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Implied contract? When conduct continues after a contract expires

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Abstract

How does the law respond where parties continue to perform their contractual obligations even though the express term of their contract has expired? This question remains unresolved in New Zealand, though it is familiar to the Australian courts. In *Andar Transport Pty Ltd v Brambles Ltd* and *CSR Ltd v Adecco (Australia) Pty Limited*, both the Supreme Court of Victoria and the New South Wales Court of Appeal held that an implied contract was formed on the terms of the expired contract, as the parties continued to act as if the agreement bound them.

This essay analyses the above question in a New Zealand context. It does so in two parts. First, it assesses the likelihood of the New Zealand courts applying the rule in *Brambles* and *CSR*. Doubtlessly, they will apply it. Contract is the law of reasonable reliance and imposes obligations where behaviour projects an objective intention to be bound. That said, courts are reluctant to uphold contracts that parties have not expressly agreed to. Therefore, where expired obligations are not "necessary for the business efficacy" of a continuing relationship, ordinarily, it will be regulated on a *quantum meruit* basis, a reasonable fee for work done.

Second, this essay assesses whether *Brambles* and *CSR* applied the law correctly to their facts. It argues that only *Brambles* was correctly decided. The continuing relationship in *Brambles* was inexplicable, absent the expired terms. In *CSR* however, it was not clear that the parties intended for the expired obligations to continue. The parties were negotiating a new contract, and an available interpretation was that they intended to operate on an informal basis while they negotiated new terms. Given this uncertainty, the New South Wales Court of Appeal was wrong to impose expired obligations. While all cases turn on their facts, New Zealand courts and business people should be aware of its troubling conclusion.

Key words

Implied contract, continuing conduct, contract formation

Introduction

Picture this. Two parties enter into a fixed-term supply agreement. The contract is dutifully performed and the contract expires. However, following its expiration both parties continue to conduct themselves according to the expired terms. A simple question arises: does the parties' continuing conduct give rise to an implied contract on the terms of the expired agreement? Or is the continuing relationship regulated on a *quantum meruit* basis, a reasonable fee for services provided? As yet, the New Zealand courts have not faced this legal question, but it is familiar to the Australian courts. In both *Andar Transport Pty Ltd v Brambles Ltd,*[1] and *CSR Ltd v Adecco (Australia) Pty Limited*[2] the courts held that an implied contract was formed on the expired terms as the parties continued to act as if the agreement bound them. This essay analyses whether the New Zealand courts might take a similar approach when comparable facts arise. To do this, it is structured in two parts.

Part one analyses whether the rule articulated in *Brambles* and *CSR*, at least in principle, can be supported by New Zealand contract law. It consists of three sections: to begin with, it outlines what implied contracts are and why the courts, traditionally, have been hesitant to uphold them. Implied contracts are formed by conduct and do not have express terms. Generally courts are reluctant to recognise them because they involve the *imposition* of obligations that were not expressly agreed to. Nonetheless, modern contract law can embrace agreements formed by conduct if the parties actions create reasonable reliance. Next, part one will assess the limiting mechanisms courts have adopted in order to ensure contracts are implied as fairly as possible: firstly, to satisfy requirements of certainty, implied contracts require an objective standard against which terms may be ascertained.[3] Secondly, to be confident that parties objectively intended to enter contractual relations, implied contracts must ordinarily be "necessary for business efficacy".[4] Against this background, part one concludes that New Zealand contract law

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[1] *Brambles Ltd v Wail; Brambles Ltd v Andar Transport Pty Ltd* [2002] VSCA 150.
[2] *CSR Limited v Adecco (Australia) Pty Limited* [2017] NSWCA 121.
[3] *Baird Textiles Holdings Ltd v Marks & Spencer plc* [2002] 1 All ER (Comm) 737 at [26].
[4] *Modahl v British Athletics Federation* [2001] EWCA Civ 1447 at [102].

can recognise implied agreements, based on expired terms, where parties continue to conduct themselves as if the contract is ongoing. This is because, applying the limiting mechanisms, the expired contract constitutes an objective standard against which implied terms can be assessed. Ultimately, the critical question will be whether, on the facts of each case, conduct gave rise to the reasonable inference that the parties intended for the obligations to continue.

Consequently, part 2 analyses whether *Brambles* and *CSR* applied the law correctly to their facts. While the decisions are addressed in detail below, by way of introduction, the cases can be summarised as follows. In *Brambles,* Brambles contracted Andar to carry out the pickup-and-delivery part its laundry business. Under the contract, Andar agreed to indemnify Brambles against personal injury caused to its drivers. After the agreement expired, the parties conducted themselves exactly as they had done while the contract was ongoing. Subsequently, a driver was injured while collecting laundry from a hospital. The Victorian Court of Appeal held that, on the facts, although the contract had expired Andar was liable to indemnify Brambles against the injury claim. Following expiration, the parties' continuing conduct gave rise to the reasonable inference that they intended to form a new contract on the expired terms.

Indeed, in 2017 the New South Wales Court of Appeal faced similar but slightly different facts in *CSR*.[5] There, a formal contract for labour supply between Adecco and CSR had expired. Under the contract, Adecco was liable to indemnify CSR against personal injury suffered by temporary staff. After the agreement expired, Adecco continued to supply labour, and CSR continued to pay at the same price in the expired contract. Unique from *Brambles*, however, the parties were negotiating a new contract. CSR consciously elected not to extend the expiring contract as negotiations were ongoing. Subsequently, a staff member was injured at CSR's plant. The Court held that the new facts changed nothing. Following the agreement's expiration, the parties' continuing conduct gave rise to an implied contract on the expired terms, including the indemnity provision.

[5] *CSR Limited*, above n 2.

