

THE HIGH COURT
COMMERCIAL

[2014 No. 5675 P]

BETWEEN

DD GROWTH PREMIUM MASTER FUND
(IN LIQUIDATION)

PLAINTIFF

AND

PNC GLOBAL INVESTMENT SERVICING (EUROPE)
LIMITED NOW KNOWN AS BNY MELLON
INVESTMENT SERVICING (INTERNATIONAL)
LIMITED

DEFENDANT

JUDGMENT of Mr Justice Cregan delivered ex tempore on the 15th day of April, 2016

(A) INTRODUCTION

1. This judgment deals with two applications for discovery in these proceedings. The first application is the Defendant's application for discovery against the Plaintiff in which the Defendant seeks discovery of some 18 categories of documents from the Plaintiff. The second application is the Plaintiff's application for discovery in which the Plaintiff seeks discovery of one category of documents against the Defendant. Although the second application was heard first I will, in this judgment, deal with the Defendant's application for discovery first. However, before I turn to the categories of discovery sought, I wish to set out the pleadings and issues in these proceedings.

(B) THE DEFENDANT'S APPLICATION FOR DISCOVERY

(I) The pleadings

2. The Plaintiff is a company registered in Cayman Islands in 2004 and was placed into provisional liquidation in April 2009.

3. Paragraph 2 of the Statement of Claim pleads that:

"The Plaintiff was the Master Fund in a 'Master Feeder' fund structure (referred to hereafter as the 'Fund'). The two feeder funds were DD Growth Premium Fund and DD Growth Premium 2X Fund (together the 'Feeder Funds')."

4. The Defendant is a limited liability company incorporated in Ireland. The Defendant was appointed to act as the administrator of the Plaintiff under an Administration Agreement between the parties dated 15th December, 2004.

5. In paragraph 7 of the Statement of Claim the Plaintiff also pleads that:

"By further agreement in writing the Middle Office Agreement, dated 3rd March 2008 ('Middle Office Agreement'), the Defendant, the Plaintiff (and the Investment Manager) agreed that the Defendant would provide certain middle office services for the Plaintiff."

6. The Plaintiff pleads that it was an express term of these agreements that the Defendant would exercise due care and diligence in the performance of its functions. It is also pleaded that the express provisions of the Administration and/or Middle Office Agreement also provided that the Defendant would, *inter alia*:

1. Provide administration and accounting services to the Plaintiff;
2. Keep proper books and records of the Plaintiff's securities transactions;
3. Arrange for the computation of the net asset value (the 'NAV') in accordance with the provisions of the Offering Memorandum;
4. Obtain prices from independent sources or, if unavailable, obtain such prices from the Investment Manager;
5. Use all reasonable endeavours to accurately value the assets of the Plaintiff and the NAV.

7. At paragraph 15 the Plaintiff pleads that the Defendant was in breach of these two contracts and, in particular, that in calculating the NAV of the Plaintiff from 30th June 2008 to the date of liquidation the Defendant:

1. Failed to exercise due care and skill;
2. Failed to calculate the NAV of the Plaintiff in accordance with the valuation principles set out in the Offering Memorandum, or generally;

3. Failed to follow pricing policies clearly stated in the Offering Memorandum;
4. Mispriced over the counter options ('OTC Options');
5. Overstated the valuation of certain assets including bonds known as Reflect Scientific Bonds;
6. Failed to verify the pricing and/or validity of other bonds known as Asseterra Bonds;
7. Failed to monitor compliance with the 20% investment restriction contained in the Offering Memorandum and the Rules of the Irish Stock Exchange;
8. Failed to calculate properly the real market value of these OTC Options, Asseterra Bonds, Reflect Scientific Bonds and other assets.

8. The Plaintiff also pleads that if the Defendant had ensured that the NAV of the Plaintiff Fund had adhered to the principles set out in the Offering Memorandum of the Fund then the Fund's NAV would have been accurate.

9. The Plaintiff also pleads that the Plaintiff incurred increasing losses from at least the middle of 2008 onwards, but that these were not reported in the Plaintiff's monthly NAV. Instead, the Plaintiff continually reported trading profits and this was achieved, they say, by the material overvaluation of the OTC Options. This overvaluation would not have occurred, they say, if the Defendant had been carrying out its duties in a reasonably diligent manner.

10. The Plaintiff also pleads that the Investment Manager also caused the Plaintiff to invest in Asseterra Bonds, that the circumstances of this investment should have put the Defendant on notice that further investigation into these bonds was needed, and that if the Defendant had done so, it would have been clear that there were serious issues about these Asseterra Bonds.

11. The Plaintiff pleads that if the Defendant had performed its obligations properly, and if the Plaintiff's true NAV had been calculated, the Plaintiff would have ceased trading in July 2008, and, if it had done so then the realisable assets of the Plaintiff at that time would have been US\$285 million. Instead, the Plaintiff says it continued to trade, continued to pay out redemptions and continued to incur losses and went into liquidation with assets of US\$2 million. The Plaintiff, therefore, claims a loss of US\$283 million. The Plaintiff also claims a further loss of US\$134 million for related matters. So the Plaintiff's total claim for damages against the Defendant is approximately US\$415 million.

12. All these allegations are denied in the Defence. Moreover, the Defendant pleads the principle *ex turpi causa non oritur actio*. In particular the Defendant also pleads:

1. That the Plaintiff's losses were not caused by the Defendant and that there is no causal link between any of the Plaintiff's losses and the Defendant's acts; and
2. That such losses were caused by the Plaintiff and/or its directors, persons other than the Defendant, events unrelated to the Defendant's performance of its contract and/or events outside the control of the Defendant.

13. The Plaintiff filed a Reply in these proceedings and specifically denied these positive pleas in the Defence.

(II) The issues in this case

14. Mr. Murray S.C. for the Defendant submitted that based on the pleadings it was clear, even at this early stage in the proceedings, that there were several issues in the proceedings which could be identified having regard to the pleadings. These were as follows:

(1.) Firstly, that the Court would have to determine what the administrator's obligations were under the Administration Agreement and that the Court would also have to decide, as part of this assessment, whether the duties of the administrator extended to an obligation to assess the value of the assets as opposed to simply computing the price.

(2.) Secondly, if the administrator did have that duty to assess value, the Court would have to determine how that relates to the duties of the Manager, the duties of the Investment Manager and the duties of the Board of the Plaintiff and of the Feeder Funds.

(3.) Thirdly, the Court would have to determine whether oral or written instructions were given to the administrator and, if so, whether those instructions absolved it from responsibilities where the matter is pleaded in the claim.

(4.) Fourthly, the Court would have to determine if there was a negligent failure by the administrator to question the value of all or some of the assets of the Fund at a particular point in time.

(5.) Fifthly, the Court would have to decide (in the event that the administrator did have an obligation to assess the value of the assets) when it ought to have done so.

(6.) Sixthly, the Court would have to determine at each point what the administrator was legally required to do. For example, at one point in the Statement of Claim, Mr. Murray S.C. points out that it was pleaded that the administrator ought to have drawn the attention of the Plaintiff to the fact that the Asseterra Bond was overvalued. Mr. Murray also submitted therefore, that this issue was critically relevant because it meant that issues such as the knowledge of the directors of the Plaintiff are crucial to issues of liability and causation. He submitted that if the directors of the Plaintiff knew, or ought to have known, of an overvaluation of assets, then the provision of that information by the administrator would have made no difference.

(7.) Seventhly, the Court would have to determine what the losses were and whose losses they were because, he submitted, it appeared to the Defendant that the claim was brought to recover losses that had been sustained by those who invested in the Master Fund and, therefore, the Court would need to determine who those investors were. This is relevant, he submitted, because the agreement between the parties contains a clause which precludes any liability on the part of the administrator for consequential, indirect, or special loss.

(III) The Upper Tribunal report

15. Therefore, when one has regard to the pleadings – and in particular the plea in the Defence that the Plaintiff's losses were caused by the Plaintiff and/or its directors – and when one has regard to the issues in the case as outlined by Mr. Murray S.C. (and, in particular, the issue of what the Plaintiff knew and what the directors knew), it is clear that one of the central issues in the case, apart from the valuation of the OTC Options, will be the pricing of the Asseterra Bonds.

16. In this regard Mr. Gallagher SC for the Defendant referred to a decision of the Upper Tribunal in the UK entitled *Micalizzi v. The Financial Conduct Authority* [2014] UKUT 0335 (TCC). I have been informed by Mr. Murray S.C. that this UK Upper Tribunal is a Superior Court of Record in the UK and that the Tribunal is chaired by a judge, (in this case Judge Berner) sitting with two other members of the Tribunal.

17. This case involved an appeal brought by Mr. Micalizzi, (a director of the Plaintiff, a director of the Manager of the Fund and of the Investment Manager of the Fund), against a decision of the Financial Services Authority in the UK (now the Financial Conduct Authority).

18. Mr. Gallagher S.C. opened certain portions of that judgment to the Court and in particular page 4, pages 12 to 14, pages 15 to 16, pages 16 to 20, pages 24 to 29, page 37, pages 50, 60, pages 73 to 76 and pages 93 to 99. I have read and considered the passages which I have been referred to. The judgment, as a whole, sets out an immensely detailed narrative of events.

19. Pages 12 to 14 of the judgment deal with the structure of the Fund and at paragraph 39 the decision states as follows:

"The Fund had two classes of investor. The first class, which the parties referred to as "investors", comprised those investors who, for their own account, invested directly in one of the feeder funds. The terms of that investment were governed by the Offering Memorandum from time to time of the relevant feeder fund. The second class, referred to as "lenders", comprised lenders who provided leverage to one of the feeder funds. There were three such lenders: IXIS Corporate and Investment Bank (Natixis), Bear Stearns International Limited ("Bear Stearns") and Nomura.

40. *The terms on which the lenders provided leverage to the Fund are set out in:*

(a) a total return swap between Natixis and DD Growth Premium IX Limited dated 30th March, 2007;

(b) a letter agreement dated 28th December, 2007 between Bear Stearns and DD Growth Premium BS Limited; and

(c) a confirmation between Nomura and DD Growth Premium SG Limited dated 8th December, 2008.

41. *By these agreements, the lenders did not invest in the Fund or in its Feeder Funds for their own account. The agreements created synthetic exposure to the Fund on a leveraged basis. The return to the lenders was an interest return, payable irrespective of the performance of the Fund. The lenders had the right to receive their capital back in preference to the investors."*

20. At paragraphs 45 to 47 of the document it sets out the investment strategy of the Fund. Paragraph 45 states that:

"The Fund employed a quantitative market neutral investment strategy known as a "pairs strategy". It is that strategy that was referred to in the hearing before us as the "main strategy", a term we adopt in this decision to distinguish that strategy from the investment in the Asseterra Bond.

