I v J

Jurisdiction:	Jersey
Judge:	Anderson JA
Judgment Date:	17 January 2017
Neutral Citation:	[2017] JCA 13
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Court:	Court of Appeal
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Text

[2017] JCA 013

COURT OF APPEAL

Before:

W. J. Bailhache, Esq., Bailiff of Jersey, President;

Miss Clare Montgomery Q.C., and

David Anderson, Esq., Q.C.

Between
I
Respondent/Plaintiff
and
J
Appellant/Defendant

Advocate L. J. Glynn **for the Appellant**.

Advocate C. Hall **for the Respondent**.

Authorities

I -v- J [2016] JRC 162.

Children (Jersey) Law 2002.

O'Brien v Marett [2008] JCA 178.

Ferchal v Ferchal [1990] JLR 117.

Children (Jersey) Law 2002.

Trusts (Jersey) Law 1984.

Patel v Mirza [2016] UKSC 42.

D. Fairgrieve, Law of Contract Study Guide.

Trusts (Jersey) Law 1990.

Appeal against decision of the Royal Court dated 12th September 2016.

Anderson JA
Introduction

1 This is the judgment of the Court. Mr J appeals against a judgment of the Inferior Number of the Royal Court (TJ Le Cocq Esq., Deputy Bailiff, with Jurats Nicolle and Sparrow, *I -v- J* [2016] JRC 162) by which he was ordered to pay £50,000 to the respondent pursuant to what the Royal Court found to be an agreement reached following the end of a long-term relationship between them.

2 The issue on this appeal is whether there was a valid and enforceable contract between the parties under Jersey law for the payment of £50,000 to the respondent.

3 The uncontested outline facts, as set out by the Royal Court, may be summarised as follows:

(i) The parties began a relationship in 1990 and had two daughters together, born in 1997 and 2003.

(ii) X Limited ("X") was incorporated in 2000, with the appellant as sole director and its

two shares held by nominee companies.

(iii) In October 2002 the appellant purchased a garage and bungalow, relocated the business to the garage and moved into the bungalow with the respondent.

(iv) In November 2003 the respondent was made a director of X.

(v) In November 2007, the two shares in X were transferred from the nominee shareholders to the appellant and the respondent respectively.

(vi) The relationship between the parties broke down in around November 2009, after the appellant began a new relationship.

(vii) The respondent resigned as a director of X by letter of June 2010.

(viii) The respondent transferred her share in X to the appellant's new partner in or around June 2011.

4 Between 2011 and 2014, family proceedings described as “acrimonious” were brought by the respondent, pursuant to Schedule 1 to the Children (Jersey) Law 2002, to seek financial provision for the parties' 10 year old child. The details of the family proceedings are not relevant to this appeal. We note however that in assessing the financial position of the parties in those proceedings:

(i) The Family Division of the Royal Court did not proceed on the basis that the respondent had either an interest in X or an entitlement from the appellant of £50,000; but that

(ii) the appellant himself made reference to a payment of £50,000, allegedly paid by him for reasons irrelevant to this appeal, though his evidence that he had paid that sum to the respondent was held by the Royal Court both in those proceedings and below to be implausible.

Proceedings in the Royal Court

5 We can provide no better summary of the parties' contentions before the Royal Court in this matter than that which was given by Deputy Bailiff Le Cocq, sitting alone, in his judgment of 12 September 2016 on costs.

> ***“8 The main thrust of the Plaintiff's claim was to the effect that she was with the Defendant an equal beneficial owner of a company through which the Defendant's garage business was conducted and which owned the home which she shared with the Defendant.*** Her case, in essence, was that it was all agreed between herself and the Defendant that the business would be an equal partnership and that she would share in that partnership. She pointed to the fact that she held 50% of the shares in the company as evidence in support of her claim. When

the relationship between the Plaintiff and the Defendant came to an end there were negotiations between them as a result of which the Plaintiff agreed to take a significantly reduced figure, namely £50,000 in return for her share in the company and her beneficial interest in the company in general. She identified the contribution that she had made to the business but claimed that her contribution to the business overall was primarily her contribution to family life and her responsibility for looking after the children. In addition to her primary claim, the Plaintiff also set out an alternative claim for setting aside the transfer of a share that she transferred to the Defendant on the grounds of mistake or misrepresentation .

