MORE ON SUBJECTIVITY IN THE FORMATION OF A CONTRACT

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An obiter *passage in a Court of Appeal judgment argues that the proper approach to the question whether a contractual agreement has been made is the objective approach, as in English common law. The author expresses a contrary view and contends that, in any event, it is not open to the courts to change the law of Jersey in this way.*

1 It is becoming fashionable for judges of the Jersey Court of Appeal to issue *obiter* postscripts on controversial matters of law. The latest example of this genre is an excursus delivered by Martin JA in *Booth v Viscount and Investec Bank (Channel Islands) Ltd*[1] equaling in length the judgment on the matters in dispute. It is, as one might expect, an erudite digression on a matter of some importance, on which the judiciary in Jersey is divided.[2] However, it was a digression delivered without hearing argument from counsel, and it went so far as to broaden the discussion into the determination of *cause*. It is unusual for such advocacy to appear in appellate judgments. However, the excursus is there, and although not an authoritative statement, it nonetheless merits a response. Academic discourse may not furnish a result but may hopefully inform the process of deliberation and the ultimate decision either of the courts or the legislature. The issue is important, not merely from an intrinsic social and commercial viewpoint, but also as to the nature of Jersey customary law and the extent of the courts' jurisdiction to reform it.

2 The point at issue is whether, in determining whether the parties have reached agreement (consent) and formed a contract, a subjective or objective approach is adopted by the law of Jersey. The civil law, in particular the law of modern France, takes a subjective approach;

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[1] [2019] JCA 122 CA (Sir William Bailhache, President, Martin and Logan Martin JJA).

[2] Indeed, the careful analysis is such that the author unhesitatingly withdraws any inference that might have been taken from his previous article ("Subjectivity in the formation of a contract—a puzzling postscript" (2016) 20 *Jersey & Guernsey Law Review* 160) that judges of the Court of Appeal might be unduly influenced by their English legal training.

English common law, an objective approach. Although in many, if not most, cases the issue is immaterial, because the same conclusion would be reached under either system, it is not always so. Furthermore, the issue is important, as we shall see; a fundamental principle is at stake, because adopting the English approach has the capacity to undermine the whole concept of consent as it is currently understood in Jersey law, and to create uncertainty more broadly.

3 Until the late 1960s, or thereabouts, the position was, it is submitted, plain. Martin JA states[3] that—

> "What the debate is not—or should not be—about is whether French or English law forms the basis of Jersey contract law. Although the sources of that law are varied, there is no possibility of dispute that they ultimately originate, like the rest of the customary law of Jersey, in the customary law of Normandy . . . Those who espouse the objective view do not—or, again, should not—seek to sweep away existing Jersey concepts and superimpose English contract law."

One might quibble that the basis of Jersey contract law is more properly described as the civil law, or the *ius commune*.[4] However, to the extent that the customary law of Normandy absorbed the civil law in matters of contract, Martin JA's statement can surely be accepted as a mutually agreed starting point. What, then did the civil law have to say about the subjective/objective approach to the issue of consent?

4 The genesis of the civil law was the law of Rome, first as the law of the city itself and much later as the law of the Roman Empire. In AD 527, more than a thousand years after the foundation of Rome, the Emperor Justinian embarked upon a project of codification of the law which would become known as the *Corpus Iuris Civilis*, of which the most important part was the Digest. Shortly after, the Roman Empire collapsed and Europe entered the Dark Ages from which it emerged only five centuries later. The Digest survived, and in the 11th century the astonishing second life of Roman law began, as it was studied in the universities of northern Italy, and then more widely. Its influence eventually spread throughout the continent of Europe; only England, which retained its common law, and the customary law provinces of northern France (to an extent) resisted the spread of Roman law, by then commonly called the civil law, or *ius commune* (the common law

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[3] At para 46.

[4] See Nicolle, *The Origin and development of Jersey Law* (5th edn, 2009, Jersey & Guernsey Law Review) section 13 "*Ius commune/droit commun*".

of Europe).[5] But in matters of contract, the Normans (and others) looked to the civil law.[6] What did the civil law originally provide in relation to the subjective/objective dispute?

5 Of the contractual doctrine of consent, Professor Nicholas wrote in *An Introduction to Roman Law*—

> "Consent involves the meeting of two minds, the concurrence of two intents. The first need is therefore to determine what those intents are. In doing this one meets the possibility of a divergence between a man's real intent and the manifestation of that intent—between what modern lawyers sometimes call subjective and objective intent. For example, there may be an apparent agreement to buy and sell a horse but the buyer may have had in mind horse A and the seller horse B, neither party being aware of the disagreement. There is here, subjectively, no consent. But it may be that the natural interpretation of what passed between the parties, the interpretation of the reasonable bystander, is that they were agreed on horse A. Objectively there is consent. Modern systems differ. The older view, resting upon the philosophical doctrine of the autonomy of the will (*i.e*. that the binding force of a contract derives from the human will, which is its own law)[7] requires subjective consent. The more recent view asserts that the validity of a contract comes not from the individual will but from the law, and that the law is concerned with a balancing of interests. It emphasizes the difficulties of proof and the importance of stability and certainty in commercial transactions:

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[5] See generally Nicholas, *An Introduction to Roman Law* (1962, Oxford, Clarendon Press), *Justinian's Institutions* (translated into English by George Harris, LLD, 1756, London, C Bathhurst and E Withers), and Buckland & McNair, *Roman Law & Common Law* (1936, Cambridge, University Press).

[6] In his *Remarques & Animadversions sur la Coustume Reformée*, Poingdestre wrote in the *Préface* that the Custom of Paris (unpublished but accessible on www.jerseylaw.je) should only be followed in Jersey—

> "*quand ils sont conformes au Droict Romain, qui est celuy que tout le monde suyten matiere de contracts, & autres, ou les Coustumes n'ont rien pourueu de plus particulier*."
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> [to the extent that they are in conformity with Roman law, which is what the whole world follows in matters relating to contract, and other matters where the customary law systems have not made any special provision.]

