

**THE HIGH COURT
JUDICIAL REVIEW**

[2019 No. 215 JR]

BETWEEN

DANIEL MCCARTHY

APPLICANT

AND

THE VETERINARY COUNCIL OF IRELAND

RESPONDENT

JUDGMENT of Mr. Justice MacGrath delivered on the 27th day of February, 2020.

Introduction

1. This is an application for an order pursuant to O.19, r. 7(1) of the Rules of the Superior Courts to compel the respondent to furnish further and better particulars of matters arising from the statement of opposition delivered in these proceedings on the 29th July, 2019.
2. In the underlying proceedings, the applicant seeks, *inter alia*, an order of certiorari quashing the decision and recommendation of the respondent's Fitness to Practice Committee ("*the Committee*") in connection with an inquiry into the conduct of the applicant. The Committee reported its findings and made recommendations on the 22nd January, 2019. It recommended, *inter alia*, that the applicant's name be struck from the respondent's register. The findings of the Committee were reported to the Veterinary Council of Ireland ("*the Council*") which is charged, *inter alia*, with the imposition of sanctions. It is alleged that there were errors on the face of the report of the Committee.
3. A statement of opposition was delivered on 21st June, 2019. On the 18th July, 2019 a notice for particulars was raised by the applicant arising out of the statement of opposition. This was replied to on 25th July, 2019. The applicant took issue with a number of these replies and raised a notice for further and better particulars on the 29th July, 2019. In total, seven queries were raised. The court was informed at the outset of the application that no issue now arises in respect of certain of those queries.

Background

4. The applicant is a vet and a pharmacist. The respondent is a statutory regulatory body who conducted an investigation into allegations made against the applicant and which occurred between January, 2009 and February, 2011. Broadly speaking it is alleged that the applicant dispensed prescription only animal medicines in respect of animals which were not under his care. It is also alleged that he issued prescription only animal medication without prescription and failed to produce documentation to an authorised officer. The disciplinary proceedings were instituted by way of notice of inquiry dated 12th July, 2012 but were stayed pending the outcome of a criminal prosecution. Following the conclusion of the criminal proceedings, the disciplinary proceedings were re-entered before the Committee on the 10th October, 2018. The applicant was also the subject of disciplinary proceedings by the Pharmaceutical Society of Ireland and that inquiry concluded on the 5th February, 2018.

5. The oral hearing before the Committee was held on the 10th October, 2018. The applicant was not present because of a particular family difficulty but was represented. A number of charges were withdrawn and the applicant accepted the remaining charges. Following submissions, the hearing was adjourned. On the 22nd January, 2019, the Committee made its decision and recommendations and it is against that decision and recommendations that these judicial review proceedings have been brought. Two of the recommendations are at the heart of the challenge.
6. At para. 1 of the recommendation, the Committee stated that it was satisfied that there was professional misconduct on the part of the applicant in relation to certain alleged breaches of the European Communities (Animal Remedies) (No. 2) Regulations 2007, as amended.
7. In the body of its recommendation, the Committee quoted from the closing submission of counsel for the Registrar, in which reference is made to the drug OxyContin, rather than Oxytocin, which was the animal remedy involved. Counsel is recorded as having stated:-

"That medication, critically, included antibiotics and included other serious forms of medication such as OxyContin in very significant units, in circumstances where there simply wasn't any supervision of the manner in which these medications were to be administered and giving rise to serious concerns, in particular where the possibility of antibiotics use or misuse was at play..."

It is contended that this is an erroneous finding.

8. Further, at para. 4, having expressed the view that the professional misconduct on the part of the applicant was reprehensible and that he had supplied prescription only medicines without prescription in respect of animals not under his care on what appeared to have been an industrial scale, the Committee referred to a witness statement which had been read to the inquiry. The witness had been employed by the applicant as a pharmacist for a period of two years. The Committee then reproduced the following paragraph from his statement:-

"I am aware of at least two occasions where the Shournagh Valley orders were delivered on pallets by the wholesaler and were collected by representatives of Shournagh Valley Buyers Group. These pallets were simply held on the pharmacy premises until they were collected by members of the Shournagh Valley Buyers Group..."

