

UPDATE

Good faith in Jersey law governed contracts

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The question of whether there is a general duty of good faith in the performance of contracts governed by Jersey law has not yet been definitively decided, but the recent Jersey case of *Hard Rock Limited v HRCKY Limited* [2018] JRC 026 is nevertheless instructive as to when and how such a contention may be raised and pleaded.

Background

Hard Rock Limited and Hard Rock Café International STP Inc. (the **Plaintiffs**) sought the summary dismissal of the counterclaim of HRCKY Limited (**HRCKY**) pursuant to Rule 7/7(1) of the Royal Court Rules 2004. The Plaintiffs are affiliates of Hard Rock Café International (USA) Inc., which controls and promotes the 'Hard Rock Café' brand by way of franchising arrangements. Proceedings had originally been started by the Plaintiffs concerning a restaurant franchise agreement, which permitted HRCKY to operate a Hard Rock Café in Grand Cayman. The relevant part of HRCKY's counterclaim related to its contention that the franchise agreement contained an implied term of good faith, and that the Plaintiffs were in breach of that term.

Good faith as an implied term

The issue was framed in this case in terms of whether a duty of good faith was an implied term of the franchise agreement. In approaching the argument in that way, the court was not required to address whether, at a more fundamental level, an overarching duty of good faith arose as a matter of (Jersey) law.

Such a duty of good faith does not arise under English law. One of the piecemeal solutions the English courts have therefore adopted to deal with issues of 'unfairness' is the implication of a term requiring good faith in a particular contract, or in contracts of a particular type. In *Yam Seng Pte Ltd v International Trade Corp Ltd* [2013] EWHC 111 (QB), the English court set out an important and extended consideration of the law, which discussion has been taken to suggest that an implied term of good faith should in fact be recognised in most, if not all, commercial contracts governed by English law on the basis of the expectation of the parties.

However, subsequent cases in England have not gone as far as endorsing that approach: in *Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd* [2013] EWCA Civ 200, the court noted that 'there is no general doctrine of 'good faith' in English contract law, although a duty of good faith is implied by law as an incident of certain categories of contract', and in *Greenclose Ltd v National Westminster Bank Plc* [2014] EWHC 1156 (Ch) the court stated that 'there is no general doctrine of good faith in English contract law and such a term is unlikely to arise by way of necessary implication in a contract between two sophisticated parties negotiating at arms' length'.

Should a duty of good faith be an implied term in a Jersey commercial contract?

The law of Jersey regarding implied terms is similar to English common law. A party arguing that a term should be implied into a contract must show either that the term is customarily included in contracts of the kind in question, or that it is necessary to imply the term in order to ensure that the contract is not futile,

inefficacious or absurd: *Minister for Infrastructure v Parish of St Helier* [2016] JRC 153. The Jersey courts are also likely to take note of developments in English common law, and in particular *Marks v Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72. In that case, the English court stated that in order to be implied into a contract, a term must (a) be reasonable and equitable; (b) be necessary to give business efficacy to the contract (no term would be implied if the contract would be effective without it); (c) be so obvious that it goes without saying; (d) be capable of clear expression; and (e) not contradict any express term of the contract. In this case, the Plaintiffs argued that the implication of a term requiring good faith did not satisfy these requirements.

The Royal Court held that it was not appropriate at a pre-trial summary stage to determine whether every contract governed by Jersey law should be seen as containing 'an implied term of good faith', noting that the scope of such a term, including whether it could be removed or obviated by the express terms of a contract, were not matters that had been definitively decided. The Master had come to a similar conclusion in an earlier judgment in the proceedings (*Hard Rock Limited and another v HRCKY Limited* [2013] JRC 244B). HRCKY's position was therefore arguable in principle, and it could not be said that, in relation to the law at least, it had no real prospect of succeeding at trial (a necessary element of any application for summary judgment under Rule 7/7(1)).

HRCKY's substantive allegation of breaches of good faith

This was not, however, the end of the matter. The court pointed out that, as a matter of fact, it was not possible to regard the alleged actions of the Plaintiffs to be examples of a lack of good faith. The allegations concerned the Plaintiffs' refusal of what HRCKY regarded as reasonable requests to alter some of the express terms of the franchise agreement, in particular regarding portion sizes and opening hours. Some of HRCKY's requests had been agreed to by the Plaintiffs, but others rejected. The court held that an implied term of good faith, even if one were to exist, could not be used to qualify the general purpose and commercial rationale of an agreement, and given the express terms of the franchise agreement, a simple refusal to vary the Plaintiffs' express requirements with a view to protecting the integrity of its franchise or to meet its commercial aims generally, could not be said to amount to a lack of good faith.

The court also concluded that there did not appear to be any causal link between the losses claimed by HRCKY and the Plaintiffs' conduct alleged to amount to a lack of good faith.

For these reasons, the court decided that HRCKY had no real prospect of success in recovering any damages under the particular breaches alleged, and granted the Plaintiffs' application for summary dismissal of the 'good faith' element of HRCKY's counterclaim.

The general position under Jersey contract law

Although the case did not need to determine the more fundamental legal question in Jersey, it does show that if a breach of good faith is alleged, the substantive allegations, even if they are proved, must amount to something which the court will actually regard as a lack of good faith, and any loss said to have occurred must also be causally linked to the alleged breach of good faith. If not, the claim will risk being struck out or dismissed.

For the certainty of contracts, it is helpful that the court recognised that a requirement of good faith cannot be used to alter the purpose and commercial rationale of an agreement. Declining to agree to a variation of the express terms of an agreement does not amount to a lack of good faith.

In this case, the argument was framed as a consideration of an implied term. It remains an open question whether a broader duty of good faith runs deeper than this.

Conclusion

The precise position under Jersey law remains to be determined. Where it is important to a party that the other party acts in good faith, it therefore remains advisable to include an express provision to that effect (a proposal which would, of course, be rather difficult to resist in negotiation). Given the uncertain effect that such a clause might have in practice, it is also important to be as specific as possible in defining the parties' expectations.

Where relations later break down to the point of litigation and a lack of good faith is alleged, it is then necessary, as this case shows, that the pleaded factual allegations amount to a lack of good faith, bearing

in mind the importance the court will attach to the express terms of contract. It is also necessary that such allegations are directly linked to the plaintiff's alleged loss. These two requirements will apply on any view of the law, regardless of whether a duty of good faith is an intrinsic part of the law of contract in Jersey, or whether it should be regarded as an implied term in the particular contract (or in Jersey law governed contracts generally).

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