IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 114/2019
[2020] NZSC 115

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
Further Submissions:	3 July 2020
Court:	Winkelmann CJ, William Young, Glazebrook, O'Regan and Ellen France JJ
Counsel:	D P H Jones QC and C L Bryant for Appellants R E Harrison QC and W D Woodd for Respondents
Judgment:	22 October 2020

JUDGMENT OF THE COURT

A The appeal is allowed. The judgment of the Court of Appeal is set aside. The respondents are liable to the appellants on the first and second causes of action in the first amended statement of claim.

B An order directing an inquiry into damages is made in relation to the first cause of action.

C The declaration and the order directing an inquiry into damages made by the High Court in relation to the second cause of action are restored.

D **The first and second respondents must pay the first and second appellants one set of costs of $25,000 plus usual disbursements.**

E **The orders as to costs in the Court of Appeal and the orders as to costs in the High Court as they relate to the High Court's dismissal of the first cause of action are quashed. Costs should be re-determined in those Courts in light of this judgment.**

REASONS

WINKELMANN CJ, GLAZEBROOK, O'REGAN AND ELLEN FRANCE JJ
(Given by Ellen France J)

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Introduction

[1] In October 2006 and December 2007 the appellants, Savvy Vineyards 4334 Ltd and Savvy Vineyards 3552 Ltd, and the respondents, Weta Estate Ltd and Tirosh

Estate Ltd, entered into agreements for the supply of grapes to the appellants from vineyards owned by the respondents (the grape supply agreements).[1]

[2] The first issue on the appeal concerns the interpretation of the grape supply agreements and, in particular, the meaning of cls 2.2 and 2.4 which deal with Savvy's option to purchase the grapes. To put this issue in context, it is sufficient to note that cl 2.2 provides that the option to purchase is "deemed to be effective on [1 May 2009] and to be repeated on each third anniversary of [that date]" with the proviso that if Savvy "does not exercise" the option "for 2 consecutive periods of 3 years", the option lapses. Savvy purported to exercise the option by notice of 17 November 2014. Weta refused to supply grapes to Savvy on the basis that Savvy's notice had not been given in time so the option to purchase had lapsed. Whether the notice was given in time turns on whether the option had to be exercised by the three-year point or whether there was another opportunity at the six-year point.

[3] The second issue on the appeal is whether Weta is liable to Savvy in damages for its admittedly wrongful repudiation of the grape supply agreements when, by notice of 20 December 2010, Weta said that the grape supply agreements were at an end. The factual background to this issue is quite complex. By way of introduction, it is sufficient to note the following. Savvy successfully brought proceedings seeking declarations that the December 2010 notice was invalid and of no effect.[2] The High Court judgment was overturned on appeal to the Court of Appeal.[3] On appeal to this Court, the judgment in the High Court was restored.[4] This chain of events meant that for a period, after the Court of Appeal's judgment and before the decision of this Court, there was a declaration in place that the grape supply agreements had no legal effect.

[4] Against this background, Savvy brought the current proceedings in the High Court seeking, amongst other matters, an inquiry into damages based on Weta's

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1 As we explain below at [36], the original contracting parties were different. We refer to the appellants as "Savvy" and the respondents as "Weta".

2 *Savvy Vineyards 3552 Ltd v Kakara Estate Ltd* [2012] NZHC 416 [The earlier HC judgment].

3 *Kakara Estate Ltd v Savvy Vineyards 3552 Ltd* [2013] NZCA 101, [2013] 3 NZLR 297 [The earlier CA judgment].

4 *Savvy Vineyards 3552 Ltd v Kakara Estate Ltd* [2014] NZSC 121, [2015] 1 NZLR 281 [The earlier SC judgment].

actions in giving the notice of termination in December 2010 (the wrongful repudiation claim). Savvy also sought declarations concerning the November 2014 notice that the agreements remained on foot and sought damages (this cause of action raised the interpretation issue). Weta counterclaimed seeking declarations that Savvy's notice of 17 November 2014 was invalid and ineffectual and that Savvy's option to purchase had permanently expired or lapsed. Weta also counterclaimed, contingent on the Court accepting Savvy's interpretation of the agreements, seeking rectification. Savvy's defence to the rectification counterclaim was that Weta was estopped from advancing its interpretation of the agreements by an earlier judgment in the proceeding.

[5] Orders were made by consent that issues of liability would be heard and determined first with claims for damages to be considered, if necessary, at a second stage. The matter accordingly proceeded to a hearing on liability.

[6] In the High Court, Gordon J dismissed Savvy's cause of action based on the December 2010 notice but found in favour of Savvy on the cause of action relating to the notice of 17 November 2014.[5] The Judge accepted Savvy's interpretation of the agreements, made a declaration to the effect that Savvy was entitled to purchase the 2016 and subsequent harvests in terms of the grape supply agreements, and ordered an inquiry into damages. Weta's counterclaims were rejected. In particular, Weta's rectification claim, which accorded with the interpretation it now advances, failed. The Judge also rejected Savvy's estoppel defence. Weta appealed to the Court of Appeal and Savvy cross-appealed. The Court of Appeal allowed Weta's appeal.[6] The Court agreed with Weta's interpretation of the agreements. The judgment of the High Court, the declaration and the order directing an inquiry into damages were set aside. Savvy's cross-appeal challenging, amongst other things, the findings in the High Court in relation to the December 2010 notice was dismissed.

[7] Savvy was granted leave to appeal to this Court from the decision of the Court of Appeal on the interpretation issue and on the question of the effect on the parties'

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5 *Savvy Vineyards 4334 Ltd v Weta Estate Ltd* [2018] NZHC 989 [HC judgment].

6 *Weta Estate Ltd v Savvy Vineyards 4334 Ltd* [2019] NZCA 437 (Cooper, Clifford and Gilbert JJ) [CA judgment].

legal positions of the two earlier judgments.[7] As we shall discuss, the central issue arising from consideration of the effect of the two earlier judgments is whether Weta is liable for damages for wrongful repudiation. Because it features in the narrative later on, we note that leave to appeal was declined on the question of whether Savvy could claim estoppel by convention.[8]

[8] Before addressing these questions, it is helpful to provide a brief overview of the parties' contractual arrangements.

Overview of the contractual arrangements

[9] The background to the agreements is set out in the Court of Appeal judgment and we adopt that description.[9]

[10] There were, relevantly, two sets of inter-related agreements in respect of each of the blocks of land owned by Weta.[10] First, there were the agreements providing for the subsequent management of the vineyards which Savvy was to undertake (the vineyard management agreements). Secondly, there were the grape supply agreements.[11] As we shall come to, Savvy was novated as a counterparty to the vineyard management and the grape supply agreements.

[11] The present appeal focusses on the grape supply agreements. Under those agreements, Savvy had what is described in cl 2.2 as a "right of first refusal" to buy the grapes. This is more accurately expressed as an option to purchase.[12] If the option was exercised, Savvy was obliged to buy all of the grapes from that block for the term of the agreement. The initial term expires on the completion of the harvest of the tenth

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7 *Savvy Vineyards 4334 Ltd v Weta Estate Ltd* [2019] NZSC 145.

