THE REQUIREMENTS OF CERTAINTY AND COMPLETENESS
**7.1 PRINCIPLES OF AUSTRALIAN CONTRACT LAW — Cases and Materials**

**INTRODUCTION**

This chapter is concerned with the, not mutually exclusive, requirements that, for an agreement to be binding and enforceable, its wording must be sufficiently precise and clear so that its obligations can be ascertained with sufficient certainty, and that its key or important parts have been set in sufficient detail. If an agreement is incomplete or uncertain it is void. If a sufficiently certain and complete agreement is entered into informally with the intention that a more formal agreement be subsequently entered into, there is the further matter of the circumstances in which, in the absence of the more formal agreement being entered into, the informal agreement is enforceable.

The cases extracted in this chapter deal with and illustrate the following principles:
- the requirement of completeness: *Booker Industries Pty Ltd v Wilson Parking (Qld) Ltd* (1982) 149 CLR 600;
- the requirement of certainty: *Whitlock v Brew* (1968) 118 CLR 445;
- whether an obligation to negotiate in good faith is void for uncertainty: *United Group Rail Services Limited v Rail Corporation New South Wales* [2009] NSWCA 177;
- the enforcement of informal agreements that contemplate more formal agreements being entered into: *Masters v Cameron* (1954) 91 CLR 353.

**AGREEMENTS MUST BE SUFFICIENTLY COMPLETE**

### 7.2 Booker Industries Pty Ltd v Wilson Parking (Qld) Pty Ltd (1982) 149 CLR 600

**COURT:** High Court of Australia

**FACTS:** Wilson leased premises from Booker for a period of three years. Clause 4.01 of the lease granted Wilson an option for a further lease for a period of three years. The option clause stipulated that the terms of the new lease would be the same as for the original lease with the exception of the rent to be paid. In relation to that rent, Clause 4.01 stipulated that it would be ‘the rental as may be mutually agreed between the Lessor and the Lessee and failing agreement then such rental as may be fixed by an arbitrator nominated in accordance with the provisions of Clause 3.05(b) but in any event the rental shall not be less than the rental payable in the last year of the first term’. Clause 3.05(b) provided for the appointment of a single arbitrator to be nominated by the President for the time being of the Queensland Law Society Incorporated. Wilson sought to exercise his rights pursuant to the option clause. Booker rejected Wilson’s claim, arguing that the option clause was void for incompleteness as to an essential term, namely the rent. Wilson brought an action for specific performance in relation to the option clause.

**ISSUE:** The issue before the High Court was whether the option clause was sufficiently complete to be enforceable by a decree of specific performance.

**DECISION:** The High Court (Gibbs CJ, Murphy, Wilson and Brennan JJ) unanimously held in favour of Wilson and ordered specific performance of the option.

**EXTRACT:** The extract from the joint judgment of Gibbs CJ, Murphy and Wilson JJ discusses the issue of completeness and the conditional nature of the decree of specific performance that was granted in the circumstances of the case.
THE REQUIREMENTS OF CERTAINTY AND COMPLETENESS

7.2

Gibbs CJ, Murphy and Wilson JJ

[604] The only issue of substance which now arises for decision is whether the renewal agreement contained in the lease is a concluded agreement …

It is established by authority, both ancient and modern, that the courts will not lend their aid to the enforcement of an incomplete agreement, being no more than an agreement of the parties to agree at some time in the future. Consequently, if the lease provided for a renewal ‘at a rental to be agreed’ there would clearly be no enforceable agreement. On the other hand, it is also well established that the parties to a contract may leave terms — even essential terms — to be determined by a third person … In the present case, the lease itself provides [605] the entire mechanism for determining the rental for the renewed term. There is no further agreement required of the parties. It is true that if they do agree upon that rental, then there is no occasion to resort to the independent mechanism that the lease provides. But, there being no such agreement, all that is required is that the President name a person to fix a figure being not less than the minimum rental operative during the original term. No formality is required to effect the necessary appointment. Either party may request the President to facilitate the fulfilment of the agreement. It may be assumed that if he declines to do so, or if the person nominated declines to carry out the task assigned to him, then the renewal cannot be effected, and that Wilson’s exercise of the option will have been fruitless. Nevertheless, in the circumstances as they stand at present, there is a valid agreement for the renewal of the lease subject to the fixation of a rental for the new term. The fixation of that rental is a condition precedent to the performance of the agreement.

