

JERSEY / JUDGMENT

HRCKY Limited v Hard Rock Limited and Anor [2024] JCA 069 (05 April 2024)

[2024] JCA 069

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Court of Appeal 5 April 2024 Before : Lord Anderson of Ipswich KBE KC, President Mr Jeremy Storey, KC Sir Richard McMahon, Bailiff of Guernsey Between HRCKY Limited (a company incorporated in the British Virgin Islands) Defendant/Appellant And (1) Hard Rock Limited (2) Hard Rock Café International (STP) Inc. Plaintiffs/Respondents Mr K. Doyle for the Appellant Advocate M. L. A. Pallot for the Respondents Advocate J. M. Dann as amicus curiae

judgment

anderson ja: This is the judgment of the Court, to which all its members have contributed.

Introduction

1. This appeal is from a judgment of the Royal Court (Commissioner Thompson sitting with Jurats Averty and Le Heuzé) concerning a franchise agreement signed on 11 June 1999 ("the Franchise Agreement") by which the First Respondent ("Hard Rock"), a Jersey company forming part of the Hard Rock group of companies, permitted the Appellant ("HRCKY"), a British Virgin Islands company, to run a franchise in the Cayman Islands under the description Hard Rock Café. The Second Respondent ("HRCI"), a New York corporation, is the vehicle within the Hard Rock Group which enters into memorabilia leasing agreements for items displayed in Hard Rock Café premises. HRCKY's claims against HRCI are no longer pursued and the remaining dispute is between HRCKY and Hard Rock. 2. The Franchise Agreement was terminated by Hard Rock on 17 June 2013 for alleged defaults including a failure to make franchise payments. These proceedings were commenced on 14 August 2013. On 19 December 2013 the Royal Court gave summary judgment for Hard Rock and HRCI ([2013] JRC 244B), declaring that the franchise agreement was terminated lawfully by Hard Rock and awarding the Plaintiffs the sum of US\$90,000. HRCKY's counterclaim was struck out in part, but the remainder, which was founded on allegations of breach of an implied term in the Franchise Agreement of good faith, was allowed to proceed to trial. 3. The counterclaim was amended on 1 June 2015 to add a claim that HRCKY had entered into the Franchise Agreement on the basis of misrepresentations, some of which amounted to dol (in essence, fraudulent misrepresentation) or erreur . The Respondents applied for

summary dismissal of the counterclaim, which was granted by the Royal Court on 1 February 2018 (

[2018] JRC 026) but set aside by the Court of Appeal on 2 February 2019 (

[2019] JCA 123), essentially on the basis that, as the Court put it at [61], "the factual matrix that was essential to enable [the] counterclaim to be weighed had not been established" . 4. The counterclaim was re-re-amended on 4 November 2020, with the addition of a claim in dol par réticence (in essence, fraud by silence). Having previously been listed for trial in February 2017 and June 2022, the counterclaim was eventually tried over 11 days in April/ May 2023. The judgment under appeal 5. The Royal Court heard evidence from some fifteen witnesses of fact and from witnesses expert in accountancy and in US franchise law instructed by each side. Its lengthy judgment concluded by dismissing the counterclaims in their entirety, and it is against that decision that this appeal is brought. 6. The issues before the Royal Court were summarised at [52]-[54] of the judgment under appeal: "52. By the time the matter came to trial, the complaints of HRCKY arising out of its Re-Re-Amended Answer and Counterclaim can be summarised as follows: (a) Whether written projections provided by Mr Marable in March and April 1999 were misrepresentations, amounted to dol, including dol par réticence, or entitled HRCKY to claim damages for entering into a contract on the basis of erreur. In this judgment, these projections are referred to separately as the 'March Projections' and the 'April Projections' and together as the 'Written Projections'; (b) Whether Mr Marable made oral representations to HRCKY that HRCKY could expect to make returns of 15-30% per annum. It was alleged in evidence that these representations were made orally at a dinner attended by Mr Marable, Mr Doyle and Mr Frankel on 18 March 1999 at a restaurant in Cayman. In this judgment, these representations are referred to as the 'Oral Representations'; (c) What was known by the Hard Rock Group about the profitability of the food and beverage side of Hard Rock Cafes owned and run by the Hard Rock Group, and whether this knowledge should have been disclosed to HRCKY, either in combination with the Written Projections or the Oral Projections or on a standalone basis. The questions for the Court to determine is whether the matters complained of should have been disclosed and, if they should have been, whether they were withheld deliberately or recklessly. 53. The above matters give rise to the following legal issues: (a) What is a misrepresentation as a matter of Jersey law. (b) The effect of a misrepresentation. (c) The law of dol including dol par réticence. (d) Whether a duty of good faith arises between parties prior to the formation of a contract. (e) The scope of claims based on erreur. (f) Whether an implied term of good faith operates during a contract. 54. If HRCKY's claims based on allegations that it would never have entered into the Franchise Agreement had it known what it says was the true position are not successful, HRCKY, in the alternative, pleads that the Franchise Agreement was subject to an implied term of good faith during its operation and that Hard Rock breached that term by refusing to agree certain variations to the Franchise Agreement ... " 7. We pause to add by way of explanation that Mr Marable, who died in June 2015 without either party having obtained any evidence or statement from him, was Senior Director of

International Development at Hard Rock. Mr Doyle is Kevin Doyle, a Director of and 49% shareholder in HRCKY when the Franchise Agreement was signed. He presented the case for HRCKY before the Royal Court and before us. His sons Keith and Colin also worked for HRCKY at various times. Mr Frankel was a 51% shareholder in HRCKY until 2008, when Mr Doyle acquired his interest. 8. The complaints summarised at [52] of the judgment under appeal were referred to in the judgment as Issue 1, Issue 2 and Issue 3 respectively. Having addressed the legal questions identified at [53] (including, at [85]-[119], the question of whether *dol par réticence* forms part of Jersey law), the Royal Court turned to Issues 1, 2 and 3. 9. On Issue 1, the Royal Court concluded that: (a) The Written Projections were not representations but projections or forecasts [222]. They were not produced fraudulently [223]-[224]. A claim based on misrepresentation or *dol* could not be made out in relation to the Written Projections alone [225]. (b) HRCKY and Mr Doyle did not rely on the Written Projections when deciding whether or not to enter into the Franchise Agreement; Mr Doyle was capable of understanding and evaluating the figures provided to him and preparing his own calculations [231]-[232]. (c) What was granted to HRCKY by the Franchise Agreement, and what HRCKY understood it was taking, was one business with two parts: a café and a retail operation [241]. (d) Even if (contrary to the Royal Court's findings) the Written Projections were statements of fact and not opinion, and were relied upon by HRCKY in deciding whether or not to enter into the Franchise Agreement, they were not misrepresentations because HRCKY's actual results were broadly consistent with the Written Projections [249]-[250]. (e) Even if, additionally (contrary to the Royal Court's findings) Mr Doyle lacked sufficient experience to evaluate the Written Projections, he could have taken his own independent accounting advice prior to entering into the Franchise Agreement but chose to analyse the figures himself rather than rely on any expert input. This meant that HRCKY could not invoke *erreur* by reference to the Written Projections [251]. (f) In any event, the Franchise Agreement excluded liability for any representations made, absent *dol*. As no dishonesty was committed by Mr Marable in providing the Written Projections, Hard Rock is entitled to rely on the entire agreement provision in the Franchise Agreement to exclude liability for any claims based on the Written Projections [252]. 10. On Issue 2, the Royal Court concluded that: (a) It was not persuaded that Mr Marable made a specific promise that HRCKY, during the Franchise Agreement, could expect to make returns of 15% to 30% per annum as alleged at paragraph 24D(i) of the Re-Re-Amended Answer and Counterclaim [261]. (b) If (contrary to the Royal Court's finding) Mr Marable did say something about returns of 15% to 30%, he was not making any representation but only proffering statements of opinion [262]. (c) The lack of any evidence of dishonesty, leaving aside Issue 3, means that a claim in misrepresentation or *dol* cannot be founded on the basis of the Oral Representations alone [263]. (d) Any oral statements made by Mr Marable, if (contrary to the Royal Court's finding) they were representations, were in any event not misrepresentations because the return on capital achieved in each of the years 2000 to 2004 exceeded 15% [265]. (e) In addition, HRCKY did not rely on the Oral Representations: the decision to invest was based on Mr Doyle's workings and analysis and ultimately not anything that may have been said

orally by Mr Marable [266]. (f) Even if, contrary to the Royal Court's findings, an oral misrepresentation was made by Mr Marable, the Franchise Agreement excluded liability for any representations made absent dol [267]. (g) HRCKY could not invoke erreur in relation to the Oral Representations [268]. 11. On Issue 3, the Royal Court concluded (assuming, contrary to its view, that the doctrine of dol par réticence is part of Jersey law in such a case as this) that: (a) As at the date of the Franchise Agreement, the vast majority of the food and beverage side of the corporate cafés owned by the Hard Rock Group were, on the balance of probabilities, loss-making; this was known to the senior executives of the Hard Rock Group and its then shareholder Rank [299]. (b) The Strategic Report of 2006, a plan put to the then owners of the Hard Rock Group setting out how to improve the profitability of the food and beverage side, confirmed the Royal Court's conclusions about the lack of profitability of the food and beverage side in 1999, which situation was continuing [302]. (c) The finding that the vast majority of the corporate cafés on the food and beverage side were loss-making in 1999 did not however affect the Royal Court's conclusions in relation to the Written Projections or the Oral Representations [305]; as HRCKY's expert accountant Mr Borelli had said, someone fairly sophisticated would have been able to see that the profitability of the franchise depended on the sales of merchandise, and Mr Doyle was such an individual [306]. (d) Even if Mr Doyle and HRCKY had known the position in relation to the food and beverage side of corporate cafés being loss-making in 1999, it would not have made any difference to the decision taken by HRCKY to enter into the Franchise Agreement [308]-[312]. (e) It was not persuaded that the non-disclosure of the food and beverage side of corporate cafés being loss-making was dishonest so as to amount to any kind of dol or fraudulent misrepresentation [316], [319] and [324]. The findings at (a) and (b) above were as contended for by Mr Doyle, though their ultimate value to him was negated by the findings at (c), (d) and (e). 12. After consideration of further issues include breach of an implied term, causation and loss, the judgment concludes as follows: "386. For the reasons set out in this judgment: (a) We rule as a matter of law that dol par réticence and a general implied term of good faith does not form part of the law of Jersey; (b) An implied term of good faith does form part of Jersey law in relation to long-term relational contracts. (c) The Franchise Agreement is such a long-term agreement and there is nothing in it to exclude an implied term of good faith. (d) The complaints of HRCKY as summarised at paragraph 52 arising out of its Re-Re-Amended Answer and Counterclaim are dismissed whether they arise on the basis of dol, dol par réticence, fraudulent misrepresentation or any kind of erreur. This is notwithstanding the food and beverage side of the majority of the corporate cafes operated by the Hard Rock Group in 1999 being loss making. (e) The claims for breach of an implied term applicable to the Franchise Agreement are dismissed. (f) HRCKY has failed to prove any loss in relation to any breach of an implied term. (g) The reasons for HRCKY losing money during the operation of the Franchise Agreement arise out of factors external to both HRCKY and the Hard Rock Group. (h) Had HRCKY established any breach amounting to dol, fraudulent misrepresentation or erreur, further evidence would have been required in respect of losses arising from any such findings. Accordingly all the