8 See below at [87]–[93].

9 CA judgment, above n 6, at [2]–[4].

10 The first respondent (Weta Estate) and the second respondent (Tirosh Estate) each bought two blocks of land. The first appellant (Savvy 4334) is the buyer in the grape supply agreements covering the two vineyards owned by Weta Estate. The second appellant (Savvy 3552) is the buyer in the grape supply agreements relating to the two blocks owned by Tirosh Estate.

11 The High Court said that under the Savvy "investment model", the grape supply and vineyard management agreements were to operate in conjunction: HC judgment, above n 5, at [13].

12 There are some differences between the agreements for the different blocks but these are not relevant for the purposes of the appeal.

"fruit producing vintage". There are two rights of renewal, each for an additional term of 20 fruit producing vintages.

[12] The first date on which the option became effective was the "Commencement Date". The "Commencement Date", defined in cl 1.1, means "1 May of the year before the first planned harvest of grapes". The parties agree that the Commencement Date was 1 May 2009. Notice to exercise the options was not given on or before that date. Notice could again be given three years later. The parties agreed to extend the 1 May 2012 date to 1 May 2013 in light of the earlier pending appeal to the Court of Appeal.

[13] Savvy did not give notice to exercise the option on or before 1 May 2013. Rather, as noted, Savvy said it was exercising the option for all blocks under all agreements by its notice of 17 November 2014. Savvy's case was that it had a further option effective on 1 May 2015. Weta did not accept that. Weta responded on 8 December 2014 saying, for the first time, that the options had lapsed when they were not exercised by notice before the May 2013 deadline.

The interpretation issue

[14] The interpretation issue arises in relation to Savvy's second cause of action. Savvy pleads that by its letter of 8 December 2014, Weta repudiated the agreements and, by reason of that repudiation, Savvy lost the opportunity to profit from the purchase and on-sale of grapes from the vineyards for the 2016 and subsequent harvests. As the High Court said, this cause of action was pleaded largely as a claim for breach of the grape supply agreements based on Savvy's interpretation of cls 2.2 and 2.4 of those agreements. We turn then to the relevant provisions of the grape supply agreements.

The grape supply agreements

[15] The preamble to the agreements sets out the background, recording that:

> A. The Grower [Weta] has entered into an agreement to purchase … the land … which property includes the Vineyard[.]

> B. The Grower has or is about to enter into a management agreement with the Buyer [Savvy] whereby the Buyer provides for the management of the Vineyard as a high quality vineyard producing grapes for wines of an international standard.
>
> 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 in this agreement.

[16] Clause 2 is headed "supply of grapes". Clause 2.1 provides for Weta to plant all of the plantable areas of the vineyards and deals with the configuration of the planting. The key clauses are cls 2.2 and 2.4 which provide as follows:

> 2.2 The Grower hereby grants to the Buyer a right of first refusal to purchase the entire crop of Grapes grown on each of the Blocks. Such right of first refusal shall be deemed to be effective on the Commencement Date and to be repeated on each third anniversary of the Commencement Date provided that if the Buyer does not exercise the right of first refusal in respect of any Block for 2 consecutive periods of 3 years the right of first refusal shall be deemed to have lapsed. If the Buyer elects to purchase part of the crop of Grapes only then the Buyer must at the time of giving notice as provided in this agreement specify the specific Block or Blocks in respect of which the Buyer wishes to purchase Grapes. The Buyer must purchase all Grapes from any such Block or Blocks specified for the remainder of the term of this agreement.
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> 2.4 Should the Buyer wish to exercise its right of purchase pursuant to this Agreement it shall give written notice of that exercise in the manner hereinbefore specified at any time prior to the Commencement Date or such other date the right of first refusal is to be exercised. Once notice is given to purchase Grapes from any Block or Blocks then the Purchaser shall have an ongoing obligation to purchase of all the Grapes from such Block or Blocks for the term of this agreement.[13]

[17] There is no cl 2.3.

[18] Under cl 2.5, the terms of the parties' sale and purchase are as set out in the agreement unless the parties agree otherwise.

The approach in the Courts below to the interpretation issue

[19] The High Court Judge was of the view that the natural and ordinary meaning of the clauses within the context of the agreements as a whole was consistent with

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13 "Block" and "Grapes" are defined terms.

Savvy's interpretation. Two textual points influenced the Judge's approach. The first was the reference in cl 2.2 to the option lapsing if Savvy did not exercise the right "for 2 consecutive periods of 3 years". This meant that Savvy had up to six years from the Commencement Date to exercise the option. Second, that interpretation was supported by the fact the option was "repeated on each third anniversary of the Commencement Date" (cl 2.2) and could be exercised at any time before the Commencement Date "or such other date the right of first refusal is to be exercised" (cl 2.4). Notice could therefore be given prior to any of the "three dates" referred to in cl 2.2, namely, the Commencement Date, the third anniversary of the Commencement Date and the sixth anniversary of the Commencement Date.[14]

[20] The Court of Appeal said "the fact that the parties were working from a standard form template" formed "part of the relevant context" in which the agreements were to be interpreted.[15] The Court then undertook a comparison between cls 2.2 and 2.4 in the original template and the deletions and additions as they appeared in the final form of the clauses.

[21] The conclusion the Court drew from this exercise was that in departing from the template, the parties had agreed "there would not be recurring rights of exercise at three-yearly intervals throughout the term of the agreement".[16] The Court went on to say that in determining objectively what was agreed, "it is appropriate not to accord primacy to the legacy and ill-fitting wording at the expense of focusing on the wording of the specifically agreed amendments, particularly the wording of the proviso".[17]

[22] On the importance of the proviso in cl 2.2, the Court said:[18]

> The proviso defines when the right of first refusal lapses by reference to the non-exercise of the right for two consecutive periods of three years. There are two key points to note. The first is that the lapsing of the option results from its non-exercise *for* two consecutive periods of three years. The second point is that the right of first refusal must be exercised prospectively for the following three years by serving notice prior to the effective option date in respect of the relevant crops. Thus, the first right of first refusal for the first three-year period must be exercised by serving a notice prior to the

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14 HC judgment, above n 5, at [154].
15 CA judgment, above n 6, at [48].
16 At [51].
17 At [51].
18 At [52].

> commencement date. If no notice is given prior to the commencement date, the option will not have been exercised for the first three-year period. The option for the second (consecutive) three-year period is effective on the third anniversary of the commencement date. The right of first refusal for that three-year period must be exercised prior to the third anniversary of the commencement date. Savvy lost its right of refusal to purchase the grapes for the second three-year period of the agreement when it did not exercise the option prior to 1 May 2013.

The parties' positions

[23] The parties' differing cases are essentially reflected in the differences and reasoning in the Courts below. We address the detail of their submissions in the discussion below.

