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2. Agreement: Objective or Subjective?

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Abstract

This chapter discusses the approach adopted by the courts when seeking to ascertain the intention of the parties to a contract. The general rule is that the existence and content of an agreement are questions that must be answered by reference to the intention of the parties, objectively ascertained. Two leading cases are presented that consider the scope of the objective test, namely *Smith* v. *Hughes* (1871) LR 6 QB 597 and *Centrovincial Estates plc* v. *Merchant Investors Assurance Company Ltd* [1983] Com LR 158. The discussion then turns to the case where one party attempts to 'snap up' an offer which he knew that the offeror did not intend, and the case where one party was at fault in failing to notice that the other party's offer contained a mistake, or he was himself responsible for inducing that mistake in the other party. In these cases it would appear that the courts will have regard to the subjective intention of that party and the effect of doing so may be to provide a good reason for not applying the objective test that is generally deployed by the courts (thereby declining to give effect to their objective agreement).

Keywords: contract law, objective intention, relevance of subjective intention of the parties, snapping up, role of fault

Central Issues

1. When deciding whether or not parties have in fact reached agreement the law could either seek to examine the subjective intentions of the parties or it could have regard to their intention, objectively ascertained.

2. English law has chosen to adopt an objective approach. The reasons for this choice will be examined in this chapter, together with the different forms that the objective test can take. It will be suggested that the approach adopted by the judges is to attempt to put themselves in the position of a reasonable person in the position of the parties (principally, but not exclusively, the promisee of the disputed promise). The judges do not adopt the perspective of the reasonable detached observer.
3. Finally the chapter concludes by considering the weight, if any, which is attached to the subjective intention of a contracting party in the case where he attempts to 'snap up' an offer which he knew that the offeror did not intend and in the case where he was at fault in failing to notice that the other party's offer contained a mistake, or he was himself responsible for inducing that mistake in the other party. In these cases it would appear that the courts will have regard to the subjective intention of that party and the effect of doing so may be to provide a good reason for not applying the objective test that is generally deployed by the courts (thereby declining to give effect to their objective agreement).

2.1 Introduction

A party who wishes to establish that a legally binding contract has been formed between himself and another party must prove a number of matters. The first is that the parties have reached agreement. This is usually done by demonstrating that one party has made an offer that the other has accepted. The rules relating to offer and acceptance are discussed in Chapter 3. Secondly, the agreement must be expressed in a form that is
p. 18 sufficiently certain ↵ for the court to be able to enforce. The tests applied by the courts when deciding whether a term has been expressed in a form that is too vague, incomplete, or uncertain to be enforced are discussed in Chapter 4. Thirdly, the agreement must be supported by consideration (although it is possible that effect may be given to a promise that is unsupported by consideration via an estoppel). The doctrine of consideration and the role that estoppel can play in giving effect to promises that are unsupported by consideration are discussed in Chapter 5. Fourthly, the law may only recognize the validity of the agreement if it is entered into in a particular form (such as writing). The significance of requirements of form has diminished in recent years but they have not been entirely abolished. Requirements of form are discussed in Chapter 6. Finally, the parties must have had an intention to create legal relations. This intention is presumed in commercial transactions, but in the case of domestic and social agreements the law initially presumes that the parties did not intend to be legally bound by their agreement. The doctrine of intention to create legal relations is discussed in Chapter 7.

The function of this chapter is to discuss a preliminary matter, namely the approach adopted by the courts when seeking to ascertain the intention of the parties. Many of the rules of contract law are said to rest on the intention of the parties. But how does the court ascertain their intention? Does it seek to examine the actual, subjective state of mind of the parties or does it look to the outward manifestation of their intention (as expressed in the words used, their appearance, conduct, etc.)? The general rule is that the existence and

content of an agreement are objective questions that must be answered by reference to the intention of the parties, objectively ascertained. As Lord Clarke observed in the Supreme Court in *RTS Flexible Systems Ltd* v. *Molkerei Alois Müller GmbH & Co KG (UK Production)* [2010] UKSC 14, [2010] 1 WLR 753, [45]:

> whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations.

The proposition that the test for the existence and content of an agreement is objective rather than subjective raises three issues. The first relates to the justification for the adoption of an objective approach. If contract is about the enforcement of promises voluntarily made, why does the law not place primary emphasis on the subjective intentions of the parties? Reasons which are often given for the adoption of an objective approach are, essentially, the need to encourage certainty in commercial transactions and the desire to avoid the evidential difficulties associated with an inquiry into the actual state of mind of a party to the contract. Thus Lord Steyn, writing extrajudicially ('Contract Law: Fulfilling the Reasonable Expectations of Honest Men' (1997) 113 *LQR* 433), put the matter as follows:

> It is a defensible position for a legal system to give predominance to the subjective intentions of the parties. Such a policy can claim to be committed to the ideal of perfect individualised justice. But that
> p. 19 is not the English way. Our law is generally based on an objective ↵ theory of contract. This involves adopting an external standard given life by using the concept of the reasonable man. The commercial advantage of the English approach is that it promotes certainty and predictability in the resolution of contractual disputes. And, as a matter of principle, it is not unfair to impute to contracting parties the intention that in the event of a dispute a neutral judge should decide the case applying an objective standard of reasonableness.

But it is possible to find other justifications for the adoption of an objective approach. Professor Stevens ('What is an Agreement?' (2020) 136 *LQR* 599, 600–601) has put the case for the adoption of an objective test in the following terms:

> Why does the law apply an objective test to the existence and interpretation of agreements … It is sometimes said we do so for the purpose of legal certainty, and because one or more parties may rely upon the objective appearance created. These reasons are unpersuasive. Certainty, on its own, is never a forceful reason for a rule, when other equally certain alternatives are available. Why apply an objective test where no reliance has taken place? Indeed, an objective approach to interpretation is adopted even where no reliance could possibly have taken place … The true justification is that agreements. … are not found in our minds, but in our actions in the world. All are *acts* of communication, whose meaning is determined, just as they are outside the law, objectively, and not by what one or more of the parties involved intended. That adopting this approach has in some cases the useful advantages of commercial certainty or, where it has occurred, protection of a party who has relied upon outward appearances, counts in its favour, but it is a mistake to think that these incidental benefits provide the reason for the rule as a matter of justice. (Emphasis in the original)

The second issue relates to the definition or the scope of this 'objective theory of contract'. Lord Steyn's definition, quoted above, is a broad one in that it places considerable emphasis on the concept of 'reasonableness' (more than one might, perhaps, expect from a judge sitting in a court in England). There are in fact different variants of the objective theory of contract. Howarth ('The Meaning of Objectivity in Contract' (1984) 100 *LQR* 265) identifies three varieties. The first he terms 'promisor objectivity' (that is to say the promise is to be understood in the way in which it would have been understood by a reasonable person in the position of the promisor); the second is 'promisee objectivity' (according to which the promise is to be understood in the way in which it would have been understood by a reasonable person in the position of the promisee); and the third is 'detached objectivity' (in which case the perspective adopted is that of the reasonable man who is independent of the two parties to the contract). Howarth is himself an advocate of 'detached objectivity'. The distinction that he draws between 'promisor' and 'promisee' objectivity is, however, a troublesome one in application because in an ordinary bilateral contract the parties are both promisors and promisees (for criticism of Howarth's analysis along these lines see J Vorster, 'A Comment on the Meaning of Objectivity in Contract' (1987) 103 *LQR* 274). Thus in the case of a contract for the sale of goods the seller is a promisor in relation to the promise to sell the goods but a promisee in relation to the buyer's promise to pay for them, while the buyer is a promisor in relation to his promise to pay for the goods but a promisee in relation to the seller's promise to deliver the goods. What does Howarth himself mean by

p. 20 ↵ the use of the labels 'promisor' and 'promisee'? He defines his concepts in footnote 5 of his article where he states:

> The use of promisor/promisee terminology, rather than plaintiff/defendant or offeror/offeree, serves as a convenient means of distinguishing the party wishing to enforce a contract or contractual promise (the promisee) from the party wishing to avoid the enforcement of that promise (the promisor).

As we shall see (2.2, 2.3, and 2.4), this distinction gives rise to considerable difficulty in terms of application and should, for that reason, be rejected. Nevertheless, despite these terminological difficulties, Howarth's insight is a useful one because it points out that the objective test can be viewed from different perspectives.

Generally, there are two parties to a contract and the law could adopt the perspective of the reasonable person in the position of either party to the contract or it could adopt the position of the reasonable independent observer.

The third issue relates to the role of the subjective intentions of the parties to the contract. Are they irrelevant (at least to the extent that they do not coincide with the result reached by the application of the objective test) or do they have some residual significance? Cases in which it has been argued that the courts have had regard to the subjective intentions of at least one contracting party include cases in which one party attempts to snap up an offer which she knows the other party did not intend (see *Hartog* v. *Colin & Shields* [1939] 3 All ER 566, 2.3) and where one party was at fault in not realizing that the other party had made a mistake (see *Scriven Brothers & Co* v. *Hindley & Co* [1913] 3 KB 564, 2.4). We shall examine these cases and consider whether they do in fact support the proposition that English law has regard to the subjective intentions of the contracting parties after we have discussed two leading cases that consider the scope of the objective test, namely *Smith* v. *Hughes* (1871) LR 6 QB 597 and *Centrovincial Estates plc* v. *Merchant Investors Assurance Company Ltd* [1983] Com LR 158.

2.2 The Objective Theory Illustrated

Smith v. Hughes
(1871) LR 6 QB 597, Court of Appeal

The facts are set out in the judgment of Cockburn CJ.

