[2023] IEHC 344

THE HIGH COURT
JUDICIAL REVIEW

[2022 No. 157 JR]

BETWEEN

MARTIN STAPLETON

APPLICANT

AND

AN BORD PLEANÁLA, THE MINISTER FOR HOUSING, LOCAL GOVERNMENT AND HERITAGE, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

AND

SAVONA LIMITED AND DUBLIN CITY COUNCIL

NOTICE PARTIES

(No. 4)

JUDGMENT of Humphreys J. delivered on the 23rd day of June, 2023

1. The applicant challenges a decision by the board on 23rd December, 2021 authorising a strategic housing development in Redcourt, Seafield Road, Clontarf, Dublin 3, consisting of 131 build-to-rent apartment units.

2. Proceedings were commenced on 25th February, 2022.

3. Amendment of the pleadings was allowed on 28th February, 2022 and 7th March, 2022 and a first amended statement of grounds was filed on 16th March, 2022. Further amendments were allowed on 21st March, 2022 and a second amended statement of grounds was filed on 23rd March, 2022. Leave was granted on the basis of that latter statement on 28th March, 2022.

4. Following that, an issue blew up about costs protection.

5. In *Stapleton v. An Bord Pleanála (No. 1)* [2022] IEHC 372, [2022] 6 JIC 2201 (Unreported, High Court, 22nd June, 2022) I refused costs protection relief in part and decided in principle to refer a question in that regard to the CJEU.

6. In *Stapleton v. An Bord Pleanála (No. 2)* [2022] IEHC 455, [2022] 7 JIC 2602 (Unreported, High Court, 26th July, 2022) I gave directions regarding the reference.

7. In *Stapleton v. An Bord Pleanála (No. 3)* [2022] IEHC 456, [2022] 7 JIC 2603 (Unreported, High Court, 26th July, 2022) I made the formal order for reference.

8. Subsequently however the costs issue was agreed and the reference was withdrawn.

9. Statements of opposition were filed by the board on 18th October, 2022, by the notice party on 1st December, 2022 and by the State on 21st March, 2023 – the first anniversary of the order allowing the latest amended statement of grounds.

10. The board's opposition papers contained numerous legalistic complaints about the drafting of the statement of grounds, which sparked a kind of arms race between the parties whereby the applicant has responded in an equally, if not more, legalistic manner. That is possibly not an ideal situation.

11. Following the delivery of papers by all opposing parties, the applicant delivered a notice setting out further particulars of its case, dated 4th April, 2023. That resulted in the issue of a motion by the applicant which was heard on 24th May, 2023 and 12th June, 2023. On the latter date, reliefs 6 to 8 in the applicant's motion were adjourned generally, by consent. I now deal with reliefs 1 to 5, albeit not in that precise order.

Reliefs relating to particulars

12. Relief 1 claims:

> "An Order pursuant to Order 19 Rule 7 of the Rules of the Superior Courts as amended, or otherwise, deeming good the Applicant's Reply to Deemed Notice for Particulars annexed hereto at Schedule 1 Parts 1 and 2 respectively."

13. I will assume without deciding that the particulars procedure can apply to judicial review. But even if it does apply, it can only apply subject to fairly close supervision by the court; and in that regard, in many situations it is better in the interests of certainty for any significant clarifications to be effected by amendment rather than by notice giving particulars.

14. To some extent it is a matter of degree. In many situations it may be acceptable for an applicant to write a letter saying "for the avoidance of doubt, in ground number 1 we wish to clarify that this is intended to make point x specifically (and not point y)". However the extent of the particularisation here is such that amendment is the preferable way to go. Hence I would refuse to approve the applicant's attempt to serve a notice giving further particulars of his case.

15. Finally in relation to this relief, I should note that the inventive confection of a "Deemed Notice for Particulars" is just an attempt by the applicant to pass the buck to the opposing parties. There is no such thing as a deemed notice for particulars. If, whether stimulated by complaints from other parties or for any other reason, a party wants to give additional particulars of its case in

proceedings, it should just serve notice to that effect if the procedures applicable to the litigation so permit. If they don't so permit, the party should apply to the court to be allowed to do so in the appropriate form, which may be by way of amendment.

