project management agreement in relation to each of the vineyards, but those are not relevant for present purposes.

or a receiver … is appointed of the whole of any part of the assets and undertaking of the other party[.]

[67] Under the heading "Assignment of Rights" the agreements provide:

Control of Assignment

25.1 Subject to the provisions of this section, the Buyer must not assign the Buyer's interest in this agreement to any party that is not a related company of the Buyer or Goldridge Estate Ltd without first obtaining the consent in writing of the Grower.

Conditions

25.2 The Grower's consent as required under clause 25.1 must not be unreasonably [with]held, provided that the Grower may, as a condition of any consent, require prior compliance with the following conditions:

…

(d) the assignee must sign a deed of covenant with the Grower agreeing to perform the Buyer's obligations under this contract and granting security on the same terms as in 20.1[.]

…

25.3 The Buyer acknowledges the Grower may assign its rights under this agreement to another party and may sub-contract with a third party for the performance of the Grower's obligations under this agreement provided that:

(a) the assignee must sign a deed of covenant with the Buyer agreeing to perform the Grower's obligations under this contract; and

…

(c) The assignment to [Kakara or Weta] is hereby consented to.

[68] In the agreements relating to the tied parts of the vineyards, which required any purchaser from the vineyard owner to take an assignment of the grape supply agreement, there was this additional provision:

25.4 The Owner [presumably the Grower] shall assign its rights and obligations under this agreement to any purchaser of the Vineyard and the provisions of clause 25.3 shall apply to such assignment.

[69] As to amendment, the agreements provide:

> **30 AMENDMENT**
>
> 30.1 This agreement cannot be altered except in writing signed by authorised representatives of the parties.

The vineyard management agreements

[70] The same provisions appear in the vineyard management agreements, save that in the management agreements:

(a) Vines is described as "the Owner" and Goldridge as "the Manager";

(b) the clauses are differently numbered;

(c) the clause which corresponds to cl 25.1 in relation to control of assignment additionally provides:

> The Manager may sub-contract for the performance of some but not all of the Manager's obligations under this Agreement but any such sub-contracting shall not relieve the manager from liability for performance of the manager's obligations under this Agreement.

(d) the control of assignment clause also contemplates assignments to companies related to Matakana Estate Ltd (another Vegar company) as well as to companies related to Goldridge, as the exception to the requirement for consent is expressed as applying to an assignment to "any party that is not a related party of Matakana Estate Limited or Goldridge Estate Limited";

(e) the clause that is the equivalent to cl 25.2(d) of the supply agreement is in these terms:

> the assignee must sign a deed of covenant with the Owner agreeing to perform the Manager's obligations under this contract but without releasing the assignor or any other persons from liability under this contract[.]

(f) in the clause which is the equivalent to cl 25.3 there is no approval of the assignments to Kakara or Weta.

Kakara and Weta become parties to the agreements

[71] Agreements, each styled as a "deed of assignment", were entered into on 30 July 2007 between Vines, Kakara and Goldridge in respect of the vineyard management and grape supply agreements associated with Kakara's vineyard. Despite using the language of assignment, these deeds substituted Kakara for Vines with the deeds recording that Kakara and Goldridge were bound by the vineyard management agreements as if Kakara had originally been a party. Whether Vines was completely taken out as a party is less clear as there are standard indemnities between Vines and Kakara which imply that Vines would or might be responsible for post-assignment defaults by Kakara.

[72] A different mechanism was adopted when Weta took over Vines' interests in the vineyard management and grape supply agreements relating to Weta's vineyard. The operative documents were again each styled as a deed of assignment. Under them, Vines assigned to Weta its interests in the agreements and Weta covenanted with Goldridge that it would comply with the obligations accepted by Vines as owner and grower. There was, however, no direct assumption of contractual responsibility by Goldridge to Weta.

The Savvy companies become involved

[73] At a meeting held on 22 July 2009, Messrs Paul and Peter Vegar indicated to Mr Forlong and a co-director of Kakara and Weta that Goldridge intended to assign the vineyard management and grape supply agreements. There was dispute at trial as to the reasons which the Vegars proffered for this assignment and as to the response of the Kakara and Weta directors. We do not, however, see this dispute as material to the issues we must decide.

[74] Savvy 3552 (at that time Goldridge Estate Vineyards 3552) and Savvy 4334 (at that time Goldridge Estate Vineyards 4334) were incorporated on 28 August 2009. The shareholders and directors of Goldridge were also the

shareholders and directors of the new companies. Goldridge and the Savvy companies executed deeds (styled as deeds of assignment) dated 28 August 2009 under which the agreements relating to Kakara's vineyard were to be transferred to Savvy 3552 and the agreements relating to Weta's vineyard were to be transferred to Savvy 4334. Each deed listed three parties: Goldridge, the relevant Savvy company and Kakara or Weta. Provision was made for execution by each of those parties. Clause 1.2 of the deeds provided that the parties agreed that:

> The Assignee shall be substituted for the Assignor under the Agreement as if the Assignee had originally been a party to the Agreement instead of the Assignor, and all references in the Agreement to the Assignor shall be read and construed as if they were references to the Assignee[.]

