Court of Appeal - appeal against an order of the Royal Court - bankruptcy - loan

[2019]JCA122

COURT OF APPEAL

2 July 2019

Before : Sir William Bailhache, Bailiff
John Vandeleur Martin Q.C.
Robert Logan Martin Q.C.

Between	**Alan Paul Booth**	**Appellant**
And	**(1) Viscount of the Royal Court**	
	(2) Investec Bank (Channel Islands) Limited	**Respondents**

The Appellant appeared on his own behalf.

The Viscount appeared on her own behalf.

Advocate J. D. Garrood for the Second Respondent

JUDGMENT

MARTIN JA:

1. This is an appeal from an order of the Royal Court (the Deputy Bailiff and Jurats Olsen and Thomas) dated 12 September 2018 (Viscount v Booth and Investec Bank [2018] JRC 170). By that order the Court affirmed decisions made by the Viscount in the désastre of the appellant, Alan Paul Booth ("Mr Booth"). The Viscount, who is the first respondent to this appeal, had decided that she would not seek to set aside on the ground of *erreur* secured loans made to Mr Booth, and would not further investigate the causes of Mr Booth's bankruptcy. The principal secured loan was made by the second respondent, Investec Bank (Channel Islands) Limited ("Investec"). Mr Booth claims that the loans were vitiated by mistake as to the value of the property on which the loans were secured. He challenges the decisions of the Viscount and their affirmation by the Royal Court.

Procedure

2. The Royal Court's order was made on an application by the Viscount under Article 31(8) of the Bankruptcy (Désastre) (Jersey) Law 1990. Article 31 is concerned with the admission or rejection of proofs of debt. Paragraph (2) provides that "***before admitting or rejecting proof of a debt the Viscount shall examine the proof and any statement opposing the admission of the debt***". Following discussions between them, Mr Booth wrote to the Viscount on 3 January 2017 claiming that the Investec loan was void for *erreur*. That letter was treated as a statement opposing the admission of Investec's proof of debt. By letter dated 11 April 2017, the Viscount rejected Mr Booth's contentions. Paragraphs (5), (6), (7) and (8) of Article 31 set out what is to happen in such circumstances:

> ***"(5) If the Viscount rejects proof of a debt in whole or in part the Viscount shall serve notice of rejection in the manner prescribed by the court on the person who provided the proof.***
>
> ***(6) If the Viscount rejects a statement opposing admission of a debt in whole or in part the Viscount shall serve notice of rejection in the manner prescribed by the court on the person who provided that statement.***
>
> ***(7) If a person upon whom notice has been served in accordance with paragraph (5) or paragraph (6) is dissatisfied with the decision of the Viscount and wants the decision reviewed by the court he or she must, within the time prescribed by the court, request the Viscount to apply to the court for a date to be fixed for the court to review the decision.***
>
> ***(8) The Viscount shall comply with a request made in accordance with paragraph (7)".***

Mr Booth did not make a request under paragraph (7); instead, on 10 November 2017, he issued his own representation. The court subsequently directed that the matter be dealt with in accordance with the Article 31 procedure, and on 24 January 2018 the Viscount issued an application under Article 31(8). Mr Booth's representation was then discontinued.

3. Article 31(7) contemplates a review by the court of the Viscount's decision. The nature of that review has been considered previously by this Court in Shirley v Deputy Viscount 1999 JLR 256. At page 268, Southwell JA said this:

"There is nothing in art. 31(4) or in the relevant rules which limits the review by the court of the Viscount's decision to a judicial review on Wednesbury principles. The right given by Art. 31 (4) is a right to appeal to the Royal Court, and in such an appeal the court will be able to reconsider fully the merits of the Viscount's decision, and itself decide whether or not a particular proof of claim should be admitted".

4. This statement was quoted by the Royal Court in Re Amy en Désastre [2013] JRC 193. The Court then said this (at [21]):

"We think we are bound by the Court of Appeal's decision in Shirley v Deputy Viscount and we apply it. Accordingly, although the statute describes the application to the Court as being for a review of the Viscount's decision, it is in effect an appeal at large. Even if we had not regarded ourselves as bound by the decision of the Court of Appeal, we would have reached the same conclusion. The Viscount is the executive officer of the Court, and in administering the désastre, is doing so in that capacity. It is clear to us that when questions arising out of the Viscount's administration are referred to the Court, the Court has a free discretion to exercise unless there should be express statutory provision to the contrary".

5. Later in the same decision (at [29(ii)]) the Court said this:

"The nature of the process under the review is that the burden of proof lies on the party who requires the matter to come to court for a review. In the case of a creditor whose claim has been denied, a creditor must establish his claim. In the case of a creditor who objects to another creditor's claim, the objector must establish the objection".

6. In the present case, the Royal Court considered these decisions and concluded that the burden of proof lay upon Mr Booth, as it was he who had sought to have the Viscount's determination reviewed by the Court. In my view, no criticism can be made of that approach.

Facts

7. The circumstances giving rise to Mr Booth's objections are as follows.

8. In 2011, Mr Booth and his late wife were the owners of a property known as King's Oak in St Peter. Mr and Mrs Booth entered into negotiations with Investec with a view to replacing the existing indebtedness of £2.62 million secured on the property with an increased loan at a lower interest rate. These negotiations were successful; and by a facility letter dated 25 July 2011, accepted by Mr and Mrs Booth on 28 July 2011, Investec agreed to make available to Mr and Mrs Booth an on demand loan facility of £2,950,000 for the purpose of refinancing existing indebtedness and to assist with the building of a garage. The facility was, however, subject to conditions precedent, one of which was that there should be *"a valuation for mortgage purposes by the Bank's approved valuers, who are to confirm a minimum market value of the Property of £4,400,000"*. The costs of the valuation were to be borne by Mr and Mrs Booth.

9. The figure of £4 .4 million appears to have come from a valuation of King's Oak in that amount obtained by Mr Booth in May 2011 from Reynolds Chartered Surveyors.

10. On 25 August 2011 CBRE, Investec's approved valuers, produced a report valuing King's Oak at £4 million. That caused Investec to reduce the amount of the loan made to Mr and Mrs Booth to £2.8 million.

11. On 2 September 2011 Mr and Mrs Booth entered into an acknowledgement and bond in relation to the Investec loan, and on the same day Investec took a first ranking judicial hypothec over King's Oak.

12. An existing charge in favour of a Mr and Mrs Le Cornu was postponed to the Investec loan, so that Mr and Mrs Le Cornu had a second ranking judicial hypothec over King's Oak. They also had a first ranking judicial hypothec over another property owned by Mr and Mrs Booth, known as Beaumont Hill House. Mr and Mrs Le Cornu have played no part in these proceedings, although Mr Booth contends that their security also is invalid.

13. Mr Booth failed to keep up the interest payments on the Investec loan, and on 16 October 2015 the Royal Court declared him en désastre.

14. In March 2016 Wills Associates valued Kings's Oak at £2 .4 million, and gave a retrospective valuation as at August 2011 of £2 .3 million.

15. King's Oak was sold on 15 December 2017 for £1,807,500.

Royal Court judgment

16. The Royal Court summarised Mr Booth's argument on mistake as follows:

> ***"In essence, as we understand it, [Mr Booth's] claim in erreur is simply that both he and [Investec] were mistaken as to the value of King's Oak and he would never have borrowed the money from [Investec] had he been aware of the true value. He, and so he would argue, [Investec], were in erreur and the contract should be set aside as void ab initio".***

17. The Court then considered the law on *erreur*. It cited from this Court's decision in Marett v Marett and O'Brien [2008] JLR 384, from Pothier's Traité des Obligations and from the French Civil Code. It identified Mr Booth's contention as being that there had been an *erreur sur la substance*, and translated that phrase as encompassing fundamental mistake, which in the Court's judgment was a fundamental mistake as to the nature of the thing contracted for or its essential qualities. It considered that it was unnecessary to decide whether the contractual position between Mr Booth and Investec was to be analysed on a subjective or an objective basis, since both approaches produced the same answer. It expressed its conclusion on the *erreur* argument as follows:

> ***"[W]e are satisfied that the substance of the transaction between [Mr Booth and Investec] was that of lending and borrowing and there was no erreur about any aspect of that. There was no fundamental mistake about the core nature of the contract or the quality of the thing contracted for whether one is considering the facility or the granting of the judicial hypothec".***

18. In relation to the Mr Booth's second complaint, that the Viscount had failed properly to investigate the causes of the désastre, the Court considered the steps taken by the Viscount and the financial position in the désastre, and concluded as follows:

> ***"In our view, no further investigation will be for the benefit of the creditors in the désastre nor indeed for the financial benefit of [Mr Booth]. In our judgment the Viscount does not need to carry out any further investigations".***

Mr Booth's contentions

19. Mr Booth represented himself on the appeal, as he had done below. He stated that he had relied on the £4 million CBRE valuation when entering into the Investec loan, and but for the valuation

would not have entered into the loan. The *erreur* consisted of entering into the contract on the basis of the valuation, and since a mistake had been made the contract should be avoided. If the valuation was wrong, the loan was wrong. He accepted that he had in fact borrowed from Investec, and owed them the amount of the loan and interest; but if the security was set aside he would get peace of mind and his unsecured creditors, who had trusted him, would get something back. Investec had compromised a claim against CBRE, and so had recovered something on account of the erroneous valuation; but neither he nor his creditors had benefited from that recovery, even though Mr Booth had paid for the valuation. However, the mere fact that CBRE had settled Investec's claim showed that there was a problem with the valuation. That problem affected Mr Booth too: both he and Investec had relied on the valuation, and that amounted to a sufficient *erreur*. Otherwise, where was the equality? The valuation had gone to the core of the contract: it was the whole basis of the loan. Had the true value of King's Oak been known, Mr Booth could, so he said, have refinanced elsewhere and secured the borrowing on other properties. . The Viscount should have challenged the security, although not the loan itself, on the same basis as Mr Booth now did. Moreover, the Viscount had acted hastily in selling Mr Booth's properties, and had done so at artificially low prices. The Viscount was under a duty to investigate the circumstances giving rise to the désastre: see Jersey Insolvency and Asset Tracking (fourth edition) and Jobas Ltd v Anglo Coins Ltd 1987-88 JLR 359. Her failure to do so, and her conduct of the sales, were incompatible with Mr Booth's Convention rights and thus unlawful under the Human Rights (Jersey) Law. The Royal Court had been wrong to reject these arguments; and some of its reasoning had been in French, which Mr Booth did not understand.

