

## PART VI – INTENTION

### I GENERAL APPROACH

#### A *Basic Principle*

Both parties to the contract must manifest an intention to be legally bound (*Australian Woollen Mills*). The presence of this intention is determined objectively based on an inference from conduct.

The analysis is highly factual; courts will look to the surrounding circumstances, including actions and statements of each party, to determine the objective manifestation of their intention.

#### B *Contextualisation*

There is considerable overlap between the requirement of intention and other requirements of formulation (offer, acceptance).

Intention may be problematic in the following scenarios:

- Commercial context – honour commitments
- Social or domestic context – agreements relating to substantial matters
- Government context – policy announcements
- Preliminary agreements – intention to be binding?

### II PRESUMPTIONS

#### A *Traditional Types*

The *traditional* approach to determining intention looks at the class into which the agreement falls and the context in which it was made.

1 *Purely social or domestic agreements*

- It may be presumed that the parties did not intend to create a legally enforceable agreement

2 *Business or commercial agreements*

- It may be presumed that the parties did intend to be contractually bound

Importantly, both of these presumptions are rebuttable. The party attempting to enforce the promise bears the onus of demonstrating intention.

## B Present Role

As a result of *Ermogenous*, the role of presumptions is solely to determine who bears the onus of proof.

For example, in a commercial context, the prima facie presumption that the parties intended a promise to be contractually binding has the effect of shifting the onus of proof onto the defendant to establish that no such intention was actually present.

However, the High Court in *Ermogenous* warned against the misuse of presumptions. As a result, the approach of earlier cases may not survive (though the outcome may still be the same).

The focus of the courts should be on the intentions of the parties as evidenced by

- Subject matter of the agreement
- Status of parties to the agreement
- Relationship of the parties to one another
- Other salient circumstances

### ***Ermogenous v Greek Orthodox Community:***

#### Facts

- E served as the archbishop of the Greek Orthodox Community
- After E resigned, he claimed to be entitled to various leave entitlements
- GOC resisted making the payments
- E argued that he was employed under a contract of employment and therefore entitled to the leave payments

#### Issue

- Had the archbishop and the church made a contract?
- Was there intention to create a legally enforceable agreement?

#### Reasoning

- An intention to create contractual relations is essential
- In determining whether an intention to create legal relations existed, the Court will objectively assess the state of affairs existing between the parties (*Masters v Cameron*)
- Discerning intention warrants intricate analysis of the facts – intention cannot be presumed purely based on the context or type of the agreement
  - Doubt is expressed about the utility of presumptions based on setting
  - At best, these presumption do no more than identify the party who bears the onus
  - The focus should always be on the circumstances of the case
- Consider the following factors:
  - The subject-matter of the agreement (eg, employment: salary, duties, control)
  - The status of the parties to the agreement
  - The relationship of the parties to one another
  - Other surrounding circumstances
- The role of presumptions
  - Doubt is expressed about the utility of using presumptions based on the setting in which the agreement was reached
- Did the court extend the class of cases in which intention must be positively proved to 'the engagement of a minister of religion'?
  - Despite purporting to ignore presumptions, the religious nature of the

<p>archbishop's alleged employment contract seems to influence the majority's reasoning</p> <ul style="list-style-type: none"> <li>○ The majority leaves open the question of whether certain classes of case could be presumed to imply (or deny) contractual intention</li> </ul> <ul style="list-style-type: none"> <li>• Kirby J: <ul style="list-style-type: none"> <li>○ The court should not use presumptions for or against intention</li> <li>○ There is no presumption that contracts between minister and a religious body are not intended to be contractually enforceable</li> </ul> </li> </ul> <p><u>Decision</u></p> <ul style="list-style-type: none"> <li>• On the facts, the archbishop's relationship to the church is relevant but not determinative of presumptions</li> <li>• The archbishop established that there was a contract; the dispute was remitted to a lower court for determination whether it was a contract of employment</li> </ul>
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### III PRELIMINARY AGREEMENTS

#### A *Deferring Legal Commitment*

**Question:** did the parties intend to be bound immediately upon signing, or did they intend to defer any legal commitment until a formal contract had been made?

Parties may resist contractual obligations on the basis that they had only reached preliminary agreement and did not intend that preliminary agreement to be given contractual force.

An example of a preliminary agreement is one that is 'subject to contract'.

Critical to intention is that the agreement be final. If the parties make their agreement "subject to (some condition)," then prima facie, agreement has not been reached unless one of the parties can prove a contrary intention.