16. Relief 5 claims:

> "In the alternative to reliefs 1, 2 and 4 above, an Order pursuant to Order 84 Rule 26 of the Rules of the Superior Courts as amended, declaring that the First Respondent, An Bord Pleanala, and the First Notice Party, Savona Ltd, are not entitled to contest the adequacy of the particularisation of the Statement of Grounds herein, by reason of their and each of their failure to reply in accordance with Order 19 Rule 7 to the Applicant's Reply to Deemed Notices for Particulars, annexed at Schedule 1, Parts 1 and 2 respectively."

17. This is totally misconceived. A party in judicial review is perfectly entitled to object to a lack of particularisation of the other side's case without being obliged to first request particulars. That doesn't mean that the party complained against has no come-back – that party can argue that its case is adequately pleaded, or can seek to amend its pleadings. The board objected that there was no such thing as a reply in judicial review pleading, which is quite correct, but an objection to an applicant's pleadings is not an inherently irremediable one. Just because there is no pleading in the form of a "reply" doesn't mean that an applicant is prohibited from taking *any* steps by way of damage-limitation. Seeking an amendment is one such step.

18. The board complains that the applicant is "mending his hand" as a result of opposition papers, and that doing so creates a further round of activity and expense. But so be it – 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).

Reliefs relating to amendment of pleadings

19. Relief 2 claims:

> "In the alternative to relief 1 above, an Order pursuant to Order 84 Rule 23 of the Rules of the Superior Courts as amended granting liberty to the Applicant to amend his grounds of application in accordance with the draft Amended Statement of Grounds annexed hereto at Schedule 2."

20. I endeavoured to summarise the principles applying to amendments in *Habte v. Minister for Justice and Equality* [2019] IEHC 47, [2019] 2 JIC 0405 (Unreported, High Court, 4th February, 2019), the first point being that the jurisdiction to amend is intended to be liberal: *Croke v. Waterford Crystal Ltd.* [2004] IESC 97, [2005] 2 I.R. 383, [2005] 1 I.L.R.M. 321, [2004] 11 JIC 2605, [2005] 7 JIC 0701, *Moorehouse v. Governor of Wheatfield Prison and Others* [2015] IESC 21, 2015 WJSC-SC 18608, [2015] 3 JIC 0502 (Unreported, Supreme Court, 5th March, 2015).

21. The point made in *Croke* about the approach to amendments and the need for justice not to be defeated by technicalities has been relied on in numerous recent cases including *Reddy v. Hyper Trust Ltd.* [2023] IEHC 278 (Mulcahy J.).

22. The critical issues are arguability, explanation, and lack of irremediable prejudice, all under the umbrella of the interests of justice (see *Keegan v. Garda Síochána Ombudsman Commission* [2012] IESC 29, [2012] 2 I.R. 580, [2012] 5 JIC 0103, *B.W. v. Refugee Appeals Tribunal* [2017] IECA 296, [2018] 2 I.L.R.M. 56, [2017] 11 JIC 1501).

23. Broadly, the amendments are arguable. And they have now been explained, albeit that the explanation is rather ingenuous and defiant – the applicant thinks the amendments are unnecessary but wants to avoid an issue at trial. I can only construe that as meaning that if the amendments are in fact needed, then the explanation for the amendments is the applicant's lawyers' error (as in *Keegan*) – specifically an erroneous belief in relation to that issue. I think it would be unduly harsh to penalise the applicant for a lack of guile in relation to how the explanation was phrased.

24. The matter to be explained is the failure to make the point originally within the statutory time period. An applicant is not under any absolute obligation to explain on a day-by-day basis each element of the delay after the expiry of that period, although in effect the lawyers' mistaken view as to the correct approach does explain that here. Indeed, it is clear that delay is not a bar to an amendment, and the power to amend can be exercised during the trial, after judgment is reserved, or at any time up to perfection of the final order (*Wildgust v. Bank of Ireland* [2001] 1 I.L.R.M. 24, *J.K. (Uganda) v. Minister for Justice and Equality* [2011] IEHC 473, [2011] 12 JIC 1305 (Unreported, High Court, Hogan J., 13th December, 2011)). The board majored on the applicant's failure to seek amendments after delivery of its own statement of opposition, but it was perfectly reasonable for the applicant to await all opposition papers before deciding on the next move. The standard directions set out in Practice Direction HC119 make clear that any applicant's replying affidavit only comes after all opposition papers are in, and not on a piecemeal basis. The fact that the State took an entire year from the second amended statement of grounds to deliver opposition papers, even bearing in mind that there were costs protection issues being debated, doesn't particularly improve

the look of the board's belligerent complaints regarding the applicant's alleged delay here. In that context, a delay of about 17 days from the State's opposition to the applicant making the points it has sought to make here is small potatoes.

