THE HIGH COURT
PLANNING & ENVIRONMENT

In the matter of Section 50 of the Planning and Development Act 2000 (as amended)
2022/939 JR

Between
MOUNT SALUS RESIDENTS' OWNERS MANAGEMENT COMPANY LIMITED BY GUARANTEE
Applicant

and
AN BORD PLEANÁLA
and
THE MINISTER FOR HOUSING LOCAL GOVERNMENT AND HERITAGE,
IRELAND AND THE ATTORNEY GENERAL
and
THE PLANNING REGULATOR
Respondents

and
ALANNAH SMYTH
and
DUN LAOGHAIRE RATHDOWN COUNTY COUNCIL
Notice Parties

JUDGMENT OF MR JUSTICE HOLLAND DELIVERED on 15 DECEMBER 2023.

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INTRODUCTION

1. In this judicial review the Applicant ("Mount Salus"), a residents' management company for residences on Mount Salus Road, Dalkey, County Dublin, seeks primarily to have quashed a decision (the "Impugned Decision") of An Bord Pleanála ("the Board"), made on the 7th of September 2022, granting permission to the First Notice Party, Ms Smyth, for the construction of a four-bedroom house on a site at Torca Road, Dalkey ("the Site"). Inter alia, Mount Salus says the Site is accessed by a public pedestrian right of way between Knocknacree Rd and Torca Rd, on Killiney Hill and overlooks the Vico Road, the Vico Road Architectural Conservation Area and Killiney Bay.

2. Simplifying the facts somewhat, in the 2016 Dun Laoghaire Rathdown Development Plan, the Site was governed by Objective 0/0, which states: "*No increase in the number of buildings permissible*." For that and other reasons, Dun Laoghaire/Rathdown County Council refused permission in 2020. Ms Smyth, appealed to the Board ("the Appeal"). That appeal resulted in the Impugned Decision. Objective 0/0 was repeated in the Dun Laoghaire Rathdown Development Plan 2022, which came into force on 21 April 2022. The Planning Regulator ("OPR") had recommended deletion of Objective 0/0, but the elected members, in adopting that Plan, decided to keep it. However, that Objective was, on the recommendation of the OPR, removed by direction of the Minister made under s.31(16) PDA 2000[1], with effect from 28 September 2022. By its judicial review, Ground 6, Mount Salus challenges the Impugned Decision as invalidly based on recommendations of the OPR and a draft direction and direction of the Minister (the "Impugned Ministerial Direction"). Both the OPR and the Minister, Mount Salus alleges, exceeded their respective statutory powers.

3. The pleadings (using that word loosely) have closed. The application for judicial review is grounded in the affidavit of Susan McDonnell affirmed on 1 November 2022, to which 20 documents are exhibited. Also deserving of mention is an affidavit of Fred Logue, Mount Salus' solicitor, affirmed on 13 December 2022, to which are exhibited documents relating to the Board's deferral of its decision in the Appeal and to the Impugned Ministerial Direction.[2] Further documents were exhibited to affidavits of

1 The Planning & Development Act 2000.
2 Exhibit 3FPL1 contains copies of

- Pearse Dillon sworn on 23 March 2023 for the Board.
- Claragh Mulhern sworn on 5 May 2023 for the second, third and fourth respondents ("the State").
- John Desmond sworn on 11 May 2023 for the OPR.

4. I have read some, though not all, of the documents exhibited in those affidavits. As to those I have not read, I have found the indices to the exhibits informative as to their nature and content. It appears to me that I have adverted to information ample to allow me to observe that the vast majority, if not all, are in the nature of official or public or, one might say, quasi-official or quasi-public,[3] documents and correspondence. It seems to me highly unlikely that there could be any real dispute as to their accuracy as copies of originals, their provenance, their authorship, their content (as a matter of fact observable in the document as opposed to as to the truth of such content) and, in cases where it arises, receipt by addressees. Such documents are routinely admitted in evidence and their exhibition (other than in an affidavit of discovery) renders them admissible against the party exhibiting them, though not against other partes. But pleaders are entitled to raise such disputes and put opposing parties to formal proofs. So they should take care not to unnecessarily or unintentionally raise doubts in such regards. Of course, even as to documents of which formal proof is not required, issues may remain in dispute as to the interpretation or meaning of such documents, as to the factual truth of their content and/or as to their legal significance. So, again, pleaders are entitled to dispute such matters but should take care not to unnecessarily raise doubts in such regards. A pleader's opponent should not be put to reading between the lines of a plea in an attempt to discern what is "really" in dispute. In short, and as to documentary evidence, pleaders must be clear as to what exactly about a document they dispute.

5. Mount Salus objects to content of the respective opposition papers as, inter alia, being in impermissibly broad and unspecific terms. Accordingly, on the 17th of July 2023, it issued purported[4] notices for particulars to all other parties to the proceedings and sought consent to amend its Statement of Grounds.

6. Ms Smyth agreed to the amendment of the Statement of Grounds and replied to the notice for particulars issued to her. I cannot help observing that her approach was an example of sensible pragmatism. So, she had the good fortune to play no part in those motions but, as a party with a

- OPR Notice dated 6 April 2022 to Minister under S.31 AM(8) PDA 2000 – inter alia recommending deletion of the 0/0 zone objective from the Development Plan & enclosing a draft Ministerial Direction, inter alia to that effect.
- Minister's Notice dated 12 April 2022 to Dun Laoghaire Rathdown County Council of Intention to Issue a Direction under s.31 PDA 2000 and enclosing a draft direction inter alia to delete the 0/0 zone objective from the Development Plan
- OPR Notice dated 17 June 2022 to Minister under s.31AN(4) PDA 2000 – recommending that the Minister issue a Direction to Dun Laoghaire Rathdown County Council inter alia to delete the 0/0 zone objective from the Development Plan.
- Minister's Notice dated 28 September 2022to Dun Laoghaire Rathdown County Council of his issuing a Direction under s.31 PDA 2000 and recording enclosure of a copy thereof. The exhibit does not include a copy of the Direction but it is exhibited by Ms McDonnell.
- Undated advice note by Dun Laoghaire Rathdown County Council that, by reason of the Draft Ministerial Direction, certain sections of Development Plan 2022-2028 would not come into force on 21 April 2022.
- Board letter dated 20 April 2021 to Dun Laoghaire Rathdown County Council deferring decision on Appeal.
- Board letter dated 15 June 2021 to Dun Laoghaire Rathdown County Council deferring decision on Appeal.

3 I use the prefix "quasi" very imprecisely.

[4] I say "purported" not to deem the notices invalid but merely to reflect the dispute as to whether they are valid.

very keen interest in the outcome of the proceedings, was otherwise rewarded for her pragmatism only by delay.

7. The other parties served declined to reply to the notices and refused consent to the proposed amendments. In consequence, on 1 August 2023, Mount Salus issued two motions, both grounded on the affidavit of Fred Logue, solicitor, sworn on 1 August 2023, seeking the following orders:

i. pursuant to Order 19, rule 7, RSC[5] and/or the inherent jurisdiction of the Court, compelling the Board, the State[6] and the OPR to reply to particulars raised by Mount Salus ("the particulars motion").

ii. pursuant to Order 84, rule 23, RSC granting Mount Salus leave to amend its Amended Statement of Grounds ("the amendment motion") in terms of an attached draft further Amended Statement of Grounds.

8. The only replying affidavit is that of Claragh Mulhern, sworn for the State on 14 September 2023. It consists in substance of a legal submission rather than of averments as to fact. While I have considered its content, I need refer to it no further. The parties made extensive written and oral submissions.

9. A considerable measure of resolution occurred at the trial of the motions. By agreement of all concerned, the parties, after trial, were to submit a memorandum recording that measure of resolution. I had understood that it would be an agreed joint statement of agreements reached and issues outstanding. What they submitted was a Memo of their respective positions. However, they do record appreciable agreement. It seems to me, indeed, that in some degree they advance, or at least clarify, the measure of agreement beyond that reached at trial. The positions of the respective respondents are set out sequentially and, last of all, the Mount Salus sets out its understanding of the position resulting from the stated positions of the respective respondents. I append a copy of that memorandum to this judgment ("the Memo"). A disadvantage of the format adopted is that it is necessary to infer from the agreed submission of the Memo that Mount Salus, in its contribution to the Memo, has correctly characterised the positions of the respective respondents such that Mount Salus' very considerable reduction of the issues it invites me to now decide is one to which all parties subscribe. It seems to me proper to draw that inference. However, I will to some degree record the background to and my views on certain matters agreed in the hope that similar motions can be minimised in other case by sensible interaction between parties, and waste of court time avoided. I also address below certain matters which were argued at the hearing though their present importance has, to some extent, receded.

5 Rules of the Superior Courts.
6 i.e. The Minister For Housing Local Government and Heritage, Ireland and the Attorney General.

10. I respectfully make the somewhat plaintive general observation that, in the context of litigation of a kind generally viewed as both time-sensitive and highly consumptive of court resources, practical good sense and sensible and proactive negotiation as to interlocutory matters is as desirable in judicial review as in other forms of litigation. I do not know what, if any, negotiation preceded the hearing but must imagine that the degree of resolution reached during it and since must have, in at least large part, been possible beforehand. The parties, to my mind, have a duty to the court to actively explore such matters, at least where there is an appreciable prospect of progress. Even though I am viewing the matter in hindsight, it is apparent that there was such a prospect here. It is unclear why it was not realised before the hearing, even if only in part.

11. I should say that this judgment is written in considerable part with a view to avoiding, or at least minimising, procedural and pleadings disputes at the trial of the action and to do so by recording the degree of resolution reached during and after the hearing. But of course, as an interlocutory judgment, it does not tie the hands of the trial judge. I should also say that I am conscious that ultimately (by which I mean on foot of the Memo submitted even after the hearing had concluded) a single and net issue remained for decision. However, given that resolution of the other issues occurred at the hearing, and even thereafter, on something of a "rolling" basis as the issues were argued and teased out and concessions made, and also in deference to the helpful and considered arguments made and in some hope that they will not have been entirely wasted and may be thought informative, it has seemed to me proper to set out my resolution of at least some of those arguments, if only obiter.

