
# CONTRACT: WHAT CONTRACT?

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## Introduction

Consider the following scenario: An owner wishes to engage a contractor to carry out some construction work. The parties start negotiating and drawing up the form of the proposed contract but they fail to reach agreement on all of its terms and conditions. In particular they fail to agree on the date for practical completion of the works. Consequently, the parties do not execute a formal written agreement.

Nevertheless, the parties proceed as if a formal agreement had been concluded. The contractor starts carrying out the work under the contract and submitting claims for payment on account of the contract price. Claims for extensions of time and variations are also submitted by the contractor in accordance with the draft terms of the unexecuted contract.

The owner similarly starts performing the obligations it would have had if the contract had been executed. For example, the owner starts paying the contractor's payment claims and assessing and granting extensions of time.

As the work continues, a dispute arises between the parties. The contractor forms the view that it would be better off if it could claim that there was no formal agreement between them and that it should be paid on the basis of a *quantum meruit*.

This paper considers how one may go about substantiating such a claim. In particular, it considers whether it may be arguable that:

(a) the parties had actually come to an agreement; and

(b) the parties intended to be bound by that agreement.

In the absence of agreement and intent, the contractor may be able to assert that there was no legally enforceable contract and may then be able to claim payment for work done on the basis of a *quantum meruit*. This paper also considers whether the conduct of the parties in ostensibly performing the unexecuted contract could give rise to an estoppel by conduct.

It concludes that, in the scenario described above, it is likely that a failure of the parties to reach agreement on the essential terms of the contract will be the most significant factor in finding that no contract was formed. This will remain the most significant factor notwithstanding that the parties' conduct may nevertheless evidence an intent to create legal relations.

This paper also concludes that, whist it may be possible for the owner to establish some of the elements of estoppel by convention, it is likely to be difficult for the owner to substantiate that each of the parties held a common assumption as to the terms of their legal relationship. This may be sufficient to defeat a claim of estoppel by convention.

## Agreement

### *Basis of the agreement*

It is trite to observe that, for any agreement, there needs to be an offer and acceptance. In this particular scenario, it is necessary to ascertain whether:

- a combination of the draft contract, the parties' correspondence and the parties' actions during the negotiations could give rise to an offer capable of acceptance; and
- notwithstanding that the parties failed to execute a formal written contract, acceptance could nevertheless be demonstrated by some other means (possibly by conduct) and that this has been satisfactorily communicated to the offeror.

Additionally, there is some support for the argument that an agreement may arise in the absence of a formal offer and acceptance. As such, it is necessary to consider whether the parties' conduct could be sufficient to give rise to an agreement on this basis.

### *The offer*

Three issues arise when considering whether an offer has been made in this scenario:

- What were the terms of the offer?
- While the parties may not have agreed all the terms, does the correspondence give rise to a counter-offer to perform on the basis of part of the terms being negotiated?
- If the parties intend to enter into a formal contract, do any of the classes of contract in *Masters v Cameron*[1] apply?

Each of these questions are considered in turn below.

#### *(a) What were the terms of the offer?*

In this scenario, one significant difficulty is likely to be ascertaining the precise terms of any offer. This is because of the convoluted nature of the parties' correspondence and the fact that the parties elected to proceed without agreement on all the terms.

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1 *Masters v Cameron* (1954) 91 CLR 353 (High Crt of Australia).

The owner may claim that the offer is made up of express and implied terms. The express terms may be constituted partly by written correspondence between the parties, partly by the written terms of the draft contract and partly by the parties' oral communications. The parties may also seek to fill any gaps in the contract by implying terms *ad hoc* or by custom.

This argument was unsuccessfully claimed by the owner in *Monarch Building Systems v Quinn Villages*.[2] In this case, the owner (Quinn) engaged the contractor (Monarch) to supply fabricated steel sections for a housing development in Mt Coolum, Queensland. During the negotiation phase, Quinn's agent and project manager (Global Construction Management Pty Ltd) prepared and forwarded to Monarch a draft contract in the form of the Master Builders Association standard form TC/CM1-1999, together with a number of amendments thereto. The parties exchanged correspondence regarding the terms of the contract but never reached agreement on whether liquidated damages for delay would be payable. As such, a formal agreement was never executed.

