THE HIGH COURT
COMMERCIAL

[2022] IEHC 444
Record No. 2021/3571P

Between:

CHUBB EUROPEAN GROUP SE (FORMERLY ACE EUROPEAN GROUP LIMITED)
AIG EUROPE SA (FORMERLY AIG EUROPE LIMITED)
AXIS SPECIALTY EUROPE SE
ALLIANZ GLOBAL CORPORATE & SPECIALITY SE
ALLIED WORLD ASSURANCE COMPANY (EUROPE) DESIGNATED ACTIVITY COMPANY (FORMERLY ALLIED WORLD ASSURANCE COMPANY (EUROPE) LIMITED)
LIBERTY MUTUAL INSURANCE EUROPE SE (FORMERLY LIBERTY MUTUAL INSURANCE EUROPE LIMITED)
XL INSURANCE COMPANY SE
ZURICH INSURANCE PLC
QBE EUROPE SA/NV (FORMERLY QBE INSURANCE (EUROPE) LIMITED)
AND
LLOYD'S INSURANCE COMPANY SA

Plaintiffs

And

PERRIGO COMPANY PLC,
JOSEPH PAPA, JUDY BROWN, MARC COUCKE, LAURIE BRLAS, JACQUALYN A FOUSE, ELLEN R HOFFING, MICHAEL R JANDERNOA, DONAL O'CONNOR, GARY COHEN, HERMAN MORRIS JR, GERALD K KUNKLE JR, JOHN HENDRICKSON, RONALD WINOWIECKI, DOUGLAS BOOTHE, DAVID GIBBONS
AND
RAN GOTTFRIED

Defendants

JUDGMENT OF MR JUSTICE HOLLAND DELIVERED THE 19TH OF JULY 2022

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INTRODUCTION AND BACKGROUND

1. This judgment concerns a discovery application by the First Defendant, ("Perrigo") against all Plaintiffs in a complex claim as to insurance coverage. Perrigo is a public limited company and, simplifying somewhat, a manufacturer of generic and over-the-counter drugs. It is the policyholder under a series of 5 Directors' & Officers' Liability and Company Reimbursement Insurance policies named, by reference to commencement date, for each of the years 2014 to 2018 inclusive[1] ("the Policies"). I will use the commencement dates to describe the policies accordingly but such description is a little misleading in that each policy started in mid-December and so, in much the greater part, covers the following year.

2. Under each Policy the Defendants other than Perrigo ("the other Defendants") are insured persons[2]. The other Defendants have been directors and officers of Perrigo. Again simplifying and as the title to the Policies intimates, their general purpose is to indemnify Perrigo and the other Defendants in respect of certain types of legal actions taken against them by third parties asserting wrongs in the management and governance of Perrigo. The other Defendants are separately represented and did not participate in the motion. Perrigo is also an insured person but only as to certain "Securities Claims" alleging "Wrongful Acts" against Perrigo[3].

[1] Policy Periods
· 18 December 2014 to 18 December 2015 (the "2014 Policy")
· 18 December 2015 to 18 December 2016 (the "2015 Policy")
· 18 December 2016 to 18 December 2017 (the "2016 Policy")
· 18 December 2017 to 18 December 2018 (the "2017 Policy")
· 18 December 2018 to 18 December 2019 (the "2018 Policy")

[2] Not all are insured under all policies. The 2nd to 12th and 15th to 17th Defendants are insured under the 2014, 2015, 2016, 2017 and 2018 Policies. The 13th and 14th Defendants are insured under the 2016, 2017 and 2018 Policies. Nothing turns on that for present purposes.

[3] The precise mechanism by which this is achieved varies somewhat between the Policies. I return to the detail below but for now it will assist to note that in the 2014 and 2015 Policies this element of cover is provided by an "Entity Cover For Securities Claims Endorsement (DRP)" which provide in part as follows:
1. Insuring Agreement The-cover provided under this Policy is extended to pay on behalf of the Company 100% Loss of the Company - arising from any Securities Claim first made against the Company after the Effective Date and during the Policy Period (or Discovery Period if applicable) for any Wrongful Act committed by the Company.
2. Definitions - For the purposes of this endorsement only:
2.2 Definition 3.13 Insured shall be amended as follows: Insured means the Company but only for Securities Claims.
2.4 & 2.5 – defines Securities Claim & Wrongful Act
5 – states aggregate limits

3. The Plaintiffs are the insurers potentially liable on the Policies. Though nothing turns on it for present purposes, it bears noting that the First Plaintiff – Chubb - was the lead underwriter and subscribed to 100% of the primary layer of insurance under each policy, with the remaining Plaintiffs subscribing for various excess layers in varying percentages[4].

4. The Plaintiffs have declined indemnity in respect of certain claims made by the Defendants on certain of the Policies and on foot of about 30 claims (including a class action) made against the Defendants by third parties in 2015 and succeeding years. The Plaintiffs in these proceedings in essence seek declarations that the claims are not covered by the Policies or, if covered, are covered by the 2014 Policy only. They sent 31 "Declinature"/"Coverage Position" letters to the Defendants setting out their positions to that effect. The Defendants counterclaim to the contrary – that all the claims are covered by one or more of the 2014, 2015 and 2016 Policies. Depending on how the claims are distributed to the various Policies, it seems that about €125 million is at stake in the proceedings.

5. I will later list the categories of discovery sought but very broadly, Perrigo seeks, and the Plaintiffs resist, discovery from all Plaintiffs of all documents relating to the interpretation of the Policies, the declining of indemnity and the attribution of any rights of indemnity to the 2014 Policy only. The protagonists made written and oral submissions.

Mylan Counterclaim

6. From early 2014 Perrigo and Mylan N.V. ("Mylan" - a competitor of Perrigo) were in discussion as to the possibility of a merger or of a takeover of Perrigo by Mylan. In November 2014 Perrigo announced its intention to buy Omega Pharma NV ("Omega"), a Belgian health products manufacturer, for about US$4.5 billion. It completed that purchase in March 2015. The following month Mylan made a non-binding offer to buy Perrigo. Perrigo's board publicly advised rejection. In September 2015 Mylan made a formal tender offer ("the Mylan Tender Offer") to buy Perrigo. Perrigo's board again publicly advised rejection. Later that month Perrigo sued Mylan in the US alleging[5] that Mylan had made misrepresentations to Perrigo shareholders in and about its Tender Offer – ("the Perrigo Complaint"). Later again in September 2015 Mylan counterclaimed, against Perrigo and the 2nd Defendant[6], alleging misrepresentations & misstatements by them, in breach of Section 14(e) of the Securities Exchange Act 1934[7], in advising rejection of the Mylan Tender Offer – (the "Mylan Counterclaim").

[4] Hence the policies are sometimes referred to as "towers".
[5] District Court, Southern District of New York - Record Number 15-CV-7341
[6] Joseph Papa, CEO of Perrigo.
[7] See for example, "Kennedy's reply to Reed Smith" (Below) and the Plaintiff's Replies to Particulars 1 September 2021 §2.1

7. The Plaintiffs say[8] these alleged misrepresentations & misstatements essentially, and allegedly[9], sought to inflate Perrigo's value and convince its shareholders that the Mylan Tender Offer undervalued Perrigo. More specifically[10], these alleged misrepresentations & misstatements related to

- the size of the exchange offer premium[11];
- the allegedly dilutive, rather than accretive, nature of the transaction for shareholders[12];
- Abbot's[13] shareholding in Mylan; (asserting that Abbot, Mylan's largest shareholder, wanted to sell its shareholding[14])
- Mylan's representations about synergy[15].

In general terms the Plaintiffs say that the later litigation described below in substance, and in whole or in part, repeated these allegations.

8. In September 2015 Perrigo notified the Mylan Counterclaim to the 2014 Policy. The Plaintiffs accept that the Mylan Counterclaim is a Securities Claim as defined in the 2014 Policy[16] and confirmed cover subject to the policy terms.

9. In November 2015 the majority of Perrigo's shareholders rejected the Mylan Tender Offer.

Omega Counterclaim

10. In December 2016 Perrigo commenced a Belgian arbitration against Alychlo NV & Holdco I Be NV, the sellers of Omega, alleging fraudulent misrepresentation & breaches of warranty as to Omega's business – (the "Omega Arbitration"[17]). Perrigo alleged those sellers had, with a view to maximising the price they got from Perrigo, deliberately misrepresented Omega's growth forecasts, improperly inflated its sales & profits and intentionally failed to make sufficient accounting provision for obsolete & expired products – which practices were not reflected in Omega's accounts & were concealed from Perrigo. Perrigo alleged that, as a result, it overpaid for Omega and had to restate its

[8] See for example, "Kennedy's reply to Reed Smith" (Below) and the Plaintiff's Replies to Particulars 1 September 2021 §2.1
[9] As alleged by the various Plaintiffs in the actions against Perrigo, its directors and officers in respect of which the claims against the Policies were made – the claims as to which the rights of indemnity under the Policies are disputed in these proceedings.
[10] Perrigo has set out those alleged misrepresentations & misstatements even more specifically in Particulars of Defence & Counterclaim 28 January 2022
[11] As I understand and perhaps roughly, this premium is the extent to which a tender offer, insofar as comprising an offer of securities as opposed to cash, represents a premium over the current share price or value of the company for the acquisition of which the tender offer is made.
[12] As I understand and perhaps roughly, this asks the question whether, if they accept the tender offer, the offerees would be better or worse off in value terms.
[13] I presume this to refer to the well-known multi-national, Abbott Laboratories
[14] Particulars of Defence & Counterclaim 28 January 2022
[15] I presume this to refer to the question of synergistic benefits allegedly likely to accrue to the combined enterprise which would result from the posited takeover of Perrigo by Mylan and hence to shareholders.
[16] Given the Entity Cover for Securities Claims (DRP) endorsement (the "Entity Endorsement").
[17] Perrigo Company PLC, Perrigo Ireland 2 Limited v Alychlo NV and Holdo I BE NV, Cepani Arbitration No 22891

accounts to make a US$2.29 billion impairment charge as to the value of Omega's goodwill & intangible assets.

11. The sellers of Omega counterclaimed that Perrigo had persuaded them to accept Perrigo shares in part-consideration for the sale of Omega on the basis that Perrigo would pursue, in good faith, the interests of Perrigo to secure the value of Perrigo's shares & create additional shareholder value as a result of proper integration of Omega's business in the Perrigo group and that Perrigo's failure to perform those obligations resulted in losses to the vendors in the form of reduced value of the Perrigo shares which they had taken in part consideration for the sale of Omega – (the "Omega Counterclaim"[18]).

12. On 23 May 2017 Perrigo notified the Omega Counterclaim to the 2014, 2015, 2016 and 2017 Policies, asserting that it alleged Securities Law violations[19]. The Plaintiffs declined cover on the basis (disputed in these proceedings) that while the Omega Counterclaim alleged breach of a duty of good faith imposed by Article 1134 of the Belgian Civil Code, that is not a Securities Claim within the meaning of the Policies as Article 1134 of the Belgian Civil Code is not a Securities law within the meaning of those Policies[20].

13. In August 2021 the Omega Counterclaim was dismissed with costs to Perrigo.

29 Securities Actions – including Roofers 1 & 2 and Carmignac

14. After the Mylan Counterclaim was made, 29 actions ensued[21] against Perrigo and others of the Defendants – which actions the Plaintiffs accept are Securities Actions – (the "29 Securities Actions"[22]). The Plaintiffs describe these Securities Actions as variously alleging various violations of US federal & state laws, including the Securities Exchange Act 1934, regarding

- Perrigo's organic growth ("Organic Growth"),
- the integration of Omega into Perrigo operations ("Omega Integration"),
- alleged anti-competitive practices in the generic drug sector ("Drug Price-Fixing") and
- alleged improper accounting treatment of the Tysabri[23] royalty stream ("Tysabri Accounting Treatment" or "Tysabri Accounting Violations"– essentially the allegation was that Perrigo exaggerated its income and profitability).

[18] Perrigo Company PLC, Perrigo Ireland 2 Limited v Alychlo NV and Holdo I BE NV, Cepani Arbitration No 22891
[19] But cover under the 2017 and the 2018 Policies is no longer asserted by Perrigo as to any claim – see Perrigo Defence and Counterclaim.
[20] For example by letter 19 June 2018, Kennedys for the Plaintiffs assert that, in the contractual phrase "securities laws", the word "Securities" adjectively describes the nature of the laws - contemplating regulatory laws which specifically and in substance deal with securities - i.e. the question is whether the law specifically addresses securities. Article 1134 of the Belgian Civil Code is not such a law as it implies a duty of good faith into all contracts. Consequently, the Plaintiffs assert, the Omega Counterclaim is not a Securities Claim.
[21] 3 in Israeli courts. The rest in US courts.
[22] listed in the Statement of Claim Schedule 2.
[23] Tysabri being a multiple sclerosis drug.

15. Notable amongst the 29 Securities Actions are the "Roofers 1" class action[24] and the "Roofers 2" class action[25]. The remainder are "opt out claims"[26] including the "Carmignac" action[27].

16. Roofers 1 commenced in May 2016, against Perrigo and Joseph Papa only and prior to the Omega Arbitration and Omega Counterclaim. Its claims were based on the Securities Exchange Act 1934 under section 10(b) (for a class consisting of those who bought Perrigo shares on a US exchange between 21 April 2015 and 11 May 2016 (approximately 12.5 months)), section 20(a) and section 14(e). Roofers 2 was an amendment in June 2017 of Roofers 1, making additional allegations. The Carmignac action was filed in November 2017 making yet further allegations not made in Roofers 1 or Roofers 2.

17. Each of the 29 Securities Actions was notified by the Defendants to the Plaintiffs under one, some or all of the Policies[28] (the "29 Securities Claims"[29]). The Plaintiffs say that these 29 Securities Claims are covered, if at all, only by the 2014 policy.

Claims Made Policies, Aggregation

18. Before explaining the legal basis of the Plaintiffs' position that the 29 Securities Actions are covered, if at all, only by the 2014 policy, it will help to understand its practical implications. Each of the Policies is a "claims made" policy[30] and the quantum of indemnity provided under each Policy is limited. That is to say, each Policy stipulates a total limit ("Aggregate Limit") of the most the Plaintiffs will pay to cover all claims made on that Policy. Once that limit is reached the indemnity provided by the policy is exhausted. In such circumstances it may be to the Plaintiffs' advantage, if claims are to be made in any event, to maximise the quantum of those claims made pursuant to a single policy such that some will not be paid as the total claimed will have exceeded the Aggregate Limit of that policy. The corollary is that to the extent those claims are not made on the other policies, the Plaintiffs will not have to pay on those claims on those policies. Once the quantum of claims on a policy exceeds its aggregate limit, the greater the quantum of claims made on that policy the greater the quantum thereof that the Plaintiffs will not have to pay at all. Conversely, it will suit Perrigo to spread its claims amongst the Policies to avail of the Aggregate Limits of multiple policies and minimise the likelihood of claims going unpaid by reason of Aggregate Limits being exceeded.

[24] Roofers' Pension Fund v Papa, Brown and Perrigo Company PLC No. 2:16-cv-02805, (District of New Jersey)
[25] Roofers' Pension Fund v Papa, Brown and Perrigo Company PLC No. 2:16-cv-02805, (District of New Jersey) (as amended by an Amended Complaint filed on 21 June 2017)
[26] i.e. claims by those choosing not to have their claims determined in the class action.
[27] Carmignac Gestion SA V Perrigo Company PLC, Joseph Papa, Judy Brown and Marc Coucke. No. 2:17-cv-10467 (District of New Jersey)
[28] But cover under the 2017 and the 2018 Policies is no longer asserted by Perrigo as to any claim – see Perrigo Defence and Counterclaim.
[29] Correctly, the "29 Securities Actions" refers to the litigation by third parties against Perrigo, its officers and directors whereas the "29 Securities Claims" refers to the consequent claims by Perrigo, its officers and directors on the Policies. The issue is potentially further confused in that the Policies define "Securities Claim" in terms which refer to assertions against Perrigo rather than to a claim on the policy. The usages apparent in the papers are not entirely consistent. However as the context is generally clear in practice no confusion results.
[30] i.e. answering to claims made in the year of the policy, as opposed to claims as to events occurring in the year of the policy.

19. Bearing that position as to Aggregate Limits in mind and putting the matter very broadly, the Policies contain clauses which, in effect, direct certain claims made in the policy period to coverage by an earlier policy. Generally, that occurs if the claim made during the period of a later policy is related to the subject-matter of a claim made under an earlier Policy. This tends to concentrate claims into earlier policies and so tends to maximise the benefit to the insurer of the Aggregate Limit of earlier policies in the manner described above.

20. Essentially, the Plaintiffs say on foot of such clauses, and Perrigo disputes, that the 29 Securities Actions are related to the Mylan Counterclaim which is covered by the 2014 policy, and so, therefore, are the 29 Securities Actions covered by the 2014 policy, if covered at all. I will describe these clauses later in this judgment but essentially they are:

- 2014 Policy - Condition 5.1(iii) – claims arising out of similar or related Wrongful Acts
- 2015 to 2018 Policies §4.3 – Prior Notice Exclusion
- 2016 to 2018 Policies §5.2 – Single Claim Provision
- 2016 to 2018 Policies – Specific Matters Exclusion Endorsement

<u>Reed Smith letter & Kennedy's Reply to Reed Smith</u>

21. Reed Smith[31] for Perrigo, by lengthy letter dated 19 April 2021 to Kennedy's[32] for the Plaintiffs, set out Perrigo's position as to policy coverage of the Securities Actions. Though inevitably non-neutral and I make no findings as to its accuracy or otherwise, it nonetheless helpfully describes the dispute and Perrigo's position. Indeed the Plaintiffs plead it to that end[33]. It, inter alia,

- Records that the Plaintiffs contend that only the 2014 Policy applies to the Securities Actions as all the various claims in the Securities Actions relate back to the allegations in the Mylan Counterclaim, which was made in the 2014 Policy period.

- Makes legal argument as to what it means to say that "claims" are "related" and seeks to apply that meaning to the comparison of the Mylan Counterclaim and the Securities Claims.

- Asserts that the aggregation language at issue binds claims together only where they were all caused by similar or related wrongful acts. In considering the policy language, the analysis relates to *claims* not *suits*, and there can be multiple claims in a single suit. Moreover, the focus must be on the *acts* from which the claims arise. Most critically, the similar or related acts must together *cause* each of the claims.

[31] Solicitors, London
[32] Solicitors, Dublin
[33] Statement of Claim §71

- Asserts that the Plaintiffs' contention is an unreasonably broad causation analysis of the claims raised in the Mylan Counterclaim and the Securities Claims and ignores the fundamentally different factual premises for the different claims against the Defendants and the legal theories under which they proceed.

- Asserts that the Mylan Counterclaim alleged three categories of misrepresentations and misstatements by Perrigo and the 2nd Defendant as follows:
  - That the Mylan Tender Offer misrepresented its value – thereby undervaluing Perrigo.
  - That Abbot, Mylan's largest shareholder, did not support the Mylan Tender Offer.
  - As to synergies achievable from a takeover of Perrigo by Mylan.

- Asserts that the Securities Actions allege five distinct claims, four not made in the Mylan Counterclaim and asserted over three separate policy periods:
  - (1) Claims of misrepresentation relating to the valuation of Perrigo (inflating it), and of Mylan, designed to defeat the Mylan Tender Offer (first asserted in the 2014 policy period);
  - (2) Claims that Perrigo concealed problems regarding the integration and prospects of Perrigo's largest and most important acquisition, Omega (Omega Integration - first asserted in the 2015 policy period);
  - (3) Claims that Perrigo inflated its projections of organic growth (Organic Growth - first asserted in the 2015 policy period);
  - (4) Claims that Perrigo's Generic Rx division engaged in anticompetitively and artificially inflating Perrigo's value ("Generic Rx Division Price Fixing") (first asserted in the 2016 policy period); and
  - (5) Claims that Perrigo falsely accounted for its largest financial asset, the Tysabri royalty stream (first asserted in the 2016 policy period).

- Asserts that each of the five claims triggers coverage in the policy period in which it was first made because each of those claims is factually and legally independent; they were not all *caused* by the same alleged Wrongful Acts. The letter sets out reasons for this view in some detail. Inter alia, it asserts that of the various classes of Plaintiffs certified in the Securities Actions only the claims of the class who held shares at the time of the Mylan Tender Offer attach to the 2014 Policy.

22. By letter dated 21 May 2021, Kennedy's, for the Plaintiffs. replied to Reed Smith[34]. That letter, inter alia,

- Recites the background from the merger/takeover discussions of early 2014, to the notification of the Mylan Counterclaim to the 2014 Policy.

- Identifies the Mylan Counterclaim as a Securities Claim alleging Wrongful Acts against Perrigo.

[34] Cited in extenso in Replies to Particulars 1 September 2021 §2.1

- Identifies the Wrongful Acts alleged in the Securities Claims as "similar or related" to those alleged in the Mylan Counterclaim.

- Relies on
  - 2014 Policy - Condition 5.1(iii) – claims arising out of similar or related Wrongful Acts.
  - 2015 to 2018 Policies §4.3 – Prior Notice Exclusion.
  - 2016 to 2018 Policies §5.2 – Single Claim Provision.
  - 2016 to 2018 Policies – Specific Matters Exclusion Endorsement.

Shareholder Demand Letter & Perrigo Derivative Complaint/Claim

23. By "Shareholder Demand Letter" dated 30 October 2018 to Perrigo, certain Perrigo shareholders purported to require that Perrigo sue the 2nd to 12th and the 15th Defendants[35]. It was followed by the "Perrigo Derivative Complaint/Claim"[36]. The Plaintiffs describe both the letter and that claim as alleging breach of fiduciary duty by directors and officers of Perrigo in exaggerating Perrigo's value and misleading its shareholders in relation to four themes identified above: Organic Growth, Omega Integration, Drug Price-Fixing and the Tysabri Accounting Treatment. It also introduced a fifth theme of complaint against the 9th and 14th Defendants[37] as to Irish corporation tax liabilities purportedly owed by Perrigo arising from the tax treatment of the Tysabri royalty stream (the "Tysabri Tax Liability Claim"[38]). It seems, consistent with the derivative nature of the claim, that Perrigo was a nominal defendant against which no wrongs were alleged – the substantive defendants being the directors and officers. The Perrigo Derivative Complaint was dismissed in August 2020.

24. The Shareholder Demand Letter and the Perrigo Derivative Complaint were notified by the Defendants to the Plaintiffs under each of the 2014, 2015, 2016 and 2017 Policies.[39] The Plaintiffs say they attach, if at all, only to the 2014 Policy but are in fact not covered as a Securities claim as no claim was made against Perrigo.

[35] And investigate "potential claims" against the 13th Defendant.
[36] Ryan R. Krueger, derivatively on behalf of nominal defendant Perrigo Company Plc v Bradley A. Alford; Rolf A. Classon; Adriana Karaboutis; Jeffrey B. Kindler; Donal O'Connor; Geoffrey M. Parker; Theodore R. Samuels; Jeffrey C. Smith; Laurie Brlas; Gary M. Cohen; Jacqualyn A. Fouse; Ellen R. Hoffing; Michael J. Jandernoa; Gerald K. Kunkle, Jr.; Herman Morris; Jr., Murray S. Kessler; John T. Hendrickson; Joseph C. Papa; Judy L. Brown; Ronald L. Winowiecki; Douglas S. Boothe; and Marc Coucke, (Perrigo Company Plc Nominal Defendant) Case 2:19-Cv-18652 (District Of New Jersey)
[37] And other directors or officers of Perrigo who are not parties to these proceedings
[38] The Plaintiffs accept that the "Tysabri Tax Liability Claim" falls for cover under the 2017 policy and so is not relevant to the proceedings or this discovery application see McGahey Affidavit §26 & Replies to Particulars 1 September 2021 §4.4. Essentially this complaint asserts that an Irish Revenue Audit Findings Letter on 30 October 2018, found that Perrigo owed circa €1.6 billion, that the Irish Revenue's position became final by Notice of Assessment dated 29 November 2018, and that did not disclose the Audit Findings Letter and the Notice of Assessment to the public until 20 December 2018.
[39] But cover under the 2017 and the 2018 Policies is no longer asserted by Perrigo as to any claim – see Perrigo Defence and Counterclaim.