What was contemplated therefore was novation and not assignment.

[75] The deeds were sent to Kakara and Weta on 11 September 2009 under cover of letters from Mr Peter Vegar as managing director of Goldridge. The letters were in these terms:

> We write to notify you that Goldridge Estate Limited is selling its business to [the relevant Savvy company]. This is a related company with the same directors and the same shareholders. The assignment took effect on the 28th August 2009.
>
> Although the [agreements] each state that Goldridge Estate Limited is not required to obtain your consent to assign the agreements to a related company, we have prepared assignment documents that will require execution.

The letter ended with a request for execution and return of the deeds.

[76] Kakara and Weta did not sign the deeds of 28 August 2009 and did not respond in any way to the letters of 11 September 2009. They did, however, receive invoices from the Savvy companies. For the period from September 2009 until December 2010, Kakara and Weta paid these invoices, albeit sometimes after some delay and in circumstances of dispute. In his evidence at trial, Mr Forlong said that Kakara and Weta dealt with the Savvy companies "as assignees of the benefit and burden" of the agreements. Deferring for the moment consideration of what that means legally, this was a fair summary of the way in which the parties interacted.

The events leading to the purported terminations of the agreements

[77] In February 2010, difficulties arose over the non-exercise by Goldridge of its right of first refusal in respect of the grapes from Kakara and Weta in March 2009. On 17 February 2010, Kakara and Weta purported to terminate the vineyard management and grape supply agreements. This gave rise to litigation which resulted in Wylie J issuing an interim injunction preventing Kakara and Weta from acting on the terminations.[40] In these proceedings the Savvy companies were the plaintiffs. No issue was taken as to their entitlement to sue.

[78] Further difficulties developed from August 2010, the precise details of which are of no present moment. What is significant, however, is that:

(a) In letters of 23 August and 26 August 2010 the solicitors for Kakara and Weta wrote to the solicitors for the Savvy companies, proceeding on the basis that they had obligations as manager as to consultation and preparation of draft plans and budgets and the general management of the vineyards.

(b) In September 2010, Kakara and Weta issued notices to remedy defaults under the vineyard management agreements. Those notices and the accompanying correspondence proceed on the basis that the Savvy companies were the "Manager[s]" under the vineyard management agreements and bound to comply with its provisions. The notices invoked the disputes resolution procedure provided under the agreement. By way of example, one of them began in this way:

> By virtue of certain assignments [Savvy 4334] as "Manager" and [Weta] as "Owner" are the present parties to two vineyard management agreements dated 20 October 2006 … originally entered into between [Goldridge] and [Vines].

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

This notice concluded by recording that:

> … Weta requires [Savvy 4334] to remedy its breach or non-observance … referred to in the immediately preceding paragraph[.]

(c) Further solicitors' letters and notices to remedy defaults, sent on 19 October 2009, are written in the same style. The "present parties" are described as being either Kakara and Savvy 3552 or Weta and Savvy 4334. There is no suggestion that Goldridge was also a party. The notices proceed expressly on the basis that the Savvy companies are obliged to perform the obligations of the "Manager" under the vineyard management agreements.

[79] Correspondence between the solicitors continued through to November 2010, all of which proceeded on the basis that the Savvy companies had contractual obligations to Kakara and Weta and vice versa. On 21 November 2010, Goldridge was placed into voluntary liquidation. This was noted by the solicitors for Kakara and Weta in a letter of 24 November 2010 and, after an unsuccessful attempt to resolve the dispute by mediation, Kakara and Weta purported to cancel the vineyard management and grape supply agreements by letter of 20 December 2010.

Interpretation of the agreements

Curiosities of drafting

[80] There are four odd features to the way in which the agreements address assignment.

