Dispute - matters relating to a construction project - the existence of a contract - financial consequences

# [2020]JRC179

**ROYAL COURT**
**(Samedi)**

**8 September 2020**

**Before : T. J. Le Cocq, Esq., Deputy Bailiff, and Jurats Blampied and Thomas**

| | | |
|---|---|---|
| **Between** | **Sir Bob Murray C.B.E.** | **Plaintiff** |
| **And** | **Camerons Limited** | **Defendant** |

**Advocate N. M. C.Santos-Costa for the Plaintiff.**

**Advocate S. M. J. Chiddicks for the Defendant.**

**JUDGMENT**

**THE BAILIFF:**

**Introduction**

1. This is a dispute between Sir Bob Murray CBE ("the Plaintiff") and Camerons Limited ("the Defendant") concerning the construction of a dwelling house known as L'Orangerie ("the Project") which is situated on the land to the west of Les Lumieres, La Route Orange, St Brelade, Jersey. The Project was described as Les Lumieres West as well as Coeur du Nord and L'Orangerie. The Plaintiff lived at Les Lumieres prior to the construction of L'Orangerie which was designed for the Plaintiff and Lady Susan Murray (Lady Murray) as their main residence.

2. The matters in dispute relate to the existence of a contract between the parties in connection with the Project, the terms of that contract and the financial consequences that flow from the relationship between the parties. The dispute encompasses the basis on which payment should be made for works done in and around the Project, and whether any monies are still to be paid or indeed to be repaid.

3. The Plaintiff is a businessman with significant experience in building projects mainly in the North East of England where he lived prior to moving to Jersey. He resides in Jersey and has made Jersey his home and has lived here for more than fifteen years.

4. The Plaintiff engaged the following professionals for the Project

   (i) Identity Consult, based in Sunderland to manage the Project ("IC");

   (ii) Godel Architects based in Jersey;

   (iii) RNJ Partnership LLP based in Newcastle upon Tyne to act as Quantity Surveyor ("RNJ");

   (iv) Turner & Townsend Cost Management Ltd, based in Leeds ("T&T") from January 2015.

   Representatives of IC and T&T gave evidence, but there was no evidence from GodelArchitects or RNJ.

5. The Defendant is a substantial building contractor with over 60 years' experience in Jersey. It was represented during the Project by Mr Marc Burton ("Mr Burton"), the Managing Director who gave evidence on its' behalf. The Defendant was the main contractor for the Project from commencement in March 2014 until the Plaintiff removed it from the site in February 2016. Mr Burton is a member of the Chartered Institute of Building and has worked in the construction industry in Jersey for over 24 years. He has worked on pre-construction negotiations and the delivery of major construction projects including commercial buildings and high-end residential properties.

**The Nature of the Dispute**

**The Plaintiff's Case**

6. It is the Plaintiff's case that in or about April 2014 he entered into a JCT intermediate form of contract ("the Intermediate Contract") with the Defendant to enable the Defendant to commence certain Enabling Works ("the Enabling Works") on the Project. The Enabling Works comprised, amongst other things, sub-structure work, including excavation and earth works, piling, service diversions and drainage work. In order to complete the Project, once the Enabling Works were concluded, the building would then need to be erected and there would need to be internal

finishing, mechanical, electrical installations and other associated external works and landscaping ("the Main Works").

7. Whilst the Defendant was carrying out the Enabling Works it also undertook certain measurement and pricing of the Main Works required to complete the Project. It was anticipated, so it is pleaded, that the Defendant contemplated commencing such works in and around November 2014. The Defendant's pricing for the remainder of the Main Works was considered by the Plaintiff's Quantity Surveyor, RNJ, who carried out an assessment and reported in a cost report to the Plaintiff on the 29th October 2014 ("the RNJ Cost Report").

8. The RNJ Cost Report indicated a recommended potential works cost for the Project in the sum of £5,548,172 (excluding GST) which was inclusive of the sum paid by the Plaintiff in respect of the Enabling Works and part construction of the house under the Intermediate Contract (which, at that time, amounted to £1,783,242). The RNJ Cost Report included £1,161,400 in respect of provisional sums and allowances .The Plaintiff and the Defendant then entered into an agreement which, so the Plaintiff alleges, was constituted by a Letter of Intent issued and signed by the Plaintiff on the 4th November 2014 ("the Letter of Intent") subject to certain amendments recorded in an exchange of emails with Mr Burton both dated the 7th November 2014 ("the November 2014 emails") to which reference will be made hereunder.

9. It was the intention of the parties that the agreement would ultimately be covered by a JCT Standard Form of Contract ("the JCT Standard Contract") but one was never executed because, so it is alleged, of the delays in the Project, the Defendant's reduced performance on site, and the Defendant's attempts to seek additional costs over and above the costs specified in the RNJ Cost Report. The Plaintiff alleges that the Defendant commenced main works on the site on the 24th November 2014. Negotiations concerning the price for the Main Works proceeded in parallel with the work being undertaken under the Intermediate Contract. There were a number of factors that presented, potentially, a risk to the certainty of the costing identified in the RNJ Cost Report and the Plaintiff alleges that it was his intention that the risks would be discussed and negotiated, and the costs and timescale of the works, amongst other things, would be agreed and set out in the JCT Standard Contract. It is alleged that the Defendant failed to prepare and present to the Plaintiff a proper and fully considered proposal and instead adopted a piece meal approach with the cost of every item being considered as it arose.

10. Negotiations and discussions failed and at the end of the process, so it is alleged, there were amongst other things:-

    (i) no agreed contract signed;

(ii) no agreed basis for the measurement of the costs of changes;

(iii) no agreed basis for the measurement of the cost of any additional work;

(iv) no agreed programme for the works;

(v) no agreed completion date;

(vi) no identified sum for liquidating and assessing damages;

(vii) no contract administrator who would be required to act impartially between the Plaintiff and the Defendant.

11. It is further alleged that the Defendant's conduct undermined the Plaintiff's trust and confidence in the Defendant and was unreasonable. A number of allegations are made by the Plaintiff in his amended Order of Justice.

12. In a meeting between Mr Burton and Mr Darren Laybourn ("Mr Laybourn") of T&T held on the 20th August, 2015, Mr Laybourn advised Mr Burton that the Project was reaching a critical phase and that the Plaintiff was alarmed in the escalation of costs. He asked for Mr Burton's assistance in seeking a way forward and for him to take a commercial view. Mr Burton was informed, so it is alleged, that if there was no improvement on the costs then the Plaintiff would be left with no alternative but to terminate the Defendant's involvement.

13. There was a meeting on the 2nd September, 2015, which the Plaintiff, Mr Laybourn and Mr Dent and Mr Burton were present. Mr Burton was asked to produce his "*very best price".* On the 28th September, 2015, the Defendant submitted an updated estimate which details an adjusted contract sum of £7,731,038. After further discussion on the 8th December 2015 Mr Burton provided Mr Laybourn with four further cost options which range from £7.99 million to £8.27 million. These cost options were not acceptable to the Plaintiff and he terminated the Letter of Intent without any expressed reasons on 26th February 2016. The Plaintiff alleges a number of losses, defective works and other costs including the repayment of £210,143 paid under Architects Certificates in respect of which the Plaintiff alleges he was overcharged.

14. In essence, the Plaintiff claims that the Defendant was not entitled to charge on any basis other than that set out in the Letter of Intent.

**The Defendant's Case**

15. The Defendant pleads that the November 2014 emails qualify the Letter of Intent and meant that the Letter of Intent was governed by the JCT Standard Contract. The Defendant alleges that the Letter of Intent and the November emails were based upon the RNJ Cost Report, the quantities rates and prices used as the basis for the figures contained in that report, a document entitled 'Pricing and Measurement of Works dated the 19th August 2014' referred to in the RNJ Cost Report and the terms of the JCT Standard Contract.

16. It was understood that the parties were to finalise the contract for the Main Works by the end of November 2014, and the Letter of Intent was a holding measure following the imminent completion of the Intermediate Contract which had been extended to 21st November 2014. Notwithstanding the fact that the contract had not been finalised, the works on the property continued giving effect to a number of changes and variations effected by agreed measurement, revision of drawings and Change Control Requests (referred to hereunder) included within architect's instructions. These were works, so it is alleged, outside the steps provided for under the Letter of Intent.

17. The Defendant alleges that at all times with the prior instruction, approval and agreement of the Plaintiff it undertook the Main Works on the understanding that this was in accordance with a JCT Standard Contract and the agreed amendments to that contract. The Defendant submitted interim valuations on the basis of agreed values which had been agreed and which, so the Defendant alleges, were subject to the terms of the JCT Standard Contract. It is alleged that the Plaintiff, through his professional agents and advisers, valued and certified the Main Works on the same basis, issuing interim certificates pursuant to which the Plaintiff made interim payments in accordance with the JCT Standard Contract. This is referred to as the "*agreed value basis*". It is the Defendant's case that the Letter of Intent to the extent that it refers to the Defendant's entitlement to *"all direct and actual costs properly incurred"* does not cover the Defendant's entitlement to payment for work or services under the agreed valuations and in accordance with the JCT Standard Contract and/or is restricted to the reimbursement of the costs of the work expressly provided for by the Letter of Intent.

18. The Defendant goes on to allege that in any event the Plaintiff is estopped by convention or representation from denying the Defendant's entitlement to payment in accordance with the agreed valuation basis, the agreed values and the terms of the JCT Standard Contract or, alternatively, the Defendant is entitled to payment on a *quantum meruit* or by virtue of the doctrine of *"unjust enrichment*".

19. The Defendant also advances a counterclaim for balance owing under the contract between it and the Plaintiff in the sum of £623,752.79.

**The Factual Matrix and Evidence**

20. We have before us affidavit evidence and have heard a significant amount of oral testimony on behalf of the Plaintiff. For the Defendant, as we have said, we heard from Mr Burton. We also heard expert evidence to which we will make some reference later in this judgment.

21. Although we do not refer to all of the evidence that we have read and heard, all has been considered by us, and the Court has had the opportunity to assess the witnesses through their oral testimony.

22. In or around 2013 the Plaintiff had engaged Mr David Dent ("Mr Dent) of IC to manage three building projects (including the Project at L'Orangerie ) on his behalf in Jersey. On 14th October 2013, Mr Dent emailed Mr Burton of the Defendant to invite the Defendant to tender for all three projects. The Defendant's tender for one of the projects (La Pinede) appeared to be successful. The Parties did a significant amount of work amending the JCT Standard Contract that was to apply to that project, but the Plaintiff changed his mind and appointed JP Mauger. The Defendants were successful, however, in securing the tender for the Project and the various amendments to the standard JCT contract discussed for the La Pinede contract were utilised in agreeing the Intermediate Contract for the Project. Those amendments were referred to by the Defendant as the "Agreed Amendments". The Defendant's pricing for the works on the Project was based upon drawings and specifications and measurements prepared by RNJ. RNJ checked and amended the Defendant's pricing as appropriate.

23. On the 10th February 2014, Mr Burton emailed Mr Stephen Box ("Mr Box") of RNJ giving details of the preliminary costs (which at that stage amounted to £677,610) for the Enabling Works. In his email it is clear that the Defendant intended to charge overhead and profits ("OHP") at a rate of 6.5% and this would be applicable on the net construction costs and the preliminaries. It is, so we are informed, standard practice in the construction industry to add a percentage to the net cost for OHP.

24. On the 20th February 2014, Mr Dent emailed the Defendant indicating the Plaintiff's wish for work to commence on the site on the 24th March 2014, and in his email he stressed the need to meet the Plaintiff's target cost of £4 million excluding preliminaries, OHP, professional fees and GST. On the 28th February 2014, Mr Box emailed Mr Dent and other professionals to discuss

the Enabling Works and the Main Works. He set out the scope of the works and the quantum for the Enabling Works and stated that he had agreed with the Defendant that the Intermediate Contract (with contractor's design portions) would be appropriate. It is clear that elements of design of the Project had not yet been finalised.

25. On the 25th March 2014, Mr Box emailed the Defendant attaching the price document produced for contract purposes. He also attached the schedule of amendments prepared in accordance with discussions with the Defendant which were the amendments that had been proposed, as indicated above, when the Defendant was tendering for a different project. The amendments relate to JCT Standard Contract, although the contract for the Defendant to deal with the Enabling Works was to be the Intermediate Contract.

26. Work commenced as anticipated on the 24th March 2014. On the 15th April, the parties signed the JCT Intermediate Building Contract with Contractor's Design 2011 in order to complete groundwork by the 16th May 2014 at a contract price of £535,256. This contract included a Schedule of Amendments to the JCT Standard form of Building Contract 2011 edition without quantities. As we have said this schedule of amendments was more extensive than for an intermediate contract and would be seen as appropriate for the main contract. This schedule was signed by the Plaintiff and witnessed by Mr Dent.

27. On the 28th April 2014, the Enabling Works had been completed and it was agreed to extend the Intermediate Contract to permit work to start on building the house. The contract was extended to the 21st November 2014 by way of architect's instruction and the work (by this time, part of the Main Works) continued uninterrupted in anticipation of a signed contract.

28. On the 28th April 2014, the Defendant wrote to Mr Dent to say that they had reviewed the interface between the Enabling Works and the Main Works to ascertain the necessary requirements for the continuation of the works. Post the Enabling Works the Defendant required ground work, block work and form work contractors to be on site and undertaking their work together with the necessary materials and products. It is important to note that by the time the Intermediate Contract, as extended, eventually expired in November 2014 the Defendant had constructed the basement structure, the basement walls and columns, and ground and first floor slabs, walls and columns, which was work in addition to the basic Enabling Works and added a total of a £1,200,000 to the final cost of the Intermediate Contract. This, in our view, suggests that the Main Works - the construction of the property that the Plaintiff wanted – had started in May of 2014, and that the Defendant had been working on it well in advance of the Letter of Intent.

29. On the 1st May 2014, IC started a Change Control Request ("CCR") procedure. This had been agreed between the Plaintiff and his professional advisers, and was in effect presented to the Defendant as a *fait accompli*. The process, in short, involved RNJ sending a short description of the proposed work to the Defendant for pricing. The price would then be checked by RNJ and sent to the Plaintiff for approval. Once the approval was given, the architect would issue an architect's instruction ("AI") which the Defendant would execute. It seems to us that process had become necessary because there were a number of items in the specification that had not been finalised and the Plaintiff, from time to time, changed his mind on what he wanted. The CCR's all included a 6.5% OHP element.

30. On the 17th June 2014, a meeting was held on site. The Plaintiff and his wife, Lady Murray and their daughter, who is an interior designer, were present as was Mr Dent, Mr Andrew Milnes ("Mr Milnes") of IC and Mr Godel, the architect, and Mr Burton and others from the Defendant. During the meeting, a presentation was given by the Defendant and the design team which indicated a total estimate construction cost (excluding contingency) in the sum of £5,434,567. This was slightly above the figure of £5,250,000 which the Plaintiff had as the target construction cost. At the meeting, the Plaintiff confirmed the construction programme for completion at Christmas 2015, and the Plaintiff confirmed that the contract should be put in place to action, other than the contract sum which at that point remained to be settled.

