

Construction of Contracts: An Analysis of Objectivity and Subjectivity within Contractual Transactions

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Abstract

This paper will focus on the relationship with the objective test of contractual relations and the recognition by courts in favour of subjective understanding of the transaction. The direction this paper will take will be to look at the different circumstances that contractual relations benefit from taking an objective view, and the intermittent exceptions when courts will interpret these contracts subjectively when it would be unreasonable for objectivity. In these instances, the courts will use the objective test as a first approach before deciding that a parties' subjective belief will rule the objective approach inequitable.

Keywords

Contract, interpretation, construction, objectivity, subjectivity

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I. Introduction

The concept of objectivity is interpreted as ‘words ... which are (*sic*) reasonably understood by the party to whom they were spoken’¹, while subjectivity is looking into ‘the intent in a man’s mind.’²

The main focus of paper will be based on offer and acceptance. However, consideration and intention are also pertinent to this discussion. Professor Treitel defined offer as ‘an expression of willingness to contract on certain terms, made with the intention that it shall become binding as soon as it is accepted by the person to whom it is addressed’. Acceptance can be defined as ‘the expression, by words or conduct,³ of assent to the terms of the offer prescribed by the offeror.’⁴

The rulings in *Fisher*⁵ and *Boots*⁶ highlight the importance of the objective approach which is to allow freedom of contract and provide certainty where possible. This links to *Storer*⁷ through Lord Denning’s judgment that states: ‘you do not look into the actual intent in a man’s mind.’⁸ Denning’s judgement was a key element to the emergence of the *reasonable man* as criteria for ascertaining objectively if, or where a contract has come into existence. The reasonable man looks at how a bystander would view the terms of the contract in line with a reasonable presumption of that view. Denning’s obiter statement is supported in *Daulia*⁹ where the start of performance should prevent revocation of a unilateral offer. *Daulia*¹⁰ supports this principle of objectivity and need for parity in the judgement, due to the suggestion of bypassing the subjective intent of the party and focusing on an equitable solution for unilateral contracts. The equitable solution in hand is to restrict revocation once commencement has started and provide option of full performance for a second party. As a result of these developments, there is an argument that the subjective approach would encroach on the ability of the objective test to provide a level of certainty to the formation of contracts that is lacking in statutes. As such ‘the courts will fill in the missing terms as long as there is . . . agreement to show that the

¹ J P Vorster, ‘A Comment on the meaning of Objectivity in Contract’ (1987) 103 *LQR* 274,274

² *Storer v Manchester City Council* [1974] 1 WLR 1403 (CA)

³ *Brogden v Metropolitan Railway Co* [1877] 2 App Cas 666 (HL)

⁴ Jack Beatson, Andrew Burrows and John Cartwright, *Anson’s Law of Contract* (30th edn, OUP 2016) 42

⁵ *Fisher v Bell* [1961] 1 QB 394 (CA)

⁶ *Pharmaceutical Society of GB v Boots Cash Chemists Ltd* [1953] 1 QB 401 (CA)

⁷ *Storer* (n 2)

⁸ *Storer* (n 2)

⁹ *Daulia Ltd v Four Millbank Nominees Ltd* [1978] 2 WLR 621 (CA)

¹⁰ *Ibid*

parties had the firm intention to enter into a contract.’¹¹ In De Moor’s discussion,¹² there is counterbalancing between objectivity and subjectivity, which is similar to Howarth’s view¹³ that objectivity incorporates more than one type of objectivity which impact on the decisions the court takes. For example, it could be argued the decision in *Storer*¹⁴ was taken from a position of ‘promisee objectivity’¹⁵ which favoured the plaintiff. Based on the plaintiff’s point of view a reasonable person would have reasonable expectations that a contract had been formed. This discussion is relevant while the objective test is applied. On the contrary, however, there are times when looking at facts objectively lead to the inference of a contract on parties with no desire to contract. At which point the application of the subjective rule would be more reasonable.

