COLLAS CRILL

Channel Islands contract law

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Welcome to Collas Crill's first Channel Islands contract law update. Why do we need a Channel Islands specific contract law update? Well, let's start with a history lesson.

Both Guernsey and Jersey have historically sent aspiring lawyers to the university of Caen in Normandy to learn about the Norman origins of Channel Islands law and its impact on the laws of obligations here.

The abridged version is that the Channel Islands were part of the Duchy of Normandy before 1066 (we were team William rather than team Harold). Whilst subsequent history linked us to the English crown and not the French, our heritage, combined with our proximity and regular trade links to Normandy, as well as French being the predominantly spoken language here (*Guernesiase* or Guernsey French was Guernsey's official language until 1948) led to the local recognition of a number of decidedly French principles of law, particularly in relation to contractual interpretation.

Despite this, modern contractual drafting in the Channel Islands owes much to English legal principles and, typically, contract law works in the Channel Islands much as it does in England. Occasionally however significant differences arise, serving as a reminder of our Norman heritage.

For that reason this update focusses on recent cases which provide on the customary law of the Channel Islands and how it interacts with modern transactional fact patterns:

In this article, James Tee considers two recent cases where the history and development of Guernsey contract law are discussed and principles of interpretation are addressed, while Wayne Atkinson considers what one of these cases means for the interpretation of potential penalty clauses.

Finally, Jonathan Barham considers a recent Jersey judgment on the concept of dol par réticence (fraudulent concealment) in a truly international context.

Evans v Guernsey Building Renovations Limited

In the case of Evans v Guernsey Building Renovations Limited, Lieutenant Bailiff Hazel Marshall KC, sitting in the Royal Court, had to consider the law of contract under Guernsey law. As the parties in the case were unrepresented it was a case in which - rather unusually - the Court had to do its own research to arrive at the correct Guernsey law principles in this area of law. The Court noted that there is a remarkable dearth of reported authority and modern commentary in relation to Guernsey contract law.

The claim was brought by Mrs Evans against a building firm claiming repayment of a deposit she paid for building works.

The Court determined that Guernsey law which would govern the contract is derived from the *coutume* and that the law is reliably sourced in a *Treatise on the Law of Obligations or Contracts*, authored by Robert Joseph Pothier, published in 1761.

The law of contract in Guernsey is embodied in the French maxim *"la convention fait la loi des parties"*. Therefore the starting point is what did the contract between the parties actually say.

The Court then considered what is necessary to cancel or vary a contract which has been previously made. The Court determined this to be acts which are sufficient to amend the *"loi des parties"*, in principle, a further contract to effectively supersede the original one.

In order to make a binding contract under Guernsey law four elements are required are:

1. **Capacity** - the persons have the legal capacity to enter into the contract;
2. **Consent** - must be apparent and there must not be any matter the vitiates the apparent consent such as fraud or misrepresentation;
3. **Object** - relates to the subject matter of the contract and this must be clear. It is in respect of the subject and the intention of the agreement and whether it is ascertainable with sufficient certainty.; and
4. **Cause**, is the reason for the obligation to be performed.

In this case the Court focused on the last two elements required to form a valid contract under Guernsey law.

LB Marshall found that cause in Guernsey law has the same function as English law consideration, being *"the magic element which makes a promise contractually binding"*. However, they were not the same thing. It needed to be a wider concept because Guernsey (and Jersey) law do not have the concept of a deed and because the relevant English law estoppels which mitigate the position are equitable doctrines of English law, and not part of Guernsey customary law. Cause did not develop with any connection to English law doctrines but out of Norman law, and with more affinity with French law.

The key appears to be the intention (to be bound) of the party making the promise. Cause can extend to matters which would appear to demonstrate this, rather than stopping, simply, at an objective assessment of the intended function of an agreement derived from reciprocity of the obligations undertaken. It extends to wider matters, such as the existence of a family relationship, or a relationship of responsibility, from which it may be inferred that the promisor intended his promise to be enforceable. The existence of “cause” is very dependent on the facts of the case.

Following the decision it will be interesting to see if in the future a totally gratuitous promise at arm's length would be enforceable under Guernsey law.