counterclaims of HRCKY against the Plaintiffs are dismissed." The Grounds of Appeal 13. HRCKY presents nine grounds of appeal, of which the first eight concern disputed issues of primary fact and evaluation. The ninth ground is a challenge to the decision of the Royal Court that *dol par réticence* does not form part of the law of Jersey, at least where commercial arrangements are concerned, and so falls into rather a different category. The Bailiff of Jersey ordered that an *amicus curiae* be appointed to assist the court with this point of law, to which we will return after addressing the other grounds before us. 14. No Respondent's Notice was filed by Hard Rock, which rests on the judgment under appeal in its entirety. 15. HRCKY's short skeleton argument was supplemented by a series of written "exhibits", which elaborate the points made with a mixture of argument and assertion on the part of Mr Doyle. In aid of his oral submissions before us, Mr Doyle produced a further note of some 20 pages in which he developed and emphasised the points on which he chiefly relied. 16. As a non-lawyer, Mr Doyle told us that he felt at something of a disadvantage. We were however able to understand the points that he made, which were a product of his deep immersion in the case. Through his various written contentions and his relatively brief oral submissions, which focused in particular on his Grounds 4 and 5, Mr Doyle said everything that it was possible to say in support of his grounds of appeal. In some cases, indeed, his submissions ranged more widely than HRCKY's Notice of Appeal, which defines the ambit of the appeal before us. Accordingly, though we have read carefully the material that was placed before us, we have not found it necessary to refer in this judgment to every point that was made in written and oral argument. 17. In the period prior to the hearing before us, Mr Doyle applied to the Court to admit two items of further evidence: (a) An LDM Global Forensic Report dated 1 November 2023; and (b) A sworn deposition before a Cyprus notary from Renos Michaelides, dated 1 March 2024, in which Mr Michaelides recounts his own experiences with Hard Rock in Greece. On each occasion we indicated that we would rule at or after the hearing on the admissibility of these statements. The deposition of Mr Michaelides is of no conceivable relevance to the issues before us: there are no "special grounds" for admitting it within the meaning of Rule 12(1) of the Court of Appeal (Civil) Rules 1964, and we decline to do so. We address the LDM Global Report when we come to Ground 6 of HRCKY's appeal. 18. In a judgment of 6 January 2024 (

[2024] JRC 003, "the costs judgment") by which he allowed Hard Rock to enforce an interim payment of costs which had been subject to a stay, Commissioner Thompson explained briefly why he considered that the nine grounds of appeal advanced before us had only "a limited prospect of success". His observations are of interest, though needless to say we have exercised our own independent judgement on each of the matters before us. The test for overturning findings on appeal 19. The tests applied by this Court in determining whether to entertain appeals against challenges to findings of fact and evaluative judgements were summarised in *Financial Technology Ventures (Q) LP and ors. v ETFS Capital Limited and Tuckwell*

[2021] JCA 176 as follows: "37. As to findings of primary fact, it is well established that:

- a. in order for an appellate court to overturn a finding of primary fact in the court below, it must be satisfied that the decision was wrong and there was no evidence which could have supported it: *CSS v. Nautech Services Ltd*

[2015] JCA 021 , at §18; *Pell Frischmann v. Bow Valley Iran Ltd*

[2008] JCA 146 , at §108; *AF198 14*

- b. this court fully recognises and respects the advantages that a trial court enjoys by virtue of sitting through the entire trial process, particularly when it has had the opportunity to consider oral testimony, the terms in which that testimony is couched and the demeanour of the witnesses: *McGraddie v. McGraddie*

[2013] UKSC 58 , at §3 - 4; *CSS Ltd v. Nautech*, at §17;

- c. it is salutary to keep in mind all of the numerous justifications for this approach explained in *Fage UK Ltd v. Chobani UK Ltd*

[2014] FSR 29 , at §114 - 115, but in this case we would draw particular attention to the fact that the trial court will have had regard to the whole sea of evidence presented to it, not all of which will necessarily have been expressly referred to in the judgment, and the significance of those matters which are discussed in the judgment below may not always convey the same weight when reviewed on appeal as they did to the trial court;

- d. these principles have particular force in this jurisdiction, where the jurors decide the facts: *Pell Frischmann*, at §109 - 110;
- e. finally, we also remind ourselves that a trial court is not required to deal with every piece of evidence or every argument presented to it.

38. In relation to appeals against the exercise of a discretion, or the exercise of an evaluative judgment, this court will only intervene if the court below has erred in law, or if it has failed to take into account a material factor or taken into account an immaterial factor, or if it has reached a decision which is plainly wrong (i.e. one that is irrational, in the sense that no reasonable decisionmaker could have reached it). This approach is well recognised as a matter of general law. More specifically, it is clearly illustrated in relation to appeals against orders made in the context of unfair prejudice proceedings by decisions such as *Re Cumana Ltd* [1986] BCLC 430, at 437f - g; *Hawkes v. Cuddy* [2010] BCC 597, at §80; *Re Sprintroom Ltd*

[2019] BCC 1031 , at §76 - 78; and *Biogen Inc v. Medeva Plc*

[1997] RPC 1 , at 45." 20. The passage referred to by the Court of Appeal from the judgment of Lewison LJ in *Fage UK Ltd v Chobani UK Ltd* bears setting out in full: "114. Appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them. The best known of these cases are: *Biogen Inc v Medeva Plc*

[1997] RPC 1 ; *Pigłowska v Pigłowski*

[1999] 1 WLR 1360 ; *Datec Electronics Holdings Ltd v United Parcels Service Ltd*

[2007] UKHL 23 ;

[2007] 1 WLR 1325 ; *Re B (A Child) (Care Proceedings)*

[2013] UKSC 33 ;

[2013] 1 WLR 1911 and most recently and comprehensively *McGraddie v McGraddie*

[2013] UKSC 58 ;

[2013] 1 WLR 2477 These are all decisions either of the House of Lords or of the Supreme Court. The reasons for this approach are many. They include: i. The expertise of a trial judge is in determining what facts are relevant to the legal issues to be decided, and what those facts are if they are disputed. ii The trial is not a dress rehearsal. It is the first and last night of the show. iii Duplication of the trial judge's role on appeal is a disproportionate use of the limited resources of an appellate court, and will seldom lead to a different outcome in an individual case. iv In making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping. v. The atmosphere of the courtroom cannot, in any event, be recreated by reference to documents (including transcripts of evidence). vi. Thus even if it were possible to duplicate the role of the trial judge, it cannot in practice be done.

115. It is also important to have in mind the role of a judgment given after trial. The primary function of a first instance judge is to find facts and identify the crucial legal points and to advance reasons for deciding them in a particular way. He should give his reasons in sufficient detail to show the parties and, if need be, the Court of Appeal the principles on which he has acted and the reasons that have led him to his decision. They need not be elaborate. There is no duty on a judge, in giving his reasons, to deal with every argument presented by counsel in support of his case. His function is to reach conclusions and give reasons to support his view, not to spell out every matter as if summing up to a jury. Nor need he deal at any length with matters that are not disputed. It is sufficient if what he says shows the basis on which he has acted. These are not controversial observations: see *Customs and Excise Commissioners v A*

[2002] EWCA Civ 1039 ;

[2003] 2 WLR 210 ; *Bekoe v Broomes*

[2005] UKPC 39 ; *Argos Ltd v Office of Fair Trading*

[2006] EWCA Civ 1318 ;

[2006] UKCLR 1135 " 21. With those principles in mind, we turn now to the specific grounds of appeal. Ground 1: Was the franchise one or two businesses? 22. Mr Doyle maintained below that the franchise granted to HRCKY consisted of two separate businesses: a café and a retail operation. In support of these contentions, particular significance was attached to the facts that the Cayman franchise required two licences to operate, and that the Franchise Agreement provided for different levels of royalty fees to be charged on food and beverage sales (5%) and merchandise sales (10%). Other matters to which reference was made before us include the evidence of HRCKY's expert accountant Mr Borelli, and (though by way of assertion and unsupported by evidence) the requirements of Cayman employment law and the different terms of employment in the restaurant and retail sectors. 23. The argument that the franchise consisted of two businesses rather than one underlies various other points made by HRCKY, relating in particular to the significance to be attached to the Royal Court's finding that the vast majority of the food and beverage side of the corporate cafés owned by the Hard Rock Group (as opposed to the merchandise side) were loss-making in 1999 and at other times. 24. The Royal Court rejected the "two businesses" argument at [233]-[241], as part of its consideration of Issue 1, concluding that the subject-matter of the Franchise Agreement was, and was understood by HRCKY to be, one business with two parts. In reaching that conclusion, the Royal Court relied on the terms of the Franchise Agreement itself, the provision in the Written Projections provided by Mr Marable in March and April 1999 of accounts representing the net profit of one business, the terms of a restaurant opportunity document produced by Mr Doyle to attract investors, communications sent by Mr Doyle on 22 April 1999 (to Mr Frankel) and 16 May 2002 (to Mr Kneidinger of the Hard Rock Group), the evidence of Mr Goodwin of the Hard Rock Group, communications from Keith Doyle in 2006 and 2010 to senior figures in the Hard Rock Group, and the fact that HRCKY produced one set of accounts internally, rather than separate sets of accounts for the merchandise and the food and beverage side of the franchise operations. 25. That conclusion is one to which the Royal Court was amply entitled to come. Indeed, having reviewed the evidence relied upon at [234]-[240], it could fairly be described as inescapable. HRCKY took on, and understood that it was taking on, a single business, albeit one with two clearly-defined parts. We accordingly reject this ground of appeal. Ground 2: Pleading of particulars of damage 26. The Royal Court remarked at [51]: "What is sought for the claims based on misrepresentation, dol, including dol par réticence, and erreur are damages. No particulars of the damages sought are pleaded apart from the damages claimed for breach of an implied term of good faith ...". 27. Mr Doyle by his second ground of appeal takes objection to the observation that no particulars of damage had been pleaded save in relation to the claimed breach of an implied term. He referred in

particular to the Third Addendum Report of Mr Borelli, and to a judgment of Master Cadin of 20 February 2023, rejecting an application by HRCKY to amend its pleadings by the inclusion of the expert reports of Mr Borelli and the Plaintiffs' expert accountant, Mr Lewis. 28. Master Cadin acknowledged at [14] that Mr Doyle made his application because he wished to ensure that damages were fully pleaded. In rejecting it, he commented as follows: "22. This claim has proceeded, to date, with the approval of the Court and the parties on the basis of a generally pleaded claim for damages with the particulars of quantum being set out in the disclosed expert reports. The Defendant's application to amend to include a schedule of loss therefore seeks firstly to change that approach (by expressly particularizing the claim for loss in the pleadings) and secondly to replicate what is already before the Court and contained within the expert reports. In my view, a formal amendment at this stage to plead the information set out in the expert reports is both unnecessary and undesirable." 23. Whilst both of these categories of proposed amendments would add nothing to the issues before the Court, they would inevitably have to be addressed by the Plaintiffs through an amendment to their Re-Re-Amended Answer and Reply to Counterclaim. This would inevitably increase costs and divert their attention (and that of the Defendant) from the forthcoming trial. None of which is likely to assist the Court nor advance the Overriding Objective." In other words, a pragmatic view was taken: damages had been particularised in the expert reports, with the approval of the Court, and there was nothing to be gained by requiring them to be formally pleaded. It follows that no blame attached to HRCKY for not taking this course, and that [51] of the judgment under appeal is not to be understood in this sense. 29. As was pointed out in the costs judgment at [18(ii)], the Royal Court dealt with the question of loss at [346]-[353], and indeed at [347] agreed with Mr Borelli about the correct approach to the assessment of damages had the question arisen in relation to Issues 1, 2 or 3. HRCKY was not therefore disadvantaged in any way by the fact that particulars of the damages sought were not formally pleaded, and there is nothing in this ground of appeal. 30. We would add that issues relating to damages and causation of loss were not live issues in any event before the Royal Court, in view of its conclusions on Issues 1, 2 and 3 and its finding that the implied term of good faith for relational contracts had not been breached. Ground 2, like Ground 3 and Ground 8, could therefore be relevant to the outcome of this case only if those conclusions were to be overturned, which we have not been persuaded they should be. Ground 3: Evidence of loss or damage 31. By its third ground of appeal, HRCKY criticises the Royal Court for ignoring or failing to have proper regard to the evidence that it had presented in support of its claimed loss and damages: in particular, the Third Addendum Report of Mr Borelli of April 2021 and an Amended Schedule of Losses prepared by Mr Borelli. 32. HRCKY also addresses a table attached to Hard Rock's opening skeleton argument and reproduced at [342] of the judgment under appeal. The Royal Court concluded on the basis of that table that taking the business as a whole, significant profits were made up to and including 2006 (save in the aftermath of Hurricane Ivan in 2004). The Royal Court attributed the sharp decline in profits shown by the table for the period 2007-2013 to the moving of the disembarkation point for cruise passengers, who