The onus of proving contrary intention rests with the party seeking to rebut. That party must establish the fact of contrary intention by reference to:

- Circumstances surrounding the agreement; or
- The express terms of the agreement

#### B *Possible Interpretations*

Three possible interpretations of a subject to contract clause are established by *Masters v Cameron*:

- 1 The parties intend to be bound **immediately**, but propose to restate the terms in a form which is fuller or more precise, but not different in effect

- There is a binding contract; parties are bound regardless of whether formal document ever created or signed
- 2 The parties have agreed on all the terms of their bargain, and do not intend to vary those terms, but have made performance **conditional** upon the execution of a formal document
- There is a binding contract whereby parties are bound to bring the formal document into existence
- 3 The parties **do not intend** to make a binding agreement at all unless and until they execute a formal contract, in which case, the terms of the agreement are not intended to have any binding effect
- Parties are not contractually bound in any way until a formal document is actually signed; consider estoppel argument

The use of an expression such as ‘subject to contract’ prima facie indicates that the parties have done no more than establish a framework for future agreement (*Masters v Cameron*).

### ***Masters v Cameron:***

#### Facts

- Both parties signed a written memorandum whereby C agreed to sell and M agreed to buy a property at a stipulated price
- The document contained the following statement:

*this agreement is made subject to the preparation of a formal contract of sale which shall be acceptable to my solicitors on the above terms and conditions*

- Both parties behaved as though the transaction was proceeding but no further documentation was signed
- When M ran into financial difficulties, he refused to complete the transaction

#### Issue

- Was there a contract between M and C?

#### Reasoning

- The interpretation of a subject to contract clause is a question of fact; the Court will use relevant facts to infer the applicable interpretation
- The default interpretation of a subject to contract clause is that there is no intention to be legally bound
  - Negotiating parties might want to ensure that a document recording matters agreed on was unenforceable as a contract for several reasons:
    - They might wish to reserve the right to withdraw
    - There might be more than two parties
    - Complex negotiations for large contracts need to have records for further negotiations
- A distinction is drawn between conditions relating to *formation* and conditions relating to *performance*
  - A contract may not be *formed* until a formal document is drawn up and signed; or
  - The obligations in an agreement may not be *performed* until some condition is

met

Decision

- There was no contract; the deposit is repayable to the buyer (M)

Parties may also make contracts conditional on events other than the execution of a formal document. For example:

- Obtaining finance
- Approval of some kind (eg, zoning)

### C *Honour Clauses*

Honour clauses are those expressly providing that the parties do not intend their agreement to create legal rights or to result in legal consequence.

Examples:

- “This document does not give rise to any legal relationship, nor is it intended by the parties that any legal consequences shall flow from this agreement”
  - Acceptable, since it expressly denies an intention to be bound
- “No court of law shall have the jurisdiction over or power to adjudicate in respect of any matter arising out of this agreement or any breach thereof”
  - Unacceptable, since it implies that if the agreement can be breached it is binding

## IV OTHER AGREEMENTS

### A *Commercial*

There is a rebuttable presumption that parties to a commercial contract intend contractual relations. However, since *Ermogenous* the effect of this presumption is merely to identify who bears the onus of proof.

The party attempting to deny enforceability of the contract may still attempt to argue that the agreement does not give rise to contractual obligations because they were not intended. Ultimately, whether parties to a commercial transaction intended to create legal relations is a question of fact, about which there may be disagreement.

For example:

- Letters of intent
- Letters of understanding (our focus)
- Heads of agreement
- Memoranda of understanding

The presumption of intention in commercial settings is quite difficult to overcome (*Banque Brussels*), though it is uncertain what the approach will be after *Ermogenous*.

Letters of comfort must contain statements of a promissory nature if they are to evidence an intention to create legal relations (*Banque Brussels*).

**Banque Brussels v ANI:**Facts

- ANI gave a letter of comfort in relation to SSL's loan
- ANI had the controlling interest in SSL's parent company, SHL
- The letter stated that ANI would inform the bank if it disposed of its interest in SHL
- The letter also said:

*We take this opportunity to confirm that it is our practice to ensure that our affiliate SSL will at all times be in a position to meet its financial obligations as they fall due. The financial obligations include repayment of all loans made by your Bank under the arrangements mentioned in this letter*

- ANI disposed of its shareholding without informing the bank
- SSL was unable to pay its debt and went into liquidation
- ANI denied liability on the basis that the parties did not manifest an intention to create legal obligations

Issue

- Did the parties intend to create legally binding obligations in their letter of comfort?

Reasoning

- Letters of comfort are documents accepted by a lender from a person other than the borrower by which that person acknowledges awareness of the loan and gives some assurance in connection with it that, because of the wording used, falls short of a guarantee
- Letters of comfort might be used in circumstances where:
  - writer does not want to incur liability;
  - writer wants to protect its own credit rating;
  - writer wants to avoid showing a contingent liability on its balance sheet; or
  - unfavourable tax or foreign exchange consequences
- The letter of comfort gives rise to contractual liability because it is of a commercial nature
  - There a presumption in favour of an intention to create legal relations
  - This presumption (assuming it even exists, after *Ermogenous*) can be rebutted
- The relevant characteristic in determining intention is whether the statements are sufficiently promissory in character – there needs to be a promise made
- Rogers CJ:
  - The letter of comfort was a contract
  - There is a presumption that, in commercial situation, such agreements are intended to give rise to contractual relations
  - Letters of comfort are often too uncertain, but not here
  - The letter of comfort is promissory in nature.