[81] The first of these relates to the agreements which require assignment by the vineyard owners on sale of the vineyard. The agreements made it clear that the interests of Vines would be assigned to Kakara and Weta and that in the event of a further on-sale of the tied part of a vineyard, the vineyard owner concerned was required to "assign its rights and obligations" under the agreement to the purchaser. This suggests that what was envisaged was not an ordinary assignment.[41] It is not

[41] For reasons which are explained below at [85]–[97].

entirely clear on the language of the agreements whether, following such assignments, the assignor remained a party to the agreements. Given that the assignor was required to assign all rights and obligations, it is a little difficult to see what, if any, remaining contractual role it might have.[42]

[82] Secondly, there is a similar issue as to what was envisaged by assignments by Goldridge or its successors as manager and buyer. The agreements do not address the consequences of an assignment by Goldridge of its "interest" in the agreements to a related company. Clearly the assignee was expected to step into the shoes of Goldridge and take over the rights of Goldridge under the agreements. But was it also to take over its obligations and, if so, by what mechanism? The vineyard companies were not entitled to require covenants by the assignee to perform the obligations of Goldridge.[43]

[83] Thirdly, the grape supply agreements contain certain provisions which are expressed to apply only so long as Goldridge "is the Buyer". This contemplates the continued operation of the agreement when Goldridge is no longer the buyer. The same is true of cl 25.1, which permits assignment to a company related to "the Buyer or Goldridge". This seems to presuppose that following assignment, Goldridge is no longer the buyer.

[84] Finally, there is the use of three different expressions for the subject matter of the assignment. Using the grape supply agreement as the example, cl 25.1 (dealing with assignment by the buyer) refers to "the Buyer's interest in this agreement". Clause 25.3 (dealing with the grower's right to assign) refers to the grower's "rights under this agreement". Clause 25.4 (dealing with assignments on sale of the vineyard) refer to the grower's "rights" and "obligations" under the agreement.

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42 The Manager (or Buyer) was entitled to require any "assignee [to] sign a deed of covenant with [the Manager or Buyer] agreeing to perform the [Owner's or Grower's] obligations".

43 For clarity, cl 25.2(d) only required such covenants in the event of assignment to an unrelated party.

Assignment of the burden of a contract – the conventional view

[85] In *Tolhurst v Associated Portland Cement Manufacturers (1900) Ltd*, Lord Collins MR said:[44]

> It is, I think, quite clear that neither at law nor in equity could the burden of a contract be shifted off the shoulders of a contractor on to those of another without the consent of the contractee. A debtor cannot relieve himself of his liability to his creditor by assigning the burden of the obligation to some one else; this can only be brought about by the consent of all three, and involves the release of the original debtor … .

The provisions of the Property Law Act 2007 as to the assignment of things in action proceed on the same basis, addressing the assignment of debts (including the right to the performance of obligations) but not the assignment of the burden of obligations.[45] On this basis, where there has been a contract between A and B and an assignment by B to C, and nothing else, the traditional view is that:

(a) the rights but not the obligations of B are transferred to C;

(b) C may enforce the rights of B against A;

(c) B remains liable on the contract to A; and

(d) A and C are not otherwise in contract.

[86] Since an assignment is always subject to equities, A may deploy against C defences associated with pre-assignment misrepresentations or breaches of contract on the part of B. Thus an entitlement to cancel the contract arising out of the conduct of B can be relied on by A after assignment. As well, A can set-off against any claim by C any entitlement to damages relating to pre-assignment breaches by B.

[87] Some exceptions to this have been recognised, most significantly in the case of contracts affecting land. In the case of leases, this is now provided for in ss 239–242 of the Property Law Act under which the assignee of a lease becomes the

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44 *Tolhurst v Associated Portland Cement Manufacturers (1900) Ltd* [1902] 2 KB 660 (CA) at 668.

45 Property Law Act, pt 2, subpt 5.

lessee and is bound by the lease albeit that the assignor remains liable to the lessor as well. Similar provisions apply in the case of mortgages.[46] As well, in relation to financed consumer transactions where the vendor assigns its right to a financier, the consumer has rights directly against the assignee.[47] More generally, if the instrument by which an assignment is effected purports to confer benefits on the non-assigning party (for instance in the form of a promise by the assignee to perform the assignor's promises) such benefits may be directly enforceable by the non-assigning party under the Contracts (Privity) Act 1982.[48]

Section 11 of the Contractual Remedies Act 1979

[88] This brings us to s 11 of the Contractual Remedies Act, which provides:

> **11 Assignees**
>
> (1) Subject to this section, if a contract, or the benefit or burden of a contract, is assigned, the remedies of damages and cancellation shall, except to the extent that it is otherwise provided in the assigned contract, be enforceable by or against the assignee.
>
> (2) Except to the extent that it is otherwise agreed by the assignee or provided in the assigned contract, the assignee shall not be liable in damages, whether by way of set-off, counterclaim, or otherwise, in a sum exceeding the value of the performance of the assigned contract to which he is entitled by virtue of the assignment.
>
> (3) Unless it is otherwise agreed between the assignor and the assignee, the assignee shall be entitled to be indemnified by the assignor against any loss suffered by the assignee and arising out of—
>
> (a) any term of the assigned contract that was not disclosed to him before or at the time of the assignment; or
>
> (b) any misrepresentation that was not so disclosed.
>
> (4) This section shall be read subject—
>
> (a) in the case of a mortgage of land, to subpart 8 of Part 3 of the Property Law Act 2007:
>
> (b) *[Repealed]*

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46 Property Law Act, ss 203–204. Section 203 provides that a person who accepts an assignment of mortgaged land becomes personally liable to the mortgagee under the mortgage.

