MASTERS V CAMERON – AGAIN!

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Since 1986 many Australian courts have accepted that there exists a fourth category of Masters v Cameron. *In 2004 the authors published an article criticising this development. That article was the subject of a reply by David McLauchlan in which he defended the fourth category on the basis that it allowed for the enforcement of an agreement to agree which he thought was a welcome development. This present article is a comment on Professor McLauchlan's paper and argues that the adoption of the fourth category has conflated an issue of construction – the meaning of 'subject to contract' when used in an agreement – with an issue of fact, namely, whether the parties intend to be bound.*

I INTRODUCTION

In 2004 we published an article in the *Journal of Contract Law* entitled "When Three Just Isn't Enough: the Fourth Category of the 'Subject to Contract' Cases".[1] In a 'reply', David McLauchlan to some extent defended the fourth category.[2] It was always our intention to write a short reply to his article and this special edition of the *Victoria University of Wellington Law Review* has provided us with a chance to revisit the issue perhaps with our final words on the subject. Given that there has been some water under the bridge since 2004, we begin with a summary of our views as expressed in 2004 and David's case in reply.

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1 E Peden, JW Carter and GJ Tolhurst "When Three Just Isn't Enough: the Fourth Category of the 'Subject to Contract' Cases" (2004) 20 JCL 156.

2 David McLauchlan "In Defence of the Fourth Category of Preliminary Agreements: Or are There Only Two?" (2005) 21 JCL 286; There has now been a further article on this topic. See Brett Walker SC "The Fourth Category of *Masters v Cameron*" (2009) 25 JCL 108.

II MASTERS V CAMERON *AND THE GENESIS OF THE FOURTH CATEGORY*

Masters v Cameron[3] involved an agreement for the sale of pastoral property which was made 'subject to contract'. In Australia it is the leading decision on the effect of this phrase. In that case, the words 'subject to contract' were express, but such a provision could be implied in an appropriate case. Indeed, in the sale of land context there is a presumption that all negotiations are carried out 'subject to contract'. The Court saw the issue as one of construction. In the result, the Court concluded that the phrase could have one of three possible legal effects. First, the reference to the agreement being 'subject to contract' may refer to a mere formality and the parties intend to be immediately bound. The reference is merely a reference to an intention to put the agreement into a formal document at some time in the future. Second, the parties may intend to be immediately bound, but performance is suspended until they execute a formal contract. Third, the parties may not intend to be bound until a formal agreement is executed.

As to the fourth category, this emerged from a judgment of McLelland J in *Baulkham Hills Private Hospital Pty Ltd v GR Securities Pty Ltd*.[4] However, McLelland J did not claim to have invented it, he claimed that it was recognised by the High Court of Australia in a decision that pre-dated *Masters v Cameron*, namely, *Sinclair, Scott & Co Ltd v Naughton.*[5] In that case the Court made reference to a transaction:[6]

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

This was identified as a separate 'fourth' category by McLelland J. In ascribing a legal effect to this category he said:[7]

> In the absence of agreement as to further terms to be inserted in the formal contract, the obligation of each party would be to execute a formal contract in accordance with the terms of the agreement appearing from the ... [evidence of an informal contract].

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3 (1954) 91 CLR 353.

4 (1986) 40 NSWLR 622 (SC). Affirmed in *GR Securities Pty Ltd v Baulkham Hills Private Hospital Pty Ltd* (1986) 40 NSWLR 631 (CA).

5 (1929) 43 CLR 310.

6 Ibid, at 317–318 per Knox CJ, Rich and Dixon JJ referring to a passage of Lord Loreburn in *Love & Stewart Ltd v S Instone & Co* (1917) 33 TLR 475 (HL) at 476, which they thought mentioned such a case. See further Peden, Carter and Tolhurst, above n 1, at 160–161.

7 *Baulkham Hills Private Hospital Pty Ltd v GR Securities Pty Ltd*, above n 4, at 629.

This category has been widely adopted in Australian courts, but not considered by the High Court of Australia. As will be discussed below, in our view this legal effect is subsumed into categories one and two.