Ultimately, this essay argues that only *Brambles* should be treated as a reliable application of the law by the New Zealand courts. As will be made clear, the *Brambles* facts naturally lead to the inference that a new contract should be implied based on the expired terms; no alternative explanation for the parties' continuing conduct existed. That said, in *CSR* the NSWCA was wrong to reach the same conclusion. The parties were negotiating new terms, and CSR consciously elected not to extend the expired contract while negotiations continued. Therefore, the facts were equivocal because an available inference existed that CSR intended to contract on an informal *quantum meruit* basis, a reasonable payment for labour supply, while a new agreement was negotiated. It was unnecessary for business efficacy that the indemnity clause continued to apply, and the Court was wrong to hold Adecco liable for the injury claim. The New Zealand courts should treat *CSR* cautiously.

I Part 1

A Implied Contract law

To assess the likelihood of *Brambles* and *CSR* applying in New Zealand, this essay first outlines contract theory and its relationship with implied contracts.

The distinction between implied contracts and express contracts is simple: "Contracts are express when their terms are stated in words… [they are] implied when their terms are not so stated[.]".[6] Express contracts are entered into by express agreement. Conversely, implied contracts arise implicitly from the parties' conduct.

Since *Brogden v Metropolitian Ry it* has been well established that contracts may be formed by conduct.[7] A railway company tendered a draft contract for coal supply. The supplier returned the agreement marked "approved", however, it had made a number of alterations to the agreement constituting a counteroffer. The railway company did not expressly assent to the alterations but acted in accordance with them for two years. The

[6] HG Beale (ed.) *Chitty on Contracts* (32nd ed, Sweet & Maxwell, United Kingdom, 2015) at [1-014].
[7] Brogden v Metropolitan Railway Co (1877) 2 App Cas 666.

House of Lords held that a contract had been formed as the railway company's conduct constituted assent to the draft terms.

Strictly speaking, *Brogden* did not constitute an implied contract.[8] *Brogden* involved an express agreement accepted by conduct as the terms were express in the draft offer.[9] Nevertheless, the basic recognition that conduct can signal someone's consent lay the foundation for contracts being wholly implied.[10]

The willingness of courts to uphold contracts formed by conduct mirrors the shift in contract theory away from *consensus ad idem*, a meeting of the minds. Classical contract law was founded on the pillars of freedom and sanctity of contract. The fundamental feature of contract was mutual agreement; therefore, the parties had to subjectively consent to its formation. In the absence of consent, one could not say the parties had voluntarily undertaken liability.

Conversely, modern contract law recognises that establishing subjective consent is not practical for commercial efficacy. Business people's reasonable commercial expectation is that they can plan their lives based on agreements they enter. It is impossible to look into a business associate's mind and determine what they actually intended. Consequently, the touchstone of contract is not whether a person subjectively consented, but whether objectively their behaviour shows they intended to agree.[11] The object of contract thus, is not to uphold a person's voluntary will, but to protect the reliance of parties on *behaviour* that would reasonably lead them to believe a contract has been formed.[12]

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[8] Carter and Furmston "Good Faith and Fairness in the Negotiation of Contracts: Part II" (1995) 8 JCL 93 at 108.
[9] At 108.
[10] See *Modahl v British Athletics Federation* [2001] EWCA Civ 1447; *Blackpool & Fylde Aero Club Ltd v Blackpool Borough Council* [1991] ANZ ConvR 161; *Glencore Energy UK Ltd v OMV Supply & Trading Ltd* [2018] EWHC 895 (Comm).
[11] Andrew Robertson "The Limits of Voluntariness in Contract" (2005) 29(1) Melb Univ L Rev 179 at 203.
[12] Randy Barnett, 'A Consent Theory of Contract' (1986) 86 C.L.R. 269 at 307.

In fact, Robertson argues that in many respects contract now resembles tort law. Both contract and tort impose obligations onto individuals based on "norms of reasonable behaviour".[13]

That said, the courts are reluctant, particularly in complex commercial arrangements, to recognise contracts formed by conduct alone. As a matter of factual inference, generally, it will be unreasonable to rely on the formation of an agreement unless intention was express.[14]

However, this is not the only issue. As a matter of theory, courts are reluctant to impose implied contracts because reasonable reliance is not a wholly objective concept. Lord Steyn has suggested that reasonableness "postulates community values",[15] but community values are subjective. Notably, his Lordship distinguished between the contemporary standards of "right thinking people" and the standards of "moral philosophers",[16] but a spectrum of values exist in society. Therefore, when the court implies a contract the risk is that they will interpret background conduct as evidence of what the parties reasonably *ought* to have meant rather than what they reasonably *did* intend.

In express contracts it is easier for courts to strike the balance. Express terms act as an anchor to what parties actually mean. This is because the processes of contractual formation and contractual interpretation involve the same question: what did the parties objectively intend? However, by definition implied contracts do not have express terms. The courts must determine what the parties meant, despite the fact their intentions were left unsaid.

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[13] Andrew Robertson "On the distinction between Contract and Tort" (Public Law and Legal Theory Research Paper No. 40, University of Melbourne, 2003) at 11.
[14] *Modahl,* above n 4, at [102].
[15] Johan Steyn "Contract Law: Fulfilling the reasonable expectations of honest men" (1997) 113 LQR 433 at 434.
[16] At 434.

To a certain extent existing custom alleviates interpretive difficulty.[17] For example, when a passenger enters a bus, it is common practice to imply a contract: the passenger agrees to pay the fare and the driver agrees to transport them safely to the destination.[18] That being said, custom's explanatory value is limited. Custom might define how people have behaved, but not necessarily how they will continue to behave. Within legal limits people are entitled to enter any transaction that they choose.

Consequently, when conduct moves away from existing custom, an ever-present risk exists that reasonableness is informed not by the "distinctive colour… of a consumer transaction",[19] but from an idealistic interpretation of what conduct *should* mean.

Indeed, Lord Goff stated in *Blackpool & Fylde Aero Club Ltd v Blackpool Borough Council*:[20]

> "I readily accept that contracts are not to be lightly implied. Having examined what the parties said and did, the court must be able to conclude with confidence both that the parties intended to create contractual relations and that the agreement was to the effect contended for."