31. In his evidence before us, the Plaintiff indicated that he had never seen a breakdown of the contract sum. However, we note that the meeting suggests that he was asking for a breakdown of some elements and was already seeking to reduce the projected cost. RNJ produced a cost overview summary for that meeting and continued to produce updates until the Letter of Intent was signed by the Plaintiff. These cost overviews gave breakdowns of the total estimated construction cost and formed the basis of the cap incorporated in the Letter of Intent. We also note that this meeting suggests that the Defendant would have been led to understand that the contract would be put in place very shortly thereafter.

32. On the 4th August 2014, Mr Milnes of IC wrote to Mr Box of RNJ requesting a full copy of the Schedule of Amendments as he was working up a clean copy of contract amendments prior to agreeing the contract sum. Mr Box confirmed that this full version had been incorporated into the set of contract documents issued to the Employer and the Contractor. It seems to us to be clear that all parties were proceeding on the basis of the schedule of amendments already incorporated in the Intermediate Contract.

33. Following a client meeting on the 28th July, RNJ issued an updated cost overview showing a recommended potential works cost of £5,404,956 after deducting £55,000 for adjustments and recommended discounts. In Note (vi) of that Report they say:-

> *"RNJ have sought adjustments and commercial discounts / better buy in respect of preliminaries, windows, glazed façade and stone cladding; to date Camerons have not offered any such adjustments; the amounts noted above are purely notional reductions in cost inserted by RNJ; RNJ cannot guarantee that reduction in this magnitude will be achieved."*

34. On the 3rd October 2014, RNJ issued an updated costs overview and recommended potential costs of £5,458,665 which included the cost of the Enabling Works and the other work done under the intermediate contract. The notes to this costs overview provide that no allowance was made for cost implications of ongoing design, development of works or contractor's design. The provisional sums and allowances are stated at being £1,161,400 net, and reference is made to the works associated with completion of the Project to be procured in accordance with JCT Standard Contract incorporating client amendments and priced in accordance with the document "Pricing and Measurement of the Works dated the 19th August 2014". This document was sent by Mr Dent to the Defendant on the 6th October 2014 and amongst other things, in the email Mr Dent indicates that the Plaintiff is keen to enter into a contract for the Project with a Letter of Intent being issued this week and a contract entered into soon after. In the email, Mr Dent says:-

> *"The ability of the family to enter into contract is however subject to Camerons being able to accept an overall price of £5,375m….."*

Mr Burton responded on 7th October asking:-

> *"Could you give me an idiot's guide to how you get from RNJ's figure of £5.458 to your proposal of £5.375, please?"*

35. The difference between the figure proposed by RNJ and that figure as suggested by Mr Dent is unexplained. In his oral evidence the Plaintiff stressed his wish to have "value for money". It seems to us that this exchange is a good example of what the Plaintiff meant by seeking value for money.

36. On the 22nd and 23rd October 2014, an exchange took place between Mr Burton and Mr Dent starting with the Defendant's request to add a percentage for contractor's design portion supplements. This was never agreed. In his email of the 23rd October, Mr Burton says this:-

> *"The bigger issue here is, does the client understand that the price will fluctuate up or down? We are not signing a lump sum contract and as I have previously advised we think there will be a number of additional costs that will become apparent once the construction drawings have been issued as the design has changed / developed since February, with two good examples being the underground drainage and the steel reinforcement in the concrete structure."*

37. It was clear, at this point, that the Defendant was not agreeing to a fixed price contract.

38. On the 4th November, RNJ revised the cost overview dated the 29th October in manuscript. It shows the sum of £3,764,930 for the main contract and a cost of £1,783,242 for the Intermediate Contract. The total cost remained the same at £5,548,172.

39. On the 4th November 2014, Mr Burton attended on site with Mr Box and the Plaintiff. The Intermediate Contract was due to expire on the 21st November 2014. At the meeting the Plaintiff handed a copy of the signed Letter of Intent to Mr Burton. There is no evidence that this letter had been shown to the Defendant previously, nor had they been asked for their comments. It was presented as a "*fait accompli*". It appears to us that as work on building the property had started in May 2014, following completion of the Enabling Works, both parties wished to continue to work on the building without interruption. It also appears to us that Mr Burton anticipated that the JCT Standard Contract for the Main Works would be signed very shortly afterwards. The Letter of Intent was to enable the Main Works to continue, which as we have indicated we believe to have started in May 2014. So far as the Defendant was concerned it was intended as a provisional holding document prior to the early finalisation of the JCT Standard Contract, but at the same time it purported to place a cap on the total project cost of £5,548,172 in accordance with the RNJ cost overview.

**The Letter of Intent**

40. We set out certain provisions of the Letter of Intent as it has been examined during the course of this dispute in some detail.

41. After the heading *"Letter of Intent – Coeur du Nord"*, the Letter of Intent contains the following introduction:-

> *"I would confirm that subject to completion of the final contract documentation it is my intention to award a contract for the above works to Camerons Ltd which will be let under the JCT Standard Form of Building Contract Without Quantities 2011 complete with Client amendments and Contractor Design Portion Supplements for the design and completion of Coeur du Nord along with associated swimming pool, external works and landscaping."*

42. There are then a series of numbered paragraphs which we set out in full:-

> *"1. This letter authorises Camerons Ltd to commence Site Mobilisation, Procurement of Materials, and Engagement of Supply Chain to commence 24th November 2014.*
>
> *2. The Contract Completion date will be the 26th February 2016.*
>
> *3. The scope of works is as defined within the tender documentation and any updated design information received to date.*
>
> *4. Camerons will be reimbursed for all direct and actual costs properly incurred by you after the date of this letter including cancellation costs provided that our aggregate total maximum liability under this letter of intent shall not exceed the sum of £3,764,930 excluding GST.*
>
> *5. Contractor Design Portion Supplements are defined within the tender documentation to date.*
>
> *6. Upon receipt of this letter you will provide certificates of insurance cover confirming that all insurances that you are required to obtain are in place and where appropriate in the joint names of Camerons Ltd and Sir Bob Murray.*
>
> *7. An appropriate Health and Safety Plan will be put in place and you will warrant to us that you are competent and have allocated or will allocate adequate resources to ensure compliance with Health and Safety issues.*

*8. You hereby grant us an irrevocable, non-exclusive royalty free license to use and reproduce all drawings, details, plans, calculations, specifications and other work prepared by you and or on your behalf by any consultants or subcontractors pursuant to the instruction contained within this letter of intent for any purposes whatsoever.*

*9. You will endeavour to obtain on our behalf a Collateral Warranty from sub-contractors who are carrying out a design function in connection with the works pursuant to this letter of intent.*

*10. In accordance with the terms of the draft contract you hereby indemnify us against claims for death or personal injury or damage to real or personal property arising out of or in connection with any activities carried out under this letter or by any act, negligence or default by you or your sub-contractors, suppliers or agents.*

*11. If and when the Contract is entered into between us the terms of the Contract will supersede this letter which will thereupon cease to have any further effect save as set out herein.*

*12. I reserve the right to terminate this instruction at any time and for any reason immediately on written notice where upon you will deliver to us all proprietary material associated with this letter of intent."*

43. The Letter of Intent concludes with the words:-

*"Kindly acknowledge your acceptance of this letter and your agreement to proceed in accordance with its terms by signing and returning the letter."*

44. Under the Plaintiff's signature there is a typed space for the signature of Mr Burton as Managing Director of the Defendant acknowledging receipt and accepting the terms of letter. Mr Burton signed the letter on 11th November but added the following manuscript endorsement to his signature:-

*"The above is agreed and amended by the wording stated within the emails dated the 7th of November 2014, copy attached."*

On 12th November Mr Milnes of IC forwarded the Letter of Intent as countersigned by Mr Burton with attachments to the Plaintiff. At no time did the Plaintiff or his agents seek clarification as to the meaning of Mr Burton's amendments to the Letter of Intent.

**The November 2014 emails**

45. The emails referred to in the manuscript endorsement of the Letter of Intent were both dated the 7th November 2014. The first was timed at 8.50 a.m. Mr Burton wrote to Mr Dent in the following terms:-

*"Following receipt of the Letter of Intent on the 4th November, I can confirm that we will be willing to sign the document on the basis of the following:-*

*(1) Item 4 – to clarify the overall sum of the combined letters of intent is £5,548,172 as per RNJ Cost Overview Report dated the 29th October 2014;*

*(2) Item 5 – CDPS we note the above figure excludes the contractor's risk of 3%. We cannot agree that this item is zero, therefore this item remains to be agreed and once agreed the sum will be added to the above figure;*

*(3) Item 12 – termination should be by notice to terminate within 28 days notice, as we will need time to demobilise from the site;*

*(4) Extra item – the Letter of Intent will be governed by the terms of the proposed standard form of contract and agreed amendments.*

*General note. I understand there may be sums included within the Letter of Intent relating to what will become domestic sub-contractors where we are yet to receive a copy for the quote for verification. An example being Herrington Gate, where the sum of £88k is included but we have no copy of the quote. We will need all quotes and back-ups for review before accepting on a domestic arrangements so could you ask Stephen Box to release the necessary information please.*

*If you could confirm agreement to the above I will then sign the document and email copies back to you appending this email."* ("Mr Burton's November 2014 email")

46. A response was received from Mr Dent on the same day, timed at 13.44 ("Mr Dent's November 2014 email"). That email is copied to Mr Box of RNJ and Mr Milnes of IC. It reads:-

> *"In principle we are comfortable with the points raised given that this relates to an LOI.*
>
> *Please can you add in the additional point we reference to the amended JCT and initial. Can you also amend the termination period to 28 days and again initial and forward the signed LOI to our offices.*
>
> *With regard to the overall combined contract sum I will leave that up to Stephen and David to finalise, albeit I believe that discussions have taken place already so hopefully this will not prove to be contentious.*
>
> *I also note your point in relation to the CDPS and as discussed on Tuesday we will need to give this matter some further thought as to how we wish to proceed, i.e. does the client take the risk or is it passed across to CL. We will revert back to you on this.*
>
> *Look forward to receiving the signed LOI in due course."*

47. It appears to us that the purpose of the Letter of Intent was to enable work to continue on the site uninterrupted. To an extent Clause 1 of the Letter of Intent is somewhat strange given our understanding that much of the work it references had been in progress since May 2014. Given that the authority it grants is limited it is not apparent that the Defendant was authorised by it to go beyond those works stated in it.

48. Clause 3 identifies the scope of Main Works which seem to have been accepted by the parties as capable of ascertainment and would be updated.

49. The cap in Clause 4 appears to us to be the full contract price as certified by RNJ which is surprising as the evidence before us was that such caps in letters of intent are generally limited to between 10% and 20% of the full contract price. Given that *prima facie* the ambit of the Letter of Intent under Clause 1 was relatively narrow in the work it authorised the Defendant to carry out this is again strange. What this appears to demonstrate to us, however, is that the Plaintiff and Defendant both agreed that the full tender price and cap was based on the RNJ Cost Report, which was itself based on the Defendant's figures. The evidence before us, as we refer to later in this Judgment, was that the Plaintiff wanted the cap to remain, notwithstanding

alterations to the design brief and delays in completion. The cap was never agreed by the Defendant as applicable to the whole Project notwithstanding changes but rather to the works provided for in the RNJ Cost Report.

50. Clause 5 of the Letter of Intent defines the contractor design portion supplements as within the tender documentation to date. It is clear, therefore, that the Letter of Intent refers to the tender documentation prepared by the Defendant. This documentation was itself extensive and supported the price quoted by the Defendant. Clause 10 makes reference to *'the terms of the draft contract'* which appears to us to be a reliance upon the terms of the JCT Standard Contract which was then in the process of finalisation.

51. The evidence before us was that the Defendant did not seek legal advice on the Letter of Intent before responding with Mr Burton's November 2014 email. Mr Burton's reference to *'agreed amendments'* appears to us to be those amendments that were attached to the Intermediate Contract and which had been agreed between the Defendant and the Plaintiff previously. In Mr Dent's November 2014 email, he does not seek to clarify what was meant by *'agreed amendments'* and we assume therefore that these amendments and their nature were understood by Mr Dent.

52. We note that in evidence the Plaintiff denied ever having seen Mr Burton's amendments to the Letter of Intent. We find this difficult to accept but, in any event, there was no doubt that the nature of the amendments were understood by the Plaintiff's agents and those negotiating on his behalf. We also note that the Plaintiff refers to the Letter of Intent (in his letter to Mr Burton dated 3rd November 2015) as *"…our signed letter of intent dated 4th November 2014 and the emails attached to it dated 7th November 2014*".

53. Work continued thereafter on the draft JCT Standard Contract which appears to have been largely agreed by the 3rd December save with regard to the Defendant's request for a 3% uplift for contractor's design portion supplements (CDPS), the Defendant's loss of profits on items removed from the contract, the parent company guarantee, and a final price.

54. On the 7th January, Mr Box forwarded by email to Mr Burton copies of schedules identified with contract drawings, and Mr Burton asked one of the Defendant's employees to check that the drawings were the same as those which had formed the basis of the tender. It was established that these drawings were done in November 2014 and that there was a material difference from the February 2014 drawings on which the tender had been based. Those differences would affect the tender price. In his evidence before us, Mr Burton said that these drawings were a surprise to him and he put the contract on hold.

55. By the 21st January 2015, the Defendant had become concerned at the cost implications of the new drawings. In evidence before us, the Plaintiff asserted that the building had not changed. This assertion is difficult to accept. In evidence, the Plaintiff relies on the fact that the 'footprint' of the Project had not changed, but it is clear to us from a review of the comments on the revised drawings circulated by Defendant that the changes were potentially substantial.

56. In January, so we understand, the Plaintiff appointed T&T as his quantity surveyors, but retained RNJ in place as well. The Plaintiff, in his evidence, told us that he engaged T&T as he was *"terrified by what was going on".* It was obvious to him, so he said, that the Defendant was taking advantage. He thought that RNJ were not up to the struggle and that T&T, and particular Mr Laybourn, was able to deal with it.

57. On the 23rd January 2015, Mr Burton emailed Mr Dent listing fifteen issues and suggesting seven proposals to rectify them. One of the issues that he listed was that the Project was falling behind, the reason for which, in part, was that progress on the site was ahead of the design for the interior. He was concerned about a withdrawal by the architect of an instruction to the builder and difficulties that were arising with the CCR process. He says this:-

> *"I must advise that works previously instructed are now uninstructed and will be stopped immediately which will incur us in abortive costs and have severe programme implications".*

He also says at item 9,

> *" I am deeply concerned that owing to current status of the design we are at risk of having to work in both an inefficient and uneconomical manner which will incur us in additional management and other costs which will need to be recovered."*

He also says to Mr Dent:-

> *"David, if you do not act fast the Project will descend into further chaos."*

Mr Dent's response did not appear to engage with the Defendant's concerns and instead asks for the Defendant's contractor's proposals for each of the CDPS elements which "are essential for completing the contract documents".