II. New Direction Taken by the Courts?

There are two cases in offer and acceptance that contradict each other. These are *Webster*¹⁶ and *Centrovincal*¹⁷ which due to being one hundred years apart, help to highlight the progression of the courts toward the objective test. This enabled case law to develop through judicial precedent that the courts put into effect. This is evidenced in *Webster*¹⁸ where the court ruled in favour of a mistake in the offer which negated acceptance. This can be contrasted with the *Centrovincal*¹⁹ ruling that a mistake in the price was not sufficient. This decision was due to the offeree having no knowledge of this mistake in the offer, which represents the progression of the courts to intervene more within contractual situations. Drawing attention to these contrasting judgements, acts as an illustration of the impact that objectivity possesses within offer and acceptance as it has directed judges to interpret ‘words by reference to the transaction’s commercial context and background.’²⁰ Importantly, this new direction allows judges to view the true construction of the contract, including previous business dealings and represents a turnaround in approach as discussed by Sullivan.²¹ A view that judges were

¹¹ Anne De Moor, ‘Intention in the Law of Contract: Elusive or illusory?’ (1990) 106 *LQR* 632, 637

¹² *Ibid* 632-55

¹³ William Howarth, ‘A note of the Objective of Objectivity in Contract’ (1987) 103 *LQR* 527, 528

¹⁴ *Storer* (n 2)

¹⁵ Howarth (n 13)

¹⁶ *Webster v Cecil* [1861] 30 B 62, 54 ER 812 (HC)

¹⁷ *Centrovincal Estates Plc v Merchant Investors Assurance Co Ltd* [1983] Com LR 158 (CA)

¹⁸ *Webster* (n 16)

¹⁹ *Centrovincal* (n 17)

²⁰ Janet O’Sullivan, ‘Say What You Mean and Mean What You Say: Contractual Interpretation in the House of Lords’ (2009) 68 *CLJ* 510, 510

²¹ *Ibid*

moving away from the status quo where prior business dealings were not admissible ‘information is unhelpful, representing shifting subjective positions of the parties.’²² While this could be interpreted as a move that exhibits disagreement with Denning’s judgement in *Storer*²³, one could argue it is a shift towards objectivity allowing for effective consistency within the courts. Consequently, this acts as a buffer in the sense that any previous business dealings will very often see the courts infer an intention to create legal relations. This will automatically remove any (ounce of) subjectivity which shows Campbell’s²⁴ view that ‘subjective intentions must . . . be expressed in the objective form recognised as legitimate by the State.’²⁵

The courts will adopt a subjective approach when considering the construction of a contract in some circumstances. Acceptance combined with the principle *consensus ad idem* help courts determine whether parties have a meeting of the minds. Circumstances such as these are brought to our attention through *Hartog*²⁶ and *Scriven*²⁷ where the *reasonable man* was not applied. As an alternative, there was a view that only the subjective intent of the parties could be decisive in the ruling because there was no equitable way to judge the facts without pertaining to the fact that *consensus ad idem* did not occur. The case of *Dickinson*²⁸ provides Furmston²⁹ with the impression that applying the objective test to communicating revocation is problematic. In his article, Furmston’s question is, ‘was the information such that a reasonable man should have been persuaded of its accuracy?’³⁰ To answer this question, within its context, would be to look at how the courts would be able to view such situations from an objective standpoint. The problem in doing so, is due to the fact that it is impossible to reach consistency in these situations. This is due to an inability to distinguish, consequently providing a difficulty that the court must judge.

²² *Ibid* 511

²³ *Storer* (n 2)

²⁴ David Campbell, ‘Good Faith and the Ubiquity of the ‘Relational’ Contract’ (2014) 77 *MLR* 475

²⁵ *Ibid* 485

²⁶ *Hartog v Colin and Shields* [1939] 3 All ER 566 (KBD)

²⁷ *Scriven Bros v Hindley* [1913] 3 KB 564 (KBD)

²⁸ *Dickinson v Dodds* [1876] 2 CH D 463 (CA)

²⁹ Michael Furmston, *Cheshire, Fifoot & Furmston’s Law of Contract* (16th edn, OUP 2012)

³⁰ *Ibid* 76

III. Clash between Objectivity and Equitable Outcomes

Acceptance is one area of contract where objectivity is however clearly favoured over a subjective approach. This is exhibited in *Felthouse*³¹ which supports the ruling in *Storer*³² and is able 'to instil certainty into an area of law'³³ that would not be able to apply the law equitably without the ruling in *New Zealand Shipping*³⁴. This ruling helped to establish the principles of the objective test as the conduct of the parties were the main focus. This, however, could essentially be disputed by *Brogden*³⁵ as the facts were similar to *Felthouse*³⁶, the defining difference being the inference of intent to create legal relations in *Brogden*³⁷. This was as a result of previous negotiations which incorporate the subjective nature of forming a contract, while providing a question of whether certainty through objectivity could be provided without the alternative subjective approach.

