THE HIGH COURT
COMMERCIAL

[2017 No. 2795 P.]

BETWEEN

ALLIED IRISH BANKS PLC

PLAINTIFF

AND

AIG EUROPE LIMITED, AIG EUROPE (UK) LIMITED, AIG EUROPE (SERVICES) LIMITED, CHUBB INSURANCE COMPANY OF EUROPE S.A., CHUBB INSURANCE COMPANY OF EUROPE S.E., LLOYD'S UNDERWRITERS SUBSCRIBING TO LLOYD'S POLICY NO. 509/QA469401, WURTTEMBERGISCHE VERSICHUNG A.G., ANTARES UNDERWRITINGS SERVICES LIMITED, ANTARES MANAGING AGENCY LIMITED, CNA INSURANCE COMPANY LIMITED, CNA INSURANCE, LLOYD'S SYNDICATE 1211, ALL MEMBERS OF LLOYD'S SYNDICATE 1211 FOR THE LLOYD'S 2001, 2002 AND 2003 YEARS OF ACCOUNT, LLOYD'S SYNDICATE 1411, ALL MEMBERS OF LLOYD'S SYNDICATE 1411 FOR THE LLOYD'S 2001, 2002 AND 2003 YEARS OF ACCOUNT, TRAVELLERS SYNDICATE MANAGEMENT LIMITED, ASHLEY PALMER LIMITED, TRAVELLERS INSURANCE COMPANY LIMITED, LLOYD'S SYNDICATE 1218, ALL MEMBERS OF LLOYD'S SYNDICATE 1218 FOR THE LLOYD'S 2001, 2002 AND 2003 YEARS OF ACCOUNT, NEWLINE UNDERWRITING MANAGEMENT LIMITED, NEWLINE CORPORATE NAME LIMITED, LLOYD'S SYNDICATE 1400, ALL MEMBERS OF LLOYD'S SYNDICATE 1400 FOR THE LLOYD'S 2001, 2002, 2003 YEARS OF ACCOUNT, MARKET SYNDICATE MANAGEMENT LIMITED, LLOYD'S SYNDICATE 1221, ALL MEMBERS OF LLOYD'S SYNDICATE 1211 FOR THE LLOYD'S 2001, 2002, 2003 YEARS OF ACCOUNT, NAVIGATORS UNDERWRITING AGENCY LIMITED, LIBERTY MUTUAL INSURANCE COMPANY (UK) LIMITED AND LIBERTY MUTUAL INSURANCE EUROPE LIMITED

DEFENDANTS

JUDGMENT of Mr. Justice Denis McDonald delivered on the 29th day of November, 2018

1. This is an application in which the plaintiff seeks further particulars arising out of the defence delivered on behalf of the defendants. The application is brought prior to delivery of the plaintiff's reply to the defence. In broad terms, the plaintiff contends that the defendant is obliged to set out the material facts on which it relies in support of its defence. Again, in very broad terms, the position of the defendants is that their defence comprises, in substance, a denial of the claim asserted by the plaintiff and that it would be inappropriate to direct them to furnish particulars of a traverse. This contention of the part of the defendants is advanced against a background where the defendants say that the burden of proof in this case lies on the plaintiff and where, in any event, the defendants have no knowledge of the events giving rise to the claim advanced by the plaintiff (whereas they say that the plaintiff has spent many years investigating the underlying facts in significant detail). The defendants also say that the particulars sought are not necessary to enable the plaintiff to plead to the defence.

2. In response, the plaintiff makes the case that the defence does, in fact, make positive assertions which entitle the plaintiff to raise particulars. In addition, the plaintiff contends that, in commercial proceedings, a party is not entitled to simply traverse the plaintiff's claim and that, accordingly, even if it could be said that the defence is no more than a traverse, the defendants are not entitled to rely on the well-established principle that the court will not order particulars of a denial.

Background

3. The claim of the plaintiff relates to a policy of insurance issued by the predecessors of the defendant on 10th May, 2002. The plaintiff contends that it is entitled to be indemnified by the defendants under the policy in respect of the fraudulent activity of Mr. John Rusnak, a former employee of AllFirst, a subsidiary company of the plaintiff in the United States. Mr. Rusnak was a proprietary currency/foreign exchange trader at AllFirst who was hired in July 1993. According to the statement of claim, from a date in the 1990s Mr. Rusnak was engaged in a fraudulent scheme which involved carrying on unauthorised foreign exchange trading; concealing the significant losses which that trading engendered thereby preserving his employment with AllFirst and enabling him to continue to make financial gains from his position. It is alleged that Mr. Rusnak entered into transactions which involved the manipulation of trading risk limits to allow him to engage in trading far beyond his authorised limits and that these dishonest activities caused very significant loss and damage to AllFirst and to the AIB Group generally. The case made by the plaintiff is that these losses are insured (subject to the limits of cover) under Clause 1 of s. 1 of the Policy of Insurance.

4. The plaintiff says that the fraudulent activities of Mr. Rusnak did not come to its attention until 2002. The plaintiff says that the defendants were notified of the loss in accordance with the policies at that time. Subsequently, the plaintiff submitted an initial proof of loss in early February 2003. Thereafter, in December 2003 the plaintiff and the defendants agreed to a standstill arrangement in order to permit proceedings to be brought in the United States by the plaintiff against two of Mr. Rusnak's principal counterparties, Bank of America and CitiBank.

5. In the United States proceedings, the plaintiff sought to recover damages for fraud and fraudulent concealment, aiding and abetting the fraud and also aiding and abetting Mr. Rusnak's breach of fiduciary duty. Ultimately a settlement was reached in the US proceedings with Bank of America in January 2012 and afterwards a resolution was reached with CitiBank on 7th January, 2016. From the papers before the court it appears that the plaintiff has spent a considerable amount of the settlement on its costs in the US proceedings. It is clear that the settlement did not generate full compensation for the plaintiff in respect of the losses sustained as a consequence of Mr. Rusnak's activities.

6. Following the settlement, proof of loss was submitted to insurers in July and August 2016. The proof of loss was not placed before the court during the course of the present application. However, my understanding is that in the proof of loss, the plaintiffs maintained that the losses fell within para. 1 of Clause 1 of s. 1 of the policy. I also understand that the plaintiffs argued that the losses did not fall within para. 2 of the same clause (albeit that they also advanced an alternative argument that, even if the losses did not fall within para.1, they are nonetheless covered under para.2).

7. By letter of 30th November, 2016, the defendants declined cover under the policy. In these proceedings, the plaintiff alleges that the declinature of cover was wrongful and in breach of the policy.

8. It is unnecessary in this judgment to set out the full terms of the letter of 30th November, 2016 (which was made available to the court). It is sufficient to record that, in that letter, the defendants rejected the contention that the claim fell within para. 1 of Clause 1 of the policy. Para. 1 of Clause 1 covers losses arising from dishonest or fraudulent acts of an employee carried out with the intention to cause loss to the insured or to obtain financial gain for the employee himself. In contrast, para. 2 provides that:"*With regard to trading or other dealings in securities, commodities, futures, options, currencies, foreign exchange and the like*," cover will only be available where: -

(a) there was a manifest intent on the part of the employee to make improper financial gain for himself or some other person;

and where

(b) such activity, in fact, resulted in such gain.

9. Insurers took the view that the claim arose from trading and that, in those circumstances, the only form of cover potentially available was under para. 2 of Clause 1.

10. However, in the letter of 30th November, 2016 it was stated that the cover was not triggered under para. 2 of Clause 1 because the plaintiff had not established that Mr. Rusnak had obtained improper financial gain and that it was his manifest intention to do so. The letter also stated that the plaintiff had "*failed to satisfy the factual burden of proving that its losses are covered under the policies, including by reference to the strict standard of causation required*". The letter concluded by stating that underwriters' rights under the policies and at law "*remain fully and expressly reserved*".

11. The case now made by the plaintiff in these proceedings (consistent with the case made in the proof of loss described above) is that the losses sustained by it as a consequence of Mr. Rusnak's fraud all fall within para. 1 of Clause 1. In the alternative, the plaintiff maintains that the losses fall within para. 2. In contrast, the position taken by the defendants is that the losses arise exclusively from trading and that the only form of cover available for trading under the policy is that contained in para. 2 of Clause 1. As noted above, for para. 2 to apply, it must be shown that the trading was undertaken with a view to making an improper financial gain and it must also be shown that the activity of the employee in question led to such a gain. It is the defendants' case that the only cover available in respect of "*trading*" is that provided for in para. 2 and that the plaintiff has failed to prove that the loss sustained by it satisfies the requirements of para. 2 and is therefore not covered under the policy.

12. This is not a complete summary of the positions taken by the parties but, as I understand it, this is the nub of the dispute between them.

The Pleadings

13. A very lengthy and detailed statement of claim has been delivered. This is unsurprising in circumstances where, as the plaintiff itself acknowledges, the onus of proof is on the insured to show that the policy covers the losses claimed. If authority for that proposition is required, it is to be found in the judgment of Kelly J. (as he then was) in *Analog Devices v. Zurich Insurance Company* [2002] 12 JIC 2008 at p 25. In that case, Kelly J. also made clear that, in contrast, the insurer bears the burden of proof insofar as it seeks to rely on an exclusion clause in a policy.