[7] From which, no doubt, the customary law maxim "*la convention fait la loi des parties"* derives.

> each party should be able to assume that the other will be held to the objective interpretation of the transaction.
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> The Roman lawyers, with their habitual disregard of questions of evidence, give little attention to matters such as this, but seem tacitly to assume a subjective interpretation, qualified only by such principles as that a man may not profit from an ignorance which comes from his own gross carelessness."[8]

6 That conclusion as to the approach of Roman lawyers is consistent with the work of Pothier whose writing was so influential in the drafting of those sections of the French *Code Civil* dealing with the law of contract,[9] and whose work is still so authoritative in Jersey.[10] Pothier was a subjectivist. The French rule on the revocability of an offer is a manifestation of the subjective theory of contract. All legal systems require that an offeree should receive the offer before it is capable of acceptance. However, in French law, once the offeror has changed his mind and revoked the offer, it is no longer capable of acceptance even if the offeree is unaware of the change of heart. In objective theory, the revocation of the offer is only effective upon receipt by the offeree. The French theory, based as it is upon the autonomy of the will, can be traced back to Pothier—

> "This will is presumed to continue, if nothing appears to the contrary; but, if I write a letter to a merchant living at a distance, and therein propose to him, to sell me a certain quantity of merchandise, for a certain price; and, before my letter has time to reach him, I write a second, informing him that I no longer wish to make the bargain, or if I die; or lose the use of my reason;

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[8] Nicholas, *An Introduction to Roman Law* (1962, Oxford, Clarendon Press) at 175–176.

[9] See Nicholas, *The French Law of Contract* (2nd edn, Oxford, Clarendon Press, 1982).

[10] See, *e.g.* "surer guide to the discovery of the law of the Island than is the law of England", *In re Priston, veuve Terry* 1963 JJ 335 at 340; "The principles stated by Pothier we believe to be the principles of our law" *Golder v Société des Magasins Concorde Ltd* 1967 JJ 721 at 730; "Pothier is a surer guide to the Jersey law of contract than are the English authorities" *HM Viscount v Treanor* 1969 JJ 1243 at 1245; "Both counsel referred to the English authorities on the question of warranty. We think that on this issue Pothier is to be preferred in this jurisdiction" *Wood v Wholesale Electrics* 1976 JJ 415 at 426; "We think that Mr Valpy underestimated the authority of Pothier in this court" *Goodwin Estates Ltd v Le Gros* 1978 JJ 115 at 117; "Pothier has often been treated by this court as the surest guide to the Jersey law of contract" *Selby v Romeril* 1996 JLR 210 at 218.

> although the merchant, on the receipt of my letter, being in ignorance of my change of will, or of my death or insanity, makes answer that he accepts the proposed bargain; yet there will be no contract of sale between us; for, as my will does not continue until his receipt of my letter, and his acceptance of the proposition contained in it, there is not that consent or concurrence of our wills, which is necessary to constitute the contract of sale."[11]

7 Pothier's views remain at the heart of the French subjective theory of contract.[12] The question is, however, whether they also remain at the heart of Jersey law. According to Dr Kelleher—

> "The works of Robert Joseph Pothier (1699–1772) on *Obligations* provide the backbone to Jersey's law of contract. Pothier's role as a source, indeed the main source, derives from his most influential work, the *Traité des Obligations* (1761) . . . A statistical analysis of sources cited by the Jersey courts in post-1950 contract cases provides an interesting, if crude, reflection on Pothier's influence on our jurisprudence in this area. He has been cited in approximately 50% of the cases which have come before the Royal Court."[13]

8 That opinion, and the cases cited at fn 10, would suggest that the answer to the question is in the affirmative, and that Pothier remains a highly authoritative source for the Jersey law of contract.

9 It must be recalled that Pothier was not only a writer upon the customary law (of Orléans) but also on the civil law.[14] Norman customary law had little to say on the law of contract and absorbed the civil law to fill the gap. For that proposition we have the authority of

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[11] Pothier, *Treatise on the Contract of Sale* 17 (LS Cushing translation, Boston, Charles C Little and James Brown 1839).

[12] It is beyond the scope of this paper to explore the issue further, but French law contains a mitigating principle which greatly reduces the difference in outcomes between the French and English approaches. See Barnes, "The French Subjective Theory of Contract: Separating Rhetoric from Reality", (2008) 83 Tul. L Rev 359 available at https://scholarship.Law.tamu.edu/fac scholar/281; see also J Perillo "Robert J Pothier's influence on the common law of contract" (2005) 11 *Tex Wesleyan Law Review* 267 at 287—"Pothier espoused a subjective approach to contract law".

[13] "The Sources of Jersey Contract Law" (1999) 3 *Jersey Law Review* 1, at 13.

[14] Pothier's first work was on the *Pandects of Justinian*, published in 1748.

Poingdestre who wrote in his *Commentaires sur l'ancienne coutume de Normandie*[15]—

> "*touchant les contrats et promesses, mais qui voudrait approfondir en ces matières là ou s'esclaircir des difficultés . . . n'y trouveroit pas son compte; car pour ces choses là les anciens Normans . . . se réglaient par le droit civil*"
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> [concerning contracts and promises, whoever wishes to deepen his knowledge on these matters, or clarify difficulties, . . . will not find there (in the Grand Coutumier) anything in point; for in these matters the ancient Normans . . . governed themselves by the civil law].[16]

10 Of course Poingdestre (1609–1691) was writing a little before Pothier (1699–1772), but there is no evidence to suggest that English common law exercised even a tangential influence upon the contract law of the Island until the latter half of the 19th century. The *Loi (1860) sur l'Ouverture du Barreau* laid down for the first time a qualification for becoming an advocate which included passing examinations on Norman law, the law of Jersey, English commercial law and procedure in the Jersey courts. The requirement to learn of English commercial law no doubt reflected the adoption by the States of legislation such as the *Loi (1861) sur les sociétés à responsabilité limitée* which were based upon equivalent English statutes.

