SUPREME COURT OF QUEENSLAND

CITATION:	*King Tide Company Pty Ltd v Arawak Holdings Pty Ltd* [2017] QCA 251
PARTIES:	**KING TIDE COMPANY PTY LTD** **ACN 602 611 423** **(appellant)** **v** **ARAWAK HOLDINGS PTY LTD** **ACN 157 865 195** **(respondent)**
FILE NO/S:	Appeal No 5530 of 2017 SC No 9275 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane – [2017] QSC 70 (Martin J)
DELIVERED ON:	27 October 2017
DELIVERED AT:	Brisbane
HEARING DATE:	18 September 2017
JUDGES:	Fraser and Gotterson JJA and Bond J
ORDERS:	**Appeal dismissed with costs.**
CATCHWORDS:	CONTRACTS – FORMATION OF CONTRACTUAL RELATIONS – ACCEPTANCE ADDING TO OR VARYING TERMS OF OFFER - COUNTER-OFFER – where the appellant and respondent were the plaintiffs in a separate proceeding brought against a third party – where the appellant alleged that the parties had formed a legally binding agreement as to the conduct of the proceeding against the third party – whether a contract was formed as a result of correspondence between the parties CONTRACTS – FORMATION OF CONTRACTUAL RELATIONS – CONTRACT IMPLIED FROM CONDUCT OF PARTIES – where the appellant and respondent were the plaintiffs in a separate proceeding brought against a third party – where the appellant alleged that the parties had formed a legally binding agreement as to the conduct of the proceeding against the third party – whether a contract could be implied from the parties' conduct *Adnunat Pty Ltd v ITW Construction Systems Australia Pty Ltd* [2009] FCA 499, cited

Alborn v Stephens [2009] QCA 384, cited
Apple and Pear Australia Ltd v Pink Lady America LLC (2016) 343 ALR 112; [2016] VSCA 280, cited
Australian Energy Ltd v Lennard Oil NL [1986] 2 Qd R 216, cited
Brambles Holdings Ltd v Bathurst City Council (2001) 53 NSWLR 153; [2001] NSWCA 61, cited
Brogden v Metropolitan Railway Co (1877) 2 App Cas 666, cited
Empirnall Holdings Pty Ltd v Machon Paull Partners Pty Ltd (1988) 14 NSWLR 523, cited
Feldman v GNM Australia Ltd [2017] NSWCA 107, cited
Integrated Computer Services Pty Ltd v Digital Equipment Corporation (Aust) Pty Ltd (1988) 5 BPR 11,110, cited
Laidlaw v Hillier Hewitt Elsley Pty Ltd [2009] NSWCA 44, cited
Masters v Cameron (1954) 91 CLR 353; [1954] HCA 72, cited
P'Auer AG v Polybuild Technologies International Pty Ltd [2015] VSCA 42, cited
Pavlovic v Universal Music Australia Pty Ltd (2015) 90 NSWLR 605; [2015] NSWCA 313, cited
Port Jackson Stevedoring Pty Ltd v Salmond & Spraggon (Aust) Pty Ltd (1978) 139 CLR 231; [1978] HCA 8, cited
Whisprun Pty Ltd v Dixon (2003) 77 ALJR 1598; [2003] HCA 48, cited
Woolcorp Pty Ltd v Rodger Constructions Pty Ltd [2017] VSCA 21, cited

COUNSEL: M L Robertson QC, with S Carius, for the appellant
B W J Kidston, with A N Quinn, for the respondent

SOLICITORS: Aylward Game Solicitors for the appellant
Enyo Lawyers for the respondent

[1] **FRASER JA:** The appellant appeals against a decision by a judge in the Trial Division refusing a declaration that the appellant and the respondent made a valid and binding contract governing their participation as plaintiffs in a proceeding against other parties. Bond J's chronological analysis of the events upon which the appellant relied in the appeal (in [22]-[68] of his Honour's reasons) convincingly demonstrates that, upon the necessary objective analysis, the parties did not reach a consensus upon the terms of the alleged contract or make any agreement by which they intended immediately to be bound. I agree with Bond J's reasons ([70]-[94]) for rejecting the appellant's arguments that the alleged contract was concluded. I also agree with Bond J's reasons ([96]-[108]) for rejecting the appellant's contention that the matter should be remitted to the Trial Division for an assessment of damages for breach of a different contract, an antecedent partnership agreement which the respondent denied was binding upon it.

[2] Otherwise, I generally agree with Bond J's reasons and I agree that the appeal should be dismissed with costs.

[3] **GOTTERSON JA:** I agree with the order proposed by Bond J and with the reasons given by his Honour.

[4] **BOND J:**

Introduction

[5] Before the learned primary judge the appellant had sought and failed to obtain a declaration that on or about 31 October 2014 a valid and binding contract was entered into between the appellant and the respondent governing their participation as plaintiffs in a separate proceeding which was commenced against two other parties on 31 October 2014.

[6] The appellant also failed to obtain the ancillary relief which it had sought, namely an order for specific performance of the alleged contract, and an injunction restraining the respondent from compromising, discontinuing or withdrawing from the separate proceeding.

[7] By this appeal the appellant sought to overturn the learned primary judge's conclusion that the appellant had failed to prove that the appellant and the respondent had reached a legally binding contract between themselves. In support of this contention, the appellant sought to demonstrate that the learned primary judge erred in his analysis of alleged offer, alleged acceptance and relevant conduct in various ways.[1]

[8] On the appellant's case, his Honour should have found that a contract had been formed by 31 October 2014, when the separate proceeding commenced, and that it comprised the following terms:[2]

(a) the appellant would fund the litigation [i.e. the separate proceeding];

(b) the respondent would take all steps necessary to assign its interest in the litigation to the appellant;

(c) the respondent would do all things reasonably necessary to assist in the preparation and conduct of the litigation;

(d) the respondent would be entitled to 12.5% of any gross amount received from a beneficial order or settlement in the litigation; and

(e) the appellant would indemnify Mr Perry (the sole director and shareholder of the respondent) personally for any exposure to costs or other negative legal complication arising from the litigation.

[9] As the separate proceeding has now settled,[3] the ancillary relief which the appellants sought from this Court by the notice of appeal was, in lieu of specific performance and an injunction, damages for breach of the term that the respondent would do all things reasonably necessary to assist in the preparation and conduct of the litigation, to be assessed on remitter to the trial division.

[10] For reasons expressed below, the appeal should be dismissed. The learned primary judge was correct to reject the appellant's case as to contract formation. And if the contract was not formed as alleged then the remitter case raised by the notice of appeal must also fail.

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[1] The appellant also contended that an estoppel by convention prevented the respondent from denying that the alleged contractual terms were binding between the appellant and the respondent. It is unnecessary to consider the merits of this contention because the appellant cannot be permitted to take this new point on appeal. No estoppel case was advanced below and an estoppel case was something which the respondent might have met by rebutting evidence or cross-examination: cf *Whisprun Pty Ltd v Dixon* (2003) 77 ALJR 1598 per Gleeson CJ and McHugh and Gummow JJ at [51].

[2] AR 700-701: Notice of appeal at 2.1.

[3] The Court was informed from the bar table that this was common ground. There was no evidence of the nature of the settlement or how it came about.

[11] The structure of these reasons will be, first, to identify the legal principles relevant to the assessment of the evidence concerning contract formation, second, to conduct a chronological analysis of the evidence on that question and, finally, to deal with the appellant's arguments on appeal.

Relevant legal principles

[12] The appellant's case below principally sought to prove that a contract had been formed by the application of a classical offer and acceptance analysis.

[13] The application of the classical theory of contract formation requires a consideration of the terms of an alleged offer and the terms of the alleged acceptance. If the acceptance corresponds with the offer, then so long as the other requisite elements exist (namely intention to be legally bound, consideration and certainty[4]), then a legally binding contract will, generally speaking, have been formed.

