SUPREME COURT OF QUEENSLAND

CITATION:	*Al-Freah & Anor v Thompson & Anor* [2023] QCA 175
PARTIES:	**MOHAMMAD AL-FREAH** (first appellant) **AL-FREAH MEDICAL SERVICES PTY LTD** ACN 604 911 159 **ATF AL-FREAH MEDICAL PRACTICE TRUST** ABN 53 623 210 099 (second appellant) **v** **MARK STEPHEN THOMPSON** (first respondent) **WILDASH HOLDINGS PTY LTD** ACN 125 836 188 (second respondent)
FILE NO/S:	Appeal No 10865 of 2022 SC No 3855 of 2022
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane – [2022] QSC 166 (Hindman J)
DELIVERED ON:	29 August 2023
DELIVERED AT:	Brisbane
HEARING DATE:	6 February 2023
JUDGES:	Morrison and Bond and Dalton JJA
ORDER:	**Appeal dismissed with costs.**
CATCHWORDS:	CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – FORMATION OF CONTRACTUAL RELATIONS – CONTRACT IMPLIED FROM CONDUCT OF PARTIES – where there was a contractual dispute between the appellants, respondents and two other parties – where the respondents sent the appellants an offer of compromise – where the offer of compromise states that the respondents would write to the other two parties to inform them of the agreement and to obtain relevant releases – where the respondents wrote to the other two parties as contemplated by the offer – whether the subsequent conduct of the parties indicates that the respondents and appellants intended to be immediately bound by the correspondence CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – FORMATION OF CONTRACTUAL RELATIONS – AGREEMENTS CONTEMPLATING

EXECUTION OF FORMAL DOCUMENT – WHETHER CONTRACT CONCLUDED – where the appellants seek an order for specific performance of an agreement alleged to have been made in a four email exchange with the respondents – where the parties attended an unsuccessful mediation – where in the four email exchange subsequent to the mediation the respondents made an offer to compromise to the appellants – where the appellants accepted the offer of compromise – where the execution of a formal deed of settlement was contemplated by the parties – where no formal deed of settlement was entered into – where the primary judge found that there was no immediately binding contract created by the four email exchange – whether the four email exchange evidences an immediately binding contract of compromise between the appellant and the respondents

CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – FORMATION OF CONTRACTUAL RELATIONS – CONTRACT IMPLIED FROM CONDUCT OF PARTIES – where counsel for the respondents below sought to admit correspondence which was antecedent to the alleged contract and did not involve the appellants into evidence – where the appellants objected to this evidence being admitted on irrelevance grounds – where the trial judge decided the objection during the course of the hearing and gave ex tempore reasons – where the trial judge admitted the correspondence into evidence – whether the primary judge erred in allowing the correspondence into evidence

CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – DISCHARGE, BREACH AND DEFENCES TO ACTION FOR BREACH – CONDITIONS – CONDITIONS PRECEDENT AND SUBSEQUENT – where the offer of compromise was subject to the satisfaction of conditions subsequent – where the respondents had an obligation to make reasonable endeavours to obtain the releases required by the conditions subsequent – where the respondents failed to obtain the relevant releases – where the respondents terminated the contract due to the alleged failure of the conditions subsequent – whether the respondent was entitled to terminate the contract

Corporations Act 2001 (Cth), s 233, s 461(1)(k)

400 George Street (Qld) Pty Ltd v BG International Ltd [2012] 2 Qd R 302; [2010] QCA 245, cited
Australian Broadcasting Corporation v XIVth Commonwealth Games Ltd (1988) 18 NSWLR 540, cited
Australian Energy Ltd v Lennard Oil NL [1986] 2 Qd R 216, considered
Barrier Wharfs Ltd v W Scott Fell & Co Ltd (1908) 5 CLR 647; [1908] HCA 88, considered
Brambles Holdings Ltd v Bathurst City Council (2001) 53 NSWLR 153; [2001] NSWCA 61, cited

Brice v Chambers & Ors [2014] QCA 310, cited
Codelfa Construction Pty Ltd v State Rail Authority (NSW) (1982) 149 CLR 337; [1982] HCA 24, cited
Commercial Bank of Australia Ltd v GH Dean and Co Pty Ltd [1983] 2 Qd R 204, considered
Darter Pty Ltd v Malloy [1993] 2 Qd R 615; [1992] QCA 96, cited
Eccles v Bryant [1948] Ch 93; [1947] 2 All ER 865, cited
Electricity Generation Corporation v Woodside Energy Ltd (2014) 251 CLR 640; [2014] HCA 7, cited
Ermogenous v Greek Orthodox Church Community of SA Inc (2002) 209 CLR 95; [2002] HCA 8, considered
Feldman v GNM Australia Ltd [2017] NSWCA 107, considered
Fletcher Challenge Energy Ltd v Electricity Corporation of New Zealand Ltd [2002] 2 NZLR 433; [2001] NZCA 289, cited
Fraser v Strathmore Group Ltd [1991] NZCA 329/90 (Unreported, 4 October 1991), cited
Geebung Investments Pty Ltd v Varga Group Investments (No 8) Pty Ltd (1995) 7 BPR 14; [1995] NSWCA 166, cited
Godecke v Kirwan (1973) 129 CLR 629; [1973] HCA 38, cited
GR Securities Pty Ltd v Baulkham Hills Private Hospital Pty Ltd (1986) 40 NSWLR 631, cited
Johnston v Brightstars Holding Company Pty Ltd [2014] NSWCA 150, cited
Marek v Australasian Conference Association Pty Ltd [1994] 2 Qd R 521, cited
Masters v Cameron (1954) 91 CLR 353; [1954] HCA 72, considered
Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd (2015) 256 CLR 104; [2015] HCA 37, cited
New Zealand Shipping Co Ltd v Société des Ateliers et Chantiers de France [1919] AC 1, cited
Sagacious Procurement Pty Ltd v Symbion Health Ltd [2008] NSWCA 149, cited
Sully v Englisch (t/as Alpine Property) (2022) 406 ALR 456; [2022] VSCA 184, considered
Suttor v Gundowda Pty Ltd (1950) 81 CLR 418; [1950] HCA 35, cited
Verissimo v Walker [2006] 1 NZLR 760; [2005] NZCA 491, cited
Weemah Park Pty Ltd v Glenlaton Investments Pty Ltd [2011] 2 Qd R 582; [2011] QCA 150, cited
Wickman Machine Tool Sales Ltd v L Schuler AG (1972) 2 All ER 1173; [1972] 1 WLR 840, cited
Zhu v Treasurer (NSW) (2004) 218 CLR 530; [2004] HCA 56, cited

COUNSEL: K C Fleming KC, with M E Pope, for the first and second appellants
J D McKenna KC, with J Sargent, for the first and second respondents

SOLICITORS: Derek Legal for the first and second appellants
Thomson Geer for the first and second respondents

[1] **MORRISON JA:** I agree with the reasons of Dalton JA and the orders proposed by her Honour.

[2] **BOND JA:** I have had the advantage of reading in draft the reasons for judgment of Dalton JA. For the reasons expressed below I do not agree that a binding contract between the Thompson interests and the Al-Freah interests was formed as at 17 February 2022. Save in that respect, I agree with her Honour's reasons on the dispositive issues. Accordingly, I agree with her Honour that the appeal must be dismissed with costs.

[3] I should observe first that I am unable to agree that the circumstances of this case could be regarded as falling within the first *Masters v Cameron* category.[1] If there was an intention immediately to be bound, at best it could be an agreement falling within the second *Masters v Cameron* category, because condition 1 of the first email (quoted at [35] of her Honour's judgment) expressly conditioned performance of the obligation to pay on the fulfilment of conditions 2, 3, 4, 5 and 6. Performance of at least that term was conditional upon the execution of the deed of settlement between the two sides referred to in condition 5.

[4] The approach to be taken to the critical question whether parties to an alleged contract have manifested an intention to be legally bound is not in doubt. In the High Court decision of *Ermogenous v Greek Orthodox Church Community of SA Inc*, Gaudron, McHugh, Hayne and Callinan JJ made the following observations:[2]

> ""It is of the essence of contract, regarded as a class of obligations, that there is a voluntary assumption of a legally enforceable duty." To be a legally enforceable duty there must, of course, be identifiable parties to the arrangement, the terms of the arrangement must be certain, and, unless recorded as a deed, there must generally be real consideration for the agreement. Yet "[t]he circumstances may show that [the parties] did not intend, or cannot be regarded as having intended, to subject their agreement to the adjudication of the courts".
>
> Because the inquiry about this last aspect may take account of the subject-matter of the agreement, the status of the parties to it, their relationship to one another, and other surrounding circumstances, not only is there obvious difficulty in formulating rules intended to prescribe the kinds of cases in which an intention to create contractual relations should, or should not, be found to exist, it would be wrong to do so. Because the search for the "intention to create contractual relations" requires an objective assessment of the state of affairs between the parties (as distinct from the identification of any uncommunicated subjective reservation or intention that either may harbour) the circumstances which might properly be taken into account in deciding whether there was the relevant intention are so

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1 *Masters v Cameron* (1954) 91 CLR 353.

2 *Ermogenous v Greek Orthodox Church Community of SA Inc* (2002) 209 CLR 95 at [24] to [25], footnotes omitted.

> varied as to preclude the formation of any prescriptive rules. Although the word "intention" is used in this context, it is used in the same sense as it is used in other contractual contexts. It describes what it is that would objectively be conveyed by what was said or done, having regard to the circumstances in which those statements and actions happened. It is not a search for the uncommunicated subjective motives or intentions of the parties."

[5] When a particular dispute raises *Masters v Cameron* issues, the inquiry is no different in character. One is seeking to determine whether there was an intention to be legally bound immediately. Obviously, the initial focus of the inquiry is as to the circumstances which existed at the time the contract was allegedly formed and the extent to which those circumstances shed light on the objective assessment of the intention of the parties at that time. But the law is also clear that recourse may be had to the conduct of the parties to the alleged contract subsequent to the time the contract is alleged to have been formed, in order to determine whether or not a contract was formed on the date alleged. The authorities cited by Dalton JA at [86] support that conclusion. The juridical basis on which subsequent conduct may be regarded to bear upon contractual intention may not be settled,[3] but on the present state of the authorities that does not gainsay the proposition that regard may be had to that conduct.