Cockburn CJ

This was an action brought in the county court of Surrey, upon a contract for the sale of a quantity of oats by plaintiff to defendant, which contract the defendant had refused to complete, on the ground that the contract had been for the sale and purchase of old oats, whereas the oats tendered by the plaintiff had been oats of the last crop, and therefore not in accordance with the contract.

p. 21 ↵ The plaintiff was a farmer, the defendant a trainer of racehorses. And it appeared that the plaintiff, having some good winter oats to sell, had applied to the defendant's manager to know if he wanted to buy oats, and having received for answer that he (the manager) was always ready to buy good oats, exhibited to him a sample, saying at the same time that he had forty or fifty quarters of the same oats for sale, at the price of 35s. per quarter. The manager took the sample, and on the following day wrote to say he would take the whole quantity at the price of 34s. a quarter.

Thus far the parties were agreed; but there was a conflict of evidence between them as to whether anything passed at the interview between the plaintiff and defendant's manager on the subject of the oats being old oats, the defendant asserting that he had expressly said that he was ready to buy old oats, and that the plaintiff had replied that the oats were old oats, while the plaintiff denied that any reference had been made to the oats being old or new.

The plaintiff having sent in a portion of the oats, the defendant, on meeting him afterwards, said, 'Why, those were new oats you sent me', to which the plaintiff having answered, 'I knew they were; I had none other'. The defendant replied, 'I thought I was buying old oats: new oats are useless to me; you must take them back'. This the plaintiff refused to do and brought this action.

It was stated by the defendant's manager that trainers as a rule always use old oats, and that his own practice was never to buy new oats if he could get old. But the plaintiff denied having known that the defendant never bought new oats, or that trainers did not use them; and, on the contrary, asserted that a trainer had recently offered him a price for new oats. Evidence was given for the defendant that 34s. a quarter was a very high price for new oats, and such as a prudent man of business would not have given. On the other hand, it appeared that oats were at the time very scarce and dear.

The learned judge of the county court left two questions to the jury: first, whether the word 'old' had been used with reference to the oats in the conversation between the plaintiff and the defendant's manager; secondly, whether the plaintiff had believed that the defendant believed, or was under the impression, that he was contracting for old oats; in either of which cases he directed the jury to find for the defendant.

It is to be regretted that the jury were not required to give specific answers to the questions so left to them. For, it is quite possible that their verdict may have been given for the defendant on the first ground; in which case there could, I think, be no doubt as to the propriety of the judge's direction; whereas now, as it is possible that the verdict of the jury—or at all events of some of them—may have proceeded on the second ground, we are called upon to consider and decide whether the ruling of the learned judge with reference to the second question was right.

For this purpose we must assume that nothing was said on the subject of the defendant's manager desiring to buy old oats, nor of the oats having been said to be old; while, on the other hand, we must assume that the defendant's manager believed the oats to be old oats, and that the plaintiff was conscious of the existence of such belief, but did nothing, directly or indirectly, to bring it about, simply offering his oats and exhibiting his sample, remaining perfectly passive as to what was passing in the mind of the other party. The question is whether, under such circumstances, the passive acquiescence of the seller in the self-deception of the buyer will entitle the latter to avoid the contract. I am of opinion that it will not.

[He set out his reasons and continued]

It only remains to deal with an argument which was pressed upon us, that the defendant in the present case intended to buy old oats, and the plaintiff to sell new, so the two minds were not ad
p. 22 idem; and that consequently there was no contract. This argument proceeds on ↵ the fallacy of confounding what was merely a motive operating on the buyer to induce him to buy with one of the essential conditions of the contract. Both parties were agreed as to the sale and purchase of this particular parcel of oats. The defendant believed the oats to be old, and was thus induced to agree to buy them, but he omitted to make their age a condition of the contract. All that can be said is, that the two minds were not ad idem as to the age of the oats; they certainly were ad idem as to the sale and purchase of them. Suppose a person to buy a horse without a warranty, believing him to be sound, and the horse turns out unsound, could it be contended that it would be open to him to say that, as he had intended to buy a sound horse, and the seller to sell an unsound one, the contract was void, because the seller must have known from the price the buyer was willing to give, or from his general habits as a buyer of horses, that he thought the horse was sound? The cases are exactly parallel.

The result is that, in my opinion, the learned judge of the county court was wrong in leaving the second question to the jury, and that, consequently, the case must go down to a new trial.

Blackburn J

In this case I agree that on the sale of a specific article, unless there be a warranty making it part of the bargain that it possesses some particular quality, the purchaser must take the article he has bought though it does not possess that quality. And I agree that even if the vendor was aware that the purchaser thought that the article possessed that quality, and would not have entered into the contract unless he had so thought, still the purchaser is bound, unless the vendor was guilty of some fraud or deceit upon him, and that a mere abstinence from disabusing the purchaser of that

impression is not fraud or deceit; for, whatever may be the case in a court of morals, there is no legal obligation on the vendor to inform the purchaser that he is under a mistake, not induced by the act of the vendor. …

But I have more difficulty about the second point raised in the case. I apprehend that if one of the parties intends to make a contract on one set of terms, and the other intends to make a contract on another set of terms, or, as it is sometimes expressed, if the parties are not ad idem, there is no contract, unless the circumstances are such as to preclude one of the parties from denying that he has agreed to the terms of the other. The rule of law is that stated in *Freeman* v. *Cooke* 2 Ex 663. If, whatever a man'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 that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms.

The jury were directed that, if they believed the word 'old' was used, they should find for the defendant—and this was right; for if that was the case, it is obvious that neither did the defendant intend to enter into a contract on the plaintiff's terms, that is, to buy this parcel of oats without any stipulation as to their quality; nor could the plaintiff have been led to believe he was intending to do so.

But the second direction raises the difficulty. I think that, if from that direction the jury would understand that they were first to consider whether they were satisfied that the defendant intended to buy this parcel of oats on the terms that it was part of his contract with the plaintiff that they were old oats, so as to have the warranty of the plaintiff to that effect, they were properly told that, if that was so, the defendant could not be bound to a contract without any such warranty unless the plaintiff was misled. But I doubt whether the direction would bring to the minds of the jury the distinction between agreeing to take the oats under the belief that they were old and agreeing to take the oats under the belief that the plaintiff contracted that they were old.

p. 23 ↵ The difference is the same as that between buying a horse believed to be sound, and buying one believed to be warranted sound; but I doubt if it was made obvious to the jury, and I doubt this the more because I do not see much evidence to justify a finding for the defendant on this latter ground if the word 'old' was not used. There may have been more evidence than is stated in the case; and the demeanour of the witnesses may have strengthened the impression produced by the evidence there was; but it does not seem a very satisfactory verdict if it proceeded on this latter ground. I agree, therefore, in the result that there should be a new trial.

Hannen J

[…]

It is essential to the creation of a contract that both parties should agree to the same thing in the same sense. Thus, if two persons enter into an apparent contract concerning a particular person or ship, and it turns out that each of them, misled by a similarity of name, had a different person or ship

in his mind, no contract would exist between them: *Raffles* v. *Wichelhaus* 2 H & C 906.

But one of the parties to an apparent contract may, by his own fault, be precluded from setting up that he had entered into it in a different sense to that in which it was understood by the other party. Thus in the case of a sale by sample where the vendor, by mistake, exhibited a wrong sample, it was held that the contract was not avoided by this error of the vendor: *Scott* v. *Littledale* 8 E & B 815.

But if in the last-mentioned case the purchaser, in the course of the negotiations preliminary to the contract, had discovered that the vendor was under a misapprehension as to the sample he was offering, the vendor would have been entitled to shew that he had not intended to enter into the contract by which the purchaser sought to bind him. The rule of law applicable to such a case is a corollary from the rule of morality which Mr Pollock [counsel for the plaintiff] cited from Paley, *Moral and Political Philosophy*, Book III, ch. V, that a promise is to be performed 'in that sense in which the promiser apprehended at the time the promisee received it', and may be thus expressed: 'The promiser is not bound to fulfil a promise in a sense in which the promisee knew at the time the promiser did not intend it'. And in considering the question, in what sense a promisee is entitled to enforce a promise, it matters not in what way the knowledge of the meaning in which the promiser made it is brought to the mind of the promisee, whether by express words, or by conduct, or previous dealings, or other circumstances. If by any means he knows that there was no real agreement between him and the promiser, he is not entitled to insist that the promise shall be fulfilled in a sense to which the mind of the promiser did not assent.

If, therefore, in the present case, the plaintiff knew that the defendant, in dealing with him for oats, did so on the assumption that the plaintiff was contracting to sell him old oats, he was aware that the defendant apprehended the contract in a different sense to that in which he meant it, and he is thereby deprived of the right to insist that the defendant shall be bound by that which was only the apparent, and not the real bargain.

This was the question which the learned judge intended to leave to the jury; ... I do not think it was incorrect in its terms, but I think that it was likely to be misunderstood by the jury. The jury were asked, 'whether they were of opinion, on the whole of the evidence, that the plaintiff believed the defendant to believe, or to be under the impression that he was contracting for the purchase of old oats? If so, there would be a verdict for the defendant'. The jury may have understood this to mean
p. 24 that, if the plaintiff believed the defendant to believe ↵ that he was buying old oats, the defendant would be entitled to the verdict; but a belief on the part of the plaintiff that the defendant was making a contract to buy the oats, of which he offered him a sample, under a mistaken belief that they were old, would not relieve the defendant from liability unless his mistaken belief were induced by some misrepresentation of the plaintiff, or concealment by him of a fact which it became his duty to communicate. In order to relieve the defendant it was necessary that the jury should find not merely that the plaintiff believed the defendant to believe that he was buying old oats, but that he believed the defendant to believe that he, the plaintiff, was contracting to sell old oats.

