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UNE TRÈS GROSSE ERREUR: JERSEY'S MISTAKE OVER MISREPRESENTATION

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This article reviews the creation and development of English law misrepresentation in Jersey and argues that Jersey customary law erreur *(supplemented where necessary by* dol*) ought to replace every instance of misrepresentation in advice to clients, pleadings before the courts, and in judgments handed down by the courts. Although regard is had to the provenance and integrity of Jersey's contract law, the article makes a pragmatic case for the replacement of misrepresentation with* erreur. Erreur *is simpler to integrate with the creation of a contract, easier to understand by itself, and less complicated to communicate to others; for those reasons, it is a better tool than misrepresentation.*

1. Introduction

1 It is no secret that Jersey's law of contract has been in a state of confusion. This confusion is especially stark when considered beside the clear, consistent, and widely-understood English law of contract on the one hand, and the codified and prosaic French law of contract on the other. These two systems of contract feature heavily in Jersey's own jurisprudence, which could be described broadly as an amalgam of principles from the two systems. This article deals with two aspects of the law of contract as it is understood and practised in Jersey; those areas are what would in England be termed "mistake" and "misrepresentation", and in France would fall within the principles of *erreur* (mistake) and, to a significantly lesser extent, *dol* (deception). Leaving aside all question of whether, on a theoretical basis, Jersey ought to follow its customary law roots or whether it ought to use the language and principles of English contract law in any meaningful sense, this article seeks to set out an argument against the continued use of the English law terms "mistake" and "misrepresentation" in Jersey. It is not the aim of this article to review the provenance of the law of Jersey or discuss the strict jurisprudential basis for adopting elements of the French *Code Civil* into the Island's contract law.

2 *Erreur* is the French law principle which deals with an error made by one or more of the parties to a contract as to a term of that contract.

Dol, which is mentioned here only in so far as it only partially maps to the English law principles of fraudulent misrepresentation, is the French law principle of deception within the French law of obligations. Both *erreur* and *dol* are dealt with in French law by reference to what was in fact in the mind of the party claiming either of these; they are analysed subjectively. Mistake in English law is a doctrine that concerns an error made by one or more of the parties to a contract as to the terms of the contract. Misrepresentation is an English law doctrine which operates where a party has been induced into a contract by the non-contractual statement of the other party, which statement is false. Both mistake and misrepresentation are analysed by reference to what ought to have been understood by the parties; they are analysed objectively. Neither *erreur* nor *dol* map directly to either mistake or misrepresentation (and *vice versa*), so while it is tempting to translate *erreur* as mistake, for example, it should not be forgotten that these two words represent very different concepts which reside neatly only within their own system of law. Because mistake and misrepresentation are English words which have widely-understood lay meanings which are different from the strict technical definitions, the use of these terms can be confusing. Furthermore, their use within a system of contract law which analyses contract formation subjectively poses even greater risks of confusion. It is argued that that is precisely what has happened in Jersey. Because it has been conclusively held at the Court of Appeal level[1] that Jersey follows a subjective theory of contract, it is far more fitting for *erreur* and *dol* to be used to address circumstances of error and deception in Jersey contract law.

3 It is easy to identify the source of confusion in this area of contract. It is the gradual increase in the frequency of English terminology used in counsel's submissions before the Royal Court and the subsequent adoption of that terminology by the judiciary in their judgments. For example, in *La Motte Garages Ltd v Morgan*,[2] Hamon, Commr said "it is perhaps somewhat disappointing that neither party chose to mine the rich lodes of our ancient French law but to rely on English law" but then proceeded to deliver a judgment in which he found that there had been mutual mistake.

4 This is not surprising, and indeed the reasons for this piecemeal encroachment have been widely discussed in the past.[3] What is seldom

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[1] *Marett v O'Brien* 2008 JLR 384, CA

[1] 1989 JLR 312.

[2] See, for example, Kelleher "*Résolution* and the Jersey law of contract", (2000) 4 J&G L Rev 266: "an English speaking Island whose courts are

questioned is the assumption that English law is the easier law with which to grapple. It is by challenging the assumption that the English principles are more user friendly than the historic Jersey principles that this article seeks to persuade its readers that English "mistake" and "misrepresentation" should be banished from advice to clients and submissions to the Royal Court alike. Relationships of a contractual nature will continue to be entered into without regard to the system of law that might eventually be used to interpret and analyse those relationships. The paradigm shift advocated is not limited to practitioners; the courts must be receptive to it and the clients who instruct practitioners must also be educated.

5 It is argued here that Jersey's customary law background provides a perfectly sound and complete framework for the analysis of contract law in this area and, had the English authorities never been adduced, Jersey's contract law still would be crystal clear in its concepts.

2. English contract law: misrepresentation

6 Let us start with the English law on misrepresentation. Although trite to set out the elements of misrepresentation, they are as follows—

(i) an unambiguous statement of fact is made;

(ii) the statement is made by (or known to) a party;

(iii) the statement is false; and

(iv) the other party is induced to enter into the contract on the basis of the statement, which need not have been the sole reason for entering the contract.

7 The remedy for misrepresentation is rescission, unless the misrepresentation was fraudulent or negligent pursuant to the Misrepresentation Act 1967, in which case damages will be available in addition to rescission.