Discussion

20. As the Royal Court rightly thought, the starting point is this Court's decision in Marett. That case concerned a consent order made in divorce proceedings. One party to the order contended that it should be set aside on the ground that there was no enforceable compromise underlying the consent order because of a *vice du consentement*. The Royal Court refused to set aside the consent order, and the Court of Appeal refused leave to appeal. The Court of Appeal approached the matter on the basis that a consent order could be set aside where there was at the date of the order an erroneous basis of fact, such as misrepresentations or misunderstandings as to the position or in relation to assets. One ground of appeal contended for was that there was no agreement (through the consent order) between the parties or, if there was an agreement, it was not enforceable or was null. In dealing with that ground, the Court considered the elements necessary to constitute a contract under Jersey law. It prefaced its discussion of those elements by saying this [at 55]:

"This is not the time for a detailed analysis of the Jersey law of contract – for some of the difficulties in relation to this topic see Kelleher, The Sources

of Jersey Contract Law, 3 Jersey Law Review, at 1 – 21 (1999). The general principles can be taken from the helpful summary in Advocate Sinel's contentions on this issue (to which there was no objection by Advocate O'Connell)."

The Court continued as follows:

"56. There are four elements necessary to constitute a contract under Jersey law: (i) capacity; (ii) consent; (iii) cause; and (iv) objet.

57. Ignoring capacity, which is not in issue, the Jersey law of contract determines consent by use of the subjective theory of contract (see Pothier, Treatise on the Law of Obligations or Contracts, transl. Evans, para. 4, at 4; para. 91, at 53; para. 98, at 59 and Appendix V, at 35 (1806) and Selby v. Romeril (34). And see Mobil Sales & Supply Corp. v. Transoil (Jersey) Ltd. (24) and La Motte Garages Ltd. v. Morgan (14) (which must now be considered per incuriam on this specific point in the light of Selby v. Romeril)). 58. It follows that, "for a contractual theory based on the subjective intention of the parties, a mistake is the principle (sic) obstacle to a valid contract" (Sefton-Green, Mistake, Fraud & Duties to Inform in European Contract Law, at 72 (2005)).

59. Consent is prevented, amongst other things, by erreur/error (Pothier, Traité des Obligations, paras. 17–20, at 13–16 (1827 ed.); Domat, 1 The Civil Law in its Natural Order, book 1, title, 1, at 53–54 (Strahan transl., 1722); French Civil Code, arts. 1109–1110). In turn, erreur may be of two kinds: erreur obstacle (erreurs that prevent the meeting of minds necessary to constitute a contract's creation and cause a contract to be a nullity absolue) and erreur vice du consentement (a defect of consent where there is consent/meeting of minds but consent is impeachable for some other reason and which causes a contract to be a nullity relative: as to which see French Civil Code, arts. 1109 and 1118). Steelux Hldgs. Ltd. v. Edmonstone (née Hall) (36) is recent Jersey authority for the proposition that a vice du consentement (and, a fortiori, erreur obstacle) will render a contract void ab initio, that is to say, it never existed. Erreur vice du consentement is said to be relevant in this case.

60. As to erreurs obstacle, such erreurs may themselves be of three kinds: erreur sur la nature du contrat (mistake as to the nature of the agreement, e.g. gift v. for value); erreur sur l'objet (mistake as to the subject of the agreement); and erreur sur l'existence de la cause (mistake as to the basis or purpose of the agreement). Each of these erreurs obstacle will prevent the meeting of minds that is fundamental and necessary to the existence of

consent and the creation of a contract under Jersey law. Returning to erreurs vice du consentement, these erreurs are of two kinds: erreur sur la personne and erreur sur la substance.

…

64. But if, in Jersey law terms, mutual mistake may be unnecessary to invalidate a consent order (at least in relation to any underlying contract) and the question is whether or not there was a vice du consentement, then, in my opinion, there was no such defect, no such vice in this case. There was no mistake as to the subject matter of the agreement or as to its principal terms. There may have been a misunderstanding by [one of the parties] as to the consequences or ramifications of the agreement but that, in my view, is not enough. In my view, the order by consent in this case satisfied the requirements of the Jersey law of contract."

21. I am content to assume for the purposes of disposing of this appeal that that statement of the approach to and the elements of the Jersey law of contract is correct. On that basis, it is clear that Mr Booth cannot contend that the Investec loan is affected by *erreur obstacle*. Such *erreurs* prevent there being an agreement at all. Here, both parties understood and intended that the transaction between them would be one of loan secured on King's Oak. There was no mistake about the nature of the transaction, or about its subject, or about its basis or purpose. In those respects, the parties were as one; and the subjective meeting of minds stated in Marett to be fundamental and necessary to the creation of a Jersey contract was present.

22. *Erreurs vice de consentement* do not prevent an agreement from coming into existence, but vitiate the consent of one or both parties. Consent is given, but is given on a false basis. As stated in Marett, such *erreurs* are of two types: *erreur sur la personne* and *erreur sur la substance*. The first applies only where the identity of a contracting party is the main cause of the contract – for example, a contract for the painting of a portrait, where the identity of the artist will ordinarily be fundamental. That does not apply in the present case: Mr Booth does not, and cannot, say that he made a mistake about the identity or attributes of Investec.

23. Accordingly, as the Royal Court recognised, Mr Booth's case depends upon his ability to establish that there was an *erreur sur la substance*.

24. The principal material cited by the Royal Court as to the elements of an *erreur sur la substance* was the following passages from Pothier's Traité des Obligations, Partie I, Chapitre I, paragraph 18:

"L'erreur annulle la convention, non seulement lorsqu'elle tombe sur la chose même, mais lorsqu'elle tombe sur la qualité de la chose que les contractants ont eu principalement en vue, et qui fait la substance de cette chose. C'est pourquoi si, voulant acheter une paire de chandeliers d'argent, j'achéte de vous une paire de chandeliers que vous me présentez à vendre, que je prends pour des chandeliers d'argent, quoiqu'ils ne soient que de cuivre argenté; quand même vous n'auriez eu aucun dessein de me tromper, étant dans la même erreur que moi, la convention sera nulle, par ce que l'erreur dans laquelle j'ai été détruit mon consentement; car la chose que j'ai voulu acheter est une paire de chandeliers d'argent; ceux que vous m'avez présentés à vendre étant des chandeliers de cuivre, on ne peut pas dire que ce soit la chose que j'ai voulu acheter…. Il en est autrement lorsque l'erreur ne tombe que sue quelque qualité accidentelle de la chose. Par exemple, j'achète chez un libraire un certain livre, dans la fausse persuasion qu'il est excellent, quoiqu'il soit au-dessous du mediocre: cette erreur ne détruit pas mon consentement, ni par consequent le contrat de vente; la chose que j'ai voulu acheter, et que j'ai eue en vue, est véritablement le livre que le libraire m'a vendu, et non aucune autre chose; l'erreur dans laquelle j'étois sue la bonté de ce livre ne tomboit que sue le motif que me portoit à l'acheter, et elle m'empêche pas que ce soit véritablement le livre que j'ai voulu acheter: or nous verrons dans peu que l'erreur dans le motif ne détruit pas la convention; il suffit que les parties n'aient pas erré sue la chose qui en fait l'objet, et in eam rem consenterint."

25. These passages may be translated as follows (*chose* being translated throughout as "thing", but that expression often in the context referring to the subject-matter of the contract) :

"Mistake nullifies a contract, not only when it affects the thing itself, but also when it affects the quality of the thing which the contracting parties had principally in prospect, and which formed the substance of that thing. It is for that reason that if, wishing to buy a pair of silver candlesticks, I buy from you a pair of candlesticks which you offer to me for sale, which I take to be silver candlesticks but which are in fact only silver plate; even though you had no intention of deceiving me, being under the same mistake as me, the contract will be void, because the mistake which I was under destroys my consent; for the thing which I wished to buy was a pair of silver candlesticks; but what you offered to me for sale being silver plate candlesticks, it cannot be said that they were what I wished to buy…. It is otherwise if the mistake only affects some incidental quality of the thing. For example, I buy from a bookshop a certain book, under the false impression that it is excellent, when in fact it is worse than mediocre: the mistake does not destroy my consent, nor as a result the contract of sale; the thing that I wished to buy, and that I had in

prospect, is in fact the book the bookshop sold me, and not something else; the mistake I was under about the quality of the book affects only my reason for buying it, and does not prevent the book from being in fact the one I wished to buy; but, as we shall shortly see, mistake in relation to motive does not destroy the contract; it is enough that the parties were not mistaken about the thing which was the object of the contract, and were in agreement about that."

26. The Royal Court also cited Article 1110 of the French Civil Code, and certain of the notes to it in the Dalloz Code Civil 1986-87. In doing so, it relied on Selby v Romeril [1996] JLR 210, where the court thought it helpful to consider the French Civil Code as an indication of the development of the law since Pothier's time, Pothier being one of the authors upon whom the draftsmen of the Civil Code relied.

27. In Public Services Committee v Maynard [1996] JLR 343 at 350-1, this court stated that ***"no great weight can be placed on French law as it exists today in ascertaining what is Jersey law, except perhaps on a comparative basis and showing how the same problems have been treated in another legal system"***. Following criticism of that statement by Stéphanie Nicolle in Origin and Development of Jersey Law, Richard Southwell QC (who had delivered the Court's judgment in Maynard) wrote a Note on Sources of Jersey Law [1999] 3 JL Rev 213, in which he said that "***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, or by way of comparative analysis".*** I accept that as a correct statement of the approach to be adopted. It is worth noting, however, that the Civil Code has recently been revised, and the new Code in some respects represents a departure from the previous law. A Jersey court seeking help from the new Civil Code will need to be cautious to ensure that the relevant provisions remain "***continuous with the customary law before codification***".

28. The statements from Pothier, the Civil Code and the notes from Dalloz cited by the Royal Court in the present case seem to me consistent with each other, and I accept them 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.

29. Article 1110 itself is in the following terms:

"L'erreur n'est une cause de nullité de la convention que lorsqu'elle tombe sur la substance même de la chose qui en est l'objet. Elle n'est point

une cause de nullité, lorsqu'elle ne tombe que sur la personne avec laquelle on a intention de contracter, à moins que la consideration de cette personne ne soit la cause principale de la convention."

In the translation adopted by the Royal Court, that is:

"Erreur is a ground for annulment of an agreement only where it rests on the very substance of the thing which is the object thereof. It is not a ground for annulment where it only rests on the person with whom one has the intention of contracting, unless regard to/for that person was the main cause of the agreement."

30. The notes quoted by the Royal Court were as follows:

"1. L'erreur de l'une des parties sur la valeur d'une chose ne peut entraîner la nullité du contrat, sauf le cas où la lesion est admise comme une cause de rescision…"

"2. L'erreur sur la substance s'entend non seulement de celle qui porte sur la matière même dont la chose est composée, mais aussi, et plus généralement, de celle qui a trait aux qualités substantielles (authenticité, origine, utilisation, etc.) en consideration desquelles les parties ont contracté…."