AMENDMENT MOTION

12. As stated, Ground 6 of the Statement of Grounds impugns the Impugned Decision as invalidly based on recommendations of the OPR and a draft direction and the Impugned Ministerial Direction amending the Development Plan that allegedly exceeded their respective statutory powers. Ground 6 is pleaded, in Part E2 of its Grounds, in the form of a general introductory plea, followed by a series of subparagraphs. Mount Salus argued that the Statements of Opposition filed by the State and by the OPR misinterpreted Ground 6 to the effect that each sub-paragraph represented a distinct and unparticularised (and hence invalid) ground of challenge to the Impugned Decision. Mount Salus motioned to amend its Grounds to make it clear that the sub-paragraphs of Ground 6 were not distinct grounds of challenge but were, rather, particulars of Ground 6.

13. On my inquiry, it became apparent early in the hearing that both the State and the OPR were happy to acknowledge that the sub-paragraphs of Ground 6 were not distinct grounds of challenge but were, rather, particulars of Ground 6. On that basis, and on the basis that such acknowledgement will bind all parties at trial, the parties were happy both that the motion to amend need no longer be determined and that, by this judgment, I would record the common

position achieved between them as to the meaning of the Mount Salus' pleading of Ground 6. Why that position was not reached prior to the hearing of the motion is unclear to me.

PARTICULARS MOTION – MATTERS DETERMINED AT TRIAL OF MOTION & BY THE MEMO

Particulars sought of the State

14. Mount Salus' Notice for Particulars to the State asked what matters are comprised in the phrase "*all relevant matters*" at §35 of the State's Statement Of Opposition (other than matters already specified at §36 thereof). This question related to the State's positive plea that, in making the Impugned Ministerial Direction pursuant to s.31(16) PDA 2000, the Minister "*considered all relevant matters*" when concluding that Objective 0/0 was inconsistent with national and regional objectives in the NPF[7] and the RSES[8], "*including countervailing environmental objectives"*, as evidenced by, inter alia, the reasons set out in the Statement of Reasons for The Direction and the balance of the documents relevant to the Impugned Ministerial Direction as exhibited to the affidavit of Claragh Mulhern sworn on 5 May 2023.

15. I note that discovery or other mere provision of documents is not coterminous with identification of the particular documents before a decisionmaker when making its decision, or those on which it relied in making its decision, unless that is positively stated by the decisionmaker – **O'Keeffe**.[9] Ms Mulhern's affidavit sworn on 5 May 2023 lists 13 documents which, she says, constitute *"each document relevant to the issuing of the Notice of Intention to Issue a Direction and the Direction."*

16. The State's plea at §35 is a reply to §6.8 of the Statement of Grounds, headed "*Countervailing Environmental Objectives".* It alleges that the Minister failed to have any or adequate regard to the environmental objectives of the NPF, or to the balance between those objectives and NPO3b,[10] NPO11 and NPO35 of the NPF. By way of particulars, §6.8 of the Statement of Grounds identifies the relevant content of the NPF as NSO7[11], NPO52 and NPO60.

17. It became apparent at hearing that the State accepts that the matters pleaded in §6.8 of the Statement of Grounds were matters relevant to the Minister's decision. The State differs from Mount Salus only in the respect that, whereas Mount Salus says the Minister did not consider those

[7] National Planning Framework
[8] The applicable Regional Spatial and Economic Strategy.
9 O'Keeffe v. An Bord Pleanála [1993] 1 IR 39. Finlay CJ p78. The headnote reads: "That the affidavit of discovery filed by the Board identified all the documents within its power or procurement relating to the relevant issues but did not identify all the material before the Board when it made its decision and as the applicant had not called upon the Board to deliver a list or minute of all such material, the absence of such list could not constitute grounds for the invalidity of the decision."
10 NPOs are National Planning Objectives set by the NPF.
11 National Strategic Outcome 7.

matters, the State says the Minister did consider them. Given the well-established necessity of precision in pleadings, especially in judicial review, the State should have,

- admitted that the matters specified by Mount Salus were relevant,
- denied that it did not consider them and
- followed that with any positive plea it desired to make.

18. Arguably, it was unnecessary to meet the Mount Salus case for the State to plead positively that the Minister considered all matters relevant to the Impugned Ministerial Direction (i.e. beyond even those pleaded by Mount Salus as having been ignored). But, given the general view that public authorities should be forthcoming in judicial review as to what it is they in fact did, I do not think the State should be criticised for making that positive plea and identifying the documents containing the material which the Minister did consider. The State has confirmed that all documents relevant to the Impugned Ministerial Direction and on which the State intends to rely at trial have been exhibited. Though the State could not have relied in any event on documents not exhibited, or at least cited in affidavit, this confirmation is nonetheless helpful.

19. I infer that Mount Salus is correct in understanding, as recorded at §10 of the Memo, that those documents exhibited to Ms Mulhern's affidavit sworn on 5 May 2023 are the "relevant matters" referred to at §35 of the State's Statement of Opposition, and that no other "relevant matters" were considered. However, and for the avoidance of doubt, that does not permit Mount Salus to allege at trial that the Minister failed to consider "relevant matters" other than such alleged failures as Mount Salus has, or may have, pleaded by the time of the trial.

20. In any event, in those circumstances, and on the basis that I would in this judgment record the position as set out above, Mount Salus accepted at trial that the motion for particulars against the State need be no further pursued.

Particulars sought of the OPR

21. The motion for particulars against the OPR sought, inter alia, that the OPR identify the parts on which it relies of those documents it listed at §17 of its Statement of Opposition. §17 pleaded reliance on two categories of document – "*the various documents referred to above as produced by the OPR (and, indeed, the Direction)*"[12] and "*the various policies ultimately set out in the Direction by the Minister*". I observed at trial that these two categories represented clearly identifiable documents and that unless they were so many or so voluminous that the State's plea amounted to telling Mount Salus to find a needle in a haystack, or that Mount Salus would be otherwise substantively discommoded in litigating the matter by want of the particulars, I would not be inclined to order particulars in that regard. At the hearing Mount Salus disavowed such an argument

12 i.e. earlier in the Statement of Opposition.

and in the Memo records that *"it does not seek further particulars in relation to ground 17 of the OPR's opposition".*[13]

Particulars sought of the Board

22. As to its motion for particulars against the Board and to any extent it was not apparent, which I think in fairness to Mount Salus it was, Mount Salus clarified that it did not seek particulars of the following elements of the Board's Statement of Opposition:

- That part of §15 which reads: *"The Applicant should be confined to those pleas which have been properly particularised. The Board will object to any attempt by the Applicant to expand or enlarge its grounds by reference to general pleas. Insofar as any general plea is denied hereafter, it is without prejudice to this general objection."*

- That part of §16 which reads: *"Insofar as reference is made to different documents which comprised the application for planning permission, submissions made as part of the public consultation process, national policy documents either Development Plan or the records of the decision of the Board, the Board will rely on the totality of each of those documents for their full terms, meaning and effect."*

- That part of §17 which reads: *"Insofar as the pleas at Part E3 of the Statement of Grounds purport to contain legal grounds of challenge, the Board objects to same where they are not addressed in the section entitled Particulars of Legal Grounds".*

23. For completeness, I should add that, as to the Board – as opposed to the OPR and the Minister – Mount Salus accepted that from the 1992 Planning Act[14] the difficulty identified in **O'Keeffe** as to identification of the documents before the Board no longer arises as its file is available and it is always accepted as

- presumptively containing all documents which were before the Board when it made its decision.
- implying that all documents on the file were before the Board when it made its decision.

Further & Outstanding Matters

24. The table below lists what remained after trial in the motions for particulars and adds reference to the post trial Memo.

13 Memo §12.
14 Local Government (Planning and Development) Act 1992.

Particulars Sought	**Plea in Opposition of which Particulars sought**	**Post-trial Memo[15] & Notes thereon**
of the Board		
1. Particulars of the grounds which it is alleged, at §15 of the Board's Statement of Opposition, are inadequately particularised.	§15 - The legal pleas contained in the Statement of Grounds have not been adequately particularised and there has been a failure to comply with the requirements of Order 84, rule 20(3) of the Rules of the Superior Courts.	• The Board confirms that this plea is made in respect of each Ground pleaded against the Board. • Mount Salus pursues further particulars thereof.[16]
2. Particulars of the factual matters which the Board states, at §16 of its Statement of Opposition, differ from the factual particulars pleaded by the Applicant, and which it proposes to rely on.	§16 - Part E3 of the Statement of Grounds purports to plead "Factual Particulars", which are not admitted by the Board.	• The Board does not dispute the chronology pleaded in the Statement of Grounds or require proof of the documents exhibited to the affidavit of Susan McDonnell or of the content thereof. • The Board does not require proof of the documents cited in Part E3 of the Statement of Grounds • The Board disputes the interpretations ascribed by Mount Salus to those documents and, to that end, will rely on the totality of each such document for its full terms, meaning and effect. • Mount Salus understands the foregoing to completely express this dispute as pleaded by Board. • On this basis Mount Salus no longer seeks to pursue question #2.[17] • I understand the Board to limit its plea in the manner it has
3. Particulars of the grounds of which the Board, at §17 of its Statement of Opposition, does not admit the characterisation.	§17 - The Board does not admit the characterisation of any evidence or documentation which is pleaded at Part E3 of the Statement of Grounds.	
	§17 - For the avoidance of doubt, all of the pleas in Part E3[18] of the Statement of Grounds are denied in full as if set out herein and traversed seriatim.	

15 I have sought to express the meaning of the Memo entries as opposed to, necessarily, their precise terms.
16 See generally Memo §§3 & 9.
17 See generally Memo §§1, 2 & 8.
18 Part E3 - Factual Particulars.

Particulars Sought	**Plea in Opposition of which Particulars sought**	**Post-trial Memo[15] & Notes thereon**
		described above and that, in §17, in disputing "characterisation", it is disputing the interpretation and legal significance of the evidence and documents pleaded by Mount Salus. • I take the "avoidance of doubt" plea of §17 to be merely a repetition of that element of §16 considered above and that the same resolution pertains thereto.
of the OPR		
1. With respect to §1 of the Regulator's Statement of Opposition, particulars identifying which matters at §§36-67 of Part E3 of the Applicant's Statement of Grounds are not admitted, and setting out what the Planning Regulator says they say that is different from the grounds as set out.	§1 - The factual pleas made in relation to the case against the OPR, at §§36 -67 are not admitted and the Applicant is put to full proof thereof.	• The OPR states that, other than as indicated below, it now puts Mount Salus to proof of no facts and formal proof of no documents. • The OPR puts Mount Salus to proof that those documents, o Contain the text pleaded by Mount Salus o Bear the interpretations pleaded by Mount Salus • Mount Salus accepts the OPR position as adequately pleaded and seeks no further particulars.[19]

25. Mount Salus concluded its contribution to the Memo as follows:

"Other than in respect of grounds 15 of the Board's opposition, the Applicant considers the clarifications provided by the Respondents provide the additional particulars sought. Whether they do or not is a matter for the Court.