[6] In the recent decision of *Sully v Englisch*, the Victorian Court of Appeal was content to adopt the following summary of the law:[4]

> "Whether an agreement is reached which is intended to be immediately binding falls to be determined objectively, having regard to the presumed or inferred intention of the parties. The parties' objective intention is fact-based and to be determined having regard to all of the surrounding circumstances, including 'by drawing inferences from [the parties'] words and their conduct' and from the terms of the parties' correspondence, such correspondence to be read in the light of the surrounding circumstances and having regard to the commercial context in which they were exchanged. The ultimate question to be answered is what each party, by its words or conduct, would have led a reasonable person in the position of the other party to believe.
>
> The relevant intention or belief which is the subject of the Court's assessment is that which obtained at the time an alleged agreement was made. The subjective intention or belief of a party is not determinative though it may be relevant.
>
> In certain circumstances, regard may be had to the subsequent conduct of the parties. In *Nurisvan Investment Ltd v Anyoption Holdings Ltd* … the Victorian Court of Appeal distinguished between 'cases involving contracts that are said to have come into existence as a result of an exchange of correspondence of other communication between the parties', and cases involving an

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3 See *Sagacious Procurement Pty Ltd v Symbion Health Ltd* [2008] NSWCA 149 at [102] per Giles JA, Hodgson and Campbell JJA.

4 *Sully v Englisch* (2022) 406 ALR 456 at [62] per Walker JA (with whom Niall JA and Sifris JA agreed), footnotes omitted.

> agreement purported to be contained in a single document, and noted that regard may be had to conduct subsequent to an alleged agreement made in the former kind of case. In *Queensland Phosphate Pty Ltd*, a case involving an exchange of emails said to evidence a binding contract, the Victorian Court of Appeal held that regard may be had to subsequent communications between the parties: '(1) in order to see what was important or essential to the transaction; (2) as admissions; and (3) as probative of the parties' contractual intention'. …"

[7] In the present case the contract was alleged to have been made in writing by the four 17 February 2022 emails. Dalton JA has identified the relevant terms of those emails and the relevant aspects of the context in which they were sent. If the enquiry as to the parties' intention was limited to a consideration of that material, although I regard the relevant indicia as relatively evenly balanced, I would conclude that the parties should not be taken to have intended to have been immediately bound. I would conclude that the balance tips in favour of the third *Masters v Cameron* category rather than the first or the second, for the following reasons:

(a) Condition 1 made it clear that performance of conditions 2, 3, 4, 5 and 6 was to occur simultaneously with payment of the settlement sum. In other words, if there was an intention to be immediately bound, it was an intention to be immediately bound to a settlement process that would involve four things happening simultaneously, namely (1) the Thompson interests paying to the Al-Freah interests the sums referred to in conditions 1, 2 and 4; (2) the Al-Freah interests performing the share transfer and the resignations referred to in condition 3; (3) the Al-Freah interests entering the deed of settlement referred to in condition 5; and (4) the Al-Freah interests entering the deed of settlement referred to in condition 6. But what would be the utility, one might ask rhetorically, of requiring the Al-Freah interests to enter into a deed of settlement covering the performance of the obligations referred to in items 1, 2, 3 and 4 simultaneously with those obligations being performed? It cannot have been only to create an enforceable confidentiality obligation because condition 5 specifically required the deed to cover conditions 1, 2, 3 and 4 as well as that obligation. To my mind the wording of the first email rather suggests an ill-thought through and clumsily worded agreement in principle intended to be dealt with in a binding way in the condition 5 deed, which would necessarily be entered into at some time prior to the proposed settlement. That is rather confirmed by the terms of the second and third emails which suggested steps be taken to produce the deed as soon as possible.

(b) Condition 4 obliged Dr Thomson's company to pay legal costs in the litigation to date but did not identify a sum. Although I accept the theoretical possibility that parties to a contract could have intended to be immediately bound by a promise to pay "legal costs in the litigation to date", the uncertainty as to the quantum involved in such a promise would have been notorious, especially to lawyers. And the communications concerned were communications between lawyers. In my view, an objective third party standing in the shoes of the parties knowing what they knew and noting that uncertainty, would also note the request to be advised of the amount and the

content of condition 5, and would conclude that the parties intended to avoid that uncertainty and not to be bound until the condition 5 deed of settlement documented the amount of the obligation to pay. Of similar significance is the fact that confidentiality obligations were regarded as important but left for articulation on the condition 5 deed of agreement.

[8] But, as indicated previously, it is clear law that recourse may be had to the conduct of the parties to the alleged contract subsequent to the time the contract is alleged to have been formed, in order to determine whether or not a contract was formed on the date alleged. I turn to explain why my view is that the relevant subsequent conduct tends to support the view that the Thompson interests and the Al-Freah interests should not be taken to have intended to be immediately bound as at 17 February 2022.

[9] In roughly chronological order the relevant conduct was as follows:

(a) After the correspondence on 17 February 2022, Dr Thompson's solicitors wrote to the solicitors for Drs Francis and Mishra in the following terms (emphasis added):

> "We thank you for your patience in this matter.
>
> **Our client has now reached agreement with Dr. Al-Freah and his company Al-Freah Medical Services Pty Ltd (AFMS).**
>
> That **agreement** includes the transfer of all shares in GIC and EE owned by AFMS to Wildash Holdings Pty Ltd for $1.00 per share parcel and simultaneous resignation by Dr. Al-Freah as an employee of the business and as a director of GIC and EE. We request confirmation that your clients agree Dr Al-Freah will be released from any restraints on his employment, effective simultaneously with the settlement of the transfer of shares.
>
> The transfer of shares, etc., should be finalised by Friday 4 March 2022, subject to your clients' approvals.
>
> Accordingly, on the basis the current litigation is discontinued and all parties provide mutual releases and indemnities with respect to the various claims against each other, our client is now in a position to agree to all of the terms set out in your letters of 20 December 2021 (from Mr Muller) and 3 February 2022 (from Mr Steele).
>
> We propose that there be two deeds of settlement; one to cover releases (to include Dr Al-Freah and AFMS as parties to the deed) and the other to cover the orderly winding up of GIC and EE and all other matters (to which Dr Al-Freah an AFMS will not be parties).
>
> Kindly let us have your draft deeds of settlement for our urgent review, along with details of your clients' costs of the litigation to date.

> Our client is preparing a list of the opportunities he has been pursuing (per point 9 of Mr Muller's letter and point 11 of Mr Steele's letter) and we will forward same to you very shortly."

(b) Dr Thompson's solicitors subsequently engaged with the solicitors for Drs Francis and Mishra to reach settlement with those parties (from 18 February 2022 to 1 March 2022), without a settlement being achieved.

(c) During the same period, Dr Thompson commenced making arrangements with a financial institution to obtain the amounts (or at least the settlement amount with some buffer for expenses) contemplated by the offer.

(d) Dr Al-Freah's barrister emailed Dr Thompson's solicitors at 6.46 pm on 23 February 2022. In the subject line of the email was written (emphasis added), "**Is the offer [to] settle still available?**" The body of the email stated only "Please respond –". There was no evidence that Dr Thompson's solicitors responded to that email. Dr Thompson's affidavit deposed that, so far as he was aware, they did not. However, at 7.40 am on 24 February 2022 Dr Thompson texted Dr Al-Freah reporting that his barrister had tried to call Dr Al-Freah's barrister but did not hear back from him. He asked Dr Al-Freah to expedite communication between their counsel. There were further texts and a meeting on 24 February 2022. During the meeting Dr Thompson expressed that it was difficult for him to borrow the money to pay the amounts in the offer. He asked Dr Al-Freah to pay his own legal expenses. Further discussions ensued but ultimately no different position as between Drs Thompson and Al-Freah was agreed at the meeting.

(e) On 1 March 2022, Dr Thompson sent a text to Dr Al-Freah in the following terms (emphasis added):

> "I know you & [your wife] must be very angry with me & I'm incredibly sorry for what's happened to you. I'm a broken & shattered old man with those 2 thugs giving me no respite. They want me destroyed & gone which I just don't deserve.
>
> **[My solicitor] will go back to [your barrister] later today with a revised offer.** Although it doesn't include a massive capital payment for which I can't be held responsible, it does give you what both you & I believed you were buying into with a great future for us to work together long term as equal colleagues with whatever opportunities may lay ahead.
>
> I don't believe you'll have lossed anything whereas I'm potentially losing my family, my dignity, my business built over 35 yrs & so my life as I know it. I just don't deserve it.
>
> I so very much hope you'll consider my offer fair & reasonable & so bring this soul destroying dispute to an end. Please help me Mo. I'm begging you. I need an urgent answer or believe me I'm about to crack!"

(f) Dr Al-Freah texted his response in these terms (emphasis added):

> "Please don't waist your time. **I agreed to indemnify the others based on the previously signed offer your lawyers sent on 17th Feb.**
>
> Unfortunately, and just like you, I am now (and have been) under enormous pressure too. [My wife] has had enough and she just wants me to go to Court as she believes **that this will put an end to this 'ping pong' of emails, proposals, motions, meetings, text msgs, meetings at your house, phone calls etc etc etc**
>
> To tell you the truth, I had my Statement of Claim all ready to go by Monday 14th Feb. The only reason why it was not submitted was because of the tragic loss of [your brother]. [My wife] & I didn't want to add salt to your wounds at that time and hence we backed off. **This was followed by your proposal and we were glad the SOC was not submitted.**
>
> However, [my wife] wants an end to this and she is pressing on me to go to Court and I tend to agree with her too. I can't go on with this as it's already been two years with no results. Had we gone to Court 2 years ago we wouldn't have been far from reaching an end by now!
>
> I will however support you as a friend and colleague for a better future but for now I can't do much until this case is over. I can't put [my wife] & my young family through more of this. I will wait to 4th March as per deadline of **your proposal**. After that I will have not option but to
>
> As stated previously, my statement of claim (including $1.5m, damages, $260k's interest +++) is done and I was ready to file with the court.
>
> I am sick and tired of changes of plan and resolutions. **If the deed is not received before the close of business day today, I'll consider the offer is cancelled and I'll start court proceedings.**
>
> Thank you for your understanding."

(g) No revised offer was sent by the Thompson interests to the Al-Freah interests. Neither side drew or tendered any deed of settlement contemplated by the offer, nor was the second deed of settlement prepared by Dr Francis's solicitors.

[10] Some guidance as to the approach which can be taken to such communications of the nature of those identified in the previous paragraph is to be found in the early High Court decision of *Barrier Wharfs Ltd v W Scott Fell & Co Ltd.*[5] I observe:

(a) The case involved an action which was brought in the original jurisdiction of the High Court seeking damages for breach of a contract which was alleged to

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5 *Barrier Wharfs Ltd v W Scott Fell & Co Ltd* (1908) 5 CLR 647.

have been formed by 6 February 1906 for the use by the defendants' ships of the plaintiff's wharf.

(b) At first instance, Higgins J analysed the oral and written communications by which it was said the contract had been formed and concluded that having regard to those communications no contract had been formed by the time of the last letter sent, namely that of 6 February 1906. However, his Honour examined the subsequent conduct of the putative parties to the contract and concluded that conduct also supported his conclusion. Amongst other "subsequent" conduct which his Honour found to be relevant on that basis were the following:

(i) To the knowledge of the plaintiff the defendants' ships were using other wharves after the date the contract had allegedly already been formed, but the plaintiff made no complaint to the defendants.