11 Some support for the proposition that Poingdestre subscribed to the subjective approach to the formation of consent can be found in his chapter on guarantees in *Les Lois et Coutumes de l'Ile de Jersey*[17] where he wrote—

> "*En tous contracts les parties contractantes peuuent de consentement mutuel, s'obliger l'un l'autre a des garandies extraordinaires . . .*"
>
> [In all contracts the contracting parties may, by mutual consent, oblige themselves one to the other in extraordinary guarantees].[18]

The emphasis on mutual consent would seem to indicate a subjective approach, *i.e.* that both must be of one mind.

12 If one accepts that the civil law adopted a subjective approach to the formation of contractual consent, and Jersey law reflected that

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[15] Published by Law Society of Jersey, St Helier, 1907.
[16] *Ibid*, at 4.
[17] Published by the Law Society of Jersey (JT Bigwood Ltd, 1928).
[18] *Ibid*, at 102.

approach until, at least, the middle of the 20th century, the next question is whether that approach has changed during the last 60 years. There is no doubt that in some cases between 1969 and 1989 the Royal Court appeared to assume that the law of Jersey was the same in this respect as the law of England.[19] In *Leach v Leach*[20] Sir Frank Ereaut, Bailiff, stated—

> "We have considered whether we can, by applying an objective test to the statements and conduct of the parties and their lawyers and by endeavouring to draw a reasonable inference from the whole of the circumstances leading to the settlement, impute to the parties an intention that one or other should take the disputed items."[21]

In *Mobil Sales & Supply Corp v Transoil (Jersey) Ltd*[22] the same judge stated—

> "If, whatever a man's real intention may be he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself is equally bound as if he had intended to agree to the other man's terms."[23]

In *La Motte Garages Ltd v Morgan*[24] Hamon, Commr, stated—

> "If we have to ascertain the 'sense of the promise', it seems to us that we must ascertain by the objective test what a reasonable man would have assumed it to mean."[25]

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[19] Nicolle, *op cit* states at para 15.17 that—

> "The 1960s and 1970s saw sporadic reliance upon English principles of contract law. It is at times difficult to escape the feeling that this owed as much to the inability or disinclination of counsel to cite proper authority to the courts as to any considered conviction that that English law was the appropriate authority to cite, as in *Colledge v Little Grove Hotel Ltd* (1970 JJ 1487) [master and servant] and *Denney v Hodge* (1971 JJ 1915) [breach of contract] where the judgments record that that the parties agreed that the principles of English law applied but not why."

[20] 1969 JJ 1107.

[21] *Ibid*, at 1118.

[22] 1981 JJ 143.

[23] *Ibid*, at 159. It may be, however, that the court was applying New York law. See fn 9 in Bailhache, "Subjectivity in the Formation of a Contract—a Puzzling Postscript" (2016) 20 *Jersey & Guernsey Law Review* 160.

[24] 1989 JLR 312.

It must be noted that, judging only by the reports of those cases, no arguments were addressed to the court on the issue of subjectivity/objectivity, none of the relevant texts was placed before the court, and no reasons were given by the court for assuming that the common law objective approach to consent had been adopted by Jersey law.

13 If it is correct to state, as the Court of Appeal did in *Home Farm Developments v Le Sueur*,[26] that "whether an objective or subjective test should be adopted was not argued in *Marett*"[27] and that therefore "the point has not yet been definitively resolved",[28] it must follow all the more strongly that the three first instance cases cited above did not resolve the issue either.

14 Furthermore, *Leach*, *Transoil* and *La Motte Garages* were followed by a number of cases where the subjective approach was assumed to be correct. In 1996, in *Selby v Romeril*,[29] the Royal Court determined that there were four requirements for the creation of a valid contract, of which the first was the consent of the parties. It is true, as Martin JA stated in *Booth* at para 51, that the court did not expressly state that a subjective approach to the issue of consent was being adopted. On the other hand, again as stated by Martin JA, it was implicit in the references to Pothier and the *Code Civil* that *Selby v Romeril* assumed that the subjective approach of the civil law formed part of the law of Jersey. That was certainly the view taken by the Court of Appeal in *Marett v Marett* where the court (in declaring that "the Jersey law of contract determines consent by use of the subjective theory of contract")[30] considered *Transoil* and *La Motte Garages per incuriam* in the light of the court's decision in *Selby v Romeril*. Subsequently, of course, the pendulum has swung back and forth.[31]

15 Most lawyers would agree that the current position can hardly be described as satisfactory. A strong Court of Appeal in *Marett v Marett*

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[25] *Ibid*, at 316.
[26] [2015] JCA 242, 25 November 2015, unreported (Crow, Martin and Birt JJA).
[27] 2008 JLR 384 CA (Sumption, Nutting and Pleming JJA).
[28] *Ibid*, at para 59.
[29] 1996 JLR 210; the author declares an interest as the presiding judge in that case.
[30] *Ibid*, para 57, at 407.
[31] See, *e.g.*, *Home Farm Developments v Le Sueur* [2015] JCA 242 (objective), *J v I* 2017 (1) JLR 32 (neutral), *Calligo v Professional Business Systems* 2017 (2) JLR 271 (objective), *Foster v Holt* 2018 (1) JLR 449 (subjective).

made what appeared to be a definitive statement, as set out above. Subsequently, differently constituted Courts of Appeal have initially doubted the correctness of that statement and, in the case of the excursus from Martin JA in *Booth v Viscount*, effectively argued that it is wrong. It is also true that judges of the Royal Court are divided in their opinions.

16 It is submitted that the Court of Appeal in *Marett v Marett* set out the law as it was in 2008 and as it had been for many centuries before—at least for so long as the customary law of Normandy had embraced the civil law. A number of senior judges have suggested that the point of law in dispute is, however, open for decision and, by implication, that it can be declared to accord with the position at English common law. In effect they seek, by judicial decision, to implement in part recommendations of the Jersey Law Commission[32] to adopt by statute the contract law of England—recommendations which were, and still are, widely regarded as unacceptable.