Our assessment

[24] There is no dispute as to the approach to interpretation applicable. The approach is that set out by this Court in *Firm PI 1 Ltd v Zurich Australian Insurance Ltd*.[19] The Court in that case said the approach was an objective one.[20] The Court went on to accept that "in interpreting commercial contracts the courts should have regard to their commercial purpose and to the structure of the parties' bargain, to the extent that they can reliably be identified".[21] The Court also said:[22]

> [63] While context is a necessary element of the interpretive process and the focus is on interpreting the document rather than particular words, the text remains centrally important. If the language at issue, construed in the context of the contract as a whole, has an ordinary and natural meaning, that will be a powerful, albeit not conclusive, indicator of what the parties meant. But the wider context may point to some interpretation other than the most obvious one and may also assist in determining the meaning intended in cases of ambiguity or uncertainty.

[25] Applying this approach, we consider the grape supply agreements give Savvy two consecutive periods each of three years within which notice may be given, that is, up to six years from the Commencement Date. On this interpretation, Savvy's notice was effectual when given on 17 November 2014.

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19 *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* [2014] NZSC 147, [2015] 1 NZLR 432.
20 At [60] per McGrath, Glazebrook and Arnold JJ.
21 At [79] per McGrath, Glazebrook and Arnold JJ.
22 Footnote omitted. See also at [62] where the Court made the point that "[t]o some extent, … the scope for resort to background is itself contextual".

[26] We start with consideration of cl 2.2 and, in particular, the wording of the proviso because that assumes significance on Weta's case and in the reasoning of the Courts below. To reiterate, the proviso says that if the option is not exercised "for 2 consecutive periods of 3 years", it has lapsed. In our view, it is difficult to make sense of the proviso if the interpretation favoured by Weta and the Court of Appeal is adopted. As we read cl 2.2, the proviso operates as a qualification on what is otherwise a rolling three-yearly right. But on Weta's approach, the proviso simply says that there are two opportunities to purchase the grapes and if there was no purchase on those two opportunities, the option lapsed.

[27] To put the issue in context, Weta says that the opportunity to give notice prior to the Commencement Date (1 May 2009) triggers purchase with effect from the grape vintage immediately after that date. That is the first of two "consecutive periods" within which there is no actual purchase of grapes. As Savvy did not give notice prior to 1 May 2009, it had just the one further opportunity to do so leading up to the first three-year anniversary (1 May 2013 on the agreed extended date). Savvy's failure to give notice before that date meant that the period between 1 May 2013 (extended by agreement) and 1 May 2015 was the second of the two "consecutive periods" without any actual purchase of grapes. On this interpretation, the proviso in cl 2.2 was activated and Savvy's notice on 17 November 2014 to trigger purchase for the period beginning 1 May 2015 was ineffectual.

[28] However, we consider that it is relevant to the interpretation of the proviso that cl 2.2 refers to the option to purchase being "effective", "on the Commencement Date" and "to be repeated on each third anniversary". As Savvy says and the High Court found, that must mean that at the Commencement Date (1 May 2009) the right to exercise the option became effective and runs for three years. The right to exercise the option is then again effective at the three-year anniversary of the Commencement Date (by agreement extended to 1 May 2013) and runs for another three years. In other words, the reference to the option being effective on the Commencement Date must mean that it becomes operative at that point. And that state of affairs springs up afresh (as it is "to be repeated") on each third anniversary. Read in this way, the proviso operates to qualify the position by making it clear that if notice is not given in the requisite timeframe, the option lapses.

[29] Further, reading cls 2.2 and 2.4 together, we do not see the wording "to be repeated on each third anniversary" as simply a remnant of the standard template form as the Court of Appeal said.[23] Rather, when the two clauses are read together, it is clear Savvy did not have to give notice before 1 May 2009 but, rather, at some point in the relevant three-year period. Hence, cl 2.4 refers to the requirement to give notice at any time before the "Commencement Date or such other date the right of first refusal is to be exercised". Contrary to Weta's submission that cl 2.4 refers to "such other date" (not "dates"), cl 1.2(b) states that the singular is defined in the agreements to include the plural. Indeed, it is odd to refer to "such other date" if there is in fact only one other date after the Commencement Date on which the right to exercise the option is effective.[24]

[30] While we agree with Weta that cl 2.4 is ancillary to cl 2.2, we do not consider it follows that cl 2.4 is somehow subordinate to cl 2.2. We consider Savvy is right that Weta's approach to cl 2.4 conflates the exercise of the contractual right (the option) with the communication of that right, namely, the giving of notice. Clause 2.4 qualifies the provision of notice and makes it clear notice can be given within each three-year period. If Savvy wanted to exercise the option, it would need to give written notice of that within either three-year period. Savvy did so by giving written notice on 17 November 2014 which was within the second three-year period between the third anniversary and sixth anniversary of the Commencement Date.

[31] As we agree with the High Court Judge that there is no ambiguity in these clauses, we do not need to deal with the alternative argument for Weta that the clauses should be interpreted against Savvy on the basis of the contra proferentem principle.

[32] It follows that Savvy succeeds on this point and we restore the judgment of the High Court on the second cause of action.

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[23] Whether or not the Court of Appeal could consider the previous drafts and the relevance of pre-contractual negotiations are not matters before us but whatever the position ultimately reached on that topic, it does not seem correct to take into account just two versions of the agreement (the original template and the contract in its final form).

[24] Recital C, set out above at [15], refers to exercise of the right "from time to time".

Liability for wrongful repudiation?

[33] In this part of its claim which is its first cause of action, Savvy pleads that Weta repudiated the grape supply agreements in its notice of 20 December 2010. Savvy says:

> But for that repudiation, Savvy … would have exercised the options to purchase grapes under cl 2.2 of the [grape supply agreements] on 1 May 2013 for each and every block … .

[34] The first amended statement of claim continues by averring that, by reason of the repudiation, Savvy lost the opportunity to profit from the purchase and on-sale of grapes and/or wine made from those grapes from the vineyards for the 2014 and subsequent harvests. The particular given is as follows:

> The Court of Appeal judgment on 12 April 2013 meant that the [grape supply agreements and vineyard management agreements] terminated before those options accrued or were inoperative and/or suspended.

[35] To put the claim in context, we need to say a little about the genesis of the litigation between the parties and the history of that litigation.

The narrative of events

[36] The companies now known as Savvy 4334 and Savvy 3552 were initially incorporated as, respectively, Goldridge Estate Vineyards 4334 Ltd and Goldridge Estate Vineyards 3552 Ltd. (We call both companies Goldridge.) On 28 August 2009 Goldridge assigned the grape supply and vineyard management agreements to Savvy.[25]

[37] On 17 February 2010, Savvy received a letter from Weta purporting to terminate both the vineyard management agreements and the grape supply agreements. Weta served this notice on the basis that Goldridge had not exercised the option to purchase under the grape supply agreements before the Commencement Date of 1 May 2009.

