Defendant's application, pursuant to Rule 52 of the Royal Court Civil Rules 2007, to strike out certain paragraphs in the Plaintiffs Cause and Réplique and for the Plaintiff to provide Further and Better Particulars in relation to other paragraphs of the Cause and Réplique pursuant to rule 60 of the RCCR. As an alternative to the application made under Rule 52, the Defendant also applied under Rule 19 of the RCCR for Summary Judgment of the aforesaid paragraphs.

**[2021]GRC059**

**IN THE ROYAL COURT OF GUERNSEY**
**(ORDINARY DIVISION)**

**Between:**

**INTERNATIONAL HEALTHCARE SOLUTIONS LIMITED**

**Plaintiff**

**-AND-**

**UTMOST WORLDWIDE LIMITED**

**Defendant**

**Date of hearing: 7th June 2021**

**Judgment handed down: 30th November 2021**

**Before: Jessica E Roland, Deputy Bailiff**

**Counsel for the Plaintiff: Advocate R D Breckon**
**Counsel for Defendant: Advocate M G A Dunster**

**Cases, texts & legislation referred to:**

The Royal Court Civil Rules, 2007
The Insurance Business (Bailiwick of Guernsey) Law, 2002
The Price Gouging Control (Emergency Circumstances) Law, 2015 of the Cayman Islands
Jefcoate v Spread Trustee Company Limited [2013] GLR 220
Tranquillity Holdings Limited v Invista Real Estate Investment Management (CI) Limited Royal Court 38/2015
Popat v Popat et al [2019] GFC050
Easyair Limited (t/a Openair) v Opal Telecom Limited [2009] EWHC 339 (Ch)
Inn Soo Kim v Youg [2011] EWHC 1781 (QB))
Yam Seng Pte Ltd v International Trade Corp Ltd [2013] EWHC 111 (QB)
Credit Suisse AG v Arabian Aircraft & Equipment Leasing Co [2014] CP Rep 4
Tchenguiz and Others v Grant Thornton LLP and Others [2015] EWHC 405 (Comm)
Wani LLP v The Royal Bank of Scotland plc [2015] EWHC 1181 (Ch)

## Introduction

1. In this matter there are various cross applications dealing with the Plaintiff's pleadings. The first in time is an application by the Defendant dated 20 April 2021 pursuant to rule 52 of the Royal Court Civil Rules 2007 (the "RCCR") to strike out certain paragraphs in the Plaintiff's Cause and Réplique and pursuant to rule 60 of the RCCR for the Plaintiff to provide Further

and Better Particulars in relation to other paragraphs of the Cause and Réplique. The Plaintiff then filed an application dated 14 May 2021 to amend the Cause. On the 21 May 2021 the Defendant filed an amended application to include an application under rule 19 of the RCCR for summary judgment of those paragraphs as an alternative to those it was seeking to strike out under rule 52.

2. The Defendant relied on the first affidavit of Ian McLennan, the Defendant's Head of Legal and Compliance dated 20 April 2021 and after the hearing filed a second brief affidavit from him dated 10 June 2021 in accordance with rule 19. The Plaintiff relied on the affidavit of Randy Skoly one of the directors of the Plaintiff dated 14 May 2021 and a short affidavit of Jana Valkovska dated 2 June 2021. Both parties filed skeleton arguments and augmented these orally at the hearing on the 7 June 2021.

**Background**

3. The Plaintiff is a Cayman Islands company which was incorporated on the 8 August 2008. The purpose of the Company is to manage the marketing of and to provide certain administration services for insurance policies issued by the Defendant in the Cayman Islands, pursuant to an Agency Agreement signed on 1 September 2016 (the "2016 Agreement").

4. The Defendant is licenced by the Guernsey Financial Services Commission to carry on long-term insurance business under the Insurance Business (Bailiwick of Guernsey) Law, 2002 and by the Cayman Islands Monetary Authority ("CIMA") as a class "A" insurer to carry on business in or from the Cayman Islands.

5. The 2016 Agreement is governed by the laws of Guernsey and contains an exclusive jurisdiction clause submitting to the Royal Court of Guernsey. This replaced an earlier version of the agreement between the parties dated 1 September 2008 and thus the parties have worked together for over 10 years.

6. The 2016 Agreement provides that the Plaintiff is the Defendant's agent and sole distributor of insurance policies in the Cayman Islands. The insured's contractual relationship is with the Defendant. The Plaintiff cannot offer services similar to those it provides under the 2016 Agreement to any other party other than the Defendant.