It follows that at this stage an order could not be made for the specific performance of the agreement to grant a further lease.¹ However, in order to give business efficacy to cl 4.01 and 3.05(b) it is necessary to imply a term that, once the conditions specified in cl 4.01 have been performed, both parties will do all that is reasonably necessary to procure the nomination by the President of an arbitrator.² … [606] It may be that in the present case the President might nominate an arbitrator at the request of one of the parties, but he might decline to do so unless both parties requested him to act. Given an effective exercise of the option, both parties were under an obligation to request him to nominate an arbitrator, if such a request was reasonably necessary to procure the nomination.

In those circumstances there should be a limited decree for specific performance … If a lessor agrees to renew a lease at a rent to be fixed by a third party, and agrees (expressly or impliedly) to do all that is reasonably necessary to ensure that the rent is so fixed, it is not right to say that there is no concluded contract until the rent is fixed. There is a contract which immediately binds the lessor to perform his obligation to do all that is reasonably necessary to ensure that the rent is fixed, although the performance of the further obligation to renew the lease is conditional on the rent being fixed. There is no reason in justice or in law why the court should not make an appropriate order for specific performance in such a case, that is, an order that the lessor should

2. See Butts v O’Dwyer (1952) 87 CLR 267; Kennedy v Vercoe (1960) 105 CLR 521; Sudbrook Trading Ltd v Eggleton (1983) 1 AC 444.
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do whatever is reasonably necessary to ensure that the rent is fixed, and, if the rent is fixed, should renew the lease.

**COMMENTS**

1. See Radan & Gooley at 7.7–7.8.

**AGREEMENTS MUST BE SUFFICIENTLY CERTAIN**

**7.3 Whitlock v Brew**

**(1968) 118 CLR 445**

**COURT:** High Court of Australia

**FACTS:** Whitlock agreed to sell land to Brew. Special Condition 5 of the agreement stipulated that Brew would grant a lease of the petrol station on the land to the Shell Company of Australia for the sale of its products 'on such reasonable terms as commonly govern such a lease'. Whitlock purported to rescind the agreement and forfeited the deposit. Brew sought recovery of the deposit. He argued that Special Condition 5 was uncertain and could not be severed from the rest of the agreement with the consequence that the whole agreement was void for uncertainty. If this argument was correct, Brew was entitled to restitution of the deposit.

**ISSUE:** The issue before the High Court was whether Special Condition 5 was uncertain, thereby rendering the whole of the agreement void for uncertainty.

**DECISION:** In a majority decision, the High Court (Kitto, Taylor, Menzies and Owen JJ; McTiernan J dissenting) held in favour of Brew. The entire agreement was void because of the uncertainty of Special Condition 5, there being no evidence of a lease in common use that could be used to establish specific terms on key issues such as the rent and term of the lease.

**EXTRACT:** The extract from the joint judgment of Taylor, Menzies and Owen JJ applies the principles of uncertainty to the facts of the case.

**Taylor, Menzies and Owen JJ**

[460] The first question to be considered is whether the contention that special condition 5 is uncertain should be upheld. [Whitlock] asserts that it should not and that, in effect, that clause simply provides that in the event of there being no agreement as to the terms of the contemplated lease, including both the period during which it is to subsist and the rent to be paid, the parties shall enter into a lease in the form settled by an arbitrator. Of course, if this were so the basis for the contention that the clause is uncertain would disappear. But the language of the clause does not permit of this view. The lease is to be 'upon such reasonable terms as commonly govern such a lease' and in the event of a dispute 'as to the interpretation or operation' of the clause the dispute is to be referred to arbitration. We are firmly of opinion that the expression 'upon such reasonable terms as govern such a lease' is not, in the context in which it appears, apt to refer to either the period for which the contemplated lease is to subsist or to the rent to be payable thereunder. Nor do we think that the further expression 'as to the interpretation or operation' of this clause covers a dispute as to either of those matters. We, therefore, are of opinion that the clause is uncertain in that it neither specifies [461] nor provides a means for the determination
as between the parties of the period for which the contemplated lease shall be granted or the rent which shall be payable thereunder.