58. On the 21st February, Mr Burton emailed again to say that the site is effectively on hold and a lot more work needs to be done before the Defendant can commence work again. He indicates that the Project urgently needs a manager. We have not noted any reply to this email.

59. It appears to us that the Project was, as Mr Burton feared, descending into chaos. The Project had not been properly thought out and there were a number of difficult features including the imposition on the Defendant of sub-contractors who did not meet their standards and had no experience of working in Jersey, the engagement of the Plaintiff's daughter as interior designer, and the disinclination to engage with the Defendant's concerns. The Plaintiff, to us, appeared to be focussed on having a fixed price and did not appear to wish to accept the consequences of the change in instructions and the difficulties with the Project.

60. On the 13th March, the Defendant submitted a revised bill of quantities to RNJ in the sum of £7,003,940. That figure was backed up by detailed schedules and the variations to the contract reflected the revised drawings and the developing interior of the finished project.

61. On the 26th March, Mr Burton wrote again to Mr Dent reporting on a meeting with Mr Laybourn, The email refers to Mr Burton's understanding that Mr Laybourn had informed him that he had advised the Plaintiff not to rush into the contract and not to accept any other form of contract other than a lump sum fixed price.

62. On the 27th April, Mr Burton sent another email repeating the points he had made in January and February. We were not shown any response and conclude that there was no response at all. The Defendant was expressing concerns about cost delays and delaying decisions on design.

63. On Friday 8th May, T&T issued RNJ's interim assessment of the 2nd April 2015. This adjusted the Defendant's bill of quantities down to £6,428,127 from the £7,003,940 mentioned above. The Defendant then issued a quotation in the sum of £6,882,796. This suggests to us that both sides of the contract accepted that the price had moved from the price originally anticipated in the RNJ Cost Report to a different price and that, on the assumption that the cap in the Letter of Intent was intended to be a maximum figure for the Project then that cap was no longer realistic and could not be the basis for the cost of the Project. The cap in the Letter of Intent, tied as it is to the RNJ Cost Report, was based on an earlier specification for the Project. It appears to us that it must have been in the Plaintiff's anticipation that new plans and specifications were being drawn up (given that they were sent by Mr Box to Mr Burton on the 7th January), when the Letter of Intent was prepared and signed by the Plaintiff. The Plaintiff must have known that the cap in the Letter of Intent was *de facto* tied to the RNJ Cost Report which itself was based on a

different specification for the Project. On the basis, which we think likely to be the case, that the Plaintiff knew at the time of the Letter of Intent that the specification was in the process of changing or would in the future change (as indeed it did) he could not have believed that the cap would represent the overall and final cost of the Project.

64. On the 2nd June, RNJ was removed from the Project leaving T&T as the sole quantity surveyor. On the 11th June, T&T sent a draft contract to the Defendant complete in every detail apart from the price. A meeting was arranged between Mr Burton and Mr Laybourn to discuss the contract but this was deferred following the death of Mr Burton's father.

65. The deferred meeting took place on the 20th August 2015 in Newcastle ("the August 2015 meeting"). Mr Burton asked for an agenda, but none was provided. According to Mr Burton's affidavit, Mr Laybourn stated that the Defendant was working for a very litigious client and that therefore, as part of the Defendant's commercial offering, they should offer a £500,000 discount which would be the equivalent of legal costs in the event of a dispute and that it would be less painful to settle matters at that stage. Mr Laybourn denies that he made these comments, but he refused to put anything in writing despite Mr Burton's request that Mr Laybourn repeat what he had said at the meeting.

66. On the same day, Mr Burton asked the Plaintiff for a one-to-one meeting but the Plaintiff declined. This suggests to us that the Plaintiff at this point knew that there was to be a difficult conversation with Mr Burton and preferred that to be handled by Mr Laybourn who was *"able to deal with it".* A meeting was held on the 2nd September at the Murray family office in Jersey, organised by the Plaintiff, who was present together with Mr Dent, Mr Laybourn and Godel Architects. It appears from that meeting that Mr Burton agreed to submit a review of the progression of the contract sum from £5.5M to £7M.

67. At the 2nd September meeting, the Plaintiff produced a written complaint about cost escalation, lack of progress on site, and demanding a value for money construction cost. He says in that letter:-

> *"During the summer of 2014, the scheme was heading nearer to £5.5 million. This was regrettably accepted."*

68. The Plaintiff made it clear that he was not willing to accept any increase over £5.5M on the basis that the family's requirements had not changed which appears to us to reflect at the very least an unrealistic position taken by the Plaintiff.

69. On the 25th August, in between the two meetings referred to above, the Defendant issued formal notice that the works had been delayed by 118 calendar days and gave their reasons. Notification was given of additional costs as a consequence of the delay and that the Defendant would recover those costs through the contract.

70. On the 28th September, Mr Burton issued a document known as 'Progression of the Contract Sum' and a revised programme for completion on the 31st July 2016. The above numbers were based, so Mr Burton states, on the agreed OHP recovery, agreed preliminaries, agreed contract sum for the Enabling Works, agreed CCRs and architect's instructions, plus the Defendant's own assessment on known variations and works to be instructed. The forecast contract sum was said to be £7.7 million.

71. On the 14th October, Mr Burton requested that the cap included in the Letter of Intent was increased to account for changes in the scope of work, the CCRs and the AIs issued thus far. He noted in his communication that the scope and value of the works had increased considerably since the Letter of Intent was issued.

72. On the 3rd November, the Plaintiff wrote to the Defendant rejecting the proposed sum of £7.7 million, rejecting any increase in the cap included in the Letter of Intent and requesting a full review by T&T of the Enabling Works contract sum, and blaming the Defendant for the delays.

73. On the 10th November, T&T emailed the Defendant to make significant reductions to the interim valuation number 11. For the first time, it appears, the Defendant was informed that the Letter of Intent was the contract for the Main Works, and that the Defendant was only entitled to be paid on the basis of "*direct and actual costs directly incurred*".

74. On the 16th November, Mr Burton responded to the Plaintiff's letter of the 3rd November at some length.

75. On the same day, Mr Burton issued a formal letter explaining why the Letter of Intent cap is no longer appropriate. In the letter Mr Burton talks about the history of the way that the prices were assessed and how they had increased and, indeed, the warnings given by the Defendant on, for example, the 23rd January 2015 where they stated *"we are concerned that the projected final account is now in excess of £6m"*.

76. Mr Burton went on to say that he had requested in February 2015 that the cap should be raised by the value of the AIs issued and in the future to be issued. The Defendants were committing

themselves to the supply chain on the basis that they were working towards agreeing a contract sum. The letter, and indeed the facts and circumstances on which it is based, tell a story of a Project that was increasing in cost because the specifications were changing. The Defendant was warning about the increase in cost and AIs were being issued on a regular basis which reflected a cost that would take the Project above the cap. The Defendant had responded to requests to provide updates on the contract sum to account for the latest set of AIs issued in July of 2015. The letter then talks about the August 2015 meeting. It says this:-

> *"I attended a meeting with T&T at their office in Newcastle. The meeting lasted 35 minutes whereby Darren Laybourn spoke on behalf of the client, Identity Consult and T&T. In this discussion Camerons were reminded that we were working for a litigious client who did not understand why the contract sum had increased from the figures referred to under the Letter of Intent. The client's current expectation was to therefore pay circa £5.55 million for a project valued by Camerons of circa £6.8 million. Camerons advised that this figure was subsequently out of date. T&T stated that Camerons would be well advised to take a "commercial view" when considering the revised and updated contract sum."*

*77.* The letter goes on to say that at the August 2015 meeting Mr Burton had said that the Defendant would not be bullied or intimidated and Mr Laybourn had then indicated that *"in the absence of a commercial adjustment that they were to revalue the works back to first principles ignoring any previously agreed measured rates, sub-contract quotes or agreed and authorised values on the CCRs and / or AIs".*

*78.* It was on that occasion that Mr Burton had sought a one to one meeting with the Plaintiff but, as we have indicated above, that meeting had been refused. In the letter the Defendant sets out in a schedule broken down into various items the difference between the sums provided for within the Letter of Intent and the latest cost and the difference between them. It is clear that all of the items had significantly increased in cost. To give two examples, the internal doors, as a result of a change to specification, had increased from £83,635 to £145,768. The sanitary ware had increased from £27,000 to £112,907. There were many other examples of the change of price and none led to a reduction in any element. The letter did not suggest that the schedule contained within it was final but referred to it instead as an *"extract of the changes, and by no means comprehensive".*

79. The letter concludes by stating:-

*"The value of variations issued under the architect's instructions now needs to be added to the original sum. Again we advise that we have now placed orders to the level of the original sum of £5,548,172 (as defined under our email of the 7th November 2014) and request an extension. Without this we will be unable to comply with any further architect instructions issued after the date of this letter."*

80. In our judgment this letter provides an accurate summary of what had transpired and how the price had moved.

81. On the 8th December, the Defendant issued their best and final offer for a contract sum. The Plaintiff on the 18th December issued a letter drafted by his English legal adviser terminating the contract and requesting that no further work be undertaken.

82. On the 4th January 2016, Mr Burton responded and said:-

*"We have never had notification of any matters you may consider were delays to the contract caused by Camerons nor have we had any feedback on the rates, prices and make of our assessment of the contract sum / potential final account. Given the hard work put into the Project it does seem odd to terminate without any disagreement on time or money."*

83. On the 21st January, T&T issued a draft deed of termination which was the first indication that the Plaintiff intended to pay for the contract on the direct and actual costs basis as referred to in Clause 4 of the Letter of Intent, rather than the JCT Standard Contract basis of assessment which had been adopted during the progress of the Main Works.

84. On the 17th February 2016, the architect submitted an interim certificate payment and repeated the contents of T&T's letter justifying substantial deductions from the Defendant's claim.

85. On the 24th February 2016, Mr Burton wrote to the Plaintiff suggesting a face-to-face meeting and negotiating to a point of mutual satisfaction. The Plaintiff responded by terminating the Letter of Intent under Clause 12.

86. On the 10th March 2017, T&T issued a report to the Plaintiff which summarised the main areas of change. This, to us, demonstrated the level of costs were rising from the development of the design, and is support in our view for the proposition that the costs for the work were increasing and that this was largely attributable to the Plaintiff.

**The Oral Evidence**

**The Plaintiff**

87. The Plaintiff is clearly an astute businessman with extensive experience in the construction industry. He is a qualified accountant and had been so for almost fifty years. He told us that the Intermediate Contract was for the Enabling Works and that was defined and quantified within an agreed scope of works and an agreed timeframe. The second contract, for the Main Works, was different from the Intermediate Contract. The Plaintiff maintained that they were different projects.

88. We do not accept that at the time that the Letter of Intent was executed this was relating to a completely different contract for the work covered by the Intermediate Contract. By November 2014, as can be seen from the review of the documentary evidence above, the Defendant had been working for approximately six months on the construction of the main house, and the original scope of works covered by the Intermediate Contract had been completed by May of that year. It had been extended in time so that the Defendant could commence work on building the house which was part of the Main Works. The agreement dated 15th April, 2014, was for enabling works, at a contract sum of £535,256, comprising excavation and associated earthworks, piling, services diversion and drainage works to achieve ground levels suitable for subsequent construction of a detached dwelling house. The final account under this agreement as extended to incorporate part construction of the house was for £1,783,242.

89. The Plaintiff told us that the Letter of Intent was an interim document to get the job underway, and that it was always intended to get a formal contract as soon as possible once the price was agreed and the scope of work was known. Again, for the reasons that we mentioned above, we cannot accept that the Letter of Intent was simply *"to get the job underway"* as the job had been in process for a significant period. Nor can we accept that the scope of works was yet to be agreed. The Defendant had been on site since March, and the enabling works completed in May. Since then work had continued unabated on constructing the house.

90. The Plaintiff maintained that the build of the new house never changed and the house always had the same footprint, although the price had escalated very quickly. He felt that he had been taken advantage of and that the Letter of Intent was always expressed as being dealt with on a without profit basis and that the Defendant was accordingly doing work without a profit element. He pointed out there were a large number of provisional sums. He was anxious to sign a JCT Standard Contract for the main works, but he could not do so as the price had quickly moved from £5.5 million to £8.2 million.

91. His assertion that there were very few design changes other than altering the location of two pillars in the master bedroom, and accordingly the increases proposed by the Defendant were unjustified is not in our view borne out by the contemporaneous paperwork. The Plaintiff's quantity surveyor report from the 10th March 2017 summarised the variations implemented by the Defendant from the original tender. The variations related to the sub-structure, roof, stairs and guarding, external walls, windows and external doors, internal doors, floor and ceiling finish, fittings and furnishings, sanitary appliances, hard landscaping, drainage and preliminaries which were among the reasons for the increase in the tender price. Only certain variations to wall finishes, mechanical and electrical and the pool were reasons for a decrease. It is for these reasons that we cannot accept the Plaintiff's assertion that there were very few variations to the original design. There were many, and it is clear to us that they were and must have been understood, by both parties, to have a financial consequence.

92. The Plaintiff was asked in cross-examination why the RNJ cost report had included a sum, 6.5%, for OHP. His response was that the figure was intended to be added to the cost price in the final contract and had nothing to do with the Letter of Intent.

93. When he was referred to the last paragraph of an email from T&T in relation to CCRs and the fact that there is reference there to OHP, the Plaintiff indicated that this was best practice and was agreed in anticipation of entering into the JCT Standard Contract. Nonetheless, he maintained that the understanding between him and the Defendants was that OHP would be paid when the final contract was entered into, and prior to that everything was done as best practice to anticipate the transfer to the final contract. He accepted that it was perfectly reasonable for the Defendant to claim OHP if they had been under contract and he accepted that he would have paid overhead and profit in relation to the value of the Architect's Instructions, but only if the parties had entered into a final contract.

94. The Plaintiff confirmed that he had taken retentions. These were taken automatically and he could not imagine anyone instructing a builder and not holding back a retention. In cross-examination he was asked why the Letter of Intent does not refer to a retention system and he responded that it was not a *"full blown contract"* and not a JCT contract and that he and T&T had *"implied terms into it*". As to the CCR process mentioned above, this was the idea of his representative IC, and it was put in place to ensure that the Defendant had cash. They only represented a small percentage of the overall costs and were designed to cover works which were outside the RNJ Cost Report. It was a process to allow the Defendant pay sub-contractors and he accepted that the overall use of CCRs worked to everyone's benefit.

95. It appears to us that neither of the parties treated the Letter of Intent as representing the entirety of the agreement between them. The Plaintiff asserted that terms were implied and work was clearly taking place that was not preliminary in nature and represented changes to the cap put in place by reference to the RNJ Cost Report. Undoubtedly, it was intended that a final contract would be finalised and signed, but it is equally clear to us that the parties operated *de facto* as if one was in existence in certain material respects. Neither the Plaintiff nor the Defendant treated the Letter of Intent as the definitive and encompassing statement of what went on between them.