Subject to the above, the only remaining issue relates to grounds 15 of the Board's Opposition."

26. As to this content of the Memo, I make two observations:

19 See generally Memo §§6 & 12.

- Whether the particulars provided by the Respondents are adequate is a matter for the Court to decide only to any extent the parties remain in dispute in that regard and not otherwise.

- I interpret the phrase "*subject to the above*" as referring to understanding expressed by Mount Salus at §7 et seq. of the Memo – which understanding I take to be correct given the agreed submission of the Memo to the court.

The Remaining Issue

27. The remaining issue, therefore, is whether Mount Salus is entitled to further particulars of the Board's plea, as to each Ground pleaded against it, that it is inadequately particularised against it.[20] As will be seen, this apparently simple question has some not insignificant aspects. Not least, the first question is whether in judicial review one may request or motion for particulars at all.

Matters determined – Coda

28. I should say that, in disposing of certain aspects of the motions at trial, a pragmatic course was taken. That should in no instance be taken as undermining the general principles of pleading - not least that:

- pleadings should speak for themselves rather than be later orally glossed.
- documents should be pleaded primarily as to their alleged legal effect on which the pleader party relies, as opposed to primarily their verbatim content - **Jacob & Goldrein**.[21]

The practice in judicial review is convenient that facts be pleaded separately from legal assertions but the alleged connections between them should remain clear from the pleadings.

29. **Jacob & Goldrein** also say that: *"In stating what the pleader contends is the legal effect of an instrument having due regard to conciseness, he should follow the terms and order of the document itself and not attempt to reform it or to use supposed equivalent expressions but he should omit all portions of the document not material to his case"*. In other words, he should plead the relevant parts and not the entire of the document. It is not per se a criticism of a pleading that part only of a document is pleaded.

30. It may, of course, be pleaded in response that other parts of the documents are relevant or that the parts pleaded are to be understood by reason of context in a manner other than that

20 See generally Memo §§3 & 9.
21 Jacob & Goldrein, Pleadings, Principles & Practice, 1990 pp60 & 61.

asserted – such context including other parts of the document - on the basis that documents must be interpreted as a whole. But if so, the pleader in response should specifically plead those other parts of the document on which they rely and plead the meaning and legal effect for which they contend.

31. While a plea that the entire of a document will be relied on for its full meaning and effect, may be endemic and convenient, it does not absolve the pleader from setting out what it asserts to be, in substance, that full meaning and effect. Again, this is not an unfair burden on pleaders. It requires them only to discern when pleading what they will in any event have to discern at trial.

RULES OF COURT

32. The starting point in the law as to particulars in judicial review is Order 84 of the Rules of the Superior Courts ("RSC"). Inter alia, as to specifically judicial review, it provides as follows:

- O.84 r.20(3) *"It shall not be sufficient for an applicant to give as any of his grounds for the purposes of paragraphs (ii) or (iii) of sub-rule (2)(a) an assertion in general terms of the ground concerned, but the applicant should state precisely each such ground, giving particulars where appropriate, and identify in respect of each ground the facts or matters relied upon as supporting that ground."*

- O.84 r.22(5) *"It shall not be sufficient for a respondent in his statement of opposition to deny generally the grounds alleged by the statement grounding the application, but the respondent should state precisely each ground of opposition, giving particulars where appropriate, identify in respect of each such ground the facts or matters relied upon as supporting that ground, and deal specifically with each fact or matter relied upon in the statement grounding the application of which he does not admit the truth (except damages, where claimed)."*

It was common case that, essentially, rules 20(3) and 22(5) impose the same degree of requirement of particularity on applicants and respondents in judicial review. That has been acknowledged at least as far back as **Saleem**[22] and as recently as **McCarthy**.[23]

- O.84 r.24(3) *" ….. the Court may give directions and make orders for the conduct of the proceedings as appear convenient for the determination of the proceedings in a manner which is just, expeditious and likely to minimise the costs of those proceedings …." Such directions may include further affidavits, discovery, fixing issues of fact or law to be determined, and "directions in relation to the exchange of pleadings or points of claim or defence between the parties".*

22 Saleem v Minister for Justice, Equality and Law Reform [2011] IEHC 55.
23 McCarthy v Veterinary Council [2020] IEHC 248, §§38 & 39.

33. By Mount Salus' notice of motion, its motion for particulars was explicitly grounded in Order 19, rule 7 RSC and/or the inherent jurisdiction of the Court. However, Mount Salus' written submissions canvassed only O.19 r.7 and said nothing of inherent jurisdiction. Mount Salus' oral submissions said nothing of consequence of inherent jurisdiction. As argued, its case was confined to O.19 r.7.

34. Order 19 is headed "Pleadings". As relevant, O.19 r.7 reads as follows:

> *"7. (1) A further and better statement of the nature of the claim or defence, or further and better particulars of any matter stated in any pleading, notice or written proceeding requiring particulars*[24]*, may in all cases be ordered, upon such terms, as to costs and otherwise, as may be just.*
> *(2) Before applying under this rule to the Court a party may apply for particulars by letter. ….."*

35. Other rules cited in argument, included the following,

- O.125 r.1. *"In these Rules, unless there is anything in the subject or context repugnant thereto, the several words and expressions hereinafter mentioned shall have or include the meanings following: ….*
  - *"pleading" includes an originating summons, statement of claim, defence, counter- claim, reply, petition or answer;"*

36. As relevant, Order 19, rules 27 & 28 RSC read as follows:

> *"27. The Court may at any stage of the proceedings order to be struck out or amended any matter in any indorsement or pleading which may be unnecessary or scandalous, or which may tend to prejudice, embarrass, or delay the fair trial of the action; and may in any such case, if it shall think fit, order the costs of the application to be paid as between solicitor and client.*
>
> *28. The Court may order any pleading to be struck out, on the ground that it discloses no reasonable cause of action or answer and in any such case or in case of the action or defence being shown by the pleadings to be frivolous or vexatious, the Court may order the action to be stayed or dismissed, or judgment to be entered accordingly, as may be just.*

24 Emphasis added.

DISCUSSION

The Point is Undecided

37. It is agreed that, while judgments in some cases have proceeded on the assumption, without deciding, that O.19 r.7 RSC applies in judicial review,[25] the point is undecided. In **McCarthy**[26] the party from whom particulars were sought did not contest the jurisdiction in judicial review to direct that particulars be provided under O.19 r.7 and MacGrath J assumed it without so deciding. Given the view I take on the substance of the only issue remaining in this matter, I could approach the matter on the same basis. However, in this case Mount Salus put that issue squarely for decision and the respondents met it equally squarely. Indeed, the issue occupied a great part of the arguments in the case and was the subject of considerable written submissions. In deference to those arguments and submissions of all parties, I will set out my views on the issue. But for obvious reasons they must be regarded as obiter. That said, it is at least possible, given that much clarification of the respondents' positions occurred only at and after trial, that my views in these regards could be relevant to costs.

The Floodgates Argument

38. The State expressed its concern that a power in the Court, deriving from O.19, r.7, to order that particulars be given of pleadings in judicial review would have the effect of provoking many motions for particulars and resultant systemic delay impinging on good administration while impugned decisions are in doubt. As O'Donnell J said in **Kelly,**[27]

> *"…. judicial review is meant to provide a speedy review of lawfulness. If the courts do not have sufficient resources to ensure that judicial review is concluded speedily, the great remedy and guarantee of legality can become an obstacle to the efficient administration it is meant to ensure."*

39. I acknowledge that the consequences of a particular interpretation of a statute, or statutory instrument such as the Rules of the Superior Courts, are relevant to its correct interpretation – **NE Pylon**.[28]

40. But in **Re JB & KB**[29] McKechnie J said, "*I have never been a supporter of the totally overused "floodgates" argument*". Floodgates arguments, while very proper for consideration and sometimes

25 E.g. McCarthy v Veterinary Council [2020] IEHC 248; Stapleton v An Bord Pleanála [2023] IEHC 344, §13.
26 McCarthy v Veterinary Council [2020] IEHC 248.
27 Kelly v The Minister for Agriculture, Fisheries and Food, et al [2021] 2 IR 624, §3.
28 North East Pylon Pressure Campaign Ltd v An Bord Pleanála [2016] IEHC 301.
29 In the matter of the Adoption Act, 2010, Section 49 (2), and in the matter of JB (a minor) and KB (a minor) [2018] IESC 30, McKechnie J, §49.

influential, are often to be taken with a pinch of salt. That is especially so where the argument is based on bare assertion - as in **Redmond**[30] where the Court commented on the paucity of evidence in support of a floodgates argument. That said, I do accept that the question of evidence is context-specific to the nature of the deluge foreseen and judges are well-placed from their experience to consider likely effects of procedural changes on the procedural efficiency of litigation. However, I respectfully reject the floodgates argument in this case for the following reasons:

- First, and generally – though the Rules of Court do not exist for the sake of discipline[31] – the Court, as master of its own procedure and with an overarching duty to facilitate justice, must have a jurisdiction to ensure compliance with the Rules in a manner and at a time conducive both to their timely observance and the attainment of their purposes of procedural order, fairness and justice.

- Second, there is the fact that the pleading rules in judicial review are strict. A rule that they can be enforced in advance of trial as opposed to only at trial, is consistent with that strictness and, for reasons on which I expand below, is necessary to procedural good order, the proper use of resources and – quite simply – fairness and justice.

- Third, and as is often observed, judicial reviews usually (though not always) proceed on undisputed facts – **Hogan, Morgan & Daly,**[32] **Okunade**[33] and **Hamwood**.[34] So the occasion for a dispute as to particulars is less likely to arise in practice than in cases involving disputed facts.