It, therefore, becomes necessary to determine whether the condition is severable from the rest of the provisions of the contract or whether the whole contract falls. On this point … in Life Insurance Co of Australia Ltd v Phillips … Knox CJ [said]:

When a contract contains a number of stipulations one of which is void for uncertainty, the question whether the whole contract is void depends on the intention of the parties to be gathered from the instrument as a whole. If the contract be divisible, the part which is void may be separated from the rest and does not affect its validity.³

Observations in the same case make it clear that in seeking to ascertain the intention of the parties to a written contract extrinsic evidence may not be resorted to except where such evidence may be called in aid in the interpretation of the written instrument. Clearly enough, it seems to us, it is not to the point to make an independent examination of extrinsic facts, even if they were within the knowledge of both parties, and upon such evidence to conclude that a particular provision was or was not of importance to them or to either of them; the question for determination is the intention of the parties as disclosed by the contract into which they have entered … Of course, cases may arise where a vague, uncertain or meaningless clause in a contract may simply be ignored … But special condition 5 does not fall into any such category; nor can it be said to be a clause inserted solely for the benefit of one of the parties and capable of being waived by him. It is, in a sense, [462] definitive of the ultimate rights which it is contemplated the purchaser is to get under his contract. The clause provides that [Brew] will immediately upon taking possession grant a lease the effect of which will be to deprive him of possession of part of the land in return for a promise to pay rent. Of course, the Shell Co is in no way obliged to take a lease but it is clear enough from the terms of the contract that it was contemplated that it would. The case is, perhaps, not as clear as the case where a contract for the sale of land is entered into with a reservation to the vendor of an unspecified part.⁴ … The case more closely resembles Duggan v Barnes,⁵ where A agreed to sell land to B for a stated price and B undertook to grant a lease to any person who should purchase A’s business. There the court had no difficulty in holding that B’s undertaking was a material and inseverable part of the consideration for A’s promises. In our view the same conclusion must be reached in this case and the fact that here it is the purchaser, and not the vendor, who is asserting the invalidity of the contract is of no consequence. In our opinion [Whitlock’s] appeal should be dismissed.

COMMENTS
2. In G Percy Trentham v Archital Luxfer Ltd [1993] 1 Lloyd’s Rep 25 at 89, Rix LJ listed the following as a non-exhaustive list of principles to apply in dealing with cases of possible uncertainty:

3. Life Insurance Co of Australia Ltd v Phillips (1925) 36 CLR 60 at 72.
4. Pearce v Watts (1875) LR 20 Eq 492.
5. [1923] VLR 27.
Each case must be decided on its own facts and on the construction of its own agreement. Subject to that:

Where no contract exists, the use of an expression such as ‘to be agreed’ in relation to an essential term is likely to prevent any contract coming into existence, on the ground of uncertainty. This may be summed up by the principle that ‘you cannot agree to agree’.

Similarly, where no contract exists, the absence of agreement on essential terms of the agreement may prevent any contract coming into existence again on the ground of uncertainty.

However, particularly in commercial dealings between parties who are familiar with the trade in question, and particularly where the parties have acted in the belief that they had a binding contract, the Courts are willing to imply terms, where that is possible, to enable the contract to be carried out.

Where a contract has once come into existence, even the expression ‘to be agreed’ in relation to future executory obligations is not necessarily fatal to its continued existence.