96. The Plaintiff told us that he had become increasingly mistrustful and dissatisfied with the Defendant. He was referred in cross-examination to site minutes as the agenda for site meetings which included an item under the heading of "Client care". It is clear from those minutes that the Plaintiff did not raise any dissatisfactions or complaints. We find it strange that a man of the Plaintiff's experience, ability and apparent strength of personality did not explain his concerns and dissatisfactions when they arose. His explanation in evidence was that he wished to maintain harmony between the parties.

97. At some stage in his evidence, the Plaintiff appeared to us to suggest that he was unaware of some of the actions of his agents. For example, he suggested that he had not initially seen the November 2014 emails that had qualified the Letter of Intent, nor was he aware of all of the detail of the actions of IC and T&T. We view some of these assertions with an element of scepticism, and it may be that the Plaintiff had forgotten the precise time in which he had seen some of the documentation and became aware of things. However, be that as it may, there is no doubt that the professionals dealing directly with the Defendant, on behalf of the Plaintiff, were his agents and when something is agreed and accepted it was agreed and accepted on his behalf unless there was a qualification to such an acceptance.

98. The email of the 23rd October 2014 between Mr Burton and Mr Dent was put to the Plaintiff. In that email Mr Burton had raised a number of concerns and made the observation that the client needed to understand that the price would fluctuate and that they were not signing a lump sum contract. Notwithstanding the Letter of Intent, therefore, the Plaintiff must have understood that the Defendant was not prepared to agree a fixed price contract. The Plaintiff accepted in cross-examination that he anticipated that there would be variations and that was why the CCR process had been put in place. He confirmed that the Letter of Intent had been drafted by IC, but also maintains that he would have consulted his legal advisors, Ogier, on it and would never sign a contract worth some £5 million without legal advice. This assertion was not supported by the evidence of his legal adviser. He accepted that there were drawings, but said that the final drawings and the price had not been agreed at that point. He maintained in cross-examination that he had never seen Mr Burton's amendments to the Letter of Intent before, and he did not

accept that the terms saying that it was subject to the JCT contract were known to him. He surmised that his secretary might have received a full copy of everything and filed it, but he had not seen it. He was adamant that he had not seen the manuscript changes and he did not agree them.

99. We find this difficult to accept. In our judgment the Plaintiff did see the Letter of Intent, its amendments and the November 2014 emails at around the time that they were settled. He may have forgotten now in evidence before us that he did so, but we think it highly unlikely that these would have passed him by at the time given the clear oversight that he maintained over what was an important personal project to him and his experience in the construction world. We think it highly unlikely that his agents would have omitted to draw that to his attention but, even were we wrong, there is no doubt that Mr Dent was held out by the Plaintiff as being able to conclude and agree matters on his behalf.

100. In searching for the reality of the contractual relationship between the parties, we must take into account not only what was signed and sent but, because the documentation does not in our view provide clarity and certainty in material respects, we must look to how the parties conducted themselves to identify how they understood the contract and how it would be performed.

101. With regret, therefore, we cannot in the round accept the Plaintiff's assertions as to his understanding, and whilst there were matters still to finalise in our view the true nature of the contract between the parties, as it was understood by them, was that the Letter of Intent as qualified by the November 2014 emails would form the basis on which the parties continued for the time being, but subject to the provisions of the JCT Standard Contract which would undoubtedly have been signed once the final price and other aspects had been agreed.

102. Again in cross-examination the Plaintiff accepted that Godel Architects had done a monthly valuation which was in accordance, as he asserted, with best practice and it was natural to do a valuation and prepare a certificate. He did not mind that it included OHP because they were anticipating or pre-empting the contract that would be signed.

103. It was pointed to him that in the Letter of Intent that sum of £3,764,930 was a reference to the RNJ Cost Report which included profit. His response was that profit would only have been allowed when the final contract had been signed. He accepted that no builder would build without profit. He accepted that the CCRs all featured OHP.

**Lady Murray**

104. Lady Murray told us that she and the Plaintiff wished to get the work started but that not all of the decisions had been made on the design or finishing and so they split the works and the Intermediate Contract for the Enabling Works allowed the Defendant to begin work.

105. She confirmed that the Letter of Intent was drawn up as both she and the Plaintiff wanted to get started.

106. She explained that she found the Defendant's attitude to be strange and they would never help to find alternatives. Clearly there had been disputes between Lady Murray and the Defendant, and she referred to the Defendant's refusal to work with her preferred audio visual company.

107. The CCR process had been suggested by Mr Dent. She accepted that she had originated a number of CCRs but she was not sure why that was. She did not understand how the costs were always increasing.

108. She confirmed that she had seen Mr Burton's email of the 7th November 2014 but did not agree, in cross-examination, that the agreed schedule of amendments referred to in that email was the agreed schedule of amendments relating to the Main Works.

**Mr Milnes**

109. Mr Milnes is a director of IC and has worked there for a number of years and is a member of the Royal Institute of Chartered Surveyors and had been since 2015.

110. Although the matter had primarily been dealt with by Mr Dent also of IC he was too ill to attend trial having had a stroke some three years ago. He had, however, worked under Mr Dent and supported him in his duties relating to the Project.

111. He maintained that the agreed overall price of the contract was £5,548,172 and whilst the price of the work done under the Intermediate Contract had gone up that meant that the residual value went down (as incorporated in the Letter of Intent) resulting in the total cost remaining the same. He indicated that the Defendant had worked alongside RNJ to come up with the figure of £5,548,172 as at 4th November 2014 and, with regard to Clause 4 of the Letter of Intent, he informed the Court that the figure of £3,764,930 was the cost of the remainder of the works after

subtracting the final cost certified for the intermediate contract. Clause 4 of the Letter of Intent allowed a ceiling figure that would not be exceeded unless instructed. He accepted that if there was an Architect's Instruction for additional work that could raise the cost cap. He was referred to the JCT Standard Contract and indicated it was a very different contract from the Intermediate Contract. With regard to the *"extra item"* in Mr Burton's amendments to the Letter of Intent he said that the amendments to the JCT Standard Contract had never been agreed.

112. He referred to his affidavit of the 6th November 2019 in which he had confirmed, amongst other things, that negotiations had continued in connection with the amendments to the JCT Standard Contract and lasted until January 2015. Three points were not agreed, specifically:-

(i) The Defendant's uplift on the contractor design portion supplement;

(ii) An issue relating to the Defendant's losing profit on items instructed as being removed from the draft JCT contract;

(iii) A guarantee from the parent company of the Defendant to the Plaintiff.

113. As to the CCR process, Mr Milnes confirmed that it was not part of a building contract, but rather was a project management tool to enable the client and contractor to understand cost implications. Whilst it was not part of the contract it was good practice to monitor changes and manage the process. He confirmed that the CCR process could work alongside a JCT Standard Contract. Mr Milnes confirmed that if the Letter of Intent had not been in place all of the works would have stopped.

114. Mr Milnes indicated that he remembered sending the email of the 7th November 2014 received from Mr Burton to the Plaintiff, but cannot remember whether they had specifically discussed its content. He did not know whether Mr Dent had done so.

115. He confirmed that some aspects of the parties' conduct was consistent with the JCT Standard Contract, for example, interim valuations being certified and pay less notices. Mr Milnes replied that these things were entirely consistent with a JCT Standard Contract and had been put in place early in anticipation of moving to the JCT Standard Contract.

116. When it was put to him that no problems with regard to the Defendant had been raised by the Plaintiff in site meetings, he said that in his experience the Plaintiff liked to raise things on a one-to-one basis.

**Mrs Katherine Marshall**

117. We heard from Mrs Marshall who was the Plaintiff's legal adviser. She had become involved when the Plaintiff had asked her to look at the amendments to a JCT contract. She had prepared a schedule of amendments.

118. She informed us that she received an email from Mr Dent dated the 26th March 2014 instructing her to advise and to assist the Plaintiff in the finalisation of the terms of the main JCT contract with the Defendant. The proposed amendments were provided to her in that email.

119. She had no recollection of being involved in the Intermediate Contract. She had at no stage held the view that the main JCT Standard Contract with amendments had been agreed in final form. She had responded to the request for advice and had heard nothing further.

120. She told us that she had not been asked to advise in relation to the Letter of Intent. This would seem to conflict with the Plaintiff's recollection and understanding.

**Mr Laybourn**

121. T&T is a construction consultant and deals with project management. Mr Laybourn is a quantity surveyor by profession and a member of the Royal Institute of Chartered Surveyors. He was appointed to assist the Plaintiff in achieving a satisfactory outcome with the Defendant.

122. He was not involved with the project at the time of the agreement of the Enabling Works Intermediate Contract which was entered into prior to his appointment.

123. He had seen the Letter of Intent and informed us that such a letter was put in place to provide a mechanism to commence a project before a full agreement is in place. He was directed to paragraph 11 of the Letter of Intent and explained that in his view that meant the letter would in effect fall away and the executed new contract would take precedence. If a new contract had not been executed then, in Mr Laybourn's view, the Letter of Intent would be the only basis of any contract.

124. His view of Mr Burton's email of the 7th November 2014, and specifically the extra item listed in it, is simply that the parties were intending to get into a JCT formal contract for the main works, but it was never finally agreed. Had one been agreed, then the Letter of Intent would have fallen away.

125. In relation to OHP, Mr Laybourn acknowledged there was no reference to that in the Letter of Intent but he had in the past seen Letters of Intent which made reference to OHP and that it was unusual for such not to be included, and generally an amount for OHP would be included in a Letter of Intent.

126. He was referred, in cross examination, to an email from T&T to the Defendant of the 23rd November 2015, referring to it having been agreed *"that a percentage of 6.5% would be added to variations to include for Camerons overhead and profit…".* Mr Laybourn expressed the view that the 6.5% was a basis of the parties moving to a JCT Standard Contract for the Main Works. That is not provided for within the Letter of Intent. He was also referred to the RNJ Cost Report where provision is made for overheads and profits.

127. With regard to the CCR process, Mr Laybourn agreed that it was good project management and parties could at any point then record changes. The CCR process records any change whether from the contractor or client.

128. Mr Laybourn informed us that much had to be negotiated to finalise a contract and that certain essential elements were missing from any agreement for the final contract in this matter. With regard to the 26th August 2015 Meeting between Mr Laybourn and Mr Burton, Mr Laybourn explained to us that it had been arranged by T&T on behalf of the Plaintiff to raise concerns with Mr Burton with regard to price and scope. In effect, he agreed that the purpose of the meeting was to obtain a reduction in the contract price otherwise the Plaintiff would terminate the contract. Mr Burton did indeed seem rather surprised at this. Mr Laybourn, in his affidavit of the 1st November 2019, had explained the concerns that the family had with some of the Defendant's pricing and that all of the prices were subject to various caveats and qualifications. It was put to him that Mr Burton had set out four different cost options in an email of the 8th December 2015, but Mr Laybourn said that they were all to be adjusted to reflect variations and provisional sums and therefore even if the Plaintiff had accepted one of them he would not have known the final price. A certain amount of evidence provided by Mr Laybourn dealt with a number of allegations of wrongdoing made by the Plaintiff against the Defendant in respect of which Mr Laybourn gave at best indirect or hearsay evidence. We do not find any of those allegations of wrongdoing established.

129. Mr Laybourn disputed Mr Burton's assertion that he had demanded a decrease of £500,000 at the August 2015 meeting.

**Mr Burton**

130. Mr Burton gave evidence on behalf of the Defendant.

131. He confirmed that the Defendant had worked with RNJ in relation to the RNJ Cost Report but that, in his view, this was always subject to possible increases. He believed that there were in fact three contracts. The first was the contract for the Enabling Works (the Intermediate Contract), the second was the Letter of Intent modified by his email of November 2014, and the third was the JCT Standard Contract for the main works.

132. In his reference to the Letter of Intent, Mr Burton said that this was only intended to last for a short time whilst the main contractual documentation was finalised. The third contract, the JCT Standard Contract, would be a full contract as was the Intermediate Contract. He was asked about the amendments contained in the Letter of Intent in his email of the 7th November 2014. With regard to item 4, he indicated that the Defendant was working on an aggregate sum and they wished to link the RNJ Cost Report of the 29th October 2014, which provides for OHP, and contains a re-measurement clause.

133. As to item 5 from his email, Mr Burton explained that CDPS remained to be negotiated at a later date.

134. As far as the "extra item" was concerned, he thought that this was to protect both parties and put them in a position not dissimilar from the Intermediate Contract. He expressed the view that the agreed amendments referred to in the November 2014 email were those amendments that had been agreed in respect of the Enabling Works contract. He had not taken legal advice and matters were dealt with in-house.

135. When Mr Burton received the Letter of Intent he reviewed it but felt that it was unusual in that the value it gave was £3.5 million for what would have been a four week period. Normally Letters of Intent were restricted to 10% of the total value of the works. The Letter of Intent, so far as Mr Burton was concerned, was to enable continuity of work from the 24th November so that the Defendant could remain on site until a formal contract had been executed.

136. We also agree that the Letter of Intent was an unusual document and that it was expected that the full JCT Standard Contract would be in place within a month. It was unusual in part because the Main Works had already been in progress for some six months under the JCT intermediate contract, and, as we have said elsewhere, the work was continuing. The Letter of Intent makes no direct reference to the RNJ Cost Report, but the price incorporated in it is clearly the same aggregate sum as shown in the RNJ Cost Report and it is not therefore difficult for us to determine that the contract price was agreed and it is quite straightforward to see how the contract price was calculated. The figure of £3,764,930 is to be found in the RNJ cost overview of the 28th October 2014, amended in manuscript on the 4th November 2014 which shows a total cost of £5,548,172. The amount paid under the Intermediate Contract was £1,783,242. We also accept that the agreed amendments referred to by Mr Burton are those incorporated into the Intermediate Contract, as they were related to a full JCT contract, not just an Intermediate contract.

137. Mr Burton accepted that the Defendant was involved in the original pricing of the project and worked with RNJ on the cost report and broadly agreed with the pricing set out in it. He believed at the time that the house could be built for £5.5 million although he maintained that it was not, and was never intended to be, a fixed price.

138. We have no difficulty in accepting that the price of £5.5 million was carefully worked through with RNJ and was a genuine attempt to assess the cost of the Project. Mr Burton had, in our view, made it clear to Mr Dent, however, that the price was not fixed. We do not see how it could have been given that so much remained to be decided on with regard to the works. Mr Burton was asked about Mr Laybourn's email of the 1st March 2016 in which Mr Laybourn had sought certain categories of information to review the Defendant's final account. The final account had been based on the Letter of Intent and Mr Burton said that this was on an *"agreed value basis".* He was then asked where it states in the Letter of Intent that costs would be valued on that basis, and he responded that it would be governed by the JCT Standard Contract. He was pressed as to where the basis of a calculation on an "agreed value basis" is to be found in the Letter of Intent, and he responded that the Letter of Intent, taking on board the amendments that he had added to it says *"it will be governed by the standard form of contract. All parties proceeded on that basis. The contractual mechanism was the AI".*

139. In his evidence, he also stated to us that his amendments were intended to achieve that the Letter of Intent would be governed by the JCT form. He had wanted a JCT contract and he wanted the Letter of Intent governed by JCT to provide for continuity. When the final contract had been settled, the Letter of Intent would have fallen away.

