

Application for leave to amend pleadings pursuant to rule 59 of the Royal Court Civil Rules, 2007. Cross-application to strike out the Plaintiff's pleadings (or such paragraphs of the Cause and Replique be struck out as the Court considers appropriate) or for the Court gives summary judgment in the Defendant's favour in respect of the Plaintiff's claims (or such heads of claims the Court considers appropriate).

[2023]GRC051

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

Between:

INTERNATIONAL HEALTHCARE SOLUTIONS LIMITED

Plaintiff

-AND-

UTMOST WORLDWIDE LIMITED

Defendant

Final Judgment handed down: 29 September 2023

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

Woodbourne Trustees Ltd v Generali Worldwide Ins. Co. Ltd [2009-10 GLR 131]

Jefcoate v Spread Trustee Company Limited [2013] GLR 220

Invescap Holdings Ltd v Douglass 36/2014

Musa Holdings Limited v Newmarket Holdings (Guernsey) Limited [2014 GLR 41]

Tranquillity Holdings Limited v Invista Real Estate Investment Management (CI) Limited Royal Court 38/2015

Popat v Popat et al 6/2017

Coco v AN Clark (Engineers) Ltd [1969] RPC 41

Williams v Basa Surveying Ltd v Chapman [1998] 26 GLJ 41 (RC)

Cranway Limited v Playtech [2008] EWHC 550 (Pat)

Easyair Limited (t/a Openair) v Opal Telecom Limited [2009] EWHC 339 (Ch)

In Soo Kim v Youg [2011] EWHC 1781 (QB)

Yam Seng Pte Ltd v International Trade Corp Ltd [2013] EWHC 111 (QB)
Hamsard 3147 t/a Mini Mode Childrenswear and Anor v Boots UK Ltd [2013] EWHC 3251
British Telecommunications plc v Telefonica O2 Ltd and others [2014] UKSC 42
Marks & Spencer Plc v BNP Paribas Securities Trust (Jersey) Limited [2015] UKSC 72
MSC Mediterranean Shipping Company S.A. v Cottonex Anstalt [2016] EWCA 789
Monde Petroleum SA v Westernzagros Ltd [2016] EWHC 1472 (KNN)
Astor Management AG v Atalaya Mining plc [2017] EWHC 425 (Comm)
UTB LLC v Sheffield United Ltd [2019] EWHC 2322 (Ch)
Elite Property Holdings Ltd v Barclays Bank Plc [2019] EWCA Civ 204

Introduction

1. The Plaintiff has applied in an application dated 18 November 2022 for leave to amend its pleadings pursuant to rule 59 of the Royal Court Civil Rules, 2007 (“RCCR”). On the 18 October 2022, I handed down my judgment on a previous application by the Plaintiff to amend pleadings (the “October 2022 Judgment”) which was preceded by various cross applications dealing with the Plaintiff’s pleadings (the “November 2021 Judgment”). The conclusion of the October 2022 Judgment was that the Plaintiff had been almost entirely unsuccessful in amending its Cause, but that it should be given a further opportunity to amend its pleading. The Defendant has cross-applied to strike out the Plaintiff’s pleadings (or such paragraphs of the Cause and Replique be struck out as the Court considers appropriate) or for the Court gives summary judgment in the Defendant’s favour in respect of the Plaintiff’s claims (or such heads of claims the Court considers appropriate) in an application dated 2 December 2022.
2. The Plaintiff relies, as it did in the previous rounds of applications, on the affidavit of Mr Randy Skoly (“Mr Skoly”) one of the directors of the Plaintiff, dated 14 May 2021 and in addition the affidavits of Samantha Harris dated 9 January 2023 and 20 January 2023. The Defendant relied on the third affidavit of Ian Charles McLennan 9 January 2023. Both parties filed skeleton arguments and augmented these orally at the hearing on the 25 January 2023.

Background

3. The Plaintiff is a Cayman Islands’ company which was incorporated on 8 August 2008. The purpose of the Plaintiff 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.
6. The 2016 Agreement provided that the Plaintiff was the Defendant’s agent and sole distributor of insurance policies in the Cayman Islands. The insured’s contractual relationship was with the Defendant. The Plaintiff could not offer services similar to those it provided under the 2016 Agreement to any other party other than the Defendant. Reinsurance was provided by Generali Global Health (“GGH”).

7. The dispute revolves around the decision of the Defendant to exit the Cayman Islands' market in 2020. The underlying facts are set out in more detail in the November 2021 Judgment.

The Law

8. The legal principles were not in dispute.
9. Rule 59 of the RCCR provides: “No party to an action may amend his pleadings except with the consent of all other parties or by leave of the Court.”
10. 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 (sic) 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.
- (k) When considering the limitation period, it is necessary to have regard to any period of time during which the plaintiff was empêché d'agir.
- (l) An amendment will not be allowed if the case introduced by it has no realistic prospect of success.
- (m) Apart from considerations of prescription, the mere fact that the change effected by a proposed amendment would involve introducing a new cause of action or that it would substantially alter the character of the proceedings or the burden of conducting them is not a reason for refusing leave to amend provided that the change can be made without inflicting injustice on the other parties of a kind incapable of being compensated by an order for costs.”

11. The Defendant's application for strike out under rule 52(2) of the RCCR 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."*

12. 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 (In 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 (In 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).”*

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

(a) *the Plaintiff has no real prospect of succeeding on the claim or issue ...,*

and there is no other compelling reason why the claim or issue should be disposed of at a trial.”

14. 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):

- “(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.”

Brief Summary of the Submissions

15. The Plaintiff’s position is that it has complied with the pleading deficiencies identified in both previous judgments. Further, having made the amendments it has demonstrated that it has a realistic prospect of success on the claims.

16. The Plaintiff also says that consideration should be given to the nature of the amendments and where the only effect is to insert further particulars, rather than add a new cause of action, the issue is whether the amendment can be allowed without prejudice to the Defendant, see Williams v Basa Surveying Ltd v Chapman [1998] 26 GLJ 41 (RC).

17. The Plaintiff acknowledges that notice terminating the agreement was served on 15 September 2020, however the Plaintiff says that the Defendant should have served notice on or around 9 March 2020. This is the date that the Defendant received an email conveying the decision by GGH to stop supporting the reinsurance for the Defendant's health policies in the Cayman Islands, Bahamas and the BVI and the Defendant informed GGH that as a consequence it would not carry on in the market. There appears to have been close collaboration between the Defendant and GGH, which is set out in various PowerPoint documents. By 26 March 2020 the Plaintiff says that the plan of the Defendant to exit the Cayman Islands' market and to terminate the relationship with the Plaintiff had been committed to writing but no notice to terminate the agreement was served. Further, by April 2020 the Plaintiff had been informed by the Defendant of the price for the policies and the Plaintiff through its officers had expressed a firm opinion these prices would cause non-renewal of policies. The Plaintiff had informed the Defendant that for various reasons (for which it blamed the Defendant) by July 1 2020, the exit of the Defendant from the market would be known. This had been greeted internally by the Defendant as possibly the best outcome for it. The inference that the Plaintiff says that should be drawn from the documents is that, initially, there was no interest in the book of business being sold by the Defendant and that it was being prepared for being wound down. Further, that the Defendant had not taken into account the contractual notice period in the 2016 Agreement.
18. With regard to pricing, the Plaintiff says that the fact that the Defendant says that it was merely passing on the prices provided to it by the reinsurer is not relevant to the Plaintiff's claim against the Defendant for breach of the 2016 Agreement. The Defendant's failings on the pricing cannot be thwarted by the terms of its contract with GGH. The Plaintiff says if the Defendant could rely on its contractual terms and lack of discretion over pricing from its contract with GGH, this would create a position where the Plaintiff would have a contract without recourse. The Plaintiff says this would mean a Defendant could rely on its obligations to a third party to stop it honouring its contract with a party in the Plaintiff's position. The documentation shows that there was a new pricing policy and that there is no doubt on the evidence that something dramatic happened to the policies which has caused the Plaintiff loss. Nevertheless, the Plaintiff does accept that it has no price setting authority under the 2016 Agreement.
19. The Plaintiff says that the Defendant owed it a duty of good faith to act in accordance with the terms of the 2016 Agreement in setting the prices. Advocate Breckon referred to a number of paragraphs from *Yam Seng Pte Ltd v International Trade Corp Ltd* to support his submission that this duty should be implied in the 2016 Agreement. In particular starting at paragraph 142:

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.

143. The Agreement in this case was a distributorship agreement which required the parties to communicate effectively and cooperate with each other in its performance. In particular, ITC needed to plan production and take account of the expected future demand from Yam Seng for Manchester United products. For its part Yam Seng, which was incurring expense in marketing the products and was trying to obtain orders, was arguably entitled to expect that it would be kept informed of ITC's best estimates of when products would be available to sell and would be told of any material change in this information without having to ask.

