Contract law report

In the common law to speak of the outcome of consenting minds or, even more mystically of consensus ad idem is to mislead by adopting an alien approach to the problem of agreement. The function of an English judge is not to seek to satisfy some elusive mental element but to ensure, as far as practical experience permits that the reasonable expectations of honest men are not disappointed. It is a long established principle in English law that people should be free to make any contract they wish.

There are obvious exceptions but they do not concern us here. The problem arises when performance of contractual obligations does not occur in the manner one or other or indeed both parties claim to have envisaged. The law is then called on to judge not only the nature of the contract to which the parties believe themselves bound, but often whether a contract exists at all. If people may contract on what they wish, it follows that for a contract to be enforced, the parties must have agreed to contract. In defining agreement the common law has often referred to “ consensus ad idem,” a meeting of minds.

In other words the law has traditionally said it must be shown the contracting parties intended to be bound to the same thing. However long held this doctrine in England, there is an equally long held understanding of the problem in establishing consensus ad idem. It is clearly expressed by Chief Justice Brian, when he said in 1478, “ the intent of a man cannot be tried, for the devil himself knows not the intent of a man” 1. Judges therefore take an objective view of agreement, classically summed up in the case of Smith v Hughes2 by Blackburn J, who said:” If whatever a man’s real intention be, he so conducts himself that a reasonable man would believe he was assenting

to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had agreed to the other party’s terms.

“ It is this case which judges find their authority to search for evidence of intention in words and writing, and also in actions. On closer inspection however, the court in fact, often rejects the notion of looking at all facts surrounding contract cases, looking for agreement only in the framework of offer and acceptance. Reliance on both the objective approach and the formula of offer an acceptance is illustrated in the case of Gibson v Manchester City Council3. In this the court was asked whether the sale of a council house had been agreed. The evidence showed letters from the council offering terms and conditions, and indeed a price, on which they “ may” have considered the sale.

The claimant’s letters questioned the terms, and then asked for his application to buy to be considered. Subsequent to this correspondence and before any other the claimant incurred expenses by repairing the house. For political reasons the council then halted any sales of council houses on which a sale had not been agreed. It was held that on the facts of the correspondence, the claimant’s reliance was not relevant, even as evidence of his innermost intention to buy, nor was the council’s initiation of the correspondence of their innermost intention to sell.

The only question was whether there had been offer and acceptance. The House of Lords took the view that in using the term “ may” the council made clear they were willing to enter into negotiations rather than offering to sell.

This meant there were no offer to be accepted and therefore no contract. Lord Denning in a previous hearing in the Court of Appeal questioned this approach by claiming all factors should be considered in the case, including reliance, and the agreement on all material facts. Lord Diplock in the House of Lords rejected this argument, affirming offer and acceptance as the preferred form of analysis in finding agreement.

A similar judgement, affirming offer and acceptance over reliance as the root of a party's liability, in the case of Centrovincial v Merchant Investors Assurance Co. Ltd4, has also been challenged by Professor Atiyah5 for its failure to consider " all material facts" and its acceptance of mere promises as evidence of agreement and validity of contract. By looking only at the correspondence between the parties the court affirmed the case law that an offer cannot be withdrawn after it has been accepted, even if the promisee has not acted in reliance on it. Professor Atiyah questioned this offer and acceptance approach, saying no one should be able to claim legal relations for him simply by the bare act of acceptance with no evidence of reliance on the bargain.

(ibid.)While the type of analysis preferred by Atiyah was clearly rejected in Centrovincial, its injustice can also be seen be reapplying its logic to the Gibson v Manchester City Council case. Would it not have been unjust to enforce a bargain on the defendant council simply because the claimant had relied on the bargain to his detriment? Would it not also give rise to the undesirable situation where parties in negotiation, happy they had agreed on all material facts acted on reliance of the contract, better to seal the conclusion of it, whatever the intention of the other party. The judgement

and reasoning in Centrovincial has been affirmed several times in the courts in the last 20 years in cases such as The Anticlizo6, and most recently in OT Africa Line Ltd v Vickers Plc.

7In the latter case Mance J made reference to a quote made in The Anticlizo, and in the earlier case of McCutcheon v David MacBrayne Ltd from the book, Gloag on Contract, " The judicial task is not to discover the actual intentions of each party; it is to decide what each was reasonably entitled to conclude from the attitude of the other." 8Professor Atiyah further states that the defendant's liability in the Centrovincial case has nothing to do with actual " will, their intention, their promise or their agreement", and everything to do with the appearance of it. 9The judgement of Mance J, and others' affirmation of Centrovincial would appear to uphold this, but still the idea of replacing the concept of will as being the driving principle of liability in contract, with another, such as reliance, is rejected. It has been considered by McKendrick that there are still places in the law of contract where the subjective approach to intention remains, in particular mistake10. The doctrine of mistake also stems from the concept of consensus ad idem, in that a mistake made in offer or acceptance by one party, can negate consent, as there has been no consensus ad idem. However, he also explains that this doctrine too uses the objective approach.

It is accepted that for there to be no consensus ad idem, the person apparently accepting the mistaken offer, must have known of the mistake when accepting it. Otherwise they would have accepted it in good faith and consensus ad idem with the offer, objectively read, would be satisfied. Furthermore the approach taken to finding whether the offeree knew of the

mistake, is of course, objective. This can be seen by comparing the case of Hartog v Colin and Shields11 with the Centrovincial case above. In Hartog v Colin and Shields the defendant's mistake as to the price of goods he offered for sale, was taken as reason for the contract to be void.