7. The dispute revolves around the decision of the Defendant to exit the Cayman Islands' market in 2020.

**Brief Summary of Pleadings**

8. The central complaint in the Cause which went inscrite on the 31 July 2020 is that the Defendant had not served, or attempted to serve, any notice in accordance with the termination provisions contained in the 2016 Agreement but nevertheless had taken certain action leading to it being known in the relevant market that the Defendant intended to withdraw from the market and terminate the 2016 Agreement.

9. Within the 2016 Agreement at clause 2.4.2 there is a provision that either party can terminate the 2016 Agreement provided that the party withdrawing shall provide the other with at least one year's notice. Clause 18.1 of the 2016 Agreement refers to the 12 months' notice being written notice. However, on the 17 June 2020, the Defendant wrote to CIMA, stating its intention: "*… to stop accepting new business from 1 July 2020 and to stop renewing policies from 1 October 2020* …" The Plaintiff alleges that the Defendant, by that letter, has breached the termination provisions of the 2016 Agreement. The Plaintiff pleads that it is entirely reliant on the Defendant to discharge its contractual duties and the Defendant's failure to give proper notice and the increases in the premiums for the Defendant's products mean that the

Defendant's products are being priced out of the market with consequential impact on the Plaintiff's commission. The Plaintiff further pleads that by setting the price of the products at "*grossly inflated prices*" that this was a breach of the implied term which the Plaintiff argues is present in the 2016 Agreement that "*the parties would conduct themselves in a manner consistent with its terms*".

10. A further complaint in the Cause is that the Defendant failed to give adequate notice for there to be appropriate discussions to determine the proper pricing structures for the insurance year 2020/2021 with effect from 1 June 2020. The Plaintiff further pleads that "*This failure coupled with an unreasonable increase in premiums to take account additional administrative expenses and a CoVid* (sic) *19 pandemic load has resulted in the Defendant's product being priced out of the Cayman market."*

11. Further, it is pleaded that the price increases are in contravention of the Price Gouging Control (Emergency Circumstances) Law, 2015 of the Cayman Islands (the "Price Gouging Law") and that this contravention in turn breaches Clause 10 of the 2016 Agreement which says "*subject to the provisions of clauses 5 and 6 the Insurer shall comply with all legal and regulatory obligations imposed upon it in connection with the maintaining of its Class A insurer domestic insurance business licence in the* [Cayman Islands]".

12. The failures of the Defendant have led to the Plaintiff losing clients; being unable to mitigate its losses by finding an alternative insurance provider; damaged the Plaintiff's reputation; hampered the Plaintiff's ability to re-build its business generally; and further the Defendant failed to have proper regard to the interests of the Plaintiff to which it owes ongoing duties. Loss is pleaded on the basis of lost commission estimated to be USD3760886.11 and other unspecified damages.

13. In its defence dated 27 August 2020, the Defendant pleads that whilst it intended to leave the market at some time in the future, it did not intend to withdraw from the insurance market yet and that as a consequence it was not required to serve notice. The Defendant says in any event it is an express term at clause 2.4.2 of the 2016 Agreement (and reflected in the previous 2008 Agreement) that the Defendant is able to withdraw unilaterally from the insurance market in the Cayman Islands, subject to an obligation to provide 12 months' notice of the same. The Plaintiff also has an ability to terminate the 2016 Agreement with 12 months' notice at any time.

14. The Defendant also pleads that it is an implied term of the 2016 Agreement that the Defendant is entitled to take reasonable steps to exit the insurance market in Cayman which includes discussions with regulators and notifying policy holders and the market to this effect. The 2016 Agreement contains obligations on both parties in relation to applicable laws and regulatory approval in the Cayman Islands as well as their respective responsibilities to one another. In any event it is the issue of the proceedings in this Court that has allowed matters to become public and the Defendant denies that it is in breach of the Price Gouging Law allegation.

15. The Defendant denies that there was an unreasonable increase in premiums; that the prices are uncompetitive or that the Defendant acted improperly. Further it relies on the express term that at Clause 4.2 of the Agreement: "[the Plaintiff] *shall not have underwriting or price-setting authority."* Accordingly, the Defendant maintains that the setting of policy prices is a matter for the Defendant in its sole discretion.

16. It denies any implied terms suggesting a "heightened" duty of care or of the parties conducting themselves in a manner consistent with their contractual duties or that the Plaintiff is entirely reliant on the Defendant to discharge its contractual duties properly. It avers that the commercial difficulties caused to the Plaintiff by the Defendant's withdrawal from the

insurance market were always inevitable if the Defendant exercised its right to withdraw from the market as it was entitled do and is thus not the basis of a claim.

