Case In Point

Appellate Court Clarifies Use of Subsequent Conduct Evidence in Resolving Ambiguous Contract

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In an important decision regarding the law of contractual interpretation, [Shewchuk v. Blackmont Capital Inc](#)*.*, the Ontario Court of Appeal considered when the subsequent conduct of parties can be considered in interpreting a contract made between those parties. Significantly, it distinguished "subsequent conduct" from the "factual matrix" of the contract (the facts known to the parties at the time the contract was entered into). The Court has established that factual matrix evidence is admissible at the outset to interpret a contract, whereas subsequent conduct evidence is admissible only where a court finds that the contract is ambiguous and that ambiguity cannot be resolved by reference to the terms of the contract or the factual matrix.

The appellant in this case was employed by the respondent as an investment advisor (IA) in the respondent's Retail Group of brokers. The appellant was dissatisfied with aspects of his compensation, including the amounts he received for referring transactions to the Capital Markets group. As a result, he entered into a letter of agreement (Agreement) with the respondent which amended his IA Compensation Plan by granting him deferred stock units in the respondent and by providing for additional compensation which related to prescribed qualified options eligible for finders fees, all of which related to Retail Group transactions. The Agreement made no reference to Capital Markets and explicitly required that the appellant keep the terms of the Agreement confidential. This meant that the appellant could not disclose the terms of the Agreement to the Capital Markets personnel.

Subsequently, a dispute arose between the parties in which the appellant alleged that the Agreement was applicable to Capital Market transactions. The trial judge found that the terms of the Agreement were ambiguous. The judge examined the parties' subsequent conduct once the Agreement was entered into and concluded that they had not intended for the Agreement to apply to Capital Market transactions: for example, the evidence included repeated efforts by the appellant to negotiate a revenue sharing agreement with respect to Capital Markets *after* the Agreement had been executed.

The Court of Appeal upheld the trial judge's decision, holding that the Agreement was ambiguous and that the parties' subsequent conduct was admissible for the purposes of resolving the ambiguity. Contrary to the trial judge's decision, however, the Court clarified that subsequent conduct does not form part of the "factual matrix" of a contract. It held that where the ambiguity cannot be resolved through resorting to the text of the contract or the evidence of the factual matrix, subsequent conduct may be admitted to show the meaning the parties gave to the words of the contract. The weight that should be given to the evidence of subsequent conduct will depend on the facts of the particular case.

The Court also warned of the risks of admitting evidence of subsequent conduct, including:

- changes in the parties’ behaviour over time can add to the uncertainty
- the subsequent conduct may itself be ambiguous, and
- subsequent conduct may be self-serving if a party deliberately conducts themselves in a way that would lend support to that party’s interpretation of the contract.

In this case, the trial judge was correct to admit the evidence of the parties’ subsequent conduct to resolve the residual ambiguity. The evidence showed that the actions of the appellant were consistent with the conclusion that at the time the parties executed the Agreement there was no intention for it to be applicable to Capital Market transactions