were the principal source of revenue for HRCKY, to a new location in October 2006. In an apparent reference to operating losses shown on the table for 2008 and 2009, it added at [344] that "[t]he effect of the world-wide financial crash in 2008 and 2009 can also clearly be seen." HRCKY criticises the table (in an echo of Ground 1) for having presented consolidated figures for the restaurant business and the retail business. The table is also said to have been based on "selected partial information" extracted from the Schedule of Losses prepared by Mr Borelli. 33. The Royal Court was justified in rejecting the suggestion that the table obscured the true position by combining profit and loss statements from the food and beverage part and the merchandise part of the franchise operation. HRCKY's expert Mr Borelli in his Third Addendum Report explained that the business model for the franchise relied on the merchandise operations to subsidise the food and beverage operations; that HRCKY operated this model from the commencement of its operations in 2001; and that "it faltered when retail sales declined following a relocation of the Cayman Islands' cruise berth facilities in 2006 and the financial crisis in 2007/2008". That conclusion closely echoes that of the Royal Court, and indeed the table reproduced at [342] (albeit that the table consolidates the figures for the two parts of the operation in order to give an overall figure). 34. In the Joint Report of Mr Borelli and Mr Lewis of June 2021, Mr Borelli did express the view, adopted in HRCKY's Notice of Appeal, that Hard Rock had "obscured the true performance of the restaurant business by providing the Projections on a consolidated basis, notwithstanding that more detailed and helpful information was available in respect of both the restaurant and retail operations". That view does not appear to have been shared by Mr Lewis. But the Royal Court carefully reviewed the Joint Report (and the Joint Report of Mr Borelli and Mr Gilbey, Mr Lewis's predecessor as Hard Rock's accountancy expert), as is evident from the judgment under appeal at [246], [282] and [285]. In certain important respects (e.g. its findings that the Written Projections were not misrepresentations [249] and were not fundamentally inaccurate [250]), the Royal Court relied in Hard Rock's favour upon the agreement of the expert accountancy witnesses. In others (e.g. [287], [299]) it took the view that the expert evidence supported HRCKY's position. 35. A similarly careful approach is evident from the Royal Court's attention to the Third Addendum Report of Mr Borelli. It recorded at [340] and [347] that it would have accepted the approach to losses set out in that Report in the event - which was not realised

- that HRCKY had been successful on Issues 1, 2 or 3. 36. Applying the tests set out earlier in this judgment, we are not persuaded that the Royal Court erred in its approach to the evidence relating to loss and damage and accordingly we reject this ground of appeal - which, as noted above, would only be material in any event if we had acceded to an invitation to find that the Royal Court erred in finding that Hard Rock was not liable. Ground 4: Assessment of Written Projections 37. The Written Projections provided by Mr Marable in March and April 1999, which formed the subject-matter of Issue 1, were addressed by the Royal Court at [181]-[252] of the judgment under appeal. The Court first placed them in the context of events in 1997 and 1998, before explaining the genesis of the Franchise

Agreement, the content of the Written Projections themselves and the actions taken by Mr Doyle upon receipt of them. At [222]-[225] it addressed the issue of whether the Written Projections were representations, concluding that they were not representations and that they were not made in bad faith or fraudulently. At [226]-[232] it addressed the issue of whether HRCKY relied on the Written Projections, concluding that HRCKY made a decision to enter into the Franchise Agreement based on its own analysis, that HRCKY and Mr Doyle did not rely on the Written Projections when deciding whether or not to enter into the Franchise Agreement, and that Mr Doyle (who had enjoyed a career in the finance industry where he held a number of senior positions) was capable of evaluating the figures presented to him, preparing his own calculations and understanding the risks involved. 38. The Royal Court then turned, in the alternative, to the accuracy of the Written Projections. Though they contained certain errors identified by Mr Goodwin ([189]-[190] and [223]), the Court found at [246]-[250], having considered a joint report of Mr Borelli and Mr Gilbey, accepted by Mr Lewis, that "HRCKY's actual results were broadly consistent with the Written Projections" and that "There is nothing fundamentally inaccurate about the Written Projections themselves which could amount to any kind of erreur upon which HRCKY could rely." 39. By its Ground 4, HRCKY's Notice of Appeal takes issue with the Royal Court's finding that Mr Doyle had not relied on the Written Projections, drawing attention to what is said to be an inconsistency with the Court's acceptance at [222] that the figures that Mr Doyle had himself produced in December 1998 were based on a Cayman Islands Capex Form Application that had been prepared by Mr Marable in October 1998. We do not agree that there is an inconsistency here. We accept that an independent analysis will be flawed if it is based on the uncritical acceptance of flawed data: but the Royal Court found at [228]-[229], by reference to a variety of evidential sources, that Mr Doyle was "not just reworking the numbers" but "assessing what Mr Marable was saying and testing the possibilities", and "doing his own assessment of the figures and evaluating whether or not to enter into the Franchise Agreement". 40. Furthermore, and contrary to what is suggested in HRCKY's Notice of Appeal, the Royal Court at [189]-[190] and [223] of the judgment under appeal had taken account of the inaccuracies, originating in Mr Marable's October 1998 report and carried over into the Written Projections, that were identified by Mr Goodwin in his witness statement. It was in full knowledge of those inaccuracies that the Royal Court still concluded that there was nothing fundamentally inaccurate about the Written Projections. While Mr Doyle sought to suggest that the full import of Mr Goodwin's evidence was not taken into account by the Royal Court, having reviewed his witness statement and the passages to which we were directed from the transcript of his evidence, we find no basis for this suggestion. 41. Finally under this head, Mr Doyle suggests that the Royal Court, in citing the support of HRCKY's expert witness Mr Borelli for the proposition that there was nothing fundamentally inaccurate about the Written Projections, erroneously based itself upon the first joint experts' report of 2017, which he described as outdated, rather than Mr Borelli's Third Addendum Report of April 2021 in which Mr Borelli was recorded at paragraph 51 as concluding that the Projections "do not provide any meaningful information regarding the assumptions used in the preparation of the projections", and the joint experts' report of

June 2021 in which Mr Borelli was recorded at paragraph 14 as concluding that "the Projections were materially overstated" and inconsistent with the experience of a Hard Rock operation in San Juan. 42. We have already addressed the Royal Court's approach to the accountancy reports, which strikes us as both thorough and even-handed. The Royal Court had careful regard to the Third Addendum Report, accepted the evidence of Mr Borelli on a number of points, and was fully entitled to prefer the evidence of other witnesses on others. Mr Doyle's submissions under this head, sincere though they undoubtedly were, amounted to an invitation to engage in the "island hopping" that was deprecated in *Fage (UK) Ltd. v Chobani (UK) Ltd*. Applying the guidance in *Financial Technology Ventures (Q) LP and ors. v ETFS Capital Limited and Tuckwell*, we find no basis on which to hold that in its evaluation of the evidence on this issue, the Royal Court failed to take into account a material factor, took into account an immaterial factor or reached a decision that is plainly wrong or irrational, in the sense that no reasonable decision maker could have reached it. Ground 5: Finding of Mr Marable's Honesty 43. HRCKY's Ground 5 is closely linked with its Ground 4. HRCKY takes issue with the statement of the Royal Court at [190], in relation to the errors identified by Mr Goodwin, that "No one suggested during the course of the trial that these errors had been made deliberately or were acts of dishonesty". Mr Doyle referred us to a passage of the transcript of evidence in which Mr Doyle initially said of Mr Marable "I can't say he is dishonest" but later added, under questioning from Advocate Pallot, that "if withholding the truth behind the facts of the figures, if that's being dishonest, then I would say yes, he was dishonest". That does not, as it seems to us, affect the validity of what the Royal Court said at [190], which was limited to the specific errors identified by Mr Goodwin rather than to any broader issue of misrepresentation by silence. 44. As the Respondent submits, the issue of precisely what Kevin Doyle said or meant is in any event a distraction from the Court's finding at [223], which was that "there is no material before us to conclude, in relation to the Written Projections, that Mr Marable was acting in bad faith". Advocate Pallot further submits that a lower court's finding of honesty "should not be displaced on appeal except on the clearest grounds": *Akerhielm v de Mare*

[1959] AC 789, 806, applied in *Central Bank of Ecuador and another v Conticorp SA and others*

[2015] UKPC 11 at [7]-[8]. In that context we note that Mr Marable had died without giving written or oral evidence in these proceedings, with the result that the Royal Court had no opportunity to assess his credibility first-hand, and therefore no advantage in that specific respect over this Court. It remains the case however that dishonesty will not be lightly inferred by any court and that the Royal Court had the advantage referred to above of familiarity with the complete factual matrix. In circumstances where the Royal Court held that there was no material before it allowing it to conclude that Mr Marable was acting in bad faith, compelling evidence would be required for us to revisit that proposition. 45. Neither the somewhat equivocal comments of Kevin Doyle, nor the passages to which we were referred from the evidence of Mr Goodwin, Hard Rock's General Counsel Mr Wolszczak and its CEO Mr Beaudrault, come close to constituting such compelling evidence. Accordingly we dismiss this ground of appeal. Ground 6: Strategic Report 46.

Issue 3 was addressed by the Royal Court on the assumption that (contrary to the Royal Court's view) the doctrine of *dol par réticence* is capable of application to this case and that Hard Rock was therefore under a duty to make disclosure about the profitability of Hard Rock cafés owned and run by the Hard Rock Group. 47. The Royal Court addressed at [300]-[302] a Hard Rock Strategic Report of 2006 (referred to by Mr Doyle as "the Strata Plan"), which painted a generally negative picture of the profitability of Hard Rock's corporate cafés. The Royal Court rejected the evidence of Hard Rock's witnesses that the Strategic Report was nothing more than an analytical exercise based on assumptions. Rather, it relied on the Strategic Report as confirming its conclusions, reached on other grounds, that the vast majority of the corporate cafés were in 1999 loss-making on the food and beverage side ([304]) - though it went on to hold for reasons given at [307]-[312] that disclosure of this fact to HRCKY would have made no difference to its decision to enter the Franchise Agreement. 48. HRCKY's Ground 6 takes issue with the Royal Court's rejection of Mr Doyle's claim that he did not read the Strategic Report until 2011 - a claim made notwithstanding the fact that his son Keith had sent him a copy on 9 May 2006 with the accompanying message that "you'll want to read this over the next week or so". The Royal Court added: "310. ... When Mr Doyle became aware of the conclusions of the Strategic Report in 2006, he said nothing about it for another 9 years, did not object or raise any concerns about the Franchise Agreement HRCKY had entered into and did not mention dishonesty. Rather he continued to try and maintain the benefit of the Franchise Agreement for another seven years. This conduct supports the conclusion that he would have entered the Franchise Agreement had he known the position in 1999."