To "conclude with confidence", the courts have fallen back on two requirements: firstly, to satisfy requirements of certainty, the court requires an *objective standard* against which terms may be determined.[21] Secondly, to be confident that the parties reasonably intended to enter contractual relations, an implied contract must ordinarily be "necessary for business efficacy".[22]

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[17] At 434.
[18] Chitty, above n 6, at [1-014].
[19] Steyn, above n 15, at 434.
[20] *Blackpool & Fylde Aero Club Ltd v Blackpool Borough Council* [1990] 3 All ER 25 at 31.
[21] *Baird,* above n 3, at [26].
[22] *Modahl,* above n 4, at [102].

B Limiting Mechanisms

1 Objective Standard

In *Modahl v British Athletics Federation*, Lord Mance stated that two steps must be satisfied before an implied contract is formed. There must be "(a) an agreement on essentials with sufficient certainty to be enforceable and (b) an intention to create legal relations".[23]

In the context of an implied contract inherent uncertainty exists because the essential terms are not express. Ordinarily, the court is being asked to imply a contract because "co-operation has broken down".[24] Parties allegedly took it for granted that their relationship would be conducted in a particular way and therefore they felt no need to create an express agreement.

The legal implication of reasonableness is capable of "supplying the requisite degree of certainty", however, in order to draw this legal implication Sir Andrew Morrit C drew a distinction between two types of cases:[25]

> "[B]etween cases where the contract provides for an objective standard which the court applies by ascertaining what is reasonable and those where, there being no such standard, the test of reasonableness is being used to make an agreement for the parties which they have not made themselves."

Hence, while essential terms such as reasonable price, or a reasonable time can be determined by reference to fact,[26] the facts must establish an objective standard against which the essential terms may be set. In *Glencore Energy UK Ltd v OMV Supply & Trading Ltd,* for example, it sufficed to assess essential terms according to a separate contract between the parties.[27] Similarly, in *Integrated Computer Services Pty Ltd v*

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[23] At [100].
[24] At [68].
[25] At [26].
[26] Contract and Commercial Law Act 2017, s 199.
[27] *Glencore Energy UK Ltd v OMV Supply & Trading Ltd* [2018] EWHC 895 (Comm) at [55].

Digital Equipment Corp (Aust) Pty Ltd, essential terms were established according to the parties past negotiations.[28] Likewise, in *Modahl*, an implied agreement between a British athlete and the IAAF, regulating their relationship towards athlete doping, could be assessed in accordance with rules in the IAAF handbook.[29]

In *Baird Textiles Holdings Ltd v Marks & Spencer plc,* however, no objective standard existed to assess essential terms.[30] Baird was a clothes manufacturer, and M&S periodically made orders. The parties had been in a commercial relationship for 30 years; however, they did not expressly enter into a long-term contract governing this relationship. In 1999, without warning, M&S stopped placing orders. Baird alleged this action breached an implied contract between the parties under which it was entitled to reasonable notice before termination. This was because it was fundamental to M&S's philosophy, and this was known by its suppliers, that "M&S was going to carry on doing business with the manufacturer season after season, year after year."[31]

Rejecting this submission, the England and Wales Court of Appeal held no implied contract existed because there was no objective standard to assess the reasonable quantity of goods to be ordered each year.[32] Although the parties had been in a commercial relationship for 30 years, M&S had not made orders based on an annual formula. Any implied contract would "involve the court writing a 'reasonable' contract for the parties, after making a complete review… [of the parties] needs, abilities and expectations".[33] Though hindsight proved it had been in Baird's best interest to negotiate a long-term contract with M&S, the absence of an objective standard illuminated the distinction between how parties *do* act and how they *should* act. Baird was willing to co-operate on a flexible basis to preserve favour with the clothing retailer. This flexibility was at odds with an intention to contract on a long-term basis.[34]

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[28] *Integrated Computer Services Pty Ltd v Digital Equipment Corp (Aust) Pty Ltd* (1988) 5 BPR 11,110 at 11,118.
[29] *Modahl,* above n4, at [50].
[30] *Baird,* above n 3.
[31] At [3].
[32] At [29].
[33] At [68].
[34] At [30].

2 Necessity

This leads to the second requirement of necessity. Once an objective standard for establishing essential terms has been identified, the party asserting the contract still has to establish "(b) an intention to enter into contractual relations".[35]

In *Modahl,* Lord Mance stated that it is insufficient to show that the parties reasonably intended to enter contractual relations, the party asserting the contract must "show the necessity for implying it".[36] Consequently, it will be "fatal to implication of a contract if the parties… might have acted exactly as they did in the absence of the contract".[37]

The requirement of necessity directly addresses uncertainty between what the parties objectively meant and what they *ought* to have meant. Where no alternative explanation for behaviour exists, the court can confidently conclude that the parties *did* reasonably intend to enter contractual relations.

Nevertheless, it remains questionable whether necessity operates as a legal test or merely as an "analytical tool" for determining what the parties meant. This is because the legal requirement of necessity has its origins in the evolving law of implied terms. In *Baird*, Mance LJ stated that it could not be right "to adopt a test of necessity when implying terms into a contract and a more relaxed test when implying a contract - which must itself have terms".[38]

Traditionally, "necessity to create business efficacy" was a legal requirement for implying terms into a written contract.[39] In fact, *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* required five distinct legal tests to be satisfied before a term would be implied: [40]

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[35] *Modahl,* above n 4, at [100].
[36] At [102].
[37] *Baird,* above n 3, at [17].
[38] At [62].
[39] *BP Refinery (Westernport) Pty Ltd v Shire of Hastings*(1977) 16 ALR 363 at 376.
[40] At 376.

> "(1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that “it goes without saying”; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract."