17. In terms of losses no causation is admitted, or admissions made.

18. Also contained within the defence are allegations that the Plaintiff's pleadings are, in various places, defective.

19. On 18 September 2020, the Plaintiff filed a Réplique. In broad terms, the Plaintiff remained steadfast that the pleadings were adequate and that the actions of the Defendant had caused the Plaintiff damage and loss. Further, that any purported notice after the date of the defence cannot make good the damage already caused and the ongoing consequences of the Defendant's conduct.

20. On 15 September 2020 the Defendant served 12 months' notice of the termination of the 2016 Agreement (the "Termination Notice"). The consequences of the service of the Termination Notice were that the Defendant was due to cease (now ceased) underwriting policies with effect from 16 September 2021.

21. In March 2021, the Plaintiff indicated to the Defendant that it was going to apply to amend the Réplique but did not procced with this.

22. On 30 April 2021, the Defendant issued its Application to strike out eight paragraphs of the Cause, namely paragraphs 11, 12, 13, 14, 18, 19, 24 and 25(a), as well as the words "*the failure by the Defendant to provide any proper notice*" within paragraph 22 of the Cause and paragraphs 12, 16, 17 and 31 of the Réplique. Further pursuant to rule 60 of the RCCR, the Defendant seeks Further and Better Particulars of the Cause and Réplique.

23. This was followed by the Plaintiff's application to amend the Cause (which is resisted by the Defendant). It is averred in those draft pleadings that the Termination Notice was served as a direct result of the Plaintiff issuing proceedings and does not serve to rectify the damage already caused nor brought with it any amendments to the Defendant's pricing structures without which the pricing remains grossly inflated Also contained within the draft amended Cause is a pleading that by pricing itself out of the market, by breaching clause 14 of the 2016 Agreement in relation to confidentiality and by its failure to serve notice until it was forced to by the issue of the Cause, the Defendant has breached the implied term that the parties would "*conduct themselves in a matter consistent with the terms*" of the 2016 Agreement and such conduct was "*improper, commercially unacceptable and/or unconscionable and accordingly, constituted bad faith on the part of the Defendant*".

24. Thereafter the application from the Defendant for striking out the paragraphs in the Cause was amended, to include the application for summary judgment on those same paragraphs identified in the strike out application.

25. Advocate Dunster confirmed that despite some exchanges in relation to the Further and Better Particulars, the Defendant was still pursuing the answers to the Further and Better Particulars, having not been satisfied by the responses given thus far by the Plaintiff. Advocate Dunster, in dealing with the applications on behalf of the Defendant did so on the basis of the draft amended Cause as in this case the draft Cause was adding to rather than removing pleadings on the original Cause. I agree that this makes practical sense particularly given the legal tests for amending the pleadings and summary judgment (see *Wani LLP v The Royal Bank of Scotland plc [2015] EWHC 1181 (Ch))*.

**The Law**

26. The legal principles were not in dispute.

27. The application for strike out under Rule 52(2) of the 2007 Rules, which provides that:

> *"The Court may strike out a pleading if it appears to the Court-*
>
> *(a) that the pleading discloses no reasonable grounds for bringing or defending an action,*
>
> *(b) that the pleading is an abuse of the Court's process, or is otherwise likely to obstruct the just disposal of the proceedings, or,*
>
> *(c) that there has been a failure to comply with a rule, practice direction or Court order."*

28. The Bailiff (as he was then) Sir Richard Collas summarised the position in relation to strike outs in *Tranquillity Holdings Limited v Invista Real Estate Investment Management (CI) Limited Royal Court 38/2015* as follows: -

