

THE HIGH COURT

High Court Record No. 2018/488CA

Circuit Court Record No. EC008/2017

EASTERN CIRCUIT

BETWEEN

MICHAEL JEFFERS

PLAINTIFF

AND

**VOLKSWAGEN AKTIENGESELLSCHAFT,
VOLKSWAGEN GROUP IRELAND LIMITED,
BRIMBAY LIMITED T/A SHEEHY MOTORS (NAAS)
AND VOLKSWAGEN BANK GMBH**

DEFENDANTS

JUDGMENT of Mr. Justice Heslin delivered on the 16th day of December 2020

1. The fundamental issue in the present application, which involves a hearing, *de novo*, consequent on an appeal brought by the First, Second and Fourth Named Defendants (hereinafter "the Volkswagen Defendants") against a Circuit Court order made by His Honour Judge O'Sullivan on 19 October 2019, is whether the Plaintiff is required to furnish replies to certain particulars raised by the Volkswagen Defendants in relation to the claim in the Plaintiff's equity civil bill dated 27 March 2017.

The Plaintiff's claim

2. The Plaintiff is a doctor and it is pleaded that on or about 23 April 2015 he agreed to purchase a motor car. The Plaintiff's pleaded claim includes *inter alia* specific pleas that the motor vehicle in question was being offered for sale by the Defendants and/or each of them, their respective servants or agents. The Plaintiff also pleads that he made known to the Defendants and/or each of them, their respective servants or agents that he required a motor vehicle which was *inter alia* of merchantable quality. He also pleads that, in order to induce him to enter into an agreement, the Defendants and/or each of them, their respective servants or agents made certain representations to him including as to merchantable quality and to the effect that the vehicle had low emissions with a low motor tax rate and was fuel efficient. It is pleaded that the Defendants and/or each of them, their respective servants or agents made these representations fraudulently and the Plaintiff pleads that, relying on those representations and not otherwise, he agreed to purchase a motor car from the Defendants and/or each of them, their respective servants or agents in consideration of the sum of €21,950.00 which, it is pleaded, was paid to the Defendants and/or each of them, their respective servants or agents.
3. It is not in dispute that the Third Named Defendant is the garage where the car was acquired the Third Named Defendant plays no part in the present appeal. It is not in dispute that finance to purchase the relevant motor car was provided by the Fourth Named Defendant, in circumstances where the Plaintiff pleads that he entered into a hire purchase agreement with the Fourth Named Defendant on 23 April 2015 in respect of the sum of €14,000, for a period of 36 months with the relevant interest rate being 6%. The balance of the total purchase price is pleaded as being a trade-in value of €3,950.00 together with a cash payment of €4,000. The indorsement of claim in the relevant equity

civil bill which was issued by the Plaintiff on 27 March 2017, runs to just over five pages of text and, among other things, a list of express and/or implied conditions or terms are pleaded as comprising part of the agreement whereby the Plaintiff purchased the car. In the alternative, it is pleaded that equivalent representations and/or warranties were made by the Defendants and/or each of them, their respective servants or agents. It is also pleaded that in breach of the relevant agreement, the representations were false and untrue and the Defendants and/or each of them, their respective servants or agents were in breach of the pleaded conditions and/or terms in that it is pleaded that the motor vehicle was not of merchantable quality, not fit for purpose, did not correspond with its description, was not a low emission motor vehicle, was not fuel efficient as represented, had not complied with all statutory or regulatory requirements and applicable emissions standards or limits, had not lawfully passed all motor vehicle emissions testing, may be subject to higher motor tax than represented, was not free from defects and it is also pleaded that, in breach of conditions, warranties or guarantees, the Defendants and/or each of them, their respective servants or agents did not have the necessary skill to render the service and did not supply the service with due skill, care and diligence.

4. The case made by the Plaintiff against the Defendants and/or each of them their respective servants or agents is that they were guilty of negligence, breach of duty and/or breach of statutory duty and that the pleaded representations and/or warranties detailed in the equity civil bill were false and untrue and that the Defendants and/or each of them, their respective servants or agents were guilty of fraud and/or negligence in making the said representations or warranties and the Plaintiff pleads loss under various headings in particular breach of contract, negligence, breach of duty, breach of statutory duty, fraud and/or misrepresentation, explicitly pleading that the Plaintiff has suffered loss, damage, inconvenience, upset and/or expense.

Particulars of loss and damage

5. Under the heading of "Particulars of Loss and Damage" the Plaintiff pleads, *inter alia*, that he had a long-standing relationship with the Defendants and or each of them, their respective servants or agents, having previously purchased Volkswagen motor cars from the Defendants and/or each of them. It is pleaded that the Plaintiff is required to perform a considerable amount of driving in his profession as a doctor, working in four different hospitals in Dublin and Kildare at least once a week. Among other things it is pleaded that:

"In or about the beginning of 2008, the Defendants, and or each of them, their respective servants or agents conceived the idea of installing engine controlled unit software (hereinafter referred to as a "cheat device") in motor vehicles fitted with a type EA189 diesel engines. The aforementioned software could detect when a particular motor vehicle was undergoing emissions testing and would thereby give a false reading of the Nitrogen Oxide (NOx) levels of the particular vehicle during emissions testing, which said readings were inaccurate and false thereby enabling the vehicle to successfully pass the emissions testing. However, during normal driving conditions, the said emissions control software was deactivated and/or shut

off in order to attain greater fuel economy and additional power, resulting in greater pollution.

In or about September, 2015 the Defendants and/or each of them, their respective servants or agents publicly admitted that the said cheat device was and/or is installed in approximately 11 million vehicles with type EA189 diesel engines worldwide.

By letter dated October, 2015 the Plaintiff was informed by the Defendants, and/or each of them, their respective servants or agents that his aforesaid motor vehicle was one such vehicle which was fitted with the aforesaid EA189 diesel engine and cheat device. In light of the Defendants, and/or each of them, their respective servants or agents' actions and/or the deliberate concealment of these actions, they have unilaterally breached the mutual relationship of trust and confidence with the Plaintiff. The Plaintiff is gravely concerned about the reliability and/or performance of his said motor vehicle. The Plaintiff was informed by letter dated March, 2016 from the Defendants, and/or each of them, their respective servants or agents that his said motor vehicle is now required to undergo both a software update to the engine management system together with a "technical measure" to rectify the concealed cheat device with which the said engine was fitted. The said technical measure involves fitting a flow transformer directly in front of the air mass sensor in the said engine, which the Defendants' allege will stabilise the air flow in front of the sensor to improve accuracy. These measures will involve opening up the engine in the Plaintiff's aforesaid motor vehicle at a local Volkswagen dealer. The Plaintiff's expert engineer has significant concerns in this regard as the proposed measures involve opening the induction system of the Plaintiff's said motor vehicle, which is a vital area of any motor vehicle, in a setting other than under factory conditions. As such this increases the risk of possible engine damage and/or engine failure post modification and repairs. It is unknown what effect, if any, both the software and technical update/solution to the problem will have on the engine itself, the longevity of the said motor vehicle and on the fuel consumption levels, performance levels, and/or emissions levels. In addition, it is unknown whether the Plaintiff's said motor vehicle will be subject to a higher rate of motor tax.

At this juncture it is unknown how the Plaintiff's said motor vehicle will perform following the aforementioned software and technical updates and/or repairs and further particulars may arise on foot of same.

Furthermore, the Plaintiff's aforesaid motor vehicle will henceforth be known as a motor vehicle affected by the aforementioned emissions scandal and is a fact which will have to be disclosed to any future purchaser. As such the Plaintiff's said motor vehicle may be subjected to a diminution in value beyond what one would reasonably expect a second-hand motor vehicle to experience on resale and/trade in.

By reason of the matters aforesaid, the said motor vehicle was worthless or worth far less than the said sum of €21,950.00 paid by the Plaintiff. In addition to which, the Plaintiff, pursuant to the aforesaid Hire Purchase Agreement, has been discharging interest on the principal sum of €14,000 at a rate of 6% per annum since on or about the 23rd day of April, 2015, together with all other associated fees thereon and as such the Plaintiff seeks the return of all payments made – pursuant to the Hire Purchase Agreement to date.

The Plaintiff reserves the right to furnish further and better particulars of loss and damage if, and/or when, same come to hand prior to and/or at the hearing of the action herein.

Further, or in the alternative, the breach of agreement aforesaid (including breach of warranty) fraud, misrepresentation, negligence and breach of duty (including breach of statutory duty) constitute a fundamental breach between the parties as a consequence of which the Plaintiff is entitled to repudiate and/or rescind the said agreement and return the said motor vehicle to the Defendants, and/or each of them, their respective servants or agents and have the purchase monies of €21,950.00, together with all accruing interest thereon, returned to him by the Defendants and/or each of them, their respective servants or agents.” (emphasis added)

6. It is fair to say that references to events and documents in the foregoing narrative (which is set out between pages 4 to 7 of the equity civil bill) are not specifically connected to the various pleas of negligence, breach of duty including breach of statutory duty, breach of contract, breach of agreement and/or warranty, breach of fiduciary duty, misrepresentation, negligent misstatement and fraud which are pleaded against each of the Defendants as well as their respective servants or agents jointly and or severally.

The relief sought by the Plaintiff

7. In the equity civil bill the Plaintiff goes on to claim damages, including exemplary and/or aggravated damages. The Plaintiff also seeks the repudiation and/or rescission of the 23 April 2015 agreements, including the Hire Purchase Agreement. The Plaintiff also seeks the return of the sum of €21,950 as well as the return of the sum of €1,293.76 as well as further or other relief. All such claims are pleaded as against the Defendants and/or each of them, their respective servants or agents. It is fair to say that numerous pleas are made against each and every one of the four Defendants in the equity civil bill.