"Perrigo Claims" & "Contested Claims"

25. The Plaintiffs, in the Statement of Claim[40], identify the "Perrigo Claims" as collectively

- the 29 Securities Actions (including Roofers 1 & 2 and Carmignac);
- the demands made in Shareholder Demand Letter and the claims in the Perrigo Derivative Complaint (save that as to Tysabri Tax Liability Claim[41]).

Perrigo uses the term "Contested Claims" as including the Perrigo Claims and adding the Omega Counterclaim[42].

2017 & 2018 Policies

26. None of the notifications of claim to the Policies were to the 2018 Policy. And as will be seen, Perrigo by its counterclaim does not seek any declaration of cover under the 2017 or 2018 Policies.

Interpretation, Factual Matrix & Discovery – Initial Observation

27. The parties have not articulated in the pleadings or on affidavit their specific, respective and competing interpretations of specific clauses beyond the analysis in the correspondence cited above and have invoked the factual matrix relevant to such interpretation in somewhat general and abstract terms without identifying the facts in question or how and to what effect they affect the interpretation of the Policies. Nonetheless, the parties agree in general terms that significant issues will arise at trial as to the interpretation of the Policies and that the Policies will be interpreted on "text in context" principles by reference, inter alia, to the relevant factual matrix current when the Policies were respectively made. They are agreed in general terms that there is likely to be evidence as to the content of those factual matrices. Perrigo assert in general terms and the Plaintiffs concede at least in principle, that discovery is in principle available as to facts and matters properly falling within those matrices. I consider that justice requires that I consider the issue of discovery by reference to the potential factual matrices relevant to the interpretation of each Policy.

THE PLEADINGS & THE POLICIES

28. As the primary criterion for a decision on discovery is that of relevance to the issues disclosed on the pleadings, and as these are complex claims, it is necessary first to consider the

[40] §61
[41] it is not apparent that anything turns on that for present purposes.
[42] Affidavit of Julie Murphy-O'Connor sworn 23 March 2022 §25 et seq. While I am not sure that Perrigo does so, I exclude the Mylan Counterclaim from the phrase "Contested Claims" as it does not appear to be contested: all agree it falls for cover under the 2014 Policy.

pleadings. In so doing I will consider certain content of the exhibited and pleaded Policies – particularly to make the pleadings somewhat more easily understood.

Statement of Claim & Particulars[43]

29. Much of the narrative content of the Statement of Claim and Particulars is set out in the Introduction above and will not be repeated here.

The Reliefs Claimed

30. The Statement of Claim seeks declarations that[44]

- A. & B The Omega Counterclaim and the Perrigo Derivative Complaint are not "Securities Claims" as defined in the 2014, 2015, 2016 and 2017 Policies and so are not covered by any of those policies.

- C. The Perrigo Claims[45], fall within the 2014 Policy.

- D. & E & F The Plaintiffs are not liable to cover the Perrigo Claims by reason of
  - §4.3 of each of the 2015, 2016, 2017 and 2018 Policies,
  - §5.2 of each of the 2016, 2017 and 2018 Policies,
  - the Specific Matters Exclusion endorsement to each of the 2016, 2017 and 2018 Policies

- H. If the Perrigo Claims attach to a policy other than the 2014 Policy, any sums paid out under the 2014 Policy shall be deemed paid under the relevant policy in accordance with the relevant Plaintiff's subscription to that policy, and to the extent that such Plaintiff does not subscribe to that policy or does not subscribe in the same proportions as it does to the 2014 Policy, a declaration that any sums paid, or parts thereof, should be reimbursed to that Plaintiff.

Omega Counterclaim & Perrigo Derivative Complaint not Securities Claims

31. As recorded above, the Plaintiffs deny cover as to the Omega Counterclaim and the Perrigo Derivative Complaint on the basis that they are not Securities Claims.

[43] See Replies to Particulars 1 September 2021 & 21 October 2021
[44] I have edited the text. Some reliefs are sought in the alternative
[45] Being the 29 Securities Actions, the Shareholder Demand Letter and, the Perrigo Derivative Complaint save for the Tysabri Tax Liability Claim

32. Securities Claims – against Perrigo only - are covered under the "*Entity Cover for Securities Claims Endorsement (DRP)*" of the 2014 and 2015 Policies ("Entity Endorsements"). Those deem Perrigo an Insured only as to Securities Claims for any Wrongful Act committed by it[46]. They define "*Wrongful Act*" as meaning, with respect to Perrigo, "*any actual or alleged breach of trust, error, omission, misstatement, misleading statement, neglect, breach of duty or breach of warranty of authority by Perrigo but only in relation to a Securities Claim"*. [47]

33. The Entity Endorsements define a "*Securities Claim*"[48] (in part) as any claim[49] against Perrigo:

> *"…. alleging the violation of Securities laws of any country which is:*
>
> *(i) brought by any person or entity alleging, arising out of, based upon or attributable to the purchase or sale or offer of solicitation of an offer to purchase or sell any Securities of the Company*
> *Or*
> *(ii) brought by a holder of Securities of the Company, whether directly or on behalf of the Company."*

34. The 2016 and 2017 Policies do not contain Entity Endorsements. But in each the same effect is achieved by Insuring Agreement 1C which provides[50] that "*The Insurer will pay on behalf of the Company all Loss resulting from a Securities Claim first made during the Policy*." Both Policies define *"Securities Claim*" (in part) as:

> *"any Claim for a Wrongful Act, involving the violation of Securities laws of any country which is*
> *(i) brought by any person or entity alleging, arising out of, based upon or attributable to the purchase or sale or offer or solicitation of an offer to purchase or sell any Securities of the Company; or*
> *(ii) brought by a holder of Securities of the Company, whether directly or on behalf of the Company."*

The common and essential concept in the 2014, 2015, 2016 and 2017 Policies of "*violation of Securities laws of any country*" will be noted.

Both the 2016 and 2017 Policies define "*Wrongful Act*"[51], as relates to Perrigo, in the same terms as in the 2014 and 2015 Policies.

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[46] Entity Endorsements §2.2
[47] Entity Endorsements §2.5
[48] Entity Endorsements §2.4
[49] other than an administrative or regulatory proceeding made against, or an investigation of, Perrigo
[50] As the 2014 and 2015 Insuring Agreements had not. In effect and in general terms, the 2014 and 2015 Policies cover for Securities Claims set out in the Entity Cover for Securities Claims Endorsement (DRP) migrated in the 2016 and following Policies, to the Insuring Agreements, but with changes.
[51] §3.54

35. The Plaintiffs deny cover:

- as to the Omega Counterclaim as not being Securities Claims as not alleging the violation of Securities laws[52];
- as to the Perrigo Derivative Complaint as not being Securities Claims as not alleging Wrongful Acts by Perrigo[53].

36. "*Securities law*" is not defined in the Policies or in the Statement of Claim. In Particulars[54] the Plaintiffs say, as to the material facts relied on to decline cover, that:

> *"Article 1134 of the Belgian Civil Code implies a duty of good faith into all contracts. You[55] appear to contend that when this duty applies to a contract involving securities, it falls within the ambit of the description of "Securities laws" in the 2016 Policy and that any breach of this duty is, in turn, is a "violation" of such "Securities laws". This approach fails completely to appreciate that the word "Securities" is used adjectively to describe the nature of the laws. It use clearly indicates that the provision is contemplating laws which specifically deal with securities."*

<u>2014 Policy Condition 5.1(iii) - Limit of Liability</u>
<u>2015 to 2018 Policies §4.3 – Prior Notice Exclusion</u>[56]

37. Condition 5.1(iii) of the 2014 Policy and §4.3 of the 2015, 2016, 2017 and 2018 Policies are broadly similar.

38. Condition 5.1(iii) of the 2014 Policy provides that:

> *"If a single Wrongful Act or act or a series of related Wrongful Acts or acts give rise to a claim under this Policy then all claims made after the expiry of this Policy arising out of such similar or related Wrongful Acts or acts shall be treated as though first made during this Policy Period."*

39. §4.3 of the 2015, 2016, 2017 and 2018 Policies excludes liability on those Policies *"based on, arising from or attributable to any Wrongful Act or a series of related Wrongful Acts alleged in any Claim, circumstance … of which notice has been given under any Directors and Officers Liability Insurance Policy existing or expired before or on the inception date of …"* each policy.

[52] Statement of Claim §56
[53] Statement of Claim §59
[54] See Replies to Particulars 1 September 2021 §1.2 – echoing Kennedys letter dated 19 June 2018.
[55] i.e. Perrigo
[56] Statement of Claim §60 et seq

40. The Statement of Claim pleads that Condition 5.1(iii) of the 2014 Policy and/or §4.3 of the 2015, 2016, 2017 and 2018 Polices have the effect that the Perrigo Claims[57] are covered by the 2014 Policy only as, putting the matter roughly, arising out of wrongful acts alleged in the Mylan Counterclaim notified to the 2014 Policy. As Perrigo no longer asserts cover under the 2017 and 2018 Policies this §4.3 issue is for practical purposes now confined to the 2016 Policy.

2016 to 2018 Policies §5.2 – Single Claim Provision[58]

41. The Statement of Claim pleads that, by §5.2 of the 2016, 2017 and 2018 Policies,

> *"A Single Claim shall attach to the Policy only if the notice of the first Claim, Investigation or other matter giving rise to a claim under a policy, that became such Single Claim, was given by the Insured during the Policy Period."*

42. By §3.51 of the 2016, 2017 and 2018 Policies, "Single Claim" is defined as meaning:

> *"All Claims or Investigations or other matters giving rise to a claim under this Policy that relate to the same originating source or cause or the same underlying source or cause, regardless of whether such Claims, Investigations or other matters giving rise to a claim under this Policy involve the same or different claimants, Insureds, events, or legal causes of action."*

43. The Statement of Claim pleads that §5.2 of the 2016, 2017 and 2018 Policies have the effect that the Perrigo Claims[59] are not covered by the 2016, 2017 and 2018 Policies as the matters giving rise to the Perrigo Claims were first notified to the 2014 Policy as to the Mylan Counterclaim. As Perrigo no longer asserts cover under the 2017 and 2018 Policies this §5.2 issue is for practical purposes now confined to the 2016 Policy.

2016 to 2018 Policies – Specific Matters Exclusion Endorsement[60]

44. The Statement of Claim pleads that "Specific Matters Exclusion Endorsements" on the 2016, 2017 and 2018 Policies provide that the Plaintiffs are not liable on those Policies to indemnify for loss "*based on, arising from or attributable to*" certain listed legal proceedings – at all events if cover

[57] The 29 Securities Actions and the demands of the Shareholder Demand Letter and the Perrigo Derivative Complaint - save the Tysabri Tax Liability Claim & without prejudice to the denial of cover under the 2014 Policy on the basis that it is not a Securities Claim.
[58] Statement of Claim §65 et seq.
[59] the 29 Securities Actions and the demands of the Shareholder Demand Letter and the Perrigo Derivative Complaint - save the Tysabri Tax Liability Claim & without prejudice to the denial of cover under the 2014 Policy on the basis that it is not a Securities Claim.
[60] Statement of Claim §68 et seq.

for such loss is accepted under the 2014 or 2015 Policy[61]. Those listed proceedings are the Mylan Counterclaim[62] and the four earliest Securities claims, including Roofers 1.[63] The Plaintiffs have confirmed cover of these claims under the 2014 Policy subject to its limits, terms, conditions and exclusions such that, the Plaintiffs plead, they are not covered by the later policies. So, the Plaintiffs plead, all of the Perrigo Claims are not covered by the later policies[64]. As has been seen, Perrigo no longer asserts cover under the 2017 and 2018 Policies so this Specific Matters Exclusion issue is for practical purposes now confined to the 2016 Policy.

45. I note that Perrigo asserts that only the Specific Matters Exclusion Endorsements were negotiated and bespoke clauses. Otherwise the Policy wordings appear to have been drafted by the Plaintiffs or the insurance industry.

Coverage Position Correspondence[65]

46. The Statement of Claim pleads that, since 2016 and as claims were made, the Plaintiffs have set out in correspondence to the Defendants their positions as to coverage of all claims under all Policies. The relevant coverage position letters are identified in Replies to Particulars[66] and are exhibited. (Their content is essentially replicated in the Plaintiffs' Statement of Claim and Particulars.) Perrigo and the other Defendants dispute those coverage positions in terms set out, as to the Securities Actions, in the Reed Smith Letter.[67] Presumably this plea is intended to establish dispute such that the Court's declaratory jurisdiction is engaged.

47. To my reading the coverage position letters are consistent with those coverage positions being based only on information provided by Perrigo but are equally consistent with reliance on other materials also. In truth they are not definitive as to what information the Plaintiffs relied on – though it undoubtedly included that provided by Perrigo.

[61] The Plaintiff pleads the additional words "subject to those policies' limits, terms, conditions and exclusions". These words are not in the Policy clauses.
[62] Perrigo Company PLC v Mylan N V, Case No. 15-CV-7341 in the United States District Court for the Southern District of New York.
[63] The others are: Schwieger and Gavrieli v Perrigo Company PLC, Papa, Brlas, Hendrickson, Coucke and Kunkle. No. 43897-05-16 (District Court (Economic Department) of Tel Aviv- Jaffa, Israel); AMI – Government Employees Provident Fund Management Company Ltd v Papa and Perrigo Company PLC. No. 1:16-cv-04752 (District Court for the Southern District of New York); Michael Wilson v Papa and Perrigo Company PLC. A further listed claim does not seem to be relevant to these proceedings: Apothecus Pharmaceutical Corp. v Hendrickson, Needham and Perrigo Company PLC, Index No. 605710/2016 in the Supreme Court of the State of New York, County of Nassau, and removed as Case No. 2:16-cv-04932 in the United States District Court for the Eastern District Court of New York.
[64] Statement of Claim §70 and Replies to Particulars 1 September 2021 §7.3
[65] Statement of Claim §71
[66] Replies to Particulars 1 September 2021. They include:
As to the Securities Actions, Kennedy's Reply to Reed Smith 21 May 2021.
As to the Omega Counterclaim, Kennedys to Covington & Burling LLP dated 16 January 2018 & 19 June 2018, Skarzynski, Black and Merrick LLP to Covington & Burling LLP dated 31 January 2020, Kennedys to Willis dated 23 September 2020.
As to the Perrigo Derivative Complaint, Kennedys to Willis dated 9 October 2020, Kennedys to Covington & Burling LLP dated 27 February 2019.
[67] See above.

Particulars of Wrongful Acts/Misrepresentations & Relationships Between Them

48. As to the reasons for the Securities Actions attaching to the 2014 Policy only, the Plaintiffs' Particulars[68] assert that "*this is a matter for evidence and legal submissions*" and recite Kennedy's Reply dated 21 May 2021 to Reed Smith in extenso[69]. The Plaintiffs describe[70] allegations of misrepresentations and omissions made in the Securities Actions as to Organic Growth, Omega Integration, Drug Price-Fixing and Tysabri Accounting Treatment as misrepresentations and omissions made with a view to defeating the Mylan takeover proposal. Inter alia the Plaintiffs plead[71] that:

> *"These misrepresentations included statements made in a Schedule 14D-9 filing (in September 2015[72]) with the United States Securities and Exchange Commission in response to the proposed merger / takeover by Mylan and public statements made by the first named Defendant against the proposed merger / takeover by Mylan, which the Plaintiffs shall refer to at trial."*
>
> *"…… on 13 August 2015 the first named Defendant issued a press release in which it was stated that Mylan proposed a dilutive deal that substantially undervalued the first named Defendant. Further, on 17 September 2015 the second named Defendant appeared on CNBC and stated that the proposal would be dilutive. The Plaintiffs shall refer to each of the misstatements referred to in each Securities Action at trial."*

The foregoing seems to suggest that the Plaintiffs intend at trial, in justifying their coverage positions, to adduce evidence not merely that allegations having a particular content were made in the Mylan Counterclaim and the Securities Claims but evidence of the underlying alleged misrepresentations themselves. As will be seen, the scope of discovery sought and obtained by the Plaintiffs tends to confirm this impression.

49. More generally, and though certain information was, nonetheless, provided, many of the particulars sought by Perrigo of the "*material facts*" on which the Plaintiffs rely in declining claims were initially refused as seeking particulars of evidence, including requests to identify "*similar*" and "*related*" Wrongful Acts[73] or those which "*relate to the same originating source or cause or the same underlying source or cause*"[74] and requests to "*identify the precise underlying source or cause"*.

[68] See Replies to Particulars 1 September 2021 §2.1
[69] See above.
[70] See Replies to Particulars 1 September 2021 §2.2
[71] Replies to Particulars 1 September 2021 §2.2 & 2.3
[72] Replies to Particulars 1 September 2021 §2.3
[73] E.g. Replies to Particulars 1 September 2021 §5.7.2 & §5.7.4 – related Wrongful Acts being concepts arising under 2014 Policy Condition 5.1(iii) - Limit of Liability and 2015 to 2018 Policies §4.3 – Prior Notice Exclusion.
[74] A concept deriving from 2016 Policy §5.2 – Single Claim Provision.

50. However, later particulars[75] do reply in substance to these question by tabulating the Wrongful Acts alleged in the Mylan Counterclaim and in addition citing *"other matters contained within the Mylan Counterclaim, Schedule 14D-9, the investor presentation dated 17 September 2015, and Mr Papa's media comments, which Mylan alleges were false and misleading .."*[76]. The Particulars tabulate the allegations pleaded in the Securities Actions, alleging that the essence of the allegations in all is of misrepresentations and omissions made in order to defeat Mylan's takeover bid.[77] Similar particulars are given as to the Shareholder Demand Letter and the Perrigo Derivative Complaint[78] and more generally as to the Perrigo Claims[79].

Perrigo's Amended Defence & Counterclaim & Particulars thereof[80]

51. It is unnecessary here to recount the Defence & Counterclaim in detail[81]. Many of the basic facts of the dispute are, unsurprisingly, admitted or generally reflective of Perrigo's position as already set out above. The First Defendant Counterclaims declarations that[82]

- 1. The Mylan Counterclaim is covered by the 2014 Policy.

- 2. The Omega Counterclaim is covered by
  - the 2014 Policy insofar as it comprised claims first made in the Mylan Counterclaim,
  - the 2015 Policy insofar as it comprised claims first made in Roofers 1,
  - the 2016 Policy insofar as it comprised claims first made in Roofers 2.

- 3.
  - The Roofers 1 claims are covered by the 2015 Policy,
  - The Roofers 2 Misstatements and/or Additional Wrongful Acts claims are covered by the 2016 Policy.

- 4. The Securities Actions are covered by
  - the 2015 Policy as to claims therein first made in Roofers 1,
  - the 2016 Policy as to claims therein first made in Roofers 2,
  - the 2016 Policy as to claims therein first made in Carmignac.

- 5. The Shareholder Demand Letter and the Perrigo Derivative Complaint claims[83] are covered by
  - the 2015 Policy as to claims therein first made in Roofers 1,

[75] Replies to Particulars 21 October 2021.
[76] Replies to Particulars 21 October 2021 §1.1.
[77] Replies to Particulars 21 October 2021 §2.1.1 et seq.
[78] Replies to Particulars 21 October 2021 §2.8.1 et seq.
[79] Replies to Particulars 21 October 2021 §3.1 et seq.
[80] Replies to Particulars of Defence & Counterclaim 10 December 2021 & 28 January 2022.
[81] Inter alia Perrigo pleads that it has indemnified the other Defendants as to the various claims made against them on the basis that Perrigo asserts their rights of indemnity as against the Plaintiffs and such that they are not necessary parties to these proceedings. This is useful to know as context but is not strictly relevant to the present discovery application.
[82] I have edited the text. Some reliefs are sought in the alternative.
[83] Excluding the Tax Liability Claim.

- the 2016 Policy as to claims therein first made in Roofers 2.

- 6. All claims first made in Roofers 2 and/or Carmignac are to be treated as a Single Claim covered by the 2016 Policy.

52. It will be noted from those counterclaims that the Defendants assert cover only on foot of the 2014 to 2016 policies and do not assert cover under the 2017 and 2018 policies.

53. It seems to me to necessarily follow from the reliefs counterclaimed that Perrigo disputes the Plaintiffs' declinatures of cover and coverage positions[84]. Indeed, if they do not, one wonders what is the point of this litigation from either side's point of view? The Plaintiffs' written submissions that these issues are not in dispute on the pleadings was unreal and at hearing was prudently revised to an acceptance that at issue in these proceedings is whether those declinatures of cover and coverage positions were substantively correct by reference to the relevant contractual obligations. The Plaintiffs do say that the "nature and quality" of their decision-making in reaching those declinatures of cover and coverage positions is not at issue in these proceedings. In my view the nature and substance of their decisions is self-evident and their substance is in dispute as allegedly incorrect as, in effect, in breach of contract, albeit the pleadings take the form of competing claims for declarations. I agree with the Plaintiffs that the quality of the Plaintiffs' decision-making is not in issue.

54. Generally, Perrigo denies that relevant Wrongful Acts are similar or related or have the same underlying or originating source or cause. Perrigo denies that the summary descriptions of the Perrigo Claims in the Statement of Claim suffice and Perrigo will rely on the pleadings and filings[85] in those matters as to the nature and subject matter of the proceedings and the Wrongful Acts therein identified. It has provided those pleadings and filings to the Plaintiffs.

55. Perrigo pleads that the Omega Counterclaim against Perrigo included claims,
- alleging, arising out of, based upon or attributable to the purchase or sale of offer or solicitation of an offer to purchase or sell Perrigo securities,
- brought by holders of Perrigo securities alleging the violation of Securities laws,
- alleging violations of Article 1134 of the Belgian Civil Code and hence alleging violation of Securities laws,
- that are also the subject of Roofers 1 & 2, which the Plaintiffs have accepted is a Securities Claim,
- such that the Omega Counterclaim must also be a Securities Claim.

[84] I will use these terms interchangeably
[85] What is meant by "filings" is elucidated further below.

56. Perrigo pleads that the Shareholder Demand Letter and Perrigo Derivative Complaint relate to Wrongful Acts alleged in Roofers 1 and 2 which the Plaintiffs have accepted are Securities Claims, such that the Shareholder Demand Letter and Perrigo Derivative Complaint must also be Securities Claims.

57. Perrigo pleads that ambiguous terms in the Policies are to be construed contra proferentem. I mention this as it featured in argument as to the proper scope of discovery.

Notice for Particulars of Perrigo's Defence & Counterclaim & Reply thereto

58. The Plaintiffs' notice for particulars dated 17th December 2021 generally concentrates on seeking to have Perrigo identify each "Wrongful Act" alleged in each claim on the Policies and how each is the same, similar to or related to Wrongful Acts in others of those claims. Inter alia it states that as Perrigo,

> *"…… itself rejected the proposition that the Wrongful Acts or acts can be identified by the filings in that complaint, the Plaintiffs reject the suggestion now made by the first named Defendant that the "allegations made in the Mylan Counterclaim can be readily ascertained from the pleadings in that case."*

This question is at least ambiguous as to the prospect of evidence relevant to the ascertainment of the allegations made in the Mylan Counterclaim.

59. Generally, Perrigo's reply dated 28 January 2022 asserts that alleged Wrongful Acts are adequately particularised in the pleadings in the cases in which they were alleged and repeats its reliance on the pleadings and filings in those cases. Nonetheless, Perrigo identifies in some detail each Wrongful Act alleged in Roofers 1, Roofers 2 and Carmignac and does so inter alia by reference to the categories of wrongful act identified above as Organic Growth, Omega Integration, Drug Price-Fixing and Tysabri Accounting Treatment. Perrigo identifies in some detail each Wrongful Act alleged in the Shareholder Demand Letter and the Perrigo Derivative Complaint as having been first made in, respectively, Roofers 1, Roofers 2.

