IN THE SUPREME COURT OF NEW ZEALAND SC 44/2013

[2014] NZSC Trans 2

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

Coram: Elias CJ
McGrath J
William Young J
Glazebrook J
Arnold J

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

CIVIL APPEAL

MR JONES QC:

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

ELIAS CJ:

Thank you Mr Jones, Ms Bryant.

MR HARRISON QC:

If Your Honours please, I appear for the respondents with my learned friend Mr Woodd.

ELIAS CJ:

Thank you, Mr Harrison and Mr Woodd. Yes, Mr Jones. There is the application for leave to put in the further evidence. We have read the submissions and we will admit it on the basis that it's indisputable otherwise there is a risk we might not do justice. Mr Harrison, you were expecting to make submissions on this, were you?

MR HARRISON QC:

I wasn't expecting to make a meal of the issue.

ELIAS CJ:

After that rather quelling opening, do you wish to?

MR HARRISON QC:

Well, I simply say this, if I may –

ELIAS CJ:

I should say that I was away last week and I think some of the matters of procedure may not have come to me, sorry.

MR HARRISON QC:

Yes. Well, it's just this, that the evidence was not before the High Court or the Court of Appeal. It's plainly not fresh. There's no explanation as to why it wasn't adduced earlier. It's not reflected in the pleadings and in formal terms I oppose it, but I will deal with the effect of it, shall I say, if admitted in the course of the main argument, if I may.

ELIAS CJ:

Yes, thank you, Mr Harrison, we will admit it.

MR JONES QC:

As the Court pleases. That's disappointing for Ms Bryant, who is going to take that part of the argument.

Now, this Court has granted leave for an appeal to be brought with the approved ground being whether the Court of Appeal was correct to conclude the appellants had not by novation been substituted for Goldridge Estate Limited in respect of both the management and supply agreements in issue in the proceeding.

The background to the parties' interaction is important as far as context is concerned. The investor vineyard model which has been set out in the submissions and in the evidence of Peter Vegar was one which was thought up by Mr Vegar and his wife, and the essence of those was that investors who had literally no knowledge of vineyard management or wineries in general could invest with the expertise being supplied by the Vegars, and this would include the setting up of the vineyards under the project management agreements and also the management of the vineyards under the vineyard management agreements, and then what was in it for the Vegars was the grape supply agreements. So what we have is a series of agreements where the front end obligations were with the Vegars, and they had to develop vineyards from bare land into valuable income-producing assets, and that is exactly what happened.

The way in which the scheme was devised, if you like, was to have the company, The Vines, which purchased the land, enter into the property agreements with Goldridge Estate Limited, and as the Court will have seen from the materials, what actually happened is that the respondents in this case were consulted thoroughly in relation to the terms of those property agreements, the grape supply, the vineyard management, and the project management agreements. The first contractual relationship came into being on the 20th of October of 2006.

If I can take the Court to an example sale and purchase agreement, that is in volume 3 at page 506. Now, we have the standard provisions from pages 505 through to 510.

GLAZEBROOK J:
My volume 3 – volume 3 on the case of appeal –

MR JONES QC:
Yes.

GLAZEBROOK J:

My volume 3 – have I got something wrong – goes up to 503.

ELIAS CJ:

There's two lots of numbering.

GLAZEBROOK J:

Oh, I see, at the top, thank you.

MR JONES QC:

It's at the very top, the smaller numbers. The others are the Court of Appeal. I've been grappling with that myself over a period of time, I confess.

What we have is further special conditions of sale from pages 511 through to 515. The relevant provisions for the purposes of this proceeding are at page 513, clause 21.1. It states there that the vendor must, on or before the unconditional date, enter into the following agreements. These are the ones that were negotiated with the respondents. In 21.2, the vendor must, on settlement, assign the benefit of the agreements to the purchaser. Now, this is one of the uses of the word "assign", which, with respect, appears to mean "transfer" as opposed to the legal meaning of the term. The reason, it seems, behind this mechanism is so that the terms of the property agreements could be struck with the intending purchaser. The owner of the land vines would then enter into the property agreements with Goldridge Estate Limited. The purchaser would then execute the sale and purchase agreement and then Vines would transfer, to use a neutral term, the agreements and its part in the agreements to the purchasers. That or an example of that can be seen at page 706. That is in the same volume.

ELIAS CJ:

Sorry, what's this one?

MR JONES QC:

This is the, in accordance with 21.2, this is the transfer or assignment from Vines to Kakara, the purchaser.

ELIAS CJ:

Yes.

MR JONES QC:

So this is page 707. Now in terms of the background it can be seen that – and what happens is there are different, there are four property agreements in relation to each vineyard, because the vineyards are split into two. So, each part of each vineyard has a supply agreement and a vineyard management agreement, so there are four agreements, two vineyard management agreements and two vineyard property agreements for each of the respondents.

ELIAS CJ:

For each of the respondents?

MR JONES QC:

Yes, so there are eight altogether. What happened is the purchasers took part in terms of buying blocks of land which happened to be in two different blocks but adjoining two different titles and so separate agreements were put in place in relation to each part. Nothing turns on that, it's just a multiplicity of the same agreements.

McGRATH J:

This is an agreement which substitutes a party in relation to supply grapes?

MR JONES QC:

Yes, and these are the same for the vineyard management agreements as well. So, this is simply an example, but they're the same all the way through as far as Kakara is concerned.

McGRATH J:

So it's just an example of agreements that cover supply of grapes and cover the transfer of the property as well. Is that what you're saying?

MR JONES QC:

This isn't a grapes supply agreement as such. It is the assignment agreement, which is in fact a novation.

McGRATH J:

Yes.

MR JONES QC:

Which puts into effect clause 21.2 of the agreement for sale and purchase.

McGRATH J:

Okay, thank you.

ELIAS CJ:

There are vineyard management agreements, there are supply agreements.

MR JONES QC:

Yes.

ELIAS CJ:

And there are development agreements.

MR JONES QC:

Yes, a project –

ELIAS CJ:

They're separate, are they?

MR JONES QC

They are all three separate.

ELIAS CJ:

And are we concerned with the development agreements?

MR JONES QC:

Not at all.

ELIAS CJ:

No, that's right, thank you.

MR JONES QC:

That was for a limited period to turn the land from bare land into a producing vineyard and those have all be discharged, have all been completed. So, the only ones we're

talking about are the vineyard management agreements and the vineyard or the grape supply agreements.

ELIAS CJ:
Yes.

MR JONES QC:
So, under the agreement for sale and purchase, The Vines as the vendor and the contracting party to the various property agreements with Goldridge was obliged to assign the agreements to the purchaser. The one we're looking at at page 707 is Kakara and it can be seen in the background to that document under the head "Background" it talks about the agreements for the supply of grapes and the agreement for sale and purchase under (b) that the assignor has agreement to sell and the assignee has agree to buy the property and the buyer has agreed to the benefit and burden being assigned to the assignee.

Now, what actually happens in terms of the operative provisions of this document at 1.1 is a novation, because we can see at 1.1(a) it states that, "The assignee shall be substituted for the assignor under the grapes supply agreement as if the assignee had originally be a party instead of the assignor and all references to the assignor shall be to the assignee. The assignee shall be bound to buy and comply with the provisions and the buyer will be bound to comply with the provisions of the grape supply agreement."

Now, with respect, that removed Vines as a party to both the vineyard management and grape supply agreements and that, in my submission, was clearly the intent of the parties under the agreement for sale and purchase, notwithstanding the use of the word "Assign" and the reason for that is this, the vineyard management agreements were put in place so that the quality of grapes, the quality of the harvest could be maintained by the buyer, because the buyer was both the manager and the buyer under the grape supply agreements, so there is an interrelationship between the two.

The grape supply agreements had the ability to endure for up to 50 years. The initial term was for 10 years and then there are two further rights of renewal or should I say two rights of renewal for 20 vintages, ie, 20 years each. So, these are very long-term and interactive types of agreements. The buyer has the ability to state how certain

things should be done with the vineyard and that is why the vineyard management agreement is also important to the buyer, because that determines the quality of the grapes and the harvest.

Now, The Vines had no further involvement with anything. It was the owner of the land and it sold it. So, there are no reason for The Vines to remain as a party to the grape supply agreement, to the vineyard management agreement, to any agreement. It was the vendor and once it had sold the land it was done. Hence the obligation in the sale and purchase agreement appeared to clearly contemplate, notwithstanding its wording, I have to say, that The Vines would not take any further part in the relationship between any of the companies that were left and the reason for that is quite simple. There is a termination clause common to all of the agreements which say in the usual way that if a party to the agreement goes into receivership or liquidation or some other event occurs, that gives the right to terminate.

Now, of course, The Vines is not having any involvement at all after the actual sale of the land, absent executing the novations. If in five years time it goes into liquidation, if they were still a party, technically, then if the buyer wanted to or the manager wanted to, they could say, “Ah, you’re still a party, you have gone into liquidation therefore even though you have nothing to do with the day-to-day running of this vineyard and you’re not a buyer and you have no input, I can base a right of termination on your liquidation and that’s what I'm going to do.” That, in my submission, could not possibly have been contemplated by the parties and would be commercially ridiculous.

ELIAS CJ:
There were indemnities given by Vines, weren’t there?

MR JONES QC:
There are indemnities in the agreement at paragraph 2.

ELIAS CJ:
Which agreement?

MR JONES QC:

At page 708, that's in the novation agreement, if I can call it that, but they're just the standard indemnities, if anything happened beforehand I'll indemnify you and indemnify –

ELIAS CJ:

They're not continuing indemnities?

MR JONES QC:

No.

ARNOLD J:

Well, they're continuing but they're only effective for conduct occurring at particular times.

MR JONES QC:

Put it this way there's no guarantee, if you like, from The Vines that we will back you up, which is essentially what an assignor does. They're the last resort or the backstop. There's nothing to suggest that.

ARNOLD J:

That's right. The effective date is the critical cut off date, yes.

MR JONES QC:

Indeed, yes, yes, there is a cut off, so it's up to that point and then after that.

ARNOLD J:

Yes, yes.

ELIAS CJ:

And what about the reciprocal indemnity from the assignee?

MR JONES QC

This is simply my submission standard.

ELIAS CJ:

Yes, you describe it as boilerplate, I think, in your submissions.

MR JONES QC:

Yes, yes.

ELIAS CJ:

But what effect do you say it has?

MR JONES QC:

Well, it simply protects in case there is any claim, but it doesn't effect what the agreement actually does, which is to novate, which is to substitute.

ELIAS CJ:

But if there is a novation, how could there be any claim?

MR JONES QC:

Well there can't, that's why it's been described as boilerplate. Because the operative provision under 1.1 clearly is a novation. This is an identical agreement or document to the one that is in fact at the heart of the appeal.

ARNOLD J:

It would still have that, 2.1 would still be relevant though because even if it was a novation, if after the effective date somebody brought a claim against Vines, Vines might successfully defend the claim but would incur costs in doing so.

MR JONES QC:

Indeed.

ARNOLD J:

And then the indemnity, I guess, would cut in?

MR JONES QC:

Yes, it would.

ELIAS CJ:

So it's an indemnity for liability arising before the effective date?

MR JONES QC:

The assignor indemnifies for liability arising before the effective date, so the assignee doesn't take on board anything that's already happened and the assignee in reverse says, "Anything that happens afterwards you won't be liable for, even if you get sued."

ELIAS CJ:
Yes, thank you.

MR JONES QC:
That's what His Honour was talking about. So, it's accepted by everybody that this form of document in fact effects a novation and with respect that has to be so given the operative provisions of it. The substitution of the assignee as the party from the beginning as if they'd been the original party, it's a classic novation situation. So, notwithstanding the use of the word "assign" in the agreement for sale and purchase. This is clearly in my submission what was intended and it makes commercial sense and so from this point on the two parties to the grape supply and vineyard management agreements were Kakara and Goldridge. So, what had happened is the vendor is now out, Vines is no longer part of the process.

Now, I've been dealing with Kakara. The following year the principles of Kakara undertook another purchase on the same terms effectively with the second respondent Weta. They set up the company and the same process was utilised and the same agreements were put into place and that occurred in December of 2007. Now, for whatever reason it appears that the transfer of the property agreements from Vines to Weta was not in the same form as we've just looked at. It was in a different form which appeared to be in the same of an assignment. Having said that, the effect of it, in my submission, was or should've been a novation. That was obviously the intension of the parties. Nothing really turns on that. So, what we have is a –

GLAZEBROOK J:
Have we got a copy? Is that in the bundle somewhere?

MR JONES QC:
It is indeed. I just have to go to another bundle, sorry. This is at, the one I have is volume 4, page 1054. Now the operative provision of that agreement is on page 1055, paragraph 2 and paragraph 3. Now there is no explicit novation clause in

this document, but in the reason that this form of document was used as opposed to the one we previously looked at for the Kakara transfer is unexplained. We just don't know.

GLAZEBROOK J:
But you say nothing turns on it, in any event?

MR JONES QC:
Nothing turns on it.

GLAZEBROOK J:
The intention was that it was, in fact, it should have been a novation?

MR JONES QC:
Yes.

GLAZEBROOK J:
So would it be a rectification issue or a –

MR JONES QC:
Well, the argument is that it's in a hybrid novation situation, but I'm not sure we need to delve into that.

GLAZEBROOK J:
It's not relevant, yes.

MR JONES QC:
No, no. So, that sets the scene, if you like, for The Vines being out and Kakara and Weta being in. So, the parties to the vineyard management agreements and the grape supply agreements are now Goldridge Estate Limited and each of the respondents.

McGRATH J:
The 14th December agreement is a different agreement, isn't it?

MR JONES QC:
Yes, differently worded.

McGRATH J:
It's not just this particular provision. It's a different form of agreement?

MR JONES QC:
It is, but the sale and purchase agreement is the same, the concept was the same, the other contracts are the same, so this is something which was used, but it seems that it was intended that the effect should be the same. There's no rational reason for Vines to remain in any sort of commercial relationship with either of the parties Goldridge Estate or Weta. But, as stated, we don't need to actually delve into that –

McGRATH J:
I'm very much conscious of that.

MR JONES QC:
Which is probably a good thing. Now, moving on and looking at the chronology perhaps, what happens is that over this period of time Kakara, that vineyard is developed under the project management agreement and the Weta vineyard is also developed under that agreement and there's no issue about that and the vineyard started looking at producing, as I recall, for the 2010 harvest.

Now, what happened in 2009 becomes important and indeed critical in relation to the appeal. There is evidence that the Vegars, that is Jean and Peter Vegar who are the principals of Goldridge Estate Limited determined that the way in which the business model was structured needed modification and that there needed to be a separate company to deal with each investor vineyard and they had a number of investor vineyards. So, what happened was a number of companies were incorporated, which I'll call the numerical companies, because the numbers of the companies related to the number of the State Highway.

WILLIAM YOUNG J:
The companies were – the Goldridge in Matakana were insolvent with it.

MR JONES QC:
Not in 2009, Sir, no.

WILLIAM YOUNG J:

When?

MR JONES QC:

They were wound up on the 21st of November 2010.

WILLIAM YOUNG J:

But were they insolvent in 2009 or don't we know?

MR JONES QC:

There's no evidence that they were. The evidence is that there is a restructure because it was decided that there would be individual companies put into place in relation to each particular vineyard.

WILLIAM YOUNG J:

Well, the allegation at trial was that the restructure was to take assets away from the consequences of an RMA prosecution which was disputed?

MR JONES QC:

Yes, that's correct.

WILLIAM YOUNG J:

As opposed to insolvency and clearing the decks for that?

MR JONES QC:

Yes, and just while we're dealing with – well, I'll get on with that in a minute, but that is the background to it and there is email correspondence which leads up to a meeting on the 22nd of July 2009 between the principals of Goldridge, Peter Vegar and his brother Paul who is an employee and the principals of the respondents, that is Bruce and Murray Forlong. I don't think Mr Weird was present at that meeting.

Now, this is where there was the discussion that Your Honour talked about alleged to have happened and there was evidence adduced in the High Court that there was indeed an RMA prosecution, but Mr Brabant, who was acting for Goldridge have indicated and he gave evidence of this which was unchallenged, that the level of fine potentially was $10,000 but should be less due to mitigating factors.

The respondents opined in their evidence that as far as they were concerned they were told that there was a fine that could go up to $200,000 and because of that Goldridge was going to transfer its assets out of its own name into other companies and would then be a shell. Now that evidence was disputed, but what it does do is show in light of what did and didn't happen later, that Goldridge Estate Limited as a company can have had no value to the respondents at all, because on their own evidence they're being told that steps are being put in place to denude Goldridge Estate Limited of its assets. That very thing occurs according to them and they say and do nothing, but at a later – but they say and do nothing and then when it comes to whether Goldridge remains as a party to the agreements, Goldridge is held up as being a most important factor and they would never have let Goldridge go. That's simply an internal contradiction in the respondents' case.

But what we do know from the 22nd of July is that the respondents were told what the position was that there was going to be a transfer out of Goldridge into the numerical companies and this was going to be put into effect. Now, importantly there is no evidence to establish that that was objected to or anything was said, "No, you can't do that," or words to that effect. That's referred to in the submissions evidence of Bruce Forlong where he says he's asked the question by his own counsel about that. "Is it possible that the Vegars went away from the meeting and thought everything was all right?" And he said, "Yes, it is possible." He didn't really say too much. But in any event –

GLAZEBROOK J:
Isn't the argument they couldn't say anything because there was an ability to assign to associated companies?

MR JONES QC:
That is the argument, yes, it is, but this is an informal –

GLAZEBROOK J:
So it was really irrelevant to them, so they couldn't object anyway?

MR JONES QC:
Well, the thing is this. If Goldridge had been so important to them as an entity, then something should've been said.

GLAZEBROOK J:

Well, why is that? Because they didn't have any choice? They couldn't say, "Well, you can't do that," could they? Because they could, without even asking permission.

MR JONES QC:

Well, they could, indeed, yes.

GLAZEBROOK J:

Which I think some of the correspondence actually points out, doesn't it?

MR JONES QC:

Yes, it does, but the point is this, that as far as that meeting is concerned, there was no opposition in terms of what was being suggested.

McGRATH J:

The trial Judge made a finding on this, did she not?

MR JONES QC:

Yes.

GLAZEBROOK J:

But if you can't oppose, then why would you say that it's significant you didn't oppose? Because you could oppose all you liked and then say, "Well, tough, we're dong it anyway."