14. The statement of claim runs to 125 paragraphs. In para. 28, the plaintiff makes the case that para. 2 of Insuring Clause 1 provides additional cover to that available under para. 1 of the same Clause. In para. 32, the case is made that where a transaction involving trading is entered into for a dishonest or fraudulent purpose (or for the purpose of hiding or disguising existing losses or breaches of the authorisation limits of an employee), any such trading does not deprive the insured of the benefit of the cover provided in para 1.

15. In para. 33, the plaintiff contends that in the alternative, if the losses are not covered under para. 1, they are covered under paragraph 2. However, it is clear that the overall thrust of the statement of claim is to make the case that the losses fall within para. 1. This is evident, for example, from para. 36 of the statement of claim where it is alleged that the losses sustained by the plaintiff are "*Transaction losses*" which result solely and directly from the fraudulent schemes of Mr. Rusnak. In the same paragraph, it is alleged that the extent that such transactions involved trading or dealing, they were all implemented as part of the same fraudulent scheme which Mr. Rusnak devised to conceal his losses and to preserve his employment and they were accordingly losses which resulted from that scheme rather than from trading and are therefore recoverable under paragraph 1.

16. Similarly, in para. 47, it is expressly alleged "*for the avoidance of doubt*" that the activities on the part of Mr. Rusnak involved in the creation of "*non-existent assets*" and/or "*disguised funding transactions*" do not constitute trading or other transactions specified in para. 2 and are therefore covered under para. 1. In the same paragraph, the case is made "strictly in the alternative and without prejudice to the foregoing" that if the transactions were in the nature of trading, the losses are in any event recoverable under paragraph 2.

17. The case made in para. 47 is further developed in paragraphs 59-63. In the latter paragraph, the case is made that the options entered into by Mr. Rusnak were not "genuine options" or "trading" but were "disguised funding transactions" made by Mr. Rusnak with his counterparties including Citibank and Bank of America. Paragraphs 64-102 deal with other transactions entered into by Mr. Rusnak. Para.110 (and following paragraphs.) deal with the case made by the plaintiff that there was a manifest intention on the part of Mr. Rusnak to cause loss to AllFirst or to obtain financial gain for himself.

18. In para.119, the plaintiff alleges that the declinature of cover by the defendants was wrongful. In that paragraph, the case is made that the activities of Mr. Rusnak and the losses which flow from his activities fall within para.1 of Clause 1. The case is made in the alternative that the losses fall within para.2.

The Defence

19. In their defence, the defendants admit the policy. They also admit that Mr. Rusnak was charged in Maryland with bank fraud, false entries in bank records, and other offences under US law. An admission is also made that Mr. Rusnak, in October 2002, pleaded guilty to bank fraud on a plea bargain and that the remaining charges were not progressed. The defendants also admit that in January 2003 Mr. Rusnak was sentenced to seven and a half years' imprisonment.

20. However, in para. 5.3 of their defence, the defendants say that "*having regard to their lack of knowledge as to the acts and omissions of Mr. Rusnak*", they make no admission in relation to his employment by AllFirst, his duties of employment, the manner in which he performed those duties, the nature of the wrongdoing committed by him, the alleged transactions and entries which the plaintiff alleges were intended to disguise his trading positions, and his alleged collusion with others. No admission is made that there is any causal connection between any alleged wrongdoing on the part of Mr. Rusnak and the losses caused to AllFirst. Against that background, the defendants plead in para. 6 of the defence that they are strangers to much of what is pleaded in the statement of claim.

21. The first of the allegations in the defence, directly relevant to the present motion, is para. 7 which is in the following terms: -

> *"In any event . . . the defendants plead that any loss caused to AllFirst arising from . . . the alleged acts or omissions of Mr. Rusnak is not within the coverage of the Policy and that, accordingly, AllFirst was not entitled to the claimed or any indemnity from the defendants."*

22. The plaintiff contends that para. 7 is a positive plea and that the plaintiff is therefore entitled to raise a request for particulars in respect of it. The defendants submit that the plea is, in substance, a denial of the case made by the plaintiff and that there is no basis to seek particulars of it.

23. The second allegation which is relevant to the present application is para. 8 which says: -

> *"In accordance with the Declinature Letter, the Defendants' rights under the Policy and at law remain reserved. In particular, . . . the Defendants continue to specifically reserve their rights under General Condition 11(ii) of the Policy in respect of whether the Policy has terminated as to Mr. Rusnak . . . having regard to the fact that, on AllFirst's case, Mr. Rusnak's dishonest and/or fraudulent acts while in the service of AllFirst commenced in 1997. Pending discovery by the Plaintiff, the Defendants rights are strictly reserved."*

24. Para. 8 gives rise to a different issue. The plaintiff submits that, if this plea is to be maintained, it is essential that it should be fully particularised and that the defendants cannot be permitted to reserve their position in this way. The plaintiff is concerned that the plea is designed to permit the defendants to utilise the discovery process to fish for evidence to support a case which the defendants have yet to properly plead yet alone substantiate. The plaintiff strongly argues that this is impermissible.

25. The third paragraph which is relevant for present purposes is para. 9.3 which, for the purposes of this motion, raises similar issues to para.7. Para. 9 commences with a statement that the defendants take issue with the construction of the policy advanced in the statement of claim. Without prejudice to that contention, the defendants contend in para 9.3 as follows: -

> *"The alleged loss suffered by AllFirst . . . is exclusively loss arising from trading or other dealings in securities, commodities, futures, options, currencies, foreign exchange and the like, and loans, transactions in the nature of a loan, or other extensions of credit".*

26. The fourth relevant paragraph, in the context of this motion, is para. 9.4, which is in the following terms: -

> *"For cover to arise under the Policy, such loss must be shown to be loss of the kind specified in Paragraph (2) . . . of . . .Clause 1. The loss claimed herein is not loss within the scope of Paragraph (2)".*

27. The fifth paragraph in issue is para. 9.5 which states: -

> *"Paragraph (1) of . . . Clause 1 is not relevant to the Plaintiff's claim and cannot be relied upon by the Plaintiff for the purposes of these proceedings. In any event, the loss claimed here is not loss within the scope of Paragraph (1)".*

28. The sixth paragraph which is potentially relevant is para 9.9 which is in the following terms: -

> *"The Defendants further plead…Clause 1 was not intended to provide unauthorised trading cover. Such cover was available in the market (and so far as necessary, the Defendants will adduce evidence of that fact at the hearing of these proceedings) but the Plaintiff elected not to avail of same".*

29. Para. 10.2 is the seventh relevant paragraph. This refers to a 2002 report into Mr Rusnak's activities but does not identify the specific sections of the report on which the defendants rely. Para. 10.2 states: -

> *"Loss caused by the acts and omissions of AllFirst are not within the scope of … Clause 1. The Defendants will … refer … to the Report of 12 March 2002 to the Plaintiff and AllFirst by Promontory Financial Group and Wachtell Lipton, Rosen & Katz (commonly referred to as the Ludwig Report)".*

30. The eighth relevant paragraph is para. 16 which relates to the notification of the claim. It states: -

> *"It is admitted that the plaintiff notified the Insurers… on 6 February 2002 of a loss. It is not admitted that the said notification was in accordance with the Policies…."*

31. The ninth relevant paragraph is para. 23.3. It is in response to para. 24 of the statement of claim where the plaintiff pleads that the declinature of cover in the letter of 30th November 2016 was wrongful and in breach of the policy. Para. 23.3 of the defence then pleads: -

> *"The Defendant declined cover in circumstances where the plaintiff did not substantiate a covered claim under the Policies."*

32. The next relevant plea is contained in para. 32.1 which is in response to para. 47 of the statement of claim where the plaintiff has made the case that the activities of Mr. Rusnak did not constitute trading within the ambit of para. 2 of Clause 1. On that basis the plaintiff contends that the losses fall within para. 1 of Clause 1. In the alternative, the plaintiff pleads that if the transactions put in place by Mr. Rusnak constitute trading (which the plaintiff strictly denies) then such losses are in any event recoverable under paragraph 2.

33. The response of the defendant to this plea is set out as follows in para. 32: -

> *"32.1 The first sentence is denied. The alleged acts of Mr. Rusnak…constitute trading or other transactions specified in Paragraph (2)…*
>
> *32.2 Accordingly, it is denied that the alleged losses arising from those alleged acts come within the scope of … Paragraph (1)…*
>
> *32.3 For the avoidance of doubt, it is denied that such alleged losses are recoverable under Paragraph (2)…."*

34. In para. 45.3, the defendants respond to para. 119 of the statement of claim (which I have already summarised in para. 15

above). They then plead as follows: -

> *"45.3 It is denied that the alleged dishonest and fraudulent acts of Mr. Rusnak involved no trading… manifestly, the asserted loss arises with regard to … trading or other dealings in securities or in the other items more particularly described in Paragraph (2) …."*

35. The remaining relevant plea is para. 49.2. There, the defendants deal with para. 123 of the statement of claim. In para. 123 of the statement of claim, the plaintiffs sought to take issue with the approach taken by the defendants in the Declinature Letter of 30th November 2016. In response, in para. 49.2 of the defence, the defendants say: -

> *"It is the … Defendant's position, as set out in the Declinature Letter, that the plaintiff has failed to establish the factual burden of proving that its losses…are covered under the Policies".*

The Present Motion

36. All of the particulars which are sought by the plaintiff relate to the paragraphs in the defence which I have quoted in paras. 18 to 35 above. It is unnecessary at this point to set out in full the lengthy and detailed exchanges between the parties in relation to each of the relevant paragraphs in the defence. It is sufficient to record that the particulars sought broadly break down into the following categories:-

> (a) the largest group comprises a demand by the plaintiff that the defendants set out the material facts on which they rely in support of the allegations made in paras. 7, 9.3-9.5, 9.9, 23.3, 32.1-32.3, 45.3 and 49.2 of the defence;
>
> (b) a separate and distinct issue arises in relation to para. 8 of the defence where, as noted in para. 23 above, the defendants purport to reserve their ability to rely in the future on general condition 11(ii) in the event that evidence emerges that the plaintiff was aware of Mr. Rusnak's activities at an earlier point than is currently pleaded and accepted by the plaintiff;
>
> (c) a discrete issue also arises in relation to para. 16 of the defence insofar as the defendants take the position that they do not admit that the notification of the loss in 2002 was in accordance with the policy; and
>
> (d) a further discrete issue arises in relation to para. 10.2 of the defence insofar as the defendants refer to the Ludwig Report and plead that they propose to rely on it without identifying any specific parts of that report.