…

"8. L'erreur de droit ou de fait, qui porte, non pas sur la cause de l'obligation, mais seulement sur les motifs qui ont determine le consentement, ne vicie pas, en principle, le consentement, et est, dès lors, sans influence sur la validité de la convention…."

These may be translated as follows:

1. A mistake by one of the parties as to the value of a thing cannot cause the contract to be void, except in the case where lésion [excessive inequality of economic benefit] is treated as a reason for rescission;

2. A mistake as to substance means not only that which affects the very material of which the thing is composed, but also, and more generally, that which has to do with the substantial qualities (authenticity, origin, use etc) in consideration of which the parties have contracted;

8. A mistake of law or fact which does not affect the cause of the obligation, but only the reasons which have brought about consent, does not in principle vitiate the consent and is consequently without effect on the validity of the contract.

31. In his recent book, Comparative Law in Practice: Contract Law in a Mid-Channel Jurisdiction (2016), Professor Duncan Fairgrieve summarises the current French law relating to erreur sur la substance as follows (at page 99):

"A mistake is traditionally defined as an incorrect appreciation of the reality, so that a party's mistake must relate as to a substantial quality, whether that be a mistake of law or alternatively a mistake as to the characteristics of the item in question. According to the traditional case law, the claimant party must, however, show that the element in question (and in respect of which the mistake was made) was the determining factor in the conclusion of the contract – in other words if he or she had known the reality (and had not been mistaken), no contract would have been undertaken.

In respect of a mistake as to the substantial quality, the term "substance" can be understood as relating to the physical properties of the article bought or obtained. This notion, however, also extends further, known in French through the expression qualités substantielles de la chose which means the essential qualities of the thing such as the authenticity of a work of art, its age.

This approach regarding mistake as to the substantial quality typifies the subjective approach of the French courts as the judge will analyse whether it was essential to the aggrieved party in question (and determinative of their consent to contract)" (original emphasis).

32. On the following page, Professor Fairgrieve refers to constraints on the operation of the doctrine of *erreur* in French law. These include the fact that it is for the court to assess whether a party's mistake was essential; that a claim of *erreur* will not be admitted if the parties have accepted a risk as to substantial quality, for example where they recognise that the authenticity of a work of art is uncertain; that both parties must be aware of the factual circumstances giving rise to the

essential quality of the mistake, for example where a purchaser of land intends to the knowledge of the seller to sell it off in parcels, so that an accurate understanding of the hectarage is essential; and that the mistake in question must be excusable, so that a property cannot claim that his consent is vitiated if he should have known better.

33. Although it is easy enough to see that there is a difference between a mistake as to the physical properties of something (silver as against silver plate) and a mistake as to the desirability of a purchase ("good" book as against "bad" book), identifying the precise nature of the difference and applying it in practice are much less easy. A person buying a pair of candlesticks or a work of art may simply like the object and be largely indifferent to the material of which the candlesticks are made or the identity of the artist of the work of art. To a person who only collects silver or the works of a particular artist, however, the material of which the candlesticks are made or the authenticity of the work of art will be critical.

34. In considering how the principles I have identified – as set out in Pothier, the Civil Code and Fairgrieve - are to be applied in 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 he 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.

35. In the present case, the subject matter of the contract (stage one) consisted of two components: a loan, and security for that loan in the form of a judicial hypothec over King's Oak. Neither of these components was the subject of valuation; what was valued was King's Oak, but that was not the subject matter of the contract. There was no mistake by either party as to the value of either of

the elements of their contract (stage two). The amount of the loan was accurately known to both parties, and both knew that that was the amount secured on King's Oak. The substance of the contract was unaffected by the erroneous valuation.

36. That being so, stages three and four do not arise. However, it is worth noting that caution is necessary when dealing with questions of value. It is not always correct to say that a mistake as to value cannot amount to an essential error as to substance. In some instances, the parties may understand that the value is an essential element of the contract. It is not unknown for contracts to contain warranties of value. In circumstances where value is an essential element, a mistake as to the value may be capable of vitiating consent.

37. As to stage four, the stipulation as to the value of King's Oak was for the benefit of Investec, not Mr Booth: it was designed to give Investec comfort that its security would cover the amount of the loan. The value of the security was not essential to Mr Booth, and so was not determinative of his consent to contract. His concern was to obtain the loan, not to know what was the value of King's Oak.

38. As I have said, the Royal Court's conclusion was that "***there was no fundamental mistake about the core nature of the contract or the quality of the thing contracted for whether one is considering the facility or the granting of the judicial hypothec***". I agree with that conclusion and with the Royal Court's decision.

39. The claim against Mr and Mrs Le Cornu raised the possibility that their charges would be avoided because of a unilateral mistake made by Mr and Mrs Booth, there being no evidence that Mr and Mrs Le Cornu knew of the valuation of King's Oak. However, for the reasons I have given, Mr Booth's mistake about the value of King's Oak is not sufficient to result in the avoidance of the transaction. His suggestion that the second charge taken by Mr and Mrs Le Cornu over King's Oak (and indeed the first charge they had over another property belonging to him and his late wife) were vitiated by his mistake must fail for the same reasons.

40. Mr Booth's second ground of appeal, that the Viscount had failed adequately to investigate the causes of his bankruptcy, was barely developed in his oral submissions before us. From his skeleton argument produced for the appeal, it appears that his main complaint (apart from setting aside the Investec security on the ground of *erreur*) relates to the Viscount's handling of the sale of King's Oak and her undue reliance on the Wills' valuation in setting the sale price of that property. There is nothing in this complaint: the Viscount obtained directions from the Royal Court as to the sale, and Mr Booth cannot now seek to go behind the Court's decision as to how the sale should be conducted. The Viscount did consider if she should seek to set aside the

Investec security, and obtained legal advice on that matter; but in the light of the advice – and rightly, having regard to the outcome of this appeal – she decided that she should not attempt to do so. In all other respects, she properly conducted investigations into the financial state of Mr Booth's désastre. She was not obliged to investigate why it was that Mr Booth had come to overextend himself to such a degree that he was unable to avoid bankruptcy, since to do so would produce no benefits to his creditors. There is no question of any breach of Mr Booth's Convention rights.

41. For the sake of completeness, I refer to Mr Booth's complaint that Investec had apparently been able to obtain compensation from CBRE, whereas he had no claim in respect of what he said was a negligent valuation that he had paid for. The obvious difference, however, is that Investec could justifiably claim to have suffered loss as a result of the valuation, since it had lent more than it would have done had the true value been known and was left without adequate security; but Mr Booth suffered no loss at all.

Disposition

42. For these reasons, I would dismiss the appeal.

Excursus

43. As I said in paragraph [21] above, I have assumed for the purpose of disposing of the appeal that the subjective approach to contractual consent is the approach to be adopted in Jersey law. Whether or not that is the correct approach has, however, been highly controversial in Jersey in recent years. It is in the area of *erreur* that the difference between an objective approach and a subjective approach may be particularly important. That is because the subjective approach focuses upon the primacy of individual consent. This has the consequence that under the subjective approach a unilateral mistake is capable of vitiating consent, and therefore nullifying the contract; whereas, under the objective approach adopted by English law, a contract may be avoided in some circumstances on the ground of mutual mistake but scarcely ever on the ground of mistake by one party alone.

44. There are other areas of contract law where a subjective or an objective approach may make a difference. Once such is in relation to the existence in a contract of a *cause* (the third requirement identified in paragraph [56] of Marett). As described in Marett, the *cause* is the basis of or the reason for the contract, and is constituted by the interdependence of promises or the mutual performance of obligations. In France, there has been a divergence of views on the question whether the *cause* is to be established from a subjective or an objective standpoint: see

Fairgrieve, op cit, p 75; and the new Civil Code has abandoned *cause* altogether as a formal requirement for the creation of a valid contract (Article 1128 of the new Code requiring only consent, capacity, and a "licit and certain content"). Although the notion of *cause* is embedded in Jersey law, there appears to be no case in which the approach to be taken to its establishment has been decided. Given the uncertainty existing in France, it seems to me sensible to wait until the question arises for direct decision before suggesting whether the subjective or the objective approach is to be preferred. However, the remarks which follow, which are mainly focused on the approach to be taken to the determination of the existence of consent, may be taken so far as material to apply also to the determination of *cause*.

45. It is important at the outset to identify what the subjective/objective debate is and is not about. A contract is an agreement between the parties to it as to the performance and acceptance of obligations. It requires a meeting of minds, a consensus *ad idem*. This is true whether the principles of Jersey law that determine the existence of the contract are derived from French or English law. The debate is about the way in which the existence or absence of the necessary agreement is to be determined. One possibility is to inquire into the actual states of minds of the parties and see if subjectively they were in agreement. The other is to look to the circumstances and consider if, viewed objectively, they indicate that agreement has been reached.

46. What the debate is not – or should not be – about is the question 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. French-derived concepts such as *erreur* and *dol* differ from English concepts of mistake and fraud not just in name but in some respects in substance. Those who espouse the objective view do not – or, again, should not – seek to sweep away existing Jersey concepts and superimpose English contract law. They do, and should, however, point out some of the problems with the subjective approach that is adopted in French law and is said to be part also of Jersey law.

47. The principal criticism of the subjective approach is that it leads to uncertainty, since apparently enforceable contracts may turn out to be void in consequence of some defect in the consent of one of the parties. This is capable of occurring long after the apparent conclusion of the contract, and of affecting the rights of innocent third parties who have no means of knowing what was in the minds of the original parties. By contrast, the objective approach is more conducive to certainty, since it looks to the appearance created by independently ascertainable facts. Certainty has always been regarded in English law as of prime importance: almost 250 years ago Lord Mansfield CJ said in Vallejo v Wheeler (1774) 1 Cowp 143 , 153:

"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."

48. The desirability of certainty in the context of a modern contract law has been recognised also in recent cases in Jersey. In Hong Kong Foods v Gibbons [2017] JRC 050 at [141], for example, Birt, Commissioner said (in the context of the consequences of innocent misrepresentation) that ***"the Court should, so far as consistent with the legal principle and precedent, develop the Jersey law of contract so as to be suitable for the requirements of commercial life in the 21st century and to be as easily ascertainable and understandable as possible".***

49. Again, in Calligo Limited v Professional Business Systems CI Ltd [2017] JRC 159 Le Cocq, Deputy Bailiff, said (at paragraphs [25] – [27]):

"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 finance centre.... It seems to us that such an approach [i.e. an objective approach] is more likely to provide legal certainty for commercial transactions than would the subjective approach.... In short it seems to us that a subjective approach will lead to greater uncertainty than will the approach that has traditionally been adopted by the Courts of Jersey, namely the objective approach".

50. The principal authorities supporting the proposition that the subjective theory of contract applies in Jersey law are Selby v Romeril and Marett v O'Brien.