Other Pleadings

60. I have had sight of other pleadings[86], the content of which need not be recounted here.

[86] Defence of the Second to Seventeenth Defendants - 19 November 2021; Reply to the Defence of the Second to Seventeenth Named Defendants - 14 January 2022; Reply and Defence to Counterclaim – of the Plaintiff to the First Defendant - 9 February 2022.

THE DISCOVERY SOUGHT, OFFERED & RESISTED

61. The categories of discovery first sought by way of Perrigo's letter for voluntary discovery dated 24 February 2022 are set out in the schedule to the Notice of Motion for discovery dated 23 March 2022. It is possible to simplify the wording somewhat for present purposes without altering meaning.

Categories 1 - 5: The Omega Counterclaim

All documents relating to the Plaintiffs' decision to decline cover, and/or their position that they are under no obligation to provide cover, for the Omega Counterclaim under

1. the 2014 Policy.
2. the 2015 Policy.
3. the 2016 Policy.
4. the 2017 Policy.

5. All documents relating to reserves set or established by the Plaintiffs or any of them in connection with the Omega Counterclaim under the Policies or any of them.

Categories 6 - 10: The Perrigo Derivative Complaint

All documents relating to the Plaintiffs' decision to decline cover, and/or their position that they are under no obligation to provide cover, for the Perrigo Derivative Complaint under

6. the 2014 Policy.
7. the 2015 Policy.
8. the 2016 Policy.
9. the 2017 Policy.

10. All documents relating to reserves set or established by the Plaintiffs or any of them in connection with the Perrigo Derivative Complaint under the Policies or any of them.

Categories 1 – 10 - Reasons

62. The reasons[87] for seeking discovery of Categories 1 – 10, as set out in the letter for voluntary discovery dated 24 February 2022, are essentially the same: that the Plaintiffs have declined cover for the Omega Counterclaim and the Perrigo Derivative Complaint on the basis that they are not Securities Claims within each of the 2014, 2015, 2016 and 2017 Policies under which the Omega Counterclaim and the Perrigo Derivative Complaint were notified. Perrigo denies that the Plaintiffs

[87] The reasons are cross-referenced to specific paragraphs of the pleadings.

are entitled to decline cover on that basis and both Perrigo and the Plaintiffs seek declaratory relief as to the correct interpretation of the Policies and the term "Securities Claim" therein.

Categories 11 - 16: The Perrigo Claims[88]

All documents relating to the Plaintiffs':

11. position that the Perrigo Claims fall within the 2014 Policy only.

12. analysis of the Perrigo Claims (in whole or in part) and the extent to which they attach to particular policy years.

13. position that by reason of §4.3[89] of the 2015, 2016, 2017 and 2018 Policies, the Plaintiffs are not liable under the relevant policy to make any payment in respect of the Perrigo Claims.

14. position that by reason of §5.2[90] of the 2016, 2017 and 2018 Policies, the Perrigo Claims are excluded from cover under any of those policies.

15. position that by reason of the Specific Matters Exclusion[91] endorsement to each of the 2016, 2017 and 2018 Policies the Plaintiffs are not liable under any of those policies to make any payment in respect of the Perrigo Claims.

16. All documents relating to reserves set or established by the Plaintiffs or any of them in connection with the Perrigo Claims under the Policies or any of them.

Categories 11 -16 - Reasons

63. The reasons[92] for seeking discovery of Categories 11 – 16, as set out in the letter for voluntary discovery dated 24 February 2022, are essentially that the Plaintiffs say and Perrigo denies

[88] Being the 29 Securities Actions, the Shareholder Demand Letter and the Perrigo Derivative Complaint save for the Tysabri Tax Liability Claim.
[89] §4.3 of the 2015, 2016, 2017 and 2018 Policies - Prior Notice Exclusion - provides that the Insurer shall not be liable to make any payment under those Policies "based on, arising from or attributable to any Wrongful Act or a series of related Wrongful Acts alleged in any Claim, circumstance … of which notice has been given under any Directors and Officers Liability Insurance Policy existing or expired before or on the inception date of …" each policy.
[90] §5.2 of the 2016, 2017 and 2018 Policies - Single Claim Provision - provides that "A Single Claim shall attach to the Policy only if the notice of the first Claim, Investigation or other matter giving rise to a claim under a policy, that became such Single Claim, was given by the Insured during the Policy Period." By §3.51, "Single Claim" is defined as meaning: "All Claims or Investigations or other matters giving rise to a claim under this Policy that relate to the same originating source or cause or the same underlying source or cause, regardless of whether such Claims, Investigations or other matters giving rise to a claim under this Policy involve the same or different claimants, Insureds, events, or legal causes of action."
[91] The "Specific Matters Exclusion Endorsements" on the 2016, 2017 and 2018 Policies provide that the Plaintiffs are not liable on those Policies to indemnify for loss "based on, arising from or attributable to" certain listed legal proceedings – in all events if cover for such Loss is accepted under the 2014 or 2015 Policy[91]. Those listed proceedings are the Mylan Counterclaim and the four earliest Securities claims - Roofers 1, Schwieger and Gavrieli, AMI and Wilson. The Plaintiffs assert that they have confirmed cover of these claims under the 2014 Policy subject to its limits, terms, conditions and exclusions so, all of the Perrigo Claims are not covered by the later policies.
[92] The reasons are cross-referenced to specific paragraphs of the pleadings.

that the matters giving rise to the Perrigo Claims were first made and notified to the 2014 Policy such that the Perrigo Claims fall within the 2014 Policy only on the basis of:

- §5.1(iii) of the 2014 Policy - the aggregation provision.
- §4.3 of the 2015, 2016, 2017 and 2018 Policies – the Prior Notice Exclusion clause
- §5.2 of the 2015, 2016, 2017 and 2018 Policies – the Single Claim Provision
- The Specific Matters Endorsement of the 2016, 2017 and 2018 Policies.

Accordingly, Perrigo say and the Plaintiffs deny that the Plaintiffs are not entitled to decline cover for the Perrigo Claims, in whole or in part, under 2015, 2016, 2017 and/or 2018 Policies.

64. Perrigo also cites its substantive position on cover and aggregation as set out at §§16, 21 and 27 of its Defence & Counterclaim. Though the letter does not elaborate, I note that those pleas include the following[93]:

- §16 - The Wrongful Acts alleged in the Perrigo Claims are not "*similar or related*" to the Wrongful Acts alleged in the Mylan Counterclaim covered by the 2014 Policy within Condition 5.1(iii) of the 2014 Policy and the Plaintiffs have failed to identify, adequately or at all, how they are "*similar or related*".

- §21
  - Some claims in the Omega Counterclaim were first made in the Mylan Counterclaim such that they fall within the 2014 policy coverage but others were not. Some were first made In Roofers 1 and so fall within the 2015 policy and others were first made in Roofers 2 and so fall within the 2016 policy.
  - Some claims in the Securities Actions, the Shareholder Demand Letter and the Perrigo Derivative Complaint were first made In Roofers 1 and fall within the 2015 policy and others were first made in Roofers 2 and fall within the 2016 policy.
  - All claims first made in Roofers 2 and/or Carmignac are to be treated as a Single Claim under the 2016 Policy.

- §27 recites the counterclaim and is essentially repetitive of the foregoing.

Categories 17 - 21: The Policy Documents, Underwriting Files, and Guidelines Applicable to the Policies and Claims

17. All documents relating to the drafting and negotiation of the Policies by or on behalf of the Plaintiffs (or any of them), inter se and/or with the Defendants (or any of them), their servants or agents, and/or any broker, and the following clauses in particular, upon which the Plaintiffs rely:

(a) §5.1(iii) of the 2014 Policy;

(b) §4.3 of the 2015, 2016, 2017 and 2018 Policies;

[93] The following is not verbatim from the Defence but seeks to summarise its content.

(c) §5.2 of the 2016, 2017 and 2018 Policies; and
(d) the Specific Matters Exclusion Endorsement in the 2016, 2017 and 2018 Policies.

18. The underwriting file(s) in relation to the Policies and each of them.

19. All manuals, guidelines, guidance, or similar documents applicable to the underwriting of the Policies.

20. All manuals, guidelines, guidance, or similar documents applicable to the handling of claims under of the Policies.

21. Any marketing, advertising or explanatory information / materials provided by the Plaintiffs or any of them, their servants or agents (to include any broker), to the Defendants or any of them, their servants or agents, (to include any broker), relating to the Policies.

Categories 17 - 21 - Reasons

65. Perrigo say that

- the parties dispute the proper interpretation of the policies and that these categories relate to the factual matrix in the context of which they fall to be interpreted.
- any ambiguous clause, the interpretation of which is in dispute, must be construed *contra proferentem.* The Plaintiffs deny that any disputed clause is ambiguous and that Perrigo is entitled to invoke the principle of *contra proferentem.*

66. Essentially the Plaintiffs offered to discover only the declinature/coverage position letters – which Perrigo already has.

Affidavit of Julie Murphy O'Connor

67. Perrigo's grounding affidavit, sworn by Julie Murphy O'Connor, Solicitor, on 23 March 2022 essentially sets out the background to the case and exhibits the 2014 to 2018 Policies and the inter partes correspondence. Much of its content is reflected elsewhere in this judgment or consists of submissions which I will not repeat here.

68. Ms Murphy O'Connor characterises the thrust of the Plaintiffs' response to Perrigo's discovery request as being that the issues in these proceedings are confined to contractual interpretation and that documents showing the Plaintiffs' subjective interpretation of the Policies,

do not aid interpretation and are inadmissible. She says this erroneously conflates relevance (and by implication discoverability[94]) and admissibility.

69. Generally, she says that - beyond the Plaintiffs' declinature/coverage position letters - Perrigo has no knowledge of the basis on which the Plaintiffs refused indemnity. Presumably one should add to the list of what Perrigo knows in this regard the documents – pleadings and filings – supplied by Perrigo to the Plaintiffs in the claims notification processes. She says, in effect, that complex and contested issues are pleaded as to the extent to which Wrongful Acts alleged in the Contested Claims are "*similar or related*" to the Wrongful Acts alleged in the Mylan Counterclaim[95] and why and how they are "*similar or related*". She says that the Plaintiffs appear to want to confine Perrigo's knowledge of these issues to (a) the pleadings in the present proceedings; (b) the declinature letters and (c) the pleadings in the Contested Claims and the Mylan Counterclaim. Ms Murphy O'Connor says that Perrigo's request for Particulars on these issues prompted replies in the form only of tables of extracts from the pleadings in the Contested Claims and the Mylan Counterclaim. She says that other documents in the Plaintiffs' files may well be relevant to those issues.

70. As to these matters she says that the documents to hand shed "*no light on the Plaintiffs' approach*" and that "*Perrigo is hampered by an ongoing lack of information and understanding as to why the Plaintiffs consider that the Wrongful Acts in each of the Perrigo Claims are similar or related to the Mylan Counterclaim."* I pause to observe that "*the Plaintiffs' approach*" and what the Plaintiffs "*consider*" as subjective matters would seem inadmissible as evidence as to the objective question, which I accept will arise at trial, whether the Plaintiff's declinature/coverage position decisions were correct in substance. The Plaintiffs correctly say that the prospect of such "*light*" is not, per se, a basis for discovery. However that does not necessarily imply that the documents recording that approach are irrelevant and not discoverable: such documents may be relevant in some way other than as shedding light on the Plaintiffs' approach.

71. Ms Murphy O'Connor says that the complex coverage position requires assessment of the underlying Wrongful Acts with a view to assessing whether they are Securities Actions and whether they arise from similar or related Wrongful Acts as gave rise to the Mylan Counterclaim. As to the 29 Securities Actions, Ms Murphy O'Connor notes that the Plaintiffs' position is that they all attach to the 2014 Policy only - whereas Perrigo says that they can't be grouped together indiscriminately, without considering the substantive nature and subject matter of the Wrongful Acts alleged in each of the 29 Actions and that it has pleaded the relevant Wrongful Acts and, on that basis, that the Securities Actions attach to the 2015 and 2016 Policies rather than the 2014 policy.[96]

[94] My gloss.
[95] This may not be a full account of this type of issue but it is the main element and suffices for present purposes.
[96] Defence & Counterclaim §9.4 & 9.6.

72. Ms Murphy O'Connor says that the documents relating to reserves are discoverable as they could show that the Plaintiffs understood that the later policies were at least potentially implicated, even though they denied coverage under them.

73. Ms Murphy O'Connor also says that:

- Perrigo, being obliged to do as policyholder, has shared with the Plaintiffs materials requested to facilitate their understanding of the Contested Claims.
- Perrigo has agreed to the discovery sought by the Plaintiffs.[97]
- The Plaintiffs, it can reasonably be assumed, considered and conducted their own investigations into the Contested Claims and have relevant documents the withholding of which by the Plaintiffs creates an asymmetry in the extent of the parties' sight of each other's relevant documents, which asymmetry confers a litigation advantage on the Plaintiffs over the Defendants.

74. Ms Murphy O'Connor notes and disputes the Plaintiffs' contention that the documents sought were irrelevant to any pleaded issue as, in the proceedings, "*there is no challenge to the decision to decline nor any allegation that the decision to decline was wrongful.*" Wisely in my view, the Plaintiffs did not press this argument at the hearing of the motion - as I have recorded above.

75. Ms Murphy O'Connor notes the Plaintiffs' position that discovery by reference to the 2017 and 2018 policies is irrelevant as the Counterclaim does not assert cover under those policies. She replies that the Statement of Claim itself put those policies in issue.

76. As to Categories 17 - 21 - Policy Documents, Underwriting Files, and Guidelines Applicable to the Policies and Claims - Ms Murphy O'Connor says they relate to the factual matrix against which the "*policies fall to be considered*" and the possibility of policy ambiguity requiring interpretation contra proferentem. More specifically she says that:

- Discovery of Category 17 - documents relating to the drafting and negotiation of the Policies and specific terms thereof - is required for purposes of understanding the rationale behind the wording in the Policies, understanding any negotiations around the policy wording, the parties understanding of what was intended to be covered and is also relevant to the entitlement of Perrigo to rely on the principle of contra proferentem.

- Discovery of Categories 18 and 19 - the underwriting file(s) and manuals, guidelines, guidance, or similar documents applicable to the underwriting of the Policies - is not unusual in an insurance dispute. She says that an insured is entitled to explore what risks the insurer expects to cover in the policy. She says that underwriters often explain why they have proposed specific policy wording to meet the insured's business needs, and how a provision would apply

[97] See further below.

should a claim arise and that the underwriting file will reflect the Plaintiffs' true understanding of the position in which the policy wording evolved over time, sometimes as a direct response to the Contested Claims. (E.g. the Specific Matters Exclusion Endorsement) and in which the Plaintiffs denied or sought to restrict cover over many years. That analysis would shed critical light on the meaning and intended reach of critical policy language.

- Categories 20 and 21 - manuals, guidelines, guidance, or similar documents as to claims handling and marketing, advertising or explanatory information / materials relating to the Policies are sought as part of the factual matrix against which the Policies fall to be considered. Claims handling guidelines would be relevant as instructing claims handlers how to handle allegedly related claims and "Wrongful Acts" or describing what would constitute a related claim subject to aggregation. Marketing Materials would reveal what the insurers promised to insure or what they were asking the policyholder to purchase.

77. Ms Murphy O'Connor says that the Plaintiffs fail to substantiate their assertion that the discovery sought would be burdensome, oppressive and disproportionate.

Affidavit of Andrew McGahey

78. The Plaintiffs' replying affidavit, sworn by Andrew McGahey, Solicitor, on 7 April 2022 repeats much of the background set out above. It too consists in considerable part of submissions and of much that is repetitive, although the latter is understandable in the context. It asserts that there is "*no material factual dispute*" in the proceedings as the issues are confined to the proper interpretation of the Policies. However, Mr McGahey later puts the issue differently and, in my view, more accurately, when he says, as to the Securities Actions, that the court:

> *"… will be largely required to determine whether allegations contained in or giving rise to the Securities Actions are similar or related to or originate from those matters alleged in the Mylan Counterclaim."*

This describes an exercise, not merely of interpretation of the Policies, but of establishing the facts as to the nature and content of the Wrongful Acts alleged in the Mylan Counterclaim and the nature and content of the Wrongful Acts alleged in the Securities Actions and deciding whether the latter are similar or related to or originate from the former within the meaning of that interpretation.

79. The only reason given by Mr McGahey for the Plaintiffs' declining cover for the Omega Counterclaim is that Article 1134 of the Belgian Civil Code is not a Securities law within the meaning of the Policies. He says that by its discovery sought in categories 1 – 5, Perrigo seeks to interrogate the Plaintiffs' legal interpretation of the Policies: seeking "*documents which exclusively reveal the Plaintiffs' subjective interpretation of the Policies*". He also says that the Plaintiffs intend to call

"expert evidence on the issues of foreign law which is[98] *relevant to the resolution of this issue"*. By this I presume is meant that they will call an expert in Belgian Law to prove, as a matter of fact, the relevant content, interpretation and effect of Article 1134.

80. As to the Plaintiffs' declining cover for the Omega Counterclaim, Mr McGahey observes that while the Plaintiffs sought a declaration as to the 2017 Policy in that regard, as the Perrigo Counterclaim does not assert that the Omega Counterclaim is covered by the 2017 Policy, there would be no useful purpose in discovery in that regard. This point is repeated as to other counterclaims by Perrigo.

81. As to the Securities Actions, Mr McGahey recites the Policy Clauses on which the Plaintiffs rely for their coverage positions[99]. Of Perrigo's assertion that some or all of the Securities Actions do not allege Wrongful Acts similar or related to or arising from those alleged in the Mylan Counterclaim, Mr McGahey asserts:

> *"…… it is incorrect to suggest that the Plaintiffs have grouped the Securities Actions together in a manner which has not been the subject of careful and detailed consideration …….. the suggestion that the Plaintiffs have not considered the substantive nature and subject matter of the Wrongful Acts contrasts with the approach consistently adopted by the Plaintiffs and evidenced in the various declinature letters …"*

I do not see this averment as introducing a dispute in the pleadings as to the quality of the Plaintiff's decision-making as to coverage positions.

82. I note that Mr McGahey does not assert that in considering "*the substantive nature and subject matter of the Wrongful Acts"* and as to the factual materials considered for that purpose, the Plaintiffs confined themselves to considering only the Policies, the filings in the Mylan Counterclaim and the Contested Claims and whatever materials were proffered by Perrigo.

83. Mr McGahey's description of the Plaintiffs' coverage position as to the Shareholder Demand Letter and Perrigo Derivative Complaint is more complex. He repeats the bases of the Plaintiffs' opposition to discovery as to their position on coverage of the Omega Counterclaim and he summarises that the trial court will have to determine whether:

- The Perrigo Derivative Complaint is a Securities Claim within the Policies
- The allegations in or giving rise to the Shareholder Demand Letter and the Perrigo Derivative Complaint are similar or related to or originate from the matters alleged in the Mylan Counterclaim.

[98] Sic.

[99] See above. Generally: 2014 Policy - Condition 5.1(iii); 2015 to 2018 Policies §4.3 – Prior Notice Exclusion; 2016 to 2018 Policies §5.2 – Single Claim Provision; 2016 to 2018 Policies – Specific Matters Exclusion Endorsement.

84. Mr McGahey asserts inadequacy of Perrigo's reasons for discovery and that the request amounts to a "general trawl". He asserts that the documents sought are irrelevant, unnecessary and wholly disproportionate having regard to the actual dispute between the parties.

85. Mr McGahey says that the parties' subjective understanding of the Policies is irrelevant to their interpretation and that discovery of documents plainly capable only of demonstrating one party's subjective interpretation of the contract is unnecessary to assist the Court's resolution of its interpretation.

I observe that whether documents of which discovery is sought may assist the Court is not the relevant test and is not same question as whether they may assist the party seeking discovery. For example, a document may be discoverable as likely to lead to a line of inquiry though itself inadmissible in evidence and hence unlikely, at least directly, to assist the Court. However, the observation that the parties' subjective understanding of the Policies is irrelevant to their interpretation, though a submission inapt to an affidavit, is in law correct.

86. Accepting that determination of these proceedings requires "*an assessment of the Wrongful Acts"* alleged in the various claims Mr McGahey says that:

> *".. documents relating to the Plaintiffs' decision to decline cover, their position that they have no legal obligation to provide cover and their analysis of the claims made are neither relevant nor necessary to enable [the Court] to determine which of the parties' respective constructions of the Policies is correct as a matter of law."*[100]

Mr McGahey says that "*Such documents are incapable of demonstrating whether the factual allegations made in the individual claims are similar or related to the factual allegations made in the Mylan Counterclaim."* But the criterion is not demonstration: it is, at least primarily, relevance.

Accepting arguendo that not all documents relating to the Plaintiffs' decision, position and analysis would be discoverable, the point does not address the question of discoverability of the factual materials (presumably including the filings in the various claims, but perhaps not limited thereto) upon which that decision, position and analysis were based.

87. Mr McGahey refers to the agreement of discovery to be made by Perrigo of (1) the filings in the Omega Counterclaim, Securities Actions and Perrigo Derivative Complaint; and (2) the misstatement documents referenced in the Securities Actions[101]. He comments that *"To the extent that it is suggested that the Plaintiffs have been provided with additional documentation capable of being used in these proceedings beyond these two categories of discovery, this is not understood."*

[100] Emphases in original.
[101] See further below.

This could be read as an assertion that the Plaintiffs in deciding their coverage positions relied, as to the facts on which those decisions were based, only on information provided to them by Perrigo. But if that was the meaning intended it should have been clearly stated. If that was the meaning intended it would imply that the documents recording those facts are already within Perrigo's knowledge – but that is not a basis for refusal of their discovery: as Hogan J said in **IBB Internet Services v Motorola**[102]:

> *"…… it has never been the law that the party requesting discovery could properly be disentitled to otherwise necessary and relevant documentation by reason of the fact that he or she may already have some or all of such documentation. …. The entire purpose of discovery is to ensure that the requesting party knows what documentation the requested party has in his or her possession."*

However this principle does not require discovery of documents which the party requesting discovery knows the requested party has for the very reason that the party requesting discovery itself gave them to the requested party.

88. In any event and even if the Plaintiffs' position is that in deciding on their coverage positions they relied, as to the facts on which those decisions were based, only on information provided to them by Perrigo, Perrigo is entitled to know, insofar as discovery and inspection will reveal, all facts on which the decisions were based.

89. Mr McGahey decries the discovery request as a "*fishing expedition which is incapable of resolving any material issue in dispute".* If it is a fishing expedition the point is well-made[103] but the test is not whether the discovery sought is "*capable of resolving any material issue".* He alleges a fishing expedition in particular as to discovery relating to reserves and asserts that the reason for discovery proffered by Perrigo – that those documents *"may contain relevant commentary on the basis for declinature"* again seeks, in substance, discovery as to Plaintiffs' interpretation of the Policies.

90. Mr McGahey asserts that the discovery sought would be disproportionate as

- far-reaching and likely to impose a significant financial burden on the Plaintiffs.
- discovery of the 21 categories of discovery sought would involve each of the 11 Plaintiff insurers having to search and analyse significant quantities of raw data across multiple media in multiple jurisdictions.
- each insurer has various levels of claims handlers, managers, underwriters, in-house counsel and executives. Multiple personnel in each insurer would have been involved in considering and providing instructions on coverage decisions.

[102] IBB Internet Services v Motorola [2015] IECA 282 (Court of Appeal, Hogan J, 7 December 2015) §83.
[103] If made in the incorrect document.

- "*potentially in excess of sixty (perhaps more) potential custodians*"[104] data would need to be processed, de-duplicated and made amenable to search terms being applied.
- thereafter, costly document review would ensue.
- the first complaint was made nearly seven years ago.
- relating to "a claim of this magnitude" (It is unclear on what basis Mr McGahey attributes significance to this factor).

DISCOVERY BY PERRIGO TO THE PLAINTIFFS

91. Discovery by the Plaintiffs to Perrigo has been agreed[105] limited to:

- (1) the filings in the Omega Counterclaim, Securities Actions and Perrigo Derivative Complaint;
- (2) the misstatement documents referred to in the Securities Actions. (These are the documents in which the misstatements allegedly made by Perrigo were allegedly made[106].)