311. Even if we are wrong on that conclusion, and Mr Doyle did not know about the Strategic Report until the end of 2011, even then he did not raise any concerns and still attempted to preserve the benefit of the Franchise Agreement until it was terminated in 2013. He also did not refer to the Strategic Report until 2015." 49. Mr Doyle complains that the Royal Court was wrong in failing to accept his evidence, and claims that had he read the Strategic Report in 2006 he would have confronted Hard Rock straightaway. 50. As noted above, HRCKY sought permission from the Court of Appeal to adduce further evidence in the shape of a report from LDM Global which reviewed what were said to be all the emails and documents from the hard drives of Mr Doyle's various laptops and found no evidence of any documents or email correspondence relating to the Strategic Report between 2006 and 2012. We indicated in December that we would allow this report to be referred to *de bene esse* but that we would reserve our decision as to whether it should be admitted into evidence. Applying Rule 12(1) of the Court of Appeal (Civil) Rules 1964 in accordance with the principles in *Ladd v Marshall*

[1954] 1 WLR 1489, which apply in this jurisdiction (*Trico Limited v Buckingham*

[2020] JCA 067 at [50]), we decline to admit this evidence on the basis that it could have been obtained with reasonable diligence for use below, and is in any event not likely to have an important effect on the result of the case. Even assuming that the database searched by

LDM Global was complete and that the search terms were apt to catch any relevant material, the conclusion that "HRC strat plan" and similar terms were not referred to in documents or correspondence over the relevant period is not conclusive of the issue of whether the Strategic Report was read by Mr Doyle when his son Kevin suggested that he do so. 51. The issue of whether Mr Doyle had read the Strategic Report is one on which the Royal Court had the benefit not only of Mr Doyle's witness statement but of his cross-examination on it. It was in a better position than we are to assess the correctness of Mr Doyle's recollection, and it would not be right for us to interfere with its assessment. 52. In any event, the Royal Court's conclusion that the losses incurred on the food and beverage side would not have affected HRCKY's decision had they been known to it in 1999 did not depend solely on its finding that Mr Doyle first read the Strategic Report in

2006. It remarked that even on Mr Doyle's version of events he did nothing about the Strategic Report from 2011 (when the Franchise Agreement was still in force) until 2015. The fact that Mr Doyle sought to maintain the benefit of the Franchise Agreement even after he accepted that he was aware of the Strategic Report might reasonably be thought to be a factor supporting the conclusion that he would have entered the Franchise Agreement had he known the position in 1999, particularly in conjunction with the other, discrete, matters to which the Royal Court referred at [308] and [309] of the judgment under appeal. All in all, and applying the principles referred to earlier in this judgment, we consider that the Royal Court's conclusion on this issue was one that it was entitled to reach. 53. We therefore dismiss this ground of appeal also. Ground 7: Franchise Offering Circular 54. This ground of appeal relates to a Franchise Offering Circular that was served on HRCKY by Hard Rock on 9 June 1999, two days prior to the signing of the Franchise Agreement. This was described by Hard Rock as an instrument with no equivalent under Jersey law which, under US federal franchise law, must be issued to prospective franchisees. 55. The Royal Court addressed the Circular in the following terms: "55. It is right to observe that the Re-Amended Answer and Counterclaim at paragraph 24D(2) relies on service upon HRCKY of a document called a Franchise Offering Circular ("the Circular") on 9 June
1999. However, in his witness statement dated 13 January 2017 at paragraph 61, Mr Doyle stated the following in relation to the Circular: 'I didn't pay much attention to it given that by the time we received it we had essentially concluded our negotiations of the terms of the RFA and ADA and that we had been furnished with extensive information about the costs and projected returns of the franchise opportunity. At the time I did not understand the importance of the FTC Document. Mr Dawson did not explain its contents or what in particular we should do with the information contained in it.'
56. In addition, the franchise law experts agreed that US franchise law did not give HRCKY any cause of action against Hard Rock for any breach of US franchise Law in relation to the Circular. Accordingly, it is not necessary to determine the claims of HRCKY in relation to the Circular as pleaded because it was not a document that led HRCKY to enter into the Franchise Agreement and it is not a document that gives HRCKY a direct cause of action

against Hard Rock. We did hear evidence from these experts on the assumption that US Franchise law did apply which we address in relation to the question of Hard Rock acting dishonestly in withholding information about the profitability of the food and beverage side of cafes operated by the Hard Rock Group." 56. HRCKY in its Notice of Appeal does not address these paragraphs in terms, but claims that the Royal Court erred in not fully considering Mr Doyle's written evidence, and in neglecting the evidence of Mr Wolzszack and HRCKY's expert in US franchise law, Mr Bundy. Its claim appears to be that US franchise law should have been found to apply to the relationship between HRCKY and Hard Rock, and that certain (unspecified) rights and remedies flowed from the Franchise Offering Circular. However, as the Royal Court noted at [56], cited above, Mr Bundy agreed with his opposite number Mr Plave that the Circular gave no cause of action against Hard Rock for any breach of US franchise law, even on the assumption that US franchise law applied. No reason was advanced to us for suggesting that this finding was clearly or plainly wrong. For this reason and bearing in mind also the comments of Mr Doyle reproduced by the Royal Court at [55], cited above, we have no hesitation in rejecting this ground of appeal. Ground 8: Causation 57. HRCKY's eighth ground of appeal concerns causation - an issue which did not arise for decision on Issues 1, 2 and 3 (as the Royal Court explained at [340]-[341]) and which would therefore have been relevant, on the Royal Court's analysis, only in respect of any losses flowing from breach of an implied term ([342]). No such breach was found. The subject was nonetheless dealt with by the Royal Court, in case it was wrong in that conclusion, at [342]-[345] of the judgment under appeal. As that passage was previewed at [338]: "... we have concluded that what caused the losses suffered by HRCKY in respect of its café in Cayman were either external events or costs within the control of HRCKY." 58. Mr Doyle acknowledged that his Ground 8 was related to his Ground 3, and indeed dealt with them in the same "exhibit" of his original written submissions. 59. In its Notice of Appeal, HRCKY suggested that the Royal Court had failed to consider the witness statement of Mr Cavalaris of Hard Rock. We gained little assistance on the issue of causation from the passage that was cited from that witness statement, and note that the evidence of Mr Cavalaris was cited extensively on a related point by the Royal Court at [294]. We do not accept that this evidence was ignored, or that it substantially advances HRCKY's case on causation. 60. HRCKY takes issue once again under this head with the table reproduced at [342] of the judgment under appeal. We have addressed that table under Ground 3, above, together with the acknowledgment by HRCKY's expert Mr Borelli that the relocation of the Cayman Islands' cruise berth facilities in 2006 and the financial crisis in 2007/2008 were factors in the decline of retail sales and the faltering of the business model of the franchise operation. 61. The burden of HRCKY's complaint is, once again, that the cause of its loss was the imposition on it of Hard Rock's business model, combined with Hard Rock's failure to disclose the losses that were routinely sustained by the food and beverage arms of its franchises. That submission was minutely examined by the Royal Court, including by reference to the Third Addendum Report of Mr Borelli to which extensive reference is made by Mr Doyle. We have declined to disturb its findings, so far as we were asked to do so by the Notice of Appeal. The findings of the Royal Court in relation to causation were findings to

which it was entitled to come and we reject this ground of appeal also. Ground 9: Dol par Réticence 62. HRCKY's final ground of appeal raises a question of law because it concerns a challenge to the conclusions that dol par réticence is not a principle of Jersey customary law that applies to all Jersey law contracts (at [117]) and that the doctrine does not apply to commercial contracts, i.e. those concluded between businesses (at [118]). The judgment under appeal continues: "118. ... Where businesses are contracting with each other, they are able to make appropriate enquiries and / or seek appropriate warranties or assurances in the contract (see *Mackie v Scott*

[2018] (2) JLR 63 as an example of the effect of pre-contractual enquiries at paragraphs 61 and 62). We have therefore concluded that the starting point for such businesses having regard to their own interests does not need to be varied by imposing a duty to speak up where knowledge of a material fact known to one party only would have led the other party to refuse to enter into a contract if it had known that fact. 119. The above conclusions are not to say that a failure to speak up may not amount to dol in certain circumstances. We agree with Birt, Bailiff, in *Toothill* that the doctrine may be of relevance in relation to a contract created where there is a fiduciary relationship between the parties or if one party has placed trust and confidence in another (outside the commercial arena). The precise scope of where customary law might be extended is, however, a matter for another day because the Franchise Agreement is clearly between businesses and, in our judgment, as a matter of law, the concept of dol par réticence at its lowest cannot apply to such commercial arrangements." In the preceding paragraphs, starting at [85], there is a comprehensive analysis of the cases to which we will also refer in this part of the judgment, explaining why these conclusions have been reached. 63. As set out in HRCKY's Notice of Appeal, what is sought is the application of the doctrine of dol par réticence to "relational contracts such as a Franchise Agreement which establish fiduciary relationships but where a party who is not on an unequal footing can potentially be susceptible to suffering from an act of fraud by silence by the opposing party". This ground does not (and does not need to) seek any wider application of the doctrine, but asks simply whether there is merit in applying fraud by silence to relational contracts in Jersey. The Appellant's case 64. In HRCKY'S written contentions, its submissions are found in what is termed "Exhibit #8". This document first explains that dol par réticence had been pleaded, particularly at paragraph 24F6 of the Re-Re-Amended Answer and Counterclaim. The relevant paragraphs were quoted by the Royal Court at [49]. 65. The paragraphs relating to dol begin at paragraph 24F2, which set out that there was a duty on Hard Rock to disclose to HRCKY before it entered into the Franchise Agreement any knowledge Hard Rock had relating to the proposed operation of a "restaurant franchise" that was or was reasonably likely to be material to HRCKY and also to act in good faith. At paragraph 24F3, it is alleged that those duties arose and/or were more onerous because it "involved a prospective franchisee entering into a relational contract", noting that the period of the contract was unusual because its length had been extended to 20 years as opposed to 10 years. Further, at paragraph 24F3(vii) it was pleaded that: "An obligation, inter alia, to disclose all material

facts in an accurate and unambiguous manner was assumed on the part of the First Plaintiff by reason of its service of the Franchise Offering Circular on the Defendant shortly before execution of the Franchise Agreement as is pleaded at paragraph 24E above, being its purported compliance with FTC regulations and guidance. Furthermore, the duty of compliance with such FTC regulations had been assumed by the Plaintiffs and their affiliates, and they are estopped from denying the same." 66. Paragraph 24F6 is in the following terms: "By reason of the matters pleaded above, the First Plaintiff is guilty of (i) dol; (ii) dol par réticence and (iii) acting in bad faith in that it failed (a) to disclose to the Defendant its knowledge of the facts referred to above prior to the execution of the Franchise Agreement; (b) masked or concealed such knowledge from the Defendant; and/or (iii) [sic] misled the Defendant in respect of the same." 67. The consequences are explained at paragraph 24F7: "The Defendant would not have entered into the Franchise Agreement at all had it know [sic] of the matters referred to in paragraph 24F1 and 24F4 above. Further or alternatively, the Defendant would not have suffered the losses which it has incurred as a result of entering into the Franchise Agreement. If and so far as may be necessary the Defendant will contend that, notwithstanding the purported termination of the Franchise Agreement and Memorabilia Lease pleaded at paragraph 11 of the Order of Justice, the said agreements were void by reason of dol or dol par réticence and that the Defendant is entitled to restitution in respect of all costs and expenses incurred in respect of entering into the said agreements and/or damages suffered in consequence thereof. Particulars of such losses will be served in the form of an updated Schedule following receipt of expert evidence." The contentions then note that the implied duty of good faith was accepted in respect of the Franchise Agreement, a relational contract. This is a reference to the conclusion of the Royal Court found at [331]. 68. Reference is made to The Law and Regulation of Franchising in the EU, Elgar (2013) , which suggests that the growth in the EU of franchising "seems to have brought with it a degree of sharp practice" . On behalf of HRCKY, Mr Doyle suggests that it has experienced sharp practice from Hard Rock. He suggests that, as shown in the Re-Re-Amended Answer and Counterclaims, HRCKY had been subjected to a mixture of positive misrepresentations by Hard Rock, misleading statements and half-truths as well as dol par réticence . Accordingly, the specific vulnerability of the Hard Rock Café model was concealed from HRCKY both before it entered into the Franchise Agreement and during the years it operated thereunder. HRCKY also relies on the Franchise Offering Circular. 69. HRCKY further relies on the manner in which the issue of dol par réticence was expressly left open in Toothill v HSBC Bank plc