46. *Pursuant to the main strategy, DDCM sought to identify two related stocks (a "pair") which were inconsistently valued in relation to one another in the market. A long position was taken in the undervalued stock, and a short position in the overvalued stock. DDCM employed a model known as the Growth Premium Analysis model ("GPA") developed by Mr Micalizzi and others to identify pairs. Liquidity was a crucial element of the main strategy. In marketing material dated September 2008, for example, an overview of investment strategy and risk management policy spoke of stocks being accessed from a "highly liquid universe" of the S&P 500 and the EuroStoxx 600. It described market volatility and correlation among stocks as being the two most important drivers of the Fund's performance, and the strategy as basically "long volatility and short correlation".*

47. *The Fund was subject to a restriction set out in the Offering Memorandum of each of the feeder funds, and in respect of the unlevered feeder fund, by the Irish Stock Exchange (until the latter fund was de listed from that exchange on 17th November 2008). Restrictions were also imposed in the contractual documentation associated with the obtaining of leverage through the lenders."*

21. Paragraphs 48 to 52 of the decision deal with the Offering Memorandum and set out certain details of that memorandum.

22. Paragraph 59 and following deal with the performance of the main strategy in 2008. At paragraph 60 it states that:

"Between 1st January 2008 and 30th September 2008, the NAV of the Fund increased from \$352 million to \$437 million. The Fund was profitable in every month except August 2008."

23. At paragraph 61 it states:

"Between 1st October 2008 and 31st December 2008, the NAV of the Fund increased from \$437 million to \$555 million. In each month the Fund recorded profits which totaled \$17.9 million for the quarter, with the balance of the increase in the NAV being attributable to incoming investment."

24. The document then sets out at paragraph 62 the figures on the trading profit for the Fund in October 2008. It shows considerable losses on most of the categories of investments but shows a profit on the Asseterra Bond of approximately \$90 million.

25. Similarly, at paragraph 66 similar figures are set out for November 2008 and in paragraph 69 for December 2008.

26. At paragraph 72 (and following) of the decision the Upper Tribunal dealt with the Asseterra Bond and it stated at paragraph 72:

"We outline here the structure of the Asseterra Bond. In doing so we should preface our summary description by saying that we do not consider that the Bond was at any time a genuine financial instrument capable of providing any financial

return or capable of being converted into a commodity. The Bond at no time delivered any financial return, whether in the form of an interest coupon, redemption or the exercise of a conversion option. Apart from the acquisitions by the Fund, the Bond was never successfully traded, either on an exchange or electronic platform, or privately. No genuine proof of product was ever made available. There is no evidence that any of the parties associated with the Bond, that is to say the issuer, Asseterra Inc ("Asseterra"), the guarantor, Pacific Global Oil Australia Pty ("PGO"), and the owner of the asset by which the Bond was purported to be collateralised, the International Charitable Christian Foundation ("ICCF") had any substance."

27. At paragraph 73 it states:

"The following description of the Bond is taken from the documents by which it was purported to be constituted. In view of our conclusion that the Bond was not a genuine financial instrument, it follows that we consider that none of these documents had, or were intended to have, any real commercial effect. They were, in short, a sham."

Paragraph 83 deals with an apparently important meeting in Portofino in October 2008.

28. I will move then to paragraph 152 of the decision which states as follows:

"In an instructive passage of the cross examination of Mr. Micalizzi, he accepted that the effect of Repurchase Agreement 1 was to restrict the profit on the transaction in the \$200 million tranche of bonds to \$5 million. On the other hand, Repurchase Agreement 1 was never "booked", meaning that it was not sent to PNC, the administrator of the Fund. Had it been, as Mr. Micalizzi candidly observed, PNC would not have permitted any profit in excess of \$5 million to be ascribed to the Bond at that stage."

29. Paragraph 263 of the decision dealing with Nomura states that:

"On 8th December, 2008, Nomura invested \$41.8 million into the Fund, through a shareholding hedged lending transaction. That transaction was negotiated between Nomura and DDCM, including Mr. Micalizzi. Nomura undertook due diligence, which involved the provision of information by DDCM to Nomura."

30. At paragraph 461 in its conclusion, the Upper Tribunal states as follows:

"We have concluded that Mr. Micalizzi's conduct in the respects we have examined lacked integrity overall, and was in many instances dishonest. Our reaching this conclusion necessarily means that we have rejected Mr. Micalizzi's submissions in almost all respects, with the notable exception of his knowledge of the lack of genuineness of the Bond at the initial stages, and we have by the same token rejected much of his evidence. In that connection, whilst Mr. Micalizzi was superficially plausible and appeared to be frank and helpful in his evidence, on analysis we have found that in many instances he was none of those things. In our view, in those respects where we have made findings adverse to him, he continued to attempt to mislead this Tribunal with regard to those matters in the same way as he had misled investors, lenders, the Authority and others."

A similar comment is made at paragraph 462.

(IV) The legal principles applicable to discovery applications

31. The legal principles applicable to these discovery applications were not in dispute between the parties. The relevant principles are that:

1. Discovery will be made of documents relating to any matter in question and the requirement of relevance is "the touchstone of the discovery process", as is stated by Delany and McGrath, *Civil Procedure in the Superior Courts* (3rd ed., Roundhall, Dublin, 2012) at p. 402;
2. The test of relevance is that set out in *Compagnie Financière et Commerciale du Pacifique v Peruvian Guano* (1882) 11 QBD 55 which has been repeatedly approved and applied in the Irish courts;
3. Relevance must be assessed by reference to the pleadings and the issues in the case;
4. Documents will only be discovered if they are also necessary for disposing fairly of the cause or matter, as Fennelly J. noted in *Ryanair v. Aer Rianta* [2003] 4 I.R. 264;
5. In addition, the concept of proportionality has increasingly been referred to as a relevant factor in assessing whether discovery of a particular category should be ordered in particular cases.

(V) Three preliminary general issues

32. Before I turn to deal with the specific categories of documents sought by the Defendant there were three general issues which were in dispute between the parties. These were:

- a. The issue of the Feeder Funds;
- b. The issue of subcategories;
- c. The issue of whether certain documents are in the power, possession or procurement of the Plaintiff.

I will deal with these in turn.

(a) The issue of the Feeder Funds

33. The Defendant seeks discovery of documents which relate not only to the Master Fund but also relate to the two Feeder Funds. The Plaintiff refuses to make discovery of documents which relate to the two Feeder Funds. Therefore, the issue is whether discovery should be ordered of documents which relate to the Feeder Funds.

34. This issue of the Feeder Funds is set out in some detail in the pleadings. At paragraph 2 of the Statement of Claim, as I have already quoted above, it provides that:

"The Plaintiff was the Master Fund in a 'Master Feeder' fund structure (referred to hereafter as the 'Fund'). The two feeder funds were DD Growth Premium Fund and DD Growth Premium 2X Fund (together the 'Feeder Funds')."

35. Moreover, the Defendant raised particulars and the Plaintiff replied to these particulars as follows: The particular raised at paragraph 2 by the Defendant was:

"Arising from paragraph 2 of the Statement of Claim, please provide the following further and better particulars:

(a) Please specify precisely what the Plaintiff means by the term 'Master Fund' and please provide full and detailed particulars in this regard."

36. The Plaintiff's Reply was as follows:

"Master Fund' means a company that issues equity interests to one or more investors, holds investments and conducts trading activities to implement an overall investment strategy and has one or more regulated feeder fund. Such a structure involves a master fund and feeder funds, which invest in the Master Fund. In this case the Plaintiff was the Master Fund.

The Plaintiff accepted investments (directly and/or indirectly) from two Feeder Funds, namely:

(i) DD Growth Premium Fund (the 'Premium Feeder Fund') which was incorporated on 19th November 2004;

(ii) 2 DD Growth 2X Fund which was incorporated on 2nd February 2007, which was also incorporated on 19th December 2004;

Both of these were registered as exempt companies under the laws of the Cayman Islands. The Premium Feeder Fund was allocated shares in the Plaintiff."

37. The Defendant submits that the Manager of the Fund was Dynamic Decisions Capital Management Limited and that Mr. Micalizzi was CEO of this management company. He was also a director of the Plaintiff Fund.

38. Moreover, the Defendant submits that there are other cross overs of directors between the Master Fund and the two Feeder Funds. The Defendant also submits that knowledge of the directors of the Master Fund cannot be separated from their knowledge as directors of the Feeder Funds.

39. Moreover, the Defendant also submits that the Offering Memorandum for the Feeder Funds is the same as the Offering Memorandum for the Master Fund. Therefore, the Defendant says that the Master Fund and Feeder Funds are inextricably linked and it is therefore necessary to have all documents which are relevant to each category, both from the Master Fund and each of the Feeder Funds.

40. The Plaintiff submits that: (1) the Feeder Funds are different entities; (2) the Feeder Funds are not parties to the proceedings; (3) the Feeder Funds do not make any allegations or claims against the Defendant; and (4) that both Feeder Funds are in liquidation and have different liquidators to the Master Fund.

41. That may be so, however, it is clear on the facts of this case that (1) the two Feeder Funds were part of the Fund structure; (2) the Plaintiff itself has pleaded that they were part of a fund structure; and (3) that the Feeder Funds were investors in the Fund.

42. In my view, the Feeder Funds are clearly inextricably linked to the Master Fund on the facts of these proceedings. Moreover, there is simply no reality to the claim that documents which relate to the Feeder Funds are not relevant or material to the issues in these proceedings. They are clearly relevant and material. Indeed they may well become central to the issues in these proceedings.

43. I would, therefore, conclude that all of the documents which relate to the Feeder Funds are relevant and material and should be discovered.

(b) The issue of subcategories

44. The second general issue which arose in the discovery sought by the Defendant was the issue of subcategories. The Defendant sought 18 categories of discovery. For the avoidance of doubt, it also listed a number of subcategories under each category. In all cases the Plaintiff has engaged with the Defendant in relation to the general category, and has either agreed or disagreed, or partly agreed or disagreed with the wording of the general category proposed by the Defendant. However, it has steadfastly refused to engage with the Defendant on the issue of the subcategories.

45. The Plaintiff has adopted an unusual position given that these are its proceedings. It has made a claim for over \$400 million and it consented to the Defendant's application for admission of these proceedings to the Commercial List and the case management procedures of this Court. Its position is that it will agree to make discovery of the documents covered by the wording of the general category of documents as sought by the Defendant (or ordered by the Court) and it says that all of the documents which it has will be discovered. However, it will not say whether or not the documents set out in each subcategory will be captured. It simply refused to engage with the argument. The effect of this position is that:

1. The Defendant (and indeed the Court) does not know whether the subcategory of documents would be regarded by the Plaintiff as being captured by the general category. The Plaintiff is remaining silent on this point;

2. The Plaintiff will then make discovery of the relevant documents by category;

3. The Plaintiff will decide, at that point in time, on its own, whether certain subcategories of documents fall within the general category;

4. If so, then it will make discovery of these documents;

5. If not, it will not make discovery of these documents;

6. The Defendant will then have to review all of the documents discovered to assess whether in fact discovery of all of the subcategories were made;

7. If it finds that certain subcategories are not made, then the Defendant will have to make a second application to Court for discovery under that subcategory;

8. The Plaintiff accepts that this is the position and says that this is what should happen.

46. Mr. Murray S.C. for the Defendant criticised this approach in trenchant terms as a "*fundamentalist*" approach to discovery. It may not be fundamentalist but it is certainly delphic. More to the point, it is absolutely wasteful of legal costs and resources for the parties and equally important, wasteful of court time and resources. Two days have been taken up with this application and it would be wasteful of court time if a further day or two days time were to be set aside to deal with the subcategories in a future application.