I am the more disposed to think that the jury did not understand the question in this last sense because I can find very little, if any, evidence to support a finding upon it in favour of the defendant. It may be assumed that the defendant believed the oats were old, and it may be suspected that the

> plaintiff thought he so believed, but the only evidence from which it can be inferred that the plaintiff believed that the defendant thought that the plaintiff was making it a term of the contract that the oats were old is that the defendant was a trainer, and that trainers, as a rule, use old oats; and that the price given was high for new oats, and more than a prudent man would have given.
>
> Having regard to the admitted fact that the defendant bought the oats after two days' detention of the sample, I think that the evidence was not sufficient to justify the jury in answering the question put to them in the defendant's favour, if they rightly understood it; and I therefore think there should be a new trial.

Commentary

Smith was decided at a time when juries were still in common use in civil disputes. As Cockburn CJ states in his judgment, the judge left two questions for the jury. Had he required the jury to answer these questions separately, the appeal to the Court of Appeal might have been avoided. The jury entered a verdict for the defendant but, as a consequence of their failure to answer the two questions separately, the plaintiff was able to secure a new trial because of the possibility that the jury had misunderstood the second question and had entered judgment for the defendant only as a result of that misapprehension.

There are two points of importance that emerge from *Smith*. The first relates to the scope of the doctrine of mistake. This is a topic to which we shall return in Chapter 16. Here it suffices to note that the Court of Appeal distinguished between the case where the plaintiff believed that the defendant thought he was buying old oats and the case where the plaintiff believed that the defendant thought that he was buying oats which the plaintiff had promised were old. In the former case the defendant is liable to take the oats and must take the consequences of his own mistake, whereas in the latter he is not liable to take the oats on the ground that the parties were at cross-purposes as to the terms of the contract (for a modern affirmation of this rule see *Statoil ASA* v. *Louis Dreyfus Energy Services LP* [2008] EWHC 2257 (Comm), [2008] 2 Lloyd's Rep 685).

The second point, and the issue with which we are here concerned, relates to the submission that the parties were not 'ad idem' and that, consequently, no contract had been concluded between the parties. In considering whether or not the parties had reached agreement, the Court of Appeal clearly did not adopt a subjective approach because the fact that the defendant mistakenly believed that the oats were old oats was not sufficient to persuade the court to hold that no contract had been concluded. So the court applied an objective approach.

p. 25 ↵ But which variant of the objective test did the Court of Appeal apply? The judgments do not appear to offer any support for 'detached objectivity'. Howarth interprets the judgment of Hannen J as support for 'promisor objectivity' and the judgment of Blackburn J as support for 'promisee objectivity' (at (1984) 100 *LQR* 265, 268, and 271 respectively). But here we encounter the problem, alluded to earlier (see 2.1), of the identification of the 'promisor' and the 'promisee'. The seller was the promisor in relation to his promise to sell the oats, while the buyer was the promisor in relation to his promise to pay for them. Was the subject matter of the dispute the buyer's promise to pay or the seller's promise to sell? There is a real sense in which the dispute was about the buyer's promise to pay, in that the seller was suing for the price and so was attempting to enforce the buyer's promise to pay. But neither the buyer nor the seller disputed that the buyer

had promised to pay for the oats at 34s per quarter. The dispute between the parties related to the seller's promise to sell the oats and, in particular, the buyer's understanding of that promise. In relation to that promise, the seller was the promisor and the buyer was the promisee. But it is unlikely that either Blackburn J or Hannen J thought it necessary to distinguish between 'promisor objectivity' on the one hand and 'promisee objectivity' on the other. It seems more likely that they intended to examine the case from the perspective of the reasonable person in the position of both parties.

Applied to the facts of *Smith* this approach works out as follows. The seller sues for the price. The buyer cannot deny that he promised to pay for the oats. But he denies that he is liable to pay for them because he alleges that the seller promised to sell him old oats. This focuses attention on the seller's promise. Does the court attempt to put itself in the position of the reasonable man in the position of the buyer or the reasonable man in the position of the seller? It starts with the reasonable man in the position of the buyer (who is the promisee in relation to the seller's promise to sell). How would a reasonable man in the position of the buyer understand the seller's offer? Assuming that the seller did not use the word 'old' to describe the oats the reasonable man would understand it to be an offer to sell oats. This being the case, the contract was for the sale of oats and the buyer was liable to pay the price to the seller. But it does not follow from this that the court has no concern with the position of the seller (or, more accurately, the reasonable person in the position of the seller). On the facts of *Smith* the court gave little overt attention to the position of the seller because the reasonable man in the position of the seller would understand the buyer's promise as a promise to buy oats. But suppose that the seller knew that the buyer had misunderstood the terms of his offer and, further, he knew that the buyer believed that the seller had offered to sell him old oats. In such a case the seller would not be entitled to rely on the objective appearance created by the buyer's promise to pay for the oats because of his knowledge that the buyer did not intend to buy the new oats. The law does not allow a party to snatch at a bargain which he knew was not intended (see *Hartog* v. *Colin & Shields* [1939] 3 All ER 566, 2.3). This, indeed, is the point that was made by Hannen J in the context of his quotation from the work of Paley.

Suppose a further variation of the facts of *Smith* (based on the example given by Hannen J in the second paragraph of his judgment). Assume that the seller did not in fact intend to sell oats. He intended to sell barley but took along oats as his sample because he was unable to distinguish between oats and barley. When he delivers the barley the buyer refuses to take delivery or to pay for it. Again the buyer does not deny that he promised to pay for the goods. His defence is that the goods delivered were not those he contracted to buy. He states that he contracted to buy oats and not barley. The seller maintains that he intended to sell barley and not oats. So, once again, it is the subject matter of the seller's promise that is in dispute. How would a reasonable person in the position of the buyer understand the seller's offer? He would understand it as an
p. 26 offer to sell oats and, this being the case, the buyer would not be ↵ liable to pay for the barley. Any argument by the seller to the effect that he did not intend to offer oats for sale would be dismissed by the court on the ground that a reasonable person in the position of the buyer would understand his offer as an offer to sell oats and the seller would be bound by the appearance created by his conduct.

It is therefore suggested that the court does not have to choose between adopting the position of the reasonable person in the position of one party or the other. In relation to the promise, the meaning of which is disputed, the law starts from the position of the reasonable person in the position of the promisee but it does not stop there. It then goes on to examine the transaction from the perspective of the reasonable person in the position of the other party to the contract.

Centrovincial Estates plc v. Merchant Investors Assurance Company Ltd
[1983] Com LR 158, Court of Appeal

The plaintiffs let premises to the defendants for a term running from 1 December 1978 to 24 December 1989 at a yearly rental of £68,320, payable from 25 December 1978 and subject to a rent review from 25 December 1982. The agreement between the parties contained the following rent review clause:

> PROVIDED ALWAYS and it is hereby agreed that the rent hereby reserved shall on the Twenty-fifth day of December One thousand nine hundred and eighty-two be increased to the then current market rental value of the demised premises and in this connection the following procedure shall be adopted namely—
>
> A. At least six months before the Twenty-fifth day of December One thousand nine hundred and eighty-two the Lessor and the Lessee or their duly authorised representatives (sic) will endeavour to reach agreement on the then current market rental value of the demised premises and if they are able to agree such current market rental value within a period of three months they shall certify the amount of the then current market rental value as agreed between them—
>
> B. In the event of the parties hereto failing to reach agreement as to the then current market rental value within the said period of three months by sub-clause A hereof
>
> C. PROVIDED then the matter shall be referred to an independent surveyor or valuer (to be appointed within a further period of one month by the President for the time being of the Royal Institution of Chartered Surveyors) for assessment and not by way of arbitration and the assessment of such independent surveyor shall be communicated to the parties hereto in writing and shall be final and binding upon them. ...
>
> D. Upon the signing of the Certificate by the duly authorised representative of the Lessor and Lessee respectively or the receipt by the Lessor and the Lessee of the independent surveyor's or valuer's written communication as to the then current market rental value the rent hereby reserved shall as from the twenty-fifth day of December One thousand nine hundred and eighty-two be increased to the amount so certified or assessed
>
> E. Under no circumstances shall this proviso operate to effect a reduction in the rent below that which was payable immediately before the particular date of any rent revision hereunder. ...

On 22 June 1982 a letter was written to the defendants on behalf of the plaintiffs by their solicitors
p. 27 which invited the defendants to agree that the 'current market rental value' of the ↵ premises was £65,000. The defendants' company secretary replied to this letter on the following day and he agreed that £65,000 was the appropriate figure. The plaintiffs received this letter on 28 June and immediately one of their partners telephoned the defendants to inform them that the letter of 22 June 1982 contained an error and that they had intended to propose a current market rental value of

£126,000, not £65,000. The plaintiffs' solicitors wrote to the defendants in similar terms on the following day. But the defendants refused to accept the amended terms and insisted that the parties had concluded a binding agreement at a rental of £65,000.

The plaintiffs issued a writ against the defendants and sought a declaration that no legally binding agreement had been made between the parties in respect of the reviewed rent payable by the defendants to the plaintiffs from 25 December 1982 and a declaration that the plaintiffs were entitled to refer the assessment of the current market rental value to an independent surveyor or valuer in accordance with sub-clause B of the rent review clause.

The trial judge held that the plaintiffs were entitled to summary judgment. The defendants appealed to the Court of Appeal who allowed the appeal and gave the defendants unconditional leave to defend the action.