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[25] The company names were changed to those of the first and second appellants on 11 November 2010. The original contracting parties on the grower side were also different to Weta Estate and Tirosh Estate.

[38] Savvy rejected the termination and issued proceedings. Savvy also applied for an interim injunction. The interim injunction hearing took place before Wylie J on 13 July 2010. Weta conceded that it was not entitled to terminate the grape supply agreements. The hearing proceeded in response to the notice of termination of the vineyard management agreements. Wylie J issued a judgment granting an interim injunction restraining Weta from taking steps to terminate the grape supply agreements and/or the vineyard management agreements.[26]

[39] On 21 November 2010, Goldridge was put into voluntary liquidation. That prompted a further notice of termination of 20 December 2010 from Weta in relation to the agreements. This notice was given on the ground that Savvy was a mere assignee of the contract. The question of Savvy's status arose because the agreements entitle either party to terminate if "the other party" goes into liquidation. Savvy resisted and amended its statement of claim to seek relief from this, the second attempt to terminate the agreements.

[40] In the High Court, Andrews J found that Goldridge had ceased to be a party to both the grape supply and vineyard management agreements and that those agreements had been novated to Savvy.[27] The High Court made declarations that the notice of termination dated 20 December 2010 was invalid and that the grape supply agreements were binding on Weta. Weta appealed to the Court of Appeal by notice of appeal filed on 27 March 2012.

[41] It became apparent that the decision on the appeal would not be made before the third anniversary of the Commencement Date, 1 May 2012. It was against this prospect that the parties reached their agreement to extend the time for the exercise of the options to 1 May 2013.

[42] By judgment delivered on 12 April 2013, the Court of Appeal quashed the declarations made in the High Court.[28] A declaration in favour of Weta that the grape

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26 *Goldridge Estate Vineyards 3552 Ltd v Kakara Estate Ltd* HC Auckland CIV-2010-404-2838, 3 August 2010. The Judge also expressed a view as to the interpretation of the grape supply agreements consistent with that advanced by Savvy.

27 The earlier HC judgment, above n 2.

28 The earlier CA judgment, above n 3.

supply agreements and vineyard management agreements had been validly terminated was substituted.

[43] Savvy did not exercise the options to purchase the grapes under cl 2.2 by 1 May 2013.

[44] On 10 May 2013 Savvy sought leave to appeal to this Court. Weta opposed that application. Leave was granted on 17 July 2013.[29] Subsequently, in a judgment dated 5 September 2014, the Court allowed the appeal setting aside the judgment of the Court of Appeal and restoring the judgment of the High Court.[30]

[45] It was against this background that, on 17 November 2014, Savvy gave notice exercising the option under cl 2.2 to purchase all grapes from both sets of vineyards for the 2016 and subsequent harvests. The date of 1 May 2015 was the sixth anniversary of the Commencement Date.

[46] The response, as we have indicated, from Weta on 8 December 2014 was to assert that the option under the grape supply agreements was deemed to have lapsed as at 2 May 2013 and that Savvy's notice of 17 November 2014 was not effectual. Savvy, by letter dated 23 December 2014, responded that its option could be exercised before the third and sixth anniversaries of the Commencement Date; that is, prior to 1 May 2013 (the extended date) and 1 May 2015. Savvy claimed that Weta was repudiating its obligations. The repudiation was not accepted.

[47] The present proceedings followed.

The approach in the Courts below to liability for wrongful repudiation

[48] The High Court determined Weta's liability by considering, first, the effect in law of Weta's wrongful repudiation and, second, the effect of the earlier Court of Appeal judgment and whether that judgment, as a matter of law, prevented Savvy from giving notice before the extended 1 May 2013 deadline.

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29 *Savvy Vineyards 3552 Ltd v Kakara Estate Ltd* [2013] NZSC 71.
30 The earlier SC judgment, above n 4.

[49] On the first point, the Judge found that Savvy had not refrained from giving notice of the exercise of its options before 1 May 2013 because of any act, omission or representation on Weta's part. Rather, this was "a consequence of their own view of their legal position" following the earlier Court of Appeal judgment.[31] Nor did the Judge consider this was a situation where, having elected to keep the contract afoot, Savvy was entitled to be excused of its own non-performance of the contractual obligation. The Judge distinguished Savvy's case from those cases where "the innocent party either elects to cancel or makes no (immediate) election either way".[32]

[50] As to the effect of the earlier Court of Appeal judgment, the High Court Judge said that this Court's judgment reversing the Court of Appeal judgment and holding that the December 2010 termination notice was invalid meant it had been invalid all along. On this basis, the High Court said that the grape supply agreements remained in full force and effect throughout. Savvy could still have exercised its rights under the agreements. Therefore, the earlier Court of Appeal judgment in favour of Weta had not, as a matter of law, prevented Savvy from exercising the option before the agreed extended date of 1 May 2013.

[51] Nonetheless the Judge went on to consider whether Savvy would have exercised the option for the 2014 and subsequent harvests. The evidence of Peter Vegar on behalf of Savvy in this respect was accepted.[33] The finding made was that Savvy would have exercised the option to purchase grapes for the 2014 and subsequent harvests. Accordingly, the Judge said:[34]

> … had I found in favour of [Savvy] as to the effect of the wrongful repudiatio[n] by Weta … , and as to the effect of the Court of Appeal judgment, then [Savvy] would have succeeded on [this] cause of action.

[52] The Court of Appeal agreed with the High Court Judge. In terms of Weta's act of wrongful repudiation, the Court saw the "real question" as "whether Weta somehow prevented Savvy from exercising the option such that it could be said to be seeking to take advantage of its own wrongdoing".[35] The answer to that was no. Rather, the

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31 HC judgment, above n 5, at [97].
32 At [95], referring to *Ingram v Patcroft Properties Ltd* [2011] NZSC 49, [2011] 3 NZLR 433.
33 Mr Vegar was a director and shareholder of the two Savvy companies.
34 HC judgment, above n 5, at [125].
35 CA judgment, above n 6, at [68].

Court considered the High Court Judge was right that the evidence showed Savvy's decision resulted from its assessment of the effect of the earlier Court of Appeal judgment and its belief it could exercise the option later, on 1 May 2015.

[53] The Court then addressed the effect of the earlier Court of Appeal judgment. The Court said that, pending any further appeal, the earlier Court of Appeal judgment "was conclusive as to the legal consequence of Weta's termination notices, namely that the grape supply agreements were at an end".[36] But that decision was "provisional in the sense that appeal rights had yet to be exhausted".[37] The Court stated that the "effect of the Supreme Court judgment was to confirm what the legal position had been all along, namely that Savvy's rights subsisted throughout".[38]

[54] The Court continued by noting that while, in the interim, Savvy could not have compelled Weta to supply grapes:[39]

> Nevertheless, as a matter of law, the Court of Appeal judgment did not prevent Savvy from giving notice exercising the rights it continued to assert it had under the grape supply agreements, thereby protecting its position in the event its appeal was successful.

