THE COURT OF APPEAL
CIVIL

[Approved]
[No Redaction Needed]
Appeal Nos. 2023/222, 2023/199,
2023/210, 2023/215, 2023/227
Neutral Citation Number [2023] IECA 273

Costello J.
Allen J.
O'Moore J.

BETWEEN/

(1) SMBC AVIATION CAPITAL LIMITED,
(2) GLOBAL AVIATION EQUIPMENT LEASING IRELAND LIMITED,
AND
(3) WILMINGTON TRUST SP SERVICES (DUBLIN) LIMITED

PLAINTIFFS/RESPONDENTS

-AND-

(1) LLOYD'S INSURANCE COMPANY S.A.,
(2) HDI GLOBAL SPECIALTY S.E.,
(3) SWISS RE INTERNATIONAL S.E., NIEDERLASSUNG DEUTSCHLAND,
(4) CHUBB EUROPEAN GROUP S.E.,
(5) FIDELIS INSURANCE IRELAND D.A.C.,
(6) GLOBAL AEROSPACE UNDERWRITING MANAGERS (EUROPE) SAS,
(7) GREAT LAKES INSURANCE S.E.,
(8) AIG EUROPE S.A.,
(9) SCOR EUROPE S.E.,
(10) STARR EUROPE INSURANCE LIMITED,
AND
(11) MITSUI SUMITOMO INSURANCE COMPANY LIMITED

-AND BY ORDER-

(12) GREAT LAKES INSURANCE SE,
(13) BERKSHIRE HATHAWAY EUROPEAN INSURANCE DESIGNATED ACTIVITY COMPANY,
(14) TOKIO MARINE EUROPE S.A.
(15) MAPFRE ESPANA COMPANIA DE SEGUROS Y REASEGUROS S.A.,
AND

(16) MSIG INSURANCE EUROPE A.G.,
ALL UNDERWRITING THROUGH AND AS PART OF THE GLOBAL AEROSPACE UNDERWRITING MANAGERS (EUROPE) SAS POOL

DEFENDANTS/APPELLANTS

Appeal Nos. 2023/220, 2023/198, 2023/206, 2023/231, 2023/213

BETWEEN/

(1) BOC AVIATION (IRELAND) LIMITED,
(2) BOC AVIATION LIMITED,
(3) SILVER AIRCRAFT LEASING (IRELAND) 2 LIMITED,
AND
(4) WILMINGTON TRUST SP SERVICES (DUBLIN) LIMITED

PLAINTIFFS/RESPONDENTS

-AND-

(1) LLOYD'S INSURANCE COMPANY S.A.,
(2) BERKSHIRE HATHAWAY EUROPEAN INSURANCE DESIGNATED ACTIVITY COMPANY,
(3) CHUBB EUROPEAN GROUP SE,
(4) CONVEX EUROPE S.A.,
(5) FIDELIS INSURANCE IRELAND DESIGNATED ACTIVITY COMPANY,
(6) HDI GLOBAL SPECIALTY SE,
(7) GREAT LAKES INSURANCE SE,
(8) STARR EUROPE INSURANCE LIMITED,
(9) SWISS RE INTERNATIONAL SE,
(10) AXIS SPECIALTY EUROPE SE,
(11) SIRIUSPOINT INTERNATIONAL INSURANCE CORPORATION (PUBLIC),
(12) GENERALI IARD S.A.,
(13) HELVETIA ASSURANCES S.A.,
(14) MMA IARD S.A.,
(15) SMA S.A.
(16) AIG EUROPE S.A.,
(17)TOKIO MARINE EUROPE S.A.,
(18) MAPFRE ESPANA COMPANIA DE SEGUROS Y REASEGUROS S.A.,
(19) MSIG INSURANCE EUROPE A.G.
AND
(20) PING AN PROPERTY & CASUALTY INSURANCE COMPANY OF CHINA LIMITED

DEFENDANTS/APPELLANTS

Appeal Nos. 2023/219, 2023/197, 2023/209,
2023/216, 2023/226, 2023/224

BETWEEN/

(1) CDB AVIATION LEASE FINANCE DESIGNATED ACTIVITY COMPANY,
(2) GY AVIATION LEASE 1818 CO., LIMITED,
(3) GY AVIATION LEASE 1830 CO., LIMITED,
(4) GY AVIATION LEASE 1817 CO., LIMITED,
(5) GY AVIATION LEASE 1852 CO., LIMITED,
(6) GY AVIATION LEASE 1702 CO., LIMITED,
(7) GY AVIATION LEASE 0906 CO., LIMITED,
(8) GY AVIATION LEASE 1856 CO., LIMITED,
(9) GY AVIATION LEASE 1712 CO., LIMITED
AND
(10) GY AVIATION LEASE 1713 CO., LIMITED

PLAINTIFFS/RESPONDENTS

- AND -

(1) LLOYD'S INSURANCE COMPANY S.A.,
(2) CHUBB EUROPEAN GROUP SE,
(3) SCOR EUROPE SE,
(4) GLOBAL AEROSPACE UNDERWRITING MANAGERS LIMITED,
(5) GLOBAL AEROSPACE UNDERWRITING MANAGERS (EUROPE) SAS
(6) GREAT LAKES INSURANCE SE,
(7) BERKSHIRE HATHAWAY EUROPEAN INSURANCE DAC,
(8) TOKIO MARINE EUROPE S.A.,
(9) MAPFRE ESPANA, COMPANIA DE SEGUROS Y REASEGUROS, S.A.
(10) MSIG INSURANCE EUROPE AG,
(11) HDI GLOBAL SPECIALTY SE,
(12) SWISS RE INTERNATIONAL SE,
(13) FIDELIS INSURANCE IRELAND DESIGNATED ACTIVITY COMPANY
(14) STARR EUROPE INSURANCE LIMTIED,
(15) SWISS RE INTERNATIONAL SE,
(16) AXIS SPECIALTY EUROPE SE,
(17) HDI GLOBAL SPECIALTY SE,
(18) PICC PROPERTY AND CASUALTY COMPANY LIMITED,
(19) PING AN ROPERTY & CASUALTY INSURANCE COMPANY OF CHINA,
(20) CHINA PACIFIC PROPERTY INSURANCE CO LTD,
AND
(21) TAIPING GENERAL INSURANCE ZHEJIANG BRANCH CO LTD.

DEFENDANTS/APPELLANTS

JUDGMENT of Ms. Justice Costello delivered on the 9th day of November, 2023

Introduction

1. The fallout of the Russian invasion of Ukraine on 24 February 2022 has been immense and felt throughout the world. These six related groups of cases are just part of that fallout. In these proceedings, the plaintiffs (hereinafter *"the respondents"*) allege that they are the owners of aircraft and aircraft assets (hereinafter *"the aircraft"* or *"the aircraft assets"*) which were leased to Russian lessees, and which have not been returned to them following the invasion of Ukraine. They allege that they remain in Russia despite the fact that they are entitled to their return. The respondents claim under various policies of insurance for the loss of the aircraft assets. The coverage provided by the insurance was in the first instance *"all risks"* coverage which excluded identified *"war risk perils"*. Coverage for the excluded war risk perils was provided separately, in some cases in another section of a single policy, in others in a second and separate policy. The war risks insurers retained a power to review the geographic scope of the war risks coverage upon serving notice to the insured. They were permitted to exclude certain territories from the ambit of the coverage by serving notice on the insured. The insured could then accept the review or reject it. If it was accepted, the coverage would continue outside the excluded territory. If they did not accept it, the coverage would terminate entirely.

2. The respondents in the six sets of proceedings are Irish aircraft lessors. Until early 2022, each had leased aircraft to Russian airlines. They claim that following the invasion and the introduction of sanctions by the European Union, the United Kingdom, and the United States of America, they terminated the leases and sought the return of the aircraft. The vast majority of the aircraft have been unlawfully retained in Russia.

3. The respondents each make the primary case that Russian state and political actors determined that foreign leased aircraft, including the aircraft assets, would not be returned to foreign lessors, including the respondents. They plead that in late February and early March 2022 a series of measures had been formulated and were being implemented to ensure that despite foreign lessors' demands and notices of termination, foreign leased aircraft, including the aircraft assets, would not be permitted to be returned to foreign lessors, including the respondents. The respondents each claim in the alternative that, if the losses were not caused by one or more war risk perils, they are entitled to cover under the all risks policies on the grounds that the aircraft assets have been lost by reason of the occurrence of one or more war risks perils and that they are therefore entitled to claim under the war risks cover.