47. In my view, the Plaintiff's position on the subcategories is unsustainable. It could have chosen to accept certain subcategories and argued that others were not captured in the general category; however, for its own reasons, it has chosen not to do so. This means that the Defendant must submit that, (and the Court must assess whether) all of the subcategories fall within the general categories, rather than having a more focused debate on a smaller number of subcategories.

48. However, having considered the arguments of both sides, I am quite satisfied that the position of the Plaintiff is wrong in principle and cannot be sustained. It follows, therefore, that I will order discovery of documents in respect of all of the subcategories where I am satisfied that those subcategories fall within the general category.

(c) The issue of power, possession and procurement

49. A third general issue is the issue of whether documents which relate to the Feeder Funds are within the Plaintiff's power, possession, or procurement. Clearly if the Court orders discovery, as I intend to do, then the Plaintiff will have an obligation to discover all documents in its power, possession and procurement with respect to the Feeder Funds. It is a matter then for the Plaintiff as to how and, to what extent, it can comply with that order. In this regard I note that a copy of the agreement between the Master Fund and the two Feeder Funds, which was handed in to the Court, (at paragraph 12.5) provides as follows:

"On the termination of this agreement;

(2) the Investment Manager shall forthwith deliver to each fund, or as it shall direct, all correspondence and records of all and every description relating to the affairs of such fund which are in the Investment Manager's possession, or under the Investment Manager's control, and shall not be entitled to any lien in respect of any of the foregoing."

50. However that paragraph may or may not be determinative of the issue. In my view, it is a matter for the Plaintiff to comply with the order, and as I understand the Plaintiff's position, it will, of course, comply with the order and discover all such documents which are in its power, possession or procurement. If the Defendant is not satisfied with the documents received it may then decide to challenge the Plaintiff's position, or to take such other course of action to obtain discovery as it may be advised. That, however, is clearly a matter for another day.

51. I also note Mr. Gardiner's submission to the Court this morning in relation to this issue and that is effectively consistent with the terms of this judgment, that the full compliance (or otherwise) by the Plaintiff is a matter for another day.

52. I turn, therefore, to deal with the 18 categories of documents sought and I propose to do so by reference to what was described as Mr. Gallagher's schedule, a helpful document handed in to court and which set out, in a tabular form, the categories sought by the Defendant and the Plaintiff's response in respect of all categories.

(VI) The categories of documents sought

Category 1

53. The general category of documents sought under this heading by the Defendant is:

"All documents which evidence and/or relate to the management and structure of the Plaintiff and each of its Feeder Funds during the period from 1st May 2008 onwards."

The Plaintiff engaged with this request for general discovery and it offered to make discovery of:

"All documents which evidence and/or relate to the management and structure of the Plaintiff during the period from 1st May 2008 until the appointment of the liquidators to the Plaintiff."

The only difference in relation to the formulation was in relation to the Feeder Funds and I have already dealt with that issue earlier in my judgment.

54. I am of the view, therefore, that the order which should be made in the general category is the wording set out in Category 1 by the Defendant, subject only to the stipulation that the period of time would be the period from 1st May 2008 until the appointment of the liquidators to the Plaintiff.

Category 1 the issue of subcategories

55. There are nine subcategories sought by the Defendant. These subcategories are:

"All documents which evidence and/or relate to:

1. The Memorandum and Articles of Association of the Plaintiff and each of its Feeder Funds (as amended from time to time);

2. The purpose of the Plaintiff and each of its Feeder Funds and their management and structure;

3. The 'Master Feeder' fund structure and the overall investment strategy implemented by the Plaintiff and each of its

Feeder Funds;

4. The basis on which the Plaintiff accepted investments directly and/or indirectly from DD Growth Premium Fund, DD Growth Premium 2X Fund, and any other entities;

5. The legal and/or beneficial ownership and/or control of the Plaintiff and each of its Feeder Funds;

6. The appointment, resignation and/or replacement of directors of the Plaintiff and each of its Feeder Funds and their respective remuneration;

7. All iterations (to include drafts of same) of the Offering Memoranda of the Plaintiff and each of its Feeder Funds and supplements thereto as amended from time to time;

8. Any communications between the Plaintiff and service providers to the Plaintiff regarding the drafting, meaning and/or effect of each iteration of the Offering Memoranda; and

9. The respective roles, duties, responsibilities and obligations of the directors of the Plaintiff and each of its Feeder Funds, including in relation to the making of investment decisions on behalf of the Plaintiff, the valuation of the Plaintiff's assets, and the monitoring of compliance with the Plaintiff's valuation principles, pricing policies, investment objectives and restrictions."

56. In my view all of these categories are captured by the broad general category of management and structure of the Plaintiff. The fact that the Plaintiff has agreed discovery of this general category means that all such documents are relevant and material and must be discovered. Therefore, the only question for the Court is whether, in its view, the general category covers the subcategories. Given the broad wording of the general categories agreed, I am of the view that it does so cover the subcategories. Moreover, each of the subcategories are clearly relevant and material. I had a concern about Section 1.7, the various iterations of the Offering Memorandum, but I am satisfied that this is a critical issue in these proceedings, and in the factual matrix of these proceedings, and the iterations are relevant and necessary to the issues in dispute and should be discovered.

Category 2

57. The second category sought by the Defendant is:

"All documents which evidence and/or relate to the appointment and engagement of Dynamic Decisions Capital Management (Cayman) Limited (the 'Manager') and Dynamic Decisions Capital Management Limited (the 'Investment Manager') by the Plaintiff and/or each of its Feeder Funds."

58. This is refused by the Plaintiff. However, I am of the view that these documents are clearly relevant and material and must be discovered for the following reasons:

1. These documents relate to the appointment and engagement of the Manager and Investment Manager of the Fund and Feeder Funds;

2. The Manager and Investment Manager were of central importance to the management and operation of the Fund and central to investment decisions of the Fund, which are the central issues in this case;

3. Moreover, the Manager and the Investment Manager were, according to the Defendant, both controlled by Mr. Micalizzi who was also a director of the Plaintiff and a director of the Feeder Funds. He was, according to the Defendant, the controlling mind of all the companies;

4. Moreover, the Defendant in one of their letters seeking voluntary discovery, (at page 170 of the book of the Defendant's discovery motion papers) stated as follows:

"In the particulars pleaded under paragraph 15 of the Statement of Claim, it is pleaded that the Investment Manager caused the Plaintiff to invest in a Note Issuance Program (the Asseterra Bonds) which were issued by Asseterra Inc, a company incorporated in the State of Nevada, USA.

In paragraph 16 of the Statement of Claim, it is pleaded that the Plaintiff continued to trade and suffered loss and damage as a result of the alleged acts and/or omissions of the Defendant. Particulars of Loss and Damage are pleaded in the Statement of Claim. In paragraph 34(f) of the Replies to the Notice of Particulars of the Defendant, it is pleaded that the Defendant relied on valuations and information provided to it by the Investment Manager at face value and without independent verification, contrary to the obligations as administrator.

In paragraph 42(p) of the Replies to the Notice of Particulars of the Defendant, it is pleaded that the Note Issuance Program, which resulted in the acquisition of the Asseterra Bonds, was promoted by the Plaintiff's Investment Manager to the Board of the Plaintiff. In paragraph 42(s)(ii) of the Replies to the Notice for Particulars of the Defendant, it is pleaded that the Joint Official Liquidators believe that the US\$5 million deposit paid for the Asseterra Bonds in November and December 2008 was authorised by the Investment Manager."

59. Likewise, at page 238 of the booklet, in a further letter from Arthur Cox Solicitors for the Defendant they state as follows:

"Central Issue in the Proceedings

A central issue in dispute in these proceedings is the manner of the operation of the Plaintiff, particularly the investments it made in and, the valuations it ascribed to, the OTC Options, the Reflect Scientific Bonds, and the Asseterra Bonds. It appears to the Defendant that all of these matters were largely, if not exclusively, carried out on behalf of the Plaintiff by its Manager and Investment Manager. By way of example, on the Plaintiff's own case, the Investment Manager caused the Plaintiff to invest in a Note Issuance Program in respect of the Asseterra Bonds. The Plaintiff also pleads the Joint Official Liquidators' belief that the US\$5 million deposit paid for the Asseterra Bonds in November and December 2008 was authorised by the Investment Manager.

Documents evidencing or relating to the role and responsibility of the Plaintiff, its servants and/or agents, including the

Manager and Investment Manager, in providing information, instructions and confirmation in respect of these assets of the Plaintiff are clearly relevant to the issues in dispute in the proceedings and will assist in establishing the factual position in relation to the allegations made by the Plaintiff which are denied by the Defendant.

An examination of the role and responsibility of the Manager and/or the Investment Manager in the operation of the Plaintiff, the extent to which they advised on the investment made by the Plaintiff, and the extent to which they monitored the compliance by the Plaintiff with the investment restrictions allegedly set out in the Offering Memoranda, is essential to determine the circumstances of and responsibility for the losses allegedly suffered by the Plaintiff.

Mitigation of Loss

The Defendant has pleaded that, if any loss or damage has been suffered by the Plaintiff, the Plaintiff has failed to mitigate its loss. One possible means by which the Plaintiff could have mitigated the alleged loss or damage is to have pursued the Manager and/or Investment Manager in respect of their conduct and/or their discharge of their duties. The Defendant is not aware of the Plaintiff having taken any steps against the Manager and/or the Investment Manager in this regard.

Discovery of this category of documents is necessary, therefore, in order for the Defendant to understand the exact terms on which the Manager and the Investment Manager were engaged by the Plaintiff, any limitations on the liability of the Manager and the Investment Manager and to understand why the Plaintiff has failed to take steps against the Manager and/or the Investment Manager to mitigate its loss.

Duties and obligations of the Manager and Investment Manager

In these proceedings it appears that the Plaintiff is seeking to impose duties and obligations on the Defendant which duties and obligations were, as far as the Defendant is concerned, more properly within the remit of the Manager and/or the Investment Manager pursuant to the terms of the agreements entered into by the Plaintiff with those entities.

Discovery of documents under this category will allow the Defendant to establish the nature and extent of the respective roles of the Plaintiff, the Manager and the Investment Manager. These documents are clearly relevant to the proceedings, particularly in light of the apparent close relationships between the directors and officers of the Plaintiff, the Manager and Investment Manager. They will also assist in establishing the Defendant's case that the Plaintiff itself and its servants and/or agents, including the Manager and the Investment Manager, were responsible for the alleged losses."

60. The Plaintiff's position appears to be that of an outright refusal of discovery. It says that this case has nothing to do with the Investment Manager, that it is not an issue on the pleadings and that the Plaintiff has admitted that the Investment Manager was engaged. However, in my view that argument is not valid. It is clearly an issue on the pleadings. Paragraph 35(iv) of the Defence pleads that the losses of the Plaintiff were in fact caused by the Plaintiff and/or its directors. One of these directors was Mr. Micalizzi, who was also a director of the Manager and Investment Manager. The Manager and Investment Manager were intimately involved with the management of the Plaintiff's investments. It is difficult, therefore, if not impossible, to see how these documents are not relevant and material. Indeed, I am of the view that they are centrally relevant and material and must be discovered. They are also relevant to issues of causation and contributory negligence and go to the heart of the case.