37. It will be necessary in due course to separately consider each of these categories but, before doing so, it may be helpful in the first instance to consider the relevant principles that apply.

The Applicable Principles

38. Save to the extent set out below, there was substantial agreement between the parties as to the relevant principles to be applied. It seems to me that the most relevant principles for present purposes are the following:-

> (a) Under O. 19, r. 7(1), the court has power to direct any party to furnish further and better particulars of any matter stated in any pleading or similar document.
>
> (b) Under O. 19, r. 7(3), further particulars will not be ordered before defence or reply (as the case may be) unless the court is of opinion that they are "*necessary or desirable to enable the defendant or plaintiff, as the case may be, to plead or ought for any other special reason to be…delivered*".
>
> (c) While O. 19, r. 7(1) does not identify the criteria to be applied by the court in considering an application of this kind, the principles to be applied are now well established. The fundamental principle is that a party should know in advance, in broad outline, the case which that party will have to meet at the trial. This was made clear by Fitzgerald J. (as he then was) in the Supreme Court in *Mahon v. Celbridge Spinning Co. Limited* [1967] I.R. 1 at page 3.
>
> (d) Thus, as Henchy J. noted in the Supreme Court in *Cooney v. Browne* [1985] I.R. 185 at p. 191, where a pleading is so general or so imprecise that the other side cannot know what case he or she will have to meet at trial, further particulars will be ordered.
>
> (e) However, Henchy J. stressed in the same case that a party will only be entitled to "*such particulars as will inform him of the range of evidence (as distinct from any particular items of evidence) which he will have to deal with at the trial*". Accordingly, particulars cannot be used as a mechanism to extract details as to the evidence to be given by the opposing party. This was reiterated more recently by Hogan J. in Armstrong v. Moffatt [2013] 1 I.R. 417 at page 426.
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> (f) Particulars will not be ordered unless they are genuinely required to enable a party to know the case to be made by the opposing party at trial. As Costello J. made clear in *James Elliot Construction v Lagan* [2014] IEHC 547 at para. 18, the court will not entertain an application for further and better particulars which are oppressive or unreasonable.
>
> (g) It is also well established that the court will not direct a party to provide particulars of a denial in a pleading. This is confirmed by the authors of *Delany and McGrath on Civil Procedure* (4th Ed.) 2018, at paragraph 5-128. *Delany and McGrath* cite as authority for this proposition the decision of the Court of Appeal of England and Wales in *Pinson v. Lloyds* [1941] 2 K.B. 72. Logically, the same principle must apply to a non-admission. In *Warner v. Sampson* [1959] 2 WLR 109, Ormerod L.J. made clear that a denial and a non-admission have a similar effect in that both pleas have the effect of putting the opposing party on proof of its case. At this point, it should be noted that there is a dispute between the parties as to whether the principle that one cannot obtain particulars of a denial can be said to be applicable in the Commercial Court. This is an issue which is addressed further below.
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> (h) Particulars of a denial will, however, be ordered where the denial amounts in substance to a positive allegation. This principle is succinctly stated by *Delany and McGrath* at para. 5-129 as follows:-
>
> > *"However, the position [is] different where the traverse [is] of a negative allegation…in which case, the question whether or not [there] defendant can be ordered to give particulars depends on whether the traverse is a mere*

traverse or whether, though negative in form, the negative is pregnant with an affirmative, in which case particulars of that affirmative must be given."

(i) It is also clear that a party is not entitled to hide behind a traverse in those cases governed by O. 19, r. 15. which provides as follows: -

"The defendant or plaintiff (as the case may be) must raise by his pleading all matters which show the action or counterclaim not to be maintainable, or that the transaction is either void or voidable in point of law, and all such grounds of defence or reply…as if not raised would be likely to take the opposite party by surprise, or would raise issues of fact not arising out of the preceding pleadings, as, for instance, fraud, Statute of Limitations, release, payment, performance, facts showing illegality either by statute or common law, or Statute of Frauds."

(j) Thus, in cases coming within the principles at (h) – (i), the court must be in a position to direct a party to furnish particulars notwithstanding that the relevant pleading of that party may take the form of a traverse. Furthermore, it is clear that if the matter has not been appropriately pleaded in accordance with O. 19, r. 15, the court may refuse to allow the party responsible to subsequently make a positive case (within the ambit of application of these rules) at the trial. (See the decision of the Supreme Court in *Duffy v. Ridley Properties Limited* [2008] 4 I.R. 282 at p305).

(k) It is no answer to a request for particulars for a party to contend that the relevant facts are already known by the party making the request. As Clarke J. (as he then was) observed in *Moorview Developments v. First Active plc* [2005] IEHC 329 at para. 7.2: -

"It should be noted that the fact that a party is required to be told, as part of the pleading process, are not the facts as they may objectively be, but the facts as his opponent alleges them to be. Therefore, an assertion that the other party well knows the relevant fact will rarely be a sufficient answer to what would otherwise be a proper request for particulars. A requesting party may well have its own view about what the truth in respect of a relevant factual issue is but that does not absolve his opponent, where it is part of his case, from setting out in reasonable detail the relevant facts which he alleges."

(l) The requirement in the Commercial Court that, prior to trial, the parties must exchange witness statements, can be relevant in the context of an application for further particulars. This is clear from the decision of Clarke J. (as he then was) in *Thema International Fund plc v. HSBC Institutional Trust Services* [2010] IEHC 19 at paragraph 4.1. This principle was succinctly summarised by Costello J. in *Quinn Insurance Limited (Under Administration) v. PriceWaterhouseCoopers* [2015] IEHC 303 at para. 39 where she said:

"the question of a party being taken by surprise is of reduced significance in proceedings involving witness statements".

(m) There may be circumstances where it is appropriate to direct that particulars should only be furnished after discovery. This follows from the decision of Clarke J. in *Thema International Fund plc v. HSBC Institutional Trust Services (Ireland)* [2010] IEHC 19 at paras. 4.6 to 4.7. There is a dispute between the parties in this case as to the extent to which this principle is of application here and this is an issue that I may need to examine in more detail in due course.

(n) Finally, it is important to bear in mind that the purpose of pleadings and of particulars is to ensure that the issues in the case are sufficiently identified in advance of the trial. It has, therefore, been observed that in more complex cases, particulars may have a more expansive role than in the case of more routine cases. This was made clear by Baker J. in *Playboy Enterprises International v. Entertainment Media Network Works Limited* [2015] IEHC 102, which was subsequently approved by the Court of Appeal in *Quinn Insurance Limited (Under Administration) v. Pricewaterhousecoopers* [2017] IECA 94 at paragraph 16.

39. Before proceeding further, I should deal, at this point, with the debate that took place between the parties as to whether the principle described in para. 33(g) above continues to apply in the context of Commercial Court proceedings. I should also deal, at the same time, with the case made by the plaintiff that, in any event, the material allegations in the defence are positive assertions rather than denials. Essentially, these are the allegations in those paragraphs of the defence identified in para. 31(a) above.

40. In order to address these issues, I believe it is important to consider, in the first instance, the rationale for the well-established principle that (at least in cases which have not been admitted to the Commercial Court) particulars will not be ordered of a denial. *Delany & McGrath* cite the following observation of Goddard L.J. (as he then was) in *Pinson v. Lloyd's* [1941] 2 KB 72 at p.p. 3-84 as providing some explanation for this principle. There, Goddard L.J. said:

"Where the traverse is a mere denial or putting in issue of some positive or affirmative allegation in the statement of claim, the rule that a defendant cannot be ordered to give particulars really rests on the common sense basis that there is nothing which the defendant can particularize, in which case, to say the least of it, though it be no point in ordering him to do something which ex hypothesi is impossible".