MR JONES QC:

The issue is whether or not opposition was actually communicated to the Vegars in terms of later conduct establishing consent to the novation and the simple point is, look as far as the meeting was concerned, the uncontested evidence is that as far as the respondents were concerned, they were told of the pending transfer, so it didn't come as a surprise. It certainly wasn't a Heller farmer situation where something was simply sent by way of a fact saying, "Look, from now on you'll be dealing with this other company." It's really a background matter as far as that is the situation.

McGRATH J:

Can you just give me the reference, Mr Jones? Don't go to it, don't take me to it, but just a page reference of what the Judge said about this?

MR HARRISON QC:

If I may while my learned friend is looking, the position as to what was said at the meeting, even on the appellants' evidence is being misrepresented and it's simpler to go to the source which is the appellants' own witnesses' brief at case 2, page 126, paragraph 13, it said that the, "Goldridge's intention to assign the property agreements part of a general restructure was what was advised." There's a dispute around that, but that's – it wasn't about an announcement that assets would be stripped from Goldridge or anything like that.

ELIAS CJ:

Well, you may need to take us to the evidence or perhaps Mr Harrison can take us to it in response, if you think it necessary?

MR JONES QC:

I'm sure he will.

ELIAS CJ:

Yes.

MR JONES QC:

But on the respondents' own evidence, they were told that assets were going to be moved out of Goldridge so it would be a shell. That was their own evidence, ostensibly on the basis that they might be landed with a large fine. That's what their evidence was. So, it's the transfer of assets out which was discussed, that isn't an issue. It's the reasoning behind it, which is the issue, which is probably irrelevant, but whatever the position, the 22nd of July meeting occurred and at that point the respondents were effectively on notice that something was going to occur and it did.

Now, the reference is, Your Honour, it's page 67 of volume 1 of the case, paragraphs 56 and 58 of the judgment.

McGRATH J:

Thank you.

MR JONES QC:

Now what followed was – well perhaps if I can take you to a file note. It's in volume 4, page 1082. This is Murray Forlong's diary note.

GLAZEBROOK J:
Sorry, I missed that reference.

MR JONES QC:
1082. It's difficult to read, I'm afraid, because the photocopying is not as good of the diary.

GLAZEBROOK J:
Is that from the – oh 22nd of –

MR JONES QC:
22nd of July, 9.00 am, Bruce, Peter and Paul and it says, "Propose Goldridge pleading guilty and transfer existing contracts to new company." So, there's no question but that the contracts are going to be transferred.

McGRATH J:
Well, we read on.

MR JONES QC:
Now –

WILLIAM YOUNG J:
Asked about the Goldridge name, is that right? Different companies?

MR JONES QC:
Yes.

GLAZEBROOK J:
The name of the different companies, do you think that means?

MR JONES QC:
Well, that's simply what the record says. There's no suggestion, as I understand it, that there was anything said, "No Goldridge must remain as a party."

ARNOLD J:

So the initial numerical companies were Goldridge and the number, weren't they? Did they then change the –

MR JONES QC:

The numerical companies had not yet come into existence.

ARNOLD J:

I know, but when they did later, weren't they Goldridge plus the number?

MR JONES QC:

Yes, yes, they were.

ARNOLD J:

And then they became savvy –

MR JONES QC

On the 11th of November of the following year, yes.

ARNOLD J:

Yes.

MR JONES QC:

So, Goldridge 4334 and 3554 came into being on the 28th of August, the month after this meeting, so the name was followed through.

Now we now come to the actual documents which were at the heart of the appeal and if I can take you to – sorry, there's a number of different iterations of the document for some unknown reason, so I just want to get the right one because there was a covering letter. Yes, 1169, this is in volume 4. So this was a letter dated 11 September addressed to Kakara and there was a similar letter addressed to Weta. It was all mirrored, and the letter obviously can be read. It talks about Goldridge Estate Limited is selling its business to the Goldridge Estate numerical company. It talks about it being a related company and the assignment taking effect on the 28th of August. It talks about assignment to a related company not requiring consent but assignment documents have been prepared which require execution and

then there are a number of assignment documents, if I can call them that, which are appended, which relate to each of the property agreements for each vineyard.

Now over the page at page 1171 is the document titled deed of assignment and which is at the heart of the appeal. It's dated the 28th of August, but the terms of it are significant. Under the heading "Background" there's a reference to, in this case, a vineyard management agreement and others refer to vineyard supply agreement as well. Under (b) it talks about, "The Vines assigned its rights and obligations under the agreement to the client with the consent of the assignor." That in fact is the novation document that we looked at earlier. (c), "The assignor and assignee have entered into an agreement whereby the assignee will purchase all of the assignor's rights, title and interest." The effective date is said to be the 1st of September 2009 and it states that the client has agreed to accept such assignment.

Now, as far as the activation part of the document is concerned under the heading "Assignment" which in my submission is a misnomer, it then talks about the assignor conveying, transferring and assigning all of the assignors estate, title and interest in and under the agreement with effect from the effective date and then as part of that at 1.2 with effect from the effective date, the parties agree and then it has the novation clause which we've already looked at, as far as that earlier assignment, if you like, from Vines to Kakara's concern, it's in identical terms.

Now, it's common ground that had the respondents signed these documents then novations would've occurred and Goldridge Estate Limited would no longer be a party to the property agreements, that is common ground. What in fact occurred is that Goldridge Estate Limited assigned them, the numerical Goldridge company assigned them, but Kakara and Weta did not. Neither did they communicate in any way that they were refusing to do so. There was simply no response and there was no follow up and matters simply did not get progressed. But what we have is the position where by the letter of the 11th of September 2009, what I'll call the novation document executed by two of the three parties is forwarded to the respondents for them to execute and it isn't, but there is no overt rejection of it, there is no communication, in fact, of any kind from either side after this, in relation to it. But the important thing is this, there was no separate assignment between Goldridge Estate Limited and the numerical company. This is the document and it's accepted, as I understand it, in the respondents' submissions at paragraph 47 that this document contemplated the contract of a certain nature and on fundamental

principles because it wasn't accepted, it has no effect. That is this document as it stands, absent consent. So, the respondents are saying in some way –

McGRATH J:
Is it consent or is it really just execution, acceptance if you like?

MR JONES QC:
Well obviously execution connotes or signifies consent. That's an express way of saying, I agree, just as someone might say yes.

McGRATH J:
It's acceptance, really?

MR JONES QC:
Yes. Coming back to it, if the contract doesn't accept the basic principles of contract, if the contract isn't accepted in the way in which it is put forward then it is not a contract.

McGRATH J:
Well you'd think when you talk of consents you, for me, both the idea of consent to an assignment or something that contractually has to happen under a contract. But it's not really that, is it? It's really a question of whether these parties were –

MR JONES QC:
Yes.

McGRATH J:
– entering into this contract. This is what their signature was going to do?

MR JONES QC:
Yes, if one looks at it in terms of offer and acceptance, a signature would have been an acceptance that that is the position.

GLAZEBROOK J:
This would still have an effect as an assignment in the normal sense between Goldridge and the numerical companies though, wouldn't it? There's no suggestion that because the client didn't sign, there wasn't actually an assignment. All that the

signature of, which I doubt it's Kakara, pronounced Kakara, but anyway, all that would've happened in respect of that is that it wasn't novated?

MR JONES QC:

In my submission that is not the position. That is not an assignment.

GLAZEBROOK J:

So you say this isn't a – so this isn't a contract at all because it wasn't signed? And in fact Goldridge remains the party to the vineyard agreements, if I can use that in the generic sense.

MR JONES QC:

This document the date of the 28th of August 2009, was contemplated as being a three party contract.

WILLIAM YOUNG J:

So you say it's not effective at all until –

MR JONES QC:

As an assignment, yes.

WILLIAM YOUNG J:

– one way or another that the clients ascent to it?

MR JONES QC:

Indeed, it's not effective as an assignment.

WILLIAM YOUNG J:

Well, that's not really the basis your clients acted on though.

MR JONES QC:

Well, the client has acted on the basis that it was accepted in its terms by the respondents and so the numerical companies have been replaced, have replaced Goldridge Estate, that's the basis that they have acted on.

ELIAS CJ:

Well, I'm not sure, sorry –

GLAZEBROOK J:

I don't see –

ELIAS CJ:

I don't see as a matter of principle why it isn't effective as an assignment as between Goldridge Estate and the numerical company.

WILLIAM YOUNG J:

Well, it could be saying that the assignees consent to the assignment and the assignors consent to the assignment if conditional upon the third party signing it.

ELIAS CJ:

Well, it could.

WILLIAM YOUNG J:

I mean that's a question of whether it means it or not.

GLAZEBROOK J:

I doubt it, because they say it had already occurred when they sent it on the 11th of September, so as far as they were concerned it had happened.

ELIAS CJ:

And indeed it's a bit late to raise anything like that.

MR JONES QC:

Well, it seems pretty clear from the evidence that Mr Vegar didn't know the difference between an assignment and a novation.

GLAZEBROOK J:

Well, exactly, so he thought he'd already – they had assigned it without the consent which they knew they didn't need as between themselves and then on 11th of September sent it off to turn it into a novation, which of course it would've been turned into a novation had it been executed at that stage. So, isn't the issue really by conduct post this period taking account of the background whether there had in fact been an acceptance of that, an oral acceptance of it, effectively, or an acceptance by conduct rather than execution?

MR JONES QC:

That is correct. That is the fundamental issue, but a preliminary issue is, does this document actually have any legal effect as an assignment –

GLAZEBROOK J:

It doesn't help you much if it doesn't, because then they can cancel because Goldridge remains a party.

MR JONES QC:

Well, no, it still comes to the point of if they've accepted it then this document becomes enforceable and becomes the actual document which forms the basis of the agreement between the three.

ELIAS CJ:

You don't need a document.

MR JONES QC:

For an assignment?

ELIAS CJ:

No.

MR JONES QC:

No.

McGRATH J:

Can I put it to you this way? We don't need to go into the issue of whether or not this agreement is binding between the first two named parties, do we?

MR JONES QC:

Well in one sense –

McGRATH J:

You've made an assertion or a submission as to it, but I can't see that we need to go into that.

MR JONES QC:

Well, I suppose the issue must be this, that if this isn't an assignment, when was there an assignment and how was it done, because the appellants essentially say, "Look, this is the only deal on the table," and it was all part and parcel of the one thing.

ELIAS CJ:

The covering letter –

McGRATH J:

There was no dispute, there was no dispute between the first two named parties, so why is it important whether or not this operated as an assignment between the two of them. The issue is whether or not, as you correctly put it, there was an acceptance by conduct, there being no acceptance by signature.

MR JONES QC:

Well, it comes back to the point it's raised in the respondents' argument that there had been a previous assignment.

ELIAS CJ:

Well, that's what the covering letter says.

MR JONES QC:

That's what the covering letter does say. Whether or not that is legally correct or not is another matter.

GLAZEBROOK J:

Well, both of them agreed to it and they had agreed to it and they said they agreed to it, it's quite difficult to see how they can't agree to it.

ELIAS CJ:

It's effective.

MR JONES QC:

Well, the agreement is –

GLAZEBROOK J:

There's no requirement in writing, is there?

MR JONES QC:
Not for an equitable assignment, no.

GLAZEBROOK J:
No.

MR JONES QC:
But for the –

ELIAS CJ:
Why do you say not from equitable assignment? Why wouldn't it be effective?

GLAZEBROOK J:
It's not land, is it?

ELIAS CJ:
No.

MR JONES QC:
Well, there's no evidence of any other agreement being put into place except for the reference in the letter.

ELIAS CJ:
Well, that could be a reference to an oral agreement, why is that not effective?

MR JONES QC:
Well, the reference in the letter is to the date of the 28th of August, which is the date on this document.

GLAZEBROOK J:
So they thought when they signed this – well, especially if you didn't know the difference, they thought that when they signed that, there it was. One would have thought so.

MR JONES QC:

Yes, whether or not it's legally effective or not because of its terms.

GLAZEBROOK J:

Well, it's difficult to see how it's not legally effective, if both of the contracting parties thought they were assigning, one thought it was assigning and one thought it was the assignor and one thought it was the assignee, then why wouldn't the law say, "Well, that's the position?"

MR JONES QC:

Well, the difficulty is, I suppose, that it needs the consent of the third party.

GLAZEBROOK J:

No, it doesn't. An assignment doesn't need the consent of the third party. A novation needs not the consent of the third party, but the third party to be a party to the contract, which are quite different.

WILLIAM YOUNG J:

It's the assignor, the best argument we've got, I think, is the assignor looked at objectively as saying, yes, I assign, but only subject to these conditions and the condition, one of the conditions is that I'm released as a party, and that's one way of construing the document. So, if that represents the bargain between assignor and assignee, the assignor didn't get what it was bargaining for, because it didn't get a release.

GLAZEBROOK J:

But in that case it doesn't help you, because the party remains Goldridge.

WILLIAM YOUNG J:

No, no, the answer then is at that time it doesn't help you, but later when you get down to documents like the notices in relation to the dispute there are assertions by the Kakara and Weta that by virtue of various assignments the parties to the agreements are the –

MR JONES QC:

The present parties, yes.

WILLIAM YOUNG J:

– Savvy companies and the two client companies. I mean that's the argument in a nutshell, isn't it?

MR JONES QC:
It is.

GLAZEBROOK J:
But that's the conduct of the alleged novate – person party to the novation rather than anything to do with the assignor and assignee, that's the only thing I was saying.

MR JONES QC:
Well, if I can just leave it on this basis that the only transaction, if I can use a neutral term of which there is actually evidence is contained in this document at 1171.

ELIAS CJ:
And 1169.

MR JONES QC:
Yes, although that indicates what someone thought and if one looks at (d) on page 1171 –

GLAZEBROOK J:
1 September also being prior to 11 September when the letter was written?

MR JONES QC:
Yes, but pre the effective date of 1 September. So, the effective date is meant to be 1 September 2009 as opposed to any other date. So, the issue is could there have been another agreement on the 28th of August coming into effect on the 1st of September or is this it? And if this is it, then as His Honour Justice Young was saying then it creates difficulties as far as a contract is concerned.

Look, I think we probably dealt with that and I'm going to move on.

ELIAS CJ:
Well, just on the basis that it's to be construed to be contingent on the third party signing, again, that's not the way the letter of 11 September is expressed.

MR JONES QC:

Yes.

ELIAS CJ:

Because it acknowledges that consent is not necessary.

MR JONES QC:

Yes, that may reflect a misunderstanding on behalf of the numerical companies in Goldridge.

ELIAS CJ:

Well, what's the nature of the misunderstanding?

MR JONES QC:

What the effect of an assignment actually is, whether in fact it is an assignment or whether or not the Goldridge Estate Limited has the power to transfer by way of complete transfer, taking itself out of the loop to a related party.

ELIAS CJ:

Well –

MR JONES QC:

There are inconsistencies in the letter and the document. The issue is –

ELIAS CJ:

Not necessarily if the letter is taken – the letter is expressed as although here is the document for you to sign. Anyway, I think we understand the argument.

MR JONES QC:

Yes, so from the 11th of September the respondents had this document. They clearly knew what it was. It had a novation clause in it. It was identical to the one that Kakara executed a couple of years before and whilst it is subjective, it seems that Mr Forlong was well aware at the time that it was a novation as opposed to anything else. So, as far as for example the analysis and Heller Farmer is concerned, it wasn't a question of something simply coming in and being under the radar and someone taking over. This was expressed in these terms, so it was clear exactly what was proposed.

McGRATH J:

It's all you need to say, isn't it? We don't need to go back to the fact that the clause is the same clause as appeared in the previous document that actually isn't part of the transaction.

MR JONES QC:

I suppose it simply – it is, but I suppose it's two points, the first is that it's not a foreign document to the parties in that they've already executed one before and it's common ground that a novation actually was transacted as a result of the execution of the first one and it's accepted that that would have happened had there been an execution of the this, ie, acceptance.

ELIAS CJ:

That's a bit of a two-edged sword though because the fact was they did execute the first one and they did not execute the second and that may have significance.

MR JONES QC:

It may, but we then go into the issue of acceptance as far as conduct is concerned, which is probably the key issue in the case.

GLAZEBROOK J:

Yes. Can you just –

McGRATH J:

Which we're really slow getting to Mr Jones.

GLAZEBROOK J:

Can you just tell me when you say Mr Forlong was well aware at the time it was a novation, was there evidence to that effect or are you just –

MR JONES QC:

Yes, he said he knew.

GLAZEBROOK J:

Can you just give us a reference to that, please?

MR JONES QC:

Certainly. Ms Bryant can do that and I'll carry on.

GLAZEBROOK J:

Thank you.

MR JONES QC:

Seeing as we need to get to the point. If I can take the Court to page 1145, this is the start of the billing regime under the numerical company and there are various invoices that follow in the case book from the 1st of September '09 which of course is the effective date in the document we've just looked at and if I can take the Court to page 1166 by way of shorthand. This demonstrates the payments that were made on those invoices in the name of the numerical company 3552 and over the page 1167, the invoices paid to the numerical company 4334. Now this is the first piece of conduct which the appellants rely on as evidencing the acceptance of novation.

ARNOLD J:

By itself though it's equivocal isn't it?

MR JONES QC:

It is equivocal by itself, yes.

GLAZEBROOK J:

Because you would normally expect, if there's been an assignment, that you would deal with the person to whom the contract's been assigned first before you have to go to the assignor, wouldn't you?

MR JONES QC:

Yes. But in the appellant's submission what follows demonstrates that these payments were, in fact, made having accepted the numerical companies as the parties and Goldridge was no longer involved. So the payment of invoices issues on the 1st of September, the effective date in the novation document, and the payment by Weta and Kakara of those invoices and subsequent invoices, against the backdrop of what happened later, in the appellant's submission evidence is there, consent by conduct or acceptance by conduct.

Now the next few months things it would seem carry on with the numerical companies stepping into the shoes of Goldridge Estate Limited. Goldridge Estate Limited has no further involvement with the respondents and so the numerical companies take over and they continue on through providing management services. Now what happens in February, and this is at page 1207, this is the first attempt by the respondents to terminate the grape supply and vineyard management agreements. Now this was the subject of litigation in the High Court which led to an injunction being granted by Justice Wylie and matters proceeding from that point. But the proceedings were issued by the numerical companies seeking declarations that the terminations were, in fact, invalid and the injunction was granted on that basis. Now there is nothing in the litigation which indicates that the respondents engaged or considered that Goldridge Estate Limited remained as a party to the agreements.