4. Following the invasion of Ukraine, the appellants served a number of notices to review geographic limits under the various policies (hereinafter *"the notices"*). The first such notice was allegedly served on 1 March 2022 and gave seven days' notice of the exclusion of Russia and Ukraine from coverage in respect of war risks. The appellants say that in consequence, war risks coverage extending to Russia expired on 8 March 2022 (or various later dates). The appellants deny that the war risks cover is engaged for a variety of reasons. In particular, they say, that if the aircraft assets have been lost, this did not occur before notices of geographic variation issued by or on behalf of the insurers to exclude cover with respect of Russia and Ukraine took effect.

5. In response, the respondents rely on the *"grip of the peril"* doctrine – a doctrine established in English law derived from marine insurance – arguing that even if the aircraft were not lost until after cover was excluded in respect of Russia by the service of the various notices, they were in the grip of one or more insured peril and as such they are entitled to indemnity for the losses.

6. While there is a considerable degree of overlap in the six sets of cases, nonetheless there are significant differences between the claims and the pleadings in the six sets of cases. The six groups of cases are being closely case-managed in the Commercial List of the High Court. The High Court directed that for the purpose of seeking to identify and agree the parameters of discovery, the parties should agree a list of the issues arising in any of the pleadings in any of the cases. Once this was done, the agreed list of issues, rather than the pleadings, would form the basis for seeking and agreeing categories of discovery to be made, though in a case of dispute, the issue would have to be decided by reference to the pleadings rather than the list of issues.

7. As part of this case-managed discovery process, several meetings of counsel were held to try to reach consensus on categories of discovery. Where this could not be achieved, the disputed categories were referred to the court for resolution. The details of this bespoke process and its relevance to the issues on the appeal will be discussed further below. The High Court heard the claims in relation to the unresolved categories of discovery over two days and gave *ex tempore* rulings in respect of each disputed category. Thus, the categories of discovery to be made by the parties have been determined, either by agreement of the parties or by order of the court, save in respect of the single category which is the subject of these appeals.

8. McDonald J. in the High Court directed the appellants to make discovery of category 1(ii)(b) as follows:-

> *"All documents evidencing any discussion or consideration of proposed or actual Notices of Cancellation in respect of the Aviation Assets or any of them in respect of Russia, Ukraine, Crimea/Republic of Crimea and/or/Belarus (including as to the validity, effect, rectification and/or clarification of any purported notice).*
>
> *Temporal period 1 February 2022 to 31 March 2022"*

Each of the appellants has appealed this order in their respective cases. This judgment is in respect of all thirty-three appeals.

The decision of the High Court

9. The trial judge first considered whether the category was relevant to an issue in the proceedings. He rejected the argument that it was relevant to the issue of good faith as no issue as to good faith had been raised in the pleadings in relation to the services of the notices by the insurer.

10. He then referred to *"the other issue"* to which the category was said to be relevant, though in fact it had been said to be relevant to two other issues, and he did not address the second of these. McDonald J. identified what he had described as the other issue *"in very broad terms"* as whether *"the aircraft were already in the grip of the peril at the time the notices…were served"*. He said this was not an area an Irish court had ever had to address its mind to, and this was a matter to be borne in mind in considering whether discovery should be made.

11. He quoted the passage from Arnould on *Law of Marine Insurance and Average (19th Edition)* in relation to the doctrine of the grip of the peril which had been opened to him. He noted that *"a question would arise as to whether it could be applied to the insurance in issue here"* and held that this was not an issue he could determine on the application for discovery.

12. The judge rejected the argument that the category was not necessary because the appellants had agreed to make discovery of categories 1(ii)(a) and (c). Those categories were:-

> *"(a) Documents which evidence or record whether or not any entity which purported to service notices to review geographical limits had authority to do so on its own behalf or on behalf of any other entity or entities.*
>
> …

(c) Copies of all purported Notices to review geographical limits purportedly served on the plaintiffs and all communications between the plaintiffs and the defendants or between the defendants and the plaintiffs' brokers, in respect of the purported Notices to Review (proposed or actual) and/or any endorsement proposed in respect of the purported Notices to Review."

13. The trial judge held that neither of these two categories would address the internal documents of the appellants *"which would identify what their subjective thinking was at the time the Notices were served."*

14. He considered the appellants' *"fundamental"* objection, which was that the category of documents was irrelevant to the court's assessment of whether an insured peril had occurred *"was an entirely objective exercise"*. The appellants had relied upon the decision of the Court of Appeal of England and Wales in *Campbell Scott v. Copenhagen Reinsurance Company* [2003] EWCA Civ 688, [2003] Lloyd's Rep. I.R. 696 as authority to support this proposition. The trial judge accepted that the English High Court had addressed the question of when the loss had actually occurred in that case *"in a purely objective way"* but went on to say:-

"... I don't think the decision can be relied on as authority, definitive authority for the proposition that one can never have regard to subjective material in determining whether an asset was or was not in the grip of the peril at the time an event occurred. And I do draw attention to the fact that, in para. 79 of the judgment of Lord Justice Rix in the Court of Appeal, he expressly said the case was not argued on the basis of the grip of the peril doctrine.

So, in those circumstances, I don't believe that the decision can be relied upon, as I have said, in providing a definitive guidance that subjective material can never be relied upon…"

15. The judge noted that, quite apart from authority, the appellants had argued that as a matter of principle the only way in which a court can determine whether a total loss has or has not occurred is on the basis of entirely objective material. He said:-

"And I do see very considerable force in that submission, and it is a submission which may well succeed at the trial of the action, but the question that I have to address today is whether I can be satisfied, today, that there is no basis on which the subjective understanding or belief of the insurers is irrelevant and inadmissible in determining whether or not these aircraft were in the grip of the peril…"

16. The reason McDonald J. held he had to be satisfied today that there was no basis upon which the subjective understanding or belief of the insurers is irrelevant and inadmissible in relation to that question is because, where there is a legal dispute of this nature, it is not for a court hearing an application for discovery to rule on those issues as a basis for either ordering or refusing discovery. He quoted from the judgment of Holland J. in *Chubb European Group SA v. Perrigo Company plc* [2022] IEHC 444, para. 105:

"Save perhaps as to simple and clear issues, it is not generally appropriate at discovery stage to determine, for the purpose of deciding whether documents should be discovered, issues of law or fact to be contested at trial – including issues as to admissibility of evidence. In [*Wheelock v. Promontoria (Arrow) Ltd.* [2021] IECA 71] *Haughton J allowed discovery refused by the High Court on the basis that:*

'the trial judge… erred in his approach to relevance in preferring one view of the law, where that view is contested and an alternative view was put forward will be argued before the court of trial...'"

17. McDonald J. concluded on the basis of these two authorities that:-

> *"So that suggests that, unless it can be shown definitely, today, that there is no basis on which the subjective understanding of insurers is relevant to the grip of the peril theory, that the fact that it may appear unlikely that a court at trial would have any regard to material of this kind, is not, of itself, an answer to an application for discovery which is made, of course, at a stage when a judge hearing such an application has not determined any of the issues to be determined at trial, and I have to bear in mind that the grip of the peril doctrine is one that is very much untested in this jurisdiction and I cannot predetermine at this stage what the parameters of the doctrine are in the event that a trial judge determines that the doctrine is applicable to a case of this kind."*

18. He also borne in mind that *"this material, potentially being relevant to an issue on the pleadings, the only way the plaintiffs can get access to this material…is through discovery"*. He therefore concluded that discovery was necessary in respect of this category. He noted that the temporal period was short (from 1 February 2022 to 31 March 2022) and said he did not believe it would be unduly burdensome for the appellants to make discovery in the terms sought.

19. McDonald J. rejected the objection that, having refused the appellants discovery they had sought in terms of category 7(b) of their application for discovery, he ought to reject what the appellants contended was a mirror category of discovery sought by the respondents. Category 7(b) of the appellants' request related to a plea of estoppel. The judge found that the doctrine of estoppel is well established: a party should be estopped from asserting the contrary to what had been *conveyed* to another party. Therefore, internal communications *not conveyed to the other side* could not be relevant to a plea of estoppel. He contrasted this with the grip of the peril doctrine, and he concluded his ruling:-

"For the reasons which I have outlined, it seems to me that the grip of the peril doctrine, that the parameters of that simply haven't been established in this jurisdiction and no sufficient authority is available to me today to allow me to form the view that there is no basis at all, ever, on which any party could ever establish or, in particular, the plaintiffs here could ever establish that the subjective understanding of the insured is relevant to the grip of the peril."

20. For these reasons, he directed the appellants to make discovery of the disputed category.

A synthesis of the issues in the Notices of Appeal

21. Thirty-three notices of appeal were filed on behalf of the thirty-three appellants in the six sets of cases. The following emerge as the issues upon which the appellants assert that the trial judge erred and this Court ought to disallow discovery of this category of documents.

