

**THE HIGH COURT  
COMMERCIAL**

[2022] IEHC 22  
**Record No. 2020/7948P**

**BETWEEN**

**IRISH AIRLINE PILOTS PENSION DAC**

**PLAINTIFF**

**AND**

**MERCER (IRELAND) LIMITED TRADING AS MERCER**

**DEFENDANT**

**JUDGMENT OF Mr. Justice Twomey delivered on the 20th day of January, 2022**

**SUMMARY**

1. This is a case in which the plaintiff (the "Pilots") seek damages from the defendant ("Mercer") arising from Mercer's alleged failure to promptly sell €40 million worth of shares held in the Pilots' pension scheme (the "Scheme") after the decision was taken to sell those shares on the 14th February, 2020. This failure allegedly resulted in losses to the Pilots, arising from the fall in stock market valuations in and around March 2020 which resulted from the start of the Covid-19 pandemic.
2. This case considers the approach of a court to interpreting a category of discovery agreed between parties to litigation where there is a dispute as to the breadth of the category in issue and in particular whether certain documents should be discovered.
3. It considers the extent, if any, to which the pleadings, and the reasons for the category in the letter seeking discovery, are relevant (as claimed by Mercer), where there is alleged to be no ambiguity in the category of discovery ordered (as claimed by the Pilots).
4. This Court concludes that where there is no ambiguity regarding the terms of the discovery order, the relevance and necessity of the documents to the dispute have no application to the question of whether the documents should have been discovered.
5. Instead, it is purely a matter of interpretation of the terms of the court order for discovery, in line with the normal rules of interpretation, to determine whether the documents fall within the category and should have been discovered. On this basis, even if the documents are relevant and necessary to the dispute, they are not discoverable, if they fall outside the 'natural and ordinary meaning' of the discovery order.

**BACKGROUND**

6. This issue arises in the context of an application for further and better discovery in relation to the following category of documents sought by Mercer from the Pilots, which category (Category 2) was agreed between the parties:

*"All documents created between 1 January 2018 and 24 November 2020 relating to or recording the discussions and consideration internally or with third parties concerning the [Pilots'] decision to realise €40,000,000 of the Scheme's global equity holdings with Irish Life Investment Managers ("ILIM") and to hold the proceeds in cash pending reinvestment in committed infrastructure and long lease vehicles, including but not limited to all advices received by the [Pilots] from Mercer*

or any other party *on the investment strategy for the Scheme*, including for the avoidance of doubt any consideration of the risk appetite of the Scheme, and all documents setting out communications, deliberations and consideration of those advices internally and with third parties (including the Pensions Authority), and all attendances/ minutes/notes of the meeting on 14 February 2020 and all documents setting out communications, deliberations and consideration had concerning the decision to disinvest prior to and after the meeting.” (Emphasis added)

7. The key issue in dispute is that Mercer allege that the Pilots have failed to discover certain documents relating to the investment strategy for the Scheme, i.e. documents relating to the long-term investment strategy of that Scheme.

8. What is between the parties can be best illustrated by the averment of Mr. Paul Kenny, on behalf of Mercer, at para. 17 of his Grounding Affidavit, which sets out his interpretation of the Pilots’ position. He avers that:

“The [Pilots’] solicitors’ response in respect of category 2 is concerning, as it would appear to comprise an acknowledgement on behalf of the [Pilots] that it approached the category at issue on the basis that *only documents going directly to the particular decision made on 14 February 2020 would be disclosed*, rather than further documents relating to the investment strategy for the scheme which indirectly informed that decision.” (Emphasis added)

9. The position of Mercer is clarified in their legal submissions, where it is stated:

“It is clear from the words of Category 2, construed in light of the factual matrix, being the pleadings and the reasons furnished by Mercer for seeking that category, that the category covers both documents relating immediately to the decision to disinvest made on 14 February 2020 and documents relating to the long-term investment strategy which Mercer contends informed that decision.” (Emphasis added)

10. Mr. Kenny, in his affidavit sworn on behalf of Mercer, supports this legal submission by averring that:

“As the [Pilots are] aware, and as outlined in Mercer’s letter seeking voluntary discovery dated 26 April 2021, *it forms part of Mercer’s defence to these proceedings that the decision to realise €40,000,000 of the Scheme’s global equity holdings ‘was based principally on a long-term strategy previously agreed and discussed between the [Pilots] and [Mercer] of diversifying the [Pilots’] asset allocation away from equities to reduce portfolio risk, and that there was no immediate urgency to the effecting of the disinvestment in circumstances where the purpose of the disinvestment was not related to avoiding any immediate or short term risk of a fall in equity market performance’.*”

11. Thus, it is quite clear that a key defence for Mercer in this litigation is its claim that there was no need to divest the Pilots of its €40 million in equity holdings on or after 14th February, 2020 in a prompt manner, since the rationale for that divestment decision on that date (the "Divestment Decision") was not to lock in equity gains, as claimed by the Pilots, because of the then short-term risk to markets, but rather to diversify asset allocation away from equities to reduce portfolio risk, as claimed by Mercer.