- Fourth, and as to particulars of opposition, one must presume that the State will in practice conform to its pleading obligations as to clarity and precision in judicial review – such that the occasion to raise particulars will be relatively rare. Indeed, one may paraphrase Hogan J speaking of personal injuries cases in **Armstrong v Moffatt**[35]:

> *"If, therefore, a* (Statement of Opposition in Judicial Review) *is properly pleaded ….. the necessity for further extensive particulars ….. should be very much the exception, not the rule."*

- Fifth, and amplifying the third, the State will plead in the context of its obligation, particular to judicial review, to place all its cards face up on the table.[36]

30 Redmond v Minister for the Environment, Ireland and The Attorney General [2001] 4 IR 61.
31 Primor plc v. Stokes Kennedy Crowley [1996] 2 I.R. 459; Croke v. Waterford Crystal [2005] 1 I.L.R.M. 321; Cropper v Smith (1884) 26 Ch.D. 700.
32 Administrative Law in Ireland, 5th ed. §18-18.
33 Okunade v The Minister for Justice, Equality and Law Reform, Ireland and The Attorney General, [2012] 3 IR 152; [2012] IESC 49.
34 Hamwood et al v ESB et al 2023 IEHC 173 – "In practice, discovery in judicial review is granted less often than in plenary actions because discovery in plenary actions is most commonly granted as relevant to facts in dispute, the resolution of which dispute bears on the result of the action. Such disputes as to fact are far less common in judicial review – which very often proceeds on agreed facts or turns on issues of law to which the resolution of any disputed facts is of little or no relevance."
35 [2013] IEHC 148, [2013] 1 IR 417.
36 R v. Lancashire County Council ex p. Huddleston [1986] All ER 941 ; cited, inter alia, in RAS Medical Ltd v Royal College of Surgeons in Ireland [2019] IESC 4, [2019] 1 IR 63, Cork Harbour Alliance for a Safe Environment v. An Bord Pleanála [2019] IEHC 85, and ZK v Minister for Justice – ICEA, Power J, 20 October 2023.

- Sixth, in light of the third and the fourth and while this observation is not to be construed as licence to applicants in judicial review, one may reasonably hope that public bodies will take a pragmatic approach to requests for particulars addressed to them and thereby minimise delay.

- Seventh, the concern as to applying O.19, r.7 specifically withers in practical terms if, indeed, there is an inherent jurisdiction to order particulars. And, as the OPR pointed out in this case, Order 124 RSC in any event generally empowers the court to deal with non-compliance with the Rules (such as O.84 r.22(5)) "*in such manner and upon such terms as the Court shall think fit".* Further, and as Mount Salus observes, O.84 r.24(3) affords a wide power to give directions, including as to pleadings. More generally, it clearly recognises that interlocutory applications, and such (hopefully small) delay as they may involve, are a recognised feature of judicial review and are not contradictory of the aim of prompt resolution of judicial review proceedings. Such promptitude is an element of the interests of justice and of the public interest in good administration – but it is far from the only element. On this basis, and as to the floodgates argument, whether such jurisdiction is exercised pursuant to O.19 r.7 as opposed to any inherent jurisdiction, O.84 r.24(3) or O.124, seems unimportant. The effect, whatever it may be, would be the more or less the same.

- Eighth, and though the interlocutory procedures of discovery and interrogatories and the possibility of cross-examination at trial have all been open to litigants for many years (at least in principle and subject to control by the Court) it is not apparent that, as to those procedures, any fears of flooding, similar to those now expressed by the State, have been realised.

- Ninth, there is some, if perhaps not great, weight in the observation that, '*après McCarthy, le déluge*' has not transpired since that case was decided in 2020. This though it was a case in which jurisdiction to order particulars in judicial review was not contested. The floodgates, if any exist, were by that case left at least ajar.

- Tenth, given other procedural avenues to obtaining particulars,[37] any flood likely to derive from reliance on O.19 r.7 will likely occur in any event – and indeed has not occurred to date.

- Eleventh, and finally, in view of the foregoing factors, the Court will be healthily sceptical of motions for particulars – as indeed it was in **McCarthy**. As Humphreys J said in **Stapleton**,[38] if the procedure applies in judicial review it must operate "*subject to close supervision by the court*".[39]

That Pleadings Issues can be Resolved at Trial

41. The inevitable implication of the respondents' resistance, as a matter of general principle, to giving particulars, is that any deficiencies in their pleadings can be resolved only at trial and then by way of orders limiting the scope of their defence of the proceedings accordingly. Indeed, when pressed, counsel for the Board stood over the view that no matter how badly and uninformatively drafted a statement of opposition may be, it can be corrected only at trial and not before and by

37 See below.
38 Stapleton v An Bord Pleanála [2023] IEHC 344 (High Court (Judicial Review), Humphreys J, Ireland - High Court, 23 June 2023).
39 Stapleton, §13.

shutting the respondent out of the case according to the nature and degree of the deficiency of its pleading.

42. It is an essential characteristic of pleadings, and of the fairness which they ensure, that they define and fix the issues in dispute in advance of the trial. One of their primary purposes is to avoid surprise at trial – **Quinn**[40] and **Cooney**.[41] Pleadings

- enable the parties to prepare for trial in the reasonable assurance that there will be no such surprises.
- contribute to the efficiency of the trial, and efficient use of resources, both of the parties and the Court system – **Cooney**.
- contribute to reducing costs by ensuring that in that preparation for trial in advance of trial the parties focus on the issues defined and fixed by the pleadings and not on other issues.

The "*classic statement of principle*" identified in **Casey**[42] includes a purpose "*to ensure that the trial may proceed to judgment without either party being taken at a disadvantage by the introduction of matters not fairly to be ascertained from the pleadings. In other words a party should know in advance,*[43] *in broad outline, the case he will have to meet at the trial."* That such knowledge be available to all parties in advance of trial was described as a "*fundamental principle*" by the Court of Appeal in **Crean**.[44]

43. The observation of Jessel MR in **Thorp**[45] still holds true:

> *"The whole object of pleadings is to bring the parties to an issue, and the meaning of the rules … was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to definite issues, and thereby to diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing. ….. (it) enables the Plaintiff or Defendant to get rid of so much of the action as to which there is no controversy."*

The foregoing applies even in a matter decided on affidavit as the parties must decide what affidavits to file and what to say in them. They do so by reference to the issues as joined in the pleadings.

40 Quinn Insurance Limited v PricewaterhouseCoopers [2021] 2 IR 44. Also, Foley v. Environmental Protection Agency [2022] IEHC 470 §41 – "This cannot, in this Court's view, be fair."
41 Cooney v Browne, [1985] IR 185. Also Armstrong v. Moffatt (t/a Ballina Medical Centre) & Irwin [2013] 1 I.R. 417.
42 Casey v Minister for Housing Planning and Local Government [2021] IESC 42 §23, citing Mahon v. Celbridge Spinning Company Limited [1967] I.R. 1 at p. 3 McGee v. O'Reilly [1996] 2 I.R. 229, and Wildgust v. Bank of Ireland [2000] IESC 10.
43 Emphasis added.
44 Crean v Harty [2020] IECA 364, [2022] 1 IR 171, §19.
45 Thorp v Holdsworth (1876) 3 Ch.D. 637.

44. In **Keegan**[46] O'Donnell J said that the "*purpose of pleadings is to define the issues between the parties, so that each party should know what matters are in issue so as to marshal their evidence on it …. "*. Such marshalling necessarily precedes trial – even a trial on affidavit. He considered that they enabled "*discovery and other intrusive interlocutory procedures (to be) limited to those matters truly in issue*" and considered these factors "*particularly important in judicial review*". Indeed, this observation suggests that insistence on proper particulars, while a motion for particulars may delay a particular case, has the more general effect of reducing the need for "*intrusive interlocutory procedures"* and hence has the more general effect of reducing delay in judicial review.

45. In similar vein, Humphreys J in **Flannery**,[47] when considering the general question of transfer of information between litigants, as opposed to the precise procedure by which it is to occur, said, that *"the court should ask itself the real question which is - what is most just and most likely to save time and costs overall? That normally means that if something is definitely going to come out, it should be brought out at the earliest opportunity so that the case can be, if necessary, settled or at least narrowed at the earliest opportunity."*

46. As the foregoing review of the cases demonstrates, the rules as to pleadings are not merely directed at procedural order – they are grounded in justice and fairness.

47. These purposes of pleadings – as they relate to notice in advance of trial, as opposed to at trial, of the cases to be made by both sides, and as they relate to avoidance of surprise at trial – would be frustrated if it were not in the Court's power, in an appropriate case, to enforce pleadings rules in advance of the trial. That is not to say that in certain types of litigation, including judicial review, in which such expedition as the courts can muster is valued, the court should readily permit delay by disputes over pleadings. But it seems to me to follow from this purpose of pleadings that the court must have the power, where justice requires, to enforce pleadings rules in advance of the trial.

48. Finally, I should say that whereas in plenary proceedings, as was said pithily by O'Donnell J in **Quinn**,[48] pleadings "*should contain "facts — not law", and "facts — not evidence",*[49] those strictures, at least as to law, would seem not to apply in judicial review. **Quinn** is also notable for repeating the oft-ignored principle that it is not a ground for refusing particulars that the party requesting them already knows the facts of which he seeks particulars.[50] As to particulars, what matters is not to know what the facts are, it is to know what the allegations of fact are. The two are often very different.

46 Keegan v Garda Síochána Ombudsman Commission [2015] IESC 68 §42 – as cited in Casey.
47 Flannery & ors. v An Bord Pleanála [2021] IEHC 140.
48 Quinn Insurance Limited v PricewaterhouseCoopers [2021] 2 IR 44.
49 Though O'Donnell J also made clear that identification of evidence incidental to necessary particulars does not offend that principle: Crean v Harty [2022] 1 IR 171 §27.
50 Citing Moorview Developments Ltd. v. First Active plc [2005] IEHC 329, §7.2. See also Crean v Harty [2022] 1 IR 171 §28.

The "Pleading" point

49. The Respondents argued that statements of grounds and of opposition are not "pleadings" within O.125 and so O.19 r.7 cannot apply to them. It is common case that statements of grounds and of opposition in judicial review are not pleadings within O.125. But it is disputed that the disapplication of O.19 r.7 to Statements of Grounds and of Opposition follows. However, too much should not be made of the observation that such documents are not pleadings, given their functions as described in **Casey**.[51] At very least, and indeed as to their main purposes, analogies apply. Indeed, the State cite **Hynes**,[52] for the proposition that a statement of grounds is not a "*pleading*". That case states that "…. *the statement grounding an application for judicial review would seem not to be a pleading in the general sense in which the term is used in the Rules….* ". But consideration of the context discloses that this observation in the judgment was directly followed by the observation that *"……. there is no doubt that precision is required particularly in relation to what appears to me to be a fundamental plea in relation to which particulars should be given."* And the preceding analysis is explicitly by repeated reference to "*pleadings*". That is not to gainsay O.125 RSC – but it is to amplify rather than diminish the analogies between, and framework of analysis common to, pleadings in other forms of proceedings and papers in judicial review.