- The trial judge reversed the burden of proof in respect of the category.
- The subjective views of insurers cannot be relevant to whether the aircraft were in the grip of the peril.
- Where the doctrine applies, the doctrine of the grip of the peril is established and not uncertain and the trial judge erred in his application of *Chubb* and *Wheelock.*
- The respondents' contention that the parameters of the doctrine is uncertain is no more than mere assertion and is unsupported by authority. Therefore, *Chubb* and *Wheelock* did not apply in the circumstances of this case.
- The application amounts to impermissible fishing in support of an un-pleaded allegation of breach of good faith.
- The category should be refused on a reciprocal basis because the High Court refused category 7(b) of the appellants' request for discovery.

- The fact that documents may potentially be relevant is not a sufficient basis upon which to order discovery of the category.

22. The respondents' notices plead that the High Court was entitled to conclude that discovery of the category was relevant and necessary because it was relevant *"to the disputed issues of whether the defendants were precluded from serving a purported Cancellation Notice (as defined in the plaintiffs' Statement of Claim) and/or whether any such purported Cancellation Notice was valid and effective to exclude cover in circumstances where an insured peril had gripped the aircraft before the notice purported to take effect. In particular:*

> *(iv) Documents evidencing discussions or consideration regarding Purported Cancellation Notices are relevant to these disputed issues. It is reasonable to suppose that such documents contained information which may directly or indirectly advance the plaintiffs' case or undermine the defendants' case*
>
> *…*
>
> *(vi) Disputes regarding the precise scope of the grip of the peril doctrine, and the entitlement of insurers to serve Purported Cancellation Notices after an insured peril had occurred, and the types of documents that are admissible on these issues, cannot be decided on a Discovery Motion. They are matters which must be determined at trial."*

23. The respondents also rely on their second argument – upon which the High Court did not rule – regarding authority to serve Notices of Cancellation and plead that the category is important in ensuring *"that the case presented by the defendants is not inconsistent with the documentation that the defendants hold regarding purported Cancellation Notices, i.e., 'keeping the parties honest'"*. The notices traverse the various grounds of appeals which I have summarised above.

Discussion

24. It is accepted by all parties that this appeal is not a rehearing of the application for discovery and that this court ought not to interfere with the order of the High Court unless the order under appeal is *"outside the range of any order which could reasonably have been made."* The central issue in this appeal is whether the category of discovery sought is relevant to an issue or issues in the proceedings. If it is, it is not seriously contended that discovery would be both necessary and proportionate and accordingly ought to be ordered. It will be necessary to consider the pleadings in detail as the issues in the case are defined by the pleadings and there is a serious dispute between the parties concerning the pleaded case of the appellants.

25. Relevance in the context of an application for discovery is to be assessed by reference to the issues in the case and they are determined by the pleadings in the case. In agreeing the list of issues, all parties reserved the right to refer to the particular pleadings in their particular cases because the cases have been pleaded in slightly different ways.

26. In the case in which SMBC Aviation Capital Limited *("SMBC")* is plaintiff, Lloyd's Insurance Company S.A. *("Lloyds")* delivered a defence which *inter alia* denied that any alleged war risks peril occurred or that alleged total loss of the aircraft was sustained by the time of the activation of the notices. SMBC delivered a reply. Para. 14 reads as follows:

> *"14.1. It is denied that any of the Purported Cancellation Notices (which term as used herein means the Purported Cancellation Notices as defined in the Statement of Claim or in any of them) were effective in excluding cover for any of the Plaintiffs' loss and damage.*
>
> *14.2. Without prejudice to the foregoing, and for the avoidance of doubt:*
>
> *(i) on the true construction of the War Risks Policy, alternatively pursuant to a term to be implied therein; and/or*

(ii) on the true construction of the relevant notices and response thereto; and/or

(iii) as a matter of law:

the War Risks Insurers were not entitled to deliver any such notices or otherwise to seek to effect any cancellations or alterations to cover in respect of Russia or any aircraft in Russia or in respect of the Aircraft for the purposes of excluding cover and/or any such notices, cancellations or alternations were not thereby valid and effective to exclude cover where:

(a) a War Risks Peril or Perils had already incepted in the region to which the purported variation of geographical limits relates and/or in respect of the Aircraft before any Purported Cancellation Notice took or purported to take effect; or

(b) further or in the alternative, loss or damage had already occurred to the Aircraft before any Purported Cancellation Notice took or purported to take effect; or

(c) further or in the alternative, loss or damage occurred to the Aircraft thereafter but which were caused or contributed to by the War Risks Peril or Perils which had already been incepted and/or begun to operate on the Aircraft and/or which the Aircraft were already affected by or in the grip of before any Purported Cancellation Notice took or purported to take effect; or

(d) further or in the alternative, loss or damage occurred to the aircraft thereafter but which incepted while the Aircraft were outside the control of the Plaintiffs by reason of any War Risks Peril or Perils which had already incepted and/or begun to operate on the Aircraft

or in Russia and/or which the Aircraft were already affected by or in the grip of before any Purported Cancellation Notice took or purported to take effect." [Emphasis added].

27. In a rejoinder delivered on 5 July 2023 Lloyds denied that the war risks insurers were not entitled to deliver any cancellation notices or that any such notices, cancellations or alterations were not thereby valid and effective to exclude cover by reason of any of the matters pleaded at para. 14.2 (a) - (d) of the reply. Lloyds required strict proof of the allegation that a war risks peril or perils had already incepted in the region to which the variation of geographical limits related and/or in respect of the aircraft before any purported cancellation notice took effect. They similarly traversed the allegations in sub-paras. (b), (c) and (d).

28. By these pleas the respondents have put in issue the entitlement of the war risks insurers to deliver the notices or to seek to effect any cancellations of or alterations to the cover in respect of Russia or any aircraft in Russia where a war risk peril or perils had already incepted in the region to which the purported variation of geographical limits relate and/or in respect of the aircraft (as defined) before any purported cancellation notice took effect or purported to take effect. They similarly put in issue the pleas that any such notices, cancellations or alterations were not valid and effective to exclude cover in the circumstances. These pleas were traversed by the appellants in their rejoinders and the respondents were put on strict proof of whether or not such peril or perils had already incepted in the region and/or in respect of the aircraft before any notice took or purported to take effect. Thus, whether as a matter of fact the peril had incepted, and the aircraft were in the grip of the peril is an issue in the case. But so also is whether the appellants were entitled to deliver the notices where the peril had already incepted in the region and/or in respect of the aircraft before any notice took or purported to take effect.

29. In the list of issues prepared jointly by all the parties on 18 July 2023 for the purposes of the presentation and argument of the respective motions for discovery, Issue 29 is identified as:

> *"(a) What were the measures, communications, orders and expectations (including tacit orders) in Russia in respect of the Aviation Assets/Foreign Leased Aircraft?*
>
> *(b) What were the effect(s) and/or understanding(s) of same".*

30. Other issues identified are whether War Risks Perils A, C and/or E occurred, and if they did, when did that peril or perils incept/occur? And whether the concept of *"grip of the peril"* applies.

31. Two questions now fall for consideration. Firstly, whether the category of documents as sought could be relevant to the issues identified above and, secondly, whether the respondents have abandoned the argument which found favour in the High Court and are seeking to uphold the decision of the High Court on a basis which was not advanced to the trial judge and which is diametrically opposed to their previous position such that they ought not to be permitted to rely on these arguments.

Relevance: the test

32. As was recently stated by Collins J. speaking for this Court in *Ryan v. Dengrove DAC* [2022] IECA 155:

> *"46. ... the primary test continues to be whether the documents sought are relevant to the issues in the proceedings. The touchstone of relevance continues to be the oft-cited formula offered by Brett L.J. in Peruvian Guano.*
>
> *...*
>
> *53. ... there are some additional points to be made about the approach to discovery generally. They can be stated briefly:*
>
> - *Relevance is to be assessed by reference to the pleadings and particulars.*

- *Relevance must be demonstrated as a matter of probability. 'It is not for the Court to order discovery simply because there is a possibility that documents may be relevant': Hannon v Commissioner of Public Works* [2001] IEHC 59 *(per McCracken J. at pages 3).*
- *It follows that a party 'may not seek discovery of a document in order to find out whether the document may be relevant' and 'must demonstrate that it is reasonable for the court to suppose that the documents contain relevant information.' (O'Brien v. Red Flag Consulting Limited* [2017] IECA 258]*"*

33. The test in *Compagnie Financiere du Pacifique v. Peruvian Guano Co.* (1882) 11 Q.B.D. 55 remains the test of relevance for applications for discovery. Brett L.J. stated:-

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

The Pleadings

34. The respondents' notices filed in each appeal first set out general grounds why the High Court was entitled to take the view that the discovery of the category was relevant and necessary. In para. 3(a) the respondents plead:-

> *"Category 1(ii)(b) is relevant, <u>firstly</u>, to the disputed issues of whether the defendants were precluded from serving a Purported Cancellation Notice (as defined in the plaintiff's Statement of Claim) and/or whether any such Purported Cancellation Notice was valid and effective to exclude cover in circumstances where an insured peril had gripped the aircraft before the notices purported to take effect. In particular:*

(iv) documents evidencing discussions or consideration Purported Cancellation Notices are relevant to these disputed issues. It is reasonable to suppose that such documents contain information which may directly or indirectly advance the plaintiffs' case or undermine the defendants' case.