20. In this case, the nature of the nearly two decade long relationship between the Plaintiff and the Defendant, was that the Plaintiff was totally reliant on the Defendant to ensure competitive policy prices in the Cayman Islands' market creating the “*expectations of loyalty*” which are mentioned in *Yam Seng Pte Ltd v International Trade Corp Ltd* (ibid). These expectations of loyalty are heightened by the expenses the Plaintiff was obliged to incur under clause 7.5 of the 2016 Agreement, where the Plaintiff was required to put into place IT infrastructure and under clause 7.1, which required it to provide office accommodation, other facilities, equipment and personnel to perform its obligations as an agent and upon which it was totally reliant on the Defendant to perform its contractual obligations to fulfil. The Plaintiff says the 2016 Agreement is a paradigm example of where the principle of a duty of good faith fits, unlike the examples in the authorities relied on by the Defendant. Further, in considering this duty and whether it exists in the 2016 Agreement, the Court should have in mind the six principles which Justice Leggatt sets out at paragraphs 147-152 of the judgment in *Yam Seng Pte Ltd v International Trade Corp Ltd* (ibid):

“147. First, because the content of the duty is heavily dependent on context and is established through a process of construction of the contract, its recognition is entirely consistent with the case by case approach favoured by the common law. There is therefore no need for common lawyers to abandon their characteristic methods and adopt those of civil law systems in order to accommodate the principle.

148. Second, as the basis of the duty of good faith is the presumed intention of the parties and meaning of their contract, its recognition is not an illegitimate restriction on the freedom of the parties to pursue their own interests. The essence of contracting is that the parties bind themselves in order to co-operate to their mutual benefit. The obligations which they undertake include those which are implicit in their agreement as well as those which they have made explicit.

149. Third, a further consequence of the fact that the duty is based on the parties' presumed intention is that it is open to the parties to modify the scope of the duty by the express terms of their contract and, in principle at least, to exclude it altogether. I say “in principle at least” because in practice it is hardly conceivable that contracting parties would attempt expressly to exclude the core requirement to act honestly.

150. Fourth, I see no objection, and some advantage, in describing the duty as one of good faith “and fair dealing”. I see no objection, as the duty does not involve the court in imposing its view of what is substantively fair on the parties. What constitutes fair dealing is defined by the contract and by those standards of conduct to which, objectively, the parties must reasonably have assumed compliance without the need to state them. The advantage of including reference to fair dealing is that it draws attention to the fact that the standard is objective and distinguishes the relevant concept of good faith from other senses in which the expression “good faith” is used.

151. Fifth, in so far as English law may be less willing than some other legal systems to interpret the duty of good faith as requiring openness of the kind described by Bingham LJ in the Interfoto case as “playing fair” “coming clean” or “putting one's cards face upwards on the table”, this should be seen as a difference of opinion, which may reflect different cultural norms, about what constitutes good faith and fair dealing in some contractual contexts rather than a refusal to recognise that good faith and fair dealing are required.

152. Sixth, the fear that recognising a duty of good faith would generate excessive uncertainty is unjustified. There is nothing unduly vague or unworkable about the concept. Its application involves no more uncertainty than is inherent in the process of contractual interpretation.”

21. Advocate Breckon also points to the final sentence of paragraph 144 where Justice Leggatt says:

“The court is concerned not with the subjective intentions of the parties but with their presumed intention, which is ascertained by attributing to them the purposes and values which reasonable people in their situation would have had.”

22. Counsel for the Plaintiff accepted that it may be the case that even if the Plaintiff is successful in showing that there is such an implied term and that it has been breached, it may not increase the damages which on the draft Amended Cause is currently pleaded at paragraph 26A as “damages for breach of good faith by the Defendant to be calculated with expert evidence” and at paragraph 26B as “The level of damages for breach of good faith is a matter for the Court.” On behalf of the Plaintiff he says that this is an area of developing jurisprudence and, therefore, until the Plaintiff has been successful on liability, it is unable to quantify additional losses and this could be an expensive exercise to undertake before the principle has been established.
23. The confidentiality clause at clause 14 of the 2016 Agreement is drafted in broad terms. The draft Amended Cause deals with this at paragraph 7D and 13G. The evidence is that amongst other examples the Defendant provided third parties with confidential information including the 2016 Agreement itself and the commission rate between the Plaintiff and the Defendant. The pleading now sets out that the breaches of confidentiality undermined the Extended Notice Period, as defined in the draft Amended Cause. Further, emails in relation to the Bahamas show that the very notion of the exit from the Cayman Islands was also considered confidential.
24. The conduct of the Defendant in contacting third parties in breach of the confidentiality provisions, increasing prices and effectively trying to demit the matter before the notice terminating the 2016 Agreement was served were all in breach of 2016 Agreement.
25. Overall, the Plaintiff says that it has properly pleaded its claim, including re-ordering the draft Amended Cause to provide a more concise and coherent pleading and has adequately dealt with all the previous criticisms of its pleading in the draft Amended Cause. This is not a case where the Plaintiff has failed to engage but rather following the principle found at sub-paragraph (e) of *Jefcoate v Spread Trustee Company Limited* (*ibid*) set out above that “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”. The Plaintiff says that summary judgment cannot be justified as the Plaintiff has achieved the low hurdle required of it to show a realistic prospect of success, likewise, there are not grounds for the claim to be struck out.
26. The Defendant says the situation with the Plaintiff’s pleadings has become intolerable and invites the Court to bring an end to this litigation in the interests of fairness to the Defendant and the proper administration of justice. This is the third application before the Court by the Plaintiff for leave to amend the pleadings and there have been additional attempts which have not been the subject of a court application. *Invescap Holdings Ltd v Douglass* 36/2014 confirmed that a failure to comply with a pleading rule (such as RCCR r10) is a sufficient breach of a rule to engage the jurisdiction to strike out under RCCR r52(2)(c) (in addition to any grounds it may give to justify striking out under RCCR r52(2)(a) or (b)). The Defendant says that the grounds for strike set out in rules 52(2)(a) and (c) are available to it. In relation to rules 52(c) is on the basis that the Plaintiff has failed to comply with the directions given to it under the previous two judgments.
27. The Plaintiff’s operative pleadings are the original Cause filed on 10 July 2020 and the Réplique filed on 18 September 2020. The original Cause does not contain any claims based on a breach of clause 14 of the 2016 Agreement (confidentiality) or a breach of an implied duty of good faith. If the Court does not give permission to the Plaintiff to amend its Cause to introduce those heads of claim, the Court has no need to further consider strike-out and/or summary judgment. If the Court does not give leave to amend the Cause, the Defendant says that there is nothing left in the Cause which should survive.

28. If the Plaintiff is successful in his arguments on implying a term of good faith, then this will mean that all commercial contracts in this jurisdiction will have this duty imposed upon them. Further, that if there is a breach of an implied duty of good faith, it is still no more than a breach of a term of the contract to which the normal rules of pleading apply and does not entitle the Plaintiff to some form of heightened or additional damages or a free standing head of loss. Nothing in the case law which either party relies on changes this.
29. An implied term cannot undermine an express term¹ and an implied term as to a duty of good faith is no different. The third principle set out at paragraph 149 in Leggatt J's judgment in Yam Seng Pte Ltd v International Trade Corp Ltd states that the duty can be modified by the express term of the contract. In Hamsard 3147 t/a Mini Mode Childrenswear and Anor v Boots UK Ltd [2013] EWHC 3251 at paragraph 86 Norris J said:

"I do not regard the decision in Yam Seng Pte Ltd v International Trade Corporation as authority for the proposition that in commercial contracts it may be taken to be the presumed intention of the parties that there is a general obligation of "good faith". I readily accept that there will generally be an implied term not to do anything to frustrate the purpose of the contract. But I do not accept that there is to be routinely implied some positive obligation upon a contracting party to subordinate its own commercial interests to those of the other contracting party.

Boots was not obliged as a matter of "good faith" to order from Hamsard goods that it did not want (the so called "transitional AW10 stock") simply because if it had done so the nascent joint venture would have been more profitable.

87. Further, if a term is to be implied then I consider that it would only have imposed on the parties a duty to deal with one another on an open and collaborative basis. That is the obligation actually imposed in the 2007 Agreement. There is no obligation to maximise profit. The term plainly cannot be read as subjecting every other contractual obligation to the qualification that the maximum Net Profit must be generated by the relationship.

88. Boots had a contractual right to terminate the relationship on reasonable notice. It was free to exercise that right according to its terms. The right was not subject to a qualification that it could only be exercised in "good faith" and so as to "maximise the Net Profit generated under the Agreement".

