A Question of Faith

Does Jersey law recognise an actionable duty of good faith in contracts?

1. It has long been postulated that Jersey law imposes a duty of good faith in the performance of contractual obligations. The principle is recognised in the commercial codes of most civil law jurisdictions, as well as the United States' Uniform Commercial Code. In English law there is currently no such principle of general application\(^1\), however there have been signs of reform\(^2\) and the proposition has received a warmer reception elsewhere in the common law world, notably Australia and Canada.

2. A broad concept of good faith or *bonne foi* is a prominent feature of Jersey contract law, which is rooted in the civilian traditions of France and not the common law of England. Unfortunately, to what extent the concept confers a cause of action upon an aggrieved party, in the absence of an express term to this effect, has remained a vexed question. This is largely due to the lack of authority on the point, which reflects the relatively small number of contract cases that come before the Jersey courts. This short article cannot answer the question unequivocally, but a series of recent decisions augurs significant progress.

3. The starting point is *Sutton v Insurance Corporation of the Channel Islands Limited [2011] JRC027*. The case concerned a contract of insurance and it was held that all such contracts were subject to *uberrima fides* (utmost good faith) as a matter of established market understanding\(^3\). In his judgment William Bailhache QC Deputy Bailiff, as he then was, referred to a number of sources including Domat and Le Gros, the Privy Council decision in *Snell-v-Beadle [2001] JLR 118* and the Supply of Goods and Services (Jersey) Law 2009 and observed:

“It may well be that an obligation of good faith on both sides is a common understanding in all contracts governed by Jersey law, though we do not decide that in this case as it is unnecessary to do so and we have not had full argument on the point.”\(^4\)

4. In *Hard Rock Limited and Another v HRCKY Limited [2013] JRC 244B* the Master of the Royal Court referred directly to the observations in *Sutton*, in an application for summary judgment and to strike out parts of the Answer and Counterclaim, and held that it was arguable that an obligation of good faith on both sides could form part of the understanding between contracting parties\(^5\). The obligation was pleaded as part of an implied term and the Master indicated that its existence would therefore have to be established in accordance with ordinary principles\(^6\); an approach which appeared disinclined towards a general obligation of good faith.

5. The case returned to court in 2015 when the Defendant applied to amend its Counterclaim to contend *inter alia* that the obligation of good faith, which had been framed as an implied term, was also a contractual duty\(^7\). This amendment was refused because it was not founded upon an express or implied term of the contract. The Defendant also applied to plead a further breach of the implied term. Again the Master limited his discussion to the conventional principles applicable to a party seeking to persuade a

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\(^1\) *Chitty on Contracts*, 32\(^{nd}\) Ed, Vol 1 at 1-039

\(^2\) See, for example, *Yam Seng Pte Limited v International Trade Corporation Limited [2013] EWHC 111*

\(^3\) *Sutton v Insurance Corporation of the Channel Islands Limited [2011] JRC027* at 15

\(^4\) Ibid at 16

\(^5\) *Hard Rock Limited and Another v HRCKY Limited [2013 JRC 244B]* at 59

\(^6\) Ibid at 62 and 85

\(^7\) *Hard Rock Limited and Another v HRCKY Limited [2015] JRC117* at 5
court to imply a term and declined to consider whether good faith might enjoy a pre-eminent status outside this framework.

6. In Haden Taylor v Canopius Underwriting Ltd and Others [2015] JLR 224 the point received greater attention. Again it arose in the context of a strike out application and the Master was not directly addressed on the point, although arguably he should have been. The Master had to consider the interrelationship between utmost good faith as it applies to contracts of insurance and a potential general obligation of good faith. The relevance of the distinction being that utmost good faith is a principle of law which enables an aggrieved party to rescind a contract ab initio with any consequent financial adjustment being a matter of restitution, not contractual damages. In contrast, breach of an implied term of good faith would sound in damages.

7. The relationship is not unduly problematic as a matter of English law, as it does not recognise a freestanding obligation of good faith. The existence of such an obligation in Jersey law would mean that in certain contracts, such as contracts of insurance, two legally distinct doctrines of good faith would operate. The Master did not consider this to present an insurmountable conceptual or practical difficulty.

8. The Master noted that no party had cited any customary law authorities in support of a general obligation, but referred fleetingly to Pothier and Art 1134 of the French Code Civil, which prescribes an obligation of good faith in performance, and hinted that Jersey law might develop in this direction. He concluded as follows:

“As the view I have reached, therefore, is that it is arguable that an implied term of good faith exists between parties in relation to performance of the obligations under a Jersey law contract, including a contract of insurance. I also consider it is arguable that such an implied term is not inconsistent with the obligation of utmost good faith”.

9. While it must be acknowledged that the decisions of the Master considered above were interlocutory and full argument was not heard, his judgment in Haden-Taylor differs from those in Hard Rock Limited that it contemplates an implied term of good faith being an inherent feature of a contract (presumably unless specifically excluded), which therefore would not need to be established retrospectively upon the facts of the case in question. Curiously, having referred to the civilian basis for a general obligation of good faith, the Master proffered “a principle of fair open dealing” as a potential definition, a reference to the judgment of Bingham L.J., as he then was, in Interfoto Pictures Library Ltd v Stiletto Visual Programmes Ltd [1989] QB 433. A concise illustration of the Anglo-French humours of Jersey contract law.

10. The judgment of the Court of Appeal in The Minister for Treasury and Resources v Harcourt Developments Limited and Others [2014] JCA179 has been mooted as an important development for the doctrine of good faith. This may be arguable in a broad sense, however it has little bearing on the issue in question. The case concerned Heads of Terms under which the parties agreed inter alia to act in good faith and with all due diligence to negotiate a development contract. A claim was subsequently brought in tort alleging that the Minister had induced the States of Jersey Development Company to breach its contractual obligation. The Minister applied to strike out the claim on the basis that the Heads of Terms were not an enforceable contract.

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8 Ibid at paras 6-8 sets out the relevant principles and authorities
9 Haden Taylor v Canopius Underwriting Ltd and Others [2015] JLR 224 at 135-136
10 Ibid at 138
11 Ibid at 137
12 Ibid at 138
13 Ibid at 139, the passage refers to Ralph Gibson L.J. however this appears to be a typographical oversight.
11. The application turned upon whether it was arguable that the relevant provision in the Heads of Terms (3.4) gave rise to a contractual obligation, or was merely an agreement to agree and thus absent contractual force. The Minister failed to persuade the Royal Court that the claim was sufficiently meritless to be struck out, but prevailed on appeal. The Court left open the possibility that particular Heads of Terms might be enforceable, but found that the provision relied upon would not\textsuperscript{14}. The question of whether an obligation of good faith would be implied into the terms of any contract arising from the Heads of Terms was not considered. In context it is unsurprising that this judgment was not referred to in either of the subsequent decisions discussed above.

Conclusion

12. Once again Jersey contract law finds itself charting a course between civil and common law principles. The question posed is yet to receive an authoritative answer, but hopefully the law is on the precipice of change. As was ever thus, the catalyst will be the right case and a clear judgment. Recognition would broaden the purview of contractual liability and a party contemplating a claim based on an implied term of good faith, which exists inherently and therefore need not be established upon conventional principles, should feel emboldened by recent developments. A coherent argument - closely reasoned by reference to customary law authorities - could herald a change which provides clarity and certainty (both legal and commercial), aligns Jersey with numerous comparable jurisdictions and remains faithful to the law’s originating principles.

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\textsuperscript{14} The Minister for Treasury and Resources v Harcourt Developments Limited and Others [2014] JCA179 at 62-63