9. The Defendant for his part denied that the Plaintiff had a 50% interest in the company and maintained that she held her share as his nominee. He pointed to a copy of a nominee agreement, the original having been lost, which apparently had the Plaintiff's signature on it and was witnessed by an accountant, Mr Sully. He denied that the payment of £50,000, or any other sum, had ever been agreed between himself and the Plaintiff .

10. The Plaintiff disputed her signature on the copy nominee agreement and as a result, some not insignificant part of the hearing dealt with the evidence from hand-writing experts and the evidence from Mr Sully as to whether the agreement had been signed and from other witnesses tendered by the Defendant to give evidence as to her role within the company .

11. In its judgment the Court found, on a balance of probabilities, that the Plaintiff did not have an agreement with the Defendant that she would beneficially own 50% of the company and she did not do so. She held her share as the Defendant's nominee and her signature on the nominee agreement was genuine. The Court formed the view that she had forgotten that she had signed it .

12. The Court went on to find, however, that there was an agreement nonetheless between the Plaintiff and the Defendant that the Defendant would pay her £50,000 and ultimately her claim to be entitled in contract to that sum was vindicated." ((*I v J* [2016] JRC 162).

6 As that passage makes clear, the respondent's primary contention before the Royal Court was that when one of the two shares in X was transferred to the respondent in November 2007, she held it in her own name and right. That contention was rejected on the basis of a nominee agreement (dated 2005, it was said in error) which the respondent was found to have signed, and to have forgotten signing.

7 The respondent nonetheless won her case before the Royal Court because it found an agreement between the parties that the appellant would pay her £50,000. The appeal to this Court focused on the terms of that supposed agreement, and on the legal consequences of an agreement in those terms.

Submissions of the appellant

8 The appellant contested the Royal Court's finding that there was a valid contract between the parties. The kernel of Advocate Glynn's submissions on his behalf was that:

> (i) The appellant's cause for agreeing the terms of the contract found by the Royal Court was *"inextricably linked to the return of his share"*. There was *"no evidence"* to suggest that he considered he should make the payment as compensation for her contribution to the business and/or family and the primary submission was that no contract had been made. The respondent's stance in evidence, pleadings and written submissions before the Royal Court was relied upon for the proposition that she saw the £50,000 as consideration for her interest in the business.
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> (ii) On that basis, the contract lacked *"a legitimate objet"* because it purported to allow the respondent to procure a payment from the appellant for the transfer of a share which was rightfully his and returnable on demand. Reference was made to Article 24(2) of the Trusts (Jersey) Law as amended ("the Law"), which required the respondent as trustee of her share to convey the share to the appellant as its beneficial owner, or to another, immediately on the appellant's direction.
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> (iii) Such a contract would have put the respondent in breach of trust, in that Article 21(4) of the Law provides that a trustee shall not profit from her trusteeship, nor enter into any transaction which would result in her profiting from her trusteeship. This fell foul of the requirement that the *objet* of a contract must be lawful: *O'Brien v Marett* [2008] JCA 178, para 59.
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> (iv) Furthermore, if the appellant were required to transfer £50,000 in accordance with the Royal Court's judgment, the respondent would hold the sum as a constructive trustee pursuant to Article 33 of the Law, rendering the decision of the Royal Court *"nugatory"*.
>
> (v) The contract as determined by the Royal Court should be set aside because a valid cause was lacking and because (as a consequence) its objet (the payment of £50,000 for the transfer of the share) was illicit.

9 It was further submitted that the contract lacked *volonté* (or consent), because of the presumption that family arrangements do not create legally binding contracts: *Ferchal v Ferchal* [1990] JLR 117. That presumption was accepted to be capable of rebuttal when the seriousness of the matter in contemplation, the consequences of one party acting upon it and the intention of the parties is such that a contract was intended. But it was said to be

inherently unlikely that the appellant intended legal obligations to arise at a time of acrimony between them, when he had no such intention in 2002. Furthermore, the consequences could not be said to be significant when the respondent was entitled to, and did, issue proceedings pursuant to Schedule 1 of the Children (Jersey) Law 2002 to seek financial provision for the child of the parties.

10 Finally, insofar as the supposed contract was based on a moral obligation to recompense the respondent for her role within the family, the appellant submitted that it was contrary to public policy. He noted that there was no plea of unjust enrichment, and that the respondent had been unable in the family proceedings to persuade the Royal Court that she should receive any greater provision than £5,000 for a holiday and £752 per month in child maintenance.