Notwithstanding the absence of an executed written agreement, Monarch commenced fabrication of the steel sections and Quinn took delivery. The parties also submitted payment claims and variations by reference to clauses in the unexecuted contract. When a payment dispute arose, Monarch argued that there was no contract in existence and that it should be paid for work done on a *quantum meruit* basis.

Quinn argued that there was a concluded bargain between the parties, comprised of terms which were partly written, partly oral and partly implied. It contended that the express terms were to be found by reference to the draft contract but that it was possible to disregard the fact that the parties had not reached agreement on the liquidated damages provision. The main flaw in Quinn's argument was that it was used to substantiate a contract based on the terms of the written agreement – rather than attempting to assert the existence of a contract based on different terms.

The court held that, since the parties failed to agree on a particular term of the agreement which they both identified as being essential (that is, the liquidated damages provision), no concluded bargain existed. However, this is not to say that in a similar situation, one party could not assert the existence of a separate contract constituted by express and implied terms – at least partly constituted independently of the draft agreement.

***(b) While the parties may not have agreed on all the terms, does the correspondence give rise to a counter-offer to perform on the basis of part of the terms being negotiated?***

If the parties are unable to reach consensus on all the terms of their agreement, it may still be possible to argue that the correspondence between them is

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2 *Monarch Building Systems Pty Ltd v Quinn Villages Pty Ltd* [2006] QCA 210 (Queensland Crt of Appeal).

sufficient to give rise to a counter-offer which was subsequently accepted by conduct. For example, in *Monarch Building Systems*, Quinn argued:

> 'A contract was admitted [sic] for signature. It was returned, signed with some amendments. The defendant then returned some pages with further amendments. The conduct of the parties thereafter constituted this situation, in my submission: that the contract was agreed but for [the] the liquidated damages clause, and my primary submission will be [that] your Honour will find there was a contract complete and certain but shorn of the liquidated damages provision. That is the conduct of the parties after the plaintiff said, "You haven't placed liquidated damages for us before. We will not agree to pay them." The conduct of the parties thereafter was consistent with there being an agreement otherwise complete but shorn of that provision.'[3]

Ultimately, in that case, the argument was unsuccessful because the liquidated damages provision was essential to the parties' bargain and it was obvious from the evidence that that term was never agreed.

The court relied on the decision of Bingham J (at first instance) in *Pagnan SpA v Feed Products* where his Honour said:

> '... where the parties have not reached agreement on terms which they regard as essential to a binding agreement, it naturally follows that there can be no binding agreement until they do agree on those terms.'[4]

However, it is conceivable that, in the scenario discussed above, it would be possible for a counter offer to be sustained which was accepted by conduct where the parties had still not reached a concluded position on the essential terms of the agreement.

### *(c) If the parties intend to enter into a formal contract, do any of the classes of contract in* **Masters v Cameron** *apply?*

In *Masters v Cameron*,[5] the High Court of Australia held that where parties who have been in negotiation reach agreement upon terms of a contractual nature and also agree that the matter of their negotiation shall be by formal contract, the relevant circumstances may fall into one of three categories:

(a) where the parties have reached finality in arranging all the terms of their bargain and intend to be immediately bound to the performance of those terms, but at the same time propose to have the terms restated in a form which will be fuller or more precise but not different in effect;

(b) where the parties have completely agreed on all the terms of their bargain and intend no departure from or addition to the terms of that bargain but have nonetheless made performance conditional on execution of a formal document; and

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3 *Monarch Building Systems*: note 2, para [7].
4 *Pagnan SpA v Feed Products Ltd* [1987] 2 Lloyd's Rep 60, page 611.
5 *Masters v Cameron*: note 1.

(c) where the parties do not intend to make a concluded bargain at all unless and until they execute a formal contract.