**Interpretation of discovery ordered v. whether discovery should be ordered**

12. There is a significant difference in the approach of a court to determining whether a category of discovery should be ordered on the one hand and, on the other hand, to interpreting whether a document or category of documents falls within a category previously ordered.
13. It is not disputed that the terms of the pleadings are relevant to a decision as to whether to grant discovery and the extent of that discovery to be granted.
14. However, this is not an application for discovery in which it is claimed that discovery should be granted for say a category of documents relating to the long-term investment strategy of the Scheme. If it were, then clearly the pleas in the defence would be relevant to deciding whether a category of documents was relevant and necessary and so whether discovery *should be ordered*.
15. Rather this is an application where the discovery has been agreed and thus the role of this Court is to interpret the terms of the discovery that have been so agreed between the parties, to see to what extent those terms include investment strategy documents.
16. Accordingly, it is not for this Court to decide whether, based on the pleadings or the letter seeking discovery, a certain category of documents is relevant and necessary and so should be discovered. That stage of the proceedings is over, once the terms of category have been agreed/ordered by the court, as in this case.
17. Rather, the role of this Court, where a category has been agreed/ordered, in considering whether it has been complied with, is one of interpreting the category according to the normal rules of interpretation, to see if a category of documents falls within the terms agreed/ordered. In this regard, a court is obliged to use the '*rules generally applicable to interpreting written instruments*' (per Murray J. in the High Court case of *Daly v. Ardstone Capital Ltd.* [2020] IEHC 200 at para. 16). This means that the natural and ordinary meaning of the words applies (see *Analog Devices BV v. Zurich Insurance Co.* [2005] 1 I.R. 274, 281 per Geoghegan J. quoting *Investor Compensation Scheme v. West Bromwich Building Society* [1998] 1 W.L.R. 896, 912 per Lord Hoffman).
18. At para. 17 Murray J. states:

"These rules of construction combine to invest the court with ample jurisdiction to ensure the categories of discovery, where they prove ambiguous or give rise to contentious (and sometimes happens, semantic) disputes of construction, can be

resolved by the Court in a way that sensibly implements the intention of the parties.” (Emphasis added)

19. The corollary of this principle is that if there is no ambiguity then there is no need for a resort to the pleadings or the letter seeking discovery.
20. In this case, it is this Court’s view that there is no ambiguity in relation to what documents are covered by this category of discovery.
21. This is because it seems clear to this Court that the whole focus of this category of documents, based on the ordinary and natural meaning of the terms used, is that it applies to those documents which *relate* to the Divestment Decision of 14th February, 2020.
22. First, this is clear from the opening words of the category, which makes plain that the primary purpose of the category is to discover documents ‘*relating to*’ the Divestment Decision.
23. Secondly, the reference, to any advices received by the Pilots on the investment strategy for the Scheme etc., is not a separate category of documents. If Mercer required a stand-alone category of documents regarding the general investment strategy of the Pilots, it could have sought such a category, as a subcategory, or a brand-new category of documents. However, it did not do so.
24. Thirdly, instead, what Mercer sought and what was agreed by the Pilots was that only those documents regarding the investment strategy of the Scheme, which *related* to the Divestment Decision, are included in the category. This is because, in this Court’s view, it is clear that the investment strategy documents are *included* in the documents relating to the Divestment Decision. This is because of the use of the phrase ‘*including, but not limited to*’ which applies to the subordinate category (‘investment strategy’ documents), after the primary category (documents relating to the Divestment Decision). To put the matter another way, the primary category is documents relating to the Divestment Decision and it includes a subordinate category of those investment strategy documents, that must, by their nature as ‘inclusive’ in the primary category, relate to the Divestment Decision.
25. It follows therefore that if, as seems to be the case, there are no further documents which deal with the investment strategy (such as ones which might state that the Scheme wished to diversify asset allocation away from equities to reduce portfolio risk) *and* which relate to the Divestment Decision then there are no further documents to disclose.
26. In the circumstances, this Court cannot see how it could order further and better discovery and so rejects the application of Mercer in this regard.

**CONCLUSION:**

27. The application for further and better discovery is therefore denied.

28. Insofar as final orders are concerned, this Court would ask the parties to engage with each other to see if agreement can be reached regarding all outstanding matters without the need for further court time. In case it is necessary for this Court to deal with final orders, this case will be provisionally put in for mention on one week from today's date, at 10.45 am (with liberty to the parties to notify the Registrar, in the event of such listing being unnecessary).