9. The complaint of the applicant is that this portion of the statement was taken out of context as it had been made in relation to non-prescription medicines.

Communications Prior to Proceedings

10. These errors were addressed in correspondence exchanged prior to the institution of the proceedings. The applicant contended that the report could not go to the Council. In a reply of 6th March, 2019, solicitors representing the respondent informed the applicant that it was accepted that an error was made by the reference to OxyContin, rather than

Oxytocin. It was also accepted that this error should be drawn to the Council's attention. The applicant was informed of his entitlement to attend the Council meeting. It was further explained that the error arose either through the use of that word by counsel representing the Registrar or that the stenographer incorrectly recorded what counsel had said. It was stated, however, that it was clear from the extract included in the report that counsel had been referring to a core book before the Committee in which reference was made to many different types of medication including oxytocin. If the error was on the part of counsel and not the stenographer, it was stated that the applicant's legal representatives did not correct the error at the enquiry. More fundamentally, it was stated that the Committee's recommendation had been made not simply on the basis of the use of the particular drug "OxyContin" and that a proper reading of the report shows that the Committee focussed on a number of issues. The author of the letter stated that "*in our view*" the error has no material bearing on the Committee's recommendation as to sanction. The letter continued:-

"The Committee simply included an extract from the transcript in their report and includes reference to the wrong medication. As you point out, the Committee had all the evidence submitted by your client which clearly refers to oxytocin "together with many other types of medication."

11. With regard to the term *pallets*, reference was made to another portion of a statement of the witness, in which he referred to both prescription and non-prescription animal remedies. The respondent maintained that the statement was capable of bearing the meaning that the pallets contained prescription only medication and that it had been a matter for the applicant to decide whether to admit that statement into evidence. Having done so it was now unclear on what basis it could be contended that the pallets contained non-prescription medication only. It was further pointed out that any factual inaccuracies could be raised with the Council and that the Committee's recommendation on sanction was not binding on the Council.
12. It may be said that the contents of the above letter are similar in material respects to the relevant pleas in the statement of opposition.

The Claim in the Underlying Proceedings

13. In the statement required to ground the application for judicial review, the applicant pleads that erroneous reliance was placed by the Committee on the purported supply of the drug OxyContin (rather than Oxytocin) and that the applicant had dealt with prescription only medicines "*in pallets*". He pleads that OxyContin is a very serious, highly addictive drug which is capable of being abused in non-medical circumstances. It is primarily for human use. *Oxytocin*, however, is a drug regularly used to aid delivery during animal birth and for certain other purposes and is often administered in an animal context by farmers. He alleges that the finding that *OxyContin* was used in very significant units constituted an erroneous finding of fact.
14. The statement of opposition, at para. 17 largely reflects the stance adopted by the respondent in the pre-trial correspondence. The respondent denies that the

Recommendation included a charge that the applicant, without prescription and wrongly, had dealt with the drug OxyContin, in very significant units. It is pleaded that the respondent does not accept the applicant's characterisation of the report in such a way and pleads that the Committee's findings were outlined in the preceding sections of the report. The respondent admits that the reference to OxyContin is an error, seemingly made by counsel for the Registrar in who referred to OxyContin whereas the documentation before the Committee referred to Oxytocin. The other possibility of a typographical error was raised. The error was not corrected by the applicant's legal representative, but it was clear from the evidence adduced during the inquiry, including the admitted statements of certain witnesses that the applicant supplied oxytocin and that there was never any suggestion that OxyContin, which is not an animal remedy was being supplied by the applicant. It is pleaded that, having regard to the totality of the evidence, this error did not have any bearing on the findings of the Committee or on the opinion it expressed in relation to the applicant's fitness to practice. At para. 20 it is pleaded:-

"Further, and without prejudice to the foregoing, the error made with regard to Oxytocin is not a material error and does not warrant the intervention of this Honourable Court."