In *Masters v Cameron*,[6] Dixon CJ, McTiernan and Kitto JJ relied heavily and with approval on the English decision of *Rossiter v Miller*. In *Rossiter*, the court held that parties do not continue in negotiation merely because they require the execution of a formal agreement embodying the formal terms to be signed by the parties.[7]

In the time since *Masters*, a fourth category has emerged which has its foundations in a preceding decision of the High Court of Australia in *Sinclair, Scott v Naughton*. In that case, Knox CJ, Dixon and Rich JJ *obiter* made mention of another category of preliminary contract, namely:

> '... one in which the parties were content to be bound immediately and exclusively by the terms which they had agreed upon whilst expecting to make a future contract in substitution for the first contract, containing, by consent, additional terms'.[8]

In the present case, it will be a question of fact whether the circumstances substantiate an argument that the parties intended to be bound by any particular contract. In *Monarch Building Systems*, at first instance, the

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6 *Masters v Cameron*: note 1.

7 *Rossiter v Miller* (1877-8) 3 App Cas 1124 (HL). The court found that the first and second categories in *Masters v Cameron* would be usually established where:
(a) the parties had agreed on all the essential terms of the agreement; and
(b) neither party had the power to vary the terms already settled prior to execution of the formal contract.
The court held that the third category in *Masters v Cameron* would usually be established where:
(a) there was still the possibility of new terms being imported into the agreement - that is, that the parties had only dealt with major matters and contemplated by the agreement may be regulated by further provisions to be discussed and introduced into a future agreement; and
(b) either party could still avoid entry into the contract if it was dissatisfied with its terms.

8 *Sinclair, Scott & Co Ltd v Naughton* (1929) 43 CLR 310 (High Crt of Australia), para 317. Their Honours relied on the statements of Lord Loreburn in *Love and Stewart Ltd v S Instone and Co Ltd* (1917) 33 TLR 475 (HL). This category of preliminary contract was explicitly recognised by the New South Wales Supreme Court in *Baulkham Hills Private Hospital Pty Ltd v G R Securities Pty Ltd* (1996) 40 NSWLR and subsequently affirmed by the New South Wales Court of Appeal in *G R Securities Pty Ltd v Baulkham Hills Private Hospital Pty Ltd* (1986) 40 NSWLR 631.
This fourth category is now widely accepted as a classification of a legally enforceable contract: See for example: *Tern Minerals NL v Kalbara Mining NL* (1990) 3 WAR 486 (Western Australia Supreme Crt); *Heysham Properties Pty Ltd v Action Motor Group Pty Ltd* (1996) 14 BCL 145 (New South Wales Crt of Appeal); *Telstra Corporation Ltd v Australis Media Holdings* (1997) 24 ACSR 55 145 (New South Wales Supreme Crt); *Brunninghausen v Glavanics* (1999) 46 NSWLR 538 (New South Wales Crt of Appeal); *Graham Evans Pty Ltd v Stencraft Pty Ltd* [1999] FCA 1670 (Federal Crt of Australia); *Player v Isenberg* [2002] NSWCA 186; *African Minerals Ltd v Pan Palladium Ltd* [2003] NSWSC 268; *Helmos Enterprises Pty Ltd v Jaylor Pty Ltd* [2005] NSWCA 235; *Ciavarella v Polimeni* [2008] NSWSC 234; *Australian and International Pilots Association v Qantas Airways Ltd* [2008] FCA 1972.

contractor argued that the case fell into the third category under *Masters v Cameron*. That is that 'the intention of the parties [was] not to make a concluded bargain at all, unless and until they execute a formal contract'.[9] While the court did not confirm or dismiss this argument, it was not particularly persuasive in the judgment of the trial judge or those of the court of appeal.

## Acceptance

Acceptance is determined objectively by reference to the words or actions of the offeree. While acceptance by way of signature is an obvious form,[10] the law has generally taken a flexible approach to determining whether there has been acceptance – including acceptance by conduct.

For example, in *Brogden v Metropolitan Railway*, Brogden supplied the Metropolitan Railway with coal for years without a formal contract.[11] After some time, the parties agreed to formalise their relations. Metro's agent produced a draft agreement and sent it to Brogden – who inserted the name of an arbitrator, signed and returned the agreement. Thereafter, the agreement was never executed by Metro and the parties continued supplying and paying for coal in accordance with the unexecuted contract. When a dispute arose, Brogden argued that there was no contract in existence because, by inserting the name of the arbitrator, it had made a counter offer rather than accepted Metro's original offer. The House of Lords found that the counter offer was either accepted by Metro when Metro first ordered coal on these new terms or when Brogden first delivered the coal.