8 The purpose of misrepresentation in English law is to provide a remedy for pre-contractual statements which eventually turn out to be false. Such statements may not be caught by the law of mistake as they may not become terms of the contract, and even if they do, a remedy in

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peopled with lawyers and judges trained in England"; and *West v Lazar*d (1993 JLR 165): "lawyers trained in England drafted trusts based on English models". But in addition to the legal education, vocational training, and—increasingly—former practice in England, the ease of access to English authorities and the availability of English texts makes English law a *de facto* reference point.

mistake requires the terms to be sufficiently fundamental. Of course, a term of a contract may also be a representation, but the relationship between the two is one of sufficiency and not necessity (a representation may be sufficiently fundamental to become a term of a contract, while a term of a contract may have been a sufficient inducement to be a representation, but neither representation nor term are necessarily both). There has been much analysis of the advantages and disadvantages of a claim in each of mistake, misrepresentation, and breach of contract, all of which may be available in circumstances where a term of the contract is false. It can be seen that this overlap itself may cause confusion; for example, where McKendrick[4] describes misrepresentation as the law of induced mistake, it is to the lay meaning of "mistake" that he refers and not to the strict legal doctrine which bears that name.

3. English contract law: mistake

9 There are two fundamentally different categories of mistake in English law.[5] The first is where all parties have entered into a contract upon agreed terms but under a shared misapprehension as to the facts or the law. This is usually termed "common mistake", as the same mistake is common to all parties. The second category arises where there is some misunderstanding as between the parties leading to circumstances where there is no effective agreement upon the terms stated. This category includes "mutual misunderstanding" where each party is mistaken as to the terms intended by the other, and "unilateral mistake" where only one of the parties is mistaken as to the terms of the contract or the identity of the other party.[6] For present purposes, it is sufficient to refer to the second category described above, which shall be termed "mistake". Common mistake presents a number of problems to the law of Jersey in addition to those presented by what I term "mistake"; there are certain requirements, including that no party be at fault for the error, and that performance of the contracted terms is impossible. It is of a different nature from the other category of mistake;[7] common mistake is said to give rise to remedies in common law and in equity. For this reason, common mistake is not considered further here.

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[4] *Contract Law: Text, Cases and Materials* (2nd ed, Oxford University Press) at 657.
[5] *Chitty on Contracts* (30th ed, Sweet & Maxwell) at para 5–001.
[6] *Chitty on Contracts*, *ibid*, at para 5–001.
[7] *Great Peace Shipping Ltd v Tsavliris Salvage (Intl) Ltd* [2002] EWCA Civ 1407.

10 Chitty[8] has this to say on mistake—

> "A mistake as to the facts made by one party only is legally irrelevant, even if the other party knows of it. Mere silence as regards a material fact which the one party is not bound to disclose to the other is not a ground of invalidity, for the principle that in relation to sale is referred to as *caveat emptor* ('let the buyer beware') is still the starting point of the English law of contract."

This demonstrates that although the language of mistake is suggestive of a wide range of circumstances, the limits of a claim in mistake are drawn very narrowly; a claim in mistake will permit a remedy in contract law only where the same mistake—analysed objectively—was made by both parties, or where a mistake by at least one party operates to avoid agreement on the terms of the contract—again analysed objectively. Although it was formerly possible to argue mistake in equity and obtain satisfaction where no remedy was available at common law, there is no longer any inconsistency between the two as to the circumstances where a remedy is available. Equity, however, still permits certain remedies not available at common law.[9] At common law, the remedy for mistake is the avoidance of the contract, which is said to be void *ab initio*. In equity, remedies such as rectification or a denial of specific performance might be available, although in truth equity plays only a minor role in the law of mistake.[10] Thus, it is unhelpful that the term used to describe the circumstances giving rise to a remedy is a term that has such a broad lay meaning. This duality of meaning may have contributed to the confusion in Jersey as to the distinction between *erreur* and mistake. Although it is not suggested that at the advent of mistake in Jersey law any confusion as to the legal concept of mistake existed, it is suggested that the existence of a customary law remedy for *erreur*, the translation of that word being "mistake", and the similarity between the circumstances in which *erreur* might be employed and those in which English law mistake might be employed, all led to there eventually being broad acceptance in Jersey of the existence of English law mistake as a separate cause of action.

4. Jersey contract law: *erreur*

11 Broadly speaking, Jersey's contract law is derived from customary law, which itself looked to the heavily Roman-influenced French

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[8] *Chitty on Contracts*, *ibid*, at para 5–008.
[9] *Chitty on Contracts*, *ibid*, at para 5–009.
[10] *Chitty on Contracts*, *ibid*, at para 5–010.

common law, as amended by post-separation French jurisprudence. The decision in *Selby v Romeril*[11] has been followed and is now firmly established as the leading Jersey authority on the formation of contract. Bailhache, Bailiff (as he then was), chose to adopt art 1108 of the French *Code Civil* on the basis that it represented a modern interpretation of the customary law. That decision added capacity to the essential customary elements of contract of *objet*, *cause*, and consent. In effect, the rules governing the formation of a Jersey contract remained unchanged, as prior to *Selby v Romeril* capacity simply would have been a constituent of consent.

12 That being the case, Jersey law contracts are formed in accordance with French law principles and French law; art 1110 of the French *Code Civil*, in particular, provides that—

> "Error is a ground for annulment of an agreement only where it rests on the very substance of the thing which is the object thereof. It is not a ground for annulment where it only rests on the person with whom one has the intention of contracting, unless regard to/for that person was the main cause of the agreement."