51. Selby v Romeril was a decision of the Royal Court presided over by Sir Philip Bailhache, Bailiff. The primary issue was whether there was a supplementary or collateral agreement between the parties that the defendant would pay the costs of certain work. At page 218, the Court said this:

"What, then, is the law applicable to the first question of whether there was a supplementary or collateral contract as to the payment of the costs of repairs and renovations? Mr Kelleher, for the defendant, submitted that there was no contract. He referred us to Pothier, Traité des Obligations, Part 1, Chapter 1, at 3 (1781 ed.): "Il est de l'essence des obligations; 1°. qu'il y ait une cause d'où naisse l'obligation; 2°. des personnes entre lesquelles elle se contracte; 3°. quelque chose qui en soit l'objet." It is true that Pothier has often

been treated by this court as thesurest guide to the Jersey law of contract. It is also true, however, that Pothier was writing two centuries ago and that our law cannot be regarded as set in the aspic of the 18th century. Pothier was one of those authors upon whom the draftsmen of the French Civil Code relied and it is therefore helpful to look at the relevant article of that Code. Article 1108 of the Code provides:

> ***"Quatre conditions sont essentielles pour la validité d'une***
>
> ***convention:***
>
> ***Le consentement de la partie qui s'oblige;***
>
> ***Sa capacité de contracter;***
>
> ***Un objet certain qui forme la matière de l'engagement;***
>
> ***Une cause licite dans l'obligation."***

In our judgment, it may now be asserted that by the law of Jersey, there are four requirements for the creation of a valid contract, namely (a) consent; (b) capacity; (c) an "objet"; and (d) a "cause.""

The first point to note is that neither the passage I have quoted nor any other passage in the case in terms states that a subjective approach is to be taken to determining the existence of consent. However, the adoption of French principles relating to the formation of contracts necessarily brings with it the subjective French approach to consent. That approach is implicit in the example of the candlesticks given by Pothier (paragraphs [24-5] above): it is clear that the unilateral mistake of the purchaser vitiates the contract whether or not known to or shared by the seller. It is implicit also in the first of the requirements - "***the consent of the party who binds himself***" - stated in Article 1108 of the Civil Code; and in other works of Pothier, for example the introduction to his Treatise on the Contract of Sale 17:

> ***"The consent of the parties, which is of the essence of the contract of sale, consists in a concurrence of the will of the seller, to sell a particular thing to the buyer, for a particular price, and of the buyer, to buy from him the same thing for the same price".***

The second point of note, however, is that there was already a body of first instance law in Jersey which suggested that an objective approach was consistent with the customary law and was to be preferred; and it is a pity that no attempt was then made to address that body of law. Thirdly, the outcome of the case would have been the same whether the subjective or the objective approach had been adopted, since the court concluded that there was neither an *objet* nor a *cause*, so that a decision on the correct approach was not fundamental to the outcome of the case. A fourth point capable of being made is that the quoted passage represents the direct adoption into Jersey law of the four essential requirements stated in Article 1108 of the Civil Code. It does so by regarding that article as a modern statement of principles discernible in Pothier; but, beyond stating that Pothier had often been treated as the surest guide to the Jersey law of contract, it does not offer an analysis either of the extent to which those principles were already part of Jersey law or an assessment of the desirability of incorporating elements of modern French contract law into Jersey law. As I have said, however, that is not germane to the subjective/objective debate, and it is no part of my present purpose to cast doubt on the statement of the elements necessary to the formation of a Jersey contract.

52. Marett v O'Brien at first sight confirms that the four elements of a contract under Jersey law are those set out in Selby v Romeril, and makes explicit that the approach is a subjective one: see the passages cited at paragraph [20] above. However, it is evident from paragraph [55] of the Court of Appeal's judgment in that case that it was not in fact deciding those matters. Leaving aside the statement that the court was not intending a detailed analysis of the Jersey law of contract (which is not inconsistent with the Court affirming as part of its decision the existence of certain principles), the Court made clear that it was proceeding on the basis of uncontested argument as to the applicable principles. Moreover, the Court's decision would have been the same whether a subjective or an objective approach had been adopted: as paragraph [64] of the judgment makes clear, there simply was no sufficient mistake. In my view, the case cannot be regarded as definitive authority that the subjective approach is to be taken to contractual issues in Jersey law.

53. A similar view was expressed by this Court (Crow, Logan Martin and Birt JJA) in Home Farm Developments Limited v Le Sueur [2015] JCA 242, which concerned an appeal against the summary disposal of the proceedings. One of the issues considered concerned *erreur*. At paragraphs 43 to 48 the Court said this:

> ***"43. Advocate Taylor accepted for the purposes of this appeal that, as stated in Marett v Marett [2008] JLR384 at 407, the Jersey law of contract determines the question of consent (being one of the essential requirements for a valid contract) by applying a subjective test. In other words, the court has regard to the subjective intention of the parties when deciding whether they have in fact reached an agreement. This approach applies irrespective of***

whether the alleged erreur be an erreur obstacle (which prevents the meeting of minds necessary to constitute a contract's creation) or an erreur vice de consentement (a defect of consent where there is a consent or meeting of minds but consent is impeachable for some other reason).

44. Mr Holmes argues that there was no meeting of minds since he was in error because of his belief that the Settlement Agreement included a requirement for Mr Le Sueur to procure the Strata creditors to agree to accept part payment in full and final settlement of their claims.

45. We accept for the purposes of this appeal that a unilateral erreur by one party to a contract may prevent the required meeting of minds or amount to a defect of consent as described in Marett. However, we do not agree that a misunderstanding as to the meaning of a contract can amount to such an erreur. The example given in Pothier Traité des Obligations, Part 1, Chapter 1, §18, p. 22, of the sale of a pair of candlesticks is of a very different character, because that was not dealing with a question of interpretation.

46. The consequences of holding that the misunderstanding of a contract by one party is sufficient erreur to invalidate the contract would be startling. Let us take a simple case where a plaintiff and defendant disagree over the meaning of a contract. The plaintiff argues for interpretation X and the defendant for interpretation Y. Applying the approach set out in §32 above, the court rules that interpretation X is correct. If an erreur as to interpretation by the defendant were held to be sufficient to avoid the contract, he would have lost the battle but won the war, because his interpretation of the contract would have been rejected but notwithstanding that defeat he would be entitled to have the contract declared void on the basis of his own misunderstanding of its effect. Conversely, the plaintiff would be in a lose-lose position, despite having correctly understood the contract and being unaware of the defendant's misunderstanding. That cannot be the law.

47. Accordingly we hold that a misunderstanding or mistake by one party to a contract as to its correct interpretation is not an erreur which prevents the contract being formed or gives any ground for it being declared void on the grounds of a vice du consentement. The erreur must be of a different nature.

48. The erreur relied upon by Mr Holmes in this case is, in our judgment, a mistake as to the meaning of the Settlement Agreement. He consented to and signed that agreement containing the words in clauses 1 and

2. He thought (wrongly) that those clauses provided that the payment to the creditors would have to be accepted by them in full and final settlement. That has been his argument in this case. All the judges who have heard this case have held that he is wrong. He has therefore misunderstood the Settlement Agreement – but the mistake upon which he relies cannot in law amount to an erreur such as to void the contract.

…

POSTSCRIPT

59. We have mentioned in §43 above that Advocate Taylor drew our attention to the decision in Marett. Although the point was not argued in this appeal, and we do not need to decide it, we would nevertheless observe that the question whether an objective or a subjective test should be adopted was not argued in Marett either: it was simply assumed by the court to be correct (see §55), and indeed the court expressly said that "This is not the time for a detailed analysis of the Jersey law of contract". Advocate Taylor drew our attention to earlier case-law such as Leach v Leach [1969] JJ 1107 where an objective approach had been adopted. We would therefore be concerned if a body of opinion were to develop regarding Marett as the last word on this point. We would be concerned because we consider that there are potentially powerful arguments against the adoption of a subjective test. We cannot express a concluded view as to which arguments ought to prevail, but we do express the view that the arguments have yet to be deployed, and as a result the point has not yet been definitively resolved."

54. The postscript gave rise to an article by Sir Philip Bailhache in the Jersey and Guernsey Law Review entitled "Subjectivity in the Formation of a Contract – A Puzzling Postscript" [2016] JGLR 160, in which he gave three main reasons why the postscript might be thought to be a puzzling comment. The first reason was that the Court of Appeal's remarks in Marett were not obiter: the assessment of what was a contract in Jersey law and how it was made were directly relevant to the issue whether the consent order could be set aside on the ground of *erreur*. Whilst it was true that the matter was not argued, "***that can only be because the Court of Appeal (as then constituted) considered the matter to be so well established as to be beyond argument".*** Moreover, earlier cases adopting the objective approach largely proceeded on the basis of an assumption that the English objective approach applied in Jersey law, and some of them had been overruled in Marett itself. "***Fresh life would have to be breathed into such disapproved judgments if the objective approach were to be introduced".*** The second reason was that the subjective theory of contract finds strong support in the customary law, in particular in the maxim "*la convention fait la loi des parties*". This encapsulates the theory of the autonomy of the will,

which in the French law of contract is understood to lead to a requirement of a subjective meeting of minds rather than (as in English law) the objective appearance of agreement. The suggestion that the objective approach might be the law of Jersey would be inconsistent with centuries of legal assertions that Pothier and other civilian authorities are the source of contract law. It would also create internal confusion within the Jersey law of contract. In the specific area of *erreur*, how would an objective approach to the existence of misunderstanding impact upon questions such as the distinction (based in French law) between *erreurs* obstacles and *erreurs sur la substance*? "***That would be an impossibly confusing state of affairs***." The third reason was that it was not for the judiciary to usurp the functions of the legislature. Although it was understandable that judges of the Court of Appeal trained in England might consider that English law produced a more satisfactory solution to the question of consent in the formation of a contract, that was not the Jersey approach. Litigants in Jersey were entitled to expect that their judges would apply Jersey law to the resolution of their disputes, and it was the duty of ordinary judges of the Court of Appeal to give judgment in accordance with the laws and customs of the Island. The introduction of an objective test was a matter for legislation, and the legislature would be able to consider in the round all the conflicting political, moral and practical considerations before deciding whether it was appropriate or not. The article concluded by stating that practitioners had thought that the Court of Appeal in Marett had settled the subjective/objective question in favour of the subjective theory of contract. One element of inconsistency had been eradicated. It was surprising, therefore, that a differently constituted Court of Appeal had cast doubt on the clarity of the statement in Marett that "***the Jersey law of contract determines consent by use of the subjective theory of contract***" and thereby sown the seeds of more uncertainty. It was also unnecessary: French law occasionally adopted a mixture of objective and subjective approaches, and it would be open to the Jersey Courts to adopt a more flexible approach, if they wished, without undermining one of the fundamental principles of the Jersey law of contract.