(ii) The tenor of a letter written by the defendants to the plaintiff after the date the contract had allegedly already been formed suggested that the defendants were "unconscious of having made any agreement yet". The letter referred to "the proposed agreement" and of "willingness to enter into any contract for the parties' mutual interests". His Honour found it to be significant that the plaintiff's reply to that letter did not assert words to the effect "[b]ut the agreement is actually made, it is not merely proposed".[6]

(iii) Other letters from the defendants to the plaintiff which clearly treated the agreement has not yet made and which clearly treated the defendants as still free to send or not send their ships to the plaintiff's wharf.

(c) The conclusion of Higgins J was upheld on appeal. As to the High Court judgment:

(i) Griffith CJ agreed with Higgins J that within the communications up to 6 February there was no concluded contract. But he concluded that even if they had prima facie disclosed a contract:[7]

> "… the subsequent correspondence shows that it was not in the contemplation of either party that they were to be bound until all the essential preliminaries had been agreed to, nor until a formal contract had been drawn up embodying all the matters incidental to a transaction of such a nature."

(ii) Barton and O'Connor JJ agreed with the conclusion reached by Higgins J but did not specifically address the subsequent conduct issue.

(iii) Isaacs J too agreed that no contract had been concluded by 6 February and did not think it was necessary to go further. However, his Honour added:[8]

> "If it were necessary, I think the conduct of the parties subsequent to 6th February shows that it was not

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6 *Barrier Wharfs Ltd v W Scott Fell & Co Ltd* (1908) 5 CLR 647 at 656 to 657.
7 *Barrier Wharfs Ltd v W Scott Fell & Co Ltd* (1908) 5 CLR 647 at 669.
8 *Barrier Wharfs Ltd v W Scott Fell & Co Ltd* (1908) 5 CLR 647 at 672.

> understood that they were bound down contractually to the exact terms which had already been set out in the letters."

[11] I do not regard the subsequent conduct identified at [9](a), [9](b) or [9](c) as pointing towards a conclusion that there was an intention immediately to be bound once the fourth email was sent. It was just as consistent with the Al-Freah and Thompson interests having reached an agreement in principle and the Thompson interests taking steps towards converting the agreement in principle into a binding agreement by which the Al-Freah interests at least were removed from the disputation. It would not have been in Dr Thompson's interests to convey to Drs Francis and Mishra that his arrangements with Dr Al-Freah had not yet amounted to a binding contract. Accordingly, I would not put weight on the fact that he used the language of "agreement" in his first communication to them, or that he took the steps he did in trying to get them to agree to be part of the proposed settlement.

[12] Importantly, the communications between the two putative contracting parties (by themselves and by their representatives) identified at [9](d), [9](e) and [9](f) above occurred at a time when their content could not be regarded as having been influenced by there having been an extant dispute as to whether there was already a binding contract. In my view, the communications may be evaluated in a similar way to the communications considered in *Barrier Wharfs Ltd v W Scott Fell & Co Ltd*. The parties' communications to each other show that it was not in their contemplation that they had already settled their relationship in a binding way. Consistent with this evaluation of their conduct are the following:

(a) Dr Al-Freah's counsel asking whether an "offer" was still open;

(b) Dr Thompson referring to a revised "offer" being sent as between lawyers;

(c) Dr Al-Freah's final text, like the plaintiff in *Barrier Wharfs Ltd v W Scott Fell & Co Ltd*, not responding to Dr Thompsons' reference to a further offer by conveying that a deal had already been struck and he intended to enforce it. Rather to the contrary, Dr Al-Freah's text conveyed that he and his wife were sick of the "ping pong" of negotiations and he intended to enforce his rights in the same way as he was proposing to do before the emails of 17 February 2022 were sent, unless a deed was received that day.

[13] The result is that the conduct of Drs Al-Freah and Thompson and their respective representatives subsequent to 17 February 2022 is either neutral on the critical question or tends to support a negative answer to it. Having regard to that conclusion and the conclusion I reach by reference to an assessment of the emails of 17 February 2022 in the context they were written, I conclude that a binding contract between the Thompson interests and the Al-Freah interests was not formed as at 17 February 2022.

[14] **DALTON JA:** The appellants applied for specific performance of an agreement alleged to have been made in an exchange of four emails. The primary judge dismissed the application. The appellants contend that she was wrong to do so. In my view the appeal should be dismissed with costs, although, as will be seen, my reasoning differs from that of the primary judge.

Factual Circumstances

[15] The first respondent, Dr Thompson, is a medical specialist. In 1990 he set up two companies (The Gastrointestinal Centre Pty Ltd (GIC) and Endoexcellence Pty Ltd (EE)) through which he operated his practice. In 2012 another doctor, Dr Francis, bought shares in GIC and EE and became a director of those companies. In 2014 a Dr Mishra bought shares in GIC and EE, and was appointed a director of both companies. Finally, in 2018 and 2019, the first appellant, Dr Al-Freah, paid about $1.5 million for shares in GIC and EE, and was appointed a director of both companies.[9]

[16] There was a GIC shareholders' agreement by which the four doctors granted pre-emptive rights to the other shareholders on the sale of their shares in GIC. The constitution of GIC provided that a shareholder who made an agreement to transfer shares remained the holder of them until the transfer was registered. There was an employment agreement between (relevantly) Dr Al-Freah and GIC which obliged him to devote the whole of his professional time to providing medical services for GIC. It imposed a restraint on him in relation to both patients and referring general practitioners after termination of the employment agreement.

The Cochine Proceeding

[17] In November 2021 Cochine Pty Ltd, the corporate shareholder associated with Dr Francis, instituted a proceeding in this Court against the other shareholder companies and GIC and EE. Cochine claimed relief pursuant to s 233 of the *Corporations Act 2001* (Cth) on the grounds that Dr Thompson was acting in the affairs of GIC and EE in a manner which was oppressive. It was alleged that since March 2020 there had been an irretrievable breakdown in the working relationship between Dr Thompson on the one hand, and Drs Francis and Mishra on the other.

[18] While Dr Al-Freah's shareholder company was named as a party to the Cochine proceeding, no allegation of oppressive or unfair conduct was made against it. However, Cochine asked for an order that Dr Thompson's company and Dr Al-Freah's company purchase Cochine's shares in GIC and EE. Alternatively, it sought that GIC and EE be wound up. Costs were sought against GIC, EE, and the shareholder companies controlled by Drs Thompson and Al-Freah.

Mishra Statement of Claim

[19] Dr Mishra engaged lawyers to draw a statement of claim naming GIC, EE and the other three shareholder companies as defendants. Dr Mishra's statement of claim also claimed oppressive conduct on the part of Dr Thompson, beginning as early as June 2019. Dr Mishra sought that GIC and EE be wound up on the just and equitable ground (s 461(1)(k) of the *Corporations Act*), or orders pursuant to s 233 of the *Corporations Act* that Dr Thompson purchase Dr Mishra's shares in GIC and EE. The statement of claim made no allegations against Dr Al-Freah and sought no relief against him. It sought costs generally.

[20] Two days before a mediation in the Cochine proceeding (below), solicitors for Dr Mishra sent a copy of his statement of claim to solicitors acting for the other three doctors. They said that if the dispute between "the parties" (which must mean

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[9] All four doctors used corporate vehicles to buy shares in GIC and EE. However, nothing turns on this and, as far as possible, I shall discuss the factual matters as if the four doctors were the only relevant parties.

the parties to the Cochine proceeding) was unable to be resolved at mediation, Dr Mishra would file the statement of claim. Although the mediation did not resolve the Cochine proceeding, Dr Mishra did not file a claim at any time relevant to the issues in this appeal.

Mediation and its Aftermath

[21] A court-ordered mediation was held in the Cochine proceeding on 16 December 2021. There was no agreement reached at the mediation. After the mediation there was correspondence between the lawyers acting for the doctors. There were evidentiary disputes about aspects of this correspondence, but it was agreed that it could be used by the primary judge as evidence of what occurred at the mediation.[10]

[22] At the mediation Drs Thompson, Francis and Mishra were in agreement that GIC and EE should be wound up. However, Dr Al-Freah was not interested in participating in a (necessarily complicated) winding up of GIC and EE. Dr Al-Freah expressed the view, for the first time, that he had been induced by fraudulent misrepresentations made by Dr Thompson to purchase shares in GIC and EE – AB 331. The antagonism between Dr Thompson and Drs Francis and Mishra had begun very soon after Dr Al-Freah paid $1.5 million to join the group. At the mediation Dr Al-Freah took the position that he simply wanted to get his money back and leave the corporate structure (GIC and EE).

[23] Thus, in broad terms, at the end of the failed mediation Drs Francis and Mishra had claims against Dr Thompson, and Dr Al-Freah had a separate claim against Dr Thompson. Dr Thompson, by his solicitors, began making proposals designed to end both sets of claims. He settled on a plan to be executed in two stages: 1) to repay Dr Al-Freah's investment in GIC and EE and have Dr Al-Freah depart from the group, and 2) then to wind up GIC and EE on the basis that he, and Drs Francis and Mishra would split the assets of those companies three ways. Dr Thompson realised that were Drs Francis and Mishra to know of his payment to Dr Al-Freah, they would likely require an equivalent payment as the price of co-operating in releasing Dr Al-Freah and winding up the two companies.[11] This was obvious having regard to the fact that the amount to be repaid to Dr Al-Freah was essentially a refund of the price he had paid to buy shares in GIC and EE, and that the primary relief sought in the Cochine proceeding was that Dr Thompson buy Dr Francis' shares in GIC and EE. No doubt for this reason he endeavoured to keep his correspondence with Dr Al-Freah separate from his correspondence with the other two doctors.

[24] Dr Thompson's plan did not work. Dr Mishra, at least, was never going to make any agreement for the winding up of EE and GIC without knowing the details of the arrangements between Dr Thompson and Dr Al-Freah. A second difficulty with the plan was that Dr Thompson did not have $1.5 million to repay to Dr Al-Freah.[12]

Correspondence post-mediation

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10 T 2–2 l 45ff of the hearing below.

11 AB 397.

12 This is what he told Dr Al-Freah after Dr Al-Freah had said that he would accept that amount as the price for his departure – AB 387; see also AB 418 where Dr Thompson tells Dr Al-Freah that he cannot borrow that amount.

[25] The relevant correspondence began on 20 December 2021, four days after the mediation. It ended on 1 March 2022. Dr Al-Freah's claim for specific performance is based on four emails exchanged between him and Dr Thompson on 17 February 2022. At trial counsel for Dr Al-Freah objected to parts of the wider correspondence to which Dr Al-Freah was not a party. The trial judge allowed the letters and emails into evidence, albeit with a reservation as to their use. Ground 4(a) of the notice of appeal contends that she was wrong to do so. I will outline all the correspondence before coming to the evidentiary point which is the subject of this ground of appeal.

