



# Précis Paper

## Contracts by Conduct

A discussion of the creation of contracts by conduct of the parties, in the absence of a written contractual document.

### Discussion Includes

- What is a contract at law?
- Contracts by conduct and *Masters v Cameron* (1954) 91 CLR 353
- *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104
- The role of equity in creating the existence of a contract
- *Feldman v GNM Australia Ltd* [2017] NSWCA 107
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- Contracts by implication
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- Conclusions

# Précis Paper

## Contracts by Conduct

1. In this edition of BenchTV, Alexander H Edwards (Barrister, Level 22 Chambers, Sydney) and Nicholas Mirzai (Barrister, Level 22 Chambers, Sydney) discuss the creation of contracts by conduct of the parties in the absence of a written contractual document.

### What is a contract at law?

2. A contract must contain the following elements:
  - i. an agreement (either written or oral);
  - ii. consideration; and
  - iii. intention to create a binding legal relationship.

The terms of a contract are designed to give effect to this legal relationship. It is the interaction between the intention to create a legal relationship and the identification of these terms that is relevant for present purposes.

### Contracts by conduct and *Masters v Cameron* (1954) 91 CLR 353

3. A contract by conduct is a species of contract aside from those that are embodied in a written contractual document. Contracts by conduct are concerned with the types of relationships referred to in *Masters v Cameron* (1954) 91 CLR 353 ("*Masters v Cameron*"), where the parties have engaged in a discussion or negotiation, have put forward terms, and have expressed various levels of agreement to those terms. Depending on the situation, it may be that, prior to those discussions becoming binding in the form of a written document, the parties have nonetheless bound themselves to that form of contract.
4. The *Masters v Cameron*-type cases are usually concerned with commercial negotiations where a level of commercial agreement is reached that may not yet have defined all of the essential terms that will govern the contractual relationship. In the absence of certainty as to essential terms, there will not be a contract at all. As such, the question in these cases is not what is the gist of the agreement, but whether the parties have crossed the threshold into having a binding agreement – that is, is there a contract at all? In this analysis, it is critical to consider what were the essential matters to the parties informing that contract. There is no law or objective criteria by which essentiality is determined; it can be different for all parties. Nonetheless, there usually needs to be agreement about more than one essential item; there must be a "package" of essential aspects that must be able to be identified from the conduct of the parties that can be embodied in something the court will find is binding.

### *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104

5. The most prominent case in the construction of commercial contracts is *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104, where the majority of the High Court laid down some seminal principles about contract construction. One of these was that one interprets a contract by having regard to the contract. However, in the case of contracts by conduct, where there is no contractual document, it becomes necessary to look at the surrounding circumstances. Where there is nothing else to go by, surrounding circumstances become critical. It is the commercial context in the specific case in question that is important, not what would have been the case in any context, or in a commercial context similar. Therefore, parties who wish to invite the court to make a finding that there has been a contract by conduct need to be careful about the evidence they adduce to demonstrate the species of contract that they are trying to establish.
6. The Court of Appeal reiterated this in *Australian Broadcasting Corporation v XIVth Commonwealth Games Ltd* (1988) 18 NSWLR, namely, that in a *Masters v Cameron*-type situation, what the parties considered to be the essential terms of the bargain must be identified, followed by an examination of the evidence to determine whether there was agreement between the parties as to those essential terms.

#### The role of equity in creating the existence of a contract

7. In the interpretation of agreements, equity has always held a "gap fill" role, meaning that, if it would be against conscience, in the equitable sense of the term, for the party denying the existence of a representation to benefit from that denial, then notwithstanding the fact that there may not be a binding agreement, that party will be estopped from denying the existence of that representation.
8. While equity may have a role in being able to bind a party to a series of representations in the absence of an agreement, the effect of which is to do the very same thing that an agreement would do, equity cannot always create an agreement where there is none. An example can be found in the taking of security. Estoppel cannot create a security agreement for the purposes of the *Personal Property Securities Act 2009* (Cth) because a necessary ingredient of a security interest under the Act is a consensual transaction. Further, in order to perfect one's security for the purposes of the Act, some form of registration is required. In order to register an interest, the Act requires one to have a security agreement which is enforceable against third parties, namely, in writing. An oral agreement is insufficient for this purpose; if the agreement is not in writing, the interest cannot be perfected. Whilst equity may allow this agreement to be enforced, or recognise the representations and give parties the rights they may have had under the contract, the Act stands as a barrier to this, making

clear that if a perfected interest, requiring a written agreement, cannot be demonstrated, the asset cannot be recouped.