55. I consider the third reason, and the conclusion, at the end of this judgment. As to the first of the reasons (statements in Marett not obiter), a view also expressed in Foster v Holt [2018] (1) JLR 449 (considered below), I respectfully disagree. It is true that the Court of Appeal approached the question it had to decide on the basis that the subjective approach applied; but that was expressly on the basis of unchallenged contentions, so that the contrary was not argued, and as I have pointed out either approach would have produced the same outcome because there was no sufficient mistake. The opening words of paragraph [64], in which that conclusion is expressed, are phrased in a way which to my mind makes it clear that the Court of Appeal was not definitively adopting the subjective approach: those words, which are "***if, in Jersey law terms, mutual mistake may be unnecessary to invalidate a consent order (at least in relation to any underlying contract)"*** appear to me to imply at least some hesitancy. In the circumstances, it seems to me impossible to say that the Court of Appeal in Marett "***considered the matter to be so well established as to be beyond argument"***. The most that can be said is that the court was prepared to proceed on the assumption that the subjective approach applied; but it does not

follow that, if the subjective approach and the objective approach had led to different results in the circumstances of that case, the Court would have persisted in its acceptance of the conceded position.

56. The second reason is more formidable. It is beyond question that the maxim *la convention fait la loi des parties*, described by Le Gros in his Traité du Droit Coutumier de L'Ile de Jersey as "*un principe en quelque sorte sacré*", forms part of the customary law of Jersey. The maxim has recently been said to encapsulate a principle of Jersey law that a contract is an emanation of the parties' will or *volonté*. In Incat Equatorial Guinea Ltd v Luba Freeport Ltd [2010] JLR 287, Sir William Bailhache, then Deputy Bailiff, after setting out the four requirements for the creation of a valid contract identified in Selby v Romeril, said this:

> ***"21 Pausing there, it is noteworthy that these requirements for the creation of a valid contract go some way to explaining the ancient maxim: la convention fait la loi des parties, which reflects art. 1134 of the French Code Civil, which is in these terms: "Les conventions légalement formées tiennent lieu de loi à ceux qui les ont faites."***
>
> ***22 At the heart of this provision in the French Code Civil and behind the maxim to which we are so accustomed in Jersey 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 agreed by free men. However, it is to be noted that rather earlier the same rationale appears in the commentaries of Berault, Godefroy & d'Aviron on La Coutume Reformée de Normandie, vol. 1, at 74, this edition being published in 1684, where the authors say this: "Car la volonté est le principal fondement de tous contracts, 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.***
>
> ***23 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, déception 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."

57. It does not seem to me obvious that the undoubted existence of the maxim as part of the law of Jersey results in the subjective approach to contractual consent being part of that law also. On its face, the maxim means no more than that the parties will be held to their bargain. There is authority that this is the extent of how it had previously been understood in Jersey. In Basden Hotels Ltd v Dormy Hotels Limited [1968] JJ 911, 919 the Royal Court said this:

"But we cannot leave this matter without referring to another maxim. It is the often quoted maxim 'La convention fait la loi des parties'. Like all maxims it is subject to exceptions, but what it amounts to is 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 ground of public policy, for them to be set aside."

A similar principle of the binding nature of contracts exists in English law, which takes an objective approach to consent. It is therefore difficult to see that the maxim is anything other than neutral on the question whether the subjective or the objective approach is to be adopted.

58. Even assuming that the maxim encapsulates the notion of will or *volonté*, it leaves open the question how the existence of the will is to be determined. French and English law provide different answers to that question. It does not seem to me that either answer is inherently impossible. Sir Philip asks rhetorically how an objective approach to the existence of misunderstanding would impact upon questions such as the distinction between *erreurs obstacles* and *erreurs sur la substance*, saying that it would lead to impossible confusion. But 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 would assess 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.

59. There is an obvious attraction in a concept - that of the will, or *volonté* - capable of providing a consistent basis for, and explanation of, the formation and avoidance of contracts. As I say, I consider that that may be achieved by either approach. However, emphasis on the primacy of the subjective will must logically mean that where consent is absent or vitiated the contract is a nullity. This has indeed been held to be so in Jersey cases such as Steelux Holdings Limited v Edmonstone 2005 JLR 152; and see Marett at paragraph [59]. But such an outcome is often undesirable: it can adversely affect innocent third parties, and a party who has given his consent in error induced by the other party may wish to retain the benefit of the contract but with compensation.

60. The problem, and the inconsistency of the approach adopted by the Jersey Courts, was discussed in Hong Kong Foods Ltd v Gibbons [2017] JRC 050, in which Sir Michael Birt, Commissioner, said this:

> ***"136. Until fairly recently, it appeared from cases such as McIlroy, Channel Hotel and Properties Limited v Rice (1977) JJ 111, Kwanza and Newman that Jersey law recognised an ability to rescind a contract or award damages in lieu in the case of misrepresentation. In other words a contract induced by misrepresentation (at least if not fraudulent) rendered a contract voidable rather than void. In none of these cases was there any suggestion that misrepresentation amounted to a vice du consentement. Thus:***
>
> ***(i) In McIlroy the defendant claimed that the contract had been induced by misrepresentation and sought rescission, alternatively damages. The Court (Ereaut, Bailiff) found that the alleged misrepresentations were in fact statements of opinion and therefore did not amount to misrepresentations. The defendant's claim was therefore dismissed. However there was no suggestion that the alternative claim for damages was not something which the Court could award.***
>
> ***(ii) In Channel Hotel and Properties, there was no claim for rescission. The plaintiff only claimed damages under the headings of misrepresentation, breach of warranty and negligence. Although the judgment of Crill, Deputy Bailiff, is not entirely easy to follow, the Court specifically held at 115 that the Court had jurisdiction to award damages for innocent misrepresentation (although somewhat confusingly it declined to say whether that extended to negligent misrepresentation). The Court appears in the latter context to have been thinking of a liability in tort for negligent mis-statements rather than misrepresentation inducing a contract. The Court found for the plaintiff on liability.***

(iii) In Kwanza the plaintiff sought only damages. It did not seek rescission of the relevant contract as it wished to retain the property it had purchased. It was not suggested by Ereaut, Bailiff or the Court of Appeal that this remedy was not available for misrepresentation although, on the facts, it was held that the statement relied upon was not a statement of fact but merely a descriptive expression.

(iv) In Newman the plaintiff sought rescission, alternatively damages for, inter alia, misrepresentation as to the age of a horse which she had purchased from the defendant. On the facts, the Court (Tomes, Deputy Bailiff) held that any misrepresentation as to the age of the horse had not induced the contract but at page 359 the Court said "it is clear that under Civil Law, the judge had a wide discretion to decide whether the contract should be rescinded, or the price lessened, or damages paid, or whether any regard at all ought to be had to the complaint."

137. However, in Steelux Holdings Limited v Edmonstone [2005] JLR 152 the Royal Court (Bailhache, Bailiff) indicated at paragraph 10 that an innocent misrepresentation which induces a contract amounts to a vice du consentement. Thus, having stated that a fraudulent misrepresentation would amount to dol and would therefore be a vice du consentement, the Bailiff went on to say:

"It may not be necessary that the statement is, at the time it is made, knowingly false; if the statement is in fact false, and the other party acts upon it, there is nonetheless a defect of consent (vice du consentement) because the other party enters the contract under the mistaken impression that the statement or representation is true. It may be seen, therefore, that the distinction between mistake (erreur) and fraud (dol) as defects of consent may sometimes be blurred. There is, in either event, a defect of consent which allows the injured party to treat the contract as void. …"

138. This approach was followed by the Royal Court in Sutton v Insurance Corporation of the Channel Islands Limited [2011] JLR 80 where at para 46 William Bailhache, Deputy Bailiff, having referred to the fact that in earlier decisions the Royal Court had been prepared to investigate whether there had been an innocent misrepresentation which induced the contract, said this:

"This must have been taken to have been upon the basis of a vice du consentement which goes to the issue as to whether there was any true

common will or volonté to agree the terms of the contract … A fraudulent misrepresentation clearly allows the contract to be avoided. But we go further and hold that Jersey's contract cases show that, depending on the facts, including, in particular, the materiality of the alleged misrepresentation to the contract and its actual impact on the party to whom it was made, an innocent misrepresentation which induces a contract can be another form of vice du consentement, just as erreur or dol."

It is clear that in this passage the Court was differentiating Jersey law from modern French law. Under French law an innocent misrepresentation which induces a contract can only constitute a vice du consentement if it amounts to an erreur sur la substance, which in many cases it will not. Thus the Court in Sutton held that Jersey law should recognise an additional category of vice du consentement in addition to erreur and dol.

139. The problem with seeking to bring misrepresentation under the rubric of vice du consentement is that it may lead to difficulties in connection with remedies. In this respect, there is an interesting discussion in Section 7 of the Law of Contract Study Guide 2015 – 2016 issued by the Institute of Law.

140. Our understanding is that the consequence of holding that a vice du consentement exists is that the contract has to be considered as 'nul' and is therefore void ab initio. The contract does not and never has existed. Although some vices du consentement lead to nullité relative and some to nullité absolue, this does not affect the consequences for the parties or for third parties to whom any asset may have been transferred in the meantime because whichever type of nullité results, the contract is void; see Nicholas, French Law of Contract, second edition at 77 (1992) quoted with approval by Bailhache, Bailiff, in Selby v Romeril [1996] JLR 210 at 219/220; and see also Marett v Marettt [2008] JLR 384 where the Court of Appeal said at para 59 with apparent approval:

"Steelux Holdings Limited v Edmonstone is recent Jersey authority for the proposition that a vice du consentement … will render a contract void ab inito, that is to say, it never existed. …"..

141. In our judgment, the Court should, so far as consistent with legal principle and precedent, develop the Jersey law of contract so as to be suitable for the requirements of commercial life in the 21st century and to be as easily ascertainable and understandable as possible. In our judgment, to hold that a contract induced by an innocent (ie non-fraudulent) misrepresentation is void

ab initio (nul) would be an undesirable outcome and furthermore is not required by precedent.

142. In the first place, unless one were to introduce for the very first time into Jersey law an exception which modern French law has apparently introduced in connection with movable goods, the consequence of a contract being void is that the purchaser cannot transfer title because he does not have any title himself. Thus, an object purchased on the basis of misrepresentation might have been sold on one or more times before the contract is formally voided and all such sales would also be void because of the nullity of the original contract induced by misrepresentation.

143. Secondly, there are many circumstances where a purchaser induced to enter a contract by misrepresentation does not wish to have the contract rescinded but merely seeks damages to compensate him for any loss caused by the misrepresentation. A typical example is where the purchaser wishes to keep the thing purchased but to claim damages equal to the difference between the value of the thing as it was represented to be and the thing as it actually is. That course is not open to him if the contract is void ab initio.