In *Brodgen*, it was relatively easy to determine the terms of the agreement. This may be more difficult in other cases of acceptance by conduct where the conditions are not so clear. For example, in *Monarch Building Systems* at first instance de Jersey CJ noted:

> 'Now it may be that if all matters were agreed, the lack of execution would nevertheless not necessarily have meant there was no binding contract ...'[12]

However, as discussed below, his Honour went on to hold that even though acceptance by conduct may be possible, there was insufficient clarity on all the fundamental terms of the agreement for acceptance to be sufficient to give rise to a binding contract.

In the scenario above, it may be possible to argue acceptance by conduct if the facts of the case warrant such a conclusion. As such, it is advisable for the contractor to look to insufficiencies in both the terms of the offer and the parties' intent to create legal relations as the basis for arguing that there is no

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9 *Monarch Building Systems Pty Ltd v Quinn Villages Pty Ltd* [2005] QSC 321, para [53].
10 *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165 (High Crt of Australia).
11 *Brogden v Metropolitan Railway Company* (1876-7) 2 App Cas 666 (HL).
12 *Monarch Building Systems*: note 9, para [53].

contract, rather than disputing acceptance by conduct (which may be a more tenuous basis for claiming that there is no contract).[13]

## Agreement in the absence of formal offer and acceptance

If the owner is unable to prove the elements of a formal offer and acceptance, this may not, of itself, defeat a claim that the parties were in fact in agreement. This is because the requirement for a formal offer and acceptance has not always been adopted in a strict sense. As Seddon and Ellinghaus observe:

> 'There are may circumstances of modern commerce that do easily fit the formal offer-acceptance model ... From time to time attempts have been made to escape the straightjacket of offer and acceptance by adopting a 'global' approach to negotiations between parties. On this approach, the court's task is to ask whether, objectively and having regard to the totality of the dealings between the parties, they should be considered to have entered into a contractual relationship without inquiring too closely into the formalities of offer and acceptance.'[14]

In *Gibson v Manchester City Council*, Lord Denning MR observed:

> 'To my mind, it is a mistake to think that all contracts can be analysed into the form of offer and acceptance. I know in some of the text books it has been the custom to do so: but, as I understand the law, there is no need to look for a strict offer and acceptance. You should look at the correspondence as a whole and at the conduct of the parties and see therefrom whether the parties have come to an agreement on everything that was material. If by their correspondence and their conduct you can see an agreement on all material terms – which was intended thenceforward to be binding – then there is a binding contract in law even though all the formalities have not been gone through.'[15]

While this will depend on the specific facts in each case, it is worth noting the Master of the Roll's references to the 'material terms' of the contract. In the scenario discussed above, if, for example, the parties were unable to agree the date for practical completion of the construction project, it is arguable that there was no agreement on all the material terms. In which case, even though strict offer and acceptance may not be necessary, the absence of consensus on all the fundamental terms may, nevertheless, be destructive of an agreement.

## Intent to be bound

Where the parties fail to reach consensus on the terms of their agreement and, consequently, do not execute a contract but proceed to perform the substance of the contract largely in accordance with the agreed terms, it may be arguable

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13 *Empirnall Holdings Pty Ltd v Machon Paull Partners Pty Ltd* (1988) 14 NSWLR 523 (New South Wales Crt of Appeal); *Airways Corp of New Zealand Ltd v Geyserland Airways Ltd* [1996] 1 NZLR 116 (Rotorua High Crt).

14 Seddon and Ellinghaus, *Cheshire and Fifoot's Law of Contract* (9th Australian edition, LexisNexis Butterworths 2008), para 3.5.

15 *Gibson v Manchester City Council* [1978] 1 WLR 520 (CA), pages 523-4.

that the parties' conduct evidences an intent to be bound by those terms of the contract.

This occurred in *Monarch Building Systems* where the parties were unable to reach a final consensus as to whether liquidated damages for delay would apply (and did not execute the contract) but proceeded largely in accordance with the terms which had been discussed. In this case, it was argued that the subsequent conduct of the parties suggested that they intended to be bound by the terms of the unexecuted agreement.