III OUR VIEW

We suggested in our article that the categorisation in *Masters v Cameron* represents all possible legal effects of such a provision. We arrived at that conclusion for two reasons. First, as a matter of precedent, this was an issue directly before the High Court and the answer the Court gave was that there are three categories. A court below the High Court could not then say there were four. Second, as a matter of legal doctrine we thought that these three legal effects reflect the only three legal possibilities. We emphasised that the parties may intend any number of things between these categories but the process of contract construction is concerned with both meaning and legal effect and the categories derived in *Masters v Cameron* encapsulate all relevant legal effects. We suggested that the intention of the parties could be viewed on a continuum with the *Masters v Cameron* categories appearing as staging posts along that continuum. We said:[8]

> In our view, in *Masters v Cameron* the High Court was attempting a functional classification which may be seen from two quite different perspectives.
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> The first perspective requires us to answer a question that we are not aware any of the judges which have proposed the fourth category have actually asked, namely, why the High Court chose the three points on the intention continuum that we identified earlier. The obvious answer is that the points mark out the availability of particular remedial responses. (For convenience we assume the context of a sale of land transaction.)
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> The first point (the first category) is reached if the agreement can be enforced whether or not a formal document is signed: either party may sue for specific performance once the date for performance has arrived whether or not the formal document has been executed.
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> The second point (the second category) – and in terms of enforcement the only other relevant point – is reached if the agreement can be enforced by specific performance of a promise (express or implied) to execute the formal document: neither party may call on the other to complete the sale, but either may require the other to execute the formal document so that the sale may be completed.
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> The third point (the third category) is where the parties have not reached agreement on anything which can be enforced as a contract. In the absence of other considerations, the agreement has no remedial significance.

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8 Peden, Carter and Tolhurst, above n 1, at 163–164.

> This analysis does not deny the existence of other points on the intention continuum. But, rather than there being a fourth point, there are an infinite number of points. But they have no legal significance. Thus, if the parties get past the third point, but do not reach the second, there is no contract. If the parties get past the second point, but do not reach the first, the only relevant obligation is to execute the formal document. In our view, *Baulkham Hills* simply illustrates a fact situation where the parties got past the second point, but did not reach the first. It was therefore a second category case.
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> The alternative perspective is in terms of the extent to which the terms of the formal contract have been negotiated. In *Masters v Cameron* the High Court acknowledged that one reason parties may intend their agreement to fall within the third category is that they intend the formal agreement to contain further terms. Here, in our view, the apparent nervousness of the courts in the recent cases in dealing with the first and second categories reflects that there is now much more open discussion of the possibility that a contract may be in existence even though there are further terms to be agreed. From the perspective of the extent to which the terms of the formal contract have been negotiated, the third category is now probably narrower than in the past. Even so, every 'subject to contract' situation must conform to the rule that an agreement to agree is not a contract. All agreements to agree fall within the third category. By definition, an agreement to agree cannot fall within either of the other categories.

We expressed a number of concerns with the fourth category. Generally, the legal effect which is supposed to give rise to the category could equally be present in the first two categories of *Masters v Cameron* without altering the legal effect of the agreement made 'subject to contract'.[9] To elaborate, the first category could be expressed as:[10]

> 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, *whilst expecting to make a further contract containing, by consent, additional terms*;

And the second category could be expressed as:[11]

> 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, *whilst expecting to make a further contract containing, by consent, additional terms*.

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9 Ibid, at 164–165.

10 *Masters v Cameron*, above n 3, at 360.

11 Ibid.

In our view the ultimate issue is always whether the parties are committed to be bound by the agreement (whether or not the 'contemplated' terms are agreed) or whether, instead, they have committed themselves to negotiate further. In our view, in terms of legal effect, the fourth category does not cover any ground not covered by categories one and two and that this was the point made by the High Court in *Godecke v Kirwan*[12] as an explanation of *Masters v Cameron* rather than an overruling of it.

IV DAVID'S DEFENCE

Like us, David did not like the label 'fourth category'. Nevertheless, he felt that the category might be helpful in recognising the enforcement of preliminary agreements. In particular, David was concerned with upholding agreements to agree. Such agreements have been held to be void. David has long held the view that that position should change and that the decision in *May & Butcher Ltd v R*[13] should be abandoned. He made the argument that modern courts are now resiling from that traditional position.[14] He said:[15]

> The outcome of these formation disputes will commonly depend on the answer to two questions. First, did the parties intend to be bound at the time of their initial agreement? Second, if they did, is that intention capable of being given legal effect. Or, in other words, is the agreement, though intended to be binding, void for uncertainty or incompleteness? However, the two issues cannot be entirely divorced. This is because the existence of uncertainty or incompleteness may support an inference that the parties lacked the requisite intention to be bound. Thus, the fact that a term or terms has been deferred for future agreement may be a factor indicating that the parties did not intend to be bound. Indeed, the proper inference in the circumstances, particularly where the agreement is informal and the parties contemplate that it will be embodied in a later formal document, will often be that no immediately binding commitments were intended. It is entirely another matter, however, to say that, where the parties' intention is to be bound is otherwise clearly established, their intention must be frustrated due to a technical rule of the law of contract which avoids agreements to agree. Indeed the function of the court in such circumstances is to do its best to give effect to that intention notwithstanding apparent incompleteness or uncertainty … .