[55] If Savvy had given notice, the Court said that:[40]

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

[56] The Court drew a distinction between the present case and one where the Court made an order restraining Savvy from taking steps. The Court put the position in this way:

> [77] Nor could it be said that Savvy would be acting in disobedience of the Court of Appeal judgment if it had served notice exercising the option against the prospect the Supreme Court would allow its appeal. It would be different

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36 At [75].
37 At [75].
38 At [75].
39 At [76].
40 At [76].

> if the Court of Appeal had made an order restraining Savvy from taking any steps under the grape supply agreements. We agree with the Judge that the Court of Appeal judgment, which was declaratory of the legal position subject to any contrary final determination by the Supreme Court, did not operate as a matter of law to prevent notice being given.

The parties' positions

[57] Savvy says its claim is for damages for its lost opportunity to purchase the grapes for the 2014 and subsequent harvests. Savvy's case is that it was Weta's wrongful attempt to terminate the grape supply agreements, which included obtaining a declaratory order, that prevented it from purchasing the grapes while the earlier Court of Appeal order remained in force.

[58] In developing this submission, Savvy says that in the interim period between the earlier judgment of the Court of Appeal and that of this Court, there were no legal rights or duties arising under the grape supply agreements. Accordingly Savvy could not, contrary to the findings in the Courts below, give notice that it was exercising the options during this interim period and Weta had no duty to sell the grapes. In this respect, Savvy submits that the Courts below were wrong to distinguish between the effect of declaratory judgments and restraining orders.

[59] Finally, Savvy submits that if Weta's interpretation that the option lapsed if notice was not given by May 2013 is accepted, then Savvy should be given an alternative "extension of time" remedy which would have the effect of retrospectively extending the May 2013 deadline by a reasonable period of time.

[60] Weta supports the approach taken in the Courts below and says that Savvy has no right to damages under this cause of action. Weta makes the following submissions. First, Weta emphasises that no action lies, save for very limited exceptions in the nature of abuse of process, for recompense for damage caused by litigation itself. But, Weta says, that is essentially what Savvy seeks. Second, Weta says the contractual consequences of Savvy's failure to give notice of the exercise of the option are fatal to its claim. In contractual terms, Savvy was entitled to give notice and, had Savvy done so, Weta would have been bound by that. In addition, Weta says that there are concurrent factual findings that the decision not to exercise the option was Savvy's

own. Finally, Weta submits that Savvy's proposed "extension of time" remedy is unsustainable.

Our assessment

[61] The central issue raised by this ground of appeal is whether Savvy's loss for which damages are sought arises from an act or omission (the wrongful repudiation) on Weta's part or from the earlier Court of Appeal judgment (subsequently reversed), as the Courts below effectively found.[41]

[62] We frame the issue in that way as we agree, on the basis of the authorities such as *Hillgate House Ltd v Expert Clothing Service & Sales Ltd*, that if any loss arose from the reversed judgment, rather than from the wrongful repudiation, then the Courts below were correct to dismiss this part of the claim.[42] But, as we shall explain, we consider any loss can be attributed to the wrongful repudiation and that, but for the repudiation, Savvy would have exercised the option. Therefore, we allow Savvy's appeal on this ground.

[63] In explaining our reasoning, it is helpful first to say a little more about *Hillgate* because it is a key plank in Weta's argument that the cause of any loss in the present case is the reversed judgment. In *Hillgate*, the landlords went into possession after a successful application for forfeiture at first instance. The order for possession was subsequently reversed on appeal, and the tenants then brought a claim seeking damages for wrongful breach of the covenants of quiet enjoyment and non-derogation from grant.

[64] Sir Nicolas Browne-Wilkinson V-C said that the judgment on appeal disclosed that "the true view all along was that the lease had remained in existence. What was

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41 In this part of the judgment, we will also refer to the earlier Court of Appeal judgment as the reversed judgment.

42 *Hillgate House Ltd v Expert Clothing Service & Sales Ltd* [1987] 1 EGLR 65 (Ch). Given our reasoning, it has not been necessary to pursue the line of authority in cases such as *Rodger v The Comptoir D'Escompte de Paris* (1871) LR 3 PC 465 [*Rodger's Case*], relied on by Savvy, for the proposition that the court will restore litigants to the position in which they would have been had the reversed judgment not been made: see below at [66]. The relevant principles are discussed in DM Gordon "Effect of Reversal of Judgment on Acts Done Between Pronouncement and Reversal" (1958) 74 LQR 517.

in doubt was what was the true legal effect".[43] Weta places reliance on the finding that:[44]

> On analysis what the plaintiffs are claiming in this case is that the acts done by them, the tenants, and by the landlords, directly pursuant to the order of the trial judge, themselves constitute a breach of legal duty which gives rise for the first time to a cause of action. In my judgment, that cannot be right. As the judgment of Scott J indicates, when an order is in force, and so long as it is in force, it is to be obeyed and is in law correct. It is true that it may be subsequently altered on appeal; but unless and until it is altered, it is an order of the court and acts done under it are lawful.

[65] By analogy with contempt of court, Sir Nicolas Browne-Wilkinson V-C observed that acts done pursuant to an order of the court are valid and cannot constitute wrongful acts by the party doing them. He said:[45]

> If the case were otherwise, there would, in my judgment, be very great confusion. People must be entitled to act in pursuance of a court order without being at risk that they are thereby acting unlawfully. Public policy requires it.

[66] Sir Nicolas Browne-Wilkinson V-C also said this approach did not affect those cases, such as *Rodger v The Comptoir D'Escompte de Paris*, which indicated that where a judgment is reversed, the objective of the court should be to return the litigants to the position "in which they should all along have been had the law been properly appreciated".[46] Those cases were 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".[47]

[67] A similar approach to that in *Hillgate* was taken in the judgment of Brooking J in *National Australia Bank Ltd v Bond Brewing Holdings Ltd*.[48] Further, Jacob LJ in *SmithKline Beecham plc v Apotex Europe Ltd*, relied on by Weta, also makes the point that there is no action, "save for very limited exceptions in the nature of abuse of process, for recompense for damage caused by litigation itself".[49]

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43 At 66.
44 At 66.
45 At 67.
46 At 67, citing *Rodger's Case*, above n 42.
47 At 67.
48 *National Australia Bank Ltd v Bond Brewing Holdings Ltd* [1991] 1 VR 386 (VSC).
49 *SmithKline Beecham plc v Apotex Europe Ltd* [2006] EWCA Civ 658, [2007] Ch 71 at [73] (with whom Moore-Bick LJ at [126] and Sir Andrew Morritt C at [127] agreed). Citing *Hillgate*, above n 42, a similar point was made in *Drachs Investments No 3 Ltd v Brightsea UK Ltd* [2012] EWCA Civ 516, [2012] STC 1507 at [64] per Patten LJ with whom Kitchen LJ at [68] and Pitchford LJ at [69] agreed.