144. Whilst it appears that under French law, where there is a vice du consentement leading to nullité relative (i.e. dol, erreur, or violence), the contract may be subsequently validated by confirmation by the person protected by the nullité, it is not clear that he can then claim damages for such vice because, once a vice du consentement is proved, the Court has no option but to declare the contract void (see Nicholas (supra) at 77-81). It seems that there may be some alternative type of action available in France to such a plaintiff, namely an action en resolution pour inexécution but this would require the introduction in this jurisdiction of procedures and concepts which are unknown to Jersey law at present, which do not appear to work entirely satisfactorily in France, and which would not conduce to the law being easily ascertainable and understandable as envisaged at para 141 above.

145. We consider that the preferable solution is to revert to the position which it seems to us was envisaged by the Royal Court and the Court of Appeal in the earlier misrepresentation cases prior to Steelux and Sutton and to hold that a contract induced by innocent misrepresentation is voidable rather than void. This protects the position of bona fide third parties and also gives the Court and the plaintiff flexibility as to whether rescission and/or damages is the appropriate remedy. It seems to us that that can be achieved

by continuing to regard misrepresentation as a principle of Jersey contract law which stands alone rather than seeking to shoehorn it into the structure of a vice du consentement with all the undesirable consequences which may follow.

146. This approach seems to us not only to be preferable as a matter of policy but also to be more in accordance with precedent and principle, in that it is consistent with the Jersey cases prior to Steelux and Sutton. Furthermore, it also appears to be consistent with the views of earlier writers. Thus Le Geyt, Constitution, Les Lois et Les Usages (1946 Edition) Tome 1 at page 119 appears to have drawn a distinction between contracts which were nul ab initio and those which were merely voidable. Thus he refers first of all to various grounds of nullity which lead to a contract being void ab initio. He summarised these grounds as "des nullitez évidentes et perpétuelles, contre lesquelles il n'est besoin de restitution ni de révocation expresse, parce qu'elles sont accompagnées d'un vice inséparable"; in translation "evident and perpetual nullities against which there is no need for restitution or express revocation because they come with an inherent defect".

147. He contrasts these with other types of nullity as follows:

"Il y a des Contrats dont les défauts ne sont pas si manifestes, ni d'une si grande importance. Les causes en sont occultes ou douteuses, il y faut de l'examen et de la preuve; tels sont le dol, la lésion d'outre moitié, la crainte, etc de tout quoy, pour se faire relever, on a besoin du ministère de la Justice, et l'on ne déclare pas le Contrat nul ab initio, mais on le casse comme fait injustement. (translation: there are contracts where defects are neither manifest nor of such great importance. Their causes are obscure or dubious and need to be examined and proved, for instance dol, lesion d'outre moitié, violence etc, and all requires the intervention of the Courts to remove them, and it is not possible to declare the contract null ab initio but it shall be terminated for having been made unfairly.)"

148. It seems to us that this approach is also consistent with that of Domat, Loix Civiles Volume 1, Book 1, Title 2, Section XI at para XII where, as the Court of Appeal made clear in Kwanza (at page 122), he deals specifically with cases of misrepresentation in the following terms:

"Si le vendeur a declaré quelque qualité de la chose vendue, outre celles qu'il doit garentir naturellement : & que cette qualité se trouve manquer, ou que même la chose vendue se trouve avoir les défauts contraires ; il faudra

juger de l'effet de la déclaration du vendeur, par les circonstances de la conséquence des qualitez qu'il aura exprimées, de la connoissance qu'il pouvoit ou devoit avoir, de la verité contraire à ce qu'il a dit, de la manière dont il aura engagé l'acheteur, & sur tout il faudra considerer si ces qualitez ont fait une condition sans laquelle la vente n'eut pas été faite. Et selon les circonstances, ou la vente sera résolue, ou le prix diminué: & le vendeur tenu des dommages & intérêts s'il y en a lieu …. Mais si le vendeur a seulement usé de ces expressions ordinaires aux vendeurs, qui louent vaguement ce qu'ils veulent vendre, l'acheteur n'ayant pas dû prendre ses mesures sur des expressions de cette nature, il ne pourra faire résoudre la vente sur un tel pretexte."

In this passage Domat clearly envisages that, according to the circumstances, the Court in its discretion may rescind the sale or it may simply reduce the price or award damages. Applying modern terminology, he was saying that the contract is voidable rather than void because it is up to the Court whether to rescind the contract (if applied for by the plaintiff) or leave it in place with an award of damages for any loss caused by the misrepresentation. In our judgment the weight to be placed on Le Geyt and Domat on this occasion is greater than that to be placed on modern French law.

149. We can understand that, if one introduces into Jersey law the concept of a vice du consentement, it may be logical to regard misrepresentation as another form of vice du consentement for the reasons described in Steelux and Sutton. However, the law is not built on logic alone. Logic often has to give way to precedent or to the interests of achieving justice. In our judgment, for the reasons we have given, which relate to both precedent and the achievement of justice, we would hold that a contract induced by innocent misrepresentation (by which we mean a negligent misrepresentation or one which is made wholly innocently) is voidable rather than void, with the consequence that the plaintiff may seek rescission and/or damages and the Court has a discretion as to the appropriate remedy. We specifically do not address the position where there is a fraudulent misrepresentation (which may be said to amount to 'dol') and leave that open for consideration when the point arises.

150. Finally, we should add that, if it is desired to bring innocent misrepresentation under the rubric of a vice du consentement, an alternative approach to that envisaged at para 145 above might be to hold that under Jersey law – regardless of the position under modern French law – the issue of whether a vice du consentement renders a contract void or voidable depends

upon the nature of the vice. This approach would enable our law to be consistent with the approach envisaged by Domat. Thus, an erreur as to the identity of what is actually being sold would no doubt result in a contract being considered as void because there would never have been the necessary consent to a contract for the purchase of an agreed item. Accordingly there never was a contract. However, other types of vice du consentement - such as a contract induced by an innocent misrepresentation if that were to be categorised as a vice du consentement – could be regarded as being voidable on the basis that the necessary elements for a contract (including consent) are present but the consent was wrongly induced, so that the Court has a discretion to rescind the contract if the innocent party so wishes but such a vice du consentement does not render the contract void ab initio. However, the present case does not require us to consider this matter further and accordingly we say no more about it."

61. It is convenient to mention at this point the recent Royal Court decision of Calligo Limited v Professional Business Systems CI Limited [2017] JRC 159. That case did not deal with *erreur*, but addressed head on the question whether the approach to the existence of consent should be subjective or objective. That was necessary, because (as the Royal Court explained in paragraph [8]) one party relied on a contractual document and the surrounding circumstances as clear support for the proposition that the other party intended to be legally bound, whilst the other party relied on unambiguous evidence that it did not intend to be bound. After pointing out that the authorities in Jersey as to the correct approach do not speak with one voice, the Court considered Leech v Leech [1969] JJ 1107, Mobil Sales v Transoil (Jersey) Ltd [1981] JJ 143, Le Motte Garages Limited v Morgan [1989] JLR 312 and Daisy Hill Real Estate Limited v Rent Control Tribunal [1995] JLR 176. At paragraph [16] Le Cocq, Deputy Bailiff said this:

"The above cases illustrate that the approach of the Royal Court to analysing matters of consent in Jersey contract is the objective approach. The approach has been to make an assessment of what the reasonable man would from the circumstances have taken the parties to have agreed to and not a subjective approach by looking to what the parties actually did have in their minds when they purported to enter into a contract".

After referring to Marett, stating that there appeared to be two competing lines of authority (the older cases clearly applying an objective test, and Marett (itself based in part upon Selby v Romeril) which put forward a subjective test), and referring to the postscript in Home Farm Developments Limited v Le Sueur, the Deputy Bailiff continued as follows:

"24. We respectfully agree with the cautionary words of the Court of Appeal in Home Farm Developments Limited. The question of whether Jersey law analyses questions of consent by the application of the objective test all the subjective test has not yet been definitively resolved. In the absence of adversarial argument before it on the point, we respectfully express the view that the weight that can properly be placed on Marett is limited.

25. 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 pursuit the needs of a modern community which is also a sophisticated international finance centre. Although it has been said that: "Pothier (for example) is a "surer guide" to discovery of the law of Jersey than is the law of England", that cannot mean that the Court looks to the text in Pothier and follows it without further consideration. There may in those words be found a predisposition to find the law of Jersey within the principles articulated by Pothier or by even older authors but that does not mean that this Court must necessarily adopt those principles if they do not appear to serve the needs of Jersey in the 21st century.

26. As suggested by the Court of Appeal in Home Farm there are, so it seems to us, arguments of some force that might be deployed in favour of the objective approach. It seems to us that such an approach is more likely to provide legal certainty for commercial transactions than would the subjective approach. 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 insofar as it relates to consent is to be established by reference to what the parties did and/or said all the surrounding circumstances which point to what they intended. It would it seems to us to be unsatisfactory, if adopting the subjective approach, to reach a result where a party to a contract who believes that he has entered into a binding arrangement finds that it is of no effect because of some unknown but private intention of the other party. There is the risk, of course, that a contracting party may change his mind ex post facto with all the uncertainty that that might bring.

27. There is also the public policy consideration that English law is used regularly as the preferred system of law and international commercial contracts because of its clarity and legal certainty. It seems to us that it would be to the advantage of Jersey to develop its law, where it is permissible for it to do so, in those directions, namely clarity and certainty, as well. In short it seems to us that a subjective approach will lead to greater uncertainty than will the approach that has traditionally been adopted by the Courts of Jersey, namely the objective approach.

28. We were referred to an introduction to the Law of Contracts (5th Edition 2009), page 9 by P Atiyah, discussing the English law of contract, who says this: –

"It is one of the most fundamental features of the law of contract that the test of agreement is objective and not subjective. It matters not whether the parties have really agreed in their innermost minds. The question is not whether the parties have really agreed, or what they really intended, but whether their conduct and language are such as would lead reasonable people to assume that they may have agreed."

29. In our view, the preponderance of jurisprudence in Jersey shows that the Royal Court has applied an objective test in considering the question of consent. There does not appear to be anything in Selby v Romeril that calls into question the continued use of the objective standard. The fact that the elements of the Jersey law of contract have been identified by reference amongst other things to Pothier does not mean that the means of ascertaining whether those elements exist must equally be subject to the strictures of that body of law. It is open to us, we think, to apply a different approach if we believe that that represents the current law of Jersey and is better suited to the needs of a modern society. For the reasons that we have articulated, we prefer the approach of the Jersey Courts in Leech v Leech and Others and in subsequent cases and adopted the objective standard for determining whether or not consent exists in a contract. In other words the parties to a contract will be taken to have meant what on consideration of the evidence as a whole a reasonable man would have taken them to mean."