61. I should also say, before I deal with the issue of subcategories, that whilst I sought clarification from the Defendant about the meaning of the term "engagement" in line 1 of General Category 2, I am satisfied that what is meant by the term is the ongoing engagement of DDCM and DDCM Limited by the Plaintiff after its appointment. In other words, what is to be discovered are documents which relate to the appointment and engagement of these companies (i.e. the appointment and continued engagement of the companies).

Category 2 the subcategories

62. The Defendant sought seven subcategories under Category 2. These subcategories are as follows:

"All documents which evidence and/or relate to:

- 1. Any submissions and/or applications made by the Manager and the Investment Manager to the Plaintiff to perform services for and/or on behalf of the Plaintiff and the terms upon such services would be provided;*
- 2. Any due diligence carried out by the Plaintiff on the Manager and/or the Investment Manager;*
- 3. The ownership, management and/or control of the Manager and the Investment Manager and the Plaintiff's knowledge and/or awareness of same;*
- 4. The appointment, resignation and/or replacement of directors of the Manager and the Investment Manager;*
- 5. Any agreement(s) (to include drafts of same) between the Plaintiff, the Manager and Investment Manager and documents evidencing or referring to the negotiation of the terms of such agreements;*
- 6. Any agreements and/or arrangements in relation to fees payable to the Manager and the Investment Manager;*
- 7. The respective roles, functions, duties, responsibilities and obligations of the Manager and the Investment Manager, including in relation to the making of investment decisions on behalf of the Plaintiff, the valuation of the Plaintiff's assets, and the monitoring of compliance with the Plaintiff's valuation principles, pricing policies, investment objectives and restrictions."*

63. Having considered all seven subcategories, I am quite satisfied that all of these clearly come within the terms of the general category of Category 2. They are, therefore, subcategories of documents which should be discovered.

Category 3

64. The third category of documents sought by the Defendant in general terms was as follows:

"All documents which evidence the extent of the duties and obligations owed by the Defendant to the Plaintiff in the provision of administration services to the Plaintiff."

This was agreed to by the Plaintiff. Therefore, an order can be made in these terms.

65. The only issue which arose in Category 3 were the subcategories. There were three subcategories. These are as follows:

"All documents which evidence:

- 1. The appointment and engagement of the Defendant by the Plaintiff to provide administration services;*
- 2. The precise scope of the duties and obligations which the Plaintiff alleges were owed by the Defendant in respect of the provision of administration services; and*
- 3. The source of all terms governing the relationship between the Plaintiff and the Defendant in this regard."*

In my view, having considered these three subcategories, they clearly all fall within the general category of Category 3 and are, therefore, discoverable.

Category 4

66. Category 4 is the mirror image of Category 3 except that it refers to the Middle Office Agreement rather than the Administration Agreement. The documents in Category 4 which the Defendant sought were:

"All documents which evidence the extent of the duties and obligations owed by the Defendant to the Plaintiff in the provision of middle office services to the Plaintiff."

This was agreed by the Plaintiff. Therefore, the only issue in this category are the subcategories.

67. There are four subcategories sought by the Defendant. These are as follows:

"All documents which evidence:

- 1. The appointment and engagement of the Defendant by the Plaintiff to provide middle office services, including all documents regarding the negotiation, consideration and/or agreement of the terms of the Middle Office Agreement (including drafts of same);*
- 2. The precise scope of the duties and obligations which the Plaintiff alleges were owed by the Defendant in respect of the provision of middle office services;*
- 3. The source of all terms governing the relationship between the Plaintiff and the Defendant in this regard; and*
- 4. The relevance of the services to be performed by the Defendant, or its obligations arising, under the Middle Office Agreement to the calculation of the NAV of the Plaintiff by the Defendant pursuant to the Administration Agreement."*

In my view, all of these four subcategories clearly fall within the general category. They should, therefore, be discovered.

Category 5

68. The general category, under Category 5, of documents sought by the Defendant was:

"All documents from 1st May 2008 onwards which evidence and/or relate to the OTC Option transactions, the Reflect Scientific Bond transactions and the Asseterra Bond transactions."

69. The Plaintiff's response essentially agreed the request. However, it is worded slightly differently and it stated that it would agree to discover:

"All documents from 1st May 2008 onwards which evidence and/or relate to the trading activity of the Plaintiff, including, but not limited to, the OTC Option transactions, the Reflect Scientific Bond transactions and the Asseterra Bond transactions."

However, for reasons which have to do with the later categories sought, I would prefer to order discovery of this category in the wording sought by the Defendant.

70. The only real issue in relation to this category was the dispute in relation to the subcategories.

Under this category the Defendant sought 14 subcategories of documents. These were as follows:

"All documents which evidence and/or relate to:

- 1. All communications and correspondence in relation to the OTC Options, Reflect Scientific Bonds and Asseterra Bonds, including, but not limited to, communications and correspondence between the Plaintiff and/or investors and/or potential investors and/or leverage providers and/or potential leverage providers and/or the Plaintiff's auditors and/or prime brokers and/or the Defendant and all internal communications within the Plaintiff.*
- 2. Any due diligence performed by the Plaintiff prior to entering into each of the OTC Options, Reflect Scientific Bonds and Asseterra Bonds;*
- 3. The Note Issuance Program which resulted in the acquisition of the Asseterra Bonds by the Plaintiff and the alleged promotion of same by the Investment Manager to the Board of the Plaintiff;*

4. *The counterparties to, and issuers, sellers, underwriters, guarantors, and/or trustees of, each of the OTC Options, the Reflect Scientific Bonds and Asseterra Bonds, the management, ownership and/or control of such entities, and the Plaintiff's knowledge and/or awareness of same, including, but not limited to, Asseterra Inc, Pacific Global Oil Australia Pty, International Charitable Christian Fund SL, Nexus Group Pty, and Technokom;*
5. *All connections and communications between the Plaintiff and each such entity;*
6. *The payment of a deposit or deposits in respect of the OTC Options, Reflect Scientific Bonds and Asseterra Bonds;*
7. *The recording of each OTC Options, Reflect Scientific Bond and Asseterra Bond entered into by the Plaintiff;*
8. *Any consideration by the Plaintiff of entering into the OTC Options, Reflect Scientific Bonds and Asseterra Bonds, including the effect of entering into these transactions, the purchase price, and whether the Plaintiff's investment in same was and remained consistent with the investment objectives and restrictions of the Plaintiff;*
9. *Any consideration by the Plaintiff of the value of the OTC Options, Reflect Scientific Bonds and Asseterra Bonds, including compliance with the valuation principles and/or pricing policies of the Plaintiff, the provision of valuations by the Manager and/or the Investment Manager to the Defendant, the obtaining of prices from independent sources, and the value of these assets relative to the value of the Plaintiff;*
10. *The awareness of the directors of the Plaintiff of the OTC Options, Reflect Scientific Bonds and Asseterra Bonds;*
11. *Any ongoing monitoring by the Plaintiff of the performance of the OTC Options, Reflect Scientific Bonds and Asseterra Bonds and compliance (or otherwise) with the investment objectives and restrictions of the Plaintiff;*
12. *Any trade confirmations, valuations, contracts, term sheets, prospectuses, offering circulars, purchase agreements, and repurchase agreements, in respect of the OTC Options, Reflect Scientific Bonds and Asseterra Bonds;*
13. *The daily independent market values, valuation methodologies, assumptions behind the valuations, and fair value calculations allegedly available from various third party data providers, including Bloomberg and Reuters, in respect of the Reflect Scientific Bonds; and*
14. *The 'red flags' which were allegedly apparent in relation to the Asseterra Bonds."*

71. I have considered each of these subcategories and I am satisfied that they all fall within the general category sought in Category 5 and are, therefore, discoverable. That is, of course, because the category which is sought is drafted in very broad terms and has been consented to by the Plaintiff. Whilst subcategory 4 is quite broad and gave me some pause for thought, the only documents which are discoverable are those documents under this category which are in the Plaintiff's possession, power and procurement which relate to all of these parties and I am satisfied that, as drafted, this subcategory does fall within the general category.

Categories 6 and 7

72. No issues arose on these categories and no order will be made in respect of them.

Category 8

73. The general Category 8 sought by the Defendant was as follows:

"All documents from 1st May 2008 onwards which evidence and/or relate to the other trading activity of the Plaintiff and each of its Feeder Funds other than their trading activity in relation to the OTC Options, Reflect Scientific Bonds, and Asseterra Bonds."

The Plaintiff's position was that it was of the view that this category sought was captured by its formulation under Category 5. That may be so but I am of the view that the Defendant is entitled, on the facts of this case, to discovery according to its formulation and I will, therefore, order discovery in terms of the Defendant's formulation of the general category in Category 8.

74. The other issue that arose in relation to this was in relation to the Feeder Funds and I have already dealt with that earlier in my judgment.

75. The only other issue that arose in relation to this category were the subcategories. The Defendant sought four subcategories. These were as follows:

"All documents which evidence and/or relate to:

1. *The investment decisions taken by the Plaintiff and each of its Feeder Funds in respect of such trading activity;*
2. *The entering into of options, derivatives, instruments, bonds, and other assets (other than the OTC Options, Reflect Scientific Bonds and Asseterra Bonds) by the Plaintiff and each of its Feeder Funds;*
3. *The closing out of options, derivatives, instruments, securities, bonds and other assets (other than the OTC Options, Reflect Scientific Bonds and Asseterra Bonds) by the Plaintiff and each of its Feeder Funds; and*
4. *The losses incurred and/or profits made by the Plaintiff and each of its Feeder Funds arising from their trading activity other than their trading activity in relation to the OTC Options, Reflect Scientific Bonds, and Asseterra Bonds."*

76. Having considered these four subcategories I am of the view that they are clearly caught by the general category of discovery and I will, therefore, order discovery of documents within those subcategories.

Category 9

77. The general category of documents sought by the Defendant under this heading was:

"All documents which evidence and/or relate to the calculation of the NAV of the Plaintiff and/or each of its Feeder Funds for each of June, July, August, September, October, November and December 2008."

In essence this was agreed to by the Plaintiff. The only issues which arose were the issues of (1) the Feeder Funds, which I have already dealt with and (2) the issue of the subcategories.

78. The Defendant sought four subcategories in relation to this. These were as follows:

"All documents which evidence and/or relate to:

- 1. All communications and correspondence between the Plaintiff and the Defendant in relation to the calculation of the NAV of the Plaintiff;*
- 2. The valuations for assets of the Plaintiff which were provided to the Defendant by or on behalf of the Plaintiff;*
- 3. Any consideration by the Plaintiff of the valuations of its assets; and*
- 4. All uses to which the NAVs calculated by the Defendant were put by or on behalf of the Plaintiff."*

79. Having considered all of these subcategories I am of the view that they are clearly caught by the general category sought by the Defendant.

Category 10

80. The general category sought by the Defendant under this heading was:

"All documents from 1st May 2008 onwards which evidence and/or relate to the Plaintiff's compliance (or otherwise) with all applicable laws, listing rules, regulations and/or the investment objectives, guidelines, strategies or restrictions of the Plaintiff."