25. As far as lack of irremediable prejudice is concerned, I have minimised prejudice to the opposing parties by setting a trial date notwithstanding that the case is not fully ready.

26. Implausibly, the opposing parties claimed prejudice due to merely having to deal with the points. That is wholly self-proving and circular and would defeat the court's jurisdiction to amend. Cognisable prejudice must stem from the fact of the belated alteration of the pleadings, rather than the presence (if allowed) of the amendment itself: *per* Clarke J. in *Woori v. KDB Ireland Ltd* [2006] IEHC 156, [2006] 5 JIC 1702 (Unreported, High Court, 17th May, 2006) at para. 3.2, *per* Collins J. in *Stafford v. Rice* [2022] IECA 47, [2022] 3 JIC 0201 (Unreported, Court of Appeal, 2nd March, 2022) at para. 23, *per* Ferriter J. in *Behan v. Deering Transport Ltd*. [2023] IEHC 64, [2023] 2 JIC 1003 (Unreported, High Court, 10th February, 2023) at para. 10.

27. I set out in a table below the position in relation to each of the amendments claimed. I have added a reference number for the purpose of this exercise, for ease of navigation.

28. In certain respects some further amendments are required which I will direct as terms on which the claimed amendments should be allowed. Those terms are as follows, and any amendments allowed are subject to those:

(i) **Correct heading:** The amended grounds should be headed Third Amended Statement of Grounds, and should refer to the orders of 28th February, 2022, 7th and 21st March, 2022 and the current order.

(ii) **Removal of reference to opposition papers:** All text phrased as a reply or by refence to points made by the opposing parties should be removed. The statement of grounds is meant to be a stand-alone document and should not be phrased as a reply.

(iii) **Argumentative matters to be moved out of the factual grounds section:** It will be a term of the amendments being allowed that argumentative statements in the factual grounds section be moved to the legal grounds section. This includes paras. 30 to 34 setting out alleged errors, 52 to 57 regarding transport, 66 to 68 regarding climate and 90 regarding water, which is essentially legal. Contested facts can remain in the factual grounds section as long as they are purely factual. But argumentative matters and mixed questions of fact and law should be in the legal grounds.

(iv) **Consecutive paragraph numbering:** It will be a general term of the order allowing amendments that numbering of paragraphs be by consecutive integers, starting with 1 and increasing upwards thereafter, and not re-starting for any new heading (whether sub-grounds or factual grounds or otherwise). This greatly simplifies references to the statement of grounds by the court or otherwise.

(v) **Narrative rather than over-technical drafting**: More generally the pleadings are drafted in a way that uses an incredible density of technical references. One would have to be forgiven for at least momentarily drifting into the undoubtedly unfair speculation that this could be to discourage comprehension lest such comprehension invite disagreement. But for the time being anyway, pleadings are to be digested by humans rather than by AI, so drafting should bear that in mind. Every time a reader comes to an unnecessarily tortured technical reference, she hits a speed bump and a distraction, and runs the subconscious risk of irrecoverably losing whatever level of interest she had in the first place regarding the point being made. Pleadings should be phrased narratively in relatively understandable English or Irish or any other permissible language. So technical references should be made readable where possible and in particular all references to "E1" should be changed to "core ground x", "E2" should read "sub-ground x" and "E3" should read "factual ground x". Obviously this process should not be taken to extremes – patronisingly sub-literate oversimplifications are even worse (but this applicant is in absolutely no danger of going down that road). Essentially any communication with the court should be on a level that presupposes a mutually respectful reasonable commonality of comprehension – neither above the court's head nor *de haut en bas*. (This tone really should also apply to communications *by* the court as well, but that would take us beyond what is necessary for present purposes.)