Smith v Carey Olsen

In this case, the Plaintiff brought a claim against the Defendant firm of advocates in negligence and/or breach of contract for failure to advise on the options open to the Plaintiff to avoid being evicted.

Under Guernsey law, the prescription period for claims in contract and tort is six years.

The Defendant asserted that the claim was time barred by operation of the limitation of liability clause in the Defendant's terms of business, which provided that the negligent acts and contractual breaches of duty claims had to be brought within a period of 3 years.

The Defendant's contention was that by virtue of the customary law maxim *"la convention fait les lois des parties"*, the signatures of the parties to the Defendant's terms of business demonstrated that the Plaintiff freely entered into the agreement and the terms contained therein with the effect that the shortened limitation period could not be avoided.

The Plaintiff argued by reference to English authority that where a condition was particularly onerous or unusual, the party tendering the document must show that it has been brought to the other's attention. As the Defendants had not brought the Clause to his attention so he was subject to a mistake or "*erreur*".

The Defendant submitted that Guernsey law does not recognise the same approach as under English law on unconscionability, rather there are settled principles relating to *erreur vice de consentement*.

The Court considered that English contract law principles should not be applied and that well established principles derived from Norman Customary law were, instead, applicable.

The Bailiff went on to consider the principles expressed by customary law commentators such as Laurent Carey, particularly in relation to freedom of contract and consent.

The Bailiff held that principles of *erreur*, as confirmed by the Jersey Court of Appeal in *Booth v Viscount of the Royal Court* (**Booth**), were equally applicable in Guernsey. The customary law recognised both an erreur obstacle and an erreur vice de consentement.

Erreur obstacle divides into:

> Mistake as to the nature of the agreement;
> Mistake as to the subject of the agreement; and
> Mistake as to the basis or purpose of the agreement,

Each of which prevent the meeting of minds that is necessary to the existence of consent and the creation of a contract.

Erreur vice de consentement as explained in Booth is comprised of *erreur sur la personne and an erreur sur la substance. Erreur sur la personne* was where the identity of a contracting party is the main cause of the contract. This *erreur* did not apply in this case.

The Bailiff applied the four stage approach:

1. it is essential to start by identifying the **chose** to which the contract relates – in other words, the subject matter of the contract;
2. to see whether the claimed **erreur** relates to that subject-matter;

3. if the claimed mistake does relate to the subject matter of the contract, it is necessary to consider whether or not the mistake relates to something which in principle affects the quality of the thing which the contracting parties had principally in prospect, and which formed the substance of that thing, and;
4. the court must determine whether or not a mistake which in principle was capable of amounting to an **erreur sur la substance** related to something that was essential to the mistaken party, such that he would not have contracted had he known the true position.

Adopting the above approach the Bailiff considered that the Plaintiff had contracted for legal services with the Defendant. The fact that he sought to sue the Defendants for negligence because the services, he alleged, did not meet the requisite standards did not affect the subject matter of the contract so there was no *erreur vice de consentement* vitiating the Plaintiff's consent to enter the agreement.

The case is a good illustration of that the Royal Court will not follow English principles and will look to customary law principles when considering issues of contract law.

Evans v. Guernsey Building Renovations Limited - France wins on penalties?

In Evans v. Guernsey Building Renovations Limited ([2024] GRC001), Lieutenant Bailiff Hazel Marshall KC, sitting in the Royal Court, had to consider the law of contract under Guernsey law as applied to a construction matter.

Both the parties in the case were unrepresented and rather unusually the Court had to do its own research to arrive at the correct Guernsey law principles in this area of law. The Court noted that there is a remarkable dearth of reported authority, modern commentary in relation to Guernsey contract law.

Broadly, the facts centred on a contract between the parties for building works. Having signed the contract and transferred a significant deposit to the counterparty, Mrs Evans learned a day or so later of a bad medical diagnosis that led her to seek to cancel the arrangement. The builder claimed entitlement to retain the whole deposit, Mrs Evans sought its return. In her judgment Lieutenant Bailiff Marshall noted the recent English authority of Cavendish Square Holdings BV v Talal El Makdessi ([2015] UKSC 67) and the various distinctions English law draws between penalties (an obligation to pay a sum of money on an event and unenforceable in England) and forfeitures (a party retaining money already received on the occurrence of a breach by the paying party).