Particularly in a case of contracts for future performance over a period, where the parties may desire or need to leave matters to be adjusted in the working out of their contract, the Courts will assist the parties to do so, so as to preserve rather than destroy bargains, on the basis that what can be made certain is itself certain …

This is especially the case where one party has either already had the advantage of some performance which reflects the parties’ agreement on a long term relationship, or has had to make an investment premised on that agreement.

For these purposes, an express stipulation for a reasonable or fair measure or price will be a sufficient criterion for the courts to act on. But even in the absence of express language, the Courts are prepared to imply an obligation in terms of what is reasonable.

COURT: Court of Appeal in New South Wales
FACTS: United Group Rail, in two contracts, undertook to design and build new rolling stock for Rail Corporation. Both contracts contained an identical clause 35.11 which stipulated that any difference or dispute that arose between the two parties to the contract, would be referred to senior representatives of each party. These representatives were then obliged to ‘meet and undertake genuine and good faith negotiations with a view to resolving the dispute or difference’.

ISSUE: The issue before the Court of Appeal was whether clause 35.11 was enforceable or void for uncertainty.
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DEcision: The Court of Appeal (Allsop P, Ipp and Macfarlan JJA) unanimously upheld the validity of clause 35.11, on the basis that such clauses could, in appropriate circumstances, be valid and enforceable.

EXTRACT: The extract from the judgment of Allsop P, who gave the only judgment in this case, explains the reason why, in appropriate circumstances, an agreement to negotiate in good faith is not void for uncertainty and can be enforced.

ALLSOP P

[43] [In Coal Cliff Collieries Pty Ltd v Sijehama Pty Ltd (1991) 24 NSWLR 1, Kirby P] cautiously, but decidedly, [put] the view that an agreement to negotiate in good faith might be enforceable, depending on its terms and context . . . His Honour was not stating an all encompassing generalised test or formula.

[50] In Trawl [Industries of Australia Pty Ltd v Effem Foods Pty Ltd (1992) 27 NSWLR 326], Samuels JA made the valuable point . . . that uncertainty and incompleteness were different concepts. I agree . . .

[56] [G]iven the juristic debate that has taken place about agreements to negotiate in good faith, it is helpful to begin with some essential propositions founded on accepted authority and principle. First, an agreement to agree is incomplete, lacking essential terms.6 (That is not a question of uncertainty or vagueness, but the absence of essential terms.)

[57] Secondly, the task of the Court is to give effect to business contracts where there is a meaning capable of being ascribed to a word or phrase or term or contract, ambiguity not being vagueness.7 . . .

[58] Thirdly, good faith is not a concept foreign to the common law, the law merchant or businessmen and women. It has been an underlying concept in the law merchant for centuries. It is recognised as part of the law of performance of contracts in numerous sophisticated commercial jurisdictions. It has been recognised by this Court to be part of the law of performance of contracts.8 . . .

[59] There are other decisions of Australian courts and discussions by scholars recognising the obligation of good faith in a non-fiduciary context.

[60] It is fair to say that caution (in some cases a lack of enthusiasm) has been expressed by some . . .

[61] Whilst . . . the law in Australia is not settled as to the place of good faith in the law of contracts, this Court should work from the position that it has said on at least three occasions (not including Renard) that good faith, in some degree or to some extent, is part of the law of performance of contracts . . .


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[63] In my view, Kirby P’s reasons [in Coal Cliff Collieries v Sijehama] are more persuasive than the competing authority …

[64] I turn to the major contrary appellate decisions. In … Courtney,9 … Lord Denning MR equated an agreement to negotiate with an agreement to agree. The latter is, of course, not enforceable.10 … It does not follow, however, that an agreement to undertake negotiations in good faith fails for the same reason. An agreement to agree to another agreement may be incomplete if it lacks essential terms of the future bargain. An agreement to negotiate, if viewed as an agreement to behave in a particular way, may be uncertain, but is not incomplete. The objection that no court could estimate the damages because no one could tell whether the negotiations ‘would be’ successful ignores the availability of damages for the loss of a bargained for valuable commercial opportunity.11 The relevant question is whether the clause has certain content.