The problem with this argument is that, while such subsequent conduct may be demonstrative of the requisite intent, it is still not clear what the parties intend to be bound by unless the terms of the agreement are sufficiently certain. De Jersey CJ came to this conclusion (at first instance) in *Monarch Building Systems* where his Honour held:

> 'It is true that in their subsequent communications, each party proceeded on the basis there was a binding contract between them ... The reasonable inference is that the parties proceeded on the basis they were contractually bound. The difficulty is finding consensus as to the terms of that contract, and that difficulty stems from the circumstance that the liquidated damages issue was never resolved.'[16]

His Honour went on to find:

> 'The eventual question is whether objectively, one infers from all relevant circumstances their intention to be bound, and to be bound to a particular contract. That the parties considered themselves contractually bound does not resolve this case. That is because one cannot answer the next question: to what particular contract were they bound? Once one acknowledges the apparent significance to the parties of the liquidated damages provision, their persisting failure to resolve their difference over that provision, and the effective role of that disagreement in forestalling full execution of the contract form, it is not possible to conclude that the parties bound themselves to a contract "shorn of the liquidated damages provision."'[17]

As such, while the parties' subsequent conduct may be demonstrative of an intent to be bound by the terms of the agreement, in the absence of sufficient certainty surrounding the exact scope of the terms, any such agreement will still be devoid of contractual force.

## Should estoppel by convention apply?

### *Estoppel by convention generally*

In this scenario, in response to the contractor's argument that there is no contract, the owner may seek to argue that an estoppel by convention should

16 *Monarch Building Systems*: note 9, paras [46-7].
17 *Monarch Building Systems*: note 9, para [55].

apply to prevent the contractor from departing from the parties' understanding of the terms of their bargain.

Principally, estoppel by convention operates to prevent parties from resiling from a mutually held assumption that forms part of the basis of the parties' relationship. Handley J describes estoppel by convention as follows:

> 'When parties make a statement of fact or of mixed fact and law the conventional basis of their transaction... both are estopped from questioning its truth for the purpose of the transaction. Estoppels by convention can be created ad hoc, expressly, by a course of dealing, or by other acts or declarations. In such a case 'there must be some mutually manifest conduct by the parties' with the intention of effecting their legal relationship.'[18]

In *Con-Stan Industries of Australia v Norwich Winterhur Insurance*, an assured ('Con-Stan') obtained a number of insurance policies through an insurance broker ('Bedford').[19] Con-Stan paid the premiums to Bedford, but Bedford did not make the subsequent payments to the underwriter ('Norwich'). When Bedford was wound-up, Norwich sought to recover the premiums from Con-Stan. Con-Stan argued, *inter alia*, that Norwich was estopped by convention from recovering the premiums it had already paid because the parties 'business relationships were conducted on the footing that the broker alone was liable to the insurer'. The High Court of Australia observed that:

> 'Estoppel by convention is a form of estoppel founded not on a representation of fact made by a representor and acted on by a representee to his detriment, but on the conduct of relations between the parties on the basis of an agreed or assumed state of facts, which both will be estopped from denying.'[20]

In this case, the High Court dismissed the claim of estoppel by convention because the assumed state of affairs, that Bedford was solely liable to Norwich, was an assumption as to the legal relationship between the parties and not an assumption of fact (the currency of this distinction is discussed further below).

One of the leading cases in the United Kingdom on conventional estoppel, frequently referred to by Australian judges, is *Amalgamated Investment & Property v Texas Commercial International Bank.* In this case, Lord Denning MR, referring to the Australian High Court case of *Grundt*,[21] declared:

> 'To use the phrase of Latham CJ and Dixon J in [*Grundt*], the parties by their course of dealing adopted a 'conventional basis' for the governance of the relations between them and are bound by it. They are bound by

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18 Handley J, *Estoppel by Conduct and Election* (2006) para 8-001.

19 *Con-Stan Industries of Australia Pty Ltd v Norwich Winterhur Insurance (Australia) Ltd* (1986) 160 CLR 226 (High Crt of Australia).

20 *Conn-Stan Industries*: note 19, page 244 (both quotations).