Slade LJ

[giving the judgment of the court]

The essence of the plaintiffs' case is, and has at all times been, that the parties have failed to reach 'agreement' as to the 'current market rental value' of the demised premises within the meaning of sub-paragraphs A and B of the rent review provision and that the plaintiffs are accordingly entitled to have matters referred to an independent surveyor pursuant to sub-paragraph B. To establish this claim, it was and is necessary for them to satisfy this Court that the two letters of the 22nd and 23rd June did not result in the conclusion of any 'agreement' within the meaning of those sub-paragraphs.

So far as their affidavit evidence revealed, the two grounds upon which the plaintiffs intended to argue the latter proposition were in effect:

(1) that not even an apparent binding agreement was concluded by these two letters, because, on the true construction of the rent review provision, there could be no binding agreement until the parties had signed the contemplated certificate;

(2) that even if the two letters did evidence an apparent binding agreement, there was in fact no binding agreement in law, on the grounds that the defendants, in responding as they did to the letter of the 22nd June, were trying to take advantage of what they knew, or ought reasonably to have known, was an error on the part of the plaintiffs' solicitors.

When the Order XIV[1] summons came on for hearing before Mr Justice Harman, the plaintiffs shifted their position. They did not attempt to pursue the first of these two points. As to the second, they accepted that there was a substantial disputed issue of fact as to whether the defendants on the 23rd June 1982, knew, or ought reasonably to have known, of the alleged error on the part of the plaintiffs. Correspondingly, they conceded that they could not expect to obtain summary judgment on the basis of any such alleged knowledge on the part of the defendants since the disputed issue as to the defendants' state of knowledge is one that can only be appropriately resolved at the trial.

p. 28 ↵ This concession having been made, in our opinion correctly, the plaintiffs were confronted with at least formidable difficulties on their application for summary judgment. On the face of it, the letter of the 22nd June 1982 constituted a formal, unequivocal and unambiguous offer made to the defendants on behalf of the plaintiffs, with an intent to create legal relations, to agree that the 'current market rental value' of the demised premises, for the purpose of sub-paragraph A of the rent review provision, was £65,000 per annum. On the face of it, the letter of the 23rd June 1982 constituted a formal, unequivocal and unambiguous acceptance of that offer by the defendants. The plaintiffs' solicitors indeed assert that they erroneously inserted the figure of £65,000 in the letter of the 22nd June 1982 in substitution for the figure of £126,000, which they had intended to insert; and like the learned Judge we are prepared to accept the truth of this assertion for the purpose of dealing with the present application. But in the absence of any proof, as yet, that the defendants either knew or ought reasonably to have known of the plaintiffs' error at the time when they purported to accept the plaintiffs' offer, why should the plaintiffs now be allowed to resile from that offer? 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. It is an equally well-established principle that ordinarily an offer, when unequivocally accepted according to its precise terms, will give rise to a legally binding agreement as soon as acceptance is communicated to the offeror in the manner contemplated by the offer, and cannot thereafter be revoked without the consent of the other party. Accepting, as they do, that they have not yet proved that the defendants knew, or ought reasonably to have known, of their error at the relevant time, how can the plaintiffs assert that the defendants have no realistic hope of establishing an agreement of the relevant nature by virtue of the two letters of the 22nd and 23rd June 1982?

Mr Richard Scott [counsel for the plaintiffs] in answer has submitted an argument to the following effect. The 'agreement' envisaged by sub-paragraphs A and B of the rent review provision is a genuine agreement, a real meeting of the minds. In the present case there was no real meeting of the parties' minds because of the plaintiffs' error. True it is that their intentions would have fallen to be judged objectively, according to their external manifestation, if the defendants had not only purported to accept the offer but had further altered their position as a result. However, so the argument runs, the general rule that the intentions of an offeror must be judged objectively is based on estoppel. Accordingly, if the person who has accepted the offer has not altered his position in reliance on the offer, no such estoppel arises. In the present case, it is submitted, the critical fact is that the figure of £65,000 was lower than the rent currently payable under the Lease immediately before the 25th December 1982. In these circumstances, it is said, the defendants in agreeing that figure, did not alter their position in any way. Because of sub-paragraph E of the rent review provision, the current rent of £68,320 would have continued to be payable after the 25th December 1982, notwithstanding the agreement. In all the circumstances, it is submitted, the plaintiffs, having proved their error at the relevant time, were at liberty to withdraw the offer contained in the letter of the 22nd June 1982, even after it had been accepted, and they duly did so at the end of June 1982. …

The nature of the apparent contract concluded by the two letters of the 22nd and 23rd June 1982 is what is sometimes called a 'bilateral contract'. It was concluded by

> (a) an offer by the plaintiffs to treat £65,000 as the 'current market rental value' of the premises for the purpose of the Lease if the defendants would promise to accept that figure as that value, followed by
>
> (b) the giving of a promise by the defendants in those terms.
>
> p. 29 ↵ Where the nature of an offer is to enter into a bilateral contract, the contract becomes binding when the offeree gives the requested promise to the promisor in the manner contemplated by the offer; the mutual promises alone will suffice to conclude the contract. In our opinion, subject to what is said below relating to consideration, it is contrary to the well established principles of contract law to suggest that the offeror under a bilateral contract can withdraw an unambiguous offer, after it has been accepted in the manner contemplated by the offer, merely because he has made a mistake which the offeree neither knew nor could reasonably have known at the time when he accepted it. And in this context, provided only that the offeree has given sufficient consideration for the offeror's promise, it is nothing to the point that the offeree may not have changed his position beyond giving the promise requested of him.
>
> For these reasons we think that the plaintiffs' submissions based on mistake cannot, as matters stand, suffice to negative the existence of the apparent agreement of the parties to treat £65,000 as the current market rental value for the purpose of the Lease and to deprive the defendants of the right to defend this action on the basis of such agreement, though we are not, of course, saying that the plea of mistake as formulated in the statement of claim will not succeed at the trial. ...
>
> This is a case where the defendants clearly ought to be given leave to defend this action, unless the plaintiffs can satisfy the Court that the defendants have no realistic prospect of establishing an agreement of the relevant nature at the trial. The plaintiffs have not so satisfied us on the evidence now before the Court.

Commentary

It is important to note that the plaintiffs in this case were seeking summary judgment against the defendants under what was Order 14 of the Rules of the Supreme Court (see now Part 24 of the Civil Procedure Rules). Order 14 rule 1 provided:

> Where in an action to which this rule applies a statement of claim has been served on a defendant and that defendant has given notice of intention to defend the action, the plaintiff may, on the ground that the defendant has no defence to a claim included in the writ, or to a particular part of such a claim, or has no defence to such a claim or part except as to the amount of any damages claimed, apply to the Court for judgment against that defendant.

The court in an Order 14 case could either give judgment for the plaintiff or give the defendant leave to defend. The Court of Appeal in the present case gave the defendants unconditional leave to defend the action. All this means is that the defendant is entitled to defend the claim so that the plaintiff must proceed to trial if he is to succeed in his claim. This being the case, the plaintiffs' claim in *Centrovincial* would proceed to trial unless the parties were able to settle it before trial.

What would the plaintiffs have to prove in order to win their claim at trial? According to Slade LJ they would have to prove that the 'defendants either knew or ought to have known of the plaintiffs' error at the time when they purported to accept the plaintiffs' offer'. One might think that the fact that the proposed rental was lower than the existing rental (and that sub-clause E stated that effect could not be given to a proposal to lower the rent) would have alerted the defendants to the fact that the proposed reduction in the rental value
p. 30 was a mistake. But Mr Evans, a chartered surveyor who acted for the defendants and who drafted ↵ the defendants' letter of 23 June, swore an affidavit in which he 'strongly denied that he either knew or ought reasonably to have known of any such error and supported this denial by a number of reasons'. The state of the defendants' knowledge was therefore a matter of dispute and, as Slade LJ stated, that dispute could 'only be appropriately resolved at the trial'.

The decision of the Court of Appeal in *Centrovincial* establishes a number of points of importance. First, it affirms the general rule that the intentions of the parties are to be ascertained objectively and not subjectively. Secondly, it rejects the proposition that this general rule is based on estoppel.[2] It is a rule of contract law and is not confined to estoppel. Thus it was not necessary for the defendants to establish that they had acted to their detriment in reliance upon the plaintiffs' offer in order to hold the plaintiffs to the terms of their offer. The fact that they had accepted the offer was sufficient to give rise to a binding contract, notwithstanding the fact that the plaintiffs were mistaken and that they pointed out their mistake to the defendants immediately and before the defendants had acted on it in any way. This aspect of the decision has aroused some controversy. Thus Professor Atiyah has asked ('The Hannah Blumenthal and Classical Contract Law' (1986) 102 *LQR* 363, 368–369):

> Why should an offeree be entitled to create legal rights for himself by the bare act of acceptance when he has in no way relied upon the offer before being informed that it was made as a result of a mistake and did not in reality reflect the intention of the offeror? Now that liability for misleading statements is an accepted part of tort law, it becomes increasingly anomalous if in a contractual context a party is able to sue upon an unrelied-upon statement, whereas in any other context he is not. A misleading offer is a commercial or perhaps a social nuisance which should be discouraged, and for which compensation may be due, if loss is thereby caused, but surely the principles governing such misleading communications ought not to depend upon whether the communication can be classified as an offer or not?