11 We also received written and oral submissions from the appellant personally. The written submissions were critical of the approach taken by Advocate Glynn on this appeal, which criticisms do not appear to us, on the material before us, to be justified. In his oral submissions, the appellant was not critical of the submissions made on his behalf. At all events, we have considered all that he has put before us.

Submissions of the respondent

12 The respondent does not appeal against the finding of the Royal Court that she held the share in X as a nominee, though she emphasised, correctly, that her honesty was not impugned in the judgment. Advocate Hall accepted on her behalf that a nominee is obliged as trustee to return a nominee share to the beneficial owner when instructed to do so, and did not further address the legal submissions founded on Articles 21(4), 24(2) and 22 of the Trusts (Jersey) Law 1984.

13 The respondent's argument focused instead on the terms of the contract as it was found to exist by the Royal Court. The following points were made:

(i) The respondent has not benefited from her trusteeship, nor sought remuneration for it. The share transfer was only linked to the payment of £50,000 because the respondent thought in good faith that she held the share in her own right.

(ii) The *objet* of the contract was £50,000: this was clear, certain and lawful. The Royal Court was entitled on the evidence to find that the cause (or reason why the money was owed) was (1) to compensate the respondent for her contribution to the business, both by working in it and by looking after the children so as to allow the appellant to concentrate on it, and (2) to prevent any claim that she may have had by way of estoppel or unjust enrichment.

(iii) Even if the transfer of the share was part of the *objet* and as such was unlawful, the courts in their inherent equitable jurisdiction should not allow the appellant to

profit from a mistake of the respondent in which the appellant was complicit: cf. the English case *Patel v Mirza* [2016] UKSC 42. Even if part of the objet was null and void, the remaining part can still be enforced.

(iv) As to *volonté*, relations between the parties were acrimonious when the Royal Court found the contract to have been made: they were separating, not engaging in an informal family arrangement such as was referred to in *Ferchal v Ferchal*, and the seriousness of the subject-matter was evident.

(v) The terms of the contract as they were found by the Royal Court leave no room for any argument that they were contrary to public policy. In particular, it was found as a fact that when the parties separated, the appellant decided and agreed that the respondent might be entitled to an interest in the business and should receive £50,000 as recognition for that contribution.

Jersey law of contract

14 The four elements necessary to constitute a contract under Jersey law were described by the Court of Appeal in *O'Brien v Marett* [2008] JCA 178, *para 55 as capacity, consent, cause and objet*. Capacity is not at issue in these proceedings, and consent is in issue only to in relation to the operation of the presumption, referred to above, that family relations do not create legally binding contracts.

15 *Objet* is a party's obligation of performance under a contract: “what a party promises to do under the contract by way of performance / discharge of his or her obligations”. In a bilateral contract, each party's obligation (e.g. of A to deliver goods and of B to make payment for them) is a distinct *objet*. As the Court of Appeal stated in *O'Brien*, (para 59) there can only be an *objet* if the promised performance is certain, possible and lawful.

16 The concept of cause, said to be unique to the French family of legal systems, is used in France “in order to impose a minimum reciprocity in contractual terms” and so is analogous in some **respects (though as the Jersey courts have emphasised, not in all) to the common law concept of consideration:** D. Fairgrieve, ***Law of Contract Study Guide* 2013–13, 3.108, 3.119, 3.140.** Fairgrieve describes cause as “the reason or motivation for which the parties enter into a contract” or, quoting B. Nicholas, the French Law of Contract (2nd edn. p.118), as ***“the end pursued”*** (3.117).

17 In some French cases, it seems that cause has been used to invalidate bargains affected by a ***“subjective rather than an objective imbalance”***, or which may be seen in retrospect to have constituted foolish or bad bargains from the point of view of one of the contracting parties: see Fairgrieve at 3.117–3.118, 3.124–3.125. Such decisions have been controversial in France and we have not received full argument as to what might be the position in Jersey. In the event, this appeal does not require us to consider the issue in detail for the reasons which follow later in this judgment. We note merely that the existence or otherwise of cause (like consideration in English law) is generally to be assessed by

having regard to the express terms of the contract, construed in accordance with the usual rules of construction, and by reference to the time of the contract was entered into. In so remarking, we do not prejudge the distinct question of whether consent (or *volonté*) is to be judged on an objective or a subjective basis, which does not arise in this case: see most recently Sir Philip Bailhache, ***"Subjectivity in the formation of a contract — a puzzling postscript"*** [2016] JLR 160–172.