The correspondence in that regard is exhibited[107]. Inter alia, the Plaintiffs took the position that the documents sought are relevant to determining the Wrongful Acts or acts alleged in the various claims. Mr McGahey says that much but not all documents falling within these categories had been furnished by Perrigo to the Plaintiffs prior to the discovery process and those were excluded from the discovery obligation. I observe that it follows that the Plaintiffs sought and obtained discovery of documents which they did not have when determining their coverage positions – necessarily on the basis that they were relevant to the Courts' determining the Wrongful Acts or acts alleged in the various claims.

92. "Filings" was agreed to mean:

- (1) All pleadings, including complaints, answers, defences and counterclaims, motions (including exhibits), replies, briefs, memoranda, stipulations, orders, judgments, notices, transcripts, letters and filed expert reports;
- (2) All requests for arbitration, statements of claim, answers, counterclaims, statements of counterclaim, written submissions, and awards; and
- (3) All deposition transcripts (including exhibits), witness statements (including exhibits), expert evidence and testimony.

[104] Sic.
[105] But not yet made.
[106] As particularised in the Plaintiffs' Replies to Notice for Further and Better Particulars delivered on 21 October 2021.
[107] McGahey Affidavit exhibit AMG2.

93. So, while I have not seen them[108], it is clear that filings were defined to include evidential material. This definition of filings implies that, in considering the nature and substance of wrongful acts at issue in any given set of proceedings, for purposes of their comparison with wrongful acts at issue in any other set of proceedings, the Plaintiffs considered it appropriate to compare not merely the pleadings but the evidential matter available in the respective proceedings being compared. Doubtless this evidential matter was incomplete but that does not affect the principle of its relevance. Indeed the relevance of such evidential matter is unsurprising given the breadth of the concepts of "*Single Claim*"[109] and "*similar or related Wrongful Acts*". Also, the Plaintiffs indicated that their requirement was for filings "*relevant to the merits of the underlying dispute*" and as "*relevant to determining the Wrongful Act or acts alleged in contested claims*".

94. It is apparent from the correspondence that at least some of the filings supplied by Perrigo to the Plaintiffs consisted of large amounts of evidential matter (including expert reports which must have been based in turn on factual instructions and must have recorded those factual instructions), statements of fact, declarations, exhibits, many depositions of numerous witnesses and legal submissions in at least some of the Contested Claims. The Plaintiffs sought[110] "Misstatement Documents" which, they say, had not been provided to them and included the full document - transcripts, broadcasts or recordings - in which each misstatement alleged in each of the Securities Actions was made. For example, the Plaintiffs specified that some Securities Actions referred to comments allegedly made by Mr Papa at a conference in Boston on 6 May 2015 and required discovery of the document or transcript containing those comments. The request also implies that the Plaintiffs did not have those documents when making their coverage position decisions and so implies the possibility that at trial, and as to the coverage decisions to be made by the court, the Plaintiffs may seek to rely on material relevant to the characterisation of the Wrongful Acts which was not in their possession when making their coverage position decisions.

95. However, it must also be acknowledged that in giving reasons for seeking discovery of filings, the Plaintiff repeatedly cited Perrigo's repeatedly pleaded intention to rely on those filings and as Perrigo "*has placed express reliance on the Filings to establish the Wrongful Acts or acts*". In that sense the Plaintiff's discovery request can be viewed as a response to the Plaintiff's pleaded assertion of their relevance as opposed to a detailed assertion by the Plaintiffs of such relevance. But that does not gainsay the submission of counsel for Perrigo that in comparing the claims in the Contested Claims with, most obviously, those in the Mylan Counterclaim, it is unlikely be a matter of comparison merely of pleadings, whether or not the Plaintiffs, in making their coverage decisions, limited themselves to such an exercise.

[108] Nor do I suggest I should have.
[109] See above.
[110] Kennedys to Matheson 15 March 2022

LAW ON DISCOVERY

96. The general principles on which discovery is granted or refused have been repeatedly rehearsed in the caselaw and were not much in dispute in this case – though their application was much in dispute. Since argument in this case the Court of Appeal (Collins J) has given its decision in **Ryan v Dengrove**[111]**.** It does assist but does not seem to me to require further argument in this case. As a very broad observation one may discern in that judgment a frustrated acceptance of the continued vitality of the law permitting relatively wide discovery pending anticipated reform[112].

The Purpose and Importance of Discovery[113]

97. Generally, discovery is for "*the very specific purpose of enhancing the prospects of justice being done in the case*" – that is a "*very limited focus*" - **Waterford Credit Union v J & E Davy**[114]. In **O'Donnell v Ryan**[115] the Court of Appeal said that *"Discovery is a procedural device designed to promote fairness in litigation by making relevant documents equally available to the parties to the action."* It cited the Supreme Court in **Tobin**[116] as noting that, in certain instances where documents are voluminous or finding them involves significant expense, discovery risks defeating rather than enhancing access to justice but also as recognising the valuable - even critical - contribution discovery can make the administration of justice in our adversarial legal system. The Supreme Court did so in terms I will not set out at length here but which include:

i. Fair disposal of the proceedings, "*in a timely and cost effective way*".

ii. Ensuring that no party is taken by surprise by the production of documents at a trial.

iii. The necessity that parties have a reasonable opportunity to present to the court any evidence which may bear on questions of fact which have the potential to influence the proper result of the case.

iv. That discovery can play an important role in ensuring that the case presented by an opponent is not inconsistent with documents it possesses but has withheld from the court. Of particular importance, discovery can play a role in keeping parties honest: otherwise they might succumb to the temptation to present a less than full picture to the court. This consideration counterweighs the oft-quoted argument that the vast majority of discovered documents do not find their way into the evidence presented to the court. I should add that I do not read this observation as pejoratively implying in any particular case a particular risk of dishonesty by any party. It is an important observation but a general one.

[111] [2022] IECA 155
[112] Citing Civil Justice Efficiencies and Reform Measures: A Civil Justice System for the 21st Century (Minister for Justice and Equality May 2022).
[113] Given the overlapping and relativity of concepts such as relevance, necessity and proportionality it is more than usually the case that as to the Law on Discovery, the subheadings of this judgment are no more than very generally indicative of the following content.
[114] [2020] IESC 9.
[115] [2022] IECA 76.
[116] Tobin v Minister for Defence [2019] IESC 57.

v. Generally, discovery "*improves the chances of the court being able to get at the truth*" as to contested facts.

The Court of Appeal in **Ryan v Dengrove** similarly acknowledged the importance of discovery while simultaneously noting **Tobin's** acknowledgment that discovery can hinder access to justice – a consideration which Collins J considered to be "*a real and acute issue in civil litigation in this jurisdiction*".

The Broad Principles

98. As Barniville J said in **Dunnes Stores v McCann** ("**Almonte**")[117]. "*Irish law on discovery is based on the twin requirements of relevance and necessity".* Given recent emphasis in the caselaw, one might add "*proportionality*" to that list, though it may properly be a subset of necessity[118] and little is likely to turn in practice on whether it is a subset or a stand-alone requirement. The three concepts are linked such that a neat discrete analysis of each is not possible[119].

99. Broadly, documents are discoverable if:

- they are relevant to the issues in the case as determined by the pleadings – "relevance" is the "*primary test*"[120]
- their discovery is necessary to the fair disposal of those issues or necessary for the saving of costs in their fair disposal – "necessity",
- the burden of their discovery on the party making discovery is proportionate to the likelihood that they will assist in the fair disposal of those issues – "proportionality".

100. As to relevance, the starting point remains "**Peruvian Guano**"[121] as endorsed by the Supreme Court in **Tobin**[122]. In **Ryan v Dengrove** Collins J commented: *"Remarkably, the extravagant conception of relevance articulated by Brett LJ some 140 years ago in Peruvian Guano continues to be the primary touchstone of whether documents ought to be discovered or not."* In **Peruvian Guano,** Brett LJ said:

> *"… every document relates to the matter in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which may – not which must – either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary.*

[117] Dunnes Stores & Almonte v McCann [2018] IEHC 123.
[118] See discussion in Ryan v Dengrove[2022] IECA 155 §48
[119] And the headings of this section of the judgment should be understood accordingly.
[120] Ryan v Dengrove [2022] IECA 155 §46
[121] Compagnie Financiere et Commerciale du Pacifique v Peruvian Guano (1882) 11 Q.B.D. 55, Brett J.
[122] Tobin v Minister for Defence [2019] IESC 57.

I put in the words 'either directly or indirectly' because, as it seems to me, a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or damage the case of his adversary, if it is a document which may fairly lead him to a train of inquiry, which may have either of these two consequences."

101. The Court of Appeal in **BAM**[123] and in **Red Flag**[124] reviewed the caselaw and helpfully summarised applicable principles as follows – I have amalgamated slightly different wordings from both cases:

- *"1.* The crucial question is whether discovery is necessary for "*disposing fairly of the cause or matter."*[125] The primary test is whether the documents are relevant to the issues in the legal proceedings between the parties.[126] It is not enough that they relate to the dispute that gave rise to the litigation.

- *2. Relevance is determined by reference to the pleadings. O.31, r.12*[127] *specifies discovery of documents relating to any matter in question in the case.*[128]

- *3. There is nothing in the Peruvian Guano test which is intended to qualify the principles that documents sought on discovery must be relevant, directly or indirectly to the matter in issue between the parties in the proceedings.*

- *4. An applicant for discovery must demonstrate that it is reasonable for the court to suppose that the documents contain relevant information.*[129]

- *5. An applicant is not entitled to discovery based on speculation. Neither is it available merely to test averments.*[130]

- *6. In balancing procedural justice the court may require a party whose application is based on a mere assertion to satisfy a threshold criterion of establishing a factual basis for the claim.*[131]

- *7. Although relevance is the primary criterion, and when established in respect of documents it will follow in most cases*[132] *that their discovery is necessary for the fair disposal of*

[123] BAM PPP PGGM Infrastructure Cooperative UA v National Treasury Management Agency [2015] IECA 246
[124] O'Brien v Red Flag Consulting Ltd & Ors [2017] IECA 258. The principles listed in Red Flag have been repeatedly cited since – for example in Dunnes Stores & Almonte v McCann [2018] IEHC 123, Mustardside v Tracre [2018] IEHC 124 and O'Donnell v Ryan et al [2022] IECA 76.
[125] Citing Fennelly J. in Ryanair plc v Aer Rianta cpt [2003] 4 I.R. 264.
[126] Citing Stafford v Revenue Commissioners; Supreme Court (ex-tempore) O'Flaherty J 27 March, 1996.
[127] Order 31 Rule 12 of the Rules of the Superior Courts.
[128] Citing Hannon v Commissioners of Public Works [2001] IEHC 59 §2.
[129] Citing Peruvian Guano.
[130] Citing Framus Ltd v CRH plc [2004] 2 I.R. 20, pp. 34 – 35. In BAM the court said that discovery may not be permitted for the purpose of exploring for possible relevant material or for merely testing averments. However the word "merely" may be important here as BAM cites, as authority Ó Caoimh J in Shortt v Dublin County Council [2003] 2 I.R. 69, who disapproves of discovery to test averments ".. in the absence of material suggesting that the averments in the affidavits filed on behalf of the respondent are untrue .."
[131] Citing Hartside Ltd v Heineken Ireland Ltd, §5.9
[132] In Tobin, Clarke CJ says that "the default position should be that a document whose relevance has been established should be considered to be one whose production is necessary".

those issues, the question of whether discovery is necessary for 'disposing fairly of the cause or matter' cannot be ignored[133].

- *8. The court should consider the necessity of the documents having regard to all the relevant circumstances, including the burden, scale and cost of the discovery sought*[134]*.* (I observe that this principle links proportionality to necessity.)

- *9. There must be some proportionality between the extent or volume of the documents to be discovered and the degree to which the documents are likely to advance the case of the applicant or damage the case of his or her opponent in addition to ensuring that no party is taken by surprise by the production of documents at trial.*[135] (I observe that this principle links proportionality to both degree of relevance and fair disposal of the action.)

- *10. In certain circumstances, a too–wide ranging order for discovery may be an obstacle to the fair disposal of proceedings.*[136]

- *11. Discovery could become oppressive and the court should not allow it to be used as a tactic in war between parties.*[137]

- *12. If a party objects to discovery, the Court may reserve the question until a disputed issue in the case has first been decided if it is satisfied that the right to the discovery depends on the decision or that for any other reason it is desirable that any issue or question in dispute in the cause or matter should be determined first and may order accordingly."*[138]

102. To the foregoing list and at risk of some duplication, I would respectfully add the observations in the Supreme Court by Fennelly J. in **Ryanair**[139], and Clarke CJ in **Tobin**, that:

i. The decision whether to grant or refuse discovery requires the exercise of a "*broad discretion*".

ii. 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.

iii. The establishment of relevance will prima facie also establish necessity.

iv. "Necessity" means that the disclosure of the documents may be necessary for the fair and just resolution of the proceedings and potentially for saving costs. An applicant for discovery

[133] Citing Cooper Flynn v Radio Telefis Eireann [2000] 3 I.R. 344.
[134] Citing Ryanair plc v Aer Rianta cpt [2003] 4 IR 264.
[135] Citing Framus Ltd v CRH plc [2004] 2 I.R. 20, p38.
[136] Citing Independent Newspapers (Ireland) Ltd v Murphy [2006] 3 I.R. 566, p. 572.
[137] Citing Hannon v Commissioners of Public Works [2001] IEHC 59 §4.
[138] Citing McCabe v Ireland [1999] 4 I.R. 151, p. 156.
[139] Ryanair plc v Aer Rianta cpt [2003] 4 IR 264.

must show such necessity and there has recently been much greater scrutiny of the issue of necessity. The court should be willing to confine categories of documents sought to what is genuinely necessary for the fairness of the litigation. Nonetheless, an applicant for discovery "*need not prove that they are in any sense absolutely necessary."*

However, I observe that as "*relevance will prima facie also establish necessity"* the reality of the onus as to necessity may be on the party opposing discovery – that is the view Collins J took in **Ryan v Dengrove**[140].

v. Where there are other equally effectual means of establishing the truth and thus providing for a fair trial then discovery may not be "necessary". It is for the party resisting discovery to, at least initially, identify such means. I observe that this principle also shifts at least part of the burden as to proof/disproof of necessity to the party opposing discovery.

vi. The proportionality test can be seen as a refinement of the concept of "necessity". I observe that on this view at least part of the burden as to proof/disproof of necessity lies on the party opposing discovery.

vii. While he was not convinced it was wise to introduce a new term of art, nonetheless Fennelly J considered the notion of *"litigious advantage"* useful. Discovery of a document should generally be refused of a document where a party is merely curious about its content and would suffer no litigious disadvantage by not seeing it and would gain no litigious advantage by seeing it. Fennelly J does not record the corollary, but it would seem to follow that, at least generally and ceteris paribus, a document should be discovered where the applicant for discovery would suffer litigious disadvantage by not seeing it or would gain litigious advantage by seeing it.

And, whatever Fennelly J's doubts, the phrase *"litigious advantage"* has in the years since become irremovably lodged in the lexicon of the law of discovery.

<u>Relevance to the Issues Pleaded – Admissibility not the Criterion</u>

103. For the proposition that relevance must be determined solely by reference to the pleadings Irvine J in **Halpin**[141] cited **BAM**[142] to the effect that the court *"does not possess a power to engage in a roving investigation of the relationship between the two parties or of the circumstances that gave rise to the proceedings".* In **BAM**, the Court of Appeal said that it is not the dispute that gave rise to the proceedings but the nature of the legal dispute pleaded that defines the scope of discovery. For this purposes, pleadings include particulars - **Ryan v Dengrove**[143].

[140] Ryan v Dengrove [2022] IECA 155 §47
[141] Halpin -v- National Museum of Ireland [2019] IECA 57.
[142] BAM PPP PGGM Infrastructure Cooperative UA v National Treasury Management Agency [2015] IECA 246 §35.
[143] [2022] IECA 155 §53

104. As to the identification in the pleadings of the issues between the parties – or, which is the same thing, "*any matter in question in the case*" – to which relevance must be shown, Clarke CJ in **Hartside**[144], said that the issue to which discovery is directed "*must fairly arise on the pleadings*". As to identification of those issues, and speaking as to the issue of loss but in terms applicable to any issue, Clarke CJ put it pithily: *"Loss is an issue because it is pleaded and denied[145]."*

105. Save perhaps as to simple and clear issues, it is not generally appropriate at discovery stage to determine, for the purpose of deciding whether documents should be discovered, issues of law or fact to be contested at trial – including issues as to admissibility of evidence. In **Wheelock**[146] Haughton J allowed discovery refused by the High Court on the basis that *"the trial judge … erred in his approach to relevance in preferring one view of the law, where that view is contested and an alternative view was put forward will be argued before the court of trial .."*

106. Similarly, in **Hartside**[147] Clarke J:

- identified the point of principle that arose as being *"as to the approach which the court should take where the real reason why a set of documents is said not be relevant is that it is argued that there is no legitimate basis for suggesting that the issue to which those documents might be relevant can properly arise in the case."*

- declined to *"attempt to resolve potentially contested issues at the preliminary stage of a discovery application[148]. The relevant general proposition must, therefore, be that, provided that an allegation is properly made on the pleadings, then documents which are probably[149] relevant to the resolution of that issue should be discovered even though that issue may only arise in the event that other matters are resolved in favour of the party concerned …."*

107. However though relevance relates to pleadings, Clarke CJ also cautioned against bare pleas as a basis for discovery. He said:

> *"The overall problem is one between balancing, on the one hand, the need to facilitate a party who may have a legitimate claim but who may require access to information available only to its opponent in order to fully plead and ultimately substantiate that claim on the one hand, and the need to prevent, on the other hand, a party, by making a mere allegation, from being able to have a wide range of access to its opponent's documentation, including what may well include highly confidential documentation. …… a party may be required to pass a limited threshold of being able to specify a legitimate basis for their case before being given access to*

[144] Hartside Ltd v Heineken Ireland [2010] IEHC 3.
[145] Emphasis added.
[146] Wheelock v Promontoria (Arrow) Ltd [2021] IECA 71 (Court of Appeal (civil), Haughton J, 12 March 2021). Citing Hartside Ltd v Heineken Ireland [2010] IEHC 3 and Mythen Construction v Allianz plc [2020] IECA 148 (see below).
[147] Hartside Ltd v Heineken Ireland [2010] IEHC 3
[148] By which was meant that discovery is a preliminary stage in proceedings – as opposed to referring to a preliminary stage in a discovery application.
[149] Note again the probability standard

their opponent's relevant documentation. The need for such a restriction seems to me to stem from the undoubted undesirability of allowing a mere allegation to give rise to an entitlement to access highly confidential information."[150]

108. As to a particular category, Clarke CJ considered it *"appropriate to assess whether the relevant allegations of Hartside under this heading are clearly pleaded and, if so, are mere assertion or whether they possess a sufficient degree of credibility …"*[151]

109. As to relevance and litigious advantage, one may again observe, as it was prominent in argument in the present case, that the criterion is not whether the documents of which discovery is sought are likely to be deployed or admissible in evidence at trial. Brett J in Peruvian Guano contemplated documents which "*not only would be evidence upon any issue, but also which"* may confer litigious advantage. The continuing vitality of Brett J's deployment in Peruvian Guano of the words "*directly or indirectly*" and "*which may fairly lead him to a train of inquiry*" was confirmed by Finlay Geoghegan J in **Boehringer**[152] to the effect that the test of relevance "*goes beyond documents potentially admissible in evidence*". Finlay Geoghegan J noted that the *"line of inquiry"* formula appears in the form of affidavit of discovery required by the rules of the Superior Courts[153]. Kelly J in **AstraZeneca v Pinewood**[154] said *"… it is important not to confuse discoverability with admissibility."* In **Murphy v Revenue Commissioners**[155] Haughton J considered that admissibility of documents likely to be discovered is a matter for the trial judge and cited **Mathews** on *Disclosure*[156] to the effect that

"Documents could relate to matters in question and be discoverable, even though they were inadmissible in evidence, so long as they might throw light on the case. That a document would not be admissible in evidence was never in itself a ground for refusing discovery."

110. I would add that while relevance is essential to admissibility in evidence, admissibility turns on other factors also: most obviously, a document may be relevant but inadmissible hearsay. Also, in discovery relevance encompasses documents relevant, not directly to an issue in the case, but indirectly and in the sense that they may lead to a train of inquiry and documents which "*may not must*" confer litigious advantage. Adding the factor that discovery is decided before trial – and trials are more or less unpredictable, including as to admission of evidence – and is typically decided on incomplete information[157] it follows that the concept of relevance in discovery is somewhat wider than the concept of relevance as applied in determining admissibility of evidence at trial.

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[150] Citing National Education Board v Ryan & Ors [2007] IEHC 428, Moorview Developments Limited v First Active plc [2008] IEHC 211 and Ryanair v Bravofly [2009] IEHC 41. See also Morrissey -v- The National Asset Management Agency Ltd [2017] IEHC 193

[151] See also cases such as MacAodhain v Ireland [2012] 1 IR 430; Carlow/Kilkenny Radio Limited v Broadcasting Commission [2003] 3 IR 528; Framus Limited v CRH PLC [2004] 2 IR 20

[152] Boehringer Ingelheim Pharma v Teva Pharmaceutical Ireland [2016] IECA 67. See also Morrissey v The National Asset Management Agency Ltd [2017] IEHC 193

[153] O.31 r.13 & Appendix C Form 10.

[154] [2011] IEHC 159

[155] [2020] IECA 36 §17

[156] (5th Ed.) at p.163

[157] See further below as to Waterford Credit Union v J. & E. Davy [2020] IESC 9 §6.1 – 6.2, cited in O'Donnell v Ryan et al [2022] IECA 76

Standard of Proof of Relevance

111. Finlay Geoghegan J in **Boehringer** observed that relevance is to be determined *"as a matter of probability"* – as opposed to mere possibility[158]. It has been said in **Hannon**[159] that the court will not "*order discovery simply because there is a possibility that documents may be relevant"* and that it follows that *"a party may not seek discovery of a document in order to find out whether the document may be relevant."* It does strike me that, in a particular case and on incomplete information, this may in practice be a difficult principle to deploy consistently with the wording of Brett J in **Peruvian Guano** - *"…. it is reasonable to suppose, contains information which may – not which must - either directly or indirectly …"* – though in **Murphy v Revenue Commissioners**[160] Haughton J observed, as to the words "*reasonable to suppose*", that the bar had since been raised in **Hannon** to the effect that if a document is *probably* relevant then it is *prima facie* discoverable if it *may* directly or indirectly advance the case made by the party seeking discovery, or damage the case of their adversary. Collins J reiterated the probability requirement in **Ryan v Dengrove**[161].

112. The theoretical subtlety of the principles is perhaps apparent when one combines the probability standard of proof of relevance with the recent observation in **Red Flag**[162] that *"It is sufficient that a document may contain such information. It is not necessary to prove that it will."* As proof is on the balance of probabilities and synthesising this observation with the probability of relevance standard, an applicant for discovery would have to prove a probability that the documents sought may contain relevant information – information relevant in that it *"may – not which must - either directly or indirectly"* confer litigious advantage. In reiterating the probability requirement in **Ryan v Dengrove**[163] Collins J explained that the applicant for discovery "*must demonstrate that it is reasonable for the court to suppose that the documents contain relevant information*." It is unclear if the "*reasonable to suppose*" formulation is an alternative way of expressing the "*probability*" requirement. If it is it may confuse rather than assist. If it is not, the applicant is burdened, perhaps not heavily enough, with proving as a probability that it is reasonable to suppose. The matter is further complicated when one remembers that the "*reasonable to suppose*" formula comes from Peruvian Guano and it is directly linked to the "*may not must*" formulation of Brett J. In **AstraZeneca**[164] indeed, in upholding a more liberal view of discovery than that available across the water, Barrett J described the articulation of the probability standard in **Hannon** as one of the *"occasional discordant notes in the general 'may, not must' thrust of the applicable jurisprudence"* - which general thrust Barrett J sets out to demonstrate from the caselaw. Perhaps the principle stated in Hannon is best understood in light of the sentence which follows it – ruling out a *"A general*

[158] See also Hannon v Commissioner for Public Works (Unreported, High Court, McCracken J., 4th April, 2001), Hartside Limited v Heineken Ireland Limited [2010] IEHC 3, Clarke J
[159] Hannon v Commissioner for Public Works (Unreported, High Court, McCracken J., 4th April, 2001), Hartside Limited v Heineken Ireland Limited [2010] IEHC 3, Clarke J
[160] [2020] IECA 36 §17
[161] §53, citing Hannon
[162] O'Brien v Red Flag Consulting [2021] IECA 172 (Court of Appeal (civil), Donnelly J, 11 June 2021)
[163] §53, citing Hannon
[164] Astrazeneca AB & Patents Acts [2014] IEHC 189

trawl through the other party's documentation …". This echoes the disapproval of "*fishing expeditions*" in discovery (albeit disapproval of fishing by nets rather than by lines[165]).