[65] Nor, with respect, do I find the views of Lord Ackner in Walford v Miles12 persuasive. An obligation to undertake discussions about a subject in an honest and genuine attempt to reach an identified result is not incomplete. It may be referable to a standard concerned with conduct assessed by subjective standards, but that does not make the standard or compliance with the standard impossible of assessment. Honesty is such a standard.13 Whether it is capable of assessment depends on whether there is a standard of behaviour that is capable of having legal content. Asserting its uncertainty does not answer the question. The assertion that each party has an unfettered right to have regard to any of its own interests on any basis begs the question as to what constraint the party may have imposed on itself by freely entering into a given contract. If what is required by the voluntarily assumed constraint is that a party negotiate honestly and genuinely with a view to resolution of a dispute with fidelity to the bargain, there is no inherent inconsistency with negotiation, so constrained. To say, as Lord Ackner did, that a party is entitled not to continue with, or withdraw from, negotiations at any time and for any reason assumes that there is no relevant constraint on the negotiation or the manner of its conduct by the bargain that has been freely entered into …

[66] Of course, it must be that the certainty and content of any contract will depend on its specific terms and context. Sweeping generalised rules, however, are difficult to sustain and not of great assistance …

[70] What the phrase ‘good faith’ signifies in any particular context and contract will depend on that context and that contract. A number of things, however, can be said as to the place of good faith in the operation of the common law in Australia. The phrase does not, by its terms, necessarily import, or presumptively introduce, notions of fiduciary obligation familiar in equity or the law of trusts. Nor does it necessarily import any notion or requirement to act in the interests of the other party to the contract. The content and context here is a clearly worded dispute resolution clause of an engineering contract. It is to

be anticipated at the time of entry into the contract that disputes and differences that may arise will be anchored to a finite body of rights and obligations capable of ascertainment and resolution by the chosen arbitral process (or, indeed, if the parties chose, by the Court). The negotiations (being the course of treaty or discussion) with a view to resolving the dispute will be anticipated not to be open-ended about a myriad of commercial interests to be bargained for from a self-interested perspective … Rather, they will be anticipated to involve or comprise a discussion of rights, entitlements and obligations said by the parties to arise from a finite and fixed legal framework about acts or omissions that will be said to have happened or not happened. The aim of the negotiations will be anticipated to be to resolve a dispute about an existing bargain and its performance. Honest and genuine differences of opinion may attend the parties' views of their rights and obligations. Such things as difficulties of proof and uncertainty as to fact or law may perfectly legitimately strike the parties differently. That accepted, honest business people who approach a dispute about an existing contract will often be able to settle it. This requires an honest and genuine attempt to resolve differences by discussion and, if thought to be reasonable and appropriate, by compromise, in the context of showing a faithfulness and fidelity to the existing bargain.

[71] The phrase 'genuine and good faith' in cl 35.11 is, as I have said, a composite phrase. It is a phrase concerning an obligation to behave in a particular way in the conduct of an essentially self-interested commercial activity: the negotiation of a resolution of a commercial dispute. Given that context, the content of the phrase involves the notions of honesty and genuineness. Whilst the activity is of a self-interested character, the parties have not left its conduct unconstrained. They have promised to undertake negotiations in a genuine and good faith manner for a limited period (14 days). As a matter of language, the phrase 'genuine and good faith' in this context needs little explication: it connotes an honest and genuine approach to the task. This task, rooted as it is in the existing bargain, carries with it an honest and genuine commitment to the bargain (fidelity to the bargain) and to the process of negotiation for the designated purpose.