Decision

- The letter of comfort is a commercial agreement and, as such, evinces an intention to be contractually bound
- By allowing SSL to fall into liquidation, ANI is in breach of its assurance to Banque Brussels that they would always be in a position to meet their financial obligations

## B *Non-Commercial*

There exists a rebuttable presumption that family members who reach agreement do not intend to create legal relations. However, since *Ermogenous*, the extent of this presumption is merely to dictate who bears the onus of proof. The question of intention is still a question of fact.

A finding of intention is more likely where

- Parties have acted as though rights have been created
  - Eg, by altering their position in some way, behaving as though a binding agreement exists between the parties
- Serious rights or obligations are incurred
- Family members are entering into agreements of a commercial nature

The outcome is largely dependant upon factual analysis.

### ***Todd v Nicol:***

#### Facts

- N sent a letter to sister and niece (the Ts) inviting them to live with her in Australia
- N promised that they could live there for life and promised to change her will to reflect this
- Ts accepted the offer and moved to Australia
- the relationship broke down and N asked Ts to leave the house
- Ts sought declaration that they were entitled to remain in the house

#### Issue

- Did N intend to be contractually bound when she promised that the Ts could live with her for life?

#### Reasoning

- The Court inferred intention from the following factors:
  - N changing her will to reflect her sister and niece's interest in the estate
  - The fact that N invited her sister and niece of her own accord
  - The large expense incurred by the Ts by relocation to Australia in reliance on N's promise
- The subsequent conduct of the parties seems to indicate that if the Ts didn't intend to be contractually bound they wouldn't have acted in the way they did; however, this alone is insufficient to infer intention
- However, the Court makes it clear that reliance is not the basis for liability
  - Estoppel may also have a role to play (inducement by N leads to Ts to assume they could live with her and detrimentally rely on that assumption in moving to Australia)
- Mayo J: the plaintiff's claim nevertheless fails
  - There is an implied term in the contract to act reasonably
  - The Ts needed to act in such a way as to maintain livable conditions for N
  - By acting the way they did, the Ts were in breach of the agreement

#### Decision

- Contractual relations were intended, but the Ts breached the agreement by behaving unreasonably

#### Notes

- Should there be a presumption against an intention to create legal relations in relation to

domestic and social settings?

- Many legitimate contracts are created in a domestic setting; presumptions seem predisposed to produce unfair outcomes
- There seems to be no compelling reason to separate domestic/social agreements from commercial ones in principle
  - Although: commercial agreements differ substantially from domestic ones
- By starting from the position that parties want to create legal relations, the law may be seen as encroaching too far upon the realm of private affairs
- Factual analysis will be required to rebut any assumption or establish intention; either way, analysis is necessary – why not eliminate assumption and start with the analysis?
- Presuming no intention doesn't really aid the investigation; if anything, it will reduce certainty and render the party seeking to rely on the promise in the same position as if there were no presumption at all
- For this reason, the presumption should be abolished and the onus of proof should remain with the party who seeks to enforce the contract; practically, this will result in little, if any, difference

## V HYPOTHETICAL

### A Facts

The Church of Immortals has instructed its regional offices to renovate their premises and, wherever possible, to engage unemployed persons to perform the work.

S is the director of one of the offices. His brother-in-law (B) is unemployed. When S visits B, B tells him he has a problem with alcohol and says he would like work to help straighten himself out.

S tells B of the Church's instructions. He asks B if he is interested in doing some painting. B says he will give it a go and S says 'I will pay you \$10 an hour for starters and see how you go'. B says that is fine. Is there a contract of employment (can B claim workers' compensation?)

### B Analysis

- 1 Parties must manifest an intention to be legally bound (*Australian Woollen Mills*)
- 2 Both parties must have intention to create a legally binding contract
- 3 Prior to *Ermogenous*, assumptions were made in several contexts to the effect that prima facie contractual obligations were not intended
  - i. Church
  - ii. Family
- 4 *Ermogenous* questions the usefulness of presumptions and stresses the importance of detailed factual analysis

- 5 The onus of proving intention is on the plaintiff (B)
- 6 Identify facts or circumstances to show the manifestation of intention:
- Factors mitigating towards intention:
- B did the work
  - Church not relevant
  - Salary being paid
- Factors militating against intention:
- Unfixed salary
  - Alcohol problem
  - 'see how you go' statement being made to B
  - Arose in non-commercial setting
- 7 Ultimately, it is largely up to the Court's analysis and there is little predictive certainty
- 8 Further relevant factors:
- Fact of church doesn't negate intention
  - Offer made in capacity as director, not brother
  - 'see how you go' implies assessment of performance prior to entering into a formal contract of employment
  - Control of payment/tasks
  - 'for starters' implied limited term of engagement, and one subject to review
  - Contract of employment not formally assented to