Preliminary observations

8. On the basis of the contents of the equity civil bill, the case is one of considerable complexity. It is also uncontroversial to say that, even though the relevant motor car was acquired in the Third Named Defendant’s garage, all pleas, including breach of contract, breach of fiduciary duty, misrepresentation, negligence, breach of duty, breach of statutory duty fraud and are made as against all four Defendants. In the pleas, which are made with obvious care and skill in the equity civil bill, the identity of any servant or agent of any of the Defendants who is alleged to have made any fraudulent

misrepresentation is not referred to. The pleas which I have highlighted in bold, above, constitutes what the Plaintiff says as regards his pleaded loss. It is fair to say that, although diminution in value is referred to, this is not quantified in any way in the equity civil bill. It can also be fairly said that no Plaintiff is entitled to both rescission of an agreement and compensation in respect of their financial loss in the context of returning a motor vehicle and, at the same time, is entitled to compensation for the diminution in value of the same motor vehicle on the basis it is not returned. It seems to me, therefore, that legitimate questions arises, in light of the comprehensive pleas set out in the equity civil bill, as to both the nature of the loss claimed and the calculation of such loss. The equity civil bill makes no reference to whether the motor vehicle in question was, or was not, sold. That is not a criticism, but an observation. It is also one I make in circumstances where, towards the very end of the hearing of this matter which took place on 19 November, and although not on affidavit, learned counsel for the Volkswagen Defendants/appellants indicated that, on his instructions, the car may have been sold on 8 May 2018, namely, prior to the hearing in the Circuit Court which took place on 19 October 2018. Learned counsel for the Plaintiff/respondent confirmed that this information did not accord with his instructions but, very properly acknowledging that this is something the court should know in the context of the decision it was being asked to make on the appeal, indicated that instructions would be taken and the Plaintiff's solicitor would write a letter in early course confirming the position. This is an issue I will return to later in this decision.

Notice for Particulars dated 9 October 2017

9. Prior to looking closely at the relevant particulars which the Volkswagen Defendants seek in the present motion, it is appropriate to refer to exchanges which took place between the parties as follows. On 9 October 2017, A&L Goodbody Solicitors for the Volkswagen Defendants delivered a notice for particulars. This is a document which ran to some 16 pages and which contained 42 numbered queries, several of which had sub-paragraphs. Although this notice for particulars was, on any analysis, quite an extensive document, I have carefully considered each of the queries raised and each is expressed to be with respect to a particular plea in a numbered paragraph in the equity civil bill. I make this observation here in circumstances where, as will be discussed more fully in this judgment, the well-known decision of Mr. Justice Hogan in *Armstrong v. Moffatt* [2013] 1 IR 417 featured heavily in the submissions made with great skill both by Mr. Rogers for the Plaintiff and Mr. Gardiner for the Volkswagen Defendants. In *Armstrong v. Moffatt*, Hogan J. decried the practice, particularly in personal injury cases, whereby what might be called "boiler plate" notice for particulars were delivered containing queries which were irrelevant to the pleaded case. Hogan J. underlined that particulars sought must relate to matters stated in the pleadings whereas in the case before him, queries had been raised in relation to matters not referred to in the pleadings. Indeed, Mr. Justice Hogan went, with great care, through each of the particulars raised by the first and Second Named Defendants taking the view that many of the queries raised by the Defendants did not relate to any issue in the Plaintiff's pleaded case. At para. 18 of his judgment, Hogan J., commenting on the position prior to the Civil Liability and Courts Act, 2004 stated inter alia that "*in retrospect, the courts should, perhaps, have been more prepared to strike*

out many of the pre-rehearsed requests as oppressive, and in some cases, as constituting quite simply an abuse of process". Those comments by Mr. Justice Hogan in *Armstrong v. Moffatt* were made in a particular context, but the factual position is entirely different in the present case. This is not a personal injuries claim, nor is the aforesaid Act of 2004 of any relevance. The 9 October 2017 notice for particulars could not fairly be described as "boiler plate". On the contrary, it is very much a bespoke document which, although extensive, is drafted with the specific queries said to relate to specific pleas raised in the equity civil bill. Unlike the position in *Armstrong v. Moffatt*, there is no question of any query contained in the 9 October 2017 notice for particulars not referencing in some manner a plea which is made in the Plaintiff's equity civil bill. In other words, it could not fairly be said that the queries raised do not, at least *prima facie*, arise from the Plaintiff's pleadings. In fairness to counsel for the Plaintiff, it was made clear that this court is not being urged to make a finding that a notice for particulars delivered by the Volkswagen Defendants was oppressive or an abuse of process but in light of the foregoing observations I have made, I think it is appropriate to say that I do not believe either finding could fairly be made.

Replies to particulars dated 14 November 2017

10. Returning to the sequence of events, the Plaintiff delivered replies to particulars on 14 November 2017, running to 6 pages, the first page of which contained a preliminary objection, relying on the *dicta* of Mr. Justice Hogan in *Armstrong v. Moffatt*. As well as maintaining that the 9 October 2017 notice for particulars was oppressive, the key assertion made by the Plaintiff was that: "... the Court reaffirmed that the object of pleadings, including Particulars was to ensure that a party should know in advance, in broad outline, the case it will have to meet at the trial." The Plaintiff submitted that the Defendants "...are well aware in broad outline of the nature of the case they have to meet and it cannot be said that they will be surprised by the nature of the case which they have to meet." Strictly subject to the foregoing preliminary objection, the Plaintiff went on to provide certain replies over the course of the following approximately 5 pages. Many of the replies furnished were to the effect that the Defendants were "well aware" of the particulars sought or that the information was "not a proper matter for particulars" or that it was "a matter wholly within the knowledge 'of the Defendants' ".

Notice for further and better particulars dated 15 December 2017

11. It is not in dispute that on 15 December, 2017 the solicitors for the Volkswagen Defendants delivered a notice for further and better particulars. This document began with a "response to preliminary objection" which asserted that the replies provided on 14 November 2017 were inadequate. Among other things, the Volkswagen Defendants stated that they were entitled to know the specific nature of the relationship alleged to exist between the Defendants as well as "...the nature, extent and form of representations made and the individuals who made them and furthermore, the exact, precise and specific particular of each and every allegation of fraud made." Over 4 pages, 26 numbered particulars were raised and it is fair to say that many of the particulars were a re-statement of the request for particulars which had been raised on 9 October 2017, with

a setting-out of reasons why the Volkswagen Defendants regarded the responses as inadequate.

Further and better replies to notice for particulars dated 5 January 2018

12. On 5 January, 2018, in response to the 15 December, 2017 notice for further and better particulars, the Plaintiff delivered a document entitled "further and better replies to notice for particulars". This document also began with a "Preliminary Objection" which, *inter alia*, emphasised the Plaintiff's reliance on the dicta of Hogan J. in *Armstrong v. Moffatt*. This document contained, *inter alia*, the following text after it was asserted that the Defendants and/or each of them, their respective servants or agents caused, permitted and/or allowed the Plaintiff's motor vehicle to be designed, manufactured, supplied, distributed, imported and/or sold to the Plaintiff while it was fitted with a "cheat device" without disclosing same:-

"The precise identities of the servants or agents of the First, Second and Fourth Named Defendants who were aware of these facts and who made the fraudulent and/or negligent representations is a matter wholly within the knowledge of the said Defendants and the Plaintiff is unable until after discovery to give further and better particulars of their identities and will furnish same if and/or when same come to hand and prior to the trial of the action herein. In addition, the Plaintiff will further rely on sales brochures and/or documentation in this regard as to the specifications of his said motor vehicle and will further seek same by way of discovery together with details of the authors of the said sales brochures and/or documentation."

13. By way of observation, the foregoing response does not address the question of who, to the knowledge of the Plaintiff, made representations to him. It is not clear, for example, whether the Plaintiff makes the case that representations were made directly to him by any individual who is said by the Plaintiff to represent the Volkswagen Defendants.

Plaintiff's Circuit Court motion dated 23 February 2018

14. It is not in dispute that the Volkswagen Defendants considered the replies furnished by the Plaintiff to be inadequate and a motion was issued on 23 February 2018 seeking an order from the Circuit Court to compel the Plaintiff to reply to certain particulars as set out in a schedule to the motion. That motion was grounded on an affidavit sworn by Mr. Liam Kennedy, solicitor, and it is common case that no replying affidavit was provided by or on behalf of the Plaintiff.

Circuit Court's orders dated 19 October 2018

15. It is clear that, when the motion brought by the Volkswagen Defendants was heard in the Circuit Court on 19 October, 2018, the Volkswagen Defendants had not yet delivered a defence and it is not in dispute that this is because the Volkswagen Defendants took the stance that, prior to delivering a defence, the Volkswagen Defendants were seeking replies to all of the particulars raised in the 9 October, 2017 notice for particulars. It is not in dispute that the motion came for hearing on 19 October, 2018 when Judge O'Sullivan ordered the Plaintiff to furnish replies to particulars 2(i), 3(i), 4(i) and 31. The Circuit Court declined to order the Plaintiff to reply to any of the other particulars sought

and it is against the foregoing Circuit Court decision that the present appeal is made. By means of a second order made on 19 October, 2018, the Honourable Judge in the Circuit Court struck out a motion for judgment in default of defence as against the Volkswagen Defendants and extended the time for the delivery of a defence.

Supplemental further and better replies to notice for particulars – 15 January 2019

16. It is not in dispute that replies to particulars were not furnished by the Plaintiff in respect of the aforesaid queries 2(i), 3(i), 4(i) and 31 until on or about 15 January, 2019. These replies were set out in a document of that date entitled "supplemental further and better replies to notice for particulars". The first paragraph of that document makes it clear that it comprises those replies to the queries raised in the notice for particulars dated 20 October, 2017 which were directed by the Circuit Court order, dated 19 October, 2018, to be furnished by the Plaintiff.

Additional supplemental further and better replies to notice for particulars – 20 March 2019

17. On or about 20 March 2019, the Plaintiff delivered a document entitled "additional supplemental further and better replies to notice for particulars". It will be recalled that the document delivered on 15 January 2019 was expressed by the Plaintiff to constitute the delivery of replies in compliance with the order made by the Circuit Court on 19 October 2018. Notwithstanding the foregoing, this document dated 20 March, 2019 begins in a similar fashion to the replies of 15 January 2019, stating that the Plaintiff furnishes additional replies to the Volkswagen Defendants' notice for particulars dated 20 October 2017 as directed by the Circuit Court's order, dated 19 October, 2019 and these replies are said to be "...in addition to the supplemental further and better replies to particulars to notice for particulars dated the 15th January 2019". Among other things, the response on p. 2 of this document in respect of "2(i)" includes, *inter alia*, the following:-

"The Plaintiff entered into the said contract on the basis of the express and/or implied representations and/or warranties made to him that the said motor vehicle was, inter alia, of merchantable quality, was free from defects, was fit for the intended purpose, corresponded with its description, had low emissions with a low motor tax rate and was fuel efficient. The Plaintiff will also rely on the First Named Defendant's relevant marketing, advertising, sales literature and/or online content in respect of environmental credentials, standards, characteristics and/or specifications of the said motor vehicle in this regard. As already pleaded in the Plaintiff's previous replies to particulars sought by the Defendants herein, the Plaintiff reserves the right to furnish further and better particulars of the representations and/or statements made by the First Named Defendant, its servants or agents in relation to the environmental credentials, standards, characteristics and/or specifications of the motor vehicle the subject matter of the within proceedings and its compliance with relevant European emissions standards and the Plaintiff will seek discovery of, inter alia, the relevant marketing, advertising, sales literature and/or online content in respect of same from the First

Named Defendant as required upon receipt of the First Named Defendant's defence herein, which is awaited."

