

The sound of silence: the role of good faith and silence in Jersey contract law

Briefing Summary: Jersey contracts are not subject to a general duty of good faith and mere silence, without more, cannot amount to a misrepresentation. These were some of the key outcomes of the Royal Court's decision in *Hard Rock Limited and Anor v HRCKY Limited* [2023] JRC 169.

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What happened?

In 1999, Hard Rock sold to HRCKY the franchise rights to run a Hard Rock Café in the Cayman Islands. The franchise was initially a lucrative operation. External circumstances – including the devastating Hurricane Ivan – intervened such that the establishment's profitability declined in later years leading to its ultimate demise in 2013. And so began 10 years of litigation in both the United States and Jersey, culminating in the Royal Court's recent judgment which followed an extensive trial.

The recent trial (and judgment) pertained to HRCKY's counterclaim. Hard Rock having obtained judgment against HRCKY in 2013 for breach of the franchise agreement. The thrust of the counterclaim was that Hard Rock, pursuant to an asserted good faith duty, ought to have amended the terms of the franchise agreement in HRCKY's favour. In the alternative, HRCKY argued that Hard Rock's asserted silence as to the relative profitability of different components of the franchise business amounted to fraud. HRCKY's counterclaim was dismissed in its entirety.

The judgment is extensive and provides a thorough and helpful excursus on modern Jersey contract law. This briefing note is limited to two of the key commercial considerations for parties contracting under Jersey law. We suggest these are:

1. the scope of good faith in Jersey contract law; and
2. whether mere silence can constitute a misrepresentation.

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Good faith in Jersey contract law?

The Royal Court conducted a thorough review of the customary law commentators including Pothier, Jersey's surest guide to contract law, according to *Selby v Romeril* 1996 JLR 210, and Houard, who wrote specifically about the customary law of Normandy, the original source of Jersey contract law. The Royal Court concluded that there is no definitive authority supporting the existence of an implied term of good faith as a matter of Jersey customary law. The Royal Court, very sensibly in our respectful view, held that the development of such a term would be a matter for the legislature.

However, the Royal Court was prepared to recognise the existence of an implied term of good faith in "relational contracts". These are long-term contracts where collaboration is central and there is an expectation of mutual trust and loyalty. This means something less than the undivided duty of loyalty required in fiduciary relationships. Notably, 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 it 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.

In our view, this is a welcome clarification of Jersey contract law. This judgment demonstrates Jersey law's high regard for parties' contractual freedom (*la convention fait la loi des parties* –the agreement makes the law of the parties). Even where a term of good faith is implied (i.e. in relational contracts), its function is not to re-cast the contract, but rather to ensure collaboration when the contract is one where collaboration was specifically intended. In general, however, there simply is no implied term of good faith in Jersey contracts.

Fraudulent silence – and why it isn't part of Jersey law

Jersey law accepts that a positive representation accompanied by silence can amount to an actionable misrepresentation. However, until now, it has been unclear whether mere silence could constitute a misrepresentation. This was accepted in the context of an insurance contract, where the insured has a duty to volunteer and disclose information which a prudent insurer would need to know to evaluate the risk and determine whether to provide cover and on what terms. But what about other commercial contracts in the ordinary course?

Steelux Holdings v Edmonstone [2005] JLR 152, one of Jersey's leading cases on *dol* (fraud), 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. This theory – known as *dol par reticence or reticence dolosive* (fraudulent silence) was debated, though never settled, in subsequent cases. Proponents of the fraudulent silence theory suggest that its function is to level the playing field where there is apparent inequality of bargaining power. In our view, the utility of this doctrine has been questionable in practice and created improper uncertainty where parties had freely elected to commit their bargain to writing. The Royal Court's decision in *Hard Rock*, provides welcome clarity by dismissing this theory.

Fraudulent silence is not a principle of Jersey customary law that applies to all Jersey contracts. As with its analysis of good faith, the Royal Court once again considered 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.

Practical conclusions for industry

Businesses contracting under Jersey law now have the benefit of enhanced contractual certainty. A term of good faith will not generally be implied into Jersey contracts. In relational contracts, such a term will be implied, but it can be excluded by an express clause to that effect. Equally, a general duty of disclosure does not apply to all Jersey contracts. Rather, the proper approach to pre-contractual disclosure requires that contracting parties need to think broadly about buy-side and sell-side warranties that might be sought and given.

Even in relational contracts, where a term of good faith is implied, a successful claim on the basis of good faith will require pleading and proving the usual elements – duty, breach, causation and loss. Good faith is not a silver bullet, even in relational contracts. If one of the usual elements is missing, the claim will fail.

**Carey Olsen acted for Hard Rock in obtaining a successful judgment in this matter. Carey Olsen's trial team included Marcus Pallot (Advocate and Partner), Mike Kushner and Tom De La Cour.*

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