81. The Plaintiff's response was an agreement in principle to part of it. The Plaintiff agreed to discover:

"All documents from 1st May 2008 onwards which evidence the Plaintiff's compliance (or otherwise) with the 20% restriction contained in the Offering Memoranda and the Rules of the Irish Stock Exchange and/or the Plaintiff's investment objectives, guidelines, strategies or restrictions."

82. Therefore the Plaintiff seeks to restrict it to the 20% restrictions in the Offering Memoranda and the Rules of the Irish Stock Exchange and the Defendant seeks more. The Defendant seeks documents which relate to all applicable laws and compliance therewith, all listing rules and compliance therewith and all regulations and compliance therewith.

83. The Plaintiff's argument is that what it has offered is all that is relevant as derived from the pleadings. However, in my view, that position is not correct. It is certainly all that is contained in the Statement of Claim, but the Defence specifically pleads that the Plaintiff's losses were caused by the Plaintiff and/or its directors. Moreover, the Upper Tribunal Report sets out in considerable detail the wrongdoing and dishonesty of Mr. Micalizzi, a central character for the Plaintiff in these proceedings.

84. The Plaintiff submits that there is no plea that the Plaintiff is in breach of any of these other rules and regulations. That may be so, but the performance of the Plaintiff and its directors and whether they broke any rules or regulations are clearly central issues in the case. There are already findings of dishonesty in the UK against Mr. Micalizzi and the Defendant wishes to obtain discovery of any other documents which relate to the Plaintiff's compliance (or non compliance) with other rules and regulations. These are clearly documents which are relevant and material, having regard to the issues in the case. They are, therefore, relevant and material and must be discovered.

85. Having said that, of course, the issue of the findings of the UK Upper Tribunal and its status (and evidentiary status) in this trial under Irish law will be a matter for the trial of the action. I simply note it in passing as showing how the documents which the Defendant seeks are clearly relevant and material and should be discovered.

86. The other issues in relation to Category 10 are the subcategories. The Defendant seeks four subcategories. These are:

"All documents which evidence and/or relate to:

- 1. Any formal procedures which were put in place by the Plaintiff to monitor such compliance;*
- 2. Any communications within the Plaintiff and/or between it and its service providers and/or advisors regarding such compliance;*
- 3. Any reports prepared by the Plaintiff in relation to the performance of its investments and such compliance; and*
- 4. Any breaches of applicable laws, listing rules, regulations and/or investment restrictions, any notification of such breaches and any consideration given and/or steps taken by or on behalf of the Plaintiff to address same, including any advice obtained and any communication by or on behalf of the Plaintiff to any third parties, including the Irish Stock Exchange and investors in and/or leverage providers to the Plaintiff or each of its Feeder Funds in this regard."*

87. In my view, having considered these four subcategories they clearly fall within the general categories sought and I would, therefore, order discovery of them.

Category 11

88. The general category of documents sought by the Defendant under this heading is:

"All documents from 1st May 2008 onwards which evidence and/or relate to the involvement of the directors of the Plaintiff and each of its Feeder Funds in their operations."

89. The position adopted by the Plaintiff was that it refused this category. However, it refused it because it believed that the documents would be captured by Categories 1 and 5, to which it had already agreed. Category 1 is *"all documents which evidence and/or relate to the Management and structure of the Plaintiff"*, and Category 5 is *"All documents which evidence and/or relate to the OTC Option transactions, the Reflect Scientific Bond transactions and the Asseterra Bond transactions."* Therefore the Plaintiff's

position is that they are in fact consenting to Category 11 but believe that they are captured by Categories 1 and 5, and, therefore, do not need to be set out in a separate category. That may be so. However, in my view, it is better, in complex cases such as this, to ensure that there is no confusion or lack of clarity, if possible, about what is ordered to be discovered. In the circumstances I will therefore order discovery of Category 11 in the wording sought by the Defendant.

90. The only issue which arose in relation to Category 11 between the parties was the subcategories. The Defendant sought eight subcategories of documents under Category 11 as follows:

"All documents which evidence and/or relate to:

1. The discharge by the directors of the Plaintiff and each of its Feeder Funds of their roles, duties, responsibilities and obligations;

2. The involvement of the directors of the Plaintiff and each of its Feeder Funds in relation to the making of investment decisions on behalf of the Plaintiff, the valuation of the Plaintiff's assets, and the monitoring of compliance with the Plaintiff's valuation principles, pricing policies, investment objectives and restrictions;

3. The consideration by, and/or awareness of, the directors of the Plaintiff and each of its Feeder Funds of the OTC Options, Reflect Scientific Bonds and Asseterra Bonds;

4. The supervision of the Plaintiff and each of its Feeder Funds' activities, and those of the Manager, Investment Manager and other service providers;

5. The review of management accounts and financial statements of the Plaintiff and each of its Feeder Funds;

6. The corporate governance of the Plaintiff and each of its Feeder Funds, including, but not limited to, minutes, agendas and records of meetings, all documents prepared in respect of such meetings, board and/or members' resolutions and directors' certificates;

7. All internal communications and correspondence as between the directors of the Plaintiff and each of its Feeder Funds; and

8. All communications and correspondence between the directors of the Plaintiff and each of its Feeder Funds and/or investors and/or potential investors and/or leverage providers and/or potential leverage providers and/or the Plaintiff's auditors and/or prime brokers and/or the Defendant."

91. Again, I have considered these subcategories and in my view all eight subcategories are clearly categories which fall within the general category of documents sought. They are also clearly relevant and material to the proceedings. The Defendant needs to obtain documents which relate to what each director knew, who knew what and who was responsible for what. These documents are clearly central to the Defendant's plea at paragraph 35 (iv) of its Defence.

Category 12

92. The general category sought in Category 12 by the Defendant is:

"All documents which evidence and/or relate to the provision of leverage to and/or direct investment in the Plaintiff and/or each of its Feeder Funds by leverage providers. Strictly without prejudice to the generality of the foregoing, such documents should include, but not be limited to, all documents which evidence and/or relate to..."

93. The position of the Plaintiff in respect of the general category sought is that it refuses the category sought. However, it is refusing it on the basis that it is caught by Category 18. So it is, therefore, not a full refusal; indeed it is an acceptance in principle. I am of the view that the general category of documents which are sought in Category 12 are relevant and material and, therefore, should be discovered. Moreover, I am of the view that the order for discovery should be in the general terms sought by the Defendant at Category 12.

94. The issue of Feeder Funds I have already dealt with earlier in this judgment.

95. The only other issue which was in dispute between the parties was the issue of the subcategories. The Defendant sought four subcategories in Category 12. These were as follows:

"All documents which evidence and/or relate to:

1. The terms on which leverage providers provided leverage to and/or invested directly in the Plaintiff and/or each of its Feeder Funds;

2. The timing of the provision of such leverage or the making of such investments;

3. The extent to which leverage providers relied on the NAV of the Plaintiff and/or each of its Feeder Funds in deciding whether to provide leverage to and/or invest directly in the Plaintiff and/or each of its Feeder Funds; and

4. All communications and correspondence between the leverage providers and/or the Plaintiff and/or its Feeder Funds."

96. Having considered these subcategories I am of the view that they are clearly caught within the general category sought, and, therefore, they should be included. Therefore, the documents which pertain to those subcategories should be discovered.

97. There is one other matter relevant to this because this was in dispute between the parties. In Mr. McDonnell's affidavit, sworn on behalf of the Defendant grounding this application, (which is at page 44 of the Defendant's book of motion papers), Mr. McDonnell states as follows (at paragraph 137 of his affidavit):

"137. In its Replies to the Notice for Particulars, the Plaintiff has identified the four creditors of the Plaintiff which have representatives on its Liquidation Committee. These are Nomura International Bank, Bear Stearns Alternative Assets International Limited, Natixis, and DD Growth Premium Fund (one of the Plaintiff's Feeder Funds). The Defendant

understands that the first three of these creditors were leverage providers to the Plaintiff and/or its Feeder Funds, and, in connection with this leverage, also invested directly in the Plaintiff.

138. It appears that, to at least some extent, the losses claimed by the Plaintiff from the Defendant in the proceedings are, in fact, losses of these leverage providers, either by virtue of their provision of leverage, their direct investment, or some combination of these two. The Plaintiff has confirmed that a Nomura entity is funding this litigation on its behalf.

139. It is not clear to the Defendant the extent, if any, to which these leverage providers relied on the NAV of the Plaintiff and/or each of its Feeder Funds in deciding whether to provide leverage to and/or invest directly in the Plaintiff and/or each of its Feeder Funds or whether the leverage providers were provided with additional information over and above that which was available to other investors. It appears, for example, that agreements were entered into between the leverage providers and the Plaintiff and/or its Feeder Funds and/or companies related to the Plaintiff which set out the terms on which leverage would be provided and the direct investments made."

98. In paragraph 140 he sets out the Upper Tribunal decision and states that it:

"...found in relation to the leverage providers: (i) that the leverage providers did not invest in the Plaintiff or in its in Feeder Funds for their own account; (ii) that the agreements entered into with the leverage providers created synthetic exposure to the Plaintiff on a leveraged basis; (iii) the return to the leverage providers was an interest return, payable irrespective of the performance of the Plaintiff; and (iv) the leverage providers had the right to receive their capital back in preference to the investors in the Plaintiff.

141. The Defendant is entitled to understand the basis on which the losses of these leverage providers arose, by reference to the documents which evidence the terms on which they provided leverage to and/or invested directly in the Plaintiff and/or each of its Feeder Funds, the timing of same, the extent to which these parties relied on the NAV of the Plaintiff and/or each of its Feeder Funds, and the issues dealt with in communications and correspondence between the leverage providers and the Plaintiff and/or each of its Feeder Funds.

142. Discovery of documents within the ambit of this category would also assist the Defendant in understanding whether the losses incurred by the leverage providers can properly be claimed by the Plaintiff as its losses."

99. I believe that these paragraphs set out clearly and cogently why these categories and subcategories of Category 12 are relevant and material and should be discovered.

Category 13

100. The Defendant seeks at Category 13, in general terms:

"All documents from 1st May 2008 onwards which evidence and/or relate to any information provided and/or representations made to investors in and/or potential investors in and/or leverage providers and/or potential leverage providers to the Plaintiff and/or each of its Feeder Funds."

101. This category was, in general terms, agreed to by the Plaintiff with some difference in wording. In particular the Plaintiff did not agree to make discovery of documents which related to leverage providers and/or potential leverage providers. However, in my view, for the reasons set out in Category 12, the documents with respect to the leverage providers are relevant and material and should be discovered.

102. A second issue in relation to this was the issue of the Feeder Funds and I have already dealt with this in my judgment.

103. There is one other issue that is of relevance to this issue which is that the Plaintiff accepted that documents which related to investors and/or potential investors in the Plaintiff were relevant and material and should be discovered. However, it is clear that the leverage providers were also investors into the Fund and yet the Plaintiff appears to refuse to provide consent to discovery of this category. The Defendant argued that this position was not defensible on any grounds of logic or principle and I am in agreement with this view.