50. The respondents, though acknowledging that judicial reviews have been struck out under O.19, rr. 27 and 28,[53] cite the recent footnoted obiter of Collins J in **NWTAG**.[54] That case was a judicial review, in which the State applied, pursuant to O.19, rr.27 and/or 28 and/or the inherent jurisdiction of the Court, to dismiss/strike-out the proceedings as disclosing no reasonable cause of action, as frivolous and vexatious and/or as doomed to fail. Collins J noted that no point had been taken as to the form of the application but said,

> *"…. it is difficult to see how the jurisdiction to strike out a pleading given by Order 19, Rule 28 RSC could arise here given that the definition of "pleading" in Order 125, Rule 1 RSC does not include a statement of grounds or originating notice of motion. Indeed, that very point was made by the State by way of arguing that Order 28 RSC (amendment of pleadings) was of no relevance to the amendment application here. Similarly, Order 19, Rule 27 – which empowers the High Court to strike out or order the amendment of "any matter in any indorsement or pleading" would appear to have no application to the proceedings here."*[55]

51. In response, Mount Salus, I think tellingly, pointed to the presumptively significant differences in the wordings of O.19, rr.7, 27 and 28. Rules 27 and 28 apply, respectively, to "*any*

51 See below.
52 Hynes v Wicklow County Council [2003] 3 IR 66 - a case the reasoning of which, as to amendment of grounds, has since been overtaken by the jurisprudence.
53 See, e.g., Alen-Buckley v An Bord Pleanála [2017] IEHC 311.
54 North Westmeath Turbine Action Group v An Bord Pleanála [2022] IECA 126.
55 North Westmeath Turbine Action Group v An Bord Pleanála [2022] IECA 126, fn 5.

indorsement or pleading" and to "*any pleading*". In some contrast, rule 7 applies more widely – to *"any pleading, notice or written proceeding requiring particulars, may in all cases be ordered,"*.

52. The word "any" is notable in rule 7. There is authority that "proceeding" is to be given a wide meaning – **Re the Care of a Ward**.[56] In the ordinary discourse of the courts and their judgments, the phrases "judicial review proceedings", "proceedings by way of judicial review", "proceedings in judicial review" and the like are a commonplace – see for example, **Heather Hill**.[57] S.50B PDA 2000[58] explicitly applies to "*proceedings in the High Court by way of judicial review*". The judgment in **Heir**[59] starts with the words "*Three sets of proceedings have been instituted by the applicant, two for judicial review …*". And **K.A.**[60] is direct authority that, at least after leave has been granted and once the motion for judicial review has issued, judicial review is a "*proceeding in the Court*".

53. Within O.84 Part V RSC as to judicial review,

- Rule 22(2A)(a) refers to *"proceedings by way of judicial review".*
- Rule 24(1) refers to *"the likely impact of the proceedings on the respondent or another party".*
- Rule 24(3) provides that *"the Court may give directions and make orders for the conduct of the proceedings as appear convenient for the determination of the proceedings in a manner which is just, expeditious and likely to minimise the costs of those proceedings*" and further references to proceedings follow.
- Rule 26(1) allows that "*Any interlocutory application may be made to the Court in proceedings on an application for judicial review. In this rule "interlocutory application" includes an application for an order under Order 31, or Order 39, rule 1, or for an order dismissing the proceedings by consent of the parties."* A motion for particulars is an interlocutory application – as much as is, for that matter, a motion for discovery or to administer interrogatories. **De Blacam**[61] observes that the terms of rule 26 "*could hardly be wider: 'any' interlocutory application is permitted".*
- One may add to the list the references to "*proceedings"* in rules 27(5)(6) and (7).

54. It is unnecessary to rehearse here the many cases on the vital and stringent requirements of particularity, clarity and precision in pleadings in judicial review.[62] It suffices to mention **Casey**,[63] in which Baker J for the Supreme Court observed that:

56 People (Attorney General) v. Bell [1969] I.R. 24; In re the Appropriate Care of a Ward of Court [2020] IEHC 20.
57 Heather Hill Management Company CLG & McGoldrick v An Bord Pleanála and Burkeway Homes Ltd and the Attorney General [2022] IESC 43 ([2022] 2 I.L.R.M. 313). One may add Protect East Meath Limited, v An Bord Pleanála, & Ravala [2020] IEHC 294 [2021] 2 IR 796.
58 Planning & Development Act 2000.
59 Heir v An Bord Pleanála & Anor [2016] IEHC 104.
60 K.A. v The Minister for Justice, Equality and Law Reform & Refugee Appeals Tribunal [2003] 2 IR 93.
61 Judicial Review, Third Edition, 2017 §37.01.
62 Some were recited in Ballyboden Tidy Towns Group v. An Bord Pleanála & Shannon Homes [2022] IEHC 7 §305 et seq, Environmental Trust Ireland v An Bord Pleanála [2022] IEHC 540 §210 et seq. and Heather Hill Management Company CLG v. An Bord Pleanála [2022] IEHC 146 §243 et seq.
63 Casey v Minister for Housing Planning and Local Government [2021] IESC 42, §22 et seq.

- While the papers exchanged in judicial review may not be technically "pleadings" as defined by the Rules of Court, the statement of grounds does perform the same function as pleadings generally.
    - It appears to me that this observation must apply equally to statements of opposition – nor did I understand that to be disputed in this case.

- Pleadings ensure fairness in the process.

- Pleadings set the parameters of, and define and fix, the issues in dispute which may be determined by the court. They define and limit the jurisdiction of a court because a court obtains its jurisdiction from the issues the litigants, by their pleadings, bring before it for decision. A decision *"made … without pleading … cannot be sustained …"*

- Given the requirement to obtain leave to bring judicial review on the grounds pleaded, the requirement for clarity and specificity in pleadings and the extent to which the statement of grounds defines and confines the issues to be determined at trial are stricter.

55. I will return to the issues of clarity and specificity in due course. For now I note the analogy – one might even say equivalence (certainly as to function) – noted in Casey between the papers exchanged in judicial review and "pleadings" formally so-called, and the commonality of their main functions and purposes. One may also note that Baker J's judgment liberally uses "pleading" and cognates in referring to procedures in judicial review. While, no doubt, the usage was a convenient shorthand, it is nonetheless telling.

56. I reject the State's argument that the phrase "*any pleading, notice or written proceeding requiring particulars"* in O.19 r.7 is cut back by its context in an order headed "Pleadings" so as to exclude documents not considered by O.125 to be pleadings such as proceedings in judicial review:

- First, it ignores that the simple fact that the word "pleadings" itself appears in the phrase and is it is clearly intended that "*notice or written proceeding requiring particulars*" encompasses something additional - documents not falling within a narrow understanding of the word "pleadings".

- Second, it ignores the contradistinction of that phrase from the corresponding, but notably different, phrases in O.19 r.27 & r.28 RSC: respectively "*any indorsement or pleading*" and "*any pleading*".

- Third, headings such as this, whether in statutes, rules, judgments or other documents, are primarily convenient aids to navigation of documents by giving a general indication of the scope of the content of the text under the heading. One can easily imagine how impossible it would be to navigate at least the paper version of the RSC without such headings and the contents list they populate. But their virtue is in their brevity. They are like chapter headings in a book. Often a

lengthy, complex and detailed text ensues. They are not intended to and do not delimit the scope of what ensues. **Dodd**[64] considers this issue generally and the combined effect of ss.18(g) and 7 of the Interpretation Act 2005. He says, correctly, that s.7 does not apply to statutory instruments. That leaves s.18(g) – which does apply to statutory instruments[65] - to the following effect:

> *"(g) Marginal and shoulder notes, etc.*
> *Subject to section 7,[66] none of the following shall be taken to be part of the enactment or be construed or judicially noticed in relation to the construction or interpretation of the enactment:*
>
> *(i) a marginal note placed at the side, or a shoulder note placed at the beginning, of a section or other provision to indicate the subject, contents or effect of the section or provision,*
>
> *(ii) a heading or cross-line placed in or at the head of or at the beginning of a Part, Chapter, section, or other provision or group of sections or provisions to indicate the subject, contents or effect of the Part, Chapter, section, provision or group;"*

- Fourth, if I am wrong in my third point, and I should consider the heading of O.19 in interpreting O.19, r.7, I would consider it outweighed in any event by my first and second points.

57. The Board's argument that O.19 contemplates plenary proceedings (as it does) in that it is littered, (as it is), with references to such as "Plaintiff", "Defendant" and "Statement of Claim" – not terms used in judicial review – does not seem to me decisive. Indeed, only the latter appears, though not precisely, in O.19 r.7 and does so in terms which distinguish it from the phrase "*or further and better particulars of any matter stated in any pleading, notice or written proceeding requiring particulars*".

Order 84 – a Code?

58. The State also argued that Order 84, Part V RSC is "*to a large extent*", a self-contained procedural code as to judicial review, such that it should not be readily assumed that other rules of the RSC apply to judicial review absent explicit provision to that effect. That is an assertion often made and has some force. The Board described O.84 as, "*For the most part*", a "*sealed code*". But neither cites authority and I confess that I do not see that the express invocation of O.84 in s.50 PDA 2000, makes O.84 a sealed code. That a judicial review is "*under Order 84*" is true of many, if not all, judicial reviews. While there is authority that planning legislation is a self-contained code[67] and that

64 Statutory Interpretation in Ireland, 2008 §3.49 et seq.
65 S.18 commences "The following provisions apply to the construction of an enactment …". S.2 states, inter alia,—(1) In this Act— "enactment" means an Act or a statutory instrument or any portion of an Act or statutory instrument;
66 Which for reasons stated, we may ignore.
67 E.g. State (Abenglen Properties Ltd) v Dublin Corporation [1984] I.R. 381, [1982] I.L.R.M. 590

s.160 PDA 2000 is a self-contained code as to planning injunctions[68] and it is hard to find similar authority as to Order 84. Though it is described, broadly correctly, as "comprehensive" in **Delany & McGrath**[69] that is not quite the same as saying it is a self-contained code to the exclusion of all other rules of the RSC. The Board and the State fairly acknowledge that – though not mentioned in O.84 – Orders 40 (as to evidence on affidavit), 52 (as to motions and other applications) and 99 (as to costs) apply to judicial review. That the proposition of a self-contained code cannot be pushed too far is illustrated by the possibility of judicial review in the form of a plenary action, even if, in such actions, O.84 is applied by analogy in some respects.[70]

59. I respectfully do not consider these arguments by the State and the Board decisive of the issue.

Conclusion as to the applicability of Order 19, rule 7 in Judicial Review

60. For the reasons set out above, in my view, judicial review is a "*proceeding*" in respect of which O.84 r.20(3) and r.22(5) require particularity, such that they fall within the scope of application of O.19 r.7 denoted by the phrase *"any … written proceeding requiring particulars.*" Accordingly, it is competent in an applicant to raise particulars of a statement of opposition and, if applicable criteria are satisfied, competent in the court to order their provision.