41. With due respect to Goddard L.J. that explanation appears to me to be incomplete. It does not, in any real way, elucidate the underlying rationale. In my view, a more satisfactory explanation is to be found in the judgment of Astbury J. in *Weinberger v. Inglis* [1918] 1 Ch. 133. That case arose during the currency of the First World War. The plaintiff (who had been born in Germany) applied to become a member of the London Stock Exchange. The committee of the Stock Exchange, in the exercise of their discretion, refused the application. The plaintiff brought proceedings challenging that refusal and he alleged in his statement of claim that the committee did not exercise their discretion in a *bona fide* way. In a previous decision – namely *Cassel v. Inglis* [1916] 2 Ch. 211 – it had been established that there was a presumption that the committee of the Stock Exchange acted in a bona fide way and that the onus of rebutting this presumption lay upon a party who wished to challenge the decision of the committee. In his statement of claim, the plaintiff alleged that the committee did not exercise any discretion either *bona fide*, fairly, reasonably or judicially, but had acted arbitrarily. In their defence, the committee traversed each of the allegations made in the statement of claim. In addition, in para. 9 of the defence, it was specifically alleged that the committee, acting *bona fide* and honestly in the exercise of their duty and discretion under the Stock Exchange rules decided not to admit the plaintiff to membership of the exchange. The plaintiff sought particulars of the defence (including particulars of the allegation made in para. 9). Among the particulars sought by the plaintiff were the facts and grounds on which the committee based their decision. The application for an order compelling the defendants to furnish the particulars

was refused by Astbury J. In setting out his reasons for his decision, Astbury J. very helpfully identified the rationale underlying the principle. He said at p. 137:

> *"As a general rule the Court never orders a defendant to give particulars of facts and matters which the plaintiff has to prove in order to succeed, and this is especially the case where a defendant has confined himself to putting the plaintiff to the proof of allegations in the statement of claim, the onus of establishing which lies upon him."*

42. At p. 140 Astbury J. reiterated the same point in these terms:

> *"Under Order XIX r. 7, further particulars may be ordered of any matter 'stated' in any pleading requiring particulars. A traverse by a defendant, even of a negative plea by a plaintiff which he must establish in order to succeed, is not, in my judgment, a matter 'stated' within the defence within the meaning of this rule. The rules under the Judicature Act abolishing the general issue were intended to limit and define the issues to be tried, but not to force a defendant on a traverse to undertake the burden of proving anything himself, and still less to relieve a plaintiff from any onus of proof resting solely upon him."*

43. It seems to me that the observations of Astbury J. in that case provide an entirely rational explanation for the principle that a court will not order a party to provide particulars of a denial. On the face of it, that principle cuts directly across the basic proposition described in para. 33(c) above that a party should know in advance, in broad outline, the case which that party will have to meet at the trial. At a superficial level that principle does not sit comfortably with the principle that particulars with not be ordered of a denial. However, applying the logic of Astbury J. in *Weinberger v. Inglis*, both principles are, in fact, entirely reconcilable. If the onus of proof is on one party in relation to some aspect of the case, then it must follow that a denial by the opposing party of the allegations made in support of that case could not properly give rise to an obligation on that party to provide particulars of the denial or an explanation for the denial. If the onus of proof rests solely on one party, the opposing party must be entitled to put that party on proof and the classic way in which to achieve this is to deny (or not to admit) the allegations in question. This does not offend against the principle set out in para. 33(c) above because the party, on whom the onus of proof lies, knows that it will have to establish the relevant issue at the trial. That party will itself know what it has to prove at trial. Given that the onus of proof in relation to the relevant issue rests on that party, it is for it to make its case and it cannot force the opposing party to narrow the scope of the work which it must undertake in order to prove its own case.

44. One further aspect of *Weinberger v. Inglis* is relevant. As noted in para. 36 above, the defendant in that case had made what was, in form, a positive plea in para. 9 of his defence where an express allegation was made that the committee had acted bona fide and honestly in the exercise of their discretion. Nonetheless, Astbury J. took the view that, in substance, this was a traverse of the claim made by the plaintiffs. He said at p. 138: -

> *"The plaintiff here knows perfectly well what case he has to meet, and what the real issue raised by the defendants in para. 9 of their …defence is. It is that they acted bona fide in accordance with their duty under the rules which bind him and them alike. Prima facie, the court will presume this, and the onus of disturbing this presumption lies upon the plaintiff …..*

This plea raised by the defendants, although in form affirmative, is in substance a traverse of the plaintiff's allegation in para. 9 of the statement of claim, which he must prove in whole or in part in order to succeed."

45. This observation by Astbury J. is directly relevant here where the plaintiff contends that the defendant has made positive assertions while, in response, the defendants have urged that what they have done, in substance, is to make very clear in their defence that they are putting the plaintiff on proof that the claim the subject matter of these proceedings is covered under the policy. This is an issue which I address further below in my consideration of the first category of particulars sought.

46. Having examined the rationale for the principle that particulars will not be ordered of a traverse, it is next necessary to address the argument made by the plaintiff that, following the establishment of the Commercial Court, there is no longer any scope for a party in Commercial proceedings to rely on a simple denial or traverse. In support of that proposition the plaintiff relies principally on the decision of Clarke J. (as he then was) in *Ryanair Ltd v. Bravofly Ltd* [2009] IEHC 224. The plaintiff places emphasis, in particular, on the following observation of Clarke J. in that case at para. 5.3:

> *"…it does not seem to me that any material weight should be attached to the argument put forward on behalf of Bravofly to the effect that, prior to the coming into operation of the Commercial Court Rules, a blanket traverse on the part of Bravofly might have sufficed. It is precisely to avoid complex cases such as this going to trial with no further pleadings than a bare assertion and a bare traverse that the more elaborate case management procedures adopted in the Rules of the Superior Courts applicable to the Commercial Court have been brought into being. …"*

47. On the face of it, those observations would appear to suggest that no party is entitled in the Commercial Court to proceed on the basis of a simple traverse of the allegations made in the opposing party's pleading. However, on a careful consideration of that judgment in conjunction with a later judgment given by Clarke J. in the same case (neutral citation [2009] IEHC 387), I do not believe that Clarke J. intended to go that far.

48. It is undoubtedly the case that there was an expectation that the setting up of the Commercial Court would lead to more focused pleading. It is equally the case that blanket denials are generally unacceptable in the Commercial Court. As Dowling says in "*The Commercial Court*" (second edition, 2012, para. 5-18 citing an article written by Kelly J. (as he then was) in the 2004 *Bar Review*): -

> *"Blanket denials can also lead to the obfuscation of the issues and it has been stated that this 'type of pleading has no part to play in the work of the Commercial Court'"*

49. I do not, however, believe that these observations were intended to interfere with the right of a party to put the opposing party on proof of a particular allegation where the latter has the onus of proof in relation to that allegation. A consideration of both of the judgments in *Ryanair Limited v. Bravofly Limited* bears this out. In that case, the plaintiff complained about the way in which the defendant was using information alleged to be derived from the plaintiff's own website relating to Ryanair flights. The principal cause of action asserted by Ryanair appears to have been infringement of copyright. It is clear from para. 2.3 of the judgment delivered by Clarke J. on 14th May, 2009, ([2009] IEHC 224) that, in its defence and counterclaim, Bravofly made a series of positive allegations in which it purported to set out the sequence of events which occurred from the time that a user accessed its website to the time when, on the assumption that a booking of a flight was made, a confirmation of a flight issued to the user. On the basis of that sequence of events, it was expressly pleaded that Bravofly did not access the Ryanair website. Ryanair sought particulars of precisely

how the Bravofly system worked. At some time prior to the judgment of Clarke J., an order had been made requiring Bravofly to provide the particulars sought.

50. In my view, it is significant that the particulars were sought of a positive allegation made in the Bravofly defence. It is clear that the approach taken by Bravofly in that case was to not merely deny the wrongdoing alleged against it but to make a positive defence as to how its system operated. This is clear, in particular, from the following passage from the judgment of Clarke J. at para. 5.3:-

> *"However this matter is dealt with, it would be totally unacceptable if Bravofly were to be permitted to run a positive defence based on evidence from which it might be inferred that the precise way in which the relevant technology operates does not give rise to contractual relations or a potential breach of copyright or database rights, without having to specify, well in advance, the manner in which that case would be sought to be made out."*

51. Clarke J. was, however, prepared to provide further time to Bravofly to comply with the previous order made that the particulars of the Bravofly methodology should be provided to Ryanair. Subsequently, Bravofly failed to provide those particulars and the matter came back before Clarke who dealt with the issue in a later judgment delivered on 31st July, 2009, ([2009] IEHC 387). Ryanair sought in those circumstances to have certain aspects of the defence and counterclaim struck out. At this point, as noted by Clarke J. at para. 6.1 of his judgment, it was conceded by Bravofly that it had not provided the particulars sought which required it to describe the precise technical manner in which the system used by it, in fact, operated. Clarke J. had to consider what consequences should flow from that failure. At para. 6.2 of the judgment, while reiterating what he had said in his first judgment, Clarke J. acknowledged that Ryanair, as plaintiff, still had the obligation to prove its case. He said: -

> *"It should be remembered, of course, that Ryanair is the plaintiff in these proceedings. It is for Ryanair to prove its case. The fact that the operation of the practice of the Commercial Court does not permit a defendant to simply enter into a bland traverse of a plaintiff's claim and allow its case to 'emerge' in the course of the hearing does not, of course, have the effect of altering the onus of proof which rests on a plaintiff. Thus, the fact remains that Ryanair will need to establish on the balance of probabilities that whatever happens in the complex interaction between the systems of Bravofly, Travelfusion, and its own website, same amounts to an infringement of the various rights asserted. However, it may well be that Ryanair will be in a position to put forward expert evidence which would allow a reasonable inference to be drawn that the operation of such systems does amount to a breach of some or all of the rights asserted. It is in that context that the positive plea contained in the Bravofly defence and counterclaim, to the effect that the operation of the systems concerned should not be characterised in a way which would lead to a potential breach of Ryanair's rights, needs to be seen. It is one thing for Bravofly to defend these proceedings on the basis of an assertion that Ryanair has not been able to establish that what happens amounts to a breach of any of Ryanair's rights. It is quite another thing altogether for Bravofly to wish to put forward a positive case, based on evidence, from which it might be sought to be asserted that the proper technical characterisation of what happens is such as should lead to no breach of rights occurring."*

52. It seems to me that this passage shows very clearly that Clarke J. did not go so far as to suggest that any practice operated in the Commercial Court was intended to interfere with a party's right under the law (existing prior to the establishment of the Commercial Court) to put the opposing party on proof of any allegation made by the latter where the onus of proof in respect of that allegation lies on the latter.