140. Mr Burton also indicated that in his view paragraph 4 of the Letter of Intent should be read as taking out the reference to all and direct and actual costs and superimposing the agreed value basis because this is what had been qualified by his reference to a JCT contract.

141. It is fair to say that in his response to a number of questions put to him by counsel and cross-examination, and indeed by the Court, Mr Burton was unable to assist as to how a JCT form of contract should be read in conjunction with the Letter of Intent, which might take priority and which applies where there is a conflict.

142. Mr Burton accepted that the JCT Standard Contract had not been finalised and he further accepted that the agreed value basis of calculation only in fact applied to the AIs. The Court asked Mr Burton whether he accepted that if something was not covered by an AI then paragraph 4 of the Letter of Intent applied, a proposition which he appeared to accept.

143. We accept that he was genuinely shocked at the meeting with Mr Laybourn on 20th August 2015 and that Mr Burton's version of what transpired at the meeting, specifically that he was asked to give a substantial discount, was correct. Mr Burton gave evidence that he had been on good terms with the Plaintiff to the extent that the Plaintiff had entertained Mr Burton and his wife on more than one occasion, and yet had no inkling of what Mr Laybourn told him at that meeting. So much so that Mr Burton could not believe that Mr Laybourn was acting on the Plaintiff's authority.

144. Much of the Plaintiff's closing submissions to us sought to highlight inconsistencies and lack of clarity in some of Mr Burton's answers and in particular to an error in Mr Burton's first affidavit dated 9th March 2017 in support of the Defendant's application to arbitrate the disagreement over their final account. This, it was suggested, undermined his credibility and we should treat his answers with caution.

145. Having heard the evidence of Mr Burton at some length and, indeed, his cross-examination, we do not accept the Plaintiff's invitation in that regard. In our judgment, whilst Mr Burton's evidence was not perfect and clearly in his affidavit errors had been made, his evidence before us appeared to be frank and honest as was his correspondence.

**The experts**

146. We heard a significant amount of expert evidence and, indeed, have read the reports of the experts carefully. They do not, to our mind, assist us as much as might be hoped, because the

basis of the valuation or assessment of costs had not been agreed. There were quite simply conflicting reports applying different bases of calculation.

147. We do not suggest by these observations that the experts who gave evidence did anything other than offer their own expertise honestly to the Court. But they appear to have based their calculations and indeed much of their evidence applying the thesis argued for by their respective clients. We shall come on to the method of calculation in due course.

**The Law**

**Interpretation**

148. The principles that the Court applies in interpreting contracts are well known.

149. In The Parish of St Helier v The Minister for Infrastructure [2017] JCA 027, the Court of Appeal at paragraphs 12 et seq of the Judgment said this:-

> ***"12. The Royal Court set out extensively the principles applicable to the construction of documents, primarily by reference to the decisions of this Court in Trilogy Management v YT Charitable Foundation (International) Ltd [2012] JCA 152 and La Petite Croatie Ltd v Ledo [2009] JCA 221. Those principles, which are well-known, may be stated as follows:***
>
> ***(1) the aim is to establish the presumed intention of the makers of the document from the words used;***
>
> ***(2) the words must be construed against the background of the surrounding circumstances or matrix of facts existing at the time of execution of the document;***
>
> ***(3) the circumstances relevant and admissible for this purpose are those that must be taken to have been known to the makers of all parties to the document at the time, and include anything which would have affected the way in which the language of the document would have been understood by a reasonable man;***
>
> ***(4) evidence of subjective intention, drafts, negotiations and other matters extrinsic to the document in question is inadmissible as an aid to***

***construction, but may be admitted to resolve a latent ambiguity (that is to say, an ambiguity that only becomes apparent when otherwise clear words are related to the surrounding circumstances);***

***(5) evidence of events subsequent to the making of the document is inadmissible as an aid to construing the original meaning of the document;***

***(6) words must be read in the context of the document as a whole;***

***(7) words should so far as possible be given their ordinary meaning; and if the language is unambiguous the Court must apply it unless the result is commercially absurd;***

***(8) if the words used are ambiguous, in the sense of being capable of more than one construction, the court should adopt the construction that appears most likely to give effect to the commercial purpose of the agreement and to be consistent with business common sense; but there is a correlation between the degree of ambiguity and the persuasiveness of a common sense construction, so that the greater the ambiguity the more likely it is that the court will adopt a construction based on business common sense, and vice versa.***

***13. Subject to one point, both parties accepted that the Royal Court had correctly stated the relevant principles. Advocate Williams suggested, however, that the recent decision of the United Kingdom Supreme Court in Arnold v Britton [2015] UKSC 36 was of relevance to the question of adopting a construction by reference to business common sense. Although the majority judgments in that case certainly do discuss that question, in particular between paragraphs [16] and [22], they do not appear to me to contain anything that contradicts or goes further than the principles I have stated above. It is nevertheless worth quoting, because the point it contains was one relied on by Advocate Williams, part of paragraph [19] of the majority judgment, delivered by Lord Neuberger of Abbotsbury PSC:***

***"The third point I should mention is that commercial common sense is not to be invoked retrospectively. The mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language. Commercial common sense is only relevant to the extent of how matters would or could have been perceived by the parties, or by***

***reasonable people in the position of the parties, as at the date that the contract was made."***

150. In terms of incorporating a document (in this case the JCT Standard Contract) by reference, in Calligo Limited v Professional Building Systems CI Limited [2017] 2 JLR 271, there is an example of where the court has incorporated a document by reference. In identifying whether standard terms and conditions issued by the plaintiff formed part of the contract, the court took the view that they had been incorporated having been expressly referred to in two of the other contractual documents. The court, at paragraph 131, said this:-

***"Accordingly, we also find that the STC's of Calligo form part of the contract. They were referenced in every iteration of SOW001 and in SOW002 and we cannot think that Mr Le Tiec did not know that he would be bound by them. Whether or not he read them in detail we cannot say but the evidence that we heard was to the effect that it is normal practice that terms and conditions are referenced by way of a hyperlink and in our view Mr Le Tiec would have been aware of this."***

151. In Sabah Flour and Feed Mills v Comfez Limited [1988] 2 Lloyds Reports, the Court at page 3 of the Judgment said this:-

***"For Mr Gruder reliance is place on the case of Adamastos Shipping Co Ltd v Anglo-Saxon Petroleum Co Ltd [1959] AC 133. Two passages were relied on, the first in the speech of Viscount Simonds at page 155 and the second in the speech of Lord Keith at pages 178 and 179. Those passages lend support to the proposition that if an incorporated document contains provisions which conflict with provisions of the written document, then the terms of the written document would, in the ordinary way, prevail. For my part I am prepared to accept that that is one rule of construction which may be applied in circumstances such as these. But it is not the only rule of construction, and no rule of construction as far as I know is a rule of such importance that it may be regarded as paramount. In the present case, unlike the Adamastos case, the conflict is not between what the parties have written and the incorporated documents. It is a conflict between the provisions of the incorporated documents themselves, and at the very lowest it can, in my judgment, be said that the position is not clear."***

152. In RTS Flexible Systems Limited v Molkerei Alois Muller Gmbh & Company KG (UK Production) [2010] UK SC 14, at paragraph 47, the Court said:-

***"47. We agree with Mr Catchpole's submission that, in a case where a contract is being negotiated subject to contract and work begins before the formal contract is executed, it cannot be said that there will always or even usually be a contract on the terms that were agreed subject to contract. That would be too simplistic and dogmatic an approach. The court should not impose binding contracts on the parties which they have not reached. All will depend upon the circumstances. This can be seen from a contrast between the approach of Steyn LJ in the Percy Trentham case, which was relied upon by the judge, and that of Robert Goff J in British Steel Corporation v Cleveland Bridge and Engineering Co Ltd [1984] 1 All ER 504, to which the judge was not referred but which was relied upon in and by the Court of Appeal."***

153. Although not available to the parties when the matter was discussed before us, we have also had the benefit of the Judgment of Trico Limited v Anthony Buckingham [2020] JCA 067 in which the Court of Appeal considered the construction of a document called "A Side Letter" and, at paragraph 56, said this:-

***"56. We consider it incontrovertible that the terms of the Side Letter are not felicitously drafted and it is unsurprising that the proper construction is disputed, on the bases summarised above. In proceeding to approach a question of the construction of the terms of a contract, we have noted the views of the Supreme Court, as set out by Lord Hodge in Wood v Capita Insurance Services Limited [2017] AC 1173. He said this:-***

***"10. The Court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focussed solely on a passing of the wording of the particular clause and that the Court must consider the contract as a whole and, depending on the nature, formality and quality of the drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning….. Lord Wilberforce affirmed the potential relevance to the task of interpreting the parties contract of a factual background known to the parties at or before the date of the contract, excluding evidence of the prior negotiations. When in his celebrated judgment in Investors Compensation Scheme Limited v West Bromich Building Society [1998] 1 WLR 896, 912 – 913 Lord Hoffman reformulated the principles of contractual interpretation, some saw his second principle, which allowed consideration of the whole relevant factual background available to the parties at the time of the contract, as signalling a break with the past. Lord Bingham of Cornhill in an extra judicial writing, 'A***

***New Thing Under the Sun? The Interpretation of Contracts and the ICS Decision' (2008) 12 Edn LR 374, persuasively demonstrated that the idea of the Court putting itself in the shoes of the contracting parties had a long pedigree.***

***11. Interpretation is, as Lord Clark JSC stated in the Rainy Sky case (para 21), a unitary exercise; where there are rival meanings, the Court can give weight to the implication of rival constructions by reaching a view as to which construction is more consistent with business common sense. But, in striking a balance between the indications given by the language and the implications of the competing constructions the Court must consider the quality of drafting of the clause….. and it must also be alive to the possibility that one side may have agreed to something with which hindsight did not serve his interests…. Similarly, the Court must not lose sight of the possibility that a provision may be a negotiated compromise or that the negotiators were not able to agree in what precise terms.***

***12. This unitary exercise involves an iterative process by which each suggests that interpretation is checked against the provisions of the contract and its commercial consequences are investigated….. To my mind once one has read the language in dispute and the relevant part to the contract that provides its contexts, it does not matter whether the more detailed analysis commences with the factual background and the implication of rival constructions or a close examination of the relevant language in the contract, so long as the Court balances the indications given by each.***

***13. Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation. Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement. The extent to which each tool will assist the Court in its task will vary accordingly to the circumstances of the particular agreement or agreements. Some agreements may be successfully interpreted principally by textual analysis, for example because of their sophistication and complexity and because they have been negotiated or prepared with the assistance of skilled professionals. The correct interpretation of other contracts may be achieved by a greater emphasis on the factual matrix, for example because of their informality, brevity or the absence of skilled professional assistance….."***

***57. We are perfectly content to adopt this thorough and considered exegesis as part of the law of Jersey. A constant, to which Lord***

***Hodge adverts, is that many issues in the construction of contracts are subtly different. Here, the creation of the Side Letter and the advisory agreement as part of the same negotiations may add an unusual complexity. For the reasons which we now address, we consider that the creation of the Side Letter falls squarely within Lord Hodge's category of contracts, the correct construction of which may be achieved by greater emphasis on the factual matrix, because of their informality, brevity or the absence of skilled professional assistance….."***

This approach, articulated by the Court of Appeal, seems to us to be apposite as the Letter of Intent is brief; its' purpose was to enable work to continue uninterrupted: and it is not in any sense a contract appropriate for the remaining work to be done on the Project. Further, Mr Burton's amendments to the letter were informal and prepared without any skilled professional assistance. There are conflicts between the Letter of Intent and the November 2014 emails. Thus we place a greater emphasis on the factual matrix in our interpretation of the contract entered into between the parties.

154. It seems to us that the correct approach, taking the principles from the above cases, should be that if there is clear documentation which is designed to encapsulate the agreement between the parties then any provisions which are clearly worded should be applied. But if provisions are not clear, or indeed opposed by other alternative words within the documentation, then we must look at the position more broadly to identify the nature of the understanding between the parties. One important way of understanding the realities of any contract between the parties is to look at how they operated in carrying out any contract.

**Formation**

155. The constituent elements of a Jersey contract are well understood and were set out in the case of Selby v Romeril [1996] JLR 210, in which the court said this:-

***"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'."***

156. We will come on to deal with some of the elements identified in Selby v Romeril.

157. It is clear that a contract must be sufficiently certain and an agreement to agree is insufficient. In the Minister of Treasury and Resources v Harcourt Development Limited [2014] (2) JLR 353, the Court of Appeal said, at paragraph 17 of that Judgment:-

***"17. He further submits, we think correctly, that the Jersey authorities, set out and discussed by the Bailiff in his judgment (2014 (1) JLR 472, at paras 29 -36), are clear that neither an agreement to agree nor an agreement to negotiate is enforceable in Jersey law (see Osment v St Helier (9) (see particularly 1975 JJ at 212-215); Jersey Automatic Co Ltd v H A Gaudin & Co Ltd (6) (1980 JJ at 166-167); and Bennett v Lincoln (3) (2005 JLR 125, at paras 34 – 36). The reason such agreements fail is that there is no sufficiently certain 'objet' for there to be a Jersey contract. Reference was made to dicta in the decision of the Royal Court in Mirpuri v Bank of India (7) ([2010] JRC 129 , at para 29), where it was held that a term 'to monitor the deposits in just the same way as it had done in 2005' and 'to protect the margin' was 'not sufficiently certain. It would not necessarily be possible from such a vague term to establish whether the plaintiff was or was not in breach of the term in any particular case."***

**Consent**

158. Given the issues between the parties it is necessary to consider the question of consent. There is no doubt that both the Plaintiff and the Defendant thought that they were in a contractual relationship with each other but, in the evidence before us, the Plaintiff's assertion as to what the contract comprised is different from that of the Defendant. We must accordingly deal with the question of consent and what the parties consented to as part of establishing whether or not there was a valid contract and if so what its terms were. How then do we determine that question? Do we turn first to the expressions of historic intent of one party or another, and together with supporting evidence if any, seek to determine, subjectively, what that party intended? Or do we look at the circumstances in the round and ask ourselves what a third party looking at the paperwork in the matter and how individuals behaved and their evidence would think that the parties intended for their contractual relations? In other words do we assess the matter using the subjective test or the objective test? It may be in some circumstances that that would produce the same result but not necessarily.

159. In dealing with this matter, as we think is necessary, we are acutely aware that there are conflicting lines of authority and indeed arguably conflicting cases within the Court of Appeal itself on this very issue. We must therefore look at some of the arguments that have been placed before the Court and some of the cases to which reference has been made. We deal with these in date order.

