MISCELLANY

Good faith in the Jersey law of contract

1 A recent interlocutory decision by the Royal Court of Jersey in *Hard Rock Ltd v HRCKY Ltd*[1] following on from the decision of the Court of Appeal in *Minister for Treasury and Resources v Harcourt Devs Ltd*[2] yielded another melancholy glimpse into an area of the Jersey law of contract which remains uncertain. Do contracting parties have a general duty of good faith towards one another, or is the concept confined to particular types of contract, *e.g.* contracts of insurance,[3] and to particular forms of action, *e.g.* the action for *déception d'outre moitié*?[4]

2 Hard Rock Ltd ("HR") applied for summary dismissal of part of the defendant's counterclaim pursuant to r 7/1(1) of the Royal Court Rules 2004[5] which came into force only on 1 June 2017. Summary judgment can be given if—

> "(a) [the court] considers that—
>
> (i) The plaintiff has no real prospect of succeeding on the claim or issue, or
>
> (ii) The defendant has no real prospect of successfully defending the claim or issue; and
>
> (b) there is no other compelling reason why the case or issue should be disposed of at a trial."

3 Since the rule mirrored equivalent English legislation, Le Cocq, Deputy Bailiff, turned to English precedent and asked himself whether the defendant had a "realistic" as opposed to a "fanciful" prospect of

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[1] [2018] JRC 026.

[2] 2014 (2) JLR 353, CA (Bennett, Collas and Bompas JJA).

[3] *Sutton v Insurance Corp of the Channel Islands Ltd* 2011 JLR 80, at 88, para 15 where the court held that "as a practical matter, insurance contracts, of all contracts, require that the parties act with good faith towards each other".

[4] In *Snell v Beadle* [2001] UKPC 5, at para 46, 2001 JLR 118, at 138, the Privy Council held that the doctrine was "based on the principle of good faith".

[5] https://www.jerseylaw.je/laws/revised/PDFs/07.770.72.pdf.

success at trial.[6] A "realistic" claim is more than one that is merely arguable; it carries some degree of conviction.[7]

4 One question was whether a requirement of good faith in the negotiation and/or performance of contracts is part of Jersey law. The defendant argued that it was an implied term of the contract that HR would act in good faith. On the facts, the court held that there was no realistic prospect of the defendant succeeding in showing that HR's alleged want of good faith was material, and granted HR's application for summary dismissal of that part of the counterclaim.

5 On the question of law, however, the court held "with some caution"[8] that it was arguable that there was an implied term of every contract that parties would act in good faith. The issue remains therefore undecided.

6 Every legal system acknowledges a mutual obligation upon contracting parties not to practise deceit. Most civil law systems go further and recognise the overriding principle that in making a contract parties should act in good faith. English law recognises no such general principle. Contracting parties are not obliged to "come clean" or "play fair", as Bingham LJ (as he then was) put it in *Interfoto Pichers Library Ltd v Stiletto Visual Programmes Ltd.*[9] He continued—

> "English law has, characteristically, committed itself to no such overriding principle but has developed piecemeal solutions in response to demonstrated problems of unfairness."[10]

7 What are the pointers as to the law of Jersey on this issue? The Royal Court has vacillated, but what do the authorities state? Jean Poingdestre, (Lieutenant Bailiff of Jersey 1668–1676), considered that in matters of contract we look to the civil law—he wrote that

> "*[le] Droict Romain, qui est celuy que tout le monde suyt en matiere de contracts, & autres, ou les coustumes n'ont rien pourueu de plus particulier*."[11]

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[6] See *Trilogy Management Ltd v Harcus Sinclair* [2017] EWHC 1164 (Ch), *per* Rose J, at para 32; *Swain v Hillman* [2001] 2 All ER 91.
[7] *ED & F Man Liquid Products Ltd v Patel* [2003] EWCA Civ 472, at para 8.
[8] *Ibid*, para 24.
[9] [1998] 1 QB 433.
[10] *Ibid*, at 449.
[11] *Remarques et Animadversions sur la Coustume Reformée, preface* (unpublished, available on www.jersey.je).

