# Can you take account of post-contract conduct as a guide to interpretation?

Update prepared by Gordon Dawes (Partner, Guernsey)
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**// This update considers whether post-contractual conduct can be used as an aid to contractual interpretation as a matter of Guernsey law.**

Guernsey is a small jurisdiction and produces comparatively little case law. It is the same with statute law. As a result, large areas of law which are relatively certain in English law are very uncertain in Guernsey law. Everything though is truly relative. The amount of English case law and its lack of coherence can itself generate a great deal of work, see for example the six finely nuanced judgments of the nine presiding judges of the Supreme Court in *Patel v Mirza* [2016] UKSC 42, a 91 page judgment on the common law doctrine of illegality.

Returning to Guernsey, a prime example of an area of uncertainty is Guernsey contract law taken as a whole. There are no contract law statutes in Guernsey, not even a sale of goods act, let alone anything on unfair contract terms, misrepresentation or frustrated contracts. On the face of it there is complete freedom of contract. We have very little contract case law. While we very often look to Jersey case law in such circumstances, it is not so much help here. Jersey took a much criticised lurch towards civilian contract law, which is itself problematic in some respects.

We are not bound by English case law, even less so by English statute, which begs the question of how you go about solving any given legal problem. This is fairly fundamental when it comes to contract law. As a matter of principle we ought to look to the work of Robert Joseph Pothier, an 18th century legal author whose Treatise on the Law of Obligations was the model for Chitty, Anson and France's Code Civil, hence the relative (that word again) similarity of French and English contract law.

Equally, there is no doubting that Guernsey contract law is heavily influenced by English case law; but when that case law is itself in dispute and often regardless, a good Channel Island lawyer will shop around the more reputable Commonwealth jurisdictions for helpful precedent.

As to the particular issue of post-contract conduct as an aid to interpretation, English law is as clear as anything is clear in English case law that the answer is 'No'; see House of Lords authority such as *Whitworth Street Estates (Manchester) Ltd v James Miller & Partners Ltd* [1970] AC 583 and *Wickman Tools Ltd v Schuler* [1974] AC 235. The key objection appears to be that you should not ex post facto interpret that which, in principle, ought to be interpreted as at the day the contract was made. To do otherwise would, it is claimed, alter interpretative truth retrospectively, which cannot be permitted to happen.

What then of the Code Civil, the successor to Pothier? By contrast to English law the Code Civil has no difficulty at all in permitting reliance on post-contract conduct to determine meaning. The relevant provision was in there from the start in 1804 (Article 1156, as interpreted subsequently, see now Article 1188 of the newly reformed provisions as of 1st October 2016). In French law one must look for the common intention of the contracting parties rather than stop at the literal meaning of the terms; which isn't so dissimilar from English law, except that French law goes further in the search for that intention.

Such Jersey authority as there is followed English case law without really examining the point in any detail. Australia has also followed English law, Scotland too; although the Scottish Law Commission produced a Discussion Paper (No. 147) entitled 'Review of Contract Law, Discussion Paper on Interpretation of Contract' in 2001 which supported the taking into account of such conduct. The paper is a useful survey of the law in this area.

Further afield, the courts of New Zealand, South Africa, Canada and the USA (via the Uniform Commercial Code and Restatement of Contracts) all permit subsequent conduct as an evidentiary guide to determining the meaning of the agreement. There is no Guernsey authority on the point.

On the face of it, the Royal Court is not bound by English authority and is free to determine what evidence it will and will not take into account to arrive at the true meaning of an agreement. From a purely common sense and commercial point of view, there seems no good reason not to take into account the conduct of the parties in the operation of an agreement as a guide to its meaning and every good reason to do so. The objection that the meaning of an agreement is fixed as at the date of its making and cannot be varied by subsequent conduct is, arguably, to miss the point. Subsequent conduct does not change meaning, as opposed to assist to disclose it, and perhaps rather more accurately than academic dissection of the words themselves, even if set against the perceived factual matrix of the time.

The issue arose in a recent Guernsey case which then settled, as is often the way. There is now no imminent prospect of the issue being resolved by the Guernsey courts, nor indeed a host of other issues, including the limits of freedom of contract itself.

All we can say is that the issue is illustrative of the nature of litigation in a small jurisdiction. Argument and counter-argument are deployed in pleadings and skeletons and the issue goes into the mix of negotiation, increasing or reducing the risk of any given outcome and the cost of settlement, one way or the other.

## Contact

**Gordon Dawes**
**Partner, Guernsey**
+44 1481 731 479
gordon.dawes@mourantozannes.com