



HARD CHEESEBURGERS: ROYAL COURT OF JERSEY ISSUES LANDMARK SUMMARY DISMISSAL DECISION AND CASTS DOUBT ON THE IMPLIED DUTY OF GOOD FAITH

FEBRUARY 2018

In *Hard Rock Limited v HRCKY Limited* [2018] JRC 026, the Jersey Royal Court heard an application for summary dismissal of the defendant's counterclaim, one of the first applications under the newly introduced procedural rule permitting a defendant to seek summary judgment on the claim or counterclaim against them in circumstances where the claim has no real prospect of success.

Background

The first and second plaintiffs were part of the US-based Hard Rock Café group and the defendant company, HRCKY Limited, was the operator of their franchise restaurant and merchandising store in Grand Cayman. The restaurant franchise agreement was governed by Jersey law.

The long-running dispute arose out of the poor performance of the franchise which resulted in financial losses. In previous decisions, the Royal Court had already struck out parts of HRCKY's defence and given summary judgment in favour of the plaintiffs on their claim against it. Only HRCKY's counterclaim remained to be determined.

HRCKY advanced a counterclaim which was based on three elements of the Jersey law of contract which have their roots in customary and French contract law:

- The implied contractual term or duty of good faith;
- *Dol* (fraudulent conduct or misrepresentation) vitiating consent to the contract; and
- *Dol par réticence*, the concept of deliberate silence when under a duty to reveal material matters.

Implied term of good faith

Previous decisions of the Royal Court had suggested that there may, under Jersey law, be a general obligation of good faith on the parties in both the negotiation and performance of contracts.

HRCKY alleged that there was an implied term in the franchise agreement imposing a duty on the franchisors to act in good faith and that, in breach of that term, the franchisors had unreasonably refused to accede to requests from HRCKY to change its food offering,

WE ARE OFFSHORE LAW

BVI | Cayman | Guernsey | Jersey | London





portion sizes and opening hours, causing it to incur losses.

The court expressed serious reservations as to the legal argument for an implied duty of good faith due to the countervailing requirement for contractual certainty and the principle that a term may only be implied where it is necessary to give business efficacy to the contract.

In the specific context of the franchise agreement, it was open to doubt as to whether any term could be implied given the inclusion of an "entire agreement" clause. As a pure matter of law however, the court reluctantly concluded that the issue was capable of argument.

Turning to the facts, the court noted that the franchisors had sometimes acceded to requests from HRCKY while rejecting others, and had done so for commercial reasons in order to protect the integrity of its franchise. In the context of a commercial arrangement, there was no evidence that the franchisors had acted in bad faith and the court concluded that, on the expert evidence, it would not be possible to establish what loss if any flowed from the alleged breach.

As there was no real prospect of success of recovering any damages, the court dismissed this part of the counterclaim.

Dol

HRCKY alleged that the franchisors had deliberately induced them to enter into the franchise agreement by providing inaccurate financial projections, suggesting a certain level of return and profitability.

HRCKY maintained that it would never have entered into the contract had it known that the restaurant business was likely to be loss-making if run in accordance with the franchisors' business model. On that basis, the franchise agreement should be set aside as void.

The court gave this argument short shrift on the basis that it was divorced from reality. The forecasts referred to were not only believed to be accurate at the time of preparation but had actually turned out to be accurate according to the expert evidence.

The court also cited the maxim of Jersey contract law, "*la convention fait la loi des parties*": parties to a contract are to be held to the terms of their bargain. This was a commercial transaction that HRCKY had entered into with the benefit of legal advice. The franchise agreement contained an entire agreement clause which generally excluded extra-contractual representations and warranties and any specific representations could and should have been included in the agreement had HRCKY wanted to rely on them.

Dol par réticence

On a closely related note, it was alleged that, as franchisors, the plaintiffs deliberately withheld information about the level of profitability of its worldwide franchise operations and, in particular, that the restaurant businesses were generally loss-making. Again, the contract should be set aside as HRCKY would have not entered into it had it been aware of this information.

The court dismissed this argument for two reasons.

1. The evidence suggested that HRCKY was commercially aware and able to form its own view of the projected profitability of the business.
2. In addition to the entire agreement clause, the franchise agreement also contained a specific provision which stated that

WE ARE OFFSHORE LAW



the franchisee had not relied upon any representation or warranty of the franchisors that the restaurant operation would be successful or achieve a specific level of profit.

What does this mean for cases in Jersey?

The case blazes a trail for future applications by defendants for summary dismissal of weak claims.

Prior to the introduction of this new procedural power last year, defendants in the Jersey courts were limited to the option of applying to strike out claims against them where they were legally unsustainable or in some way an abuse of process.

Defendants now have the ability to bring proceedings to an end at an early stage and without the expense of a full trial where the facts of the case mean that the plaintiff has no real prospect of succeeding. Summary dismissal is also available for a specific issue raised within the claim.

The decision is also significant as being part of a recent trend where the Jersey courts have interpreted and applied the principles of Jersey contract law in a pragmatic and commercial way.

For example, in last year's decision in [*Hong Kong Foods Limited v Robin Hood Curry Limited* \[2017\] JRC 050](#), the Royal Court held that there is a standalone remedy of damages for innocent misrepresentation which does not automatically cause a contract to be void from the outset.

While the courts continue to acknowledge the importance of Jersey's unique legal heritage with its roots in Normandy and France, they have signalled that they will determine contractual disputes with an equal regard to the need for certainty and clarity.

WE ARE OFFSHORE LAW

BVI | Cayman | Guernsey | Jersey | London





FOR MORE INFORMATION PLEASE CONTACT:



SAM WILLIAMS

Group Partner* // Jersey

t: +44 (0) 1534 601638 // e: sam.williams@collascrill.com



NUNO SANTOS-COSTA

Senior Partner // Jersey

t: +44 (0) 1534 601731 // e: nuno.santoscosta@collascrill.com

WE ARE OFFSHORE LAW

BVI | Cayman | Guernsey | Jersey | London