17 Whether the Court of Appeal should purport to change the law of Jersey in this way is a moot point to which the author returns below. But is it desirable to change the law at all?

18 The first argument advanced is that Jersey, as a significant international financial centre closely linked to the City of London, should in the interests of the industry follow English law so far as possible. In *Toothill v HSBC Bank PLC*, Michael Birt, Deputy Bailiff (as he then was), stated—

> "The law of undue influence in Jersey is similar to that of English law and we find that the principles underlying the decisions in *O'Brien*[33] and *Etridge*[34] are entirely consistent with those of Jersey law. Furthermore, there are strong policy grounds for thinking that the law in this jurisdiction should be the same as England. The majority of banks who lend money on the security of immoveable property in the Island are UK-owned. Their guide-lines and procedures have been established in accordance with the clear judicial guidance offered in *Etridge* and their personnel will have been trained accordingly."[35]

19 One might observe that banks in Jersey, and their personnel, seem to have adapted without undue difficulty to the absence of mortgages

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[32] Jersey Law Commission, *Consultation Paper No 5 The Jersey Law of Contract*, 2002; https://jerseylawcommission.org/reports/
[33] *Barclays Bank PLC v O'Brien* [194] 1 AC 180.
[34] *Royal Bank of Scotland plc v Etridge (No 2)* [2002] 2 AC 773.
[35] 2008 JLR 77, at 89.

and to the registration of hypothecs upon immoveable property to secure their loans, and indeed to a whole system of property law based upon the civil law. It is true that modern statutes dealing with a swathe of commercial law have used English models as their base—*e.g.* the Companies (Jersey) Law 1991, Banking Business (Jersey) Law 1991, Limited Partnerships (Jersey) Law 1994, Financial Services (Jersey) Law 1998, and Limited Liability Partnerships (Jersey) Law 2017, to name but a few. Yet in most cases they have respected the civil law roots of the general law of contract.[36] The commercial law statutes are not irreconcilable with those roots.

20 The high point of the financial services argument came with a statement from Le Cocq, Deputy Bailiff, in *Calligo Ltd v Professional Business Systems (CI) Ltd*.[37] At para 25 the Deputy Bailiff stated—

> "It seems to us that an important part of this court's role is to develop the law of contract so far as it may be open to us to do so to suit the needs of a modern community which is also a sophisticated international financial centre."

Although the judge wisely qualified his words with the phrase "so far as it may be open to us to do so", this is nonetheless a bold statement. Few would disagree that the needs of a modern community are an appropriate focus, but what of the needs of a sophisticated international financial centre? Financial services currently provide an important part of public revenues, but that may not always be so.[38] Industries wax and wane, and it would be rash to assume that the financial services sector will forever constitute an important part of the economy. Suppose that the interests of a sophisticated international financial centre no longer coincide with the needs of the general

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[36] *E.g.* Article 1 of Companies (Jersey) Law 1991—"'*cause*' has the meaning assigned to it by the customary law of Jersey"; art 40 of Limited Partnerships (Jersey) Law 1994—

> "The rules of customary law applicable to partnerships (*contrats de société*) shall apply to limited partnerships except in so far as they are inconsistent with the express provisions of this Law";

art 42 of Limited Liability Partnerships (Jersey) Law 2017—

> "The rules of customary law applicable to a partnership shall apply to a limited liability partnership except in so far as they are inconsistent with the express provisions of this Law."

[37] 2017 (2) JLR 271.

[38] In any event, it is always open to financial services entities to choose English law as the governing law of the contract, with a submission to the non-exclusive jurisdiction of the Royal Court. Such a choice would almost certainly be upheld.

community. Should the courts still develop the law in the interests of finance? One could argue that the answer is in the affirmative, but this is a difficult political area. It is unsurprising that the Royal Court in *Foster v Holt*[39] thought that mounting that unruly horse of public policy was not to be encouraged and that—

> "[i]t is only legitimate to take the law in a new direction if there is some authoritative principle on which one can rely which has previously been adopted by the courts of this Island and there is no contrary authority which is binding upon us."[40]

21 The second reason advanced for taking the law in the direction of English law is that an objective approach to the issue of consent leads to certainty. Martin JA cites a *dictum* of Lord Mansfield CJ 250 years ago in *Vallejo v Wheeler* where he stated—

> "In all mercantile transactions the great object should be certainty: and therefore, it is of more consequence that a rule should be certain than whether the rule is established one way or the other. Because speculators in trade then know what ground to go upon."[41]

22 Lord Steyn expressed the same view extra-judicially in 1997—

> "Our law is generally based upon an objective theory of contract. This involves adopting an external standard given life by using the concept of the reasonable man. The commercial advantage of the English approach is that it promotes certainty and predictability in the resolution of contractual disputes. And, as a matter of principle, it is not unfair to contracting parties the intention that in the event of a dispute a neutral judge should

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[39] 2018 (1) JLR 449.

[40] *Ibid*, para 12, at 445. Martin JA thought (at para 64 in *Booth*) that there was some prior authority for the stance taken by the court in *Calligo* but he did not say what it was. It seems to the author that *Marett v Marett* stands until it is set aside. Even in *Booth* itself, Martin JA was able to state (at para 21)—

> "I am content to assume for the purposes of disposing of this appeal that that statement [in *Marett v Marett*] of the approach to and the elements of the Jersey law of contract is correct."

The same approach was taken by the Court of Appeal in *Home Farm Developments Ltd v Le Sueur*.

[41] (1774) 1 Cowp 143, at 153.

> decide the case applying an objective standard of reasonableness."[42]

Lord Steyn, while promoting the English system as being "advantageous" does however concede that the subjective theory is reasonably tenable. He writes in the same article—

> "It is a defensible position for a legal system to give predominance to the subjective intentions of the parties. Such a policy can claim to be committed to the ideal of perfect individualised justice."

23 Martin JA takes a rather more extreme position. He states, at para 73—

> "There can be no doubt that the subjective approach to consent in the law of contract produces uncertainty. The idea that contracts may fail because of a defect of consent of one party that is unknown to the other is on the face of it incompatible with a modern commercial jurisdiction."