(vi) **Glossaries to be at the end:** Front-loading a glossary or other lengthy apparatus merely forces the reader to engage in repeated page-downing in order to get to the substance, if any. So such apparatus should be placed at the end of the grounds, not at the start. Although this is small potatoes compared to the unhelpful way the Law Reform Commission's revised Acts proudly (and, I'm afraid, pointlessly to

almost everyone else) add a long list of all the legislation affecting the Act that they have looked at before we even get to section 1 of any given Act. While the content is excellent, the way it is presented could be a lot more user-friendly – their website should really be considered as a shrine and monument to the page-down key.

(vii) **Correction of errors:** The terms will also include the correction of errors. In para. 1 of the factual grounds the reference to "self-cleaning" should be deleted. Factual ground 69 should be a heading, not a ground ("Water").

(viii) **Purely consequential changes:** Any consequential changes or link phrases required by the amendments can also be included.

29. To avoid any further confusion at the hearing, the filed version of the third amended statement of grounds should be a completely clean copy with totally consecutive numbering, removing any tracking of amendments already made. But the applicant should provide the opposing parties for information with a tracked version to allow them to confirm that the order has been complied with.

Ref No.	Amendment sought	Disposition
1.	Ground E2 §1 is intended to be read as a whole, and each paragraph informs the others.	Refused – this merely spreads uncertainty and confusion. The grounds should be distinctly intelligible.
2.	The factual particulars are at Part E3 §1 in accordance with Practice Direction HC107.	Refused – it is unnecessary to state that factual particulars are in the factual grounds section.
3.	1.3. That roof is a structure, ~~enclosed~~ supported on 4 sides by other structures, with the result that the proposed communal open space is not open space for the purposes of the Development Plan.	Allowed – permissibly correcting an error.
4.	1.5.1. The irrelevant material in this respect was the proposed structure itself, which failed to constitute "open" space, being roofed.	Allowed – this essentially removes "irrelevant consideration" as an issue and re-phrases this as a point that the applicant has already made separately. Thus it is in the interests of the opposing parties to box off this issue in this way.
5.	1.5.2. Submissions relating to material contravention are at: 1.5.2.1. Book 03 p1338, Council Chief Executive Report notes this is all one structure. 1.5.2.2. Book 03 p 1391 CRA sub, p8. 1.5.2.3. Book 03 p 1443, 1447, Marston Planning sub. 1.5.2.4. Book 03 p1481, Hugh McIlvenna, no open space. 1.5.2.5. Book 03 p1541, Aine Kidd 1.5.2.6. Book 03 p1995 Horsburgh Family	Allowed – this does not make any new legal claim but elaborates the facts. This should be placed in the factual grounds section.
6.	1.7. The following additional particulars are provided in relation to the Grounds of Opposition pleaded by the Developer, Savona Ltd. 1.7.1. The Board has erred by considering the internal part of a structure to be open space. The proposed purported open space is not open space, because it is not open, and therefore	Allowed – this is acceptable clarification. However, all references to opposition papers should be deleted from this and all other amendments.

	§16.10.1 of the Development Plan is breached. 1.7.2. §1.6.3 refers back most particularly to §1.3 and 1.4.	
7.	2.2. It failed to take "appropriate and reasonable regard" of the BRE Guidelines as required by part 3.2 of the Height Guidelines, and failed to "be guided" by those Guidelines as required by part 16.10.1 of the Development Plan, in particular the <u>recommended average daylight factor (ADF) of 5% for a well daylit space</u> particularised at E3 §31-32, the vertical sky component for windows particularised at E3 §30, and the loss of light to rear gardens particularised at E3 §33, and the loss of light due to light passing through the proposed ETFE root particularised at E3 §34. 2.2.1. §2.2.2 to 2.2.6 are advanced by way of further particulars. 2.2.2. The Applicant is not required to identify what rooms are required to meet the ADF threshold. What is pleaded is that the Board failed to apply the test posited AT ALL, and failed to determine whether any room was required to be a "well daylit space" and whether it met the 5% threshold for such a room. 2.2.3. Part E3 §2-34 set out how the Developer and Board approached the matter and provide sufficient particulars to demonstrate that the Board did not consider or apply, and was not guided by, the concept of 5% ADF for a well daylit space. 2.2.4. They particularise that the Board did not determine which rooms, if any, should constitute a well daylit space, and did not apply the 5% ADF rule at all. Instead, it applied the minimum values for kitchens, living rooms and bedrooms, but applied them as though they were recommended levels which could be breached, rather than minima which should be respected. 2.2.5. In circumstances where the Board has not sought to justify its non-compliance with the BRE Guidelines by asserting that it applied alternative compensatory design solutions, the plea at §2.3 will not arise. 2.2.6. The Applicant reserves its position in the event that the Board	Allowed – while the board complained that these were new points, they were largely already there, albeit mis-located in the factual grounds section. However, as a term of the amendment, the issues relied on should be particularised by reference to the particular parts of the BRE guidelines not followed and the erroneous factual steps in that regard. Also, as regards the opening underlined words, this amendment has been allowed previously but it will be a term of the further amendments now being allowed that "in particular" be changed to "specifically" in the interests of certainty.