.....
90. Boots had a contractual right to set the prices for the products: this was undoubtedly one of the financial and operational terms of the 2007 Agreement by reference to which the implicit contract was operated. The right to set sale prices applied to goods which belonged to Boots and for which it had already paid Hamsard. The right was not subject to a qualification that it could only be exercised in "good faith" and so as to "maximise the Net Profit generated under the Agreement". It was not subject to some unstated obligation to sell the stock for the best price reasonably obtainable. Indeed, according to the very terms of Clause 10.2 of the 2007 Agreement Boots was free to exercise that right notwithstanding the provisions of any other term of the agreement. The implicit contract cannot have been on more onerous terms."

30. The Defendant says that as this authority makes clear, whatever the duty of good faith is, this does not mean it obliges one party to subordinate its own commercial interests to those of the other party. Further, to the extent that such a term is implied, this must be subject to and not contradictory of the express terms and not as the Plaintiff appears to be arguing, a free standing term. The same principles of implied terms would apply to an implied duty of good faith, including whether the contract lacks coherence without the implied term. The Defendant also relies on Monde Petroleum SA v Westernzagros Ltd [2016] EWHC 1472 (KNN) starting at paragraph 249

¹ See Astor Management AG v Atalaya Minin plc [2017] EWHC 425 (Comm) as per Leggatt J

249. "There is no general doctrine of "good faith" in English contract law. A duty of good faith is implied by law as an incident of certain categories of contract (for example, contracts of employment and contracts between partners or others whose relationship is characterised as a fiduciary one). However, in all other categories of contract including the CSA - such a duty will only be implied where the contract would lack commercial or practical coherence without it and where all the other requirements for implication are met....."

Carrying on at paragraph 150:

250. In *Yam Seng*, Leggatt J gave "some joint venture agreements, franchise agreements and long-term distributorship agreements" as examples of contracts which may perhaps "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", and in which the implication of a term requiring the parties to perform their obligations in good faith might therefore sometimes be justified. However, it is clear that the mere fact that a contract is a long-term or relational one is not, of itself, sufficient to justify such an implication. As Beatson LJ recently noted in *Globe Motors, Inc v TRW Lucas Varity Electric Steering Ltd*.

.. an implication of a duty of good faith will only be possible where the language of the contract, viewed against its context, permits it. It is thus not a reflection of a special rule of interpretation for this category of contract....."

31. The Defendant also relies on *UTB LLC v Sheffield United Ltd [2019] EWHC 2322* in particular at paragraph 204:

"Thus, to imply a general obligation to act at all times in good faith towards the counterparty because the contract is a relational contract may fail to have regard to rights and obligations created by the express terms, to which any implied obligation must be tailored if it is not to be excluded as being inconsistent with them."

and at paragraph 206:

"Where detailed, professionally-drawn contracts exist, it is more difficult to imply terms because there is a strong inference that the parties have given careful consideration to all the terms by which they agree to be bound (though the test for implying terms remains the same)."

32. These authorities are all consistent with the cases on implied terms in this jurisdiction such as *Woodbourne Trustees Ltd v Generali Worldwide Ins. Co. Ltd [2009-10 GLR 131]* and *Musa Holdings Limited v Newmarket Holdings (Guernsey) Limited. (C.A.), [2014 GLR 41]*.

33. This contract does not require a term of good faith to make it work. The Defendant argues that the Plaintiff is attempting to force an implied term into a contract that is not necessary. The nature of the business deal that the Plaintiff entered into was being a sole insurance agent for the Defendant and one which could be terminated on notice. This was not any form of partnership, as this was expressly excluded at clause 28.3 of the 2016 Agreement, but an arm's length commercial agreement between two parties. The Defendant accepts there will come a time when the Court may need to consider whether a duty of good faith can be implied into a Guernsey law contract and, if so, the limits and role of such a duty however, this is not the case for that judicial analysis.

34. The Defendant says that the Plaintiff has failed to establish a causative link between a breach of confidentiality and the loss alleged. Before the notice terminating the agreement was formally given in September, there were internal considerations about what to do and discussions first with GGH and then with the Plaintiff. It is commercially unremarkable that this should happen prior to

the formal notice being served but ultimately 12 months' notice was given and accepted. The Plaintiff has not improved its pleading. If the Plaintiff's argument is focused on what the Defendant did between March when it is said the decision was made that the Defendant was leaving the market and September when the notice was formally served, the Plaintiff has still failed to plead legally coherent complaints. Likewise, with regard to pricing despite paragraph 46 of the November 2021 Judgment and paragraph 41 of the October 2022 Judgment, the Plaintiff has still failed to identify a duty in circumstances where the GGH controlled the price and where there are specific clauses 2.4.1 and 4.2 which make clear that pricing rests with the Defendant for its product. The Plaintiff chose to enter a contract on those terms and cannot now argue that there is some sort of obligation or implied duty on the Defendant to control how GGH sets its prices or that the GGH was obliged by an implied duty of good faith to control its prices. The Defendant also complains that despite the terms of the previous judgments there are still references to price gouging, which should be removed or properly particularised the pricing increases, although they are said to be unconscionable.

35. Paragraphs 15K – 22 of the Amended Cause refers to demitting the Cayman Island Health Insurance Market. The Defendant complains that elements of these paragraphs are repetitive of previous paragraphs. Further, paragraph 15P appears to be either an additional duty of “*not prejudicing the Plaintiff's business*” or alternatively this may be part of the alleged duty of good faith which the Plaintiff has attempted to plead. However, the Defendant says that on the wording of this paragraph as pleaded, the term is only engaged if the Defendant did not serve a valid Termination Notice in accordance with the requirements of the 2016 Agreement, which it did. At paragraph 20A, the Plaintiff refers to the purported agreement not to communicate the Defendant's intention to leave the Cayman Islands' market which was breached when the Defendant communicated its intention to leave the Bahamas market. The Defendant relies on the paragraphs of the previous judgments which set out what the Plaintiff needed to do to plead reliance on this purported agreement which the Defendant says has been ignored by the Plaintiff. The Defendant invites the Court to conclude that no reasonable cause of action exists and to refuse leave for the amendments. To the extent that the original pleadings from July 2020 remain, the Plaintiff's continued failure to plead this head of claim properly now warrants summary judgment or the sanction of strike-out. Likewise, paragraphs 22A-22C with regard to exclusivity, the Defendant says the Plaintiff has again failed to take into account the comments from the October 2022 Judgment. The draft Amended Cause still has fundamental flaws in relation to this element of the claim which it has not yet surmounted namely it fails to provide a basis for the express terms of the 2016 Agreement should be ignored or rewritten; that the terms of the correspondence which were not in any event a refusal; and that the Plaintiff was subject to regulatory limitations as a result of which it was unable to offer services other than to the Defendant.
36. With regard to paragraph 22D (e) and (f) the Defendant says that the Plaintiff has again ignored the October 2022 Judgment in relation to the alleged claims and still fails to advance properly what the Plaintiff's case is such that leave should not be granted to amend the pleading.

Discussion

37. It is the Plaintiff's obligation to put the case forward in a manner which is coherent so that there is clarity about each allegation. The Plaintiff must adequately identify the claims being pursued in a way which can be reasonably understood or responded to by the Defendant so that it knows what the case is that is being brought against it. It is necessary that the other party understands the case which is being brought against it so that it may plead to it in response, disclose those of its documents which are relevant to that case and prepare witness statements which support its defence and consider the value of the claim so it knows how to deal with it in terms of considerations of settlement and resources. If the case which is brought against it is vague or incoherent it will not, or may not, be able to do any of those things. Time and costs will, or may, be wasted if the Defendant seeks to respond to a vague and incoherent case. It is also necessary for the Court to understand the case which is brought so that it may fairly and expeditiously decide the case and in

a manner which saves unnecessary expense. It cannot be ignored that this is the third judgment I have made on the Plaintiff's Cause in relation to this matter and have made similar points.