ARNOLD J:
Well these letters were written to GEL.

MR JONES QC:
They were but it would seem that counsel then instructed had not been told of the 28 august 2009 documents at all and disavowed any knowledge of them and this was the subject of some cross-examination of Mr Furlong. So in my submission nothing can be taken from the fact that they were addressed to Goldridge Estate Limited. That was simply something that was done out of a, it seems, misunderstanding or lack of knowledge. But once one gets to litigation, of course, that is where the presence of an assignor, if there be an assignor, comes into play because if the assignor is still a party to the contract they should be a party to litigation. Now clearly the numerical –

ELIAS CJ:
Do they have to be? I'm just trying to think that through. Why would they have to be? Only if remedy was being sought against them?

MR JONES QC:
Indeed, we get to that a bit later, but in this situation the contracts, they're attempting to cancel the contracts and if it is, in fact, in their mind that Goldridge Estate Limited is still in the game, they took no steps of any kind to engage with Goldridge in the litigation to terminate any agreement. So what you have is the assignee, if you like

according to the respondents, taking up the cudgels, then wanting declarations that the agreements are at an end, but that's simply not occurring, Goldridge Estate Limited is not involved.

ELIAS CJ:

It's only a declaration that's being sought, isn't it? Was it declaration?

MR JONES QC:

Actually to be clear the plaintiffs were seeking the declaration that the termination notices were invalid.

GLAZEBROOK J:

The numerical companies were?

MR JONES QC:

Yes. The numerical companies which were the plaintiffs.

ELIAS CJ:

Yes, that's right.

MR JONES QC:

But there was a discussion and correspondence about the fact numerical companies were now involved and that was cleared up in terms of the litigation but the respondents took no steps to engage Goldridge Estate Limited and the appellants in this proceeding say, look, that is indicative of them not considering Goldridge Estate Limited to be a party to those grape supply or vineyard management agreements anymore.

Now the litigation took up some time and the judgment was delivered on the 3rd of August and that granted an injunction such that the termination could not be acted upon. In the meantime, and this is probably opportune to raise it, one of the plaintiffs and Hillersden, which was a contracting company that did work on the vineyards, have taken liquidation proceedings against the respondents for unpaid invoices. It's against that background that the correspondence that emanates in relation to that, and indeed the pleading which has been admitted as indicated at the beginning of the hearing, needs to be considered.

If I can take the Court now to page 1237, it's in volume 4, I raise this because it's important for later reference. This is a notice dated the 13th of April 2010 to Weta by the numerical company exercising a right to buy under the grape supply agreement and this is referred to later and I refer to it now so the Court is aware of its significance. On the opposing page we have a letter of 23 August 2010 from the respondent's solicitors.

ELIAS CJ:
Sorry, I've lost the place?

MR JONES QC:
Sorry page 1237.

ELIAS CJ:
Yes I have it thank you.

MR JONES QC:
That's the notice to buy and then we have at 1238, that's correspondence post the injunction. It refers to, in paragraph 1, "The parties find themselves yoked together." That could be a generic term but it is used. No reference to Goldridge of course and then in paragraph 3 it talks about the manager is to provide the owner and that is addressed to the numerical company.

That's the 23rd of August. On the 30th of August we have the amended pleading in the liquidation proceedings. If I could take the Court to that. Now this isn't part of any paginated bundle of course I'm afraid but if I could take Your Honours to the first amended statement of defence and one can see the parties, the first plaintiff is one of the numerical companies.

GLAZEBROOK J:
Sorry, where are you?

ELIAS CJ:
This is in the memorandum.

GLAZEBROOK J:
I've got a statement of claim, I just can't –

MR JONES QC:
It should be the statement of defence that follows.

ELIAS CJ:
It's the first –

GLAZEBROOK J:
I have it now.

MR JONES QC:
It's B in Ms Holderness' affidavit. One will see who the parties are to the litigation. The numerical and Hillersden and the two respondents as defendants. In paragraph 2 of the statement of defence there's a denial that Kakara is indebted to the first plaintiff then half way through that paragraph it refers to being overcharged by the first plaintiff in terms of the current contractual arrangements between it and the first plaintiff being two vineyard management agreements dated 14 December 2007 originally entered into between The Vines and Goldridge Estate Limited. So in defence, in a formal document, the first respondent is asserting current contractual arrangements and if there is an assignment there wouldn't be any contractual arrangements. Further –

ELIAS CJ:
Is that right, that there would be no contractual arrangements?

MR JONES QC:
In my submission, yes. The assignee has no contractual relationship with the third party. Contractual arrangements are being asserted here and they can't be dumbed down, in my submission, by the respondents by asserting that, oh no, we're just dealing with the assignee. And interestingly when one looks at it –

ELIAS CJ:
It may be that it is just self-evident but is there any authority that you rely on?

MR JONES QC:
There is no contractual nexus between an assignee and the non-assignee party.

WILLIAM YOUNG J:

You signed a benefit but not the burden of a contract.

MR JONES QC:

So if you have A and B, and A assigns to C, there is no contractual relationship between C and B.

ELIAS CJ:

No, I understand that.

WILLIAM YOUNG J:

So C can't sue B?

MR JONES QC:

Yes. What we have in paragraph 2, it talks about in terms of the current contractual arrangements between it and the first plaintiff and the appellants say well that's perfectly true because they now stand in the shoes of Goldridge Estate Limited and then importantly it goes on to explain the two vineyard management agreements dated the 14th of December 2007 originally entered into between The Vines and Goldridge Estate Limited. So there's no question but that they're talking of the same documents. There's no reference in here at all to the numerical company being an assignee. At paragraph 10 we have at 10.1 refers to purported contractor appointments dated the 6th of August 2009. That contractor appointment was effected by Goldridge Estate Limited, the numerical company was not then in existence. Paragraph 11 talks about allegations of overcharging –

GLAZEBROOK J:

What do you take from 10.1?

MR JONES QC:

That actions of Goldridge Estate Limited, which pre-dated the 28 August document, are being called in aid against the numerical company. They're dealing with a dispute that pre-dates the purported assignment or novation or whatever it is.

GLAZEBROOK J:

But that would be the case if Goldridge still remain a party, wouldn't it?

MR JONES QC:

Well it says –

GLAZEBROOK J:

It's just a confusion, isn't it?

WILLIAM YOUNG J:

No but they can't be liable for what Goldridge did legally –

MR JONES QC:

No.

WILLIAM YOUNG J:

– unless there's been a novation.

MR JONES QC:

Indeed. And what it says –

GLAZEBROOK J:

Right, I see.

MR JONES QC:

– is that by purported contractor appointments dated 6 August the first plaintiff, the numerical –

GLAZEBROOK J:

All right, I understand the point now.

MR JONES QC:

Yes. So it's there, in my submission, adopting completely the scenario that the numerical company stands in the shoes of Goldridge Estate and substituted in accordance with the novation document for that company.

McGRATH J:

Is it adopting it or is it assuming it because it's not really an issue in the proceeding?

MR JONES QC:

Well there's no issue but that it knows which legal company – which legal entity its dealing with. This isn't a letter that's written by an individual who may get something wrong. This is a formal document which has been put together in a legal way for the purpose of legal proceedings and is asserting a legal situation, if you like, as far as a defence is concerned. It's difficult to get more formal than that, with respect, and obviously it's been done by those trained in the law. Now what we have here is that situation being put forward, that on the 6th of August, before the numerical company actually existed, it was doing something. The only way that there can be an obligation for it, or it can be attributed to the numerical company, is if there is a novation. That's the only basis, in my submission, that this actually makes sense.

McGRATH J:
But the context though of the statement of defence is really simply to clarify what – where issue is taken with points in the statement of claim. It's not going further than that, is it, for the purposes of that proceeding?

MR JONES QC:
That is correct but it is asserting a factual situation and by asserting that factual situation, in my submission, it is demonstrating an acceptance of the numerical company as the other party. It pre-dates the assignment or the novation of the 28th of August. It's attributing the actions of Goldridge Estate Limited to the numerical company. It is absolutely plain in my submissions.

Also in paragraph 11 there's reference to a further defence about what sums may or may not be due and refers to those matters being dealt with pursuant to the disputes procedure, this is about the sixth line of paragraph 11, pursuant to a disputes procedure contained in the vineyard management agreements which includes a binding submission to arbitration by the first plaintiff in respect of disputes unresolved by mediation. So the disputes resolution process in the vineyard management agreement is being called in aid in defence. So that is significant again for the same reasons already outlined but importantly under the property agreements any agreement reached by way of mediation, if that is inconsistent with the agreement itself, then the agreement reached in mediation takes priority. It's probably a clumsy way of putting it but it essentially supersedes the agreement.

So if that were to be the case, if Goldridge Estate Limited remained a party, it would have to be involved. There's no way in the world it couldn't be otherwise the

agreement to which it's a party would be amended without its involvement. Agreement, consent or whatever.

GLAZEBROOK J:

Well they were just trying to get some money, weren't they, so if they had the benefit of the agreement, which had been assigned to them, they would've been – they didn't, I don't think – you don't have to involve the assignor do you when you're suing now?

MR JONES QC:

No I'm looking at it from the other way.

GLAZEBROOK J:

But from this side all they were doing was getting some money and they're saying well if you want to get this money you have to go to arbitration?

MR JONES QC:

Yes but by invoking the disputes provisions of the contracts. They're going further than simply with an assignee and the disputes provisions provide that if there is agreement reached which means that the –

GLAZEBROOK J:

It's drawing a long bow, isn't it, this was just, they just said you owe us money and they're saying no we don't owe you money.

MR JONES QC:

Well they're not just saying that.

GLAZEBROOK J:

It's difficult to see how you go from modify –

MR JONES QC:

– just saying that –

GLAZEBROOK J:

It's difficult to see how you're going to modify an agreement, isn't it?

MR JONES QC:

Well that's what the provision actually says.

GLAZEBROOK J:

Well I know that's what it says but in this particular instance somebody is saying, you owe us money, they're saying, no we don't, and anyway you shouldn't go to Court because it should go to arbitration.

MR JONES QC:

But that relates to a party as opposed to an assignee.

GLAZEBROOK J:

So if you're assignee you can sue even though the original contract says you have to go to arbitration?

MR JONES QC:

Indeed.

GLAZEBROOK J:

I wouldn't' actually have thought so because that would –

MR JONES QC:

You can sue for debts but what I'm saying is –

GLAZEBROOK J:

You might be able to sue for debts but –

MR JONES QC:

The importance of it is –

GLAZEBROOK J:

– if there's a dispute about the debt are you saying that that overrides an arbitration clause if there's been an assignment?

MR JONES QC:

Well what's happening is that the respondent is invoking the arbitration clause. It's saying, it is the respondent that is saying, you shouldn't have done this. We should

have gone down the disputes procedure which includes a binding sufficient to arbitration.

WILLIAM YOUNG J:
But there were also claims by the respondents against the numerical companies, weren't there?

MR JONES QC:
This is the liquidation proceeding.

WILLIAM YOUNG J:
I know that, I know the liquidation, but there are also other claims aren't there, that are the subject of mediation?

MR JONES QC:
That's correct, there were notices to remedy, which we'll get to.

WILLIAM YOUNG J:
They're perhaps better examples of the point you're trying to make, I think –

MR JONES QC:
Yes.

WILLIAM YOUNG J:
– than just the response to a claim in debt.

MR JONES QC:
Yes, it's simply that they're trying to invoke that process.

GLAZEBROOK J:
Can you have authority for the provision that if I have a contract that says I can assign it and the contract has an arbitration clause in, I assign the benefit to someone else and then as soon as I've assigned that the person can go to Court and ignore an arbitration clause?

MR JONES QC:

I'm not saying that you can ignore an arbitration clause, but what I'm saying is that the arbitration clause is being invoked by the other party.

GLAZEBROOK J:
So what they're entitled –

WILLIAM YOUNG J:
But it presupposes – you see the part of the problem in a way is that there are a series of issues. It presupposes there's an assignment. That's really all you can say I think at this point. If this had simply been a simple assignment, no suggestion of novation, then presumably the dispute between the numerical companies and the other companies could be arbitrated, and would be subject to the arbitration agreement.

GLAZEBROOK J:
You've just had the opposite to me, which I just don't believe.

MR JONES QC:
Sorry, there is no contract between the respondent according to them and the assignee.

WILLIAM YOUNG J:
But the assignee takes the claim subject to all sorts of detriments and if one of those detriments is some issue arbitration has to accept that.

MR JONES QC:
Yes, well these are all things that happened after it.

WILLIAM YOUNG J:
Yes, but I mean the simple point is that it's still nonetheless an acknowledgement that there's been an assignment.

MR JONES QC:
Well, acknowledgement, we say, it's more than acknowledgement of an assignment. It's an acknowledgement and acceptance of the numerical company standing in the shoes of Goldridge.

WILLIAM YOUNG J:

All right, okay, well, I think there are better points for that than this.

MR JONES QC:

Indeed but I'm just going through things in a chronological order.

WILLIAM YOUNG J:

Because I mean that, what's happened here is entirely consistent with an orthodox simple assignment, I think, an effective assignment. I mean the point that I will want to hear from particularly Mr Harrison about is that as far as I can see the only assignment ever agreed was as recorded in the deeds. There isn't a separate – there isn't evidence of a separate or distinct assignment.

MR JONES QC:

No, there's not.

WILLIAM YOUNG J:

So by accepting that the Savvy companies, the numerical companies are assignees, there's a sense in which the Weta and Kakara accepted that the transaction by which they became assignees which included substitution of them for the original Goldridge company?

MR JONES QC:

Yes, my submission is that has to be the position.

ELIAS CJ:

Is that a convenient time?

MR JONES QC:

I'm sorry, I note the time, sorry, thank you Ma'am.

COURT ADJOURNS: 11.33 AM
COURT RESUMES: 11.52 AM

ELIAS CJ:

Yes, Mr Jones.

MR JONES QC:

Now if I can take the Court to volume 4, page 1242, this is a letter dated 10 –

WILLIAM YOUNG J:

Sorry, what page?

MR JONES QC:

1242. This is a letter dated 10 September 2010, which emanates from the respondent solicitors in appended to, it is the first of two notices. Looking at that first page it refers paragraph 1 and again there is no reference to Goldridge Estate limited. It's only the numerical companies and the respondents. Instructions have been received according to paragraph 2 to issue notices, remedy to fault.

Paragraph 4 over the page, the notice is to remedy, invoke disputes process. That is the process that we've already discussed at some length. Paragraph 6, the final sentence of that refers to any demands by the numerical companies being met by the invocation of the disputes procedure and then if you go to page 1246, which is the first of the notices. This is addressed, as an example, to numerical company 3552.

Now, paragraph 1 of the recital is important. It records that by virtue of certain assignments the numerical company as manager and Kakara as owner are the present parties to two vineyard management agreements dated 20 October 2006 and then it refers to the various lots, lots 1 and 2 being one part of the vineyard and 3, 4 and 5 at the other and then specifically states originally entered into between Goldridge Estate Limited and The Vines Development Company Limited. So, here we have the invocation of the formal notice process under the disputes procedure, identifying the numerical company and Kakara as the present parties at identifying the original parties who are no longer parties in my submission.

Importantly paragraph 2, again, refers to the contractor appointments. This is the Hillersden issue, the appointment of Hillersden as a contractor, bearing the date of the 16th of August 2009. This obviously predates the incorporation of the numerical company and then it asserts that Goldridge, through its director, and in breach of its obligations of fidelity and good faith et cetera, appointed Hillersden. So, it is referring to action of Goldridge Estate Limited that the numerical company had no involvement with and could only have responsibility for, in relation to a novation and this is a

document again which emanates from the respondents, so there is no question about the terminology. There is no question about the fact that it was done with legal advice.

Over the page 1247, at paragraph 5, the reference to the notice to remedy defaults pursuant to clauses of the vineyard management agreements and the invocation of the disputes process, interestingly under the heading "Notices of dispute" it states, "The purported Hillersden contracts purport to buy in Kakara to a direct contractual relationship with Hillersden to which Kakara did not and does not consent." So, that issue in terms of contractual relationships obviously is something of significance and of note, it's referred to in relation to Hillersden if the numerical company was simply seen as an assignment. My submission is it must have been noted as such in Goldridge Estate Limited the original company would have to have been mentioned. It's simply beggar's belief that this document would not have gone to that point, if that had been the position of the respondents. It was not because it wasn't the position. It submitted that clearly the numerical companies had been accepted in the stead of Goldridge Estate Limited as parties and the only parties to the property agreements.

In terms of the requirements under the notice, there's a requirement that under (a) Goldridge shall in writing accept that the purported Hillersden contracts are not legally binding, that Goldridge shall, within 14 days, advise Hillersden in writing of certain things and under (c) again, a requirement that Goldridge do something within 14 days.

That is a formal notice, in my submission, that demonstrates beyond question acceptance of the numerical company as a party and as the only party. That is replicated in the following pages to the second company 4334, the notice, and that's at 1251 and that's the notice by Weta.

Now going to 1257, this is a further piece of correspondence, some 11 days later. I just refer the Court to paragraph 3.

GLAZEBROOK J:
Sorry, I didn't catch the page number.

MR JONES QC:

Sorry, 1257, Ma'am. Which refers again an obligation on the parties. If I can take the Court next to page 1278, a further letter from the respondent solicitors, this time dated 27 September 2010. I simply refer to paragraph 6 which talks about some history it seems in relation to the Hillersden contracts all predating the incorporation of the numerical companies. Paragraph 9, refers again to the actions of Goldridge in purporting to buy in Weta and Kakara.

WILLIAM YOUNG J:
Why is it in quotation marks, Goldridge? Or is it defined earlier in the document?

MR JONES QC:
It's been referred to throughout all the notices, for example, Goldridge only means the numerical companies.

WILLIAM YOUNG J:
Yes.

MR JONES QC:
That's what it's previously been defined as. I can't just quickly reading it see any definition in this particular letter, but the notice in my submission must inform the letter because the notice predates it and refers specifically to the numerical company and it's referred to as Goldridge.

GLAZEBROOK J:
But it is Goldridge, actually in quotation marks as well, actually in the notice of default?