21 *Grundt v Great Boulder Pty Gold Mines Ltd* (1937) 59 CLR 641 (High Crt of Australia).

> the 'conventional basis' on which they conducted their affairs. The reason is because it would be altogether unjust to allow either party to insist on the strict interpretation of the original terms of the contract – when it would be inequitable to do so, having regard to dealings which have taken place between the parties.' [22]

Similarly, Brandon LJ in *Amalgamated Investment* said:

> '… for the purposes of those transactions both the bank and the plaintiffs assumed the truth of a certain state of affairs … The transaction took place on the basis of that assumption, and their course was influenced by it in the sense that, if the assumption had not been made, the course of the transaction would without have been different. These facts produce … a classic example of … [an] estoppel by convention.[23]

Recently, Tobias JA in *Ryledar v Euphoric*[24] recounted the principles of conventional estoppel set out by Lord Steyn in *The Indian Grace (No 2)*, where his Lordship observed that:

> 'It is settled that an estoppel by convention may arise where parties to a transaction act on an assumed state of facts or law, the assumption being either shared by them both or made by one and acquiesced in by the other. The effect of an estoppel by convention is to preclude a party from denying the assumed facts or law if it would be unjust to allow him to go back on the assumption.'[25]

Consequently, where two or more parties have mutually adopted a particular state of affairs as to fact or law, the general objective of estoppel by convention is to hold the parties to that assumption.

In *Moratic v Gordon,*[26] and also in a recent article, Brereton J set out the following five elements which a plaintiff will need to establish in order to claim a common law estoppel by convention:

(a) that it has adopted an assumption as to the terms of its legal relationship with the defendant;

(b) that the defendant has adopted the same assumption;

(c) that both parties have conducted their relationship on the basis of that mutual assumption;

(d) that each party knew or intended that the other act on that basis; and

(e) (arguably) that departure from the assumption will occasion detriment to the plaintiff.[27]

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22 *Amalgamated Investment & Property Co Ltd v Texas Commerce International Bank Ltd* [1982] QB 84 (CA), page 121.
23 *Amalgamated Investment*: note 22`, page 131.
24 *Ryledar Pty Ltd v Euphoric Pty Ltd* [2007] NSWCA 6, para [198].
25 *The Indian Grace (No 2)* [1998] AC 878 (HL), page 913.
26 *Moratic Pty Ltd v Gordon* [2007] NSWSC 5, para [32].

Therefore, it is necessary to consider each of the elements of an estoppel by convention in order to ascertain whether this may apply in the scenario discussed above.

### *An assumption of present or future, fact or law?*

The passage from *Con-Stan* (quoted above)[28] demonstrates the traditional common law position that, in order to give rise to an estoppel by convention, the assumption must have been as to an existing state of fact and not a representation as to future conduct or to a question of law.[29] While there is still some judicial support for this traditional approach,[30] Seddon and Ellinghaus argue that this position should be reconsidered in light of *David Securities v Commonwealth Bank of Australia*[31] and that estoppel by convention could be applied in cases where the assumption is one of 'present or future fact or law'.[32]

In relation to the scenario above, the owner may wish to argue that the contractor induced an assumption that a legal relationship existed between the parties on the basis of the draft contract despite neither party having executed that contract. Such an assumption is likely to relate to questions of both fact and law. While it may be possible to support the proposition of an assumption having arisen, the contractor is likely to have a good argument that the parties had not adopted the same assumption.

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27 Brereton J, *Equitable Estoppel in Australia: The court of conscience in the antipodes* (2007) 81 ALJ 638, page 645.

28 See note 20.

29 See *Ferrier v Stewart* (1912) 15 CLR 32 (High Crt of Australia), page 44.

30 *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 (High Crt of Australia). See the decision of Holmes J in *Equuscorp Pty Ltd v Glengallan Investments Pty Ltd* [2006] QCA, para [117], where her Honour observes that she doubts that conventional estoppel can be founded on a representation of future conduct – discussed below.

31 *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 (High Crt of Australia) where the High Court, in relation to a claim for restitution, saw no clear distinction between a mistake of fact and a mistake of law.