13 *Erreur* in French law requires the error to operate on a fundamental quality of the contract in order to avoid the contract. The error is assessed subjectively and any lack of valid consent will render the contract void *ab initio*. English law will not cause a contract to be avoided unless the defendant is in some way implicated in the claimant's lack of consent. Therefore, while English law could be said to begin from the defendant's position and gives priority to the security of the contract in question, French law begins from the claimant's position and gives a higher initial priority to the claimant's consent.[12]

14 Jersey's key advantage over English law in relation to pre-contractual statements is the subjective theory of contract which the provenance of Jersey's law of contract permits.[13] This means that whether a statement is made pre-contractually or eventually incorporated into the contractual scheme itself, the subjective state of mind of the contracting parties is always addressed in relation to determining whether there was a "meeting of the minds".[14]

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[11] 1996 JLR 210.

[12] Cartwright, 'Defects of consent and security of contract: French and English law compared', in Birks and Pretto (eds), *Themes in Comparative Law* (Oxford University Press 2002), pp 154–164.

[13] *Marett v O'Brien* 2008 JLR 384.

[14] *Steelux v Edmonstone* 2005 JLR 152.

15 As alluded to above in section 1, it is clear that English principles of mistake have crept into Jersey's law; *La Motte Garages v Morgan*[15] and *Leach v Leach*[16] both describe a principle which is very similar to English mistake and even go so far as to ascribe to the principle an objective analysis of the parties' knowledge. For example, in *La Motte Garages v Morgan*, when it is said that the defendant ought reasonably to have understood the terms of the contract that the plaintiff was offering, despite his mistake in describing it, it is clearly to an objective view of knowledge and error that the court turned. But *erreur* is analysed subjectively.

5. Jersey's first forays into misrepresentation

16 It is often said that misrepresentation was introduced into the law of Jersey in the mid-1960s by the case of *Scarfe v Walton.*[17] In reality though, misrepresentation was not introduced as a head of claim in Jersey until the case of *McIllroy v Hustler*[18] was decided in 1969.

17 In *Scarfe v Walton*, S and others commenced proceedings against W to set aside the transfer from W to S's nominee of shares in a company holding land. S claimed that it was represented to him by W's advocate that the land owned by the company included a certain area of rocks. This was later found not to be the case. Bois, Deputy Bailiff set out the law of Jersey as described by *Terrien, Poingdestre*, and *Domat*. Reference is made to the case of *Langlois v Jersey Contractors Ltd*,[19] but that case was decided without reference to the principles upon which the decision was arrived at, so its use is limited.

18 Bois likened the law of England in respect of misrepresentation and mistake to the principles enunciated by *Domat* in respect of "error induced by misrepresentation but also error not so induced". He continues that "[t]he allegation in this action is error induced by misrepresentation and, in arriving at our judgment, we have had regard both to the civil law and to the law of England."[20] As a matter of fact, it was held that: (1) S bought the land believing the area of rocks to be included in the land for which S was contracting and would not have done so had he known the true situation; (2) W authorized his advocate to give S full explanations and that accordingly W was taken to have given explanations to S; (3) W knew S considered the area of

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[15] 1989 JLR 312.
[16] 1969 JJ 1107.
[17] 1964 JJ 387.
[18] 1969 JJ 1181.
[19] (1958) 251 Ex 279.
[20] *Ibid.* at 393

rocks to be important; (4) as a result of the explanations given by W's advocate, S was entitled to believe that the area of rocks belonged to the company; and (5) W's advocate shared the belief that the area of rocks belonged to the company. Bois finally concluded—by reference to *Domat* and English authority which were expressed to be analogous—that S was prevented from setting aside the contract because S had not availed himself of the opportunity to discover the defect in title to the relevant land. The court in *Scarfe v Walton* recognised the distinction between the English and French principles and sought to reconcile the two, eventually finding that English misrepresentation was analogous to French *erreur* on the particular facts of the case. The court cited *Domat* in the following terms—

> "*Si les défauts de la chose vendue sont tels que l'acheteur ait pû les connoître et s'en rendre certain . . . l'acheteur ne pourra se plaindre . . .*"[21]
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> [If the defects of the thing sold are such that the purchaser could have known of them and made certain of them . . . the purchaser cannot complain . . .]

19 The court then went on to conclude that "[i]n this respect, we find no material difference between the civil law as expounded by Domat and the law of England".

20 In *McIlroy v Hustler*, M contracted to sell a café business to H for a certain sum, of which a deposit was paid by H. When H took possession of the business he concluded that the takings were not as he had been led to believe by M and instructed his advocate to withhold payment to M of the remainder of the sale price. M began proceedings for the remainder and, in defence, H pleaded that he had been—

> "[I]nduced to purchase the business by representations made by the plaintiff or his agents to the defendant and/or his agents which were false and known to be false by the plaintiff or his agents or which should have been known by the plaintiff and/or his agents to be false."[22]

21 H sought rescission of the contract, or in the alternative, an order for damages amounting to the difference between the valuation of the business upon which the contract was concluded and the actual value of the business.