…

(vi) disputes regarding the precise scope of the grip of the peril doctrine and the entitlement of the insurers to serve the Purported Cancellation Notices after an insured peril had occurred, and the types of documents that are admissible on these issues, cannot be decided on a discovery motion. They are matters which must be determined at trial."

35. The wording in (iv) clearly engages the test of relevance laid down in *Peruvian Guano* though the case is not expressly referred to. Sub-paragraph (vi) expressly relies upon the scope of the grip of the peril doctrine and the entitlement of the appellants to serve the disputed notices.

36. In their response to the appeal by Lloyds, at para. 5(a)(ii), the respondents plead:-

"Based on first principles and as a matter of logic, contemporaneous statements or consideration by insurers, their employees or agents as to whether the Aircraft were in the grip of an insured peril are relevant evidence on the issues in dispute. There is no rule of law or evidence excluding evidence of that nature."

Thus, the relevance of the category is said to be based upon first principles and logic. In this case, first principles presumably means the first principles governing discovery.

The respondents' submissions

37. In their written submissions on the appeal the respondents expand on their contention that the category of document sought is relevant to issues in the proceedings in the *Peruvian Guano* sense of relevance. At paras. 49 and 50 the respondents submit:

"49. In addition, it is important to emphasise that the respondents fully agree with the appellants' position that:

(i) The operation of the 'grip of the peril' doctrine, assuming it applies, is not in any way affected by any of the parties' subjective knowledge or understanding; and

(ii) Whether an insured peril had occurred or 'gripped' must be assessed by reference to evidence about the factual situation in Russia on the relevant dates.

However, in the respondents' submission, it does not follow that contemporaneous statements by the insurers about that factual situation are irrelevant, inadmissible or incapable of undermining the defendants' case.

50. In particular, it is submitted that contemporaneous communications and other documents – both between the relevant insurers, syndicates and other entities involved in sending the notices, and within the defendants – regarding the notices are relevant (in the Peruvian Guano sense) to two distinct aspects of these pleaded issues:

(i) Firstly, the documents may contain information which advances the plaintiffs' case or undermines the defendants' case, on the factual issues relevant to whether an insured peril had occurred or 'gripped' the aircraft by the time the notices were served.

(ii) Secondly, the documents may contain information which advances the plaintiffs' case, or undermines the defendants' case on the separate but related question of whether the insurers were entitled to cancel cover for Russia, assuming an

insured peril had occurred or gripped the aircraft before the notices were served or took effect." [Emphasis added].

38. The point was further addressed at para. 93 of the respondents' written submissions where – having referred to *Scott v. Copenhagen, Knight v. Faith* (1850) 15 Q.B.D. 649 and *Kuwait Airways Corporation v. Kuwait Insurance Co.* [1996] 1 Lloyd's Rep. 664 – it was said that:-

"None of these cases, however, addresses the actual point in dispute, i.e., whether one party's contemporaneous statements regarding the occurrence of an insured peril or the facts relevant to the occurrence of a peril may contain information which damages that party's case on whether the insured peril occurred. That issue has never previously arisen in Ireland or, to the plaintiffs' knowledge, in England." [Emphasis added].

39. At para. 95 they also submit that the category is relevant to the question of "*whether, assuming, it is established that the aircraft were in a grip of an insured peril (as the plaintiff say it will be), the defendants were nevertheless entitled to serve notices cancelling cover."* [Emphasis added].

40. In oral submissions, counsel for the respondents submitted that the category of documents was *"unarguably relevant in the Peruvian Guano sense"* both to the grip of the peril argument and to what was described in a shorthand way as the *"authority proposition"*. It was submitted that it was never truly contested that the category of discovery was relevant in a *Peruvian Guano* sense, that it was a category which will *"encompass documents which may, not must, contain material which will either advance the plaintiffs' case or harm the defendants' case directly or indirectly"*. It was accepted that it was *"probably correct"* that whether or not a peril had incepted was a matter of objective fact. But that did not mean that discovery was not relevant as:-

"that is to conflate the inception of a peril on the one hand with evidence that might [be] led to demonstrate the existence of an objective fact or to identify information relevant to that consideration, or to lead to a line of enquiry."

41. Counsel emphasised that the admissibility of evidence at trial should not be conflated with relevance for the purposes of discovery, citing the decision of Holland J. in *Chubb European Group SE v. Perrigo Co. plc* [2022] IEHC 444. He relied on para. 112 of the judgment where Holland J. held that:-

"…an applicant for discovery would have to prove a probability that the documents sought may contain relevant information – information relevant in that it "may – not must - either directly or indirectly' confer litigious advantage."

42. Counsel submitted that it is sufficient to justify an order for discovery of a category of documents if that category can *"indirectly assist me or undermine my friend's case and that is either through lines of enquiry or because it demonstrates factual information – or indeed it may further still in terms of specifically identifying a state of affairs upon which the notices were issued."*

43. When asked whether the argument presented to the Court of Appeal was impermissibly different to that presented to the High Court, counsel for the respondents submitted that there was *"perhaps different nuance to the argument we make today. It is certainly more detailed, with perhaps a slightly greater focus on Peruvian Guano, but it is fundamentally the same argument."*

44. It is unsurprising that, in this appeal, arguments were more developed and detailed than was the case in the High Court. As is set out later in this judgment, the capacity to make submissions was inevitably more limited at first instance than on appeal.

Decision on relevance

45. The test of relevance in respect of categories of discovery as set out in *Peruvian Guano* is a broad test. In my judgment the documents captured by this category probably will contain references to the authors' understanding of or information about events unfolding in Russia, Crimea and Belarus and the responses or anticipated responses thereto of relevant actors; including the lessees of the aircraft, the Russian authorities including the Civil Aviation Authority or other governmental or regulatory authorities. Such information, it seems to me, is relevant to the trail of enquiry test provided in *Peruvian Guano*. It may assist in the enquiries and investigations of the experts whom the respondents will instruct to give evidence on their behalf as to whether a war risks peril or perils had incepted at the relevant time or times. This is underscored by the description of Issue 29 in the Issue Paper cited above which expressly references measures, communications, orders and expectations in Russia and the effects and understandings of same.

46. It may also assist the respondents in undermining the assertions of the appellants that the peril had not gripped. It is not disputed that the invasion commenced on 24 February 2022. The earliest date on which a notice was served is 1 March 2022. A variety of notices were served in the days following. In some instances, more than one notice purporting to limit the geographical scope of the cover was allegedly served on behalf of an individual insurer. The appellants assert that there is considerable confusion in relation to the notices. The court is entitled to have regard to the fact that the appellants must have sought information regarding the unfolding state of affairs in Russia and any developments which might impact upon the risk and the insured assets. There is uncontroverted evidence that the insurers may have their own sources of information and intelligence in addition to that which may be in the public domain. It is reasonable to suppose that this intelligence fed into the decision or decisions to serve the notices at issue in these proceedings and that the notices

were served because of the perceived risks arising from the unfolding events. Thus the communications preceding the service of any of the notices may contain information which may assist the respondents in their inquiries about those unfolding events and the responses of the various actors to the developments. This, in my opinion, squarely brings this category of documents within the test in *Peruvian Guano*.

Is it open to the respondents to argue on the appeals that the category is relevant by reference to Peruvian Guano?

47. As already stated, the appellants strenuously objected to this argument being advanced at this stage in the proceedings on the grounds that it was not how the application unfolded in the High Court and that the respondents have now adopted before this Court a diametrically opposed position to that maintained in the High Court. They contend that this was impermissible as the appeal is not a rehearing of the application and the respondents are precluded from advancing a new argument, *a fortiori* one which is diametrically the opposite of the argument pressed in the High Court, having regard to the decision of the Supreme Court in *Lough Swilly Shellfish Growers Co-Operative Society Limited v. Bradley & Ors* [2013] 1 I.R. 227.