18 Just as each party to a bilateral contract undertakes a distinct objet, so to each objet may attach a distinct cause:

> ***"In bilateral contracts, there is a fundamental interdependence between objet and cause.*** If one party's obligation lacks an objet, then the other party's obligation will lack a cause."

(Fairgrieve, 3.121). Types of cause upheld in Jersey cases include the conferral of benefits to which a person is not otherwise entitled (*Wightman v Cathcart Properties Limited* (1970) JJ 1433, 1441), and forbearance from taking action which could otherwise have been taken (*Gallichan v Gallichan* [1954] JJ 57).

Terms of the contract

19 The Royal Court employed both narrow and broad formulations to describe the nature of the contract that it found, after exhaustive consideration of the evidence, to exist between the parties.

20 The appellant draws attention to those parts of the judgment in which the Royal Court is said to have characterised the *objet* of the contract in narrow terms as being for the transfer of the respondent's share in X to him. By way of example, the Royal Court expressed itself as follows (emphases added):

> ***"(a) We are to determine, therefore, whether or not there was an agreement between the Plaintiff and the Defendant under which the Defendant would pay to the Plaintiff the sum of £50,000 to transfer her share in X to him" (para 10)*** .
>
> ***"(b) She says there was a clear agreement between herself and the Defendant … that when the relationship ended he had subsequently offered to pay and she had agreed to receive £50,000 for the transfer of her share in the company to the Defendant or his nominee" (para 10, emphasis added)*** .
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> ***"(c) Either there was an agreement that the Defendant would pay £50,000 for the share or there was not" (para 12, emphasis added)*** .
>
> ***"(d) We … think that the Defendant linked that payment to the transfer to him of the share that the Plaintiff held in the company"***

(para 76, emphasis added) .

21 Those formulations indeed reflect the predominant way in which the respondent herself put the case in her pleadings and in her evidence.

22 It is important however to understand that the respondent expressed herself in those terms because of her belief (which in the judgment of the Royal Court was wrong, but which was held in good faith) that she held the share in her own right. There was some evidence before the Royal Court that the share was seen as an encapsulation of the value of the respondent's interest in the business. Thus, in her Reply of 28 November 2014, the respondent characterised the "consideration" for her share as

> *"in recognition of her contribution to the success of the business before the share was officially transferred to her and in recognition of the on-going contributions she was to make not only to the business but also to the parties' family life which allowed [the appellant] to concentrate on making the business such a success"*.

23 The respondent further stated in her witness statement of 23 September 2015:

> *"In 2009 we began to have numerous discussions about how I could be compensated for my interest in the business, which we both agreed I had but could not agree how much that interest was.* Whilst I had believed it to be a 50% interest, the discussions focused on how I contributed over the years and how I should be compensated tor that contribution." (emphasis added).

That evidence, on which there was every opportunity to cross-examine the respondent, is consistent with the view that the *cause* attaching to the promised payment of £50,000 when the agreement was made in late 2010 or early 2011 was not limited to the transfer of the share which (as it turned out) she held as nominee. As the respondent put it under cross-examination, she agreed to £50,000 for the transfer of the share because "I believe that was my money that was due to me for my contribution to the business" (transcript p. 60).

24 The respondent also emphasised in her oral evidence that she accepted a payment of £50,000, rather than the larger sum to which she considered herself entitled and which she claimed had been promised, because *"I wanted an end to it"* (transcript p. 55) and *"I really wanted to bring an end to it, I didn't, nobody in their right mind would want to be dragged through the family courts"* (transcript p. 60). She added:

> *"It would be nice to be able to put it all to one side and tie up all the loose ends, hopefully with the business, and I thought if I tied things up with the business and made it nice and easy he would be happy with that because he got a good deal at £50,000 in not having to buy us a house or give me the £200,000 he promised."* (transcript p. 60).

25 The written and oral evidence of the respondent was reflected in the Royal Court's broader findings as to the terms of the contract, which we consider were intended to be definitive and which are expressed in the following passages from near the end of the judgment:

> ***"(a) We do not doubt that the Defendant was anxious to procure the return of the share to him, avoid a dispute about it, and we think on the balance of probabilities that he agreed to make a payment of £50,000 to the Plaintiff to ensure that she did so and to keep things relatively cordial"*** (para 77, emphasis added).
>
> ***"(b) In this we accept the evidence of the Plaintiff and in our view it is more likely than not that the Defendant, recognising a moral obligation, if nothing more, to the Plaintiff for her contribution to the relationship over the years and seeking to avoid any difficulties with regard to the transfer of the share made positive representation to her that he would provide for her and ultimately, agreed to pay her £50,000 and, in reliance on that, she transferred the share that she held as nominee to him on the basis that he would pay her £50,000 in return for giving up any claim she might have in the business.*** It was intended at the time, by both of them, to be an agreement and legally binding" (para 78, emphasis added).