[72] The notion of fidelity to the bargain can be seen as founded, at least in part, on the requirement of a party to do all things necessary to enable the other party to have the benefit of the contract and upon the recognition that contractual obligations do not set up a choice or election to perform or pay damages. Contractual promises (supported by consideration) comprise legal rights to performance. The encompassing of fidelity to the bargain within the concept of good faith, at least in the context at hand — the genuine and good faith negotiation of an existing dispute by reference to an existing contract — does no violence to the language used here by the parties. That the phrase 'good faith' contains the notion of fidelity (or faithfulness) to the bargain conforms with what other jurisdictions have seen as the core of the concept and with historical uses of

14. Butt v McDonald (1896) 7 QLJ 68 at 70–1, approved in Secured Income Real Estate (Australia) Limited v St Martins Investments Pty Limited (1979) 144 CLR 596 at 607.
15. United States Surgical Corporation v Hospital Products International Pty Limited [1982] 2 NSWLR 766 at 800.
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the phrase.17 Most importantly, its strength lies in its closeness to the contractual jurisprudence of the common law and the appreciation that the parties have expressly bound themselves to a good faith standard in seeking to resolve a dispute arising from an existing bargain about the resolution of which dispute they anticipate having different views. The parties have mutually agreed to bring an approach of genuineness and good faith to that process of seeking resolution of any such disagreement. That agreement carried with it, in ordinary language, a requirement to bring an honestly held and genuine belief about their mutual rights and obligations and about the controversy to the negotiations, and to negotiate by reference to such beliefs.

[73] These are not empty obligations; nor do they represent empty rhetoric. An honest and genuine approach to settling a contractual dispute, giving fidelity to the existing bargain, does constrain a party. The constraint arises from the bargain the parties have willingly entered into. It requires the honest and genuine assessment of rights and obligations and it requires that a party negotiate by reference to such. A party, for instance, may well not be entitled to threaten a future breach of contract in order to bargain for a lower settlement sum than it genuinely recognises as due. That would not, in all likelihood, reflect a fidelity to the bargain. A party would not be entitled to pretend to negotiate, having decided not to settle what is recognised to be a good claim, in order to drive the other party into an expensive arbitration that it believes the other party cannot afford. If a party recognises, without qualification, that a claim or some material part of it is due, fidelity to the bargain may well require its payment. That, however, is only to say that a party should perform what it knows, without qualification, to be its obligations under a contract. Nothing in cl 35.11 prevents a party, not under such a clear appreciation of its position, from vindicating its position by self-interested discussion as long as it is proceeding by reference to an honest and genuine assessment of its rights and obligations. It is not appropriate to multiply examples. It is sufficient to say that the standard required by the notion of genuineness and good faith within a process of otherwise tactical and self-interested behaviour (negotiation) is rooted in the honest and genuine views of the parties about their existing bargain and the controversy that has arisen in connection with it within the limits of a clause such as cl 35.1.

[74] With respect to those who assert to the contrary, a promise to negotiate (that is to treat and discuss) genuinely and in good faith with a view to resolving claims to entitlement by reference to a known body of rights and obligations, in a manner that respects the respective contractual rights of the parties, giving due allowance for honest and genuinely held views about those pre-existing rights is not vague, illusory or uncertain. It may be comprised of wide notions difficult to falsify. However, a business person, an arbitrator or a judge may well be able to identify some conduct (if it exists) which departs from the contractual norm that the parties have agreed, even if doubt may attend other conduct. If business people are prepared in the exercise of their commercial judgement to constrain themselves by reference to express words that are broad and general, but which have sensible and ascribable meaning, the task of the Court is to give effect to, and not to impede, such solemn express contractual provisions. It may well be that it will be difficult, in any given case, to conclude that a party has not undertaken an honest and genuine attempt to settle

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...a dispute exhibiting a fidelity to the existing bargain. In other cases, however, such a conclusion might be blindingly obvious. Uncertainty of proof, however, does not mean that this is not a real obligation with real content.

