THE HIGH COURT

COMMERCIAL

[2024] IEHC481

RECORD NUMBER 2021/3571P

BETWEEN

CHUBB EUROPEAN GROUP SE (FORMERLY ACE EUROPEAN GROUP LIMITED),

AIG EUROPE SA (FORMERLY AIG EUROPE LIMITED), AXIS SPECIALTY EUROPE SE,

ALLIANZ GLOBAL CORPORATE & SPECIALTY SE,

ALLIED WORLD ASSURANCE COMPANY (EUROPE) DESIGNATED ACTIVITY COMPANY (FORMERLY ALLIED WORLD ASSURANCE COMPANY (EUROPE) LIMITED),

LIBERTY MUTUAL INSURANCE EUROPE SE (FORMERLY LIBERTY MUTUAL INSURANCE EUROPE LIMITED),

XL INSURANCE COMPANY SE,

ZURICH INSURANCE PLC,

QBE EUROPE SA/NV (FORMERLY QBE INSURANCE (EUROPE) LIMITED)

and

LLOYD'S INSURANCE COMPANY SA

PLAINTIFFS

AND

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

(NO.3)

DEFENDANTS

JUDGMENT OF Mr Justice Twomey delivered on the 31st day of July, 2024

INTRODUCTION

1. This is the third judgment arising from the interpretation of the insurance policies entered into by the parties and relate claims made by Perrigo under those policies. The claims which Perrigo are seeking to have covered by their insurance policies (with Chubb and other insurers) include class actions taken by shareholders against Perrigo and its directors.

2. The issue for this Court in this judgment is whether three *alleged* wrongful acts (which for ease of reference are referred to as 'wrongful acts') should be covered by the 2015 Policy[1]

[1] Defined terms in *Chubb European Group SE & Ors v Perrigo Company PLC & Ors* [2024] IEHC 9 (the "**Principal Judgment**") and in *Chubb European Group SE [Formerly Ace European Group Limited] & Ors v*

or the 2016 Policy. The three wrongful acts are the (i) Tysabri Accounting Misrepresentation (ii) the Collusive Pricing Misrepresentation and (iii) the Pricing Pressure Misrepresentation (collectively referred to as the "**Three Wrongful Acts**').

3. In the Principal Judgment, the question addressed was whether these Three Wrongful Acts and three other wrongful acts, the Value of Offer Misrepresentation, Organic Growth Misrepresentation and the Omega Integration Misrepresentation (which, with the Three Wrongful Acts, are collectively referred to as the "**Six Wrongful Acts**"), should have been aggregated back to the 2014 Policy.

4. Chubb claimed that the Six Wrongful Acts should be aggregated back to the 2014 Policy because, pursuant to Clause 5.1(iii) of the 2014 Policy, they were '*similar or related'* to the wrongful acts in the Mylan Counterclaim, which had been notified to, and allocated under, the 2014 Policy.

5. The Mylan Counterclaim contains four wrongful acts i.e. the Offer Value Misrepresentation, the Dilutive Misrepresentation, the Abbott Misrepresentation and the Synergy Misrepresentation (the "**Four Wrongful Acts**"). Accordingly, the issue as to whether the Six Wrongful Acts should be aggregated back to the 2014 Policy was determined in the Principal Judgment on the basis of whether those Six Wrongful Acts were '*similar or related'* to any of these Four Wrongful Acts. This is because Clause 5.1(iii) of the 2014 Policy states that:

> "If a single Wrongful Act or act or a series of related Wrongful Acts or acts give rise to a claim under this Policy then all claims made after the expiry of this Policy arising out

Perrigo Company PLC & Ors (No.2) [2024] IEHC 272 (the "**Second Judgment**") have the same meaning when used in this judgment and this judgment should be read in conjunction with the Principal Judgment and the Second Judgment.

of such **similar or related Wrongful Acts** or acts shall be treated as though first made during this Policy Period." (Emphasis added)

It should be noted at this juncture that, in determining in this judgment, whether the Three Wrongful Acts should be aggregated back to the 2015 Policy, that the relevant clause is Clause 5.1(iii) of the 2015 Policy, which is in the exact same terms as the foregoing Clause 5.1(iii) of the 2014 Policy.

6. At the hearing for the purposes of the Principal Judgment, Chubb claimed that all Six Wrongful Acts should be aggregated back to the 2014 Policy, while Perrigo claimed that none of the Six Wrongful Acts should be aggregated back to 2014 Policy. Thus, Chubb claimed that all of the Six Wrongful Acts were *'similar or related'* to the Four Wrongful Acts in the Mylan Counterclaim for the purposes of Clause 5.1(iii) of the 2014 Policy, while Perrigo claimed that none of them were.