The answer given by the Court of Appeal to Professor Atiyah's questions is that, while a binding promise may render reliance possible, it is not the case that it is the reliance that renders the promise binding. The parties were bound to one another the moment that the defendants accepted the plaintiffs' offer and there was nothing further that the defendants needed to do in order to render the contract binding. Were the law otherwise parties would not be able to have confidence in the security of their transactions unless and until they had acted to their detriment upon the promise made by the other party. The plaintiffs' offer was therefore binding upon them from the moment of acceptance, and they could not unilaterally bring that agreement to an end by the assertion that their offer contained within it a mistake. On its facts the decision in *Centrovincial* may seem harsh on the plaintiffs. But any appearance of hardship is mitigated by two factors. The first is that the plaintiffs may well have had an action in negligence against their solicitors who mistakenly inserted the figure of £65,000 in the offer. The second is the need to consider the position of the

defendants and, more generally, the need for a measure of security in commercial transactions. Assuming that the defendants neither knew nor ought reasonably to have known of the plaintiffs' mistake, why should they not be entitled to the benefit of their bargain? Parties need to know where they stand in relation to transactions that have been concluded and, were the law to allow a party to escape from an agreement by the mere assertion that he entered into it under a mistake, such security would be significantly undermined (see further D Friedmann, 'The Objective Principle and Mistake and Involuntariness in Contract and Restitution' (2003) 119 *LQR* 68).

p. 31 ↵ Finally, the Court of Appeal noted that it was open to the plaintiffs to prove at trial that the defendants either knew or ought reasonably to have known of the plaintiffs' mistake at the time they purported to accept the plaintiffs' offer. Cases in which the defendant knew of the plaintiffs' mistake at the time at which he purported to accept the plaintiffs' offer are commonly referred to as examples of 'snapping up'. These cases are discussed in the next section. Cases in which the defendants ought reasonably to have known of the plaintiffs' mistake are slightly more difficult to classify. They could be examples of 'snapping up'. But there is a wider category of case in which one party was at fault in failing to notice that the other party's offer contained a mistake, or he was himself responsible for inducing that mistake in the other party. In such a case the party at fault may not be entitled to hold the other party to the terms of his offer. These cases are discussed in the final section of this chapter.

2.3 The ‘Snapping Up’ Cases

Hartog v. Colin & Shields
[1939] 3 All ER 566, King’s Bench Division

The plaintiff alleged that the defendants had agreed to sell him 30,000 Argentine hare skins and that, in breach of contract, the defendants had failed to deliver them. He accordingly brought an action for damages against the defendants. The defendants denied that any binding contract had been entered into. They maintained that they had made a mistake in offering to sell the hare skins at a price per pound when they had intended to sell the skins at a price per piece (the value of a piece being approximately one third of the value of a pound). Further, the defendants alleged that the plaintiff was well aware of the mistake and had ‘fraudulently’ accepted an offer which ‘he well knew that the defendants had never intended to make’. It was held that the plaintiff was not entitled to recover damages from the defendants on the ground that he must have known that the defendants’ offer contained a material mistake.

Singleton J

In this case, the plaintiff, a Belgian subject, claims damages against the defendants because he says they broke a contract into which they entered with him for the sale of Argentine hare skins. The defendants’ answer to that claim is: ‘There really was no contract, because you knew that the document which went forward to you, in the form of an offer, contained a material mistake. You realised that, and you sought to take advantage of it.’

Counsel for the defendants took upon himself the onus of satisfying me that the plaintiff knew that there was a mistake and sought to take advantage of that mistake. In other words, realising that there was a mistake, the plaintiff did that which James LJ, in *Tamplin* v. *James* (1880) 15 Ch D 215, 211, described as ‘snapping up the offer’. It is important, I think, to realise that in the verbal negotiations which took place in this country, and in all the discussions there had ever been, the prices of Argentine hare skins had been discussed per piece, and later, when correspondence took place, the matter was always discussed at the price per piece, and never at a price per pound. Those witnesses who were called on behalf of the plaintiff have had comparatively little experience of dealing in Argentine hare skins. Even the expert witness who was called had had very little. One witness, Mr Caytan, I think, had had no dealings in them for some years, though before that he had had some, no doubt. On the ↵ whole, I think that the evidence of Mr Wilcox, on behalf of the defendants, is the more likely to be right—namely, that the way in which Argentine hare skins are bought and sold is generally per piece. That is shown by the discussions which took place between the parties in this country, and by the correspondence. Then on 23 November came the offer upon which the plaintiff relies. It was an offer of 10,000 Argentine hares, winters (100 skins equalling 16 kilos), at 10¼d per lb; 10,000 half hares at 6¾d per lb; 10,000 summer hares at 5d per lb. Those prices correspond, roughly, in the case of the winter hares, to 3¾d per piece, half hares 2d per piece, and summer hares 1¾d per piece. The last offer prior to this, in which prices were mentioned, was on 3 November from the defendants, and the price then quoted for winter hares was 10¾d per piece. Even allowing that the

p. 32

> market was bound to fall a little, I find it difficult to believe that anyone could receive an offer for a large quantity of Argentine hares at a price so low as 3¾d per piece without having the gravest doubts of it.
>
> I mention merely the price of the winter hares, because Mr Wilcox told me, and I accept his evidence, that at some time the price of Argentine winter hares fell to 9d. I am satisfied, however, from the evidence given to me, that the plaintiff must have realised, and did in fact know, that a mistake had occurred. …
>
> I cannot help thinking that, when this quotation in pence per pound reached Mr Hartog, the plaintiff, he must have realised, and that Mr Caytan, too, must have realised, that there was a mistake. Otherwise I cannot understand the quotation. There was an absolute difference from anything which had gone before—a difference in the manner of quotation, in that the skins are offered per pound instead of per piece.
>
> I am satisfied that it was a mistake on the part of the defendants or their servants which caused the offer to go forward in that way, and I am satisfied that anyone with any knowledge of the trade must have realised that there was a mistake. I find it difficult to understand why, when Mr Caytan bought in this way at 11d per lb, he could not tell me what the total purchase price was, and I cannot help thinking that there was an arrangement of some sort, amounting rather to a division of the spoil. That is the view I formed, having heard the witnesses. I do not form it lightly. I have seen the witnesses and heard them, and in this case can form no other view than that there was an accident. The offer was wrongly expressed, and the defendants by their evidence, and by the correspondence, have satisfied me that the plaintiff could not reasonably have supposed that that offer contained the offerers' real intention. Indeed, I am satisfied to the contrary. That means that there must be judgment for the defendants.

Commentary

Singleton J attributes the phrase 'snapping up' to the judgment of James LJ in *Tamplin* v. *James* (a case which is discussed at 2.4).

Singleton J states that, on the evidence, the plaintiff 'must have realised, and did in fact know, that a mistake had occurred'. Thus he found that the plaintiff actually knew that a mistake had been made by the defendants. It is a more difficult question whether this finding was crucial to the outcome of the case because he also makes it clear in his judgment that the plaintiff could not reasonably have supposed that the offer expressed the defendants' real intention. Subsequently, in *Longley* v. *PPB Entertainment Ltd* [2022] EWHC 977 (QB) Ellenbogen J (at [94]) interpreted the judgment of Singleton J as support for the proposition that it was the plaintiff's actual knowledge of the defendants' mistake which prevented him from snapping up an offer which he knew was not intended and that constructive knowledge of the mistake would not have sufficed to render the contract void (that is to say, it would not have been enough to show that a reasonable person in the
p. 33 plaintiff's position would have ↵ realised that the defendants had made a mistake). It is, however, difficult to extract the latter proposition from the judgment of Singleton J. Given his conclusion that the plaintiff knew

of the defendants' mistake, it was not necessary for him to decide whether the plaintiff's constructive knowledge of the defendants' mistake would not have sufficed to prevent the plaintiff from accepting the defendants' offer and he made no such decision.

What were the factors that led Singleton J to conclude that the plaintiff knew that the offer did not express the defendants' real intention? Two factors appear to predominate. The first was that the prior negotiations were conducted on the basis of a price per piece and the second was the extent of the disparity between the price per piece and the price per pound.

A more modern illustration of the application of this rule is provided by the facts of *Chwee Kin Keong* v. *Digilandmall.com Pte Ltd* [2004] 2 SLR(R) 594. The defendants mistakenly altered the price of commercial laser printers on their website. The price was altered from 3,854 Singaporean dollars to 66 Singaporean dollars. Overnight some 4,000 printers were ordered before the defendants were informed of their mistake. The defendants contacted all the purchasers immediately they became aware of the mistake, informed them of the mistake, and stated that they would not be supplying the printers at the price of S$66. The six plaintiffs refused to accept this and claimed that they were entitled to the benefit of their bargain. Between them the six plaintiffs had ordered 1,606 printers and they claimed that they were entitled to the benefit of their good bargain (namely the acquisition of printers with a market value of S$6,189,524 for S$105,996). Rajah JC held that the plaintiffs were not entitled to succeed with their claim. He examined the evidence in relation to all six plaintiffs (one of whom had placed orders for 1,090 printers) and concluded that 'they were fully conscious that an unfortunate and egregious mistake had indeed been made by the defendant'. In reaching this conclusion he had regard to the fact that there was a 'stark gaping difference between the price posting and the market price' of the printers and the fact that the plaintiffs were 'well-educated professionals—articulate, entrepreneurial and, quite bluntly, streetwise and savvy individuals'. A further factor relied upon by Rajah JC was the circumstances in which the printers were purchased. The orders were placed in the 'dead of night' with 'indecent haste' and the email exchanges between the plaintiffs demonstrated that they were 'clearly anxious to place their orders before the defendant took steps to correct the error'. In these circumstances he held that the plaintiffs were not entitled to enforce 'their purported contractual rights' and so he dismissed their claim.