[2008] JLR 77 in order to submit that, because the notion of dol par réticence operates before the formation of the contract, it ought to apply to a franchisee who is very vulnerable when buying a Franchise Agreement. The position is summarised in paragraph 17 (Exhibit #8) of the contentions: "HRCKY respectfully contends that a Restaurant Franchise Agreement can differ considerably from other commercial arrangements made in the majority of other Commercial Agreements. As a working example the Restaurant Franchise

Agreement granted to HRCKY merely granted specified licensed rights to operate in Grand Cayman an establishment known as a "Hard Rock Café". Hard Rock confirms that it licenses the name "Hard Rock Café" "as the Licensed Rights in connection with the restaurant/merchandise establishments". The Restaurant Franchise Agreement is no more than an intangible asset." 70. The following paragraph also sets out the reasoning HRCKY invites this Court to adopt: "The Court appears to have left it open for situations where fiduciary relationships OR if one side places trust and confidence in another, then *dol par réticence* could apply and this is especially important in relational contracts. And it is simply not a giant leap to apply fiduciary duties to a relational contract between commercial businesses ESPECIALLY when the bargaining strength of both is so ASYMMETRIC." HRCKY also suggests that it would assist Jersey in attracting franchisors, both financially and reputationally, if *dol par réticence* attached to contracts before they are "consummated" . 71. In his oral submissions, Mr Doyle did not elaborate on the legal issues, adopting the approach set out by Advocate Dann as amicus , but he suggested there is scope for some incremental expansion of the concept of *dol* . As he has explained in respect of some of the other grounds of appeal, reliance was placed on Hard Rock, especially where within the 12 months preceding the execution of the Franchise Agreement the Hard Rock group had decided that opening an operation in Cayman was not viable for it to be undertaken. In summary, Mr Doyle submitted that Hard Rock, by sharing some financial information, was then under a duty to disclose all of it, in particular that it "knew that all restaurants were losing money, and the [Cayman] restaurant never could be profitable" . In respect of the suggestion that the Franchise Agreement contains a term stating that no fiduciary relationship was being created, as set out below, Mr Doyle points out that the principle of *dol par réticence* would take effect prior to any agreement being executed, so that term should have no bearing on the issue. The Respondents' case 72. The Respondents support the conclusion reached by the Royal Court. However, even if this Court were to disagree and find that the doctrine of *dol par réticence* is part of Jersey law, they submit that it does not assist HRCKY because it is not made out on the facts. 73. Advocate Pallot also draws support from the submissions of the amicus appointed to assist the Court, to which we will turn in a moment, noting that the duty of the Court is to declare the customary law, but not to legislate. Because it appears that *dol par réticence* did not form part of Roman law, it is unsurprising that the commentators on the customary law do not mention it. Having regard to the approach established in *Snell v Beadle*

[2001] JLR 118 relating to customary law matters, caution is required before relying on developments in modern French law. Similarly, in English law, the position would also not assist HRCKY because mere silence cannot constitute a misrepresentation (*Bell v Lever Brothers Limited*

- [1932] AC 161). There is no reason to extend the principle to contracts that are not *uberrimae fidei* . 74. Having regard to the Royal Court's judgment, Advocate Pallot points out, by reference to *La Motte Garages Limited v Morgan*
- [1989] JLR 312 , where disappointment had been expressed that counsel had failed to "mine the rich lodes of our ancient French law but to rely on English law" , that the various sources of law to which reference could properly be made have been thoroughly mined, such that the doctrine of *dol par réticence* was not known to Roman law, was never adopted into Norman customary law and did not find its way into Jersey law. 75. Both in his written submissions and as elaborated upon orally, he invited the Court to have due regard to the approach to declaring the customary law set out in *Snell v Beadle* . We recognise that we are obliged to follow that approach and, whilst Advocate Pallot acknowledged that Jersey's customary law can develop, he supported the conclusions reached in the Royal Court. To the extent that there is any support for the doctrine in the writings of Pothier, which we will consider in more detail shortly, those passages should be regarded as relating only to defects in title in the item being sold rather than supporting any wider application of there being responsibility in respect of omitting to reveal or explain something. 76. He emphasised that the question for the Court was not what the law ought to be but rather what it is. Whilst *dol* is a broad concept, it cannot be a principle that can be expanded as widely as proposed by HRCKY. He suggested that the Royal Court was faced with a divergence of views and sought to find a solution offering certainty. 77. In any event, the Franchise Agreement contained confirmation that there was no fiduciary relationship between the parties. Instead, the franchisee had independent contractor status. This is found in Section 18: "(C) Independent Contractor Status . This Agreement does not create a fiduciary relationship between the parties hereto, and Franchisee is and shall, at all times, remain an independent contractor. Nothing in this Agreement is intended to constitute either party an agent, legal representative, subsidiary, joint venturer, partner, employee, or servant of other party for any purpose. During the term of this Agreement, Franchisee shall hold itself out to the public only as an independent contractor operating the business pursuant to a license and franchise from Franchisor. Franchisee shall take all such affirmative action as Franchisor shall deem necessary to comply with the foregoing, including, without limitation, providing the notice required by §11(E)(6) of this Agreement, and exhibiting a notice of such fact in a conspicuous plan at the Premises, the content of which notice Franchisor reserves the right to specify." In any event, it is said that it is clear that *dol* requires dishonesty and so *dol par réticence* similarly requires an appropriate element of dishonesty, where the Royal Court did not find any such dishonesty. 78. Finally, the Respondents refer to what was set out in the costs judgment at [18(viii)]: "In relation to Ground 9 of the Notice of Appeal on the questions of law raised, Mr Doyle has merged two different principles. The issue of the effect of long-term relational contracts was set out in the context of the application of an implied term of good faith to such contracts. However, that principle applies once such a contract has been agreed. The notion of *dol par réticence* ... arises prior to the formation of a contract. The

Substantive Judgment concluded that such a notion should not apply to any Jersey contract, but if the Court's judgment was wrong on that conclusion, it should certainly not apply to commercial contracts (see paragraph 118). The Franchise Agreement was clearly such a contract." The submissions of the amicus 79. We have received detailed submissions on this ground of appeal from Advocate Dann, who was appointed as amicus to assist the Court. We are grateful to him for his explanation of the principles he suggests are applicable, both in his written submissions and the way he expanded upon them orally. 80. Having regard to *Snell v Beadle*, Advocate Dann first sets out the absence of any references in the texts on customary law relating to *dol par r tice*. He starts by referring to the nature of *dol*. Pothier's classic definition had been cited in *AG v Foster*

[1989] JLR 70 : "On appel *dol*, toute esp ce d'artifice dont quelqu'un se sert pour en tromper un autre". Further, in Domat's *Traite des Lois Civiles* (1689), *dol* was defined as: "toute surprise, fraude, finesse, feintise, et toute autre mauvaise voie pour tromper quelqu'un" ("all surprise, fraud, sharpness, manoeuvre and all other bad techniques used to deceive another person"). 81. At [100] in the judgment under appeal, the Court cited paragraph 234 of Pothier's *Traite du Contrat de Vente*, to which Advocate Dann also refers: "Quoique, dans plusieurs affaires de la soci t  civile, les r gles de la bonne foi se bornent   nous defendre de mentir, et nous permettent de ne pas d couvrir aux autres ce qu'ils auroient int r t de savoir, lorsque nous avons un  gal int r t de ne leur pas d couvrir; n anmoins dans les contrats int ress s, du nombre desquels est le contrat de vente, la bonne foi ne defend pas seulement out mensonge, mais toute r tice de tout ce que celui avec qui nous contractons, a int r t de savoir touchant la chose qui fait l'objet du contrat." In the translation of Pothier's work by L. S. Cushing, prepared in 1839, this paragraph is preceded by the explanation that the section covers: "Whether good faith obliges the seller, at least in the forum of conscience, not only to refrain from false declarations, but even from omitting to declare, in relation to whatever concerns the thing sold, and to what such omission obliges him." 82. Advocate Dann agrees with the analysis of the Royal Court that what Pothier was commenting on in this first Article in Chapter II, relating to matters which result from good faith, was the Roman law position. As such, he suggests it must be treated with a degree of caution. Paragraph 238 was referred to in [101] to support that conclusion, referring to "These principles of the Roman jurisconsults are more exact, and more conformed to justice, than the decision of saint Thomas, who permits the seller to conceal the defects of the thing, except in two cases." The Royal Court then quoted from the following paragraph 239, albeit this appears under Article II, dealing with what suppression imposes an obligation upon the seller, as well as mentioning paragraph 240 at [102], where the cases in which a seller conceals the knowledge he possesses, for example that the thing does not belong to him, or does not belong to him irrevocably, or that it is subject to certain charges, annuities (rentes), or special hypothecations. The short passage quoted at [101] includes: "The interests of commerce not permitting parties to be readily admitted to demand a dissolution of bargains which have been concluded". 83. Advocate Dann highlights that reference was made in a

previous appeal to this Court (

- [2019] JCA 123) at [50], appearing after an analysis of where the coutumiers had covered dol , to Le Gros' *Traité du Droit et Coutumier de L'Ile de Jersey* (at page 350): "C'est une principe en quelque sort sacré que la convention fait la loi des parties, mais la bonne foi est une condition essentielle et ce n'est pas quoi non de la convention. La raison est évidente: c'est un principe, à tous les contractants se doivent franchises, sincérité sans voile. Toutes espèces d'artifices que l'une des parties se servant pour trompé l'autre pour être de nature à rendre le contrat annulable. Ce n'est pas à dire que le préjudice qu'éprouve le vendeur par suite de la suffisance du prix suffit pour rescinder le contrat. D'autre circonstances doivent concourir à l'annulation du contrat, tel que le dol." Whilst the Court of Appeal acknowledged that Le Gros was writing about *déception d'outre moitié* , it added at [51] that it regarded his comments as stating "a broader principle". 84. In the following paragraph in the 2019 Judgment, the Court referred to a passage from Poingdestre's *Les Lois et Coutumes de L'Ile de Jersey* (at page 206): "Tout contrat ou transaction extorqué par menace, fausses suggestions, subornement d'un tiers & persuasions indirectes est présumé fraudueux principalement quand la personne induite est faible de jugement ou d'âge, comme un jeune homme, une femme, un decrepit &c." Whilst disagreeing with the examples offered of those who are vulnerable, the Court accepted that there is a general principal that there is a presumption of dol , which is rebuttable, where the contract is entered into by someone whom the law would class as being vulnerable. As Advocate Dann further notes, this passage was also cited in *Steelux Holdings Limited v Edmonstone*
- [2005] JLR 152 , albeit that it was made clear that there was no mention of silence. 85. Advocate Dann at the hearing suggested that the reference to "fausses suggestions" is potentially wide enough to include falsity through not speaking up. Accordingly, whilst there is no express reference in the coutumiers to dol par réticence , the terms in which dol is covered do not preclude the possibility that dol can be extended incrementally to encompass what the Appellant has termed "fraud by silence". 86. In his written submissions, Advocate Dann undertakes a detailed analysis of the three modern cases in which dol par réticence has been mentioned. The earliest was *Steelux* , followed by *Toothill v HSBC Bank plc* and finally *Sutton v Insurance Corporation of the Channel Islands Limited*
- [2011] JLR 80 . Rather than set out these submissions here, we will deal with them in our discussion of dol par réticence and how this was covered in the judgment under appeal. 87. Thereafter, Advocate Dann moved on to consider the way in which Fairgrieve, in his work *Comparative Law in Practice: Contract Law in a Mid-Channel Jurisdiction* (2016) treats these developments. They appear in Chapter 5, which relates to "Undermining a Contract: Vices de Consentement" . Looking broadly at the question of vices de consentement , there is reference on page 85 to Pothier's *Traité Des Obligations* , in which he characterised the defects in consent in contracts as being: "Les vices qui peuvent se rencontrer dans les contrats sont l'erreur, la violence, le dol, la lesion, le défaut de lien."