First issue: was there a valid cause and licit objet?

26 The first and most substantial issue for decision is whether, as the appellant submits in the arguments summarised at para 11 above, the contract lacked a *legitimate objet* because the cause was inextricably linked to the return of the share.

27 Here, the starting point is the Royal Court's finding in relation to the terms of the contract, which as we have indicated are to be found in paragraphs 77 and 78 of its judgment. While the parties plainly envisaged the return of the share, the view taken by the Royal Court indicates that the cause was considerably broader than that. Influenced by the appellant's recognition of his moral obligation to the respondent for her contribution to the relationship over the years, the cause extended to the compromise of any possible dispute both as to the return of the share and as to any claim the respondent might have in the business.

28 We consider that the Royal Court was entitled to find as it did, having had the advantage of hearing the evidence. As we have already indicated, we consider that there was material in the evidence on the basis of which the Royal Court could reasonably come to the conclusion that it did. We decline in the exercise of our appellate function to second-guess the assessment of the Royal Court, or to characterise the cause in the narrower terms submitted for by the appellant.

29 On the basis of the Royal Court's assessment, we consider that there was a valid cause for the payment of the promised £50,000. As noted above, forbearance to take action that

could otherwise have been taken can in principle constitute a cause under Jersey law (*Gallichan*). A promise to give up even a doubtful claim may in our judgment constitute a valid cause, just as it can be good consideration under English law. As to a *licit objet*, we think the Royal Court was entitled to find that the objet was the transfer of £50,000, irrespective of the nominee arrangements. There is nothing intrinsically illicit in such an *objet* and since the cause was valid, there is no reason to consider that the *objet* of transferring £50,000 was illicit or unenforceable in this case.

30 As to the primary contention that there was no evidence of the contract as alleged by the respondent, this was a finding of fact by the Royal Court on the evidence which it heard. That court was far better placed than an appellate court to make such a finding and we do not disturb it.

31 Given the Royal Court's formulation of the cause, the legal consequences identified by the appellant under the Trusts (Jersey) Law 1990 do not arise. It is not therefore necessary to consider them further.

Second issue: was the requirement of consent satisfied?

32 We reject the appellant's submission that the contract lacked *volonté* (or consent), because of the presumption that family arrangements do not create legally binding contracts.

33 The purpose of that presumption, and its limitations, were described as follows in *Ferchal v Ferchal* [1990] JLR 117, 121:

> ***"We can see that in a very large number of cases family arrangements do not create legally binding contracts.*** It would be invidious for a husband to allow his wife to use the car registered in his name and when in a fit of pique she refused to return it to him, to allow the husband to sue his wife for its restitution. But there must be times when the seriousness of the matter in contemplation, the consequences of one party acting upon it and the intention of the parties is certain enough for the court to be able to hold that there are circumstances in which arrangements between close relatives are intended to have the force of law and where, in those circumstances, it is possible to rebut the original presumption."

34 It is understandable that some routine arrangements between close family members should not be understood as evincing consent, or intention to create contractual relations. But the reason for that, as illustrated by the Royal Court in *Ferchal*, is the informal and unremarkable nature of such arrangements. The contract found by the Royal Court in the present case is at the other extreme: a significant financial arrangement between an unmarried couple whose relationship had broken down and who were seeking to provide for their respective futures apart. We can conceive of no reason why such a contract should

be brought within the ***"family arrangements"*** presumption: indeed given the absence of statutory protection for unmarried couples who separate, there are strong policy reasons for ensuring that financial arrangements made by such couples are in principle enforceable.

Third issue: was the contract contrary to public policy?

35 The appellant's submission of public policy was based on the assumption that the appellant agreed to pay £50,000 purely on the basis of familial obligation. That was not the finding of the Royal Court, as noted above.

36 Even if the cause had been limited to familial obligation, we see no reason of public policy why the couple should not have chosen to agree on provision for the respondent in addition to what had been awarded by the Royal Court in proceedings under the Children (Jersey) Law 2002.

Conclusion

37 The appeal is dismissed.