22 Ereaut, Deputy Bailiff (as he then was) found it appropriate to refer to *Scarfe v Walton* as counsel had referred exclusively to English

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[21] *Ibid*, at 391.
[22] *Ibid*, at 1182.

authority. Furthermore, he reached the same conclusion as Bois, Deputy Bailiff in *Scarfe v Walton* in respect of the similarity between *Domat et al* and the English common law of misrepresentation. The court accepted the definition in *Cheshire & Fifoot's Law of Contract* of misrepresentation and proceeded to analyse the evidence with reference to the elements of misrepresentation set out therein. As a matter of fact, the court held that misrepresentation was not made out. It did so entirely within the framework of English law misrepresentation. The court applied *Scarfe v Walton*, citing that case as authority for the elements of misrepresentation in Jersey and thereby putting in motion a chain of decisions that cite *Scarfe v Walton* as authority for the proposition that misrepresentation is a part of Jersey law. It is submitted that although the court in *Scarfe v Walton* came very close to introducing misrepresentation into the law of Jersey it in fact stopped short of doing so. Incorrectly interpreting *Scarfe v Walton* as authority for the existence of misrepresentation in Jersey law, the court in *McIlroy v Hustler* in fact did what *Scarfe v Walton* did not do but is often accused of doing; it made misrepresentation a head of claim in Jersey.

6. The embedding of misrepresentation into Jersey law

23 *Griggs v Coutanche*[23] and *Channel Hotels v Rice*[24] considered mutual mistake and misrepresentation, respectively. *Griggs* is unhelpful as the principles are little discussed. *Channel Hotels* is helpful in that it does address the principles, but it does so in a confusing manner. The case is significant as it is one of the very few cases in Jersey in which misrepresentation was found to have occurred. On the facts, R, through a company, ran a hotel which premises were owned by another party. When the hotel was put up for sale, R wished to buy it but could not raise sufficient funds and met with CH which also had an interest in acquiring the hotel, which included a nightclub generating about 50% of the hotel's earnings. After the sale to CH was concluded, an application for the then new seventh category licence was refused and CH sought damages for innocent misrepresentation arising from the representations of the R that, *inter alia*, the hotel held all appropriate licences, R knew of no complaints which might jeopardise the conduct of the nightclub business and R knew of no police surveillance of the nightclub.

24 Crill, Deputy Bailiff (as he then was), presiding, had no hesitation in referring to *McIlroy v Hustler* and, in applying the test therein set

[23] 1975 JJ 219.
[24] 1977 JJ 111.

out, and asked himself the three questions: (1) what representations were made by R; (2) were such representations false; and (3) if false representations were made, did they constitute one or more of the causes that induced CH to enter the agreement? As a matter of fact, the court found that R had made representations, that they had been false and that they had contributed to CH's inducement to enter the sale agreement. The court awarded CH the damages sought, thereby concluding, in contrast to the jurisprudence of England, that damages were available where misrepresentation was only innocent.

25 The 1980s saw the embedding of misrepresentation into Jersey law. The cases of *Kwanza Hotels v Sogeo*[25] and *Newman v Marks*[26] both show the court addressing misrepresentation with a degree of analysis that was absent from earlier cases. No criticism of the earlier cases is intended here; the content of judgments has changed over time, but the increase in the length of judgments, the number of cases cited, and the depth of legal analysis included (in short, the Anglicisation of Jersey judgments) has meant that judgments that are recognisably of a modern form were hitting their stride at the same time that misrepresentation was gaining traction in Jersey. The result of the new-found diligence for setting out the steps to the *ratio decidendi* is that *Scarfe v Walton* and *McIlroy v Hustler*, which might have been distinguished on their facts, became the legal strut that subsequent cases used to support the inclusion of English law misrepresentation in their assessments of similar-fact cases. Thus, the modern judgments hijacked the relatively innocuous use of the word "misrepresentation" from the earlier judgments and, in so doing, created legal precedent for misrepresentation as a head of claim in the jurisprudence of Jersey, where it was formerly only used as a comparator to French law *erreur*.

26 *Kwanza* and *Newman* set the high-water mark for misrepresentation in Jersey. In *Kwanza* a guest house had in its grounds a wooden chalet that had been constructed without planning consent. The owner of the guest house, who had overseen the rebuilding of the chalet, in 1974 sold the guest house to S, who in turn later sought to sell the guest house. In the particulars of the guest house, the agent specified the chalet as "owner's accommodation". K purchased the guest house, placing reliance on the belief that the beneficial owner of K would be able to live in the chalet. After the purchase, K applied for planning consent to extend the chalet, which application was refused as the chalet had never been permitted for the

[25] 1981 JJ 59; upheld by the Court of Appeal, 1983 JJ 105.
[26] 1985–86 JLR 338.

purpose of residential accommodation. Neither K nor S knew at the time of the sale that the chalet was an authorized development incapable of obtaining consent for the purpose of residential accommodation.

27 Ereaut, Bailiff sought to answer one question relevant to present purpose: whether there had been a representation as to the legitimacy and planning consent status of the chalet. In answering the question, the court decided that the law of England was the same as the law of Jersey as to the definition of a misrepresentation. On an interpretation of *Cheshire & Fifoot*'s definition of representation, Ereaut found that the agent's advert containing the phrase "owner's accommodation" was not a representation. Instead, it was merely a descriptive term and was not—as proposed by K—a representation by the vendor as to the existence of all statutory consents. It is curious to note that *Basnage*, *Domat*, *Dalloz*, and *Pothier* are extensively cited in reference to a further question as to implied terms, but no customary law commentators are cited in respect of the so-called misrepresentation question. In addressing the question of the extent to which a purchaser had to investigate the status of the chalet, the court found, citing *Scarfe v Walton* and *McIlroy v Hustler*, that absent an active misrepresentation, a buyer must take steps to investigate the legal status of the object of the sale where the vendor has been silent as to the issue.