The Singapore Court of Appeal affirmed the decision of Rajah JC ([2005] SGCA 2, [2005] 1 SLR 502). In doing so, the Singapore Court of Appeal concluded (at [53]) that 'in the absence of actual knowledge on the part of the non-mistaken party, a contract should not be declared void under the common law as there would then be no reason to displace the objective principle'. It was this approach that was followed by Ellenbogen J in *Longley* v. *PPB Entertainment Ltd* (above) when she concluded (at [94.10]) that actual knowledge of the relevant mistake is required in order to prevent a party from snapping up an offer and that a consideration of what the reasonable person in the position of the non-mistaken party ought to have known is merely one means by which to ascertain, on the balance of probabilities, whether the non-mistaken party in fact possessed the requisite actual knowledge.

If Ellenbogen J is correct in her view that English law requires actual knowledge of the relevant mistake before a party will be precluded from accepting an offer which he knew contained a mistake, then it must follow that English law does take at least some account of the subjective intentions of the parties when deciding whether or not the parties have reached agreement. But it is important to note that regard was had to the subjective

p. 34 knowledge of the plaintiff, not for the purpose of enforcing his version of the contract, but for the purpose of ↵ preventing him from relying upon the objective appearance that was created by the words used by the defendants (namely that they had agreed to sell the Argentine hare skins at a price per piece). *Hartog* was not a case in which the court was asked to enforce a contract on the basis of evidence of the subjective intentions of the parties. Rather, the evidence of the subjective intention of the plaintiff played a negative role in so far as it operated to deprive the plaintiff of the entitlement to enforce the contract on the basis of the objective appearance which had been created by the words used by the defendants in making their offer.

Hartog has in fact been variously interpreted by commentators. Thus Professor Endicott has argued ('Objectivity, Subjectivity and Incomplete Agreements' in J Horder (ed), *Oxford Essays in Jurisprudence*, Fourth Series (Oxford University Press, 2000), p. 157) that '*Hartog* does not depart from the objective approach, because a reasonable person who knew that A had made a blunder in communicating a term would not treat A as having agreed to price hare skins per pound'. Howarth treats *Hartog* as an example of 'promisee objectivity' ((1984) 100 *LQR* 265, 272), while Vorster points out that the penultimate sentence in the judgment of Singleton J adopts the standard of 'promisor objectivity' ((1987) 103 *LQR* 274, 281 n.42). This further illustrates the terminological confusion which Howarth's approach can cause. The promise which was the subject matter of the dispute was the defendants' offer to sell the hare skins and the court focused attention on the plaintiff's understanding of that offer. In relation to the promise to sell, the plaintiff was the promisee. The reason for the focus on the position of the plaintiff was that he was seeking to enforce his version of the contract and it was his understanding of the defendants' promise that was in issue.

But the position might have been otherwise had the defendants brought a claim against the plaintiff on the basis that the parties had concluded a contract to sell the hare skins at a price per piece. No such claim was brought on the facts. The defendants had not delivered the hare skins to the plaintiff and were content simply to deny the existence of a contract. But suppose that the defendants had attempted to deliver the hare skins and the plaintiff had refused to pay at a price per piece. Would Singleton J have found the existence of a contract to sell the hare skins at a price per piece? In seeking to answer this question, there seems little point in asking how a reasonable person in the position of the defendants would have understood the plaintiff's promise to pay given that there was no dispute in relation to the promise to pay. It was the promise to sell that was in dispute. Given that the plaintiff knew of the defendants' mistake and must have known that the defendants' intention was to sell at a price per piece, should his acceptance of their offer be regarded as an acceptance of an offer to sell at a price per piece? It is suggested that it should not. Objectively the price agreed was a price per pound, and the fact that the plaintiff snapped at a bargain he knew was not intended should not result in him being bound to pay at a price per piece when no such offer was objectively made. This appears to have been the view of the defendants in *Hartog*. Their defence was that no contract had been concluded; it was not to assert the existence of a contract on their own terms.

There is, however, another possibility, albeit one that did not arise on the actual facts of *Hartog*. Suppose that there had been a remarkable movement in market prices such that the defendants' offer to sell at the stipulated price per pound had become a good bargain for the defendants and, as a result, they wished to enforce the agreement to sell at that price. Could the plaintiff in such a situation have maintained that no contract had been concluded between the parties because, at the time at which the offer was made, the plaintiff knew that the offer did not match the defendants' subjective intent? As a matter of authority there is no clear answer to this question, but it has been suggested (R Stevens 'What is an Agreement?' (2020) 136 *LQR*

599, 602) that the plaintiff in such a case could not have insisted that no contract had been concluded between
p. 35 the parties. On this view there was objectively a bargain ↵ between the parties, albeit one that only the defendants could enforce. The plaintiff could not enforce the objective bargain because he actually knew that the defendants' subjective consent to the terms which they had objectively proposed was vitiated and his knowledge of that mistake deprived him of any entitlement to rely on the objective principle. But there is no such objection to the defendants seeking to rely on the objective principle in order to uphold an agreement to sell at the stipulated price per pound. The fact that, to the knowledge of the plaintiff, the defendants did not subjectively intend to make the offer which they in fact had made, would not have prevented the defendants, had they wished to do so, from taking steps to give effect to the bargain which they had objectively agreed. In effect this approach would provide a one-way escape route from the bargain because it would give a potential escape route to the defendants (as it did on the facts of the case), but not to the plaintiff (in the example of our hypothetical). The justification for so limiting the escape route is that there is nothing in the conduct of the defendants to deprive them of their entitlement to rely on the general rule that the existence of an agreement is to be determined objectively. Matters are otherwise, however, in relation to the plaintiff because his knowledge of the defendants' mistake operates to deny to him any entitlement to take advantage of the mistake of the other party in making the offer. To this extent, the objective principle is displaced and the plaintiff's knowledge of the defendants' mistaken offer is regarded as a sound justification for departing from the application of the objective test and using the plaintiff's actual knowledge of the defendants' subjective mistake as the basis for concluding that the plaintiff was not entitled to snatch at an offer which he knew was not intended by the defendants.

2.4 The Role of Fault

More difficult are the cases in which the mistake in relation to the terms of the contract has been induced or caused by one of the parties to the contract. Three cases will be discussed in this context. In all three the claim was brought by a seller. In the first and third cases it was held that the seller was not entitled to the remedy which he sought on the ground that he was responsible for creating in the mind of the buyer a mistake in relation to the terms of the seller's offer. In the second case it was held that the buyer was responsible for his own misapprehension, and so the seller was held to be entitled to the remedy that it sought.

Denny v. Hancock
(1870) LR 6 Ch App 1, Court of Appeal

The plaintiffs put up property for sale by auction. Prior to bidding for the land, the defendant inspected the property. He took with him a plan that had been annexed to the particulars of sale. The plan showed that the western side of the property was bounded by a strip of ground that was covered with a mass of shrubs or trees. The defendant discovered an iron fence and three magnificent trees to the west of the property and, in the belief that they represented the western edge of the property, he bid for it. In fact the fence and the three trees belonged to an adjoining property. The actual boundary of the property was in fact concealed by shrubs. Further, the plan represented all the trees on the property in a conspicuous manner but did not show the three trees seen by the defendant. The three
p. 36 trees were found to be a material element in the value of the property. When he discovered the
↵ mistake the defendant refused to complete the purchase. The plaintiffs sought a decree of specific performance and they succeeded before Malins VC. The defendant appealed successfully to the Court of Appeal where it was held that the defendant had been misled by the fault of the plaintiffs and that the plaintiffs were not entitled to a specific performance order.

Sir W.M. James LJ

I have no doubt whatever that if I had done exactly what this gentleman did, and taken that plan in my hand, and gone through the property, and found a shrubbery, or ground covered partly with shrubs and partly with thorns, with an iron fence outside, I should have arrived at exactly the same conclusion as this gentleman did, and I should have gone to the sale and bid in the belief that I was buying the belt up to the iron fence with those trees upon it. …

There is no denial in evidence of this fact, that the plan produced was calculated to induce anybody to believe that the whole of the belt, or shrubbery, or whatever you may call it, was included in the property sold. It is urged, however, that the Defendant was negligent. The substance of the argument seems to be this: that if he had looked at the plan very minutely he would have seen that the trees in the meadows and in the garden were marked, but these three fine trees, which added so much to the value of the property, were not marked; and it is urged that the absence of these remarkable trees from the plan is a thing calculated to put a man so completely on his guard that he ought not to have been misled, and is not to be believed when he says he was misled. But it seems to me that it never would occur to a person who entertained no doubt whatever about what the thing was that had been sold to him, to make any inquiry about the omission of two or three trees in that which appeared on the plan to be a mass of wood. If this gentleman did as he says, buy it under a mistake as to the property, such mistake was caused by the plan which was presented to him, drawn by the vendors' agent, and also caused by this fact, which alone might have been enough to mislead him, that there was on the ground an apparent visible boundary, quite distinct from the almost invisible real boundary. I think that, independently of the plan, and on this latter ground alone, it would have required great consideration before a Court of Equity would have fixed the purchaser with this contract, which he swears he entered into in the belief that the property extended to its apparent boundary; but coupling the state of the property with the representation made by the plan, I am of

> opinion that it would not be according to the established principles of this Court to compel the purchaser to complete his contract. I am also of opinion that the mistake was occasioned by at least *crassa negligentia* on the part of the vendors in respect to what they sent out to the public. I am, therefore, unable to agree with the Vice-Chancellor, and am of opinion that he ought to have dismissed this bill with costs.
>
> ***Sir G. Mellish LJ*** [delivered a concurring judgment].