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12 (1973) 129 CLR 629 at 648.

13 [1934] 2 KB 17n (HL).

14 See further David McLauchlan "Rethinking Agreements to Agree" (1998) 18 NZULR 77.

15 McLauchlan "In Defence", above n 2, at 287–288, citing as authoritative statements for this view *Fletcher Challenge Energy Ltd v Electricity Corporation of New Zealand Ltd* [2002] 2 NZLR 433 (CA) at 446–447, 448; *Pagnan SpA v Feed Products Ltd* [1987] 2 Lloyd's Rep 601 (CA) at 619; *Global Container Lines Ltd v State Black Sea Shipping Co* [1999] 1 Lloyd's Rep 127 (CA) at 155. Later he discusses *Anaconda Nickel Ltd v Tarmoola Australia Pty Ltd* (2000) 22 WAR 101 (SC) and *LMI Australasia Pty Ltd v Baulderstone Hornibrook Pty Ltd* (2002) 18 BCL 57 (SC) as modern examples giving effect to this approach.

> [A]greements intended to be legally binding ought never to be rejected simply on the ground that a material term was deferred for future agreement between the parties. The fact that a term is designated as 'to be agreed' will often be simply an indication of the parties' understanding that the term is capable of being agreed in the future and that it is their intention to do so, not that there is to be no contract until such agreement is reached. Such an understanding is perfectly consistent with the existence of the further intention that, failing agreement, the gap is to be filled if possible by reference to the objective standard of what is reasonable in the circumstances.

Despite this, and despite what the law might be in New Zealand, the common law in Australia and England is that the parties cannot create an agreement where none exists. Indeed, later discussion of what would be considered important matters to the transaction may indicate a lack of intention to be bound.[16]

It can be seen from what has been said above that in David's view the overriding concern is with whether or not the parties intended to be bound; if they do, then effect should be given to this unless the agreement is void under the modern approach to uncertainty and incompleteness.[17] He sees the cases recognising the fourth category as doing just that. In his view this approach means that if there are elements of what would otherwise be considered an agreement to agree this is not fatal to the efficacy of the agreement.[18] This he gives in answer to our criticism that the courts should spend less time on creating categories and more time at looking at the parties' intention.

In David's view the genesis of the idea that the fourth category can give effect to an agreement to agree can be traced back to the very case that gave rise to the category, namely, *GR Securities Pty Ltd v Baulkham Hills Private Hospital Pty Ltd.*[19] That case involved a counter-offer which stated that upon acceptance there would be 'a legally binding agreement in principle'. The Court of Appeal held that effect had to be given to the words 'legally binding agreement' with the further 'curious' reference to 'in principle' probably indicating that "the parties had reached agreement on the main matters and were content to be immediately bound".[20] Thus, in David's view this case involved an agreement which clearly indicated by the words 'in principle' that further terms were to be agreed but was nevertheless upheld. He does note that the trial Judge held that the case was not one involving an agreement to agree, but David states that the fourth category principle that evolved

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16 See *Sagacious Procurement Pty Ltd v Symbion Health Ltd* [2008] NSWCA 149 at [104]–[105].

17 See also McLauchlan "In Defence", above n 2, at 296.

18 Ibid.

19 *GR Securities Pty Ltd v Baulkham Hills Private Hospital Pty Ltd*, above n 4. See further (at 300–303) his discussion of *Anaconda Nickel Ltd v Tarmoola Australia Pty Ltd*, above n 15 and *LMI Australasia Pty Ltd v Baulderstone Hornibrook Pty Ltd*, above n 15.