MR JONES QC:
Yes, yes, so it's simply following through in my submission and then finally in that letter 1281, paragraph 14.3, again reference to the utilisation of the disputes resolution process. The next correspondence is 1284. That follows on, paragraph 2 relating to the disputes process. Paragraph 3 talks about the Hillersden contracts being the only aspect of dispute at this point. Other current disputes and our clients intend that they will raise those disputes in contractual terms.

The next correspondence of significance is at page 1291, the letter of 19 October and this was forwarded in conjunction with a further notice, but I'd just like to go

through the letter briefly and point out a number of points, 1291, Sir. Paragraph 2 talks about past and present supposed defaults and going straight to mediation thereby super inventing the dispute procedure. The next page 1292, paragraph 9, a new dispute or difference and then going over the page to 1293, talks about existing dispute or difference, absence of the Weta 2010 vintage. Now, this related to whether or not Weta could in fact get a 2010 vintage because it was at an early stage of development, I think, in its third year and it's possible they might have got say 20% or something along those lines in terms of actual fruit, but looking at paragraph 11 of that letter on 1293, it starts off, "Weta is both owner and grower and the numerical company as both manager and buyer, were agreed upon a contractual goal of a sauvignon blanc harvest from the Weta vineyards in 2010 being the second vintage after planting." The crop didn't eventuate, Weta claims that the absence of that crop was caused by the numerical company's contractual default in a particular negligent failure to ensure plant and vines produced, et cetera.

Paragraph 12 refers to the grape supply agreements Weta contends that the 2010 crop constituted a first plan harvest of grapes and as a consequence the numerical company failed to give notice of the exercise of its clause 2.2 right of first refusal within the time required, namely that was meant to be by the 1st of May 2009. Accordingly it's Weta's position that the purported notice dated 30 April 2010 was later invalid. That's the notice that I referred the Court to a little earlier that had been sent by the numerical company in 2010 on the 30th of April. Here in correspondence, the respondents are saying that it should've been in 2009 prior to the 1st of May.

WILLIAM YOUNG J:
That's not necessarily a claim against the numerical company for the defaults of its predecessor though. It's simply saying things that – what you need to show to be entitled to what you claim you're entitled, didn't happen?

MR JONES QC:
Yes, it's attributing the failure to the numerical company.

WILLIAM YOUNG J:
But it doesn't not necessarily, is it? It's not a claim for damages for what happened before August 2009, which would be a bit different.

MR JONES QC:

No, not at all. But the thing is this, it was a Goldridge Estate Limited failure if you like at that time because it was the only company in existence of the two.

WILLIAM YOUNG J:
It does refer to the default being by the numerical company.

MR JONES QC:
It does and so that, in my submission, lends support to the fact that the respondents have accepted the numerical company is standing in the stead of Goldridge from the beginning in accordance with the 28 August 2009 document.

Now, we then get onto losses in paragraph 14 and it refers back to the affidavits in the injunctive proceedings where Weta contends that it has suffered substantial financial losses as a consequence and that of course must relate back to management of the vineyard that occurred at an earlier stage. So, there's no question that there's any sort of look that may involve Goldridge Estate as well. It's simply referring and identifying the numerical company as the party and the only party, in my submission.

Over the page, page 1295, paragraph 21, the respondents identify the issues to be resolved. The dispute about validity and propriety of the actions of the numerical companies in entering into the purporting Hillersden contracts. They're the 6th of August 2009, when the numerical companies weren't even in existence. So, the only way that they could've entered into them is if they retrospectively are given that title, if you like, by virtue and novation.

21.4 talks about the dispute raised as far as the absence of the crop for 2010 is concerned, including redress of financial losses and Weta's challenge to the purported notice to purchase given by the numerical company. Now, it's probably relevant to, just at this stage, deal with the point that's been raised by the respondent that these notices in the correspondence only appears to relate to the vineyard management agreements as opposed to grape supply agreements. With respect that isn't the case, but in any event, the vineyard management agreements and the grape supply agreements were dealt with on the same basis. There is no differentiation with respect and so if the Court finds there was acceptance or consent by conduct, then that must, in my submission, relate to both agreements, both types of agreement.

Now, over the page, page 1297, we have the further notice dated the 19th of October 2010 and that has the identical recitation in paragraph 1 about the present parties. That was in the first notice dated the 10th of September. Now that's one for Weta and the one for Kakara is at 1310. It is in identical terms.

So the appellants say look, the course of conduct is clear that there is no communicated refusal for non acceptance of the 28 August 2009 novation documents. There is conduct by the respondents from the time of paying the invoices issued by the numerical companies on the effective date of the 1st of September '09 through until the new year and then everything that flowed, the litigation, the correspondence, the statement of defence, the notices to remedy, all of those are consistent with, and in some cases, demonstrate without doubt, in my submission, that the numerical companies have been accepted in the place of Goldridge Estate Limited in terms of the novation.

One interesting facet is the termination notices themselves. I take the Court to 1366 and that's one for Weta and one for Kakara, as with all of these, there are a number of them. I deal with the Weta one. It talks about Weta Estate being the assignee from The Vines. That's never been stated before in any correspondence from the respondents and refers to the termination of Goldridge being the triggering event.

Over the page 1367, Kakara being the assignee. So, once the legal point became available, it would seem that the terminology changes completely.

ELIAS CJ:
Well, one would expect that.

MR JONES QC:
Indeed.

ELIAS CJ:
Yes.

MR JONES QC:
But in my submission it shows a contrast in the party's actual conduct and that whilst, of course, the motivation behind exercising a contractual right is irrelevant, it shows

an opportunistic approach to this and how Goldridge Estate Limited has been out of the frame since the beginning of September 2009 and the numerical companies have been dealt with consistently from that point in relation to all matters, whether they occurred before or after the 1st of September 2009, involving provision of services, exercising rights of purchase under the grape supply agreements, litigation, notices to remedy defaults. So the change in terminology in my submission is quite marked. Now, the –

ELIAS CJ:
Does that conclude the run through of the facts?

MR JONES QC:
Yes.

GLAZEBROOK J:
Well weren't they just nominated as an assignee under the agreement and one of them was a true assignee because it was an assignment and the other one was actually a novation, although both of them were supposed to be novated. I don't see there's any significance in that apart from using the word "assignee" possibly as a novation in one case when it was, in fact, a novation and using it in the correct sense for the other person.

MR JONES QC:
I was simply referring to the – well, put it this way. If one is dealing with another entity as a party or as an assignee over a period of 15 months, one would expect that to be clear in the correspondence and in the interaction and in my submission it did become clear that the numerical companies have been dealt with as the party, not a party but the party, to the exclusion of Goldridge Estate Limited. There's not a suggestion that –

GLAZEBROOK J:
Well, I thought you were saying that there was some significance about probably pronounced Kakara, Kakara.

MR JONES QC:
Kakara, I think.

GLAZEBROOK J:
Well, it's not Kakara if you're pronouncing it correctly.

MR JONES QC:
Sorry.

GLAZEBROOK J:
So being the assignee ...

WILLIAM YOUNG J:
I think the point you're making is that the language has suddenly become – it's still inaccurate, as it turns out, but it's suddenly become far more particular whereas before they say Goldridge Estates was formerly a party. Now here you are, you're the party and we're the assignee even though previously we said we were the party.

MR JONES QC:
It's not a major point. It's simply interesting to see the change in the terminology.

Now, I appreciate that the Court in a previous decision has referred to the need for an appellate Court to obviously consider reasons given in the Court to be appealed from. I wonder if the Court wishes me to go through the Court of Appeal judgment in any particular detail.

ELIAS CJ:
Well, we've read it. What do you want to emphasise? Where do you say they went wrong?

MR JONES QC:
Well ...

ELIAS CJ:
We've also read your submissions so you can take that into account.

MR JONES QC:
Yes. I'm not sure I can advance the submissions more than they are written. I suppose the real concerns are these. The underlying premise, if you like, as far as the Court of Appeal was concerned, seem to be that there had been a refusal to sign

based on the importance of Goldridge Estate Limited, whether that is properly considered to be, looking at things objectively, the right approach is one thing but it did disturb, in my submission, a finding in the High Court, which had been made by Justice Andrews, that she simply did not accept the position as far as the so-called importance of Goldridge Estate Limited is concerned. It was the subject of a fair degree of evidence by way of cross-examination as well, but in my submission it became clear, and I've already touched on it earlier on, that it was the Vegars who were important and it was the branding, if anything, that was important as opposed to the legal entity and the Vegars retained the continuity in terms of the branding. There was – the evidence was there had been no enquiry at any stage as to what assets Goldridge Estate Limited actually had, whether it had the intellectual property, anything of that nature. So all we had were assertions saying, look, it was the branding or it was the name that we were interested in.

ELIAS CJ:

I'm just not sure whether that really helps you, because if the branding was important when Goldridge went into liquidation, does that mean it's – that the position occupied by the buyer was less attractive to the sellers of the grapes?

MR JONES QC:

Well, it was already – everything had already well passed by that stage in terms of any novation.

ELIAS CJ:

No, no, I understand that. But you're looking sort of more broadly than the contractual arrangements.

MR JONES QC:

Well, it was to deal with the issue because it was raised in the High Court and reiterated in the Court of Appeal that it was the company, Goldridge Estate Limited, which was important as opposed to anything else.

ELIAS CJ:

Well, I understand that because of the way the argument is run, but I'm reflecting a little on the submission that you make that this is all opportunistic. It may also have been a real detriment to the suppliers of grapes that they didn't have behind – you say it was all well gone.

MR JONES QC:

We've got to look back, with respect, at August and September 2009 when Goldridge went into liquidation on 21 November 2010, so it was well after the event.

ELIAS CJ:

Well after that, yes.

MR JONES QC:

So it doesn't actually impact it.

ELIAS CJ:

No. That's right. Yes.

MR JONES QC:

It was to do with the submission that this was a construct, the importance of the entity, and looking at the projections and the, I suppose, the sale-speak that they have, there were two companies referred to Goldridge Estate Limited and Matakana Estate Limited and there was no inquiry, it seemed, about who owned what or whatever. It was all to do with the Vegars and the brand as opposed to anything else.

GLAZEBROOK J:

Where do you say the findings of the trial Court Judge and when was it overturned? Sorry, you probably did say but I've missed it.

MR HARRISON QC:

Paragraphs 52 and 56 of page 66 volume 1 of the case.

MR JONES QC:

In the judgment of Justice Andrews –

GLAZEBROOK J:

When was that overturned by the Court of Appeal? That's what I was really interested in.

MR JONES QC:

There's reference to it at paragraph 67 on page 96.

GLAZEBROOK J:

You see, in any assignment, nobody really thinks it particularly important that the assignor remains there unless or until the assignee defaults on an obligation, do they?

MR JONES QC:

That can be the position, of course.

GLAZEBROOK J:

Because I don't read section 67 as saying that they accepted that Goldridge did think it was important.

MR JONES QC:

No. Paragraph 67, this is referring to Weta and Kakara –

GLAZEBROOK J:

No, I understand that, but I don't think it's overturning the trial Court Judge's finding. It just says we accept it wasn't communicated. They just saw it as evidence saying when asked to accept the novation it didn't, and there's no doubt it didn't at that stage in the sense of executing the novation. Isn't that all the Court of Appeal is saying?

MR JONES QC:

In my submission, implicitly it must go further than that.

GLAZEBROOK J:

Well, why? Because what I understand the Court of Appeal's decision is based on is that you have equivocal conduct afterwards but the actual, really important thing is that they didn't sign the agreement when they were asked to do so, so they didn't accept it, and then afterwards you have equivocal conduct, and that equivocal conduct, even though the sum of it is more consistent with having accepted a novation, wasn't enough to overcome the presumption, if you like, that if you don't sign something that means that you don't want to be bound by it.

MR JONES QC:

Well, I simply make the point at paragraph 67 that it seems to be implicit in that that if it didn't communicate that it saw it as important that Goldridge remained as a party that seems to be accepting implicitly that that was a finding of fact that they didn't in fact think it was important.

GLAZEBROOK J:
I don't read it that way and I certainly don't read the decision is turning on that. The decision is turning on you send a formal deed. If it's not accepted and signed, then doesn't that mean it's not accepted and signed an equivocal conduct afterwards can't have it as an acceptance?

MR JONES QC:
Well the –

GLAZEBROOK J:
That seemed to me the basis of the decision.

MR JONES QC:
The decision refers to paragraph 77. It talks about the formal deed being provided in saying when Kakara did not sign the deed that was presented to it, Goldridge and Savvy must've realised that they did not have Kakara's agreement. That with respect isn't something which was put –

GLAZEBROOK J:
It clearly didn't have the signed document and they didn't follow it up.

MR JONES QC:
Yes, in my submission it is simply one of those situations which can often happen when something is done but it isn't finalised. There is no communication of any dissent.

GLAZEBROOK J:
Well, they were told they didn't need to consent and they didn't.

MR JONES QC:
No, sorry, dissent. There was no communication of any dissent.

GLAZEBROOK J:

No, well that's understandable, but in a circumstance where they're told even if they dissent it's too bad, we're doing it anyway and we're entitled to, it's difficult to read too much into somebody saying, "Oh, well, if I could've dissented, I would've dissented."

MR JONES QC:

Well, I suppose that's one way of looking at it, but as far as the findings are concerned, in my submission, the Court of Appeal went further and passed the High Court decision where Justice Andrews didn't consider that the issue of Goldridge being or remaining a party was something that she found established. It just seems to be implicit in this that the Court is saying, well, this is something that they didn't communicate but it was sitting there, and that seems to buttress that the finding that at 74 about the issue of execution and then of course we get to 75 which talks about correspondence.

GLAZEBROOK J:

Well, are you suggesting that isn't the correct position if you don't sign a formal document then it has to be clear conduct that indicates acceptance rather than equivocal conduct?

MR JONES QC:

I do accept that.

GLAZEBROOK J:

Right, so all they're saying is, well, you were sent a document, you didn't send it back and then there was equivocal conduct equally consistent with a true assignment or a novation. Not clear enough.

MR JONES QC:

My submission is that they must've realised that they weren't agreeing to it, is not something that's based on the evidence. Secondly that it's not equivocal conduct. There is a clear course of conduct as the High Court found.

WILLIAM YOUNG J:

Well, there are statements saying the parties are, the former parties are.

MR JONES QC:
Yes, it's difficult to get better than that.

WILLIAM YOUNG J:
Which is as unequivocal as it could be?

MR JONES QC:
Yes, this is my submission, and this is against the background as I've stated all of the various interactions between the parties and it's clear that certainly from February of 2010 Weta and Kakara are wanting to exit the commercial relationship between them and the Vegars. So, if there were a point they could take, they'd take it.

WILLIAM YOUNG J:
So was this the – just by way of context, because obviously the evidence given here is a bit limited. Was the breakdown in the relationship the failure or the fact that the Vegars didn't take the grape supply for the first season?

MR JONES QC:
Yes. They weren't obliged to. They had an option to take.

WILLIAM YOUNG J:
Yes.

MR JONES QC:
And they decided not to and Your Honour may recall and I think it's in the evidence that the next couple of years were not good ones in terms of the wine industry, but there was an option. That was the first right of refusal, if you like, and that simply wasn't taken up and that was perfectly or something that the – that Goldridge didn't need to do and it didn't. It seems at that point, certainly by February 2010, things had broken down and there was an attempt to sever the relationship in relation to both the vineyard management and the grape supply agreement which were the only ones standing at that point, because the project management agreement had already been completed.

And at paragraph 75 of the Court of Appeal decision, page 98 it refers to the correspondence and it's couched in the negative that did not refer to Goldridge as a continuing party to the agreements. With respect, taking up on Your Honour's point a

minute or two ago, it was more than not referring to Goldridge, it was the positive assertion about the numerical company being parties.

WILLIAM YOUNG J:
Yes, although the Court of Appeal picked that point up at 72 and described the high watermark of your client's case.

MR JONES QC:
Yes, although only one notice is referred to, the 17th October or 19th October, doesn't get a mention and the correspondence in paragraph 75 has explained a way that the correspondence may have been inaccurate. With respect there is no basis for saying that. The correspondence is what it is and added together with the other material it was a compelling case, in my submission, to evidence the acceptance by Weta and Kakara of the numerical companies.

Those factual difficulties, if I can put them that way, as far as the Court of Appeal is concerned, come more into focus because of their assessment at paragraph 76. It's a finely balanced case. With respect there are unequivocal statements emanating from the defendants which specify the numerical companies and only the numerical companies as the other party and so it's difficult when there are factual findings made in the High Court, the Court of Appeal then defines the case as finely balanced, doesn't refer to a number of features and then finds against the successful parties in the High Court and refers to Goldridge and Savvy must've realised they didn't have any agreement to the proposed course, when if it's equivocal for one side it must be equivocal for the other. So, how can it possibly be said that they didn't think that they had agreed to it, albeit by conduct. My submission is that's something the Court of Appeal should not have done.

McGRATH J:
What do you say about the principle in paragraph 74 of the judgment by reference to Concord Enterprises, the normal inference is that the declining party did not intend to be bound unless there's clear evidence to the contrary then goes on to refer to the fact that the party chose not to execute an agreement. It has got a strong argument it should not be bound to that agreement by its later conduct.

MR JONES QC:

In my submission that Concord case which I will just get. Yes, this was the case where there'd been no relationship between the parties before and as I recall the facts it related to market ability or a market survey being conducted before the contract could be consummated.

The casebook, it's at the appellant's bundle of authorities, tab 4, it's important to note the factual background, in my submission, and the Court does say – this is page 388 line 48, it says, "In such circumstances as pertained in that case, we think the normal inference in New Zealand is that the parties do not intend to be bound before the agreement has been drawn up and executed on both sides." So that's referring to the circumstances of that case where you have two parties who hadn't been involved with each other before entering into an apparently complex commercial arrangement. Certainly if a document is presented to somebody and they're asked to sign it, the assumption or inference would be that they will sign it. But if they don't, but conduct themselves in a manner which is consistent with them having accepted it, if that's looked at objectively, in my submission that assumption or inference can certainly be overcome, and whilst that may raise a barrier, and it may mean that there certainly has to be clear conduct of the party to evidence consent, they can't avoid the contractual relationship that they have adopted, essentially, by knowing the full facts and conducting themselves in a certain way.

WILLIAM YOUNG J:
Well, you say there's a course of conduct that is referable only to somehow or other Goldridge Estate Limited's dropping out and the numerical companies coming in.