47 See s 46 of the Consumer Guarantees Act 1993 and the s 2 definition of "supplier".

48 See Justine Kirby "Assignments and Transfers of Contractual Duties: Integrating Theory and Practice" (2000) 31 VUWLR 317 at 337–339.

> (c) in the case of a contract for the supply of goods or services to a consumer, to section 46 of the Consumer Guarantees Act 1993.
>
> …

[89] Sections 11(1) and (2) are addressed to pre-assignment misrepresentations and breaches of contract by the assignor. They extend slightly the pre-existing principles under which an assignee takes subject to equities and which enabled the non-assigning party to rely on pre-assignment conduct of the assignor in relation to cancellation and set-off. To these entitlements, s 11(1) adds a right to seek damages. But given the default limitation of liability in s 11(2) (which applies subject to agreement to the contrary) is the "value of the performance of the assigned contract" to the assignee, the economic significance of this change is limited.

[90] More significantly for present purposes, the language of s 11(1) presupposes that a contract as a whole and the burden of a contract are assignable. Since this presupposition is false, it might be thought to follow that the words "or the burden" are of no effect. Such a view was expressed (albeit tentatively) by Dawson and McLauchlan in 1981 in "The Contractual Remedies Act 1979":[49]

> [I]t is to be doubted whether the inclusion of the words "or burden" … serves any purpose. … [An] obligor can only shift his obligations on to a third party with the consent of the obligee. Such consent will ordinary bring into existence a new contract (novation) between the obligee and the third party. It will not be a case of assignment at all.

[91] Section 11(1) has been considered by the Court of Appeal on two occasions. In *Gibbston Valley Estate Ltd v Owen*, no definitive conclusion as to its effect was reached by Henry and Blanchard JJ.[50] However, Tipping J noted:

> [32] When the burden of a contract is assigned, it is important to recognise two consequences. The first is that such an assignment does not relieve the assignor of the burden as regards the other contracting party. While the burden may have been shifted from assignor to assignee as between themselves, the other contracting party, in the absence of a novation which discharges the assignor from the burden, may continue to look to the assignor to discharge the burden, leaving it to the assignor to take whatever steps may be necessary to pass the burden on to the assignee in terms of the assignment.

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[49] F Dawson and D McLauchlan *The Contractual Remedies Act 1979* (Sweet and Maxwell, 1981) at 192.

[50] *Gibbston Valley Estate Ltd v Owen* (1999) 4 NZ ConvC 193,024 (CA) at [22].

> [33] The second consequence is that an assignment of the burden of a contract as between say a purchaser and his assignee, cannot of itself increase or alter the contractual burden of the vendor. Section 11 does not have that effect. An assignment on one side of a contract cannot alter the contractual duties on the other side.

We note that Tipping J did not refer to the mechanism by which the burden of a contract might be assigned and likewise did not refer to the English Court of Appeal decision in *British Gas Trading Ltd v Eastern Electricity Plc* which we are about to discuss.[51] In the second case, *SB Properties Ltd (in liq) v Holdgate*, the Court concluded that the effect of s 11(1) is that the burden as well as the benefit of a contract may be assigned:[52]

> In our opinion, to the extent that the rules of the common law did not impose a burden on the assignee, that cannot withstand the pressure placed upon it by the emphatic language of s 11(1): the common law must yield. A contract and its benefit together with its burden may now be assigned.

[92] The Contractual Remedies Act is an unlikely vehicle for the making of a change to the law of personal property as radical as that postulated in *SB Properties*. There is no suggestion in its legislative history, including in the report of the Contracts and Commercial Law Reform Committee[53] on which the legislation was based, that such a change to the law was the purpose of the Act. Its purpose was to clarify and simplify the law in relation to remedies for misrepresentation and breach of contract. There is also no indication in the Property Law Act that such a change had occurred. The text of s 11(1) does not provide that the burden of a contract may be assigned and when construed in light of its purpose, we think it is clear that it did not have that effect. So whatever the explanation for the opening words of s 11(1), we are satisfied that they do not operate so as to provide for the assignment of the burden of a contract.

A right to novate?

[93] It is conceptually possible for a contract between A and B to confer on A the right to novate the contract in favour of a third party. That this is so is

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51 *British Gas Trading Ltd v Eastern Electricity Plc* unreported, 18 December 1996 (CA).