104. The only issue, therefore, which remains in relation to Category 13 are the subcategories. The Defendant sought five subcategories. These are as follows:

"All documents which evidence and/or relate to:

1. Any documents issued or made available to investors and/or leverage providers regarding the investment policy and/or performance of the Plaintiff and each of its Feeder Funds, including investor circulars, statements, marketing newsletter, subscriber newsletters, lender reports, and documents filed with and/or published by the ISE;

2. All communications between the Plaintiff and/or each of its Feeder Funds and service providers to the Plaintiff relating to the nature and/or content of any communications and/or representations to investors in and/or leverage providers to the Plaintiff and each of its Feeder Funds;

3. The subscription (or potential subscription) for, and/or redemption (or potential redemption) of, any investment by any investor in the Plaintiff and/or each of its Feeder Funds;

4. The provision (or potential provision) of lending and/or leverage by any leverage provider to the Plaintiff and/or each of its Feeder Funds;

5. The repayment (or potential repayment) of any lending and/or leverage to any leverage provider to the Plaintiff and/or each of its Feeder Funds."

105. I have considered all of these subcategories and I am satisfied that they all fall within the general category sought and, therefore, discovery of documents which relate to these subcategories should be made.

Category 14

106. The Defendant seeks, in general terms:

"All documents from 1st January 2007 onwards which evidence and/or relate to the interactions and communications between the Plaintiff and/or each of its Feeder Funds and their auditors."

107. The Plaintiff's position in response is to agree to discover:

"All documents from 1st May 2008 relating to the interactions and communications between the Plaintiff and its auditors."

108. Therefore, the issue in dispute between the parties is that the Defendant seeks documents from 1st January 2007, whereas the Plaintiff offers documents from 1st May 2008.

109. The reasons why the Defendant seeks documents for this additional time are set out in Mr. McDonnell's affidavit grounding the Defendant's application at paragraphs 162 to 166. At paragraph 162 Mr. McDonnell states as follows:

"162. In paragraph 15 of the Statement of Claim, the Plaintiff alleges that the Defendant, inter alia, mispriced the OTC Options, failed to use the available independent pricing source being the counterparty to each OTC transaction, failed to perform its own internal calculations of the OTC Options (using standard mathematical models), failed to accurately calculate the real market value of the OTC Options, and failed to perform any or any adequate due diligence with regard to each of the OTC Options. Each of these claims is denied by the Plaintiff."

163. The Defendant understands that there was extensive engagement between the Plaintiff and/or the Manager and/or the Investment Manager and the Plaintiff's then auditors, PwC, in the context of the audit of the Plaintiff for the financial year ended 31st December 2007, in relation to the OTC Options, particularly in relation to the valuations ascribed to the OTC Options by the Plaintiff."

164. The Defendant contends, inter alia, that any alleged losses which the Plaintiff has incurred arise as a result of the wrongful and unlawful actions of the Plaintiff itself perpetrated by those who controlled it, including in relation to the OTC Options. Accordingly, documents regarding interactions and correspondence between the Plaintiff, its servants and/or agents, and the auditors are clearly relevant to the issues in dispute between the parties in relation to the OTC Options."

165. Discovery of documents within the ambit of this category will assist the Defendant in understanding the issues/queries which the auditors were raising in respect of the OTC Options, whether such queries were raised in respect of the OTC Options, whether such queries were raised in respect of other assets of the Plaintiff and its Feeder Funds, how the Plaintiff responded to the auditors' queries, and whether the accounts or the valuations were required to be restated or amended as a result of this engagement with the auditors."

166. The Defendant understands that PwC ceased to act as auditors for the Plaintiff during the course of 2008 and that Deloitte were appointed as their replacement. Discovery under this category will assist the Defendant in understanding the reasons for PwC's replacement and Deloitte's appointment, and whether this was related to the matters now at issue in the proceedings."

110. In my view these paragraphs show the reasons why these documents are highly relevant and material and should be discovered and I will therefore order discovery in the general terms sought by the Defendant.

111. The Defendant also seeks, under Category 14, five separate subcategories. These are as follows:

"All documents which evidence and/or relate to:

- 1. The appointment, engagement, resignation and/or replacement of the auditors, including, but not limited to, the replacement of PwC, and appointment of Deloitte, as auditors of the Plaintiff;*
- 2. The preparation and audit of the financial statements for the financial years 2007 and 2008 and the information provided to the Defendant in connection with the preparation of same;*
- 3. All communications and/or queries raised by or on behalf of the auditors, in particular queries raised regarding the valuation of assets of and/or instruments entered into by the Plaintiff and/or each of its Feeder Funds (including, but not limited to, the OTC Options, Reflect Scientific Bonds, and Asseterra Bonds) and the responses to such queries from the Plaintiff;*
- 4. Any restatement of and/or amendment to the accounts of the Plaintiff and/or each of its Feeder Funds and/or the valuations ascribed to assets of and/or instruments entered into by the Plaintiff and/or each of its Feeder Funds (including, but not limited to, the OTC Options, Reflect Scientific Bonds, and Asseterra Bonds); and*
- 5. Any consideration of these issues by the directors of the Plaintiff."*

112. I have considered the five subcategories in Category 14 and I am satisfied that they all fall within the general category of documents sought at Category 14.

113. The Plaintiff says that these documents predate the NAV of June 2008. That may be so, but in my view the documents are clearly relevant to the issues in this case.

Category 15

114. Category 15 is:

"All documents from 1st May 2008 onwards which evidence the manner in which the Plaintiff's accounts were kept by the Defendant. Strictly without prejudice to the generality of the foregoing, such documents should include, but not be limited to, all documents which evidence the extent of the applicability (if any) of International Financial Reporting Standards to the keeping of such accounts by the Defendant and/or the Plaintiff's financial statements."

115. The Plaintiff agrees with this request in principle; the only dispute between the parties was the subcategory set out by the Defendant in relation to the applicability of International Financial Reporting Standards. In my view this subcategory clearly comes

within the general category and, therefore, should be discovered.

Category 16

116. The general category of documents sought by the Defendant is:

"All documents from 1st May 2008 which evidence communications between the Plaintiff and its actual or potential prime brokers."

In fact the Plaintiff has agreed this general request for discovery and, therefore, the only issues which arise are the subcategories.

117. The Defendant has sought four subcategories under Category 16. These are as follows:

"All documents which evidence:

- 1. The appointment, engagement, resignation and/or replacement of the Plaintiff's prime brokers and/or the proposed appointment of potential prime brokers;*
- 2. The resignation of Morgan Stanley as a prime broker of the Plaintiff in November 2008 and all communications and/or meetings between the Plaintiff, the Defendant, and/or Morgan Stanley in relation to same, including the alleged reasons for such resignation;*
- 3. All communications and/or queries raised by or on behalf of the Plaintiff's prime brokers and/or potential prime brokers, in particular queries raised regarding the valuation of assets of and/or instruments entered into by the Plaintiff (including, but not limited to, the OTC Options, Reflect Scientific Bonds, the Asseterra Bonds) and the responses to such queries from the Plaintiff; and*
- 4. Any consideration of these issues by the directors of the Plaintiff."*

118. In my view, having considered these four subcategories, I am satisfied that they all fall within the general category of discovery sought.

Category 17

119. The general category sought is:

"All reports and/or investigations and/or reviews commissioned by the Plaintiff and/or any other party in relation to the OTC Options, Reflect Scientific Bonds, or Asseterra Bonds (to include any drafts of same) from 30th June onwards."

120. The Plaintiff has agreed to discovery of these documents; therefore, the only issue is in relation to the subcategories. There are three subcategories sought by the Defendant. These are:

"All documents which evidence and/or relate to:

- 1. The reports prepared by KPMG and Kinetic Partners LLP ('Kinetic') in this regard (and any drafts of same);*
- 2. The terms of reference for all reports and/or investigations and/or reviews (including, but not limited to, the KPMG and Kinetic reports); and*
- 3. The instructions provided in respect of all reports and/or investigations and/or reviews (including, but not limited to the KPMG and Kinetic reports)."*

121. In my view it is absolutely clear that these documents in these subcategories all fall within the general category and, therefore, should be discovered.

Category 18

122. The general category sought in Category 18 by the Defendant is:

"All documents from 30th June 2008 onwards which evidence the scope and extent of the loss and damage allegedly suffered by the Plaintiff and/or each of its Feeder Funds."

123. The Plaintiff has agreed in principle with this request, subject to the issue of the Feeder Funds and subject to the issue of the sub-categories. I have already dealt with the issue of the Feeder Funds above. I now turn to deal with the issue of the sub-categories.

124. The Defendant has sought nine subcategories under Category 18. These are as follows:

"All documents which evidence:

- 1. Any review of the financial position of the Plaintiff and each of its Feeder Funds arising from the alleged losses in the OTC Options, Reflect Scientific Bonds, and Asseterra Bonds;*
- 2. The subscriptions taken in, and redemptions paid out, by the Plaintiff in the period from 30th June 2008 to the date of liquidation;*
- 3. Payments made by the Plaintiff to, or received by the Plaintiff from, leverage providers in the period from 30th June 2008 to the date of liquidation;*
- 4. The losses incurred by the Plaintiff in the period from 30th June 2008 to the date of liquidation;*
- 5. The fees and charges paid by the Plaintiff to service providers in the period from 30th June 2008 to the date of liquidation;*

6. *The consideration by the Plaintiff of what the Plaintiff alleges was the 'true' NAV for each month from June 2008 to the date of liquidation;*

7. *The placing of the Plaintiff into liquidation;*

8. *The conduct of, and progress with, the liquidation of the Plaintiff, including documents and/or updates filed with the Cayman Court and/or circulated to creditors of the Plaintiff in this regard; and*

9. *The composition of the Liquidation Committee of the Plaintiff and the basis on which the members of that committee are creditors of the Plaintiff."*

125. Having considered these subcategories I am satisfied that all of these subcategories fall within the general category. I had a slight reservation about subcategory 8 (which relate to the conduct of, and progress with, the liquidation of the Plaintiff, including documents and/or updates filed with the Cayman Court and/or circulated to creditors of the Plaintiff in this regard) and sub-category 9, (the composition of the Liquidation Committee of the Plaintiff and the basis on which the members of that committee are creditors of the Plaintiff). But on the facts of this case I am satisfied that subcategories 8 and 9 are relevant and material. I accept that category 9 is not an issue on the pleadings, but it is relevant to an issue in the proceedings, especially the basis upon which members of the Committee are creditors of the Plaintiff and how this is so. They are, therefore, relevant to the issue of indirect consequential loss, which, as claimed by the Defendant, is excluded by contractual agreement of the parties.

Category 19

126. The general category sought by the Defendant in this regard is:

"All documents from 30th June 2008 onwards which evidence and/or relate to the consideration by the Plaintiff of any steps to mitigate or recover the alleged loss and damage suffered by it and/or its investors and/or its leverage providers."

