SHORTER ARTICLE

ANOTHER PUZZLING CONTRACT JUDGMENT

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1 Long-time readers of this *Review* will have observed its commitment to promoting the development of the Jersey law of contract into something more accessible and coherent, with proper regard to the historical roots of our law. It has been a long process but progress has been made. A touchstone of that progress is the fact that last year saw the publication of Duncan Fairgrieve's book on Jersey contract law (*Comparative Law in Practice. Contract Law in a Mid-Channel Jurisdiction* (Oxford and Portland, Oregon 2017) (a review of which may be found in the June 2017 edition of the *Review*).[1]

2 Since the seminal case of *Selby v Romeril*,[2] the evolution of our contract law has had a decidedly French hue, recognising as it does our Norman roots and the Norman law reliance on the French common law (*ius commune*) for its law of obligations. The Royal Court's recent decision in *Calligo Ltd v Professional Business Systems CI Ltd*[3] will thus come as something of a disappointment in its determination that the identification of consent in a Jersey contract should be determined, following the English common law, by an assessment of "what a properly informed reasonable man would take to be the position (the '*objective test*')", as opposed to "looking for the subjective intention of the individual parties to the contract (the '*subjective test*')", as is the case in French law. It is a disappointment for three reasons.

3 First, the decision was reached without a proper consideration of the competing arguments. The court correctly noted the apparent disagreement at Court of Appeal level between differently constituted benches in *Marett v Marett*[4] (which very clearly stated that the Jersey law of contract determined consent by reference to the "subjective

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[1] (2017) 21 *Jersey & Guernsey Law Review* 267.
[2] 1996 JLR 210.
[3] [2017] JRC 159.
[4] 2008 JLR 384.

theory" of contract) and *Home Farm Developments Ltd v Le Sueur*[5] (where the court queried the conclusion in *Marett*, which it referred to as an assumption, and indicated that its preference was for the matter to be properly considered at some future date; whilst not expressing a preference, it noted that there were "potentially powerful arguments" against the subjective test). This difference of opinion promised a properly argued case to resolve it. *Calligo* has not delivered such a result. Rather, the court simply referred to the Jersey cases of *Leech v Leech*,[6] *Mobil Sales v Transoil (Jersey) Ltd*,[7] *La Motte Garages Ltd v Morgan*[8] and *Daisy Hill Real Estate Ltd v Rent Control Tribunal*,[9] all of which predate the significant renaissance in Jersey contract law hailed by *Selby v Romeril*, and two of which were stated in *Marett* to have been decided *per incuriam*. The Royal Court adopted the objective test of the English common law without argument or consideration of the alternative. From these, the Royal Court concluded that the objective test was—

> "more likely to provide legal certainty for commercial transactions. It is not necessary, if one approaches the matter objectively, to enquire into the actual state of mind of a party to the contract. The state of mind in so far as it relates to consent is to be established by reference to what the parties did and/or said or the surrounding circumstances which point to what they intended."

Otherwise, the court feared, contracts could be overturned by a private intention of one party which had been unknown to the other party.

4 This takes us on to our second point. Had the court been properly assisted with well researched arguments, it would have realised the fallacy of a conclusion that determination of subjective intention extends no further than what one contracting party claims was in his mind at the time of entering the contract. As Professor Fairgrieve shows, neither English nor French law adopts a strait-jacketed objective or subjective approach. Importantly, given the Royal Court's concerns, he also shows how French law, which assesses such matters in the context of a "predominantly written procedure", sets store on written contractual documentation as evidence of intention.[10] If a party

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[5] [2015] JCA 241; see Bailhache, "Subjectivity in the formation of a contract—a puzzling postscript" (2016) Jersey & Guernsey Law Review 160.
[6] 1969 JJ 1107.
[7] 1981 JJ 143.
[8] 1989 JLR 312.
[9] 1995 JLR 176.
[10] See Fairgrieve *op cit* at 36 *et seq.*

has signed a written contract, in a context where he can be taken to have understood its contents and effect, he will have a difficult time wriggling out of his obligations arising therefrom. Indeed and surprisingly, notwithstanding its finding that the objective test was the proper approach, the Royal Court in *Calligo* itself adopted a hybrid approach, both examining the documentation said to evidence an agreement and hearing oral testimony from the parties, including the managing director of the defendant who claimed he had not intended to be bound by his signature. The court evidently had no difficulty sifting through the evidence, written and oral, objectively stated in written form and subjectively stated from memory, to find that there was a binding agreement.

5 Finally, the Royal Court should surely have had some regard to the totality of Jersey's contract law and the effect its decision might have on past efforts to establish a coordinated framework. If it had done so, it might have realised the oddness of rejecting the subjective approach in a contract law which in recent times has served to emphasise the centrality of consent.

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