28 In *Newman*, N contracted to buy from M a horse, known to N, which was described as a "super schoolmaster" and of thirteen years of age. N told M that she required a schoolmaster for five years and M alleged that she advised N to seek a professional opinion as to the age of the horse in question as she was not certain of the age. A short time after N bought the horse she became dissatisfied and sought to sell it, upon which she learnt that the horse was in fact three years older than the thirteen years represented by M. N contended that due to its age, the horse would not have been able to act as a schoolmaster for the five years intended and was therefore much less valuable than the price paid. N sought rescission of the contract for innocent misrepresentation or, in the alternative, damages in respect of the diminished value of the horse for negligent misrepresentation. In evidence, it came out that M had expressed uncertainty as to the horse's age, that M had encouraged N to have the horse vetted, indeed this was the custom of the trade, and that N had not expressed any age requirements.

29 Tomes, Deputy Bailiff found that no misrepresentation had occurred because any representations that may have been made by M did not, as a matter of fact, induce N to buy the horse. The judge cited the usual suspects: *Scarfe v Walton*, *McIlroy v Hustler*, *Channel*

Hotels v Rice and the two *Kwanza v Sogeo* decisions, having begun the discussion of the law thus—"We have to decide whether there was a misrepresentation. The law of Jersey with regard to misrepresentation is well set out in *Scarfe v Walton* . . .".[27] In a judgment replete with careful consideration of equine law, it is curious that the court did not appear troubled about the very existence of the cause of action in respect of which it so readily held the law of Jersey to be clear. The court went on to consider the English authorities[28] on the meaning of inducement and by reference thereto found that M did not intend to induce N to buy the horse.

30 In both cases, the courts proceeded on the assumption that misrepresentation was part of Jersey law and they validated that assumption by producing lengthy judgments—two, in the case of *Kwanza*—which thoroughly lead the reader through the reasoning of each. One of the conclusions of *Kwanza*—that a buyer must take steps to investigate an item for sale—is difficult to reconcile with the English principles of misrepresentation and is closer to the limits set on *erreur* by French law to moderate the subjective approach to contract analysis. As Cartwright[29] has argued—

> "There is a clear line between mistakes the defendant induced and those he did not. English law normally attributes the defendant with responsibility for the claimant's defect of consent only where he has done or said something to cause it. His failure to disabuse the claimant of his misunderstanding is a fault of omission, not commission. French law, by contrast, sees the pre-contractual stage as less adversarial, focuses more on the subjective consent of the claimant than on whether the defendant was a cause of the vitiation of consent, and is more ready to impose liability for omissions: it has therefore been able more easily to develop duties of disclosure and information during the negotiations."

31 At a similar time, *La Motte Garages v Morgan*[30] did for mistake what *Kwanza* and *Newman* did for misrepresentation. M agreed to purchase a car from L for £4,995. M offered her existing car in part-exchange and L offered her £2,000 for it. A sum of £2,270 was outstanding on the hire-purchase agreement of M's car and when L's agent issued the invoice he noted the transaction as £2,995, forgetting

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[27] 1985–86 JLR 338, at 350.
[28] *Dick Bentley Prods Ltd v Harold Smith (Motors) Ltd* [1965] 1 WLR 623 and *Esso Petroleum v Mardon* [1976] QB 801.
[29] Cartwright, *ibid*, pp 154–164.
[30] 1989 JLR 312.

to include the hire-purchase sum which ought to have been included: £5,265. When L noticed and the invoice was re-issued in corrected form, M refused to pay the additional sum and L claimed. In a judgment which famously expressed disappointment that neither party "chose to mine the rich lodes of our ancient French law", Hamon, Commr held that there had been mutual mistake. M was ordered to pay L £2,270. While the arithmetic in *La Motte* is clearly correct, and most would agree that the merits lie in favour of the plaintiff in the case, the formulation of the claim within a framework of English mistake shows that by 1990, even with encouragement towards the Jersey remedies available for *erreur*, the Royal Court had internalized the submission that mutual mistake was a head of claim in Jersey contract law.

7. Recent decisions

32 Three cases began to redress the balance for Jersey's customary law roots: *Steelux v Edmonstone*,[31] *Marett v O'Brien*[32] and *Sutton v ICCI*.[33] In *Steelux*, S, a company owned by E's stepfather, had executed in its favour by E, a promissory note representing the sum paid by E's stepfather for a property that was conveyed into E's name. When the relationship between E and her stepfather broke down, S brought the claim to recover the principal debt and the interest thereon. E stated that she had been induced to execute the promissory note by the fraudulent misrepresentation of her stepfather who had made her understand that the property was a gift to her and that the promissory note was merely a fiction for tax purposes and to assist in her divorce proceedings, and consequently the promissory note would never be enforced against her.