62. This case, like Home Farm Developments, gave rise to an article in the Jersey and Guernsey Law Review. The article, Another Puzzling Contract Judgment by Advocate Kelleher [2018] JGLR 78, gave three reasons why Calligo was a "disappointment". The first reason was that the court adopted the objective test without argument or consideration of the alternative; the second, that it is fallacious to conclude that determining subjective intention extends no further than what one contracting party claims was in his mind at the time of entering the contract; and the third, that the 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" through the emphasis in contract law on the centrality of consent.

63. Calligo was considered by the Royal Court (the Bailiff presiding) in Foster v Holt [2018] (1) JLR 449. That case concerned a claim to repayment of a loan of £15,000, which was defended on the basis that the defendant had not agreed to borrow, so that there was no consent or meeting of

minds as required by Jersey law. After stating the four requirements for a valid Jersey contract as stated in Selby v Romeril and quoting paragraphs 21 to 23 of the decision in Incat (see paragraph [55] above), the Court recorded that although Calligo, where the Court applied an objective test, had been cited, the arguments were not expanded on in light of the small amount at stake. After a statement of the facts and reasoning in Calligo, and a statement that paragraph 27 of the decision showed that the conclusion was "very much policy-based", the Court said this:

> ***"11 We note that the authorities provided to the Royal Court in Calligo were unfortunately limited, which cannot have been of great assistance to that court. It is not clear from the reported judgment what extracts from Pothier were produced. In particular, the court might have been interested to read the article in 20 Jersey & Guernsey Law Review 160 (2016) under the heading "Subjectivity in the formation of a contract—a puzzling postscript" authored by Sir Philip Bailhache, former Bailiff, in which there is a respectful but forceful critique of the postscript in Home Farm Devs. Nor was the court shown many of the recent cases in the Royal Court involving consent in the law of contract—Incat Equatorial Guinea Ltd., Sutton v. Channel Islands Ins. Corp. Ltd. and Flynn v. Reid among them.***
>
> ***12 Courts of commensurate jurisdiction are not to depart from each other on the law unless the second court considers that the earlier court was plainly wrong. With the greatest respect to the Royal Court in Calligo, we cannot agree with the conclusion that the objective test is the right test to apply in determining the issue of consent to the formation of a contract under the law of Jersey. Public policy, so often described as an unruly horse, is in our judgment not a proper basis on which to remove a central plank in the law of contract. It 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. In our judgment, there are at least four relevant points therefore to be made in this connection.***
>
> ***(i) We too are puzzled by the postscript in Home Farm Devs. Ltd. which appears to have been added to the court's judgment without any argument as to what is the appropriate law on the subject. We do not understand why the postscript should have been so added, especially so because the conclusion in Marett to which we have referred earlier in this judgment, namely that Jersey law has a contractual theory based on the subjective intention of the parties, was not obiter to the decision in Marett but an integral part of the rationale which was adopted in analysing the law of erreur. By contrast, the postscript in Home Farm Devs. Ltd. was clearly not germane to the decision and was***

therefore obiter. In our judgment, it was not open to the Royal Court in Calligo to disregard the authority of the Court of Appeal in Marett which was binding upon it.

(ii) What is wholly absent from the reasoning of the court in Calligo is any reference to the other principles of the Jersey law of contract which have grown out of the requirement for subjective consent to the formation of a contract—there is no reference to the maxim of la convention fait la loi des parties, nor to erreur, nor to déception d'outre moitié, nor volonté, nor dol. To hold that the test for whether a party consented to a particular contract is objective and not subjective is to remove the cornerstone on which all these principles are built. The law of contract ought to be—and used to be—a cohesive whole, and while it is most unfortunate that the Jersey law of contract, which was certain for centuries and rested on the writings of the commentators expounding the customary law—Terrien, Basnage, Berault, Pothier, Poingdestre, Le Geyt and Le Gros, among others—it is only a series of judgments from the mid-1960s until Selby v. Romeril that have substantially caused the problem. In our judgment, it is not open to the courts of Jersey simply to move away from centuries of Jersey contract law simply because most if not all advocates and judges were trained in English rather than French law or because it is no longer considered convenient to stay with it. That would have been a matter for the legislature, if it were ever considered appropriate to follow that course. Absent some conclusive cases decided at Court of Appeal level or in the Privy Council, the more sensible way forward now in our judgment would be a formal Restatement of the Law of Contract.

(iii) We do not doubt that there may be cases where the difference between a subjective test and an objective test will be significant but as Professor Nicholas in his The French Law of Contract, 2nd ed., at 35 (1992) expressed it:

"It is clear therefore that the analysis of contract in terms of a free agreement of wills (or, in English terms, a meeting of minds) is common to both the French and the English classical theories of contract and remains part of the currency of both systems.

Where the two systems differ, as we shall see, is partly in the intellectual rigour with which the analysis is carried through to detailed consequences, and partly in the way that agreement is understood: as a subjective meeting of two minds or as the objective appearance of agreement. English law usually favours the latter approach, as being the more practical

and the more conducive to the certainty which commercial convenience demands, whereas French law inclines to the former, although sometimes with a corrective which yields much the same practical result as the objective approach."

(iv) Applying the subjective test to the question of consent is consistent with the other fundamental principles of the law of contract in Jersey, and applying the objective test is not. But what does that mean in practice? It means that in any given case, the court will look closely at the evidence to see whether a party has in fact established that he had the subjective intention which he asserts. It is well known that courts assess what was in a person's mind by reference to what he said or did not say and what he did or did not do at the relevant time, measured against all the circumstances of the case. It may well be the case that, even applying the subjective test to the question of consent, the outcome in many cases will be the same as on the application of the objective test because the party contending for a particular intention is simply not able on the evidence to establish his case. Indeed, in Calligo, it seems that the same result would have been reached whichever test had been applied.

13 It is regrettable that on a number of occasions the Royal Court, as apparently the Court of Appeal, has given contrary indications as to what the law is in such a fundamental area, although for the reason just given it may not matter so very much in practice, at least in most cases. It is very much to be hoped that at some point the question of objective or subjective consent in contracts will come to the attention of the Court of Appeal in a contested case which can lead to a fully reasoned decision which will clarify the way for the future. This is not that case, not just because the value of the loan in dispute does not justify taking the matter forward to the Court of Appeal but because regardless of whether one applies an objective or a subjective test, we find that there was a contract of loan as the plaintiff has claimed. We have applied the subjective test to the issue of consent as the defendant has requested us to do, and still find against the defendant on the evidence, and now go on to explain why."

64. As with all the cases in which this topic has been discussed, including the present, Foster v Holt was a case where the outcome would have been the same whether the subjective or the objective approach was adopted (as the Court acknowledged in paragraph [13]). The parts of the judgment I have quoted are accordingly obiter. However, it does not seem to me correct to regard the reasoning in Calligo as driven only by the public policy considerations set out in

paragraph [27] of that decision, as the Court in Foster v Hope appears to do in paragraph [12]; other bases for the Court's comments in Calligo were prior authority and the need for certainty.

65. The crux of the comments in Foster v Holt – and, indeed, the crux of the subjective/objective debate generally – is the proposition that the requirement for subjective consent to the formation of contract is a central plank of Jersey contract law and a cornerstone of the other principles of that law, such that the law of contract is a cohesive whole which was certain for centuries and rested on the writings of the commentators expounding the customary law. I respectfully consider this to be an overstatement, for three main reasons. First, as an illuminating early article by Advocate Kelleher - The Sources of Jersey Contract Law (1999) 3 Jersey Law Review 1 – demonstrates, identification of the foundations of Jersey contract law is not straightforward, Jersey having historically taken an eclectic approach to sources without seeking a unifying theory. As Advocate Kelleher put it:

> ***"Where then does this leave Jersey law? If we are to be restricted to pre-1204 customary law we are left without a theory of contract law, without even a concept of consensual obligations. The answer is that we cannot be and have not been so restricted. Poingdestre and Le Geyt make it clear that Jersey law had, by the seventeenth century, quite pragmatically, moved on: in some respects Jersey had developed its own law, but in other respects it continued to follow developments in Normandy and this included looking into the ius commune on matters of contract law."***

In this context, it is significant that Advocate Kelleher, in his later article, speaks only of "***past efforts to establish a coordinated framework"*** of contract law, not of a cohesive law of contract that has existed for centuries. Secondly, although it is no doubt the case that when the French commentators on the customary law spoke of consent they meant actual, subjective consent, this does not appear to have been made explicit. Moreover Pothier, the most influential of the commentators, was at one stage regarded as authoritative in England: in Cox v Troy (1822) JB & Ald 474, Best J described his status as "***as high as can be had, next to a decision of a court of justice in this country***", and he is said to have had a major influence on the terms of the Sale of Goods Act 1893. The subjective theory implicit in Pothier's writings did not stop English law from adopting the objective approach; and, although the significance of Pothier to the Jersey law is of course far greater than his significance in English law, I do not think that his status in the Island means that Jersey law cannot have adopted an objective approach to consent. Thirdly, many of the concepts said to be underpinned by the subjective theory of consent have counterparts in English law. This applies at least to the theory of the sanctity of contract, to mistake and to fraud. In English law, they too are underpinned by the concept of consent; and it is not at all self-evident to me that the difference in approach to the similar concepts is dependent on the different approaches to the existence of consent.

66. Sir Philip Bailhache (in the conclusion to his article) and Advocate Kelleher (in the second reason given in his more recent article) both suggest that the French application in practice of the subjective theory may be modified in the interests of contractual certainty. The Royal Court in Foster v Holt suggests that there may often be little difference in practice between the subjective and objective approaches. The point is expressed by Professor Fairgrieve, op cit, p 42 as follows:

> ***"French law illustrates the occasional compromise between the desire to enforce the parties' real intentions and the need for contractual security. Although consent itself is largely determined subjectively in the process of assessing the content of the contract, the characterisation of consent as such is the result of an objective determination. In concrete terms, this means that the existence of mutual consent is assessed from an objective standpoint. For example, the fact that the contracting parties put their signatures on the document is considered evidence of the parties' agreement to its content and its effect, irrespective of the parties "real" understanding of the terms. This is particularly true when the contract takes place between professionals acting in the scope of their field of activity.***
>
> ***Similarly, it is an exaggeration to present the rules of contractual interpretation is imposing a purely subjective approach. Whilst Article 1156 of the French Civil Code (now Article 1188 of the new Code) may invite judges to seek the parties' common intent, other provisions alongside it have definitely objective end. For example, Article 1135 of the Civil Code (now Article 1194 of the new Code) proposes a broad conception of the contractual agreement, incorporating not only the express provisions, but also matters of equity, usage and the nature of the obligation.***
>
> ***Third, objective elements have been injected into the French law notion of erreur within the context of vice de consentement. Whilst, as we shall see, the French approach to erreur is very much a subjective one, elements of objectivity may nonetheless be detected in the case law, or instance where the importance of the subject-matter (in respect of which the mistake was made) was known to the other party (or that he ought to have known it), or whether the erreur in question was "excusable" or not."***

67. I interpolate that, quite apart from the question of the extent to which these mitigations apply in the law of Jersey, modification of, or "occasional compromise" in relation to, an approach that has built into it the likelihood of uncertainty is no answer if certainty itself is the primary object.