113. I am under no illusion that the foregoing analysis assists – save as one view of where we have got to as to proof of relevance. Perhaps, indeed, the more pertinent observation is to hope that the pending reform of the law as to discovery will clarify this aspect of the law. However it seems to me necessary to observe a real and genuine underlying difficulty: the court is generally asked to discern on necessarily incomplete information[166] the relevance of documents it has not seen and which it may be to the benefit of the party of whom discovery is sought not to volunteer. As Clarke J said in **Tobin**[167] discovery tends to keep parties honest. This underlying difficulty no doubt contributes to the difficulty in formulating an acceptable and generally applicable standard of proof of relevance. For what it's worth, I tentatively suggest that, in reforms, maintaining a wide view of relevance but strengthening the requirements of necessity and proportionality may assist at least to some degree.

Necessity

114. While relevance usually implies necessity, Barniville J in **Mustardside v Tracre**[168] considered that "*that is not always the case*" and that recent cases evince "*a greater focus on the need to satisfy the necessity test"*. Finlay Geoghegan J in **Boehringer**[169] also linked the concepts of relevance and necessity in that, as to necessity, she considered that *"the nature and potential strength of the relevance is a consideration to be taken into account".* However I note the chagrin of Collins J in **Ryan v Dengrove** that the case law on the 1999 Discovery Rules[170] - citing the Supreme Court in **Ryanair v Aer Rianta**[171] - had not given "*real teeth*" to the requirement of necessity but rather gave it an "*attenuated meaning*" in which it is presumed implied by relevance. And Collins J considered[172] that as relevance prima facie implies necessity, the party resisting discovery in reality bears the burden of disproving necessity.

Proportionality & Burden

115. In **Tobin** the Supreme Court observed that since **Peruvian Guano**, "*The principle of proportionality has ….. become an important criterion employed by the courts in order to avoid the imposition of excessive burdens on parties to litigation as a result of wide ranging orders for*

[165] Comcast International Holdings Inc. v Minister for Public Enterprise [2019] IEHC 720 (High Court, Allen J, 1 November 2019) §119
[166] Waterford Credit Union v J. & E. Davy [2020] IESC 9 §6.1 – 6.2, cited in O'Donnell v Ryan et al [2022] IECA 76
[167] Tobin v Minister for Defence [2019] IESC 57.
[168] Mustardside Limited v Tracre Limited [2018] IEHC 124.
[169] Boehringer Ingelheim Pharma v Teva Pharmaceutical Ireland [2016] IECA 67. See also Morrissey v The National Asset Management Agency Ltd [2017] IEHC 193
[170] Rules of the Superior Courts (No 2) (Discovery) 1999 SI 233/1999.
[171] Ryanair plc v Aer Rianta cpt [2003] 4 IR 264
[172] §47

discovery" and cited Fennelly J in **Dome Telecom**[173] as examining whether "*the unusual scale and extent of the burden*" arising from an order for discovery was likely to "*produce genuinely useful evidential material*", and as having held that the court was required to have "*a clear view of the litigious benefit to the plaintiff*" in light of the heavy burden and cost of the discovery sought. This could be seen as undermining the "*may not must*" standard set in **Peruvian Guano** but it seems likely to be important that the predicate of this analysis was "*the unusual scale and extent of the burden*" likely to be imposed by an order for discovery as sought in that case. More recently, Barniville J in **Mustardside** referred to the burden of discovery as a potentially significant barrier to access to justice and to the Courts' concern not to order excessive discovery is not ordered: *"There is an increasing awareness on the part of judges of the need to be scrupulous in assessing the requirement for the discovery sought in a particular application."*

116. I gratefully adopt the characterisation by Counsel for Perrigo of the decisions in **AstraZeneca** and **Tobin** as amounting to the proposition that discovery of documents accepted as relevant and necessary will be refused as disproportionate where the burden of their discovery is so burdensome that, on an overview, the effect of ordering discovery would be as to defeat rather than enhance justice.

117. The issue of proportionality is often framed as an argument that the financial and other burdens of making the discovery sought would be oppressive. In **Goode Concrete**[174] Costello J, approved, as correctly identifying the principles to be applied when an issue as to the proportionality of the discovery sought is raised, the observation of Barrett J. that

> *"… the court looks at how relevant the documents are, how important they are to the issues in the proceedings; on the other side the court balances time and cost. Thus, to put matters at their simplest, if there are documents that are not very relevant to a case and it is going to cost a lot of money to make discovery of them, a court will likely say that the discovery sought is disproportionate. By contrast, if discovery of certain documentation is going to cost a lot of money but the documents are very relevant, a court will likely say that that it is not disproportionate, given how important the documents are to that particular case."*

Here again we see concepts of degree of relevance – "*how relevant*" and "*not very relevant"* – and degree of necessity – "*how important"* – as informing consideration of proportionality . Collins J in **Ryan v Dengrove** also links degree of relevance to necessity[175].Where issues of proportionality and burden arise, relevance and necessity are relative, not absolute concepts. It necessarily follows that, while a certain baseline of relevance and necessity is always required to justify discovery and thereafter the greater the burden the greater the relevance and necessity which must be shown, it must conversely be that the lesser the burden, the lesser the relevance and necessity which must be shown in comparison to burdensome cases.

[173] Dome Telecom Ltd. v Eircom Ltd. [2007] IESC 59, [2008] 2 I.R. 726
[174] Goode Concrete v CRH PLC [2020] IECA 56 (Court of Appeal (civil), Costello J, 19 February 2020)
[175] Ryan v Dengrove [2022] IECA 155 §53

118. As to onus of proof and evidence on the issue of proportionality, the party resisting discovery bears the onus *"to satisfy the court that it would be disproportionate and unduly burdensome, by reference to the exercise involved and the likely time and costs involved"* – see **Goode Concrete** and **Comcast**[176]. In **Tobin**, Clarke CJ said that it is incumbent on a party arguing that the discovery sought is excessively burdensome, to set out *"in some reasonable detail, just why that is said to be so".* In **Ryan v Dengrove**[177] Collins J observed that *"While there may have been some faint suggestion that the discovery …might impose an undue burden on Dengrove, any such suggestion lacked any evidential basis."* As to the practical requirements of this principle, Costello J helpfully said the following in **IBRC v Fingleton**[178]:

> *"[29] Significantly, despite the lengthy exchange of affidavits, no information is put before the court as to the likely time or expense that may be incurred if discovery in the terms sought by the Defendants is ordered as opposed to discovery in the terms offered by the Plaintiffs. Therefore, the court is left with averments, no doubt made in good faith and based upon considerable experience, by the solicitor for the Plaintiffs who is conducting the discovery exercise, that the proposed discovery will be extremely expensive and extremely lengthy. The difficulties involved in specific searches are highlighted but the court is left with no information as to the likely or estimated cost of complying with the discovery sought by the Defendants. There is no estimate of the difference between the cost of making discovery as offered by the Plaintiffs and that sought by the Defendants. This makes it very difficult for the court to conclude how onerous or unreasonable the discovery sought actually is. Generalities are not sufficient in the context of this case. Furthermore, it is to be borne in mind that this case involves a claim for damages of up to Eur6 billion canvassing a wide range of allegations over a very wide period of time. In assessing the proportionality arguments of the Plaintiffs this is a fact to which the court should have regard. I disagree with the submission of the Plaintiffs that it is not permissible to link the concept of proportionality to the perceived gravity and magnitude of the Plaintiffs' claim. Where a party sues for damages of up to Eur6 billion, it is difficult to deny a Defendant documents on discovery which may assist his defence, on the grounds that it is too expensive without establishing or attempting to establish precisely how unreasonably burdensome and onerous the request for discovery is. The possible injustice of unfairly, if unwittingly, withholding documents from a Defendant so placed are too grave."*

119. I pause to observe of the present case that, while obviously and in absolute terms the €125 million, approximately, at stake is not nearly as large as a claim for €6 billion, it is nonetheless a very large claim. Past a certain point, in terms of the value of a claim, the foregoing comments of Costello J apply. In my view, a €125 million claim is past that point.

[176] Goode Concrete v CRH PLC [2020] IECA 56 (Court of Appeal (civil), Costello J, 19 February 2020) §11; Comcast International Holdings Inc. v Minister for Public Enterprise [2019] IEHC 720 (High Court, Allen J, 1 November 2019)
[177] Ryan v Dengrove [2022] IECA 155 §52, citing Boehringer Ingelheim Pharma GmbH v Norton (Waterford) Ltd, §44.
[178] Irish Bank Resolution Corporation Ltd and another v Fingleton & Purcell and others [2015] IEHC 296

Tensions between Principles and Imperfectly Informed Judgment

120. The tensions between the various principles set out above – some tending towards discovery and some against – and the relativity, as opposed to absolute nature, of the concepts involved, will be apparent. To complicate the resolution of those tensions, the exercise of the "*broad discretion*" requires the exercise of imperfectly informed judgment. The Supreme Court in **Waterford Credit Union**[179] acknowledged that:

> *"…….. many of the issues which potentially arise on a discovery application involve questions of degree. While there may well be categories of documents where the court is satisfied that the documents in question could not be relevant or, at the other end of the scale, would be manifestly relevant, nonetheless there are many points in between those two extremes. All judges have experience of the fact that, of the documents discovered, many are not actually deployed at the trial because they turn out to be of little value to the resolution of the issues. However, the problem is that, without sight of the documents in advance, it can be very hard to tell exactly how relevant a document is likely to be. In such cases a first instance court must exercise a degree of judgment as to the likelihood of any document or documents being relevant, and must factor that into its overall conclusion."*
>
> *"….. a court considering whether the disclosure of relevant documents may nonetheless not be necessary having regard to the principle of proportionality, may also have to make a judgment call, on the basis of whatever materials may be before the court, both as to the degree of relevance of the documents in question and the burden which their disclosure might be likely to place on the requested party."*

121. Lest it be thought from the excerpts I have cited, that Collins J in **Ryan v Dengrove** took a resolutely restrictive view of the proper scope of discovery, I should record that he is fully aware of these tensions – as is reflected in the following passage as to principles applicable to discovery of specifically confidential documents but which is in any event of general application:

> *"It must always be remembered that contested issues of discovery are almost always addressed in advance of trial. The court must assess issues of relevance and necessity on the basis of the pleadings. At that stage, it will be difficult to predict the course of the trial. As proceedings move closer to hearing, some issues will loom larger and other will recede in significance. At the hearing of a discovery application, it may be very difficult to confidently assess the extent to which a document or category of documents (which, generally, the court will not have reviewed) will bear upon the resolution of any of the issues in dispute. The court will be concerned to adopt the approach that involves the least risk of injustice. Accordingly, where there appears to be any material risk that refusing discovery could give rise to unfairness, the court should generally err in favour of directing discovery (if necessary, on terms)."*

[179] Waterford Credit Union v J. & E. Davy [2020] IESC 9 §6.1 – 6.2, cited in O'Donnell v Ryan et al [2022] IECA 76

Documents "relating to" - Documents which "evidence or record"

122. Often, as here, discovery is sought of all documents "relating to" or "in relation to" a particular subject matter. In **IBB v Motorola**[180] Hogan J in the Court of Appeal agreed with Barrett in the High Court in noting:

> *" … some instances where the inclusion of the words "in relation to" in the request for discovery have the potential greatly to expand the scope of discovery. There are, however, also many instances where the term "in relation to" must be used if the requesting party is to be certain that all potentially useful or relevant documents will emerge during the discovery process."*

123. I gratefully note that in **IBB**, as to certain categories, the narrower formulation "*evidences or records*" was preferred. I understand this formula to use the word "evidences" in a sense which does not entitle the person making discovery to decide to discover a document, or not, based on a judgment whether it will be formally admissible in evidence at trial. The word is used in its colloquial, wider, sense. I say that in particular given that *"… it is important not to confuse discoverability with admissibility"*[181] and that decisions as to admissibility at trial are unpredictable at discovery stage in the sense that they depend, often, on factors such as whether objection is taken at trial to admission of the document,[182] the probative purpose for which admission of the document is sought[183] and the availability or otherwise of a relevant witness to prove the document - all of which, and more, may be more or less unpredictable when discovery is ordered. However the formulation "*evidences or records*" can be useful to attempt to reduce the burden of discovery to that which is genuinely necessary.[184]

Reformulation of Categories

124. The Court may reformulate the categories of discovery sought and grant discovery in the terms of the categories as reformulated – see for example **Trafalgar Developments**[185] and **IBB**. The court has a discretion in "*framing the terms of discovery*" – **Promontoria v Sheehy**[186].

125. Typically, reformulation will be by way of narrowing the category to a subset of that sought. Other than by narrowing a category, generally and without purporting to lay down a firm rule, the

[180] IBB Internet Services v Motorola [2015] IECA 282 (Court of Appeal, Hogan J, 7 December 2015) §§76 - 78
[181] Supra
[182] There can be many reasons why objection is not taken to the admission in evidence of a technically inadmissible document and any trial lawyer knows that such documents often in practice make their way into a trial.
[183] For example, admission of a letter may be sought not to prove the truth of its content but merely to prove that a letter in terms of its content was sent to the recipient.
[184] Note again in this sentence the interaction of concepts of relevance, proportionality and necessity.
[185] Trafalgar Developments ltd v Mazepin [2019] IEHC 610 (High Court, Barniville J, 31 July 2019)
[186] Promontoria (Aran) Limited v Sheehy [2020] IECA 104, [29]

Court should not reformulate to grant the discovery it thinks the Applicant for discovery ought to have sought. At least unless canvassed at the hearing of the motion for discovery, any other form of reformulation could run an appreciable risk, in an adversarial system of litigation, of a decision made other than on the basis of argument.

LAW ON DISCOVERY - MYTHEN

126. If at the expense of some repetition of principles canvassed above, **Mythen**[187] deserves attention as relied on in particular by Perrigo as the important case on this motion.

127. Mythen had a contract to build a swimming pool and leisure centre. The roof was damaged in a storm and Mythen looked to its roofing subcontractor, Bidcon, to make good storm damage losses of about €1.8 million. Allianz insured the sub-contractor but declined indemnity, citing two exclusion clauses. The sub-contractor went into liquidation. Mythen got judgment against the subcontractor and then sued Allianz for a declaration, pursuant to section 62 of the Civil Liability Act 1961 ("S.62"), in effect, that Allianz was bound to satisfy the judgment against the subcontractor.

128. Mythen sought discovery from Allianz of the insurance policy and of:

> *"All documentation and communications (include electronic communications, all recordings etc) passing between [Allianz] and [Bidcon] and/or its legal advisors and/or the liquidator of that company and/or the liquidator's legal advisers in relation to [Allianz's] refusal to indemnify [Bidcon], including a letter of repudiation[188] dated the 19th September, 2014."*

129. Mythen's stated reason for seeking such discovery was its need to ascertain *"the precise reason as to why indemnity cover was refused and the rationale therefor which is not at all clear from the Defence or from any correspondence received."*

130. Allianz agreed to discover the Policy and the letter declining indemnity but no other documents. The High Court declined to order greater discovery than Allianz had offered, largely for want of privity of contract between Mythen and Allianz.

131. Mythen appealed - arguing that S.62 created an exception to the privity of contract rule and entitled Mythen to sue Allianz directly. Allianz argued, in resisting discovery, that Mythen's claim against it on foot of S.62 was misconceived at law and bound to fail as S.62 does not create an

[187] Mythen Construction Ltd v Allianz plc [2020] IECA 148 (Court of Appeal, Collins J, 8 June 2020).
[188] By which was meant refusal of indemnity.

exception to the privity of contract rule and does not entitle the party to whom the insured is liable to sue the insurer. Allianz also argued that, as between Allianz and the subcontractor, it had validly declined indemnity and that the time-limit for the subcontractor to arbitrate the refusal to indemnify had expired such that the issue was abandoned – this on the basis that Mythen could only stand in the subcontractor's shoes. Mythen argued[189] that it was inappropriate to resolve potentially contested issues in a discovery application or to examine the chances of success or failure of the pleaded claim giving rise to the discovery sought. And by the time Mythen sought discovery, Allianz had not motioned to dismiss the claim as doomed to fail or for a preliminary issue by reference to the subcontractor's failure to arbitrate.

132. Mythen argued that the documents sought were relevant and necessary because Mythen had little or no knowledge of the basis on which Allianz had refused indemnity and the discovery sought would be of vital importance in enabling it to challenge the contention that the refusal was valid. Mythen argued that the documents "*are likely to explain <u>(in more detail than the declinature letter)</u>[190] Allianz's decision to refuse indemnity and may include engineers' reports dealing with the damage to the leisure centre roof and its cause(s). The documents may also be relevant to the question of arbitration."*

133. Collins J in the Court of Appeal observed, in a passage Perrigo emphasises:

> *"The coverage issue is whether or not the risk here is excluded by one or both of the clauses invoked by Allianz, as well as the issue connected to the arbitration clause. But if the issue of whether Allianz was entitled to refuse indemnity is indeed an issue in these proceedings – as the Judge appears to have accepted – it might be thought to follow that Mythen was entitled to discovery of documents going to that issue. The Judge clearly thought otherwise, however."*

134. However, and importantly for present purposes, Allianz did not dispute the relevance of the documents of which discovery was sought. Indeed, on being pressed by the Court as to documents post-dating Allianz's decision to refuse indemnity, counsel for Allianz *"very fairly acknowledged that such documents could be relevant to the refusal …".* It is clear therefore that in Mythen relevance was conceded not argued and that, as Collins J said, *"the hearing before this Court involved only very limited discussion of the category of documents at issue."* The Plaintiffs here make the obvious argument, as concerns Mythen as an authority that documents beyond the letter declining indemnity are discoverable as relevant to a dispute as to the validity of the declining of indemnity, that "*a point not argued is a point not decided"*[191].

[189] Citing Hartside Ltd v Heineken Ireland [2010] IEHC 3
[190] Emphasis added.
[191] See The State (Quinn) v Ryan [1965] I.R. 70 – cited recently in Enniskerry Alliance and Enniskerry Demesne Management Company Clg v An Bord Pleanála, et al including Cairn Homes Properties Limited [2022] IEHC 337

135. Collins J noted that Allianz did not argue that the documents of which discovery was sought were confidential[192] or that their discovery would be disproportionately burdensome. In the latter regard and potentially relevant here, Collins J observed that Allianz's position was *"hardly surprising" "given the discrete nature of the category sought.. "*

136. Rather, Allianz's argument was, as outlined above, that discovery of those documents was not necessary because:

- Mythen's claim on foot of S.62 was bound to fail as Allianz's "*fundamental premise*" was that S.62 does not entitle the party to whom the insured is liable to sue the insurer or to dispute the refusal of indemnity[193]. As Collins J said: *"the fault-line between the parties ran directly through Section 62."*
- The subcontractor's failure to arbitrate the refusal of indemnity was an abandonment of the claim to indemnity and that Mythen could at best stand in the subcontractor's shoes in that regard.

In essence, Allianz very particularly argued that discovery was unnecessary as the court would never have to decide the issue to which it was relevant. I agree with counsel for the Plaintiffs that Mythen does not reflect argument as to relevance or necessity in the sense in which those concepts more ordinarily arise for argument and arise for argument in the present case.

137. It will be noted that, whereas Allianz argued in terms of necessity, it could have framed the same argument in terms of relevance – arguing that, as the issue of the validity of their decision to decline cover could never arise, documents relevant to that decision were irrelevant to any issue in the case. I make this observation not to suggest error of approach by Allianz but to illustrate that the criteria of relevance and necessity are not separated by a bright line.

138. Allianz argued also that at trial it would bear no onus to establish that its decision to decline indemnity was valid (in the sense of being correct). Rather, all that Allianz had to establish, it said, was that it had material available to it on which it could properly rely in deciding to decline cover. The only onus on it would be to prove that a decision to decline cover was made as a matter of fact and, perhaps, to establish the basis on which the decision was made but it would not be open to Mythen to seek to challenge the validity of that decision.

It is fair to say that, in the present hearing, I and counsel for both Perrigo and the Plaintiffs found this argument by Allianz, as recorded in Mythen, difficult to understand. Perhaps it turned on the particular terms of the policy in that case. More generally, it seemed to all of us that if the validity of a decision to decline cover is in issue, and remembering the onus on an insured seeking indemnity to proffer all relevant information to the insurer, the question is indeed whether, as a matter of private law of contract and on the information available to the insurer at any material time, a decision to

[192] In contrast to the position in Hartside.
[193] Contrasting the position in the UK as a result of the Third Parties (Rights against Insurers) Act 1930

refuse indemnity is substantively and contractually correct. It is not clear, at least now to me, whether that material time must be when the coverage decision was made or whether information later to hand can inform a decision at trial.

139. Mythen argued, citing **Hartside,** that disputed issues of law – specifically the meaning and effect of S.62 – were for resolution at trial and not in a discovery application. Collins J considered that "*Hartside is clearly correct as a matter of general principle*" as if the court in a discovery application had to attempt to resolve potentially contested issues "*as a necessary preliminary to applying the established discovery rules, the discovery jurisdiction would rapidly become practically unworkable. Applications for discovery would become forums for debating and determining complex legal issues wholly unsuited for resolution within the proper parameters of such applications."* Similarly, Collins J took the view that the issue of the effect of the subcontractor's failure to arbitrate was not for decision in the discovery application.

140. Collins J observed that Mythen had pleaded,

- that Allianz wrongfully refused to indemnify the subcontractor,
- a cause of action based on Section 62 and the facts necessary to bring itself within that section,
- that it is entitled pursuant to Section 62 to sue Allianz directly.

Collins J observed that if Mythen's analysis of Section 62 is correct, then the issue,

> *"whether Allianz was entitled to refuse indemnity – ….. "the merits" of its decision to decline indemnity – is an issue squarely in the case. Indeed, on Mythen's case, it is the central issue. Allianz's contentions that Mythen's claim is, in various ways, "misconceived" and that the issue of Allianz's entitlement to refuse to indemnify Bidcon is not an issue that ought properly to be reached in these proceedings may well turn out to be correct. However, it is no function of this Court – any more than it was properly a function of the High Court – to seek to adjudicate on these contentions within the confines of a discovery application."*

141. Collins J considered that, having elected not to seek to have the proceedings dismissed as bound to fail, it was not open to Allianz to meet the discovery application by asserting, in effect, that Mythen's pleaded claim will fail in limine and therefore that discovery is not "necessary". Collins J concluded that the High Court had erred in refusing discovery on the basis of a view as to how the issues on the pleadings would be resolved at trial. I agree with Counsel for the Plaintiff, that that is the ratio of Mythen.