18. By way of observation, it is not clear from this, or indeed from any other plea made by the Plaintiff, whether the Plaintiff makes the case that any particular individual, or individuals, representing the Volkswagen Defendants did or do not make specific representations to the Plaintiff, oral or written.

Defence delivered 1 May 2019

19. It is not in dispute that a defence was delivered by the Volkswagen Defendants on 1st May 2019. The said defence is, in relative terms, quite a short document comprising just three pages and 22 numbered pleas. It is fair to say that it comprises a traverse and denial of all claims made the Plaintiff. During the course of very sophisticated and skilled submissions on behalf of the Plaintiff, it was argued that the underlying purpose of particulars is to provide sufficient clarity in respect of a Plaintiff's claim to enable a defence to be delivered and it was submitted that the fact a defence had been delivered illustrated, of itself, that the particulars sought by the Volkswagen Defendants in this appeal were, and are, not necessary. Despite the skill with which this submission is urged on the court, I do not believe it can fairly determine the matters at issue. It is plain from the pleadings to which I have referred that the Volkswagen Defendants regarded the particulars raised by them as necessary in the context of understanding the claim being made and delivering a defence. It cannot be disputed that the Volkswagen Defendants brought a motion seeking to compel the delivery of the relevant particulars prior to drafting a defence, nor can it be disputed that the Circuit Court, in effect, directed that a defence be delivered on a certain basis. Having reviewed the contents of the defence, it can fairly be said to be the type of "belt and braces" traverse containing a full denial of everything, which is often delivered so as to ensure the position of the relevant Defendants is not prejudiced by a failure to deny all pleas made. That being so, it does not, in its own terms, demonstrate that the particulars sought by the Volkswagen Defendants were not and are not necessary.
20. I now turn to an examination of the specific particulars which are in issue in this matter. These are helpfully set out in the schedule to the 19 November, 2018 notice for appeal. For the sake of convenience, I propose to look, in turn, at each of the particulars sought by the Volkswagen Defendants with reference to those paragraphs in the Plaintiff's equity civil bill to which the relevant particulars are said to relate. Having done so, I propose to make certain preliminary comments, in circumstances where, later in this judgment, I will look closely at the principles which emerge from an analysis of the relevant authorities which counsel for very helpfully drew to the Court's attention and, having applied those principles, I will detail this Court's decision in relation to each of the particulars sought. To begin this exercise, it is necessary to set out, verbatim, paragraphs 7, 8 and 9 of the equity civil bill, followed by particulars 12, 13, 14 and 17, the latter comprising the particulars sought which relate to the said paragraphs.

Equity Civil Bill – Paragraphs 6, 7 and 8

21. The following is a verbatim extract: -

- “6. *At all material times to these proceedings, the Defendants, and/or each of them, their respect (sic) servants or agents were responsible and liable for the design, manufacture, supply, distribution, importation and/or sale of mechanically propelled motor vehicle registration numbers and letters 131-KE-1703 (hereinafter referred to as “the said motor vehicle”).*
7. *In or about the April, 2015 (sic) the Plaintiff was minded to purchase the said motor vehicle which was being offered for sale by the Defendants, and/or each of them, their respective servants or agents. In the course of all negotiations, the Plaintiff made known to the Defendants, and/or each of them their respective servants or agents that he required a motor vehicle that was, inter alia, of merchantable quality, was free from defects, was fit for the purpose intended, corresponded with its description, had low emissions with a low motor trade rate and was fuel efficient as he spent a considerable amount of time travelling during the course of his profession.*
8. *In the course of the aforesaid oral negotiations and in order to induce the Plaintiff to enter into an agreement, the Defendants, and/or each of them, their respective servants or agents expressly and/or impliedly represented and thereby warranted to the Plaintiff that the said motor vehicle complied with all of the requirements set out at paragraph 7 above.*
9. *The Defendants, and/or each of them, their respective servants or agents made the said representations fraudulently and either well knowing that they were false and untrue or recklessly not caring whether they were true or false.”*

Particulars sought by the Volkswagen Defendants – 12, 13, 14 and 17

22. The following is a verbatim setting out of the particulars sought:-

- “12. *With respect to the allegation at paragraph 9 of the equity civil bill that the Defendants or each of them, their respective servants or agents, made the representations described in paragraph 7 and 8 of the equity civil bill fraudulently and either when knowing that they were false or untrue or recklessly not caring whether they were false or true:*
 - (i) *Please set out the material facts or evidence supporting this allegation with respect to each of the following particulars and/or representations which are alleged to have been fraudulently made with respect to the motor vehicle:*
 - (1) *that the motor vehicle was one of merchantable quality;*
 - (2) *free from defects;*
 - (3) *fit for the purpose intended;*
 - (4) *corresponded with its description;*
 - (5) *had low emissions with a low motor tax rate; and*
 - (6) *was fuel efficient as the Plaintiff spent a considerable amount of time travelling during the course of his profession.”*

23. It is appropriate at this juncture to point out that counsel for the Defendants properly accepts that it is not appropriate to seek "evidence" in the context of raising particulars and, for the purposes of this hearing, it is acknowledged on behalf of the Volkswagen Defendants that replies are sought on the basis that the words "or evidence" should be deleted or ignored. Having said the foregoing, it seems to me that it can be fairly said that particular 12 constitutes an attempt to seek replies in respect of the allegation of fraudulent misrepresentation which is undoubtedly made in the equity civil bill. I will later discuss the authorities which were relied on by counsel on both sides during the hearing of this appeal but I believe the following can be said on a *prima facie* basis, when one compares the pleas in the equity civil bill with what is sought at particular 12. To my mind, it is not unfair for a Plaintiff to be asked, and it is necessary for the Defendants to be told, the basis upon which the Plaintiff says that fraudulent misrepresentations were made to him as regards the relevant motor vehicle and on the range of issues which reflect the pleas made by the Plaintiff. There is no doubt about the fact that quite a lengthy narrative in the equity civil bill refers, *inter alia*, to what is described as a "cheat device" and to what the Defendants and/or each of them are said to have "publicly admitted" in relation to the installation of same in some "11 million vehicles". It is not clear, however, how the Plaintiff says that these pleas relate to what is said to have been the representations allegedly made to him in the course of negotiations or otherwise and how same relates to the Plaintiff's alleged loss. The Defendants and/or each of them are said by the Plaintiff to have made representations to him which induced him to purchase a car which, according to the Plaintiff, were representations which were made fraudulently. Those pleas are made against each of the three Volkswagen Defendants just as much as they are made against the relevant garage. As such, it seems to me that, to properly understand the case being made, more detail is necessary to be provided by the Plaintiff than is contained in the equity civil bill in order to clarify the true nature of the case being made. It seems to me that, absent authority to the contrary, it would be appropriate that the Plaintiff rely to the particulars raised, so that he can clarify how he says that representations made to him were fraudulent in respect of the range of issues he pleads. Particulars 13, 14 and 17 are as follows:-

"13. *Please set out how each of the representations set out and particularised above were made fraudulently by the Defendants, their servants or agents, and either well knowing that they were false and untrue or recklessly not caring that they were true or false.*

14. *Please set out the identities of the servants or agents who made the fraudulent representations set out and described above on behalf of each of the first, second and Fourth Named Defendants.*

17. *With respect to the above three elements of dishonesty and/or fraud alleged against the first, second and Fourth Named Defendants, their servants or agents, please specify exactly the nature and extent of the dishonesty and fraud and which elements of the allegations are fraud and/or dishonesty as relied upon by the*

Plaintiff and the material facts or evidence giving rise to the Plaintiff's reliance on these allegations."

24. In light of the case pleaded against all four Defendants, the Plaintiff must know how he says the pleaded representations were made, fraudulently, by the Defendants. Given the pleaded case, it seems to me to be necessary for the Defendants to understand how the Plaintiff says the representations were made fraudulently and the identity of the person or persons said, by the Plaintiff, to have made these representations to him. It is clear from the pleaded case that the Plaintiff alleges that fraudulent misrepresentations were made to him by all or either of the Volkswagen Defendants. What is not clear or sufficiently clear is how the Plaintiff says these representations were made fraudulently, and who is said to have made them on behalf of the Volkswagen Defendants. Given the manner in which the case is pleaded, and subject to the authorities not indicating the contrary, particulars 13, 14 and 17 seem to be appropriate queries to raise and it seems to me to be appropriate that the Plaintiff be directed to reply so that the Volkswagen Defendants understand the nature of the case made against them, unless the jurisprudence which I will presently examine indicates the contrary.

Paragraph 11 of the Equity Civil Bill

25. Paragraph 11 of the equity civil bill states as follows: -

"At the time of making the said representations, the Defendants and/or each of them, their respective servants or agents intended and they well knew or ought to have known that the Plaintiff would rely thereon and would be induced thereby to enter into an agreement with the Defendants, and/or each of them, their respective servants or agents for the purchase of the said motor vehicle and became the owner of same."

Particular 19

26. Particular 19 refers to paragraph 11 of the equity civil bill and states as follows:-

"19. With reference to paragraph 11 of the equity civil bill where it is

alleged that after the time of making the said representations the Defendants and/or each of them, their respective servants or agents, intended that they well knew or ought to have known that the Plaintiff would rely thereon would be induced thereby to enter into an agreement with the Defendants or each of them, their respective servants or agents, for the purchase of the motor vehicle in question:

- (i) Please set out the material facts and/or evidence relied upon to support this allegation;*
- (ii) Please set out the identities of the servants or agents of the Defendants and the relationship that each of the servants or agents had with each of the Defendants in question;*

(iii) *Please set out whether the relationship which is alleged to exist between the servants or agents of the Defendants is based on contract and/or a duty of care. If based on contract, please set out the relevant terms of the contract and if based on a duty of care, please set out and describe the duty in question, the breach of the duty and the damages arising therefrom.*"

27. Again, it is appropriate to point out that it accepted by the appellants that the words "or evidence" are inappropriate. It is fair to say that particular 19 is focused on the identity of those who are said by the Plaintiff to have made representations to him. That seems to me to be a legitimate query to raise in light of the pleaded case. It does not seem to me to be an adequate answer, in respect of particulars which seek to know who the Plaintiff says made representations to him, for the Plaintiff to say that this is a matter for evidence at the trial. Subject to the authorities not indicating the contrary, it seems to me that it would be appropriate to direct that the Plaintiff reply.