38. A necessary condition for any amendment is that the claim, as amended, should have a real prospect of success, which is in effect the same test as applies on a summary judgment application. There is no point in giving permission for an amendment which is fanciful and which has no real prospect of success. As Deputy Bailiff McMahon, as he was then, said in *Popat v Popat et al* 6/2017 at paragraph 14, it would be: "...contrary to the overriding objective to give leave to amend a Cause only for it to be subjected to a successful application for summary judgment to remove that element again." In this regard, the principal focus must be on the pleading in question and no attempt should be made to resolve disputed matters of evidence (i.e. conducting a mini-trial). It is, however, appropriate to consider whether a proposed pleading is coherent and contains properly particularised elements of the cause of action relied upon (*Elite Property Holdings Ltd v Barclays Bank Plc* [2019] EWCA Civ 204 at [42]).
39. Even if an amendment clears that initial hurdle and has a real prospect of success, whether to allow the amendment remains a matter of discretion.
40. The Defendant has argued that the pleadings should be struck out for non-compliance with the order made as a consequence of my October 2022 Judgment, therefore the question I must ask myself is did the Plaintiff comply with the order to file an application to leave to amend its Cause. It seems to me that this is a binary question. Either it did or not. What the order required the Plaintiff to do was to serve a draft Amended Cause within the specified deadline. That is what it did. It cannot be, and was not, suggested that the document which the Plaintiff served was not a draft Amended Cause. Accordingly, it has complied with the order.
41. However, as an overarching point there is still a lack of coherence about the draft Amended Cause as well as unnecessary repetition and a lack of precision about the allegations that are made. The headings which are no doubt designed to be helpful are, in fact, a hindrance and appear to group together elements of different claims rather than setting out clearly the elements of each cause of action that the Plaintiff is pursuing.
42. Nevertheless, the pleadings identify a number of ways which Plaintiff says that the Defendant has breached the 2016 Agreement:
 - a. At paragraphs 13G-15A the Defendant is said to be in breach of clause 14 of the 2016 Agreement, which is the term dealing with confidentiality.
 - b. At paragraphs 15B to 15J the Defendant is said to be in breach of contract in relation to pricing under the heading "*The Defendant prices its products to discourage any renewals or new business*". This is said to be on the basis of a breach of an implied term of good faith rather than an express term with regard to pricing which is linked in turn to the efficacy of the 12 months' notice period (which the Plaintiff refers to throughout as the "Extended Notice Period").
 - c. The further breaches of the 2016 Agreement are identified at paragraphs 15K-22, which is headed "*Demitting the Cayman Islands Health Insurances Market*". These are founded on the basis that by not serving notice on or around 9 March 2020, the subsequent actions taken by the Defendant were in breach of the notice period contained in the 2016 Agreement (15K), contrary to express terms (15L) and in breach of implied terms (15L). Further, that the Defendant breached clause 14 of the 2016 Agreement (15N (b)), breached its duty to not prejudice the Plaintiff's business by taking any action, which without the service of the termination notice, in accordance with the terms of the 2016 Agreement, would prejudice the Plaintiff's commercial position (15P).

- d. The Plaintiff (at paragraph 20A) pleads that the Defendant breached an agreement that it would communicate the decision of the Defendant to leave the Cayman Islands' market by announcing that the Defendant was leaving the Bahamas market, which damaged the Plaintiff's business in the Cayman Islands and undermined the efficacy of the 12 months' notice period in the 2016 Agreement. In addition, there references to damaging the standing and reputation of the Plaintiff by delaying the service of the notice of termination, undermining the design and effect of the 12 months' notice period and acting to the detriment of the Plaintiff.
 - e. Paragraph 22A is headed "Exclusivity" and refers to the exclusive appointment of the Plaintiff as agent for the Defendant in the Cayman Islands and at 22B refers to the limitation imposed by CIMA that the Plaintiff cannot offer services similar to those it provides under the 2016 Agreement to a party other than the Defendant. At paragraph 22D (d), the Plaintiff pleads that it is a breach of the alleged implied duty of good faith that the Defendant did not waive its exclusivity clause.
 - f. Paragraph 22D also pleads five incidents that the Plaintiff says that the Defendant breached the alleged implied duty of good faith. This sets out once more breaches of the alleged term on the basis of discussions with different insurers, advancing the Defendant's own commercial interests such that the 12 months' notice period was frustrated, raising prices of the products, the announcement about the Bahamas exit, and stating to CIMA that the prices did not include a COVID element, whilst internally acknowledging a risk adjustment in the prices due to COVID.
43. The losses are then pleaded at \$770269.16 plus an additional, as yet unspecified amount for a breach of the alleged duty good faith.
44. In my November 2021 Judgment I said that "*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.*" In my October 2022 Judgment, I made clear that the Plaintiff had still not achieved this and what needed to be done. As I have identified above in the draft Amended Cause the Plaintiff now relies in various ways on this implied term for the substantive part of its claim against the Defendant.
45. In addition to an implied term of good faith, the draft Amended Cause also refers to various ways the Defendant is said to have undermined "*efficacy*" of the notice period throughout the pleading. Likewise, at paragraph 15P the Defendant is said "*to have owed a duty to the Plaintiff not to prejudice the Plaintiff's business by taking any action which, without service of the termination notice, in accordance with the terms of the 2016 Agreement, would prejudice the Plaintiff's commercial position*" or acting "*to the detriment of the long-term commercial interests of the Plaintiff*" (paragraph 15N(c)) or "*to the commercial detriment of the Plaintiff*" (paragraph 22D(d)). Phrases such as these in the pleading are impermissibly vague and uncertain. However, in argument the Plaintiff did not address these as separate duties from the implied term of good faith that the Plaintiff maintains was part of the 2016 Agreement and therefore I have treated them as part of this pleading and as other ways of describing the alleged implied term of good faith and its breach.
46. There is no general doctrine of good faith in English contract law but the authorities that the Plaintiff relies on to support its claim that such a term should be implied into a Guernsey contract are all English authorities. Therefore, although I am clear that my approach must be generous and err on the side of permitting what would be a novel claim for good faith to be implied under Guernsey law into a Guernsey contract, nevertheless, the Plaintiff needs to show that there is at least an arguable claim based on the evidence (with the Plaintiff's evidence taken at its highest) to proceed to trial based on the principles found in those English authorities upon which the claim is said to be based

nor to ignore the principles which are already part of Guernsey law (such as those of implied terms). The Plaintiff in its responsive skeleton refers to the Court having “*recognised the Plaintiff’s right to pursue a breach of good faith for the Guernsey courts to consider*”. This is not an accurate reflection of what I have said in the previous two judgments on this matter. Unfortunately it fails to recognise that in both judgments the Plaintiff has been directed that the pleadings in relation to good faith were highly deficient and leave had not been given for the Plaintiff to amend its pleadings.

47. The authorities which both parties rely on the phrase “*relational contract*” as a description of the sort of contract that a term of good faith might be implied into under English law and is a phrase which comes from the *Yam Seng Pte Ltd v International Trade Corp Ltd* judgment of Leggatt J. The Plaintiff argued in submissions as to what were the characteristics of the 2016 Agreement which the Plaintiff relies on to say that it comes within this category of contract. There are references to the infrastructure of the Plaintiff scattered within the draft Amended Cause but the Plaintiff has not set out in the pleadings how this is said to be a relational contract nor does it take into account taken of the specific references within the 2016 Agreement to it not being a partnership (clause 28.3) nor an employment contract (clause 28.4) and that the relationship shall be of independent contractor (clause 28.4). I will also mention here whilst dealing with general points on good faith, that it is not enough for the Plaintiff to say in relation to loss that the level of damages for breach of good faith is “*a matter for the Court*”. I made this clear at paragraph 40 of the November 2022 Judgment. Nor have I been persuaded that this is something for which the unspecified expert evidence would be of assistance (where no such expertise is claimed for the calculation of the losses at paragraph 22F). There is no authority which the Plaintiff could point to that indicates that the normal rules of contractual loss should be set to one side when relying on a breach based on an implied term of good faith. Even if the Plaintiff could show that there was a term and it had been breached, it is still loss calculated on the basis of breach of a contract and it does not entitle it to some heightened or aggravated head of damages.
48. Further, as the Defendant has rightly emphasised, if the concept of an implied duty of good faith does exist in Guernsey law, it must comply with the principles of implied terms which have been established in this jurisdiction which follow the same principles found under English law. There is no special rule of interpretation for this type of implied term². These principles are set out in the judgment of Beloff JA at paragraph 24 of *Musa Holdings Limited v Newmarket Holdings (Guernsey) Limited* (*ibid*) (which was a case on summary judgment):

“The classic exposition of the relevant principles is found in Attorney General of Belize and Others v Belize Telecom Ltd and Another [2009] UKPC 10 at paragraphs 16 to 27 in the judgment of Lord Hoffman, applied in the Bailiwick the case of Woodbourne Trustees Limited v Generali Worldwide Insurance Company Limited 2011-12 GLR, Note 5 (Southwell LB and Jurats). From the Note I extract the following observations (citations omitted):

“(c) the issue as to whether any further term were to be implied could arise only if there were something missing or not dealt with in express terms, or if the express terms required an implied term to make sense;

(d) the necessity for implying a term had to arise from the construction of the express terms; it was not to be considered in isolation from or in contradiction of, the express terms, and it had to be required in order to make real sense (commercially or otherwise) of the express terms – not merely to add what the parties might reasonably have added if they had so decided;

and (e) a term was only to be implied if it would be necessary to give business efficacy to the contract; it had to be so obvious that it went without saying; it had to be capable of clear expression, and it was not to contradict any express term of the contract.”

² See *Monde Petroleum SA v Westernzagros Ltd* (*ibid*) paragraph 250

See further Chitty op cit Vol 1. Para 13-006 – 13-007.”