142. Otherwise, as Collins J said:

> *"62. Apart from the objection that the discovery sought was not "necessary" because the validity of its declinature was not properly an issue in the proceedings, no grounds were advanced by Allianz to the effect that the discovery ought to be refused.*

63. In my view, the category sought satisfies the requirements of Order 31, Rule 12 and is properly discoverable. …"

143. The precise scope of the discovery ordered in Mythen seems to me unclear. To recap, it was in the terms following:

"All documentation and communications (include electronic communications, all recordings etc) passing between [Allianz] and [Bidcon][194] *and/or its legal advisors and/or the liquidator of that company and/or the liquidator's legal advisers in relation to [Allianz's] refusal to indemnify [Bidcon], including a letter of repudiation*[195] *dated the 19th September, 2014."*

144. It is unclear to me, and does not seem to have been addressed in Mythen, whether the words "*passing between [Allianz] and [Bidcon]"* governed merely the *"communications"* or governed also the "*documentation*". It is no criticism of the parties to the present application that they were unable to shed much light in this regard. Perrigo submitted discovery was ordered both of communications and documents not passing inter partes and the Plaintiffs suggested the contrary on the footing that a second category of discovery sought in Mythen related to the insurer's file.

145. Remembering that Mythen (unlike Perrigo in this case) arose in the particular circumstance of Mythen's not having been privy to the interaction between the insurer (Allianz) and the Insured (Bidcon) it would not be surprising that the words "*passing between [Allianz] and [Bidcon]"* would cover both the *"communications"* and the "*documentation*". But on that view the word "*documentation*" may have been otiose and the discovery granted would have been narrower than that sought here by Perrigo as to refusal of indemnity. On the other hand, if the words "*passing between [Allianz] and [Bidcon] …"* governed merely the *"communications"* and not the "*documentation*", the order would in part have been for discovery of *"All documentation …. in relation to [Allianz's] refusal to indemnify .."*. On that view the reference to *"communications"* would have been otiose and the discovery would have been in effect the same as that sought here by Perrigo as to refusal of indemnity and would have included documents internal to the insurer and which may not have passed between insurer and insured.

146. On balance, the reference in Mythen to its seeking any engineers' reports dealing with the damage to the leisure centre roof and its cause(s) and also to its anxiety to see documents likely to explain (in more detail than the declinature letter) Allianz's decision to refuse indemnity, suggest to me that the parties in Mythen proceeded on the basis that the words "*passing between [Allianz] and [Bidcon] …"* governed merely the *"communications"* and not the "*documentation*", such that the order was, as Perrigo suggests, indeed for discovery of *"All documentation …. in relation to [Allianz's] refusal to indemnify ..",* including documents internal to the insurer and which may not have passed

[194] Emphasis added

[195] This should not have referred to repudiation and should properly have referred to the "letter declining indemnity" but the meaning was clear.

between insurer and insured - in effect the same as that discovery sought here by Perrigo as to refusal of indemnity. In that sense it provides precedent for a discovery order as sought here by Perrigo.

147. However, in the end, I am struck by the fact that in Mythen relevance was assumed – even though, reading between its lines, assumed as obvious. It was not disputed or argued. And a point not argued is a point not decided.[196] I agree with counsel for the Plaintiff that it is a fundamental principle that a case decided on a concession is not authority that the concession is correct. So I do not regard Mythen as decisive of the relevance of the documents of which discovery is sought in this case.

PRINCIPLES OF INTERPRETATION OF INSURANCE POLICIES

148. It may yet be that the outcome of these proceedings will turn more on the disputed application of the facts to the Policies than on the interpretation of the Policies. But it cannot be said at this point that their interpretation will be undisputed. Indeed the contrary seems likely and the Parties agree in so presuming - albeit the precise parameters of that dispute are not entirely clear to me. I should, at discovery stage, refrain from deciding issues proper to trial as to admissibility of evidence on such interpretation: nonetheless I must take a view as to relevance. Accordingly I must consider, at least in general terms, the principles on which insurance policies are interpreted.

149. As to interpretation of insurance policies, the principles of interpretation of contracts generally apply. In **Hyper Trust**[197] and **Coachhouse Catering**[198] McDonald J, said of interpretation of policies, inter alia[199]:

i. The general approach is the "text in context approach" - interpretation in light of the relevant factual and legal context in which the parties were at the time the policy was made.

ii. Interpretation is wholly objective. It seeks to ascertain what the contract would mean to a reasonable person (as opposed a pedantic lawyer) in the position of the parties at the time the contract was made and who is aware of the relevant factual and legal context.

iii. The factual context is also described as the "surrounding circumstances" or the "factual matrix". But this concept is imprecise: it can be illustrated but hardly defined.

[196] The State (Quinn) v Ryan [1965] I.R. 70 per Ó Dálaigh C.J. at p. 120); Ashbourne Holdings Ltd v An Bord Pleanála [2003] 2 IR 114 per Hardiman J.; Maguire v Ardagh [2002] 1 IR 285
[197] Hyper Trust Ltd v FBD Insurance PLC [2021] IEHC 78 (High Court (General), McDonald J, 5 February 2021)
[198] Coachhouse Catering Ltd v Frost Insurances Ltd et al [2022] IEHC 306 (High Court (General), McDonald J, 24 May 2022) a.k.a. "Coachhouse v Sava"
[199] The following is an amalgamation of content from both judgments with minor changes.

iv. The factual context includes the commercial purpose of the contract. This presupposes knowledge of the genesis of the transaction, the background, the context, and the market in which the parties are operating[200]. But the question is not what the parties in fact and subjectively intended to be the commercial purpose of the contract: the question is what, objectively, reasonable persons in the situation of both parties would have had in mind. So, commercial purpose cannot be assessed by reference to material available to one side only.[201]

v. The factual context includes any relevant objective material that was reasonably available to both parties at the time the policy was made. It does not include material known only to one or some of the parties. To put it another way, the courts seek to identify what a reasonable observer would have expected and believed would be available to all contracting parties. Material generally known to insurance brokers may be considered reasonably available to both parties to insurance policies.

vi. Prior negotiations provide no guide to interpretation.

vii. Events, conduct of the parties and documents subsequent to the making of the contract ordinarily[202] provide no guide to interpretation - **Re Wogan's (Drogheda) Ltd**[203] ("Wogan") - and it is wrong to approach interpretation *"through the lens of the dispute which has arisen.*[204]

viii. Evidence as to the subjective intention of the parties is inadmissible. A fortiori, the subjective intention of one party only is inadmissible. I would add reference to Fennelly J in the **ICDL** case[205] to the effect that "*The exercise is to be conducted objectively. The parties are not permitted to give evidence of their subjective intentions or of the negotiations leading to the conclusion of the contract*."

ix. The policy must be interpreted as a whole.

x. Unless the context or the terms of the contract as a whole suggest otherwise, the words of the contract are to be given their natural and ordinary meaning.

xi. As a last resort where other rules of construction fail, genuinely ambiguous content may be interpreted contra proferentem – which in practice tends to mean in favour of the insured.

150. Text in context interpretation of insurance policies is not new: as long ago as **Re Sweeney & Kennedy's Arbitration**[206], Kingsmill Moore J said that "*In construing a policy regard must always be*

[200] Emphasis added.
[201] Fortunately I need not here wrestle with the potentially difficult possibility that, even viewed objectively, counterparties to a contract may have very different, even conflicting, commercial purposes. In part the answer may lie in the fact that a contract is an agreement reconciling those purposes but that seems to return one to its words rather than to its commercial purpose.
[202] There are exceptions – such as evidence relating to business efficacy arguments – see Hyper Trust §12 et seq. and further consideration below.
[203] [1993] 1 I.R. 157
[204] Citing Law Society of Ireland v Motor Insurers' Bureau of Ireland [2017] IESC 31; O'Donnell J §14
[205] ICDL v European Computer Driving Licence Foundation Limited [2012] 3 I.R. 327 cited as a "neat summary" by Barniville J in Almonte.
[206] [1950] IR 85

had to the surrounding circumstances in order that the policy may be read as the parties intended it to be read"[207].

151. In **Law Society v MIBI**[208], Clarke J[209]

- observed that "*prior negotiations or drafts are not regarded as forming an appropriate part of the context by reference to which the text is to be interpreted*".
- noted that the nature of the document is *"a most important part of context"*
- warned that in the case of carefully drafted and important documents there is a danger of *"over-reliance on context".*

152. It is useful also to record the observations of Clarke J in **Lanigan v Barry**[210] to the effect that:

> *"The 'text in context' approach requires the Court to consider the text used in the context of the circumstances in which the document concerned was produced <u>including the nature of the document itself</u>[211]."*
>
> *"……. part of the relevant context is the nature of the document governing legal rights and obligations whose construction is at issue. The more formal the document the less one would expect to find errors or looseness of language. Contractual documents entered into after careful negotiations between experienced lawyers on behalf of the parties may be seen to operate in a different context to, for example, the informal rules of a small association. In all cases the text is important, but part of the context in which that text needs to be considered is the manner in which that text was arrived at, and the circumstances which led to the text being required and/or agreed."*

153. The contrast posited above represents, perhaps, ends of a spectrum. In between may lie contracts made in more or less standard forms proffered by one party where both parties may or may not be commercial enterprises – perhaps very substantial, perhaps not. In the case of standard form contracts, as insurance policies often are, there is a tension between the textual approach and the text in context approach – although they are *"not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation."* They are tools to ascertain the objective meaning of the language of the agreement and the extent to which each tool assists varies with circumstances - **Wood v Capita Insurance Services Ltd**[212].

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[207] Citing in turn Union Insurance Society of Canton, Ltd v George Wills & Co [1916] 1 AC 281
[208] [2017] IESC 31 §§10.6 & 10.9
[209] Dissenting as to the result
[210] Lanigan and ors. v. Barry and ors. [2016] IESC 46
[211] Emphasis added
[212] [2017] 4 All ER 615

154. Years earlier, in **The Chikuma**[213] Lord Bridge espoused textualism as applicable to parties of similar bargaining power, able to look after themselves by contracting only on terms acceptable to them, and bargaining at arm's length. As to resultant contracts in standard form he said *"it is, to my mind, of overriding importance that their meaning and legal effect should be certain and well understood. The ideal at which the courts should aim, in construing such clauses, is to produce a result, such that in any given situation both parties seeking legal advice as to their rights and obligations can expect the same clear and confident answer from their advisers and neither will be tempted to embark on long and expensive litigation … This ideal may never be fully attainable, but we shall certainly never even approximate to it unless we strive to follow clear and consistent principles and steadfastly refuse to be blown off course by the supposed merits of individual cases."* In **AIB v Martin**[214] Lord Millett, albeit dissenting, observed of a mortgage that "*A standard form is designed for use in a wide variety of different circumstances. It is not context-specific. Its value would be much diminished if it could not be relied upon as having the same meaning on all occasions. Accordingly the relevance of the factual background of a particular case to its interpretation is necessarily limited."* However **McMeel**[215] suggests caution as to that view and more recent caselaw in England & Wales, following the definitive adoption of the text in context approach there in **Arnold v Britton***[216]* and **Wood v Capita**, affirms its application to standard form contracts. So too have the recent Business Interruption Policy cases here such as **Hyper Trust**[217] and **Coachhouse Catering**[218] applied it to such policies. And a recent case across the water expressed the view that *"Lord Bridge was not saying that a different approach was to be taken in construing standard form contracts but was instead emphasising the particular importance when dealing with such contracts of not departing from the normal rules of construction"* - **CC Construction Ltd v Mincione**[219]. I have addressed this issue as it is not unusual to find that clauses in insurance policies are alleged to be in standard form and such submissions may yet be made at trial in the present case. My point is that, even as to such clauses, I should in deciding a discovery application take no strong view as to whether, and with what weight, evidence as to factual matrix will be considered in their interpretation.

155. As to subsequent events, conduct of the parties and documents, I would add that I would not rule out the possibility that a document which came into being after a contract was made may provide evidence of, or (potentially more importantly for present purposes) be relevant for purposes of discovery to (for example by suggesting a line of inquiry), discerning the substance of the factual matrix as it was when the contract was made. Haughton J seemed, obiter, to allow as much in

[213]Awilco A/S v Fulvia SpA di Navigazione, The Chikuma [1981] 1 All ER 652 at 658–659, [1981] 1 WLR 314 at 322 - a case of interpretation of a charterparty
[214] AIB Group (UK) plc v Martin [2002] 1 All ER (Comm) 209; [2001] UKHL 63
[215] Construction of Contracts, 2nd Ed'n, Oxford 2010 §5.131
[216] Arnold v Britton [2015] UKSC 36, [2016] 1 All ER 1, [2015] AC 1619, [2015] 2 WLR 1593
[217] Hyper Trust Ltd v FBD Insurance PLC [2021] IEHC 78 (High Court (General), McDonald J, 5 February 2021)
[218] Coachhouse Catering Ltd v Frost Insurances Ltd et al [2022] IEHC 306 (High Court (General), McDonald J, 24 May 2022) a.k.a. "Coachhouse v Sava"
[219] [2021] EWHC 2502 (TCC); 198 ConLR 183

Murphy v Revenue Commissioners[220]. And, as will be seen, **Law Society v MIBI**[221] and **Hyper Trust**[222] provide a limited exception to **Wogan**.

156. Still, it seems useful to recall the view of Finlay CJ for a unanimous Supreme Court in **Wogan**, citing Lord Reid[223] to the effect that:

> *"……. it is now well settled that it is not legitimate to use as an aid in the construction of the contract anything which the parties said or did after it was made. Otherwise one might have the result that a contract meant one thing the day it was signed, but by reason of subsequent events meant something different a month or a year later."*

Finlay CJ observed,

> *"It is a principle which, in my view, must be adhered to in our law and the mischief created by departing from it would be in many instances considerable.*

157. It would be wrong of me to seek to apply the foregoing principles in detail to the present facts for purposes of deciding the scope of discovery. That would offend the principle of not deciding in discovery applications issues properly for decision at trial. Certain clear principles such as the inadmissibility of evidence of subjective intention can be applied - but more generally it is to be borne in mind that the factual context, subject to explicitly established exclusions, and the requirement of being known or reasonably available to both sides when contracting, can, not least in advance of trial, be "*illustrated but hardly defined*".

158. What does seem to me clear is that, in principle, discovery is available as to matters arguably constituting or likely to illuminate the factual matrix. Indeed counsel for the Plaintiffs accepts as much – his concern is that discovery does not go beyond matters properly part of the factual matrix – commenting on the well-known words of Lord Hoffmann in the **Investors Compensation** case[224] as to exclusion of certain matters as irrelevant to contractual interpretation. Counsel for the Plaintiffs says in particular, and I accept, that while the law relating to the factual matrix has expanded the range of material that is admissible and to which discovery will also go, it has not brought into the realm of admissibility or discoverability documents that go to parties' subjective understanding of the contract.

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[220] §48. I do accept in principle that documents created after an event, such as an incident or an agreement, may be discoverable, in that their content may reflect back in a relevant way on what occurred, or may be relevant to the content or meaning of the agreement.
[221] Law Society of Ireland v Motor Insurers' Bureau of Ireland [2017] IESC 31
[222] Hyper Trust Ltd v FBD Insurance PLC [2021] IEHC 78 (High Court (General), McDonald J, 5 February 2021)
[223] In Whitworth Street Estates Ltd. v Miller [1970] A.C. 583 at p. 603. Lord Hodson, Viscount Dilhorne and Lord Wilberforce concurring.
[224] Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 All ER 98, [1998] 1 WLR 896, [1998] 1 BCLC 493, HL.

SUBMISSIONS

159. The positions of the parties have been in considerable degree set out above. What follows is therefore truncated and includes some commentary.

Perrigo's Submissions

160. Perrigo says this is not a case of agreed facts, nor is it a documents only case. Evidence will be required – and the Plaintiffs repeatedly reply to various requests for particulars to the effect that they raise matters of evidence, including as to the similarity of wrongful acts and say they carefully considered the claims on the policies. Perrigo says the Plaintiffs will lead evidence telling the Court how they assessed their coverage positions and how they evolved and why the assessment is correct and that Perrigo is entitled to discovery accordingly of, as counsel for Perrigo put it, "*what their actual thoughts were when they were assessing*" the issue of coverage.

161. However as counsel for Perrigo agreed, the question at trial will not be whether the Plaintiffs' decisions were carefully made – the question at trial will be whether the Plaintiffs' decisions were right. More generally, counsel for Perrigo says that as the Plaintiffs intend to adduce evidence and Perrigo does not know who their witnesses are, what that evidence is or whether it will be admissible, Perrigo is entitled to discovery of the documents constituting or relevant to that intended evidence.

162. Perrigo frames its written submissions as a response to the Plaintiffs' refusal to indemnify. They may be summarised as follows:

- (a) The document sought are "*plainly relevant*" to issues of policy interpretation, coverage, declinature.
- (b) The Plaintiffs' sweeping contention, in effect, that no documents can ever be relevant to an issue of contractual interpretation, is too broad given the "text in context" approach.
- (c) Documents relevant to the drafting and negotiation of the Policies are relevant to the contested issue[225] of construction of ambiguous policy clauses contra proferentem
- (d) The bulk of the categories sought relate to the Plaintiffs' coverage decisions, rather than the drafting of the Policies.
- (e) The Plaintiffs wrongly conflate relevance and admissibility – and so exceed what can be decided at the discovery stage.
- (f) The Plaintiffs bear the burden of proving that discovery would be too burdensome or disproportionate . They only cursorily refer in their letter refusing discovery to the discovery sought being "*burdensome, oppressive and disproportionate*," but fall short of stating that it would *in fact* impose an undue burden on the Plaintiffs. Rather, the Plaintiffs invoke

[225] Citing the Defence §23 and Reply to Defence and Defence to Counterclaim §17

proportionality as a general principle, by reference to which the discovery sought is effectively refused in its entirety. The McGahey affidavit, which vaguely avers that the discovery sought would be "*far reaching and likely to* impose a significant financial burden on the Plaintiffs"[226], adds little. Orally, Perrigo observes that the Plaintiff's proportionality argument is misconceived in that it asserts disproportionality on the basis of the alleged irrelevance of the documents, whereas disproportionality does not arise for consideration unless the documents are relevant.

163. Perrigo calls in aid the "text in context" principles of interpretation of contracts set down in **Hyper Trust**[227] and asserts that the documents sought constitute "*relevant factual and legal context and background*" and so are relevant to application of the contra proferentem principle. Perrigo also cites **Hyper Trust** as illustrating the role of documents and of expert evidence in insurance coverage disputes. I address these issues further below.

164. Perrigo also emphasises the alleged relevance of the discovery sought to the extent to which Wrongful Acts are "*similar or related*" across different sets of proceedings against Perrigo - and why - or whether claims relate to "*the same originating source or cause or the same underlying source or cause*" - and why.

165. As to discovery relating to any reserves set by the Plaintiffs, Perrigo assert that such documents are relevant to the validity of declinature as they may contain commentary on the basis for declinature and could show that the Plaintiffs understood that the later policies were at least potentially implicated, even though they denied coverage under them. The category is also said to be analogous to post-contractual documents concerning FBD's exposure for Covid-19 perils, deemed admissible in **Hyper Trust**[228].

166. Perrigo say that discovery of the underwriting file is "*not unusual*" and "*relevant when the interpretation, or application, of policy wording is in dispute*" as "*one of the richest sources of information regarding the insurer's interpretation of its own policy language*" and having regard to the importance identified by Clarke J in **Tobin** of *"ensuring that the case presented by an opponent is not inconsistent with the documentation which that opponent possesses but which is withheld from the court.".* Perrigo say that it may "*explore what risks the insurer expected to cover when it drafted the policy*" and that *"underwriters often explain why they have proposed specific policy wording to meet the insured's business needs, and how a provision would apply should a claim arise .."* and the file will "*reflect the Plaintiffs' true understanding*" of their refusal and restriction of cover.

[226] At §32(d)
[227] See above.
[228] See further below.

Plaintiffs' Submissions

167. Counsel for the Plaintiffs orally argued that:

- what Perrigo wants is material that demonstrates that the Plaintiffs once took a different view of what the Policies mean or of how the claims apply to the Policies to the views expressed in their coverage position letters and taken in these proceedings;
- that would provide no litigious advantage to Perrigo because it doesn't matter what the Plaintiffs once thought about those issues;
- the Plaintiffs might call evidence at trial as to the factual matrix relating to the interpretation of the policies.

168. Paraphrasing somewhat, Counsel for the Plaintiffs accepted that there are issues for trial whether their coverage decisions were correct. But, he said, those issues have nothing to do with the quality of those decisions or of the decision-making process and bad faith by the Plaintiffs is not alleged. He said he can't call at trial a witness to say, *"Here is the decision making process in which I engaged"* or explain their coverage decisions as that is not an issue in the case. He said he would not call an expert as to the nature or quality of the Plaintiff's coverage decisions. What is discoverable is decided by reference to the issues in the case - not by reference to evidence that parties might try to lead beyond the issues. Discovery cannot be based on Perrigo's fear that the Plaintiffs will adduce irrelevant evidence.

169. Counsel for the Plaintiffs' position was that the question for trial is whether, objectively, the claims fall into the Policies and if so which Policies. For example and as to whether the Omega Counterclaim is a Securities Claim will be an issue for the Court but as to that it "*doesn't matter what we thought about it*" - "*what I thought about the claims is neither here nor there*" - and there is no legitimate litigious advantage to Perrigo in knowing what the Plaintiff's thought. He characterised the issues as to coverage as being "*who's right and who's wrong according to the contract*" and agreed that at trial and as to any coverage decision, the Court stands in the shoes of the insurer in making that decision. I understood him to agree thereby that the court will, de novo, substitute its decision on coverage for the Plaintiffs'.

170. Counsel for the Plaintiffs said that at trial and in standing over their coverage decisions and as to proof of the scope of the claims made on the policies, the Plaintiffs will adduce only the materials presented to them by the insureds. He was equivocal whether evidence would be admissible on whether Wrongful Acts alleged in various actions were similar or related but reserved the right to call a claims expert as to issues such as similarity of wrongful acts. More generally, counsel for the Plaintiffs envisaged expert evidence but was not definitive as to what issues. He cited the issue of Belgian law – but only as an example.

Yet the Plaintiffs sought and got discovery of documents beyond those presented to them by the insureds and on which they based their coverage decisions. In any event, the Plaintiffs' intentions as to adducing evidence do not circumscribe Perrigo's right to adduce evidence and so do not

circumscribe discovery - for example as to matters which, Perrigo may say, the Plaintiffs should have but did not consider in making their coverage decisions or matters which the court should consider in making its coverage decisions.

171. The Plaintiffs say the discovery sought is "atypical" and a "general trawl". Much of their submission is as to "*very well-settled*" general principles of the law of discovery already set out above. More specifically they say that:

- Echoing the Murphy O'Connor Affidavit, the Plaintiffs' written submissions assert irrelevance on the basis that there is no pleaded challenge to the decision to decline nor any allegation that the decision to decline was wrongful[229]*.*
- Perrigo largely fail to engage with the dual requirements of relevance and necessity.
- *"these proceedings solely relate to the proper interpretation of contractual documents". (*Counsel for the Plaintiffs readily accepted at hearing the proceedings relate just as crucially to the application of the policies to the claims made on them.)
- Documents relating to the Plaintiffs' subjective interpretation of the Policies are irrelevant as incapable of supporting or defeating any competing construction of the Policies. The same logic applies to the characterisation of the claims on the policies. Many of the documents sought are capable only of demonstrating the Plaintiffs' subjective beliefs in those regards.
- The Plaintiffs do not conflate discoverability and admissibility. The documents sought are irrelevant as incapable of enabling Perrigo to advance its case or damage the Plaintiffs'.[230]
- The Plaintiffs do not say that no document can ever be relevant to contractual interpretation; rather, Perrigo has failed to establish the relevance and necessity to contractual interpretation of the documents sought.
- In citing the prospect of contra proferentem construction of the Policies as justifying discovery, Perrigo has failed to plead or identify any ambiguity in the Policies arguably justifying a contra proferentem construction.
- Documents internal to the Plaintiff cannot form part of the factual matrix for a text-in-context interpretation of the Policies as they were not available or known to Perrigo when the policies were contracted. The factual matrix does not include material known to one party only.
- **Law Society v MIBI**[231] does not imply wider than usual discovery.
- **Mythen** and **Hyper Trust** are not authority for a general obligation on insurers to discover all documents relating to declinature. That wasn't the issue either case.
- A central issue in the case is whether the Securities Claims, are sufficiently similar to the Mylan counterclaim to cause them to attach the 2014 policy.
- Where the issue at trial is whether a decision was objectively and in substance right or wrong, discovery is not available as to what the people who made the decision thought about it.
- The discovery requests are a fishing expedition in breach of the rule against discovery based on mere speculation as articulated in **Aquatechnologie**[232] to the effect that *"an applicant for discovery must show it is reasonable for the Court to suppose that the documents contain*

[229] As I observed as to that affidavit, the Plaintiffs, wisely in my view, did not press this argument orally.