88. At the beginning of the section on dol , reference is made to the position at the time in French law (page 91): "In modern French law, the notion of dol has been extended to encapsulate dishonest scheming, which goes beyond fraudulent misstatements. As Whittaker notes, the notion of dol 'includes fraudulent misstatements, but is rather wider, extending to any chicanery intended to deceive as long as it was effected by the other party to the contract'. The behaviour, however, must have caused a 'decisive mistake' in the other party to a contract. As set out in Article 1130 of the new French Civil Code, the dolosive scheming must have been such that, it was obvious that, without them, the other party would not have entered into the contract." Fairgrieve then discusses the three modern Jersey cases in a section beginning on page 94. At the top of page 95, reference is made to Article 1137(2) of the Code Civile, with the footnote translating the provision as " Dol is an act of a party in obtaining the consent of the other by scheming or lies. A dol is also constituted by the deliberate concealing by one contracting party of information which he knows is decisive for the other party." However, at the end of this section, Fairgrieve offers the following conclusions (on page 97): "The Jersey approach to dol resulting from silence thus remains unclear. Given the different approaches in the cases, there is a good deal of uncertainty on this issue. It remains to be seen what the definitive view of the Jersey courts will ultimately be. Different views have been expressed. The civil law heritage might be thought to indicate a broader approach to dol encompassing, in certain circumstances, omissions to disclose relevant information. On the other hand, those with a preference for orthodox common law thinking may instinctively recoil from the thought of a concept of 'fraud by silence', bolstered perhaps by the traditional reticence of the common law to impose liability for omissions to act." 89. In respect of the developments in modern French law, again in light of [21] in *Snell v Beadle* , Advocate Dann repeats what the Royal Court indicated (at [99]) was the warning from the Deputy Bailiff in *Hore v Valmordida*

[2022] JRC 202 , particularly at [166]: "It may be that modern French law is different. There are difficulties in placing reliance on modern French law, which is a product of the Civil Code which is amended from time to time by the French legislature, and is interpreted by case law which is not binding in France and upon which decisions of various French Courts of Appeal may conflict with each other." However, in relation to Article 1137(2) of the Code Civile, we were informed that this resulted from an amendment made in 2016 and, as Advocate Dann acknowledged, it means that each of the three Jersey cases were decided before that amendment was made, so the judgment in this case in the Royal Court was the first time that consideration could be given to the changes brought about by that amendment. 90. Despite what was said in *Snell v Beadle* (at [23]), Advocate Dann has referred to the way in which relational contracts, which is, of course, the basis on which HRCKY pleaded its case, has developed in English law, especially through *Yam Seng PTR Limited v International Trade Corporation Limited*

[2013] EWHC 111 (QB) and *Bates v Post Office*

[2019] EWHC 606 (QB) . In the Royal Court's judgment, there was lengthy citation from [134] - [142] from the earlier of those cases at [155] and the list of 9 characteristics from the latter to consider whether or not a relational contract exists (found at [725]) were rehearsed in full at [158]. The Royal Court concluded at [331] that the Franchise Agreement amounted to a relational contract into which the term of good faith should be implied. 91. In respect of whether these developments in English law led to a principled development of *dol par réticence* , Advocate Dann referred particularly to [141] and [142] in *Yam Seng* , which for convenience, we again set out: "141. What good faith requires is sensitive to context. That includes the core value of honesty. In any situation it is dishonest to deceive another person by making a statement of fact intending that other person to rely on it while knowing the statement to be untrue. Frequently, however, the requirements of dishonesty go further. For example, if A gives information to B knowing that B is likely to rely on the information and A believes the information to be true at the time it is given but afterwards discovers that the information was, or has since become, false, it may be dishonest for A to keep silent and not to disclose the true position to B. Another example of conduct falling short of a lie which may, depending on the context, be dishonest is deliberately avoiding giving an answer, or giving an answer which is evasive, in response to a request for information. 142. In some contractual contexts the relevant background expectations may extend further to an expectation that the parties will share information relevant to the performance of the contract such that a deliberate omission to disclose such information may amount to bad faith. English law has traditionally drawn a sharp distinction between certain relationships - such as partnership, trusteeship and other fiduciary relationships - on the one hand, in which parties owe onerous obligations of disclosure to each other, and other contractual relationships in which no duty of disclosure is supposed to operate. Arguably at least, that dichotomy is too simplistic. While it seems unlikely that any duty to disclose information in performance of the contract would be implied where the contract involves a simple exchange, many contracts do not fit this model and involve a longer term relationship between the parties which they make a substantial commitment. Such "relational contracts", as they are sometimes called, may require a high degree of communication, cooperation and predictable performance based on mutual trust and confidence and involve expectations of loyalty which are not legislated for in the express terms of the contract but are implicit in the parties' understanding and necessary to give business efficacy to the arrangements. Examples of such relational contracts might include some joint venture agreements, franchise agreements and long term distributorship agreements." In drawing attention to this passage, Advocate Dann acknowledged that Leggatt J (as he then was) refers to the conduct of the parties performing the contract, rather than referring to anything at the pre-contractual stage. He queries, therefore, whether the question the Royal Court posed at

- [112] about whether the concept of dol should be extended in the way suggested in *Steelux* might more appropriately have been framed as whether that concept might be extended to cover pre-contractual negotiations between parties to a relational contract, and in particular a franchise agreement. This would be a more limited step than that on which the Royal Court reached its conclusions. Discussion 92. We start by paying tribute to the clarity with which the Royal Court set out the conclusions of the Court on this issue (at
- [85] to [119]). The detailed analysis of the issue, starting as it does with comments about the ambit of dol and indicating the Court's preference for the approach taken in *Toothill*, rather than that in *Steelux* and *Sutton* is helpful, especially in light of the citation of the principles in *Snell v Beadle*. One aspect that appears to have been omitted, however, is any reference to the manner in which *HRCKY* had pleaded its case on dol par réticence. Whilst it is implicit that the conclusion that the doctrine does not apply to commercial contracts (at [118]) inevitably means that it was not found to apply to the Franchise Agreement, as a form of relational contract, we consider that this ought to have been made explicit, rather than the way it is put at the end of [119]. 93. We have to take into account that the judgment under appeal reached the conclusion that the Franchise Agreement was a relational contract (at [331]). This resulted from the analysis undertaken of the matters on the checklist from [725] of *Bates v Post Office* (as set out in [158]). There is no need to repeat that checklist, or the paragraphs cited from *Yam Seng PTE Limited* (at [153]), because it is the conclusion that matters and, in the absence of any Respondent's Notice, it is a conclusion with which we cannot interfere. This ground of appeal needs to be viewed in that context. *HRCKY* seeks no more than what it had pleaded, namely that dol par réticence should apply to a relational contract such as the Franchise Agreement. 94. The Franchise Agreement was expressed to be subject to Jersey law (Section 18(I)). As a result, if Jersey law recognises that dol par réticence applies to this contract, then the doctrine would apply as a form of vice de consentement nullifying it. However, if the doctrine does not apply to this contract, whether on the broad basis (as in [117]) or more narrowly to commercial contracts (as in [118]), the appeal on this ground would have to be dismissed. This is why we have considered the issue within the confines of *HRCKY*'s pleaded case and the terms of this ground of appeal. 95. In order to place principles of customary law into their proper context, we have similarly reminded ourselves of what the Judicial Committee stated in *Snell v Beadle*. At [105] in the Royal Court's judgment, [16] to [21] of the Opinion of the majority of the Board given by Lord Hope of Craighead are cited in full and we do not repeat them all here. The conclusion is found at [21]: "For these reasons, their Lordships consider that, as the customary law of Jersey has not been enshrined in a coutume, the proper approach is to regard it as still in a state of development. It is capable of being refined or clarified by judicial decision as the customary law is applied to a new set of

facts.

This may be done by reference to other customary law sources. In the present context, the search for guidance as to the content and the proper application of the principle must be conducted in the first instance by examining the works of the writers on the customary laws of Normandy. It will be helpful also to examine the Roman law, as the origins of customary law rule lie in the Roman law. French law as it exists today in the French Codes or the current jurisprudence is unlikely to be of direct assistance here, for the reasons explained by Southwell (3 Jersey Law Review, at 214-215 (1999)). Nor is it helpful in this context to have regard to the solutions which have been adopted in the modern codified systems that are to be found in other civilian jurisdictions." 96. We consider that this statement of guidance about the approach to take when considering how, if at all, the customary law can be refined or clarified has to be placed into the context of some of the comments in the earlier paragraphs of the Opinion. As Advocate Pallot emphasised, at [17] it was explained that "'custom' may be used in a variety of senses" and that, broadly speaking, it is "the product of generally accepted usage and practice", with no "formal sanction or authority behind it other than the general consensus of opinion within the community." The reference to the article by Richard Southwell QC, published in 1999, demonstrated that "the Norman origins of Jersey law remain of essential importance" (at [19]). Similarly, the well-respected work of former Solicitor General, Stéphanie Nicolle QC, The origin and development of Jersey Law (1998) , confirms at 12.4 that the customary law "can and does change" until such time as it is enshrined into statute (at [20]). Because the principle in that case involved *déception d'outre moitié* , which "is an example of the reception of a principle of Roman law through which the *ius commune* into Jersey law by way of the customary law of Normandy" was acknowledged (at [20]), the passage cited from [21] is given context. As the majority set out at [23], "English law is of no assistance on this matter" , adding that it was important "when one is applying the rule to the facts, to confine one's attention strictly to the limits and characteristics of the remedy for *déception d'outre moitié* that are to be found in the customary law of Jersey." Whilst the minority of the Board disagreed about the outcome, Lord Cooke of Thorndon and Lord Hutton did not offer any alternative to the approach to customary law set out by Lord Hope. 97. We have, therefore, adopted a similar approach to the principle of *dol par réticence* . As the Royal Court explained ([85]-[91]), *dol par réticence* must be viewed as a potential extension to the recognised doctrine of *dol* . This is apparent from *Bailhache B in Steelux* , where [10] was quoted at [86] in the judgment under appeal: "Fraudulent conduct, including the making of a fraudulent misrepresentation, can be a *moyen de nullité* , or a cause of the nullity of an agreement. The underlying principle of fraud, which we may say embraces both *dol* and *fraude* , is bad faith. Fraud is a *vice du consentement* , that is to say, a defect which nullifies the apparent consent between the parties and allows the defrauded party to treat the contract as void. If, therefore, a party knowingly makes a false statement which induces the other party to sign a document and thereby to enter a contract, there is a defect of consent which allows the other party to treat the contract as void." We agree with the Court's view at