52 *SB Properties Ltd (in liq) v Holdgate* [2009] NZCA 327, [2011] 1 NZLR 633 at [26].

53 Contracts and Commercial Law Reform Committee *Misrepresentation and Breach of Contract* (March 1967) at [19].

well-illustrated by the judgment of the English Court of Appeal in *British Gas Trading Ltd v Eastern Electricity Plc*.[54] The case concerned a long term agreement under which British Gas Trading Ltd, a subsidiary of British Gas, supplied gas to Eastern Electricity Plc. The agreement provided for each of the parties to be able to "transfer or assign its rights and obligations" with the written consent of the other, and consent was not to be unreasonably withheld. The contract also provided for termination in the event of a change of control in British Gas Trading. A restructure of British Gas was proposed which, if implemented, would have amounted to a change of control and thus entitled Eastern Electricity to terminate the contract. British Gas Trading proposed to transfer or assign its rights and obligations to another supplier but Eastern Electricity withheld its consent because it wished to be in a position to terminate the agreement. Interestingly, the right to "transfer or assign … rights and obligations" was seen as necessarily amounting to a right to introduce a new party to contract and thus as a right to novate. The Court held that in the circumstances, Eastern Electricity's withholding of consent was unreasonable.

Did the agreements contemplate assignment or novation?

[94] The vineyards were to be managed initially by Goldridge and then by the Savvy companies and it must have been envisaged as at least likely that the grapes would be acquired by Goldridge and, from September 2009, by the Savvy companies. Although Kakara and Weta were thus relatively passive investors, the underlying arrangement was in the nature of a joint venture. Kakara and Weta had a right to have input into the vineyard management plans and associated budgets. A reasonable level of co-operation was necessary for such a joint venture to work.

[95] The orthodox concept of assignment under which rights but not obligations may be assigned is not well-suited to circumstances where the rights which are assigned are conditional on contractual performance which remain the obligation of the assignor,[55] albeit perhaps provided by the assignee. This is particularly so where the contract is of a long-term nature (as in the present case). This concept of

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54 *British Gas Trading Ltd v Eastern Electricity Plc*, above n 51.

55 MP Furmston "The Assignment of Contractual Burdens" (1998) 13 Journal of Contract Law 42 at 44.

assignment would thus not provide a solid legal foundation for the joint venture contemplated by the agreements as:

(a) Kakara and Weta would have no contractual rights directly against the Savvy companies; and

(b) the Savvy companies would have no obligations to Kakara and Weta.

Presumably for this reason, Kakara and Weta accepted that the Savvy companies must be taken to have succeeded to the obligations as well as the rights of Goldridge.

[96] In the case of assignments by Goldridge to a related party, Kakara and Weta were not entitled to insist on a covenant by the assignee to adhere to Goldridge's contractual obligations. As noted, this invites the questions of whether, and, if so, how, the assignee was to become contractually committed to Kakara and Weta. For the reasons just given, it does not seem likely that the parties envisaged that the joint venture between them would proceed on the basis that the management of the vineyards in particular would be provided by an assignee with no contractual obligations to Kakara and Weta. All of this suggests that the right of assignment to a related company was envisaged as being by way of novation, with the assignee taking over the role of Goldridge.

[97] That novation was envisaged is consistent with other aspects of the agreements. As we have noted, the grape supply agreements envisage that they will subsist where the buyer is not Goldridge. And both the vineyard management and grape supply agreements envisage assignment by Goldridge not just of its rights but rather of its "interest" in the agreements. Similar considerations apply to the agreements which provide for assignments by Kakara and Weta of their rights and obligations under the agreements on sale of the tied parts of their vineyards. As the *British Gas* case suggests, this is the language of novation rather than assignment. A construction of the agreements so as to permit termination if an assignor were later liquidated would have the potential to be distinctly awkward for Kakara and Weta. On the approach favoured by the Court of Appeal, Goldridge and later the Savvy companies could have disengaged themselves from the agreements at least with

Weta[56] simply by putting Vines into liquidation. And in the case of on-sales by Kakara and Weta of the tied parts of their vineyards, the possibility that later liquidation of those companies would give rise to rights of termination would be likely to cause some anxiety to prospective purchasers.

The termination provisions

[98] Despite the repetition, it is worth setting out again the critical provisions. The termination clause is in these terms:[57]

> *Either party* shall have the right, in addition to all other rights, which it may have in law or equity, to terminate this Agreement as follows:
>
> ...
>
> if in respect of *the other party* an order is made or a resolution is effectively passed for the appointment of … a provisional liquidator or for the winding up of the other party (other than for sole purpose of reconstruction) or the other party ceases or threatens to cease to carry on business or a receiver … is appointed of the whole of any part of the assets and undertaking of the other party.