33 Bailhache, Bailiff found that there had been no misrepresentation. In so doing, the judge stated—

> "While English law and Jersey law may often arrive at the same conclusion in relation to the effect upon a contract of a false or fraudulent misrepresentation, the process of reasoning, and the route by which the journey is taken, are sometimes different."[34]

At para 10, the judge continued—

> "Fraudulent conduct, including the making of a fraudulent misrepresentation, can be a *moyen de nullité*, or a cause of the nullity of an agreement. The underlying principle of fraud, which

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[31] 2005 JLR 152.
[32] 2008 JLR 384.
[33] 2011 JLR 80.
[34] *Ibid*, at 156.

> we may say embraces both *dol* and *fraude*, is bad faith. Fraud is a *vice du consentement*, that is to say, a defect which nullifies the apparent consent between the parties and allows the defrauded party to treat the contract as void. If, therefore, a party knowingly makes a false statement which induces the other party to sign a document and thereby to enter a contract, there is a defect of consent which allows the other party to treat the contract as void. It may not be necessary that the statement is, at the time it is made, knowingly false; if the statement is in fact false, and the other party acts upon it, there is nonetheless a defect of consent (*vice du consentement*) because the other party enters the contract under the mistaken impression that the statement or representation is true. It may be seen, therefore, that the distinction between mistake (*erreur*) and fraud (*dol*) as defects of consent may sometimes be blurred. There is, in either event, a defect of consent which allows the injured party to treat the contract as void. The burden of proof lies upon the party who asserts that there is, in law, a defect of consent."[35]

34 Rather incongruously, however, the test which Bailhache, Bailiff sets himself is expressed in the following (English law) terms—

> "It is therefore for the defendant to prove, on a balance of probabilities, that (i) false or fraudulent misrepresentations were made by Mr. Hall, and (ii) she was induced to enter into the contract of loan as a result of those false misrepresentations."[36]

35 The test concludes with the following amalgam of French law principles and English law terminology—

> "If the court is satisfied on these two points, there will have been no consent, no meeting of minds, between the parties. The fraudulent misrepresentations will have given rise to a defect of consent, with the result that the contract is void *ab initio*."[37]

36 While the exposition in *Steelux* on French law *dol* and *erreur* is not faulted, it is incongruous for the court to talk of a "meeting of the minds" and "fraudulent misrepresentations" giving rise to a "defect of consent". There is simply no need for the words "fraudulent misrepresentations" to figure in the analysis. The defect of consent, howsoever occurring, is sufficient to found the nullity of the contract. It was perhaps the court's intention to explain that the defect of consent was caused by an event that would, in England, be termed

[35] *Ibid*, at 156, para 10.
[36] *Ibid*, at 156, para 11.
[37] *Ibid*, at 156, para 11.

"fraudulent misrepresentation". It is suggested that the term is used as shorthand for "a deliberately false representation", but because the phrase is a term of art to English lawyers, its use suggests the doctrine which it describes in England.

37 In *Marett v O'Brien*, a party to divorce proceedings sought the setting aside of a consent order he had previously entered into, on the basis, *inter alia*, that there had been no enforceable compromise by reason of a *vice du consentement* (a defect of consent arising from the party's lack of understanding of the terms and effect of the compromise agreement). The Court of Appeal considered the Jersey law of contract, holding that "the Jersey law of contract determines consent by use of the subjective theory of contract" and, after stating that *La Motte v Morgan* was *per incuriam* on that point, went on to deliver a judgment which clarified the principles of *erreur* as follows—

> "Consent is prevented, amongst other things, by *erreur*/error. In turn, erreur may be of two kinds: *erreur obstacle* (*erreurs* that prevent the meeting of minds necessary to constitute a contract's creation and cause a contract to be a *nullité absolue*) and *erreur vice du consentement* (a defect of consent where there is consent/meeting of minds but consent is impeachable for some other reason and which causes a contract to be a nullity relative."[38]

38 There are, it was held, three kinds of *erreurs obstacle*: *erreur sur la nature du contrat* (an error as to the nature of a contract such as believing a transfer to be a gift where it is in fact a loan); *erreur sur l'objet* (an error as to the subject of the contract such what is being bought/sold); and *erreur sur l'existence de la cause* (an error as to the purpose or basis of the contract such as what the counterparty intends to achieve from the contract), and two kinds of *erreurs vice du consentement*: *erreur sur la personne* (an error as to the person with whom the contract is made where the identity of the counterparty is an essential aspect of the contract); and *erreur sur la substance* (an error as to the substantial quality of a contract). Pleming, JA, working on the

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[38] In *Incat v Luba* (2010 JLR 287), which was decided without needing to reach a conclusion as to the subjective state of mind of each of the parties, William Bailhache, Deputy Bailiff distinguished an *erreur* which prevented the meeting of minds from an *erreur* which, although it did not operate to prevent a meeting of minds, did vitiate consent. The court found that no meeting of minds had been achieved and consequently no contract arose. This echoes the court's conclusions in *Marett v O'Brien* as to the operation of *nullités absolues* and *nullités relatives*.

basis that mutual mistake was not necessary to invalidate the consent order, held that there was no *vice du consentement*.