COMMENTS

THE ENFORCEMENT OF INFORMAL AGREEMENTS 7.5  Masters v Cameron (1954) 91 CLR 353

COURT: High Court of Australia

FACTS: On 6 December 1951, both parties signed a written memorandum for the sale of Cameron's farm to Masters. The memorandum stated that 'this agreement is made subject to the preparation of a formal contract of sale which shall be acceptable to [Cameron's] solicitors on the above terms and conditions'. On the same day Masters paid a deposit of £1,750 to Cameron's real estate agent. Later, Masters refused to complete the transaction and claimed he was entitled to a refund of the deposit paid to the agent. Cameron claimed that the memorandum created a binding and enforceable contract, even though no formal contract was ever entered into between the parties.

ISSUE: The issue before the High Court was whether the memorandum of 6 December 1951 created a binding and enforceable contract.

DECISION: In a unanimous decision, the High Court (Dixon CJ, McTiernan and Kitto JJ) held in favour of Masters, holding that the memorandum did not create a binding and enforceable contract.

EXTRACT: The extract from the joint judgment of the court discusses the principles that apply in determining whether an informal agreement, which stipulates that a later formal agreement is to be entered into, is enforceable if the later formal agreement is never entered into by the parties.

Dixon CJ, McTiernan and Kitto JJ

[360] The first question in the appeal is whether ... this document on its true construction constitutes a binding contract between [Cameron] and [Masters], or only a record of terms upon which the signatories were agreed as a basis for the negotiation of a contract ...

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 dealt with by a formal contract, the case may belong to any of three classes. It may be one in which 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. Or, secondly, it may be a case in which the parties have completely agreed upon all the terms of their bargain and intend no departure from or addition to that which their agreed terms express or imply, but nevertheless have made performance of one or more of the terms conditional upon the execution of a formal document. Or, thirdly, the case may be one in which the intention of the parties is not to make a concluded bargain at all, unless and until they execute a formal contract.
In each of the first two cases there is a binding contract: in the first case a contract binding the parties at once to perform the agreed terms whether the contemplated formal document comes into existence or not, and to join (if they have so agreed) in settling and executing the formal document; and in the second case a contract binding the parties to join in bringing the formal contract into existence and then to carry it into execution. Of these two cases the first is the more common. Throughout the decisions on this branch of the law the proposition is insisted upon which Lord Blackburn expressed in *Rossiter v Miller* when he said that the mere fact that the parties have expressly stipulated that there shall afterwards be a formal agreement prepared, embodying the terms, which shall be signed by the parties does not, by itself, show that they continue merely in negotiation. His Lordship proceeded: ‘… as soon as the fact is established of the final mutual assent of the parties so that those who draw up the formal agreement have not the power to vary the terms already settled, I think the contract is completed’. A case of the second class came before this court in *Niesmann v Collingridge* where all the essential terms of a contract had been agreed upon, and the only reference to the execution of a further document was in the term as to price, which stipulated that payment should be made ‘on the signing of the contract’. Rich and Starke JJ observed that this did not make the signing of a contract a condition of agreement, but made it a condition of the obligation to pay, and carried a necessary implication that each party would sign a contract in accordance with the terms of agreement. Their Honours … held that there was no difficulty in decreeing specific performance of the agreement, ‘and so compelling the performance of a stipulation of the agreement necessary to its carrying out and due completion’. 

Cases of the third class are fundamentally different. They are cases in which the terms of agreement are not intended to have, and therefore do not have, any binding effect of their own. The parties may have so provided either because they have dealt only with major matters and contemplate that others will or may be regulated by provisions to be introduced into the formal document, as in *Summergreene v Parker* or simply because they wish to reserve to themselves a right to withdraw at any time until the formal document is signed …

[362] So, as Parker J said in *Von Hatzfeldt-Wildenburg v Alexander* in such a case there is no enforceable contract, either because the condition is unfulfilled or because the law does not recognise a contract to enter into a contract. The question depends upon the intention disclosed by the language the parties have employed, and no special form of words is essential to be used in order that there shall be no contract binding upon the parties before the execution of their agreement in its ultimate shape. Nor is any formula, such as ‘subject to contract’, so intractable as always and necessarily to produce that result. But the natural sense of such words was shown by