24 The notion that in continental Europe, where most countries embrace the subjective theory of contract,[43] commerce is riddled with uncertainty, and that France, Belgium, the Netherlands, Spain and Italy (*inter alia*) cannot claim to be modern commercial jurisdictions, is difficult to accept. It is true that there are procedural differences between the common and civil law systems (in particular the greater reliance in the civil law upon written statements and materials) and that those differences may make it more difficult to set aside an agreement.[44] Yet it is perfectly possible both for civil law courts and common law courts to take a robust and pragmatic approach to unsupported claims that true consent was absent. Even in France, the existence of mutual consent is assessed from an objective standpoint, and the fact that the parties have appended their signatures to a written document is considered to be evidence of agreement to the document's content and effect. The notion that a party may escape contractual liability simply by declaring that he did not mean what he said or wrote is fanciful.[45] As argued in "Subjectivity in the formation of a contract—a puzzling postscript", "the difference between the English objective and French subjective approaches is not a finely tuned and

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[42] Lord Steyn, "Contract Law: Fulfilling the Reasonable Expectations of Honest Men" (1997) 113 LQR 433.

[43] See Nicholas, *The French Law of Contract*, *op cit*, at vi.

[44] See Fairgrieve, *Comparative law in Practice* (Hart Publishing, 2016, Oxford) at 47.

[45] Fairgrieve, *op cit*, at 42.

rigorously precise distinction."[46] There is a considerable overlap.[47] Martin JA is a purist common lawyer, and considers that the capacity for modifications or compromise between the two approaches in the law of Jersey is not mitigation at all. "[A]n approach that has built into it the likelihood of uncertainty is no answer if certainty itself is the primary object."[48] It is submitted that a measure of flexibility does not necessarily lead to uncertainty but is more likely to lead to justice.

25 However, Martin, JA is correct, it is respectfully submitted, to underline the fundamental difference between the subjective and objective approaches to the formation of consent, even if in practice both approaches can often ultimately arrive at the same destination. It is obviously arguable that a system which prioritises the desirability of certainty is commercially attractive. If certainty is the ultimate aim, the objective approach may be preferred. If, however, as hinted by Lord Steyn, the ultimate aim is a just solution, it is equally arguable that the subjective approach is to be preferred. *La Motte Garages Ltd v Morgan*[49] bears closer analysis in this context. The learned judge in that case (Hamon, Commr) was wrong to suggest that the outcome would have been the same whether the objective or subjective approach to the issue of consent were adopted. Donna Morgan would have won her case if the subjective approach had been adopted; the judge adopted the objective test, and she lost. The facts were straightforward. Miss Morgan decided to buy a Ford Fiesta on which the price (£4995) was prominently displayed. Her own car, to be taken in part exchange, was valued at £2000. The salesman asked her for the balance of £2995 which she paid, and said that he would settle the outstanding hire-purchase on her car. Unfortunately there was a mutual mistake, because the outstanding hire purchase debt was £2270, and Miss Morgan's car was effectively valueless. The garage sued for that amount. The court stated—"There can be no doubt in our minds that a reasonable man would have seen at once that the plaintiff meant to ask for £5265 . . ." and gave judgment against the defendant for £2270. She ended up paying more than she thought she could afford. If a subjective test had been applied, the court would have found that there was clearly no meeting of minds, and the contract would have been set

[46] (2016) 20 *Jersey & Guernsey Law Review* 160, at para 18.
[47] The English Court of Appeal has recently decided, in *FSHC Group Ltd v Glas Trust Corporation Ltd* [2019] EWCA Civ 1361, that the interests of justice required a subjective approach to be adopted in the determination of a common mistake in the context of rectification of a written contract. Even in the English common law, there is clearly room for subjectivity.
[48] *Booth*, at para 67.
[49] 1989 JLR 312.

aside. The Ford Fiesta would have been returned to the garage, Miss Morgan's car and £2995 would have been returned to her, and she could have started again. That would arguably have been the just result. As it was, the contract was enforced in circumstances where there was no real agreement between the parties.

26 In any event, is certainty an unqualified absolute to which the law should aspire? As we have seen above, a written contract which a man has signed may make it crystal clear that, objectively speaking, there was an agreement. Yet the judge may conclude from compelling extrinsic evidence (and not merely the party's protestations) that the man did not understand what he was signing, or that he had no intention of binding himself in the way in which, objectively speaking, he has. The English judge is bound to give judgment against him. Certainty can be brutal and does not always lead to justice. What may be convenient and appropriate for corporations doing business in Jersey may not be just or fair for the average Jersey resident.

27 There is, however, an even more fundamental reason why the law should not be changed in favour of an objective approach to the question of consent. Consent, or as it would be expressed in the French language, *le consentement de la partie qui s'oblige,* is one of the four essential requirements of a valid contract.[50] Martin JA was careful in the main body of his judgment in *Booth v Viscount* to limit his acceptance of the essential requirements of a contract as set out in *Selby v Romeril* and *Marett* in the Court of Appeal—

> "I am content to assume for the purposes of disposing of this appeal [the author's emphasis] that that statement of . . . the elements of the Jersey law of contract is correct."[51]

It is not clear whether he is reserving his position on the essential requirements of a contract, although he did state that "those who espouse the objective view do not—or again, should not—seek to sweep away existing Jersey concepts and superimpose English contract law".[52] However, what is generally understood by "consent" in the civil law is difficult to reconcile with an objective approach to its existence or non-existence. An English lawyer does not usually speak of the parties' "consent". He speaks of "agreement", but an agreement is not necessarily the meeting of minds which is the essence of consent. An agreement can be binding upon the parties even if in reality the parties have not agreed at all. If a reasonable man, looking

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[50] See *Selby v Romeril* 1996 JLR 210, at 218.
[51] *Booth*, at para 21.
[52] *Booth*, at para 46,

at the matter objectively from the outside, would say that the parties have agreed, then a contract is born. How can one rationally reconcile "consent" (or a meeting of minds) with a situation where the parties have not agreed but are taken to have agreed? One cannot surely have a meeting of minds unless the minds have actually met. This is the stuff of *Alice in Wonderland*.[53] A deemed agreement is not a *convention* and is irreconcilable with the notion of *volonté*—and an *accord de volontés*, the existence of which is tested by the intentions of the parties.