49. Lord Clarke concluded in Marks & Spencer v BNP Baribas at paragraph 77 “another way of putting the test of necessity is to ask whether it is necessary to do so in order to make the contract work”. Specifically, in relation to the implied term of good faith, the duty should not be seen as a “general organising principle” as that would be in danger of undermining the express terms, as per Lord Justice Moore-Bick in MSC Mediterranean Shipping Company S.A. v Cottonex Anstalt [2016] EWCA Civ 789 at paragraph 45 and no term may be implied into a contract if it would be inconsistent with an express term (see Musa Holdings Limited v Newmarket Holdings (Guernsey) Limited (*ibid*) above and paragraph 203 of the judgment of Fancourt J in UTB LLC v Sheffield United Limited [2019] EWHC 2322).
50. In this latest iteration of the draft Amended Cause, the Plaintiff has argued that the implied term of good faith is implied into the contract in a number of ways, with regard to when notice is served, with regard to how the pricing was set by the Defendant, with its communications with third parties and the obligations to waive exclusivity.
51. With regard to the service of the notice, as set out above in the 2016 Agreement there are two references to termination at clauses 2.4.2 and 18. At clause 2 it sets out that:

*“The insurer shall maintain the right to:
2.4.2 withdraw from the insurance markets in the Territory provided that the Insurer shall provide the Agent with at least one year’s notice of any such action.”*

At clause 18:

“This Agreement will commence on the Effective Date and will remain in effect for an initial minimum period of one year, after which it shall renew indefinitely unless and until either Party gives the other twelve months prior written notice of their intention to terminate the Agreement. Under no circumstances shall the Insurer or Agent, without the consent of the other Party which consent shall not be unreasonably withheld, be entitled to a withdrawal right from this Agreement during the aforementioned one year period.”

52. The Defendant is rightly critical of the Plaintiff for its pleading in relation to the two separate termination provisions under the 2016 Agreement. There is no pleading that the Defendant is in breach of clause 18 although reference is made throughout the pleadings to the termination of the 2016 Agreement. The draft Amended Cause only refers to clause 2.4.2 which does not automatically terminate the 2016 Agreement. Further, there is no mention in the draft Amended Cause that the 2016 Agreement did terminate on 16 September 2021 after service of the notice on the Plaintiff by the Defendant on 15 September 2020 under clause 18 of the 2016 Agreement and under clause 2.4.2.
53. The Plaintiff says that the alleged implied duty of good faith means that when the Defendant formed the view that it was going to leave the Cayman Islands’ territory, as it said to GGH on the 9 March 2020, it was contractually obliged to serve notice on the Plaintiff (see paragraphs 7E, 13B, 15I 15L, 19 and 22D (b)).
54. Clearly, it was always contemplated that an exit out of the territory might happen as the 2016 Agreement provides for a positive right for the Defendant to withdraw from the territory without cause which is in addition to the mutual right to terminate the contract. The 2016 Agreement is a detailed and professionally drafted agreement. It was also contemplated that the 12 months’ period for termination of the 2016 Agreement was one that could be varied by mutual agreement to a shorter period.

55. It is clear from the evidence before me that it took the Defendant some time to organise itself into the service of formal termination of notice under the relevant clauses of the 2016 Agreement. However, it did file formal notice and held itself, as it should, to the one year's notice period from that date. It was an absolute right for either party to terminate under clause 18 and for the Defendant to give notice under Clause 2.4.2 to leave the territory. As Leggatt J set out in Monde Petroleum SA v Westernzagros Ltd

“a contractual right to terminate is a right which may be exercised irrespective of the exercising party's reasons for doing so. Provided that the contractual conditions (if any) for the exercise of such a right (for example, the occurrence of an Event of Default) have been satisfied, the party exercising such a right does not have to justify its actions.”

56. Although this quotation is only by reference to termination of an agreement, clause 2.4.2 is unambiguously drafted as a contractual right that can exercised without justification or reason by the Defendant.

57. In Mr Skoly's affidavit at paragraph 11 of his affidavit *“Regrettably since making plans to demit the insurance market in the Cayman Islands without fully informing us of their strategy and particularly following making that decision known to us, I believe Utmost have acted in bad faith in breach of the 2016 Agreement as I set out herein.”* The allegation of bad faith has not been continued. However, even taking this evidence at its highest, nowhere in his evidence does he say that the Defendant was obliged to serve notice when it had formed the view that it was leaving the territory.

58. If the Plaintiff wished to rely on a breach of contract by the Defendant in the period between March and September, it was entitled under the express term set out in clause 18.1.1 to give notice to the Defendant of the alleged breaches and if matters were not remedied within 28 days to terminate the 2016 Agreement immediately on written notice. However, instead the Plaintiff argues that by not serving notice earlier than the Defendant did, it undermined the purpose or “efficacy” of the 12 months' notice which replaced the 6 months' notice and thereby breached its implied term of good faith. I cannot agree with this submission. The express term that the parties agreed to was an additional 6 months' notice period making a total of twelve months. The express term is clear. Further, there is no basis nor any evidence from Mr Skoly or anyone else to support a claim that by increasing the period of notice, the Defendant was also contractually required by an implied term of good faith to serve notice on the Plaintiff that it intended to leave the Cayman Islands' market, or either party was compelled to terminate the contract, if there was no cause and the party was not minded to do so³.

59. Further, the question of whether a term is implied is to be assessed at the time that the contract was made. It is wrong to approach the question with the benefit of hindsight in the light of the particular issue that has arisen. I am not satisfied that notional reasonable people in the position of the parties at the time of the 2016 Agreement would have intended that there was an implied term of good faith which would require the Defendant to serve notice once it had formed the view it was leaving the jurisdiction and/or for either party to terminate the contract. Further, it is difficult to see whether pleaded as an example of an implied duty of good faith or some kind of standalone implied duty, how this requirement could be consistent or interact with all the ongoing obligations and operation of the 2016 Agreement. As the Defendant submitted this term would be an unworkable approach in practice because it does not cater for the fact that a party in the Defendant's position will inevitably have many details to work out before it can commit to an exit from the market, with an

³ See also paragraph 25 of Musa Holdings Limited v Newmarket Holdings Limited (*ibid*) at 25 where Beloff J.A says *“In my view, Musa fails to make out a case as to why business efficacy, as distinct from its own commercial interests, required an agreement that the loan be repayable only after sale of the property. Quite apart from the principle that the implied term cannot contradict an express term (Chitty, op. cit., vol. 1, at para. 13–010), the interests of both parties, not just of one, viewed objectively, would be needed to compel such an implication.”*

associated timeframe (it also appears from the evidence that this required the input of CIMA). I do not consider that an implied duty of good faith alone could operate to compel the Defendant to serve such a notice. To do so, would go beyond the tests set out in *Musa Holdings Limited v Newmarket Holdings (Guernsey) Limited* (*ibid*) above. As Mr Richard Salter QC recognised in *Monde Petroleum SA v Westernzagros Ltd* at paragraph 266: “A contractual right to terminate involves a binary choice.”

60. At paragraph 15K (and in paragraphs 18 and 19), the Plaintiff also says that the intentions expressed by the Defendant (and which the Plaintiff acknowledges subsequently changed) during the period before serving the notice to terminate the 2016 Agreement to stop accepting new business after 1 July 2020 and renewals after 1 October 2020 were in breach of the “Extended Notice Period”. However, as set out in the previous judgments, the Defendant did continue to write policies before and during the 12 months’ notice period after the notice had been served, therefore there is no basis for a breach of clause 2.4.2 nor, as I have found, for the Defendant to have been compelled to serve notice before it wished to.
61. I have considered whether or not a further opportunity should be given to the Plaintiff to amend its Cause to allow this claim based on the service or non-service of the notice as part of a breach of an implied term of good faith. However, I do not consider that after all the attempts before me that the Plaintiff has been able to show on the evidence that the necessary ingredients for a claim on this basis are present. I have therefore come to the conclusion that the Plaintiff does not have a realistic prospect of success on this cause of action. Therefore, I will not give leave for this amendment.
62. The Plaintiff accepts that under the 2016 Agreement that there are express terms as to price.
63. At clause 2.4.1 it states:

“The Insurer shall maintain the right to:

2.4.1 vary the rates, terms and conditions of the Policies provided that the Insurer shall provide the Agent with at least 75 days’ notice of any such action, unless otherwise agreed to in writing by both Parties;”

At clause 4.2 it states

“For the avoidance of doubt the Agent shall not have underwriting or price-setting authority.”