[14] A complication which sometimes arises is that the offer and acceptance analysis reveals that the parties contemplated a subsequent formal document, hence the *Masters v Cameron*[5] classes of case. In such cases, the decisive consideration is an objective assessment of whether, as at the time in question, the parties intended to bind themselves to the terms of a particular contract, in advance of the creation of the formal document.[6]

[15] It remains to note that it is not controversial that conduct occurring after the date a contract was allegedly formed by acceptance of an offer is admissible on the question of whether a contract has been formed as alleged.[7]

[16] The appellant did not, however, limit its case to the application of classical offer and acceptance analysis, either below or in this Court.

[17] It is, of course, well recognized that the classical analysis is neither necessary nor suitable to all cases.[8] Thus, in *Integrated Computer Services Pty Ltd v Digital Equipment Corporation (Aust) Pty Ltd*,[9] McHugh JA (with whom Hope and Mahoney JJA agreed) observed:

> It is often difficult to fit a commercial arrangement into the common lawyers' analysis of a contractual arrangement. Commercial discussions are often too unrefined to fit easily into the slots of "offer", "acceptance", "consideration" and "intention to create a legal relationship" which are the benchmarks of the contract of classical theory. In classical theory, the typical contract is a bilateral one and consists of an exchange of promises by means of an offer and its acceptance together with an intention to create a binding legal relationship …. A bilateral contract of this type exists independently of and indeed precedes what the parties do. Consequently, it is an error "to suppose that merely because something has been done then there is therefore some contract in existence which has thereby been executed"…. Nevertheless, a contract may be inferred from the acts and conduct of parties as well as or in the absence of their words: ... . The question in this class of case is whether the conduct of the parties viewed in the light of the surrounding circumstances shows a tacit understanding or agreement. The conduct of the parties, however, must be capable of proving all the essential elements of an express contract: …. Care must also be taken not to infer anterior

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[4] N Seddon, R Bigwood and M Ellinghaus, *Cheshire & Fifoot's Law of Contract* (2012, 10th Australian edition, LexisNexis Butterworths) at [1.16].
[5] (1954) 91 CLR 353.
[6] *Pavlovic v Universal Music Australia Pty Ltd* [2015] NSWCA 313 per Bathurst CJ at [15], per Beazley P (with whom Meagher JA agreed) at [64]-[65]; *Feldman v GNM Australia Ltd* [2017] NSWCA 107 per Beazley P (with whom McColl and Macfarlan JJA agreed) at [68].
[7] *Feldman v GNM Australia Ltd* [2017] NSWCA 107 per Beazley P (with whom McColl and Macfarlan JJA agreed) at [90]-[91].
[8] Cf *Alborn v Stephens* [2009] QCA 384 per Muir JA (with whom Holmes JA and Daubney J agreed) at [53].
[9] (1988) 5 BPR 11,110, at 11,117 – 11,118 (references omitted).

promises from conduct which represents no more than an adjustment of their relationship in the light of changing circumstances.

[18] Three relevant propositions of legal principle can be identified in the case law.

[19] **First**, where the question of contract formation involves determining whether acceptance of an offer can be inferred in the absence of express consent, acceptance of the offer may be inferred if an objective bystander would conclude from the offeree's conduct, including its silence, that the offeree has accepted the offer and has signalled that acceptance to the offeror.[10]

[20] **Second**, a similar objective approach is to be taken where the question of contract formation involves determining whether a contract may be inferred from conduct, even where no distinct offer and distinct acceptance can be identified. An enforceable contract may be inferred when the manifest intention of the parties, objectively ascertained, evinces a tacit agreement with sufficiently clear terms.[11]

[21] **Third**, in both cases, care must be taken to ensure that the objective assessment of the relevant conduct in all the circumstances unequivocally points to the existence of the contract in the terms alleged by the party seeking to prove the contract.[12] It is not enough that the conduct is merely consistent with the terms of the alleged binding agreement, the evidence must positively indicate that both parties considered themselves bound by that agreement.[13]

Chronological analysis

[22] It is appropriate to analyse the course of events by reference to events up to and including 31 October 2014 and events after that date.

Events up to and including 31 October 2014

[23] In September 2006, Kentgale Pty Ltd was the trustee of the Hartnett No 5 Discretionary Trust (**the Hartnett Trust**). The Hartnett Trust was a trust associated with the interests of Mr Beau Hartnett, who is and was a solicitor and principal of the firm Hartnett Lawyers. Vault 8 Holdings Pty Ltd was the trustee of the Perry Investment Trust No 2 (**the Perry Trust**). The Perry Trust was a trust associated with the interests of Mr Craig Perry.

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[10] *Brogden v Metropolitan Railway Co* (1877) 2 App Cas 666 per Lord Hatherley at 682, 686 and per Lord Blackburn at 693; *Australian Energy Ltd v Lennard Oil NL* [1986] 2 Qd R 216 per Thomas J at 237; *Empirnall Holdings Pty Ltd v Machon Paull Partners Pty Ltd* (1988) 14 NSWLR 523 per Kirby P at 528–9 and per McHugh JA (with whom Samuels JA agreed) at 534–5; *Brambles Holdings Ltd v Bathurst City Council* (2001) 53 NSWLR 153 per Ipp AJA (with whom Mason P agreed) at [162]; *Laidlaw v Hillier Hewitt Elsley Pty Ltd* [2009] NSWCA 44 per Macfarlan JA (with whom Beazley JA agreed) at [8]-[9]; *Alborn v Stephens* [2009] QCA 384 per Muir JA (with whom Holmes JA and Daubney J agreed) at [51]-[54]; *P'Auer AG v Polybuild Technologies International Pty Ltd* [2015] VSCA 42, per Whelan JA (with whom Ferguson and Kaye JJA agreed) at [9]; *Woolcorp Pty Ltd v Rodger Constructions Pty Ltd* [2017] VSCA 21 per Santamaria and Kyrou JJA and Elliott AJA at [9].

[11] *Adnunat Pty Ltd v ITW Construction Systems Australia Pty Ltd* [2009] FCA 499 per Sundberg J at [39], cited with approval in *P'Auer AG v Polybuild Technologies International Pty Ltd* [2015] VSCA 42 per Whelan JA (with whom Ferguson and Kaye JJA agreed) at [11]; *Apple and Pear Australia Ltd v Pink Lady America LLC* (2016) 343 ALR 112 per Tate JA (with whom Ferguson and McLeish JJA agreed) at [221]; *Woolcorp Pty Ltd v Rodger Constructions Pty Ltd* [2017] VSCA 21 at [9].

[12] *Laidlaw v Hillier Hewitt Elsley Pty Ltd* [2009] NSWCA 44 per Macfarlan JA (with whom Beazley JA agreed) at [8]-[9] and see, to similar effect, *Australian Energy Ltd v Lennard Oil NL* [1986] 2 Qd R 216 per Thomas J at 237; *P'Auer AG v Polybuild Technologies International Pty Ltd* at [11]; *Apple and Pear Australia Ltd v Pink Lady America LLC* (2016) 343 ALR 112 at [221]; *Woolcorp Pty Ltd v Rodger Constructions Pty Ltd* [2017] VSCA 21 at [9].

[13] See the authorities referred to in footnote 11.

[24] Between 2000 and 2016, Hartnett Lawyers acted for Mr Perry, and various entities controlled by him, in a number of matters.[14]

[25] On or about 5 September 2006, Mr Hartnett and Mr Perry and the two trustee companies entered into a partnership and agency agreement (**the partnership agreement**).[15] The relevant features of that agreement were:

(a) The parties to the agreement were:

(i) Kentgale Pty Ltd as trustee for the Hartnett Trust and Vault 8 Holdings Pty Ltd as trustee for the Perry Trust (referred to as the "Partners");

(ii) Mr Hartnett and Mr Perry (referred to as the "Key Persons"); and

(iii) Bullish Bear Holdings Pty Ltd (**Bullish Bear**) (referred to as the "Agent").