MR JONES QC:
Yes, and whilst there may be equivocal –

WILLIAM YOUNG J:
And the great thing about that is that that's exactly what the respondent said in their notices to remedy defaults, that that had happened.

MR JONES QC:
Indeed, yes, and whilst initially with the payment of invoices, whilst that could be seen as equivocal, what happened after that demonstrates and is evidence of the acceptance it must have happened at an earlier time.

I note the time. The written submissions are the written submissions and I have spoken to what I wanted to speak to, essentially, which I wanted to stress the factual side of things because in my submission that is where the justice of the case is and the essence of the case lies. So unless the Court has any particular further questions, those are the submissions on behalf of the appellant.

ELIAS CJ:
Thank you, Mr Jones. Yes, Mr Harrison.

MR HARRISON QC:
I'll try and begin by providing something of an overview of what I submit are the issues that should concern the Court in this appeal.

Two preliminary points that I'd like to mention at once arising out of this morning's exchanges. First of all, the Court needs to not lose sight of the fact that in reality we're only concerned with the grapes supply agreements, not the vineyard management agreements, because although my clients cancelled both lots subsequently the appellants cancelled the vineyard management agreement. That's noted in paragraph 14 of the judgment of Justice Andrews at page 54 of volume 1 of the case.

The second point is that –

ELIAS CJ:
What was the date of that cancellation? I can't remember.

MR HARRISON QC:
The second point is that when we're looking at whether there were assignments in September 2009 and how those arose and took effect and then the respondents' response to them, it will be my submission that contrary to a suggestion from Your Honour Justice Young that it is quite clear that under New Zealand law the benefit and burden of a contract can be assigned. That is the law as stated in a Court of Appeal decision, *SB Properties Ltd (in liq) v Holdgate* [2009] NZCA 327, [2011] 1 NZLR 633, which is at tab 9 of the appellants' bundle.

WILLIAM YOUNG J:
Is that first on the Contractual Remedies Act provision?

MR HARRISON QC:

Well, no, it's simply now regarded as a law that by necessary implication from the Contractual Remedies Act provision it must now be the case that both benefit and burden can be assigned and so the old common law or equitable principle that limited assignments in that way. So, of course, when we look at – I mean, in one sense the case is not about the legal effect of an assignment but it is about the respondent's response to what it was unequivocally told were assignments of the property agreements. It was told the agreements had been assigned and could be assigned without consent because the assignment was to a related company. They then, we say, acted the way someone given notice of an assignment should act and dealt with the assignee, the numeric companies, throughout, so that that is the position which certainly, unless this Court overturns *SB Properties*, that is the legal position that governed the respondents' response to being told there were assignments at all times, and even if *SB Properties* got it wrong, it would still explain and put in context their behaviour because they were behaving as contracting parties given notice of assignments in accordance with the law as stated by the Court of Appeal.

ARNOLD J:

You're putting a lot of emphasis on the use of the word "assignment", but as we've seen, looking at the documents, it's used throughout even in respect of things that were plainly novations. So we can't really put enormous weight on the use of that word.

MR HARRISON QC:

With respect, I disagree entirely with that. I don't accept what my learned friend said when he took the Court through the earlier – the first stage of assignments from The Vines to the respondents. I simply don't accept that but I'll develop that.

ARNOLD J:

Okay.

GLAZEBROOK J:

What don't you accept that they were – well, at least that, I think, it's not the Weta, the other one, Karaka was actually an assignment – was actually a novation?

MR HARRISON QC:

I accept that the two transactions, which were in response to the obligation to assign, were documented differently. The Kakara one did bring about a novation and the Weta one did not. Let me deal with this, if I may. I'll just get volume 3. I'll try and deal with it as quickly as possible. The position is that the way my learned friend argued it was that he took you to clause 21.1 and 21.2 of the first agreement for sale and purchase at page 506 of volume 3. It's among the special conditions and it's at page 513 within that document. He said, "Look at 21.2. The vendor must, on settlement, assign the benefit of the documents," and he said, "Obviously, as a matter of common sense, novation was intended by the parties when they signed the agreement with that statement in it." He provided no supporting evidence that that must have been the case and I dispute that there is any evidence to support that that was the case. In fact, when I cross-examined Ms Dorrington whose firm was acting for the appellants about these drafting processes she agreed that throughout she understood the difference between assignment and novation and was using assignment in its strict sense. So there is no basis for saying, "Oh, well, the parties, when agreeing 21.2, must have meant novation not assignment because that's common sense."

Then my learned friend took you to the Kakara "assignment" which is at page 706, and he pointed out, rightly, that that form of agreement used brought about a novation. Then he took you to the Weta version, which was a mere assignment, and what he in effect argued was that the Weta assignment was the odd man out because it should have been a novation, to which I respond it's actually more likely that the Kakara novation was the odd man out because the parties had used novation in the sale and purchase – all sale and purchase agreements and that would ordinarily mean that was what they were intending to achieve, so there is no basis for saying that it was always intended to be novation or there was any loose use of language.

WILLIAM YOUNG J:
But there is loose – that's not true because what is a novation is described on its face as an assignment. Don't they create their own diction by which ...

MR HARRISON QC:
No, they don't create – they, they definitely assign –

WILLIAM YOUNG J:

Look at page 706.

GLAZEBROOK J:
And the heading on page 707.

WILLIAM YOUNG J:
So deed of assignment, that they talk about assignment but in reality what is effected is a novation.

MR HARRISON QC:
I agree the language of assignment is used there.

WILLIAM YOUNG J:
That's why I said they created their own dictionary, that depending on circumstances "assignment" can mean "novation".

MR HARRISON QC:
No, I don't accept that, Your Honour. We are dealing with a deed between The Vines and Kakara and Goldridge and that is an implementation of obligations entered into under the agreement to sale and purchase. I agree that in this particular document only they said that they were creating a deed of assignment but its actual effect on interpretation goes further. But they – you will not find the word "novation" appearing in any of these documents.

WILLIAM YOUNG J:
But there's another example where assignment is used where novation is meant, and that's the letter in September and the documents that were not signed by your clients.

MR HARRISON QC:
Yes, but the documents that were not signed by my clients were not created by my clients.

WILLIAM YOUNG J:
No, what I'm saying, this document isn't standalone. There are other documents in which assignment is used in a way that encompasses novation.

MR HARRISON QC:

I don't accept that, with respect. All that's happened is that they have intituled the deed and the parties as assignor and assignee, but in the Kakara deed of 30 July 2007 it so happens that under the heading of "assignment" – I'm looking at page 707 – the drafter has created something more, which we would call a novation. But there's never – the word "novation" doesn't feature and the real issue is what is the correct interpretation of the property agreements, the vineyard management agreements, and the grape supply agreements when those agreements in a standalone fashion used "assignment". Now, my learned friend has tried a bit of a backdoor approach to re-arguing his interpretation argument, which was rejected in the Court of Appeal, and I object to that because he hasn't appealed it, and as I say at the start of my submissions, he has stuck with it.

The real issue, I submit, is not whether two years before the transactions that are critical, starting with the September 2009 assignments, on one occasion in relation to Kakara, a document was entered into that was headed "assignment" but we would say had the effects of going further and being a novation. That is history and cannot possibly give rise to a dictionary interpretation argument. We don't actually have an interpretation argument to deal with anyway.

WILLIAM YOUNG J:

No, we're just looking at what people meant when they wrote letters and what they could fairly be taken to mean.

ARNOLD J:

If you go back to clause 21 that you took us to on page 513, so the vendor is Vines. They're selling the land to your clients. Before they do so, they've got to enter into these agreements and specify it and then they have to assign the benefit of them to your clients. Now, I mean, an assignment doesn't make any sense at all there, does it, as opposed to a novation? So Vines, having sold the land, entered into these contracts before it formally did so, assigns the benefit to your clients. If Vines is then wound up the parties can bring these parties to an end.

MR HARRISON QC:

The parties to the agreement used the language of assignment. As I've said, there's evidence that there were lawyers on both sides and that assignment was being used in its strict sense. Whether it makes – it's quite possible that that scenario was

simply unforeseen and, you know, it didn't arise. I don't accept that merely because that scenario is, in theory, possible that one interprets assign other than as meaning assign in the usual sense.

ARNOLD J:

We're trying to understand what the parties had in mind and when they later came to give effect to this in that deed we were just looking at, again, they used the language of assignment where clearly they meant novation, so the point is simply that the sort of precision with which you are now suggesting we should approach this language isn't reflected in the way the parties, in fact, dealt with it.

MR HARRISON QC:

Well, it depends which language we're talking about. Perhaps we need to look at each bit of language in question in turn.

WILLIAM YOUNG J:

Perhaps after lunch.

ELIAS CJ:

Yes. I notice that Mr Harrison checked his watch.

WILLIAM YOUNG J:

I'm hungry, I'm afraid, Mr Harrison.

MR HARRISON QC:

Very good. I'm happy to resume after lunch.

ELIAS CJ:

Did you want to finish what you were saying?

MR HARRISON QC:

It's simply this, that all – the only thing, with respect, that supports Your Honour's proposal before we get to the communications in September, from September 2010 on, is the Kakara agreement. That's the only piece of writing down to that point that supports the proposition that assignment means novation, and you place alongside that the fact that the Weta agreement was an assignment, it really doesn't get us

anywhere and, with respect, the starting point is, in fact, the September 2009 dealings.

WILLIAM YOUNG J:

Of course, the draftsman of the notice of termination, the Kakara notice of termination, also used the same – the A word when he should have referred to novated party.

MR HARRISON QC:

Well, there was certainly an assignment. Whether there was a novation as well – there were assignments plus, if you like, in the case of Kakara but not Weta.

ELIAS CJ:

Thank you. We'll take the lunch adjournment.

COURT ADJOURNS 1.02 PM

COURT RESUMES 2.19 PM

ELIAS CJ:

Thank you.

MR HARRISON QC:

Now, I am keen to get on with what I see as the heart of the case. I've not yet reached it, with respect. I want to give the page reference of the evidence of Ms Dorrington, who gave evidence about the drafting history of these agreements in cross-examination at volume 2 page 271 of the case. I put to her the distinction between an assignment and a novation, and at line 26 I said, "And can we take it that in the documentation drafted by your firm both the original property agreements and the documentation drafted in about August 2009, that distinction I have just identified would have been taken for granted?" "Yes, this was about assignments." So the appellants' solicitors involved in the drafting were making the distinction, not using their own or creating their own dictionary.

WILLIAM YOUNG J:

Can I just – well, that's what she thought she was doing. Just looking at, say, the vineyard management agreement, what I'm looking at is 550, the effect of – if Vines

is placed in liquidation Goldridge can terminate the agreement, is that right? The agreement is at 550. The termination clause is at 562.

MR HARRISON QC:

I think that may – I think the, it may not be the most official copy of the ...

GLAZEBROOK J:

Can we please have reference to the official copy of you say it's just The Vines supply agreement, so just an official copy of what the actual vines supply agreement – I know there are four of them but one of them will do.

MR HARRISON QC:

Yes. Well, my submissions work from the agreement that starts at page 614.

WILLIAM YOUNG J:

Yes, all right. So this is a supply agreement, is it?

MR HARRISON QC:

I'm working from the grapes supply agreements because it's the grapes supply agreements that are still in issue, but it's the same provision.

WILLIAM YOUNG J:

It's the same provision. It's 648, isn't it, the termination clause there?

MR HARRISON QC:

627. It's easier to jump ahead because successive copies are before us.

WILLIAM YOUNG J:

All right. So at 627, if Vines is placed in liquidation, Goldridge can cancel the agreement, terminate the agreement?

MR HARRISON QC:

Not in respect of this agreement, I have to say, because this is the Kakara agreement which was the subject of the novation.

WILLIAM YOUNG J:

No, but just looking at it as it was at the time the agreement was signed.

MR HARRISON QC:
Yes.

GLAZEBROOK J:
And let's assume it was a Weta agreement when we come to that.

MR HARRISON QC:
That's correct. When it was signed.

WILLIAM YOUNG J:
But that would mean that the Goldridge people, the Vegars, would have the ability to bring the contract down at any time they chose simply by placing The Vines in liquidation.

MR HARRISON QC:
The Vines was a separate company. It wasn't the Goldridge people. The Vines was a company not owned by Mr and Mrs Vegar but rather by Paul Vegar, the brother. With the greatest of respect, Your Honour, the position is this. All of these interpretation issues were argued out before the Court of Appeal and ruled on, not appealed again. I devoted pages and pages of submission to analysing this from a contract interpretation point of view and I haven't come prepared to do that and if I have to do it we certainly won't get finished the appeal I thought I was here to argue.

WILLIAM YOUNG J:
I don't want to go off into a big discursive like that. I want you to explain to me the commercial rationale. Here Vines is a company associated with one of the Vegars. Why would your clients want to have their ability to rely on these agreements able to be brought to an end by reference to something that happened to Vines over which they had no control?

MR HARRISON QC:
It's probable, in my submission, that it just wasn't adverted to at the time as a scenario. That would have involved Goldridge taking a step which would be to cut its nose off to spite its face, so maybe because only Goldridge would have been able to adopt that approach, but the other side of the coin here is what matters, that is, once the respondents, each of them, became involved in these agreements, either by

direct novation, full novation in the case of Kakara or strictly speaking assignment in the case of Weta, they would have wanted to have kept Goldridge in so they were quite content with their other side of the coin, as any contracting party would want to have the party who they've contracted with who then assigns there and retain the ability to terminate if that contracting/assignor party went into liquidation. So there was a bit of rough with the smooth, if you like.

WILLIAM YOUNG J:
Did Vines have any business other than the development of this group of vineyards?

MR HARRISON QC:
I'm not aware of that.

WILLIAM YOUNG J:
Because in the ordinary course, companies like this tend to be single-purpose companies and when their single purpose has been achieved they tend to be discarded.

MR HARRISON QC:
Yes.

WILLIAM YOUNG J:
With unpredictable effects on the terminability of the agreement.

MR HARRISON QC:
Quite, but the – I mean, if we're going to look at these agreements and try and resurrect an argument which was never, in fact, a dictionary-type argument anyway, which I don't concede can be done, we look at pages 627 to 628, the assignments of rights provision. I have previously analysed this in submissions which are not before the Court, but there are quite different provisions governing assignment by the buyer company on the one hand and assignment by the grower company on the other. It's only under 25.1 the buyer that has the – by backdoor statement there – the right to assign to a right related company. There are different provisions. There are unreasonable withholding of consent provisions in different terms in 25.2 and 25.3, and that we are plainly talking about assignment. That is the point. No dictionary, with respect, and once you accept that and accept that, as the appellants have conceded all along, if, as a matter of law, Goldridge remained a party, a buyer party,

to the agreements then the termination provision bit and while we've got this agreement in front of us, although it's referred to in my written submissions, when we're looking at this right to terminate and these rights to assignment, page 616, the interpretation provision C is important and as I will argue explains the language used in referring to the numeric companies as parties. Any reference to any of the parties includes that party's executors, administrators, or permitted assignees or if a company, its successors or permitted assignors or both, and I haven't mentioned this before but we note also D. Everything expressed or implied in this agreement which involves more than one person binds and benefits those people jointly and severally. So upon the assignments taking place, and I'll revert back to that issue, the appellants undertook the status of permitted assigns, and thus they were effectively parties under the contracts and appropriately referred to –

ELIAS CJ:
Well they could describe themselves as parties.

MR HARRISON QC:
And my clients could describe them as parties. As a legitimate use of language and I'll come back to the precise wording of what those statements by my clients were but that's the point.

GLAZEBROOK J:
Does it actually mean if you're a permitted assignee that you're actually bound by the contract therefore? So is there really then a distinction between novation and assignment under this particular contract?

MR HARRISON QC:
Well that –

GLAZEBROOK J:
If you're a permitted assign you actually become bound by it.

MR HARRISON QC:
That – no, I don't accept that you – well let me put it this way –

GLAZEBROOK J:
So you don't get rid of the other one is that what you're saying?

MR HARRISON QC:

You don't get rid of the other one –

GLAZEBROOK J:

Yes, all right –

MR HARRISON QC:

– you could say –

GLAZEBROOK J:

I understand –

MR HARRISON QC:

– you're bound by it.

GLAZEBROOK J:

– you're an extra party.

MR HARRISON QC:

You're an extra party –

GLAZEBROOK J:

Rather than a substitute.

MR HARRISON QC:

– but it's not a novation, a –

GLAZEBROOK J:

Extra rather than a substitute party, thank you.

MR HARRISON QC:

Yes and I adopt the Court of Appeal's interpretation on this point which I set out in paragraph 3 of my written submissions. That was their conclusion and as I keep saying it wasn't appealed.

GLAZEBROOK J:

Which, sorry?

MR HARRISON QC:
Paragraph 3 of my written submissions.

WILLIAM YOUNG J:
The interpretation that wasn't appealed is that it comes down to the proposition that the liquidation of an assignor triggered the termination clause?

MR HARRISON QC:
Yes. Now I just wanted to go back to where we left off and very quickly hopefully. When we adjourned I submitted that the September 2009, or we could say August as well, is the point at which the analysis starts, no earlier, and that my submission is that that was a new ball game from that point when the appellants decided to proceed to assign and that ball game was governed by the provisions of the contracts between Goldridge and the respondent. And what Goldridge then set out to do needs to be therefore to be considered in light of the contract which it was a party to and which it was seeking to successfully we say to divest itself of.

Now the key test in this – the key issue in this appeal, I submit, has not yet been addressed and that is the test for the formation of a contracted novation. We argue that this involves the same analysis as must be brought to bear when determining whether an original contract has been entered into between parties operating in a commercial setting and the appellants contend that all that is required is the consent order indeed implied consent of the party alleged to be bound, or as a variant this morning, the implied acceptance. Now in the particular circumstances of this case I am submitting that there's only one permissible approach to analysis of the question whether contracts of novation were formed. That's by an analysis in terms of offer and acceptance, the classic analysis. That – and I go further and submit that implied acceptance is ruled out for reasons I will come to. If I am correct on that then all my learned friend's arguments and the whole question of the meaning of and effect of the respondent's statements a year later is by the by, it's irrelevant.

Now there are two or three reasons why I submit that an analysis in terms of offer and acceptance governs and determines the outcome. Rather than outline those now they're summarised in the submissions. I'll come to them properly shortly. The back up argument is that if I am wrong there then the communications are not

sufficiently clear to warrant deciding that there's an implied acceptance. The fact that they occurred so –

GLAZEBROOK J:

When you say implied acceptance it's clear there can be acceptance by conduct, isn't it, yet you're not saying there can't be acceptance by conduct?