However, in *Attorney General of Belize v Belize Telecom Ltd,* Lord Hoffman stated that, when implying terms "[t]here is only one question: is that what the instrument, read as a whole against the relevant background, would reasonably be understood to mean?"[41] In his Lordship's view, reasonable reliance is the cornerstone of contract doctrine. Lord Hoffman believed that the *BP Refinery* requirements were merely different ways of expressing this rule.[42] Moreover, his Lordship was concerned that expressed as distinct legal tests they take on lives of their own.[43] For example, referring to "necessity" Lord Hoffman suggested that it will often be the case that a term is unnecessary for business efficacy, however the consequences of not implying it would contradict reasonable commercial expectations.[44]

Importantly, in *Bathurst Resources Ltd v L & M Coal Holdings Ltd,* the New Zealand Supreme Court affirmed that the "legal test for the implication of a term is a standard of strict necessity".[45] That being said, the Court did not disagree with Lord Hoffman's approach. It stated that while the tests in *BP Refinery* may be used to spell out whether an implied term is "strictly necessary", "conditions (1)-(3) can be viewed as analytical tools which overlap and are not cumulative".[46] Therefore, in the Court's view:[47]

> "[i]t is conceivable that a clause could be implied which, although not necessary to give the contract business efficacy, meets the threshold of being "so obvious that 'it goes without saying'".

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[41] *Attorney General of Belize v Belize Telecom Ltd* [2009] UKPC 10 at [21].
[42] At [21].
[43] At [22].
[44] At [23].
[45] *Bathurst Resources Ltd v L&M Coal Holdings Ltd* [2021] 1 NZLR 696, at [116].
[46] At [116].
[47] At [109].

Implicitly, by recognising that the *BP Refinery* tests are not cumulative, the Court affirmed that the overriding question when implying terms is what the instrument "would reasonably be understood to mean". This is because a term may be implied even if there are alternative explanations for the parties' conduct. Ultimately, the court must make a reasonable inference based on the contract's words and the background facts, using the *BP Refinery* requirements as analytical tools. In other words, following *Belize*, necessity has been relegated to a "useful indicator relevant to the ultimate question of what a reasonable person would have understood the contract to mean".[48]

Although the Supreme Court restated necessity as "the legal test",[49] it seems they were merely reminding future decision-makers that the standard for implying terms is a high hurdle. As the Court stated, where the parties have entered a formal written contract, but have nor stated a term expressly, the usual inference is that the obligation does not exist.[50]

Logically, necessity should be relegated to a "useful pointer or a rule of thumb"[51] in the formation of implied contracts as well. Both implication of terms and the formation of implied contracts require the courts to recognise obligations that were not express. The overriding question is whether the parties could reasonably rely on each other's conduct, in light of the background circumstances, to give rise to the obligations. The "analytical tool" of necessity is a useful way of reminding decision-makers that, in the absence of express agreement, the usual inference is that the obligation does not exist.

That being said, a reasonable argument exists that necessity should remain as a legal requirement for implied contracts. When a term is implied into a "gap" in a formal contract, the "gap" exists within the context of express terms. These terms act as an anchor to what the parties objectively meant. As Lord Hoffman argued in Belize, the process of implication is not detached from the process of "construction" which involves

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[48] *Hickman v Turn and Wave Ltd* [2011] NZCA 100, [2011] 3 NZLR 318 at [248].
[49] *Bathurst,* above n 45, at [116].
[50] At [116].
[51] Adam Kramer "Implication in Fact as an Instance of Contractual Interpretation" [2004] CLJ 384 at 404.

the interpretation of the instrument as a whole.[52] Therefore, because implied contracts do not have this anchor to the parties' objective intention, a legal requirement of necessity might do work instead.

Nevertheless, treating necessity as a mere analytical tool is a more principled approach. Ultimately, reasonable reliance is the overriding touchstone of contract formation.

C Summary of legal principles

In summary, an implied contract will be formed where it can be reasonably inferred from the parties' conduct that they intended to enter contractual relations. To be confident that an intention to contract *did* reasonably exist, the courts have placed the onus on the party asserting the contract to prove:

a) An objective standard against which essential terms may be assessed; and
b) Conduct establishing the reasonable inference that the parties intended to enter contractual relations. This will ordinarily require the alleged contract, and its essential terms, to be "necessary for business efficacy".

Against this background, the New Zealand courts doubtless will accept that continuing conduct can give rise to an implied contract on an expired contract's terms. Firstly, the expired agreement constitutes an objective standard against which essential terms may be assessed. Secondly, where parties continue to conduct themselves based on the core components of an expired agreement, a logical inference will exist that they intended for the obligations to continue. Nevertheless, an implied contract will not be lightly inferred.[53] The basic custom of commercial parties entering fixed-term contracts is that their obligations will expire when the term expires. Therefore, the party asserting the contract must ordinarily prove that the relationship could not have continued absent the expired terms. This is ultimately a question of evidence.

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[52] *Belize*, above n 41, at [23].
[53] *Blackpool,* above n 20, at 31.

Bearing this in mind, this essay turns to *Brambles* and *CSR* to assess whether New Zealand courts should accept their application of the law to the facts.

II Part 2

A Andar Transport Pty Ltd v Brambles Ltd

The facts in Brambles were straight forward. Brambles provided laundry services to hospitals. In 1990 it invited parties to tender for the pickup-and-delivery part of its operation. It entered into a 3-year fixed-term contract with Andar for one of its delivery routes. Under the contract, Andar agreed to indemnify Brambles against any harm caused to workers during the delivery round. The subcontract expired in April 1993. Andar continued to carry out the delivery service, invoicing Brambles, who continued to pay the invoices.[54] In July 1993, a driver, was injured when collecting laundry from a hospital. The injury was suffered as a result of the delivery process that Brambles negligently designed.