(b) Each Partner had a 50% interest in the partnership (clause 1.4).

(c) The Agent was required to conduct the business of the partnership in accordance with the direction of the Board (clause 2.1(i)). At the commencement of the partnership agreement the Board consisted of Mr Hartnett (clause 2.1(v)), but it later included Mr Perry as well.[16]

(d) The net profits of the partnership (after payment of expenses and outgoings) were to belong to the Partners in proportion to their interest (clause 4.1(i)).

(e) Each Key Person was entitled to certain entitlements as determined by the Board (clause 4.2 and Schedule 1), and each Key Person and each Partner was subject to certain obligations, including:

(i) an obligation to exercise their best endeavours in the performance of their respective functions in connection with the conduct of the partnership and the business (clause 4.3(a)); and

(ii) an obligation not to engage in any activity which might adversely prejudice the partnership or the business (clause 4.3(f)).

(f) No Partner or Key Person could take any steps in relation to certain listed matters without obtaining the prior agreement of the Board, or unless acting in that person's role as Managing Director of the Agent (clause 4.4). The listed matters included compromising or releasing any claim or debt vested in the partnership (other than a claim or debt not exceeding $10,000.00) (clause 4.4(j)).

(g) Each Partner and Key Person was required to indemnify and keep indemnified the partnership against any loss arising directly or indirectly from any breach of clause 4.4.

[26] Between 2006 and 2008 events occurred in relation to the partnership which caused the Partners to suffer loss.[17] Those events, as alleged by the partners, may be summarized in the following way:

(a) Pursuant to the partnership agreement, Bullish Bear was appointed to conduct the partnership business. It acted as agent of the partnership in connection

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[14] AR 182-183.
[15] See AR 80-105.
[16] The court was told from the bar table that Mr Hartnett and Mr Craig made joint decisions of the Board. A company search of Bullish Bear as at December 2016 also shows both Mr Hartnett and Mr Perry as directors: AR 445.
[17] AR 65-66; AR 301-302.

with a proposed redevelopment project in respect of land owned by the partnership.

(b) In May 2007, Bullish Bear had the opportunity to enter into a contract with a third party to sell rather than redevelop the land, which contract would have realized $5.3 million in profit.

(c) In reliance on misleading representations made by another company, City Pacific Limited, on about 8 June 2007 Bullish Bear decided not to proceed with the sale agreement and instead entered into a loan agreement with City Pacific in August 2007 with a view to proceeding with the redevelopment project.

(d) In November 2008, City Pacific defaulted on the loan agreement, which ultimately meant that the redevelopment project could not proceed.

(e) But for City Pacific's misleading conduct, Bullish Bear would have proceeded with the sale agreement and made the $5.3 million in profit for the Partners.

[27] The trustees of the Hartnett Trust and the Perry Trust subsequently changed over time.

[28] For the Hartnett Trust, the changes in trustee were as follows:

(a) on 20 May 2011, Capital House Holdings Pty Ltd replaced Kentgale Pty Ltd[18] (the latter company was placed into liquidation on 24 May 2011[19]);

(b) on 31 December 2012, Kentgale Holdings Pty Ltd replaced Capital House Holdings Pty Ltd;[20] and

(c) on 30 October 2014, the appellant replaced Kentgale Holdings Pty Ltd.[21]

[29] For the Perry Trust, the changes in trustee were as follows:

(a) on 17 July 2009, Goldeneye Developments Pty Ltd replaced Vault 8 Holdings Pty Ltd[22] (the latter company was placed into liquidation on 26 August 2013[23]); and

(b) on 18 April 2012 the respondent replaced Goldeneye Developments Pty Ltd[24] (the latter company was deregistered on 18 September 2014[25]).

[30] By email on 3 October 2014, Hartnett Lawyers sent a letter addressed to Mr Hartnett and Mr Craig on the subject matter of "possible action by Beau Hartnett and Craig Perry and/or associated entities against [named parties] - Bullish Bear Partnership".[26]

[31] The letter recited the relevant background facts for a possible damages claim, and noted that, to that date, none of Mr Hartnett, Mr Perry or their respective entities had commenced proceedings. The letter then advised that the limitation period for any such action would expire on 24 November 2014, and concluded as follows:

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[18] AR 299.
[19] AR 337.
[20] AR 299.
[21] AR 298.
[22] AR 300.
[23] AR 386.
[24] AR 289-292; AR 373-375.
[25] AR 377.
[26] AR 452-455.

> We are instructed by Beau and his related entities to proceed to prepare a claim in respect of the possible action, with a view toward filing such process with the Court prior to the expiration of the limitation date.
>
> We advise that it will be a necessary part of this process for us to engage and retain a suitably experienced Barrister in the near future to review the matter and otherwise settle the claim pleading prior to filing with the Court. In this regard, we would be recommending that a Queen's Counsel be engaged.
>
> In light of these considerations and the impending limitation date we now request that Craig advise us of his instructions in relation to the matter, in particular whether he and/or his related entities wish to participate in the proposed claim.
>
> Accordingly, we request that Craig advise us by no later than 4.00p.m. on Friday 17 October 2014 of his instructions in this matter.[27]

[32] The letter had noted that Mr Perry was self-represented "at this stage" and concluded with the statement that as Mr Perry had previously been represented by the law firm Wockner Partners, Hartnett Lawyers had forwarded a copy of the email to that firm "for expediency".

[33] By email on 17 October 2014 at 4:37pm, Hartnett Lawyers sent a further letter to Mr Hartnett and Mr Perry (copied to Wockner Partners) which referenced the same subject matter as the letter of 3 October 2014, and which contained the following:

> In accordance with our previous correspondence we have commenced preparation of a draft claim in respect of the possible action (the **pleading**).
>
> We confirm that we have advised that court proceedings must be filed before the expiry of the statute of limitations period, namely **24 November 2014** (the **limitation date**).
>
> Craig Perry (Craig) was requested to advise us by **4.00p.m. today** of his instructions in relation to this matter, namely whether he and/or his related entities wish to participate in the proposed claim.
>
> We note that we are yet to receive a response from Craig, or his solicitors in response to this request.[28]

[34] The letter requested Mr Perry to provide instructions as soon as practicable but in any event within 7 days and invited Mr Perry to telephone Luke Keane of Hartnett Lawyers to discuss.

[35] It may be inferred that Mr Perry contacted Mr Keane shortly after receiving that letter. On 17 October 2014 at 6:02pm, Mr Keane sent a letter to Mr Hartnett containing the following:

> I just spoke to Craig Perry.
>
> Craig apologised for not getting back to me earlier, noting that he must have "overlooked" the response date.
>
> Craig advised in any event that:
>
> 1. He is not in a position to fund any proposed action;
> 2. However, if you wanted to make a "proposal" to him regarding such matters that he would consider it.
>
> I indicated I would take instructions from you and revert in due course.[29]

[36] On the morning of 24 October 2014 Hartnett Lawyers contacted senior counsel noting that in the preliminary view of Hartnett Lawyers the limitation period would

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[27] AR 453-455.
[28] AR 456-458.
[29] AR 459.

expire on 2 November 2014 or 23 November 2014, and seeking senior counsel's opinion as to when the prospective action would need to be commenced.[30]

[37] By email at 2:23pm on 24 October 2014, Hartnett Lawyers sent a letter by email to Mr Perry, again copied to Wockner Partners and again expressed to be with respect to the subject matter of a "possible action by Beau Hartnett and Craig Perry and/or associated entities against [named defendants] - Bullish Bear Partnership". Relevantly, the letter stated:

> We are instructed by Beau to put the following 'in principle' proposal to you regarding this matter:
>
> 1. Beau is prepared to fund the possible action (including pursuit of your personal interest and/or of any interest your entity/ies may have in respect of it) on the following bases:
>
> (a) you assign to him your personal interest and/or your entity/ies interest in the possible action; and
>
> (b) you agree to assist and otherwise make yourself available and do all things necessary on your behalf personally, and on behalf of your entity/ies to assist in the preparation and conduct of this matter.
>
> 2. In exchange for the above you will be entitled to 20% of the amount of the net amount received (after legal costs) pursuant to any beneficial order or settlement made in your favour or that of your entity/ies as arising from or related to the possible action (payment of which is to be made within 28 days of the receipt of such amount by Beau or his entity/ies).
>
> …
>
> [W]e require that you advise us **by 4.00p.m. Friday 31 October 2014** as to whether you are agreeable to the proposal.
>
> As you are aware, the matter is pressing having regard to the application of the statutory limitation periods, and recognising that your agreement will need to be documented.[31]

[38] I observe:

(a) This was the first relevant offer.