MR HARRISON QC:

I am in this case, yes.

GLAZEBROOK J:

Because of why?

ELIAS CJ:

Because of the terms in which the offer was made?

WILLIAM YOUNG J:

No because of a no written – no variation except in writing clauses.

MR HARRISON QC:

Oh no, there's two main strings to that bow. One is the communication, and I'll bring you to it very shortly, the communication was signed and returned as soon as possible. Execute that and – if the communication in September 2009 is properly analysed I submit it's a two-fold communication. One, we've assigned and we don't – and if it's to a related party we don't need your consent. Two, here are these formal documents which you must execute. Sign and return. So that the second of those is an offer to novate. In my submission that's the only way to analyse it. It comes out of the blue –

GLAZEBROOK J:

And it can only be accepted in its terms by signing it rather than by conduct is that the –

MR HARRISON QC:

Correct, that's the point, and there's a Court of Appeal case right on point which I cite, and I'll come to it. If the offerer identifies the mode of acceptance by saying, for example, sign and return, that is the only way in which that offer can be accepted.

ARNOLD J:

So if the recipient has said, yes, that's fine with me, but never got around to signing and returning the document, but acted absolutely in terms of it being a novation, that would not be enough?

MR HARRISON QC:

That is a different scenario and it would give rise to equitable considerations, estoppels and the like, and –

ARNOLD J:

No, no, I'm not talking about. I'm talking about it in contractual terms. You're saying that is not enough?

MR HARRISON QC:

In contract formation terms it's not enough.

ARNOLD J:

Right.

MR HARRISON QC:

But we need to –

GLAZEBROOK J:

Well wouldn't it be, if somebody says, here's the contract, will you please sign it, then goes and does absolutely everything in accordance with the contract, so the contract's for a sale of goods and they say, well sign this and send it back and the person actually sends the goods over, accepts the cheque, can they then say, oh no actually there wasn't a contract I'm returning it all. So it's assumption that you can't – that if somebody says sign this and you don't but everybody actually goes and does it or is that part performance you say?

MR HARRISON QC:

That would be part performance. There is a –

GLAZEBROOK J:

It's a very strict view –

ELIAS CJ:

You have to have a contract –

GLAZEBROOK J:

– of offer of acceptance.

ELIAS CJ:

– before you have a part performance.

WILLIAM YOUNG J:

Yes, there has to be a contract first.

GLAZEBROOK J:

Yes, exactly.

MR HARRISON QC:

Well –

McGRATH J:

Often conduct that is held to amounts to affirming the contract is also includes an element of waiver of the formal requirement of signature and that's actually referred to in *Brogden*. So that may be a, you know, that may be a way through in this case also.

MR HARRISON QC:

Well I was going to mention *Brogden v Metropolitan Railway Co* (1877) 2 App Cas 666 –

WILLIAM YOUNG J:

Sorry, can I just put a slight variance of that before you come back to it. Weren't the numerical companies, isn't one way of looking at it that numerical companies by acting on a basis, particular basis, continuing to offer to deal with the other companies on a particular basis, which apparently was the novated proposal in the deed, and your clients by dealing with them on that basis over 14 or 15 months or whatever, and by the assertions they made, accepted that continuing offer. So there's a course of conduct of which the deed is only one component.

MR HARRISON QC:

That is my learned friend's argument based on *Brogden* and with the greatest of respect it's completely artificial. The position is that the starting point is that there was an existing contract. No new contract needed to be formed so far as my clients were concerned. There was then an assignment of that contract to the appellants so that they stood in the shoes of Goldridge. They were entitled to perform Goldridge's part of the contract and they were entitled to the performance of my client's obligations under the contract and that is why the appellants supplied the services under the management agreements and why my clients paid them. It is quite wrong with respect to and analyse that scenario in terms of a continuing offer consistent only with a contract to novate. It is –

McGRATH J:

So they were acting on the draft contract, the contract was executed by only two of the three parties. They were acting on a prior existing contract.

MR HARRISON QC:

Yes, which had been validly assigned.

ARNOLD J:

By what mechanism? The only document recording an assignment is the deed that's signed by two of the three parties.

MR HARRISON QC:

Well and now we've reached that point I will deal with that. The position there is, excuse me, can I deal with it this way? I do want to go back to the chain of communications that started so far as my client was concerned, started on the 11th of September 2009, so if we just go to page 1186 of volume 4. I'll come back to Your Honour's point about the timing of the assignment and whether this is all it documents in. I won't have to do this again if I do it all in one hit. Starting at 1186 you will see that Paul Vegar, actually Divine's brother rather than Peter, sends Murray, who is the sort of running the show for Weta and Kakara, the attached letter and, "Please signed and return by post ASAP." That's the first designation of how acceptance is to occur, if you see that. Then, the letter which accompanies it is over the page and there's the statement that Goldridge Estate is selling its business to 4334. This is a related company with the same direction. The assignment took

effect on the 28th of August 2009, so that's the first bit of evidence that the assignment occurred separately.

ARNOLD J:
Yes, but that's the date of the agreement. The assignment – the document envisaged an assignment with effect from 1 September.

MR HARRISON QC:
But he says the assignment took effect –

ARNOLD J:
I know he said that.

MR HARRISON QC:
Yes.

ARNOLD J:
But that's a mis-description of what the deed provides for.

MR HARRISON QC:
Well, I'm coming to some more evidence, Your Honour. Just let me go through this. So, that's what he says in the letter. Why do we disbelieve him? Why should my clients disbelieve him? Now although the grape supply agreement, the vineyard management agreements each state that Goldridge does not require to obtain a consent to assign the agreements, we prepared assignments documents that require execution. Then we've got the so-called deeds of 28 August.

Now, the evidence going beyond that, is that of Peter Vegar himself referring to volume 2, his brief, at page 116.

ELIAS CJ:
Sorry, what volume?

MR HARRISON QC:
Volume 2, page 116. Paragraph 49 he said, "On 3 August 2009 I emailed my wife about the necessity to restructure, get that completed by the end of month. We established the Goldridge companies. On 28 August 2009 and effected the

assignment of the vineyard management agreements and supply agreements to those companies on that date."

He goes on in similar vein in paragraph 52 in relation to the other vineyards and at paragraph 54 he paraphrases the letter I referred to earlier and at cross-examination at page 243 and following, I tackled –

GLAZEBROOK J:
Can I just check on 54 he seems to – he's referring to a deed of an assignment which is obviously enclosed, but he seems by reference to say that was the document that effected the assignment or are you saying he's referring to a different document that the assignment took place and it was pursuant to a different document or it was an oral assignment?

MR HARRISON QC:
Well, I don't read it that way because he's saying that the assignment took effect.

GLAZEBROOK J:
Well, he hasn't talked about the deed of assignment until that point or any date. He hasn't said, "We've prepared a separate document."

MR HARRISON QC:
Well, those two statements can and should be read disjunctively. He's already said in paragraph 49 that the assignments were effected on 28 August 2009. How much more evidence, with respect –

ARNOLD J:
It's just what it means. It's not literally. I mean I would've thought it mean that the deeds of assignment were executed that date. That's the date that they bear, that's the language that he uses when he sends copies to your clients and it's not a reference to the effective date of the assignment which is under the deeds 1 September. There's no suggestion that he signed a separate deed of assignment, the separate deeds of assignment that we haven't been taken to were executed is there?

MR HARRISON QC:

With respect, I'm not sure where this argument leads us. If there was an assignment, it was either legal or equitable and bound my clients upon receipt of notice of it.

ARNOLD J:

Perhaps it was ineffective.

MR HARRISON QC:

Well, if it was ineffective, my clients understandably treated the appellants as assignees, something which the appellants always maintained they were, how else did they come to sue and get an interim injunction?

ARNOLD J:

Well, true, but I mean it's just that it's as though the people are sort of talking past each other. They're saying, on the face of it, "We're an assignee, but we're an assignee on the basis of a transaction under which we replace the original Goldridge Company." Your people are saying, "Well, they're entitled to assign and we don't really care how it happens and we'll just deal with them as assignees." But they may be, as it were not entirely on the same song sheet on this –

MR HARRISON QC:

Well, obviously they weren't, because Peter Vegar believed that effecting an assignment would bring about a novation. That was his evidence when cross-examined.

GLAZEBROOK J:

It doesn't matter what –

MR HARRISON QC:

But that's neither here nor there.

GLAZEBROOK J:

Well, it doesn't matter what he thought.

MR HARRISON QC:

Yes.

GLAZEBROOK J:

When he's talking about – well, perhaps we'll go back. You say first of all there's the assignment and then there's the offer to novate. So, where do you say first of all the assignment came from? Did it come from the deed of assignment that the Goldridge and the numerical company signed or did it come outside of that deed of assignment and if it came outside of the deed of assignment, how did it come about?

MR HARRISON QC:

Well, I say that it came about outside of the deed of assignment and on his plain evidence prior to the date which that deed stated would be effective.

GLAZEBROOK J:

Well, that deed was signed on the 28th of August by the numerical company and Goldridge, so you're saying that prior to doing that, orally in some manner, because we haven't been shown another document, the assignment had already taken place?

MR HARRISON QC:

Obviously husband and wife on both sides of the deal, in other words both the appellants and Goldridge operated very informally but they brought about an assignment.

ARNOLD J:

Just pause there, why would you assume there's an assignment separate from the deed that's prepared to record it and on terms other than those set out in the deed? I mean it's possible but why would one assume that these people would do that?

MR HARRISON QC:

Well, I'll come back to the point I was about to make. There are two ways of analysing this. One is that literally as they expressly stated on oath they said, right, we're assigning, same people on both sides. Husband and wife for the numerical companies, husband and wife for Goldridge, yes we agree we've assigned, we've done it, as at 28 August. The alternative way of analysing it is that by signing the deed, even though it did not take contractual effect, it did take effect between Goldridge and the appellants as an equitable assignment. So in equity, and I find it difficult to understand, with respect, why we're having so much trouble with this proposition.

ELIAS CJ:

I'm lost now I'm afraid. Why does it matter?

MR HARRISON QC:

Well, quite, why does it matter? We say, so far as we were concerned we were presented with an assignment. We took legal advice that an assignment had to be complied with so we proceeded on the footing that the appellants were assignees and dealt with them according to law thereafter.

GLAZEBROOK J:

How does it take effect in equity? I can understand there could be an estoppels if the numerical companies said, oh no, ha ha, actually we're not parties, because they're represented that they have taken pursuant to an assignment. But I can't see quite how it becomes an assignment in equity even if it – because Mr Jones' submission was that it wasn't effective if it wasn't a novation.

MR HARRISON QC:

Well there's no surprise to hear that submission because after all that – they argued the entire case throughout until this Court on the basis that there was an assignment which by subsequent conduct became a novation. The very question posed to this Court asked whether it was an assignment or novation and presupposes that it was at least an assignment. The point is dealt with in paragraph 47 of my submissions and there is assistance to be gained from the case of *Mountain Road (No 9) Ltd v Michael Edgley Corporation Pty Ltd* [1999] 1 NZLR 335, which is at tab 9 of our bundle of authorities, Court of Appeal decision, where something similar happened. There was an assignment by deed which was not executed. Page 337 is where it all starts to happen.

ELIAS CJ:

Sorry, what tab was it?

MR HARRISON QC:

This is tab 9, page 337. So the issue is there the validity of the assignment and it was concluded over the page, page 338 at the top, "The document could not have become binding on Edgley without its signature, because it was undertaking liabilities." And then there's a timing issue. So at page 339 the first point is whether there was a valid assignment.

GLAZEBROOK J:

Is that where the assignee hadn't signed?

MR HARRISON QC:

The assignee hadn't signed, yes.

GLAZEBROOK J:

Well here the assignor and assignee have both signed.

MR HARRISON QC:

Yes, all the more so it's likely to be binding, that's what I'm saying.

GLAZEBROOK J:

Well that was the point I was making to your friend but...

MR HARRISON QC:

But the – so the point though is that if the, to be taken from the case I submit, is that if the document contemplates signature by all three parties then it doesn't come into being a contract but that doesn't stop it having other effect.

WILLIAM YOUNG J:

But if it's ineffective as a contract because a condition essential to its effectiveness hasn't been satisfied, by what mechanism does it become effective in equity?

MR HARRISON QC:

The assignment, it records an assignment and if all had signed it so that the contract too effect it would've been legal. Something falling short of that can be binding in equity if acted upon and –

WILLIAM YOUNG J:

Well isn't it the acting upon that's critical?

MR HARRISON QC:

Well it was acted on; it was acted on by Goldridge and the appellants.

WILLIAM YOUNG J:

Yes.

MR HARRISON QC:
And upon notice.

WILLIAM YOUNG J:
And arguably, and that's the argument you're meeting, arguably by your clients?

MR HARRISON QC:
Well that's what we say. Well plainly it was.

WILLIAM YOUNG J:
Yes but what they're saying, you're saying that your clients simply acted on a simple assignment with nothing attached, no conditions attached. They say they acted on an assignment which was subject to substitution of parties.

MR HARRISON QC:
But no such conditions existed and the letter clearly –

GLAZEBROOK J:
Well the document itself was clearly a novation, had it been signed by all three parties, so the document that they were acting on was a novation document not an assignment document.

MR HARRISON QC:
It was a novation document. Sorry, it was an assignment but ineffective as a novation. The document at page 763 recites that the assignor has agreed to a signor of its rights and obligations with effect from 1 September. In fact that is contradicted by unchallenged evidence of Peter Vegar that I've referred you to, that the assignments were granted earlier.

GLAZEBROOK J:
Sorry, I think you were going to take us to the cross-examination and I think I might have interrupted you.

ELIAS CJ:
But I think we should let him develop his –

GLAZEBROOK J:

No, sorry, I just remembered that I'd –

ELIAS CJ:

– argument because we are throwing him off.

MR HARRISON QC:

Well it's just that I – calling this – it's either an assignment or somehow a novation despite the non-acceptance by my clients, which it clearly isn't, or it's nothing. I mean how can it be – if it's not an assignment and there's no third signature, as of the date of that communication it has to be legally nothing.

WILLIAM YOUNG J:

Well it's absolutely true but then it can become the parties by their conduct, which appears to relate to it could adopt it as the contractual basis for their dealings, and that is the argument that's –

MR HARRISON QC:

Yes.

WILLIAM YOUNG J:

– been led. I don't know that it's –

MR HARRISON QC:

Then – but assuming all that then all that's needed for my argument to proceed further is an acceptance that that communication on 11 September was an offer to novate. I mean I don't see how there can be any – that's all that my argument requires. It was an offer to novate. Now it was an offer to novate that stipulated how it was to be accepted and nothing happened in response to that offer for at least 11 months. The offer was made by Goldridge –

ELIAS CJ:

I'm sorry, and the additional point, presumably, is that the letter was notification that there had been an assignment?

MR HARRISON QC:

Well that's what I say, yes.

ELIAS CJ:

Yes.

MR HARRISON QC:

It's a two part communication. We got into a debate about whether that was true –

ELIAS CJ:

Yes.

MR HARRISON QC:

– but I do, I stand by that, but then the next part, which I respectfully suggest is irrefutable is that it was an offer to novate.

GLAZEBROOK J:

Why do you say nothing happened for 11 months because I thought they invoiced each other – did it fairly immediately afterwards, or was it not, did nothing happen for 11 months after that in terms of ...

MR HARRISON QC:

Well, no, I mean things happened by virtue of the assignment.

GLAZEBROOK J:

Well, you say nothing happened, nothing happened that couldn't be explained by it being an assignment, is that –

MR HARRISON QC:

Correct, correct.

GLAZEBROOK J:

Right.

MR HARRISON QC:

And whether ex post facto this Court were to say, well, in fact you are all mistaken and there was no assignment, all parties proceeded for the whole period on the basis that it was. So, let's just look at the two arguments, two to three really, why that offer to novate required a formal acceptance. The arguments are at page 16 of my written submissions. The first one is contractual barter novation arising. Now, this relies on

the terms of the property agreements if we go back to the one that I've suggested we use which is the grape supply agreement which starts at page 614 and proceeds almost to the end of that agreement to page 629. We've got clause 30 dealing with amendment, "This agreement cannot be altered except in writing signed by authorised representatives," and 31 waiver and in particular 31.4, "Any waiver or consent given by a party must be in writing and will be effective only in the specific instance and specific purpose for which it is given. I put those two together and submit that my clients can't possibly be treated as having waived 30.1 unless they did so in a manner compliant with 31.4.

Now, the question, did the offer to novate if you'll bear with me on that description of it, if accepted bring about an alteration of the contract in question within the meaning of the prohibition in 30.1. If so, then the acceptance relied on by the appellants can only be one in writing, signed by authorised representatives of the company. Now my submission is that, two-fold submission, one is that the offer as put forward to novate does indeed alter the agreements. You can't get a more fundamental alteration than removing one party and substituting another. But, if that is not enough, just go back to the operative clause of the proposed deed at for example at page 1171 and what the parties by acceptance by putative acceptance are agreeing to. 1.2(a) –

ELIAS CJ:
I'm sorry, I'm lost, where are you?

MR HARRISON QC:
Page 1171, this is the 28 August 2009 deed signed by two out of three. So, we're looking at this to say was the offer an offer which would have involved alteration of the agreement and so 1.2(a) this alteration assignee to be substituted for the assignee under the agreement and this is key, "As if the assignee had originally be party to the agreement instead of the assignor and all references to the assignor shall be references to the assignee." So, it's a retrospective substitution major and (c), "The client shall be bound by and comply with the provisions of the agreement binding on the client as if the assignee had originally been a party to the agreement instead of the assignor. So, it's not only a stepping into the shoes of Goldridge both ways, benefit and burden, it's a retrospective stepping into the shoes. The effect of this would be to prevent Weta, for example, suing Goldridge for any antecedent breach.

McGRATH J:

To me, Mr Harrison, under the heading "Amendment" paragraph 30, when an agreement cannot be altered, what it's saying is the terms of the agreement can't be altered. It's not referring to alterations in the parties to the agreement.