20 *GR Securities Pty Ltd v Baulkham Hills Private Hospital Pty Ltd*, above n 4, at 635.

from the trial Judge's decision "has equal application to so-called "agreements to agree" in general."[21]

David went on to express the view that *Masters v Cameron* was restrictive and that prior authority had taken a less restrictive position. In particular, he gave as an example of an earlier less restrictive view the well known statement by Lord Loreburn in *Love and Stewart Ltd v S Instone and Co Ltd* that:[22]

> It is quite lawful to make a bargain containing certain terms which one was content with, dealing with what one regarded as essentials, and at the same time to say that one would have a formal document drawn up with the full expectation that one would by consent insert in it a number of further terms.

As regards our analysis, David particularly commented on our argument that the fourth category was unnecessary:[23]

> In relation to category one, the High Court admittedly speaks of all the terms being agreed upon, yet goes on to mention that the parties intend that the "terms [will be] restated in a form that will be fuller or more precise but not different in effect", thus contemplating that the formal contract will be longer, more detailed and cover further issues, providing the terms already agreed are not changed.

He suggested our approach was inconsistent because we accepted that there "cannot be a binding agreement that includes an agreement to agree further terms".[24] He said:[25]

> It is not entirely clear to me what the authors mean by an agreement to agree. On one hand, they accept the principle underlying the fourth category cases, namely, that a preliminary agreement may be a binding contract even though the parties agree that there is to be a further contract containing, by consent, additional terms. On the other hand, they endorse the approach of the High Court of Australia in *Godecke v Kirwan* which qualified *Masters v Cameron* by holding that the court in that case did not intend to exclude from the categories of binding contract 'every case in which the formal document, when executed, would include terms additional to those already expressed', but then added 'provided that the additional terms did not depend on further agreement between the parties'.
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> Since the fourth category cases sanction enforcement of what are in substance 'agreements to agree', it is difficult to see how these positions are consistent. While the authors are no doubt correct that 'the High

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21 McLauchlan "In Defence", above n 2, at 299.

22 *Love & Stewart Ltd v S Instone & Co*, above n 6, at 476; Contrast Peden, Carter and Tolhurst, above n 1, at 160–161.

23 Peden, Carter and Tolhurst, ibid.

24 Ibid.

25 McLauchlan "In Defence", above n 2, at 295–296 (footnotes omitted).

> Court did not intend to make new law in *Masters v Cameron*' or 'to state hard and fast categories', it seems clear to me that the statement of the three categories reflects an assumption, epitomised by the well-known and often cited words of Viscount Dunedin in *May & Butcher Ltd v R*, that 'a concluded contract is one which settles everything that is necessary to be settled and leaves nothing to be settled by agreement between the parties'. Thus, the first category is described as one where 'the parties have reached finality in arranging all the terms of their bargain and intend to be immediately bound to the performance of those terms', the second category does not apply unless it is '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', and one of the reasons given for a case falling within the third category is that the parties 'have dealt only with major matters and contemplate that others will or may be regulated by provisions to be introduced into the formal document'. Furthermore, in explaining the third category, the court referred to the observation of Lord O'Hagan in *Rossiter v Miller* that 'undoubtedly, if any prospective contract, involving the possibility of new terms … remains to be adopted, matters must be taken to be still in a train of negotiation, and a dissatisfied party may refuse to proceed'. Therefore, literally interpreted, the formulation of the three categories is inconsistent with the existence of the fourth category, that is, a category of binding contract additional to those in categories one and two.
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> Be that as it may, the really important point is that the courts in the so-called fourth category cases are displaying a preparedness to enforce agreements intended to be binding that arguably do not fall within categories one or two of *Masters v Cameron*. The motivation for doing so is clear. Whether or not we agree with all of the individual decisions, they are seeking to reach commercially sensible solutions that reflect the reasonable expectation of the parties.

In the result, David was of the view that the four categories could be collapsed into two categories. The first of his categories contains agreements which were intended to be binding and which are sufficiently complete. In his view these were the first, second and fourth categories. The second of his categories contains those agreements not intended to be binding or that are not sufficiently complete. This encapsulated the third category.

V PURPOSE OF THIS ARTICLE

The purpose of the article is to reply to David and to draw attention to certain features of the approach to the 'subject to contract' cases which seem to us inconsistent with *Masters v Cameron* and the reasons why the High Court chose to conceive of three categories. As in our initial article we are more concerned with the position in principle rather than the details of the later cases.

We approach this comment by examining two aspects of the 'subject to' cases, with particular reference to the scope of the second of the three categories stated in *Masters v Cameron*, and the use of the alleged fourth category to explain fact situations, which in our view raise a more general question.