Pointing to Pothier's Law of Obligations, Lt-Bailiff Marshall concluded that Guernsey law would not distinguish between a “penalty” and a “forfeiture” as the considerations involved are entirely similar and went on to consider how such clauses would be treated.

Having identified that a clause has the character of a penalty, Lt-Bailiff Marshall found that Guernsey law requires the court to consider whether a penalty should be moderated, by looking at its effects relative to the amount of damage actually being suffered by the party not in breach. The principle being that the penalty is a substitute for damages and so should not be excessive when compared thereto.

In the specific case before the court this involved the court considering matters such as the cancellation of materials orders, the recoverability of sub-contractors' fees and GBR's inability to find immediate replacement work leading to loss of earnings.

Those readers familiar with concepts such as legitimate interests or genuine pre-estimate of loss, may well think that the two laws reach a similar end point by different means. It may be however that the court's ability to moderate a penalty clause in Guernsey leads to less binary results than have historically been the case elsewhere and a more satisfactory development of this area of the law.

Hard Rock – Royal Court "keeps the faith"

In 2023 the Royal Court of Jersey heard the case *Hard Rock and Anor v HRCKY* which related to a dispute regarding a franchise agreement between the parties which allowed HRCKY to run a Hard Rock Café in the Cayman Islands.

HRCKY's claims were initially limited to allegations of breach of the implied terms of good faith but these were later expanded to include allegations of misrepresentation amounting to *dol* (fraud) or *erreur.*

Silent Misrepresentation

Jersey law recognises that a positive representation accompanied by silence can amount to an actionable misrepresentation. However, it had previously been unclear whether mere silence could constitute a misrepresentation.

This principle, known as *dol par réticence* or *réticence dolosive*, had been considered and debated on several occasions, but had never been settled by the Court. Advocates of the principle argued that its purpose was to put the parties on a level the playing field where there is inequality of bargaining power.

The Court considered the case of *Steelux Holdings v Edmonstone*, which suggested that silence might amount to fraud in circumstances where one party was *"more experienced and worldly-wise than the other"* and the silence related to a material fact which, had it been known to the counterparty, would have led to a refusal to contract.

However, the Royal Court found that the proper approach is to have high regard for contractual freedom. It would be inappropriate to make silence actionable, when modern-day parties are able to make enquiries and seek warranties, if they are so minded.

In light of the Royal Court confirming that fraudulent silence is not a principle of Jersey customary law and that silence is not actionable generally, parties to a contract and their advisors should give careful consideration to the warranties they want to seek from the other party. Furthermore, contracting parties need to be very thorough in their pre-contractual enquiries.

Implied duty of good faith

The Royal Court conducted a thorough review of the customary law commentators and earlier authorities which suggested that an implied duty of good faith may be part of every Jersey law contract . Having done so, the Royal Court concluded that there is no authority supporting the existence of an implied term of good faith in every contract as a matter of customary law. The Royal Court held that the development of such a term would be a matter for the States.

The Court did consider that an implied term of good faith may arise in *"relational contracts"*, bringing Jersey law broadly in line with English law in this area. These are contracts where there is collaboration and an expectation of mutual trust and loyalty. The Court recognised that a specific, express term in a relational contract could exclude the duty of good faith.

The good faith blade may thus cut in relational contracts (unless excluded by the parties) but is not as sharp as it might appear. Provided the parties act honestly, they are free to pursue their own commercial interests and do not have to subordinate those interests in favour of the counterparty. Moreover, good faith cannot impose an obligation to renegotiate a key term of the contract or give up a legal right conferred by the contract.

This judgment, like the Guernsey cases of *Smith* and *Lewis*, demonstrates the high regard that Courts in the Channel Islands have for parties' contractual freedom. Even in the limited circumstances where a term of good faith is implied, its function is to ensure collaboration when the contract is one where collaboration was intended.

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