	seeks to argue that in fact it adopted a compensatory design solution 2.2.7. The Applicant relies on the Affidavit of Dr Paul Littlefair in relation to the factual matters set out at E3 §30 to 35.	
8.	2.4.1. By way of clarification, Ground 2.4 relates to absence of reasons in respect of both Grounds 2.2 and 2.3. It is not confined to compensatory design solutions.	Allowed – essentially narrows the case and is legitimately clarificatory.
9.	2.10. By way of further particulars in reply to the Board's Statement of Opposition, the following are noted: 2.10.1. Part E3, §2-34 set out how the Developer and Board approached the matter and provide sufficient particulars to demonstrate that the Board did not consider or apply, and was not guided by, the concepts of 5% ADF for a well daylit space. 2.10.2. They particularise that the Board did not determine which rooms, if any, should constitute a well daylit space, and did not apply the 5% ADF rule at all. Instead, it applied the minimum values for kitchens, living rooms and bedrooms, but applied them as though they were recommended levels rather than minima. 2.10.3. Insofar as they provide no detail as to "how" the Board approached "(i) the issue of alleged non-compliance with the recommended 5% ADF for well-lit daylit spaces, and (ii) the alleged failure to identify a rationale for compensatory design solutions", this is because they recount the Board's failure to do so at all. 2.11. The following additional particulars are provided in relation to the Grounds of Opposition pleaded by the Developer, Savona Ltd. 2.11.1. Particulars already given at E2 §2 and E3 §2 - §30 fully particularise how or in what manner the Board failed to correctly interpret and apply the Building Height Guidelines or how or in what manner the Board failed to have "appropriate and reasonable regard" to the BRE Guidelines. 2.11.2. There is no requirement to particularise what spaces in the Proposed Development are subject to the 5% average daylight factor because the argument is that the Board failed to have regard to that factor at all, not that it failed to apply it to particular rooms.	Refused – unnecessary and defensive verbiage that is repetitive of points already made.

	2.11.3. Factual particulars in relation to the relationship between the Building Height Guidelines and the BRE Guidelines for the purposes of Ground E2 §2.5 is contained in Part E3, particularly at §2 - §6, in accordance with [*sic* – ends here].	
10.	3.1.3. By way of further particulars, the relevant material referred to is the view of the NTA and Dublin Bus as to whether there was such capacity.	Allowed on terms – this particularises what the issue is but the applicant must re-phrase the existing 3.1.1 and this ground in terms of failure to obtain information (which is what the issue is), not failure to have regard to information.
11.	3.6.1. By way of further particulars, there are two aspects to the concept of "proper planning and sustainable development": first, that the Proposed Development must be in accordance with the proper planning of the area; second, that it must constitute sustainable development. Ground E2 §3.6 relates to the latter element. 3.6.2. The Board failed to consider the question of public transport capacity raised in submission, or the likely impact on the environment arising from issues relating to lack of capacity in public transport. 3.6.3. For the avoidance of doubt, no issue in relation to environmental impact assessment is pleaded in this Ground.	Allowed – legitimately clarificatory.
12.	3.8.1. By way of further particulars, it is confirmed that Ground E2 §3.7 and 3.8 relate to the Board's error in its interpretation of National Strategic Objectives of the National Planning Framework, or failure to apply those provisions or requirements. Those Objectives are part of the National Planning Framework to which the Board is required to have regard pursuant to S9(2)(g) of the 2016 Act. In its Decision the Board stated it considered that permission should be granted "having regard to Government Policies as set out in the Project Ireland 2040 National Planning Framework." The Board cited two objectives in particular (Objectives 13 and 35), but made no reference to Strategic Outcomes 1 and 4 which are relevant to public transport. It failed to make any determination as to whether the Objectives at Outcomes 1 and 4 would be served, or impeded, by the Proposed Development, or to give any reasons in relation to them, as set out at §3.8.	Allowed – this is essentially clarificatory.