[26] On 20 December 2021 Dr Francis' lawyers wrote to Dr Thompson's lawyers. They referred to the misrepresentation claims made by Dr Al-Freah at the mediation and said, "… if Al-Freah has a complaint, it is against your client and not ours, and your client has the best means by which to resolve those matters …" – AB 331. A way forward was proposed: Dr Al-Freah either release Dr Francis from the misrepresentation claims, or the claims should be formally made and dealt with on a summary basis; then, "the parties" (which must, in context, mean the parties to the Cochine proceeding) agree that EE and GIC would cease offering medical services, go into caretaker mode, and attend to the matters necessary for an orderly winding up. Eight matters which would need to be dealt with for EE and GIC to be wound up were listed. Because all four doctors would keep practising, and needed staff and facilities to do so, it was evident that the winding up would be complicated.

[27] While this letter was addressed only to the solicitors for Dr Thompson, at some early point Dr Francis' lawyers had a copy. As well, Dr Thompson gave Dr Al-Freah a copy of this letter on 21 December.[13]

[28] On 24 January 2022 Dr Thompson's solicitor emailed the solicitors for Drs Francis and Mishra, but not Dr Al-Freah. Dr Thompson was keen to bring the matter to closure through a negotiated settlement as soon as possible. Dr Thompson understood Dr Al-Freah "will not agree to an amicable winding up without some sort of amount of money being paid to him" – AB 336. Dr Thompson was considering how that might be managed, and also how to achieve the result "your clients are looking for", ie., what the 20 December letter called a caretaker period and a winding up.

[29] The next day, by letter to solicitors for Drs Mishra and Francis, the solicitor for Dr Thompson proposed that the three of them "(in the absence of Dr Al-Freah)" apply for a winding up of EE and GIC as "the only sensible course available at this point". It was said, "That application would be made on the basis [that] the current proceedings are first discontinued" – AB 339.

[30] To this unlikely proposal, solicitors for Dr Mishra responded on 3 February advising that Dr Thompson had not "properly exhausted all potential avenues to bring Dr Al-Freah to the negotiating table". Dr Mishra was not interested in reaching a settlement which only "resolves some of the issues in dispute between the parties". Dr Mishra considered the best course of action was to have an orderly winding down of the operations of EE and GIC. To the 20 December list of eight matters necessary to achieve that, Dr Mishra's solicitors added another 13. One of them was that, "All parties are to provide mutual releases and indemnities with

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13 AB 523 and Ex 2.

respect to the various claims against each other". Dr Thompson should make a "concerted effort to seek Dr Al-Freah's agreement". If an agreement was not reached within two weeks, Dr Mishra would agitate for the Cochine proceeding to progress – AB 340–342.

[31] Although this letter is not shown as being copied to Dr Francis' solicitors, it seems to have been. There is no evidence that Dr Al-Freah saw it, or the letters of 24 and 25 January (above), before this proceeding began.

[32] Dr Thompson's solicitor then advised the solicitors for Drs Francis and Mishra that Dr Thompson wished to negotiate a settlement of their client's claims by the purchase of their interests in GIC and EE.[14] In response, the next day Dr Mishra's lawyers sent an email copied to Dr Francis' lawyers saying that Dr Mishra would be prepared to negotiate a sale of his shares in the companies on the basis that there would be indemnities as proposed in the letter of the previous day; his client was "free to compete", and equitable arrangements were made with respect to patient referrals and recalls. The email advised that Dr Francis was generally of the same mind. There was no evidence that Dr Al-Freah saw these letters.

[33] In another about-face, on 10 February lawyers for Dr Thompson wrote to lawyers for Drs Francis and Mishra saying that Dr Thompson was doing all he could to reach an agreement with Dr Al-Freah in line with the course proposed by Dr Francis' lawyers in the letter of 20 December 2021. Solicitors for Dr Mishra replied expressing concern that neither Dr Thompson nor his lawyers seemed to be pursuing a sensible way forward. There was discussion in these emails about providing the letters of 20 December and 3 February to Dr Al-Freah. In an email he sent to the three other doctors on 14 February 2022, Dr Mishra said, "I am unsure whether Dr Al-Freah has been a party to these correspondences but, as a director and shareholder of the companies, I feel he ought to be" – AB 351. Thus, Dr Al-Freah was alerted to the existence of a correspondence to which he was not a party, but not given copies of the letters and emails.

[34] On 11 February Dr Mishra's lawyers wrote to the lawyers for Dr Francis and Dr Thompson. Dr Mishra was not prepared to settle except on the basis that all the matters in the letters of 20 December 2021 and 3 February 2022 were resolved. Dr Mishra considered these letters should be given to Dr Al-Freah's solicitors. He intended to provide the letters to Dr Al-Freah at 5.00 pm on 14 February 2022. At about 4.00 pm on 14 February 2022, solicitors for Dr Thompson wrote to say that his brother had died, and could Dr Mishra's solicitors refrain from providing the letters to Dr Al-Freah "until we communicate further with you later this week" – AB 361. Apart from the letter of 20 December, see [27] above, there is no evidence that these letters were provided to Dr Al-Freah before this proceeding began.

[35] At 11.38 am on 17 February 2022 Dr Thompson's solicitors sent Dr Al-Freah's barrister[15] the first of the four emails which Dr Al-Freah relies upon as constituting a contract:

> "**WITHOUT PREJUDICE SAVE AS TO COSTS**
>
> Dear Mr Garlick,

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14 Email 3 February 2022.

15 For some reason Dr Al-Freah's solicitors were not acting for him at this time.

Re: THE GASTROINTESTINAL CENTRE PTY LTD and ENDOEXCELLENCE PTY LTD (the 'companies') and ORS ats COCHINE PTY LTD (the 'litigation')

As you know, we act for Dr. Thompson (and his company, Wildash Holdings Pty Ltd ('Wildash')) and you act for Dr. Al Freah (and his company Al-Freah Medical Services Pty Ltd ('AFMS')).

At the mediation on 16 December 2021 and since that date, your client has made it clear to our client that he will only agree to a settlement of the dispute/litigation if he/AFMS is paid $1,500,000, that being the purchase price it paid for its shareholdings in the companies. Your client has also stated that he requires our client pay his legal costs in the litigation to date.

Our client and his company Wildash make the following **confidential** offer –

1. our client/Wildash will pay by way of settlement $1,500,000 to your client/AFMS on the below conditions numbered 2, 3, 4, 5 and 6 (to occur simultaneously with the payment);

2. our client will exercise his best efforts to pay the settlement sum [of] $1,500,000 by 4 March 2022, but in any event no later than 18 March 2022;

3. AFMS will transfer its shares in GIC and EE to our client/Wildash for $1 per parcel of shares, your client will resign as an employee of the GIC/EE business and as a director of GIC and EE;

4. Wildash will pay your client's legal costs in the litigation to date (please advise this sum);

5. your client and AFMS will enter into a deed of settlement (including confidentiality/non-disclosure provisions) covering items numbered 1, 2, 3 and 4 above;

6. your client and AFMS will also enter another deed of settlement mutually releasing and forever discharging our client and Wildash, Dr Francis and his company Cochine Pty Ltd, Dr Mishra and his company Animesh Mishra Pty Ltd, and GIC and EE from all claims, actions, suits, demands, costs, damages and expenses (whether known or unknown) which any of them or your client or AFMS may have had but for the execution of the deed by reason of or in connection with the business carried on by them together in The Gastrointestinal Centre Pty Ltd and/or EndoExcellence Pty Ltd; and

7. your client will be released from any restraints on his employment, subject only to Dr Francis and Dr Mishra agreeing to this release. We will seek their agreement as soon as written confirmation of the above terms is received from you.

> Given the discovery process in the litigation is now well underway and our client might have in the order of 1000s of documents to include in its List of Documents, it is critical that we have your response as a matter of urgency.
>
> We appreciate that it is short notice, but in the interests of achieving an urgent settlement, this offer will remain open until 3pm (Sydney time) on Friday 18 February 2022. However, our client would like to communicate with the solicitors for Dr Francis and Dr Mishra early this afternoon, if possible, that our mutual clients have reached an agreement (the details of which will not be disclosed to them other than to confirm points 3 and 6 above and to seek their agreement to point 7 above).
>
> We look forward to hearing from you." (emphasis in the original).

[36] The second email was the reply from Dr Al-Freah's barrister at 1.12 pm:

> "My client accepts the offer contained within your letter of offer on the proviso paragraph 6 also is to protect my client and paragraph 7 Dr Thompson will not press the restraint.
>
> I also ask that the settlement is confidential on the quantum of $1.5M.
>
> Please go aheads and draw the deed. (sic)
>
> Thank you client from Dr Alfreah."

[37] The third email was sent at 2.07 pm by Dr Thompson's lawyers:

> "Thank you for your email.
>
> We confirm our client's agreement to the provisos you set out therein.
>
> We will forward a deed to you as soon as possible to cover the terms of the confidential settlement agreement reached between our clients and, once available, we will forward the other deed to cover the giving of releases by all parties to the litigation commenced by Cochine Pty Limited No 9558/21 (which we expect will be prepared by the solicitors for Dr Francis).
>
> Our client's accountant has asked whether your client would have any objection to Mark Thompson being the transferee of the GIC and EE shares from Al-Freah Medical Services Pty Ltd, rather than Wildash Holdings Pty Ltd. **Kindly obtain instructions to this end**.
>
> We understand from Mr Le Plastrier that Derek Legal no longer act for your client. In those circumstances, are you happy for us to include you in correspondence to be sent to the solicitors for Dr Francis this afternoon in relation to the timing of provision of Lists of Documents and related orders. Of course, it would appear such matters will become redundant as soon as settlement deeds are signed, but until that time there is a need to attend to formal matters

> until the litigation has been officially discontinued. **Kindly confirm**." (emphasis in original).

[38] The fourth and final email relied upon as being part of the contract was sent at 2.18 pm by Dr Al-Freah's barrister. It said, "I shall seek instructions on the transfer". He comes back some minutes later saying, "Dr Thompson can transfer", which should be interpreted as agreeing to the request sent at 2.07 pm.

[39] Three minutes after this last communication, a letter was sent from Dr Thompson's solicitors to the solicitors for Drs Francis and Mishra. Dr Al-Freah's barrister was not copied in. This letter said:

> "We thank you for your patience in this matter.
>
> Our client has now reached agreement with Dr. Al-Freah and his company Al-Freah Medical Services Pty Ltd (AFMS).
>
> That agreement includes the transfer of all shares in GIC and EE owned by AFMS to Wildash Holdings Pty Ltd for $1.00 per share parcel and simultaneous resignation by Dr. Al-Freah as an employee of the business and as a director of GIC and EE. We request confirmation that your clients agree Dr Al-Freah will be released from any restraints on his employment, effective simultaneously with the settlement of the transfer of shares.
>
> The transfer of shares, etc., should be finalised by Friday 4 March 2022, subject to your clients' approvals.
>
> Accordingly, on the basis the current litigation is discontinued and all parties provide mutual releases and indemnities with respect to the various claims against each other, our client is now in a position to agree to all of the terms set out in your letters of 20 December 2021 (from Mr Muller) and 3 February 2022 (from Mr Steele).
>
> We propose that there be two deeds of settlement; one to cover releases (to include Dr Al-Freah and AFMS as parties to the deed) and the other to cover the orderly winding up of GIC and EE and all other matters (to which Dr Al-Freah and AFMS will not be parties).
>
> Kindly let us have your draft deeds of settlement for our urgent review, along with details of your clients' costs of the litigation to date.
>
> …" (my underlining).