[87] that this demonstrates that *dol* covers fraudulent misrepresentation and further that "what is required for *dol* is dishonesty" (at [89]), which is apparent from Pothier's definition cited in *AG v Foster*. No one has suggested that the requirement for *dol* is anything other than dishonesty. 98. Returning to what was then expressed obiter in *Steelux* (at [13], cited in the judgment below at [92]): "As a matter of general principle, under the law of Jersey the parties to a contract are expected to defend their own interests. The maxim is: *La convention fait la loi des parties*. But fraud is a flexible notion. Silence can, in certain circumstances, amount to fraud. If one party, particularly a party who is more experienced and worldly-wise than the other, is silent as to a material fact which, if it had become known to the other party, would have led to a refusal to enter into the contract, that may well amount to fraud which may lead to the setting aside of the contract. In French law, the concept is known as *réticence dolosive*. We would characterize it as dishonest or fraudulent silence. Although Poingdestre did not expressly refer to dishonest silence, he did state (*Les Lois et Coutumes de Jersey*, at 206 (1928)) that, in the context of a contract between persons of unequal bargaining power - "*tout contrat ou transaction extorqué par ... persuasions indirectes est presume fraudueux principalement quand la personne induite est foible de jugement ou d'age ...*" In this case, it is unnecessary to decide whether or not there was dishonest silence, but, if there had been, the obligation to pay interest would have been set aside." That final sentence indicates that the notion of dishonest or fraudulent silence was not envisaged as being of general application but rather limited to the claim in the summons for interest, which had been abandoned during oral submissions (see [2]). 99. *Steelux* was an action brought on a promissory note relating to a loan of £150,000 to the defendant, which she claimed had been a gift. Initially, there was a bond registered in favour of a company that the defendant's stepfather controlled. Subsequently, the promissory note was executed by the defendant, in favour of a different company where the promissory note carried interest, unlike the earlier bond. The relationship between the defendant and her stepfather then broke down and this action was commenced. In order to put this airing of the principle into further context, we consider it useful to have regard to the remainder of [10]: "It may not be necessary that the statement is, at the time it is made, knowingly false; if the statement is in fact false, and the other party acts upon it, there is nonetheless a defect of consent (*vice du consentement*) because the other party enters the contract under the mistaken impression that the statement or representation is true. It may be seen, therefore, that the distinction between mistake (*erreur*) and fraud (*dol*) as defects of consent may sometimes be blurred. There is, in either event, a defect of consent which allows the injured party to treat the contract as void. The burden of proof lies upon the party who asserts that there is, in law, a defect of consent." Despite this recognition that the distinction between *erreur* and *dol* may be blurred, the manner in which *HRCKY* pleaded its case was reliance upon *dol par réticence* where the alternative basis in *erreur* was dealt with separately (see, e.g., [70]-[84] in the judgment under appeal). Accordingly, we treat *HRCKY*'s case as relying on a development to *dol* and the alternative approach in *erreur* is not engaged for these purposes. 100. Even in *Steelux*, there is only one comment derived from Poingdestre, with express acknowledgement that nothing is said about dishonest silence. With the benefit of

the analysis undertaken by Advocate Dann, we accept that there is nothing in those who have written about the customary law that supports a development towards *dol par réticence*. Whilst *Snell v Beadle* suggests this is indicative that the doctrine might not have its roots in Roman law, thereafter forming part of the customary law of Normandy and being received into Jersey law, it is possible that *dol* can still be developed, as was suggested in *Steelux* in this manner. 101. Albeit there was some reluctance expressed in *Toothill* to embrace what had been stated obiter in *Steelux*, we note, as the Royal Court pointed out at [90], that Birt, Deputy Bailiff (as he then was) referred to the following statement: "Tacit acquiescence in another's self-deception does not itself amount to a misrepresentation, provided that it has not previously been caused by a positive misrepresentation." That statement was contained in a passage quoted from *Chitty on Contracts*, 29th ed., and was not quite as the Royal Court described it as effectively being the Royal Court's own words "exploring the scope" of *dol par réticence*. This is clear at [107], where the Court cites [21] from *Toothill* in full. Given the reliance being placed on this statement, the caution expressed in *Snell v Beadle* about English law being of no assistance appears to us to be misplaced in this respect. We do not consider that *Snell v Beadle* means that it is impossible to have regard to these wider issues when considering what the customary law of Jersey is. Moreover, the conclusion at

- [91] that *dol* is not "limited to positive misrepresentations only and may extend to a combination of positive statements, coupled with withholding information, where it is found that this combination was used to deceive another" appears to leave open such a "combination" situation, even though *dol par réticence* is thereafter covered in detail before being rejected. 102. *Toothill* involved an appeal against the decision of the Master to award summary judgment in favour of the bank. This involved the Royal Court in a rehearing (see [3]). Because it was accepted at the end of
- [22] that the dictum in *Steelux* means that "it is obviously arguable that, if HSBC may have been guilty of "dishonest or fraudulent silence," the appellant may have a defence to the claim and leave to defend should be given", and the summary at [71(i)] concluded that there was "no arguable defence of misrepresentation or *dol par réticence* in relation to any of the loans", we take the view that the comments made in *Toothill* were not strictly obiter. 103. This is also clear from the manner in which the principle was applied. Having found in *Toothill* (at [43]) that there had been no misrepresentation, the same facts were relied on in respect of *dol par réticence* (see [44]). The conclusion on this issue in respect of the first loan in May 2001 is in [45]: "We have expressed reservations about whether Jersey law should be developed so as to incorporate a form of misrepresentation by silence, as envisaged in the concept of *dol par réticence*, which goes beyond the circumstances where silence gives rise to a remedy under English law. However, accepting for present purposes that it is arguable that it should be so developed, it nevertheless requires, as the Bailiff said in *Steelux*, a dishonest or fraudulent silence; otherwise it cannot amount to *dol*. Is it arguable that the bank's silence in this case was dishonest or fraudulent? In our judgment, it is not." Similar reasoning is given in relation to the subsequent loan in November 2001 (at [59]). In simple

terms, there was no basis for applying the doctrine where it was not shown that there was dishonesty. 104. The reservations mentioned are found at the start of [22]: "The court would wish expressly to leave open the question of whether the law of Jersey should recognize a duty of positive disclosure in the wider circumstances envisaged by the Bailiff on whether a duty of positive disclosure should be confined to those circumstances where it exists under English law, even if, jurisprudentially, it is preferred in this jurisdiction to treat it as *dol par réticence* . Such a decision would be a matter of considerable practical importance to those who contract under Jersey law and should be the subject of full argument and consideration." We note Advocate Dann's submission that the central element of this case related to whether or not to align Jersey's law of undue influence as being similar to English law (see [28]), which might explain why there is reference to English law in this passage. Of course, in *Steelux* , reliance was placed on *Poingdestre*, which appears to be a surer basis for developing *dol* rather than looking to *Chitty on Contracts*. 105. The final case in which *dol par réticence* is covered in *Sutton* . Unlike at [110] in the judgment under appeal, we do not consider that the comments in *Sutton* at [48] are *obiter* . In any event, we do not understand that a decision of the Royal Court is binding for the purposes of subsequent cases, although consistency of approach is clearly desirable. 106. Before considering [48], we consider it helpful to refer to earlier passages in the Royal Court's judgment. The case involved a claim under an insurance policy in respect of a Hublot Big Bang watch, which the plaintiff claimed had been lost. It was clear that the contract was *uberrimae fidei* (of the utmost good faith). The passage in *Chitty on Contracts*, cited in *Toothill* , indicated that contracts *uberrimae fidei* , as well as those where a fiduciary relationship existed, were amongst those where a failure to disclose some fact distorts a positive representation. As a development of *dol* , an "alleged fraud here would amount to a *vice du consentement* that would enable the defendant to avoid the contract" (at [26]). Further, at [45], having referred to *Scarfe v Walton* 1964 J. J.387, *Bailhache DB*, as he then was, stated: "This eliding of mistake, misrepresentation and principles of *erreur* has been not only oft repeated, but oft accompanied by statements that unfortunately the court has been faced with citations of English authority by counsel, when a surer guide is the law as enunciated by *Poingdestre* or *Pothier*, or indeed the civil law enunciated by *Domat*. Of course, we accept that the paucity of contract cases coming before the Royal Court means that there will be fewer precedents available to the court than would be perhaps desirable; but it appears to us that the court should be cautious to declare the law of Jersey by abstracting principles from the law of England which have been drawn fundamentally from a different approach to the law of contract." 107. It is against that background that we consider what is set out in [48] (also cited in full at [109] in the judgment under appeal): "We have therefore approached the facts of the present case on the premise that the four questions set out in para. 22 above require an answer because under his contract as we understand it the plaintiff has to establish they can be answered affirmatively. In addition, even if we are wrong on that, the first two questions at least require to be answered as central to the issue of whether there was a valid insurance contract between the plaintiff and the defendant in relation to the Hublot Big Bang watch, and whether it should be set aside on the basis of the plaintiff's alleged failure to inform the

defendant about the valuation and the circumstances in which the watch was acquired, and in particular the silence on the plaintiff's part to inform the defendant of- (i) the questionable circumstances in which the watch was alleged to be acquired; (ii) the questionable circumstances in which the plaintiff came to be in possession of the valuation; and (iii) the fact that, by the date of this valuation, the valuer had not had the watch in its custody for at least eight weeks. These alleged failures require to be considered whether they were innocent or fraudulent. In our judgment, given our view of the evidence as appears below, the failure on the plaintiff's part to inform the defendant about those matters did amount to a *réticence dolosive* which enables the defendant to reject the addition of the watch to the insurance policy and thus the claim under that policy. Had the plaintiff not produced a valuation, the insurance of the watch would not have been continued. The position would have been the same had he not been forthcoming on this critical information as set out above. To this extent only, the court finds the defendant's allegations of fraud proved. We have considered the court's hesitation in *Toothill* as to whether the doctrine of *réticence dolosive* is part of the law of Jersey. In our view, the doctrine is useful in a case such as the present because it forms part of that package of principles which go to identify whether the parties to a contract of insurance, being a contract *uberrima fides*, have that common will or *volonté* to make it, and thus provide a proper basis for an assertion that *la convention fait la loi des parties*. Not all silences will have the effect of providing grounds for a claim in nullity. The party making that claim has to relate the alleged *réticence dolosive* to a material particular of the contract and its actual impact upon his will or *volonté* to make the contract in order to discharge the burden of showing that the claimed ground of nullity has been established." (The four questions in [22] were matters for the plaintiff to prove: that the watch insured was a genuine Hublot Big Bang watch; that he had acquired lawful title to it; that the genuine value was £46,000; and that it had been genuinely lost.) In our view, this decision shows that *dol par réticence* was being adopted as a principle of the customary law of Jersey, but this is applicable only to contracts that are *uberrimae fidei*. This appears to be a principled development in an area where the parties were required to act in the utmost good faith so disclosure was always a requirement. The decision in *Sutton* certainly does not purport to apply the doctrine to all contracts or even all commercial contracts; indeed, it expressly states that not all silences will provide grounds for a claim that the contract is a nullity. 108. We are not persuaded that the first reason given in [113] for the conclusion found in [117], that there is no "general consensus as to what the law of Jersey might be", is an accurate reflection of the three cases in which *dol par réticence* has been mentioned. None of those cases has stated that the doctrine does not exist. It is clear that [13] in *Steelux* is *obiter*, but this was the foundation in *Toothill* of a recognition that the doctrine might exist to raise an arguable defence, albeit that the decision was that it could not because there was no suggestion of dishonesty. Similarly, in *Sutton* the doctrine was regarded as being useful and was applied to a contract *uberrimae fidei*. Accordingly, the question for the Royal Court was whether the doctrine applies to a relational agreement such as the Franchise Agreement or not. There was no need for the Royal Court to look at the question more broadly than that. 109. The English law development of relational contracts post-dates all

three decisions in the Royal Court. At [142] in *Yam Seng*, one example of a relational contract is a franchise agreement. However, it is also clear what was under consideration in that case was whether to imply a duty of good faith into the contract that existed (see [131], cited in the judgment under appeal at [154]). The case did not deal with any requirements of pre-contracting disclosure. Likewise, in *Bates v Post Office* at [710]-[711], the issue was about implying a term into the contract (as shown by the passages cited at [157], where there is clarification that the implied term "means that the parties must refrain from conduct which in the relevant context would be regarded as commercially unacceptable by reasonable and honest people"). Accordingly, what is suggested by HRCKY is that this combination of such an implied term and the notion of *dol* means that *dol* can, and ought to be, extended to include *dol par réticence* in respect of such a relational contract as the Franchise Agreement, for example because Hard Rock was more experienced than HRCKY.