64. The Defendant in its defences says that the Defendant did not set the prices but passed on the reinsurer’s (GGH) pricing with the addition of its own margin and in turn the Plaintiff added on their own margin and the Plaintiff has not denied this in its Replique. In my previous judgments I have set out the need for the Plaintiff to plead properly the basis upon which it says the Defendant has breached the 2016 Agreement in relation to the prices.
65. In the draft Amended Cause, the Plaintiff advances a new claim based on good faith where it alleges at 15B that the “Defendant was obliged to ensure that the reinsurer also acted in good faith when making decisions which the Defendant had to implement”. At 15C that “The failure to give any adequate notice to the Plaintiff to facilitate discussions between the parties to determine the proper pricing structures for the insurance year 2020/2021, with effect from the 1 June 2020 shows the Defendant’s lack of good faith towards the Plaintiff”.
66. At paragraph 15E, the draft Amended Cause refers to the “Defendant was opting to increase the prices of the health insurance products that the Plaintiff marketed for the Defendant with the intention of discouraging the insured clients from renewing their policies”. There is then further detail of how this is said to have been implemented and although it is not entirely clear on the pleading, it appears that the Plaintiff relies on this as a further incident of the alleged implied duty

of good faith on the basis set out at paragraph 16: “that the Plaintiff was entirely reliant on the Defendant to properly discharge its duties” and at paragraph 22D(c): “In raising prices to a level that lacked commercial or actuarial logic or efficacy the Defendant determined on a course of conduct to exit the Cayman Islands health insurance market without any or any proper regard for the interests of the Plaintiff (to whom the Defendant owed a duty to act in good faith), thus undermining the efficacy of the Extended Notice Period, which was intended to provide an opportunity for the Plaintiff to continue the receipt of commissions and to try and find another insurer for the Portfolio”.

67. Contained in the exhibits to the affidavit of Mr Skoly is correspondence between the Defendant and GGH following the decision by GGH to stop reinsurance for health insurance for Utmost in the Cayman Islands, Bahamas and the BVI. Also contained within the documents is a Generali branded PowerPoint presentation dated March 26 2020, which refers to a strategy of pricing out of the market, as well as correspondence from officers of the Defendant which refer to the advantages that this will bring. There is also exhibited to Mr Skoly’s affidavit, correspondence in relation to pricing between Mr Skoly and various officers, although the interactions appear to be with officers of GGH and not with those of the Defendant. It is not alleged, nor does it appear from the evidence, that the Defendant had taken over the role of price setting from GGH. It also appears that having decided against staying in the market after the announcement of the withdrawal of GGH, that Utmost along with GGH wished to exit on the terms that were most favourable to it. It says at paragraph 15B of the draft Amended Cause having accepted the commercial terms of the 2016 Agreement “*the Defendant was obliged to ensure that the reinsurer also acted in good faith when making decisions which the Defendant had to implement*”. However, despite this bold statement it is not particularised how the 2016 Agreement obliges the Defendant in its dealings with a third party when it is accepted by the Plaintiff in the earlier part of the sentence that the Defendant had to implement the portfolio pricing of the reinsurer. Given that the Plaintiff has a copy of the agreement between the Defendant and the GGH after the Defendant left the Generali group, but has not referred to this in its pleading, I must conclude that there is nothing helpful in that agreement for the Plaintiff. At various points in the pleading, the Plaintiff refers to the Defendant “*opting to increase*” (15E) or “*of setting premium price points*” (15F), “*in setting the prices*” (15G), “*in imposing the unjustified increase*” (15H), “*in imposing unreasonable premium price increases*” (15I), the “*Defendant: (a) Set on a course to price the insurance products on offer*” (15N), “*in raising prices*” (22D (c)), however, this ignores the fact that the Defendant was not setting the prices and that this contradicts the acknowledgment at paragraph 15B that it was the Defendant’s role to implement them not set them. The obligations of the Defendant are set out at clause 10 of the 2016 Agreement. The 2016 Agreement was the second such detailed contract negotiated and professionally drawn between these parties and yet neither party included the terms that the Plaintiff is seeking to imply. This runs counter to the view emphasised in *Marks & Spencer Plc v BNP Paribas Securities Trust (Jersey) Limited* (*ibid*) and by Fancourt J at paragraph 206 *UTB LLC v Sheffield United Ltd* (*ibid*) where “*detailed, professionally-drawn contracts exists, it is more difficult to imply terms because there is a strong inference that the parties have given careful consideration to all the terms by which they agree to be bound (though the test for implying terms remains the same).*” There is nothing in the 2016 Agreement which deals with the Defendant’s relationship with the reinsurer. It is not pleaded that the 2016 Agreement was somehow varied after the Defendant left the Generali group.
68. At paragraph 15C, the Plaintiff pleads that in previous years the “*insurer (including the Defendant in 2019) had given the Plaintiff notice of the proposed premiums for the coming year*” In 2020, the Defendant presented to the Plaintiff proposals that were neither commercial nor actuarially sound and could only have been designed to frustrate the insurance business in the Cayman Islands. The failure to give any adequate notice to the Plaintiff to facilitate discussions between the parties to determine the proper pricing structures for the insurance year 2020/2021, with effect from the 1 June 2020 shows the Defendant’s lack of good faith towards the Plaintiff.” However, the Defendant was not setting the price nor is it argued by the Plaintiff that the Defendant was in breach of the express term at clause 2.4.1 which required 75 days’ notice of a price change. The argument that

there was a motive in the level of pricing cannot be sustained as a breach of the 2016 Agreement where it is accepted by the Plaintiff that the Defendant did not set the price. I note in any event from the evidence exhibited by Mr Skoly that the Plaintiff appears to have had contact with GGH over pricing.

69. In answer to my previous criticism about the pleadings on price, the Plaintiff has recast its pricing claims based on an implied term of good faith. However despite its efforts, the Plaintiff has been unable to surmount the hurdle that the Defendant did not set the price. This is not a contractual discretion exercisable by the Defendant to which the principles of *British Telecommunications plc v Telefonica O2 Ltd and others* [2014] UKSC 42 apply. The Defendant did not have a discretion as it did not set the price. The claim lacks conviction and lacks the evidence even taking the Plaintiff's evidence at its highest to establish a factual basis. I have therefore come to the conclusion that despite the numerous attempts by the Plaintiff to do so, the Plaintiff has not disclosed a realistic prospect of success in relation to pricing and I will not exercise my discretion for leave to be given to amend the Cause. I note in passing the Defendant's complaint about the reference to "price gouging" which remain in the draft Amended Cause. I do not think I could have been clearer in my November 2022 Judgment that this reference should be removed and yet the Plaintiff has included it again this time under 15E (f). Given my conclusions on the pricing claim, this paragraph will fall by the wayside in any event, but no doubt will be a consideration for costs in due course.
70. The Plaintiff also alleges that the Defendant has breached the alleged implied term of good faith by its communications with third parties. At paragraph 15A, the Plaintiff pleads:

"Once the Defendant made known its intention to the demit the market (for its own extracontractual advantage) in breach of its confidentiality obligations, and before the Plaintiff had been formally notified, the Plaintiff's ability to act in the Cayman Islands, a small jurisdiction with a population similar to that of Guernsey, was irreparably damaged, the efficacy of the Extended Notice Period was then fatally undermined. Such conduct constitutes a lack of good faith on the part of the Defendant."

71. At paragraph 15N (b):

"Breached the confidentiality provisions of the 2016 Agreement (the Plaintiff will rely on Clause 14 for its meaning and effect) as more particularly referred in paragraph 13G et seq above to further its own commercial advantage inter alia, to gain a sell side commission of 10% in selling the insurance business, to a third-party, without regard to the implied obligations to act with good faith in its relationship with the Plaintiff."

- At paragraph 22D (a) says:

"The Defendant determined on a course of conduct to prioritise its own commercial interests by entering discussions with different insurers without any discussion or consultation with the Plaintiff;"

72. From the draft Amended Cause, it is the same disclosures by the Defendant to third parties in a bid to sell the Defendant's book of business in breach of clause 14, which are relied on for the alleged breach of the implied term of good faith. Setting to one side the issue of confidentiality, this implied term as pleaded in the draft would restrict the Defendant from enquiring about selling its book of business to a third party.
73. The exclusivity clause at clause 3 of the Agreement gives the Plaintiff exclusivity as the Defendant's agent in the Cayman Islands, however what the Defendant was doing was not attempting to move its relationship to another agent but rather to see if there was an alternative insurer to take its Cayman Islands' book of business. The reliance on the alleged breach of good faith appears to be that there was something about this contract which, over and above the

obligations of confidentiality, restricted the Defendant from making contact with third parties to whom it might want to transfer its Cayman Islands' business. At paragraph 13A the Plaintiff pleads that 12 months' notice period was *"to provide the Plaintiff with a greater period of time during which it could continue to receive commissions, together with the clear recognition that this would give the Plaintiff the best opportunity to work with the Defendant to seek to place the portfolio of health insurance clients (the "Portfolio") with alternative insurers during the Extended Notice Period as provided for in the 2016 Agreement."*

74. At paragraph 26 of the November 2022 Judgment, I said that the Plaintiff had to set out fully what the Defendant *"could or could not do in relation to its book of policies and how the Plaintiff says the Defendant was obligated to take into account the Plaintiff in this regard."* I do not consider that the draft Amended Cause has done this. I am still unable to identify from the draft Amended Cause how it said that a term can be implied into the 2016 Agreement which would prevent the Defendant making enquiries about the selling of its own business without involving the Plaintiff (over and above the breach of confidentiality). It was not a contract that was expected to be infinite as there is the ability to terminate the relationship (clause 18) which is separate from the obligation to notify the withdrawal from the market (clause 2.4.2). In my view these paragraphs of the draft Amended Cause fall directly into an attempt by the Plaintiff to imply some positive obligation upon a contracting party to subordinate its own commercial interests to those of the other contracting party. The Defendant was free to exercise its contractual rights honestly for its own commercial interests. It is my view that the Plaintiff has failed to demonstrate that there is a realistic prospect of success that this should be implied into the contract in accordance with the principles set out above. Furthermore, a pleading that *"this conduct constitutes a lack of good faith"* is not a proper pleading in relation to an alleged implied contractual term. I do not give leave to the Plaintiff to amend the Cause.