15. Regarding the use of the word "pallets", it is pleaded that the extract in question was from one of many witness statements that had been admitted and that:-

"the evidence in its totality showed that the applicant's practice showed a large scale disregard of proper practice. Moreover, Mr. Dalton's statement was admitted into evidence by the applicant. It is not now open to the applicant to seek to challenge, rebut or contextualise this (admitted) evidence in the context of judicial review proceedings."

16. At para. 23 it is pleaded:-

"The Committee was entitled to come to the decision it came to as to unfitness having regard to the totality of the evidence, including the admitted evidence of Mr. Dalton. The Committee did not err in its interpretation and consideration of Mr. Dalton's evidence. In this regard, the respondent will rely on the totality of the evidence and the totality of the report at the trial of the action and will contend that the report, in its conclusion as to fitness, does not rely on the alleged conclusion that Mr. Dalton's evidence demonstrated that pallets of prescription only medication were delivered or that, on that basis, the Applicant was engaged in a large scale or industrial scale abuse of the relevant regulatory processes."

17. It is also pleaded-

"Further, insofar as the applicant contends that the manner in which the Committee addressed the admitted evidence of Mr. Dalton constitutes a material error warranting the intervention of this Court or gives rise to an irrational decision as to unfitness, this is

denied. Any error made by the Committee (which is denied) was not a material error justifying the intervention of this Court."

Particulars

18. With regard to para. 17 of the statement of opposition, the applicants requested the respondent to:-

"set forth the facts and/or matters relied upon as supporting either or both of the contentions set forth therein that the erroneous reference to the opioid OxyContin made in the Report of the Committee arose via a mistake of counsel or by way of a stenographic/typographic mistake. This request for particulars arises in circumstances where the Respondent has access to the aural (DAR) record of the disciplinary hearing in question."

Particulars were raised in respect of the final sentence at para. 17 and the applicant requested the respondent to:-

"set forth the full facts and matters to be relied upon as supporting the contention by the Respondent that the OxyContin error did not have any bearing on the findings made by the Committee or the opinion it expressed in relation to the Applicant's fitness to practice veterinary medicine."

19. Particulars were also sought in relation to para. 20 of the statement of opposition of the full facts of the matters to be relied upon as supporting the contention that the OxyContin error was not material to the findings of the Committee. In relation to paras 17-20, the applicant requested the respondent to:-

"...set out in detail the basis in law and in fact upon which it is alleged that the finding by the Committee of supply of OxyContin was not relevant or material to the recommendations of the Committee."

At para. 6 of the request, the respondent was requested to set forth:-

"...the full facts and matters to be relied upon as supporting the contention by the Respondent that the findings of the Committee did not rely on a conclusion (which is impugned in these proceedings) that the Applicant dealt with prescription only medicines on a pallet -basis."

20. Finally, in relation to para. 24 of the statement of opposition, details were sought of the "full facts or matters to be relied upon as supporting the contention by the respondent that any error by the Committee in addressing the pallets of prescription only medicines issue was not material to the findings of the Committee."
21. In respect of each request, reliance is placed on the obligations of the respondent under O. 84, r. 22, such rule having "additional salience in Judicial Review proceedings because same are generally prosecuted via Affidavit evidence."

The Application to Compel Replies

22. The application is grounded on the affidavit of the applicant's solicitor Mr. Creed sworn on the 16th August, 2019 and was responded to by Ms. Muldoon, Registrar of the respondent. The respondent's position is simply stated that the applicant knows the precise case that is being made by the respondent and, rather than seeking to identify the issues that are in dispute, he seeks evidence. She points to paras. 7-9 of Mr. Creed's affidavit in which, she states, he makes it plain that the applicant was seeking to establish the evidence or backup in respect of the pleas in his statement of opposition. Mr. Creed avers at para. 7 of his affidavit that the pleas have been verified by affidavit sworn by a deponent who was not a member of the Committee and that:-

"No evidence or back-up has been offered by the Respondent in respect of these bare assertions set forth in the Statement of Opposition. I say that the said assertions (at paras. 17 and 20) constitute material assertions which, according to the Rules of this Honourable Court, ought to be particularised as to the facts supporting the said assertions."