7. In the Principal Judgment, this Court held that only one of the Six Wrongful Acts (the Value of Offer Misrepresentation) was '*similar or related'* to the Four Wrongful Acts in the Mylan Counterclaim and so should be aggregated back to 2014 Policy.

8. The Second Judgment arose out of a hearing held after delivery of the Principal Judgment at which the parties argued about the form of final orders which should be made by the Court in light of the terms of the Principal Judgment. In its Second Judgment, this Court found that, as the Principal Judgment determined that the Organic Growth Misrepresentation and the Omega Integration Misrepresentation (collectively referred to as the "**Two Wrongful Acts**") did *not* aggregate back to the 2014 Policy, the Court should order that they be allocated to the 2015 Policy. This was because these two wrongful acts had both been notified during the 2015 Policy period. Accordingly, there was no possibility of them being allocated to the 2016 Policy. As this Court determined in the Principal Judgment that they did not aggregate back to

the 2014 Policy, it was not in dispute that the only other possibility therefore was that they should be allocated to the 2015 Policy.

9. This left open the position regarding the Three Wrongful Acts. Their position is different from the Two Wrongful Acts. This is because the Three Wrongful Act were notified during the 2016 Policy period (unlike the Two Wrongful Acts, which had been notified during the 2015 Period). This meant that when the Principal Judgment found that the Three Wrongful Acts did not aggregate back to the 2014 Policy, this left open the possibility that they could be allocated to the 2015 Policy *or* the 2016 Policy.

10. At the hearing for the purposes of the Second Judgment, Chubb argued that the Three Wrongful Acts should be allocated to the same policy as the Two Wrongful Acts, i.e. the 2015 Policy. Chubb relied on the fact that, in the Principal Judgment (at paras 83 and 127), when comparing various wrongful acts to the Four Wrongful Acts in the Mylan Counterclaim to determine if they were '*similar or related'*, this Court stated that the essence, of each of the Three Wrongful Acts and the Two Wrongful Acts, was wrongfully inflating Perrigo's value.

11. However, in its Second Judgment, this Court noted that, in its Principal Judgment, the Three Wrongful Acts were not compared to the Two Wrongful Acts to see if *they were similar or related to each other*, such that the Three Wrongful Acts should be allocated to the same policy as the Two Wrongful Acts. This is because the issue to be determined in the Principal Judgment was whether the Six Wrongful Acts should were 'similar or related' to the Four Wrongful Acts in the Mylan Counterclaim. Accordingly, in the Principal Judgment, this Court did not compare the Three Wrongful Acts to the Two Wrongful Acts, to see if they were '*similar or related'* to each other.

12. For this reason, this Court made it clear in its Second Judgment that it could not make an order to the effect that the Three Wrongful Acts were (or were not) similar or related to the

Two Wrongful Acts, so as to conclude that the Three Wrongful Acts should be allocated to the 2015 Policy or the 2016 Policy, since this matter had not been argued before this Court

13. Accordingly, on the 11th July, 2024, this Court had a further hearing, with submissions from both parties, in which they compared the Three Wrongful Acts *to* the Two Wrongful Acts, in order to assist this Court in determining whether the Three Wrongful Acts should be aggregated back to the 2015 Policy (to which the Two Wrongful Acts had been notified and allocated) or allocated to the 2016 Policy (to which the Three Wrongful Acts had been notified).

ANALYSIS

14. Perrigo claims that as the 2016 Policy is a 'claims made' policy and as the Three Wrongful Acts were notified in 2016, the default position is that they should be allocated to the 2016 Policy.

15. For its part, Chubb claims that this default position does not apply in this case, primarily because of Clause 5.1(iii) of the 2015 Policy. Relying on that clause, Chubb claims that the Three Wrongful Acts are '*similar or related'* to the Two Wrongful Acts, which were notified during the 2015 Policy period. On this basis and in accordance with the terms of Clause 5.1(iii) of the 2015 Policy, Chubb contends that the Three Wrongful Acts aggregate back to the 2015 Policy.