> *"(i) Claims which are suitable for striking out on ground (a) include those which raise an unwinnable case where continuance of the proceedings is without any possible benefit to the respondent and would waste resources on both sides (Harris v Bolt Burdon [2000] L.T.L., February 2, 2000, CA).*
>
> *(ii) The principal test is whether the party's case is "bound to fail", which creates a high threshold before a pleading, or a part thereof, will be struck out.*
>
> *(iii) Simply because a case might be weak is not sufficient to justify striking out.*
>
> *(iv) A statement of case is not suitable for striking out if it raises a serious issue of fact which can only be properly determined by hearing oral evidence (Bridgeman v McAlpine-Brown January 19, 2000, unrep, CA).*
>
> *(v) Where a statement of case is found to be defective, the court should consider whether that defect might be cured by amendment and, if it might be, the court should refrain from striking it out without first giving the party concerned an opportunity to amend (Inn Soo Kim v Youg [2011]EWHC 1781 (QB)).*
>
> *The court may strike out, as an abuse of the court's process, particulars of claim which are so badly drafted that they fail to reveal to the defendant, or to the court, the case the defendant can expect to meet at trial. However, proof of bad drafting is not, by itself, sufficient. The court should not strike out the particulars without first giving the claimant an opportunity to amend (Inn Soo Kim v Youg [2011] EWHC 1781 (QB)).*
>
> *(vi) The purpose of the particulars of claim were explained by Moore-Bick LJ in Credit Suisse AG v Arabian Aircraft & Equipment Leasing Co [2014] CP Rep 4:*
>
> > *"Particulars of claim are intended to define the claim being made. They are a formal document prepared for the purposes of legal proceedings and can be expected to identify with care and precision the case the claimant is putting forward. They must set out the essential allegations of fact on which the claimant relies and which he will seek to prove at trial, but they should also state the nature of the case that is to be made in order to inform the defendant and the court of the basis on which it is said the facts give rise to a right to the remedy being claimed."*

*(vii) it is not appropriate to strike out a claim in an area of developing jurisprudence, since, in such areas, decisions as to novel points of law should be based on actual findings of fact (Farah v British Airways, The Times, January 26, 2000,CA referring to Barrett v Enfield BC [1989] 3 W.L.R. 83, HL)."*

29. Summary judgment is dealt with in Part IV of the Royal Court Civil Rules, 2007. By Rule 19(2)(b):

> *"i The grounds of the application for summary judgment shall be that- ...*
>
> *1 (b) the defendant has no real prospect of successfully defending the claim or issue,*
>
> *ii. and there is no other compelling reason why the claim or issue should be disposed of at a trial."*

30. The principles frequently adopted by this court when considering summary judgment were given by Lewison J (as he then was) in *Easyair Limited (t/a Openair) v Opal Telecom Limited [2009] EWHC 339 (Ch)* (at para. 15) are*:*

> *"i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: Swain v Hillman [2001] 2 All ER 91;*
>
> *ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: ED & F Man Liquid Products v Patel [2003] EWCA Civ 472 at [8];*
>
> *iii) In reaching its conclusion the court must not conduct a "mini-trial": Swain v Hillman;*
>
> *iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: ED & F Man Liquid Products v Patel at [10];*
>
> *v) However, in reaching its conclusions the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: Royal Brompton Hospital NHS Trust v Hammond (No 5) [2001] EWCA Civ 550;*
>
> *vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd [2007] FSR 63;*
>
> *vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the*

*applicant's case is bad in law, the sooner that it is determined the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: ICI Chemicals & Polymers Ltd v TTE Training Ltd [2007] EWCA Civ 725."*

31. There is a degree of overlap between the two bases on which a party can seek to bring proceedings, or part of the proceedings, to an end. However, as the learned Deputy Bailiff (as he was then) set out in *Popat v Popat et al [2019] GFC050* at paragraph 20:

> *"there is a heavy burden on such an applicant because the respondent has to provide comparatively little in respect of his case to avoid the consequences of a Cause being struck out or resulting summary judgment being entered."*

32. The legal principles on amending a pleading are as set out in *Jefcoate v Spread Trustee Company Limited [2013] GLR 220:*

> *"a. The court has a wide discretion under the Royal Court Civil Rules, r.59 to permit amendments where one or more of the parties have not consented.*
>
> *b. The discretion must be exercised judicially having regard to legal principles.*
>
> *c. The overriding objective requires that cases be dealt with justly.*
>
> *d. What justice requires depends on the circumstances of the particular case but includes taking account of the matters particularized in the Royal Court Civil Rules, r.1(2), which will be of special importance when a late amendment is sought.*
>
> *e. In general, amendments should be allowed so that the real dispute between the parties can be adjudicated provided that any injustice to the other party can be compensated for in costs.*
>
> *f. In the ordinary course it will not be just to allow an amendment if it will defeat a defence of prescription that may otherwise be available.*
>
> *g. If a defence of prescription may be defeated, it is necessary to establish whether the proposed amendment seeks to introduce a new cause of action.*
>
> *h. What constitutes a new cause of action is not determined by the label attaching to the proposed claim but by the factual situation which is required to be proved to entitle the plaintiff's claim to succeed. If the new cause of action which is sought to be added or substituted arises out of the same facts or substantially the same facts as a cause of action already pleaded, the court will not normally regard it as a new cause of action and hence will have a discretion to allow it.*
>
> *i. However, even if the new cause of action arises from similar or substantially the same facts as already pleaded, the court will disallow the amendment if the justice of the situation so requires.*
>
> *j. Where a new cause of action may be prescribed, the effective date as to when the limitation period expired is the date of the application, although if the amendment is permitted, the effect is that it is deemed to date back to the date of the original proceedings."*