23. Mr. Creed avers that two alternative contentions are advanced by the respondent which required to be particularised as "same may have a bearing on the parties' approach to the prosecution of these proceedings" and avers that the respondent is in a position to check the tape recording of the proceedings by the transcript writer, and to confirm which of the assertions advanced by the respondents is accurate.
24. In relation to the issue of the pallet, Mr. Creed avers that to plead that any such error did not constitute a material error in the context of the Committee's overall findings, is a bare plea without being supported on affidavit. He states:-

"No evidence or backup has been offered by the Respondent in respect of this bare assertions set forth in the Statement of Opposition. I say that the said assertions are (at para. 24) constitute a material assertion which, according to the Rules of this Honourable Court, ought to be particularised as to the facts supporting the said assertions."

Rules of the Superior Courts

25. The rules upon which reliance is placed on this application are the following:

- i. Order 19, r. 7(1) of the Rules of the Superior Courts which provides:-

"(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, may in all cases be ordered, upon such terms, as to costs and otherwise, as may be just."

- ii. Order 84, r. 22(5) provides:-

"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)."

Submissions

26. Counsel for the applicant, Mr. O'Shea B.L., submits that the court has jurisdiction under O. 84, r. 22(5) to direct that particulars be furnished. He contends that where an affidavit, in this case Ms. Muldoon's affidavit, contains matters in controversy, it is incumbent on the opposing party to seek to challenge same. In this regard reliance is placed on *RAS Medical Ltd v. Royal of Surgeons in Ireland* [2019] 1 I.R. 63, as to the importance of cross-examination of deponents where there is a dispute on affidavit evidence in judicial review proceedings. There, a factual dispute arose from the affidavit and documentary evidence before the court. The applicant did not seek to cross-examine the respondent's witnesses with a view to resolving the conflict. In the High Court, the sworn and uncontroverted evidence of the respondent on affidavit on the particular issue was accepted and the application for judicial review was refused. On appeal, the applicant argued, *inter alia*, that the High Court erred in not taking into account discovered documents. The Court of Appeal held that the discovered documents were admissible and should have been taken into consideration in the determination of the issue. On further appeal to the Supreme Court it was held that it was inappropriate for sworn affidavit evidence to be rejected by reference either to other sworn affidavit evidence or to documentary materials, without affording the deponent concerned an opportunity to answer questions as to why the sworn evidence should not be regarded as credible or reliable. At para. 92 of the judgment, Clarke C.J. stated:-

"But it is frankly not appropriate for parties to enter into controversy as to the facts contained either in affidavit evidence or in documents which are admitted before the court without successful challenge, without exploring the necessity for at least some oral evidence. If it is suggested that there are facts which are material to the final determination of the proceeding and in respect of which there is potentially conflicting evidence to be found in such affidavits or documentation, then it is incumbent on the party who bears the onus of proof in establishing the contested facts in its favour to use appropriate procedural measures to ensure that the potentially conflicting evidence is challenged. Where, for example, two individuals have given conflicting affidavit evidence and where it is considered that a resolution of the dispute between those witnesses is necessary to the proper disposition of the case, then there has to be cross-examination and the onus in that regard rests on the party on whom the onus of proof lay to establish the contested fact."

27. Counsel submits that while the applicant may apply to cross examine the deponent, the first step is to seek particulars of matters that ought to have been provided to comply with the requirements of O. 84, r. 22(5). He argues that judicial review applications are designed to be heard on affidavit with special and detailed pleadings.