VI SCOPE OF THE SECOND CATEGORY

It will be recalled that the second of the three categories in *Masters v Cameron* was stated in terms:[26]

> ... 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.

In our view, the cases (including McLelland J in *Baulkham Hills*), where the fourth category has been discerned have often involved the second category. Indeed, the statement of the fourth category in *Baulkham Hills* shows that to be the case. In that case, McLelland J said: "There is in reality a fourth class of case additional to the three mentioned in *Masters v Cameron*, as recognised by Knox CJ, Rich J and Dixon J, in *Sinclair Scott & Co v Naughton*."[27]

He quoted the following words as describing the category, namely:[28]

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

The statement is therefore at the root of the alleged fourth category. But it was also one of the many cases which the High Court intended to explain in *Masters v Cameron*. Clearly, Dixon CJ, McTiernan and Kitto JJ did not see the decision as illustrating a fourth category of case. The fact (as we pointed out in our comment) that Dixon CJ (then as Dixon J) participated in that decision considerably undermines the possibility of a fourth category. All the cases which have treated Australian law as supporting the fourth category are committed to a view that Dixon CJ overlooked a distinct category of 'subject to contract' case which he had himself recognised 25 years earlier. In our view, this is hardly the type of mistake Dixon CJ would make.

Yet the only difference that we can discern between the statement in *Sinclair Scott* and the High Court's statement of the second category in *Masters v Cameron* is that whereas the former speaks of the parties 'expecting' to add further terms, the latter assumes that the parties 'intend no departure' from the agreed terms. The only live issue then is to determine whether performance is suspended until agreement on those additional terms or not. It is true that *Sinclair* refers expressly to the fact that there will be a 'further contract in substitution for the first contract'. However, that must also

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26 *Masters v Cameron*, above n 3, at 360.

27 Above n 4, at 628.

28 Ibid.

occur under the analysis in *Masters v Cameron* because the execution of the formal contract will, as a matter of law and intention, discharge the first contract.

The difference between an 'expectation' and an 'intention' seems a slender basis for the recognition of a fourth category. For three reasons it is a distinction without a difference.

First, in neither category have the parties made agreement on further terms a condition precedent to formation.

Second, it is, we have to say, patently obvious that it is always open to parties to consent to further terms. Indeed, it is a truism. And it seems to have gone unnoticed that in stating the first category the High Court referred to the fact that although the formal agreement is no more than a formality, the parties may "at the same time propose to have the terms restated in a form which will be fuller or more precise".[29] They could also have referred to the possibility of the formal agreement 'containing, by consent, additional terms', since that qualification (alleged to be the foundation of the fourth category) is equally applicable to the first category. If the High Court envisaged this in the first category they must also have envisaged it in the second category. So, perhaps there are five categories? What about the possibility that 'by consent' the parties might substitute a different subject matter, or the possibility that 'by consent' the parties might tear up the first agreement and start again? Are these further, yet undiscovered, categories?

Third, in *Godecke v Kirwan*[30] Gibbs J analysed the second category stated in *Masters v Cameron* and said:[31]

> In these remarks the Court was not, in my opinion, intending to exclude from the class a case in which the formal document, when executed, would include terms additional to those already expressed, provided that the additional terms did not depend on further agreement between the parties.

This is clear recognition that the second category of *Masters v Cameron* does not exclude cases where the formal agreement may contain further terms.

In our view it follows that if the *Baulkham Hills* case must be categorised under the *Masters v Cameron* scheme (we state why it does not have to be below) then it is an example of the second category. But if David is correct that the fourth category allows for the enforcement of agreements to agree and that *Baulkham Hills* is an example of this then it would mean the High Court in *Masters v Cameron* in clearly stating that an agreement to agree is illusory has nevertheless given effect to such an agreement by recognising the second category.

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29 *Masters v Cameron*, above n 3, at 360.

30 Above n 12, at 629.

31 Ibid, at 648.

VII FACTS, CONSTRUCTION, THE FOURTH CATEGORY AND AGREEMENTS TO AGREE

Within the third category might fall cases where the 'subject to contract' provision evidences a lack of intention to contract or a lack of intention to be bound; these are factual issues. However, the category itself is concerned with those cases where on construction the parties did not intend to assume legal obligations until execution of a formal contract. Clearly this captures those cases where all the terms are agreed but the parties nevertheless stipulate there will be no contract until signature. But very often a finding that a case falls within the third category will flow from the terms which foreshadow that further terms are to be agreed. However, today there is more reluctance to avoid an agreement on that basis. Moreover, many judges do not appear to believe that transactions where further terms may be agreed fall within categories one and two – hence the attractiveness of a fourth category.