Pleadings – Denials, Non-Admissions, General Traverses, etc.

61. Part E3 of the Statement of Grounds pleads "Factual Particulars" - as is required by the practice in this list. In this case they run to 67 paragraphs under the sequential headings, Location, Applicant, Standing and Commercial Nature, Application and Zoning, Planner's Report, Council Decision, Appeal, Inspector's Report, Board Decision, Objectives Referred to in the Board's Direction or Order, Requirements of Ministerial Direction, RSES Provisions. Many pleas refer to documents and, as is permitted, they refer to parts only of those documents.

62. Generally, it was never credible that most, perhaps even many, of the facts pleaded in Part E3 of the Statement of Grounds are in dispute. To pick a simple example, it was always very unlikely to be in dispute that "*The Council decided to refuse permission*". Yet the facts pleaded in Part E3 were met by the Board and the OPR with general traverses. Progressively in argument at the hearing and ultimately by the Memo, these views were ultimately vindicated by those respondents' indications of what, despite their pleas, was not in truth in issue.

68 E.g. Cork Corporation v O'Connell [1982] I.L.R.M. 505, Marine Terminals Ltd v Dublin City Council [2014] IEHC 294.
69 Civil Procedure, 4th Ed'n§31-14 citing Hederman J dissenting in O'Neill v Iarnród Éireann[1991] I.L.R.M. 129 - but citing him for different elements of the sentence in which the word "comprehensive" appears. Hederman J did not use the word.
70 See generally Delany & McGrath, Civil Procedure, 4th Ed'n §31-11.

63. It may be that the legal significance of some or many of the pleaded facts in a judicial review are in dispute. It may be that the interpretation of documents is in dispute. It may be that the legal significance of facts, including documents, is in dispute and it may be that respondents wish to plead additional facts. But none of that absolves respondents of pleading properly and precisely to the facts alleged against them.

64. Nor is it acceptable to argue, as the Board did, that was entitled to deny pleaded facts because the Board wasn't sure why they had been pleaded. Why they were pleaded does not affect their truth or falsity.

65. As has been seen, the Board pleaded that Part E3 of the Statement of Grounds "*purports to plead "Factual Particulars", which are not admitted by the Board*." To drive home the point, the Board also pleaded, "*For the avoidance of doubt, all of the pleas in Part E3 of the Statement of Grounds are denied in full as if set out herein and traversed seriatim*." The OPR put the matter similarly: *"The factual pleas made in relation to the case against the OPR, at §§36-67 are not admitted and the Applicant is put to full proof thereof."* Though the analogy is not precise, I am reminded of O'Donnell J's observation in **Balz #2**,[71] as to "*administrative throat-clearing*". Fortunately, discussion at the hearing and the Memo have resolved these issues – to an appreciable degree by clarifying what Mount Salus served its notice and brought its motion to clarify.

66. While this issue has been overtaken by the level of agreement now reached, the difference of wording as between the two pleas resulted in a discussion at the hearing as to the difference, if any, between a denial and a refusal to admit. In my view there is none. One of the main functions of pleadings is to distinguish those facts which are agreed to be true from those facts which the party bearing the onus of proof of the fact in question must prove. Failing such proof the fact will be deemed untrue for the purposes of the trial. In litigation, and as to proof, facts do not exist in a quantum superposition, or roam wraithlike in a limbo between truth and falsity. In litigation, facts exist only if they are agreed to exist, or proven to exist, as between specific parties.

67. The use of varying terminology in pleadings has led to an erroneous impression that there is a difference between pleading that a fact is "denied", that it is "not admitted", that it is "traversed" or that the opposing party is "put to proof" of the fact. These are all negative pleas[72] – as opposed to positive pleas of facts asserted. All these pleas amount to the same thing: the opposing party must prove the fact in question or the alleged fact will be considered not to exist for purposes of the litigation.

71 Balz v An Bord Pleanála [2019] IESC 90 (Supreme Court, O'Donnell J, 12 December 2019).
72 Some denials do involve an affirmative allegation but that is not the norm see Warner v Sampson [1959] 2 WLR 109 and AIB v AIG [2018] IEHC 677, [2019] 3 IR 650 and Crean Crean v Harty [2020] IECA 364, [2022] 1 IR 171.

68. The pre-CPR practice of the English courts is illuminating. As to pleading a defence – Statements of Opposition in judicial review serving essentially the same function (see **Casey**) - the **White Book 1997**[73] states the position pithily: the objects of pleading identified in **Thorp**[74] are *"secured by requiring that each party in turn should fully admit or clearly deny every material allegation made against him".*[75] The White Book states that *"Parties ought properly to admit facts as to which there is really no controversy. A defendant ought not to deny plain and acknowledged facts which it is neither to his interest nor in his power to disprove."* [76]

69. The "traverse" is an important concept in drafting a defence.[77] It is a denial in a pleading of an allegation of fact made in an opposing pleading.[78] It negates the allegation, contradicts what is alleged, puts it in issue and casts on the opposing party the burden of proving it. A traverse can be made either by a denial or by a statement of non-admission. I would add that in a pleading, importantly, a denial is not a positive averment that the fact denied is untrue. It imposes no obligation on the pleader of the denial to prove that the fact is untrue. It merely requires the opposing party, the party asserting the fact denied, to prove it. Indeed, that was the basis of the decision in **Warner v Sampson**[79] in which a pleaded general denial[80] by a tenant was held not to effect forfeiture of his lease as the plea did not affirmatively set up a title adverse to that of his landlord.

70. Under the heading "*Denying and Not admitting – interactions*", Jacob & Goldrein say that "*The distinction usually observed is that a party denies any matter which, if it had occurred, would have been within his own knowledge, while he refuses to admit matters which are not within his own knowledge. Sometimes the distinction is simply a matter of emphasis, a denial being more emphatic that and an admission*." I do not think that distinction ever amounted to a rule of pleading and seems to me long-since in desuetude.

71. But the real point lies in Jacob & Goldrein's assertion that "*There is no difference in effect between denying and not admitting an allegation*." They cite **Warner v Sampson** in which, Lord Denning said:

73 "The Supreme Court Practice" published shortly before CPR was introduced in England & Wales. §18/13/1.
74 See above.
75 Emphases added.
76 §18/13/2. Citing Lee Conservancy Board v Button (1878) 12 Ch.D. 383.
77 Though familiar to pleaders, the word seems archaic and jargonistic. Merriam-Webster records its etymology as follows: Anglo-French traverser, literally, to lay across, bar, impede, from Old French, from Late Latin transversare to cross, from Latin transversus lying across (Traverse Definition & Meaning - Merriam-Webster). It perhaps has its vestige in modern usage in phrases such as "I wouldn't cross him".
78 For what follows see generally Jacob & Goldrein, Pleadings, Principles & Practice, 1990 p121 et seq. See also, Odgers Principles of Pleading & Practice in Civil Action 22nd ed 1981 p132.
79 [1959] 2 WLR 109.
80 "Save and except for the admission herein contained this defendant denies each and every allegation in the statement of claim as if the same were specifically set out and traversed seriatim."

> *"Sometimes the pleader "denies," sometimes he "does not admit" each and every allegation; but whatever phrase is used it all comes back to the same thing. The allegation is to be regarded "as if it were specifically set out and traversed seriatim." In short, it is a traverse, no more and no less. Now the effect of a traverse has been known to generations of pleaders. It "casts upon the plaintiff the burden of proving the allegations denied …. So this general denial does no more than put the plaintiff to proof."*

Hodson LJ said:

> *"…….. although the practice of pleaders may vary, there is no effective line to be drawn between non-admission, on the one hand, and denial on the other …"*

Ormrod L.J. said:

> *"Some pleaders, if they wish to go no further than to put the plaintiff to the proof of the matters averred in the statement of claim, will use the form "The defendants do not admit." Others will say: "The defendants deny." Having regard to the modern practice of pleaders, I have always regarded the two forms as having a similar effect, and, indeed, it is difficult to see what other effect in the ordinary case a denial could have than putting the plaintiff to proof, unless the defence also contained some positive averments."*

In my view, the headnote in Warner v Sampson correctly summarises the foregoing in asserting that,

> *"A general traverse in a pleading, whether in the form which "denies" or in the form which "does not admit" (between which forms no effective distinction can now be drawn), does no more than put the other party to proof of the allegations denied."*[81]

72. The OPR pressed me for a distinction between a denial and a non-admission by citing McDonald J in **AIB v AIG**,[82]

> *"It is also well established that the court will not direct a party to provide particulars of a denial in a pleading. … Logically, the same principle must apply to a non-admission. In Warner v. Sampson ….. made clear that a denial and a non-admission have a similar effect in that both pleas have the effect of putting the opposing party on proof of its case."*

Properly read, McDonald J is here making the very point that there is in substance no distinction between a denial and a non-admission – that is the very reason why, logically, the same principle

81 Emphasis added.
82 Allied Irish Banks plc v AIG Europe Limited, [2018] IEHC 677, [2019] 3 IR 650.

must apply to both and, notably, his view was grounded in Warner v Sampson. That view was repeated by the Court of Appeal in **Crean**.[83]

73. The law has varied as to whether a general traverse – simply in one plea denying all facts alleged – is permissible. Warner reflects the permissive view. Later, Jacob & Goldrein say: "*every allegation of fact which the defendant does not intend to admit must be specifically traversed by him in his defence. A general denial of such allegations or a general statement of non-admission of them is not a sufficient traverse of them."*[84] Under the heading "*Bad Pleading*" they say: "*The rule requiring the traverse to be specific applies equally whether by his traverse the defendant denies or does not admit. The refusal to admit must be stated as specifically as a denial so that the plaintiff will thereby know precisely what is admitted and what is put in issue*". They say: *"Each material fact must be traversed. …. the traverse … must not be vague, general or evasive. Rather it must be specific and must deal with each allegation of fact and, as regards each, must answer the point of substance."* Odgers says[85] that care must be taken to deal specifically in the defence with every material allegation of fact. There is some leeway for practicality and to avoid prolixity, essentially as to immaterial facts ("matters of inducement").[86]