53. Clarke J. made a very clear distinction between the positive defence of Bravofly (which plainly went beyond putting Ryanair on proof of its claim) and the right of Bravofly to insist that Ryanair should prove its case. This conclusion is reinforced by a consideration of what is said subsequently by Clarke J. at para. 8.2 of the same judgment where Clarke J. makes clear that even though he was striking out those aspects of the defence and counterclaim which Bravofly had failed to particularise, Bravofly would still be entitled to continue to put Ryanair on proof of its own claim. He said: -

> *"So far as … the precise technical details of the … system is concerned, I have already indicated that it will be necessary to strike out any aspect of Bravofly's defence and counterclaim which involves a positive assertion based on how it is said that … [the] system operates. Any such action will, of course, be without prejudice to the undoubted entitlement of Bravofly to assert, at the trial, that Ryanair has failed to discharge the onus of proof on it." (emphasis added).*

54. In my view, that passage makes very clear that Clarke J. recognised that the practice of the Commercial Court described elsewhere in his judgments, did not have the effect of overruling the entitlement of a party to put the opposing party on proof of an allegation where the latter bears the onus of proof. The same passage clearly indicates that a failure to provide particulars in relation to a positive allegation does not deprive a party from continuing to rely on a denial or non-admission of an allegation made by the opposing party where the latter party bears the onus of proof .

55. The passage also seems to me to be entirely consistent with the approach taken by Astbury J. in *Weinberger v. Inglis* (discussed above). In particular, it seems to me that Clarke J. was, in substance, acknowledging the entitlement of Bravofly to put Ryanair on proof of its case even where no particulars had been furnished by Bravofly explaining why it had not infringed the rights of Ryanair. That is very close to the approach taken by Astbury J.

56. It also has to be borne in mind that there is nothing in O. 63A (which is the relevant instrument under which the Commercial Court was established) which expressly purports to override or modify the pre-existing law in relation to pleadings and particulars. It is true, of course, that O. 63A introduces a number of very valuable pre-trial procedures which include the case management provisions contained in rule 14. Among the directions that can be given by the court under r. 14(7) is a direction that the issues in proceedings (whether as to fact or law) are defined as clearly precisely and concisely as possible in advance of the trial. Thus, for example, in a case where a party is inappropriately and unjustifiably purporting to rely on a blanket traverse, the court can give the necessary directions to ensure that the case was put forward and pleaded fully and appropriately, and that, for example, all of the requirements of O. 19, r. 15 are enforced.

57. However, I do not see anything in the text of O. 63A that would allow the court to require a party to provide any explanation as to why it is denying an allegation made by the opposing party in those cases where the onus of proof lies on the latter. In my view, that would require express provision in the Rules. The position in this jurisdiction is in contrast to the position under CPR 16.5(1) of the Civil Procedure Rules in operation in England and Wales. CPR 16.5(1) provides that where a defendant denies an allegation made by a claimant, the defendant must state the reasons for doing so and if the defendant intends to put forward a different version of events to that given by the claimant, the defendant must set out the version on which it is proposed to rely

58. In light of the considerations addressed in paras. 46 to 57 above, I have come to the conclusion that the decision of Clarke J. in *Ryanair v. Bravofly* is not authority for the proposition that a party can no longer rely, in any circumstances, on a denial or non-admission in a pleading in Commercial Court proceedings. On the contrary, it seems to me that when both of the *Bravofly* decisions are read together, it is clear that Clarke J. was not interfering with the right of a party to put the opposing party on proof of an allegation where the onus of proof in relation to that allegation lies on the latter.

The Categories of Particulars Sought
59. I now deal, in turn, with each of the four categories set out in para. 36 above.

60. Insofar as the first category is concerned (namely that identified in para. 36(a) above), the defendants maintain (as previously noted) that the allegations within this category are, in substance, denials or non-admissions intended to place the plaintiff on proof of the allegations made by it in the statement of claim. In essence, the defendants say that they are in the same position as the defendant in *Weinberger v. Inglis*. Accordingly, they say that they cannot be compelled to provide particulars. They also maintain (again as previously noted) that, in any event, the plaintiff has not demonstrated that it is necessary that these particulars should be furnished prior to delivery of the reply. Without prejudice to these contentions, the defendants also take the position that, even if the plaintiff is entitled to seek particulars of a traverse, what is sought by the plaintiff here goes well beyond what is permissible on a request for particulars.

61. The relevant paragraphs of the defence within this category are quoted in paras. 21, 25-28 and 31-35 above. I will not repeat them here.

Para. 7 of the defence
62. The first relevant allegation is that made in para.7 of the defence. In my view, it is clear that para. 7 of the defence (quoted in para. 21 above) is, in substance, a denial. It simply pleads that any loss caused to the plaintiff is not covered by the policy and that, accordingly, the plaintiff is not entitled to an indemnity. Paragraph 7 of the defence is effectively telling the plaintiff that it will have to prove its case that the losses sustained are within the clauses of the insuring policy. In my view, it would undermine the obligation which lies on the plaintiff to establish that its losses are covered under the policy if an insurer could be required to provide the particulars sought at para. 1.1-1.10 of the notice of particulars. There, the plaintiff purports to require the defendants to specify the material facts on foot of which the defendants allege that each of the eight individual heads of loss set out in para. 114 of the statement of claim are covered by the policy.

63. Having regard to the onus of proof which rests on the plaintiff, it will be for the plaintiff at trial to prove that these heads of loss are covered under the policy. It is important, in this context, to bear in mind that the defendants, as insurers, face a claim which is made by the plaintiff (on whom the onus of proof lies). While it may be desirable that the issues in the case should be narrowed insofar as possible (particularly with a view to minimising the extent of the discovery to be made in the future), I know of no authority (and certainly none was cited to me in the course of the hearing) that would enable a party (or indeed the court itself) to force a party in the position of the defendants here to effectively give way on the onus of proof. By asking each of the questions set out at para. 1.1-1.10 of the notice for particulars, it seems to me that this is what the plaintiff is essentially seeking to do. The plaintiff is seeking to compel the defendants to explain their position even though the plaintiff bears the onus of proof and even though the plaintiff has yet to prove its case. In my view, the defendants are entitled to decline to provide the particulars sought and to say to the plaintiff: "*It is for you to prove your case, it not for us to explain ourselves*".

64. In the circumstances, it is unnecessary to consider the detail of the questions posed at paras. 1.1-1.10 of the notice for particulars. In my view, the plaintiff was not entitled to raise particulars of para.7 of the defence.

Paras. 23.3 and 49.2 of the defence
65. It seems to me that precisely similar considerations arise in the context of para. 23.3 (quoted in para. 31 above) and para.49.2 (quoted in para. 35). In my view, the allegations made in those paragraphs are, in substance, denials of the claim made by the plaintiff that the loss was sustained or that it was covered under the policy. The onus of proof lies on the plaintiff in relation to those issues and, in those circumstances, I can see no basis on which the plaintiff can seek particulars of the allegations made in those paragraphs where the defendants have confined themselves in substance to denying the claims made. I therefore refuse to make any order in relation to the particulars sought at paras. 10.1-10.2 and 13.1-13.3 of the notice for particulars.

Para. 9.3 of the defence
66. The next relevant paragraph is para. 9.3 (quoted in para. 25 above). In form, that is a positive plea. The allegation essentially is that the losses sustained exclusively arise from trading or other dealings of the kind enumerated in para. 2 of clause 1. In para. 3 of the notice for particulars, the plaintiff asks the defendants to specify the material facts relied on in respect of this allegation.

67. In order to assess whether the plaintiff is entitled to raise particulars of this kind, it is necessary to put para. 9.3 of the defence in context. As the very helpful flow chart provided to the court makes clear, para. 9.3 of the defence is in fact in response to the case made in para. 28 of the statement of claim. That paragraph of the statement of claim is solely concerned with the way in which the plaintiff contends the policy ought to be construed. As noted in para. 12 above, the plaintiff, in para. 28 of the statement of claim, makes the case that para. 2 of clause 1 provides additional coverage to that available under para. 1 of the same clause. In para. 9 of the defence, it is made clear that the defendants dispute this construction of the policy. In para. 9.5 of the defence (quoted in para. 27 above) the defendants make the case that para. 1 of clause 1 is not relevant to the claim made by the plaintiff. In turn, in para. 9.4 of the defence (quoted in para. 26 above) the defendants make the case that, for the loss to be covered under the policy, it must be shown to fall within the ambit of para. 2 of clause 1. That subparagraph must also be read in conjunction with para. 9.3 where the defendants allege that the subject matter of the proceedings is exclusively loss arising from trading or from the other dealings specified in para. 2 of clause 1.

68. It is perhaps unsurprising that the defendants should include such a plea in circumstances where, according to the material made available to the court in the course of the hearing on 3rd October, 2018, the proof of loss submitted by the plaintiff characterised all of the elements of the claim as trading losses. Indeed, in para. 12 of the statement of claim the fraudulent scheme concocted by Mr. Rusnak is described as a scheme for the purposes of carrying on unauthorised foreign exchange trading.