The question was whether the parties continuing conduct gave rise to an implied contract on the expired terms, requiring Andar to indemnify Brambles against the personal injury claim.[55]

The Court held that, objectively assessed, the parties' conduct gave rise to an implied contract on the expired terms, including the indemnity clause.[56] This was because the parties proceeded as though they were still governed by the core components of the expired contract. Indeed, the Court stated that Andar had conducted the pickup-and-delivery service, and Brambles had paid for it, in "exactly the same" manner as while the contract was ongoing.[57]

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[54] *Brambles Ltd v Wail; Brambles Ltd v Andar Transport Pty Ltd* [2002] VSCA 150 at [56].
[55] At [61].
[56] At [61].
[57] At [61].

Although the Court's reasoning was brisk, its conclusion was correct. It was "necessary for business efficacy" that the parties' obligations, including the indemnity clause, outlived the agreement's expiration. Although the basic custom of commercial parties is for their obligations to end when a fixed-term contract expires, the parties did not *reasonably* intend for this to occur. Any reasonable person aware of the business reality of the transaction would recognise that the indemnity provision was essential to the risk allocation between Brambles and Andar. Brambles would have retendered the delivery contract had this term been excluded and Andar must have known this. The relationship, at least from Bramble's perspective, was easily replaceable as Andar was only carrying out one delivery route. Consequently, although the agreement had expired, the parties' continuing conduct established that the parties intended for the expired obligations to continue, including the indemnity clause.

B CSR Limited v Adecco (Australia) Pty Limited [2017] NSWCA 121

1 Facts

The facts in *CSR* were similar to those in Brambles, however, they had two important differences.

In 1999 CSR held a tendering process whereby it requested proposals to supply casual labour to its operations within Metropolitan and Country Areas of Australia. It accepted an offer from Adecco and a contract was executed on 1 April 2000 for a 2-year term.

Clause 23.2 of the agreement provided that Adecco would indemnify CSR against ‘any claim by Temporary Staff for personal injury... arising out of or in connection with the performance of Assignment duties'.

Under the contract, CSR had the exclusive option to extend the relationship for up to two years. It was common ground that CSR exercised this right on two occasions, first until the end of June 2002, and later until the end of July 2002. However, it consciously elected not to extend the contract beyond this date. This was because, unlike *Brambles*,

on 16 June 2002 the parties began negotiations for a new agreement. Negotiations lasted until early 2004 and it was common ground that they failed.

One of the negotiation's major stumbling blocks was the form of the indemnity provision. Although the evidence was limited, emails in early 2003 suggested that neither party was happy with it continuing. Adecco wanted to reduce its scope. Conversely, CSR wanted to extend its application; it wanted to remove a sentence in cl 23.3 of the expired agreement which provided that the indemnity clause would not apply if a claim "arises out of an act or omission by CSR".

Despite the contract's expiration and the ongoing negotiations, CSR continued to order labour from Adecco. However, as a second distinction from *Brambles,* the evidence of continuing conduct was not straight forward. From April 2002 until January 2003, it was established CSR paid Adecco Australia approximately $13 million. This amount constituted approximately 77.62 per cent of CSR's total labor hire. That being said evidence of how the ongoing transactions were conducted was unclear. No invoice receipts were presented before the Court. CSR relied on the statements of Ms Miller, the National Account Director of Adecco until October 2002, who stated that Adecco continued to supply labour according to the same terms *until she left the company*; but, after October 2002, there was no evidence identifying the terms of completed transactions.

While all this was ongoing, Adecco supplied the services of Mr Frewin, a truck driver, to CSR's operations. He worked at CSR's concrete plant from September 2002 until March 2003. He suffered a back injury during his employment.

The issue was the same as the issue in *Brambles*. Did the parties continuing conduct give rise to an implied contract on the terms of the expired agreement, requiring Adecco to indemnify CSR against the personal injury claim?[58]

[58] *CSR Limited*, above n 2, at 83.

The Primary Judge held that Adecco was not liable to indemnify CSR, however the New South Wales Court of Appeal reversed. This essay will outline these decisions below before addressing their correctness.

2 Primary Judgment

Adamson J held that Adecco Australia was not liable to indemnify CSR against Mr Frewin's claim. Her Honour considered that the facts gave rise to three theoretical solutions:[59]

(1) As in *Brambles*, the parties tacitly consented through their continuing conduct to a new agreement on the terms of the expired contract, including the indemnity provision; or
(2) The parties allowed the contract to expire, and afterwards conducted their relationship on an informal basis (a series of one-off transactions) whereby CSR agreed to pay *quantum meruit*, a reasonable fee for labour supplied. This value was accepted to be that provided in the expired contract; or
(3) The parties' continuing conduct gave rise to a new agreement on some of the expired terms, excluding those terms under renegotiation. Therefore, the terms of the new agreement related to payment for labour hire services but did not include indemnities.

In her Honour's view, the case's solution was option three. Although the parties continued to conduct themselves in accordance with some of the terms in the agreement, the indemnity provision was not "necessary" for the commercial relationship to continue.[60]

Her Honour concluded this largely based on a comparison of the case's facts to *Brambles*. She felt *CSR* was distinguishable for two main reasons.

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[59] *Frewin v Adecco Industrial Pty Ltd* [2015] NSWSC 1568 at [62].
[60] At [88]–[95].

Firstly, the parties in *Brambles* conducted themselves in "*exactly*" the same manner after the contract expired, and this conduct continued up until Mr Wail's injury.[61] Adamson J did not believe the same conclusion was possible on the present facts. CSR had the onus to prove that the expired terms continued to apply.[62] Based on Ms Miller's evidence CSR established that it continued to hire labour from Adecco on the same terms and conditions as the expired agreement until at least October 2002 (when Ms Miller left Adecco). It was also clear that Adecco supplied labour to CSR until mid 2004. That being said CSR did not point to any evidence identifying the terms of the transactions after October 2002. Mr Frewin was injured in March 2003. Then, it was uncertain whether the parties were conducting themselves in such a manner that the indemnity provision continued to apply.[63]

Secondly, the decision could be distinguished from *Brambles* as the parties were negotiating a new agreement.[64] In *Brambles* it was unclear whether the parties had realised their contract had expired.[65] Conversely, CSR consciously allowed the agreement to expire because it believed a new agreement was on the horizon. Against this evidence, Adamson J stated, "I would not infer that they were silent either because they had forgotten… or because they both assumed that the Agreement had been extended by conduct".[66] Indeed, in the absence of an express agreement, her Honour felt that the facts prohibited a distinction to be drawn between the three theoretical possibilities.[67] Therefore, it was inappropriate to imply that the indemnity provision continued as it was no longer necessary for business efficacy.[68]

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[61] At [75].
[62] At [77].
[63] At [77].
[64] At [76].
[65] At [76].
[66] At [94].
[67] At [91].
[68] At [95].