Clause 5.1(iii) of the 2015 Policy

16. In its Principal Judgment this Court determined that Clause 5.1(iii) of the 2014 Policy was an 'event' clause, rather than an 'originating cause' clause. As Clause 5.1(iii) of the 2015 Policy is in identical terms, it follows that it is also an 'event' clause. For this reason, the same analysis, in the Principal Judgment, of the restrictive manner in which those clauses are interpreted applies in this judgment. In addition, a similar analysis to that which was conducted in the Principal Judgment (in comparing the Six Wrongful Acts to see if they were *'similar or*

related' to the Four Wrongful Acts) must now be conducted (to see if the Three Wrongful Acts are *'similar or related'* to the Two Wrongful Acts). Before doing so, it is helpful to consider the analysis that was conducted in the Principal Judgment regarding the comparison of the various wrongful acts.

One of Six Wrongful Acts was *'similar or related'* to the Four Wrongful Acts

17. In the Principal Judgment, this Court held that only one of the Six Wrongful Acts (the Value of Offer Misrepresentation in the Roofer Complaint) was similar or related to any of the Four Wrongful Acts in the Mylan Counterclaim (i.e. the Offer Value Misrepresentation). In line with the caselaw, this Court reached this conclusion by adopting a fact specific analysis of the respective wrongful acts and by concluding that there was a *'real or substantial degree of similarity'* between those two wrongful acts. This was because the Value of Offer Misrepresentation was a misrepresentation that the Mylan Offer substantially undervalued Perrigo and its growth prospects, while the Offer Value Misrepresentation was a misrepresentation about the size of the exchange offer premium in relation to the Mylan Offer for Perrigo's shares. It seemed to this Court that both were misrepresentations about the value of the Mylan Offer and that this was a very real and substantial degree of similarity or relatedness, such as to be captured by an 'event' aggregation clause, when one bears in mind the very specialised interpretation of aggregation clauses, set out in the Principal Judgment, which forms the '*relevant background'* against which these specialist clauses must be interpreted (as noted in para 18 of the Principal Judgment).

Five wrongful acts were not '*similar or related'* to any of the Four Wrongful Acts

18. Similarly, in the Principal Judgment, this Court compared the nature of the remaining five wrongful acts, that make up the Six Wrongful Acts, to the Four Wrongful Acts (in the Mylan Counterclaim) to see if they were similar or related to any of them.

Organic Growth Misrepresentation

19. In relation to the Organic Growth Misrepresentation, the Court engaged in a fact specific analysis of this false misrepresentation that Perrigo would achieve 5%-10% organic growth as a standalone company, while noting that this wrongful act could be more broadly described as falsely inflating the value of the company. This Court concluded that when one did a fact specific analysis, the Organic Growth Misrepresentation was not similar or related to the other very fact specific Four Wrongful Acts (apart from the Offer Value Misrepresentation) in the Mylan Counterclaim, because of the clear difference between them, i.e. the claim that the Mylan Offer would have a dilutive, rather than accretive, effect on the earnings per share of Perrigo (the Dilutive Misrepresentation), the claim that Abbott did not support the takeover of Perrigo by Mylan (the Abbott Misrepresentation) and the claim that Mylan was wrong to claim that it would achieve the same synergies with Perrigo, whether a 50% or 100% shareholder (the Synergy Misrepresentation). As regards the fourth and final of the Four Wrongful Acts, the Offer Value Misrepresentation, this involved allegedly falsely inflating the value of the company, since it claimed that '*Mylan's Offer Substantially Undervalues Perrigo*.'[2] It is to be noted that in the Principal Judgment, this Court *did not find* that a misrepresentation, which also falsely inflated the value of the company (i.e. the false misrepresentation that Perrigo would achieve 5%-10% organic growth - Organic Growth Misrepresentation), was sufficiently similar or related to the Offer Value Misrepresentation, for the purposes of an event aggregation clause. This Court is highlighting this point, since Chubb places particular reliance on the fact that this Court has described the Three Wrongful Acts and the Two Wrongful Acts as all involving the wrongful inflation of the company's value. However, as is clear from this Court's treatment of the Organic Growth Misrepresentation in the Principal Judgment, this was not sufficient for two wrongful acts to be 'similar or related' for the purposes of an 'event' aggregation clause.

[2] Agreed Statement of Facts, para 8.4(a)(ii)

20. The same comparison with the Four Wrongful Acts, as was done for the Organic Growth Misrepresentation (and the Value of Offer Misrepresentation), was also done, in the Principal Judgment, for the remaining four wrongful acts, that made up the Six Wrongful Acts.