(b) The subject matter of the email referred to a possible proceeding by Beau Hartnett and Craig Perry and/or associated entities against defendants and concerning the Bullish Bear Partnership. It was obvious that the proposal was for an agreement to be struck in relation to certain matters connected with the contemplated proceeding.

(c) However, an objective assessment of the email leads to the conclusion that the identity of the proposed contracting parties was left unclear. The proposal contemplated that Mr Hartnett personally would be a party because he was the offeror, he was to do the funding and he was to be the assignee. The proposal obviously also contemplated that Mr Perry personally would be a party because he was to assign to Mr Hartnett his personal interest, and he was the party promising to assist, personally and on behalf of his entities. That reference also suggested the possible contemplation that Mr Perry's entities would be party to the agreement because they too were to assign their interest in the possible action. The reference in item 2 to "Beau or his entity/ies" suggests the same possibility in relation to Mr Hartnett's entities.

(d) The proposal was that Mr Hartnett would "fund" the possible action. It was unclear whether that extended to any possible costs liability to the proposed defendants, or any exposure to any counterclaim from those defendants.

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[30] AR 461.
[31] AR 463-465.

(e) The proposed return to Mr Perry and/or his entities was 20% of a figure net of costs. It is important also to note that the figure from which costs were deducted was not the total judgment in favour of the plaintiffs, but the amount received "pursuant to any beneficial order or settlement made in your favour or that of your entity/ies as arising from or related to the possible action".

(f) The reference in the first paragraph to the proposal being "in principle" and the acknowledgment in the last paragraph that the agreement would "need to be documented" raises a *Masters v Cameron* issue. At that time, given:

(i) that the letter was from a law firm to a person who had been their client in relation to a proposed contract between the principal of the firm and their former client; and

(ii) that the letter was sent in the context of an evident contemplation that their former client would obtain separate advice from another law firm (namely Wockner Partners),

an objective assessment of the intention revealed by the letter must be that the sender contemplated a binding agreement being struck only when Mr Perry's personal indication that he was agreeable to the proposal was subsequently documented (presumably with the involvement of the other law firm). That assessment is also supported by the then lack of clarity as to the identity of the contracting parties.

[39] Mr Perry replied to the letter of Hartnett Lawyers of 24 October 2014 by way of an email sent at 2:37pm on 28 October 2014 which contained the following:

> Please advise Beau that I am prepared to accept 12.5% of any gross amount that maybe [sic] awarded from the outcome of the proposed litigation. For the sake of clarity that is prior to any legal costs or other ancillary costs being deducted.
>
> I will assign by interest to Beau if I personally am indemnified from any exposure to costs or a costs order from the Courts or any legal complication that may be construed as a negative.
>
> Otherwise I agree to the terms suggested.[32]

[40] I observe:

(a) Mr Perry's email must be regarded as a counter offer.

(b) An objective assessment of the counter offer is that Mr Perry accepted subparagraphs (a) and (b) of item 1 of the "in principle" proposal, but rejected Mr Hartnett's proposal regarding funding and consideration.

(c) As to funding, Mr Perry sought more than just Mr Hartnett's agreement to fund. He sought an indemnity from Mr Hartnett from three types of risk:

(i) exposure to costs;

(ii) exposure to a costs order; and

(iii) exposure to "any legal complication that may be construed as a negative".

(d) As to consideration, Mr Perry's proposal differed in two important respects:

(i) First he proposed to take a lesser percentage return, but of the gross, not the net.

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[32] AR 108.

(ii) Second, the percentage return was applied to "the amount awarded from the outcome of the proposed litigation", not merely the amount received in his favour.

(e) As to the *Masters v Cameron* issue, Mr Perry did not copy in Wockner Partners or otherwise respond on the question of documentation. But there is no reason to suppose that the objective assessment which I expressed at [38](f) above had changed.

[41] Mr Keane of Hartnett Lawyers replied to Mr Perry by way of email at 7:01pm on 28 October 2014, copied to Wockner Partners. That email contained the following:

> 1. 'In principle' agreement to assignment
>
> Beau is agreeable to your proposal that you receive 12.5% of the gross amount received pursuant to any beneficial order or settlement made in your favour or that of your entity/ies.
>
> I will forward suitable documentation recording this agreement to you in due course.
>
> 2. Parties
>
> Your claim will be brought in the name of the trustee of the Perry Investment Trust No 2.
>
> Would you kindly provide a copy of the deed of removal and replacement appointing a new trustee to your trust in place of Vault 8 Holdings Pty Ltd (in liquidation).[33]

[42] The letter also requested other information from Mr Perry, and requested that Mr Perry provide his response to the letter overnight.

[43] I observe:

(a) The letter did not express agreement to Mr Perry's proposal about assignment and consideration in the terms in which it was expressed. Rather, it restated Mr Perry's proposal in different words and purported to accept the proposal so restated. Importantly, the different words were not insignificant because they were a return to something akin to Mr Hartnett's original proposal that the percentage be applied to the amount received in favour of Mr Perry and/or his entities, not to the total judgment in favour of the plaintiffs.

(b) The letter did not respond at all to the obviously critical matter of Mr Perry's proposal for an indemnity from Mr Hartnett. An objective bystander could not conclude that the letter was communicating Mr Hartnett's acceptance of Mr Perry's proposal in that regard.

(c) As to the *Masters v Cameron* issue, Mr Keane copied in Wockner Partners, repeated the reference to "in principle" agreement and said that he would forward suitable documentation recording the agreement to the assignment in due course. There is still no reason to suppose that the objective assessment which I expressed at [38](f) above had changed. The fact that the parties were not yet *ad idem* on the terms of Mr Perry's proposal for an indemnity from Mr Hartnett provides further support for that assessment.

(d) The request for a response was in relation to the information which had been sought, so that that information could be provided to senior counsel by way of necessary instructions. It was not a request for a further response from Mr Perry on the question of the agreement as to the terms of his participation in the litigation.

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[33] AR 470.

[44] Mr Perry replied to Hartnett Lawyers (but without copying in Wockner Partners) 16 minutes later at 7:17pm on 28 October 2014, in the following terms:

> Unfortunately I'm not able to meaningfully respond as requested overnight. I would need to refresh my mind regarding the file.
>
> I have a 10am meeting tomorrow in Surfers Paradise which I anticipate to finalise by midday. If this is too late I could endeavor to come in directly after dropping my kids at school placing me at your office at about 9:15am which would allow us 45 minutes.
>
> Please advise which is more suitable.[34]

[45] Mr Perry's response was responding only to the request for information. It did not advance any further the question of the formation of the contract.

