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Losing the faith? Implied term of good faith rejected in Jersey contract law

There is no generally implied term of good faith in all Jersey law contracts, the Royal Court has held. In doing so, it has answered a question left open in earlier Jersey judgments – including by the Court of Appeal in the same case – as to whether such a term could be found. Save in limited circumstances, the Royal Court has now definitively found that no such term exists.

Background – what was the case about?

The case arose from a franchise agreement (the "Franchise Agreement") between HCRKY Limited ("HRCKY") and Hard Rock International Limited ("Hard Rock"). Under it, HRCKY operated a Hard Rock Café in the Cayman Islands for 20 years. This involved running a restaurant and selling Hard Rock merchandise in conformity with a defined system of operation providing food and beverages and merchandise of a distinctive character and quality under the name "Hard Rock Café" (the "System"), and the use of Hard Rock's trademarks, logos, and other identifiers in respect of them.

The franchise was initially successful but eventually foundered, in part due to external factors such as the relocation of the port in Cayman further away from the restaurant and the devastation caused by Hurricane Ivan. Hard Rock terminated the Franchise Agreement in 2013, and that termination was upheld in an earlier decision of the Royal Court.

However, HRCKY counterclaimed. Under the Franchise Agreement, the food, beverages and merchandise forming part of the System were strictly defined: food and beverages were restricted to only those items on Hard Rock's approved menu or such other items specifically approved in writing by Hard Rock, and the merchandise was restricted in similar terms. HRCKY contended that Hard Rock had declined to accept HRCKY's requests to alter the System, and further that such refusals were unreasonable and so in breach of an implied duty of good faith and cooperation under the Franchise Agreement.

No implied term of good faith...

HRCKY's arguments were possible because, for the last 12 years, Jersey case law has left open whether all contracts contain an implied term to act in good faith. The issue had previously been considered in interlocutory judgments, which accepted that the existence of such a term was arguable, but no case had proceeded to a final decision on the point.

In turn, those cases had been influenced by modern and older French law. Historically, Jersey's law of contract has been influenced by certain French and civil law (rather than English or common law) legal writers. Modern French law provides, and some older French writers, describe a mutual duty of good faith to be implied in all contracts. As a result, it had been accepted in Jersey as potentially arguable that Jersey law would do the same.

In the Hard Rock case, the Royal Court therefore carried out an extensive examination of historical Jersey and French legal commentators. Having done so, it concluded that none of those recognised as sources or authorities on Jersey (or Norman) customary law supported the existence of a general contractual duty of good faith. The only references to good faith by such commentators related to a specific customary law remedy for rescinding sales of land at an undervalue (itself being an outlier, which derives from Roman law), and the doctrine of pre-contractual dol (or fraudulent misrepresentation), which is said to be underpinned by bad faith.

The Court also rejected modern French law as authority for such a term being implied in Jersey law. While the French Civil Code does expressly provide that a contract should be executed in good faith, the Court noted that this principle had been developed by the case law of the French Courts and the relevant provision of the Civil Code had been subject to modifications.

The Royal Court therefore concluded that there was no Jersey authority which stated definitely that an implied term of good faith is a part of every Jersey law contract. That being so, the Court elected not to make such a finding now. The Court considered that to do so would be a highly significant development, which would move away from the parties being entitled to have regard to their own interests. To imply a term of good faith into every contract governed by Jersey law would be a radical move and such a change would be a matter for the legislature. In any event, the Court observed that it was not clear what such a duty of good faith would actually entail.

...Except in 'relational' contracts

Nevertheless, the Court did go on to find that an implied term of good faith does form part of Jersey law for 'relational' contracts. Drawing on developments in English case law, the Royal Court concluded that, while it would be wrong to imply in every contract governed by Jersey law an implied term of good faith, there was no reason why Jersey law, in respect of relational contracts, should not permit an implied term of good faith.

Whether a contract is relational will be fact specific but the hallmarks of a relational contract are that it is long-term, the parties are committed to collaboration, and there is a mutual intention of trust and confidence. This trust and confidence is not, however, of the character found in fiduciary relationships; rather, it is trust that the other party will act with integrity and in the spirit of cooperation. Moreover, the Court said that it was possible for an implied term of good faith to be excluded specifically by express provision in a relational contract.

That being said, the Court was clear that even where there is an implied term of good faith in a relational contract, such a term does not prevent parties from exercising their contractual rights honestly in their own commercial interests, and does not require a party to subordinate its interests to those of the other party. Further, an implied term of good faith does not require a party to renegotiate key aspects of the contract, or to give up its right to hold the other party to the bargain they have already agreed.

Takeaway

So, there is no duty of good faith implied into all contracts, but there is in some. Nevertheless, the decision clarifies on an area of Jersey contract law that had been obscure and uncertain for over a decade. As a general rule, there is no implied duty of good faith in contracts governed by Jersey law, nor is there a duty to negotiate in good faith prior to contract. While a duty of good faith is an implied term in relational contracts, this does not prevent the parties from acting honestly in their own interests, and it is possible to exclude an implied term of good faith by express contractual provision.

Further information

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