Omega Integration Misrepresentation

21. Thus, it was noted that the Omega Integration Misrepresentation involved a very fact specific misrepresentation that Perrigo was not experiencing serious issues integrating the Omega acquisition. While this also involved wrongly inflating the company's value, this Court nonetheless concluded that it was not similar or related, in the context of an event aggregation clause, to the Offer Value Misrepresentation (which also involved inflating the value of the Perrigo) or indeed the other three wrongful acts that make up the Four Wrongful Acts.

Tysabri Accounting Misrepresentation

22. In relation to the Tysabri Accounting Misrepresentation, it was noted that this was a very fact specific misrepresentation regarding the accounting mistreatment of royalty income. While this also involved wrongly inflating the company's value, this Court nonetheless concluded that it was not similar or related, in the context of an event aggregation clause, to the Offer Value Misrepresentation (which also involved inflating the value of the Perrigo) or the other three wrongful acts that make up the Four Wrongful Acts.

Collusive Pricing Misrepresentation

23. Similarly, in relation to the Collusive Pricing Misrepresentation, it was noted that this was a very fact specific misrepresentation regarding the hiding by Perrigo of the fact that its results in the Generic RX division were significantly inflated. While this also involved wrongly inflating the company's value, this Court concluded that it was not similar or related, in the context of an event aggregation clause, to the Offer Value Misrepresentation (which also involved inflating the value of the Perrigo) or the other three wrongful acts that make up the Four Wrongful Acts.

Pricing Pressures Misrepresentation

24. Finally in this regard, in relation to the Pricing Pressures Misrepresentation, it was noted that this was a very fact specific misrepresentation regarding Perrigo's ability to withstand pricing pressures in the generic drug industry. While this also involved wrongly inflating the company's value, this Court concluded that it was not similar or related, in the context of an event aggregation clause, to the Offer Value Misrepresentation (which also involves inflating the value of the Perrigo) or the other three wrongful acts that make up the Four Wrongful Acts.

Now comparing the Three Wrongful Acts to the Two Wrongful Acts

25. The foregoing summarises the comparisons which this Court undertook in the Principal Judgment. The task of this Court now is to do what it did in comparing the Three Wrongful Acts to the Four Wrongful Acts in the Principal Judgment, but this time, instead to see if the Three Wrongful Acts are similar or related to the Two Wrongful Acts, i.e. to see if there is a '*real or substantial degree of similarity'* between them, such that any or all of the Three Wrongful Acts are aggregated back to the policy to which the Two Wrongful Acts have been allocated (the 2015 Policy).

26. As already noted, Chubb supports its claim that the Three Wrongful Acts are *'similar or related'* to the Two Wrongful Acts with the fact that this Court concluded in the Principal Judgment that the essence or nature of the Three Wrongful Acts and the Two Wrongful Acts is wrongly inflating the company's value.

27. However, it is clear from the Principal Judgment that this is not *per se* sufficient to make two wrongful acts similar or related for the purposes of an event aggregation clause. This is because, as already noted, the Offer Value Misrepresentation also involved the wrongful inflation of the company's value, yet the Three Wrongful Acts were not found to be '*similar or related'* to that wrongful act. This is because, as is clear from the Principal Judgment, one must not look at the broad nature of the wrongful acts but conduct a very fact specific analysis of the

respective wrongful acts. This point is understood when one considers that many class actions in securities claims will involve a claim that shareholders lost money because of a fall in the value of their shares arising from the wrongful inflation of the company's value arising from a particular act or omission of the directors or officers. However, it is clear from para 45 of the Principal Judgment, that it is *'detail between the two'* wrongful acts which must be considered. So it is that, as noted in the Principal Judgment, the wrongful release of money from a client account in the *Discovery* case was held not to be similar or related to another apparently similar wrongful release of money from a client account.

28. Chubb also relies on para 26 of the Principal Judgment where this Court quoted Lord Mustill's statement that an *'event'* is *'something which happens at a particular time, at a particular place, in a particular way'*. Chubb points out that the misrepresentations that constitute the Three Wrongful Acts were made at the same time and place and in the same way as the misrepresentations that constitute the Two Wrongful Acts, since to take one example at para 38(1) of its written submissions, Chubb says that the Tysabri Accounting Misrepresentation and the Organic Growth Misrepresentation were made at the Deutsche Bank Health Care Conference. However, it is important to note that Lord Mustill was outlining what was meant by an 'event'. He was not dealing with what is meant by 'similar or related'. In particular, it seems to this Court that two wrongful acts could be made at the same time or the same place without them being *per se* similar or related for the purposes of an event aggregation clause. To determine whether two wrongful acts are similar or related, the caselaw makes clear that one must pay particular attention to the details of the two respective wrongful acts. While the fact that two misrepresentations occur at the same time or place may be a factor in concluding that they are similar or related, what the misrepresentation concerns is key. Thus, to take an example, as is clear from the Principal Judgment, a misrepresentation that Abbott

supports the Mylan Offer is clearly very different from a misrepresentation of how patent income is treated in a company's accounts, even if they occurred at the same event.