[46] It may be inferred that Mr Perry did speak to Mr Keane of Hartnett Lawyers the next morning. On 29 October 2014, Mr Keane sent an email to Mr Hartnett which indicated that he had spoken to Mr Perry, and that Mr Perry had confirmed that the respondent was the new corporate trustee. The letter included the following:

> Further, I have pressed Craig in relation to the tight timeframes and explained that we are filing on Friday [31 October 2014] out of caution to comply with the limitation period. He has indicated that he may be able to come in tomorrow morning to discuss. I indicated this would be preferable to next week.[35]

[47] On 30 October 2014 at 12:15pm, Mr Keane requested from Mr Perry details of the date and means by which the respondent replaced Vault 8 Pty Ltd as trustee of the Perry Trust.[36] Mr Perry replied (copying in Wockner Partners) at 4:43pm in the following terms:

> I am unable to give you certainly [sic] regarding the assignment and date of the assignment of the Perry Investment Trust #2 today. However Geoff Wockner has requested archived documents that should be able to clarify by tomorrow.[37]

[48] It may be noted that Mr Perry had in fact contacted Wockner Partners at least to request them to obtain archived documents. The latter would have tended to confirm the perception that Mr Perry intended the involvement of the other law firm. (I interpolate that such a perception would have been further confirmed by a telephone conference between Mr Keane, Mr Perry and Mr Wockner which took place the following morning in relation to the pursuit of the relevant information.[38])

[49] At 7:38pm on 30 October 2014, Mr Keane sent an email to senior counsel which included the following:

> We confirm that we have been instructed by Beau Hartnett and Craig Perry, respectively, of the correct trustees to plead as plaintiffs in this matter, namely:
>
> 1. King Tide Company Pty Ltd; and
>
> 2. Arawak Holdings Pty Ltd.
>
> We have [to] plead having regard to these entities and note that Craig Perry is going to confirm with us tomorrow the details surrounding his assignment of trusteeship to Arawak Holdings Pty Ltd.[39]

[50] The information relating to the date and means by which the respondent became the trustee of the Perry Trust was provided at 9:26am on 31 October 2014.[40]

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[34] AR 475.
[35] AR 473.
[36] AR 482.
[37] AR 482.
[38] AR 488.
[39] AR 485.
[40] AR 487.

Documents relating to the Perry Trust were provided at 12:02pm on 31 October 2014.[41]

[51] The appellant was incorporated on 30 October 2014.[42] On the same day, the appellant replaced Kentgale Holdings Pty Ltd as trustee of the Hartnett Trust. As at 30 October 2014, therefore, the appellant was trustee of the Hartnett Trust, and the respondent was trustee of the Perry Trust. Mr Hartnett was the sole director and shareholder of the appellant[43] and Mr Perry was the sole director and shareholder of the respondent.[44]

[52] On 31 October 2014, Hartnett Lawyers filed a claim and statement of claim on behalf of the appellant and the respondent.[45] The appellant and the respondent were the only plaintiffs and they advanced a damages case in which they sought to recover damages for the loss of the $5.3 million profit which, but for City Pacific's misleading conduct, Bullish Bear would have made for the former trustees.

Events after 31 October 2014

[53] On 5 November 2014, Hartnett Lawyers sent a letter to Mr Perry (copied to Wockner Partners), confirming that the proceedings had been commenced and requesting confirmation of some details and provision of some relevant documentation.[46] On the same day, Mr Keane of Hartnett Lawyers separately emailed Mr Perry (copied to Wockner Partners) requesting further information and instructions concerning the history of changes to the Perry Trust, including details of variations made to the deed of trust.[47] Mr Perry replied (copied to Wockner Partners) that Mr Wockner was away until the following week and at which time Mr Perry would ensure that the relevant documents were copied through to Hartnett Lawyers.[48]

[54] Further exchanges took place in November 2014 and December 2014 in which information was requested, provided and in some respects queried. There is no evidence to suggest that Hartnett Lawyers had yet acted on the intention stated in their email of 28 October 2014 that they would "forward suitable documentation recording [the agreement concerning Mr Perry's assignment of his interest in the proceeding] in due course".

[55] Rather, it seems that the subject matter was not raised by them until a year later, on 28 October 2015, when Hartnett Lawyers sent a letter to Mr Perry informing him that the claim and statement of claim had not yet been served. The letter also contained the following:

> We note that agreement has previously been reached between yourself and Beau Hartnett concerning the assignment of your personal interest and that of Arawak in respect of the Claim.
>
> We are instructed to advise that Mr Hartnett and King Tide Company Pty Ltd consider there some benefit to having this arrangement formally documents [sic] by an independent solicitors firm, particularly if the issue of such assignment is scrutinised as part of the litigation.[49]

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[41] AR 489.
[42] AR 76; AR 310.
[43] AR 76-77; AR 296.
[44] AR 78-79.
[45] AR 308; AR 502-518.
[46] AR 520-521.
[47] AR 530-531.
[48] AR 530.
[49] AR694 Reasons at [55].

[56] I observe the letter was inconsistent with the appellant's case that an agreement had been struck with between the appellant and the respondent on or about 31 October 2014 containing the terms alleged by the appellant, because it recorded instructions that the agreement was between Mr Perry personally and Mr Hartnett personally and that it would include personal promises by Mr Perry to assign his personal interest.

[57] At 4:00pm on 30 October 2015 Mr Keane sent an email to Mr Perry (copied to Wockner Partners) which referred to the earlier letter to Mr Perry of 28 October 2015 and included the following:

> We are now instructed to finalise and in turn, document an agreement between yourself and Beau Hartnett, pursuant to which [the separate third party proceeding] will be progressed.
>
> **Terms of [A]greement**
>
> We are instructed that Mr Hartnett proposes the following terms:
>
> 1 You assign your personal interest and that of your entity Arawak Holdings Pty Ltd (ACN 157 865 195) (Arawak) in the action to Mr Hartnett;
>
> 2 You assist or otherwise make yourself available and do all things necessary on behalf of yourself personally and on behalf [of] Arawak, to assist in the preparation and conduct of the matter;
>
> 3 In exchange for the above:
>
> a. Mr Hartnett will take reasonable steps to fund the action;
>
> b. You are entitled to 12.5% of the claim amount recovered (after deduction and payment of any legal costs or other ancillary costs) with payment of such entitlement to you to be made within 28 days of receipt of such amount by King Tide Company Pty Ltd (ACN 602 611 423);
>
> c. You are personally indemnified by Mr Hartnett in relation to an adverse costs order of the Courts in the proceeding; and
>
> d. Mr Hartnett has full and unfettered discretion over the management and conduct of the matter including decisions to progress the litigation, defer the litigation, or end the litigation, decisions to pursue ADR and/or compromise the proceeding.
>
> We are instructed that Mr Hartnett considers that the essential terms aforementioned, are reasonably necessary to ensure the practical and efficient conduct of the matter.
>
> **Confirmation in writing sought**
>
> We ask that you now confirm in writing by way of return email that you agree to the essential terms as outlined above.
>
> We will then provide you with documentation formalising the agreement between the parties for signing by you.[50]

[58] I observe:

(a) Consistently with the letter sent two days earlier, the letter proposed an agreement between Mr Perry personally and Mr Hartnett personally and including personal promises by Mr Hartnett and Mr Perry. That conduct was inconsistent with the appellant's case that an agreement had been struck between the appellant and the respondent on or about 31 October 2014 containing the terms alleged by the appellant.

(b) Items 1 and 2 were consistent with the consensus that had been formed on those points by 28 October 2014: see paragraphs [40](b) above.

(c) Item 3(b) was different to Mr Keane's 28 October 2014 restatement of Mr Perry's proposal (see [43](a) above) and much closer to Mr Perry's actual

[50] AR 142-143.

proposal (see [39] and [40](d) above), save that it referred to net return instead of gross return.

(d) Item 3(a) bore a qualification which was new. Item 3(d) was new. Item 3(c) was much narrower than the indemnity which Mr Perry had sought on 28 October 2014.

[59] Mr Perry replied by email later on 30 October 2015, proposing different terms. Those terms included the removal of the requirement for the assignment by Mr Perry and the respondent of their interests, and a much broader indemnity in Mr Perry's favour, but which was still different in wording to that which he had sought on 28 October 2014.[51] I observe that Mr Perry's conduct was inconsistent with the notion that there was already a binding legal agreement in place which had been struck on or about 31 October 2014.