[40] In that letter, and in subsequent emails between these three doctors, the distribution after the winding up of GIC and EE is spoken of as being something that only Drs Thompson, Francis and Mishra have an interest in.

[41] In response, Dr Mishra said he would not consider the terms of any proposed settlement deeds without having a proper understanding of the terms of Dr Thompson's agreement with Dr Al-Freah. Dr Thompson's lawyers responded that the terms of settlement with Dr Al-Freah were confidential, but that Dr Al-Freah would complete mutual releases for all parties involved with GIC and EE, and resign as a director and employee. That did not satisfy Dr Mishra. On 25 February

2022 his lawyers reiterated his position. Dr Thompson's solicitor's response on 1 March 2022 was, "We have provided you with details of the settlement with Dr Al-Freah that our client is at liberty to provide. We are further instructed to confirm that our client will pay a sum of money to Dr Al-Freah as part of that settlement, but that sum is confidential and our client is not permitted to disclose it." These letters and emails were not sent to Dr Al-Freah or his representative.

[42] On the same day, 1 March, Dr Thompson emailed Dr Al-Freah saying, essentially, that he did not have $1.5 million to pay him. His lawyer would contact Dr Al-Freah's lawyer "later today with a revised offer". Dr Al-Freah advised Dr Thompson not to waste his time. This exchange is by text message between the doctors personally, so not too great an emphasis can be placed on the use of legal terms. Nonetheless, Dr Al-Freah says:

> "… I agreed to indemnify the others based on the previously signed offer your lawyers sent on 17th Feb.
>
> …
>
> However, [my wife] wants an end to this and she is pressing on me to go to Court and I tend to agree with her too. I can't go on with this as it's already been two years with no results. …
>
> … I will wait to 4th March as per deadline of your proposal. After that I will have not option but to [unfinished sentence but, by implication, to file his own claim].
>
> …
>
> I am sick and tired of changes of plan and resolutions. If the deed is not received before the close of business day today, I'll consider the offer is cancelled and I'll start court proceedings." (my underlining).

[43] Devoid of any context, is an email from the barrister representing Dr Al-Freah to Dr Thompson's solicitors at 6.46 pm on 23 February 2022. In the subject line was written, "is the offer [to] settle still available?" – AB 406. Dr Thompson's affidavit says that no reply was made to that enquiry.

Application for Specific Performance

[44] On 1 April 2022 Dr Al-Freah commenced his proceeding for specific performance. Dr Thompson defended. On 8 July 2022 solicitors acting for Dr Thompson wrote to Dr Al-Freah's solicitors saying that if, contrary to Dr Thompson's case, the Court found that there was a binding agreement made in the four emails, that agreement was "subject to a number of conditions to be satisfied by 18 March 2022 at the latest". Non-fulfilment of those conditions gave rise to a right in their client to terminate, which he now did, if he had not done so before – AB 410.

[45] The statement of claim filed by Dr Al-Freah was brief. It pleaded the Cochine proceeding which it defined as "the dispute" and then pleaded, "By an agreement evidenced in writing in the following correspondence the plaintiffs and defendants [re]solved the dispute ('the contract of compromise')". The particulars of that paragraph were the four emails of 17 February 2022. The pleading continued:

> "The contract of compromise:

(a) Was immediately binding; and

(b) Required the defendants to draw and tender the plaintiffs' deeds of settlement more fully and formally setting out the agreement (the *Masters v Cameron* term)."

It was later pleaded, "The defendants declined to perform the terms of the settlement (in accordance with the *Masters v Cameron* term or at all)".

[46] Read literally the statement of claim asserted that Dr Al-Freah and Dr Thompson had made an agreement which resolved the Cochine proceeding. As might be expected, the initial part of the defence was directed to pointing out that Dr Al-Freah and Dr Thompson were not all the parties to the Cochine proceeding; that the Cochine proceeding had not been resolved, and that therefore there was no contract of compromise as alleged – paragraph 5(f)(i) of the defence. The second ground of defence was that the four emails did not amount to a contract, because the formation of any binding agreement was conditional upon the appellants and the respondents entering into the two deeds of settlement contemplated by the 17 February 2022 letter; consent being given to the transfer of shares under the shareholders' agreement, and release of the restraints on Dr Al-Freah's employment – paragraph 5(f)(ii) of the defence. That is, the contract was not within the first class of contracts in *Masters v Cameron.*[16] The third defence pleaded was in the alternative to the second: if there was a contract, it was subject to the satisfaction of conditions subsequent, namely the execution of the deeds; consent to transfer, and release on restraints, which conditions had not been satisfied. Dr Thompson pleaded that he had terminated any contract due to failure of the conditions subsequent.

[47] In response to what I have called the initial part of the defence, paragraph 2(aa) of the appellants' further amended reply said:

"… the object of the Contract of Compromise was not to settle the Cochine Proceedings, but instead to:

(i) remove the Plaintiffs from GIC and EE and the prospects of any claim he may have had against any of the other Shareholders or directors of GIC and EE;

(ii) allow the Defendants and the other two parties to the Cochine Proceedings to negotiate to and, if possible in fact, resolve the Cochine Proceeding and the prospective proceedings foreshadowed by Dr Mishra;

…"

[48] That is, paragraph 2(aa) of the further amended reply was an impermissible departure from the statement of claim. No point was taken, and the appellants went to hearing with ambiguous pleadings. The ambiguity created by the allegation in the statement of claim that the contract of compromise resolved the Cochine proceeding became conflated with, and strengthened, the respondents' *Masters v Cameron* point, and its influence can be seen right through to the judgment.[17]

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16 (1954) 91 CLR 353.

17 T 1–57, T 2–2 below, and [8] and [71]–[76] of the judgment below.

Ground of Appeal 4(a): Evidentiary Points in relation to the Correspondence

[49] This ground of appeal was that the primary judge erred in allowing into evidence the "subjective views or intentions of the Respondents, uncommunicated to the appellants, of 'background facts' or negotiations not involving the appellants but with others".

[50] At the hearing below, counsel for Dr Al-Freah objected to the receipt by the Court of the parts of the above correspondence which were antecedent to the alleged contract and did not involve his client.[18] The basis for the objection was irrelevance: it was impermissible to have regard to those letters in construing the four emails which Dr Al-Freah said amounted to a contract because they were not part of the matrix of fact common to the two parties to the alleged contract.

[51] Dr Thompson's argument on the objection was that the correspondence to which objection was taken supported his position that, "properly understood, the correspondence of the 17th of February could not have objectively been intended by both parties to be a binding agreement because, amongst other things, it did not resolve the Cochine proceeding".[19] That was said to be a conclusion available from letters and emails to which Dr Al-Freah was not a party which were said to be admissible to show the context in which the 17 February exchange took place.[20]

[52] The trial judge decided the objection during the course of the hearing and gave the ex tempore reasons. She admitted the correspondence into evidence; noted that argument on the objection took place by reference to a category of documents, rather than by reference to particular documents and said, "It may be that there are particular documents or parts of documents which do not reveal anything known … to both the plaintiffs and the defendants about the context of the alleged settlement and that might properly be given no weight. Relevant surrounding circumstances should be known to both parties to be relevant extrinsic evidence."[21]

[53] What was contentious on the objection was the use of Dr Thompson's separate correspondence with Drs Francis and Mishra as commercial context to construe the four emails said to amount to a contract. Unless that correspondence was known to Dr Al-Freah before the alleged 17 February contract, it could not be used to construe what Dr Al-Freah asserted was a contract.[22] There is not some separate rule which allows facts not mutually known to the contracting parties to be used to interpret a contract between the parties on the basis that it shows the commercial context in which the parties contracted.

[54] I think that the primary judge stated the effect of this law correctly in the final sentence of the extract from her reasons just quoted, but the rule that only mutually known facts can be used as part of the commercial context is a substantive rule of law; the objection could not be resolved as a matter of evidentiary weight. Further,

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18 T 1–55 below.

19 T 2–4 l 17 of the hearing below.

20 Paragraphs 6–7 of the respondents' submissions below, AB 264, and T 1–64 of the transcript below.

21 T 2–5 l 10 of the hearing below.

22 *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104, [108]; *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* (1982) 149 CLR 337, 352; *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640, [35], and *Zhu v Treasurer (NSW)* (2004) 218 CLR 530, [82]–[84].

while the general proposition was recognised, there really was no ruling on how it applied to the documents to which objection was taken, and no clear basis for their reception into evidence, if they could not properly be used as extrinsic evidence to construe the contract alleged.

[55] Whether or not the primary judge made use of correspondence to which Dr Al-Freah was not a party in construing the four emails of 17 February is never stated subsequently to the above-quoted indication on the evidentiary point. The judgment did set out some parts of the correspondence which was not known to both the appellants and the respondents – [39] and [40] of the judgment below. The primary judge particularly quoted from the 3 February letter which referred to Dr Mishra urging Dr Thompson to seek Dr Al-Freah's agreement to a "full settlement of the various issues in dispute" and in particular for the "orderly winding down of the operations of GIC and EE". That evidence was not available to the primary judge as context to the interpretation of the four letters said to amount to a contract. At the dispositive part of her reasoning, the primary judge referred to "the commercial context and surrounding circumstances" – [71] – without saying what evidence she included in that description. Reading the determinative part of the judgment, [56] below, I consider there is a real risk that some parts of the correspondence which was not known to Dr Al-Freah was taken into account as commercial context and contributed to what I consider were factual errors made in the judgment below.

Grounds of Appeal 3, 4(b), 5 and 6 – Failure to Find an Immediately Binding Contract[23]

[56] The primary judge found that there was no immediately binding contract created by the exchange of the four 17 February emails. Her reasons were:

> "[71] What seems plain from the commercial context and surrounding circumstances was that both Thompson and Al-Freah (and their companies) were looking to achieve a settlement that was effective to bring all disputes (including the Cochine proceeding, the foreshadowed AM proceeding and the Al-Freah claim) to an end.
>
> [72] The terms of the relevant correspondence of 17 February 2022, in my view, accorded with that objective. Despite the unqualified language used of 'offer', 'settlement' and 'agreement', I consider that on a consideration of the whole of that correspondence in light of the commercial context and surrounding circumstances, what was objectively intended by the plaintiffs and the defendants was that there was to be no settlement of any separate part of the wider dispute between all of the parties. The whole of the wider dispute settled, or none of the dispute settled.
>
> [73] Accordingly, I do not accept that Thompson and Al-Freah objectively intended to settle disputes only between themselves knowing that would have the effect that:
>
> (a) the Cochine proceeding would remain on foot as against both Wildash and AFMS;

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23 Grounds 1 and 2 in the notice of appeal are purely narrative.