160. There appear to be a number of authorities dating from the 1960s in which the Court clearly applied the objective approach to identifying the question of consent in contract. In Leech v Leech [1969] JJ at 1118 Ereaut, Deputy Bailiff, said this:-

***"We have considered nevertheless whether we can, by applying an objective test to the statements and conduct of the parties and their lawyers and by endeavouring to draw a reasonable inference from the whole of the circumstances leading to the settlement, impugn to the parties an intention that one or the other of them should take the disputed items. We have regretfully concluded that we cannot."***

161. In Mobil Sales and Supply Corp v Transoil (Jersey) Limited [1981] JJ at 163, Ereaut, Bailiff, in the context of a contractual dispute said:-

***"The question which the Court has to determine is not what the parties had in their minds but what reasonable third parties, "disinterested spectators", would infer from their words or conduct. It has to determine "the sense of the promise", that is to say, whether a sensible third party would take the agreement to mean what A understood it to mean or what B understood it to mean, or whether indeed any meaning can be attributed to it at all. If whatever a party's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon the belief enters into the contract with him, the man must thus conducting himself will be equally bound as if he had intended to agree to the other party's terms, notwithstanding that there had been a material mistake."***

162. In La Motte Garages Limited v Morgan [1989] JLR 312, Hamon, Commissioner, in considering the issue of mistake, at page 316 of the Judgment said this:-

***"Mistake has long been accepted as negativing agreement. Pothier puts it this way (1 Traité des Obligations, paras 17-18, at 21-22 (1821 ed)):***

***"17. L'erreur est le plus grand vice des conventions: car les conventions sont formées par le consentement des parties; et il ne peut pas y avoir de consentement lorsque les parties ont erré sur l'objet de leur convention….***

***18. L'erreur annulle la convention…."***

***It is perhaps somewhat disappointing that neither party chose to mine the rich lodes of our ancient French law but to rely on English law. It may well be that their conclusions would have been the same if they had."***

163. He then went on to say, on the same page:-

> ***"As to the mistake, we see it as a mutual mistake. If we have to ascertain 'the sense of the promise' it seems to us that we must ascertain by the objective test what a reasonable man would have assumed it to mean."***

164. From these excerpts it seems clear that for a protracted period, and indeed from the time when judgments of the Court were reported from the 1950s, the Royal Court applied an objective test to the analysis of contractual intent.

165. There matters on the question of the correct test stood until the Court of Appeal judgment in Marett v O'Brien [2008] JLR 384 (Sumption, Nutting, Pleming JJA). At paragraph 55 et seq of that judgment the Court said:-

> ***"55. As noted above, Advocate Sinel submits that there was no consent, under Jersey law, and therefore no enforceable compromise agreement. 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).***
>
> ***56. There are four elements necessary to constitute a contract under Jersey law: (i) capacity; (ii) consent; (iii) cause; (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 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 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 tansl., 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); 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 subjective 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.***

***61.*** ***Cause is the basis of or the reason for the contract. It is thus constituted by the interdependence of promises or the mutual performance of obligations. Hence, where the basis upon which a party enters an agreement (the cause) either fails or never comes to pass at all, the agreement is, according to Jersey law, null (Pothier, op cit, paras 42-46, at 24-28; Domat, at 35; and French Civil Code, art 1131).***

***62.*** ***Objet is a party's obligation of performance under a contract (Pothier, op cit, para 53, at 32; French Civil Code, art 1126). It is what a party promises to do under the contract by way of performance / discharge of his or her obligations. If there is to be objet under a contract, the promised performance must be: (i) certain; (ii) possible; and (iii) lawful.***

> ***63. As to certainty, the promised performance must be sufficiently certain if this particular requirement is to be satisfied (see Selby v Romeril (34), where the contract failed because the objet was not defined or was uncertain). Alternatively, objet must be capable of determination (see Groom v Stock (8) (employee's right to bonus unenforceable because no means provided for its determination)).***"

166. Here was an unambiguous statement from the Court of Appeal that the "***Jersey law of contract determines consent by use of the subjective theory of contract***". Generally, such a statement from that court would be taken as settling the matter, at least until the matter was appealed to a higher court. However that did not occur.

167. It is to be noted in Marett that no argument as to the basis on which consent is to be established was put before the Court. The Court of Appeal simply proceeded on the basis of a summary of the position put forward by one side which was not objected to by the other. Accordingly, and with the greatest of respect to that court, it does not seem to us to be persuasive in considering the correct approach in this case.

168. We are supported in that view that the above authority is and was not binding on the Royal Court because the point on which the Court proceeded was not argued before it by the case of FSHC Group Holdings Limited v GLAS Trust Corp Limited [2019] EWCA Civ 1361; 2020 1 All ER in which the Court of Appeal of England and Wales, at paragraph 136 of the judgment in a case involving the English law of contract said this:-

> ***"Subsequent authorities have clearly established that the suggestion which attracted the Court of Appeal in Joscelyne v Nissen is a correct approach and that a court is not bound by a proposition of law which was not the subject of argument because it was not disputed in an earlier case (even if that proposition formed part of the ratio decidendi of the case). In Re Hetherington (decd), Gibbs v McDonnell [1989] 2 All ER 129 at 133, [1990] Ch 1 at 10, Sir Nicolas Browne-Wilkinson V-C held that, as a first instance judge, he was entitled to decline to follow even a decision of the House of Lords in which a proposition of law necessary for the decision was not disputed. After a review of the authorities, he concluded that:***
>
> ***"…the authorities therefore clearly establish that even where a decision of a point of law in a particular sense was essential to an earlier decision of a superior court, but that superior court merely assumed the correctness of***

***the law on a particular issue, a judge in a later case is not bound to hold that the law is decided in that sense."***

***See also R (on the application of Kadhim) v Brent London BC [2001] QB 955, [2001] 2 WLR 1674 (para [33]); Rawlinson v Hunter Trustees SA (as Trustee of the Tchenguiz Family Trust) v Director of the Serious Fraud Office (No 2), Tchenguiz v Director of the Serious Fraud Office [2014] EWCA Civ 1129, [2015] 1 WLR 797 (para [43]).***"

169. It might, of course, be argued that the same criticism could apply to the earlier cases that are mentioned above. The objective / subjective argument was not argued before those Courts. That is indeed the case. However, the distinction between Marett, and the other, earlier cases before the Royal Court, is that in Marett, with the greatest of deference to the highly eminent judges of appeal sitting in that case, none of them were steeped in Jersey law. In the cases before the Royal Court, which span decades, the Court in each instant was presided over by judges of law who were qualified in the law of Jersey and had previously practised as lawyers here. It is arguably the case that the fact that issues of consent were not addressed to the Court was of little moment because the judges would have proceeded to apply what they knew to be the received understanding of the approach of Jersey law on such matters.

170. The next judicial contribution to the law of Jersey in this regard is to be found in Flynn v Reid [2012] (1) JLR 370 where William Bailhache, Deputy Bailiff (as he then was) touched on the issue of *"true consent"* or *"adopting a French word "volonté"".* In an orbiter observation the Court said this at paragraph 21:-

***"In Selby v Romeril (26), this court set down four requirements for the creation of a valid contract in Jersey, namely the consent of the party undertaking an obligation; his legal capacity to enter into the contract; an 'objet' or subject matter of the contract; and finally, a legitimate 'cause' or reason for the obligation to be performed. We do not in any way dissent from that summary of essential requirements, but we add that, in relation to the requirement for consent of the parties undertaking the obligations, there must be shown a true consent, a true desire, or, adopting the French word, "volonté" that the arrangement become legally binding between them."***

171. The issue of the subject / objective approach was again touched on by the Court of Appeal (differently constituted (Crowe, Logan Martin & Birt JJA) in the case of Home Farm

Developments Limited and Others v Le Sueur [2015] JCA 242, in which the Court, in considering the question of a unilateral *erreur*, at paragraph 44-47 inclusive said this:-

> ***"44. Mr Holmes argues that there was no meeting of minds since he was in erreur 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."***

172. The Court went on to say in a postscript at paragraph 59, in relation to Marett, the following:-

> ***"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."***

173. The question fell to be addressed squarely at first instance in Calligo Ltd v Professional Business Systems CI Ltd [2017] (2) JLR 271(Le Cocq, Deputy Bailiff, (as he then was)) in which the Court considered the case law on the matter of consent, referred to the judgments set out above, and noted at paragraph 22 of the Judgment:-

> ***"22. Accordingly there appears to us to be two competing lines of authority. Those of the older cases which clearly applied an objective test in assessing the question of consent and Marett v O'Brien (based in part upon Selby v Romeril) which puts forward a subjective test."***

174. Then, at paragraphs 24 et seq, the Court said:-

> ***"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 on the objective test or 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 to suit 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 in so far as it relates to consent is to be established by reference to what the parties did and/or said or the surrounding circumstances which point to what they intended. It would it seems to us 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 in 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 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 adopt 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."***

175. In Foster v Holt [2018] (1) JLR 449 (William Bailhache, Bailiff), the Royal Court differed in its view from the Court in Calligo, criticising the fact that the authorities provided to the Court in Calligo were not complete, and indicating that the Court in that case should have found itself bound by other judgments of the Court, particularly Marett, finding the postscript in Home Farm Development Limited puzzling. Calligo is further criticised for lacking reference to the maxim *la convention fait la loi des parties* or to *erreur* or to "*deception d'outre moité", "volonte" or "dol".* The Bailiff suggested that the Court, in Calligo, in holding that the test for whether a party consented to a contract was objective and not subjective, was to remove the cornerstone on which those various principles are built. At paragraph 13 of the judgment, having made the points mentioned above (to which we concede we have not done justice in that brief synopsis), stated as follows:-

> ***"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."***

176. As we have said, in Foster and Holt, the Court was of the view that it was not open to the Court in Calligo to disregard Marett, a judgment of the Court of Appeal. For the reasons that we have set out in paragraph 168 and 169 above, we respectfully disagree with that assertion. It was, in our judgment, open to the Court in Calligo to disregard Marett as the point had not been argued before it.

177. There the question of consent would have remained, but for the judgment of the Court of Appeal in Booth v Viscount of the Royal Court [2019] JCA 122 in which the judge giving the lead Judgment, Martin JA, in what is described in the Judgment as an Excursus (between paragraph 43 and 79 of the judgment), carried out a learned and, to our mind, thorough and compelling examination of the argument concerning whether or not the subjective or objective test should be applied to the issue of consent. Whilst we accept of course that the Excursus is not part of the *ratio decidendi* of the decision and is not binding (and indeed the point was not fully argued) we adopt with gratitude that careful analysis. The Excursus dealt with, amongst other things, the question of *la convention fait la loi des parties.* It quotes from Incat Equatorial Guinea Limited v Luba Freeport Ltd [2010] JLR 287, a Judgment of William Bailhache, then Deputy Bailiff, and goes on, at paragraphs 57 and 58:-

> ***"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 <u>Basden Hotels Ltd v Dormy Hotels Limited</u> [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."***

178. As indicated above, the time honoured and central maxim of Jersey in contract law, *la convention fait la loi des parties*, was cited in <u>Foster v Holt</u> as support for the subjective approach to the issue of consent. We do not think that it does lend support in that way. The

maxim was well-known by all practitioners of Jersey law and would undoubtedly have been in the minds of the Court in the various cases cited above in connection with consent. In other words, it was thought by the judges to be equally in play whether the subjective approach to the issue of consent was taken or whether the objective approach was applied. It seems to us that the maxim simply means that in the law of Jersey contract a high level of regard and value is placed on the terms of a contract intended by the parties to it once those terms have been identified. It, the maxim, has nothing to say about how intention or consent is to be determined, by what test or against what standard – the subjective or objective approach.

179. At paragraph 65 the Excursus went on to say:-

> ***"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."***

180. In addition, the Excursus referred to the text, Comparative Law in Practice: Contract Law in a Mid-Channel Jurisdiction (2016) by Professor Fairgreave at paragraph 66-68 of the Excursus in the following terms:-

***"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."***

181. This, to us, appears to point to a practical difficulty with the subjective approach.

182. At paragraph 73 of the Excursus, Martin JA said:-

***"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."***

183. It is right to observe that William Bailhache, Bailiff, sitting on the same Court, indicated that in his view the Court should not consider itself well-placed to reach conclusions on the issue of the subjective or objective test. He indicated that he had also in past cases expressed views which were inconsistent with the conclusions of Martin JA in the Excursus.

184. It is also right, in order to reflect the current state of discussion on this important question, to note that Sir Philip Bailhache in his article "More on Subjectivity in the Formation of a Contract" in the Jersey and Guernsey Law Review was critical of the excursus in Booth. In his article he considers the Roman law roots citing from Professor Nicholas' work "An Introduction to Roman Law":-

***"The Roman lawyers, with their habitual disregard of questions of evidence, gave a little attention to matters such as this, but seemed tacitly to assume a subjective interpretation, qualified only by such principles as that a man may not profit from an ignorance which comes from his own gross carelessness."***

185. Sir Philip states that the approach of Roman lawyers, which is based in the concept of autonomy of the will, is consistent with the work of Pothier who remains influential in the Jersey law of contract. The learned author, a former Bailiff, analysed and commented upon the

Excursus. We do not in this judgment seek to address the arguments put forward in his learned article.

186. Irrespective, however, of what Pothier might have said and the attitude that he might have had, it was Sir Philip himself in Selby v Romeril who says:-

> ***"It is true that Pothier has often been treated by this court as a surest 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 frozen in the aspic of the eighteenth century."***

187. It is true that the court then followed that statement with an analysis of the position under more modern French law but in our judgment in looking for the answer to this question of the subjective or objective approach under Jersey law we are not constrained to fix our thinking on the position that may or may not have been taken by Pothier.

188. In this connection we refer to the observations of Birt, Deputy Bailiff (as he then was) in re Amy [2000] JLR 80 at pages 93 – 95 in which he said:-

> ***"It has, on a number of occasions, been said by the court that, in one context or another, Pothier (for example) is a "surer guide" to discovery of the law of Jersey than is the law of England. What exactly does this mean? In my judgment it does not mean that the court looks to the relevant text and follows it without more ado. By definition, in such cases, the law of Jersey is silent. The court therefore has a choice. In the absence of local authority, it must look for guidance elsewhere. In matters such as succession, where the customary law of Jersey is derived substantially from Norman law, it is natural that the court should look first to writers on Norman law and that, in the absence of guidance from the law of Normandy, the court should look to Pothier and to authorities on French law such as Dalloz. But it is not bound to follow these authorities. The court's sole duty is to declare the law of Jersey and it must do so for a community of the 21st century. To insist on adopting some rule laid down or derived from principles laid down several centuries ago, if they are clearly inappropriate for modern times, would in my judgment be an unsatisfactory way of proceeding and is not required by authority……..***
>
> ***In my judgment, the use of phrases such as "a surer guide" means simply that there is an inclination or predisposition to follow the source said to be the surer guide. But the court has a choice as to whether to follow the***

***"surer guide" or whether, in a particular case, not to follow it and adopt principles from some other system of law (usually, in this context, although not necessarily, English law). For example in the law of contract, Jersey law has chosen to follow principles of Pothier or modern French law in some areas (e.g. cause, penalties) and principles of English law in other areas (e.g. remoteness and measure of damages).***

189. In our judgment, there are a number of reasons that cause us to hold that the objective test is the test that applies in Jersey. We have already set out the arguments to a significant extent above but in summary our reasons for so determining are as follows:-

(i) Since Royal Court began to give reasoned judgments in the 1950s the Royal Court has expressly applied, at least until the case of Marett, the objective test. Although the question of the correct test was not argued before the court in those cases ,we take it that the adoption of that test indicates that those Jersey judges presiding saw no difficulty with the objective test as part of the law of Jersey and applied it;

(ii) The identification of French principles in determining the constituent parts of the Jersey law of contract does not mean that it is necessary to look to the same source for determining the methods by which those principles or constituent parts are established. It does not seem to us to ineluctably follow that the recasting or reanalysis in some respects of the Jersey law of contract in French terms means that the test thereby altered;

(iii) We note that the system of resolving disputes before the Jersey courts, during an adversarial process, with high regard placed on testimony and on documentation, does not as far as we are aware have a direct counterpart in the French process;

(iv) It would appear that even under the French system there need to be a number of qualifications to address the vigorous of a strict application of the subjective approach. In other words the subjective approach does not necessarily reach a satisfactory answer. In our judgment the need for certainty in contractual matters points strongly towards the objective approach.