32 *Cheshire and Fifoot's Law of Contract*, note 15, para 10.3. Samuels JA and Kirby P of the New South Wales Court of Appeal in *Eslea Holdings Ltd v Butts* [1986] 6 NSWLR 175 (New South Wales Crt of Appeal), also gave support for estoppel by convention being applicable to assumptions of fact or law. In *Eslea*, their Honours distinguished the decision in *Con-Stan* by holding that a conventional estoppel might rest upon a foundation of assumed law as well as assumed fact.
Brereton J, in *Waterman v Gerling Australia Insurance Company Pty Ltd* [2005] NSWSC 1066, para [79] states in definitive terms that 'The requirement that the assumption be of a state of facts (as distinct from law) has been discarded ...': Handley J, *Estoppel*, Commercial Law Quarterly 20(2) June / August 2006, page 30. Similarly, support for an expansive approach may be found in *Whitehouse v BHP Steel Pty Ltd* [2004] NSWCA 428.

### *Common adoption*[33]

An estoppel by convention depends upon the adoption by both parties of the assumption as the conventional basis of their relationship.[34] Handley J observes that the 'representation is not necessarily that the convention is true but that it has been mutually adopted'.[35]

In *Ryledar*, the New South Wales Court of Appeal (citing the decision of Brereton J in *Moratic Pty Ltd v Gordon*[36]), observed that conventional estoppel:

> '... is focused on the consensual basis of the parties' relationship: it operates when both parties have adopted the same assumption as the basis of their relationship, often without appreciating that any departure from the strict legal position is involved so as to hold both parties to their common understanding.'[37]

In the scenario above, it is arguable that, while the parties may have assumed that they were in fact performing a contract, the basis of each parties' assumption may not have been uniformly held. For example, the owner and the contractor may have been acting on different assumptions as to the date for practical completion of the project. If these assumptions are material enough, this is likely to undermine the basis of a claim of an estoppel by convention.

### *Conduct based on common assumption*

It is also necessary for the parties' to conduct themselves in accordance with the assumption they have adopted. For example, in *The August Leonhardt* a situation occurred where two parties' solicitors each thought that the other had obtained an agreement for an extension of the limitation period in relation to a cargo interest under a charter party. Kerr LJ observed:

> 'All estoppels must involve some statement or conduct by the party alleged to be estopped on which the alleged representee was entitled to rely and did rely… in cases of so-called estoppels by convention, there must be some mutually manifest conduct by the parties … but in the present case … Each acted – or failed to act – independently from the other on the basis of a mutual mistake which remained uncommunicated between them.
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> There cannot be any estoppel unless the alleged representor has said or done something, or failed to do something, with the result that – across

33 The term 'mutual adoption' is often used in substitution to 'common adoption'. It is submitted that 'common adoption' is the preferred term to avoid the possible interpretation of mutual being 'different but corresponding': see *The August Leonhardt* [1985] 2 Lloyds Rep 28 (CA).

34 *Dabbs v Seaman* (1925) 36 CLR 538 (High Crt of Australia), page 549.

35 Handley J, *Estoppel by Conduct and Election* (2006), para 8-001.

36 *Moratic v Gordon*: note 26, para [33].

37 *Ryledar*: note 24, para [201].

> the line between the parties – his action or inaction has produced some belief or expectation in the mind of the alleged representee ....'[38]

In the scenario above, while proving that each of the parties acted on the basis of their own assumption is less likely to be problematic, it may be difficult to prove that the parties acted on the basis of a common assumption as to the date for practical completion.

### *Knowledge of intention to rely on assumption*

Brereton J, in *Moratic v Gordon* held:

> 'Although I accept … that each party must know or intend that the other act on the relevant assumption, there is no requirement that either have induced, or acquiesced in, the adoption of the assumption by the other, and in particular there is no requirement that either know that the other may incur detriment by reliance on the assumption. To the contrary – since the assumption is one common to both parties, and may involve a mistaken interpretation of the contract – the possibility that either party might incur detriment by reliance on it will usually not occur to the other.'[39]

However, while the parties may have known or intended the other to act on the assumption, the assumption need not be true. As Handley J notes,