69. Clearly, at the trial of this action, there will be a significant debate between the parties as to the proper construction of clause 1 of the policy and in particular whether para. 2 of that clause provides additional cover to that provided for in para. 1. The respective positions of the parties on that issue are very clearly set out in their pleadings. On an interlocutory application of this kind it would be quite inappropriate for me to express any view as to how the policy should be construed. That is a matter for the trial judge.

70. For present purposes, what is important is that both sides are aware of the case which the other seeks to make in relation to

construction of the policy which is the key issue dealt with by the parties in para. 28 of the statement of claim and para. 9 of the defence respectively. Both sides know in broad outline the case which the other side proposes to make in relation to construction. In my view, anything further that arises in relation to construction of the policy is a matter for legal submission at the hearing and potentially (although there may well be a debate about this) for some element of evidence as to the relevant factual matrix possibly including expert evidence relating to how these policies operate in the market.

71. Against that background, the question arises whether the plaintiff here is entitled to require the defendants to set out the material facts on which they will rely at the trial. In my view, the onus of proof is equally relevant in this context as it is in the context of para. 7 of the defence. Clause 1 of the policy is an insuring clause. While counsel for the plaintiff (in the course of his very able oral argument) submitted that it is for the defendant to demonstrate that para. 2 of Clause 1 "*bites*", it is crucial to bear in mind that para. 2 is not an exclusion clause. It is part of the insuring clause. The onus of proof therefore remains on the plaintiff to demonstrate why it is that the losses sustained by it fall within the ambit of the insuring clause (whether para.1 of that clause or para. 2 of that clause or both). It will be for the plaintiff, therefore, to prove the relevant transactions, the losses that flow from the transactions and the basis on which such losses fall within the ambit of either or both paragraphs of clause 1. For the insured to demand that the insurer should be required to explain why the losses are trading losses and not some other form of loss seems to me to cut across (if not to altogether reverse) the onus of proof which lies on the insured.

72. Furthermore, there is a clear parallel between the approach taken by the defendants in para. 9.3 of the defence and the approach taken by the Stock Exchange in *Weinberger v. Inglis*. In that case, it will be recalled that the Stock Exchange had pleaded in their defence that the committee, acting *bona fide* and honestly in the exercise of their duty and discretion under the Stock Exchange rules decided not to admit the plaintiff to membership of the Exchange. By its terms, that was a positive allegation. However, Astbury J. rejected the application to compel the Stock Exchange to provide particulars of that allegation in circumstances where, in accordance with the pre-existing case law, the onus of proof lay on the plaintiff in those proceedings to demonstrate that the committee had not exercised its discretion in a *bona fide* fair and reasonable way. Astbury J. treated the plea made in the defence (although positive in form) as, in substance a traverse of the plaintiff's claim. In my view, a similar approach should be taken here. When one considers the matter in the round, it seems to me that para. 9.3 of the defence is simply telling the plaintiff that the defendants' contention is that this is a para. 2 claim; that the claim does not fall within para. 1, and (when read in the context of para. 9 of the defence as a whole) there is no cover available under the policy. That leaves it to the plaintiff to prove as a matter of law and a matter of fact that the claim properly falls within some element of clause 1 of the policy.

73. In my view, the plaintiff well knows from para. 9 as a whole, the case which it has to meet in response to the claim made by it in para. 28 of the statement of claim as to how the plaintiff says the policy should be construed.

74. In these circumstances, I do not believe that it is appropriate to direct the defendant to provide the particulars sought in para. 3 of the notice for particulars.

Paras. 9.4 and 9.5 of the defence
75. Very similar issues arise in the context of para 9.4 and 9.5 of the defence. The first sentence in para 9.4 deals with the case made by the defendant as to how the insuring clause is to be construed. The second sentence essentially denies that loss falls within the scope of para. 2. On no basis could it be said that either of those pleas give rise to an entitlement on the part of the plaintiff to require the defendants to specify the material facts on foot of which they claim that each category of the loss claimed by the plaintiff is not loss within the scope of para. 2. That is what para. 4 of the notice for particulars seeks to do. In my view, the plaintiff is clearly not entitled to seek such particulars and I therefore refuse to make any order in respect of para. 4.

76. Again very similar issues arise in relation to para. 9.5 of the defence (which is the subject of para. 5 of the notice for particulars). Both sentences in para. 9.5 are essentially negative. The first sentence (which relates primarily to the construction of the policy) in substance denies that para. 1 of the insuring clause is relevant. The second sentence denies that the loss claimed falls within the scope of para. 1. In those circumstances, I cannot see any proper basis to direct the defendant to provide the particulars sought in para. 5 of the notice for particulars.

Para. 9.9 of the defence
77. No submissions were addressed to me by either party in relation to para. 9.9 of the defence or in relation to the particulars sought in para. 6 of the plaintiff's notice for particulars arising out of that paragraph. Curiously, it is in para. 9.9 that the defendants go beyond what could in substance be regarded as a denial. In that paragraph, they expressly maintain that cover for unauthorised trading was available in the market but was not put in place by the plaintiff. Presumably, it is the defendants' intention to rely on this as part of the factual matrix against which the policy here was put in place. Evidence of that kind was admitted as part of the relevant factual matrix in *Analog Devices v. Zurich Insurance* [2002] 12 JIC 2008. In any event, it would appear that the further particulars furnished in response to para. 6.1-6.4 for the notice for particulars have satisfied the plaintiff and therefore do not require further consideration by me.

Para. 32 of the defence
78. The next relevant paragraph of the defence is para. 32 (quoted in para. 33 above). Para. 32 addresses the case made in para. 47 of the statement of claim that the activities of Mr. Rusnak did not constitute trading within the ambit of para. 2 of clause 1. In particular, the case is made in para. 47 of the statement of claim that the creation of non-existent assets and/or disguised funding transactions do not constitute trading or other transactions of the kind specified in para. 2. In response, the defendants contend (*inter alia*) in para. 32.1 of the defence that the acts of Mr. Rusnak do, in fact, constitute trading or one of the other transactions specified in para. 2 of Clause 1. The plaintiff, in para. 11 of the notice for particulars, requires the defendants to identify the acts of Mr. Rusnak (and of any colluding party) with respect to the creation of the "*non-existent assets*" which the defendants claim constitutes trading or some other transaction of the kind specified in para. 2. A similar question is asked in relation to the "*disguised funding transactions*".

79. The plaintiff contends that there are in fact a number of positive allegations made in para. 32 of the defence. The first is the allegation made in para. 32.1 that the acts of Mr. Rusnak constitute trading or other transactions specified in para. 2 of Clause 1. The second is contained in para. 32.2. Although para. 32.2 takes the form of a denial, the plaintiff contends that it is, in substance, a positive assertion since it refers back (as the use of the word "*accordingly*" makes clear) to the positive allegation made in para. 32.1.

80. In my view, it is very important to see para. 32 of the defence in context. As noted above, it is a response to para. 47 of the statement of claim. In para. 47 of the statement of claim, the plaintiff seeks to make the case that because the transactions entered into by Mr. Rusnak involved the creation of non-existent assets and what the plaintiff describes as "*disguised funding transactions*", these could not be said to constitute trading. While the plaintiff seeks to keep all options open in the statement of claim, it is clear

from a consideration of the statement of claim as a whole that the plaintiff wishes to be in a position at trial to demonstrate that the fraudulent activities of Mr. Rusnak do not fall within para. 2 so as to permit the claim to be addressed under para. 1. It appears to be clear that the plaintiff believes that it is more advantageous for it to bring the claim within para. 1 rather than para. 2. Importantly, it will be for the plaintiff at trial to establish this since it bears the onus of proof in relation to this issue.

81. As in the case of para. 9.3 (discussed above), it seems to me that there is a very clear parallel between the position of the plaintiff here and the position of Mr. Weinberger in *Weinberger v. Inglis*. In that case, the plaintiff had the onus of proving a negative – namely that the committee did not exercise its discretion in a bona fide way. However, the onus of proof to establish this negative was on the plaintiff. Although the Stock Exchange expressly pleaded in para. 9 of their defence that the committee acted *bona fide* and honestly, the plaintiff was not entitled to seek particulars of that allegation in circumstances where the onus lay on him to establish that the committee was not acting *bona fide*.

82. I am of opinion that the same principle applies here. The plaintiff, as insured, is seeking to make the case that para. 2 does not apply (on the ground that the transactions in issue were not, in truth, trading and also on the ground that para. 1 offers additional cover to para.2) and that instead para. 1 applies. While the defendants, in their defence, have expressly pleaded that the transactions are trading, it would, in my opinion, be wholly wrong that the plaintiff (on whom the burden lies to prove that para. 1 applies rather than para. 2) could demand that the defendants set out the basis on which they say that the transactions are in fact trading. In my view, for very similar reasons to those set out by Astbury J. (as summarised in paras. 41-43 above) the plaintiff is not entitled to proceed in this way. To do so would undermine the established legal position under which the burden lies on the insured to prove that any item of loss falls within the cover of an insurance policy. If the plaintiff wishes to make the case that the transactions in issue do not constitute trading, it is for the plaintiff to plead and prove that case. It cannot, in my view, compel the defendant (who has done no more than to plead that it does not share this view) to explain why the defendant does not accept the positon put forward by the plaintiff. Essentially, that is what the plaintiff seeks to do here. For these reasons, I am of opinion that it would clearly be inappropriate to direct the defendants to respond to question 11 of the notice for particulars.