MR HARRISON QC:

Well, with respect, I would submit the contrary and would submit that the most fundamental alteration you can have is changing the parties but I'm referring to this to demonstrate that the terms of the agreement are being –

McGRATH J:

I understand what you're saying, and you're incorporating a reference to 1.2(a)(b) and (c), but I don't see how that alters the meaning of clause 30.1 when it says an agreement cannot be altered. It seems to me that's solely concerned with the terms that the parties have agreed rather than who the parties to the agreement are at any time.

MR HARRISON QC:

Well –

McGRATH J:

I just want to put it to you directly because that's...

MR HARRISON QC:

Yes, well, it says this agreement shall be altered not particular terms of the agreement. The agreement is being altered, I submit, or would be altered by the effect of clause 1.2 and I can't really, having read it to Your Honours, I'm not sure I can elaborate –

WILLIAM YOUNG J:

There must be some cases on this because can't an agreement, including the non-agreement, the must be in writing provision of an agreement, be altered by oral agreement? I mean if the parties to this said, met, shook hands and said, "We're replacing Goldridge with the numerical companies. Is that agreed? Yes. Do we need to document? No. We're gentlemen, we'll just shake hands." You couldn't really say that's not effective could you?

MR HARRISON QC:

Well, you might have one answer in a contract that contains clause 31.4 and a different answer in one that doesn't. I mean –

WILLIAM YOUNG J:

I'm assuming it does contain –

GLAZEBROOK J:

That's not a waiver though. That's actually a –

WILLIAM YOUNG J:

It's just – but we're unequivocally altering it. We're men of our word and we can't be bothered writing it down.

ELIAS CJ:

Or you'd never have put this clause in.

WILLIAM YOUNG J:

No but you changed your mind. You're going to trust each other.

GLAZEBROOK J:

But anyway the lawyers put it in because it's a standard clause.

MR HARRISON QC:

Well that – my submission that doing that is not contractually permissible. If you want to bind the person who's acted in that way then you have recourse of principles of estoppels or waiver except that waiver's a problem under this contract so you might have to do it solely under estoppels. That's the position.

WILLIAM YOUNG J:

It's a bit like sort of the manner and form cases where you used to be taxed with in constitutional law. I mean Parliament says this Act can't be changed except with the majority and the next Parliament comes along and just says well we're altering that too.

MR HARRISON QC:

Yes, well, maybe it's Parliament – Parliament is less reviewable than what the parties to the contract do. This deed if imposed on the respondent has a major and drastic effect. It, in effect, requires the respondents to have recourse only to the numerical companies which can, and indeed on the evidence can be and were on the evidence, companies of straw and you are, I submit, altering the agreement if you impose this outcome on them and that can and should be seen as caught by 30.1 but I can't really –

McGRATH J:
No –

MR HARRISON QC:
– so that's –

McGRATH J:
For me I'll have to think further and maybe your, the merit in your argument will have grown more apparent as I do Mr Harrison.

MR HARRISON QC:
Right. Now the – there's then an argument at page 17, it's headed, "Formal signed novation agreement mandated by parties history of dealing," so I go through the fact that they were lawyered up on both sides. Everything was documented, signed and sealed throughout, that was the past history. I reviewed the evidence that Goldridge was important to us and then the legal submission is at paragraph 61. The two cases there, *Carruthers v Whitaker* [1975] 2 NZLR 671 is in our casebook at tab 8, *Concorde Enterprises v Anthony Motors* [1981] 2 NZLR 385 (CA) is in their casebook at tab 4 and Your Honours are familiar with that particular principle, indeed it was mentioned this morning. And then at 62 I note a variant which is the proposition about the stipulating the mode of acceptance and as this is an important plan for my argument I wonder if I can just take Your Honours quickly to those authorities.

Firstly, *Wilmott v Johnson* [2003] 1 NZLR 649 (CA) which is at tab 12 of the appellant's bundle and this case shows the strictness of the rule. The purchasers were named as the Beatrice M Trust and the vendors, when provided with the signed agreement, instead changed the name to the actual trustees to the Beatrice M Trust. Same party but proper names inserted. Then the agreement with that initial change was sent back to the trustees, the would be purchasers, asking them to initial the

change. That did not happen during the crucial period and the Court held that there had been a stipulation of the mode of acceptance and that governed. The key paragraphs are paragraph 35, line 20 within that paragraph, "The law of contract is concerned with the conduct of contracting parties inter se, viewed objectively," we know that. 37, the argument cannot succeed. "It is conventional and frequently decisive to analyse dealings in terms of offer and acceptance. The offer by the Beatrice M Trust could have been accepted by the vendors simply by adding their names and executing the agreement." But in *Carruthers v Whitaker* the principle was emphasised. "Parties become bound by contract when, and in the manner in which, they intend and contemplate becoming bound. That is a question of the facts of each case." Then the facts are canvassed and at 39, "They were not, however, prepared to do so unreservedly. By their conduct of returning the executed agreement for initialling by Mr Johnson, they signalled that the transaction was not to be treated as concluded as at 30 November, but that the further act of the addition of the initialling by the trustees was required." So that's a counter-offer, it was said. 41, "Whichever way the case is viewed, having by their conduct signalled that was their position, the vendors cannot now resile from it."

Then *Mountain Road* at tab 9 of our bundle is a case along similar lines. I don't need to take Your Honours through that.

Now a key feature of this aspect of the case is that the offer to novate was made by Goldridge, not by the appellants. Goldridge was the offerer. It said, sign and return. Other than the invoicing and being named as a defendant in interim injunction proceedings, as I have submitted, nothing whatsoever happened in response to the communication on 11 September for at least 11 months. So there was no acceptance – this is paragraph 63 of the submissions – and above all no acceptance by signature in return ASAP, and my submission is that the offer in those terms was necessarily finite in duration, quite apart from the precise stipulation of the mode of acceptance, and it must have taken to have lapsed and footnote 35 I've got a couple of authorities, *Kean v Dunfoy* [1952] NZLR 611 is at tab 11 of our bundle. *Dysart Timbers Ltd v Nielsen* [2009] 3 NZLR 160 is not provided.

So if you analyse this in terms of offer and acceptance, which is the way it must be, in my submission, and you set aside payment of the invoices as consistent with assignment. Being named as a defendant is neither here nor there. You've got full 11 months elapse without an acceptance as stipulated. The offer lapsed. It was

never accepted, and that quite radical change in the contractual relations was simply never the subject of contract formation.

GLAZEBROOK J:
Why did the offer lapse?

MR HARRISON QC:
It lapsed through elapse of time.

ARNOLD J:
Isn't the problem with that that the payment of the invoices standing on its own is equivocal in the sense of it's consistent either with novation or an assignment. But if there's later conduct which makes it absolutely clear – and I know you say that it's not the case but let's say there is – there's conduct that makes it absolutely clear that your clients thought there was a novation in the earlier conduct which, standing on its own, is equivocal of paying the invoices becomes clearly referable to their thinking there was a novation, so at that point it amounts to an acceptance, doesn't it? In other words, this notion of saying nothing happens treats everything as very discrete and not interrelated, whereas the argument that's being put is that when you look at the whole course of it, it is explicable only in one way, notwithstanding that the first stage the payment of the invoices standing alone is equivocal.

MR HARRISON QC:
Well, I mean, it depends which end of the telescope one looks through, perhaps. If, for the sake of argument, the September communications are regarded as sufficiently unequivocal to be used as a plank in an implied acceptance argument, then because it's objective, an objective test, one doesn't have to go back to the earlier transactions but those transactions viewed in isolation are completely explicable by reference to the fact that the respondents have been told the appellants were SIS so I would discount them in an offer and acceptance analysis because there is nothing that responds to the offer – I mean, you can't really say that payment of invoices, which are an obligation under the assignment, are responsive to the offer, nor is being named as a defendant in interim injunction proceedings and defending that without taking the non-existent point that the assignor should have been joined. Those are simply non-responsive to what I have described.

ELIAS CJ:

But aren't there two things, I think, that are being put to you? The first is the subsequent conduct argument that one can draw the inference that this was accepted to be novation by the way the parties conducted themselves or your client conducted themselves later. But I thought that Justice Arnold was also suggesting that acceptance might have come subsequently. Is that ...

WILLIAM YOUNG J:

Well, I think what Justice Arnold may have had in mind is what appears in *Wilmott v Johnson* at paragraph 40 that it's a bit unrealistic to look at offer and acceptance as discrete items. Rather, you're looking at a course of conduct, and that's what the passage at paragraph 40 *Wilmott v Johnson* suggests by reference to remarks of Lord Cooke.

MR HARRISON QC:

The position, as I've argued, is that there is the stepping back form of analysis of contract formation and I acknowledge that in my submissions. But the principle that you must – that the offerer can set the terms, the mode of acceptance necessarily trumps that analysis because if you apply that principle, "Here, sign and return these documents," was the stipulated mode of acceptance and the rules of the game are, "And then analyse in terms of whether there was that stipulated mode of acceptance," you can't then say, "All right, but now I will step back and look at it as a whole." We got a little distracted from my point that the offer must be taken to have lapsed because, with respect, Your Honour Justice Arnold's questions to me don't meet that. You're saying, "Well, ah, but if we go to September 2010 then we can view the payment of the invoices in a different light." What I'm saying is that if we don't do that, if we just look at what had unfolded down to immediately before those communications of September 2010 we have a period of inaction by which time that offer had lapsed. It was an offer of Goldridge. The conduct was now relied on. The communications now relied on were to the appellants, where is there an offer – where is there Goldridge's offer as to bind Goldridge?

McGRATH J:

Mr Harrison, whether you look at this both on your lapse of offer through fluxion of time argument and on the argument that the terms of acceptance were stipulated, you have to confront, don't you, what Justice Cooke was saying in *Concorde Enterprises v Anthony Motors* at page 389, which in effect was that whilst certainly the normal inference, when you have a contract in writing, is that parties do not

expect to be bound until both have signed it. You might say that that inference gets some reinforcement from the last paragraph in the letter of 11 September you've referred to. You can, however, have a situation, as Justice Cooke put it, cases arise where, without execution of the document, on one side or both the parties act on it, so an implied contract arises. Now, it seems to me that's acknowledged by the Judge as a situation in which there is subsequent consensus forming the contract which, in your case, would bypass whether the lapse of an offer along the way or the initial agreement that acceptance would be only in writing. The parties actually acted, in the end, in a way that showed they intended to be bound.

MR HARRISON QC:

The problem, with respect, the words "in the end". If, by any objective measure, the Goldridge offer to novate lapsed by the time these key communications to the appellants took place, then in the end it was too late.

McGRATH J:

But by their conduct they showed, I suggest, they were definitely showing it was all still alive, they were still wanting to deal on the basis they proposed.

MR HARRISON QC:

What their conduct showed was that the vineyard management agreements were still alive and they were bound to honour their obligations to an assignee party to those agreements. There is no – with respect, there can be no suggestion on the evidence that the respondents were, by their conduct, keeping that offer alive. The offer just hung there for 11 months. Now, if we just focus on that for a moment, when the offer is sign and return by post as soon as possible ignore the subsequent conduct. With respect, there is no answer to the argument that that offer would have lapsed by fluxion of time. The other thing I wanted to submit, Your Honour, is that there is actually a difference between the –

ELIAS CJ:

I'm sorry, just pause a moment. I'm still struggling as to why you say that position was arrived at here where the parties were in a relationship where they said they were sort of locked together. Where do you get the authority for saying that 11 months in this context meant that the offer had lapsed?

MR HARRISON QC:

Well, I don't have – I mean, these facts are fairly unique. I don't have that.

ELIAS CJ:

Well, what's the principle that you're relying on?

MR HARRISON QC:

Right, well, it's again –

ELIAS CJ:

It's not as if this was a one-off thing. They were dealing with each other during this period.

MR HARRISON QC:

But who were the "they"? It was a one-off thing. Goldridge and the respondents were dealing with one another under the agreements. Then at a certain point of time, Goldridge makes a one-off offer to novate, completely removing itself from the picture and substituting two Shell companies, basically. I could take you to the evidence about their lack of worth. That was a one-off offer, but in parallel with that one-off offer Goldridge says we've assigned and the respondents take legal advice from their solicitors. They're told they're bound by the assignments and they begin dealing with new companies, so there's not a continuum. It's Goldridge down to the offer, plus assignment, then the appellants as assignees thereafter. On that analysis, there is no reason in principle why the offer should remain open any longer than any other conventional commercial offer and what I was going to say in response to Your Honour Justice McGrath is that there are really quite separate – well, not quite separate. There are two separate principles. One is if the parties in a commercial relationship are negotiating there is an assumption that they will want to commit their agreement to fully executed writing. That's the Cooke principle. The second proposition that stands aside from it is that if you stipulate in your offer your mode of acceptance then you've defined the rules of contract conclusion.

McGRATH J:

You're putting that very strongly. I mean, it may – I can accept that there is the indication of expectation that they don't intend to be bound until the documents are signed and they won't otherwise be bound. Now, any suggestion that the time, some form of time limitation is implicit, I'm not sure that I see that immediately.

MR HARRISON QC:

Well, just on ordinary general principles that an offer is only open for a reasonable time.

McGRATH J:

I'm not going to dispute that.

WILLIAM YOUNG J:

But other things that happen –

MR HARRISON QC:

But I mean there we can debate what is a reasonable time in the context of this relationship but then how to characterise the relationship, I'm sorry?

GLAZEBROOK J:

Why would the numerical companies want to limit the amount of time that the novation could happen? I can understand why your client might want to limit the time for acceptance but there's no real reason why it should have lapsed, is there? I mean, they're not going to say oh well, dammit actually we won't novate then?

MR HARRISON QC:

It wasn't the numerical companies offer, it was Goldridge.

GLAZEBROOK J:

Well that side is what I mean. Well it is the numerical companies as well because they're agreeing to take it on so they're agreeing to take on as parties to a novated contract so it's both Goldridge and the numerical companies. They're both needed as part of that.

MR HARRISON QC:

I don't see why this particular fact scenario should be treated any more tenderly in terms of lapse of time than any other commercial property.

GLAZEBROOK J:

Well no but normally when you're saying it's a reasonable time you're looking at it in the context of the person making the offer. So if I make an offer to contract with you, for example, it will look at whether it's a reasonable time to leave it open for your –

until you accept. But if it's reasonable for me to leave it open forever which one assumes in its case there's nothing to suggest why would they.

MR HARRISON QC:

I don't accept that what is a reasonable time is to be judged from the perspective of the person making the offer. The Court has ultimately to determine the question objectively and perhaps taking into account the perspectives of both offerer and offeree. But in – if we look at this from the perspective of the respondents, they get this communication in September 2009, they don't want to novate but they accept that they are bound by the assignment, they have existing contracts with Goldridge which –

GLAZEBROOK J:

When you say they don't want to novate, do you say there's evidence to that effect, that it certainly wasn't communicated to the other side if so?

MR HARRISON QC:

Well –

GLAZEBROOK J:

They didn't sign.

MR HARRISON QC:

Well, let me put it this way. They were advised by their solicitors not to sign the agreement but the assignment was binding. But my –

GLAZEBROOK J:

And there is evidence to that effect, was it?

MR HARRISON QC:

Yes, there is.

GLAZEBROOK J:

Not that I think it matters actually because it wasn't communicated.

MR HARRISON QC:

But in the other – what I was going to go on and say was that they are parties to an existing agreement with Goldridge. It says that it can't be altered except in writing. They do nothing and inaction is not acceptance. Why can't they assume that their inaction has effect and that the whole offer is off? Lapses at some stage.

WILLIAM YOUNG J:
There's equivocality, perhaps, throughout but at the end of it there are these notices to remedy defects or whatever. All, I think in relation to the vineyard management agreements, but they are unequivocal as to the assumed contractual basis. There's no three ways about it. The parties are the Savvy companies and your clients. The former parties are Vines and Goldridge.

MR HARRISON QC:
Right, even if I can't persuade Your Honour, I'm going to try and persuade your brethren to the contrary and perhaps we need to move onto that now.

McGRATH J:
It's the crucial area of the case.

MR HARRISON QC:
Well it's only crucial area to the case if it's considered that some kind of – that the offer was outstanding in some kind of acceptance by conduct is –

McGRATH J:
It's "a" crucial area of the case.

MR HARRISON QC:

– is capable of giving rise to –

ELIAS CJ:
Well you say the conduct was all, subject to what you're going to be saying about the litigation in particular, that the conduct was all consistent with this being treated as an assignment.

MR HARRISON QC:

Yes. That is what I am going to be saying. So I better just take Your Honours to the notices to remedy in the communications. My approach to this, of course, is premised, although it doesn't solely depend on, the proposition that as assignees the appellants were, in effect, had become a kind of party to the property agreements, but not by means of the assignments as such, substituted for Goldridge. Therefore – and the other point of course is that at a pragmatic level the people were the same. The Vegars were still there. The same employees were on the ground and the assignment meant no change to the way they –

ELIAS CJ:
What can we take from that circumstance though?

MR HARRISON QC:
It's just by way of explanation of how –

ELIAS CJ:
It came about?

MR HARRISON QC:
How the notices to remedy were worded but if we go to –

ARNOLD J:
But I mean that cuts the other way too because those are the same people who are involved in GEL, aren't they?

MR HARRISON QC:
You mean Goldridge?

ARNOLD J:
Yes.

MR HARRISON QC:
Yes. Well of course they were but unless we're going to start lifting the corporate veil, the –

ARNOLD J:

I know but I mean that's why I can't quite see the point of your submission really because either we are or we aren't and I thought we were not.

MR HARRISON QC:

It's just by way of explanation as to how certain areas cropped up, a key area being the timing of the Hillersden contractor appointments which my learned friend points out were acts of Goldridge some three weeks before the assignments and the – I mean these, some of these communications are explainable simply on the basis that there is a factual error underlying them, namely that it wasn't picked up, the timing of the Hillersden contractor appointments, which were actually done behind the respondent's back and that was why the – one of the reasons why they were concerned.

But if we go to the notice to remedy defaults at page 1246 we've got recital 1, and what my learned friend seizes on are the present parties to sue vineyard management agreements. I point out, of course, that it begins by virtue of certain assignments, that 3552 and Kakara are the present parties.

GLAZEBROOK J:

Well actually it was a novation for Kakara.

MR HARRISON QC:

Yes and it was also –

GLAZEBROOK J:

So it wasn't an assignment?

MR HARRISON QC:

Mmm?

GLAZEBROOK J:

It wasn't an assignment, it was a novation, and that's how Kakara became a party.