29. With this in mind, the next step is to compare each of the Three Wrongful Acts to the Two Wrongful Acts.

Tysabri Accounting Misrepresentation v. Two Wrongful Acts

30. When one takes an *'acutely fact-sensitive'* approach to considering the wrongful acts (in line with the approach in the *Woodman* case), and one bears in mind the fact specific nature of the Tysabri Accounting Misrepresentation, as wrongly recording the royalty stream from Tysabri in Perrigo's accounts, it seems to this Court not to have a sufficient degree of similarity with a misrepresentation that Perrigo would achieve 5%-10% organic growth as a stand-alone company (Organic Growth Misrepresentation) and a misrepresentation that Perrigo was not experiencing integration issues around the Omega acquisition (Omega Integration Misrepresentation).

31. It is true that in ordinary language, the Tysabri Accounting Misrepresentation might be regarded as similar or related to the Organic Growth Misrepresentation and the Omega Integration Misrepresentation (just as the Tysabri Accounting Misrepresentation might be regarded as similar to the Offer Value Misrepresentation), since all of them involve falsely inflating the value of the company. However, as is clear from the Principal Judgment, the expression '*similar or related'* takes on a much more restricted meaning in 'event' aggregation clauses. For this reason, in the *Discovery* case, two wrongful withdrawals of client funds by the same solicitor in connection with the same property, were nonetheless held not to be *'similar or related'* for the purposes of an event aggregation clause. Although both claims involved '*thefts of closely connected clients' money'* by the same solicitor, they were held not to be 'similar or related', because one was the wrongful release of money from the client

account, the other the wrongful arrangement of a facility and charge, which was drawn down, and *then* released from the client account.

32. In light of the fact that two apparently similar claims involving theft by a solicitor from a client account were held not to be similar or related in the *Discovery* case, it is helpful to revisit another case referenced in the Principal Judgment, where two wrongful acts were held to be related for the purposes of an aggregation clause. The *Queensland* case involved 192 clients who lost money in a money market deposit account operated by the Bank of Queensland through its agent (DDH), as a result of a Ponzi scheme. The clients had appointed SPF as their financial planner and SPF had arranged the deposits through DDH. SFP withdrew the funds without authorisation and subsequently went into liquidation. The Bank argued that the claims against it were not separate claims, but should be aggregated to one claim, and so it would only have to pay one retention sum. An important factor in the finding, that all these claims were '*related'* wrongful acts was the fact that the claims were based on the Bank's vicarious liability for the acts of its agent and related to the wrongful act of the agent paying money out of the accounts, but in particular because of the claim that the alleged wrongful acts were engaged in by the Bank as part of SPF's Ponzi scheme, *with knowledge* of SPF's fraud.

33. What the cases referenced in the Principal Judgment, and in particular these two cases illustrate is the degree of similarity which is required for there to be a unifying factor for the purposes of an event aggregation clause, when one looks into the *'detail between the two'* wrongful acts.

34. Thus, it seems to this Court that Tysabri Accounting Misrepresentation and the Organic Growth Misrepresentation/Omega Integration Misrepresentation, are not 'similar or related' for the purposes of an aggregation clause. The former relates to the accounting treatment of income in accounts, while the latter two relate to whether a company would have organic growth of 5%-10% as a standalone company and whether there were issues in connection with

the integration of Omega into Perrigo's business. It seems to this Court that a misrepresentation about the accounting treatment of royalty income is very different in nature from a misrepresentation about organic growth of a company or the integration of an acquisition into the company.

35. The fact that they both involve wrongfully inflating the value of the company is not a sufficient 'real or substantial degree of similarity', in the same way as, for example, the alleged knowledge of the Bank in *Queensland* of the fraud in the case. Indeed, it seems to this Court that the similarities between the wrongful acts in *Discovery* (the same solicitor taking money from the firm's client account) which were held *not* to be similar or related, are more closely connected than any similarity between the Tysabri Accounting Misrepresentation and the Organic Growth Misrepresentation/Omega Integration Misrepresentation,

36. Accordingly, this Court concludes that the Tysabri Accounting Misrepresentation is not similar or related to the Two Wrongful Acts.