3 NSWCA Judgement

The NSWCA reversed. It held that the facts were indistinguishable from *Brambles.* The parties' continuing conduct had tacitly consented to a new agreement on the expired terms, including the indemnity provision.

The Court made a number of points. Firstly, it rejected the Judge's assertion that Adecco had to have acted in "*exactly*" the same manner as it had done under the expired contract up until the time of injury.[69] In the Court's view, the Judge failed to apply the objective test.[70] The Court stated:[71]

> "The ultimate issue is whether a reasonable bystander would regard the conduct of the parties, *including their silence*, as signaling to the other party that their relationship continued on the terms of the expired contract. What was 'required [was] conduct by the parties as if the contract remained on foot'."

McColl J stated that although evidence of continuing conduct was "meagre", it sufficed to show that the parties "recognised the central components of the agreement".[72] Following the contract's expiration, CSR continued to pay Adecco according to the same conditions as those in the expired agreement until at least October 2002. Furthermore, CSR clearly ordered labour after this: it paid Adecco approximately $13 million for labour hired between April 2002 and January 2003.

In fact, the Court went so far as to state that for an agreement to continue it is unnecessary to establish that the parties continued to conduct themselves for the *entire term*. It suffices to show evidence that the parties acted for a *substantial* period as if bound by the expired terms.[73] On the facts, McColl J stated, "one might think Ms Miller's evidence which took the position to October 2002 was sufficient".[74] The natural

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[69] *CSR Ltd,* above n 2, at [122].
[70] At [124].
[71] At [120].
[72] At [123].
[73] At [137].
[74] At [137].

inference from the parties' continuing conduct was that they intended for the expired obligations to apply until a new agreement was negotiated.

Secondly, the Court focused on the situation's commercial reality.[75] There was a commercial benefit to Adecco in continuing to supply labor to CSR. Ms Miller gave evidence that it was the common practice of labor hire companies to continue to supply labor after a contract has expired.[76] This is because, "it allows labour hire companies to avoid the risk of competition involved in a public tender while a new agreement is negotiated".[77] Therefore, the Court stated that the reasonable inference was that Adecco would be concerned "not to 'rock the boat' by departing from the terms of the agreement in continuing to provide its services".[78]

Furthermore, McColl J thought that given the parties' size and the complexity of their operations it must be "objectively doubted" whether they had intended to operate on any other basis than the terms of the expired contract.[79] In the Court's view, the alternative possibilities raised by the Judge were not equally available:[80]

> "[I]t did not conform with the commercial reality of the situation… that the parties' relationship after July 2002 continued on a *quantum meruit* basis or that they operated on "terms related to payment for labour hire services but did not include indemnities".

Thirdly, the Court rejected the Judge's finding that the indemnities should not apply because they were not necessary to the continuing legal relationship.[81] McColl J stated, the indemnities were central to the "risk allocation" that the parties agreed on.[82] "Adecco Australia was to carry the financial risk of the labor it supplied".[83] Had this been

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[75] At [130].
[76] At [130].
[77] *Frewin,* above n 59, at [25].
[78] *CSR Ltd,* above n 2, at [126].
[79] At [126].
[80] At [130].
[81] At [138].
[82] At [138].
[83] At [138].

excluded from the parties' relationship, it was obvious CSR would have returned to tender.

Given these findings, the Court concluded that it was unimportant that the parties never made express reference to a new contract being formed. The parties' intentions could be inferred "as much by silence, as by performance".[84] In other words, the Court objectively doubted whether it would ever have occurred to either Adecco or CSR that their "(ongoing) arrangements were governed other than by the terms of the (original) written contract".[85]

4 Analysis

When so outlined, the NSWCA's decision is persuasive. However it does not survive close scrutiny. CSR had the onus to prove that it was reasonable to infer from the parties' continuing conduct that they intended for the indemnity provision to apply.[86] Contrary to the Court's decision, CSR failed to discharge this. On the facts it *was* an available inference that the parties intended to contract informally, on a *quantum meriut* basis, a reasonable fee for labour supply, while they negotiated a new agreement.

No doubt CSR intended to maintain a commercial relationship with Adecco. From all accounts, the companies had developed a strong working relationship, and Adecco was supplying a significant amount of labour to CSR's worksites.[87] Nevertheless, CSR consciously elected not to extend the contract while it negotiated new terms. The parties began renegotiating a new deal on 19 June 2002 while the contract was ongoing. A month later, in July 2002, while the negotiations were ongoing, CSR elected not to extend the expiring contract. Had CSR intended to operate on a formal contractual basis throughout the negotiation period, the obvious answer was to exercise its extension option.

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[84] At [123].
[85] At [132].
[86] *Modahl,* above n 6, at [102].
[87] *CSR Ltd*, above n 2, at [126].

The Court suggested that because the parties were large commercial entities, involved in a complex relationship, they must have intended to manage their affairs according to the expired obligations.[88] There is no doubt that large commercial entities do not ordinarily contract informally, however, the Court's role was to determine what the parties *did* reasonably intend.