48. O'Donnell J. (as he then was) addressed the constitutional requirements of an appeal to the Supreme Court and the degree to which new arguments could be introduced. At para. 28 he observed that the precise format and procedure of an appeal is not dictated by the Constitution and that while the object of an appeal as required under the Constitution is often best achieved by a careful analysis of the argument in the High Court and the High Court's adjudication of that argument, that does not mean that the appeal must always be limited to that process. He held as follows:-

> *"There is a spectrum of cases in which a new issue is sought to be argued on appeal. At one extreme lie cases such as those where argument of the point would necessarily*

involve new evidence, and with a consequent effect on the evidence already given (as in K.D. (otherwise C. v. M.C. [1985] I.R. 697 *for example); or where a party seeks to make an argument which was actually abandoned in the High Court (as in Movie News Ltd. v. Galway County Council* (Unreported, Supreme Court, 25th July, 1977)*); or, for example where a party sought to make an argument which was diametrically opposed to that which had been advanced in the High Court and on the basis of which the High Court case had been argued, and perhaps evidence adduced. In such cases leave would not be granted to argue a new point of appeal. At the other end of the continuum lie cases where a new formulation of argument was made in relation to a point advanced in the High Court, or where new materials were submitted, or perhaps where a new legal argument was sought to be advanced which was closely related to arguments already made in the High Court, or a refinement of them, and which was not in any way dependent upon the evidence adduced. In such cases, while a court might impose terms as to costs, the court nevertheless retains the power in appropriate cases to permit the argument to be made."*

49. In *Ambrose v. Shevlin* [2015] IESC 10 at para. 4.14 Clarke J. (as he then was) elaborated on the spectrum as follows:-

"The reason why there is a spectrum of cases, as identified by O'Donnell J. in Lough Swilly, is because the balance between those two competing factors may give different results depending on the type of case concerned. Where, for example, there is 'a new legal argument ... closely related to arguments already made in the High Court' ... 'and which is not in any way dependent upon the evidence adduced', then prejudice may be non-existent or slight, a retrial unnecessary, and the strength of the argument which concerns encouraging people to put their whole case before the court may be reduced. In such a circumstance, the justice of the case may permit an argument of the

type identified to be raised for the first time on appeal because the interests of seeking to do justice on the facts of the individual case may outweigh the other weighty considerations which I have sought to identify. On the other hand, a case which would 'necessarily involve new evidence' will place much greater weight on the side of the equation which lies against permitting a new point to be raised for the first time on appeal. The risk of real prejudice will be significant. The prospects of a new trial difficult to avoid. The need to encourage a party to bring forward its full case at trial will carry more weight." [Emphasis added].

50. At para. 4.21 he continued:

"It must be strongly emphasised that a trial in the High Court is not a dress rehearsal. It is at the trial that the rights, obligations and liabilities of parties are to be definitively determined. There may be cases where, as O'Donnell J. pointed out in Lough Swilly, it may strictly speaking be the case that a particular point was not raised in the High Court, but where the relevant point does not involve any different facts to those which were relevant to the issues which were raised, and where the point may be regarded as a refinement of, or analogous to, one made at trial. In such cases, the justice of the case may require that a party should be allowed to adjust their case on appeal. To take an over-technical approach to the issues being raised for the first time on appeal would bring a disproportionate risk of injustice in the individual case. But to allow a party to reinvent their case on appeal in circumstances where major legal issues are sought to be raised for the first time, and where the facts which might be relevant to those legal issues were not necessarily fully explored in the High Court, would in itself be an injustice." [Emphasis added].

51. When considering where on the spectrum the refinement or nuance of the argument (per the respondents) or downright *volte-face* (per the appellants) the respondents' argument

should be placed, it is important to bear in mind the manner in which the issues of discovery were pursued in these related proceedings. The disputed category is the one remaining sub-category of discovery in dispute out of 33 categories of discovery sought by the respondents from the appellants and 34 categories sought by the appellants from the respondents. The discovery process in these case-managed related cases was bespoke. The usual exchange of letters seeking voluntary discovery and affidavits grounding the application for discovery were dispensed with in favour of the bespoke process directed by the court. Discovery was to be sought by reference to any of the issues raised in any of the proceedings. To facilitate this, intensive meetings between counsel were arranged to identify issues across all of the proceedings. For the purposes of the joint discovery application, an issue paper identifying all issues occurring in any of the cases was jointly prepared. There were intensive discussions to identify categories of discovery and where possible to agree those categories by reference to the joint issue paper. This reduced the number of disputed categories which the court was required to resolve.

52. This litigation has been very closely case-managed. The cases were before the judge in charge of the Commercial List of the High Court ten times between January and July 2023. The parties and the list judge are extremely familiar with the issues in the cases and the areas of agreement and disagreement. The preliminary statements on the issue paper clearly state that the parties were preserving their respective positions. They all stated that:-

> *"1. This list of issues has been prepared following a process of engagement between the parties. The particular way in which an issue has been formulated or framed in this list does not imply an admission by any party or an acceptance that the issue was properly so formulated or framed or as to who bears the burden of proof in relation to any issue.*
>
> *…*

3. This list of issues endeavours to identify the main issues to be decided across the six sets of proceedings. It is not intended to be an exhaustive account of all issues in dispute in the proceedings or all factual and legal matters that may need to be decided by the court. Moreover, not every issue arises in each of the six sets of proceedings. The policy wording in each case is different. There are case specific issues, including issues of construction of the lease – or policy – specific issues, which arise as sub-issues to the issues identified.

4. The fact that an issue has been included in this list does not mean that it is accepted by all parties that such an issue is, in fact, relevant and/or will require to be determined. In many instances, issues identified below may not arise for determination at all (for example, where a court decides an issue in a particular way, it may render it unnecessary to decide other issues).

5. Moreover, the inclusion of any particular issue in the issues list and/or the precise framing of any particular issue is not intended to supersede the pleaded case and/or relevant policy and/or relevant factual background of any party in any particular lessor case or any admission or specific plea made by any party in that case.

6. While section headings have been provided to group similar issues for ease of reference, that is not intended to signify that the issue concerned is relevant solely to that section. By way of example only, the question of what occurred in Russia is contained in the 'occurrence of a war risk peril' section, but is likely relevant to multiple other sections such as 'Loss of Aviation Assets' and 'Steps taken by the plaintiffs to recover the aviation assets/mitigation of loss/contributory negligence.'

Furthermore, the grouping of issues is not intended to reflect any suggested sequencing of issue."

53. As already referred to above, Issue 29 and Issue 32 are relevant to this appeal.

54. Nineteen categories or partial categories remained in dispute at the end of this process (in addition to others where issues of the temporal scope or reciprocity remained unresolved) and thus fell to be determined by the High Court. For the assistance of the High Court, the parties filed two joint documents, a respondents' position paper in relation to the respondents' application for discovery and an appellants' position paper in respect of the appellants' applications for discovery. The position paper was divided into three parts. In the first part, the respondents set out an introduction and the appellants' response followed in different coloured ink. In the second part, the respondents identified the legal principles applicable, and the appellants set out their position in relation to the relevant authorities thereafter. The third part of the position paper concerned the categories in dispute. The respondents set out each category and why they maintained discovery ought to be ordered. This was followed by the appellants' position in relation to the category. Thus, the trial judge was presented with a single document which outlined the positions of the respondents and appellants in respect of each category in dispute. An identical document was prepared in respect of the discovery sought by the appellants from the respondents. These documents effectively replaced the usual letters seeking voluntary discovery and affidavits grounding the applications for discovery and the replies thereto. Also, it is important to emphasise that the position papers were prepared following intensive negotiations in relation to the categories of discovery, and they were not initiating documents. Thus, the parties were already fully familiar with their respective positions.