Collusive Pricing Misrepresentation

37. The exact same analysis applies in relation to the comparison between the Collusive Pricing Misrepresentation and the Two Wrongful Acts.

38. The Collusive Pricing Misrepresentation is also a very fact specific wrongful act, which involved hiding the fact that results in the Generic RX division were significantly inflated by illegal price-fixing. In this Court's view, for the same reasons as apply in the case of the Tysabri Accounting Misrepresentation, which it is not proposed to repeat, the Collusive Pricing Misrepresentation does not have a sufficient degree of similarity with a misrepresentation that Perrigo would achieve 5%-10% organic growth as a stand-alone company (Organic Growth Misrepresentation) and a misrepresentation that Perrigo was not experiencing integration issues around the Omega acquisition (Omega Integration Misrepresentation). The former relates to hiding the fact that results in the generic division of the company were inflated by illegal price-

fixing, the latter two relate to whether a company would have organic growth of 5%-10% as a standalone company and whether there were issues in connection with the integration of Omega into Perrigo's business.

39. Accordingly, the Collusive Pricing Misrepresentation is not similar or related to the Two Wrongful Acts.

Pricing Pressures Misrepresentation

40. Finally in this regard, the same analysis also applies in relation to the Pricing Pressure Misrepresentation. The Pricing Pressure Misrepresentation is also a very fact specific wrongful act, which involved a false statement that Perrigo had the ability to withstand pricing pressures in the generic drug industry. In this Court's view, for the same reasons as apply in the case of the Tysabri Accounting Misrepresentation, which it is not proposed to repeat, the Pricing Pressures Misrepresentation does not have a sufficient degree of similarity with a misrepresentation that Perrigo would achieve 5%-10% organic growth as a stand-alone company (Organic Growth Misrepresentation) and a misrepresentation that Perrigo was not experiencing integration issues around the Omega acquisition (Omega Integration Misrepresentation). The former involves a false claim that the company had the ability to withstand pricing pressures in the generic drug industry, while the latter other two relate to whether a company would have organic growth of 5%-10% as a standalone company and whether there were issues in connection with the integration of Omega into Perrigo's business.

41. Accordingly, the Pricing Pressure Misrepresentation is not similar or related to the Two Wrongful Acts.

42. Having decided that the Three Wrongful Acts do not therefore aggregate back to the 2015 Policy, as they are *not* similar or related to the Two Wrongful Acts, this means that they are allocated to the 2016 Policy.

43. Under the terms of that policy, Perrigo claims that the Three Wrongful Acts should be treated as a single claim. It relies on Clause 3.51 and 5.2 of the 2016 Policy for this claim.

Clause 3.51 and 5.2 of the 2016 Policy

44. To understand the effect of Clause 5.2 of the 2016 Policy, it is first necessary to refer to the definition of "Single Claim" as set out at Clause 3.51 of the 2016 policy. It states that a Single Claim:

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

Bearing in mind this definition of Single Claim, Clause 5.2 goes on to state that:

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

45. It was not disputed by Chubb that this is an 'originating cause' aggregation clause and not an 'event' aggregation clause. Counsel for Perrigo submitted that for this reason the Three Wrongful Acts amount to a Single Claim since they arose from the same source, namely to defeat the Mylan Counterclaim. Accordingly, he submitted that if the Three Wrongful Acts did not aggregate back to the 2015 Policy (which this Court has now determined), then they must be subject to the terms of the 2016 Policy. This was not disputed. Under the 2016 Policy, he claimed the Three Wrongful Acts must be a Single Claim, since they arose from the attempt to defeat the Mylan Claim. It was not disputed by Chubb that the Three Wrongful Acts contained allegations that the wrongful acts were carried out in order to defeat the Mylan Offer.

46. For this reason, counsel for Perrigo concluded that if this Court concluded that the Three Wrongful Acts were not to be aggregated back to the 2015 Policy, which it has now done, then they would be allocated to the 2016 Policy and the only reason for not finding that they were a Single Claim under that policy, was the pleading point which was taken by Chubb (which is considered below). When this submission was made by Perrigo, it was not controverted by Chubb and so it seems clear to this Court therefore that the Three Wrongful Acts are a Single Claim, subject to the caveat regarding the pleading point. This will be considered next.