In the case of *Smith v Hughes*³⁸, the jury were instructed to look at the subjective element of contracts which provided an equitable decision and 'it is only in this sense that subjective considerations are relevant'.³⁹ Possibly because the subjective approach acts 'against one party exploiting another's known misunderstanding'.⁴⁰ The notion of the reasonable man which underpins the rulings of the court regarding objectivity was defined in *Smith*⁴¹ by Blackburn J. Poole subsequently interpreted this to mean that 'the reasonable person is judged in terms of the reasonable promisee to whom the words have been conveyed.'⁴² This offers an idea that there is the element of subjectivism within this concept of objectivity, because the courts still require parties to have the intention of being subjected to the terms of the contract before enforcement can happen.

Consideration 'may consist either in some right, interest . . . or benefit accruing to one party, or some forbearance, detriment . . . undertaken by the other'⁴³ is ruled exclusively on the objective test. An explanation for this can be outlined through the view that *intent of a man's*

³¹ *Felthouse v Bindley* [1862] 11 CBR 869, 142 ER 1037 (HC)

³² *Storer* (n 2)

³³ Howarth (n 13) 531

³⁴ *New Zealand Shipping Ltd v AM Satterthwaite Ltd* [1975] AC 154 (PC)

³⁵ *Brogden* (n 3)

³⁶ *Felthouse* (n 31)

³⁷ *Brogden* (n 3)

³⁸ *Smith v Hughes* [1871] 6 LR 597 (QBD)

³⁹ Jill Poole, *Textbook on Contract Law* (13th edn, OUP 2016) 33

⁴⁰ John N Adams and Roger Brownsword, *Understanding Contract Law* (4th edn, Sweet & Maxwell 2004) 48

⁴¹ *Smith* (n 38)

⁴² Poole (n 39) 32

⁴³ *Currie v Misa* [1875] 10 LR Ex 153 (HL), 162

*mind*⁴⁴ has no serious ramifications within the premise of consideration. Illustrated in *Tweddle*⁴⁵, the two fathers agreed the son (in law) could enforce the agreement. However, the courts ignored the agreement as objectively, no consideration was provided by the plaintiff as he was not party to the agreement. If these case facts were in front of the courts today, it is possible that the courts would rule in favour of the equitable decision over the objective test.

IV. Conclusion

Intention to create legal relations is seen as the most difficult in avoiding the subjective intent of parties. While the courts have attempted not to use a subjective approach when delivering a judgement it poses difficulty as a contract requires the establishment of intent. However, by looking at *Balfour*⁴⁶ and *Carlill*⁴⁷ it becomes clear that the courts look exclusively at ways to objectively identify intent. The case of *Balfour*⁴⁸ was used to establish removal of any intent for social and domestic agreements, while inferring intention in commercial cases with *Carlill*⁴⁹ due to, for example, conduct. Thus, actions by the courts remove any doubts that the subjective view contributes to, and provides the certainty desired even with intention to create legal relations.

Through this discussion, this paper presents that there is an argument that neither, the objective or subjective test are better than the other, as the two tests combine to effectively provide the certainty that is synonymous with the area of contract. However, from the point of view of the courts, there is a preference towards the objective test as highlighted by Lord Denning in *Storer*⁵⁰. This is because the objective test has the benefit of providing judges with direction, within the application of case law to the fundamental requirements of a contract. Furthermore, it allows for a consistent approach, through precedent, as established in the case of *New Zealand Shipping*⁵¹.

⁴⁴ *Storer* (n 2)

⁴⁵ *Tweddle v Atkinson* (1861) 2 B&S 393, 121 ER 762

⁴⁶ *Balfour v Balfour* [1919] 2 KB 571 (CA)

⁴⁷ *Carlill v Carbolic Smoke Ball* [1893] 1 QB 256 (CA)

⁴⁸ *Balfour* (n 46)

⁴⁹ *Carlill* (n 47)

⁵⁰ *Storer* (n 2)

⁵¹ *New Zealand Shipping* (n 34)

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