55. In relation to legal principles, the respondents submitted that the legal principles applicable to discovery are well established and did not require extensive elaboration. In

relation to relevance, they cited passage from *Tobin v. Minister for Defence* [2020] 1 I.R. 211 at para. 25 where Clarke C.J. stated:

> *"It is clear from the terms of O. 31, r. 12 of the Rules of the Superior Courts 1986, as amended, and the case law on discovery in this jurisdiction, that a court hearing an application for discovery will only order a party to make discovery if it is satisfied that the documents sought are both relevant and necessary for the fair disposal of the case or to save costs. In addition, in an effort to limit the burdens, costs and delays incurred by orders for discovery in modern practice, two further considerations have sometimes been proposed; one being that of proportionality and the other being the suggestion that alternative, more efficient methods of disclosure should first be pursued."*

56. The respondents also stated – a proposition which was not in dispute – that relevance is determined by reference to the issues in dispute on the pleadings, citing the decision of McCracken J. in the High Court in *Hannon v. Commissioners for Public Works* [2001] IEHC 59, para. 8, as approved by the Supreme Court in *Framus v. CRH* [2004] 2 I.R. 20 at para. 30. In the final paragraph of what they suggested were the applicable legal principles, para., 26, they stated as follows:-

> *"In Boehringer Ingelheim Pharma GmbH v. Norton (Waterford) Ltd.* [2016] IECA 67 *Finlay Geoghegan J. noted that in relevant consideration for a judge considering whether to order discovery of relevant documents would be whether the party from whom the discovery is sought would be afforded a litigious advantage in the absence of discovery. It is submitted that this is a useful test in the present case in which the defendants will enjoy a significant unfair litigious advantage, if they were not required to make discovery of the categories of documents in dispute in the present application."*

57. In their response, the appellants accepted that the relevant legal principles were correctly identified in the authorities referred to by the respondents and in their own position paper on the discovery they sought from the respondents. The appellants referred *inter alia* to the decision of Collins J. speaking for the Court of Appeal in *Ryan v. Dengrove DAC* as cited earlier in this judgment and which reaffirms that the touchstone of relevance continues to be the formula in *Peruvian Guano*.

58. I have set this out in some detail because the transcript of the hearing in the High Court shows that in oral argument the parties did not refer in any detail to the principles governing discovery when arguing their respective positions in relation to the category, the subject of this appeal. The principles were essentially agreed to be those set out in their two papers. Importantly, the appellants affirmed that the primary test is whether the documents sought are relevant to the issues in the proceedings and that the touchstone of relevance is that in *Peruvian Guano.*

59. The hearing before the High Court took place over two days on 19 and 21 July 2023. The trial judge had read the papers in advance; heard submissions in relation to each category and then gave his ruling. It need hardly be said that the trial judge was very familiar with the legal principles engaged by the submissions in respect of each category argued before him.

60. I have set out this context in detail as it is relevant to the approach of this Court to the appeal and, in particular, whether the respondents are precluded from advancing the arguments in the form which they have been made to this Court on appeal. It is important to bear in mind that in the High Court, approximately an hour out of a hearing which lasted six hours over two days was devoted to this category. In contrast, this Court has 33 notices of appeal and 33 respondents' notices, six written submissions filed on behalf of different appellants and one joint written submission filed on behalf of the respondents. The oral

hearing of the appeal was focused solely on this one category and lasted a period of four and a half hours. Of necessity, the issue has therefore been interrogated in far greater detail before this Court than in the court below and this is an important matter to bear in mind.

The submissions of the respondents in relation to category 1(ii)(b)

61. The respondents' written submissions in the High Court in support of category 1(ii)(b) ran to a page and a half as follows:

> *"33. The reasons why the defendants or other entities purported to serve Notices of Cancellation/Notices of Review when they did are of central relevance and are necessary to the fair determination of these proceedings. The defendants' contention is the that the defendants cancelled cover in respect inter alia of Russia under the War Risks Policies with effect from dates in early March 2022 by serving Notices of Cancellation. The plaintiffs dispute this on a number of grounds.*
>
> *34. The plaintiffs have pleaded, among other things, that the aviation assets were already in the grip of [the] peril prior to the purported service of any such notices and they have denied that the notices were effective in excluding cover or pleaded in that they were invalid. <u>The reasons for which those entities that purported to serve Notices of Cancellation/Notices of Review did so are directly relevant because they may evidence that the aviation assets were in the grip of the peril and that the defendants or other entities knew or understood that when they served the Notices of Cancellation.</u> Of course, the reasons for which entities purported to serve Notices of Cancellation are peculiarly within the knowledge of the defendants or other entities in question and that the plaintiffs have no other means of ascertaining them, in order to make their case in this regard.*

35. Furthermore, the plaintiffs have put the authority of the entities which purported to serve Notices of Cancellation and their effectiveness in excluding cover and/or validity in issue. Documents evidencing consideration or discussion of the Notices of Cancellation relating to the aviation assets, including as to the validity and/or effect of the notices purportedly served and discussion of proposed notices will capture documents directly relevant to questions in issue in these proceedings, including (i) what entity purported to serve Notices of Cancellation; (ii) what authority had that entity to serve any such notice if any, and (iii) were certain entities entitled to serve Notices of Cancellation on behalf of other defendants in the proceedings. The plaintiffs had put the defendants on proof of all of these matters.

36. The documents responsive to this category which are relevant and necessary, are not otherwise available to the plaintiffs and are uniquely available to the defendants. The category sought relates to a short period of time and is relatively discreet.

37. For those reasons, category 1(ii)(b) as sought by the plaintiffs is patently both relevant and necessary for the fair determination of the proceedings and for the saving of costs." [Emphasis added].

62. In a footnote to para. 35, the respondents identified Issue 44 on the Proposed Issue List and in the sample SMBC pleadings para. 14.2 of the reply to the Lloyds' defence and similarly referenced the relevant pleas in the sample Avalon proceedings, sample BOCA proceedings, sample CDB pleadings, sample Hermes proceedings, and sample NAC pleadings.

63. The final paragraph addressed an argument in relation to reciprocity which was not maintained on appeal.

64. At the hearing before the High Court on 21 July 2023 counsel for the respondents said that this category was relevant to two or potentially three issues arising in the proceedings.

The first relates to a *"series of points made in the pleadings concerning the Notices of Cancellation"*; challenging their validity, whether they were sent to the right addresses, identified the correct aircraft and sent by the correct insurers… *"in addition to all of these points, the plaintiffs, in various different ways across the pleadings have also pleaded that it simply wasn't open to the insurers to validly or effectively serve Notices of Cancellation of geographic scope, in circumstances where it is contended that the peril had already incepted…"* It was stated that it was *"also relevant to the question of authorisation because it looks to internal communications on the part of the insurers at the time of the Notice of Cancellations were being considered and served and it potentially also engages questions of insurance, duty and good faith"*. [Emphasis added].

65. Counsel proceeded to explain the doctrine of the grip of the peril and he cited a short passage from the 19th Edition of *Arnould* to the court. He explained that it is *"a concept or a principle that has been referenced only once in Irish jurisprudence, in a case in the 1950s but not developed. It's a concept that is not settled law, even in the Courts of England and Wales, and the scope of it is very much a subject of debate."*

66. Counsel continued his submissions saying that it *"is hard to gainsay, that the law is not settled in relation to the grip of the peril, how it applies, what factors are relevant to a consideration of when it applies, what evidence is admissible as to when it applies, and that does touch upon a point which I will come back to, but which the Court has already alluded to, the question of whether or not that is to be assessed objectively or whether or not subjective considerations come into play."*

67. Later he submitted:-

> *"… precisely because [of] the legal parameters of the grip of the peril and the extent to which evidence may be admissible in the context of grip of the peril are open questions which will be debated at trial discovery should be ordered now. That's what*

the Court of Appeal says [in Wheelock v. Promontoria (Arrow) Ltd. [[2022] IECA 71] and the reason is self-evident…"

68. Later, he again emphasised the novelty of the issues raised in relation to the grip of the peril doctrine and the uncertainty of the scope of the doctrine in the context of these proceedings. He submitted:-

"In no case has the Court ever been called upon, in any recorded or reported decision, has the Court ever been called upon to consider <u>the validity and effectiveness of an insurer's decision to serve a Notice of Cancellation after the inception of the peril."</u> [Emphasis added].

69. Counsel pointed out that the issue did not arise in the case of *Scott v. Copenhagen* upon which the appellants had relied. He asserted that *"This discovery is relevant because the insurers all chose to serve Notices of Cancellation or Review at a particular point in time. It is self-evidently clear that no question of subjective consideration could arise in Scott v. Copenhagen or in any other of the cases because that issue wasn't before any of the courts in those case, but it is clearly [inaudible] here…"*

70. Having emphasised the submission that the law was not settled in relation to the grip of the peril, it was then submitted that it is generally not appropriate to determine complex issues of law on discovery motions. Counsel cited *Chubb v. Perrigo* [2022] IEHC 444, para. 105 of the judgment of Holland J.:-

" Save perhaps as to simple and clear issues, it is not generally appropriate at discovery stage to determine, for the purpose of deciding whether documents should be discovered, issues of law or fact to be contested at trial – including issues of admissibility of evidence. In Wheelock Haughton J allowed discovery refused by the High Court on the basis that 'the trial judge … erred in his approach to relevance in

preferring one view of the law, where that view is contested and an alternative view was put forward will be argued before the court of trial.'"