Also relevant is the interpretation clause:

> In this agreement:
>
> ...
>
> (c) any reference to any of the parties includes that party's executors, administrators or permitted assigns, or if a company, its successors or permitted assigns or both;

[99] For reasons already given, we are inclined to read the provisions of the agreements as to assignment by Goldridge to a related company and assignments by Kakara and Weta to a purchaser as contemplating novation. In any event, the expressions "either party" and "the other party" indicate that the termination clauses contemplate a situation in which there are only two relevant parties. Given the extent to which assignment was provided for by the parties and that the grape supply agreements were expressed on the basis that post-assignment, Goldridge would no longer be the "Buyer", we are inclined to read the termination clauses as applying

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[56] It will be recalled that the Vines/Kakara "assignments" were by way of novation.

[57] (Emphasis added.)

only to the liquidation of a party which at the time has the status of owner, grower, manager or buyer.

[100] As we have already noted, the Savvy companies did not seek leave to appeal on the interpretation of the termination clause. For this reason, it would not be right to allow the appeal on this ground, at least without giving Kakara and Weta a further opportunity to be heard. As will become apparent, however, this is of no moment because we are satisfied that the Savvy companies are entitled to succeed on the novation point.

Were the contracts novated with the Savvy companies replacing Goldridge?

The High Court judgment

[101] Andrews J listed the evidence which pointed to novation as follows:[58]

> [40] Mr Jones submitted that all interaction from September 2009 onwards was carried on between the [Savvy] companies and Kakara and Weta, to the exclusion of Goldridge, in accordance with the terms of the assignment agreements. In particular, he referred to the following:
>
> (a) Kakara and Weta paid invoices issued by the [Savvy] companies under the management agreements, from September 2009 to December 2010.
>
> (b) Kakara and Weta engaged as defendants in proceedings issued by the [Savvy] companies shortly after Kakara and Weta purported to terminate the property agreements in February 2010. No issue was taken that the proceedings should have been brought by Goldridge, or that Goldridge should have been a party, as assignor.
>
> (c) On 10 September 2010, Murray Forlong signed Notices to Remedy Defaults on behalf of Kakara and Weta, addressed to the [Savvy] companies. The [Savvy] companies were described in the Notices as "the present parties" to the management agreements.
>
> (d) On 19 October 2010 Murray Forlong signed further Notices to Remedy Defaults on behalf of Kakara and Weta, prepared by the solicitors for Kakara and Weta, addressed again to the [Savvy] companies, and in the same terms.
>
> (e) Kakara and Weta engaged with the [Savvy] companies in the formal disputes procedures under the property agreements, and did not require the involvement of Goldridge.

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58 *Savvy* (HC), above n 36.

> (f) In correspondence from the solicitors for Kakara and Weta reference is made to the [Savvy] companies, …

[102] She later defined the issue in this as:

> [51] The issue for determination is whether the plaintiffs have proved on the balance of probabilities that the defendants consented to novations (the substitution of the [Savvy] companies as parties to the property agreements in place of Goldridge), notwithstanding that Kakara and Weta did not sign the 2009 assignment agreements.

In addressing the issue, she put to one side evidence as to the parties' subjective intentions.

[103] She did not see the "no amendment unless in writing" clauses as controlling and she likewise did not regard the non-execution by Kakara and Weta of the deeds of 28 August 2009 as determinative:

> [55] I have concluded that if the objective evidence clearly points to Kakara and Weta having accepted that the [Savvy] companies were substituted as parties to the property agreements in place of Goldridge, then that should be given effect to, as being the objective intention of the parties. In this case, I am satisfied that the objective evidence does clearly point to Kakara and Weta having accepted that the [Savvy] companies were substituted as parties to the property agreements in place of Goldridge.

A little further on, she said:

> [59] Finally, I am satisfied that the conduct of Kakara and Weta shows an unequivocal acceptance of the [Savvy] companies as parties substituted for Goldridge. It is not necessary to repeat the matters listed at [40], above, all of which point to acceptance of the novations, and date from almost immediately after the 2009 agreements were sent to Kakara and Weta. The fact that they issued Notices to Remedy to the [Savvy] companies (both by Kakara and Weta, and their solicitors), and engaged in contractual disputes processes and court proceedings (in which they were represented by counsel), where no issue was raised as to Goldridge not continuing as a party, shows that they accepted that Goldridge was no longer a party to the property agreements. They were dealing with the [Savvy] companies, only, as the contracting parties.