> [Roman Law, which is that which everyone follows in the matter of contract, and other matters, where the systems of customary law have not made any particular provision.]

8 One of the commentators to whom the court has paid particular regard over the years in relation to the Roman or civil law is Jean Domat (1625–1696). In *Les Loix Civiles dans leur Ordre Naturel*,[12] in the section entitled *Des Conventions en General*, he wrote that—

> "*La liberté d'augmenter, ou diminuer les engagemens, est toûjours bornée à ce que se peut dans la bonne foi, & sans dol ni fraude*."[13]
>
> [Liberty to increase or diminish commitments is always circumscribed by what can be done in good faith, and without fraud or deceit.]

9 In the 1735 edition of his work, Domat wrote—

> "*Il n'y a aucune espèce de convention, où il ne soit sous entendu que l'un doit à l'autre la bonne foi . . . tant dans la manière de s'exprimer dans la convention, que pour l'exécution de ce qui est convenue, et de toutes suites*."[14]
>
> [There is not any kind of agreement where it is not understood that one party owes the other a duty of good faith . . . both in the way in which the agreement is negotiated, and in the execution of that which is agreed, and in all respects.]

10 Pothier is, as the court has frequently stated, "the surest guide to the Jersey law of contract".[15] His work in relation to contracts is replete with references to good faith. In the context of contracts for the sale of goods, he states that—

> "*La bonne foi oblige le vendeur, non seulement à ne rien dissimuler les vices intrinsèques de la chose, mais en général à ne rien dissimuler de tout ce qui concerne la chose, qui pourrair porter l'acheteur à ne pas acheter, ou à ne pas acheter si cher*."[16]

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[12] Paris, 1705 edn,
[13] Domat, *op cit*, *livre 1*, section IV, titre III, at 27.
[14] *Op cit*, tome 1, at 25.
[15] *Selby v Romeril* 1996 JLR 210, at 218. See also *HM Viscount v Treanor* 1969 JJ 1243, at 1245; *Wood v Wholesale Electrics (Jersey) Ltd* 1976 JJ 415; and *Re Valletta Trust* 2012(1) JLR 1.
[16] *Traité de Contrat de Vente*, at para 237.

> [Good faith obliges the seller not only to conceal nothing about any intrinsic defects of the thing, but generally to conceal nothing of any aspect of the thing which might lead the buyer not to buy, or not to buy at such a high price.]

11 CS Le Gros, admittedly writing of only one aspect of the law of contract, stated—

> "*C'est un principe en quelque sorte sacré que la convention fait la loi des parties, mais la bonne foi est une condition essentielle et sine quà non de la convention. La raison en est evidente: c'est un principe commun à tous les contrats que les contractants se doivent franchise, sincerité sans voile*."[17]
>
> [It is a form of sacred principle that an agreement makes the law between the parties, but good faith is an essential pre-condition and sine qua non of the agreement. The reason for this is clear: it is a principle common to all contracts that the contracting parties owe each other a duty of frankness, and of honesty without opacity.]

12 The English law approach is not without its critics. Duncan Fairgrieve writes in *Comparative Law in Practice*—

> "Despite the lack of enthusiasm for a general principle of good faith, there have been signs that mindsets might slowly be changing. In the recent English High Court decision in Yam Seng PTE Ltd v International Trade Corporation Ltd [[2013] EWHC 111] Leggatt J gave a detailed consideration of the role of good faith in the performance of contractual obligations under English law. While he recognised that English law had not yet reached the stage when a general requirement of good faith could be implied by law, 'even as a default rule, into all commercial contracts', he nonetheless argued that it could be implied into an ordinary commercial contract based on the presumed intention of the parties. He then expanded on what this would mean, and thus identified a series of 'general norms' such as the expectation of honesty in performance of a contract . . . and fidelity to the parties' bargain. These represented 'standards of commercial dealing which are so generally accepted that the contracting

[17] Le Gros, *Droit Coutumier de Jersey* (Les Chroniques de Jersey Ltd, 1943; reprinted by Jersey and Guernsey Law Review Ltd, Jersey 2007), *De La Clameur Révocatoire ou Déception d'Outre-Moitié du Juste Prix*, 350.