This raises the issue of agreements to agree. David did criticise us for what he perceived to be our stance on agreements to agree and so it is appropriate that we state clearly our view on this.

It is necessary to make a few introductory remarks. First, there is distinction between an intention to contract and an intention to be bound. The presumption that applies to the former in commercial transactions can be drawn when there is an expectation of a contract. It is an issue of fact. The latter concerns the intention of the parties to assume legal obligations at a particular point in time. This too is an issue of fact. It is an issue that is raised in every alleged contract and is the more general question, to which we alerted above. It is clearly an issue that is expressly 'on the table' when there is a 'subject to contract' provision. However, the meaning of that provision is a distinct issue resolved by construction; where it is found on construction that the effect of the clause is that the 'agreement' falls into category three of *Masters v Cameron* then clearly as a matter of fact there will also be no intention to be bound.

Keeping these issues distinct is important. At first instance in *Baulkham Hills Private Hospital Pty Ltd v GR Securities Pty Ltd*,[32] McLelland J rejected the submission that this case fell within the category of agreement to agree.[33] So he was not turning his mind to the issue of whether an agreement to agree is enforceable. In our view he then posed the correct question namely, whether the parties intended to be bound. In answering that question he thought the words 'legally enforceable agreement' prevailed over any implication that the words 'agreement in principle' raised. However, he then said that the intention was sufficiently clear to take it out of the third category of *Masters v Cameron*. But the agreement did not use the words 'subject to contract' or an analogous expression. The words 'legally binding agreement in principle' are not akin to 'subject to contract'.

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32 *Baulkham Hills Private Hospital Pty Ltd v GR Securities Pty Ltd*, above n 4, at 622.

33 Ibid, at 628.

Therefore the question of construction (a question of law) that *Masters v Cameron* deals with was not an issue in the case. In our view the only issue was the factual issue of an intention to be bound. The New South Wales Court of Appeal agreed with the trial judge that the parties intended to contract. *Masters v Cameron* is not mentioned in the judgment of McHugh JA (with whom Kirby P and Glass JA agreed) in the Court of Appeal. The effect of the correspondence was to create a binding contract notwithstanding the reference to being bound 'in principle'. We accept that in deciding such an issue of fact, analogies may be drawn from the categorisation in *Masters v Cameron* which is arrived at by construction. Indeed, the Court of Appeal in this case did so. In an important passage McHugh JA, with whom Kirby P and Glass JA agreed, said:[34]

> However, 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: *Godecke v Kirwan* (1973) 129 CLR 629 at 638; *Air Great Lakes Pty Ltd v K S Easter (Holdings) Pty Ltd* (1985) 2 NSWLR 309 at 332–334, 337. 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.
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> Even when a document recording the terms of the parties' agreement specifically refers to the execution of a formal contract, the parties may be immediately bound. Upon the proper construction of the document, it may sufficiently appear that 'the parties were content to be bound immediately and exclusively by the terms which they had agreed upon whilst expecting to make a further contract in substitution for the first contract, containing, by consent, additional terms': *Sinclair, Scott & Co Ltd v Naughton* (at 317).

In the result he held that the "case, therefore, is one where the parties were bound by the informal agreement but expected to make a further contract which by consent might contain additional terms: *Sinclair, Scott & Co Ltd v Naughton*".[35] That is, to the extent it was a case to be dealt with using the *Masters v Cameron* categorisation it fell within the second category as that is how the High Court categorised S*inclair Scott* in *Masters v Cameron*.

In our view the decision in *Anaconda Nickel Ltd v Tarmoola Australia Pty Ltd*[36] was another case where the issue before the court was properly characterised as whether or not the parties intended to be bound without further consensus. Strictly, it did not involve a *Masters v Cameron* question as there was no 'subject to contract' provision to construe. Instead, the issue was purely one of fact together with a determination on the enforceability of the agreement by reference to certainty

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34 *GR Securities Pty Ltd v Baulkham Hills Private Hospital Pty Ltd*, above n 4, at 634.