[68] We also need to refer to *Dymocks Franchise Systems (NSW) Pty Ltd v Bilgola Enterprises Ltd*, on which Savvy relies for the proposition that damages may be claimed for losses that flow from the original wrongful act during the period in which the earlier Court of Appeal judgment was in force.[50] In *Dymocks*, in the context of declining a stay, the Court of Appeal was considering the adequacy of damages as a remedy. The underlying issue there was whether Dymocks had validly terminated the defendants' franchise agreements to operate Dymocks stores. Pending the High Court hearing on the validity of termination, the parties had agreed the defendants could remain in the stores.

[69] The High Court found the franchise agreements were validly terminated and that Dymocks was entitled to take over the stores concerned. The defendants sought a stay on the basis that if they lost possession of the stores, even on a favourable outcome on appeal, they would not be able to re-enter as bona fide purchasers for value would by then be in possession. In determining that the absence of a stay would not render the appeal nugatory, the Court of Appeal said that damages would be an adequate remedy for the loss that might arise were the businesses subsequently not available for the defendants to re-enter, if successful on appeal. That approach suggests that the Court of Appeal considered any loss could be directly attributed to the act of Dymocks in terminating the franchise agreements should the court on appeal conclude that act was not lawful.

[70] Against this background, we turn to the present case. The first step in the reasoning in the Courts below is that Savvy's failure to give notice or to seek a further extension of time is fatal to this cause of action. That is because, in not accepting the repudiation but rather choosing to keep the agreements alive, Savvy has treated the agreements as "fully operative" as that phrase is used in *Fercometal SARL v Mediterranean Shipping Co SA*.[51] Further, by agreeing to an extension of time for the exercise of the option to 1 May 2013, the parties effectively agreed to wait on the Court of Appeal decision before taking any further steps.[52]

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50 *Dymocks Franchise Systems (NSW) Pty Ltd v Bilgola Enterprises Ltd* (1999) 13 PRNZ 48 (HC and CA).

51 *Fercometal SARL v Mediterranean Shipping Co SA* [1989] 1 AC 788 (HL) at 806 per Lord Ackner.

52 In Savvy's letter to Weta seeking an extension, Savvy recognised the "possibility that the party which does not succeed in the Court of Appeal may wish to pursue the matter further".

[71] In *Fercometal*, Lord Ackner explained the effects of a wrongful repudiation in this way:[53]

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

[72] Weta's case is that *Fercometal* is directly on point here and that the exceptions to the principle articulated in that case do not apply. Weta relies on a passage by Ian Bassett, cited in the High Court judgment, as a helpful summary of these exceptions. Relevantly, it states that:[54]

> (a) The inability of the innocent party to perform has been caused by the conduct of the repudiating party.
>
> (b) The repudiating party represented to the innocent party that it need not perform and the innocent party acted in reliance.

[73] Lord Ackner in *Fercometal* relied on Asquith LJ's well-known dictum that an unaccepted repudiation is a "thing writ in water and of no value to anybody".[55] As Weta says, that description was endorsed by this Court in *Paper Reclaim Ltd v Aotearoa International Ltd*.[56] However, as Savvy submits, other authorities suggest that the fact there is an unaccepted repudiation will not necessarily spell the end of Savvy's case. This Court's judgment in *Ingram v Patcroft Properties Ltd*

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53 *Fercometal*, above n 51, at 805.

54 Ian Bassett *Contract Law in New Zealand: Lawyers' Handbook* (Southern Cross Publishing, Auckland, 2007) at 73 (citations omitted). See also HG Beale (ed) *Chitty on Contracts* (33rd ed, Sweet & Maxwell, London, 2018) vol 1 at [24–012].

55 *Fercometal*, above n 51, at 800, citing *Howard v Pickford Tool Co Ltd* [1951] 1 KB 417 (CA) at 421.

56 *Paper Reclaim Ltd v Aotearoa International Ltd* [2007] NZSC 26, [2007] 3 NZLR 169 at [18]. Edwin Peel, the author of *Treitel: The Law of Contract* (15th ed, Sweet & Maxwell, London, 2020) explains that the rationale for the rule that the innocent party may obtain damages for the repudiating party's repudiation without having to show performance was possible is that, when the innocent party accepts the repudiation, the innocent party is freed from their own duty to perform. That reasoning does not apply when the innocent party does not accept the repudiation. In that case, Professor Peel says that the innocent party continues to be bound by their duties under the contract so that the failure to perform, even after the repudiation, "can (if not induced by [the] repudiation) amount to a breach by [the innocent party]": at [17–029] (footnote omitted).

provides an illustration of a situation in which the Court considered the unaccepted repudiation was not determinative.[57] In that case, a lessor was found to be disentitled by its wrongful repudiation of a lease from relying on the lessees' failure to pay the rent after the lessor's invalid re-entry. The lessees were later entitled to cancel and obtain relief despite their failure to pay rent after the unaccepted repudiation. That was because:[58]

> … the lessor was intimating that payment of the balance of the … rent [due] would be futile, in the sense that it would not lead to the reinstatement of possession of the premises. Because of that continuing stance the lessor was precluded from cancelling the lease for non-payment of that rent.

[74] In reaching that decision, the Court said it was necessary to square up to Asquith LJ's description of the effect of an unaccepted repudiation. In that context, the Court referred to the writing of JW Carter to the effect that Asquith LJ's approach was a "gross oversimplification of the law" and that the "precise scope and effect of an unaccepted repudiation depends upon the particular circumstances of the case".[59] The Court noted that Professor Carter referred to several "principal possibilities" of which the Court saw two as relevant to the decision in *Ingram*.[60] The first of those possibilities was where the repudiation prevented the repudiating party from exercising its contractual rights because that party could not claim to exercise contractual rights while repudiating the contract "to a material extent".[61] The second possibility was that the unaccepted repudiation absolved the innocent party from the consequences otherwise flowing from failure on the part of the innocent party to discharge contractual obligations. In such a case, the innocent party need not tender performance and would not be liable in damages for that omission.

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57 *Ingram*, above n 32.

58 At [41].

59 At [31], citing JW Carter *Carter on Contract* (looseleaf ed, LexisNexis) vol 2 at 88,396. Jeremy Finn, Stephen Todd and Matthew Barber in their text *Burrows, Finn and Todd on the Law of Contract in New Zealand* (6th ed, LexisNexis, Wellington, 2018) at 699 also suggest the statement is "misleading" because an unaccepted repudiation "can have at least two effects". *Ingram*, above n 32, is cited as an example of the situation where "a continuing repudiation may sometimes absolve the innocent party from the necessity of performing some of his or her obligations" although the contract has been kept on foot: at 700. The authors also state that an unaccepted repudiation "may justify an award of a decree of specific performance": at 700.

60 *Ingram*, above n 32, at [31].