[230] Citing Boeringer Ingelheim Pharma GmbH v Norton (Waterford) Limited [2016] IECA 67, [12].

[231] Law Society of Ireland v Motor Insurers' Bureau of Ireland [2017] IESC 31

[232] Aquatechnologie Limited v National Standards Authority of Ireland (Unreported, Supreme Court, 10 July 2000)

information which may enable the applicant to advance his own case or to damage the case of his adversary."

- Discovery would be "manifestly" disproportionate to its burden and cost.

172. On the specific issue of discovery of documents relevant to interpretation of a contract, the Plaintiffs cite **Point Village v Dunnes Stores**[233]**, Almonte**[234], **HSE v Laya**[235]**, Lidl v Bilo & Centz**[236] **Mustardside v Tracre**[237]**, Oval Topco v Spireview** [238] and **Brooks Thomas v Impac**[239]. I will return to those cases below. Notably, however, the Plaintiffs rely on **Oval Topco** and **Brooks Thomas** for the proposition that their internal decision-making process in arriving at their coverage positions is irrelevant.

173. On the specific issue of discovery of documents relevant to reserves set by the Plaintiffs, the Plaintiffs say no dispute is pleaded as to any such reserves and discovery can't be justified by an unpleaded allegation that the Plaintiffs coverage positions are based on a construction of the Policies which they know to be incorrect.

174. As to discovery of the underwriting file, Counsel for the Plaintiffs in oral argument said[240]

- That it would be, as Perrigo asserts, "*not unusual*" is not a good basis for ordering its discovery. By which I understand him to say, that is not a reasoned basis for discovery.
- That it is irrelevant that, as Perrigo asserts, it could reveal the "*insurer's interpretation*" – "*the insurer's construction of its own policy language and will reflect the underwriter's understanding of how the wording in the policy will enhance or restrict coverage" or "the Plaintiffs' true understanding of the position"* as to coverage.
- That it may reveal whether the Plaintiffs have adopted a position in these proceedings inconsistent with their actual interpretation of the Policies is irrelevant as not a pleaded allegation – moreover, an unpleaded allegation of wrongdoing.

I agree with Counsel for the Plaintiffs in these respects.

ANALYSIS

175. I have already made various observations as to my views on various matters. What follows should be viewed in light of those observations.

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[233] Point Village Development Limited (in receivership) v Dunnes Stores [2017] IECA 159.
[234] Dunnes Stores & Almonte v McCann [2018] IEHC 123
[235] HSE v Laya Healthcare Limited [2019] IEHC 502
[236] Lidl Ireland GmbH v Bilo Property Holding Limited [2019] IEHC 638.
[237] Mustardside Limited v Tracre Limited [2018] IEHC 124.
[238] Oval Topco Limited v Spireview Equipment Unlimited Company [2021] IEHC 242.
[239] Brooks Thomas Limited v Impac Limited [1999] 1 ILRM 171.
[240] Citing Ms Murphy O'Connor §99

176. Though not so framed by way of the definition of categories of documents sought – and that is not a criticism – the categories of discovery sought generally raise two distinct, if closely connected, issues:

- The interpretation of the Policies.
- The question whether the Policies cover the claims – whether the Plaintiff's coverage decisions were correct.

I will address discovery as to those issues sequentially in what follows, but will first dispose of the issues of the 2017 and 2018 Policies and the general question of proportionality.

The 2017 & 2018 Policies

177. The Plaintiff's Statement of Claim seeks declarations, in effect, that certain of the Contested Claims are not covered by the 2017 and 2018 Policies. The Defence and Counterclaim seeks declarations, in effect, that the Contested Claims are covered by the 2014, 2015 and 2016 Policies. It seeks no declarations that claims are covered by the 2017 and 2018 Policies. Discovery must be relevant to a pleaded "issue". Another word for "issue" is "dispute". On the pleadings there is no dispute as to coverage by the 2017 and 2018 Policies: all agree that the 2017 and 2018 Policies do not cover any of the Contested Claims. I therefore refuse discovery as to any documents relating only to the 2017 and 2018 Policies.

Proportionality & Burden

178. In broad terms I am unconvinced by the Plaintiffs' assertions of disproportionality – as to which it bears the onus of proof and of which it is required to provide evidence. I do not doubt Mr McGahey's description of the process – leaving aside the amorphous concept of "*potentially in excess of sixty (perhaps more) potential custodians*". He gives no estimate of the actual time or likely cost involved. The Plaintiffs' position as to disproportionality seems to me similar to that identified by Costello J in **IBRC v Fingleton**[241] as based on "*generalities*" as opposed to "*meaningful evidence*".

179. While overall cost must be borne in mind in considering proportionality, Mr McGahey's reference to 10 plaintiffs having to make searches implies at least some degree of sharing of those costs amongst the 10 who have each chosen to sue Perrigo. This, at least to some degree, attenuates the burden of making discovery. By reference to the McGahey affidavit searches will have to be made by an average of only about 6 people per Plaintiff. To what extent the Plaintiffs may assign the burden as between them does not seem to me to properly be Perrigo's concern.

[241] Supra

180. I do not see why Perrigo should be disadvantaged as to discovery by the unilateral decisions of all 10 plaintiffs to sue if a category of documents would be discoverable by a single Plaintiff. While I would not purport to state a rigid rule, in principle it does not seem to me that the Plaintiffs can call in aid the fact that there is a large number of Plaintiffs in arguing that discovery would be burdensome – in this respect there is no safety in numbers.

181. It also seems to me relevant that the Plaintiffs are all – necessarily given the type of insurance they write – major multi-national insurers, most being members of groups which are, if not household names, at least well-known. While that of itself could not justify oppressively burdening them with discovery, nonetheless their capacity to bear burden is relevant to the presence, absence or degree of oppression. That they are major multi-national insurers also necessarily implies that they will have highly sophisticated document handling, retention, storage and recording systems and systems for searching them for purposes quite apart from purposes of discovery. For reasons which have nothing to do with discovery, they need to be able to find documents when they need them. While 60 people may have to be canvassed, there is no evidence that any will be unduly burdened by their task and presumably they will, as a matter of their own occupational practice and obligations, readily know where at least most of the relevant documents in their custody are to be found. None of this is to doubt that discovery will be a significantly demanding task – more or less so according to the scope ordered – but that is not, per se, the same thing as disproportionate burden. Proportionality is an inherently relative concept. All of the foregoing is thrown into particular relief in light of the fact that it seems to be agreed that about €125 million is at stake in the proceedings.

182. While a large number of categories of discovery is sought here, taking an overview of the discovery sought as relating to the two basic issues of policy interpretation and its application to the claims, the view of Collins J in **Mythen** that Allianz's not arguing proportionality was *"hardly surprising" "given the discrete nature of the category sought.. "* has at least some measure of application here.

183. Accordingly, I do not consider that questions of proportionality of discovery loom large in this case.

Discovery for purposes of Interpretation of Contracts

184. As recorded above, on the specific issue of discovery of documents relevant to interpretation of a contract, the Plaintiffs cite **Point Village**, **Almonte**, **HSE v Laya**, **Lidl v Bilo & Centz**, **Mustardside**, **Oval Topco** and **Brooks Thomas**. As will be seen, I will deal with **Oval Topco** separately.

185. In **Point Village**[242] Hogan J refused discovery of documents which could only relate to the subjective belief of Dunnes as to whether the word "tenants" meant "high class tenants" in the context of a prestigious retail shopping centre. He held that "*the beliefs of the parties regarding the meaning of the clause are irrelevant"* and *"as such evidence would – generally speaking, at least – be inadmissible at trial for this purpose, the discovery sought in aid of this line of inquiry must also be deemed not to be relevant …".*

As Perrigo observes, Hogan J did allow the possibility of discovery in an appropriate case relevant to showing, for example, that a party acted inconsistently with the argument as to construction of the contract which it advanced at trial - providing immediate, contemporary evidence as to what the parties had actually understood by the agreement. Hogan J commented "*This is an argument with some theoretical attractiveness which might possibly prevail in an appropriate case*." However, just as in **Point Village**, I do not see that it can prevail in this case.

186. In **Almonte**[243] Barniville J held that whether contracting parties "*regarded the licence or clause 11 itself as being integral or forming an integral part of the overall transaction is, therefore, neither here nor there*. *To the extent that the plaintiffs may be in a position to give evidence of this (and I offer no view on this save to say that it is not clear that such evidence would be admissible), I do not believe that discovery of the documents sought in this category can advance the position one way or the other*." While useful as to the irrelevance of subjective intention[244], I am not sure that **Almonte** is quite on point here. The issue there seems to have related to the importance, rather than the interpretation, of a contractual clause and it's not clear that interpretation by reference to a factual matrix was at issue. And in addressing Almonte, counsel for the Plaintiff disavowed a general principle that discovery can't be ordered as to the content of the factual matrix.

187. I do not think **HSE v Laya**[245] adds to the present analysis. It relates to interpretation of statutes, not contracts. While the principles applicable to each share common elements, they do differ - see **Emo Oil**[246]. It is entirely unsurprising that discovery was refused of documents related to the Plaintiff's interpretation of the statute in question.

188. **Lidl v Bilo & Centz**[247] related to the scope of a restrictive covenant negotiated between Lidl and Bilo prohibiting use of a premises "*as a food retail*". Centz, Bilo's tenant, said the covenant did not restrict limited and non-predominant sale of food products in a low-cost mixed retail store which, considered as a whole, was not a food retailer. Against the prospect of a "text in context" interpretation of the covenant and the view of Clarke CJ in **Jackie Greene**[248] that "*part of the context*

[242] Point Village Development Limited (in receivership) v Dunnes Stores [2017] IECA 159.
[243] Dunnes Stores & Almonte v McCann [2018] IEHC 123
[244] Recording the observation of Fennelly J in ICDL cited above.
[245] HSE v Laya Healthcare Limited [2019] IEHC 502
[246] Emo Oil Ltd v Sun Alliance & London Insurance Company [2009] IESC 2 – "It must be stressed at the outset that this case revolves around an issue of contractual interpretation rather than one of statutory interpretation."
[247] Lidl Ireland GmbH v Bilo Property Holding Limited [2019] IEHC 638.
[248] Jackie Greene Construction Ltd v Irish Bank Corporation in special liquidation [2019] IESC 2

in which that text needs to be considered is the manner in which that text was arrived at, and the circumstances which led to the text being required and/or agreed", Centz sought discovery from Lidl of what Barr J called "*a large range of documentation which they maintain would establish what was the intention of the parties when inserting the term "food retail" into the contracts*." Barr J accepted that the parties' respective subjective intentions and understanding as to the meaning of "*food retail*" was irrelevant. But he allowed that the Court could have regard to documents showing what the parties agreed in negotiating a contract was meant by a particular term in the contract and he allowed limited discovery accordingly. Essentially this was an application of the rule that evidence may be admissible that the parties have agreed a "dictionary" for use in their contract. In my view neither **Lidl v Bilo & Centz** nor **Jackie Greene** is to be understood as upsetting the well-established general rule that evidence of negotiations resulting in a contract are inadmissible as evidence of its meaning.

189. In **Mustardside**[249] the interpretation of an agreement was disputed. The defendants agreed to discover the agreement itself but not all documents in relation to it. Counsel for the Plaintiffs here cites it for the proposition, which I accept, that the meaning of contracts is to be determined objectively and you can't get discovery that goes to parties' own understanding of the contract.

Counsel for the Plaintiffs applies the same principle to the characterisation of the claims made on the policies in this case. I accept that as to the Plaintiffs' subjective characterisation of the claims – but not as to the factual materials relevant to characterisation of the claims.

190. He cites Mustardside also for the general reference by Barniville J to "*increasingly critical remarks about the burden which excessive discovery can place on parties to litigation, particularly in commercial cases"* and *"an understandable concern on the part of the courts to ensure that excessive discovery is not ordered".* I do not disagree with those general observations but they do not alter my views on those issues in this case as set out elsewhere in this judgment

191. As to his specific decision, Barniville J considered[250] that the "*extent of the discovery sought here goes far beyond anything which might reasonably be encompassed by the concept of the "factual matrix" of an agreement*" and **Law Society v MIBI**[251] did not require the discovery sought. And even if relevant, discovery of documents beyond the agreement itself was not necessary. discovery was similarly refused as to "All documentation in relation to the terms of" certain loans[252].

192. The decision of Barniville J seems to have been a response to "*completely excessive*" "*enormously broad and wide-ranging*" and unfocussed discovery of "*vast documents*" sought in **Mustardside** – not a denial in principle that discovery is available as to the factual matrix of a

[249] Mustardside Limited v Tracre Limited [2018] IEHC 124.
[250] §34
[251] Law Society of Ireland v Motor Insurers' Bureau of Ireland [2017] IESC 31
[252] 68

contract. Barniville J considered that the agreement would be interpreted "*in light of well-established principles of contractual interpretation*". Recourse to the factual matrix as part of the "text in context" approach – is such a principle.

193. In **Brooks Thomas**[253] the plaintiff sought damages for negligence and breach of contract arising from the defendant's advices to improve the plaintiff's financial performance. The plaintiff sought discovery of "*handbooks, guidebooks and standard reference works indicating the Impac approach to management consultancy/ engineering*". The Supreme Court refused discovery: Lynch J held that whether the defendant had followed its own internal guidance was irrelevant to whether the appellants did what the contract required. It was no defence for Impac to say that it followed the directions laid down in the handbooks, guidebooks and reference works if these did not discharge its obligations to the plaintiff. Conversely, it would not be sufficient for the plaintiff to show that the defendant had failed to do things which were set out in the handbooks, guidebooks and reference works. The discovery sought was no more than a fishing exercise.

I would tentatively observe that this decision might have to be revisited in some degree by reference to developments since 1999 in interpretation of contracts on "text in context" principles by reference to the factual matrix if such documents were reasonably available to both parties when the contract was made.

194. In cases disputing the interpretation of contracts, disputes are possible as to the content of the relevant factual matrix: notably whether the alleged facts alleged to constitute the relevant factual matrix are facts (and this may include disputes as to detail, scope and extent of such facts) and, if so, whether those facts were known to both parties when the contract is made (and if so in what detail, scope and extent). While pleadings put contractual interpretation in issue, they often do not plead the facts alleged to constitute the relevant factual matrix. Perhaps they should but that is an argument not made in these proceedings and the parties respectively accept that the scope and content of the factual matrices relevant to interpretation of each Policy and the significance of those matrices for the interpretation of each Policy will be in dispute at trial. It does seem to me that discovery should be available as to the questions what facts putatively part of the factual matrix, were known to the parties at the relevant time and what an opposing party asserts to be the substantive content of the factual matrix.

Hyper Trust Illustrative as to relevance of Documents & Law Society v MIBI

195. As recorded above, Perrigo cites **Hyper Trust** as illustrating the role of documents in trial of insurance coverage disputes. That there may have been "*extensive discovery*" in that case[254] does not, per se, seem to me to advance any argument of principle, much less one specifically applicable

[253] Brooks Thomas Limited v Impac Limited [1999] 1 ILRM 171
[254] Hyper Trust Ltd v FBD Insurance PLC [2021] IEHC 279§95

to the facts of and issues in this case. The excerpt cited is from a consideration of a costs issue in which discovery is mentioned in passing. It is of no present assistance.

196. Perrigo also cites **Hyper Trust** more specifically. As to interpretation of the relevant policy, Hyper Trust argued that intended expert evidence for the insurer that an insurer would be foolish to agree to provide the cover asserted by Hyper Trust could be undermined by the insurer's internal and post-contractual documents, if discovered, as to its potential exposure on business interruption claims resulting from the Covid pandemic - allegedly showing that the Insurer believed it had in fact provided such cover. The insurer objected to the admissibility of such documents – on the basis that both expressions of subjective intention and the conduct of parties to a contract after a contract is made[255] are inadmissible as an aid to its interpretation. The Plaintiff accepted these principles generally but argued that the documents were admissible, specifically as an exception to the rule in Wogan, to rebut the Insurer's argument that the factual matrix informing interpretation of the policy included its commercial impact[256]. McDonald J admitted the documents for that particular purpose.

197. However it is important to understand that McDonald J did so in light of the Insurer's reliance on **Law Society v MIBI**[257]. The MIBI had argued that to interpret the MIBI Agreement as obliging it to meet the liabilities of insolvent insurers would be "*potentially ruinous*" for its members. O'Donnell J. said that in such an interpretation "*it was an extremely foolish agreement to make*" and while that was not determinative of the interpretation of the Agreement[258],

> *"Nevertheless, the commercial impact of the Agreement is a necessary part of the background since if an agreement is plainly foolish to the point of threatening the financial viability of the companies, then it is necessary to offer some plausible explanation why a prudent party (…. all the motor insurers doing business in the State) would enter such an agreement and renew it over a period of 60 years".*

198. But the relevance of the MIBI case in Hyper Trust was not limited to the question of discerning the relevance of commercial impact or "foolishness" as part of the factual matrix. The MIBI case also addressed the question of evidence admissible on that subject. In his dissenting judgment Clarke J noted[259] that in its financial statements the MIBI had for many years noted that the MIBI was required by the MIBI Agreement to "*pay claims, to the extent that its insolvent members are unable to do so".* Clarke J considered those notes of particular relevance to the business efficacy argument. He acknowledged[260] that "*the unilateral view of one party is not relevant to the construction of an agreement*" but considered that:

[255] Citing Re Wogan's (Drogheda) Ltd [1993] 1 I.R. 157
[256] The Insurer later withdrew that argument – but nothing turns on that for present purposes.
[257] Law Society of Ireland v Motor Insurers' Bureau of Ireland [2017] IESC 31
[258] Since it is not unknown for commercial parties to make agreements that in retrospect are clearly unwise
[259] §6.12
[260] §11.30

"the established view of a party can be of some relevance in considering the weight, if any, to be attached to a business efficacy argument. The whole point of such an argument is that it is said that a particular construction should not be favoured because it should be assumed that a reasonable business person would not have entered into an agreement which was contrary to business sense. Such an argument is normally made by a party who asserts that, from its perspective, an agreement construed in a particular way would not have made sense and that it should be implied that the party would not have entered into such an agreement unless the text is clearly to the contrary.

But if the very party whom it might be said would not have entered into an agreement of a particular type can be shown to have believed that it had entered into an agreement of that very type, then such an argument is, in my view, significantly undermined.

I say that notwithstanding the fact that events occurring after a contract has been concluded cannot ordinarily be used to construe the meaning of the contract at the time it was entered into for that exercise again has to be conducted on an objective basis and in the light of the circumstances prevailing at the time in question.

However, if it truly is to be said that it would not have made business sense for the MIBI (and the insurers who are members of it) to have agreed to cover the liabilities of an insolvent insurer then it is surely highly surprising that they appear to have believed, for a significant number of years leading up to the Setanta collapse, that they had done just that. If it would have been so contrary to business sense to have entered into such an agreement then it is surprising in the extreme that the MIBI actually thought that it had done so."[261]

199. However Clarke J appears to have considered that the relevance to the interpretation of the MIBI Agreement of such notes to the financial statements was confined to the business efficacy argument. He said[262]

"…….. I am not convinced that the contents of various notes contained in MIBI accounts, which seem to imply a belief on the part of the MIBI at certain stages that it did have a liability in the case of an insolvent insurer, carry any significant weight in themselves. These again reflect the subjective view of one party to a contract. I have already dealt with the impact of those notes on the business efficacy argument."

"… fundamentally it seems to me that one of the consequences of the underlying principle to be applied in the construction of legally binding documents, which I have already sought to identify, is that the test is an objective test and little will normally be gained by attempting to identify the subjective views of the parties as to what the contract means."

[261] §11.30 – layout changed for exposition purposes.
[262] §§11.36 & 11.18

200. Hyper Trust argued that while Clarke J dissented as to the result, the majority of the Supreme Court did not dissent from his view in this respect - which was consistent with views of the Court of Appeal in the same case. McDonald J agreed[263] *"In light of the approach taken by Clarke J. in the MIBI case …… that the Wogan's decision did not preclude the admission of the evidence on which the plaintiff sought to rely in order to address the business efficacy argument advanced on behalf of FBD."*

201. Recalling the force of the view taken in **Wogan**, and that Hyper Trust's argument was framed explicitly and specifically as an exception to the view taken in Wogan[264], I do not read the decision of McDonald J in Hyper Trust as laying down any rule greater or more general than his specific finding that the insurer's internal documents as to its potential exposure on business interruption claims were admissible as relevant to the Insurer's business efficacy argument in that case. Any wider reading would risk the considerable mischief identified in **Wogan**. I am unaware of any intended such argument in this case.

202. But **Wogan**, **Law Society v MIBI** and **Hyper Trust**, are decisions on admissibility of evidence – not on discovery[265]. For discovery purposes it seems to me that a document created after the contact was made may be relevant as recording or purporting to record facts, circumstances or events preceding or contemporaneous with the making of the contract and arguably forming part of the context in which the contract was made and in which context it is to be interpreted. To put it another way, one should not confuse the timing of the facts, circumstances or events alleged to constitute the factual matrix with the timing of the making of a document recording such facts, circumstances or events. I cannot now decide whether any such document is admissible in evidence of such facts, circumstances or events. And whether or not so admissible, it may lead to a line of inquiry as contemplated in Peruvian Guano. Though the true litigious advantage to be foreseen as likely to be derived from such discovery may be diluted when one remembers that the facts, circumstances or events, in order to constitute relevant context, must have been known at the time of making the contract to both parties, including the party seeking discovery, such an observation could be made as to any discovery relevant to the context of the contract and does not seem to me to generally require refusal of discovery of such documents – at least absent evidence that such discovery would be disproportionate.

Marketing and Explanatory Materials

203. In **Beacon One v Beacon Leisure***[266]* owners bought their apartments in Sandyford, County Dublin on foot of glossy brochures advertising "One Beacon" "an aparthotel development" with access to the facilities of the Beacon Hotel. Years later the hotel changed hands and the new owner

[263] §17
[264] Hyper Trust §16
[265] Indeed no discovery was made in Law Society v MIBI. The Law Society relied on documents available from public sources, such as the MIBI's financial Statements
[266] Beacon One Management Company clg v. Beacon Leisure Investments Ltd. [2019] IEHC 556 (High Court, Allen J, 23 July 2019)

cut off access. As the apartment owners' leases said nothing of any right of access to the Hotel, they relied on the brochures as part of the factual matrix in which their leases were to be interpreted. Allen J held that *"Statements in newspaper advertisements or estate agents' brochures are not part of the factual matrix but fall into the category of statements made in the course of negotiations, which are inadmissible. … The legal rights of the apartment owners were, and are, to be found in the leases and not in the glossy brochures."*

204. However, I cannot rule out that there may be a distinction to be drawn between glossy advertising brochures for apartments and technical marketing documents aimed at brokers and intended to inform a sophisticated and perhaps more well-informed and sober market for business-to-business financial and insurance services as relevant to the condition of the market in such services. There may be a spectrum between unregulated glossy advertising brochures for apartments and the likes of highly regulated share prospectuses. In **Hyper Trust**[267] McDonald J, considered the factual matrix to include the market in which the parties were operating when contracting and specifically material generally known to insurance brokers as reasonably available to both parties. Counsel for Perrigo suggests that the issue is whether such material is ruled out now or ruled out later, at trial and where it cannot be, as he says, burdensome to discover them, better let the trial judge decide. I agree.