Counsel did not open the decision in *Wheelock* but very briefly outlined the essence of the decision to the Court and then submitted:-

"The Court of Appeal took a different view [to the High Court] and said there is at least an argument that further factors can be taken into account, that's for the trial judge and this discovery is relevant to that argument. That is particularly pertinent here, if I might respectfully say, and it is the counterpoint of Mr. Gardiner's argument from the other day that the law in relation to estoppel is very clear in terms of outward communication. Here, there is no hard and bright line distinction between what is admissible for the purposes of grip of [the] peril and what is not and it does strike us, and it is our respectful submission to the court, that the question of insurers' internal consideration of inception of the peril must surely be relevant to that question."

71. Addressing the written submissions of the appellants, counsel rejected the suggestion that the circumstances in which the notices were served was already covered by categories 1(ii)(a) and (c) because those categories did not *"capture what the defendants themselves knew or were considering or were discussing at the time they served these very critical notices…"*

72. He then rejected the appellants' suggestion that the respondents did not require the sub-category in order to dispute the cancellations of cover. He said "*[i]t seems to be premised on the idea that, since we already have arguments about non-compliance or alleged non-compliance with the terms of the policies, that we don't need to pursue this additional argument that they internally knew that this was something they couldn't [have done] because the peril had already incepted…"* [Emphasis added]. He submitted that that was plainly incorrect.

73. Counsel refuted the argument that discovery was not required because the appellants' objective understanding or knowledge of the issues captained in the category were not relevant to the objective assessment as to whether the insured assets were in the grip of the peril (assuming the doctrine applies) *"precisely because the legal parameters of grip of the peril and the extent to which evidence may be admissible in the context of grip of the peril are open questions which will be debated at trial discovery should be ordered now. That's what the Court of Appeal says, and the reason is self-evident if I might respectfully say. If we come to trial and the court finds in favour on those complex legal arguments, finds in the plaintiffs' favour that not only does the doctrine apply or the rule apply, which I think it must do, but it applies and evidence is admissible as to the defendants' understanding at the time when they served the notices, I will have no documents to pursue that because I will not have had discovery at this stage..."*

74. The second, separate basis upon which the discovery was sought was on the basis that it was relevant to the question of the authority of the entities serving the relevant notices so to do. The transcript of the hearing in the High Court shows that counsel submitted that while the other categories of discovery were directed towards whether or not an individual insurer was authorised to serve notices of cancellation *"this discovery will also shed further light in terms of any internal communications between insurers or internally within insurers in relation to Notices of Cancellation, because I think it is fair to say, and without intending to be disparaging, but the picture in relation to services of Notices of Cancellation is quite a muddled one".*

75. The final argument for discovery of this category concerned the question of the good faith of the appellants in the exercise of their decision making *"and that may go directly to the question of the court's consideration of grip of the peril"*. This latter point was rejected by the High Court and was not pursued on appeal.

76. I have set out the pleadings and submissions of the respondents in detail in order to consider properly the argument that this Court ought not to permit the respondents to advance the case they now make in this appeal. It is true to say that in the High Court they majored on whether the knowledge or understanding of the insurers could be relevant to the factual question whether the aircraft were in the grip of the peril when the appellants sent the notices. However, that was not the only basis upon which they said the category of documents was relevant. They also argued that the knowledge or understanding of the insurers was relevant to the insurers' entitlement to send the notices where the peril had, in fact, incepted. This is an issue in the pleadings (see for example para. 14.2 of the SMBC reply to the Lloyds defence and Issue 29 of the Joint Issues Paper). Counsel expressly referred to the argument in oral submissions to the High Court. He submitted that it simply was not open to the insurers validly or effectively to serve the notices in circumstances where it was contended that the peril had already incepted. He emphasised that the court will be called upon to consider the validity and effectiveness of an insurer's decision to serve a notice of cancellation after the inception of the peril and he rejected the appellants' suggestion that *"we don't need to pursue this additional argument that they internally knew that this was something they couldn't [have done before] because the peril had already incepted"*.

77. This is an issue in the pleadings, and it is identified as such at Issue 29 of the Joint Issues Paper. It was relied upon by counsel when seeking discovery of this category, albeit to a lesser extent than the factual question of whether the peril had gripped. Therefore, this is not, in fact, a new argument which is sought to be advanced for the first time on appeal. It is true that it has been greatly developed both in the respondents' notices and in their written and oral submissions when compared to the limited discussion of this argument in the High Court. However, one has to bear in mind that this Court has spent one entire day

debating one sub-category of discovery and this, therefore, was inevitable. I would be very slow to shut out an appellant from advancing an argument which is more fully developed on appeal on the basis that it is allegedly an argument which was not made to the High Court once it can be shown that it was, in fact, advanced in the High Court, even if it was not expanded upon to any great extent.

78. Even if the argument had not actually been advanced in the High Court, I nonetheless would have permitted the respondents to advance it on this appeal. When determining whether or not to permit a new argument which was not made in the High Court to be advanced on appeal, the Court must consider whether it would involve new evidence, whether a re-trial would be necessary and the degree of prejudice (if any) likely to be experienced by the opposing party.

79. This is an appeal on an interlocutory application, not one brought after a full plenary hearing. New evidence is not necessary to resolve the new argument. It is not necessary for this court to remit the matter for rehearing by the High Court. The appellants did not make a case that they were prejudiced in meeting the argument now advanced. Even if the argument *"may strictly speaking"* not have been raised in the High Court, it is still open to this Court both to allow the argument and to decide the appeal based on that argument.

80. In my judgment, it would be a grave injustice not to permit the respondents to advance their arguments as to relevance based upon *Peruvian Guano* lines of enquiry. The argument now relied upon is not diametrically opposed to the argument which found favour in the High Court. It is an oversimplification to say that the decision of the High Court was based solely on the contention that the subjective contemporaneous views of the insurers could be relevant to the question whether the peril had in fact gripped the insured assets. Therefore, the statement in para. 49 of the respondents' written submissions, quoted in para. 37, does not lead to the conclusion that the respondents have abandoned their previous position and

now are advancing a new argument which is inconsistent with their previous arguments. As they expressly state in their written submissions on the appeal, the fact that they now accept that the subjective contemporaneous views of the insurers are not relevant to the factual question whether a peril had incepted, it does not follow that contemporaneous statements by the insurers about the factual situation in Russia are irrelevant, inadmissible or incapable of undermining the appellants' case. In my view, the argument *"may be regarded as a refinement of or analogous to"* a point which was advanced in the High Court. An analysis of the manner in which the applications for discovery were progressed and argued leads to this conclusion and, for these reasons, an over technical approach to the issue being raised for the first time on appeal (even assuming this to be so) would bring a disproportionate risk of injustice in the circumstances of this case.

81. In addition, it is important to bear in mind the observations of Clarke C.J. in *Tobin v. Minister for Defence* [2020] 1 I.R. 211 where he recognised at para. 35 that:-

> *"... discovery can play an important role in ensuring that the case presented by an opponent is not inconsistent with the documentation which that opponent possesses but which is withheld from the court. Thus, from as far back as Compagnie Financiere du Pacifique v. Peruvian Guano Co. (1882) 11 Q.B.D. 55, discovery has been seen as playing a role in either strengthening the discovery seeking party's case or potentially damaging the opponent's case. I might add that, in my experience, discovery can also play a role in keeping parties honest, for it cannot be ruled out that some parties might succumb to the temptation to present a less than full picture of events to the court, were it not for the fact that they know that any attempt to do so may be significantly impaired if there is a documentary record which shows their account either to be inaccurate or materially incomplete. I consider the latter point to be of particular importance, for it provides a potential counterweight to the oft quoted argument that*

the vast majority of documents which are discovered do not find their way into the evidence presented to the court."

82. I wish to emphasise that I am in no way suggesting that the defence of these proceedings will or may be conducted in a way that is either improper or not honest. However, it is plain that there must have been considerable uncertainty as matters evolved after the invasion on 24 February 2022 and the ever changing, and possibly conflicting, information emerging from different sources to different appellants over time is complex. It is a situation where a *"materially incomplete"* picture could inadvertently be presented to the trial court through no deliberate act or omission of the appellants. Discovery of this category of documents will assist in ensuring this does not occur.

83. Finally, I am of the view that these are relevant documents and a failure to order discovery would afford the appellants a litigious advantage over the respondents in the absence of discovery as averted to by Finlay Geoghegan J. in *Boehringer Ingelheim Pharma GmbH*.