The Court of Appeal judgment

[104] The Court of Appeal concluded that Kakara had not consented to the proposed novation:[59]

> [70] We accept that Kakara's payment of invoices issued by Savvy 3552 from September 2009 to December 2010 could be seen as consistent with a novation. But it is also consistent with the reality that Savvy 3552 was providing the services for which the invoices were issued, and with the position that would apply in the event of an assignment under the clause in the agreements that provided that Goldridge could assign its interest in the agreements to a related party without the need to obtain the consent of Kakara. So we see this as neutral.
>
> [71] Kakara and Weta engaged with the proceedings issued by Savvy 3552 and Savvy 4334 after Kakara and Weta purported to terminate the agreements in February 2010 and did not take the point that Goldridge should be a party. … Kakara and Weta were defendants responding to proceedings initiated by Savvy 3552 and Savvy 4334. It could have applied to have Goldridge added as a party but that was not a necessary step given the nature of the proceedings. It would have strengthened Kakara's case if it had done so but we do not see its failure to do so as an indication of consent to a novation that it had not earlier agreed to when asked to do so.
>
> [72] We see greater force in the Judge's finding that the fact that Kakara issued notices to remedy defaults to Savvy 3552 on 10 September 2010 supported Savvy 3552's case. That is because the notices were formal legal documents prepared by lawyers and they not only omitted any reference to Goldridge but that stated that Kakara and Savvy 3552 were "the present parties" to the agreements and invoked the dispute resolution provisions of the agreements in a manner which suggested that Savvy 3552 was party but Goldridge was not, because Kakara did not require that Goldridge be involved. Mr Harrison accepted that this was the high water mark of the case for Savvy 3552 and we agree.
>
> [73] Mr Harrison argued that the notices of default could be seen as being consistent with mere assignments because, under s 11 of the Contractual Remedies Act 1979, remedies for pre-assignment breaches can be sought against an assignee. That is only partly true because the remedies that can be sought are limited to damages (subject to a statutory limitation) and cancellation, and those remedies were not what was sought in the notice of default. He also argued that most of the defaults noted in the notices of default were post-assignment defaults so it made sense to engage with the actual defaulting party, Savvy 3552. Under cl 1.2(c) of the agreement, Savvy 3552 was included as a party, so there was no impediment to invoking the dispute resolution clause against it. Again that is only partly correct because some of the defaults predated the assignments.
>
> [74] Ultimately, however, we do not see the features of the notices to remedy defaults … as sufficient to constitute agreement to the novation arrangement that had been proposed to Kakara a year earlier and not then

[59] *Savvy* (CA), above n 36 (citations omitted).

> agreed to. This Court's decision in *Concorde Enterprises Ltd v Anthony Motors (Hutt) Ltd* recognises the orthodox position that where a party has declined to execute a written contract sent to it by the other party, the normal inference is that the declining party did not [intend] to be bound, unless there is clear evidence to the contrary. While each case will turn on its facts, a party that chose not to execute an agreement has a strong argument that it should not be bound to that very agreement because of its later conduct.
>
> [75] There were also a number of letters between Kakara and Weta and the Savvy companies that did not refer to Goldridge as a continuing party to the agreements. These may have been inaccurate but on their own they do not indicate that Kakara had agreed to the novation it had declined to agree to earlier.
>
> …
>
> [77] We see the context in which the actions said to constitute acceptance by Kakara of a novation as significant. By presenting a formal deed to Kakara for execution in order to effect a novation, Goldridge and the Savvy companies set the contractual framework. This followed on from the 2007 assignments, which had been formally (albeit inconsistently) documented. When Kakara did not sign the deed that was presented to it, Goldridge and Savvy 3552 must have realised that they did not have Kakara's agreement to their proposed course. They did nothing about this. The parties then carried on their rather fractious business relationship in a way that was broadly consistent with both the assignment effected as of right by Goldridge and Savvy 3552 and the novation that Goldridge and Savvy 3552 wanted. We do not see Kakara's conduct in that context as sufficiently clear to amount to consent to the novation or, more correctly, agreement to a new contract substituting Savvy 3552 for Goldridge.

An exercised right to novate?

[105] As we have explained, we consider that the provisions of the agreements which address assignment by Goldridge to a related company contemplate novation rather than assignment. This explains why there is no requirement for a related company assignee to covenant to perform the obligations of the manager or the buyer. It is also consistent with the way in which the grape supply agreement contemplates that it will subsist at a time when Goldridge is not the buyer. As we have explained, the parties did, on occasion, use the language of assignment in relation to novation. On this basis, we are of the view that Goldridge had a right to novate along the lines of that held to exist in the *British Gas* case. If such a right existed it is clear that it was exercised. On this approach, the appeal would have to be allowed.