Perrigo did not seek order that Tysabri Accounting Misrepresentation is a Single Claim

47. Chubb pointed out, at para 6 of its Amended Defence and Counterclaim, that Perrigo sought a:

> *'declaration that all claims which were **first made** in Roofers 2 and/or Carmignac are treated as a Single Claim under the 2016 Policy'* (Emphasis added)

It is not disputed that the Tysabri Accounting Misrepresentation was not *'first made'* in Roofers 2 or Carmignac, since it was first made in Keinan, which was before Roofers 2 and Carmignac. It is also not disputed that the Collusive Pricing Misrepresentation and the Pricing Pressure Misrepresentation were first made in Roofers 2 and/or Carmignac.

48. Perrigo therefore accepted the accuracy of the point being made by Chubb, namely that in seeking a declaration from this Court that the Tysabri Accounting Misrepresentation was also to be treated as a Single Claim (with the Collusive Pricing Misrepresentation and the Pricing Pressure Misrepresentation, Perrigo was in fact seeking an order from this Court, which was not part of its pleaded case.

49. Counsel for Perrigo however sought to argue that it was part of its case, despite not being pleaded, and so this Court should grant the declaration in respect of Tysabri Accounting Misrepresentation, as well Collusive Pricing Misrepresentation and the Pricing Pressure

Misrepresentation. It made this argument by relying on some parts of the hearing when certain oral submissions were made.

50. On day 7 of the trial, at p 21 of the transcript Mr Gardiner quoted Clause 5.2 of the 2016 Policy and then stated:

> "So Keinan [by Keinan Mr Gardiner meant the Tysabri Accounting Misrepresentation] is notified to the '16 policy and then the single claim provision drags any similar -- sorry, any claim from the same source back to this policy, Judge."

That is the extent of the reference at the trial to the possibility of Tysabri Accounting Misrepresentation being treated as a Single Claim, despite the pleading which refers only to the Collusive Pricing Misrepresentation and the Pricing Pressure Misrepresentation being part of a Single Claim.

51. As sometimes happens, after a trial and judgment has been delivered, there is an argument between parties regarding the final form of the orders which should be made by the Court, as there was in this case. Counsel for Perrigo also relies on what was said at this hearing to claim that Chubb knew that it was seeking to have the Tysabri Accounting Misrepresentation included as part of the Single Claim, despite its pleading. At p 38 of the transcript for that hearing, counsel for Chubb dealt with the draft Order sought by Perrigo, in which Perrigo sought an order that the Three Wrongful Acts were a Single Claim by stating:

> "**Mr McCullough**: And the Court just didn't look at that issue at all. It's just not something, I don't think even that was raised with the Court.
>
> **Twomey J**: Sorry?
>
> **Mr McCullough**: I think it wasn't even raised in argument, Judge. I'm open to correction on that. It certainly doesn't form part of the Court's judgment. And Perrigo want you to include that, Judge, because, of course, they'll avoid the excess under the

2016 Policy if you make that declaration. I can see why they want it, Judge, but it just isn't in the judgment and therefore shouldn't form part of the Order".

52. However, it should also be noted at page 60 of the transcript that Perrigo accepted that the Principal Judgment did not deal with the Single Claim since it is stated:

"We do suggest, respectfully, that you should make an order referable to the single claim clause in the 2016 Policy. But I do want to acknowledge, at the outset, that you haven't dealt with it in your judgment. That is an important acknowledgement, Judge."

53. However, counsel for Perrigo seeks to rely on the fact that Chubb did not take a pleading point in reply, as somehow meaning that by default the seeking of a declaration must be extended to include the reference to the Tysabri Accounting Misrepresentation. This Court does not accept this point. Perrigo only sought, in its pleadings, a declaration that the Collusive Pricing Misrepresentation and the Pricing Pressure Misrepresentation form a Single Claim. Perrigo could have sought to amend its pleadings, but did not do so. A passing reference during the trial to 'Keinan' being a Single Claim under the 2016 Policy does not in this Court's view amount to an implicit amendment of the pleadings, simply because Chubb failed to object on the basis of Keinan (i.e. Tysabri Accounting Misrepresentation) not having been pleaded, when Chubb was in any case claiming that all Three Wrongful Acts were aggregating back to the 2015 Policy.

54. Furthermore, the reliance by Perrigo on a hearing, which was after the trial finished and after judgment was delivered, provides little if any support for Perrigo's claim that the Tysabri Accounting Misrepresentation claim became part of the pleadings by default (i.e. the failure of Chubb to take a pleading point). This is because at that stage the trial is over and the taking of, or the failure to take, a pleading point, when dealing with final orders, is of little consequence, particularly since there was a second hearing regarding the form of final orders (on 11 July, 2025) and at that hearing the pleading point, was in any event taken by Chubb.