MR HARRISON QC:

Yes. I accept that but the document in question, as we heard earlier, was headed, "Deed of assignment."

GLAZEBROOK J:

Well yes but you can't – you're trying to put something on the word assignment to say it can't mean novation but it did mean novation for the Kakara document.

MR HARRISON QC:

There was also an assignment wrapped up in it. The position is that looking at the notice on its face it is recognising the way in which – and actually, sorry, no, I think we're at cross purposes here. It's the reference to certain assignments is the September – the August/September 2009 assignments, not the –

GLAZEBROOK J:

I don't think so because it's actually explaining how Kakara becomes a party because the documents were originally entered into between Goldridge and Vines.

WILLIAM YOUNG J:

And Vines is referred to.

MR HARRISON QC:

No, with respect, that is not to be drawn from this. By virtue of certain assignments Goldridge Estate Vineyards 3552 as manager and Kakara as owner –

GLAZEBROOK J:

And Kakara as owner –

MR HARRISON QC:

– are the present parties.

GLAZEBROOK J:

Well Kakara wasn't an original party to the documents, the original parties were Goldridge and Vines, which is what's referred to at the end of that paragraph, so it must be referring to both the assignment to Kakara from Vines and the assignment from Goldridge to the numerical company.

MR HARRISON QC:

But that's my point. They're identified as assignments so that –

GLAZEBROOK J:

But the Kakara one wasn't an assignment, it was a novation.

MR HARRISON QC:

Yes but they're identified as assignments vis à vis 3552 Limited. So the statement is that – what matters here is the status of 3552 in relation to vineyard management agreements, not the status of Kakara because that is not in dispute. So it's saying that by virtue of an assignment in relation to 3552, 3552 for its part is one of the present parties. So that it is in effect breeding that with the definition of "party" in the vineyard management agreements. It's a loose but fair enough way of describing the situation.

Now, so I don't resile from submitting that it is equivocal. It doesn't – I did note Justice Young saying earlier in argument that these communications amount to a statement that the present parties are, and the former parties are. I don't accept that it goes as far as that. It's perfectly consistent with an acknowledgement of the assignments in favour of the appellants and the effect of the clause, the definition clause, the definition of "party" in those agreements.

WILLIAM YOUNG J:

It's the present parties which you say should be read as some of the present parties?

MR HARRISON QC:

Yes I mean it's – if "the" came out it would be perfectly accurate. It's drafted, of course, not having regard to the possibility of a Goldridge liquidation and the effect, the exercise of the determination provision. Now are the respondents going to be hung on that language? Now what I want to raise is this also. What use is actually being made of this statement? How conceptually is it being used, can it be used? If we postulate – we first must postulate the principle of contract formation and let it be – there can be an acceptance of the September 2009 offer to novate by conduct, for example. We postulate that, I don't accept it but let's postulate it, how does this document, on a worst possible construction, operate as an acceptance of that offer made 11 months ago.

WILLIAM YOUNG J:

Well it doesn't but it, along with the 28 August deed, are elements of a course of conduct. I mean I agree with you that an offer and acceptance analysis is pretty awkward here. In fact probably impossible.

MR HARRISON QC:

But how can the 28 August deed be evidence of my client's acceptance?

WILLIAM YOUNG J:

It's not conclusive evidence, it's just one bit of evidence that fits in a course of conduct. We haven't got the *Boulder Consolidated Ltd v Tangaere* [1980] 1NZLR 560 case, have we?

MR HARRISON QC:

No, no we haven't.

WILLIAM YOUNG J:

I'll just look it up.

MR HARRISON QC:

Your Honour I just want to – I'm not prepared to quite go along with this. It is the content of the 28 August deed, is not conduct by the respondents. It can't be – it simply can't be held against them.

ELIAS CJ:

But they had it and they acted consistently with it is the argument that's being put to you. It's not, in itself, their agreement.

MR HARRISON QC:

When I learned contract in law school I was taught that if an offer is made and silence is the response you have no contract and the very thought that the offer itself could somehow be evidence against the offeree supporting a contract would be anathema to, I would have thought, to Dr Coop but that's my position.

GLAZEBROOK J:

Well I wouldn't have thought so because if there's an offer and there's silence in respect of the offer, but you act in accordance with it, ie you shift the goods, that action would normally be seen as an acceptance of the offer wouldn't it? I'll buy those goods for you for $50 please confirm that's all right and then the goods are shipped. You wouldn't be able to say, oh well, you're actually giving them to me and I don't have to pay you the $50, would you?

MR HARRISON QC:

That, with respect, is a completely different scenario, it's the *Brogden* scenario where there's no contract, no legal relationship at all, and then things are done and any Court's going to say, there must have been a contract, what's the nearest contract to impose on those parties, the last draft that they were intending to sign, that's *Brogden*, perfectly happy with that. But it doesn't work where there is an existing contract and an assignment. You don't have to, there's no imperative to construct a contract the way there is in *Brogden*.

McGRATH J:

Why can't the *Brogden* approach be applied to a situation in which there is an existing contract but a subsequent contract emerges and is concluded, which replaces the earlier contract?

MR HARRISON QC:

Well it's a different analysis and I haven't even got onto the authorities on formation and contracts of novation but in my submission you've got to construct a three way contract and that is quite a different analysis from the kind of thing Your Honour is putting to me. In any event, back to these –

ELIAS CJ:

I'm sorry, can I just interrupt for a moment, just trying to work out where we're going in terms of time. Unfortunately we can't sit after 4.30 today. We would normally rise at 4.00 but we will sit until 4.30. Can I just have an indication how you think you're going and what you need to cover?

MR HARRISON QC:

Well I would like to deal with the issue of the statement of defence in the winding up proceedings and just a couple more points around these September communications. I suspect that much of most of the rest of my submissions can be taken as read.

ELIAS CJ:

Well let's press on and see how we go but don't feel under too much pressure.

MR HARRISON QC:

Yes, thank you. Well I just want to say this about the first notice to remedy defaults again at page 1246, the background to that was, I think, portrayed by my learned friend as Kakara and Weta are challenging the Hillersden appointments despite the fact that they were actions on the part of Goldridge Estate before the formation of these companies, and that just demonstrates – the fact that they are challenging the appellants just demonstrates, is a further demonstration of the novation. What needs to be understood, though, is that the background to this was that the appellants were continuing to attempt to hold the respondents to the Hillersden contracts, so it wasn't just an event back in the past. The winding up proceedings, which were around this time, were based on enforcement of the Hillersden contracts, so when we come to the notice of dispute at page 1247 and 1248, what Kakara is saying is that the numerical company is still asserting that Kakara is bound – that's under the heading, "Notice of dispute," that paragraph beginning, "The purported Hillersden contracts," and then they – what they require is that the numerical company accepts that the Hillersden contracts are not legally binding and an acknowledgement for the future that there's no lawful authority to enter into similar contracts and so on, so as assignee it was perfectly – seeking to enforce the Hillersden contracts it was perfectly proper to respond to the assignee, "These are invalid for past default and you need to acknowledge it."

Similarly, the later set of notices which, of course, adopts the same wording, page 3127, for example, there's similar wording in paragraph 1 predominantly concerned the numerical companies' management in the period between the assignment and the giving of the notice. The allegation was that the vineyard management under the numerical companies was below standard and that was what the notice of dispute related to. The final point that's relied on is to say, well, simply invoking the disputes procedure, it was actually at this stage only invoking the disputes provision, not an arbitration provision, simply invoking the disputes procedure was somehow an acknowledgement of the substitution for Goldridge. My answer to that is, if the assignment worked as it did in law and given the extended definition of "party" the respondents had every right to invoke the disputes procedure against the appellants. Indeed, they had the right to invoke the disputes procedure in respect of actions prior to the assignment because there was – the Contractual Remedies Act 1979 contemplated at least a capped liability of the assignee post-assignment for all actions.

Just while I think of it, there's an interesting discussion – I don't want to go too far into it – about these issues in *Todd Petroleum Mining Co Ltd v Shell (Petroleum Mining Co Ltd)* CA155/05, 23 September 2005 which is at tab 11 of the appellants' bundle, the Court of Appeal decision. Basically, we have Justices Chambers and Robertson saying they agree with Justice Baragwaneth on this point. It's an interim relief case but the discussion which starts at paragraph 95 about novation. If I can just paraphrase it rather than go through the chapter and verse, the interesting point that arose in this case was that when there was an assignment did the equitable rights rather than the contractual rights go with the assignment? If you have – if you had a contract that needed rectification that was assigned, would that rectification right disappear or would it be part of the package that was assigned and the argument was around that, and if I remember rightly it was accepted that the rectification was part of it. So the point is that in relation to these notices it was perfectly proper for the respondents to be invoking the disputes procedure against the appellants as assignees and pragmatically it was obvious that that's the sensible thing to do, was the people who were now in the management of the vineyards on the ground were the ones you would get to remedy rather than going back to Goldridge, who had ceased managing vineyards, and sold off that part of his business. So all of this is explicable on an objective test and in my submission doesn't go, cannot be said to go so far as to bring about an acceptance of that previous offer to novate.

Now, next the issue of the pleadings and the winding-up. Now, these statement of defence is annexed to the affidavit of Sarah Holderness. It's exhibit B. In 2, half way down, paragraph 2, there's a reference to the current contractual arrangements between the first defendant and the first plaintiff. Again, current contractual arrangements is –

McGRATH J:
I'm sorry, it's my fault, could you just remind us of where we're up to in this affidavit of Sarah Holderness?

MR HARRISON QC:
It's exhibit B, first amended statement of defence.

McGRATH J:
That's as far as you've got?

MR HARRISON QC:

Yes. I just wanted to make the point, predictably, perhaps, that "in terms of the current contractual arrangements" is a fairly vague expression. It doesn't say "in terms of a contract entered into" or "presently between". It's talking about contractual arrangements that ties into this notion that the assignment properly – can properly be regarded as having given the numeric companies some contractual statements.

ARNOLD J:

Doesn't the part in paragraphs define – sorry, in parenthesis – define what contractual arrangements means, being two vineyard management agreements dated and so on?

MR HARRISON QC:

No, it simply identifies the contract in question, not rather than defining the current contractual arrangements. It identifies the original parties, rather than the status, the current status in my submission and if not it's an equivocal point I would submit.

In paragraph 9 at the bottom the reference is to having paid invoices in pursuant of its payment obligations arising out of vineyard managements agreements. Again, sufficiently vague, if you like, to indicate the contractual context rather than amount to a statement that Goldridge is out and in paragraph 11 there's the reference is to the disputes procedure pertained in the vineyard management agreements which includes a binding submission to arbitration by the first plaintiff in respect of unresolved disputes. Again, on my analysis it is not inaccurate to say that the submission to arbitration bound the first plaintiff by virtue of the assignment and over the page the odd thing with the second defendant was that Savvy as it now is, Savvy 3552 was not a party to these proceedings so that the pleading is different, so there's a pleading about the contractual relationship in 20 and 26. It says it admits that 3552 has utilised contractors to perform services and refers to the vineyard management agreements applying as between it in 3552 Limited and again at the bottom of the page applying as between it and 3552 Limited so that the – and again at 28 the similar pleadings.

So overall, i submit it's equivocal and if I go back to my question these statements – one way of looking at the statements by the respondents is to say, well, they – if they mean what the appellants say they mean, their admissions of a state of mind, but there's no suggestion that from the appellants that they were relied on or acted on or

at the time interpreted as an acceptance of the original offer to novate. That is not the question though, the question is, is this conduct which is appropriately reparable back to the offer and reparable back as an acceptance of that offer? And the answer to that is it's just too vague and too remote for anyone possibly to construct a contract even on a sort of stepping back overall view on the most charitable approach to the appellant's case that one could adopt. So, those are my submissions on the documents.

There is just one little point about the – I don't know if you need to hear me on the alleged error, there is in the Court of Appeal, the Court of Appeal expressed itself. This is at the very end of page 30, we'll start with page 31 of the written submissions, in fact the Court of Appeal expressed itself on the pointed issue in a variety of ways, referring to the judgment in volume 1 of the case and as I note at page 31 of my written submissions at paragraph 76 at the end of the judgment they talked about Kakara being asked to agree to a novation and refraining from doing so. At paragraph 71, last sentence, they called it an indication of consent to a novation, the fact he did not earlier agree to when asked to do so, so the idea that the Court of Appeal engaged in factual error, believe that there was an outright expressed refusal is misconceived in my submission. At the end of the day I anticipate that nothing very much will turn on that.

Now, I do not resile from the submission, this is page 21 of my written submissions that the conduct relied on by the appellants does not relate to the supply agreements, the litigation and the disputes, the invocation of disputes procedure was expressly in relation to the vineyard management agreements and there is no conceptual reason nor reason in principle why any deemed acceptance of the particular set of agreements relating to the novation of the management agreements should extend to the grape supply agreements, they stood outside these almost entirely stood outside these dealings and –

GLAZEBROOK J:
They were a job lot though, weren't they?

MR HARRISON QC:
No, I don't accept that they were. They – the fact that the appellants terminated the vineyard management agreements –

GLAZEBROOK J:

I'm not suggesting they held together in that way, but effectively while they were on thin force – well, I don't suppose you can take it any further. But are you suggesting that they might've accepted the novation of one without accepting a novation of the other?

MR HARRISON QC:

I'm submitting that if, if the submission that these utterances in August and September 2010 amounts to an acceptance by a conduct finds favour, it can only do so in relation to the vineyard management agreements because it is not referable to the grape supply agreements. The grape supply agreements were separate contracts, separately assigned and in effect they gave, as we heard today, they gave Goldridge an option to purchase grapes, could give a notice and then the supply agreement's obligations would be trigger. The vineyard management agreements were ongoing, full on throughout and that's where, for the most part, the disputes arose. There was no dispute, there was a grievance about the fact that the respondents were left high and dry with their first grape crop because the appellants or one of the appellants chose not to take up the option. That created a climate of distrust, but the grape supply agreements were just sitting there and quite separate and apart from these transactions in my submission.

I think I've hopefully covered everything, taking into account the written submissions. Unless Your Honours have any questions.

ELIAS CJ:

No. Thank you Mr Harrison.

MR JONES QC:

I hope to be no more than five minutes Ma'am. The first point is the last one dealt with. The grape supply and vineyard management agreements were intertwined and they were dealt with together at all times. There was no legitimate or rational basis for dealing with them separately. There was also in the notices to remedy a reference to the issue of the 30 April 2010 exercise of the option to buy under the grape supply agreement which was meant to have been according to the respondent's exercise the previous year in 2009 before any of this came into play.

WILLIAM YOUNG J:

So where's that? Is there a document – is that in one of the – in a particular notice to remedy defect?

MR JONES QC:
Yes. I think I took the Court to that.

WILLIAM YOUNG J:
You may have.

MR JONES QC:
It's in correspondence and also – it's where the disputes process is invoked. I'm getting a reference now. The second point relates to the, I suppose, the contractual bar argument that is being put up. The first point is that a novation is a new contract and so it could be seen not as an alteration or a variation of an existing one. There is, however, also authority which I can provide the Court. I have a decision here on two aspects. First is the issue of something needed to be in writing when the contract is varied and the second is the mode of acceptance. The case that I'm referring to in terms of the notice in writing is a case called *Shelanu Inc v Print Three Franchising Corporation*, a decision of the Ontario Court of Appeal and the short point there is that it states that the, it's already been discussed, that parties can't limit themselves with future dealings by saying that there's a restriction on how they can actually conduct themselves later, and I'll provide copies to the Court.

In relation to the issue of the manner of offer, there is a case *Manchester Diocesan Council for Education v Commercial and General Investments Ltd* [1969] 3 All ER 1593, which is a decision going back to 1969, which refers to a tender process where there's a condition in terms of how the tender was to be accepted and the Court there held that effectively there may be a mode of acceptance but unless it's stipulated as the sole or only mode of acceptance then other methods of acceptance can be effected and again I'll make that decision available.

The last point I wish to make is that by definition a course of conduct is over a period of time and that is the appellant's argument, that by the course of conduct from and including September 2009 through to the point where we have the explicit notices that have just been discussed, and discussed at some length during the course of the day, the respondent's evidence acceptance of the novation making them and the appellants the sole parties –

ELIAS CJ:

Do you say that the course of – that there was some point in the course of conduct where acceptance happened or are you simply pointing to the course of conduct to explain the meaning of the contract entered into?

MR JONES QC:

The acceptance in the appellant's submission was – well the first acceptance if you like, or first course of conduct, part of the conduct, was the payment of the invoices issued in September in late October and that what happened later –

ELIAS CJ:

No, but what are you using though that subsequent conduct in support of? Is it in support of your contention that immediately –

MR JONES QC:

Yes.

ELIAS CJ:

– there was a novating contract between the parties –

MR JONES QC:

Yes.

ELIAS CJ:

– is that –

MR JONES QC:

Yes.

ELIAS CJ:

All right.

MR JONES QC:

And that what the later conduct explains is the earlier conduct. So it shows that it was, in fact, an acceptance.

ELIAS CJ:

And what's the earliest conduct evidencing acceptance?

MR JONES QC:

The most material is the payment of the invoices in October for the ones that were issued in September.

Now those are the only matters I wish to raise unless there are any further questions?

GLAZEBROOK J:

You were going to give us that reference?

MR JONES QC:

I was, thank you. This relates to Mr Furlong's evidence.

WILLIAM YOUNG J:

Sorry, wasn't it the reference to the grape supply agreement?

MR JONES QC:

Sorry, yes, the August.

ARNOLD J:

It's been wrapped up in the same dispute I think was the point.

MR JONES QC:

Yes, that's right.

ARNOLD J:

There's a letter at 1291 which seems to –

MR JONES QC:

Yes, that's it, and that also appends one of the notices. So that's the reference there. There was material relating to the cross-examination of Murray Forlong which was asked, I think, when I was making submissions this morning. I'm not entirely sure what it relates to, to be honest. It relates to the knowledge of Mr Forlong of the

novation and the advice given. In light of the discussion I wonder whether the Court wishes those references but are happy to provide them.

ELIAS CJ:

Yes, provide the references, we'll take them.

MR JONES QC:

Thank you Ma'am. Page 356, line 3; to 357, line 10; page 359, line 8; 361, line 5; and 377, line 20; to 379, line 1.

ELIAS CJ:

Thank you counsel for you help. We will reserve our decision in this matter.

COURT ADJOURNS: 4.18 PM