Discovery for purposes of Interpretation Contra-Proferentem

205. Where the insurer is the proferens "*ambiguity in the language of the policy will be construed against the insurer*"[268]. Interpretation contra proferentem is permissible only as to genuinely ambiguous content of contracts and then usually only as a last resort if other interpretive techniques fail to resolve the ambiguity. But it may be more readily available as to routine standard form commercial insurance policies. See **Emo Oil**[269]**, Headfort Arms, Hyper Trust** and **Premier Dale**[270].

206. The pre-condition of ambiguity is determined on ordinary interpretative principles, including by reference to the factual matrix, as to discovery regarding which, see above.

207. Ambiguity aside and as possibly justifying discovery specifically by reference to the prospect of interpretation contra proferentem, there remains only the question whether the terms of the policy clause in question was proposed, or, a fortiori, imposed, by one side only (the proferens) or

[267] Hyper Trust Ltd v FBD Insurance PLC [2021] IEHC 78 (High Court (General), McDonald J, 5 February 2021)
[268] Premier Dale Ltd T/A The Devlin Hotel v Arachas Corporate Brokers LTD [2022] IEHC 178 (High Court (General), McDonald J, 30 March 2022) §84(h)
[269] Emo Oil Ltd v Sun Alliance & London Insurance Company [2009] IESC 2
[270] Headfort Arms Limited T/A The Headfort Arms Hotel v Zurich Insurance plc [2021] IEHC 608; Hyper Trust Ltd v FBD Insurance PLC [2021] IEHC 78 (High Court (General), McDonald J, 5 February 2021) §115; Premier Dale Ltd T/A The Devlin Hotel v Arachas Corporate Brokers LTD [2022] IEHC 178 (High Court (General), McDonald J, 30 March 2022) §84 all citing, inter alia, Analog Devices v Zurich Insurance Co. [2002] 1 IR 272 at p. 282 and Emo Oil Ltd v Sun Alliance and London Insurance plc [2009] IESC 2. Also Knockacummer Wind Farm Ltd v Cremins 2016 IECA 205 (Court of Appeal, Hogan J, Peart J, Whelan J, 30 July 2018)

was negotiated (in which case interpretation contra proferentem will not arise for want of a proferens).

208. Generally, it will be assumed as to insurance policies that the insurer is a proferens – though that assumption may not be as strong where the insured is a substantial enterprise with significant resources, market and negotiating power and access to sophisticated professional advice as to the terms of insurance which it should seek. That may well be the case here but I have little information in that regard and Perrigo, in seeking interpretation contra proferentem has not elaborated. Ex hypothesi, as negotiation is necessarily bilateral, if a policy clause was negotiated, such that the Plaintiffs could on that account argue against interpretation contra proferentem, Perrigo will already be aware of the fact and in possession of the information relevant in that regard. I note that Perrigo asserts only that the Specific Matters Exclusion Endorsements were negotiated and bespoke clauses. Otherwise the Policy wordings appear to have been drafted by the Plaintiffs or the insurance industry. In any event, it is by no means apparent that the Plaintiffs will argue that they were not proferens: far more likely they will argue against interpretation contra proferentem on the basis of absence of ambiguity.

209. Accordingly, I do not see that discovery justified specifically by reference to the prospect of interpretation contra proferentem is necessary for fair disposal of the proceedings.

The Basis on which the Coverage Decisions May be Challenged at Trial.

210. Identifying the basis on which the Plaintiffs' coverage decisions will be disputed at trial bears upon the relevance of the discovery sought. Either those coverage decisions are correct in substance or they are not. The question whether they were reached carefully or by a correct analytical process or reasonably will not be relevant at trial.

211. Remembering the obligation on an insured making a claim to provide all relevant information to the insurer and allowing for the possibility that the insurer may perform its own investigation of a claim[271], the real question at trial may be whether, on all the factual information available to the Plaintiffs when they made their coverage decisions (which may not be the same thing as the factual information on which the Plaintiffs relied when they made those decisions), those decisions were correct as in accordance with the contract. To put it another way, in this scenario the court will, de novo, substitute its decision on coverage for the Plaintiffs' but on the basis of the the factual information available to the Plaintiffs when they made their coverage decisions. However, and as I have noted, the Plaintiffs obtained discovery of documents which they did not have when making their coverage decisions and obtained them on the basis that they are

[271] I have referred above to Ms Murphy O'Connor's assertion that the Plaintiffs can reasonably be assumed to have considered and conducted their own investigations into the Contested Claims and have relevant documents accordingly.

relevant to determining the Wrongful Acts or acts alleged in the various claims. In this scenario the court will, de novo, substitute its decision on coverage for the Plaintiffs' and on the basis of the factual information available to the court even if not available to the Plaintiffs when they made their coverage decisions. On that account it would be inappropriate to limit Perrigo to discovery of factual information available to the Plaintiffs when they made the coverage decisions.

212. The relevant factual information obviously includes the filings in the various proceedings which resulted in the claims on the Policies and any other information tendered by Perrigo in making its claims. But it may also include other factual information – for example as to

- similarities or relatedness between alleged Wrongful Acts within Condition 5.1(iii) of the 2014 Policy or
- the identity as between claims of originating causes or sources within §3.51 and §5.2 of the 2016 Policy
- whether particular losses are "*based on, arising from or attributable to*" legal proceedings listed in the Specific Matters Exclusion Endorsements on the 2016 Policy
- more generally, comparison of the substance of the contested claims with the substance of the Mylan Counterclaim.

At least and for purposes of discovery and remembering that I must not now decide issues proper to the trial, I should not rule out the prospect of such information being considered relevant at trial.

213. In **Oval Topco**[272] the Plaintiffs alleged breach of contract by the HSE in not paying monies allegedly due for services provided under contract. The Plaintiffs sought discovery inter alia as to the HSE's internal "*consideration of*" the Plaintiff's requests for payment, its internal documents as to the costs of the contract, its responses to financial information provided by the Plaintiffs to the HSE, and the HSE's decision to withhold payment. The justification proffered for the scope of discovery sought included that the Plaintiffs needed to:

- know if the current stance of the HSE was the same as its stance when it decided not to pay;
- know what was going on in the HSE prior to the decision not to pay;
- know the rationale for the decision not to pay and the Plaintiff was entitled to "test, understand and present their case as to what happened around that time";
- understand the internal assessment by HSE of the information provided by the Plaintiff;
- attain insight as to or get to the bottom of the decision not to pay.

214. Hunt J refused discovery as *"evidence of what a party subjectively believed a contractual term to mean is irrelevant. Equally, the subjective belief of a party as to the existence or otherwise of a breach of contract is also irrelevant"* citing Point Village. He observed that the purpose of the discovery sought was *"principally directed to illumination of the processes and reasoning of HSE in reaching the decision"* not to pay and he commented:

[272] Oval Topco Limited et al v HSE [2021] IEHC 242. The Plaintiffs were essentially the Mater Private Hospital group.

"I am not convinced that knowledge of those matters is relevant in any way to the construction by the Court of the terms of the agreement, or as to how the terms as interpreted apply to any underlying facts established as of the time of that decision. The process leading to, or reasons behind that decision will not assist the trial judge in determining whether the decision not to pay is objectively justified by reference to the facts and the terms of the agreement. The opinions or views of HSE officials, the completeness or otherwise of the information upon which those views were based, or the process by which the decision not to pay was reached have no bearing on whether the decision not to pay was legally justified or not."

215. **Oval Topco** is not, at least primarily, a decision on discovery as to contractual interpretation. The analogy here is less with the contractual interpretation point and more with the issue whether the trial court will interrogate the process behind and quality of the Plaintiffs' coverage decisions. I agree that it will not and gratefully apply the comments of Hunt J as applicable to that aspect of the present case.

Whether Claims are Securities Claims? - The Omega Counterclaim & the Perrigo Derivative Complaint

Omega Counterclaim – Securities Law

216. No-one has drawn my attention to, and I have not found, any definition in the Policies of "securities" or "Securities laws". Nor should I finalise a meaning of those terms at discovery stage. But a general description may assist. As Irish Law is the applicable law of the Policies, I refer to **Egan on Irish Securities Law**[273], which describes securities as fungible[274], negotiable financial instruments, usually issued by companies. They are generally issued for fundraising purposes and may take various forms - most typically the form of shares representing an ownership interest – equity - in the issuer or debt instruments such as bonds or debentures representing lending to the issuer. Securities may be offered to the public and traded by the public on markets such as stock markets on which they are "listed". Companies that offer and issue securities to the public, or plan to do so, or whose securities are traded on such markets are subject to securities law – as are many others whose roles bear on such trading, including the directors and officers of such companies. Securities law aims at promoting fair, efficient and transparent securities markets by way, inter alia, of requiring integrity of action by those subject to securities law. The securities law obligations of companies with traded or listed securities are primarily concerned with the integrity and publication of information about those companies and their securities, both generally and when particular corporate actions are undertaken. Such corporate actions include actions and events in respect of which decisions by market participants require to be informed by an understanding of the true value of the company

[273] Bloomsbury Professional 2021, Chapter 1

[274] The *Merriam-Webster Online Dictionary* defines "fungible" as "being of such a nature that one part or quantity may be replaced by another equal part or quantity in the satisfaction of an obligation." Money is the classic example of the fungible product. It represents recognized value, but one dollar bill is just as good as the next. – as cited in Cambridge Quarterly of Healthcare Ethics (2007), 16, 398–406 https://www.lexisnexis.com/uk/legal/results/enhdocview.do?docLinkInd=true&ersKey=23_T559567964&format=GNBFULL&startDocNo=0&resultsUrlKey=0_T559567966&backKey=20_T559567967&csi=374825&docNo=1&scrollToPosition=0

and/or its securities – for example decisions, whether to buy or sell such securities - both generally and in the context of mooted mergers and takeovers. However, I emphasise that the foregoing is a general description to try and place the dispute as to discovery on this issue in some context. It is not a definition.

217. Cover for the Omega Counterclaim was declined on the basis that Article 1134 of the Belgian Civil Code is not a Securities law within the meaning of the Policies. In an Irish Court, the content of Belgian Law is determined as a question of fact. It is therefore not correct to state that the question whether Article 1134 of the Belgian Civil Code is or is not a Securities law is a question solely of law. It may be a mixed question of fact and law but even if it is purely a question of fact it is a question analogous to a question of law. No doubt all parties will call evidence on the content, interpretation and effect of Article 1134 from witnesses expert in Belgian Law. The relevant experts will exchange their reports in due course and in doing so will necessarily identify the materials on which they rely. It is hard to see how discovery is necessary to an assessment of whether Article 1134 of the Belgian Civil Code is a Securities law within the meaning of the Policies

Perrigo Derivative Claim

218. Cover for the Perrigo Derivative Claim was declined, on the basis that it was not a "Securities Claim" within the meaning of the Policies as no claim was made therein against Perrigo[275]. That raises two issues:

- Whether the Perrigo Derivative Complaint in fact makes no complaint against Perrigo. That is a question to be decided on the filings in the Perrigo Derivative Complaint - as to which discovery is irrelevant and unnecessary

- Whether, if the Perrigo Derivative Complaint makes no complaint against Perrigo, that is a proper basis for refusal of cover. That is a question of interpretation of the policies. It is not apparent that any element of a factual matrix is likely to bear on this issue. Accordingly, such discovery is irrelevant and unnecessary.

Reserves & Claims Handing Guidelines

219. The only reason proffered by Perrigo for discovery of these documents is that they may contain commentary on the basis of the Plaintiffs' coverage decisions which may tend to weaken the Plaintiffs' case and could show that the Plaintiffs understood that the later policies were at least potentially implicated while denying coverage under them.

[275] As opposed to the other Defendants.

220. The Plaintiff's understanding or sincerity is irrelevant to any issue in the proceedings. Nor is any subjective appreciation of a risk that in due course they may lose a dispute as to denial of coverage or aggregation. Perrigo relied on its written submissions and did not orally press discovery as to the reserves – in my view correctly. I refuse discovery of these categories as irrelevant.

221. Perrigo relied on its written submissions and did not orally press discovery as to category 20 – claims handling guidelines – in my view correctly. I refuse discovery of this category as irrelevant.

Hyper Trust Illustrative as to Admissibility of Expert Evidence

222. Perrigo cites **Hyper Trust** as also illustrating the admissibility of expert evidence in insurance disputes – arguing that it would be unfair if only the Plaintiffs had the documents relevant to those witnesses. In **Hyper Trust** McDonald J noted that the admission of expert evidence requires not merely that it be technically admissible but also that it be "*reasonably required to enable the Court to determine the proceedings"*[276] As to admissibility, McDonald J noted *"the basic fact that the principal issue with which the court is faced is the interpretation of an insurance policy. That requires the court to consider the text of the policy in the context of the relevant factual and legal backdrop. The ….. factual backdrop includes any relevant objective material that was reasonably available to the parties at the time the policy was put in place."* McDonald J considered the intended expert evidence as to practice in the insurance market – including the specialised market for business interruption insurance, "*if it is established that the existence of this market was known to brokers in Ireland"* admissible as part of the background reasonably available to the parties. However as to whether such evidence was reasonably required he cited authority that "a *judgment needs to be made in every case".* His application of that principle to the particular facts of Hyper Trust is also instructive[277] and he ultimately decided to hear that evidence. He excluded certain other expert evidence.

223. Ultimately, as Perrigo observe, McDonald J heard evidence from various insurance experts but that is too general a proposition to assist without considering the subject matters on which they gave evidence. McDonald J heard evidence[278] inter alia of:

- The availability, scope and limitations of business interruption cover for outbreaks of infectious disease historically and generally available on the Irish market,
- The language used in other such policies available in the Irish market (which McDonald J examined in detail),

[276] RSC O.39 R.58(1)

[277] §28 – "in contrast to Analog ……(where the court was dealing with a negotiated policy and where the plaintiff was a significant multinational with its own insurance department) the position is quite different in this case where we are dealing with a standard form policy of insurance and where, if it was established that the material in Mr. Hills' report was reasonably available through a broker, only 16% of policies were sold through a broker. Having regard to those factors, I took the view that prima facie, the evidence of Mr. Hills must carry less weight." There follows a weighing of various factors.

[278] See §77 et seq

- The criteria applied by underwriters in writing risk,
- The use of reinsurance to manage risk.

McDonald J considered these to be parts of the relevant factual matrix as information reasonably available to persons in the position of the plaintiff, seeking insurance at the time the policies in issue were put in place, had they searched for it themselves or sought advice from a broker. It also seems, unsurprisingly, that bright line predictions as to admissibility of evidence may prove difficult to maintain in practice at trial[279].

224. In **Coachhouse** McDonald J rejected as inadmissible expert evidence as to how experts would interpret the policy.

225. I draw two general conclusions from the foregoing:

- Save perhaps in clear cases, a court deciding a discovery application should not attempt to finely predict the outcome of arguments at trial as to whether expert evidence is admissible or reasonably required.

- The prospect of evidence being admissible, for purposes of interpretation of the Policies and as relating to the relevant factual matrix, of the market in Policies of this type prior to and contemporaneous with the making of the policies, is real and discovery should be available accordingly.

[279] See for example McDonald J's consideration at §88 and following of the evidence of the Insurer's chief underwriter to the observation at §90 : "All of that said, it must, again, be kept in mind that the subjective understanding of one party to a contract is not admissible evidence in relation to the interpretation of the contract.". At §272(c) McDonald J said: "Notwithstanding her very senior role within FBD and notwithstanding her very obvious expertise and depth of knowledge, the views expressed by Ms. Tobin are, as all of the case law shows, not relevant to the questions of contractual interpretation which arose in this case and which were of considerable complexity and novelty."

CONCLUSION

226. For the reasons set out above, my order on this motion for discovery will be in accordance with the following table:

Category of Discovery Sought	**Order as to Discovery**
Categories 1-5: The Omega Counterclaim	
All documents relating to the Plaintiffs' decision to decline cover, and/or their position that they are under no obligation to provide cover, for the Omega Counterclaim under	• I refuse discovery in this respect save in a limited respect. • Cover for the Omega Counterclaim was refused on the basis that it is not a Securities Claim as Article 1134 of the Belgian Civil Code is not a Securities Law. • The state of that Belgian Law is a question of fact as to which discovery is unlikely to assist. • Whether that Belgian Law is a Securities Law within the meaning of the Policies may be a mixed question of law and fact but seems likely to turn on expert evidence to be adduced by the Plaintiffs and Perrigo. • The quality of the Plaintiffs' decision-making and position in this regard and the Plaintiffs' subjective views as to the correctness of those decisions are irrelevant. The court will make its own decision on the coverage issues on the basis of the evidence adduced. I cannot see that discovery in this respect can produce documents capable of conferring litigious advantage on Perrigo. • I will grant discovery limited to documents which evidence or record[280] the understanding of
1. the 2014 Policy.	
2. the 2015 Policy.	
3. the 2016 Policy.	

[280] See above, as to the formula "evidence or record" as considered and applied in IBB Internet Services v. Motorola [2015] IECA 282

Category of Discovery Sought	Order as to Discovery
	participants in the market in Directors' & Officers' Liability and Company Reimbursement Insurance policies and like policies at the time each Policy was written of the concept of Securities Law as used in such policies.
4. the 2017 Policy.	I refuse discovery in this respect as irrelevant – the parties are agreed that cover does not arise under the 2017 Policy.
5. All documents relating to reserves set or established by the Plaintiffs or any of them in connection with the Omega Counterclaim under the Policies or any of them.	For reasons explained above, I refuse discovery as to reserves.
Categories 6-10: The Perrigo Derivative Complaint	
All documents relating to the Plaintiffs' decision to decline cover, and/or their position that they are under no obligation to provide cover, for the Perrigo Derivative Complaint under	• Cover for the Perrigo Derivative Complaint was refused on the basis that it is not a Securities Claim specifically as the Perrigo Derivative Complaint makes no complaint against Perrigo. I have explained above why I refuse discovery in this regard. • Alternatively the Plaintiffs say Perrigo Derivative Complaint is covered only by the 2014 policy. In that regard see Categories 11 – 16.
6. the 2014 Policy.	
7. the 2015 Policy.	
8. the 2016 Policy.	
9. the 2017 Policy.	I refuse discovery in this respect as irrelevant – the parties are agreed that cover does not arise under the 2017 Policy.
10. All documents relating to reserves set or established by the Plaintiffs or any of them in connection with the Perrigo Derivative Complaint under the Policies or any of them.	For reasons explained above, I refuse discovery as to reserves.

Category of Discovery Sought	Order as to Discovery
Categories 11 -16: The Perrigo Claims[281]	
All documents relating to the Plaintiffs'	• I refuse discovery insofar as Categories 11 – 16 relate to the Plaintiff's "position" and/or "analysis" as to their coverage decisions with reference to the 2014, 2015 and 2016 Policies. • The quality of the Plaintiffs' decision-making and position in these regards and the Plaintiffs' subjective views as to the correctness of those decisions are irrelevant. • I grant discovery of Categories 11 – 16 limited to documents which evidence or record facts relevant to coverage decisions in respect of the Perrigo Claims with reference to the 2014, 2015 and 2016 Policies, such facts to include: ○ Facts relevant to the interpretation of the Policies ○ Facts relevant to the categorisation of the claims made on the Policies and their relationships to the claims made in the Mylan Counterclaim and/or to the Specific Matters identified in the Specific Matters Exclusion endorsement to the 2016 Policy. • For the avoidance of doubt, my purpose here is to refuse discovery as to the quality of the Plaintiffs' decisions and grant it as to facts on which those decisions were, or arguably should have been, based.
11. position that the Perrigo Claims fall within the 2014 Policy only.	
12. analysis of the Perrigo Claims (in whole or in part) and the extent to which they attach to particular policy years.	
13. position that by reason of §4.3[282] of the 2015, 2016, 2017 and 2018 Policies, the Plaintiffs are not liable under the relevant policy to make any payment in respect of the Perrigo Claims.	
14. position that by reason of §5.2[283] of the 2016, 2017 and 2018 Policies, the Perrigo Claims are excluded from cover under any of those policies.	
15. position that by reason of the Specific Matters Exclusion endorsement to each of the 2016, 2017 and 2018 Policies the Plaintiffs are not liable under any of those policies to make any payment in respect of the Perrigo Claims.	

[281] Being (i) the 29 Securities Actions (ii) the Shareholder Demand Letter and, (iii) the Perrigo Derivative Complaint[281] save for the Tysabri Tax Liability Claim
[282] Prior Notice Exclusion
[283] Single Claim Provision

Category of Discovery Sought	Order as to Discovery
	• For reasons stated above, I do not limit this discovery to facts known to the Plaintiffs when making their coverage position decisions. • I refuse discovery as to the 2017 and 2018 Policies as irrelevant – the parties are agreed that cover does not arise under those Policies.
16. All documents relating to reserves set or established by the Plaintiffs or any of them in connection with the Perrigo Claims under the Policies or any of them.	For reasons explained above, I refuse discovery as to reserves.
Categories 17-21: The Policy Documents, Underwriting Files, and Guidelines Applicable to the Policies and Claims	
17. All documents relating to the drafting and negotiation of the Policies by or on behalf of the Plaintiffs (or any of them), inter se and/or with the Defendants (or any of them), their servants or agents, and/or any broker,	• Ms. Murphy O'Connor's affidavit says this category is required for purposes of understanding the rationale behind the wording in the Policies, any negotiations around the policy wording and the parties understanding of what was intended to be covered. In my view these reasons invoke the parties' subjective understanding of the contract are not legitimate reasons for discovery. • I refuse discovery as to drafting and negotiation of the Policies as irrelevant to any disputed interpretation of those Policies as drafting and negotiation do not form part of the factual matrix in which context the policies are to be interpreted.
and the following clauses in particular, upon which the Plaintiffs rely:	
(a) §5.1(iii) of the 2014 Policy[284];	
(b) §4.3 of the 2015, 2016, 2017 and 2018 Policies;	
(c) §5.2 of the 2016, 2017 and 2018 Policies; and	
(d) the Specific Matters Exclusion Endorsement in the 2016, 2017 and 2018 Policies.	

[284] Condition 5.1(iii) provides that "If a single Wrongful Act or act or a series of related Wrongful Acts or acts give rise to a claim under this Policy then all claims made after the expiry of this Policy arising out of such similar or related Wrongful Acts or acts shall be treated as though first made during this Policy Period."

Category of Discovery Sought	Order as to Discovery
18. The underwriting file(s) in relation to the Policies and each of them.	• I agree with the Plaintiffs that categories 18 & 19 are too broad and imprecisely described and likely to contain many irrelevant documents. • Inter alia they are likely to contain documents containing information known only to the Plaintiffs and so not forming part of the factual matrix or relevant to the commercial purpose of the contract. • I will grant discovery in categories 18 & 19 limited to documents relevant to o Facts known or available to both the Plaintiffs and the Defendants when each policy was made. o The state of the market in Directors' & Officers' Liability and Company Reimbursement Insurance policies and like policies at the time each Policy was written and as the state of such market was generally known to participants in that market.
19. All manuals, guidelines, guidance, or similar documents applicable to the underwriting of the Policies.	
20. All manuals, guidelines, guidance, or similar documents applicable to the handling of claims under of the Policies.	While the correctness of the Plaintiffs coverage decisions is relevant, and the nature of those decisions is relevant (though obvious), the quality of those decisions is irrelevant. I refuse discovery of these documents
21. Any marketing, advertising or explanatory information / materials provided by the Plaintiffs or any of them, their servants or agents (to include any broker), to the Defendants or any of them, their servants or agents, (to include any broker), relating to the Policies.	I will grant discovery limited to documents relevant to the state of the market in Directors' & Officers' Liability and Company Reimbursement Insurance policies and like policies at the time each Policy was written and as the state of such market was generally known to participants in that market.

227. I invite the parties to liaise as to the drafting of the intended order as to discovery. I note that in agreeing the discovery to be made by Perrigo, the parties sensibly identified and excluded from the scope of discovery documents already in the possession of the Plaintiffs. I invite the parties to consider a similar course as to the discovery to be ordered against the Plaintiffs. I will hear counsel in relation to any issues arising from this judgment and the form of my intended order and on the issue of costs. In the first instance, the matter will be listed for mention only on 28 July 2022.

David Holland
19 July 2022