Conclusion on Ground 9 110. We are not persuaded that this is a sound argument. It is apparent from other aspects of the judgment subject to appeal that consideration was given to the possibility of there being unforeseen consequences of developing the customary law. An example is at [148]. We have similarly noted that at [79] and

- [80] the Royal Court cited passages indicating that the development of the Jersey law of contract needs, so far as possible, to provide clarity and certainty and be fit for the requirements of commercial life in this century. We consider that these elements were factors at the forefront of the Court's mind when rejecting any suggestion that the doctrine of *dol par réticence* could be of general application to all Jersey law contracts, and also in the narrower view that it should not apply to commercial contracts. However, even that approach is wider than necessary to decide if *dol par réticence* applies to a relational contract such as the Franchise Agreement, which can, for these purposes, be viewed as being significantly narrower than all commercial contracts. 111. We take the view, which is consistent with that of the Royal Court, that there is a difference between pre-contractual negotiations and the implication into a relational contract of a term of good faith. Whilst both to an extent refer to honesty, as was made clear in *Bates v Post Office* (at [710]) "a term requiring good faith does not mean honesty". We are satisfied that it was open to the Royal Court to accept that there was an implied term of good faith without necessarily having to extend *dol par réticence* to a contract such as the Franchise Agreement. They are not two sides of the same coin. 112. Given that the origins of the doctrine are found in *Steelux*, where reference was made to *dol* being a flexible notion, enabling a party who contracts with another "who is more experienced and worldly-wise than the other" to have an obligation to disclose a material fact, there could well be unforeseen consequences arising from requiring the party seeking to raise a *vice de consentement* (see above) which is the way in which we regard *dol* and so by extension *dol par réticence*, if it were applicable widely. Without offering an exhaustive list of such unforeseen consequences, the number of businesses operating in Jersey which are likely to apply generic provisions across their commercial interests elsewhere, including, for example, banks, might mean that significant expense would arise if special consideration arose from *dol par réticence* being of broad application and so

might, in turn, result in businesses being unwilling to offer services in Jersey. To that extent, we accept that the doctrine cannot simply be relied upon generally. Within the confines of a relational contract (and we were not informed as to how prevalent these might be), such as the Franchise Agreement, we accept that it is more likely than not that the franchisor will know the business model that is the subject of the franchise agreement better than the person wishing to be a franchisee. Accordingly, the franchisor will generally be "more experienced", but that does not automatically mean that it is more worldly-wise. We consider that it would be unfortunate if the application of the doctrine were dependent on how the evidence in any case were adduced. 113. As regards Toothill, it is apparent that the issue was fully argued before the Royal Court, as it has been before us. However, what was left open (at [22]) was the broad issue of whether there is a duty of positive disclosure in the wider circumstances described obiter in Steelux, but the present case is not the place to have that wider discussion. Indeed, the conclusions of the Royal Court may also be obiter, save for rejecting that *dol par réticence* is applicable to a relational contract such as the Franchise Agreement. Put another way, it follows that *dol par réticence* could not be relied on by HRCKY to argue that the Franchise Agreement was a nullity. 114. We have noted that, in the decade following *Yam Seng* there does not appear to be any suggestion in English law that there is anything new affecting the pre-contractual negotiations. Chitty on Contracts is now in its 35th ed. and the equivalent passage relating to contracts where a duty of disclosure exists is in 10-170: "Mere non-disclosure of fact, material or not, does not ordinarily amount to misrepresentation, and the general rule is that in order to be actionable a representation must take an active form. But in certain cases a stricter rule is enforced. The most important of these are the contracts *uberrimae fidei* in which knowledge of the material facts generally lies with one party alone; that party is under a duty to make a full disclosure of these facts, and failure to do so makes the contract voidable. However, it is doubtful whether any contract other than one for insurance is correctly described *uberrimae fidei*, as the extent of the duty to disclose and the remedies available seem to vary from type of contract to type of contract; and since the Insurance Act 2015 came into force it seems that it is no longer accurate to describe even contracts of insurance as *uberrimae fidei*, as any duty to disclose is statutory and any rule of law permitting a party to a contract to avoid it on the ground that utmost good faith has not been observed by the other party has been abolished. Therefore it is more helpful to consider the extent of the duty and the remedies available in each type of case in which it has been held that there is some duty of disclosure. These include contracts to subscribe for shares in a company, family settlements, contracts for the sale of land, contracts for suretyship and partnerships. To this list may be added general releases and contracts where the parties are in a relationship of trust and confidence. Contracts of service, contracts of sale of goods and interest swap agreements have been held not to be *uberrimae fidei*, so that there is no duty of disclosure." There is no reference here to relational contracts. There is also no suggestion that in English law a duty to disclose arises other than in *uberrimae fidei* contracts. Whilst the 29th ed, as cited in Toothill at [21], referred to fiduciary relationships, especially where non-disclosure distorts something positively asserted, we do not find it surprising that

English law does not assist (as was suggested in *Snell v Beadle*) as to whether *dol* can properly be extended through *dol par réticence* . 115. It is further clear to us that there is nothing to be found in the commentators on the customary law that shows that *dol par réticence* operates as any part of Jersey law. The best that can be said, as explained by Advocate Dann, is that there is nothing that openly states that it does not operate and some of the references suggest that it might. This was the basis on which [13] in *Steelux* has to be read. However, we would not regard the absence of anything supporting or opposing the existence of the doctrine as being determinative as to whether *dol* can evolve in the customary law through *dol par réticence* . Given that *Sutton* concerns a different situation, being confined to an insurance contract which was *uberrimae fidei* , we do not have to choose between previous decisions that might be regarded as inconsistent. Moreover, we do not have to decide whether *Sutton* was correctly decided. The key issue for this Court is whether *dol par réticence* can apply to a relational contract such as the Franchise Agreement and nothing more. 116. We do not agree with Mr Doyle that we should ignore Section 18(C) of the Franchise Agreement because *dol par réticence* is only concerned with pre-contractual discussions and this was a term found in the contract. Within the context of those pre-contractual discussions, HRCKY will have seen the terms of the proposed Franchise Agreement. If it had been troubled by Section 18(C) setting out that the parties would not be in a fiduciary relationship, there would have been some evidence that this was raised at the time with a view to avoiding the consequences of such a term. It is too late now to ignore the terms found in the executed Franchise Agreement. As such, this is not an example of where the parties were entering into a fiduciary relationship and so *dol par réticence* cannot, in our view, be extended to the Franchise Agreement on that basis. This is not the type of situation referred to in *Toothill* , or where trust and confidence has been placed in the other party supposedly under a duty to disclose, found in [119], although we acknowledge that in *Candey Limited v Bosheh and Another*

[2022] EWCA 1103, citing another decision of Leggatt LJ (as he then was), referred to at [162] in the judgment under appeal, reference was made to relational contracts involving trust and confidence, but we consider that this relates to the implied term once the contract is being performed rather than extending to pre-contractual negotiations. 117. We are also not persuaded by Mr Doyle's argument based on sharp practice. Either the doctrine operates for a relational contract, in this case the Franchise Agreement, or it does not. The sharp practices to which he has referred will be relevant when considering if the required dishonesty has been demonstrated. It is a step in the process but not in itself central to the initial issue as to whether *dol par réticence* applied to the Franchise Agreement. 118. Our conclusion, therefore, is that the Royal Court was right to conclude that *dol par réticence* did not apply to enable HRCKY to treat the Franchise Agreement as a nullity. It was clear that for many years HRCKY was willing to operate under the Franchise Agreement. We have taken into account the sacred principle that *la convention fait la loi des parties* , which we are satisfied prevails in this case. The alleged *vice de consentement* was only raised much later. Whilst this Court ruled that the summary judgment on the

counterclaims should be set aside (

[2019] JCA 123), despite the number of references to dol and the helpful analysis of the occasions on which that principle has been referred to by the commentators, there was little lending positive support to dol par r  t  cence . In any event, this was an interlocutory appeal and the fuller analysis appears in the judgment under appeal. For the purposes of determining this appeal, we do not need to decide whether this principle applies to all Jersey law contracts, but our conclusion that it does not apply to this particular relational contract inevitably means that we agree with the conclusion at [117]. Similarly, we do not even have to determine that it does not apply to commercial contracts, although we do understand why the Royal Court sought to provide clarity and certainty in that regard. In our view, the asymmetry on which Mr Doyle relied for HRCKY is an example of how the doctrine would become unduly fact-dependent and is why we consider that the obiter remarks in Steelux are wider than they need to be. S 119. For these reasons we also reject this ground of appeal. 120. If, however, we are wrong to conclude that dol par r  t  cence does not assist HRCKY, and should have found that it operates in respect of the Franchise Agreement, this ground of appeal would still have been rejected because HRCKY has failed to demonstrate the required element of dishonesty. 121. Our rejection of HRCKY's fifth ground of appeal confirms that we decline to interfere with the Royal Court's conclusions relating to Mr Marable's honesty. We consider that we would be able to take the same view in respect of the pre-contractual negotiations. HRCKY had failed to persuade the Jurats that they should conclude that Mr Marable or anyone else on behalf of Hard Rock were dishonest as required for dol and so also dol par r  t  cence . As a result, even if we should have concluded that dol par r  t  cence applied, HRCKY would have failed to establish this essential requirement of the doctrine. 122. In relation to Hard Rock providing the UFOC document to HRCKY, the seventh ground of appeal, where it is suggested that the importance of the document was not explained, to the extent that this issue is engaged (and it is one of the matters set out in HRCKY's written contentions), we can repeat our conclusion about this ground of appeal. Once again, there has been no suggestion on behalf of HRCKY that failing to highlight the significance of the UFOC document amounted to dishonesty. The failure to establish an essential element on which dol par r  t  cence is based shows why the conclusion would still have been the same, even if the doctrine applied.

Conclusion

123. For these reasons the appeal is rejected. 124. We are minded to order that the unsuccessful Appellant HRCKY should pay Hard Rock's costs on the standard basis, to be taxed if not agreed, and that as was the case before the Royal Court, this order should be enforceable against Mr Doyle personally as a Director of HRCKY. We invite any written submissions on costs or other consequential matters to be lodged with the Court within 14 days of the handing down of this judgment. Authorities Hard Rock Limited and Anor v HRCKY Limited

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