28 The importance of *volonté* was well expressed by the Royal Court in *Incat Equatorial Guinea Ltd v Luba Freeport Ltd*[54] where William Bailhache, Deputy Bailiff (as he then was) stated—

> "At the heart of this provision in the French *Code Civil* and behind the maxim to which we are so accustomed in Jersey [*la convention fait la loi des parties*][55] is the concept that the basis of the law of contract is that each of the contracting parties has a *volonté*, or will, which binds them together and requires that the mutual obligations which they have agreed be given effect by the courts. The notion of *volonté* as the foundation of the contract is sometimes thought to result from the political liberalism of the age of reason and of the economic liberalism of the 19th century, where obligations imposed from outside should be as few as possible. A man is bound only by his will, and because he is the best judge of his own interests the best rules are those freely expressed by free men. However, it is to be noted that rather earlier the same rationale appears in the Commentaries of Berault, Godefroi & d'Aviron on *La Coutume Reformée de*

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[53] "When I use a word", Humpty Dumpty said, in a rather scornful tone, "it means just what I choose it to mean—neither more nor less." "The question is, said Alice, "whether you can make words mean so many different things." "The question is", said Humpty Dumpty, "which is to be master—that's all". (Lewis Carroll (Charles L Dodgson), *Through the Looking Glass* (1872 chap 6))

[54] 2010 JLR 287.

[55] The maxim was described by Le Gros, *Traité du Droit Coutumier de l'Ile de Jersey*, as "*un principe en quelque sorte sacré*" (Jersey, 1943 at 350); see also *Macready v Amy* 1959 JJ 11, at 14 "the maxim undoubtedly enunciates an important principle of law" (Le Quesne QC, Lieut Bailiff); and *Donnelly v Randalls Vautier Ltd* 1991 JLR 49, at 57 "it is right for us strictly to enforce the maxim *la convention fait la loi des parties* subject, of course, to ascertaining on the evidence exactly what the *convention* was" (Tomes, Deputy Bailiff).

> *Normandie*, vol. I, at 74, this edition being published in 1684, where the authors say this: '*Car la volonté est le principal fondement de tous contrats, laquelle doit avoir deux conditions, la puissance & la liberté . . .*" before going on to consider the restrictions which the law imposes on the making of contracts which are contrary to good morals or otherwise unlawful, notwithstanding the *volonté* which existed in the contracting parties.
>
> It is because the concept of *volonté* is so important to the making of contractual arrangements that the grounds of nullity which exist for *erreur, dol, deception d'outre moitié* and *lésion* become so comprehensible. The principles which are encapsulated in these objections to the formation of a valid contract go to whether or not it can truly be said that there was a common will of the contracting parties to make the contract which comes under consideration. These grounds of nullity go directly to the reality of the consent of the parties to make the contract."[56]

29 Martin JA is not impressed by this argument and cites an extract from *Basden Hotels v Dormy Hotels Ltd* where Bois, Deputy Bailiff, states that the maxim [*la convention fait la loi des parties*] amounts to an obligation that—

> "courts of justice must have high regard to the sanctity of contracts and must enforce them unless there is good reason in law, which includes the grounds of public policy, for them to be set aside."

Martin JA concludes that the maxim is "neutral on the question whether the subjective or the objective approach is to be adopted." But, with respect, the judge in *Basden Hotels* was not concerned with subjectivity/objectivity. He was concerned only with whether the clause in dispute should be set aside as being contrary to public policy. He stated—

> "It appears to us that there is now no reason in law why the clause on which the plaintiff company relies should be set aside . . . The agreement cannot be said to be against public policy."[57]

The genesis of the maxim, and its meaning in the context of the formation of a contract, were not in issue, and were not discussed.

30 Martin JA argues that—

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[56] Paras 22 and 23, at 294.
[57] 1968 JJ 911, at 919.

> "[i]t does not seem to me obvious that the undoubted existence of the maxim [*la convention fait la loi des parties*] as part of the law of Jersey results in the subjective approach to contractual consent being part of that law also."

But the maxim incorporates in itself a subjective approach to the law of contract which is essentially civilian. A *convention* is a meeting of minds, a concurrence of *volontés*. The *Code Civil* expresses the same notion at art 1134. Why should "*convention*" mean something different in Jersey from what it means in the civil law generally, when Poingdestre has told us that we follow the civil law in matters of contract? Where is the evidence for this different meaning?

31 What is important, as stated by Sir William Bailhache, Bailiff, is the light which is shed on concepts such as error by the notion of *volonté*. In a previous article[58] this author suggested that undermining the true meaning of *consentement* (by applying an English objective approach to the question of its existence) would lead to confusion—

> "[I]f one aspect of the law of *erreur* (that is, whether or not the parties had a misunderstanding as to what was agreed between them) were to be governed by English law, how would that affect the rest of the law of *erreur*? Could one aspect be governed by English law and another (*e.g.* whether there was an *erreur sur la substance* be governed by Jersey/French law? That would be an impossibly confusing state of affairs."[59]

Martin JA demurs. He states—

> ". . . I find it difficult to see that there is a fundamental problem. An *erreur obstacle* is an *erreur* that prevents there being consent at all: for example, one party thinks the transaction is one of gift, the other that it is one of sale. In such a case the objective approach what an observer apprised of the facts would consider the transaction to be. That would mean that the subjective view of one of the parties would be defeated; but the outcome is not in principle wrong. Similar considerations apply to an *erreur sur la substance*, which—as the Royal Court in the present case recognised—will often equate to what English law would regard as a fundamental mistake. An objective approach is as capable of providing consistency of approach to such matters as a subjective approach."[60]

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[58] "Subjectivity in the Formation of a Contract" (2016) 20 *Jersey & Guernsey Law Review* 160.
[59] *Ibid*, at 166–167.
[60] At para 58.