127. The Plaintiff, agrees to make discovery of, in general terms, the category sought by the Defendant, subject to two issues: (1) excluding documents which relate to "the consideration" by the Plaintiff; and (2) documents which relate to investors and/or leverage providers. The Plaintiff says that these documents are not relevant. However, I do not agree with this submission. This is an enormous claim by the Plaintiff of over \$415 million. It will involve a consideration in this Court of what a UK tribunal has found to be dishonest behaviour by a director and the existence of sham bonds. Therefore, documents relevant to a consideration by the Plaintiff of any steps taken to mitigate or recover the alleged loss or damage suffered by it and/or its investors and/or leverage providers are clearly relevant for reasons set out earlier in this judgment.

128. The other issue in dispute between the parties is the issue of subcategories. The Defendant has sought four subcategories of documents. These are as follows:

"All documents which evidence and/or relate to:

1. The realisation and/or attempted realisation of the assets held by the Plaintiff at the date of liquidation;

2. The consideration by the Plaintiff of any steps (including the making of any claims or bringing of any proceedings) to recover any alleged loss and damage from the Manager and/or the Investment Manager, the Plaintiff's directors or officers, the Manager and/or the Investment Manager's directors or officers, or any other party, and the taking of any such steps;

3. The consideration by the Plaintiff of any steps (including, the making of any claims or bringing of any proceedings) to recover any alleged loss and damage by way of a clawback claim against investors and/or leverage providers to whom redemptions and/or payments were made by the Plaintiff; and

4. The funding of these proceedings by Nomura International Plc ('Nomura'), including, but not limited to, the basis of the entitlement of Nomura to fund the proceedings, its status as a creditor of the Plaintiff, the redemption request allegedly submitted by Nomura in 2008, and the terms on which the litigation is being funded by Nomura."

129. Having considered these four subcategories I am satisfied that all four subcategories fall within the general category. I did have a slight reservation about subcategory 4, "the funding of these proceedings by Nomura International" but I am satisfied that the taking of this litigation is an attempt by the Plaintiff to mitigate or recover its loss, and as the Plaintiff has in effect agreed in principle to this category in general terms, the issue is whether these are documents which fall within the general category. I am satisfied that the documents which fall within subcategory 4 are indeed documents which are captured by the general category sought at Category 19.

Category 20

130. The Defendant has sought:

"All documents from 30th June 2008 onwards which evidence and/or relate to civil, criminal and regulatory investigations which have been carried out and/or are ongoing arising from the collapse of the Plaintiff and/or each of its Feeder Funds."

131. The Defendant has also sought the subcategories as follows:

"All documents which evidence and/or relate to:

1. The UK Financial Services Authority (the 'FSA') (now known as the Financial Conduct Authority) investigation and decision in relation to the conduct of the Investment Manager and Mr. Alberto Micalizzi;

2. The UK Upper Tribunal (Tax and Chancery Chamber) consideration and determination of Mr. Micalizzi's appeal against the FSA decision in this regard;

3. The civil and criminal investigations which were, or are being, carried out in Italy arising from the collapse of the Plaintiff and/or each of its Feeder Funds;

4. Any other civil, criminal, and regulatory investigations, in any jurisdiction, arising from the collapse of the Plaintiff and/or each of its Feeder Funds;

5. All witness statements, evidence, expert reports, transcripts and other documents in respect of the above investigations, including, but not limited to, all communications between the Plaintiff and the civil, criminal and regulatory investigatory bodies in each case."

132. The Plaintiff has refused this category, both in terms of the general category sought and also in the subcategories. The Defendant, however, has said that these documents are relevant. At page 55 of the Defendant's book of motion papers, at paragraphs 207 and 211 of Mr. McDonnell's affidavit, it is stated as follows:

"207. The Defendant contends, inter alia, that any alleged losses which the Plaintiff has incurred arise as a result of the wrongful and unlawful actions of the Plaintiff itself perpetrated by those who controlled it, including the Manager, Investment Manager, the directors of the Plaintiff and others. To the extent that civil, criminal, and regulatory investigations into these persons have been carried out and/or are ongoing arising from the collapse of the Plaintiff and/or each of its Feeder Funds, documents regarding such investigations are clearly relevant.

208. For example, as noted above, the Defendant is aware that the UK FSA carried out an investigation and delivered a decision regarding the conduct of the Investment Manager of the Plaintiff and Mr. Alberto Micalizzi arising from the collapse of the Plaintiff, and, specifically the Asseterra Bonds. The Upper Tribunal considered and determined Mr. Micalizzi's appeal against the FSA decision in this regard. The Defendant understands that the Joint Official Liquidators provided evidence and other assistance to the FSA and/or the Upper Tribunal.

209. The Defendant is also aware that the FSA carried out an investigation, and issued a Final Notice, in respect of the conduct of Dr. Sandradee Joseph (in house counsel and compliance officer of the Investment Manager) arising from the Asseterra Bonds.

210. The Defendant also understands that civil and criminal investigations were, or are, being carried out in Italy arising from the collapse of the Plaintiff and/or each of its Feeder Funds. There may be other civil, criminal, and regulatory investigations of which the Defendant is currently unaware.

211. Discovery under this category will assist the Defendant in understanding any other specific investigations carried out/ongoing in this regard, along with the communications between the Plaintiff and the relevant civil, criminal, and regulatory investigatory bodies in each case. For example, if it is the case that the Plaintiff has adopted a position in the course of its communications with, or assistance provided to, such bodies whereby it contended that the collapse of the Plaintiff arose from the conduct of the Investment Manager and/or Mr. Micalizzi and/or the directors of the Plaintiff, this would clearly be relevant to the claims it now seeks to make against the Defendant."

133. It is clear, in my view, having regard to these averments that the documents sought at Category 20 are relevant and material and should be discovered. They are clearly relevant to the Defendant's claim that the Plaintiff's losses were in fact caused by the Plaintiff and/or its directors.

134. The Plaintiff says that these issues are not relevant because they are not on the pleadings. However I disagree. They are relevant to the Defendant's plea at paragraph 35 (iv) of its Defence that the Plaintiff's loss was caused by the Plaintiff and/or its directors. Moreover, the Defendant has specific details of specific investigations and inquiries and all these documents are highly relevant to the Defendant's defence of these proceedings.

135. In those circumstances, therefore, I propose to make an order for discovery against the Plaintiff in terms of the general category and the five sub- categories.

136. I will come back to the form of the order later.

(C) THE PLAINTIFF'S APPLICATION FOR DISCOVERY

137. I turn now to deal with the second motion in these proceedings, which is the Plaintiff's motion for discovery.

138. This is an application by the Plaintiff for discovery of one category of documents set out in its Notice of Motion dated 21st December, 2015. The category of documents which the Plaintiff is seeking is as follows:

"All documents which evidence the plea of the Defendant, which is denied by the Plaintiff, that the loss and damage sustained by the Plaintiff was caused or contributed to by the Plaintiff and/or its directors and/or other persons other than the Defendant and/or events which were unrelated to the performance by the Defendant of its duties pursuant to the Administration Agreement and/or the Middle Office Agreement and/or events which were outside the control of the Defendant."

139. This application is grounded on the affidavit of Maura Connolly, a solicitor in Eugene F. Collins, solicitor for the Plaintiff. The application is opposed and the Defendant's response is set out in the affidavit of Conor McDonnell solicitor in Arthur Cox, solicitors for the Defendant.

The relevant plea in the defence

140. Paragraph 35 (iv) of the Defendant's Defence pleads as follows:

"Further or in the alternative and without prejudice to the foregoing, if the Plaintiff and/or investors in the Plaintiff did suffer the alleged or any loss and damage (which is not admitted):

(iv) the said alleged loss and damage was caused or occasioned or contributed to by the Plaintiff and/or its directors and/or other persons other than the Defendant and/or events which were unrelated to the performance by the Defendant of its duties pursuant to the Administration Agreement and/or the Middle Office Agreement and/or events which were outside the control of the Defendant."

141. As counsel for the Plaintiff submitted, this is a composite plea which essentially consists of five separate elements. It pleads that if the Plaintiff did suffer any loss, that loss was caused or contributed to, either by: (1) the Plaintiff itself; (2) the directors of the

Plaintiff; (3) and/or persons other than the Defendant; (4) and/or by events which were unrelated to the performance by the Defendant of its duties under the agreements; and/or (5) by events which were outside the control of the Defendant.

142. The Plaintiff submits that the categories of documents sought in the discovery request are all documents which evidence or relate to this plea of the Defendant, which is denied by the Plaintiff in its Reply.

The submissions of the parties

143. The Plaintiff's first submission is that:

1. The Defendant has made the specific plea in the Defence;
2. The plea has been denied in specific terms by the Plaintiff in its Reply;
3. Therefore the matter is fully at issue between the parties in the pleadings.

144. As a result, Mr. Gardiner S.C. for the Plaintiff, submits that the category of documents are clearly relevant and material to the issues in dispute between the parties.

145. The Defendant in response has submitted that this category should not be discovered and is misconceived for a number of reasons. The first reason is set out in the Arthur Cox letter of 4th September 2015, where they say that it appears that the reasons offered for the category are that the Plaintiff is seeking all documents on which the Defendant may intend to rely in support of its plea in paragraph 35 (iv) of its Defence. They say that it is impermissible to seek documents by reference to what a party intends to rely on at the trial.

146. The Plaintiff in response says that this mischaracterises the category of documents sought. The Plaintiff's position is simple: this is the Defendant's plea; it knows the scope and ambit of the plea; it is denied by the Plaintiff; it is, therefore, an issue between the parties and it is relevant and material.

147. On balance, I do not accept the Defendant's submission that the reasons are misconceived. I agree, in part, with the Plaintiff's submission and I will come back to that later in this judgment.

148. The second argument relied on by the Defendant for resisting the discovery is that it is stated that this was a "catch-all" category of documents. I am of the view that this argument is not correct for the first two elements of the categories sought (i.e. documents in relation to the Plaintiff and/or its directors), but it is correct for elements 3, 4, and 5 (i.e. documents which relate to persons other than the Defendant, events unrelated to the performance by the Defendant of its functions and/or events outside the control of the Defendant) and I will come back to this issue later in the judgment.

149. The third argument made by the Defendant is that there is a vast range of documents which the Defendant might expect to receive as part of the Plaintiff's discovery, which might be caught by this category. The Plaintiff, however, submits in response that this category clearly is not meant to cover any documents which the Defendant might get from the Plaintiff. The Plaintiff's argument is, in my view, correct.

150. The fourth argument by the Defendant is that these documents are already captured by the Defendant's acceptance that it will make discovery of Categories 1 to 9 sought by the Plaintiff. However, counsel for the Plaintiff has carefully taken the Court through the other nine categories and I am satisfied that such documents will not be caught within the other nine categories. The documents sought under Category 10 are separate and distinct and relate to the positive plea of the Defendant in paragraph 35 (iv) of the Defence.

151. The fifth argument is that the Defendant will have to furnish witness statements and that relevant documents will be attached to those witness statements.

152. Mr. Gallagher S.C. for the Defendant, however, accepted that this was just a factor to be considered by the Court and not a complete answer to the request. I agree. The witness statements may contain relevant documents but they may also omit relevant documents which the Plaintiff is entitled to obtain and rely on under the *Peruvian Guano* principles. This reason, therefore, on its own is not a reason to refuse discovery of the first two elements in the categories sought.