This contrasts with the Centrovincial case where the mistake did not count. As, McKendrick goes on to explain, the two cases are in fact reconciled when seen it was not the subjective knowledge of the mistake in Hartog, that caused the result, but the fact a " reasonable man" interpreting the offer would have known of the mistake. 12This was explicitly recognised in Centrovincial by Slade LJ when he said, " It is a well-established principle of the English law of contract that an offer falls to be interpreted not subjectively by reference to what has actually passed through the mind of the offeror, but objectively, by reference to the interpretation which a reasonable man in the shoes of the offeree would place on the offer." The judges in Centrovincial did not think the " reasonable man" would have known of the mistake of the offeror, the judges in Hartog did, but it is clear their reasoning was the same.

There are further ways in which the subjective intention of a contracting party could be seen to affect the outcome of a judgement. The contract may be so ambiguous that it is impossible for the court to construe it's meaning, even if both parties did intend to contract for the same thing. At this point it's been suggested it would be wrong not to admit the subjective evidence of the parties. 13In the case of Rose v Pim14 two parties contracted for the sale of " horsebeans", both believing the beans to be the same as " feveroles". When horsebeans arrived at the buyers, they realised they were

not the same, they accepted them, and tried to rectify the written contract of “ horsebeans” to make reference to them being the same as “ feveroles” so as to sue for damages.

Lord Denning rejected the rectification saying that in this case “ you do not look into their inner minds, of the parties, any more than you do in the formation of any other contract…you look at their outward acts”. Smith and Thomas quote William Glanville as challenging this assertion.

15 He claims if both parties had contracted to supply horsebeans meaning “ feveroles” and not ordinary horsebeans then the contract would have. of course, been for feveroles. He claims in this case it would be untrue to say the contract had been enforced “ only according to outward appearances”. However in this case it seems likely the delivery would have been of feveroles (as both parties intended) and there would have been no need for the court to get involved.

It should be noted also, that in Glanville’s case the true reason the contract would be enforced as meaning feveroles, would be due to the doctrine of estoppel, where both parties had relied on the fact that the word “ feveroles” meant horsebeans. This doctrine exists to protect against dishonest contractors encouraging reliance on one use of the term, then going back and claiming it meant another. The question of the meaning of terms is only used if the defendant claims he has relied on a particular meaning, as would any other objectively reasonable man, even if truly objectively it means something else. However as we have seen (in the discussion of Centrovincial, above) the court does not need reliance for a contract to be concluded. If

then, an estoppel could not be found, if the parties had not yet relied on the meaning of the term, it seems likely that Lord Denning's dicta would stand. Therefore the contract would be for horsebeans, not feveroles, and the case as it stood, would be decided objectively, not subjectively.

Furthermore the courts have explicitly stated that the subjective intentions of the contracting parties will not over-rule the state of affairs objectively ascertained. As Lord Normand says in Mathieson Gee (Ayrshire) Ltd v Quigley, " when the parties put forward what they say is a concluded contract and ask the court to construe it, it is competent to for the court to find there was in fact no contract and nothing to be construed." 16In discussing the attitude of courts to consensus ad idem in constructing contracts, it seems clear there is no room for the actual contents of contracting parties' minds, but it seems they do not want to move too far from the act of willingness to be bound to agreement as being, of itself the binding factor. Does not the courts' insistence on finding agreement, even if it is objectively ascertained, and their refusal to countenance any replacement for it, such as reliance, in defining valid contracts, or indeed ascertaining liability for breach of contract, prove their commitment to the concept of consensus ad idem? In Gibson there was no single point at where both parties could have objectively have been said to have been at one. In Centrovincial it was held that the correspondence between the parties had created a point where the two could be said to have been at one.

These were the only two facts that mattered in these cases. In the case of Rose v Pim, the court while clearly taking an objective approach, and rejecting the idea of looking into innermost minds, the court still tried to find

the point of agreement as to where reasonable minds would have met, with decisions and intentions made outwith that framework rejected. It may be fair to say then, that the court is not concerned with satisfying an elusive mental element of understanding the innermost minds of men. But it would be a step too far, I think to say that consensus ad idem is an alien concept to the problem of agreement. Without an understanding of consensus ad idem it would be difficult to explain the courts' separation of finding agreement from the principle of reliance seen in estoppel.

Without an understanding of consensus ad idem it would be difficult to explain why a fundamental mistake, all be it again objectively ascertained, as rendering a contract void ab initio. It seems also seems unfair to go so far as to say the expectations of reasonable and honest men will not be disappointed in this approach. Due to the instance on finding agreement from the point of will (in offer and acceptance) rather than in reliance, there are clearly cases in which the actual honest and reasonable men in Gibson and Centrovincial may have been disappointed. Better to say the function of the law has been to maintain a doctrine, where all cases, however uneasily, fit, and to promote legal certainty in an area that seeks most of all to prevent the intervention of the law at all. In summation, consensus ad idem may be confined as an historical term, but it is undoubtedly useful in explaining how the courts' try to keep the reason for liability in contract within the bounds of assumpsit, or voluntary will.