32 It is of course true that, as an outcome, the objective approach is as capable of providing consistency as the subjective approach. The objective approach of the English common law is not *ipso facto* wrong. The question, however, is whether it can be reconciled with the meaning of *consentement* (consent) in civil law. Martin JA does not meet the argument about prospective confusion if an English approach is taken for one purpose, but not for another. The Jersey law of contract has been bedevilled, and confused, by judicial findings that the civil law has much in common with the English common law, followed by the application of English law as if it were the law of Jersey.[61] The argument quoted above shows how a preference for the objective approach to the formation of consent can expand into a similar approach to what constitutes an *erreur sur la substance*. If *erreur sur la substance*, which does indeed have similarities to the English law doctrine of fundamental mistake, is treated as its equivalent, and English authorities are applied to explain it, one will eventually create a clash with *erreur sur la substance* as explained by Pothier. It is submitted that the creeping encroachments of English law by juristic anglophiles lead to far more uncertainty than the maintenance of the subjective approach to the formation of consent. Provided that fundamental principles are not subverted, it is legitimate for judges to prefer one approach to the application of a principle to another. But where a fundamental principle is undermined, the stability of the whole is threatened. The Jersey law of contract should be coherent. Coherence cannot be achieved if the foundation stones of the civilian structure are wantonly pulled away and replaced on an *ad hoc* basis by common law bricks.

33 It is interesting that the arguments deployed in the excursus are different from the (authoritative) statements in the main body of the judgment in *Booth v Viscount.* After considering the relevant passages from Pothier,[62] the *Code Civil*[63] and Professor Fairgrieve's *Comparative Law in Practice: Contract Law in a Mid-Channel Jurisdiction*,[64] Martin JA states—

> "In considering how the principles I have identified—as set out in Pothier, the Civil Code and Fairgrieve—are to be applied in

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[61] See, *e.g.*, the law of misrepresentation, where in *Scarfe v Walton* 1964 JJ 387 the Royal Court, after quoting an inapt passage from Domat's *Loix Civiles*, purported to assimilate the English concept with the civil law doctrine on defects of consent.

[62] *Traité des Obligations*, Part I, ch I, para 18.

[63] Article 1110.

[64] Hart Publishing, Oxford and Portland, Oregon, 2016, at 99.

> practice, it seems to me that it is helpful to consider the matter in four stages. First, it is essential to start by identifying the *chose* to which the contract relates—in other words, the subject matter of the contract. It is only once that has been done that it is possible to consider the second stage, which is to see whether the claimed *erreur* relates to that subject matter. Thirdly, if the claimed mistake does relate to the subject matter of the contract, it is necessary to consider whether or not the mistake relates to something which in principle, in Pothier's words, 'affects the quality of the thing which the contracting parties had principally in prospect, and which formed the substance of that thing.' Mistakes as to the material from which an item is made, or its authenticity, origin or use are all in principle capable of amounting to *erreurs sur la substance*; mistakes as to the merits or desirability of something are not. Finally the court must determine whether or not a mistake which in principle was capable of amounting to an *erreur sur la substance* related to something that was essential to the mistaken party, such that he would not have contracted had he known the true position. In relation to this final stage, it is important to note two things: first it can only arise once the second stage has been determined in the mistaken party's favour (so that it is immaterial that it was essential to him that should only buy a 'good' book, since a mistake as to an incidental quality of that nature is incapable of amounting to an *erreur sur la substance*); secondly, that the court is not obliged to accept the mistaken party's statement about the importance to him, but should instead consider the plausibility of that statement in the light of all the circumstances."[65]

34 But for one thing, the author would respectfully contend that this is a model statement by an appellate judge. The relevant authorities are identified, and their application to contemporary problems faced in practice by the courts is clearly and succinctly laid down. It is noteworthy that nowhere in this passage do the words "subjective" or "objective" appear. The court has to establish the subject matter of the contract and whether the alleged error[66] affects the substantial quality of the subject matter in question. In assessing the evidence of the alleged mistaken party, the court should consider the plausibility of his statements as to the importance of the mistake to him. That leaves plenty of judicial space for a sensible and pragmatic approach to the dispute. Yet it is interesting to revisit *La Motte Garages Ltd v Morgan*

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[65] *Ibid*, at para 34.

[66] In the author's submission "*erreur*" is better translated as "error" so as to distinguish it from "mistake" under English law.

against the background of this judicial guidance. The subject matter of the contract was the sale of a car at a certain price. There was arithmetical confusion as to what the purchaser would actually have to pay. That was important to the purchaser. Depending of course upon the court's view of the plausibility of her evidence, Miss Morgan would have won her case.

35 The qualification lies in para 28 of the judgment where Martin JA accepts the extracts from Pothier and the Civil Code—

> "as a correct statement of the way in which the doctrine of *erreur* is applied in French law. I proceed on the assumption that the same principles apply in Jersey law."

Thus it remains open for a different judge of the Court of Appeal (or perhaps even the same judge) to take a different view on a different occasion in a different case. *Quel dommage*!

36 Finally, it remains to consider whether it lies within the proper remit of the Court of Appeal, assuming of course an acceptance that Jersey law up to 1969 adopted the civilian approach to the question of consent, to change the law. This is all customary law, and it is true both that custom can change and that the courts can give declaratory effect to such changes. Charles Le Gros, writing in 1943, states—

> "*Le droit coutumier a subi dans le cours de ce siècle des transformations progressives apparemment dictées par les conditions de la vie moderne. Jersey, inébranlable pendant plusieurs siècles dans son attachement aux principes tutélaires de l'ancien droit normand, qui a été le fondement et la pierre angulaire de notre coutume, a cru bon d'adopter aujourd'hui de nouveaux principes dictés, semble-t-il, par les nécessités sociales et économiques des temps modernes sans vouloir toutefois renoncer absolument aux directives de notre ancien droit coutumier*."[67]
>
> [During the course of this century customary law has undergone gradual changes seemingly mandated by the conditions of modern life. Jersey, unwavering during many centuries in its attachment to the tutelary principles of the ancient customary law, which has been the foundation and corner stone of our custom, has deemed it right to adopt new principles, dictated, it would appear, by the social and economic necessities of modern times

[67] Le Gros, *Traité du droit coutumier de l'Ile de Jersey* (Jersey, 1943, Les Chroniques de Jersey Ltd; reprinted by Jersey & Guernsey Law Review Ltd, 2007) *Préface.*

> without at the same time wishing to reject completely the directives of our ancient customary law.]