28. Mr. O'Sullivan B.L. on behalf of the respondent submits that the jurisdiction of this court to compel replies to particulars is governed by the general principles on which this court is obliged to act in assessing whether particulars ought to be replied to. He relies on para. 5-78 of *Delaney and McGrath on Civil Procedure* (4th ed., Roundhall, 2018) where the authors state:-

"particulars may be required in two situations: (i.) under the rules, particulars of certain pleas are required; and (ii) in any case, a party may request further and better particulars of a claim or defence and, if he is dissatisfied with the replies, may apply to the court to compel that party to furnish replies."

He submits that it is impermissible to seek particulars in respect of matters that ought more properly be the subject of interrogatories, and/or discovery and/or which are matters of evidence or law. Reliance is placed on the decision of Hogan J. in *Armstrong v. Moffatt (t/a Ballina Medical Centre) & Irwin* [2013] 1 I.R. 417 and the general principle that particulars will be ordered if they are necessary to clarify the issues so that the party requesting them can know the case he has to meet or, if there is a danger that he may be taken by surprise at the trial of the action. The authors of *Delaney and McGrath*, state at para. 5-106:-

"This was regarded by the Court of Appeal in Ryanair Ltd v. Goss as a governing principle when deciding whether particulars should be ordered. It follows that an order compelling a party to reply to a notice for particulars will be refused where the court is satisfied that the party seeking the particulars knows the broad outline of the case that it will have to meet. While these principles are well established, the courts enjoy a broad discretion in deciding whether to order particulars and, as acknowledged by Monaghan J. in Caulfield v. George Bell & Co. Ltd, the exercise of that discretion will often depend "on a view of fairness or convenience which is essentially a matter of degree."

29. Counsel for the respondent also relies on *Cooney v. Browne (No. 2)* [1985] I.R. 185, where Henchy J. distinguished situations where particulars are sought for the purpose of pleading and where they are sought for the purposes of the hearing. Henchy J. observed, in respect of the latter category, that *"they should not be ordered unless they are necessary or desirable for the purposes of a fair hearing."*

Discussion

30. In *Burke v. Associated Newspapers (Ireland) Ltd* [2010] IEHC 477 Hogan J. observed that in general while a litigant is entitled to know from the pleadings the nature of the case he has to meet, he is not entitled to learn in advance the evidence which his opponent will lead in support of that contention. He observed:-

"The distinction between what is a matter for pleadings on the one hand and what is a matter for evidence on the other is often a fine one and it is also one which is sometimes difficult to apply consistently in practice. Nevertheless, it seems clear that a plaintiff (or a defendant, as the case may be) is not entitled to further

particulars once the essence of the case which he has to meet is clear from the pleadings.”

31. The authorities which have clarified and developed the law in relation to particulars largely relate to plenary proceedings. Particulars have been ordered to ensure that parties are aware of the claim made, or defence relied upon, and to ensure that there is no element of surprise at trial. In most plenary proceedings there is no general obligation on parties to place on affidavit the evidence which will be relied on at trial. Statute has intervened in certain cases, such as, for example, actions in which damages are claimed for personal injuries where the rules require the parties to provide *affidavits of verification of the pleadings*, nevertheless the action is determined largely on the basis of oral evidence given at trial. In proceedings by way of judicial review, however, the evidence on which the parties rely is required to be stated on affidavit before the case comes on for hearing. Such evidence on affidavit may also be the subject of cross-examination.
32. Counsel for the respondent does not contest the jurisdiction of the court in an action for judicial review to direct that particulars be provided under O. 19, r. 7(1). He points out, however, that he is unaware of any previous similar application in the context of judicial review proceedings and no authority was opened to the court by either party. Thus, is not entirely clear from the authorities to which the court has been referred, or from the law as developed, whether a distinction exists between the rules as they apply to the plenary proceedings, and those in which final orders are sought on the basis of evidence on affidavit, particularly in applications for judicial review.
33. In written submissions, counsel for the respondent argues that judicial review proceedings are heard mainly on affidavit and that the distinction in plenary proceedings between the pleadings on the one hand and evidence on the other is not directly applicable to judicial review proceedings where the evidence in its entirety need to be before the court prior to the application for judicial review being heard. It is submitted, however, that this is precisely the function of O. 84, r. 22(5) and that if the respondent is aware of facts or matters supporting its assertion that the outcome of the Committee was not affected by the errors on the face of the report, these ought to be brought to light. If no such facts or matters exist, such should be stated.