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18. *Rossiter v Miller* (1878) 3 App Cas 1124 at 1151; see also *Sinclair Scott & Co Ltd v Naughton* (1929) 43 CLR 310 at 317.
19. *Niesmann v Collingridge* (1921) 29 CLR 177 at 185.
20. *Governor etc of the Poor of Kingston-upon-Hull v Petch* (1854) 156 ER 583.
21. (1950) 80 CLR 304.
22. [1912] 1 Ch 284 at 289.
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the language of Lord Westbury when he said in Chinnock v Marchioness of Ely: ‘if to a proposal or offer an assent be given subject to a provision as to a contract, then the stipulation as to the contract is a term of the assent, and there is no agreement independent of that stipulation’.25 …

This being the natural meaning of ‘subject to contract’, ‘subject to the preparation of a formal contract’, and expressions [363] of similar import, it has been recognised throughout the cases on the topic that such words prima facie create an overriding condition, so that what has been agreed upon must be regarded as the intended basis for a future contract and not as constituting a contract. Indeed, Lord Greens MR remarked during the argument in Eccles v Bryan and Pollock26 that when the expression ‘subject to contract’ was used he had never known a case in which it had been suggested, much less held, that this did not import that there was nothing binding till the exchange of parts of the formal contract was made …

[364] In the present case the context provides no reason for holding that the case is outside the application of these authorities. The formal contract, it is true, is to be ‘on the above terms and conditions’, but it is to be acceptable to the vendor’s solicitors, and the meaning is sufficiently evident that the contract shall contain, not only the stated terms and conditions expressed in a form satisfactory to the solicitors, but also whatever else the solicitors may fairly consider appropriate to the case. Accordingly … no binding contract for the sale and purchase of the property mentioned in the document dated 6 December 1951 was made between [Cameron] and [Masters].

COMMENTS

2. To the three categories noted in Masters v Cameron, a fourth has been added in Baulkham Hills Private Hospital Pty Ltd v GR Securities Pty Ltd (1986) 40 NSWLR 622 at 628: see Radan & Gooley at 7.25–7.27. The need for recognising the fourth category the fourth category is challenged in E Peden, J W Carter and G Tolhurst, ‘When Three Just Isn’t Enough: the Fourth Category of the “Subject to Contract” Cases’ (2004) 20 Journal of Contract Law 156. It has been argued that the four categories should be abandoned and replaced by two categories, the first being agreements intended to be legally binding that are sufficiently complete to be enforceable and the second being agreements that are not intended to be legally binding or that are not sufficiently complete: D W McLauchlan, ‘In Defence of the Fourth Category of Preliminary Agreements: Or Are There Only Two?’ (2005) 21 Journal of Contract Law 286. On the other hand it has been suggested that all the categories should be dispensed with, and that the question to be determined in any given case being ‘whether the objective intention of the putative parties … shows an intention to be bound’: B Walker, ‘The Fourth Category of Masters v Cameron’ (2009) 25 Journal of Contract Law 108 at 116–17.

25. Chinnock v Marchioness of Ely (1865) 46 ER 1066 at 1069.
26. [1948] Ch 93 at 94.
3. In relation to entering into formal contracts for the sale of land, in Marek v Australasian Conference Association Pty Ltd [1994] 2 Qd R 521 at 527–8, McPherson SPJ said:

The usual expectation of parties in negotiations of the sale of land is that they will not be taken to have made a concluded bargain unless and until a formal contract is executed. In this State real estate is ordinarily agreed to be sold by the execution by vendor and purchaser of a form of contract adopted by the Real Estate Institute of Queensland and approved by the Queensland Law Society … This notorious fact largely explains why these days in land sales the ‘expectation is strong that the parties did not intend to be bound until a formal contract is executed’ … Exceptionally, the conduct of the parties may reveal an intention to make a binding agreement concerning land before a formal contract is signed … However such cases are rare. Where solicitors are to assist in the preparation of a contract for the sale of real estate, that factor tends to make it less likely that the parties desire to be finally committed before the contract’s execution.