Equity Civil Bill, Paragraph 13

28. Paragraph 13 of the equity civil bill states as follows:-

"13. Acting in reliance on the said representations and not otherwise, on or about the 23rd day of April 2015 the Plaintiff agreed to purchase the said motor vehicle from the Defendants and/or each of them, their respective servants or agents in consideration of the payment of €21,950.00 which was duly paid to the Defendants, and/or each of them, their respective servants or agents."

Particular 22

29. Particular 22 concerns paragraph 13 of the equity civil bill and states as follows:

"22. With respect to the representations alleged at paragraph 13 of the equity civil bill made on or around the 23rd April, 2015 wherein it is alleged that the Plaintiff agreed to purchase the motor vehicle from the Defendants and each of them, please set out:

(i) whether the representations were made orally;

(ii) if made orally, the date of the said representation, and the individuals who made the representations;

(iii) if the representations were made in writing please supply a copy of the written representations in question."

30. It is beyond doubt that the Plaintiff alleges that representations were made by the each and or all of the Volkswagen Defendants. That being so, it seems to me to be appropriate for the Defendants to ask, and necessary for the Plaintiff to say, whether the representations were made orally, and, if so, by whom. It is uncontroversial to say that the production of documentation is more probably a matter for discovery but it is not uncommon for parties to agree, in response to a notice for particulars, to furnish certain

documents. As things stand, matters never got as far as that, in circumstances where the Plaintiff did not clarify whether the representations it relies on as against the Volkswagen Defendants are said by the Plaintiff to have been made orally or to have been made in writing and by whom. Again, unless the principles in the jurisprudence suggest otherwise, I believe it is appropriate to direct the Plaintiff to reply.

Equity Civil Bill – paragraph 16.

31. Paragraph 16 of the equity civil bill states as follows:

"In breach of the said agreement, the aforesaid representations were false and untrue and the Defendants, and/or each of them, their respective servants or agents were in breach of the aforesaid conditions and/or terms in that the said motor vehicle:

- (a) Was not of merchantable quality;*
- (b) was not fit for the purpose intended;*
- (c) did not correspond with its description;*
- (d) was not a low emissions motor vehicle;*
- (e) was not as fuel efficient and/or economical as represented;*
- (f) had not lawfully complied with all statutory and/or regulatory requirements and applicable emissions standards and/or limits;*
- (g) had not lawfully passed all motor vehicle emissions testing;*
- (h) may now be subjected to a higher motor tax rate than had been represented;*
- (i) was not free from defects;*
- (j) the Defendants, and/or each of them, their respective servants or agents did not have the necessary skill to render the service; and*
- (k) the Defendants and/or each of them, their respective servants or agents did not supply the service with due skill, care and diligence.*

Particular 24

32. Particular 24 relates to paragraph 16 of the equity civil bill and states:

"24. With respect to the allegation at para. 16 of the Equity Civil Bill that the representations set out and described in para. 15 were false and/or untrue:

- i. Please set out the material facts and evidence relied upon to support the allegation that the representations set out in paragraph 15 were false and untrue;*

- ii. *Please confirm whether or not it is further alleged that the representations made at para. 15 were made recklessly and/or without regard as to the truth or [sic] the allegations in question.*
- iii. *Please set out and describe whether or not the allegations that the representations in paragraph 15 were false and untrue or made and or [sic] made in addition to the allegations at paragraph 9 of the Equity Civil Bill that the representations made at paragraph 7 and 8 purportedly by the servants or agents of the Defendant to the Plaintiff were false and untrue."*

33. For the purposes of this appeal, the words "and evidence" in particular 24 are not urged on the court by the Volkswagen Defendants/appellants. Given the pleas made against all of the Defendants and each of them, particular 24 undoubtedly arises from the pleadings. It seems to me to be *prima facie* a legitimate particular to raise. In responding, the Plaintiff cannot be expected to furnish information he does not have or more information than he does have. It seems to me, however, that it is necessary, given the plea made, that the Plaintiff, based on the information which he must have, clarifies the nature of his case in response to the queries raised in particular 24. Requiring the Plaintiff to clarify, in advance of the discovery stage, the nature of his claim against the Defendants seems to me to create no injustice to the Plaintiff. Even without discovery, the Plaintiff must be able to say whether the pleas made by him at para. 15 are made in addition to the allegations at para. 9. The Plaintiff must also be in a position to confirm whether he makes the case that the representations pleaded at para. 15 were made recklessly. Thus, unless the authorities indicate otherwise, I believe it would be appropriate to direct the Plaintiff to respond.

Equity Civil Bill paragraph 18.

34. Paragraph 18 of the Equity Civil Bill states as follows:

"18. In truth and in fact, as appears from the foregoing, the representations and/or warranties as set out at para. 7 and/or 15 above were false and untrue. In the premises, the Defendants and/or each of them, their respective servants or agents were guilty of fraud and/or negligence in making the said representations and/or warranties."

Particular 28.

35. Particular 28 seeks the following in relation to para. 18 of the equity civil bill:

"28. With respect to paragraph 18 of the Equity Civil Bill, please set out the material facts relied upon to support the allegations of fraud and/or negligence with respect to the representations made at paragraph 7 and/or 15 of the Equity Civil Bill."

36. The Plaintiff has undoubtedly pleaded fraud and negligence with respect to representations said to have been made by the Volkswagen Defendants and this particular is directed to same. To my mind it is not unreasonable and creates no injustice for the Plaintiff to be asked how he says the representations allegedly made to him were allegedly fraudulent and/or negligent unless the jurisprudence indicates the contrary.

Equity Civil Bill paragraph 19.

37. *"19. By reason of the breaches of agreement and/or warranty, negligence, breach of duty, including breach of statutory duty, fraud and/or misrepresentation, the Plaintiff has suffered loss, damage, inconvenience, upset and/or expense."*

Particular 29.

38. Particular 29 states:

"29. With respect to paragraph 19 of the Equity Civil Bill, please set out the material facts or evidence relied upon supporting the allegation that the Plaintiff has suffered loss, damage, inconvenience, upset or expense with regard to and with reference to the breaches of the agreement and/or warranty, negligence, breach of duty, including breach of statutory duty, fraud and misrepresentations set out and described in the foregoing paragraphs".

39. The foregoing particular is directed towards identifying the loss which the Plaintiff alleges and how such loss is said to relate to the alleged wrongs on the part of the Volkswagen Defendants. I do not believe that it could be fairly said that this is something which must await discovery. The Plaintiff must know what loss he claims to have and how he claims it relates to wrongdoing alleged against the Volkswagen Defendants. Again, subject to the authorities suggesting otherwise, I believe it would be appropriate to direct the Plaintiff to respond.

Particulars 40 and 42

40. The issue of loss is also that which particulars 40 and 42 are directed to and these state as follows: -

"40. With respect to the assertion and/or plea in the particulars of the Equity Civil Bill that the Plaintiff's motor vehicle may be subjected to a diminution in value beyond what one would reasonably expect a second hand motor vehicle to experience on resale and/or trade-in, please set out the material facts or evidence relied upon by the Plaintiff in making such a plea and/or such an assertion."

42. With respect to the assertion that the Plaintiff is entitled to repudiate or rescind the said agreement and return the motor vehicle to the Defendant and have the purchase money of €21,950 returned, please set out the material facts and/or evidence relied upon by the Plaintiff in order to ground and/or support such a plea and/or assertion."

41. It is beyond doubt that the Plaintiff has pleaded loss and lays the blame for that loss at the door of the Volkswagen Defendants and each of them. The Defendant is entitled to know how the Plaintiff says that loss arises and what that loss is and it does not seem to me that this is an issue which needs to await discovery from any of the Defendants. Therefore, unless the authorities indicate the contrary, it would be appropriate in my view to direct the Plaintiff to respond.

The affidavit of Liam Kennedy

42. The only affidavit before the court is that sworn by Mr. Liam Kennedy, solicitor for the Volkswagen Defendants, on 23 February 2018. In para. 12, Mr. Kennedy avers that the key matters which the Plaintiff has failed to address can be divided into certain categories, those of particular relevance to the present appeal being described in the following terms by Mr. Kennedy: -
- "(iii) Alleged representations and particularly alleged fraudulent representations and circumstances around where such representations were allegedly made;*
 - (iv) Quantum of alleged loss and adequate particularisation of issues from which the alleged loss arises:*
 - (v) The Plaintiff's reliance on issues in the public domain without explaining any specific connection between those matters and the Plaintiff's case made herein".*
43. As averred by Mr. Kennedy, among the replies which the Volkswagen Defendants regard as inadequate by way of a response to the particulars which they have raised with regard to the pleas that the Volkswagen Defendants made representations fraudulently or recklessly, the Plaintiff has stated that: -
- The Volkswagen Defendants *" . . . are well aware of the emissions scandal which has been widely publicised and the Plaintiff's vehicle was fitted with an affected engine"*;
 - The Defendants, their respective servants or agents, *" . . . permitted and/or allowed 'the motor vehicle in question' . . . to be sold without disclosing the aforesaid facts to the Plaintiff . . ."*; and,
 - The identities of the servants or agents who made the fraudulent representations is a matter *"wholly within the knowledge"* of the Volkswagen Defendants.
44. In response to the particulars sought at Item 17, as regards the nature and extent of the alleged dishonesty and fraud and the material facts said to give rise to the Plaintiff's reliance, the Plaintiff states that the Defendants *" . . . publicly admitted that the said cheat device was installed in approximately 11 million vehicles and have written to the Plaintiff by letter dated October, 2015, to inform him that his said motor vehicles [sic] was one of the affected vehicles"*.
45. On the question of the identity of those said by the Plaintiff to have made fraudulent or negligent representations to him, the Plaintiff's 5 January 2018 replies to the notice for further and better particulars states the following at para. 6: -
- "The precise identities of the servants or agents of the first, second and fourth Defendant, who are aware of these facts and made fraudulent or negligent representations is a matter wholly within the knowledge of the said Defendants and the Plaintiff is unable until after discovery to give further and better particulars of*

their identities and will furnish same if or when same comes to hand prior to the trial of the action herein”.