74. It is very clear that the pendulum has now swung very much in favour of specificity. This reflects an insistence that pleadings commit to identifying what is truly in dispute as opposed to keeping as many options as possible open for as long as possible. The latter course is, while tactically tempting and perhaps a cherished art of pleaders, from a neutral point of view, inefficient and wasteful and fails to narrow the issues.[87] It requires one's opponent to prove facts which are not in truth in dispute and waste resources in doing so. It is no answer to that criticism, and is unfair to one's opponent, to expect him/her to divine which facts his/her opponent "really" denies and cut back his/her proofs accordingly. The current position of the pendulum is most obvious in personal injury claims, though the impetus is statutory: as Collins J said in **Morgan**,[88]

> *"From a practical point of view, one can readily understand why a pleader might wish to avoid committing themselves unduly to any particular theory of liability and instead seek to plead in a manner that covers all the bases lest something further should emerge at trial. Indeed, that was conventionally seen as part of the art of pleading. However, that mode of pleading is not, in my view, permissible since the enactment of the 2004 Act. A plaintiff is required to plead specifically and cannot properly rely on the pleading equivalent of the Trojan Horse, which can as needed spring open at trial and disgorge a host of new and/or reformulated claims."*

83 Crean v Harty [2020] IECA 364, §19.
84 Pleadings, Principles & Practice, 1990 p122.
85 Op cit p133.
86 Pleadings, Principles & Practice, 1990 p123.
87 The general point holds good, though there may be exceptions. For example, it may be legitimate to deny a fact not really in dispute to force one's opponent to call a witness to prove it but whom one wishes to cross-examine as to other matters.
88 Morgan v Electricity Supply Board [2021] IECA 29.

That there are to be no "trojan horses" in pleadings was a phrase taken up in judicial review in **Foley**.[89] In my view, the views of Collins J in **Morgan** apply in judicial review.

75. In my view, O.84, rr.20(3) and 22(5) RSC and the many cases (some cited above) of recent years on particularity of pleadings in judicial review, betoken the same impetus as to specificity of pleading. And statements of opposition must be as particular as statements of grounds.

Particulars of a Mere Denial? Particulars identifying the fact denied?

76. **AIB v AIG**[90] and **Crean**[91] are authority that, at least generally, particulars will not be ordered of a mere denial. Particulars may be ordered where the denial amounts in substance to a positive allegation - **Crean**[92] – but that seems to me less an exception to the rule than a situation not falling, in substance, within the rule. In specifically personal injuries cases it derives from an unusual statutory provision.[93] In both those cases it was said that the explanation of this rule in **Pinson**[94] was incomplete: that explanation was that the rule *"rests on the commonsense basis that there is nothing which the defendant can particularize … there would be no point in ordering him to do something which ex hypothesi is impossible."* That this explanation is incomplete, which I respectfully agree, implies that it is, nonetheless, a partial explanation and informative for all that it is incomplete.

77. For completeness, I should say that McDonald J found a more complete explanation in the logic of Astbury J. in **Weinberger**.[95] The rule that particulars will not be ordered of a mere denial derives from the true effect of a mere traverse – which is not to assert positively that an alleged fact is untrue but is merely to put the party bearing the onus of proof of that fact to its proof: *"If the onus of proof rests solely on one party, the opposing party must be entitled to put that party on proof and the classic way in which to achieve this is to deny (or not to admit) the allegations in question."*

78. However that, at least generally, particulars will not be ordered of a mere denial (in the sense of particulars of the basis of denial) does not bear on the requirement that such denials must be specific in identifying the facts they deny. Once that fact is identified and denied, particulars will not be ordered of why, how or on what basis it is denied. There need be no such basis as the plea merely puts the opponent to proof. But the prior question is: has the fact denied been specifically

89 Foley v Environmental Protection Agency [2022] IEHC 470 (High Court (General), Twomey J, 26 July 2022).
90 Allied Irish Banks plc, v AIG Europe Limited, [2018] IEHC 677, [2019] 3 IR 650 .
91 Crean v Harty [2020] IECA 364 [2022] 1 IR 171.
92 Collins J observed that *"Many — perhaps most — such denials will be negative in substance as well as in form …"*
93 S.13(1)(b) of the Civil Liability and Courts Act 2004 requires defendants to give "full and detailed particulars of each denial or traverse" in a defence where possible. In *Armstrong v Moffatt* [2013] IEHC 148, [2013] 1 IR 417, Hogan J described the 2004 Act as having "*introduced very significant changes to the system of pleading in personal injury cases*". Collins J in Crean agreed and also observed that it was "*highly unusual for the Oireachtas to legislate for the form of pleadings in any area of litigation*."
94 Pinson v Lloyds and National Provincial Foreign Bank, Ld. [1941] 2 KB 72.
95 Weinberger v Inglis [1918] 1 Ch. 133.

identified? That is the question relevant in the present case and, at least at the start of the hearing, answer was "no".

79. As was said in **Saleem**[96] of judicial review, a respondent may deny all essential elements of the grounds alleged and to put the applicant on proof of all material aspects of the claim. Nonetheless, it *"behoves the Respondent to assist the court … by identifying the issues of fact, if any, which it contests."*

80. I confess that, to some degree, I am influenced by the experience that in judicial review generally, and in planning judicial review, significant dispute as to fact is not at all the norm. That is why procedures such as interrogatories, discovery and cross-examination, though possible in judicial review, are relatively rare. I confess to having formed, early on, the strong suspicion, having read Part E3 of the Statement of Grounds, that most of it was unlikely to be in dispute. So it has proved. The respondents should have pleaded accordingly and the burden on them of identifying those (likely) few facts really in dispute would not be great. And, as a task essential in preparing for trial in any event, it will only be brought forward in point of time in the cause of fairness. In any event, I do not accept that, as the OPR suggested, appreciable time and costs would be lost by requiring the OPR to plead to the individual facts alleged to the extent of identifying any in reality denied – by the rules of pleadings all others are admitted by default.

81. In oral argument, the Board and OPR in particular and in effect said that the documents in the case will not be in dispute and noted the exhibition of many by the Board's deponent. The Memo has confirmed that to be so. I note the submission in **McCarthy**[97] that the distinction in plenary proceedings between pleadings and evidence is not directly applicable to judicial review, where the evidence in its entirety is before the court before trial. I do accept that in procedure on affidavit and by exhibition of documents in advance of trial, diminishes the risk of surprise. But that finding in McCarthy seems to me to have been supplementary, rather than essential, to the ratio that *"the particulars provided in the statement of opposition are adequate to define the issues … and to ensure that no surprise arises. It … in essence, what the applicant is in search of is whether there is any further evidence upon which the assertions contained in the statement of opposition are based."*[98] And in **Quinn** the Supreme Court said that *"… exchange of witness statements may reduce the risk of a party being taken by surprise at a trial, but does not mean that less is required by way of particulars."* A similar observation was made In **Murphy v De Puy**[99] as to expert reports: *"… in general, expert reports delivered pursuant to S.I. 391 (which are intended evidence) cannot fulfil an obligation to deliver particulars of fact in a pleading."* The point was repeated in **Crean**.[100]

96 Saleem v Minister for Justice, Equality and Law Reform [2011] IEHC 55.
97 McCarthy v Veterinary Council [2020] IEHC 248, §33.
98 MacGrath J also said: "I am not satisfied that the statement of opposition in this case, when read in its entirety and in so far as it goes, lacks particularity which necessitates the intervention of the court."
99 Murphy v De Puy Orthopaedics [2016] IECA 15.
100 Crean v Harty [2020] IECA 364 [2022] 1 IR 171 §31

82. Though the distinction between facts and evidence "*is often a fine one and difficult to apply in practice*",[101] the concepts must not be conflated or confused. To illustrate the point: applicants in planning judicial reviews have been shut out from arguments supported on affidavit (i.e. put in evidence) but not pleaded. And, just as it is a "basic rule" that an affidavit is no substitute for an applicant's pleading (**Reid**[102] and **Kemper**[103]), nor is it for a respondent's. The respective documents serve different functions: the one is about facts; the other is about evidence.

83. And in any event, documents exhibited by, and so deemed admitted by, the Board are not thereby admitted by the OPR and the State – and so also, mutatis mutandis, as to documents admitted by the OPR and the State. Questions may also arise as to whether, by exhibiting a document, the exhibitor admits or adopts the truth of its content as opposed to merely that the document existed asserted certain matters and was in the possession of a party at a material time. At trial these may turn out – in fairness often turn out – not to be in issue. But that such issues can and do arise is recognised in **RAS Medical**.[104] It is to avoid such difficulties unexpectedly arising at trial that the pleadings are the procedure for, and represent the point in the sequential process towards trial for, identifying the facts in issue so that such questions of admission and proof can be considered and addressed in a timely fashion and in preparing for trial. In RAS Medical, the Supreme Court said that "*a court can, and in many cases should, punish a party in costs for unnecessarily and unreasonably declining to agree evidence in circumstances where there was no real basis for contesting the testimony concerned.*" While that observation relates to evidence, in my view the same can be said for unnecessary and unreasonable denials of fact.

84. I was also invited to compare the facts positively pleaded by the Board with those pleaded by Mount Salus and to tease out the differences in the interstices between them – or at least it was suggested that that is what Mount Salus should do. That is not a task to which one's opponent should be put. That a respondent positively pleads its own case does not absolve it from pleading its response to the applicants'. While the phrase "*we all know what is really in dispute*" was not used, that was the tenor of the argument. While it has a superficial attraction, it is true only until it turns out at trial that it isn't. The answer is that on general pleading principles, and in particular given Order 84, rules 20(3) and 22(5), what is "really in dispute" is to be discernible from the pleadings, not by use of a divining rod or intuition or, even, experience. The issues in dispute must be identified in the pleadings – not in later oral gloss or explanation of them, as, indeed occurred, belatedly, in this case.

85. Though it was not argued, I should note also the principle that a defence needs to plead only to material facts and need not plead to particulars of those facts. However, and as ever, this is an

101 McCarthy v Veterinary Council [2020] IEHC 248, §30 citing Burke v. Associated Newspapers (Ireland) Ltd [2010] IEHC 477.
102 Reid v An Bord Pleanála [2021] IEHC 230 §11.
103 Joyce Kemper v An Bord Pleanála [2020] IEHC 601 §15.
104 RAS Medical v RCSI [2019] 1 IR 63.

issue of substance over form, headings and labels. In the current practice in judicial review, the section of a Statement of Grounds headed "Factual Particulars" or similar, in reality pleads the facts material to the matter.