Para. 45.3 of the defence
83. In my view, a similar issue arises in relation to para. 45.3 of the defence (quoted in para. 34 above). There the defendants respond to the allegation made in para. 119 of the statement of claim that the dishonest and fraudulent acts of Mr. Rusnak (in creating non-existent assets by way of false entries in the books of AllFirst and the creation of disguised funding transactions) involved no trading. In para. 45.3, the defendants deny that the alleged dishonest and fraudulent acts of Mr. Rusnak involve no trading and say that *"manifestly, the asserted loss arises with regard to Mr. Rusnak's trading…"*

84. This effectively raises a precisely similar issue as para. 32 of the defence (discussed in para. 78-82 above). In those circumstances, I do not believe that it is necessary to deal with it separately here. In my view, the same considerations apply. For the same reasons as set out above in respect of para. 32 of the defence, I do not believe that the plaintiff is entitled to require the defendants to provide the particulars sought in para. 12 of the notice for particulars.

Para. 8 of the defence
85. As noted in paras. 24 and 36(b) above, a separate and distinct issue arises in relation to para. 8 of the defence (quoted in para. 23 above). In para. 8 of the defence, the defendants seek to reserve their rights under General Condition 11(ii) of the policy in the event that evidence emerges that the plaintiff was aware of Mr. Rusnak's activities at an earlier point in time than 2002. Under General Condition 11(ii) the insurance will terminate immediately in relation to any employee as soon as knowledge of any dishonesty or fraudulent act on the part of that employee comes to the attention of certain named offices or officers of the plaintiff. What para. 8 of the defence seeks to do is to preserve the right of the defendants to treat the policy as having been terminated prior to some of the events giving rise to loss, in the event that, between now and the trial, evidence emerges that one of the named offices or officers mentioned in General Condition 11(ii) knew of Mr. Rusnak's dishonesty at an earlier time than is currently accepted.

86. In the course of the hearing before me, it was strongly urged by counsel for the plaintiff that it is impermissible for a party to plead in these terms. In particular, it was emphasised that it would be utterly wrong to permit a party to plead in such terms and then to seek discovery in order to fish for some evidence to support a case that General Condition 11(ii) applies. Counsel relied on O.19 r.3 which requires a party to plead the material facts on which the case is based. Counsel submitted that if the defendants wished to rely upon General Condition 11(ii), they would have to identify the name of the person who knew that a dishonest act had been committed, what his rank was, the date when he acquired knowledge of the act in question and the nature of the dishonest act that he is alleged to have known. Citing the observations of Geoghegan J. in *Carlow Kilkenny Radio Ltd v. Broadcasting Commission* [2003] 3 IR 528, counsel submitted that one cannot make a bare unsubstantiated assertion and then call for discovery of documents by the other side in the hope that this may unearth documents which will provide a basis for making a case.

87. Counsel also drew attention to the observation of Clarke J. (as he then was) in *Moorview Developments Ltd v. First Active Plc* [2005] IEHC 329 at para. 7.4:

> *"The fact that it may be possible, upon obtaining discovery, for a party to be able to give more detailed particulars does not absolve it from the obligation to particularise the claim as best it can when it makes that claim. One must presume that a claim would not have been included unless the plaintiff had some basis for believing that the claim was well founded. In those circumstances it seems to me that it is appropriate to require the plaintiff to deliver such particulars as it now can."*

88. Reliance was also placed by the plaintiff on a further decision of Clarke J. namely *Thema International Fund Plc v. HSBC Institutional Trust Services (Ireland)* [2010] IEHC 19 where Clarke J. said:

> *"To enable a party to move to discovery without having adequately pleaded its case is to run the risk of a significant injustice by virtue of that party being allowed to trawl through the other side's often confidential information without real justification. …"*

89. In response, counsel for the defendants stressed that the defendants have not, in para. 8, made any plea against the plaintiff at all. He contended that, if the defendants had pleaded a breach of General Condition 11(ii) for the purpose of subsequently seeking discovery to substantiate that case, such a tactic would rightly be subject to legitimate criticism. Crucially counsel accepted, in the course of the hearing, that the defendants could not go to trial on the basis of a reservation of the kind contained in para. 8 of the defence. Counsel submitted that the reservation of positon by the defendants is *"in a sense a declaration that we are not in a position to form a view one way or the other, still less to particularise any decision that there has been a breach of General Condition 11…"*.

90. It is significant that counsel for the defendants has accepted that no plea (in the sense of an allegation against the plaintiff) has been made in para. 8. The paragraph is therefore, no more than a reservation of a right to possibly make a claim in the future. While it will, ultimately, be a matter for the judge dealing with any discovery application in this case to form a view on the issue, it is difficult, if not impossible, to envisage that the defendants could plausibly, in these circumstances, seek discovery specifically tailored to the subject of General Condition 11(ii) on the basis of the material currently contained in para. 8 of the defence.

91. Nonetheless, as counsel for the defendants suggested, it may well be the case that discovery in relation to the matters currently in issue in the proceedings will throw up documents which are relevant to the state of knowledge on the part of the bank and its officers in relation to the dishonesty of Mr. Rusnak. Counsel suggested that the discovery will inevitably cover the range of activities of Mr. Rusnak and his interaction with his superiors. Thus, the possibility exists that some information may emerge, following discovery, which would permit insurers to make a positive plea based on General Condition 11(ii). In my view, there is no doubt that, if insurers wish to rely on General Condition 11(ii), they would have to make a positive case which would require to be appropriately pleaded and particularised.

92. The question is whether the defendants are entitled to maintain para. 8 in its current form, simply reserving their rights. Prior to discovery, the defendants say that they cannot go any further. However, if it is not in a position to plead and particularise a case, a significant question arises to whether it can include para. 8 in its defence at all. It is clear from the decision of Clarke J. in his July judgment in *Ryanair Ltd v. Bravofly Ltd* [2009] IEHC 387 that the court has power to strike out allegations in pleadings where there has been a failure to properly plead and particularise a party's case. However, in that case, a positive allegation had been made by a defendant in its defence and counterclaim. The defendant there was not simply reserving its rights.

93. It is, of course, highly unusual that a party in a pleading would simply reserve its rights to make a case in the future. On the other hand, it is not unknown for insurers to reserve their rights. The difficulty for the defendants in this case is that they have no first-hand knowledge of what happened within AllFirst and the plaintiff. They cannot trigger General Condition 11(ii) unless there is a basis to suggest that there was an awareness of Mr. Rusnak's fraudulent activities prior to the date claimed by the plaintiff. It is also not unreasonable to think that, in the course of discovery in relation to the matters currently in issue, documents may emerge which may assist in identifying the precise date when relevant personnel within the AIB group came to learn of Mr. Rusnak's activities.

94. It is certainly not unusual to find that applications are made by parties to amend their pleadings (including applications to expand the plaintiff's claim or to add new lines of defence) following discovery. If para. 8 of the defence did not exist, there would be nothing to prevent a defendant in the usual way, following discovery, from seeking to amend the defence to include a new contention or possibly even a counterclaim. In substance, all that the defendants are doing here is to signal that an issue under General Condition 11(ii) may arise in the future in the proceedings. Whether the defendants will be allowed to make any such case in the future will depend on an application being made to amend the defence in order to plead a new ground of defence. On the hearing of any such application, any prejudice to the plaintiff can be appropriately addressed.

95. In this context, it seems to me that the observations of Clarke J in his July 2009 judgment in *Ryanair Ltd v. Bravofly Ltd* [2009] IEHC 387 at para. 8.3 are relevant. In that paragraph, Clarke J took the approach that, although he was compelled to strike out certain elements of the positive case previously made by *Bravofly* in its defence and counterclaim (by reason of the failure of *Bravofly* to provide particulars of that positive case), he was not going so far as to rule out the possibility that *Bravofly* might, at some later point in the proceedings, be allowed to reactivate its positive assertion. He said: -

> *"I should also note that mention was made, on behalf of Bravofly, at the hearing before me, of the possibility that, contrary to Bravofly's current understanding, evidence might at some stage in the future, and prior to trial, become available relevant to the issue concerned. It seems to me that I should not rule out the possibility that Bravofly might be able to persuade the court to allow it to reactivate its assertion in those circumstances. However, it seems to me that, in fairness to Ryanair, those aspects of the defence and counterclaim which amount to a positive defence under this heading should be struck out at this stage. Therefore, if it should transpire that Bravofly, in the future, feels that it is in a position to seek to reactivate those matters, then Bravofly will be required to bring an application before the court seeking to amend the proceedings by the reinstatement of those pleas. Whether, and if so on what terms, it might be appropriate to allow such an application would, of course, depend, amongst other things, on the stage to which the proceedings had progressed at that point in time. If, for example, Ryanair had filed witness statements (including expert witness statements), which were directed towards the case as it then stood (that is, a case without a positive assertion in respect of the relevant matters from the Bravofly side), then a point might be reached where it would become disproportionate to allow Bravofly to reassert the matters now being directed to be dropped or, at an absolute minimum, it might be disproportionate to allow any such course of action to be adopted without a significant cost penalty. Those are, however, matters that can be addressed if they arise."*

96. It seems to me that similar considerations apply here. At present, the defendants have not asserted any case that General Condition 11(ii) has been triggered. They simply signal that the issue may arise in the future. If it does arise, it will be necessary for the defendants to apply to the court for leave to amend their defence to make a positive case. At that point, the defendants will have the obligation to set out the material facts on which they rely and to provide appropriate particulars so that the plaintiff is in a position to know the case (in broad outline) which it will be required to meet at the trial. It will be for the court in due course to decide whether the amendment should be allowed and, if so, on what terms. However, pending any such amendment, the plaintiff does not have to concern itself with any case under General Condition 11(ii). Paragraph 8 does not make such a case. That has been expressly accepted by counsel on behalf of the defendants in the course of the hearing on 3rd October, 2018. If no case is being made against the plaintiff at present, the concerns highlighted by counsel for the plaintiff (as summarised paras 86 to 88 above) do not arise.