61 At [31].

[75] The Court of Appeal in this case distinguished *Ingram* on the basis that *Ingram*, and the cases of *Peter Turnbull and Co Pty Ltd v Mundus Trading Co (Australasia) Pty Ltd*[62] and *Foran v Wight*,[63] also relied on by Savvy, involved executory contracts for sale and purchase giving rise to interdependent obligations. Here, by contrast, the contractual right was an option to purchase which was not exercised. The Court said Weta had no obligation to sell the grapes until Savvy exercised the option. Nor was there any representation by Weta that it no longer intended to fulfil its obligation, or that it would somehow prevent Savvy from exercising the option. There was also no indication from Weta that service of a notice would be pointless.

[76] As to the nature of the option to purchase, the Court of Appeal noted that in *Savvy Vineyards 3784 Ltd v Arck Ltd*, the grape supply agreements were treated as conditional contracts.[64] However, we do not have to reach a concluded view on the nature of the arrangement because the relevant circumstances here require us to consider the contractual position in light of the overlay of the earlier Court of Appeal judgment.

[77] As we have said, the Court of Appeal in its earlier judgment made a declaration as to the parties' legal positions which was later reversed. The law is clear that in the interim period between the Court of Appeal judgment and that of this Court reversing the Court of Appeal judgment, both parties were entitled to act during that period as though the grape supply agreements were not on foot. It follows that in that period, Weta was entitled to the fruits of its judgment.[65] That is because of the point made in *Hillgate* that the parties can act in pursuance of the order of the court while that order is in force.[66] The approach taken in *Hillgate*, *SmithKline* and *Drachs Investments No 3 Ltd v Brightsea UK Ltd* on this issue is consistent with public policy.[67] It reflects the fact that parties are entitled to act in accordance with the law as it is stated in the

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62 *Peter Turnbull and Co Pty Ltd v Mundus Trading Co (Australasia) Pty Ltd* (1954) 90 CLR 235.
63 *Foran v Wight* (1989) 168 CLR 385.
64 *Savvy Vineyards 3784 Ltd v Arck Ltd* [2015] NZCA 534 at [36].
65 See *Dymocks* (CA), above n 50, at [30].
66 *Hillgate*, above n 42, at 66. See also *Wilde v Australian Trade Equipment Co Pty Ltd* (1981) 145 CLR 590 at 603; and *The Commissioner for Railways (New South Wales) v Cavanough* (1935) 53 CLR 220 at 225.
67 *Hillgate*, above n 42; *SmithKline*, above n 49; and *Drachs*, above n 49.

judgment of a court. And the party with the benefit of a judgment can enforce that judgment.[68]

[78] The analogy drawn in *Hillgate* with contempt of court is a helpful one. The same point was made by this Court, in the context of contempt, in *Siemer v Solicitor-General*.[69] The Court noted that if a court order is within jurisdiction, the order "is binding and conclusive unless and until it is set aside on appeal or for other reason lawfully quashed".[70]

[79] The further point, which emerges from *Official Custodian for Charities v Mackey*, relied upon by Savvy, is that speculation about what might happen on appeal is not relevant.[71] The position in the interim pending the outcome of an appeal can be protected, if necessary, by taking steps such as seeking a stay of execution pending the appeal.[72]

[80] The Courts below, however, said that the position was different in this case because the order in issue in the earlier Court of Appeal judgment was declaratory not mandatory. As a matter of logic, it is not clear the distinction between declaratory and mandatory orders holds water in a case such as this, particularly given the binding effect of a declaration.[73]

[81] In any event, it does not make sense to say that Savvy could have given notice in the interim period and, if so, that Weta would have had to make a decision whether or not to supply grapes.[74] Whatever the correct characterisation of the option, the grape supply agreements contemplate a giving of notice that triggers Savvy's

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68 Ben McFarlane "The Recovery of Money Paid under Judgments Later Reversed" (2001) 9 RLR 1 at 22–23.

69 *Siemer v Solicitor-General* [2013] NZSC 68, [2013] 3 NZLR 441.

70 At [191]. See also *Hadkinson v Hadkinson* [1952] P 285 (CA) at 288, as cited in *Siemer*, above n 69, at [195].

71 *Official Custodian for Charities v Mackey* [1985] 1 Ch 168 (Ch). See the discussion of *Mackey* in *Hillgate*, above n 42, at 66.

72 On our approach it is not necessary to consider whether Savvy could have protected its position in some way. If that had been an issue we would also have had to consider the relevance of Weta's silence about its view that the options lapsed when not exercised before May 2013. We return to this topic at the end of our judgment: see below at [87]–[93].

73 *Mandic v Cornwall Park Trust Board* [2011] NZSC 135, [2012] 2 NZLR 194 at [8]–[9]. See also Declaratory Judgments Act 1908, ss 2–4.

74 Compare CA judgment, above n 6, at [76].

enforceable entitlement to the grapes in that Weta would become contractually bound to supply the grapes. The giving of notice triggering some voluntary act on the part of Weta is not the giving of notice triggering enforceable supply as contemplated by the grape supply agreements. If Savvy could not obtain an enforceable response, it is not possible to say, as the Courts below did, that the earlier Court of Appeal judgment did not as a matter of law prevent Savvy from giving notice of the exercise of the option.

[82] Therefore, the factual finding that Savvy made the decision not to exercise the option because of its assessment of the legal position is overtaken by our view of the law. Savvy is correct that it was prevented as a matter of law from doing so. This means that it was not Savvy's assessment of the legal position which caused the failure to exercise the option but, rather, that was the legal position and that legal position arose because of Weta's action in wrongfully repudiating the agreements.

[83] It follows that this case can be distinguished from *Hillgate*. In that case, it was the ruling by the first instance Court in relation to forfeiture that triggered the claim for damages.[75] It was the first instance Court's order for possession that prompted the landlords' act of going into possession, the act which the tenants unsuccessfully claimed constituted a breach of legal duty giving rise to damages. Here, as in *Dymocks*,[76] it is the wrongful repudiation that prompted the Court's decision, albeit that decision was ultimately reversed on appeal. To put it another way, what has gone wrong here is Weta's wrongful repudiation which preceded any involvement or order of the Court.

[84] The general principle, referred to in cases such as *Wallace v Herron* which is relied on by Savvy, that a party cannot assert and take advantage of its own wrong

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75 Similarly, in *National Australia Bank*, above n 48, one party sought certain orders from the Court and then acted in a way causing loss to the other party once the order of the Court had been obtained. There was no ability subsequently to obtain damages when the Court order was reversed on appeal. In *SmithKline*, above n 49, the loss sought to be recovered was as a result of the injunction granted in an action for infringement of a patent. That was, in any event, a case where the claim was said to be in restitution. The Court in *Drachs*, above n 49, was simply cautioning against the "obvious difficulties" in seeking to recover in relation to actions "based on compliance" with the Court order in issue: at [64].

76 In *Dymocks*, above n 50, the repudiation was accepted but that does not affect our assessment of the effect of the overlay of the earlier Court of Appeal judgment.

applies.[77] So, if it is clear that Savvy would have exercised the option but for Weta's wrongful repudiation, the consequence is that Weta cannot claim to be absolved from liability on the basis that Savvy did not exercise the option, having itself precluded Savvy's performance. In this case, the uncontested factual finding of the High Court is that Savvy would have exercised the option. Therefore, Savvy's loss for which damages are sought arises from Weta's wrongful repudiation and liability has been established.