35 Ibid, at 636.

36 Above n 15.

and completeness. David views the decision as showing how the recognition of the fourth category allows courts to take a new approach to agreements to agree. In our view it is an application of classic contract law formation rules and further evidences that the fourth category is solely aimed at dealing with an issue of fact, whether there is an intention to be bound, rather than an issue of construction. Therefore to suggest it sits alongside the three categories of *Masters v Cameron* is misconceived. The leading judgment in that case was given by Ipp J, with whom Pidgeon J agreed. The only time he mentions the fourth category is when setting out the arguments of counsel.[37] He characterises the issue before the court as one of determining the general question of whether there is an intention to contract.[38] This is a question of fact and it appears Ipp J saw it as such given the evidence he thought was available to him to determine that issue. He does not discuss *Masters v Cameron* and to the extent that the analysis in that case was at all relevant to his thinking he concludes the case was akin to the contract referred to in *Sinclair Scott*.[39]

Second, there is a world of difference between an agreement to agree to a contract and an agreement to agree to a term. The former cannot be enforced, it is illusory. An agreement that contains the latter may be enforced, but the key to enforcement is that the parties must intend to be bound without further agreement. However, it is not necessary for the enforcement of such an agreement that the provision requiring further agreement be capable of severance which would be determined as a matter of construction. This was the point we tried to make in our earlier article. The label 'agreement to agree' of itself carries no legal effect. What matters is that the parties intend to be bound by what they have agreed. This, of course, assumes that what they have agreed is sufficiently certain and complete to be legally capable of enforcement by a court; that is, it contains what is considered today to be the 'essential' terms.[40] Thus, *Masters v Cameron* does not discount that the formal agreement may contain further terms, but, in order to be immediately enforceable, the informal agreement must be one underpinned by an intention to be bound and cannot be one under which the parties have committed themselves to a need for further consent. Indeed, as Gibbs J noted in *Godecke v Kirwan*, the key is that the agreement need not require further agreement between the parties. So an agreement between the parties that further terms will be supplied by a

37 Ibid, at 110.

38 Ibid, at 111.

39 Ibid, at 118.

40 The concept of an 'essential' term has numerous meanings. Under the modern law, it is up to the parties to determine what are the important terms that need to be agreed before they intend to be bound. This is not dictated by a court. But a court will be need to be satisfied that what is agreed can be enforced and it is to enforceability that the notion of an 'essential' term is today addressed; see *Pagnan SpA v Feed Products Ltd*, above n 15, at 619. Of course, a failure to agree on a matter that is objectively seen as important to the transaction may evidence a lack of intention to be bound.

third party may suffice. Moreover, we suggest that this has always been the law on 'agreements to agree' and that *May & Butcher Ltd v R*[41] should not be seen as standing for any broader proposition.

An agreement to agree is void if it lacks the assent required for a contract.[42] In our view, the decision of the Court of Appeal in *GR Securities Pty Ltd v Baulkham Hills Private Hospital Pty Ltd* – which David views as an example of a modern approach that could allow for the upholding agreements to agree – is simply a classic application of the correct approach. The essence of the idea that an agreement to agree is illusory lies in the fact that the parties have indicated that further consent is required before they are to be bound. If the parties indicate an intention to be immediately bound, despite also indicating that agreement on further terms is envisaged (even important terms such as was the case in *GR Securities Pty Ltd v Baulkham Hills Private Hospital Pty Ltd*) and if the agreement is sufficiently certain to be enforced, then it is not void for being an agreement to agree and never has been.

VIII CONCLUSIONS

Academic scholars tend to draw distinctions and classifications for the purpose of analytical structure. Judges tend to be more practical in their distinctions and classifications. Thus, we pointed out that the three categories in *Masters v Cameron* were selected because of their practical importance. If the three categories are seen as points on a continuous line, the points mark out the availability of particular remedial responses. That is not true of the alleged fourth category, which seems to us to have no distinct legal significance. And, in terms of authority, the High Court's statement of the law in *Masters v Cameron* was intended to be comprehensive and authoritative. Until *Baulkham Hills Private Hospital Pty Ltd v GR Securities Pty Ltd*[43] was decided in 1986 it was so treated in cases which number in their hundreds.

In this reply we have emphasised a distinction between two similar, but nevertheless legally distinct, issues which may arise in relation to the negotiation of a contract. In *Masters v Cameron* the High Court was concerned with an issue of construction, namely, the intended meaning (legal effect) of the phrase 'subject to contract' (or a similar expression). This is distinct from the more general question of whether parties have agreed to be bound by a given set of terms even though they may have contemplated the preparation and execution of a written contract. By definition, in this type of case the parties have not made the execution of a written contract a term of their agreement.