39 Thus, it can be seen that the Court of Appeal applied the analysis of French law *erreur* to the whole of the mistake in question, accepting the subjective approach to contractual relations and limiting the availability of remedies to circumstances where sufficiently fundamental *erreurs* occurred. Pleming, JA held—

> "There was no mistake as to the subject matter of the agreement or as to its principle [sic] terms. There may have been a misunderstanding by [the party] as to the consequences or ramifications of the agreement but that, in my view, is not enough."[39]

40 This accords with Cartwright's view that—

> "French law has a significantly wider doctrine of *erreur*, but even that doctrine has limitations which protect the defendant against the claimant too easily having the contract declared a nullity because of his mistake." [40]

41 In *Sutton*, S entered into a contract of insurance with I, to which contract he had ostensibly added as a specified item a Hublot watch which was said to be valued at £46,000. S, having lost the watch, claimed against I under the policy of insurance and I refused to satisfy the claim, alleging that the watch was not genuine, that S had not had good title to it, that its value was not £46,000 and that S had not in fact lost the watch. Although all the issues raised by I were answered as matters of fact by the court, William Bailhache, Deputy Bailiff did consider the place of *erreur* in Jersey contract law as providing remedies in circumstances which would have been within the scope of misrepresentation in English contract law. This discussion was precipitated by S's assertion that because I had agreed to insure the watch for a temporary period until a valuation was provided, and that upon S providing a valuation, no objection was raised by I, who apparently continued the cover, I was then estopped (pursuant to principles of estoppel by convention) from claiming that the valuation was defective.

42 It was held, *obiter*, that—

> "the mutual understanding as to the basis upon which the contract is to be performed, which is the *sine qua non* for the purposes of the doctrine of estoppel by convention is already drawn into the

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[39] 2008 JLR 384, at 408.
[40] *Ibid.*

> contract by the application of the principles relating to the requirements for the creation of a valid contract—the mutual understanding goes to the true consent of the parties undertaking the obligations, as an expression of their will or *volonté* to make the transaction; and if in any particular case it can be shown that the assumption upon which the parties proceeded simply cannot be made to hold good against them, then the remedy will probably lie in a claim that the contract should be set aside for *erreur*."[41]

43 The court held, further, that S had induced I to enter the contract by innocent or fraudulent misrepresentations that he was the genuine owner of the watch and that the watch was genuine. According to William Bailhache, Deputy Bailiff—

> "In our view, cases in contract which have been brought before the Royal Court upon the basis of misrepresentation, where the claim is that an innocent misrepresentation did not become part of the contract terms but did induce the making of a contract which would otherwise not have been made, can sometimes be properly understood by reference to the law on *erreur*, the most recent exposition of which is to be found in the decision of the Court of Appeal in *Marett v O'Brien*."[42]

44 The Deputy Bailiff generously supposes that earlier decisions of the Royal Court made on the basis of misrepresentation could be assumed to have been made on the basis of *vice du consentement*, albeit expressed in the vocabulary of misrepresentation. While that may well be the case, it is relatively clear from the foregoing review of the case law that some judgments at least were not concerned with *erreur* in any material sense and the decisions instead were based simply upon English law principles.

8. The cycle to be broken

45 Although it is clear that "mistake" and "misrepresentation" were not part of Jersey law prior to the mid-twentieth century, there have been sufficient reported cases that have used the language of "mistake" and "misrepresentation" to justify the conclusion that we have now reached what might effectively be described as a tipping point: does Jersey now continue to recognize and apply the principles

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[41] 2011 JLR 80, at 93.
[42] *Ibid*, at 98.

of English "mistake" and "misrepresentation", or does it elect to return to its roots? There is a genuine need to examine the options.

46 The present situation may be described thus—

(a) Learning the law: students on the Jersey Law Course receive a study guide and attend seminar sessions on Jersey contract law during which the concept of a "*vice du consentement*" is expressed to be a part of Jersey law; the three types of *vices du consentement* are said to be *erreur*, *dol* and *violence*; little Jersey authority is provided in support of each of these three types of *vices*, whereas the large part of the cases that follow each *vice* in the study guide and seminar sessions deal with "mistake" and "misrepresentation"; it is recognized that in most cases, if not all, the English and French concepts do not map to one another; it is agreed that no consolidation is possible but it is nonetheless necessary to learn, and cite, authorities that are clearly at odds with one another.

(b) Practising the law: advocates continue to refer the Royal Court to English principles of misrepresentation and cases in which the English principles are given credence. This is understandable: the arguments that were successful and persuasive in earlier cases will be relevant in current ones. Given the adversarial nature of every matter that comes before the Royal Court in which mistake and misrepresentation might be in issue, it is only natural to presume that at least one of the parties will stand to gain from directing the court to an authority that relies heavily on English principles, or at least uses English terminology in a way that tends towards the further embedding of English principles.

(c) Deciding the law: the court is bound by the same limitations as practitioners; in order to protect itself from appeal it must consider the authorities to which it is directed by counsel, and although it may introduce its own analysis and research, it is nonetheless bound to deliver a judgment that uses the terminology of the authorities; those authorities—as has been seen—all use terminology which is at best unhelpful and at worst incorrect.