46. In my view the foregoing responses, as provided by the Plaintiff to date, does not clarify, sufficiently, the nature of the case being made. Put simply, the Plaintiff has plainly pleaded that all or each of the Volkswagen Defendants made representations to him. That being so, the Volkswagen Defendants are entitle, at the very least, to know whether the Plaintiff says that a natural person spoke to him or wrote to him or provided something to him on behalf of one or more of the Volkswagen Defendants upon which he claims to have relied. It seems to me that, for a Plaintiff to claim that an identified individual made a representation to the Plaintiff, is of a different nature to a case where the Plaintiff claims that the representation was not made by a natural person, but claims, instead, that the representation was set out in certain advertising or marketing or promotional or sales material or online information alone. Unless the authorities indicate the contrary, it seems to me that a Defendant is entitled to know which of the foregoing cases a Plaintiff makes and, if he makes both cases, fairness makes it necessary for the Plaintiff to clarify what, from a potentially vast range of marketing, sales or such material, the Plaintiff says he actually placed reliance upon.
47. I also think it is necessary for the Plaintiff to provide particulars in relation to how he says the allegedly fraudulent representations which he claims were made to him by the Volkswagen Defendants resulted in loss to him. To take just one example, it is not specifically pleaded that the Plaintiff has, in fact, paid any increased road tax and it seems to me that the Plaintiff must know what loss of any he says has arisen in relation to this element of his claim. Furthermore, any diminution in value of the car is a matter which the Plaintiff should be in a position to address. Similar comments apply in relation to other issues concerning the alleged sub-standard performance of the motor car in question, including the issue of fuel efficiency. That the Plaintiff must know or can find out what his case on these issues is, would seem to follow from pleaded reference on page 5 of the equity civil bill to “The Plaintiff’s expert engineer”.

Legal submissions and relevant authorities

48. The position of the Plaintiff/respondent was made clear in very comprehensive and skilled submissions, both written and oral, in which it is contended on behalf of the Plaintiff that the appeal should be dismissed and that this is an appropriate case in which the Plaintiff should be permitted to defer the giving of any further particulars of its claim until after the Plaintiff has had the benefit of such discovery or interrogatories as might be agreed or directed by the Circuit Court. Among other things, it is submitted on behalf of the Plaintiff that there is no express requirement and no provision in the Circuit Court rules equivalent to O.19, r.5(2) of the Rules of the Superior Courts which provides that: *“In all cases alleging misrepresentation, fraud, breach of trust, wilful default or undue influence and in all other cases in which particulars may be necessary, particulars (with dates and items if necessary) shall be set out in the pleadings.”* At this point let me say that I am satisfied that nothing turns, for the purposes of this decision, on the presence or absence of a Circuit Court rule equivalent to O.19, r.5(2) of the Rules of the Superior Courts. This is

clear from a consideration of the entirety of the relevant authorities which were opened to the court and which I will discuss presently. In short, I do not accept the proposition that a Plaintiff alleging fraud in Circuit Court proceedings is subject to any lesser burden, in terms of particularising their case, than if such proceedings were in the High Court.

49. Under the heading "Particulars of loss and damage" there is certainly a relatively lengthy narrative statement of events said to have occurred, with reference made to devices inserted into engines on Volkswagen vehicles and counsel for the Plaintiff submits that it is more than sufficient to clarify the true nature of the Plaintiff's case, including in respect of the claim of fraud against the Volkswagen Defendants. It has to be said, however, that no particulars are set out as to how this narrative is said to connect to the alleged representations which the Plaintiff claims were made to him by the Volkswagen Defendants at the time he purchased the motor car in question. Throughout the equity civil bill, the Plaintiff undoubtedly alleges that certain representations were made to him, and that they were made fraudulently, and that he relied on these representations which are said to have been made by all or either of the Volkswagen Defendants, their servants or agents. The Plaintiff does not, however, identify the servants or agents of the Volkswagen Defendants who are alleged to have made the representations. Nor does the Plaintiff say whether these were made orally or in writing by the Volkswagen Defendants and the Plaintiff does not plead the content of same. In sophisticated and skilled submissions, senior counsel for the Plaintiff submits that, when one goes through the contents of the civil bill, it demonstrates that the Plaintiff asserts that he purchased a car from the Third Named Defendant in the person of Mr. O'Rourke, in circumstances where the Plaintiff asserts that the Third Named Defendant was acting as agent for the Volkswagen Defendants. It does have to be said, however, that as the pleadings stand, it has not been clarified definitively that the Plaintiff acknowledges that he did not receive representations from persons *other* than Mr. O'Rourke. The case, as currently pleaded, is at that Defendants and/or each of them, their respective servants or agents, made a range of representations to the Plaintiff and/or provided warranties or guarantees to the Plaintiff in respect of the car in question.

Pleading fraud

50. In *Keaney v. Sullivan* [2007] IEHC 8, Finlay Geoghegan J. approved the following extract from *Bullen & Leake*, Precedents of Pleading, 12th Edition, 1975 at p.452, as correctly stating the law in respect of pleadings of fraud being:

"It is not allowable to leave fraud to be inferred from the facts pleaded and accordingly, fraudulent conduct must be distinctly alleged and as distinctly proved. General allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any court ought to take notice"

51. On behalf of the Plaintiff it is accepted that there is a long-established practice of the courts to require allegations of fraud to be pleaded with particularity. The Plaintiff, however, submits that this requirement is not absolute and contends that there are certain exceptions to this, as identified by Mr. Justice Clarke (as he then was) in *National*

Education and Welfare Board v. Ryan [2008] 2 IR 816. It is appropriate to look in some detail at the foregoing decision.

National Education and Welfare Board v. Ryan [2008] 2 IR 816.

52. This was a case which concerned O.19, r.5(2). Briefly put, the Plaintiff commenced proceedings by means of a plenary summons issued in March 2007 and delivered a statement of claim in April 2007. In July 2007 the Plaintiff issued a motion for judgment in default of defence against the second Defendant. Two weeks later the second Defendant issued what might be called "retaliatory" motion seeking to have the proceedings struck out for failure by the Plaintiff to respond to a notice for particulars. Both motions were heard together and at p.821 of his decision, Clarke J. (as he then was) explained the stance of the relevant parties in the following terms:

"...the contending positions of the parties are, therefore, clear. The second Defendant maintains that it is entitled to answers to each of the relevant particulars before it should be required to file its defence. The Plaintiff maintains that the second Defendant must deliver a defence followed by the making of discovery and the answering of interrogatories before detailed particulars, beyond those contained in the statement of claim, should be delivered. That is the net issue between the parties. If the Plaintiff is right, then it is clear that the appropriate course of action to take would be to require the second Defendant to file its defence in a timely fashion and to allow the other appropriate procedures to follow with the Plaintiff delivering detailed particulars subsequent to the receipt of discovery and answers to interrogatories. If, on the other hand, the second Defendant is correct, then the price which the Plaintiff must pay to avoid the proceedings being struck out at this stage is that the particulars must now be answered. Either way, the net issue is as to which comes first, a defence or in more practical terms and in reality, discovery and interrogatories which follow a defence, or particulars. Against the background of that net dispute it is appropriate to turn next to the legal principles involved."

53. Later, beginning at p.824, the learned judge stated the following:

"10 As pointed out by Bowen L.J., in Leitch v. Abbott [1866] 31 Ch. D 374, if a Plaintiff is not able to have the benefit of discovery before defining the precise parameters of his claim, it is likely, in cases of fraud or other clandestine activity, to place very great limits on the benefit of discovery. That that would be so is clear. Discovery (or interrogatories) is, quite properly, limited to materials or issues which arise on the pleadings. If the pleadings are narrowly drawn, then it follows that discovery or interrogatories will, likewise, be confined within the same narrow ambit. If a Plaintiff who makes an allegation of fraud is required to give full and exhaustive particulars prior to defence (and, thus, prior to discovery or interrogatories) in a manner which necessarily narrows the case, then there is every chance that, in a genuine case of fraud, the perpetrator will escape having to make discovery in respect of aspects of the fraud because the Plaintiff will not have been sufficiently aware of the details of those aspects of the fraud to plead them in an appropriate manner in advance. In those circumstances aspects of the fraud will be outside the

case as originally pleaded and will not be caught by any order of discovery or interrogatories.

- [11] *The other side of the coin requires that care be taken not to allow a party, by the mere invocation of an allegation of fraud to become entitled to engage in a widespread trawl of the alleged fraudster's confidential documentation in the hope of being able to make his case.*
- [12] *A balance between these two competing considerations needs to be struck. The balance must be struck on a case by case basis but having regard to the following principles. Firstly, no latitude should be given to a Plaintiff who makes a bare allegation of fraud without going into some detail as to how it is alleged that the fraud took place and what the consequences of the alleged fraud are said to be. Where, however, a party, in its pleadings, specifies in sufficient albeit general terms the nature of the fraud contended together with specifying the alleged consequences thereof, and establishes a prima facie case to that effect, then such a party should not be required, prior to defence and, thus, prior to being able to rely on discovery and interrogatories, to narrow his claim in an unreasonable way by reference to his then state of knowledge. Once he passes the threshold of having alleged fraud in a sufficient manner to give the Defendant a reasonable picture as to the fraud contended for, and establishes a prima facie case to that effect, the Defendant should be required to put in his defence, submit to whatever discovery and interrogatories may be appropriate on the facts of the case and then pursue more detailed particulars prior to trial...*
- [15] *It is in the very nature of fraud (or other unconscionable wrongdoing) that the party who is on the receiving end will not have the means of knowing the precise extent of what has been done to them until they have obtained discovery. To require them to narrow their case prior to defence (and, thus, discovery) would be to create a classic Catch-22. The case will be narrowed. Discovery will be directed only towards the case as narrowed. Undiscovered aspects of the fraud or the consequences of the fraud will, as a natural result never be revealed. This would, in my view, be apt to lead to an unjust solution.*
- [16] *It seems to me that I should, therefore, approach this case on the basis of asking the following questions; -*
- (1) *has the Plaintiff established a sufficient threshold so as to take it outside a case where there is a bald allegation of fact?*
 - (2) *if so, has the Plaintiff given sufficient particulars to enable the second Defendant to plead by way of defence?*
 - (3) *in all the circumstances of the case (including the extent to which the Plaintiff may have established a prima facie case for the fraud alleged) is it*

appropriate to require any further particulars to be delivered in advance of the defence?”