68. Professor Fairgrieve goes on, at p 43, to give a fourth example, as follows:

> ***"French procedure is characterised by a predominantly written procedure with, at its centre, the judicial dossier composed of the parties' respective written pleadings, supplemented by documentary evidence. Whilst the civil courts may hear witnesses, this in practice rarely actually occurs. Unlike the common law trial, the French civil justice system is characterised by a distrust of testimonial over documentary evidence. This has a corresponding impact on the evidence that can realistically be presented during litigation to elucidate the parties' actual intentions in contracting. In practice, contemporaneous written documentation will be required to support what that intention really was. This therefore illustrates a very different approach to civil procedural patterns in the common law, and in effect also entails an inbuilt limitation on the subjective approach in the sense that the proof of the parties' intentions must be apparent from written documentary evidence. This may not always be possible to adduce."***

He returns to this point at p 47, in a passage which to my mind emphasises the difficulty of maintaining a subjective approach to contract in the context of an essentially common law procedural system:

> ***"The shift [in Jersey] to the subjective approach also raises challenges beyond the domain of substantive law. There may also be an impact in procedural terms. In adopting the subjective approach, Jersey lawyers will have to adapt to the need to enquire into the state of mind of the contractual parties. It could clearly be an important factor in litigation if one party can bring forth credible evidence as to the understanding at the time of the contractual arrangements. As we have seen in French law, the limited use of testimonial evidence and consequential reliance on documentary evidence provides an inbuilt limitation on the subjective approach in the sense that the proof of the parties' intentions must be apparent from written evidence. That limitation does not exist in the very different civil procedural environment in Jersey, which is inspired predominantly by adversarial traditions. This shows that reinforcing the centrality of consent and the subjective approach to contracts will not only have wide repercussions throughout the substantive law, but will also make it necessary to take account of the impact of different procedural traditions".***

69. In October 2002, the Jersey Law Commission published a Consultation Paper on The Jersey Law of Contract. It addressed topics such as the origins of Jersey law, the development of the customary law, and the influence of the Norman Coutume and the Code Civil. It considered the

use of French authorities, the influence of the English law of contract and the use of English authorities, and other influences. It summarised the difficulties in ascertaining the Jersey law of contract as being the difficulty of access to Norman texts, language, the difficulty of applying ancient concepts, uncertainty, and the suitability of the legal system for a modern world of commerce. In relation to language, the Commission said:

> ***"Despite the Island's proximity to the coast of France, very few Islanders are fluent in French and in the 21st century it may be difficult to justify a legal system where the laws are written in a language which is alien to the majority of the population. In addition, the educational system in the Island is English-based, both in terms of language and content".***

At an earlier point in the Paper, the Commission had pointed out "***the practical problem that the vast majority of Jersey lawyers now receive their legal training in England and French law is therefore to them an alien concept***".

In relation to the difficulty of applying ancient concepts, the Commission said:

> ***"Whilst adherence to the roots of Jersey's law of contract may well be one of those things which serves to give Jersey a distinct identity, it is arguable that if Jersey is to maintain its reputation as a sophisticated finance centre it should be able to demonstrate that its law of contract is comprehensible, accessible and fully adapted to modern commercial transactions".***

70. The Commission's proposal, initially in its Consultation Paper and ultimately in its 2004 Final Report, was that the Jersey law of contract should be codified by a statute predominantly based on English law. This proposal undoubtedly represented a radical departure from the existing position, and has not been implemented.

71. The current state of the authorities in Jersey is, in my view, wholly unsatisfactory. It should not be the case in a modern, developed jurisdiction such as Jersey that something as fundamental to its commercial law as the correct approach to the determination of contractual consent should be uncertain. The uncertainty is made worse by the fact that the matter is controversial at the highest level in the local judiciary. On one side of the debate, espousing the subjective approach, are the current and a former Bailiff; on the other, favouring the objective approach, are a former Bailiff and the current Deputy Bailiff, soon to be the Bailiff. It is clear from the postscript in Home

Farm Developments, and from these reflections, that some of the current personnel of the Court of Appeal also consider the matter to be at best uncertain. It is time the debate came to an end.

72. The text of the third reason given by Sir Philip Bailhache in his article – that the judiciary should not usurp the functions of the legislature – included a suggestion that the attitude of the Court of Appeal in Home Farm Developments might have been influenced by the fact that the judges were trained in England. There is a hint of a similar suggestion in paragraph 12(ii) of the judgment in Foster v Holt. The panel in Home Farm Developments consisted of an English QC, a Scottish QC and a former Bailiff, although it is right to say that all of them are or were qualified in English law. I do not, however, think that it is fair to suggest that English-trained judges in the Court of Appeal of Jersey unthinkingly apply the law of England as a default; indeed, my own experience has been that the judges are exceptionally sensitive to the different origins and traditions of Jersey law and take extremely seriously their judicial oath to maintain, sustain and defend all the laws, liberties, usages and ancient customs of the Bailiwick. It is necessary, however, to bear in mind the words of Hoffmann JA in Re Barker (1985 – 86) JLR 186, 195 (quoted in the Law Commission's Consultation Paper):

> ***"I am conscious of the pride which the legal profession in this Island takes in its unique legal system but such pride can only be justified if the legal institutions are sufficiently adaptable to enable the Court to do justice according to the notions of our own time. The Court should not be left with the uneasy feeling that in following the old authorities, it might have perpetrated an injustice upon one of the litigants".***

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 in the consent of one party that is unknown to the other is on the face of it incompatible with a modern commercial jurisdiction. French law may mitigate some of the consequences of a rigorous application of the subjective approach; but one way in which it does so depends upon the existence of a procedural regime which simply does not exist in Jersey. The subjective approach appears, at least in modern times, to have been introduced into Jersey law without explanation and without consideration of modern authorities preferring the objective approach. It may be that justification for that introduction lies in a theory of the primacy of the will implicit in the French law which provided the background to the commentators on the customary law, which may perhaps also be implicit in the maxim *la convention fait la loi des parties*; but that theory, which logically entails that a defect of actual consent must vitiate a contract, has by no means been consistently applied in Jersey. Moreover, it falls to be applied in an island where, as the Jersey Law Commission pointed out, decreasing numbers of people speak French, the lawyers are increasingly English-trained, and the commercial interests of the Island increasingly align with those of England.

74. Desirable though it may be to have a unifying theory of contract, there are occasions when pragmatism is to be preferred; and the pragmatic need to provide security of contractual relations should in my view prevail.

75. In relation to the third reason in his article, Sir Philip Bailhache suggested that the introduction of an objective test was a matter for legislation. Although one can quibble with the use of the word "introduction", I agree that the legislature is, as Sir Philip says, best placed to "***consider in the round all the conflicting political, moral and practical considerations before deciding whether it is appropriate or not***". It is also best placed to ensure consistency of approach over the whole field of contract law. The problem is, of course, that the legislature has, for a period now approaching two decades, failed to act on the Jersey Law Commission's recommendations or adopt an alternative solution. An alternative canvassed in Foster v Holt is a restatement of the law of contract; but, even assuming that agreement could be reached on the contents of a restatement, given the entrenched views held within the judiciary, such a document would suffer from the defect identified by Lucy Marsh-Smith in her article Reform of Jersey Contract Law: Practical Perspectives [2017] JGLR 276:

> ***"The biggest limitation of a restatement is that it cannot of its very nature change the law and so cannot cure defects. It can only ever be a secondary source of law, however influential it is. It can do no more than point to what reforms may be desirable and its influence is limited to the areas of law that are within the interpretative reach of the courts, and there is no guarantee that future court decisions would follow it."***

76. In these circumstances, it seems to me that it must be for the courts to grapple with the question as part of the process of developing the customary law. As Sir Philip himself said in Selby v Romeril, albeit for a very different purpose, "***Pothier was writing two centuries ago and… our law cannot be regarded as set in the aspic of the 18th century***". As I have said, however, the uncertainty engendered by continuing debate is wholly unsatisfactory. Beyond these remarks, it has not been necessary or (because the matter was not argued) possible to address the topic properly on this appeal; but, in common with the Royal Court's views expressed in paragraph 13 of its judgment in Foster v Holt, I very much hope that a properly argued appeal will provide an opportunity before long for a detailed evaluation of the position.

BAILHACHE, JA

77. Like Logan Martin JA, I agree that this appeal should be refused for the substantive reasons set out at paragraphs 1 – 42 of Martin JA's judgment.

78. With regret, I feel obliged to say that while the Excursus sets out conveniently a range of possible arguments on the subjective/objective issue as well as a review of the more recent decisions of the Royal Court and this court, I consider this court is not well placed to reach conclusions on the issue because we have had neither the written authorities nor the written or oral submissions which would support our conclusions. It will also be apparent from the references in Martin JA's judgment that I have previously expressed views which are inconsistent with his conclusions.

79. I do not wish to compound the difficulties by delivering my own thesis on the matter now but I will say that in my view the court will, if this point comes up for determination, be required to justify the basis on which it can be regarded as proper to consider that the courts have the choice to follow either the English or the French laws of contract in circumstances where our ancient privileges as granted by the Royal charters require us to be faithful to our own law. As that can be regarded as well settled on this point long before the 1960s because it is at least implicit in all the writings on the customary law, the more recent diversions need to be justified and not taken as precedents on which to conclude that convenience or legal certainty in commercial contracts permits a different choice to be made. The court in future will also in my view need to be satisfied that in declaring the law it maintains a coherent structure which does not destroy an essential building block of other parts of the structure.

80. I agree with both my colleagues, however, that it would be desirable if, either by way of Restatement or a subsequent court of appeal decision, this issue could be resolved.

LOGAN MARTIN JA

81. I have had the advantage of seeing in draft the judgment delivered by Martin JA. I agree with him that the appeal should be refused and for the substantive reasons which he has given. I have noted the additional Excursus which he has also given. I have nothing to say in relation to that in the circumstances of the present case other than to agree that whether the approach to consent in the contract law of Jersey is subjective or objective remains a matter of uncertainty which one would hope can be resolved in due course in a suitable case or in legislation.

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