(b) the foreshadowed AM proceeding could be filed naming both Wildash and AFMS as defendants;

(c) Al-Freah's claim could proceed against everyone bar the defendants (particularly given the others would almost inevitably join the defendants to any such proceeding – see [31] above).

[74] Whilst in considering the relevant correspondence of 17 February 2022 it is not a matter of counting up the matters in favour or against a particular construction, I am satisfied that the relevant correspondence reveals that the parties did not intend to make an immediately binding agreement just between themselves. Instead, what was contemplated was that an agreement would be binding only at the point where the Cochine proceeding and all claims as between all four doctors and their companies and GIC and EE were also resolved.

[75] In that respect, I consider point 6 of the offer (at [9] above) particularly telling (see my comments about point 6 at [49](d) above). I do not consider that the proper construction of point 6, as submitted for the plaintiffs, was that all it contemplated was the plaintiffs executing a deed in those terms that would be held in escrow until such time as the balance of the named persons executed same. In my view what was contemplated was an effective deed, achieving the mutual releases therein mentioned, resolving all the disputes between those parties.

[76] I do not consider anything that occurred post 17 February 2022 changes the conclusion I have reached. What occurred post 17 February 2022 is sufficiently consistent with the parties understanding that the agreement of Francis, Mishra and their companies needed to be obtained for a settlement to actually become binding and be implemented."

[57] A number of grounds of appeal challenge these findings. Grounds 3 and 5 assert an error of law and fact by failing to find that the four emails constituted a binding contract having regard to their text and their commercial context. Ground 4(b) asserts an error of fact and of law in finding that the objective intention of the appellants and respondents in writing the four emails of 17 February was to settle disputes between all four doctors who held shares in GIC and EE. This was said to be due to a misplaced emphasis on the reference to the Cochine proceeding in the subject line of the first of the four communications; errors in construing paragraph 6 of that letter, and over-emphasis on the reference to disclosure directions in the Cochine proceeding mentioned at the end of that letter. Appeal ground 6 asserts an error in the primary judge's finding that nothing which occurred after the exchange of the four emails bore on the question of whether or not the parties intended to be legally bound, when there were subsequent admissions that a binding agreement had been reached.

[58] The judgment below does not deal separately with what I have called the initial point and the second point pleaded in the defence, [46] above. It conflates them. The judgment begins with a correct statement of the law in *Masters v Cameron* –

[15], and some analysis of the four emails under that rubric – [49]–[52]. However, the determinative reasoning set out at [71]–[74], is not in truth an analysis of the *Masters v Cameron* point raised in paragraph 5(f)(ii) of the defence; it is an analysis of the construction issue raised by paragraph 5(f)(i) of the defence and paragraph 2(aa) of the further amended reply. The rule in *Masters v Cameron* is engaged where parties "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".[24] The application of the rule is to ascertain whether the parties intended to be immediately bound by the terms agreed, or whether they only intended to be bound once a formal contract comes into being. In determining that the four emails of 17 February showed that Dr Al-Freah and Dr Thompson did not intend to settle the dispute between themselves unless the wider dispute between all four doctors could be resolved ([71]–[74] of the judgment below) the primary judge was not determining a *Masters v Cameron* point. She was dealing with an anterior point of construction which went to whether or not Drs Thompson and Al-Freah intended to make an agreement which only bound them, and bound them independently of the fate of GIC and EE, and the Cochine proceeding.

[59] In dealing with these grounds of appeal I will first deal with that anterior construction point. Then I will deal with the second point raised by the defence below, the *Masters v Cameron* point, namely, assuming that the appellants and respondents intended to make an independent agreement only between themselves, did they intend it to be immediately binding notwithstanding that they contemplated the execution of two deeds subsequent to the exchange of the four emails.

An Independent Agreement between Dr Al-Freah and Dr Thompson

[60] **Dealing first with the text** of the four emails of 17 February, the first and most obvious point is that the emails are only between Dr Thompson and Dr Al-Freah. The first paragraph of the 17 February letter formally establishes that the parties to the offer are Dr Thompson and Dr Al-Freah. The offer is in terms one which, if accepted, will create rights and obligations between "our client" and "your client", ie., Dr Thompson and Dr Al-Freah. The final paragraph of the first email says that Dr Thompson's solicitors would like to tell the other doctors that, "Our mutual clients have reached agreement". The third email says that Dr Thompson's lawyers will forward a deed as soon as possible to cover "the terms of the confidential settlement agreement reached between our clients" (my underlining).

[61] The emails only deal with matters as between Drs Thompson and Al-Freah. They do not discuss the many things which need to be dealt with in order to wind up EE and GIC. The emails are about repaying Dr Al-Freah the price of his shares in those companies and, in return, having him depart from those companies and their associated disputes, holding harmless the other three doctors.

[62] A separate and compelling point is that the agreement which the emails say has been reached is to be confidential between Dr Thompson and Dr Al-Freah. That is, it will be confidential from the other two doctors. This is a clear indication that the agreement is not between the four doctors, but between two, and is independent of the potential resolution of the wider disputes.

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24 *Masters v Cameron* (1954) 91 CLR 353.

[63] That the formal parts of the first email (the subject lines) refer to the attached letter being without prejudice save as to costs, and refer to the Cochine litigation, is not particularly compelling. The substance of what is said in the letter is far more important to indicate the parties' objective intentions. The first email refers to the disclosure process in the Cochine litigation. Dr Thompson wants to settle the Cochine proceeding rather than make disclosure in it, therefore he wants to settle the Cochine proceeding quickly. There is no indication that Dr Al-Freah is to be involved in any way in settling the Cochine proceeding, or that its settlement will in any way affect his rights or obligations under the agreement with Dr Thompson. The letter explains Dr Thompson's urgent motivations in a context where an agreement between him and Dr Al-Freah will clear the impediment which prevented the matter settling at mediation, namely Dr Al-Freah's refusal to participate in a winding up and his demand for repayment of the price he paid for EE and GIC shares.

[64] Because the professional affairs of the four doctors were enmeshed in the way described above, it was necessary that they co-operate if Dr Al-Freah was to depart the corporate structure. Numbered paragraphs 6 and 7 of the first 17 February letter assume they will do so. But the terms of agreement proposed only effect obligations and rights as between Drs Thompson and Al-Freah. It is possible that the agreement contemplated will fail in its execution because of the non-co-operation of Drs Francis and Mishra, but that is not a reason to think that the subject matter of these four emails was a settlement of the whole of the dispute between the four doctors, or that the express agreement between Drs Al-Freah and Thompson would not bind them unless other disputes could be settled between Dr Thompson and the other doctors. It is common enough for contracts to provide for conditions subsequent which may, as events turn out, mean that agreements fail in their execution.

[65] I do not construe the obligations at numbered points 6 and 7 as meaning that Dr Thompson and Dr Al-Freah had reached an agreement which would not be binding unless Dr Thompson negotiated a resolution of the Cochine proceeding (likely to involve winding up of EE and GIC) and all other disputes between himself and Drs Francis and Mishra. If that were contemplated, there was no point dealing separately with Dr Al-Freah's shares, directorship, employment and the restraint of trade clauses that affected him. To settle all disputes between the four doctors, provision would have to be made for the shares, directorships and employment of all doctors, as well as the assets and liabilities of those companies.

[66] Further, there would be no point in requiring Dr Al-Freah to urgently accept Dr Thompson's proposal, and no point in setting a date or dates for settlement. As to the latter point, the four email exchange fixes dates — 4 March 2022 and 18 March 2022 by which the settlement sum will be paid to Dr Al-Freah. The latest of the two dates was one month away. Given that a mediation had failed; there was considerable antagonism between Dr Thompson on the one hand, and Drs Mishra and Francis on the other, and any resolution of the wider disputes would be complex, there could not be any certainty that Dr Thompson would bring about the resolution of the wider dispute within this timeframe. There is no indication that these dates are to be postponed if Dr Thompson cannot reach a settlement of all the disputes with Drs Francis and Mishra, nor any express indication that the agreement reached was only to be binding if that occurred.

[67] **Turning to the commercial context** known to both Dr Thompson and Dr Al-Freah, Dr Al-Freah had come into the group of four doctors relatively recently, paying $1.5 million to join, and almost immediately being confronted with irreconcilable conflict between the three doctors he had joined. The first letter of 17 February expressly acknowledges that the $1.5 million Dr Al-Freah is to be paid represents the price he paid to join the group.

[68] The other three doctors were inclined to wind up EE and GIC. This would be a complex process and, given the state of relations between the other three doctors, would likely be difficult. Dr Al-Freah made it clear at the mediation that he was not interested in participating in this process. He wanted his money refunded, and to be rid of the group. He was not interested in how the remaining three doctors sorted out their wider disputes. At the mediation he refused to participate in a settlement which involved winding up EE and GIC. This stymied agreement between the other doctors.

[69] I do consider, therefore, that paragraphs [71] and [72] of the judgment below contain erroneous factual findings. In fact, I cannot see that the findings in those two paragraphs can be reconciled with the earlier factual findings at paragraph [47](a)–(d) of the judgment below:

> "Whilst all of the commercial context and surrounding circumstances to the alleged contract of compromise are relevant, the following key aspects are emphasised (in a summary way):
>
> (a) The disputes between the parties included the Cochine proceeding, the foreshadowed AM proceeding and a claim by Al-Freah. Al-Freah's claim was potentially against each of the other doctors and their companies.
>
> (b) Each of Thompson, Francis and Mishra were prepared to consider a resolution of those disputes that involved an orderly winding-up of the business of GIC and EE.
>
> (c) Al-Freah had expressed (strongly) that he was not interested in participating in such a settlement and instead required a payment of money to exit the practice, at least including the amount he had paid to buy into the practice.
>
> (d) Accordingly, one possible way of resolving all of the disputes from Thompson's perspective was to buy out Al-Freah from the practice and then proceed with Francis and Mishra, implementing arrangements for the orderly winding-up of the business of GIC and EE.
>
> (e) The Cochine proceeding and the foreshadowed AM proceeding would continue and not be resolved until such time as a settlement with Francis and Mishra was achieved. Disclosure in the Cochine proceeding was overdue (and had the potential to be costly, onerous and perhaps even damaging for Wildash/Thompson)."