54. The principles identified in the foregoing decision inform the decision of this court on the present motion. Earlier, I looked closely at the particulars which the Volkswagen Defendants seek and certain of them seek replies in respect of allegations of fraudulent misrepresentation, in particular 12, 13, 14, 17, 24 and 28. Among other things, the Volkswagen Defendants ask *how* each of the representations were made (particular 13) and the *identities* of those said by the Plaintiff to have made the fraudulent representations (particular 14). It does not appear to me that to require the Plaintiff to furnish the particulars sought, as to how he said misrepresentations were made to him and to clarify whether he is making the case that an identified individual made such representations, is to require particulars which would narrow the case and would potentially prejudice a Plaintiff in the manner explained in *National Education and Welfare Board*. In the Plaintiff's *additional supplemental further and better replies to notice for particulars* dated 20 March 2019 he states *inter alia*, that the purchase of the car:-

“...was proceeded [sic] by oral negotiations between the Plaintiff and the Third Named Defendant, acting as servant or agent for the First Named Defendant, in or about April, 2015. The Plaintiff entered into the said contract on the basis of the express and/or implied representations and/or warranties made to him that the said motor vehicle was inter alia, of merchantable quality, was free from defects, was fit for the intended purpose, corresponded with its description, had low emissions with a low motor tax rate and was fuel efficient.”

It is very clear from the foregoing that the Plaintiff says the Third Named Defendant made representations to him. What is not sufficiently clear, in my view, is whether the Plaintiff is also making the case that the First Named Defendant made a representation to him and whether he is making the case that the second and/or Fourth Named Defendants also made representations to him and, if so, whether those representations were oral or in writing. Nor does the Plaintiff explain how such representations as he claims the first, second and/or fourth Defendants made to him, were made.

55. What emerges from the very skilfully drafted pleadings is that it is asserted that fraudulent representations were made by the Volkswagen Defendants. It seems to me, however, that the Plaintiff has not, as yet, provided adequate detail as to how it is alleged that the fraud allegedly perpetrated on him took place and what the consequences of the alleged fraud are said to be. It seems to me that the Volkswagen Defendants are entitled to ask the Plaintiff to go further than he has done, given the very comprehensive case pleaded against the Volkswagen Defendants which is not limited to negligence or breach of duty but encompasses breach of contract and fraud. To my mind, this requires the Plaintiff to make clear, *inter alia*, how he says the Volkswagen Defendants made fraudulent representations to him and what the consequences for him were of the allegedly fraudulent representations. If the Plaintiff's case is that no identified individual, other than a representative of the Third Named Defendant (being the garage), said

anything to him, it seems to me to be necessary, having regard to the pleaded case, for this to be clarified so that the Volkswagen Defendants can understand the true nature of the case being made.

56. The contents of para. 2(i) of the Plaintiff's "additional supplemental further and better replies to notice for particulars" dated 20 March 2019 fortify me in that view, in circumstances where it states, *inter alia*, that: "*The Plaintiff will also rely on the First Named Defendant's relevant marketing, advertising, sales literature and/or online content in respect of environmental credentials, standards, characteristics and/or specifications of the said motor vehicle in this regard.*" (emphasis added). In the foregoing manner, the Plaintiff has made clear that, in bringing its case against the Volkswagen Defendants, he is "*also*" going to rely on what, on any analysis, is a potentially very wide range of marketing, advertising, sales and online material. The fact that the Plaintiff is "*also*" relying on this, makes it clear that the Plaintiff's case, as currently pleaded against the Volkswagen Defendants, is that the Plaintiff is not merely relying on marketing, advertising, sales and online material but is "*also*" relying on, *inter alia*, pleaded representations said to have been made by the Volkswagen Defendants to the Plaintiff in respect of a range of issues concerning the car he was allegedly induced by them to purchase.
57. As things stand, the Plaintiff's pleaded case is that he *also* intends to rely on a wide range of material, yet no limitation whatsoever is put on the material which the Plaintiff intends to rely upon, be that temporal, geographical or with respect to any type of medium (be that newspaper, magazine, radio, television, cinema, digital or social media or otherwise). It cannot be the case that the Plaintiff relied on each and every advertisement which appeared anywhere on the globe, at any time, across all media. The same can be said in relation to marketing, sales literature and online content. In my view the Volkswagen Defendants are entitled to much greater clarity as to the nature of the case actually being made against them in this regard.
58. It will be recalled that in the equity civil bill, the Plaintiff refers to "April 2015" in para. 7, and he goes on in para. 8 to plead that the Defendants made representations which induced him to enter into an agreement. The intended reliance by the Plaintiff on the Defendant's marketing, advertising, sales literature and/or online content etc. does not, however, appear to be pleaded with regard to the period of April 2015 *alone*. It seems to me that, were this Court not to permit the Volkswagen Defendants to seek and obtain more clarity in relation to what the Plaintiff claims that he, in fact, relied upon in the context of advertising, marketing material and online content etc., there is a very real risk of the possibility of what is often called a "fishing expedition" at the discovery stage. As Kerr L.J. explained in *Re State of Norway's application* [1987] QB 433, (at 482), a "*fishing expedition*" involves ". . . the search for material in the hope of being able to raise allegations of fact, as opposed to the elicitation of evidence to support allegations of fact, which have been raised *bona fide* with accurate particularisation". It seems to me that the interests of justice requires this Court, insofar as the decision on the present motion is concerned, to avoid a situation whereby a "fishing expedition" is facilitated and without

further clarity the scope for a fishing expedition exists, insofar as marketing, advertising, sales literature and online content in respect of a wide range of issues.

59. As currently pleaded, insofar as representations are said by the Plaintiff to have been made by the Volkswagen Defendants, the Plaintiff has not pleaded that *all* representations allegedly made to him by the Volkswagen Defendants are limited to marketing, advertising, sales and/or online content. It also seems to me that what the Plaintiff claims to have relied upon constitutes information which the Plaintiff must know at this point, even though discovery has not yet been made. It also seems to me that this is information which the Volkswagen Defendants are entitled to know, and which it is necessary for the Volkswagen Defendants to know, so that they can understand the actual case made. Requiring the Plaintiff to furnish the replies sought is not to require the Plaintiff to narrow their case unduly or unfairly, but it is to require the Plaintiff to particularise their case sufficiently.
60. Even if the true nature of the Plaintiff's case is that, insofar as alleged misrepresentations made by the Volkswagen Defendants are concerned, the Plaintiff relied on marketing or advertising or sales or online content, it seems to me necessary that the Plaintiff answer the particulars raised by the Defendant, in order to provide sufficient detail as to what the Plaintiff alleges induced him to enter into the contract. It is uncontroversial to say that the Volkswagen Defendants may well have years, if not decades, of marketing and advertising and sales literature and that such advertising could well have been across a wide range of media, such as television, radio, newspapers, magazines, cinema etc. It also appears uncontroversial to suggest that the Volkswagen Defendants will have large volumes of online content. As things currently stand, without the Plaintiff having indicated with any or sufficient particularity, how he says that he received and relied upon representations from the Volkswagen Defendants, there also seems to me to be a very real chance, unless the particulars sought by the Volkswagen Defendants are responded to in advance of discovery, that there is real potential, not only for a "fishing expedition", but for the type of "*widespread trawl*" of documentation, in the context of a discovery exercise, which Clarke J. (as he then was) cautioned against in *National Education and Welfare Board*.
61. Equally, I cannot see that to require the Plaintiff to furnish, in advance of discovery, particulars which are directed towards the loss he claims to have suffered and for which he holds the Volkswagen Defendants liable, narrows the case so as to cause prejudice. To my mind, the Plaintiff cannot truly need discovery from the Defendant to know what his own loss is. By the time the Circuit Court heard the motion and made the order in October 2018, well over 3 years had elapsed since the Plaintiff purchased the relevant motor car. It is pleaded that the Plaintiff does a considerable amount of driving, reference being made to travel between our hospitals in two counties at least once a week. As such, the Plaintiff will be in a position to know things such as whether the expected fuel efficiency or fuel economy was less than allegedly represented and, if so, by how much. Furthermore, to the extent that a diminution in value is claimed, it seems to me entirely possible that the Plaintiff can establish, without discovery from the Defendant,

what he says is the alleged reduction in value of the relevant car. Insofar as the Plaintiff has explicitly pleaded that the car's value may be less than what one would expect a second-hand motor vehicle to experience on resale and/or trade-in, it seems to me entirely possible for the Plaintiff to ascertain the actual loss he is claiming and there is no evidence before this Court that ascertained loss presents any difficulty for the Plaintiff.

62. At this juncture it should again be pointed out that the Plaintiff did not swear any replying affidavit in response to the present motion and the only affidavit before this court is the one sworn by Mr. Kennedy in the context of the Circuit Court proceedings. It can fairly be said that particulars 29, 40 and 42 are all directed towards the Plaintiff identifying the loss which he alleges that he suffered and calling on the Plaintiff to indicate how he alleges that the loss is caused by representations or breaches of duty on the part of the Volkswagen Defendants. Furthermore, particulars 19 and 22 focus on the identity of individuals said by the Plaintiff to have made representations or given warranties. Again, the Plaintiff must know this information as things currently stand and it is necessary, in my view, to give that detail to the Volkswagen Defendants so that they can properly understand the case being made against them. Thus, particulars which go to how the Plaintiff says that representations were made by the Volkswagen Defendants and particulars directed to the identity of those said to have made representations and particulars relating to the loss which the Plaintiff claims are all, to my mind, particulars which this Court can and should direct the Plaintiff to respond to, in advance of discovery, without there being any question of breaching the principles set out in *National Education and Welfare Board*. To my mind, requiring the Plaintiff to reply to all of the particulars sought is entirely on "all fours" with the principles outlined in that decision.
63. It cannot, in my view, be said that the *nature* of the fraud has been pleaded in sufficient terms as against the Volkswagen Defendants where those Defendants do not know, for example, whether the Plaintiff is claiming to have received a representation directly from any of the Volkswagen Defendants, be that oral or written and, if so, the nature of that representation and the basis for the plea that such representations were fraudulently made and where the Volkswagen Defendants do not know what loss the Plaintiff lays at their door and how the Plaintiff says that his loss flows from the alleged fraudulent representations made by the Volkswagen Defendants. Furthermore, if the true nature of the Plaintiff's case against the Volkswagen Defendants is that he is claiming to have been induced by advertising or marketing or sales or other information, the Plaintiff must provide sufficient particulars as to what, from a potentially very large range of as yet unspecified material, the Plaintiff claims to have been induced into entering into the contract in question.
64. To require the Plaintiff in this case to furnish particulars in relation to how he says representations were made, the identity of those said to have made the representations he relied on and how he says those representations were fraudulent and to provide particulars concerning his loss, strikes the right balance, in my view, having regard to the *National Education Welfare Board* principles.