153. The Defendant's most powerful objection, in my view, to the request for discovery is that the request for discovery is not made by reference to specific categories of documents properly speaking. Mr. Gallagher S.C. submits that it is a category referable to a plea, but it does not seem to break it down any further. There is no attempt to define, he says, a category of documents.

154. Mr. Gallagher S.C. submits that the category as sought is too vague, too broad and too disproportionate. His argument is that discovery is usually sought by reference to a category of documents and that this category of documents needs to be clear. He submits that, in effect, the Plaintiff has skipped the steps required by the *Aer Rianta* decision.

155. I have, therefore, in the light of this submission reviewed the *Aer Rianta* decision (*Ryanair v Aer Rianta* [2003] 4 I.R. 264). Two judgments were given in the Supreme Court by Fennelly J and by McCracken J. Fennelly J on page 272 of the judgment states as follows:

"It is appropriate to commence by setting out the terms of Order 31, Rule 12. Statutory Instrument No. 233 of 1999, substituted, so far as relevant, the following for the existing text of Order 31, Rule 12:

'(1) Any party may apply to the Court by way of notice of motion for an order directing any other party to any cause or matter to make discovery on oath of the documents which are or have been in his or her possession or power, relating to any matter in question therein. Every such notice of motion shall specify the precise categories of documents in respect of which discovery is sought and shall be grounded upon the affidavit of the party seeking such an order of discovery which shall:

(a) verify that the discovery of documents sought is necessary for disposing fairly of the cause or matter or for saving costs;

(b) furnish the reasons why each category of documents is required to be discovered."

156. At page 273 Mr. Justice Fennelly states as follows:

"The changes effected by the 1999 amendment fall into three parts. Firstly, each applicant must, prior to applying to the Court, write seeking the opposing party's agreement to make voluntary discovery within a reasonable time. Secondly, both the letter and any ensuing Notice of Motion must specify the precise categories of documents in respect of which discovery is sought." (Emphasis added).

157. He then goes on in the next paragraph to say:

"Morris P. interpreted the object and effect of these changes in his judgment in Swords v. Western Proteins Limited [2001] 1 I.R. 324, p. 328..."

158. In that judgment Morris P said:

"Accordingly, I believe that Rules of the Superior Courts (No.2) (Discovery) 1999 imposed a clearly defined obligation upon a party seeking discovery to pinpoint the documents or category of documents required and required that party to give the reasons why they were required. Blanket discovery became a thing of the past. The new rule was brought into being to ensure in the first instance that the party against whom discovery was being sought would, upon receipt of the preliminary letter, be in a position to know the document or category of documents referred to and be able to exercise a judgment on whether the reasons given for requiring these documents to be discovered was valid. He would then be in a position to know if he was required to comply with the request. If he disputed his obligation to make discovery the Court would know by reference to this letter precisely why the moving party sought the documents in question and the grounds upon which the moving party believed that the documents sought to be discovered might help to dispose fairly of the cause or save costs." (Emphasis added).

159. Fennelly J then continued:

"This passage was subsequently approved in express terms by Keane C.J., with the concurrence of the other members of the Court, in Burke v. Director of Public Prosecutions [2001] 1 I.R. 760 at pp. 764 and 765."

160. At page 275 Fennelly J. stated:

"It is impossible to resist the conclusion, however, that the amendment to the rule has shifted the primary burden of proof. The applicant must, under the present rule, discharge the prima facie burden of proving that the discovery sought 'is necessary for disposing fairly of the cause or matter'. This is not a mere formalistic requirement: the affidavit must, in addition, 'furnish the reasons why each category of documents is required'."

161. At page 277 Fennelly J. states as follows:

"The change made to Order 31, Rule 12, in 1999, exemplifies, however, growing concern about the dangers of unnecessarily costly and protracted litigation and, in particular, the burdens on parties and the courts arising from excessive resort to automatic blanket discovery. The public interest in the proper administration of justice is not confined to the relentless search for perfect truth. The just and proper conduct of litigation also encompasses the objectives of expedition and economy.

The Court, in exercising the broad discretion conferred upon it by Order 31 Rule 12(2) and (3), must have regard to the issues in the action as they appear from the pleadings and the reasons furnished by the Applicant to show that the specified categories of documents are required. It should also consider the necessity for discovery having regard to all the relevant circumstances, including the burden, scale and cost of the discovery sought. The Court should be willing to confine categories of documents sought to what is genuinely necessary for the fairness of the litigation. It may have regard, of course, to alternative means of proof, which are open to the applicant. These may, no doubt, include the possible service of notices to admit facts or documents. But there are two sides to litigation. The behaviour of the opposing party is relevant. That party may, for example, have made or may offer to make admissions of fact, and thus persuade a court that discovery on some issues is not necessary. This is, perhaps, axiomatic. Those facts will no longer be in issue. On the other hand, it is difficult to see how a party, such as the Defendant in the present case, which contests all the relevant facts on the pleadings and has formally objected to the right of its opponent to resort to affidavit evidence, can plausibly ask the Court to deprive its opponent of access to documents which will enable it to prove matters which it disputes."

162. In the light of these statements of principle by the Supreme Court and applying them to the facts of this case, I believe that the Plaintiff's application for discovery needs to be considered in a number of different ways, according to the five elements (which are identified by Mr. Gardiner S.C.), set out in the Defence pleaded at paragraph 35 (iv).

163. The first two elements, namely documents which relate to the plea that the damage was caused by the Plaintiff and/or its directors are, in my view, sufficiently clear. The plea is not vague. The Defendant pleads that it is the Plaintiff's fault and/or it is the Plaintiff's directors' fault.

164. The category of documents, therefore, which relate to those two elements of that plea, are also clear and distinct; those documents are relevant, necessary and proportionate and should be discovered. Therefore, the Defendant must discover all documents which relate to its plea that the Plaintiff's loss was caused by the Plaintiff and/or its directors.

165. However, the other three elements of the plea, at para. 35 (iv) of the Defence, are vague and uncertain. They could mean anything. It is not clear, for example, who are "other persons other than the Defendant"; it is not clear what are the "events unrelated to the performance by the Defendant of its duty"; and it is not clear what is meant by "events outside the control of the Defendant".

166. The Defendant submits that the Plaintiff did not raise Particulars and did not seek to clarify these matters in the Defence. The Plaintiff replied robustly that it was under no obligation to do so, that it was the Defendant's plea and the Defendant knows the scope and ambit of its own plea. That is, of course, true, but the lack of particularity in the Defence becomes relevant when a request for discovery is made because this must be made, according to the principles set out in *Aer Rianta*, in a reasonably precise manner and in reasonably certain terms insofar as it is possible to do so. I am of the view, therefore, that the request for discovery, as it applies to

the last three elements of the request, are too vague. They would impose an obligation on the Defendant which might be difficult to comply with and which could be disproportionate.

167. Therefore, what I propose to do is to adjourn this element of the application for discovery by the Plaintiff for a number of weeks to permit the Plaintiff to do either of two things:

1. To formulate a request for particulars in respect of this plea at paragraph 35 (iv) of the Defence and, having received Replies to Particulars, to reformulate its request for discovery; or
2. In the alternative, to reformulate this part of its request in a more circumscribed and precise manner, without requiring such particulars.

168. It is a matter for the Plaintiff as to which course of action it pursues, but the request as currently formulated is too vague to order discovery in such terms.

169. I also note that Mr. Gallagher S.C. submitted that there was no temporal limitation put on the request and I will hear submissions from the parties in relation to this matter.

170. Another issue which arose in the course of the hearing of this application was the issue of documents which post date the affidavit of discovery. One of the arguments made by the Defendant in respect of the Plaintiff's request is that it would be oppressive because it would mean that the Defendant would have to continually update the Plaintiff with documents which they may have acquired after the affidavit of discovery had been sworn. This is disputed by the Plaintiff. However, this issue was addressed by the parties and I was referred to an extract from Abrahamson, Dwyer and Fitzpatrick, *Discovery and Disclosure* (2nd Ed., Round Hall, Dublin, 2013) at page 149, which states as follows at paragraph 12-18, under the heading "Ongoing obligation to make discovery":

"In Murphy v. Times Newspapers Limited, the Plaintiff sought further and better discovery on the grounds that nine years had passed since discovery was first made and that it was likely that the defendants would now have additional relevant documentation in their possession. Morris P. referred to the principles in the Sterling Winthrop Group Limited v. Farbenfabriken Bayer AG and refused the application on the basis that the order sought was not available 'to bring discovery up to date'. However, he stated:

'It seems to me that if documents have, between the date of the swearing of the original affidavit and the present time, come into the hands of the defendants which should have been discovered then, without the necessity of any additional order, they are governed by the provisions of the [original order for discovery] and shall be discovered'.

12-19. Clearly, therefore, there is an ongoing duty to make further discovery of documents covered by the order which come into the possession, power or procurement of the deponent after the original discovery has been made.

12-20. The same rule does not apply, however, where the documents sought were not in existence at the time of swearing the original affidavit of discovery."

171. The learned authors refer to *Bula Limited v. Tara Mines* (No. 5), [1994] 1 I.R. 487, and the decision of the High Court and Finlay C.J. in the Supreme Court dealing with documents which come into existence after the requirement to swear an affidavit of discovery.

172. I also note the exceptions to that exception as set out at paragraph 12. 21 and I was also referred to the decision in *Moorview Developments Limited v. First Active Plc* [2009] 2 I.R. 788, at paragraph 89 Clarke J. states:

"It seems to me that the starting point for any consideration of the discovery applications currently before the Court is to determine the status of the RBS memo. Firstly, it should be noted that the memo came into existence after First Active had complied with its discovery obligations. As is clear from the decision of the Supreme Court in Bula Limited v. Tara Mines (No. 5), [1994] 1 I.R. 487, the law in this jurisdiction is clear and is to the effect that there is no continuing obligation on a party to make discovery of documents coming into existence after the party concerned has sworn their affidavit of discovery. It should be emphasised that there remains a clear obligation on a party to remedy any failure to make proper discovery in the first place so that a document that was within the power or procurement of the party concerned at the time of swearing the relevant affidavit of discovery but which was, for whatever reason, not included in the schedules to that affidavit, must nonetheless be subsequently discovered."

173. However, there is, in my view, no need for me to address this issue conclusively at this time. As I understand Mr. Gardiner's submissions for the Plaintiff, the Plaintiff is accepting, for the moment, that it is only seeking the documents which are currently in the Defendant's power, possession or procurement relating to the categories sought. It is not seeking, at present, any documents which the Defendant may subsequently obtain which are not within their power, possession or procurement. I will, therefore, expressly hold that issue over for another day. It may well be that a subsequent application may have to be brought on that issue and I am not deciding on that issue at present.

(D) Conclusion

174. I would therefore order discovery of part of the category sought by the Plaintiff as it relates to documents in the Defendant's power, possession or procurement which relate to the plea that the loss and damage was caused by the Plaintiff and/or its directors. However, I will adjourn, for further consideration, the other three elements sought in the category, namely those documents in the Defendant's power, possession or procurement which relate to the loss being caused by other persons apart from the Defendant, to events unrelated to the performance by the Defendant of its duties; and/or to events outside the control of the Defendant.