[70] The mutually known commercial context shows that an agreement whereby Dr Thompson effectively paid Dr Al-Freah to leave the group made commercial

sense both to Dr Al-Freah, because it put him back in the position he was before he joined the group, and to Dr Thompson because, without Dr Al-Freah as a director and shareholder of GIC and EE, all the relevant directors and shareholders of those companies wanted to wind up those companies. In my view the commercial context makes it quite likely that Drs Thompson and Al-Freah would look to make an agreement which took Dr Al-Freah out of the conflict and left Dr Thompson free to negotiate with the other two doctors. For them there was value in an independent agreement which did not resolve the Cochine proceeding or the wider disputes between Dr Thompson, and Drs Francis and Mishra.

[71] Something more must be said about paragraph [73] of the trial judge's reasons. In my view, the appellant is correct in saying that it betrays a misunderstanding of paragraph 6 of the first of the four emails. Read in combination with the first paragraph of the second email and the third paragraph of the third email, Dr Thompson assumes the obligation to procure a deed by which he and the other two doctors release Dr Al-Freah and his company from all claims in connection with the business carried on through the companies GIC and EE. Dr Al-Freah promises to give the same releases to Dr Thompson and the two other doctors. The deed contemplated is not one by which each of the four doctors releases each of the three other doctors from all claims; that is clear from the words in paragraph 6 of the first email. It is Dr Al-Freah who is to release everyone else, and they will all release him. Paragraph 6 says nothing about the position of the three remaining doctors *inter se.*

[72] In the third paragraph of the third email a short-form description of this is used, but I do not interpret this as changing the clear words in paragraph 6 of the first email.

[73] The consequence of such a deed would be that the Cochine proceeding would not remain on foot as against Dr Al-Freah and his company. Dr Mishra would have no right to file proceedings against Dr Al-Freah or his company, and Dr Al-Freah would have no right to make his claims of misrepresentation against anyone. Paragraph 6 does not contemplate a deed which will bring an end to the Cochine proceeding, or any other dispute between the three remaining doctors.

[74] The last sentence of the third email must be considered. The sentence is ambiguous. If the words "settlement deeds" are interpreted as meaning the two deeds contemplated by the four emails of 17 February, those words do not conflict with the above interpretation. It seems sensible to interpret those words that way as, at that point, there are no other settlement deeds in existence or in contemplation. There is also nothing in conflict with the above interpretation in the idea that until settlement deeds are signed, Dr Thompson's solicitors still need to be able to communicate about the Cochine proceeding with some legal representative for Dr Al-Freah. A difficulty comes with the last words "until the litigation has been officially discontinued". That could be read as implying that Dr Al-Freah will have obligations in respect of the Cochine proceeding until the entirety of that litigation comes to an end. On the other hand, it could also be read as meaning that Dr Thompson's solicitors will need to continue to communicate with Dr Al-Freah's barrister until the Cochine proceeding has been officially discontinued against Dr Al-Freah, as a consequence of the second deed which Dr Thompson has undertaken to procure. I prefer the latter interpretation. Otherwise a small untidiness as to the ancillary matter of Dr Thompson's solicitor's (somewhat

irregular) communication with Dr Al-Freah's barrister overrides the remainder of the text in the four emails and the commercial context in which they were written.

[75] In my opinion, what I have called the initial point in the defence should have been resolved separately, and in favour of the appellant. That is, I think it is clear from the text and the context that the four emails of 17 February were not an attempt to settle the Cochine proceeding, or any wider conflict between the four doctors. Nor was the agreement reached subject to an agreement being reached between Dr Thompson and Drs Francis and Mishra. I turn to the *Masters v Cameron* point.

The *Masters v Cameron* Point

[76] The relevant part of *Masters v Cameron* is as set out in the judgment below:

> "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 cases. 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."

[77] The controversy in this case was limited to whether or not the agreement fell within the first class of contracts spoken of in that passage. In my view it did.

[78] Which of the categories any particular case belongs in must be determined by objectively ascertaining the intentions of the parties concerned. In *Masters v Cameron* it was said that the intention is to be discerned from the "language the parties have employed".[25] That intention may be express or implied.[26] In analysing the facts, "… the decisive issue is always the intention of the parties which must be objectively ascertained from the terms of the document when read in the light of the surrounding circumstances".[27]

[79] The words of the four emails are indicative of an immediately binding agreement — cf the language in the letters exchanged in *Feldman v GNM Australia Ltd.*[28] The terms "offer" and "acceptance" are used, and used by lawyers. It is significant that they are the same lawyers who attended the failed mediation and that the letters are

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25 P 362.

26 *Eccles v Bryant* [1948] Ch 93, 99.

27 *GR Securities Pty Ltd v Baulkham Hills Private Hospital Pty Ltd* (1986) 40 NSWLR 631, 634, per McHugh JA, citing *Godecke v Kirwan* (1973) 129 CLR 629, 638, and cited by Muir JA in *Brice v Chambers & Ors* [2014] QCA 310, [94].

28 [2017] NSWCA 107, [74]-[79].

written after the mediation. That is, after the parties were at a stage where they had already spent time and effort trying to finally resolve their disputes.

[80] Moreover, the initial email says, "this offer will remain open till 3.00 pm (Sydney time) on Friday 18 February 2022". This tends to reinforce that the word offer is used in a strict sense; it implies that an acceptance within time will create legal relations, but that one out of time will not.

[81] The first email expressly contemplates in its final paragraph that if the offer is accepted, "our mutual clients have reached an agreement". As noted above, the third email says that Dr Thompson's lawyers will forward a deed as soon as possible to cover "the terms of the confidential settlement agreement reached between our clients".

[82] Nonetheless, the *Masters v Cameron* point arises because the emails contemplate that a further deed will be entered into, between Drs Thompson and Al-Freah which documents their agreement – numbered paragraph 5 of the first 17 February letter.[29] Nothing is said about whether the parties intend to be bound before that occurs. There are no words such as "subject to contract" from which an implication against any immediate binding effect might be drawn.[30]

[83] Attention needs to be paid to the type of transaction said to be the subject of the binding agreement. It has been said that "if the terms of a document indicate that the parties intended to be bound immediately effect must be given to that intention irrespective of the subject matter, magnitude or complexity of the transaction".[31] Nonetheless if the alleged contract is substantial and complex it will tend against a finding of an immediately binding contract, especially if the communications in issue are not detailed, or appear to be incomplete. Here, the agreement evidenced in the four emails was not a particularly complicated one. In my view the exchange of emails agrees all the detail necessary for the agreement to be immediately binding. It fixes the price to be paid and the date by which all parties are to perform their obligations, cf [81] *Feldman*. The parties contemplated that the deeds would contain mutual releases and discharges. Paragraph 6 of the first email goes to some lengths to specify the substance of those releases and discharges. I think that finality had been reached about that topic, even though the deed might restate the terms in paragraph 6 "in a form which will be fuller or more precise but not different in effect".[32]

[84] The email exchange also contemplated that there would be a confidentiality clause. The ambit of that clause was left open by the first email, but was circumscribed by the second email: the part of the settlement which was to be confidential was the sum paid to Dr Al-Freah. Dr Thompson agreed to that in the third email. Again, no

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29 The deed mentioned at numbered point 6 of that letter was not to document the agreement between Drs Thompson and Al-Freah, it was a deed which Dr Thompson promised to procure and Dr Al-Freah undertook to execute. The parties to this litigation accepted that this term of the contract should be characterised as a condition subsequent, despite the fact that on its face it is promissory. That construction is more sensible than a literal construction promising something which Dr Thompson does not have.

30 *Darter Pty Ltd v Malloy* [1993] 2 Qd R 615, 619.

31 *GR Securities Pty Ltd* (above), p 633.

32 *Masters v Cameron* (above), p 360.

doubt the clause would be stated more formally, but I think the subject matter of it was sufficiently defined by the exchange of four emails.

[85] A question was raised as to the promise at paragraph 4 of first email to pay Dr Al-Freah's "legal costs in the litigation to date (please advise this sum)". The term "the litigation" had been defined in the subject line of this letter as the Cochine proceeding. It was argued that the basis upon which costs were to be calculated was not specified. I think this difficulty is overcome by the words in parentheses in the part just quoted. The sum is to be all the costs incurred in the litigation to date – there is no provision for assessment or reasonableness, Dr Al-Freah is simply asked to advise the sum of his costs.

Subsequent Conduct

[86] There is a clear line of authority in this Court that recourse may be had to conduct of parties to an alleged agreement, subsequent to the time the agreement is alleged to have been made, in order to determine whether or not a binding agreement has been reached.[33] This authority is consistent with authority in the New South Wales Court of Appeal,[34] and the authority cited for the proposition in the *Commercial Bank of Australia Ltd v GH Dean & Co Pty Ltd* is the High Court case of *Barrier Wharfs Ltd v W Scott Fell & Co Ltd.*[35]

[87] I proceed on the basis that the rule is well-established and binding on this Court. That is also borne out by the authorities stated by DW McLauchlan in "Contract Formation, Contract Interpretation and Subsequent Conduct".[36] That article does however note, as some cases have done,[37] that there may be a conceptual difficulty in some cases in using subsequent conduct to determine whether or not a contract has been made, if that subsequent conduct does no more than reveal the subjective understanding of one party to the arrangement as to the question in issue.

[88] I was not convinced by submissions from both parties in this case that anything said in correspondence by either Dr Thompson or Dr Al-Freah, or their respective

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33 *Commercial Bank of Australia Ltd v GH Dean and Co Pty Ltd* [1983] 2 Qd R 204, 209, per McPherson J, followed in *Marek v Australasian Conference Association Pty Ltd* [1994] 2 Qd R 521, 529; *Darter Pty Ltd v Malloy* [1993] 2 Qd R 615, 619, per Fitzgerald P, McPherson JA and Williams J; *400 George Street (Qld) Pty Ltd & Ors v BG International Ltd* [2012] 2 Qd R 302, [59]; *Weemah Park Pty Ltd v Glenlaton Investments Pty Ltd* [2011] 2 Qd R 582, [38]; *Brice v Chambers* (above) at [96].

34 *Brambles Holdings Ltd v Bathurst City Council* (2001) 53 NSWLR 153, 163-164, [25]-[26]; *Australian Broadcasting Corporation v XIVth Commonwealth Games Ltd* (1988) 18 NSWLR 540, 550, (Gleeson CJ, Hope and Mahoney JJA); *Feldman* (above), at [90]; *Sagacious Procurement Pty Ltd v Symbion Health Ltd* [2008] NSWCA 149 at [103] per Giles JA, Hodgson and Campbell JJA agreeing; *Johnston v Brightstars Holding Company Pty Ltd* [2014] NSWCA 150 at [121] per Basten JA, Gleeson JA agreeing.

35 (1908) 5 CLR 647.

36 (2006) Vol 25 (1), *The University of Queensland Law Journal*, 77.