Avoiding a "Catch 22" situation

65. In the manner discussed in this judgment, it seems to me that it can be fairly said that the Plaintiff's claim has not yet been sufficiently particularised. This is not for a moment to criticise the very comprehensive manner in which the equities civil bill was drafted. On the contrary, its' very comprehensiveness insofar as such a wide range of legal claims are made against all four Defendants is what, to my mind, gives rise for the need for further clarity. In taking this view I am satisfied that nothing this Court orders will be to require the Plaintiff to narrow their case such that a "Catch – 22" situation will be created. Rather, it will allow the Volkswagen Defendants and, ultimately, the trial judge to better understand the case which is actually being made and, as part of this, to understand cases which are not being made. Moreover, requiring the particulars which this Court will direct in relation to how the Plaintiff says representations were made to him by the Volkswagen Defendants, whether these were oral or written, the identity of those said to have made representations to him, how the Plaintiff says the representations were fraudulent, what advertising or sales or marketing material the Plaintiff says he relied upon and how the Plaintiff says that the alleged fraudulent misrepresentations caused him loss, as well as what he says that loss is, are all matters which the Plaintiff knows or has a means of knowing and does not require discovery from the Volkswagen Defendants to know.

Armstrong v. Moffatt

66. I am satisfied that this approach is also consistent with Hogan J's decision in *Armstrong v. Moffatt*. In the present case, the Volkswagen Defendants have not raised a "boilerplate" notice for particulars seeking details which relate to matters not pleaded. Unlike the position in *Armstrong v. Moffatt*, all particulars sought relate to the pleaded case. Among other things, Hogan J. stated, at para. 36 that: "*The object of particulars is to clarify the scope of pleadings and the case alleged by the other party*". I am satisfied that the order which this Court makes is consistent with the foregoing principle. Having reviewed relevant authorities in relation to particulars, Hogan J. stated the following at para. 13: -

"13. The object of particulars nevertheless remains that as identified by Henchy J. in Cooney v. Browne [1984] I.R. 185, 191: -

'Where particulars are sought for the purposes of delivering a pleading, they should not be ordered unless they can be said to be necessary or desirable to enable the party seeking them to plead, or for some other special reason: see O. 19, r. 6(3). Where the particulars are sought for the purpose of a hearing, they should not be ordered unless they are necessary or desirable for the purpose of a fair hearing....Thus, where the pleading in question is so general or so imprecise that the other side cannot know what case he will have to meet at the trial, he should be entitled such particulars as will inform him of the range of evidence (as distinct from any particular items of evidence) which he will have to deal with at the trial'.

14. *It follows, therefore, that particulars will be ordered in the interests of fair procedures and to ensure that a litigant will not be surprised by the nature of the*

case which he has to meet. The case-law shows that this is essentially the governing principle in all cases where the issue of whether the particulars should be ordered has been considered”.

I am satisfied that the particulars to be directed are both necessary and desirable for the purpose of a fair hearing. They also seem to me to be necessary to be replied to in advance of discovery, in order to avoid a situation whereby, in the absence of sufficient clarity as to the nature of the case being made in relation to what representations the Plaintiff says he relied on, there is a risk that an inappropriately and unnecessarily wide-ranging discovery exercise might ensue with all the attendant costs involved. Later, in the same judgment, Hogan J. stated, at para. 36, that: - *“The object of particulars is to clarify the scope of pleadings and the case alleged by the other party . . .”*. I am satisfied that the particulars being directed by this Court are entirely consistent with the principles outlined by Hogan J.

Quinn Insurance Ltd. (under administration) v. Price Waterhouse Coopers

67. It is also appropriate to point out that, more recently, in *Quinn Insurance Ltd. (under administration) v. Price Waterhouse Coopers* [2019] IESC 13, O’Donnell J., delivering the Supreme Court’s judgment, said the following in relation to particulars sought in complex commercial disputes. Although the present case is not a complex commercial one, the following dicta of the Supreme Court is clearly of considerable relevance in the present case in my view: -

“ . . . a Plaintiff will wish to keep open as many lines of attack as possible, in the knowledge that the Defendant may view some of these as posing a more serious risk, and accordingly be more inclined to compromise the proceedings. A Defendant, for its part, will want to gather as much information as possible, and to try and to turn the focus of the case to perceived weaknesses in the Plaintiff’s case. Both parties will be nervous about disclosure of the details of their case, which might lead to damage which can be difficult to anticipate, and will seek to avoid being forced to take positions from which it will be difficult to retreat”.

68. The *Quinn Insurance Ltd* case concerned allegations made there had been negligent auditing over a number of years and it was claimed that this arose by reason of the relevant auditors not spotting under – reservation in respect of insurance. Plainly, the present case is not in a Commercial Court, but despite being a claim in the Circuit Court with limited jurisdiction insofar as awarding financial compensation to a successful Plaintiff, I do not think the claim could fairly be described as a simple one, given the sophistication with which it is pleaded and given the many legal claims advanced against each and every of the Defendants. At para. 24 of his decision in *Quinn Insurance Ltd.*, O’Donnell J. stated, inter alia, the following: -

“What is a sufficient level of detail must be viewed against the background of the case that is sought to be made. For that reason, I am satisfied that the more complex the case is, the more detailed the particulars that should be required”.

69. I would pause at this juncture to say that, during the course of skilled submissions at the hearing, senior counsel for the Plaintiff emphasised that *Armstrong v. Moffatt* remained the law in this jurisdiction and it will be recalled that, when delivering replies to particulars on 14 November 2017, the Plaintiff, relying on *Armstrong v. Moffatt*, adopted the stance that it was sufficient for the Defendants to know the Plaintiff's case "*in broad outline*" and the Plaintiff submitted that the Defendants "*. . . are well aware in broad outline of the nature of the case they have to meet . . .*". I regard myself as bound to take on board the guidance provided by the Supreme Court in *Quinn Insurance Ltd.* and respectfully offer the view that nothing said in O'Donnell J.'s decision in that case is at all inconsistent with the principles set out in *Armstrong v. Moffatt*, wherein Hogan J.'s reference to the dicta in *Cooney v. Browne* [1985] I.R. 185 emphasises that replies to particulars should be ordered where they are necessary for the purpose of a fair hearing, specifically so that the other side can know what case they have to meet at a trial and in the interest of fair procedures. To my mind it is necessary for the purpose of a fair hearing to direct that the Plaintiff reply to the particulars sought in order that the Volkswagen Defendants can know the case they have to meet at trial and in order that an unnecessarily wide ranging discovery exercise is engaged in with reference to matters which may not truly be in issue in the case, something which the particulars seek to clarify.
70. The endorsement, by Hogan J., of the dicta in *Mahon v. Celbridge Spinning Co. Ltd.* [1967] IR 1, wherein Fitzgerald J. stated that the object of pleadings, of which particulars form part, was to ensure that a party "*should know in advance, in broad outline, the case he will have to meet at trial*" could not, in my respectful opinion, be said to be inconsistent with the proposition that, the more complex the case is, the more detailed the particulars that should be required. The latter proposition is entirely consistent with what Hogan J. himself said at para. 36 in *Armstrong v. Moffatt* to the effect that: "*The object of particulars is to clarify the scope of pleadings and the case alleged by the other party...*". It is self-evident that the more wide-ranging in scope the pleadings are and the more detailed the indorsement of claim, in terms of the variety and number of claims made and the more sophisticated or nuanced the claims made against a Defendant may be, the greater the possibility that more detailed particulars will be necessary so that the Defendant can understand the true nature and extent of the claim made against them, which will inform crucial issues such as the range of evidence which the Defendant will have to deal with at trial. In the present case it is undoubtedly the position that a wide range of legal are made on several bases and to better understand the scope of the case made, the replies sought are, in my view, necessary. Later, at para. 24 of his decision in *Quinn Insurance Ltd.*, O'Donnell J. continued as follows: -

"Accordingly, I doubt that much guidance is to be gained from a consideration of perhaps the simplest and certainly most familiar cause of action encountered in the Courts. Even in a routine personal injuries action arising out of a road traffic accident, however, a Plaintiff is required to go beyond the standard boilerplate of alleging that the Defendant failed to stop, slow down, swerve, or control their vehicle so as to avoid the collision.

25. *One reason why a complex case requires detailed particulars is, as Clarke J. pointed out in Thema International Fund plc v. Institutional Trust Services (Ireland) Ltd. [2010] IEHC 19, (Unreported, High Court, Clarke J., 26 January 2010), to limit the range of discovery. Discovery is an essential tool in any significant litigation, but it can place an onerous, expensive, and therefore oppressive burden on the parties, which risks creating, rather than avoiding, injustice. I fully agree that the fact that witness statements are now routinely required in commercial actions and in other proceedings does not in any way reduce the weight to be attached to this justification for a greater precision in pleadings. Furthermore, in my view, the justification extends beyond the question of discovery and applies more generally to the preparation of a case, as indeed this case and this motion illustrates”.*

71. The foregoing passage from the Supreme Court’s decision in *Quinn Insurance Ltd.* seems to me to be of particular relevance to the present appeal. It seems entirely uncontroversial to suggest that discovery is likely to be sought. Indeed, the Plaintiff has made it perfectly clear that he intends to rely on a wide range of documents, stating at para. 2(i) of the 20 March 2019 “additional supplemental further and better replies to notice for particulars” that: - “. . . *the Plaintiff will seek discovery of, inter alia, the relevant marketing, advertising, sales literature and/or online content . . .*”. The Plaintiff says that he intends to seek such discovery from the First Named Defendant. The Plaintiff makes clear that he intends to rely on same in addition to the express and/or implied representations and/or warranties which he says were made to him by the Volkswagen Defendants. Yet, as matters stand, the Volkswagen Defendants have no clarity whatsoever as to the range of evidence which the Plaintiff says is relevant, namely the range of evidence the Plaintiff claims to have relied upon and claims to constitute misrepresentations made to him by the Volkswagen Defendants. In my view, fair procedures require the Plaintiff at least to go as far as identifying, within appropriate parameters including as to medium, geography and time, the nature of the material which he says he relied on. For all the defence know, the Plaintiff relied on a small number of very specific items of advertising or marketing or sales literature and nothing else. The point is the Plaintiff must know what he says he relied on and it seems to me that the Plaintiff must be required to make an adequate effort to clarify this in advance of discovery for the reasons articulated in the authorities, including both in *Armstrong v. Moffatt* and *National Education and Welfare Board* and having regard to the guidance given by the Supreme Court in *Quinn Insurance Ltd.*

Providing what the Plaintiff “has the capacity to provide”

72. At para. 31 of the Supreme Court’s judgment in *Quinn Insurance Ltd.*, O’Donnell J. went on to state that: -

“The Plaintiff has the capacity to provide substantial detail at this stage of the proceedings, and should, in my view, be required to do so. It is perhaps inevitable that any particular so provided would be qualified by reference to the limits of the information available, and pending the receipt of discovery. However, this motion raises a fundamental issue of principle as to whether the Plaintiff is entitled to

refuse this level of detail, whether at this stage of the proceedings, or even after discovery, because the Plaintiff contends it is a 'matter of evidence'. In my view, it is at least possible that the delivery of these particulars at this stage will advance the understanding of the case to be made, tighten its focus, and therefore reduce the scale and cost of the work which must be undertaken to prepare for what is on any version a very detailed, complex and lengthy case. That, I think, is the proper function of further particulars".