(v) Whilst we could not simply adopt such an approach were we to determine it to be at odds with long-standing Jersey law and principle, we do not so regard it. It appears to us to have been the principle applied by the court in the majority of the earlier jurisprudence. Jersey law has often picked its principles from different jurisdictions and we do not think that a striving for a purity in a system (no matter how unsatisfactory an aspect of that system

might be) is a valid reason to disregard the course followed by Jersey courts for many decades.

(vi) We do not think that it is essential that all of the Jersey law of contract should be derived from the source of the civil law. Thus, in matters of contract law such as remoteness of damage, mitigation of loss (see for example, Denny v Hodge 1971 JJ 1915 (Sir Robert Le Masurier, Bailiff) in which the Court applied Hadley v Baxendale (1843) 60 All ER 461; and Viberts v Golder 1995 JCR 223) and; as referred to hereafter, some aspects of termination of contract, the Court does not look to the civil law. There is authority that Jersey law has, in these aspects, followed English law.

(vii) Furthermore, outside of the law of contract in other matters where Jersey law undoubtedly looks to English law for guidance, it does not necessarily apply all aspects of the relevant English law. This does not in our judgment, prevent the relevant law of Jersey from forming a coherent body of law.

(viii) The objective test has the virtue of producing certainty by an objective assessment of the relevant circumstances to determine what had been agreed between the parties. This has the virtue not only of certainty but in our judgment of simplicity and does not lead to the potential difficulty of *ex post facto* changes of mind which are a risk if the court has to determine the question of consent using the subjective approach. It avoids the risk referred to by Martin JA of a person finding that a contract by which he thinks he is bound is invalid merely because, completely unknown to him, there is some subjective defect in the consent of the other party.

(ix) We should also point out that we have not been referred neither to case law, nor to any Jersey text that might be viewed as a source of Jersey law to suggest that the Jersey approach to consent has in the past been subjective rather than objective.

190. This is not the first occasion in which the Court has elected an English approach in contract matters over what might be termed a French approach. In the Hotel de France (Jersey) Limited v Chartered Institute of Bankers [2002] JLR Note 5 it is clear that the court, in a statement that was obiter, indicated that the case before it was an exceptional one in which there was an insufficient opportunity to apply to the court for the remedy of "résolution". An argument had been placed before the court that it was not open to a party to treat the contract as an end but had, in accordance with what might be termed the French model, to apply to the court for a declaration of the contract was at an end. The Court said:-

***"We have no doubt that there was not time to apply to court. This was "an exceptional case". Furthermore we are satisfied the matter was sufficiently serious to justify termination of the contract."***

191. This statement led to observations in the Jersey and Guernsey Law Review but the matter was resolved in the case of RA Rossborough (Insurance Brokers) Limited v Boon & Aziz [2001] JLR 416 when Birt, Deputy Bailiff (as he then was), after considering the law of constructive dismissal and identifying it as an example of a "well settled principle of English law of contract under the rubric *"discharge by breach*", went on to say, at paragraph 20:-

***"20. Both parties asserted that this principle forms of Jersey law. Mr Thompson had included in his authorities the case of Hotel de France (Jersey) Limited v Chartered Institute of Bankers…..but neither side made any reference to the case in oral argument. In that case, the court said this:-***

***"Mr Barry Nicholas in his 'The French Law of Contract' 2nd Ed 241 (1992) advances the matter:-***

***"There is obviously a broad similarity of function between the remedy of resolution and the common law remedy of rescission or avoidance for breach, but there are two marked differences;***

***(1) save in certain exceptional cases, the creditor must normally apply to the court for an order resolving the contract; he may not, as in the common law, simply treat the debtor's breach as discharging the contract.***

***(2) there is no legal criterion for distinguishing those breaches which are sufficiently serious to justify the termination of the contract and those which are not. The matter lies in the pouvoir souverain of the trial judge."***

***This extract would suggest that the English doctrine referred to above has no place in modern French law but the court made no ruling as to whether the law of Jersey was to like effect.***

***21. To insist that, however serious the breach by the other party, a party to a contract cannot treat the contract as being at an end so that he is***

***relieved of his obligation to continue to perform his side of the bargain, but has to go to court to seek a discretionary decision as to whether the contract should in fact be ended, would seem to be very undesirable. It would mean that the innocent party would not know where he stood until a decision by the court some months or even years later. We must emphasise that we have not heard any argument on this matter but our initial reaction is that we would be reluctant to find that the law of Jersey was to such effect unless there were binding precedent to say so. The court should develop the law of contract in accordance with the requirements of a modern society insofar as it is open for it to do so. The French approach would appear to leave all parties in a state of complete uncertainty. Disputes concerning contracts of employment are cases where there is a particular need for parties to know where they stand immediately. Be that as it may, both parties were agreed that the court should consider whether the defendant was constructively dismissed on the basis of the test described by Lord Denham, and that is what we have done."***

192. Although the Royal Court in Rossborough was quite clear that argument had not been deployed before it, it nonetheless declined to apply the French law and instead was content to accept the submissions of counsel and apply the English principles. As far as we are aware, this approach on the matter of the termination of a contract has not been subject to further judicial comment and it appears that this aspect of English contract law is accepted as being part of the law of Jersey.

**Objet**

193. We turn now to the question of *'objet'*.

194. In Osment v Constable of the Parish of St Helier [1974] JJ 1, Ereaut, Deputy Bailiff (as he then was) said, at page 25:-

***"We must concede that there is some force in the argument put forward by counsel for Mr Osment, but we cannot ignore the legal principles governing the formation of a contract.***

***Two of those principles have particular relevance here.***

***First, Cheshire & Fifoot's Law of Contract (7th ed) (1969) states at page 26-***

***"An offer, capable of being converted into an agreement by acceptance, must consist of a definite promise to be bound provided that certain specified terms are accepted. The offeror must have completed his share in the formation of a contract by finally declaring his readiness to undertake an obligation upon certain conditions, leaving to the offeree the option of acceptance or refusal. He must not merely have been feeling his way towards an agreement, not merely initiating negotiations from which an agreement might or might not in time result. He must be prepared to implement his promise, if such is the wish of the other party."***

***Chitty on Contracts (23rd ed) (1968) states at para 43, at 23 –***

***"The offer is a definite undertaking made with the intention (which may often be objectively ascertained) that it shall become binding on the person making it as soon as it is accepted by the person to whom it is addressed."***

***Secondly, there is no contract unless there is certainty as to the terms, Chitty states, para 83, at 43 –***

***"It is a well-established rule that the parties must make their own contract, and this means that they must agree as to its terms with sufficient certainty. If the terms are unsettled or indefinite, there will be no contract."***

***One of the examples given of an alleged agreement held to be too uncertain to create a contractual obligation is that of a lease which fails to specify the date of commencement. Although the courts seek to uphold bargains wherever possible, they cannot make a contract for the parties, nor go outside the words the parties have used, except in so far as there are appropriate implications of law.***

***Paragraph 86, at 45, states –***

> ***"There is no contract if a vital term which has not been agreed upon can be determined only by a future agreement between the parties. As Lord Dunedin said in May & Butcher Ltd v R, [1934] 2 KB 17: 'To be a good contract there must be a concluded bargain and a concluded contract is one which settles everything that is necessary to be settled and leaves nothing to be settled by agreement between***

***the parties. Of course, it may leave something which has still to be determined but then that determination must be a determination which does not depend upon the agreement between the parties'. Accordingly it was held in that case that there was no contract where an agreement for the sale of tentage provided that the price, dates of payment and manner of delivery were to be agreed from time to time."***

195. We pause to note that quite clearly Ereaut, Deputy Bailiff proceeded on the basis that the matter of intention was one for objective ascertainment. This further example may be added to those cited in paragraphs 160,161 and 162 hereof.

196. In Selby v Romeril the Court said:-

***"In essence, the objet of a contract (or more precisely the obligation which the contract creates) is the content of what the party undertakes. As to the content of the undertaking, it is the rule that it must be sufficiently certain. Pothier (op. cit., Part 1, Chapter 1, para 137 at 59) states: "Pour qu'un fait puisse être l'objet d'une obligation, il faut aussi que ce que le débiteur s'est oblige de faire, soit quelque chose de determine."***

197. In Marett the Court, at paragraph 62, stated:-

***"62. Objet is a party's obligation of performance under a contract (Pothier, op cit para 53, at 32; French Civil Code, art 1126). It is what a party promises to do under the contract by way of performance / discharge of his or her obligations. If there is to be objet under a contract, the promised performance must be: (i) certain; (ii) possible; and (iii) lawful."***

198. The requirement for certainty in a contract is well-established and accepted as a part of Jersey law.

**Estoppel**

199. The Defendant argues that the Plaintiff is estopped from denying a contract in the form as alleged by the Defendant.

200. In the case of Sutton v Insurance Corporation of the CI Limited [2011] JLR 80 (William Bailhache, Deputy Bailiff) at paragraph 34 the Court says:-

> ***"34. It is clear from case law that the Royal Court does apply the doctrine of promissory or equitable estoppel. It may be that the doctrine of estoppel by convention also forms part of our law, although the court doubts whether that is so in its entirety as applied by the courts in England and Wales. This is because the mutual understanding as to the basis upon which the contract is to be performed, which is a sine qua non for the purposes of the doctrine of estoppel by convention, is already drawn into the contract by the application of the principles relating to the requirements for the creation of a valid contract – the mutual understanding goes to the true consent of the parties undertaking the obligations, as an expression of their will or volonté to make the transaction; and if in any particular case it can be shown that the assumption upon which the parties proceeded simply cannot be made to hold good against them, then the remedy will probably lie in a claim that the contract should be set aside for erreur."***

201. In the case of the Minister for Infrastructure v The Parish of St Helier [2016] JRC 153, (Clyde-Smith, Commissioner) the Court said:-

> ***"125. We start with these general observations by Kerr LJ giving the judgment of the English Court of Appeal in The August Leonheart [1985] 2 Lloyd's Rep 28 at 34-5:-***
>
> ***"All estoppels must involve some statement or conduct by the party alleged to be estopped on which the alleged representee was entitled to rely and did rely. In this sense all estoppels may be regarded as requiring some manifest representation which crosses the line between representor and representee, either by statement or conduct. It may be an express statement or it may be implied from conduct, e.g. a failure by the alleged representor to react to something said or done by the alleged representee so as to imply manifestation of assent which leads to an estoppel by silence or acquiescence. Similarly, in cases of so-called estoppels by convention, there must be some mutually manifest conduct by the parties which is based on a common but mistaken assumption. The alleged representor's participation in this***

***conduct can then be relied upon by the representee as a basis for this form of estoppel."***

***126. In his review of the general principles Dorey, Commissioner, in <u>Pirouet v Pirouet</u> [1985/6] JLR 151 at page 159 quoted with approval this extract of the judgment from Lord Denning MR in <u>Moorgate Mercantile Credit Company Limited v Twitchings</u> [1975] 3 All ER at 323:-***

***"Estoppel is not a rule of evidence. It is not a cause of action. It is a principle of justice and equity. It comes to this. When a man, by his words or conduct, has led another to believe in a particular state of affairs, he will not be allowed to go back on it when it would be unjust or inequitable for him to do so."***

***127. In his collective summary of estoppel principles (although in particular proprietary estoppel, which is not asserted here) Bailhache, Bailiff said this in <u>Flynn v Reid</u> [2012] JRC 100 at paragraph 49:-***

***"Now there is no doubt that in cases of equitable estoppel, the remedy is provided because the law forbids the party from exercising his legal rights by resiling from a representation he has made to the defendant on which the defendant relied to his detriment. Equity in the classic sense there mitigates the rigours of the law; but although the boundaries are not always as clear as one might wish, it is possible to say that the law has not changed. The legal rights remain the same, but in equity, they cannot be enforced."***

***128. In his review of estoppel in <u>Amalgamated Property Co v Texas Bank</u> [1982] QB 84, Robert Goff J gave this overview:-***

***"The basis of all these groups of cases appears to be the same – that it would, despite the general principle, be unconscionable in all the circumstances for the encourager or representor not to give effect to his encouragement or representation. The first group concerns cases where equity would regard it as fraudulent for the party against whom the estoppel is alleged not to give effect to his encouragement or representation; an example of***

***such a case is where, on the principle stated by Lord Kingsdown in Ramsden v Dyson, L.R. 1 H.L. 129, a party has encouraged another in the expectation that he shall have an interest in the encourager's land, and the other party has, on the faith of that encouragement, expended money on that land. The second group consists of cases concerned with promissory estoppel, in which one party represents to another that he will not enforce his strict legal rights under a legal relationship between the parties. The representation may be no more than a gratuitous promise; but it may nevertheless be unconscionable for the representor to go back upon it, because a representee may reasonably be expected to act in reliance upon such a forbearance, without going to the extent of requiring a contractual variation. The third group concerns cases where one party has represented to the other that a transaction between them has an effect which in law it does not have. In such a case, it may, in the circumstances, be unconscionable for the representor to go back on his representation, despite the fact that the effect is to reduce his rights or to enlarge his obligations and so give effect to what is in fact a gratuitous promise; for the effect of the representation may be to cause or contribute to the representee's error or continued error as to his true legal rights, or to deprive him of an opportunity to re-negotiate the transaction to render it legally enforceable in terms of the representation."***

202. The Court did not find that the facts in that case gave rise to a promissory estoppel or estoppel by representation.