Tamplin v. James
(1880) 15 Ch D 215, Court of Appeal

The plaintiffs put property up for sale under the following description:

> All that well-accustomed inn, with the brewhouse, outbuildings, and premises known as *The Ship*, together with the messuage, saddler's shop, and premises adjoining thereto, situate at *Newerne*, in the same parish, No 454 and 455 on the said tithe map, and containing by admeasurement twenty perches, more or less, now in the occupation of Mrs *Knowles* and Mr *S. Merrick*.
>
> This lot is situate close to the *Lydney Town* station, on the *Severn and Wye Railway*, and abuts on other premises of the vendors, on the canal, and on lands now or late of the Rev. W. H. Bathurst.

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The lot was not sold at the auction but the defendant, who was present at the auction, made an offer to buy the property immediately afterwards. His offer was accepted, and he signed a contract to purchase the property according to the conditions of sale for £750. The defendant made his offer in the belief that two pieces of garden were included in the sale. The reason for his belief was that he had known the property from the time that he was a boy and he knew that the gardens had always been occupied with the Ship Inn and the saddler's shop. Had he looked at the plans for the sale he would have seen that the gardens were not included in the sale and, further, that they were not included in the description of the sale. When he discovered his mistake the defendant refused to complete the sale unless the gardens were conveyed to him. The plaintiffs brought an action for specific performance. Both at first instance (before Baggallay LJ) and in the Court of Appeal it was held that the plaintiffs were entitled to a specific performance order.

Baggallay LJ

The Defendant insists in his statement of defence that he signed the memorandum in the reasonable belief that the property comprised therein included the whole of the premises in the occupation of Mrs *Knowles* and of Mr *Samuel Merrick*, and not merely the messuages and hereditaments which the Plaintiffs allege to be the only property comprised therein, and that such his belief was induced and confirmed by the acts and words of the auctioneer at the sale. The Defendant has sworn positively that he had such a belief at the time he signed the memorandum, and I see no reason to doubt the statement so made by him; but was such a belief a reasonable belief?

It is doubtless well established that a Court of Equity will refuse specific performance of an agreement when the Defendant has entered into it under a mistake, and where injustice would be done to him were performance to be enforced. The most common instances of such refusal on the ground of mistake are cases in which there has been some unintentional misrepresentation on the part of the Plaintiff (I am not now referring to cases of intentional misrepresentation which would fall rather under the category of fraud), or where from the ambiguity of the agreement different

meanings have been given to it by the different parties. … But where there has been no misrepresentation, and where there is no ambiguity in the terms of the contract, the Defendant cannot be allowed to evade the performance of it by the simple statement that he has made a mistake. Were such to be the law the performance of a contract could rarely be enforced upon an unwilling party who was also unscrupulous. I think that the law is correctly stated by Lord Romilly in *Swaisland* v. *Dearsley* 29 Beav 430, 433: 'The principle on which the Court proceeds in cases of mistake is this—if it appears upon the evidence that there was in the description of the property a matter on which a person might *bona fide* make a mistake, and he swears positively that he did make such mistake, and his evidence is not disproved, this Court cannot enforce the specific performance against him. If there appears on the particulars no ground for the mistake, if no man with his senses about him could have misapprehended the character of the parcels, then I do not think it is sufficient for the purchaser to swear that he made a mistake, or that he did not understand what he was about.'

p. 38 ↵ Now does it appear, or can it safely be held in this case that the Defendant reasonably entertained a belief that the gardens were included in the property purchased by him? I will consider first the terms of the contract itself, and then the allegations as to the acts and words of the auctioneer and other agents of the Plaintiffs, for it is possible that although the terms of the agreement taken per se may have been free from doubt, enough may have been said or done by the Plaintiffs' agents to lead the Defendant to attribute a different meaning to its terms.

Mr *Pearson* [counsel for the plaintiffs] admitted, and I think he could not well have avoided admitting, that if the vendors had merely referred to the property as being in the occupation of Mrs *Knowles* and Mr *Merrick* without more, there would have been at any rate such an amount of ambiguity that the Defendant might reasonably have understood that he was purchasing the whole of the property in their occupation. But the particulars go on to state that the property sold is Nos. 454 and 455 on the tithe map and contains twenty perches. The additional land which the Defendant claims to have included is about twenty perches more. Therefore, if he is right in his contention, he would be entitled to double the amount which the printed particulars state the lot to contain. There, no doubt, is force in the argument that a person unaccustomed to measuring would not know whether a property contained twenty perches or forty perches, but that does not get rid of the effect of the reference to the tithe map. The Defendant appears to have purchased in reliance upon his knowledge of the occupation of the premises without looking at the plans, and probably without paying any attention to the details of the particulars of Lot 1, but is a person justified in relying upon knowledge of that kind when he has the means of ascertaining what he buys? I think not. I think that he is not entitled to say to any effectual purpose that he was under a mistake, when he did not think it worth while to read the particulars and look at the plans. If that were to be allowed, a person might always escape from completing a contract by swearing that he was mistaken as to what he bought, and great temptation to perjury would be offered. Here the description of the property is accurate and free from ambiguity, and the case is wholly unaffected by *Manser* v. *Back* 6 Hare 443 and the other cases in which the Defendant has escaped from performance of a contract on the ground of its ambiguity.

Baggallay LJ therefore made a decree for specific performance. The defendant appealed to the Court of Appeal.

James LJ

In my opinion, the order under appeal is right. The vendors did nothing tending to mislead. In the particulars of sale they described the property as consisting of Nos. 454 and 455 on the tithe map, and this was quite correct. The purchaser says that the tithe map is on so small a scale as not to give sufficient information, but he never looked at it. He must be presumed to have looked at it, and at the particulars of sale. He says he knew the property, and was aware that the gardens were held with the other property in the occupation of the tenants, and he came to the conclusion that what was offered for sale was the whole of what was in the occupation of the tenants, but he asked no question about it. If a man will not take reasonable care to ascertain what he is buying, he must take the consequences. The defence on the ground of mistake cannot be sustained. It is not enough for a purchaser to swear, 'I thought the farm sold contained twelve fields which I knew, and I find it does not include them all', or, 'I thought it contained 100 acres and it only contains eighty'. It would open the door to fraud if such a defence was to be allowed. Perhaps some of the cases on this subject go too far, but for the most part the cases where a Defendant has escaped on the ground of a mistake not
p. 39 contributed to by the Plaintiff, have been cases where a hardship ↵ amounting to injustice would have been inflicted upon him by holding him to his bargain, and it was unreasonable to hold him to it. *Webster* v. *Cecil* 30 Beav 62 is a good instance of that, being a case where a person snapped at an offer which he must have perfectly well-known to be made by mistake, and the only fault I find with the case is that, in my opinion, the bill ought to have been dismissed with costs. It is said that it is hard to hold a man to a bargain entered into under a mistake, but we must consider the hardship on the other side. Here are trustees realizing their testator's estate, and the reckless conduct of the Defendant may have prevented their selling to somebody else. If a man makes a mistake of this kind without any reasonable excuse he ought to be held to his bargain.

Brett LJ and ***Cotton LJ*** delivered concurring judgments.

Scriven Brothers & Co v. Hindley & Co
[1913] 3 KB 564, King's Bench Division

The plaintiffs instructed an auctioneer to sell by auction a large quantity of Russian hemp and tow. The auctioneer prepared a catalogue which did not distinguish between the hemp and the tow. Further, both lots were given the same shipping mark, 'S.L.'. Lots 63–67 were the hemp and consisted of 47 bales and lots 68–79 were the tow and consisted of 176 bales. Prior to the sale, samples of hemp and tow were displayed in the show-rooms in Cutler Street. Opposite the samples of hemp was written in chalk 'S.L. 63 to 67' and opposite the samples of tow was written 'S.L. 68 to 79'. The defendants' manager, Mr Gill, inspected the hemp but not the tow (he was not interested in bidding for the tow). At the auction the defendants' buyer, Mr Macgregor, bid for the 47 bales of hemp and these were knocked down to him. Lots 68–79 were then put up for sale and the defendants' buyer bid £17 per ton for it (an extravagant price for tow). When the defendants discovered their mistake they refused to pay for the tow. The plaintiffs brought an action to recover the price of the tow. The defendants denied that they had agreed to buy the tow and claimed that the tow had been knocked down to them under a mistake of fact.

The jury made the following findings: '(1) That hemp and tow are different commodities in commerce. (2) That the auctioneer intended to sell 176 bales of tow. (3) That Macgregor intended to bid for 176 bales of hemp. (4) That the auctioneer believed that the bid was made under a mistake when he knocked down the lot. (5) That the auctioneer had reasonable ground for believing that the mistake was merely one as to value. (6) That the form of the catalogue and the conduct of Calman [the foreman in charge of the show], or one of them, contributed to cause the mistake that occurred. (7) That Mr Gill's "negligence" in not taking his catalogue to Cutler Street and more closely examining and identifying the bales with lots contributed to cause Macgregor's mistake.'

On the basis of these findings it was held that the plaintiffs were not entitled to recover the price of the tow from the defendants.

A.T. Lawrence J

In this case the plaintiffs brought an action for 476l. 12s. 7d., the price of 560 cwt. 2 qrs. 27 lbs. of Russian tow, as being due for goods bargained and sold. The defendants by their defence denied that they agreed to buy this Russian tow, and alleged that they bid for Russian hemp and that the tow was knocked down to them under a mistake of fact as to the subject matter of the supposed contract. The circumstances were these.

p. 40 ↵ [He stated the facts and the findings of the jury as set out earlier, and continued]

Upon these findings both plaintiffs and defendants claimed to be entitled to judgment. A number of cases were cited upon either side. I do not propose to examine them in detail because I think that the findings of the jury determine what my judgment should be in this case.