75. The Plaintiff relies on a breach of an implied term of good faith in relation to the Defendant's failure to waive the exclusivity provision of the 2016 Agreement (which in turn it is said undermined the efficacy of the Extended Notice Period about which I have already commented). At paragraph 13F, the Plaintiff pleads:

"Whilst there is no contractual obligation to relieve the Plaintiff of its obligations of exclusivity, the Plaintiff avers that once the decision to leave the Cayman health insurance market had been reached it is entitled to expect the Defendant, if acting in good faith, to relieve the Plaintiff of that obligation, so as to enable the Plaintiff to try and prevent the loss of the Portfolio, and therefore its entire business in the Cayman Islands."

76. At paragraph 22A, the Plaintiff sets out the terms of the exclusive appointment in the 2016 Agreement under clause 3.1. It acknowledges at paragraph 22B that pursuant to the 2016 Agreement and limitation imposed by CIMA that the Plaintiff cannot offer services similar to those it provides under the 2016 Agreement to a party other than the Defendant. At paragraph 22D, the Plaintiff relies on lack of relinquishing the exclusivity as part of the Defendant's failure to act in good faith pleading at 22D (d):

"The Defendant did not waive the exclusivity clause (Clause 3) in the 2016 Agreement, to permit the Plaintiff an opportunity to preserve its business. On the contrary, the Defendant used the clause to advance or try to advance discussions with other insurers to the commercial detriment of the Plaintiff (who was barred from looking to transfer the Portfolio), to the unfair commercial advantage of the Defendant."

77. I identified the challenges that the Plaintiff had in relation to this issue in my October 2022 Judgment where I said at paragraph 43:

"Importantly I agree with the complaints of the Defendant that paragraph 11 fails to demonstrate why the Defendant had to positively cooperate with the Plaintiff to waive the

express clause at 3.1. Likewise at paragraph 22A (d) the Plaintiff must plead what is the source of the obligation on the Defendant to act reasonably in waiving an express term of the 2016 Agreement as to exclusivity and at all times where the Plaintiff is seeking to rely on implied terms how this interacts with the express terms of the contract.”

78. In the draft Amended Cause the Plaintiff offers no basis or explanation upon which the express terms of the 2016 Agreement should be ignored or rewritten by an implied term. The Plaintiff acknowledges this at paragraph 13F where it says that “*there is no contractual obligation to relieve the Plaintiff of its obligations of exclusivity*”. There is nothing in the contract which indicates that the exclusivity clause changed or was varied on service of notice to end the contract or to leave the market. As I have set out above, the principles of implying a term apply to an implied term of good faith. Further, the evidence before me is not that there was an absolute refusal by the Defendant and nor does the draft Amended Cause deal with the Plaintiff’s own averment that the Plaintiff “*is restricted by ... the regulatory arrangements in the Cayman Islands from acting as an Agent for any other insurer.*” Further, the paragraph refers to the Plaintiff being “*barred from looking to transfer the Portfolio*” and there are references throughout the draft Amended Cause about the opportunities, or lack thereof, due to the actions of the Defendant for the Plaintiff placing the portfolio with a different insurer. However, this fails to take into account that the portfolio or book of business were the Defendant’s policies and not the Plaintiff’s. The exclusivity clause is a restriction on providing the same services as it provided to the Defendant or selling other medical insurance products. It did not have the effect that the Plaintiff pleads.
79. I have, therefore, come to the conclusion that in relation to the issue of exclusivity, the pleading discloses no realistic prospect of succeeding on this issue and leave should not be given to amend the Cause.
80. Paragraph 20A and the following sub-paragraphs allege that there was an agreement to agree the date when the Defendant would announce when it was leaving the Cayman Islands and it would announce its exit from Bahamas and the Cayman Islands at the same time. The Plaintiff says that the Defendant breached this agreement and at paragraph 22D (e) says that by publishing its decision to leave the Bahamas market that this was an incident where the implied term of good faith was breached.
81. The pleadings on whether there was an agreement or not and the need for particularity around this alleged agreement were raised in my October 2022 Judgment and my November 2021 Judgment. In Mr Skoly’s evidence, he relies on an email dated 19 June 2020 which he exhibits to his affidavit as being evidence of this agreement. However, this email which is from the CFO of Utmost to Mr Skoly and others is not evidence of such an agreement. Whilst the Plaintiff’s submissions point to the exhibits to Samantha Harris’s second affidavit dated 20 January 2023, the documents exhibited thereto also fail to show any evidence of an agreement on this. I agree with the Defendant that on no analysis does the evidence suggest an agreement between the parties in terms of offer and acceptance, a meeting of minds, or sufficient certainty and clarity of terms. The drafting of paragraph 22D (e) appears to be on the basis that it was a breach of an implied term of good faith that information about the exit from the Bahamas market was announced. However, there is no particularisation at all about how it is said to be a breach of the 2016 Agreement (which is only in relation the Cayman Islands market) for the Defendant to announce it is leaving the Bahamas. As I have already found that the Plaintiff has failed to show that there was any agreement that the Defendant would take into account the timing of its announcement. I consider that the pleading at paragraph 20A and its sub-paragraphs and the pleading at paragraph 22D(e) disclose no realistic prospect of succeeding and leave should not be given to amend the Cause.
82. The remaining sub-paragraph under the heading “Failure to act in good faith” is paragraph 22D (f) which says:

“On 20 July 2020, the Defendant wrote to CIMA stating “Our renewals do not include a COVID adjustment at this time.” whilst on or around that time the Defendant provided a document entitled “Private and Confidential – for internal Use Only” referring to a risk adjustment due to COVID as more particularly referred at paragraph 15E (i) above.”

83. Paragraph 15E (i) says:

“On 20 July 2020, the Defendant wrote to the Cayman health insurance Commission stating, inter alia, “...our renewals do not have any COVID adjustment at the current time.”. In an internal instruction entitled “Private and Confidential – For Internal Use Only Reference Points in Relation to Price Increases from 1st August 2020” sent from the Defendant to the Plaintiff in and around the end of July 2020, the instruction states, inter alia: “...Pricing has been calculated to cater for the following elements...Risk adjustment due to Covid-19...”. The Defendant indicated that it wished at first to have a Covid load of 8%, which after expressions of concern as to the effect of the overall increases the Defendant reduced to 5% making little or no impact on the lack of competitiveness of the Defendant’s Insurance product offering.”

84. Copies of the memorandum and the letter to CIMA are exhibited to the affidavit of Mr Skoly. For the reasons set out above I have found the Plaintiff, having nailed its colours to the mast in relation to pricing to a breach of the implied term of good faith, has been unable to plead the claim against the Defendant in a sustainable manner. However, I have also considered whether paragraph 22D (f) can be considered as a separate breach of an implied term of good faith in the 2016 Agreement. Other than setting out the fact of the apparent contradiction between the correspondence with CIMA and the internal note and the vague statement at 22E “*that impugned conduct is improper, commercially unacceptable and/or unconscionable and accordingly constitutes a lack of good faith on the part of the Defendant in complying with the terms of the 2016 Agreement*”, the Plaintiff has not provided adequate particularisation of how this is said to be a breach of the 2016 Agreement between the Plaintiff and the Defendant. I therefore consider that the draft pleading discloses no realistic prospect of succeeding on this issue and leave should not be given to amend the Cause.