[60] Mr Hartnett then replied by email on 2 November 2015 at 5:41pm. The reply included the following:

> 1 The terms proposed by you are unacceptable.
>
> 2 I consider the terms I have proposed reflect the terms we discussed last year and which ultimately formed the basis upon which the proceedings were filed.
>
> 3 I consider the terms I have proposed are reasonable and necessary to facilitate the prosecution of the claim.
>
> 4 As an alternative to the terms I have proposed, I am happy for you to pay half the costs incurred in this matter to date on scale, and for you to pursue your claim separately.[52]

[61] I observe the email was also inconsistent with the appellant's case that an agreement had been struck between the appellant and the respondent on or about 31 October 2014 as it suggested merely that "the terms [Mr Hartnett] proposed reflect the terms [the parties] discussed last year" rather than terms which had been made the subject of a binding legal agreement between different parties. Further, the terms Mr Hartnett had proposed continued to be an agreement between Mr Perry personally and Mr Hartnett personally and which contemplated personal promises by Mr Hartnett and Mr Perry.

[62] Mr Perry replied by way of email on 2 November 2015 at 6:10pm. His reply included:

> I have never to date authorised any claim to be lodged. In fact I don't recall ever seeing any claim. I may be wrong but I am not able to find any claim or formal agreement in my inbox.[53]

[63] Mr Perry sent another email 15 minutes later, in which he said:

> Reflecting on your below email [the email of 2 November 2015 from Hartnett Lawyers] further and directly on your alternative offer.
>
> I withdraw from this action forthwith which I claim I never was a party to in the first place.[54]

[64] An email sent on 16 November 2015 from Mr Hartnett to Mr Perry (copied to Wockner Partners) contained the following:

> I refer to … our meeting of late Friday morning [13 November 2015].
>
> …

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[51] AR 140-141.
[52] AR 139.
[53] AR 139.
[54] AR 144.

> I confirm that at the meeting we agreed to progress the current action … in accordance with the following terms:
>
> …
>
> 1 You agree to effectively assign the benefit of your personal interest and that of your entity Arawak Holdings Pty Ltd (ACN 157 865 195) (Arawak) in the action to me;
>
> 2 You agree to assist or otherwise make yourself available and do all things necessary on behalf of yourself personally and on behalf of Arawak, to assist in the preparation and conduct of the matter;
>
> 3 In exchange for the above, it is agreed that:
>
> a. I will take reasonable steps to fund the action;
>
> b. You are entitled to 12.5% of the claim amount recovered (after deduction and payment of any legal costs or other ancillary costs) with payment of such entitlement to you to be made within 28 days of receipt of such amount by King Tide Company Pty Ltd (ACN 602 611 423);
>
> c. You are personally indemnified by me in relation to an adverse costs order of the Courts in the proceeding; and
>
> d. I have full and unfettered discretion over the management and conduct of the matter including decisions to progress the litigation, defer the litigation, or end the litigation, decisions to pursue ADR and/or compromise the proceeding.
>
> e. I will meet the reasonable professional costs incurred by you to document a change in the trustee of Arawak, such work as it to be performed by Mr Geoff Wockner of Wockner Partners Lawyers.
>
> …
>
> I ask that you now confirm in writing, by way of return email, but [sic] you agree to the essential terms as outlined above.[55]

[65] I observe that Mr Hartnett's purported confirmation of an agreement struck at a meeting between him and Mr Perry on 13 November 2015 was a purported confirmation of an agreement between Mr Perry and Mr Hartnett personally, and not an agreement between the appellant and the respondent. That is conduct by Mr Hartnett which is inconsistent with the appellant's present case. Further, Mr Hartnett purported to confirm that Mr Perry had effectively reversed the position which Mr Perry had taken on indemnity only two weeks earlier on 30 October 2015.[56]

[66] It seems that Mr Perry did not accept the proposition that he had reached a further agreement watering down the indemnity he had earlier sought. That much is evident from Mr Perry's email reply on 18 November 2015 (copied to Wockner Partners) as follows:

> As discussed with you last week. Your original offer some months ago to me was 25% less legals and I countered you with 12.5% gross you cover all legals and risk and you accepted.
>
> I agree that the cost to you to establish my new trust and work to be carried out by Geoff Wockner can be a legal cost to me subject to a successful outcome paying at minimum enough funds to cover Geoff Wockner's account.[57]

[67] It is clear that, contrary to Mr Hartnett's purported confirmation, the parties were not *ad idem* in relation to the proposed 2015 agreement.

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[55] AR 128.

[56] Compare the position on the indemnity sought on behalf of Mr Hartnett on 30 October 2015 (see [57] and [58](d) above) and the position taken by Mr Perry on 30 October 2015 (see [59] above) with [3](c) of Mr Hartnett's email on 16 November 2015 (see [64] above).

[57] AR 130.

[68] However, I also observe that the appellant argued that Mr Perry's email was to be construed as an admission of the contract which it contended was made on or about 31 October 2014 containing the terms recorded at [8] above. That submission cannot be accepted. First, in context Mr Perry's email was a response to Mr Hartnett's assertion that a further deal had been reached at a meeting on 13 November 2015. An objective assessment of Mr Perry's email is that it was an argumentative response aimed at rebutting Mr Hartnett's resistance to the indemnities which had been sought by Mr Perry on 30 October 2015, which were in any event different to those he had sought a year earlier on 28 October 2014. Second, the letter is at best equivocal because it was on its face to be read with some oral discussions the previous week about which no evidence was provided, save for Mr Hartnett's letter (which Mr Perry was disputing in any event).

[69] Mr Hartnett made two further attempts to "confirm" an agreement in subsequent correspondence in November 2015. It is unnecessary to consider them further as the appellant does not place any reliance on them.[58]

The appellant's arguments as to contract formation

[70] Before the learned primary judge, the appellant's case was characterized by a distinct lack of clarity as to when and how the alleged contract was formed.

[71] The appellant's statement of facts, issues and contentions of October 2016[59] had sought a declaration that "on 28 October 2014", a valid and binding agreement was entered into between the appellant and the respondent in relation to the conduct of the litigation commenced on 31 October 2014, comprising the terms set out in the following correspondence:

(a) the letter from Hartnett Lawyers to Craig Perry dated 24 October 2014; and

(b) the email from Craig Perry to Luke Keane dated 28 October 2014.

[72] The appellant's amended originating application of December 2016 sought a different declaration, namely that "on or about 31 October 2014", a valid and binding agreement was entered into between the appellant and the respondent in relation to the conduct of the litigation commenced on 31 October 2014, comprising the terms set out in the following correspondence:

(a) the letter from Hartnett Lawyers to Craig Perry dated 24 October 2014;

(b) the email from Craig Perry to Luke Keane dated 28 October 2014; and

(c) the email from Luke Keane to Craig Perry dated 28 October 2014.

[73] That case was altered further by the appellant's supplementary submissions before the learned primary judge of January 2017 that:

(a) a contract came into existence on 28 October 2014 because Mr Keane's email of 28 October 2014 should be regarded as an acceptance of Mr Perry's counter-offer of 28 October 2014 (and that conclusion was said to be supported by reference to the parties' subsequent conduct);

(b) alternatively, that the Court could infer from Mr Perry's conduct after 28 October 2014 that a valid and binding agreement had been entered into by 31 October 2014 (the relevant conduct being Mr Perry's provision of information to Hartnett Lawyers and his failure to state that the respondent had

[58] AR 696-697; Reasons at [65]-[66].
[59] AR 618-625.

not agreed to be a party to the proceeding commenced on 31 October 2014); and

(c) alternatively, that the alleged agreement was made by an email from Mr Perry to Mr Hartnett dated 18 November 2015, which may be regarded as "acknowledgement, acceptance or ratification" of the October 2014 agreement.

[74] During the course of argument before this Court, the proposition that the contract was made on 18 November 2015 was abandoned. Rather, as I have already mentioned, the appellant relied on Mr Perry's email of 18 November 2015 by way of post-contractual admission by Mr Perry of the fact and terms of the contract alleged to have come into existence in October 2014.