> parties would reasonably be understood to take them as read without explicitly stating them in their contractual document.'"[18]

13 And, finally, the legislature has provided a strong indication of its view in the Supply of Goods and Services (Jersey) Law 2009. Article 24 imposes an obligation on a seller of goods acting otherwise than in the course of a business to disclose to the buyer "all defects in the goods that render the goods not of satisfactory quality, being defects of which the seller is aware", thereby in effect replicating the obligation of good faith set out in Pothier. Article 5 defines "good faith" by stating—

> "A thing is taken to be done in good faith for the purposes of this Law when it is in fact done honestly, whether it is done negligently or not".

14 It is difficult to see, therefore, what led to the Royal Court's "caution" in *Hard Rock* but the decision of the Court of Appeal in *Minister for Treasury and Resources v Harcourt Devs Ltd* ("*Harcourt*") may have been a contributing factor. The facts are not material for this purpose, except that the Minister sought to strike out a claim by the company on the basis that the heads of agreement signed by the parties did not constitute a binding agreement. The heads of agreement set out in outline the proposed contractual arrangements to be embodied in a building development agreement. Clause 3.4 stated that—

> "by their execution of these heads of terms the parties are hereby agreeing to act in good faith and with all due diligence with a view to seeking to agree the terms of the development agreement."

Negotiations on the development agreement later broke down and the company sued for breach of contract. The Royal Court dismissed the strike-out application on the ground that it was arguable that the heads of agreement were not a mere agreement to agree. On appeal, it was argued that the heads of agreement was a mere agreement to agree and did not impose any binding contractual obligations upon the parties; the Royal Court had erred in finding that cl 3.4 might contain a sufficiently certain *objet* to constitute an enforceable agreement. The Court of Appeal accepted those submissions, allowed the appeal, and struck out the claim.

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[18] *Comparative Law in Practice—Contract Law in a Mid-Channel Jurisdiction* (Oxford and Portland, Oregon, 2016), at 51. This book ought to be compulsory reading for all judges and practitioners in the Channel Islands.

15 Fairgrieve[19] comments on this decision—

> "On the question of sources, the Court made only very brief references to a handful of Jersey authorities, and instead based its decision predominantly on English law, citing the well-known English case law, such as *Walford v Miles*.[20] It is very surprising to see such an approach to sources, given the continued, and recent Jersey case law warnings against reliance purely on English sources.[21] Surprisingly, no mention was made of the rich civil law sources, or of Pothier or Domat, despite the fact that these had featured in the Bailiff's judgment at first instance. Over and above that point, the Court of Appeal completely failed to analyse the recent Jersey cases discussing the potential role of good faith in the law of Jersey.[22] From the perspective of sources, the Court of Appeal's decision in *Harcourt* is a very disappointing one indeed."

16 To that comment one might add the observation that members of the Court of Appeal are not, in the main, qualified Jersey lawyers. They rely upon counsel to draw to their attention all relevant material, and in particular, local sources. Judges of the Royal Court are entitled to that assistance too. Judging only by the list of cases cited, that assistance seems to have been lacking. It must be hoped that, when a case comes before the courts which requires a decision on this point, all the relevant material will be provided and taken into account.[23]

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[19] *Op cit*, at 56–57.
[20] [1992] AC 128.
[21] See *e.g. Incat Equatorial Guinea Ltd v Luba Freeport Ltd* 2010 JLR 287.
[22] See *e.g. Sutton v Insurance Corporation of the Channel Islands Ltd* 2011 JLR 80, at para 16.
[23] The opportunity may arise quite soon. On 30 August 2018, McNeill JA, sitting as a single judge of the Court of Appeal ([2018] JCA 152) granted leave to the defendant HRCKY Ltd to appeal against the judgment of the Royal Court in *Hard Rock* summarily dismissing the defendant's counterclaim. Leave to appeal was given in so far that the judgment was "based upon issues of *dol* and *dol par reticence*".