Decision

34. This application is brought pursuant to the provisions of O. 19, r. 7 of the Rules of the Superior Courts. Accepting for the purposes of this application, and without so deciding, that the provisions of this rule as developed and clarified by the authorities and as they apply to pleadings generally, apply to judicial review proceedings. Further, taking into account the respondent's submissions, again without so deciding that an additional obligation is imposed by virtue of the provisions of O. 84, r. 22, I am not satisfied that it has been established that the applicant will in any way be taken by surprise unless the further particulars sought are replied to.
35. I am also satisfied, having considered the pleadings, affidavits and submissions of the parties, that insofar as para. 20 of the respondent's statement of opposition is concerned,

any further detail that may be required by the applicant is contained within the pleas at para. 17. It is clear from the pleadings that, that insofar as the OxyContin issue is concerned, it is the respondent's case that the error did not have any bearing on the findings made by the Committee, because of the "totality of the evidence" which was before it.

36. Further, it is clear that the respondent accepts that an error was made when the drug OxyContin was referred to. There is no claim in these proceedings that this mistake arose through *mala fides* or improper motive and in the circumstances, it is difficult to see how any further particulars beyond those which have already been supplied by the respondent to the applicant, advances matters.
37. Insofar as "the pallet" issue is concerned while the position adopted by the respondent is somewhat different *i.e.* that the Committee was entitled to come to the decision it did having regard to the totality of the evidence and the admitted evidence of Mr. Dalton and that there was no error in the interpretation and consideration of Mr. Dalton's evidence, once again, the respondent states that it relies on the totality of the evidence which was before the Committee and not on any one alleged conclusion.
38. Thus, I am satisfied that the particulars provided in the statement of opposition are adequate to define the issues between the parties and to ensure that no surprise arises. It also appears, as is to some extent apparent from the affidavit grounding the application, that 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. In this context it must be recalled, however, that on an application for judicial review the evidence upon which reliance is placed in support of a particular assertion or proposition is confined to that which is set out on affidavit, and of which the parties will be aware prior to the hearing. To that extent, the potential for surprise is further diminished, if not negated. It is also to be reiterated that the onus or proof of establishing a positive plea, defence or assertion lies on he or she who alleges or asserts, and any deficiency in the required evidence will no doubt be taken into consideration by the trial judge in determining whether the defence has been established. There are specific rules governing how such proceedings should be conducted and if a claim is vague it may result in the particular ground of challenge (and, in my view, defence) being rejected. In *Alen-Buckley v. An Bord Pleanála (No. 2)* [2017] IEHC 541, Haughton J. observed:-

"15. *The rules of pleading governing judicial review are quite clear and require applicants to state specifically each ground advanced and to particularise matters as appropriate. Linking new matters back to generally pleaded grounds is not permissible, nor is pointing to information which was before the Board. The Court is concerned with the contents of the documentation before the Board only in the context of arguments which have been correctly pleaded.*

16. *Where new arguments or evidence arises, an application should be made to amend the pleadings to include such arguments or evidence (as per O.84, r. 20, s.4)."*

39. It seems to me that as a matter of principle similar sentiments apply to the statement of opposition.
40. As stated, the obligation lies on the party who alleges to prove particular facts or circumstances and positive pleas upon which he or she relies. While *RAS Medical Ltd.* emphasises the importance of the testing of affidavit evidence, where there is controversy, it does not appear to me that it is necessarily authority for a wider and more general proposition that, as a first step, particulars should be directed, prior to any proposed application for leave to cross-examine.
41. But even if I am incorrect in this, 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.
42. I must therefore refuse the relief sought.
43. Finally, nothing in this judgment should be taken to detract from any other pre-trial processes or application which may be open to the applicant.