**Brief Summary of the Submissions**

33. The substantive complaint of the Defendant in support of its applications to strike out or obtain summary judgment is that the paragraphs in the draft amended Cause that deal with the Termination Notice fail to disclose a reasonable cause of action. Advocate Dunster in the hearing went through the relevant paragraphs of the draft amended Cause to illustrate his submissions. The Defendant or the Plaintiff, Advocate Dunster argues were contractually entitled to terminate the 2016 Agreement on one year's notice and the Defendant has done so in accordance with the contract. The effect of the 12 months' notice is that it takes two years for the Defendant to actually leave the market. This is because up until the last day of the notice period, annual insurance policies will still be being written and then in the 12 months following the termination date those policies written during the notice period will run out. The contract is exclusive and therefore the Plaintiff has had the benefit of this exclusivity but also bears the consequences when the contract is lawfully terminated in accordance with the contract. As Mr McLennan says in his first affidavit, the contractual arrangements between the two parties are such that the revenue and viability of the Plaintiff are directly linked "*to the life of the contract*." "*Damages incurred by* [the Plaintiff] *as part of the proper termination of the contract cannot be attributable to* [the Defendant]".

34. There is no allegation that the Defendant has not written the policies during the notice period, therefore, Advocate Dunster submits the pleadings such as in paragraphs 11, 12, 19, 24 and 25 (a) and the reference in paragraph 22 are not sustainable as the Defendant complied with the 12 month notice requirement. The same complaints are made about the relevant paragraphs in the Replique. Advocate Dunster further submitted that the commercial and confidential discussions that preceded the service of the notice are not relevant and/or fail to disclose a reasonable case and should be struck out or summary judgment given. The termination of the contract could not happen in a vacuum given the Defendant's regulatory obligations. His client has given the requisite notice as it was entitled to do. Thus to the extent that any of the paragraphs in the draft amended Cause go to the termination of the 2016 Agreement and the preliminary discussions with the regulators about the prospective termination (see paragraph 18 of the draft amended Cause) (as opposed to pricing of the policies) or the manner in which these discussions are said to have been undertaken, these paragraphs fail to show a reasonable cause of action and leave should not be given for the amendments. This was not a situation, he submitted, where these pleadings can be cured by giving the Plaintiff an opportunity to redraft either the current draft amended Cause or the *Replique* as a claim based on the service of the contractual notice was not one that could succeed. The court should grasp the nettle now as the claim lacked real substance.

35. Further the draft amended Cause contains pleadings which the Plaintiff knows to be incorrect or which are irrelevant given the contractual provisions of the 2016 Agreement and these too should be struck out. At paragraph 13 the Plaintiff refers to placing its "book of business with alternative insurers" when the Plaintiff does not have proprietary rights to a book of business. The insurance policies are the Defendant's policies with the insured. At paragraph 14 of the draft amended Cause reference is made to the Plaintiff informing the Defendant, in terms, that if it didn't have the opportunity to find another insurer prior to it becoming known that the Defendant was leaving the market at any time, the financial consequences would be disastrous for the Plaintiff. Advocate Dunster submits this should be struck out for relevance given the written contract that was between the parties did not contain such a term.

36. The Defendant submits that the purpose behind the outstanding Further Better and Particulars is for the Plaintiff to adequately identify what the duties are that the Defendant owes to the Plaintiff which are said to have been breached in the allegations about pricing given the commercial realities of the arrangement i.e. the Defendant is seeking to establish what the case

is that it needs to answer, which the current pleadings fail to do. What are the facts and matters relied on to support the Plaintiff's case on pricing, the duty or duties the Defendant is alleged to have breached in this regard and how they were in fact breached. The Defendant submits it needs to know what it didn't do or what it ought to have done in relation to each product, what it didn't do but could do or should have done in relation to the price provided by the reinsurer. The Defendant wants to know why the reference to the Bahamian market has been made and its relevance. If there is a claim in relation to this exit what duties the Defendant is alleged to have breached and how they have been breached. Also, the Defendant needs to know the facts relied on to support the allegation that the Defendant has disseminated its intention to depart from the insurance market in Cayman Islands and what duties the Defendant is alleged to have breached and how it is said it has breached them.