[106] This line of argument was not addressed in the High Court or Court of Appeal and the conclusion just reached is not necessarily inconsistent with their interpretation of the termination clauses, which, as construed by those courts, would still have some scope for application in relation to other assignments. That said, our right to novate approach is reasonably closely associated with our interpretation of the termination clauses – an interpretation which is undoubtedly inconsistent with the interpretation arrived at by the High Court and Court of Appeal and not expressly challenged in this Court. For this we think it appropriate to address this aspect of the case on the alternative hypothesis that novation of the agreements required the assent of Kakara and Weta.

Did Kakara and Weta assent to the novations?

[107] It is helpful to start with the contractual position as between Goldridge and the Savvy companies. The only formal documentation to which they were party were the deeds of 28 August 2009. These deeds provided for substitution of Goldridge by the Savvy companies.

[108] The deeds of 28 August 2009 were not intended to operate as assignments. The Savvy companies did not agree to take over the vineyard management and grape supply agreements otherwise than on a novated basis. The corresponding position in relation to Goldridge is the same. This marks a subtle but significant point of difference between our approach and that of the Court of Appeal and McGrath J, under which the default position – that is, assuming no novation – is assignment. As we will explain, we see the case as involving two choices:

(a) between the pre 1 September 2009 contractual status quo and novation; and

(b) if there was novation, as to the terms.

[109] From September 2009, the Savvy companies dealt with Kakara and Weta as the successors to Goldridge. Kakara and Weta accepted the Savvy companies as Goldridge's successor. They paid invoices and then even more significantly, once the disputes arose, they dealt with the Savvy companies explicitly on the basis that

they were parties to the agreements and that Goldridge was not. As earlier recorded, Mr Forlong accepted that the benefit and burden of the contracts had passed to the Savvy companies. The corollary is that the pre 1 September 2009 contractual status quo was changed. For the reasons already given,[60] an assignment theory does not explain how the Savvy companies came to be in contract with Kakara and Weta. This necessarily means that there was a novation of some kind.[61] So what were the terms of that novation?

[110] The only terms which Goldridge and the Savvy companies offered to Kakara and Weta were those set out in the deeds of assignment dated 28 August 2009. These provided for Goldridge to be replaced by the Savvy companies. It is not possible for Kakara and Weta to accept the Savvy companies as contracting parties without at the same time accepting the only proffered mechanism by which this could be achieved.

[111] The Court of Appeal placed some weight on the fact that the deeds of 28 August 2009 had been proffered to Kakara and Weta and not signed. A similar point was advanced in different terms by Dr Harrison QC in argument when he said that the appellants were not able to establish through clearly identified offers and acceptances the contracts of novation on which they rely. Considerations of this kind will often be very significant but given the course of conduct as a whole they are not controlling in the present case. In *Brogden v Metropolitan Railway Co*, Lord Hatherley concluded that a written agreement signed by one party and proffered to, but never executed by, the other was of contractual effect if: [62]

> … the course of dealing and conduct of the party to whom the agreement was propounded has been such as legitimately to lead to the inference that those with whom they were dealing were made aware by that course of dealing, that the contract which they had propounded had been in fact accepted by the persons who so dealt with them.

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60 See [85]–[93] above.
61 Compare the remarks of Dawson and McLauchlan cited at [90] above.
62 *Brogden v Metropolitan Railway Co* (1877) 2 App Cas 666 (HL) at 682.

In the same vein are the comments of Cooke J in *Boulder Consolidated Ltd v Tangaere*:[63]

> But … I would respectfully keep it in mind as a reminder that a mechanical analysis in terms of offer and acceptance may be less rewarding than the test whether, viewed as a whole and objectively, the correspondence shows a concluded agreement. On either approach the point of view of the reasonable man in the shoes of the recipient of each letter is of major importance.

[112] Dr Harrison also relied on the "no amendment unless in writing" clauses. There are a number of possible responses to this. A novation is not an amendment but rather a new contract. So, at least if construed literally, these clauses are not engaged. In any event, we do not accept that such a clause deprives the parties to a contract of the ability to vary it otherwise than in writing, albeit that it may be of distinct evidential significance. As well, there are many documents in writing and signed by the representatives of the appellants and respondents which proceed on the basis that the contracts had been novated.

Disposition

[113] The appeal is allowed. The judgment of the Court of Appeal is set aside and the judgment of Andrews J is restored (along with the costs orders made in the High Court). In this Court the appellants are entitled to costs of $25,000 together with disbursements to be fixed by the Registrar. In the Court of Appeal, the appellants are entitled to costs and disbursements to be fixed by that Court.

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63 *Boulder Consolidated Ltd v Tangaere* [1980] 1 NZLR 560 (CA) at 563.