85. In my November 2022 Judgment starting at paragraph 33 I said:

*“Dealing first with claims of breach of confidentiality (paragraphs 14A, 15H (b), 15I, 15K). These are introduced at paragraph 14A of the Second Draft Amended Cause based on a breach of the term of confidentiality which is at clause 14 of the 2016 Agreement defined in the Cause as the “Confidentiality Clause”. Where a claim is based on breach of confidentiality, the expectation is that the pleadings will identify the information which is alleged to be confidential with some precision and how that information had the “necessary quality of confidence about it” (see for example *Coco v AN Clark (Engineers) Ltd [1969] RPC 41*).*

34. If it is the case that the Plaintiff’s claim is that clause 14 is the source of the quality of confidence in relation to the exit of the Defendant from the Cayman Islands’ market, then this should be pleaded properly. It should also be clear to the Defendant how it is said that the unauthorised confidential information has alleged to have been used i.e., who it is said to have received the confidential information. I agree with Advocate Dunster’s submissions that the pleading is still as yet too vague. I was unpersuaded that any issues with disclosure that may remain or the witness evidence at trial are sufficient to excuse the Plaintiff from the lack of particularity. References to the Defendant making “known its intention to the market” or undefined third parties are not satisfactory given the pleaded breaches at 15I (a)-(d).

35. Further, despite my reference at the hearing in June 2021 to the impact of the Plaintiff issuing proceeding on 10 July 2020, the Plaintiff appears to be relying only on alleged breaches the day before and after this date, in these circumstances it is incumbent on the Plaintiff to demonstrate how, if the claim is on the basis of the Defendant’s leaving the Cayman Islands’ market, it survives this. The Plaintiff still needs to nail its colours to the mast about how this

alleged breach or series of breaches caused it loss. Phrases such as “was capable of undermining” at 15H (b) are not sufficient nor does 15K demonstrate any proper causation. If it is about opportunity to seek alternative insurers as paragraph 14A appears to indicate, then this needs to be properly pleaded i.e. why is it said that the alleged breach meant that this opportunity to seek alternative insurers was lost or irreparably damaged but also why the Defendant has any obligation to facilitate this.”

86. The Plaintiff sets out at paragraph 13G -15A of the draft Amended Cause the Plaintiff’s reliance on the express confidentiality term at clause 14 of the 2016 Agreement and how it is said that the Defendant has breached the confidentiality clause. Clause 14 is, as the Plaintiff says, widely drawn under the clause and includes the fact of the 2016 Agreement itself is confidential. There may be argument in due course about whether all the information purported to be covered by the 2016 Agreement, including the agreement itself, has the necessary qualities of confidence, but I consider that the Plaintiff has now set out why it says it is confidential. It has also set out sufficiently how it is said the Defendant has used this information in breach of the 2016 Agreement. However, the Plaintiff has failed to deal with my very clear direction at paragraph 35 of my November 2022 Judgment, which I have set out above, about the impact of the Plaintiff issuing proceedings 1 July 2020. I agree with the Defendant that the pleading also still lacks coherence with regard to causation and loss. Nevertheless, I do consider that in terms of confidentiality the amendments do go to a real dispute between the parties. There are no issues of limitation and this arises out of the same set of facts that have been the subject matter of the pleadings from the beginning. Given the repeated failure by the Plaintiff to plead its claim properly, the Defendant is unsurprisingly arguing that enough is enough and this claim should not be allowed to continue. I have carefully considered whether it is proportionate and fair to the Defendant to allow the Plaintiff’s amendment and whether it would cause any prejudice to the Defendant which cannot be compensated in costs. However, on balance I consider that I should exercise my discretion to permit the amendments in relation to confidentiality subject to the comments I have made in this paragraph and below.
87. As I identified in paragraph 42 above, under the heading “*Demitting the Cayman Islands Health Insurances market*” at paragraph 15L of the draft Amended Cause, the Plaintiff pleads the actions taken by the Defendant after the 9 March 2020 were in breach of express as well as implied terms. The express terms are not identified in the paragraph, although paragraph 15L refers to the notice period and the sub-paragraphs of paragraph 15N of the draft Amended Cause identifies the breach of confidentiality. I will deal with the allegation as to a breach of clause 2.4.2 below. Paragraph 15N must be redrawn to remove any reference to the implied terms which I have found to be unsustainable.
88. The Defendant is seeking summary judgment and/or strike out of all the claims. The burden is on the Defendant to persuade me that there is no real prospect of success of the Plaintiff’s claims or that the Plaintiff has failed to disclose a reasonable cause of action. It is correct that the operative pleadings of the Plaintiff are the original Cause filed on the 10 July 2020 and the Replique filed on 18 September 2020, which did not have claims based on good faith or on breach of confidentiality. As I have set out above, whilst I do not consider that the Plaintiff has done enough for leave to be given to amend the Cause in relation to the implied term of good faith however, I have given leave in relation to the breach of confidentiality.
89. However, in relation to pricing, having failed on its application to amend the pleadings, the Plaintiff is left with the claim as set out in the original Cause and the Replique. I set out in detail in my previous judgments that the pricing claims were inadequate and those deficiencies remain. I am mindful of the principle that the Court should not strike out the particulars without first giving the claimant an opportunity to amend (*In Soo Kim v Youg [2011] EWHC 1781 (QB)*). However, I have already given the Plaintiff two opportunities to amend the claims with regard to price and it has failed to show that it has a realistic prospect of success. As has been recognised frequently in this Court, including *Tranquillity Holdings*, there is a degree of overlap between the two bases on which a party can seek to bring an end to proceedings. In both instances, there is a heavy burden on an

applicant because the respondent has to provide comparatively little in respect of its case to avoid the consequences of a Cause being struck out or resulting in summary judgment being entered. The overriding objective of deciding cases justly and at proportionate cost requires the Court to monitor and control the scale of the resources it devotes to each individual claim. It also recognises that the principle which is the foundation of the CPR as it is of the 2007 Rules, requires that the Court should recognise that, in the interests not only of the parties, but of the administration of justice more generally, cases should not be permitted to proceed to trial with all the concurrent expenditure of costs and time if the outcome is inevitable⁴. In the circumstances of this case and given the multiple unsuccessful attempts by the Plaintiff to plead a viable claim on prices, I consider I must “*grasp the nettle and decide it*”⁵. The Defendant has shown that the pleading does not advance a winnable case on this claim and the Plaintiff does not have a realistic prospect of success. There is no other reason why this issue should be disposed of at trial and therefore I have come to the conclusion that summary judgment should be granted to the Defendant on this issue.

90. The remaining claim from the original pleadings relates to the breach of clause 2.4.2. of the 2016 Agreement. As I identified from the beginning this was always going to be an uphill task and have set out in my previous judgments the difficulties that the Plaintiff had with a claim based on this express term. Despite the various attempts to recraft this claim, the Plaintiff has failed to surmount the challenge. As with the claim on pricing, I have come to the conclusion that the Defendant has satisfied me that the Plaintiff does not have a realistic prospect of success and there being no other reason why this issue should go to trial, I have determined that the Defendant should be awarded summary judgment on this issue.
91. However, despite the Defendant urging that the time has come for the entire claim to be struck out referring me once more to *Cranway Limited v Playtech [2008] EWHC 550*, I have come to the conclusion that it is not appropriate to give summary judgment or strike out the claim in its entirety. There is now more than the kernel of a good claim on the evidence based on breach of confidentiality. I am of the view that despite the struggle that the Plaintiff has had with its pleadings this is not a case where litigation is being pursued for some abusive or ulterior motives. Costs are an adequate compensation for the Defendant in this regard.
92. Dealing with loss, the Plaintiff says it has lost commissions totalling \$770,269.16 and sets out four reasons (amongst others which are undefined). Of the four pleaded reasons only confidentiality survives. Therefore, this will need to be repleaded to take in account that the remaining claim is based on a breach of confidentiality.

Conclusion

93. The Plaintiff has not been successful on its application for leave to amend the Cause in relation to its amendments of the elements which rely on an alleged breach of an implied term of good faith. The Defendant has been successful in its application for summary judgment on the issue of pricing and the service or non-service of the notice under clause 2.4.2. The Plaintiff has been successful in its application for leave to amend the breach of confidentiality claim which is the remaining claim which continues subject to the amendments required, as I have set out above. I therefore direct that the Plaintiff will have 28 days from the date of this judgment being handed down in final form to file its application for leave to amend the Cause. If the Plaintiff makes the application in time, but the Defendant does not consent to the amendments, then the matter should be listed by the Plaintiff for the second Interlocutory Court after the 28 day deadline in order that directions can be made. If the Plaintiff does not make its application in time, then the Defendant may wish to make consequential applications.

⁴ See paragraph 18 *Musa Holdings Limited v Newmarket Holdings (Guernsey) Limited (ibid)*

⁵ See *Easycare Limited (t/a Openair) v Opal Telecom Limited (ibid)*

94. There does not appear to be a reason why the Plaintiff should not pay the Defendant's recoverable costs of, and occasioned by, its amendments and the substantial amount of the costs on a recoverable basis for the cross-applications. However, the Defendant has applied for indemnity costs under paragraph 3 of its application and therefore I invite the parties to agree directions in relation to costs if they cannot agree the costs themselves and this includes any argument the Plaintiff might have to resist the order I have intimated.