37. Despite the responses from the Plaintiff which refer to the draft amended Cause and the need for further disclosure and evidence arising from trial before it can properly quantify its losses, the Defendant submits that the losses are still not adequately quantified. A delayed assessment is not adequate. Further the Defendant is entitled to know what losses flow from the allegation of bad faith and whether they are the same as the alleged breach of commercial integrity. It is also entitled to know what the duty of "commercial integrity" is said to be or what an allegation of bad faith in the absence of dishonesty adds to the claim and what losses are claimed or said to flow from these allegations.

38. With regard to the allegation on price gouging, the Defendant submits that it is not enough for the Plaintiff to respond that it is a matter for expert evidence. The particulars requested are needed for the Defendant to answer the case against it namely how this law applies to these circumstances and how the Defendant is alleged to have breached this law. The draft amended Cause also fails to deal with how the allegations against the Defendant in relation to the Price Gouging Law marry with the obligations of the Plaintiff under the 2016 Agreement.

39. The Plaintiff's response to the applications to strike out and/or summary judgment, is that following the service of the Termination Notice and discovery, the Plaintiff's case had necessarily changed. The Plaintiff was specifically structured to act as an agent for the Defendant and the actions of the Defendant were catastrophic for the Plaintiff. The Plaintiff by the amendments it is seeking, is not suggesting that the Termination Notice is ineffective but rather as is set out in Mr Skoly's affidavit the actions of the Defendant in the lead up to the termination of the 2016 Agreement including the pricing of the policies and breaches of confidentiality has led to the losses suffered by it. This meant the service of the notice in accordance with the terms of the 2016 Agreement was in the face of irreparable damage which had already been caused by the Defendant's actions. The references to the service of the notice provided the factual context that was essential to understand the nature of the claims and therefore should not be struck out nor should summary judgment be given. The same principles he argued should be applied to the paragraphs in the Replique that the Defendant was seeking to strike out/obtain summary judgment. Nothing that the Defendant had said led to the knock-out blow required by the principles on summary judgment or strike out.

40. Advocate Breckon relied on the principles found in the case of Yam Seng Pte Ltd v International Trade Corp Ltd [2013] EWHC 111 (QB) that there is an implied term of good faith even where there is no dishonesty. He acknowledged that this was not yet a principle confirmed to be part of Guernsey law and he acknowledged there is still work to be done in relation to understanding the disclosure and also what confidential information was disseminated by the Defendant. Nevertheless, the draft pleadings satisfied the legal principles set out in *Jefcoate v Spread Trustee Company Limited* that the amendments should be permitted. The Plaintiff has dealt with the changing factual matrix by seeking to amend the pleadings to reflect this and has surmounted what was a low bar required to show that there was a reasonable cause of action disclosed by the pleadings. However, if the court did consider that the current pleadings in relation to the termination of the contract disclosed no reasonable cause of action, the court

should consider whether the defect might be cured by amendment and should exercise its discretion by refraining from striking out or not allowing the amendment and give the Plaintiff an opportunity to make such an amendment.

41. Advocate Breckon submitted that in relation to the Further and Better Particulars that although his primary submission was that adequate answers had been provided and although he maintained there were still outstanding issues of disclosure which impacted on the response, further responses could be provided to the outstanding queries. In relation to the losses alleged to have been suffered by the Plaintiff he accepted that given the passage of time a greater degree of particularity on the losses suffered should be ascertainable and steps would be taken to respond to the outstanding requests on the quantum of the alleged loss.

**Discussion**

42. The overriding objective of deciding cases justly and at proportionate cost means my focus must be on whether I consider whether the Plaintiff has a "realistic" as opposed to a "fanciful" prospect of success. Summary judgment or strike out are strong measures in that either route prevents a cause of action coming to trial. It is therefore always open to a judge to consider whether, even if the case as pleaded has no reasonable prospect of success, a suitable amendment to the pleading would enable the matter to be rescued.