[75] In its written submissions in this Court the appellant advanced three points.

[76] **First**, the primary judge erred in not finding that a binding contract was in existence on or about 31 October 2014 when the separate third party proceeding was commenced because, by analogy with the approach of Barwick CJ in *Port Jackson Stevedoring Pty Ltd v Salmond & Spraggon (Aust) Pty Ltd* (1978) 139 CLR 231 at 244, the primary judge should have found, once the proceeding had commenced, that the "essential characteristic" of the earlier emails had been "to provide an agreed consequence to future action should that action take place: to attach conditions to a relationship arising from conduct".

[77] **Second**, the primary judge erred in failing to hold that by the correspondence of 24 October 2014 and 28 October 2014, a valid and binding executory contract was formed on 28 October 2014 (which became a contract between the appellant and the respondent when the appellant became trustee of the Hartnett Trust).

[78] **Third**, the primary judge erred in failing to infer that the parties' conduct in commencing the separate third party litigation on 31 October 2014 was pursuant to a valid and binding agreement that they commence the litigation.

[79] I will deal with the second argument first, because it rests on a classical offer and acceptance analysis. I will then turn to consider the first and third arguments, each of which has as a critical proposition that the fact of contract formation on or about 31 October 2014 is a proper inference to be drawn from the conduct of the parties.

The appellant's second argument

[80] The learned primary judge rejected the appellant's contract formation case for these reasons:

(a) He noted that the argument before him was that the email from Mr Keane of Hartnett lawyers to Mr Perry dated 28 October 2014 was to be treated as an acceptance of Mr Perry's counter-offer earlier that day.

(b) He identified the following issues as obstacles to that conclusion:

(i) There was no acceptance of Mr Perry's indemnification demand.[60]

(ii) The purported acceptance of Mr Perry's counter-offer did not coincide with the terms of the counter-offer, so far as it dealt with the consideration which would flow to Mr Perry.[61]

[60] Reasons at [29]-[31]; AR 689-690.
[61] Reasons at [25]-[26], [28]; AR 689-690.

(iii) An analysis of the various indicia sounding on the question of whether the parties must have intended immediately to be bound in advance of the creation of the formal document foreshadowed in Mr Keane's email, did not support that conclusion.[62]

(c) His Honour thought that an analysis of conduct after 28 October 2014, where Mr Perry assisted Hartnett Lawyers by the provision of information, was explicable by reasons other than confirming the existence of an agreement struck on 28 October 2014.[63]

[81] It will be apparent from the chronological analysis above that I agree generally with the offer and acceptance analysis of the primary judge. The following were insurmountable obstacles to the conclusion that a valid and binding executory contract was formed on 28 October 2014.

[82] **First**, I agree with the learned primary judge that there was no acceptance of Mr Perry's indemnification proposal: see [40](c) and [43](b) above. The appellant contended that the absence of express reference to the indemnification proposal could not be construed as a rejection of the proposal. But that is to miss the point. The question is whether it could be construed as an acceptance of the proposal. It plainly could not. The question of what agreement would be reached in relation to indemnity was postponed to the contemplated delivery of (and agreement upon) formal documentation.

[83] **Second**, I agree with the learned primary judge that the purported acceptance of Mr Perry's counter-offer did not coincide with the terms of the counter-offer, so far as it dealt with the consideration which would flow to Mr Perry: see [38](e), [40](d) and [43](a) above. The appellant sought to meet this problem by contending, by reference to a consideration of the case as ultimately pleaded in the separate proceeding, that any order obtained by the plaintiffs would reflect their joint entitlement to the proceeds of the proceeding, so that the difference in wording could not have been a concern. But there is no evidence which demonstrates that, as at the date of the putative acceptance, the parties knew those facts. The pleading had not yet been drafted, let alone provided to the respondent. Indeed, as I have demonstrated, at the time of the putative acceptance, an objective third party standing in the shoes of the parties would have thought that the issue was of significance and that the lack of agreement was something which stood in the way of concluding there had been acceptance of Mr Perry's counter-offer.

[84] **Third**, I agree with the learned primary judge that an analysis of the various indicia sounding on the question of whether the parties must have intended immediately to be bound in advance of formal documentation did not support that conclusion: see [32], [38](f), [40](e) and [43](c).

[85] **Fourth**, for reasons which I address under the next heading, an analysis of the conduct which occurred after 28 October 2014 did not support the conclusion that a legally binding contract had been formed on 28 October 2014 as alleged.

[86] For the foregoing reasons, the appellant's second argument must fail. It is unnecessary to consider whether the appellant could have succeeded in its contention that a contract formed on 28 October 2014 became a contract between the appellant and the respondent when the appellant became trustee of the Hartnett Trust.

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[62] Reasons at [32]-[49]; AR 690-693.
[63] Reasons at [50]-[53]; AR 693-694.

The appellant's first and third arguments

[87] The appellant's arguments were not put before the learned primary judge in the way they were put before this Court. There are two principal reasons why they must fail.

[88] **First**, while I accept in theory that parties could reach agreement on the terms by which they would participate in litigation, which agreement might only become a legally binding contract once they acted on their agreement and commenced the litigation, the fact is that on the facts of this case that did not occur. For the reasons discussed under the previous subheading, the parties had not reached a consensus before they commenced the litigation. To paraphrase McHugh JA in *Integrated Computer Services Pty Ltd v Digital Equipment Corporation (Aust) Pty Ltd* (quoted at [17] above), it is an error to suppose that merely because something has been done there is therefore some agreement in existence which has thereby been executed. The appellant's reliance on the approach of Barwick CJ in *Port Jackson Stevedoring Pty Ltd v Salmond & Spraggon (Aust) Pty Ltd* (1977) 139 CLR 231 at 244 is misplaced because on the Chief Justice's analysis of the facts in that case, the putative contracting parties had in fact reached a consensus on the applicable terms before acting on them.[64]

[89] **Second**, the contract formation case also fails when one analyses the conduct by reference to the principles identified at [19] to [21] above. Regard should be had to the conduct up to and including 31 October 2014 and to conduct after that date.

[90] As to the former, the appellant argued that the Court could infer from the respondent's conduct after the 28 October 2014 emails and up to and including the commencement of the proceeding on 31 October 2014 that a binding contract existed between the parties.

[91] I reject that argument.

[92] As at the time that the proceeding was commenced, an objective bystander would have concluded that the parties had not reached final agreement on the terms governing their participation in the litigation. On an objective assessment, the parties' conduct did not evince a tacit agreement with sufficiently clear terms. That was particularly so in light of the fact that the parties had not reached a consensus on such critical terms as (1) who were to be parties to the agreement, (2) what was to be the extent of the indemnity, and (3) exactly how was the consideration to Mr Perry's side of the bargain to be measured.

[93] Even if one were prepared to conclude that the parties' conduct in commencing the litigation was consistent with the existence of an agreement governing the terms of their participation in the litigation, mere consistency would not be enough. Such conduct could not be taken as unequivocally pointing to the existence of the contract in the terms alleged by the appellant. The more likely objective assessment of the parties' conduct is that, despite the fact that they had not yet reached an agreement, they commenced the proceeding to avoid an adverse time limitation, but in the hope that they might reach agreement. They took the risk that they might not reach an agreement. But, after all, the risk to them was not particularly significant until the proceeding was served on the defendants, and that did not need to happen for a year from commencement. The assistance rendered by Mr Perry on and before 31 October 2014 is to be understood in that light.

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[64] *Port Jackson Stevedoring Pty Ltd v Salmond & Spraggon (Aust) Pty Ltd* (1978) 139 CLR 231 at 243.

