

FEBRUARY 2017

When Will Courts Use Post-Agreement Behaviour to Interpret a Commercial Contract?

Since the Supreme Court of Canada's pronouncement in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, that judges may look at background facts at the time of contract execution to interpret an agreement, Canadian Courts have wrestled with the question of what to do with evidence of the parties' behaviour after they have entered into the contract.

A decision of the Ontario Court of Appeal, *Shewchuk v. Blackmount Capital Inc.*, 2016 ONCA 912, has clarified that the parties' conduct after the contract's execution is admissible as an aid to interpretation only where there is a contractual ambiguity. Even where this evidence is admissible, the judge must still decide whether to give it any weight.

Shewchuk involved a claim by an investment advisor against his former employer for referral fees and compensation. He claimed he was owed monies for transactions he referred to the employer's Capital Market groups.

After expressing dissatisfaction with his overall compensation, the investment advisor entered into an amended agreement with his employer which modified

his compensation generally (the "Amended Contract").

The Amended Contract was ambiguous with respect to whether and how the investment advisor would be compensated for referrals to the employer's Capital Market Group. After the parties had entered into the Amended Contract, the advisor continued to negotiate a revenue-sharing agreement with the Capital Market Group.

The advisor brought an action against his employer, arguing that he was entitled to additional commission on four Capital Market transactions which he claimed to have sourced. The advisor argued that the Amended Contract resolved the issue of his entitlement to compensation for Capital Market referrals.

This claim was, of course, at odds with his behaviour after he entered into the Amended Agreement, i.e. he was still trying to negotiate a compensation agreement with the employer's Capital Market Group.

At issue was whether the Court could admit and give weight to the advisor's subsequent conduct to determine whether the Amended Contract



Marco P. Falco

Partner, Litigation & Written Advocacy

PHONE

416 777 5421

EMAIL

mfalco@torkinmanes.com

Marco is a partner in the Litigation Department at Torkin Manes. He provides written advocacy for a wide range of civil disputes, including commercial litigation and administrative law. He specializes in applications for judicial review and civil appeals.

conclusively resolved his entitlement to compensation from the Capital Market Group.

The trial judge held that because the Amended Contract was ambiguous, he was permitted to consider the advisor's post-contract conduct. He concluded that the investment advisor's repeated attempts to negotiate a compensation plan with the Capital Market Group after he had entered into the Amended Agreement meant that the Amended Agreement did not conclusively determine his compensation for Capital Market referrals.

The Court of Appeal upheld the trial judge's ruling and clarified when a Court can examine post-contract behaviour.

Subsequent Conduct Can Only Be Considered In Cases of Contractual Ambiguity

The Court of Appeal observed that in *Sattva*, the Supreme Court of Canada held that the Court may consider the "factual matrix" when interpreting a contract.

The factual matrix, however, "consist[s] only of objective evidence of the background facts **at the time of the execution of the contract**, that is, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting".

The Court of Appeal therefore concluded that subsequent conduct, or evidence of the parties' contract after entering into the agreement, "is not part of the factual matrix".

After considering UK decisions which effectively prohibit any consideration of the parties' post-contract behaviour, the Court of Appeal held that a finding of ambiguity in the contract is a necessary precondition to the admissibility of evidence of the parties' subsequent conduct.

The reasons for this precondition are:

- i. The parties' post-contract behaviour can undermine the written contract and contractual certainty generally;
- ii. Admitting evidence of subsequent conduct "could permit the interpretation of the contract to fluctuate over time";
- iii. Subsequent conduct can be ambiguous. Just because a party does not enforce its strict legal rights under a contract, this does not mean those rights never existed; and
- iv. Subsequent conduct can be self-serving. A party may very well act in a certain way after the contract is entered into so that a particular interpretation of the contract is adopted.

In view of the inherent dangers associated with relying on subsequent conduct to interpret an agreement, the Court held that subsequent conduct may only be used to resolve ambiguities:

Despite its dangers, evidence of subsequent conduct can be useful in resolving ambiguities. It may help to show the meaning the parties gave to the words of their contract after its

execution and this may support an inference concerning their intentions at the time they made their agreement.

Court Can Decide What Weight to Give to the Subsequent Conduct

Even if the Court rules that subsequent conduct is admissible to resolve a contractual ambiguity, the Court retains the discretion to give it little or no weight. The inherent dangers of subsequent conduct evidence "mean that when it is admitted it must be used cautiously and its weight will vary from case to case".

Post-contract behaviour will be more reliable where: i. the behaviour involves the acts of both contractual parties; ii. the acts are intentional; iii. the behaviour is consistent over time; and iv. the acts are those of individuals, rather than "agents of corporations".

Accordingly, in order to be given weight, the subsequent conduct must itself be unequivocal. Subsequent conduct that is closer to the date of contract execution may also be more reliable.

Admissibility of Subsequent Conduct Is Not a "Slippery Slope"

Shewchuk is guarded in its approach. Recognizing the perils of relying on the parties' subsequent conduct to interpret a contract, the Court was careful to restrict the admissibility of such evidence only in cases of contractual ambiguity. Even if admissible, the Court has a residual discretion not to give the evidence any weight.

In many ways, *Shewchuk* achieves the proper balance between the UK's absolute prohibition on subsequent conduct evidence and an overly broad rule which would automatically admit it as an aid to contractual interpretation.

The narrow exception carved out by the Court of Appeal in cases of ambiguity allows the Court to consider such evidence on a case-by-case basis. It grants the Court a necessary tool to discern the parties' intentions.