9. Therefore, whilst equity does recognise, and provide some "gap fill" for incomplete contracts, which may in some cases be sufficient, where one is required to have a contract for the purpose of a statute or some form of regime, equity's intervention will often be insufficient.
10. This also reflects the commercial importance of contracts to the broader commercial world. A contract is a document one is perfectly able to contemplate showing to a third party, or seeking a security on, or providing in relation to a bank guarantee, etc. A contract is something that the world needs to rely upon. This analysis is consistent with the approach taken by the High Court in interpreting commercial contracts – namely, asking what a reasonable businessperson would think the terms of the contract are. Further, there have been cases where there has been a document produced, and obligations concerning both parties, but only one party executes those obligations. There may be a written document which takes the form of a deed, for example, which the court says may not be enforceable as a deed, because the formal requirements in respect of a deed go some way towards dictating its substance – that is, it is not a deed unless the formal parts are made out. However, this does not mean that the underlying agreement cannot be enforced as a contract; in some cases, the underlying agreement may be good enough for the parties seeking to enforce it as such. Courts have been asked to adopt the same or similar considerations in respect of who the actual parties to that agreement are. For example, is it possible to bind a party to a particular agreement by their conduct, notwithstanding the fact that they had made a positive election not to sign the underlying agreement? In the case of *Nurisvan Investment Ltd v FIBO Australia Pty Ltd* [2017] VSCA 141, it was made clear that in order to work out who the parties to a contract are, one looks at the commercial context, in the same way that one would look at the commercial context to work out what the substance of the contract is. One must ensure that the parties accept the agreement put before them before performing any aspect of the contract. However, in the majority of cases, this does not often occur.

*Feldman v GNM Australia Ltd* [2017] NSWCA 107

11. This is a defamation case in which Feldman alleged that the defendant, the publisher of the online newspaper The Guardian, had made a number of defamatory imputations about him. In the course of the proceedings, the parties engaged in negotiations about the possibility of a settlement outcome, where the defendant publisher suggested they take certain steps and that the claim be compromised on that basis. There was email correspondence to the effect of that The Guardian would publish Feldman's statement, would retract the articles, and agree a deed, including terms such as confidentiality. There was a positive response to that

communication, there was some communication about the deed, a draft was provided, and some discussion followed on the draft. The draft subsequently arrived in a close to settled form, was never signed, and some time later the plaintiff's representatives indicated to the defendant that they withdrew their agreement.

12. This is not an unfamiliar situation to persons involved in litigation. Equity cannot be of assistance here, where the defendant is seeking to enforce the plaintiff's agreement to drop the action.
13. The critical aspect of *Feldman v GNM Australia Ltd* [2017] NSWCA 107 ("*Feldman*") was that in a defamation proceeding, a term as to confidentiality is of the utmost importance, both from the perspective of the plaintiff, who seeks to vindicate his or her reputation, and from the perspective of the defendant media organisation. Despite being adverted to in the media correspondence, the term as to confidentiality never actually formed part of the terms that were agreed. At first instance, the defendant was successful and the judge found that confidentiality belonged to that set of subsidiary terms that you might find captured in a later formal agreement, that is, the parties had agreed the essential aspects of the bargain, but confidentiality was some minor aspect. On appeal, the Court of Appeal disagreed, saying that in that situation, construing the intention of the parties as to what terms were essential, confidentiality – despite the fact that in some business relationships it may not be the most important term – was, in the present context, an essential term, without which there could be no contract by conduct.
14. What parties need to understand is that where they do not have a document which is clearly accepted by both, reliance needs to be had on ordinary course or dealings. The context is utterly critical. The scenario raised in *Feldman* is quintessential to this.

#### Identification of surrounding circumstances of a contract

15. Surrounding circumstances are to be determined objectively; actual conduct and what actually occurred must be looked at, not the parties' state of mind, or what somebody perceived to be.
16. Although this sounds like a very obvious proposition, the lines are often blurred. This is because, while, on the one hand, construction is objective, on the other hand, identification of essential terms may be very subjective. Particularly where a *Masters v Cameron*-type agreement is concerned, where to draw the line can be a difficult question.
17. This is a very interesting consideration where there is a reasonably sophisticated agreement in the *Masters v Cameron* sense, and the two parties are perhaps not familiar with each other.

In this case, the parties' respective views as to not only what terms are essential, subjectively, but also the construction of those terms, where the parties are both coming from very different perspectives, is complicated, and a line needs to be drawn between subjective and objective.