37 p 81. McLauchlan cites *Fraser v Strathmore Group Ltd* [1991] NZCA 329/90 (unreported, 4 October 1991), "While evidence of subsequent inconsistent statements or conduct may bear upon the credibility of witnesses, it offers no assistance in determining objectively whether the parties reached an agreement that can be enforced. To focus on subsequent events is to risk confusing the subjective views of the party with what is to be determined objectively as their intentions." McLauchlan notes that subsequent New Zealand cases have adopted the rule that subsequent conduct is admissible on the question of whether a contract was formed. He cites *Fletcher Challenge Energy Ltd v Electricity Corporation of New Zealand Ltd* [2002] 2 NZLR 433, [56] and *Verissimo v Walker* [2006] 1 NZLR 760, [40]–[41].

lawyers, after the exchange of the four emails of 17 February, could be received into evidence as bearing upon whether or not a contract existed because such statements were admissions against their respective interests. First, the cases concerning the use of subsequent conduct do not speak of it in terms of it being an admission, but in terms of it being context in which to interpret whether the words relied upon do in fact constitute a contract. Secondly, if one were to allow evidence of "admissions", there is a risk (or a greater risk) that what is recorded is simply one party's subjective understanding of the arrangement, (with an associated risk that the party is not recording their sincere understanding, but an understanding which advances their interests). In *Australian Energy Ltd v Lennard Oil NL*[38] Connolly and Thomas JJ both expressed reservations about using statements in correspondence subsequent to the disputed agreement as admissions as to the existence of a contract. As Connolly J put it, he preferred "… to exclude from consideration admissions by one party to a contract of its continued operation when this really depends upon the proper construction of the contract itself." – p 230.

[89] For this reason, while I am prepared to look at subsequent conduct of the parties, in considering the *Masters v Cameron* point, I would limit it to the matters described below.

[90] One powerful construction point is that in the four email exchange of 17 February, Dr Thompson proposes, and Dr Al-Freah does not demur from the proposition, that if Dr Al-Freah accepts his offer he will tell the other two doctors they have reached an agreement. This is an indication that the parties do intend to be immediately bound, and do not intend to postpone the binding effect of their agreement until the deeds are executed. Then, three minutes after the exchange of four emails, Dr Thompson does exactly what he foreshadows in the first of the four emails – he writes to the other two doctors and tells them that he and Dr Al-Freah have reached an agreement. It is significant that this is written by the solicitor who has written on behalf of Dr Thompson in the four email exchange. It is subsequent conduct which is expressly contemplated by the four emails.

[91] In this same letter, Dr Thompson asks Drs Francis and Mishra for the consents he had promised to attempt to obtain by numbered point 7 of the first email to Dr Al-Freah. This also lends support to the idea that Drs Thompson and Al-Freah intended to be immediately bound.

[92] Dr Thompson did not simply ask Drs Francis and Mishra to co-operate in producing the deed which it was necessary for him to provide to Dr Al-Freah by the terms of point 6 the first of the four emails. He asked for something extra which would be of advantage to him. A cynic might say that was Dr Thompson's way.

[93] What is written in this email by Dr Thompson's solicitors cannot be used as extrinsic evidence to interpret what is meant in numbered point 6 of the letter of 17 February. There is no authority that subsequent conduct can be used to explain the meaning of a term in an alleged contract, as opposed to shedding light upon whether or not words should be interpreted as creating a binding contract.[39] One can say that the request in relation to releases and indemnities would produce a

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38 [1986] 2 Qd R 216, 230 and 238.

39 *GH Dean*, above, p 209. When the points discussed in [87] above are considered one can understand why.

document which would fulfil Dr Thompson's obligations pursuant to point 6 of the first email exchanged on 17 February.

[94] It is consistent with there being a binding agreement with Dr Al-Freah that Dr Thompson contemplates a winding up and distribution in thirds in the letter sent three minutes after the four email exchange, and in subsequent letters.

[95] It is consistent with there being an immediately binding agreement with Dr Al-Freah that Dr Thompson refuses to provide details of his agreement with Dr Al-Freah to Drs Francis and Mishra on the basis that he is bound by an obligation of confidentiality, cf [83] *Feldman.*

[96] In *Feldman* the subsequent conduct of the parties was used as context showing that there was no contract formed because the parties were still negotiating. There are two pieces of evidence in this case which must be considered in this context. The first is the unexplained email described at [43] above. On one possible reading it shows that the lawyer acting for Dr Al-Freah did not regard the exchange of four emails on 17 February as creating a binding contract. Even if that is the reading given to it, I do not view his opinion on the matter as admissible. Secondly, I find it difficult to give any weight to the email in circumstances where it is unexplained, and at odds with the language used on 17 February by that lawyer, and the lawyers acting for Dr Thompson.

[97] The second piece of evidence is the text message sent by Dr Al-Freah, [42] above. The text message uses legal terms, but Dr Al-Freah does not use them as a lawyer would. In the first paragraph Dr Al-Freah speaks of agreeing to an offer, which is consistent with a binding agreement having been made. In the third paragraph he refers to the terms of the 17 February agreement, saying that he will wait until 4 March "as per deadline of your proposal". This is consistent with there being a binding agreement in place. Later in the text Dr Al-Freah says that if the deed is not received "before close of business today" (rather than 4 March) he will "consider the offer is cancelled and I'll start court proceedings". This language is ambiguous. One reading is that if Dr Thompson does not abide by the 17 February agreement, Dr Al-Freah will sue on that agreement. Another reading is inconsistent with the agreement he now alleges. In turn, that inconsistency might mean that he is writing in breach of the agreement, or alternatively, that he does not consider there was a legally binding agreement. I think this piece of evidence is too uncertain to be of any significant weight in determining the issues which arise on this appeal.

[98] In summary, as to the *Masters v Cameron* point, the text; the substance of matters dealt with in the four emails, and the context, including the subsequent conduct of Dr Thompson, show that he and Dr Al-Freah intended to be immediately bound by the 17 February exchange even though they contemplated that their agreement would be recorded in a more formal document. The third substantive defence pleaded by the respondents must now be considered, namely whether Dr Thompson was entitled to terminate the 17 February contract on the basis that conditions subsequent to its performance failed.

Conditions Subsequent, Appeal Grounds 7, 8 and 9

[99] The primary judge dealt with these matters *obiter* having regard to her findings that there was no binding contract made on 17 February.

[100] In my view, the provisions at numbered paragraphs 6 and 7 of the first letter sent on 17 February were conditions subsequent in the sense explained by Stephenson LJ in *Wickman Machine Tool Sales Ltd v L Schuler AG*:

> "… the natural and ordinary meaning of making something a condition of an agreement is that it is made something on which the agreement depends. … If the condition is one to be fulfilled before the agreement comes into force, it is what the lawyers have called a condition precedent … that is, a condition of the agreement's coming into force; and if it is not performed there is no agreement. If the condition is to be performed after the agreement has come into force, it is what lawyers have called a condition subsequent, … that is, a condition of the agreement's continuing; and if it is not performed the agreement comes to an end."[40]

[101] The effect of a condition subsequent failing will depend upon the nature of the event upon which the continuation of the contract is conditional, and in particular whether or not one of the parties to the contract can influence the occurrence, or non-occurrence, of that event. In *Suttor v Gundowda Pty Ltd* the High Court explained this by reference to the reasoning in *New Zealand Shipping Co Ltd v Société des Ateliers et Chantiers de France*:

> "The effect of contractual provisions of this character was discussed and explained in *New Zealand Shipping Co Ltd v Société des Ateliers et Chantiers de France*. Lord Atkinson said:– 'It is undoubtedly competent for the two parties to a contract to stipulate by a clause in it that the contract shall be void upon the happening of an event over which neither of the parties shall have any control, cannot bring about, prevent or retard. For instance, they may stipulate that if rain should fall on the thirtieth day after the date of the contract, the contract should be void. Then if rain did fall on that day the contract would be put to an end by this event, whether the parties so desire or not. Of course, they might during the currency of the contract rescind it and enter into a new one, or on its avoidance immediately enter into a new contract. But if the stipulation be that the contract shall be void on the happening of an event which one or either of them can by his own act or omission bring about, then the party, who by his own act or omission brings that event about, cannot be permitted either to insist upon the stipulation himself or to compel the other party, who is blameless, to insist upon it, because to permit the blameable party to do either would be to permit him to take advantage of his own wrong, in the one case directly, and in the other case indirectly in a roundabout way, but in either way putting an end to the contract.'" [41]

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40 [1972] 1 WLR 840, 859, and *Suttor v Gundowda Pty Ltd* (1950) 81 CLR 418, 443 both cited in Greig & Davis, *The Law of Contract*, (The Law Book Company Ltd, 1987) p 588 and 591.

41 *Suttor v Gundowda*, (above), pp 440–441, citing *New Zealand Shipping Co Ltd v Société des Ateliers et Chantiers de France* [1919] AC 1, 9.

[102] If the event is not one outside the influence of both parties to the contract, then it may be that one (or both) parties to the contract will have implied obligations to do all such things as are necessary to enable the other party to have the benefit of the contract.[42] Alternatively, there may be a greater obligation on one of the parties, an obligation to use reasonable efforts to bring the event about (without absolutely undertaking that they can succeed in doing so).[43] *Perri v Coolangatta Investments Pty Ltd*[44] was a case of the second type. It was recognised that a contract for the sale of land which was subject to the sale of the purchasers' existing house was not one where "the purchasers promise that a condition precedent to the obligation to complete will be fulfilled" – p 566, but that the purchasers had an obligation "to do what was reasonable to effect a sale of their [existing] Lilli Pilli property …" – pp 566 and 567.

[103] In this case it was accepted by the respondents that they had obligations of this second type, that is, obligations to make reasonable endeavours to obtain the releases described in numbered paragraphs 6 and 7 of the first letter of 17 February. Thus the conditions subsequent at paragraphs 6 and 7 were not of a type which would result in the contract being void on their non-occurrence: whether or not the releases were obtained was something which it was within Dr Thompson's power to influence, although not control. Therefore non-fulfilment of the conditions subsequent did not make the contract void, but only voidable at the instance of a party who was not in default.

[104] There are difficulties with the respondents relying upon Dr Thompson's attempts to obtain the releases and indemnities contemplated by numbered paragraph 6 of the first email of 17 February, for the reason referred to in [92]. I thus disagree with the primary judge's *obiter* finding about this ([82(c)] below) Nonetheless, I think that the respondents do show that Dr Thompson did use reasonable endeavours to obtain the paragraph 7 releases and failed, due to no fault of his own. In those circumstances it seems to me Dr Thompson had the right to terminate the contract between him and Dr Al-Freah and that he did so, see [44] above.

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42 *Mackay v Dick* (1881) 6 App Cas 251, 263; *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd* (1979) 144 CLR 596, 607.

43 Treitel, *The Law of Contract*, (Sweet & Maxwell, 10th ed, 1999, London), p 61.

44 (1982) 149 CLR 537.