13.	3.12. By way of additional particulars, the Applicant adds the further particulars at 3.13 to 3.16 below. 3.13. The Applicant relies on the factual particulars in Part E3 §38-68 as the factual basis for this Ground. 3.14. As set out at E3 §49, Chapter 5 of the RSES (Regional Spatial and Economic Strategy) for the Dublin area states that, "the NTA's Transport Strategy for the Greater Dublin Area (2016) provides a framework for the planning and delivery of transport infrastructure and services in the Greater Dublin Area (GDA) over the period 2016-2035," and that "alignment of the MASP and the GDA Transport Strategy is key to the coordination of policy making and investment within the Dublin Metropolitan Area." (MASP – Metropolitan Area Strategic Plan.) 3.15. The Board is required by S9(1)(a)(iii), S9(2) and S18 of the 2016 Act, and S143 of the 2000 Act, to consider any relevant information in so far as it relates to the likely consequences of the Proposed Development for proper planning and sustainable development in the area in which it is proposed to situate the development, and the likely effects on the environment of the proposed development, if carried out. It is required to have regard to the policies and objectives for the time being of the Government, a State authority, the Minister, planning authorities and any other body which is a public authority whose functions have, or may have, a bearing on the proper planning and sustainable development of cities, towns or other areas, whether urban or rural. (It is noted that no "public authority" has been prescribed for this purpose: the obligation to have regard to the views of the NTA and Dublin Bus arise under S9(1).) 3.16. In this regard, it is obliged to have regard to government policy, including National Strategic Outcomes Objectives of the National Planning Framework, and it is obliged to have regard to other relevant material, in particular the views of the statutory providers of transport services, the NTA and Dublin Bus, to consider those matters before taking its decision, and then to set out its consideration	Allowed on terms – this is basically particularising having regard to matters in the factual grounds section. However, the amendment needs to be made more specific. Insofar as the NPF or RSES is concerned, the claim should be phrased as a failure to have regard. Insofar as Dublin Bus and the NTA is concerned, that should be phrased as a failure to obtain material. The specific Dublin Bus email issue is addressed below.

	in the decision. It failed to do so, and it thereby erred in law and contravened those provisions.	
14.	3.17. The following additional particulars are provided in relation to the Grounds of Opposition pleaded by the Developer, Savona Ltd. 3.17.1. For the avoidance of doubt, the material to which the Board failed to have regard is as set out at E2 §3.1 and §5.1, namely evidence generated by Dublin Bus and evidence in relation to the Bus Connects project (which would probably be generated by the National Transport Authority which is the public authority responsible for Bus Connects.[)] In this respect, the email from Dublin Bus exhibited to the Affidavit of Julian Keenan might potentially have addressed this deficiency if provided as part of the application, save that the Applicant and other objectors would or could have questioned its adequacy, for instance because: it is an informal document; the question it addresses is not provided; the person who generated it is unknown, it was sent to a third party, Thomas Anderson, whose identity is not known; and it is hearsay before the Court. 3.17.2. In addition, the point which the email from Dublin Bus addresses relates to capacity in buses travelling from Dublin City to Clontarf in the morning, and from Clontarf to Dublin City in the evening, against the predominant flow of rush hour traffic.	Refused – no proper factual basis has been made out as to how the board committed a legal error in failing to have regard to an email that wasn't sent to it. Any other points appear to have been incorporated in the previous amendment.
15.	4.2.1. It failed to "be guided" by "in particular the recommended average daylight factor (ADF) of 5% for a well daylit space."	Allowed – as an EU law point, this legitimately mirrors the clarification of the issue as a domestic law point.
16.	4.17. The following additional particulars are provided in relation to the Grounds of Opposition pleaded by the Board: 4.17.1. The breach of EU law alleged in this Ground is a failure to consider the requirement of sustainable development under A3(3) of the Treaty on European Union. Failure to consider that objective, as mediated through the Binding Reductions Regulation, European Climate Law and Climate Neutrality Regulation is also pleaded. 4.17.2. Without prejudice to the above, the Applicant will emphasise the following: 4.17.3. In Regulation 2021/1119, the Climate Neutrality Regulation,	Allowed in part – the legislation referred to is generally already cited in the existing grounds. Arts. 3(3) and 4 TEU are mentioned in core ground 4. Sub-ground 4 references Regulations 2018/842 and 2021/1119. So this amendment is essentially legitimately particularising. The references to opposition papers should, as noted above, be deleted throughout.