Indeed in *Baird,* a similar sentiment was expressed.[89] M&S and Baird were involved in a clothing supply relationship for over 30 years. They contracted over individual orders, but did not choose to regulate their relationship according to a long-term contractual arrangement. The English and Wales Court of Appeal held that it could not imply a long-term contractual commitment simply because most commercial entities regulate their relationships in this way. On the facts, it was a reasonable inference that the parties believed they could achieve greater flexibility by operating on an informal basis.[90]

On the present facts, there was a reasonable commercial explanation for why CSR wanted to operate informally. CSR was attempting to negotiate new terms. Notably, it wanted a more comprehensive indemnity provision. If it exercised its option to extend the contract, it might extend obligations longer than necessary, potentially shortchanging itself in the long run. Furthermore, if it extended the contract, there was less incentive for Adecco to negotiate a new agreement swiftly as its relationship was already regulated by existing obligations.

Furthermore, there was no doubt that CSR had believed the negotiations (and therefore the period of informality) would be concluded swiftly. This was because CSR held a strong bargaining position. Although both parties were large corporate entities, CSR was in the position to pull the pin on negotiations at any point and tender its business on the open market.[91]

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[88] At [130].
[89] *Baird,* above n 5, [76].
[90] At [68]–[71].
[91] *Frewin,* above n 59, at [25].

In light of this evidence, it was unimportant that Adecco was unwilling to "rock the boat".[92] Ms Miller made it clear that it is the unique custom of labour hire companies to continue supply labour after an agreement has expired:

> "In my experience in the industry, this practice is very common. It allows labour hire companies to avoid the risk of competition involved in a public tender while a new agreement is negotiated".

While this evidence spoke to Adecco's intentions, it overlooks the fact that bargains are mutual. To establish an implied contract on the expired terms, CSR had to show that it was also the reasonable implication of its own behavior that it intended for the expired obligations to continue. Given CSR's decision not to extend the expiring contract, a reasonable person in Adecco's shoes must have objectively doubted whether the old terms continued.

Turning to a different but related point, that CSR paid for labour at the same price in the expired contract was equivocal. Admittedly, this evidence constituted the strongest support for the Court's conclusion. The expired contract price was calibrated with reference to the indemnity clause. In isolation, because labour was supplied at this price, the reasonable inference was that the parties intended for the indemnity clause to apply as well. However, this argument must be considered against the fact that the parties were negotiating a new agreement. The indemnity clause may have been central to the risk allocation between the parties pre-expiration; but, CSR's decision not to extend the contract, coupled with the parties ongoing negotiations showed that they were no longer happy with how the risk was arranged.

Furthermore, there was a logical reason why transactions continued at this price. Adecco was responsible for invoicing labour after CSR placed an order.[93] Obviously, Adecco was going to charge the same fee if CSR did not protest. Alternatively, CSR did not

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[92] *CSR Ltd,* above n 2, at [126].
[93] At [128].

protest because it thought a favourable commercial contract was on the horizon. Admittedly, it was not getting the same value if it was not indemnified against personal injury; however, CSR believed that this would be temporary. Therefore, it was at least an available inference that CSR agreed to pay the fee as *quantum meruit*, not because the price was reasonable, but because it did not stand out as unreasonable while the new contract was negotiated.

Strong support for this interpretation exists in a draft agreement sent by CSR to Adecco in March 2003.[94] The draft agreement provided for a retrospective commencement date of October 2002. CSR was trying to backdate its entitlements, including the indemnity clause. If CSR believed that the expired contractual terms covered the negotiation period, it was not obvious why it would have included this. From March 2003 CSR was clearly concerned that its business position was compromised because its orders were not protected by the expired terms.

Moreover, although the principle of "necessity for business efficacy" is not a strict legal requirement, it provides a window into the parties' objective intentions. The relationship was capable of continuing on an informal footing. Essential details such as the type of staff required and the term of employment were agreed to expressly when CSR made individual orders. Otherwise it was implicit that CSR would be pay a reasonable price for labour supply. The indemnity clause was unnecessary for this continuing relationship.

Finally, the Court of Appeal brushed over that evidence of continuing conduct was limited after October 2002 when Ms Miller left Adecco. Although CSR proved that it continued to order labour from Adecco, it was unclear on what terms, or at what price, labour was supplied.

The Court stated it was not necessary to establish that the parties continued to conduct themselves according to the expired agreement for the *entire term*. This was because, the parties had conducted themselves according to the expired agreement for a *substantial*

[94] *Frewin,* above n 59, at [41].

term.[95] Therefore, in the Court's view it was a reasonable inference from the parties conduct that they intended the expired terms to apply pending the formation of a new agreement.

However, there was a 14-month period during which it was unclear how the parties' relationship was regulated. Even if (and I am not proposing this was the case) the parties had agreed by their conduct, to extend the expired terms through the initial stages of their negotiations, CSR had to establish the indemnity clause continued to apply in March 2003.

As covered above, CSR's strongest argument establishing the parties' intention to contract subject to the indemnity clause was that they continued to pay the expired contract price. The indemnity clause was part of the risk allocation between the parties, and the price was calibrated with reference to the indemnity clause. Therefore, because the parties continued to pay the same price, it was an available inference that the indemnity clause continued.

Conversely, if the parties had contracted over a different price, the connection between the indemnity clause and the parties' continuing conduct would have had no basis in fact.

Whether the parties continued to contract at this price until March 2003 was, as the Judge stated, "a question of actual fact and not one of hypothetical fact and could, therefore, have been the subject of evidence".[96] CSR bore the onus of proof and it did not discharge this onus. Therefore even if the indemnity clause applied until October 2002, without evidence, it cannot be assumed that it applied after this date.

The Court countered the lack of evidence with a simple proposition:[97]

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[95] *CSR Ltd,* above n 2, at [137].
[96] *Frewin,* above n 59, at [77].
[97] *CSR Ltd,* above n 2, at [131].

> "Neither the primary judge, with respect, nor Adecco Australia, in my view, identified any conduct of the parties which supported possibilities (2) and (3), each of which involved a departure from the terms of the Agreement. In my view, the alternative possibilities would have required evidence of conduct indicating the parties intended to so act."