84. For these reasons, I am of the view that the category of documents is relevant to an issue in the proceedings. It is not contested that in those circumstances discovery is necessary, and no case has been made that the discovery ordered is disproportionately onerous. In effect, this conclusion disposes of the appeal. However, as the parties addressed the other issues raised in the notices of appeal, I shall briefly consider those remaining grounds of appeal which have not yet been discussed.

Reversal of the burden of proof

85. In my judgment, this ground of appeal is based upon a misreading of the judgment of the High Court. The issue before the court was whether it ought to make an order for discovery as sought in circumstances where the doctrine of the grip of the peril had never been addressed by a court in this jurisdiction. Counsel for the respondents urged that the

scope of the doctrine was unsettled and counsel for the appellants said that it was not. The case relied upon by the appellants to support this contention was a decision of the Court of Appeal of England and Wales in *Scott v. Copenhagen*. This is a persuasive authority, no more. Indeed, in her opening of the appeal counsel for the appellants described this judgment as *"guidance"* available for the courts in this jurisdiction. The proposition in the notice of appeal filed on behalf of Lloyd's in the SMBC proceedings that the High Court judge erred in failing to conclude that the judgment of the Court of Appeal in England in *Scott v. Copenhagen* established the law in Ireland is fundamentally misconceived. More importantly, Rix LJ expressly said that the doctrine was not argued and accordingly his observations are strictly *obiter*. A point not argued is a point not decided. The High Court was correct to say that this was not the definitive authority maintained by the appellants. He was correct to say that the law had never been considered in this jurisdiction.

86. The High Court approached the issue on the basis that a novel point of law was raised and there was a dispute as to its scope. Unless he could be satisfied that in fact there was no such dispute, then he must treat the matter as disputed. McDonald J. held that it was not appropriate to resolve complex issues of law or facts on an application for discovery and in so doing he was perfectly correct. It was only if it could be said that there was in fact no valid dispute as to the law that he could refuse the discovery sought. It was in this context that he observed that: *"unless it can be shown definitively today that there is no basis on which the subjective understanding of insurers is relevant to the grip of the peril theory…is not, of itself, an answer to an application for discovery."*

87. And later that:-

> *"It seems to me that the grip of the peril doctrine, that the parameters of that simply haven't been established in this jurisdiction and no sufficient authority is available to me today to allow me to form the view that there is no basis at all, ever, on which any*

party could ever establish or, in particular the plaintiffs here, could ever establish that the subjective understanding of the insurers is … relevant… to the grip of the peril."

88. It seems clear to me that on a close reading of the analysis and argument, that the trial judge did not reverse the burden of proof as alleged. The respondents were required to establish that the category of documents sought was relevant. The passages from the *ex tempore* judgment I have cited were dealing with the arguments advanced by the appellants disputing relevance based on the contention that there could be no debate as to the *scope* of the doctrine and therefore that the decisions in *Chubb* and *Wheelock* were irrelevant. I am satisfied that the trial judge acted correctly in relation to this argument, and I would reject this ground of appeal.

The remaining grounds of appeal

89. A related argument was that the trial judge misapplied the decisions in *Chubb* and *Wheelock*. The appellants argued that the respondents had merely asserted that the scope of the doctrine was uncertain, and they adduced no authority in support of their submission. The appellants contended that a bare assertion was insufficient in the circumstances. However, the difficulty is that the respondents were advancing a novel point of law. When a new point of law is advanced, almost invariably there will be no authority to support the new argument. Counsel for the appellants was asked (during the opening of the appeal) what threshold should apply where a party seeks to raise a new or novel point which has never previously been considered and seeks discovery relevant to that claim. In those circumstances, how is the court to apply the precepts in *Chubb* and *Wheelock*? It is fair to say that the Court received no immediate assistance with this query. In his reply, counsel for the appellants suggested that the burden on the respondents was *"to convince [the Court], on the balance of probabilities, that there is a credible legal theory whereby evidence of subjective views of an insurer could be relevant."* It is worth noting that a more accurate

description of the position taken by the respondents was that there may be a role, particularly in challenging the evidence of the appellants at trial, for the deployment of the subjective understanding of the insurers. More relevantly, and precisely because this proposition put forward by the appellants was itself a novel one, there was no authority to support the test advanced by them on this issue.

90. It is not an answer to say that a mere assertion is insufficient. If it were, then it would never be open to a court to grant discovery in respect of a novel issue raised for the first time and, as a matter of principle, this must be incorrect. However, an utterly outlandish assertion, which has no prospect of success, ought not to form the basis for an application for discovery of documents to which the moving party otherwise would have no entitlement. Between these two extremes, the court must tread a course. It seems to me that the court should satisfy itself that the argument is statable and that it has some prospect of success in the sense that it is not bound to fail. Once that bar is met then the court ought not to engage in weighing the relevant merits of the arguments on the issue.

91. In this case I am satisfied that this threshold has been met and that the correct approach was that set out in *Chubb* and followed by the High Court. I would reject the argument that the trial judge failed properly to follow the relevant precedents opened to him.

92. The appellants asserted that the category amounted to impermissible *"fishing"* in order to establish an un-pleaded case to the effect that the appellants had acted in bad faith. In view of the fact that I have concluded that the category is relevant to issues in the pleaded case, it necessarily follows that the complaint that the category constitutes impermissible fishing must be rejected.

93. The argument that the trial judge ought to have refused discovery of the category because he had refused to direct the respondents to make discovery of category 7(b) of the appellants' application for discovery was, wisely, not pressed at the hearing of the appeal.

Reciprocity simply has no role in the context of determining whether or not a particular category of discovery is relevant to an issue in the pleadings. Each category must be analysed individually. The fact that one category may be rejected does not mean that another also must be. The trial judge was correct to hold that the fact that he had refused to direct discovery of category 7(b) of the appellants' request on the basis that there could be no legal dispute as to the parameters of the doctrine of estoppel and therefore no argument that the internal communications of the respondents which were not conveyed to the appellants could ever be relevant to that argument, in no way bound him when considering whether the internal communications of the appellants and their brokers could be relevant to the unrelated and totally distinct grip of the peril doctrine.

Conclusions

94. The documents comprised in category 1(ii)(b) of the respondents' application for discovery are relevant within the meaning of *Peruvian Guano* to issues in the pleadings and an issue identified in the joint issue paper prepared for the purposes of presenting and arguing the combined applications for discovery in these case-managed related cases.

95. If, in the High Court, the respondents had not crafted the argument in the manner in which it was presented to this Court, they had raised a version of it in the High Court.

96. Even if it could be said to be a new argument which had not previously been advanced in the High Court, it was one which was sufficiently close or analogous to the case they had advanced and, applying the decisions in *Lough Swilly* and *Ambrose*, it was one which the Court ought to permit them to advance. This Court entertaining the argument would not require the hearing of additional evidence or a retrial and the appellants pointed to no particular prejudice which they would sustain if the court permitted the argument.

97. The documents captured by the category meet the test of relevance as set out in *Peruvian Guano*. It is necessary to make discovery of the documents as the respondents otherwise would not have access to the documents. Complying with the order for discovery will not be unduly burdensome. In the particular circumstances of this case, involving as it does the fog of war, the role of discovery in keeping a party *"honest"* is particularly apposite and reinforces the justice of directing discovery of this category of documents.

98. The trial judge did not err in reversing the burden of proof in relation to the relevance of the category of documents and he did not misapply the decisions in *Chubb* and *Wheelock.*

99. As the category of documents sought was relevant to issues in the proceedings, it did not amount to impermissible fishing.

100. The fact that the trial judge refused to order discovery against the respondents in respect of category 7(b) of the appellants' request for discovery was not a reason to either refuse or grant discovery of category 1(ii)(b) of the respondents' request for discovery. Relevance must be established in relation to each category, and this is not necessarily established by claiming reciprocity. Each category must be assessed by reference to the issues in the case as defined by the pleadings.

101. For all of these reasons, I would refuse the appeal.

102. My preliminary view is that, as the respondents have been entirely successful on these appeals, they should be awarded the costs of the appeals. If the appellants wish to contend for a different order, they have ten days in which to contact the Office of the Court of Appeal requesting a short hearing on the issue of costs. A date will be fixed in the office. In the event of such an application, the appellants should file legal submissions of no more than 1,500 words within ten days of today's judgment and the respondents should deliver replying submissions of no more than 1,500 words within seven days of receipt of the appellants' submissions.

103. In accordance with the Order of the High Court, the time fixed for the appellants to make discovery of category 1(ii)(b) is twenty-one days from the date of the delivery of this judgment.

104. Allen and O'Moore JJ. have authorised me to indicate their agreement with this judgment.