[85] As we have found in favour of Savvy on this claim we do not need to consider Savvy's alternative remedy of an "extension of time for exercise of options".[78]

[86] We also allow the appeal on this point.

Amending the grant of leave?

[87] At the start of the hearing the Court raised with counsel questions about the scope of leave. In particular, the Court asked whether the grant of leave should be amended to include questions about the following matters:

(a) Whether Weta's current position on the interpretation of cls 2.2 and 2.4 is an abuse of process vis-à-vis the initial High Court proceeding.

(b) Whether Weta's current position is an abuse of process vis-à-vis the earlier proceeding in this Court.

(c) Whether, in light of the findings in the initial proceeding, there is an issue estoppel.

[88] The Court issued a minute asking for further submissions on these matters. The background to this request is that, as we have noted, Weta did not advise Savvy until 8 December 2014 of its view of the interpretation of cls 2.2 and 2.4 which has been advanced in this proceeding. The Court considered it might be necessary to

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77 *Wallace v Herron* [2017] NZCA 346 at [52]. See also Finn, Todd and Barber, above n 59, at 289.

78 As Weta submits, this alternative remedy is, in any event, not pleaded in relation to the first cause of action but in respect of the second cause of action.

address the legal effect of Weta's failure to advance that position at any time in the course of the earlier proceedings.

[89] We received submissions from the parties. For present purposes we need only refer to two aspects of the response from Weta.

[90] First, Weta questions the power of the Court to amend the grant of leave in this way. This issue arises because, Weta says, leave to appeal was declined on the question of whether the Court of Appeal was correct to dismiss Savvy's argument that estoppel by convention applied to prevent Weta from advancing its interpretation of the agreements.[79] Implicit in Weta's submissions is the notion that the potential abuses of process and issue estoppel raised by the Court's minute replicate, in substance if not in form, Savvy's estoppel by convention argument on which leave was declined.[80] Rule 29(1) of the Supreme Court Rules 2004 says that if the leave judgment specifies approved grounds of appeal, the grounds that may be argued are limited to those grounds. Rule 29(2) says that despite r 29(1), the Court may allow "another ground" to be advanced in argument. The argument for Weta in a nutshell is that the reference to "another" ground contemplates a new ground, not one for which leave to appeal has been declined.

[91] Second, Weta says that the matters raised by the Court as potentially either an abuse of process or estoppel replicate the estoppel claims Savvy advanced unsuccessfully in both the High Court and Court of Appeal. Weta submits that those matters are now res judicata in their favour. The submissions also note in the alternative that issue estoppel was not pleaded or previously raised by Savvy in relation to the matters set out at [87(b)] and [87(c)] above. Nor was abuse of process pleaded.

[92] Having reflected on these submissions we have decided it is not necessary for us to hear further from the parties on these matters. Given the result we have reached is favourable to Savvy, determining these further issues is no longer necessary. To

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79 The Court of Appeal considered Savvy could not raise this argument on appeal because it was not pleaded in the High Court and the necessary factual findings were not made: CA judgment, above n 6, at [46].

80 See above at [7].

address the matters arising out of the questions in the Court's minute now would only impose additional costs on the parties in a situation where they could not alter the outcome. We do not amend the grant of leave but have dealt only with those matters for which leave was granted.

[93] We should, however, make it clear that we consider we do have the power to amend the grant of leave in this case.[81] We do not accept that the wording of r 29 limits the Court in the way that is submitted by Weta.[82] In any event, ultimately, the intention behind s 74 of the Senior Courts Act 2016 is that the Court should "hear and determine" appeals only if to do so is "necessary in the interests of justice" and r 29 needs to be read in light of that purpose.[83] We add that the approach advanced by Weta does not accord with the Court's ability to recall a judgment of the Court.

Result

[94] In accordance with the view of the Court, the appeal is allowed. The judgment of the Court of Appeal is set aside. The respondents are liable to the appellants on the first and second causes of action in the first amended statement of claim. An order directing an inquiry into damages is made in relation to the first cause of action. The declaration and the order directing an inquiry into damages made by the High Court in relation to the second cause of action are restored.[84]

Costs

[95] Having succeeded on the appeal, the appellants are entitled to costs.

[96] In terms of costs in this Court, we make an order that the first and second respondents must pay the first and second appellants one set of costs of $25,000 plus usual disbursements. We quash the orders as to costs in the Court of Appeal and the orders as to costs in the High Court as they relate to the High Court's dismissal of the

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81 We envisage that we would not do this often.

82 We make no comment on Weta's submission that the abuse of process and issue estoppel grounds referred to in our minute replicate the substance of Savvy's estoppel by convention claim.

83 See *Blair & Co Ltd v Queenstown Lakes District Council* [2010] NZSC 44, [2010] 3 NZLR 17 at [10].

84 These orders will need to be implemented in a way that ensures there is no double counting.

first cause of action. Costs should be re-determined in those Courts in light of this judgment.

WILLIAM YOUNG J

[97] I agree with the conclusions reached in the judgment prepared by Ellen France J but wish to add a comment in respect of the first cause of action.

[98] Weta repudiated the grape supply agreements (and thus the option to purchase agreements which they contained) by its notice of 20 December 2010. I think it would have been open to Savvy to accept the repudiation in relation to the then current option to purchase due to be exercised by 1 May 2012 but to keep the contract alive in relation to the next option to purchase (to be exercised by 1 May 2015).

[99] Between the earlier High Court judgment and the determination by the Court of Appeal of the appeal, there was an agreed extension of the notice date of 1 May 2012 until 1 May 2013. I would construe this extension as Weta acknowledging that, if it lost in the Court of Appeal, Savvy could give notice before 1 May 2013 and, subject to the result of any further appeal, Weta would accept it as effective.

[100] As it turned out, Weta succeeded in the Court of Appeal. Given this success, the relevance of the extension largely fell away. This is because, in the situation as it was then, Weta plainly did not see itself as bound by the option to purchase and, had notice been given, would not have complied with it. I see this as leaving in place the 20 December 2010 repudiation. The non-exercise of the option between the delivery of the Court of Appeal judgment on 12 April 2013 and 1 May 2013 meant that a purchase agreement as contemplated by the extension did not come into existence. In these somewhat unusual circumstances – that is where inaction (in the form of not giving notice) meant that the contractual arrangements in respect of the relevant option period came to an end – I think that the non-giving of notice by Savvy could be seen as an acceptance of the repudiation and thus as a cancellation of the then current relevant option to purchase agreement. On this basis, it has an entitlement to damages in relation to the first cause of action.

[101] Savvy did not argue its case in the way I have just outlined. This makes it impracticable to decide the case on this basis. That said, the approach I have suggested is similar in substance at least to that advanced by Ellen France J and with which I am prepared to concur.

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