Pleading failures and allegations of breach of good faith treated with the Utmost seriousness

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Carey Olsen has successfully represented Utmost Worldwide Limited ("Utmost") in defending claims advanced by International Healthcare Solutions Limited ("IHSL") in the Royal Court. The proceedings raised novel points about the role of the implied duty of good faith as a matter of Guernsey law, and the importance of particularising claims with sufficient precision and care. After a long-running saga, the Royal Court struck out IHSL's claims against Utmost, including the alleged breach of an implied duty of good faith, permitting only one minor head of claim to proceed from a suite of proposed amendments. IHSL's claims were withdrawn shortly after the ruling.

Background

IHSL was Utmost's agent and sole distributor of insurance policies in the Cayman Islands, with the terms of the relationship governed by an agency agreement executed in 2016 (the "Agency Agreement"). During 2020, Utmost decided to exit the market in the Cayman Islands, such exit to take effect in 2021, with a consequence that the agency relationship with IHSL would also come to an end in due course.

Although IHSL accepted that Utmost had a right to withdraw from the market, it objected to the period of notice it was given and to Utmost's broader conduct in connection with its withdrawal. In particular, IHSL advanced claims that Utmost deliberately inflated insurance policy premiums in an attempt artificially to circumvent the notice provision, and that it failed to protect sufficiently IHSL's commercial interests.

The proceedings

Proceedings were commenced in July 2020 once IHSL had learned of Utmost's intentions to exit the market.

A few months later, Utmost sought further and better particulars in relation to the claims advanced against it, in particular with respect to the interaction between the alleged breaches by Utmost and the applicable terms of the Agency Agreement. The Agency Agreement, among other things, contained an express provision that IHSL was entitled only to one year's notice in the event of Utmost exiting the market. In addition, the Agency Agreement conferred sole pricing discretion upon Utmost and in circumstances where it was accepted that the premiums were, in fact, determined by a third party reinsurer (with a fixed percentage margin added for the insurer and agent). Certain other claims were advanced against Utmost, including an alleged breach of an oral agreement relating to the Bahamas, albeit with limited detail of how that agreement was said to have formed and the terms in question.

In response to Utmost's demands for further details, IHSL sought to amend its claims. It did so in a number of different ways, each being rejected by Utmost, culminating in IHSL seeking the Court's consent to wide-ranging amendments in an application made in 2021. Utmost issued cross-applications for summary judgment and/or strike-out or, in the alternative, further and better particulars. The Court delivered its judgment on 30 November 2021. Whilst it refused the application for summary judgment and/or strike out, on the basis that the plaintiff should be given a further chance to plead its case properly, it also refused IHSL's application for leave to amend

its pleadings and ordered that it substantially re-plead its case to deal with the various deficiencies highlighted by Utmost, and reflected in the Court's detailed judgment.

As to the head of claim based on the alleged implied duty of good faith, Utmost had accepted that it was appropriate for the Court – in principle – to test whether Guernsey law recognises such implied duties, and in what circumstances (without conceding either that Guernsey law does recognise implied duties of good faith or, even if it does, that such an implied duty arose in the facts of this case). The Deputy Bailiff agreed that the argument about the implied term of good faith should fall to be tested at trial but, given the uncertainty in the law, directed the Plaintiff to focus on its case with particular care and precision.

There followed further attempts by IHSL to plead its case, which were again rejected by Utmost. IHSL therefore made a second application to the Court at the start of 2022 for leave to amend its pleadings. Utmost opposed those amendments on the basis that they did not satisfy the requirements of the Court's judgment of 30 November 2021 and because the amendments were so unsatisfactory that, if approved, would immediately lead to applications from Utmost for summary judgment and/or strike-out, or for further and better particulars. The Deputy Bailiff again agreed with Utmost and refused to permit the proposed amendments. Despite the second chance already afforded to the plaintiff, the Judge remained of the view that there were causes of action "*struggling to get out that are partially visible*", including with respect to the alleged breach of an implied duty of good faith. Accordingly, whilst the Court concluded that numerous defects in the pleadings remained, the Plaintiff was to be given one final chance to plead its case properly.

The pattern repeated with IHSL proposing further amendments to its pleadings, which were again deemed unacceptable by Utmost. IHSL made its third application to the Court for permission to amend its case at the end of 2022. In response, Utmost argued that IHSL's pleadings remained vague and imprecise, that the proposed amendments disclosed no reasonable grounds for bringing the relevant actions and/or that IHSL had no real prospects of success. In addition, there was no compelling reason why the claims should be disposed of at trial and, indeed, in view of the plaintiff's repeated failure to plead its case properly, strike-out for non-compliance was the only appropriate course for the Court. With respect to the arguments based on the alleged duty of good faith, Utmost objected on the basis that the claims were not properly pleaded. However, even if IHSL's claims were taken at their highest, they were destined to fail on the basis that express terms of the Agency Agreement governed the issues in question and that IHSL's case required Utmost to subordinate its own commercial interests to that of IHSL, which could not be correct as a matter of Guernsey law.

In its judgment dated 29 September 2023, the Court agreed to strike-out the plaintiff's claims and refused all its proposed amendments save for with respect to the introduction of one limited head of claim. The Court considered each of the heads of claim in turn, concluding in each case that they disclosed no real prospects of success and/or that the continuing failure to plead properly warranted strike-out by that point.

The proceedings were subsequently discontinued by IHSL.

Commentary

The Royal Court has delivered Guernsey's leading guidance to date on the implied duty of good faith. Whether Guernsey law ultimately recognises such a duty, and in what circumstances, falls to be determined in due course. However, if Guernsey law were to recognise an implied duty of good faith in certain cases, it is already clear that the Court will regard allegations for breach of such a duty as particularly serious. This follows from the very nature of the duty, a breach of which requires there to be conduct which would be regarded as commercially unacceptable by reasonable and honest people.

There must also be clear limits to the scope of an implied term of good faith (if any), and the potential consequences for the parties. An implied duty of good faith cannot override express terms of the contract, nor require a party to subordinate its own interests to that of the counterparty. Most importantly, an allegation of breach of the implied duty of good faith must not be used as a catch-all for an aggrieved party's wider complaints. Serious consequences should flow if claims of this nature are pleaded imprecisely or for tactical purposes.

This case is also a good reminder of the Court's broader expectation that a plaintiff must plead its case properly. It is a matter of basic fairness for a defendant to know the case it is expected to meet. The Court will be prepared to show some latitude to plaintiffs where there is a reasonable cause of action struggling to get out, with the risk of unfairness to the defendant capable of being managed to some extent by case management powers and costs orders where appropriate. However, the Court's patience will only go so far.

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FIND US

Carey Olsen (Guernsey) LLP
PO Box 98
Carey House
Les Banques
St Peter Port
Guernsey GY1 4BZ
Channel Islands

T +44 (0)1481 727272
E guernsey@careyolsen.com

FOLLOW US

Visit our dispute resolution and litigation team at careyolsen.com

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