**Implied Terms**

203. The situation with regard to implied terms is settled law. The main case on the principles to apply is that of Grove and Briscoe v Baker [2005] JLR 348, where at paragraph 15 et sec the Court said:-

> ***"15. We turn next to the law relating to implied terms. Pothier's rules for the interpretation of contracts, to be found in his Traité des Obligations, part I, chapter I, 5th rule, provide, in translation –***
>
> ***Usage is of so much authority in the interpretation of agreements, that a contract is understood to contain the customary clauses***

***although they are not expressed; in contractibus tacite veniunt ea qua sunt moris et consuetudinis.***

***For instance, in a contract for the lease of a house, though it is not expressed that the rent shall be paid half-yearly at the two usual feasts, and that the tenant shall do such repairs as are usually done by tenants; these clauses are understood.***

***So in contract of sale, although the clause that the seller shall be bound to warrant and defend the purchaser from evictions, is not expressed, it will be understood.***

16. ***The rule that terms may be implied into a contract if it is the custom of the trade to include them has been developed by the courts. In Sibley v Berry, 9th July 1987 unreported 111, the Court of Appeal considered an appeal by the widow of a man who had lent money to the respondent free of interest in order to enable her to buy a house. There was no written contract. The evidence was, however, that it was an indefinite loan, made in friendship, which was repayable upon the sale by the respondent of the house which she had purchased. The principal question for the court was whether a term could be implied into the contract requiring the respondent to sell the house or, alternatively, stipulating that the loan was repayable on reasonable notice. The Court of Appeal examined the principles applied in England as laid down by the House of Lords in Liverpool City Council v Irwin and another [1977] AC 239, citing a passage from the speech of Lord Wilberforce beginning at page 253 –***

***"There are varieties of implications which the courts think fit to make and they do not necessarily involve the same process. Where there is, on the face of it a complete bilateral contract, the courts are sometimes willing to add terms to it as implied terms: this is very common in mercantile contracts where there is an established usage: in that case the courts are spelling out what both parties know and will, if asked, unhesitatingly agree to be part of the bargain. In other cases where there is an apparently complete bargain the courts are willing to add a term on the ground that without it the contract will not work – this is the case, if not of "The Moorcock" (1889) 14 PD 64, itself on its facts, at least of the doctrine of The Moorcock, as above, as usually applied. This is, as was pointed out by the majority in the Court of Appeal, a strict test – though the degree of strictness seems***

***to vary with the current legal trend – and I think they were right not to accept it is as acceptable here. There is a third variety of implication, that which I think Lord Denning MR favours, or at least did favour in this case, and that is the implication of reasonable terms. But though I agree with many of his instances, which in fact fall under one or other of the preceding heads, I cannot go so far as to endorse his principle. Indeed, it seems to me, with respect, to extend a long and undesirable way beyond sound authority. The present case, in my opinion, represents a fourth category, or I would rather say, a fourth shade on a continuous spectrum. The Court here is simply concerned to establish what the contract is, the parties not having themselves fully stated the terms. In this sense the Court is searching for what must be implied".***

***17. Le Quesne JA continued –***

***It remains to consider whether the case can be brought within the second of Lord Wilberforce's categories, that is, the category of cases in which something must be implied because without it the contract "will not work". Lord Wilberforce himself remarked further about this category of case on page 254, "In my opinion such obligation should be read into the contract as the nature of the contract itself implicitly requires, no more, no less. A test in other words of necessity." He went on, on page 205, to refer to the judgement of Bowen L J, in the earlier case of Miller –v- Hancock. In that judgement, referring to the term which, in that case, it was sought to imply, which in fact he held should be implied, Bowen L J, said that the term to be implied was something without which the whole transaction would be futile, something the absence of which would render the whole transaction inefficacious and absurd."***

**Quantum meruit / unjust enrichment**

204. In the alternative the Defendant argues that it should be entitled to a quantum meruit / unjust enrichment. The law has been considered recently.

205. In Flynn v Reid, William Bailhache Deputy Bailiff (as he then was) carried out a careful analysis of the law relating to unjust enrichment, or *enrichissement sans cause*, and concluded that the Royal Court was prepared to recognise the doctrine of unjust enrichment in principle. In considering authority to reach the rules that applied at paragraphs 107 and 108 the Court concluded:-

***"107. So there we have a reference from Lord Hope to two Scottish cases where the law of unjust enrichment has been applied. In Mckenzie v Nutter (14), Sheriff Principal Lockhart, having summarised the relevant law, described his approach as follows (2007 SLT (Sh Ct)17, at para 33):***

***"On the basis of the law which I have set out it is clear that the court may allow an equitable remedy in circumstances where one party has been unjustly enriched at the expense of another party. I propose to deal with this matter under four headings:***

***a. Has the appellant been enriched at the expense of the respondent and what is the nature of that enrichment?***

***b. If so, was that enrichment unjust?***

***c. If so, what remedy, in particular circumstances of this case, is open to the respondent?***

***d. Is that remedy equitable?***

***108. In our view, this approach to the questions of unjust enrichment is one which is not inconsistent with such slender authority as can be ascertained in Jersey law from the cases and is consistent with principle. It also provides a modern statement of an approach currently adopted by French courts to questions of enrichissement sans cause. The starting point is the legal interest. The court then looks at whether there has been enrichment which benefits the legal owner or owners or perhaps some of them at the expense of the claimant in a way that is unjustifiable. We also think that approaching the problem in this way will enable the court to consider enrichment problems holistically, rather than in separate compartments. We apply these principles to the facts of the instant case."***

**Discussion**

206. Having referred to the core documents, the evidence before us and the principles that we believe apply in this case, we turn to determine whether or not a contract existed between the Plaintiff and the Defendant, what were its terms, and what may be due from one to the other under it.

207. In our judgment, the Letter of Intent was an expedient entered into to enable work to continue without interruption following the termination of the Intermediate Contract pending completion of a JCT Contract.

208. What then is the meaning of the Letter of Intent, as qualified by the November 2014 emails? It seems to us that the documentation appears to provide:-

(i) The contract for the building of the Project was to be let under the JCT Standard Form;

(ii) The ambit of the Letter of Intent extends to, but is limited to, the commencement of site mobilisation, procurement of materials, and engagement of the supply chain;

(iii) The Project will be concluded on the 26th February 2016, the scope of work for the main Project is as defined within the tender documentation and any updated design to that date;

(iv) The Defendant is entitled to be reimbursed for all direct and actual costs for works covered by the ambit of the Letter of Intent;

(v) There will be a cost cap in the sum of £3,764,930 excluding GST under the Letter of Intent which does not cover the costs paid under the Intermediate Contract;

(vi) If the JCT Standard Contract was entered into then that contract will supersede the Letter of Intent;

(vii) The cost cap referred to under item 4 of the Letter of Intent is that cost set out in the RNJ Cost Report dated 4th November 2014. This was based on the February 2014 Architect's drawings; the Defendant's Bill of Quantities prepared in detail; and RNJ's verification and adjustment of the Bill of quantities;

(viii) The contractor's risk element is still to be negotiated;

(ix) Termination should be after a period of twenty-eight days' notice;

(x) The Letter of Intent is to be governed by the JCT Standard Contract and agreed amendments. The meaning of the term "standard form of contract" is to us clear – it means

the JCT Standard Contact. The agreed amendments appear to us to mean the schedule of amendments incorporated into the Intermediate Contract.

209. As we have said the Letter of Intent was itself somewhat strangely drafted even without considering the qualifications contained in the November 2014 emails. It provided for a cap which related to the payment of the full price of the Project as identified in the RNJ Cost Report which was clearly inappropriate for dealing with an arrangement which was to be of short duration. Furthermore in its terms it expressly authorised the Defendant to deal with what we term preliminary works which had in fact been completed months earlier and was not on its terms intended to last for the entirety of the building Project.

210. Because its duration was to an extent uncertain however the qualifications were introduced by the Defendant as set out in the November 2014 emails. These it can be readily seen derive from the practical concerns of a contractor and not from someone who is carefully considering the interplay between what they say in an email and what is said in a Letter of Intent. There are inconsistencies and difficulties. However, what is clear is that the Defendant intended, and the Plaintiff agreed, to make the arrangements provided for in the Letter of Intent subject to the JCT Standard Contract with agreed amendments. Neither the Plaintiff nor his agent sought to clarify what the Defendant meant by the amendments to the Letter of Intent. We believe that they were understood.

211. The Plaintiff, in the light of the changed plans and specification must have understood that the Defendant would not be willing to cap the cost of the Project and that these changes would result in substantial additional costs. In our view, perhaps because he was preoccupied with what he viewed as “value for money”, the Plaintiff was unwilling to accept these additional costs and tried to force through a substantial discount. The Defendant’s refusal to accept that position was the death knell of the relationship between them.

212. The direct and actual cost basis, expressly referred to in the Letter of Intent, was only applicable for what was understood to be a short period pending the main contract, but if this was to be given effect to at all it was only given effect to for a very short period because the Plaintiff authorised and paid interim valuations on the agreed valuation basis, notwithstanding the fact that there was no signed contract.

213. The JCT form of contract had all but been agreed and a figure had been identified by Mr Box as to the price based upon the February 2014 drawings. There may have been further variations but there was in our judgment a clear understanding as to how matters should and would

proceed with regard to the Project, and the Defendant was entitled to believe that the formal contract would be signed soon after the Letter of Intent had been issued by the Plaintiff

214. To the outside observer the Plaintiff at all material times, after the Letter of Intent, proceeded not on the basis of the provisions of the Letter of Intent, but rather on the basis of the JCT Standard Contract. Mechanisms were put in place which would be usual to see within the JCT Standard Contract such as the fact that CCRs and variations were formally agreed by AIs. Although it is possible to incorporate such mechanisms in another form of contractual arrangement they are entirely consistent with the operation of the JCT Standard Contract.

215. There are further steps that were taken that are only consistent with the JCT Standard Contract. The inclusion of OHP in any cost claim on an ongoing basis by the Defendant is but one of them. The provision of retentions and pay less notices are others. The Plaintiff maintains that these should be implied into the contract set out by the Letter of Intent, but we see no basis on which we should do so. We think they reflected a different contractual arrangement – that the parties were operating under the JCT Standard Contract.

216. In our judgment, objectively speaking, by all that they did the parties agreed that they were operating under the JCT Standard Contract at a price that was based on revised drawings and was significantly in excess of the cap in the Letter of Intent. The cap in the Letter of Intent had become irrelevant because the Letter of Intent had ceased in our view to govern the relationship between the parties.

217. In our view, notwithstanding any subjective belief on the part of the Plaintiff there was a contract between the Plaintiff and the Defendant on the terms of the JCT Standard Form. The price had in effect originally been agreed in November 2014 and was based upon the RNJ Cost Report and the documentation underpinning that. Once those specifications had changed the price referred to in November 2014 as the cap or otherwise became irrelevant. It was and must have been understood by both parties that the price would change. The programme had been agreed as had the completion date. The works were to be conducted in accordance with JCT Standard Contract and the Defendant had made it entirely clear at every point that this was not to be a fixed price contract and they would not be providing any discount. Whatever the Letter of Intent may have been intended to achieve when it was initially created in our judgment the contractual arrangement had significantly mutated to the JCT Standard Contract and the Plaintiff and the Defendant had conducted themselves, and were content to do so, in the manner provided for by that JCT Standard Contract. This to us is demonstrated by the parties' acceptance of and adoption of retentions, pay less provisions, architect's instructions, OHP and interim valuations and certificates. Although a final price had not been agreed a mechanism for

establishing cost, through CCR's, AIs, certifications (including 6.5% OHP) had been established and the reasonable observer would have concluded that this was the agreed method of proceeding and agreed as applying to the work that the Defendant was doing.

218. The delays and escalation in costs were, in our judgment, almost entirely attributable to the Plaintiff and his family. The Defendant gave a number of warnings as to the delay relating to the Project. After the Letter of Intent was executed, the Defendant was presented with plans that were materially different from the plans which formed the basis of the cap in the Letter of Intent.

219. In our judgment, the Defendant is entitled to the 6.5% OHP. In our judgment however, there should no up lift for CDP as the Plaintiff had always refused this. There should be no uplift for potential claims from sub-contractors, unless the Defendant can show that bills have been submitted by those sub-contractors. Furthermore, there should be no up lift in the contract sum for legal costs. That in our view is how the price falls to be calculated. We see no basis to revisit sums already paid before certified.

220. In the alternative we are asked to consider the question of estoppel.

221. For the reasons that we have set out above there seems little doubt in our minds that by reason of the acceptance of the November 2014 qualifications to the Letter of Intent and the basis on which the Plaintiff and the professionals advising him and dealing with the Project conducted themselves with regard to the Project, changes, and claims for payment and AIs the Defendant was entitled to assume and believe that it was operating consensually under the JCT Standard Contract in these respects. We think it likely that the Defendant continued to permit the formalisation of such a contract to slide and to continue on site because it drew substantial comfort, potentially to its detriment, from the belief that the JCT form of contract applied.

222. We think that the tests for an estoppel are met and that even were we wrong in the other assessments that we have made in our judgment the Plaintiff would be estopped from reneging on the representation that the JCT Standard Contract would apply.

223. In the circumstances we do not need to go on to consider unjust enrichment and we do not do so.

**Conclusion**

224. It seems to us that the four elements set out in Selby above, are present in the instant case. There is no issue raised about the capacity of the parties nor about cause and the *Objet* and Cause may be identified by reference to the duty on the part of the Defendant to build the property in accordance with the various plans and specifications as they evolved from time to time in exchange for the payment agreed initially or subsequently certified and that that obligation continued until the relationship between the parties could be effectively terminated.

225. In conclusion, therefore, there was a contract (or the Plaintiff is estopped from denying that there was a contract) between the Plaintiff and Defendant after the Intermediate Contract for the continuation of the Main Works.

226. The contract as to its terms is identified by the way in which the Plaintiff and the Defendant and those professionals representing the Plaintiff dealt with values, costings and payment. The cap referred to in the Letter of Intent had ceased to apply. The Defendant had made it clear that it would not agree to a fixed price contract and the Plaintiff knew this.

227. Accordingly in our judgment the Defendant is entitled to be paid for its work on an agreed value basis, with OHP, and to the extent that that work is covered by AIs then on that basis.

228. We do not think that there was to be an uplift for CDP as this appears to be an aspect that the Plaintiff had always refused to accept and similarly there was not to be an uplift for potential claims from sub-contractors unless the Defendant can show that bills have been submitted by those sub-contractors. There was to be no uplift in the contract sum for legal costs.

229. For the avoidance of doubt, however, we do not find on the evidence before us that there is any basis to revisit the Intermediate Contract and the sums paid for the Enabling Works nor, as we have indicated above, do we find the allegations made by the Plaintiff against the Defendant established.

230. Having identified what, in our judgment, is the contractual position between the parties and the correct approach to quantification, we do not feel we that we have sufficient information before us to carry out that quantification exercise without the benefit of further submissions and possibly further evidence from the parties.

231. We observe, however, that if agreement cannot be reached between the parties in the light of contents of this judgment as to the appropriate quantum then it may well be more cost effective for the parties to agree a reconciliation of the financial aspects outside the Court process by some form of alternate dispute resolution such as arbitration or mediation or otherwise in accordance with JCT contract provisions.

232. However, if the parties cannot agree that method, then we will sit to give directions for the further quantification of the financial aspects of this case.

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