43. As Advocate Dunster submits, on the evidence the 2016 Agreement contains a right to terminate on one year's written notice. I agree that if the claim was limited to the consequences of the service of the notice that the Plaintiff would have an uphill task in showing that there was a real prospect of success on this claim. However as Advocate Dunster accepted during the course of the hearing if the effect of the draft amended Cause is the claim that the Plaintiff seeks leave to pursue is now one essentially that because the Defendant's actions between March 2020 (when the reinsurer informed the Defendant that it wished to withdraw from the Cayman Islands market) and 16 September 2020 when the Termination Notice was served including the notification to CIMA, have caused the Plaintiff loss, this goes beyond an allegation based on a breach of the notice provisions. I agree with the Plaintiff that the paragraphs regarding the notice, paragraphs 11, 12, 18, 19, 24 and 25 (a) and the reference in paragraph 22 in the draft amended Cause provide the factual matrix within which the remaining claims sit. Therefore, I will not order that these paragraphs are stuck out, but this must be read in the context of my comments below on the need for the pleadings to be amended.

44. Paragraph 13 of the cause, the Defendant says should be struck out because it is inaccurate. It was accepted in the course of the hearing by the Plaintiff that the reference of a "book of business" is not an accurate reference to the facts rather this should be reference to the clients who have come to the Plaintiff to obtain their insurance whom the Plaintiff unsurprisingly view as their customers despite the contractual relationship being with the Defendant. If this was the only amendment, I would not order it to be amended (and I suspect the Defendant would not have sought it to be struck out). However, in the context of the rest of the amendments that will need to be made, I will order that this should be amended to reflect the accurate facts. I will not order that paragraph 14 should be struck out, however if the Plaintiff wishes to rely on this part of the pleading as anything other than background information, the basis upon which this created any additional obligation upon the Defendant must be pleaded properly.

45. This naturally leads on to the application by the Plaintiff to amend its Cause. Whilst much of the draft amended Cause is in effect an updating of the Cause to take into account the service of the Termination Notice, the Plaintiff has also used the amendment to bolster its remaining claims against the Defendant. The draft amended Cause contains a reference to an alleged breach of the confidentiality at clause 14 of the 2016 Agreement. However, it is not yet pleaded how this breach has allegedly caused the Plaintiff loss. There is a vague reference at paragraph 26 (which I presume the Plaintiff would wish to be a catch all for all the alleged

breaches) that "*as a consequence of the Defendant's breaches of the 2016 Agreement the Plaintiff viability to continue in the business in which they have engaged is currently being assessed. Once a prognosis of the Plaintiff's business is known, further details of its projected losses will be provided"*. There are also references in the draft amended Cause claiming that the actions of the Defendant amount to "*bad faith*" but not on the basis of dishonesty. However, this addition is not sufficiently pleaded to show how it is said to have caused the Plaintiff loss (particularly in circumstances where in submissions counsel for the Plaintiff referred to "bad faith" as a misnomer). Further, the draft includes the addition of a breach of "*commercial integrity*". This appears to be linked to the "*bad faith*" allegation and taking the Plaintiff's case at its highest and taking into account the submissions of Advocate Breckon I am sufficiently satisfied that the Plaintiff's case on "*bad faith"* goes to an alleged breach of an implied duty of good faith but again it is not adequately pleaded. Given the uncertainty about the implied term of good faith in Guernsey law the correct course is to allow this to be tested with argument at trial however the current pleadings nor the draft amended Cause do not yet focus with sufficient care and precision on the case the Plaintiff is putting forward.

46. The Defendant was not seeking to strike out or seek summary judgment on the claims in relation to pricing claims but rather was seeking responses to those of the requests for Further and Better Particulars which were thus far inadequate. I agree that that the pleadings as they stand even taking into account the draft amended Cause are not adequately particularised in relation to these claims. For example, the Plaintiff must particularise if it is referring to all policies or products or groups of policies or products or even individual ones, and if not all policies, which ones, and to what degree and how it is alleged that the Defendant is in breach in each case. If what may or may not have occurred in the Bahamas is relevant that this needs to be properly pleaded. Broad brush statements are not enough. In those areas which are the subject of the outstanding Further and Better Particulars, the Plaintiff has failed to nail its colours to the mast in terms of what duties that the Defendant is alleged to have breached, what it is that the Defendant failed to do that it should have done, and/or what the Defendant did that it should not have done, what would have happened but for those acts or omissions, and the loss that eventuated. In the allegation relating to price gouging, the Plaintiff in effect is alleging that the Defendant was trying to take unfair advantage of consumers during an emergency or disaster by greatly increasing prices for the policies however the Price Gouging Law appears to require a clearly defined set of circumstances and is specific in its application. This is a very serious allegation and not one to be made lightly. The failure by the Plaintiff to set out how it says the Defendant contravened the Law is not one that can be left to expert evidence. The Plaintiff must have sufficient basic understanding of the Price Gouging Law to make the allegation and for it to be properly pleaded or it should not be pursued.