18. This is often frustrating in the litigation settlement scenario, where the parties may have entrenched views about certain things, which they want the other party to capitulate on. Sometimes these views can be about something as simple as a recital, which, while it is utterly unenforceable, provides no more than background context, and does not provide any operative term, it is absolutely critical to one or other of the parties that the other side capitulate or agree to it, which the other side may be very reticent to do.
19. In a litigation settlement context, where the parties are in a mediation or an informal settlement discussion, a way around this problem is for the practitioner to sit with their client and determine what the client perceives to be are the essential terms, and to draft up, however informally, a heads of agreement, setting out the important terms. This document is vital, as it may be in anticipation of a formal document, and goes some way towards setting out not only the objective surrounding circumstances, but also the subjective intention of what was important to that party at that particular point in time.
20. Drafting up these heads of agreement is invaluable, as it will be very difficult for a party to argue later on that they thought that a term not contained in the heads of agreement that they have signed was essential to their bargain. Fundamentally, the heads of agreement is evidence of the parties' subjective views as to what was critical, and even if later on, the wheels fall off, so to speak, the four corners of the heads of agreement cannot be departed from in a contract-breaking sense.
21. The other reason why having some form of a document (heads of agreement or otherwise) following any form of alternative dispute resolution or informal settlement-type conference is that these conferences are becoming more and more prevalent as a part of litigation - that the parties actually put their position to the other side, the other side have a fair and reasonable opportunity to consider it, and they meet in a forum outside the courtroom to discuss how to proceed. A document borne out of one of these conferences may also be very useful in truncating the issues in litigation, and quarantining facts which may take up a large amount of trial time to prove and distract the primary judge from the real issues in dispute. Practitioners have a real obligation to use the alternative dispute resolution process to try to identify the real issues in dispute in litigation. There are levels of agreements that can be entered into between parties at a binding level which can dictate the colour and landscape of how litigation proceeds.

22. In summary, it is always best for the parties to have a written formal contract. However, in absence of this, it might be necessary to consider whether, in the course of a negotiation, the parties have reached, broadly, a *Masters v Cameron*-style contract. In doing so, it should be considered whether the conduct contained in relevant written communications supports what might be regarded by both parties as the essential terms of the contract, and that agreement to those terms had been expressed in a final and binding manner. Whilst this situation is not preferable, binding contractual relationships can be created in this manner.

### Contracts by implication

23. Take a situation where the parties do agree and there is a contract - the contract has clear terms, there has been a clear exchange of consideration, the parties are sophisticated. However, the contract has a term with a shelf life, which expired some time ago, and one of the parties might be relying on that term, that is to say, relying on an obligation which, strictly speaking, no longer exists. In these types of situations, the courts have been prepared to find the existence of a contract by implication.
24. The Court of Appeal recently considered this issue in *CSR Ltd v Adecco (Australia) Pty Ltd* [2017] NSWCA 121 ("*CSR v Adecco*"), which followed on the heels of the Victorian case of *Andar Transport Pty Ltd v Brambles Ltd* (2004) 217 CLR 424 ("*Brambles*") and its approach in how it treated the implication of a contract. *Brambles* was concerned with a laundry delivery service provided to a cleaning company, the contract for which contained indemnities as to employees, servants, etc. A driver was injured and sued Brambles, and an indemnity was then sought under the contract. Unfortunately, the contract had expired some months prior to the driver's injury and claim. However, due to the evidence before it, the court was willing to imply a new contract following on the heels of the expired contract, with identical terms, with the exception of the new contract being for a set term, as was the case with the expired contract.

### Exactness

25. This question of how exact does a contract have to be was a controversial issue in the later case of *CSR v Adecco*, which related to labour hire services provided by Adecco to CSR. A labour hire person was injured and sued CSR, who in turn sought an indemnity from Adecco, under a contract that, like in *Brambles*, had expired by the time the injury had occurred, or at least manifested.
26. Because no one had turned their minds to the contractual position, and due to the lacuna of evidence as to what actually happened, Adecco argued that the plaintiff CSR could not satisfy the court that it performed the contract in "exactly" the same way, as per the language

used in *Brambles*. This raises the question: what is the onus on a party seeking to prove an implied contract to prove exactness?