	Recitals 3, 4, 6, 9, 10, 13, 14, 20, 25, 32, 34, 35, and Articles 1, 2, 4, 5 and 9. 4.17.4. In Regulation 2018/842, the Binding Reductions Regulation, Recitals 2, 8, 9; Articles 1 to 4; 4.17.5. Article 3(3) of the Treaty on European Union is sufficiently precise in itself to sustain this ground on the basis of Article 4(3) thereof. 4.17.6. For the avoidance of doubt, this ground relies on the submission of Clontarf Residents' Association, relating to buildings in which the lights have to be left on, even in daylight, at p7. 4.17.7. As pleaded, the claim is one of failure to have regard to relevant material, or to explain how regard was had to it. No ground is advanced as to what the outcome would have been if the Board had considered the matter in accordance with law. 4.17.8. As pleaded above, the obligation is to refrain from any action that would impede achievement of EU objectives, such as the objective to reduce emissions of greenhouse gases as set out in the European Climate Law and the Binding Reductions Regulation comes from A4(3) of the Treaty on European Union. 4.18. The following additional particulars are provided in relation to the Grounds of Opposition pleaded by the Developer, Savona Ltd. 4.18.1. The legal source of the obligation on the Board to have specific regard to the National Climate Policy Position and/or the National Adaptation Framework, as set out at E2 §2 and §4 and E3 §58 - §68, lies in the following: 4.18.2. S9(6) of the 2016 Act which authorizes the Board to grant permission in material contravention of the Development Plan where it would do so if S37 of the 2000 Act applies, and S37 allows such grant where the Board considers it is justified having regard to any relevant policy of the Government, the Minister or any Minister of the Government, and 4.18.3. A4(3) of the Treaty on European Union which requires the State and its authorities, which include the Board, to refrain from any action that would undermine the achievement of objectives of European Union law, including the objectives of the European Climate	

	Law and the Binding Reductions Regulation. 4.18.4. With respect to §4.14 and 4.15 above, the specific provision or requirement of the European Climate Law and Binding Reductions Regulation, are set out at E3 §62 - §65. A2 and A4 of the Binding Reductions Regulation are also relied upon, but the objective at Recital 12, the reduction of transport emissions, is the key provision in this instance.	
17.	5.17. The additional particulars provided at E2 §3 in this amended Statement of Grounds in relation to matters raised by the Board and by the Developer, Savona Ltd, are repeated in respect of this Ground, E2 §5, as though set out here.	Allowed on terms – as drafted this is overly defensive and impenetrable. It should simply say that the domestic law particulars apply to the corresponding EU law claim *mutatis mutandis*. It should not refer to matters raised by the opposing parties.
18.	6.9.1. The Applicant relies on Part 12 of the Inspector's Report and on Part 7 of the Natura Impact Statement which show potential impact on habitats and species within the water body through pollution and / or sediment transfer, but do not consider impact on the water body itself. 6.9.2. For the avoidance of doubt, the Applicant relies on the provisions of Directive 2000/60 in interpretation of national implementing legislation.	Allowed – acceptably clarificatory. Directive 2000/60 is already referred to in the pleadings at core ground 6.
19.	Practice Direction 107 requires that particulars of legal grounds and factual particulars be separated. Factual particulars are located in Part E3 as per that Direction. Part E3 is not intended as a statement of uncontested fact, but as a statement of the factual particulars of the legal infringements pleaded in Part E2.	Refused – this is based on the incorrect premise that mixed questions of fact and law should be in the factual grounds section. They should not. Contested facts however may be in the factual grounds section as long as they are purely factual. Mixed questions should be in the legal grounds section.
20.	30.1. The Applicant relies on the report and Affidavit of Dr Littlefair in this regard.	Refused – this appears to be an attempt to incorporate the whole affidavit by stealth into the grounds. That creates unacceptable uncertainty.