[94] To my mind, the conduct which occurred after 31 October 2014 was of diminishing probative significance, the more remote in time it was from that date. But it is of at least some significance that an evaluation of that conduct as a whole does not support an inference that a contract had been struck on or about 31 October 2014 in the terms alleged by the appellant: see my observations at [56], [58], [59] and [61] above. For example, just as it did before 31 October 2014, the conduct after that date unequivocally demonstrated that both parties knew that it was important to those on Mr Perry's side of the transaction that Mr Hartnett personally give an indemnity, yet the appellant's case is that Mr Hartnett was not even a party to the contract, let alone that he gave an indemnity. The same point can be made about Mr Perry and the evident importance that he assign his personal interest. For completeness, I mention again my rejection of the appellant's contention that Mr Perry's email of 18 November 2015 should be given any weight as an admission: see [68] above.

Conclusion on contract formation

[95] I reject the appellant's arguments that a contract had been formed on or about 31 October 2014, in the terms it alleges.

The appellant's arguments as to ancillary relief

[96] Before the primary judge, the appellant sought an order for specific performance of the contract allegedly formed in October 2014, and an injunction seeking to restrain the respondent from compromising, discontinuing or withdrawing from the separate proceeding.

[97] The elements of the injunction claim expressed in the appellant's statement of facts issues and contentions dated 14 October 2016[65] were as follows:

(a) In August 2016 the respondent had made attempts to withdraw from or to settle the separate proceeding. It refused to provide the appellant with an undertaking that it would not continue to do so.

(b) The respondent's conduct was in breach of:

(i) the contract allegedly formed in October 2014;

(ii) the requirement in clause 4.4(j) of the partnership agreement that neither partner take any steps in relation to the compromise or release of any claim vested in the partnership without obtaining the prior agreement of the Board; and

(iii) fiduciary duties which the respondent owed the appellant as its partner.

(c) If the respondent were to be permitted to persist in its conduct, it would cause demonstrable prejudice to the appellant for which damages would not be an adequate remedy.

(d) Accordingly, the Court should exercise its discretion to issue an injunction to prevent such harm occurring.

[98] For its part, and apart from the contentions which it made in relation to the contract allegedly formed in October 2014, the respondent's statement of facts issues and contentions dated 24 October 2016[66] asserted that:

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[65] See the statement of facts issues and contentions at [35]-[43]; AR 623-624.
[66] See AR 626-643.

(a) the partnership had become dissolved upon the liquidation of Vault 8 Holdings Pty Ltd and Kentgale Holdings Pty Ltd;[67]

(b) the respondent was not a party to the partnership agreement and it denied that it was bound by the partnership agreement; and

(c) otherwise in the absence of a finding that a contract was formed in October 2014, no injunction should be granted.[68]

[99] The contention that Kentgale Holdings Pty Ltd had been liquidated does not seem to be accurate: it was Kentgale Pty Ltd which had been the original partner and which had been wound up. However, the contention that the respondent was not bound by the partnership agreement was significant because the proposition that the respondent was not a party to the partnership agreement was correct. The respondent did not become the trustee of the Perry Trust until 18 April 2012, which was after the loss the subject of the separate proceeding had been suffered by its predecessor as trustee and before the time that it allegedly breached the partnership agreement by making attempts to extricate itself from the separate proceeding. Although the choses in action to recover partnership losses might be regarded as trust property which vested in the successive new trustees by operation of s 15 of the *Trusts Act* 1973 (Qld),[69] it is not immediately clear how the burden of contractual obligations owed as between the original partners would be passed on to the new trustees, absent reliance on some facts other than the fact of the original partnership agreement and the fact of the appointment of successive new trustees. The appellant's statement of facts, issues and contentions did not plead any matters of fact or law which would identify how the respondent would have become bound by a partnership agreement entered into by one of its predecessors as trustee, such that it could be sued for its own conduct alleged to be in breach of that agreement.

[100] In its written submissions to the learned primary judge dated 18 November 2016, the appellant persisted with its contention that the injunction which it sought might also be founded on breach of the partnership agreement or of fiduciary duties owed as between partners, but did not seek to meet the point raised by the respondent or otherwise explain how it was that the respondent had become bound by the terms of the partnership agreement.[70] For its part, the respondent's written submissions in response indicated that the respondent presumed that the injunction was "subject to the Court accepting that the alleged October 2014 Agreement was binding as between the [appellant] and the Respondent, which the Respondent contests for the reasons above".[71]

[101] There is no indication in the appeal record that the appellant conducted the case before the primary judge on the basis that the injunction could succeed in the event that the Court did not accept that the alleged October 2014 agreement was binding as between the appellant and the respondent. As far as the appeal record reveals, the argument at the hearing before the learned primary judge did not further pursue the proposition that the injunction case could succeed if the contract formation case failed. If it had, it would have had to explain to the learned primary judge how the burden of contractual obligations owed as between the original partners, were passed on to the respondent as new trustee.

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[67] See the statement of facts issues and contentions at [7]; AR 627.
[68] See statement of facts issues and contentions at [71] to [73] and [97]; AR 638 and 643.
[69] I express no view on the correctness of this, as no argument addressed the question.
[70] See written submissions at [25-[28] and [31]-[34]; AR 648-649.
[71] See written submissions at [31]; AR 655.

[102] Certainly, the learned primary judge understood the injunction case as rising and falling on the October 2014 agreement. His Honour's reasons stated:

> Those orders were sought on the basis that there was an October 2014 "agreement". I have found that there was no such agreement. It follows, then, that the application must be dismissed.[72]

[103] The appellant's notice of appeal did not contend that the learned primary judge erred:

(a) by failing to appreciate that the injunctive relief sought was also pressed on the alternative grounds of breach of the partnership agreement or of fiduciary duties owed as between partners; or

(b) by failing to find that the respondent was, as a matter of fact and law, bound by the terms of the partnership agreement and that the orders should have been made on the grounds of threatened breach of that agreement.

[104] To the contrary, the only relief in the notice of appeal was specifically formulated on the hypothesis that the appellant succeeded on its case that a contract had been formed in October 2014. In this regard, I have already noted the ancillary relief which the appellants sought from this Court was:

> In lieu of specific performance and an injunction to prevent the respondent from withdrawing from [the separate proceeding], damages for breach of the term that the respondent would do all things reasonably necessary to assist in the preparation and conduct of the litigation, to be assessed on remitter to the trial division.

[105] I observe that the term referred to was the term allegedly contained in the contract formed in October 2014. No such term appeared in the partnership agreement.

[106] Consistently with that proposition, the appellant's written submissions on appeal contended that the matter which should be remitted to the trial division for an assessment of damages was "the damages resulting from the respondent's breach of the terms of the joint enterprise", the joint enterprise being the agreement to advance the damages claim in the separate proceeding. Unless the appellant succeeded its case that a contract was formed in October 2014 as alleged, no occasion to make any remitter order would arise.

[107] During oral submissions before this Court, senior counsel for the appellant contended that the appellant sought an order that the question of damages be remitted to the trial division for assessment on the basis of breach of the partnership agreement. Presumably to support that contention, he sought to characterize the October 2014 agreement as a "variation" to the partnership agreement. That proposition had not been advanced at any time prior to the oral argument before this Court. Senior counsel for the appellant acknowledged that it was not part of the notice of appeal that there be some entitlement to relief in the event that the Court did not accept the appellant's argument concerning the alleged October 2014 agreement.[73] Counsel for the respondent resisted the appellant being permitted to advance for the first time on appeal claims which were not run at first instance.[74]

[108] The notice of appeal did not raise the question of whether the appellant might have some entitlement to relief in the event that this Court did not accept the appellant's argument concerning the alleged October 2014 agreement. No application was made for leave to amend the notice of appeal. More importantly, no attempt was

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[72] Reasons at [76].
[73] T1-10 to T1-11.
[74] T1-87 to T1-88.

made to identify any error made by the learned primary judge, if his Honour was right to conclude that there was no October 2014 agreement. I agree with the respondent that it is not open to the appellant to contend on this appeal that it has any entitlement to ancillary relief in the event that it fails on its contract formation argument.

Conclusion

[109] The appeal should be dismissed with costs.