55. It seems to this Court that Chubb is making a valid point, namely that Perrigo never sought a declaration that the Tysabri Accounting Misrepresentation should be part of the Single Claim and so this was never part of the case, even though mentioned in passing by Perrigo on one day of a 7- day trial. Accordingly, the only order this Court can make is one to the effect that the Pricing Pressures Misrepresentation and the Collusive Pricing Misrepresentation are a Single Claim under the 2016 Policy.

Clause 4.3 of the 2016 Policy

56. Finally, Chubb relies on Clause 4.3 of the 2016 Policy to support its claim that it should not be liable to make any payments under the 2016 Policy for the Three Wrongful Acts. This Clause states:

> "The Insurer shall not be liable to make any payment for Loss under this Policy:
>
> [….] based on, arising from or attributable to any Wrongful Act or a series of related Wrongful Acts alleged in any Claim, circumstance or any Investigation of which notice has been given under and accepted under any policy existing or expired before or on the inception date of this Policy;"

57. In the original hearing for the Principal Judgment, counsel for Chubb effectively acknowledged that, when dealing with Clause 5.1(iii) of the 2015 Policy, that Clause 4.3 of the 2015 Policy did not advance its position in determining whether the relevant wrongful acts were to be allocated to the 2015 Policy.

> "Clause 4.3, as the Court is aware, I'll just ask the Court to have that open for the purpose of this discussion, is to be found on the preceding page of -- sorry, that's in 2014, Judge -- it's to be found on page 77 of the Book of Policies where it appears in the 2015 policy.

Clause [4.3] of the 2015 and the 2016 policies prevent claims that are covered by the 2014 policy from further attaching to the 2015 or 2016 policies. What claims does it prevent from attaching specifically? Those that are based on, arising from or attributable to the wrongful acts made in a claim that is notified to the 2014 policy.

So if a wrongful act falls under 2014, this clause excludes any claim that is based on, arising from or attributable to those wrongful acts from falling into any subsequent policy period.

So, in one sense, it's a mirror image of 5.1(iii). Slightly different language and actually 5.1(iii) is in some ways broader". (Day [2], at p [22] line [26])

58. In effect he was saying that, under the 2015 Policy, if the wrongful acts were not *similar or related* so as to aggregate back to wrongful acts notified under a previous policy, then it was also the case that Chubb could not claim that those wrongful acts were not covered by 2015 Policy by virtue of being excluded because they were *based on, arose from or were attributable to* a wrongful act which had been notified under the previous policy.

59. This logic must also apply to the question now before this Court, since the wording of Clause 5.1 (iii) of the 2016 Policy is the same as Clause 5.1 (iii) of the 2015 Policy and the wording of Clause 4.3 of the 2015 Policy is similar to Clause 4.3 of the 2016 Policy (and in particular it uses the same expression '*based on, arising from or attributable to any Wrongful Act or a series of Wrongful Acts'*.

60. In this judgment, this Court has applied Clause 5.1(iii) of the 2016 Policy to conclude that the Three Wrongful Acts are *not* similar or related to the Two Wrongful Acts. Applying Chubb's own logic therefore, it must follow that the each of the Three Wrongful Acts are also not *'based on, arising from or attributable to'* any wrongful act for which notice has been given

under a previous policy (i.e. the Two Wrongful Acts). On this basis, Chubb cannot rely on the exclusion clause in Clause 4.3 of the 2016 Policy and therefore the Three Wrongful Acts cannot be excluded from cover under the 2016 Policy.

CONCLUSION

61. For the reasons set out above,

- this Court concludes that the Three Wrongful Acts should be allocated to the 2016 Policy and not the 2015 Policy,
- the Collusive Pricing Misrepresentation and the Pricing Pressure are Single Claims under the 2016 Policy, and
- Chubb cannot rely on Clause 4.3 of the 2016 Policy to avoid cover for the Three Wrongful Acts.

62. As noted in the Second Judgment, there is a clear implication from *Word Perfect Translation Services Ltd v Minister for Public Expenditure and Reform* [2023] IECA 189 at para. [94], that there is an onus on lawyers to take a broad-brush approach to costs and not to engage in time consuming and costly '*nit-picking'*. For this reason, this Court hopes that the foregoing conclusions assists the parties in reaching agreement regarding all costs incurred to date. This case will nonetheless be put in for mention at 10.30 on Friday, 11th October, 2024 , but with liberty to the parties to notify the Registrar, in the hope that such a listing proves to be unnecessary, in the event of the parties agreeing all outstanding matters and final orders.