47. On quantum, it is not enough for the Plaintiff to argue something will turn up. The Plaintiff needs to properly plead the losses particularly given the passage of time. Proper pleading of the material facts is essential for the orderly progress of the case and for its sound determination. The scope of the trial and the case that the Defendant needs to meet must be clear. The Defendant is right to refer to the need to particularise the quantum, the particularisation is not sufficient for a claim purported to be worth millions of dollars. Parties to litigation are entitled to know where they stand and what the issues are. It will inform not only the conduct of the litigation but the effort and investment that the case requires.

48. Although referring to statements of case, Legatt J in *Tchenguiz and Others v Grant Thornton LLP and Others [2015] EWHC 405 (Comm)* sets out guidance that is still apposite in this jurisdiction for a Guernsey Cause:

> "…….. *They must plead only material facts, meaning those necessary for the purpose of formulating a cause of action or defence, and not background facts or evidence. Still*

*less should they contain arguments, reasons or rhetoric. These basic rules were developed long ago and have stood the test of time because they serve the vital purpose of identifying the matters which each party will need to prove by evidence at trial*."

49. This is also echoed in the excerpt from *Credit Suisse AG v Arabian Aircraft & Equipment Leasing Co [2014] CP Rep 4* referred to in *Tranquillity Holdings Limited v Invista Real Estate Investment Management (CI) Limited ibid* where Moore-Bick LJ goes onto say that the pleadings must also:

> " *state the nature of the case that is to be made in order to inform the defendant and the court of the basis on which it is said the facts give rise to a right to the remedy being claimed."*

50. Stepping back from the pleadings and taking into account the amendments that need to be made, I am not convinced that providing answers to the requests for Further and Better Particulars is adequate nor will it assist the parties or the court if at trial the court and the parties have to dart backwards and forwards, and from one pleading to another including the responses to the Further and Better Particulars to see what the claim is. In order to obtain a coherent set of pleadings rather than require the Plaintiff to answer the outstanding requests, I am going to order that the Plaintiff amends the Cause taking into account the answers to the outstanding requests.

51. The draft Replique for these purposes should be ignored as there is no application before the Court to amend the Replique unlike the Cause. The paragraphs of the Replique which the Defendant seeks to strike out are not in my view proper pleadings in any event. They are much more of the nature of submissions (indeed the same could be said of a number of the paragraphs of this pleading although I will not strike them out under the Court's inherent power to do so). However reminding myself of the principles of *Inn Soo Kim v Youg [2011]EWHC 1781 (QB))* set out in *Tranquillity Holdings Limited v Invista Real Estate Investment Management (CI) Limited ibid* and in the light of decisions in relation to the draft amended cause I will give the Plaintiff an opportunity to amend paragraphs 12, 16, 17 and 31 of the Replique.

**Conclusion**

52. For the reasons I have given, the Defendant's Application to strike out or obtain summary judgment on the relevant paragraphs of the draft amended Cause and Replique is dismissed but on condition that where I have said that the paragraphs need amending that this is successfully undertaken by the Plaintiff. Although my decision is that all the requests for Further and Better Particulars are valid, rather than order responses to the Further and Better Particulars, I require the Cause to be amended to take into account the responses which should be part of a properly articulated cause. I am not granting the application to amend the Cause because of the work I have identified that is required of the Plaintiff to provide coherent pleadings, properly identifying and articulating the claims it wishes to advance against the Defendant. The case for the Plaintiff needs to be as focused as it possibly can be so as to concentrate everyone's minds on what is being alleged and the consequences that flow therefrom. If the amendments cannot be dealt with by agreement including the costs implications which in principle should be the usual arrangement of the Plaintiff paying the Defendant's costs occasioned by such amendments, then leave will need to be sought in the usual way. In relation to the costs of the strike out/summary judgment and the Further and Better Particulars application neither party has been 100% successful so there is scope for the parties to agree how the outcome is reflected particularly taking into account the costs in relation to the amendments. If there is no agreement as to costs then the case can be listed before a suitable Interlocutory Court.

53. Due to the commendably pragmatic way that both counsel dealt with the issues during the hearing, in a further effort to resolve matters, the Plaintiff provided further answers to the Further and Better Particulars directly to the court. In the first instance these should be provided to the Defendant rather than the court, but in any event given my judgment above it was not necessary for me to consider these.