> '... this form of estoppel does not require either party to believe in the truth of the assumption. What they rely on is that the assumption has been mutually adopted as the basis of their relationship or transaction.'[40]

### *Departure which would occasion detriment*

In order to make out a claim of estoppel by convention, the plaintiff must prove that a departure by one party from the mutually held assumption would cause the plaintiff to suffer some form of detriment. This was acknowledged by Dixon J in *Thompson v Palmer*, where his Honour held:

> 'The object of estoppel *in pais* is to prevent an unjust departure by one person from an assumption adopted by another as the basis of some act

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38 *The August Leonhardt* [1985] 2 Lloyds Rep 28 (CA), pages 34-5; see also *Coghlan v S H Lock (Australia) Ltd* (1985) 4 NSWLR 158 (New South Wales Crt of Appeal).

39 *Moratic v Gordon*: note 26, para [37].

40 Handley J, *Estoppel*, Commercial Law Quarterly 20(2) June / August 2006, 30. In *Grund*: note 23, Dixon J explained that the truth of the assumption was not a prerequisite to claim an estoppel by convention. His Honour held (at 676-7):
'[B]elief in the correctness of the facts or state of affairs assumed is not always necessary. Parties may adopt as the conventional basis of the transaction between them an assumption which they know to be contrary to the actual state of affairs. A tenant may know that his landlord's title is defective, but by accepting the tenancy he adopts an assumption which precludes him from relying on the defects.'

or omission which, unless the assumption be adhered to, would operate to that other's detriment.'[41]

In the scenario above, it may be arguable that a departure from the owner's assumption as to an earlier date for practical completion will cause the owner to suffer some detriment. For example, if the owner assumed that some plant would be completed by a particular date, delivery of the plant on a later date could cause the owner to suffer considerable losses by way of lost production.

## Conclusions

In relation to the contractor's claim that there is in fact no contract between the parties, the contractor will need to establish the absence of an agreement on the fundamental terms of the contract, or that the parties did not actually intend to create legal relations.

On the issue of agreement, the owner may assert that a combination of the draft contract, the parties' correspondence and the parties' actions give rise to an agreement comprised of express and implied terms even though no formal contract was executed. Alternatively, the owner may argue that the correspondence gives rise to a series of counter-offers which were ultimately accepted by conduct by the contractor. The owner may also argue that strict offer and acceptance are unnecessary and that an agreement can be discerned by the conduct of the parties.

In response, the contractor may claim that the parties intended that the contract fall in the third class in *Masters v Cameron*[42] ie that the parties did not intend to be bound until a formal contract was executed. Further, the contractor may assert that, since the parties failed to reach agreement on all the fundamental terms (namely the date for practical completion) there was no agreement between the parties, irrespective of whether strict offer and acceptance were present.

On the issue of intent, the owner may have a more reliable argument that the parties conduct in continuing to carry out the project is demonstrative of an intent to create legal relations. However, as occurred in *Monarch Building Systems*,[43] intent of itself is insufficient without clarity as to the terms of the agreement. This is because, the logical question is: to what do the parties intend to be bound? Accordingly, it is suggested that the contactor should focus on the absence of consensus as to the terms of the agreement as the basis for denying the existence of a contract, rather than a lack of intent.

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41 *Thompson v Palmer* (1933) 49 CLR 507 (High Crt of Australia), page 547. Similarly, in *MK & JA Roche Pty Ltd v Metro Edgely Pty Ltd* [2005] NSWCA 39, Hodgson JA (with whom Beazley and Ipp JJA agreed) held at para [72]: 'In my opinion, common law estoppel by representation or conventional estoppel still requires that the party relying on the estoppel must have " placed himself in a position of significant disadvantage if departure from the assumption be permitted"'.

42 *Masters v Cameron*: note 1.

43 *Monarch Building Systems*: notes 2 and 9.

With respect to estoppel by convention, while the owner may seek to assert a case for such an estoppel, the biggest hurdle for it is likely to be proving the existence of a common assumption between the parties. In the scenario above, it is likely that each of the parties had adopted a different assumption as to the basis of their legal relationship and this may be sufficient to defeat a claim of an estoppel by convention.

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*is to promote the study and understanding of*
*construction law amongst all those involved*
*in the construction industry'*

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