27. The Court of Appeal stated that performing the contract exactly means that the essentials of the contract are being performed as if the parties were still bound by those terms. In doing so, the Court referenced the Federal Court decision of *Viva Olives Pty Ltd v Origin Olives Australasia Pty* [2012] FCA 545, and made clear that where parties are in flagrant breach of a contract before expiry, and after expiry, continue to act as though there was a contract, in flagrant breach of it, could not ask the court to imply the continuation of a contract.
28. *CSR v Adecco* leads to the raising of an important point about exactness, that is, that exactness calls for a character of performance that is consistent with the terms of the expired contract, even if that performance might diverge from a course of conduct previously engaged in by the parties before expiry.
29. The relevance of exactness arises in complex commercial agreements. In both *Brambles* and *CSR v Adecco*, the complexity of the superseded agreement is a matter which tends to suggest that the parties would not have wished to depart from that carefully negotiated arrangement. On the contrary, if there is evidence of negotiations post-dating the expiration of the superseded agreement which would indicate a very deliberate and exact departure from the previously agreed terms, then this would suggest a desire for departure from those terms.

#### Barrister-solicitor cost agreements as contracts by conduct

30. It has become incredibly common practice for most barrister-solicitor cost agreements to contain a term to the effect of, "If you [the solicitor] continue to instruct after receiving this document, it is taken that you [the solicitor] accept the terms of this document". This is very arguably a contract by conduct, as the solicitor's conduct post-receipt of the cost agreement is what gives rise to the contract. This leads to questions of: what if the solicitor did not receive the email attaching the cost agreement? What if the barrister thought they sent the email attaching the cost agreement but in actual fact did not? In the majority of cases, no issues will arise in such a situation. However, it is the very few times in which some extraneous matter (for example, a rate increase) is sought to be enforced that problems will arise, particularly as equity cannot lend assistance in such situations. There is also the statutory framework for cost agreements for legal services, which makes the disclosure of terms critical.
31. Signed cost agreements are always best practice to avoid such situations, however, considerations of commerciality also play a part, as there are times where a matter simply



cannot wait for a signed cost agreement to be returned. A way around this would be for the barrister to ask the solicitor, in their email to the solicitor containing the cost agreement, to confirm receipt of the email. This is not a time-consuming exercise, and at the very least, demonstrates that the solicitor received the cost agreement the barrister is seeking to rely on, and allows the barrister to rely on the terms in the agreement.

32. This barrister-solicitor cost agreement example provides an illustration of the fact that the relationship between the parties will give context to what a contract by conduct is.

### Conclusions

33. Contracts by conduct tend to happen frequently with large entities that have a number of contracts (for example, the operator of a mall, who may have a vast array of contracts, not only with customers, but also with people who provide services to it). In the majority of such situations, contract management systems will be in place, which will include termination dates, option dates, etc. However, inevitably, problems often arise in the 1% of situations where a contract may have fallen through the cracks. This reinforces the importance, at least for sophisticated entities, to ensure proper contract management systems in order to be certain that they are on the correct footing with all of their customers and suppliers.
34. Another point of importance is to ensure that employees of these large entities who are involved, for example, with obtaining new customers, receive proper education and training as to what they must require from each customer that they bring to the business.
35. Arguing matters of contractual interpretation is one thing, but to have to argue whether or not there is an agreement to begin with is a very difficult position to be in.
36. Although contracts by conduct present fertile ground for academic discussion, legally, they present a myriad of problems, due to their case-by-case and very specific nature. The fundamental point to remember is that the preferable situation is not to be arguing about whether a certain contractual clause exists, but to have a written, signed contract containing that clause, or to be arguing about what that clause means.
37. As a final concluding point, if uncertainty can be avoided in any sphere, it should, contracts being no exception.



## **BIOGRAPHY**

### Alexander H Edwards

Barrister, Level 22 Chambers, Sydney

Alexander was called to the NSW Bar in 2014. Prior to this, he worked as a solicitor at a top-tier commercial firm and as tipstaff to their Honours Campbell JA in the Court of Appeal and R A Hulme J in the NSW Supreme Court. Alexander maintains a diverse practice and specialises in complex litigation in the NSW Supreme and Federal Courts.

### Nicholas Mirzai

Barrister, Level 22 Chambers, Sydney

Nicholas was called to the Bar in April 2013 and appears in State and Federal Courts across Australia primarily in corporate, commercial, and equity matters. He has particular interest and expertise in all aspects of corporate insolvency and personal property securities law, and maintains a specialist advisory practice, occasionally on a direct access basis, for sophisticated corporations, insolvency practitioners, and litigation funders. Nicholas co-authors *The Annotated Personal Property Securities Act and PPS in Practice*, and has been a part-time Lecturer in Commercial Law and Finance Law at the University of Technology, Sydney, for over seven years.

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### Legislation

*Personal Property Securities Act 2009* (Cth)