97. In the circumstance, it does not seem to me that there is any basis, at this point, to require the defendants to furnish particulars arising out of para. 8 of the defence.

Paragraph 24 of the defence

98. A further discrete issue arises in relation to para. 16 of the defence (quoted in para. 30 above) insofar as the defendants take the position that they do not admit that the notification of loss in 2002 was in accordance with the policy. As the flow chart makes clear, para. 16 of the defence is in response to para. 17 of the statement of claim where it is specifically alleged that: -

> *"In accordance with the Policies, the Plaintiff notified the insurers… on 6th February, 2002 of a loss and submitted an initial proof of loss in early February 2003." (Emphasis added)*

In response, the defendant, in para. 16 of the defence, admits that notification took place on 6th February, 2002 but does not admit

that the notification was in accordance with the policy. General Condition 3 of the policy provides that it is a condition precedent to the insured's right to be indemnified under the policy that the insured must, as soon as possible and in any event within 60 days after discovery of a loss, give written notice to the insurers.

99 In para. 9 of the notice for particulars, the plaintiff seeks particulars of the material facts on the basis of which the defendant contends that the notice was not in in accordance with the policy. During the course of the hearing, I asked counsel for both parties to address me on where the onus of proof lies in relation to a condition precedent of this kind. It appears likely to be the case (based on a consideration of a number of relevant textbooks) that the onus of proof in demonstrating that a condition precedent has not been fulfilled lies on the insurer. However, a different view has been expressed by *Clarke* in the December 2017 loose-leaf edition of "*The Law of Insurance Contracts*" at para. 26-2G. On the basis of the materials brought to my attention, it may be the case that *Clarke* is an outlier on this point. However, I do not believe that it is necessary or appropriate that I should resolve this issue as to onus of proof at this stage. In light of the conflict between the textbook writers, it seems to be that an issue of this kind should be left to the trial. In any event it is not necessary to resolve this issue because, whichever view of the law is correct, it seems to me that it is not necessary that the defendant should be ordered to furnish particulars of this allegation. If the plaintiff is correct and if the onus of proof lies on the defendants to demonstrate that the claim is not maintainable because of a failure to comply with the condition precedent contained in General Condition 2, their non-admission of the allegation made in para. 17 of the statement of claim would not permit the defendants to make such a case at trial. As noted in para. 38(i) above, O. 19 r. 15 makes clear that, if the defendants wish to show that the action is not maintainable for failure to comply with a condition precedent, they would have to distinctly plead this in their defence. A mere non-admission would manifestly not be sufficient for this purpose. A positive case would have to be made setting out the material facts on which the defendants rely. On the other hand, if the trial judge comes to the conclusion that the view expressed by *Clarke* is correct, there is no basis on which the plaintiff would be entitled to particulars of a non-admission. In these circumstances, it does not seem to me to be necessary to make any order in relation to para. 9 of the notice for particulars.

The Ludwig Report

100. As noted in para. 31(d) above, a discrete issue arises in relation to para. 10.2 of the defence (quoted in para. 29 above) insofar as the defendants refer to the Ludwig Report and plead that they propose to rely on it. In my view, the first sentence in para. 10.2 does not give rise to any right to raise particulars. It is, in substance, a denial. It simply provides that the losses claimed are not within the scope of clause 1. That is, in essence, a denial of the claim made by the plaintiff that the losses fall within that clause.

At the hearing of this motion, a debate took place between the parties as to the extent to which it is appropriate for the defendants to refer, in the second sentence of para. 10.2, to the Ludwig Report without specifying the precise aspects of it on which they rely. This is the question which is posed at para. 8.4 of the notice for particulars.

101. In their response to the notice for particulars, the defendants indicated that they intended to rely upon the Ludwig Report in its entirety. They did, however, also say: -

> *"In particular, the Defendants will rely on the various control deficiencies identified therein, including the failure of the back office to confirm bogus options with Asian counterparties, the failure of the back and middle offices to obtain foreign exchange rates from an independent source, inadequate staffing, lack of experienced staff, including in the context of risk assessment and failures on the part of internal audit of treasury operations."*
>
> *Further, as set out in the Ludwig Report, there were various missed opportunities to detect Mr. Rusnak's fraud, including failures by Mr. Rusnak's superiors to appropriately supervise his activity, inadequate responses to issues identified in respect of Mr. Rusnak, the failure to implement, audit and supervisory recommendations, the failure of Mr. Rusnak's adjacent trader to notice his activity, and other matters set out in Ludwig Report."*

102. In my view, the answer given by the defendants to this question is not adequate. In this context, it is important to bear in mind that the Ludwig Report comprises 61 pages of quite detailed material.

103. It is not acceptable for a party to rely in such a general way on a document of this kind without very clearly identifying the specific aspects of the document on which reliance is placed. It must be borne in mind that the defendants here have chosen to put the Ludwig Report in issue in the proceedings. They could have confined themselves to a plea in the terms of the first sentence of para. 10.2 of the defence. They did not do so. Instead, they expressly said that they proposed to rely *inter alia* on the Ludwig Report. That approach is not acceptable for two reasons.

104. In the first place, there is a lack of clarity in the plea insofar as it refers inter alia to the Ludwig Report. If the defendants intend to refer to more than the Ludwig Report, they must identify what other materials they proposed to rely upon. In this context, the plaintiff relies on the approach taken by Finnegan P. in *ASI Sugar Ltd v. Greencore Group PLC* [2003] 2 JIC 1102 where he said: -

> *"…the reply to the notice for particulars is inadequate in that the second sentence… commences with the words "for example". If the Plaintiff wishes to rely on the history of its trading with a company, it must set out the name of that company and it will not be permitted to rely on the words "for example" to introduce the history of its trading with any other company…*

In my view, that principle is equally applicable here.

105. Secondly, it is, in any event, unacceptable to refer to the Report in its entirety. The plaintiff is entitled to require the defendant to be much more specific. In the *ASI Sugar* case Finnegan P. emphasised that the function of pleadings is to define with clarity and precision the issues of fact and law between the parties. Such definition is required to enable each party to have fair and proper notice of the case his/her opponent proposes to make at the trial. In such circumstances, as Finnegan P. said in that case: -

> *"…each party will be enabled to prepare his own case for trial. Discovery can be directed to the issues and the delay and expense thereby incurred minimised: this is particularly important in a case such as the present where discovery even with the issues so defined will be extensive. Further this will enable the court to be aware of the issues before it and the Trial Judge will thereby be better enabled to control the hearing and confine the same within the limits of the pleadings".*

It would entirely undermine that principle if, in a commercial case such as this, the defendants could rely, in such a broad-brush way on a document as long as 61 pages. I appreciate that, in *Ryanair Ltd v. Bravofly*, Clarke J. envisaged that the provision of a specification could serve to answer the request for particulars in that case. However, that was in circumstances where the relevant issue was of a highly technical nature and, in those very particular circumstances, Clarke J. came to the conclusion that, in reality,

the provision of a specification would be necessary. In contrast, the Ludwig Report in this case is a lengthy discursive document. In circumstances where the defendants have chosen to expressly rely on the document, they must, in my view, identify precisely the aspects of the report on which they rely (with appropriate cross-references to the relevant pages of the report). It is entirely unsatisfactory for the defendants to rely on "*the various control deficiencies identified therein, including the failure of the back office to confirm bogus options with Asian counterparties…*" (emphasis added). Similarly, it is unacceptable to say that "as set out in the Ludwig Report, there were various missed opportunities to detect Mr. Rusnak's fraud including failures by Mr. Rusnaks's superiors to supervise his activity…" (again, emphasis added). In my view, the defendants are obliged to provide details of the precise passages in the Ludwig Report on which they intend to rely. In my opinion, it is also essential that these particulars should be provided prior to delivery of the reply by the plaintiff. In order to properly and comprehensively plead to the defence delivered on behalf of the defendants, the plaintiff needs to know what elements of the Ludwig Report are relied upon by the defendants in support of the plea made by them in para. 10.2 of the defence.

Conclusion

106. I will therefore make an order requiring the defendants to furnish the particulars sought in para. 8.4 of the notice for particulars dated 5 March 2018. The particulars to be furnished must include the further particulars sought at paras. 8.4.1-8.4.4 of the Rejoinders dated 23 April 2018. The order will also record the confirmation given by counsel for the defendants in the course of the hearing on 3 October 2018 that no plea is made against the plaintiff in para. 8 of the defence. Save to that extent, the relief sought in the plaintiff's notice of motion dated 13 June 2018 is refused.

107. If required, I will, of course, hear the parties in relation to costs. However, my initial view (subject to hearing the parties), is that, since neither party has been entirely successful in this motion, the most appropriate order to make would be to direct that costs should be costs in the cause.

108. This judgment is intended to apply not only to the above entitled proceedings but also the related proceedings record numbers 2014 no 2794p, 2017 no 2796p and 2017 no 2797p in which identical issues arise. The same order will be made in each case.