> The jury have found that hemp and tow are different commodities in commerce. I should suppose that no one can doubt the correctness of this finding. The second and third findings of the jury shew that the parties were never ad idem as to the subject matter of the proposed sale; there was therefore in fact no contract of bargain and sale. The plaintiffs can recover from the defendants only if they can shew that the defendants are estopped from relying upon what is now admittedly the truth. Mr Hume Williams for the plaintiffs argued very ingeniously that the defendants were estopped; for this he relied upon findings 5 and 7, and upon the fact that the defendants had failed to prove the allegation in paragraph 4 of the defence to the effect that Northcott knew at the time he knocked down the lot that Macgregor was bidding for hemp and not for tow.
>
> I must, of course accept for the purposes of this judgment the findings of the jury, but I do not think they create any estoppel. Question No 7 was put to the jury as a supplementary question, after they had returned into Court with their answers to the other questions, upon the urgent insistence of the learned junior counsel for the plaintiffs. It begs an essential question by using the word 'negligence' and assuming that the purchaser has a duty towards the seller to examine goods that he does not wish to buy, and to correct any latent defect there may be in the sellers' catalogue. Once it was admitted that Russian hemp was never before known to be consigned or sold with the same shipping marks as Russian tow from the same cargo, it was natural for the person inspecting the 'S.L.' goods and being shewn hemp to suppose that the 'S. L.' bales represented the commodity hemp. Inasmuch as it is admitted that someone had perpetrated a swindle upon the bank which made advances in respect of this shipment of goods it was peculiarly the duty of the auctioneer to make it clear to the bidder either upon the face of his catalogue or in some other way which lots were hemp and which lots were tow.
>
> To rely upon a purchaser's discovering chalk marks upon the floor of the show-room seems to me unreasonable as demanding an amount of care upon the part of the buyer which the vendor had no right to exact. A buyer when he examines a sample does so for his own benefit and not in the discharge of any duty to the seller; the use of the word 'negligence' in such a connection is entirely misplaced, it should be reserved for cases of want of due care where some duty is owed by one person to another. No evidence was tendered of the existence of any such duty upon the part of buyers of hemp. In so far as there was any evidence upon the point it was given by a buyer called as a witness for the plaintiffs who said he had marked the word 'tow' on his catalogue when at the show-rooms 'for his own protection.' I ought probably to have refused to leave the seventh question to the jury; but neither my complaisance nor their answer can create a duty. In my view it is clear that the finding of the jury upon the sixth question prevents the plaintiffs from being able to insist upon a contract by estoppel. Such a contract cannot arise when the person seeking to enforce it has by his own negligence or by that of those for whom he is responsible caused, or contributed to cause, the mistake.
>
> I am therefore of the opinion that judgment should be entered for the defendants.

Commentary

In *Denny* and *Scriven* the seller's claim failed because the seller was at fault in creating the mistake in the mind of the buyer, whereas in *Tamplin* the fault was found to be that of the buyer, not the seller. In this sense *Denny* and *Scriven* belong together. But there is also a sense ↵ in which *Denny* and *Tamplin* belong together in that they both concern the remedy of specific performance, whereas in *Scriven* the seller's action was one to recover the price. Specific performance is a discretionary remedy (unlike a claim for damages or the action for the price) and so a court may refuse to grant a specific performance order notwithstanding the fact that a binding contract has been concluded between the parties.[3] This being the case, it does not necessarily follow from the refusal of the Court of Appeal in *Denny* to make a specific performance order that no contract had been concluded between the parties. Had the plaintiffs in *Denny* brought an action for damages then it would have been necessary for the court formally to decide whether or not a contract had been concluded at least on the terms alleged by the seller. *Scriven* takes matters a stage further in that there Lawrence J did decide that the plaintiffs were not entitled to recover the price of the goods, so that it is clear that in that case there was no contract between the parties, at least on the terms alleged by the seller.

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Are these cases examples of an objective approach or a subjective approach? Take *Scriven* as an example. Lawrence J uses language that is consistent with a subjective test and it could be argued that, objectively, the parties were in agreement because in the normal case an auctioneer is entitled to assume that a bidder knows what he is bidding for. On one view it was the fact that the parties were not subjectively in agreement and that the plaintiffs were responsible for inducing a mistake in the mind of the defendants that led Lawrence J to dismiss the plaintiff's claim. On the other hand, it is possible to reach the same conclusion by virtue of the application of an objective test. Thus Professor Endicott has argued ('Objectivity, Subjectivity and Incomplete Agreements' in J Horder (ed), *Oxford Essays in Jurisprudence*, Fourth Series (Oxford University Press, 2000), p. 159) that:

> to hold that the parties had not reached agreement for the sale of tow, the court did not need to ask what the buyer intended; a reasonable auctioneer who had induced the customer to believe that the lot was hemp would not take the customer to be bidding for tow. The duty that the court identified gave the auctioneer reason not to take the buyer to be bidding for tow, and bidding for a lot of tow in that context does not count as agreeing to buy tow. So on an objective test, there was no agreement for the sale of tow.

Howarth considers *Denny, Tamplin*, and *Scriven* and states ((1984) 100 *LQR* 265, 270–271):

> [T]he conclusion to be abstracted from these three decisions must be that there is a body of judicial support for the principle that contract formation is to be viewed from the perspective of the promisor rather than any other viewpoint. If contract formation is to be objectively ascertained, the stance must be that of a reasonable man in the promisor's position rather than that of the actual promisor.

Vorster disagrees. He states ((1987) 103 *LQR* 274, 277) that Howarth's conclusion is 'misleading' on the basis that:

> these three cases are not authority for 'promisor' objectivity in the conventional sense of that term. In all three cases there was disagreement about what exactly, if anything, had been bought and sold. p. 42 There was, in other words, a dispute about the content of the seller's ↵ promise. As it was the seller's promise which had to be interpreted, the seller was the promisor for purposes of the dispute as to whether a binding contract had been concluded. In all three cases it was the seller who was attempting to enforce the buyer's obligation to pay the agreed price. In the terminology of Howarth this made the seller the *promisee*, whereas, according to conventional usage, the seller would be the *promisor* for purposes of the dispute.
>
> In all three cases the court tried to determine what a reasonable man in the position of the buyer (i.e. the promisee) would have thought he was buying. These decisions are, therefore, quite unremarkable. They are wholly in accord with the main stream of authority in their period, as they are examples of 'promisee' objectivity in the conventional meaning of that term.

Once again, we encounter our terminological problem. Vorster's view seems the preferable one in that all three cases are concerned to examine the buyer's understanding of the offer that was made and the role of the seller in producing that understanding. But what would have been the position in *Denny* or *Scriven* if the buyer had brought an action for breach of his own version of the contract? For example, in *Scriven* how would the seller, or to the extent to which it is relevant, the reasonable person in the position of the seller have understood the buyer's offer to buy the lot? It is suggested that he would have understood it as an offer to purchase the lot that was being advertised for sale. This being the case, there was no contract between the parties as they were at cross-purposes as to the terms of the contract and so neither would be liable to the other in damages.

In conclusion, it is suggested that Vorster accurately captures the approach of the courts when he states ((1987) 103 *LQR* 274, 283):

> The only practicable method of dealing with the formation of contracts, is to view the matter from the perspectives of each of the parties concerned. … The fact that the courts do not expressly adopt this method in cases dealing with mistake, is not necessarily due to judicial aversion to it. The majority of mistake cases have been pleaded in such a way as to make it unnecessary for the courts to expressly formulate a comprehensive approach to contract formation. In most cases the defendant who is sued for specific performance or damages for breach of an apparent contract, is content to deny liability; accordingly the question whether he is entitled to specific performance or damages for breach of *his version* of the contract does not arise. If the court finds that the plaintiff's understanding of the contract was unreasonable, the claim fails. The same is true if the court finds that the defendant's understanding of the contract was reasonable. These two findings make it unnecessary for the court to enquire into the reasonableness or otherwise of the other party's understanding. Where the court allows the claim for specific performance or damages because it accepts that the plaintiff's understanding of the contract was reasonable, it is at least implicit in this finding that the defendant's understanding was unreasonable. This has to be so, because if the differing understandings of the parties are both reasonable, there is no contract. Where the court allows the claim because it accepts that the defendant's understanding was unreasonable, it is also at least implicit in this finding that the plaintiff's version was reasonable.
>
> In cases where the defendant does not merely deny the plaintiff's claim, but counterclaims for specific performance of his version of the contract it will necessarily be more apparent that the court views the question from the perspectives of both parties.

p. 43

Further Reading

ENDICOTT, T, 'Objectivity, Subjectivity and Incomplete Agreements' in J HORDER (ed), *Oxford Essays in Jurisprudence*, Fourth Series (Oxford University Press, 2000), p. 159.

HOWARTH, W, 'The Meaning of Objectivity in Contract' (1984) 100 *LQR* 265.

STEVENS, R, 'What is an Agreement?' (2020) 136 *LQR* 599.

VORSTER, J, 'A Comment on the Meaning of Objectivity in Contract' (1987) 103 *LQR* 274.

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Notes

[1] The terms of Order 14 are set out in the Commentary following the extract from the judgment of Slade LJ.

[2] Estoppel is discussed in more detail at 5.3.

[3] Specific performance is discussed in more detail in Chapter 24.