However, as identified above it was a very reasonable interpretation that CSR intended to contract on an informal basis, a reasonable fee for labour supplied, while a new agreement was negotiated. CSR consciously elected not to renew the expiring obligations, despite the fact negotiations were still ongoing. Without more, this constituted evidence that CSR did not intend for the expired obligations to continue. The onus lay on CSR, not Adecco, to establish that this was not the case, and it failed to discharge this onus.

In fact, the evidence gives rise to a further argument that the indemnity provision should not have applied. It was not raised in the Court.

Attention should be turned back to the fact that in March 2003, CSR sent Adecco a draft agreement providing for a retrospective commencement date of October 2002.[98] On this evidence, arguably the parties were conducting themselves *pending* the formation of a new agreement. In other words, the parties never entered contractual relations at all as they intended that once a new agreement was negotiated it would apply retrospectively to the negotiation period.

An analogy can be drawn to *British Steel Works v Cleveland Bridge and Engineering Co Ltd.*[99] The facts were straight forward. Cleveland successfully tendered for the construction of a building. It then approached British Steel to produce a variety of cast-steel nodes for the project. The parties exchanged a letter of intention to contract, but did not agree over material terms. Nevertheless, Cleveland requested British Steel start work

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[98] *Frewin,* above n 59, at [41].
[99] *British Steel Corpn v Cleveland Bridge and Engineering Co Ltd* [1984] 1 All ER 504.

on the nodes immediately. British Steel completed the work, but delivery of the final node was delayed. Cleveland sued for late delivery, but the Court held that no contract had been formed. Just because a party conducted itself in preparation of contract formation, did not mean that it reasonably intended to enter contractual relations. Therefore, British Steel was entitled to compensation for work done on a non-contractual *quantum meruit* basis, a reasonable sum for work done.

There is a strong argument that the facts in *CSR* should have led to the same result. Both parties intended to retain their relationship while a new agreement was negotiated. However, the parties had not reached agreement over their risk allocation. The March 2003 draft agreement suggests that from at least October 2002, the parties intended that their risk allocation would be determined retrospectively by the renegotiated terms. On this argument it is simply contradictory to suggest that they intended to be bound by the terms of the expired contract, when in actuality they intended for that period to be covered by different terms.

In coming to the decision in *British Steel*, Goff J asked a critical question. At any point were the parties free, "after starting work, to cease work"?[100] In that case, the obvious answer was yes. The parties had not formed a contractual arrangement because they had not established the material terms. They were merely conducting themselves *pending* a new contract being formed.[101]

The question could be answered yes in *CSR* as well. Had CSR simply broken off the arrangement, without reasonable notice, Adecco Australia would have been at pains to challenge its decision. After all, as Ms Miller indicated, Adecco was merely providing labour to prevent CSR from sending its business to tender.[102]

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[100] At 510.
[101] At 510.
[102] *Frewin,* above n 59, at [25].

However, there is probably a good reason that this argument was not raised by Adecco. This is because:[103]

> "[The] law of non-contractual quantum meruit is not exclusively tethered to the doctrine of unjust enrichment. Its objectives are not confined only to dispossessing those unjustly enriched but can extend to providing redress for those who have been unjustly impoverished. The market value of the services that could have been used to undertake the works is relevant."

On the facts, if no contract was formed, CSR was unjustly impoverished. This is because, after the contract expired, CSR continued to pay for labour according to the expired contractual price, and this price was calibrated subject to the indemnity clause that no longer applied. Therefore, presumably, the price was inflated above market rate. Consequently, under the law of non-contractual *quantum meruit*, a reasonable price for labor was a discount on the rate set in the expired contract.[104] As a result, although CSR was not indemnified against the claim of Mr Frewin, as the expired terms did not apply, it was entitled to be reimbursed for an overpayment for labour after the contract expired. Bearing in mind that the negotiations lasted for over 2 years, this sum would have been significant.

Conclusion

Doubtlessly, the *Brambles* line of authority will be applied in New Zealand should similar facts arise. This is because contract is no longer the law of consent, but the law of reasonable reliance. Like tort, contract imposes obligations based on norms of reasonable behaviour. Where parties conduct themselves according to the core components of an expired contract, an available inference exists that they intended for the expired obligations to continue. Still, a contract will not be lightly implied. Ordinarily, commercial parties manage their affairs expressly. Furthermore, the essence of fixed-term contracts is that obligations expire when the term expires. Consequently, in each case,

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[103] *Electrix Ltd v Fletcher Construction Co Ltd* (No 2) [2020] NZHC 918 at [2].
[104] Unlike contractual *quantum meruit* the parties could not have agreed that this price was reasonable as they had not contracted.

before courts can enforce expired terms, they must be able to conclude confidently that that is what the parties objectively intended. There is no issue over certainty as the expired contract constitutes an objective standard against which new terms may be implied. However, as a matter of factual inference, usually, the expired contract must be necessary for business efficacy. Necessity is not a legal requirement, but as an "analytical tool", it forces courts to question whether the parties had, instead, intended to operate on a *quantum meruit* basis*,* a reasonable payment for work done.

Ultimately it was this tool that should have distinguished the results in *Brambles* and *CSR.* In *Brambles,* there was no alternative explanation for the parties continuing conduct. It was inconceivable with commercial reality that Brambles would maintain a replaceable relationship with Andar, absent the indemnity clause. However, in *CSR,* the facts were equivocal. CSR did not extend the expiring contract as it believed a new agreement was on the horizon. A natural inference of this decision was that CSR intended to conduct its affairs on an informal *quantum meruit* basis, while new terms were negotiated. Consequently, the indemnity clause was not necessary for the continuing relationship. The NSWCA concluded otherwise, and although all continuing conduct cases must turn on their independent facts, the New Zealand courts should treat *CSR* cautiously.

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