37 If Le Gros were alive today, he would surely be astounded at the post-war social and economic changes of the 75 years since he wrote his book. Be that as it may, custom is liable to change. Routier wrote in 1742 that—

> "*La coutume n'est autre chose qu'un DROIT non écrit, qui s'est introduit par un tacite consentement du SOUVERAIN & du PEUPLE, pour avoir été observée pendent un tems considérable*."
>
> [Custom is none other than unwritten law, introduced by the tacit consent of the Sovereign and the People, having been observed for a considerable period.][68]

It may be changed by judicial decision or by statute, as Lord Hope of Craighead explained in the Privy Council in *Snell v Beadle*—

> "As Stéphanie Nicolle QC has observed in *The Origin and Development of Jersey Law*, at para 12.4 (1998), customary law which, like the customary law of Jersey, has not been enshrined in an official *coutume* can and does change. It is therefore capable of development by judicial decision as well as by statute. In this respect, it may be regarded as being what may be described, in modern terminology, as 'the common law' of the Island. Like other customary law systems, Jersey law had recourse to the *ius commune* for areas not covered by municipal customary law: see Nicolle (*op. cit*. at para 14.7). The principle which is at issue in the present case [*déception d'outre moitié*] is an example of the reception of a principle of Roman law through the *ius commune* into Jersey law by way of the customary law of Normandy.
>
> For these reasons, their Lordships consider that, as the customary law of Jersey has not been enshrined in a *coutume*, the proper approach is to regard it as being still in a state of development. It is capable of being refined or clarified by judicial decision as the customary law is applied to a new set of facts. This may be done by reference to other customary law sources. In the present context, the search for guidance as to the content and the proper application of the principle must be conducted in the first instance by examining the works of writers on the customary laws of Normandy. It will be helpful also to examine the Roman law, as the origins of the customary law rule lie in the Roman

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[68] Routier, *Principes Généraux du Droit Civil et Coutumier de la Province de Normandie* (Rouen 1742) at 1.

> law. French law as it exists today in the French Codes or the current jurisprudence is unlikely to be of direct assistance here, for the reasons explained by Southwell (3 Jersey Law Review, at 214–215 (1999)).[69] Nor is it helpful in this context to have regard to the solutions which have been adopted in the modern codified systems that are to be found in other civilian jurisdictions."[70]

38 If Lord Hope's guidance is to be followed, any refinement or clarification of the customary law rule that consent is determined in Jersey by the subjective approach should be achieved by reference to customary law sources and the Roman law. Those authorities point inexorably, however, towards an approach that is different from the English common law. Furthermore, is there a "new set of facts"? It can hardly be argued that the subjective approach to establishing *consentement* is out of date when hundreds of millions of Europeans are governed by precisely that system. The argument that the general law of contract should be adapted to suit the needs of the financial services industry is not attractive for the reasons given above. It is submitted that it would be straining accepted limits for judicial development of the customary law for the courts to declare that whether the parties have reached a *consentement* (agreement) and formed a contract should in future be determined by an objective approach in accordance with the law of England.

39 The author contended in a previous article that, in any event, the judiciary should not usurp the functions of the legislature and that, if it were desired to introduce an objective test into the question whether there has been a meeting of minds between the parties, such a change was a matter for legislation.[71] Those contentions will not be repeated

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[69] It should be noted that Richard Southwell QC qualified his view as to the relevance of modern French law as expounded in the Court of Appeal in *Public Services Committee v Maynard* 1996 JLR 343 by stating extra-judicially, in the article cited by Lord Hope, that—

> "In each case it is for the courts to ascertain what is the law of Jersey , and to rely on the French Codes and jurisprudence in their modern form only to the extent that they are shown to be continuous with the customary law before codification as stated by, for example, Domat or Pothier . . ."

See Southwell, "A Note on Sources of Jersey Law" (1999) 3 *Jersey Law Review* 213, at 215.

[70] 2001 JLR 118, at paras 20–21.

[71] Bailhache, "Subjectivity in the Formation of a Contract—a Puzzling Postscript" (2016) 20 *Jersey & Guernsey Law Review* 160, at 169.

here. They did, however, find support in a recent judgment of the Royal Court where counsel had argued that the customary law should be developed so as to allow that a *Procureur du Bien Public* might reside in a parish other than the one which had elected him. Michael Birt, Deputy Bailiff, (as he then was), stated—

> "Even if it were theoretically open to this court to develop the customary law in the manner suggested by Advocate Clarke and the *Connétable*, we do not think that it would be right to do so. The issue before us is one upon which opinions may quite reasonably differ. Some may support the *Connétable* of St Peter and be of the view that speed of travel and the existence of modern communications means that there is no need for the retention of the residence requirement and matters can be left to the good sense of the electors at a Parish Assembly. Others, on the other hand, may take the view that it remains important that honorary officers of a Parish should have a real connection with and a stake in the Parish in which they will hold office and wield influence and the requirement for residence ensures that this is so. In our judgment, these are matters for resolution democratically through the legislature rather than by decision of this court. If there is to be a change in the customary law, it is a matter for the States."[72]

40 The author respectfully agrees.

Sir Philip Bailhache was Bailiff of Jersey between 1995 and 2009 and a Commissioner of the Royal Court and Ordinary Judge of the Jersey Court of Appeal between 2009 and 2011. He has been the editor of the Jersey and Guernsey Law Review *since its foundation in 1997.*

[72] *In re St Peter* 2008 JLR 163, at para 15.