Time for filing of third amended statement of grounds

30. Relief 3 claims:

"If necessary, an Order pursuant to Order 84 Rule 21 of the Rules of the Superior Courts as amended and / or Section 50(8) of the Planning and Development Act 2000 as amended, extending time for the Applicant to file such amended Statement of Grounds."

31. The concept of extension of time applies to the initiation of the proceedings, or to amendments that add reliefs challenging wholly new decisions (not for example interim decisions that are included for the avoidance of doubt). Delay is a factor to be taken into account in the balance of justice but there is no rule that any amendments have to be sought within 8 weeks or else extension of time applies. Pleadings carry with them the inherent possibility of being amended later (see *Krops v. Irish Forestry Board Ltd* [1995] 2 I.R. 113, [1995] 2 I.L.R.M. 290, 1995 WJSC-HC 2649, [1995] 4 JIC 0601; *Smyth v. Tunney* [2009] IESC 5, [2009] 3 I.R. 322, [2009] 1 JIC 2103, *O'Leary v. Minister for Transport, Energy and Communications* [2000] IESC 16, [2001] 1 I.L.R.M. 132, [2000] 5 JIC 1801 and *Keegan* itself).

32. The court should of course set a time for the filing of any amended statement of grounds on foot of the order allowing an amendment and an order to that effect is set out below.

Relief regarding opposition papers

33. Relief 4 claims:

> "In the alternative to reliefs 1 and 2 above, an Order pursuant to Order 84 Rule 26 of the Rules of the Superior Courts as amended, striking out so much of the Statements of Opposition of the First Respondent, An Bord Pleanala, and the First Notice Party, Savona Ltd, as maintain that the Applicant's Statement of Grounds is insufficiently particularised, the portions to be struck out being those struck through in orange on the annexed marked copies of the said Statements of Opposition at Schedule 3 Parts 1 and 2 respectively."

34. This seems to be again based on the false premise that opposing parties cannot object in their papers to vague pleadings by an applicant without taking some other procedural step such as seeking particulars. They can so object. This relief is therefore refused.

Costs

35. My provisional view on costs is that given that a number of amendments were refused, and that such benefit as accrued to the applicant by the amendments that were allowed was balanced by the procedural confusion caused by the applicant in raising misconceived issues regarding particulars and in mistakenly objecting to the opposing parties' pleadings insofar as that relief arose, so in the absence of submissions to the contrary, there would be no order as to costs of the motion.

Order

36. The order made on 24th May, 2023 was that:

(i) the need for the matter to be certified as ready be dispensed with prior to fixing a date;
(ii) the matter be adjourned to the List to Fix Dates;
(iii) the applicant have liberty to file an affidavit explaining the request for amendments within 7 days; and
(iv) the motion be listed for further hearing on 12th June, 2023.

37. The order made on 12th June, 2023 was that:

(i) reliefs 6 to 8 in the motion be adjourned generally by consent; and
(ii) the substantive matter be fixed for hearing commencing on 21st November, 2023.

38. For the reasons set out in the judgment, it is now ordered that:

(i) reliefs 1, 4 and 5 in the applicant's notice of motion be refused;
(ii) relief 2 be granted to the extent and on the terms set out in the judgment;
(iii) pursuant to relief 3 the third amended statement of grounds be filed within two weeks from the date of this judgment incorporating all past and current amendments in non-tracked form;
(iv) a fully tracked version of the third amended statement of grounds be furnished for information to the opposing parties in the same timescale;
(v) the matter be listed for mention on the sitting Monday next following the expiry of that two-week period;
(vi) subject to any application in that regard, amended opposition papers be filed within four weeks from that date (excluding August), in relation to which the opposing parties will not be confined to responding to the amendments and will be at large as to how they wish to phrase or re-phrase their opposition; and
(vii) unless any party lodges a reasoned written legal submission to the contrary within a 7-day period from the date of this judgment, the foregoing order be perfected with no order as to costs.