A Final Comment

86. I am conscious that sight should not be lost of the fact that, for the purposes of the Rules, judicial review papers are not pleadings and that some caution is required in analysing them as if they were. However, **Casey** is clear that they serve the same function and that implies that, at least broadly, they should play the same role in serving efficiency and fairness. **Hynes** is to similar effect. The same general principles and purposes underly the rules as to pleading as underlie those relating to papers in judicial review. I am also struck by the fact that O.19 r.7 is explicitly not confined to pleadings but encompasses written proceedings. I am struck further by the blanket, undiscriminating, extent and, indeed the insistent ("*for the avoidance of doubt*") terms, of the general traverses in this case in a context in which one would have ordinarily expected that the great majority of facts would be agreed. I do not see such a traverse as compliant with O.84 r.22(5) RSC – at least in the absence also of specific engagement with the factual assertions in the Statement of Grounds, at least as to identification of those facts in truth denied. In contrast, McCarthy was a case in which the plea in the Statement of Opposition of which particulars were sought was far from a general traverse and was *"adequate to define the issues … and to ensure that no surprise arises"*[105] and the request for particulars in that case sought evidence.[106]

87. In the end, this is simply the application of the same rules of pleading to both sides: respondents must be as precise as to the facts they deny as applicants must be precise as to the facts they assert.

PARTICULARS OF FACTS DENIED AND CHARACTERISATIONS DENIED

88. In my view, Mount Salus was entitled to raise particulars requiring that the respondents identify, and distinguish between, those facts which they deny and those which they admit. They must specifically identify those they deny. They may generally admit the rest – indeed they will be assumed to do so. Once a fact is identified as denied, the Respondents are generally not obliged to give particulars of that denial – though one should bear in mind the nuances of the judgment in **AIB v AIG** and **Crean** (as to denials amounting in substance to positive assertions of fact) and they may, of course, plead contradictory assertions of fact if they wish.

105 §38.
106 MacGrath J said at §38: "…. what the applicant is in search of is whether there is any further evidence upon which the assertions contained in the statement of opposition are based."

89. I consider that the same rules apply, mutatis mutandis, to the plea that "*The Board does not admit the characterisation of any evidence or documentation which is pleaded at Part E3 of the Statement of Grounds*". The word "characterisations" is a little unclear but I assume it to encompass both the interpretation of documents and the legal significance of facts. Applicants for judicial review must specifically plead both the interpretation of documents and the legal significance of facts which they allege and respondents must specifically identify those it denies. It is of course, open to a respondent, if it wishes to admit the document itself but deny the characterisation and, again if it wishes, to plead its own interpretation or legal significance: **Jacob & Goldrein**.[107] That said, and no doubt sensibly, Mount Salus don't now seek to press that issue beyond the position disclosed in the Memo.

PARTICULARS OF INADEQUACY OF PARTICULARS - DECISION

90. As recorded above, the Board pleaded that "*The legal pleas contained in the Statement of Grounds have not been adequately particularised*" and pleaded failure to comply with O.84 r.20(3). Mount Salus sought particulars of the grounds which, the Board alleges, are inadequately particularised.

91. As was said in **Eco Advocacy**,[108]

> *"… there is some modest onus on respondents to give notice of the objection as to inadequate particulars of pleading by way of the statement of opposition so as to allow consideration of whether an applicant should seek an amendment to further particularise the complaint being made …"*

92. Amendment of grounds can mend a lack of particulars – as Humphreys J said in **Stapleton**,

> *"…… there is no rule that you can never mend your hand. A pleading objection is not a "gotcha" point from which there can be no escape. But it does to some extent require the party at the receiving end to either stick or twist – stand on their pleadings and defend them as written, or seek an amendment (even for the avoidance of doubt)."*

93. In my view, similar principles apply here as are set out above as applying to denials of fact. Mount Salus was entitled to raise these particulars and the Board must specifically identify those legal pleas which it says are inadequately particularised. Once such a legal plea is identified, the Board is not obliged to give particulars of that inadequacy. Particulars will not be ordered of why or

107 Jacob & Goldrein, Pleadings, Principles & Practice, 1990 p61.
108 Eco Advocacy CLG v An Bord Pleanála [2021] IEHC 265.

how the particulars in a statement of grounds are allegedly inadequate. Respondents need not coach applicants as to how to amend their pleadings to cure any defect – or vice versa.

94. The Court will, of course, expect that State bodies exercise proper judgment in pleading a want of particulars – as opposed to pleading it as a knee-jerk reaction to every case and as to all grounds of challenge. A certain impatience in this regard is perhaps to be detected in the refrain of Humphreys J that "*The game of "particularise that" can be played forever*",[109] *"… the cry of "particularise that" can echo indefinitely*"[110] and *"the opposing cry of "particularise that" has to stop when it is acceptably clear what the point being made."*[111] However, I need not consider here how a proper restraint by respondents can be ensured while vindicating the obligation on applicants to provide particulars.

95. All that said, at trial the Board indicated that its allegation of want of particulars applied to each and all of the four grounds of challenge were laid against it. That is repeated in the Memo. While, as I have said, "oral pleading" at a motion hearing is inappropriate, on a pragmatic basis I can see that there may be little point in forcing the Board to say again in replies to particulars what I and the Memo have here recorded it as saying. That done, the Board has no obligation to give particulars of why or how Mount Salus' particulars are inadequate. In that respect, I refuse Mount Salus' motion.

CONCLUSION

96. In summary, and almost by attrition, Mount Salus has got by its motion for particulars, in oral argument and by the Memo, much of the information it seeks. As to the outstanding item, particulars of why or how Mount Salus' particulars are inadequate, I refuse it the relief it seeks.

97. In light of the foregoing, I will hear the parties as to the proper form of order to be made and will list the matter for mention only on 12 January 2024 for this purpose. I invite the parties to seek to agree a form of order prior to that date.

98. I provisionally consider that Mount Salus is entitled to its costs of the motion for particulars only, and that against the Board and the OPR only, and that there should be no order as to the remaining costs. If any party disagrees, I will hear the parties on the issue.

DAVID HOLLAND
15/12/23

109 Atlantic Diamond Ltd v An Bord Pleanála [2021] IEHC 322.
110 Sweetman v APB & Bord na Mona [2021] IEHC 390, citing Waltham Abbey Residents Association v An Bord Pleanála [2021] IEHC 312, [2021] 5 JIC 1002 (Unreported, High Court, 10th May 2021) and Eco Advocacy CLG v An Bord Pleanála [2021] IEHC 265 (Unreported, High Court, 27th May, 2021).
111 Eco Advocacy v An Bord Pleanála & Keegan Land Holdings [2023] IEHC 644.

APPENDIX - POSITION OF THE PARTIES FOLLOWING THE HEARING

The Board

1. The Board does not dispute the chronology of events pleaded in the Statement of Grounds or require further proof of the documents exhibited in the affidavit of Susan McDonnell or the contents thereof.

2. The Board does not admit the summaries of the documents which are contained at E3 (Factual Grounds) of the Statement of Grounds but does not require further proof of those summaries and considers that the proper interpretation of the documents will be a matter to be addressed in oral and written arguments at the trial of the action.

3. The Board confirms that the plea at §15 of the Statement of Opposition that there has been a failure to comply with Order 84, Rule 20(3) of the Rules of the Superior Courts is made in respect of each of the Core Grounds pleaded against the Board.

The State Respondents

4. The State Respondents confirm that, in accordance with the plea at §35 of their Statement of Opposition, the documentation on which the State Respondents will rely as evidencing the 'relevant matters' which the Minister considered are the Statement of Reasons for the Direction and the balance of the documentation relevant to the Direction as exhibited in the Affidavit of Claragh Mulhern filed on 5 May 2023. As already confirmed in the averments at §§8, 9 and 13 of that Affidavit, all documents relevant to the Direction and on which the State Respondents intend to rely at hearing have been exhibited.

The Office of the Planning Regulator

5. Whereas the OPR does not believe an amendment would have met the requisite legal tests, the OPR accepts the explanation of the pleadings as given and accepts that the sub-pleas under Core Ground 6 are particulars of the over-arching complaint.

6. With regard to §1 of the Statement of Opposition the OPR only seeks to put the Applicant on proof that the documents cited therein contain the text cited and set out – i.e. that what is set out is actually in those documents. There is no proof required of any other fact in the paragraphs referenced in §1 nor *formal proof of those documents* required – the only issue that arises is proof is required that the documents (of which no proof is required) mean what the Applicant says and contains what the Applicant says.

The Applicant

7. The Applicant understands paragraphs 1 to 6 as a set of clarifications provided by the Respondents as to what they intended their Statements of Opposition to mean, having considered the Applicant's motion and the various submissions.

8. With regard to paragraph 2 above, the Applicant understands the Board's position to mean that the first sentence of paragraph 16 of its Statement of Opposition is confined to the matters set out in the second sentence, and is not intended to require the Applicant to formally prove documents from the Board's file.

9. With regard to grounds 15 of the Board's Statement of Opposition, the Applicant considers there is a remaining issue as to whether the Board has given adequate particulars of its grounds of opposition to comply with Order 84 Rule 22(5), or should be required to provide further particulars thereof under Order 19 Rule 7. It is submitted that it has not.

10. With regard to paragraph 4 above, the Applicant's understanding of the position of the State Respondents as explained during the hearing was that the Minister considered the documents exhibited by Claragh Mulhern when preparing the Direction (which includes the Statement of Reasons for the Direction), that those documents are the "relevant matters" referred to, and that there are no other "relevant matters" that were considered.

11. The Applicant considers that the OPR statement at paragraph 5 resolves the issue relating to interpretation of ground 6.

12. The Applicant considers that paragraph 6 above resolves the issue relating to ground 1 of the OPR's Statement of Opposition: the Applicant is not required formally to prove the underlying facts, but is required to prove its interpretation of the documents as exhibited. The Applicant accepts that the particulars provided by the OPR are otherwise adequate; and it does not seek further particulars in relation to ground 17 of the OPR's opposition.

13. Other than in respect of grounds 15 of the Board's opposition, the Applicant considers the clarifications provided by the Respondents provide the additional particulars sought. Whether they do or not is a matter for the Court.

14. Subject to the above, the only remaining issue relates to grounds 15 of the Board's Opposition.