47 It is not viable for a sophisticated and mature jurisdiction to maintain these difficulties; there is no rationale for forming a contract using a subjective analysis of the meeting of the minds of the parties, while attacking the same contract with an objective analysis of the parties' knowledge at the time of formation of the contract. However, that is the scheme that is perpetuated by the authorities which continue to use the nomenclature of misrepresentation. And it is a problem of nomenclature only; *Steelux*, *Marett*, and *Sutton* all sufficiently acknowledge the central role of *erreur* in Jersey's contract law to permit future cases to be decided by reference thereto only. Where

these cases refer to misrepresentation, those references are—or can easily be interpreted to be—references to an event which, in England, would be termed "misrepresentation". In Jersey, that event might be better described by the term "false representation" so as to avoid implying the strict legal meaning designating the elements set out in section 2 above as understood by English lawyers. Indeed, it might be said that English law "misrepresentation" cannot, as a matter of fact or law, exist in Jersey. A pre-contractual false representation would either obviate a meeting of the minds necessary for contract formation and thus prevent the contract arising in the first place, or vitiate the consent of one of the parties and thus render the contract voidable. Without a contract, there is neither any need for "misrepresentation" nor any effective remedy available. With a voidable contract, the remedies that follow English law misrepresentation are redundant.

9. The simple solution

48 The cases reviewed in this article are all capable of having an analysis of *erreur* applied to them in lieu of the misrepresentation analysis and generating the same outcome: Although *Scarfe*[43] was mistaken as to the extent of the land owned by the company, he would not be afforded a remedy in *erreur* because he was able, but had failed, to investigate the facts for himself; *Channel Hotels*[44] would have been granted a remedy because it was in fact mistaken, its mistakes being caused by Rice; *Kwanza*,[45] like *Scarfe*, would have been denied a remedy for the same reason; and finally *Quenault*[46] would have been denied his remedy because although he may have asserted that he was mistaken about the cost of borrowing when he formed the contract, the court would have found that the information provided by De Gruchy was not in fact incorrect and that even if it had been, the interest rate attached to the borrowing did not go to the substance of the contract.

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[43] *Scarfe v Walton* 1964 JJ 387.

[44] *Channel Hotels v Rice* 1977 JJ 111.

[45] *Kwanza Hotels v Sogeo* 1981 JJ 59.

[46] *De Gruchy v Quenault* 1990 JLR 48, in which D procured, for a fee, for Q a loan with which to purchase property. D represented that the "going rate" (based on his recent personal experience) for such loans was 14% and charged 1% for his service. D signed the loan documentation, but before the property transaction completed, obtained an alternative loan at 12%. D commenced proceedings (in the Petty Debts Court) for the procuration fee. Q submitted that D had misrepresented the "going rate", either fraudulently or negligently. The court disagreed with Q, finding that the "going rate" was a fluid measure and that Q was in any event not induced into the contract by reason of this assertion.

Steelux, *Marett*, and *Sutton* have already been discussed in sufficient detail for the availability of *erreur* to be evident. This is not surprising. From a very high level, misrepresentation is a way of providing a remedy for a mistake. The significant difference is that an English court will consider whether the man on the Clapham omnibus would have made the same mistake, whereas the Royal Court will consider whether the party was in fact mistaken.

49 However, there nonetheless exist conflicting authorities (for example, *La Motte* and *McIlroy* on the one hand and *Marett* and *Steelux* on the other) and these will be cited when the opportunity arises. The conflicts may be actual or artificial and they may be a matter of distinction on the facts or on the legal analysis applied to the facts. Howsoever those conflicts arise, they must be reconciled. That, fortunately, is a matter for the judiciary. It is submitted that misrepresentation found its way into Jersey law erroneously and that consequently it has no real place there. Were such a pronouncement made by a Jersey court, it would, in one fell swoop, reset the law of Jersey to exclude misrepresentation and thereby permit the law of *erreur* to flourish in its stead. Every lawyer working on a dispute in which misrepresentation might be pleaded ought to consider whether his client, the court, and the jurisdiction are best served by making misrepresentation arguments when an alternative is available. There is simply no need to rely on misrepresentation when *erreur* affords such an elegant solution; where a mistake was made as to the substance of the contract, the contract may be declared void at the instance of the mistaken party, which remedy is more powerful and therefore more desirable for potential plaintiffs. This statement of the rule contains only lay language. There is no jargon to explain to clients. There are of course nuances to this rule, but those nuances are much simpler than the equivalent permutations in the English law of misrepresentation. Arguing *erreur* before the courts is also simpler: there is no need to specify the type of misrepresentation (innocent, negligent, or fraudulent), which do not in any event correspond well to the lay meaning of the words used to describe them; the force of the evidence and legal argument can be enhanced by both sides in light of the more straightforward test to overcome. *Erreur* is not only easier to explain to clients, simpler to argue before the courts, but also has the added benefit of being entirely consistent with the provenance of Jersey's contract law.

10. Conclusion

50 The use of conflicting terminology, the use of incorrect terminology, and the inaccurate application of the terminology of another jurisdiction have caused Jersey's law of contract much confusion. While the formation of contract has been addressed, where

a party has made a mistake as to the contract into which he has entered, the rules for declaring a contract void are still uncertain. The solution is the adoption of *erreur* to replace the oft-pleaded (and seldom successful) misrepresentation. Occam's razor[47] suggests that the solution containing the fewest assumptions is the preferred one. *Erreur* is that solution; it re-aligns contract unwinding with contract formation; it retains the academic integrity of Jersey's contract law; it is easier to understand and to communicate; and it would not have changed in any significant way the important outcomes discussed.

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[47] "*Frustra fit per plura quod potest fieri per pauciora*" [It is futile to do with more things that which can be done with fewer].