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41 Above, n 13.

42 See further EA Farnsworth *Farnsworth on Contracts* (3rd ed, Aspen Publishers, New York, 2004) vol 1 at [§3.27].

43 *Baulkham Hills Private Hospital Pty Ltd v GR Securities Pty Ltd*, above n 4 (affirmed on other grounds sub nom in *GR Securities Pty Ltd v Baulkham Hills Private Hospital Pty Ltd*, above n 4).

In *Masters v Cameron*, the High Court began its legal analysis with the statement:[44]

> 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 ... .

Given the references in this statement to 'agreement' and 'agree' it is hardly surprisingly the High Court concluded that the effect of the parties' agreement "depends upon the intention disclosed by the language the parties have employed".[45] Accordingly, the question is one of construction. Arguably, the question is always one of law, but it is clearly a question of law where the words at issue are in writing. The three categories identified therefore represent an authoritative statement of the interpretations which may be placed on the words.

Because the issue is simply whether parties have reached agreement, what we describe above as the 'more general' question is much broader than the question at issue in *Masters v Cameron*. The cases on that issue defy classification. Although in particular cases questions of construction may arise, whether parties intend to contract or intend to be bound is not in itself a question of construction. As McHugh JA explained in *Air Great Lakes Pty Ltd v K S Easter (Holdings) Pty Ltd*:[46]

> The intention to create a legally binding contract although a matter to be proved objectively, may, nevertheless, in my opinion, be proved by what the parties said and did as well as by what they wrote. The intention may be proved in that way even in a case where the document is intended to comprise all the terms of their bargain. This is because the intention to be bound is a jural act separate and distinct from the terms of their bargain.

In essence, the question is resolved by a consideration of all relevant circumstances. It is often more a question of fact than a question of law.[47] As seen in our analysis above, in our view, some of the cases in which the facts have been held to fall within the alleged fourth category of case are simply illustrations of cases in which this more general question has been raised.

Of course, we would not deny for one moment the possibility that in considering what we have described as the 'more general question' a court could not draw analogies with the analysis in *Masters v Cameron*. But drawing analogies is one thing. To suggest that the High Court left out one of the relevant categories in its analysis of the various meanings of the words 'subject to contract' is quite another. Indeed, the large number of cases that have been placed in the fourth category since

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44 *Masters v Cameron*, above n 3, at 360.

45 Ibid, at 362.

46 (1985) 2 NSWLR 309 (CA) at 337.

47 Contrast *Homburg Houtimport BV v Agrosin Private Ltd* [2004] 1 AC 715 (HL) at 794.

Baulkham Hills Private Hospital Pty Ltd v GR Securities Pty Ltd was decided, superficially suggests that the High Court omitted the most significant category. Even though contracting processes may have changed somewhat in the past 50 years, this does not affect the classification made by the High Court. The question of construction to which the court referred remains the same. And while a change in contracting processes may call for some adjustment to analysis of the question whether parties have reached a binding agreement, any such change has far greater relevance to the interpretation of agreement to negotiate clauses and analysis of fact situations which raise the more general question.

As noted, *Masters v Cameron* was concerned with the legal effect of a subject to contract clause. If there is to be a fourth category it can only be legitimate if it carries with it some legal effect; it cannot just be a label. As discussed above, the legal effect put forward by McLelland J in *Baulkham Hills Private Hospital Pty Ltd v GR Securities Pty Ltd* is subsumed within the second category. So what else could that legal effect be? It can only be that by expressly stating that further terms will be incorporated into a separate agreement that helps to uphold the initial agreement in the face of an attack on the basis of certainty and completeness. It can serve no other legal purpose. But if the initial agreement is unworkable so that a court cannot enforce it, it does not and should not help matters to argue that those missing or uncertain terms will be later agreed. If that were the law then no agreement could be void for uncertainty or incompleteness because every contract is subject to renegotiation and variation.

Herein lies what we feel is the great danger of this category, namely, that by giving it a label there is a suggestion that it carries with it a distinct legal effect and this could be used to uphold what would otherwise be an unenforceable agreement to agree. The High Court in *Masters v Cameron* said you cannot do that, and, at least for Australia, until the High Court says otherwise, you cannot.