73. The foregoing passage seems to me to be particularly relevant, insofar as the current appeal is concerned. It certainly seems to me that by directing the Plaintiff to reply to particulars at this stage it is not only possible, but probable, that the understanding of the case to be made will be advanced. This is not only fair to the Defendants, there is the potential for very real benefit to the trial judge and to the administration of justice. Indeed, given that unnecessary and avoidable costs and delay cannot be in the interests of any party to litigation, there is also a potential benefit to the Plaintiff. There was no affidavit sworn by the Plaintiff to the effect that any of the information sought by the Volkswagen Defendants – be it with regard to how he says fraudulent representations were made to him, whether he says those representations were made orally and/or in writing by the Volkswagen Defendants, the identity of the person or persons who made such representations on behalf the Volkswagen Defendants, the link between the alleged fraudulent representations and his alleged loss, the quantification of his loss, or what advertising or marketing or sales material, out of a potentially very wide range of same, the Plaintiff says induced him to enter into a contract which he says was made with all four Defendants - constitutes information which is unavailable to him. It seems to me that, for the Plaintiff to be required to deliver in advance of discovery the particulars which are sought, has the potential to be of very benefit to both parties and to the trial judge, and has the potential to avoid a waste of time cost and effort by having the true nature of the Plaintiff's case more clearly set out. In my view, it is no answer for a Plaintiff to say that he will not provide particulars which are necessary for a Defendant to better understand the nature of the case made against them, because the Plaintiff says "I may know *more* after discovery". To my mind, particulars must be provided now, in advance of discovery, not least because this may help to so avoid an unnecessarily wide and thereby more expensive and potentially more oppressive discovery exercise ensuing and has the potential to reduce the length of a trial avoiding, *inter alia*, wasted costs and a waste of limited court resources.
74. Counsel for the Plaintiff submits that the complexity of the dispute arising in the present appeal is far below that in the *Quinn Insurance Ltd.* case. That may well be so, but on any objective analysis, this is not a simple case and can fairly be described as one of some complexity, having regard to the legal and factual issues in dispute. In terms of complexity, it certainly goes far beyond the type of "*routine personal injuries action*" referred to by O'Donnell J. in *Quinn Insurance Ltd.* I would also venture to say that the present case is very significantly more complex than the proceedings in *Armstrong v. Moffatt*, which involved the claim by a Plaintiff that, when she was receiving treatment at a medical centre, and was endeavouring to transfer from the lying to the sitting position

on an examination couch, she was caused to slip and fall from the couch to the floor. *Armstrong v. Moffatt* was not a claim for medical negligence. Rather, it was a claim for personal injury by reason of an accident, which, the Plaintiff alleged, occurred in the examination room of a medical centre by reason of the negligence and breach of duty on the part of the Defendants. The sophistication with which a wide range of claims are pleaded against each and every one of the Defendants in the present case suggests that it is considerably more complex than that in *Armstrong v Moffatt*.

AIB Bank plc. v. AIG Europe

75. In *AIB Bank plc. v. AIG Europe* [2018] IEHC 677, McDonald J. referring to *ASI Sugar Ltd. V. Greencore Group PLC* [2003] JIC 1102, stated, inter alia (at para. 105) that: -

"In the ASI Sugar case Finnegan P. emphasised that the function of pleadings is to define with clarity and precision the issues of fact and law between the parties. Such definition is required to enable each party to have fair and proper notice of the case his/her opponent proposes to make at the trial. In such circumstances, as Finnegan P. said in that case: -

'...each party will be enabled to prepare his own case for trial. Discovery can be directed to the issues and the delay and expense thereby incurred minimised: this is particularly important in a case such as the present where discovery even with the issues so defined will be extensive. Further this will enable the court to be aware of the issues before it and the Trial Judge will thereby be better enabled to control the hearing and confine the same within the limits of the pleadings'".

76. To my mind, the principles outlined above are equally relevant to the present appeal, notwithstanding the factual differences between that case and this appeal. By directing that replies be furnished to the particulars sought, this court is ensuring that necessary clarity and precision is brought to the issues of fact and law between the parties.

77. Elsewhere in *AIB plc v. AIG Europe*, McDonald J. cited a number of relevant principles which in my view, or equally relevant to the present case, including the following, at p. 17 of the judgment:

"(k) It is no answer to a request for particulars for a party to contend that the relevant facts are already known by the party making the request. As Clarke J. (as he then was) observed in *Moorview Developments v. First Active plc* [2005] IEHC 329 at para. 7.2:

'It should be noted that the facts that a party is required to be told, as part of the pleading process, are not the facts as they may objectively be, but the facts as his opponent alleges them to be. Therefore, an assertion that the other party well knows the relevant fact will rarely be a sufficient answer to what would otherwise be a proper request for particulars. A requesting party may well have its own view about what the truth in respect of a relevant

factual issue is but that does not absolve his opponent, where it is part of his case, from setting out in reasonable detail the relevant facts which he alleges.’ ”

78. In my view, the foregoing principle applies in the present case and fortifies me in the view that it is appropriate to direct the Plaintiff to reply to the particulars sought. In skilled submissions by counsel for the Plaintiff, it was argued, among other things, that *AIB plc v. AIG Europe* dealt predominantly with the issue of whether particulars sought by the Plaintiff should be ordered in respect of a traverse defence or a denial in a pleading, which is not an issue in this appeal. The foregoing is undoubtedly true, but the judgment of McDonald J. nevertheless identified a number of principles which apply to the present appeal, the foregoing being one. Having referred to the decision of Fitzgerald J. (as he then was) in the Supreme Court in *Mahon v. Celbridge Spinning Co. Ltd.* [1967] IR 1, McDonald J. also stated, (at p. 14, para. (d)), that:

“...as Henchy J. noted in the Supreme Court in Cooney v. Browne [1985] I.R. 185 at p. 191, where a pleading is so general or so imprecise that the other side cannot know what case he or she will have to meet at trial, further particulars will be ordered”.

In the present case, there is in my view a need for further clarity as to what the case the Volkswagen Defendants can expect to meet at trial. The Plaintiff undoubtedly claims loss as a consequence of allegedly fraudulent representations and, as such, must know how he says those representations were fraudulent, how he says they were made, how he says they relate to the loss he says he has incurred and what that loss is. The Plaintiff claims that fraudulent misrepresentations were made by each or all of the Volkswagen Defendants but does not say who made them. Nor does he say what they were with any particularity and he does not say how he regards them as fraudulently made. He does not say whether there were made orally or in writing by the Volkswagen Defendants. Furthermore, to the extent that the Plaintiff claims to have relied on advertising or marketing or sales information or online content, the Plaintiff must have a clear idea of what he relied upon, but he has not said so in any meaningful way. Although a narrative is set out in the equity civil bill which refers inter alia to a “cheat device” and to alleged public admissions by the Defendants, the Plaintiff has not pleaded the link between allegedly fraudulent representations to him and his alleged losses, with sufficient clarity. Nor has the Plaintiff particularised his loss adequately in my view.

Directing that the Plaintiff relied to the particulars sought is not to set the bar too high for the Plaintiff. Requiring the Plaintiff to reply to the particulars sought by the Volkswagen Defendants seems to me to require him to do no more than to provide information which he must already have, or have a means of obtaining, in circumstances where he made the pleas he did. This is something the Plaintiff must do prior to discovery in my view, satisfied as I am that discovery cannot fairly be said to be required by the Plaintiff in order to answer the relevant particulars sought.

79. On behalf of the Plaintiff, it was also submitted that a further point of distinction between the present appeal and *Quinn Insurance Ltd.* is that the Plaintiff in *Quinn* had the capacity to provide substantial detail at the relevant stage of the proceedings but was refusing to provide the level of detail requested. It was submitted for the Plaintiff that because of what is described as the “*clandestine*” and “*surreptitious*” nature of the subject matter of the Plaintiff’s proceedings, the Plaintiff is not in a position until receipt of discovery and expert reports to particularise his case any further than he has done to date. Regardless of the undoubted skill with which that submission is made, I do not believe it is supported by the evidence before this Court. Even taking the foregoing submission at its height, it does not seem to me to explain why the Plaintiff cannot give such particulars as he must have in relation to issues such as his own loss and how he says representations were made to him by the Volkswagen Defendants and who made such representations and whether they were written or oral and how he says they were fraudulent and what out, of a potentially vast range of advertising, marketing, sales and online material, the Plaintiff says he relied upon and which he says induced him to enter into a contract which he says was with all of the Defendants in the proceedings. The absence of discovery does not seem to me to prevent the Plaintiff from indicating how he says the alleged representations were fraudulently made and how he says they relate to the loss which he says he incurred and for which he blames the Defendants.
80. In the *Quinn Insurance Ltd* case, the court found that Quinn was in a position to give a level of detail which had not been given and which the court ordered it to give. To my mind, the position in the present case is not dissimilar and the Plaintiff must have the capacity to provide more detail at this stage and in advance of discovery than the Plaintiff has, to date, provided. That is not to suggest that an appropriate test insofar as particulars are concerned is simply to ask “can the Plaintiff provide further detail?” It is, however, a very relevant question to ask, as in the present case, where the detail which is sought is *necessary* in order that the true nature of the case being brought by the Plaintiff is clarified.
81. Even though it is asserted by and on behalf of the Plaintiff that he requires discovery before he can provide any further particulars, that cannot be so in relation to the issues which have been raised in the particulars and which I have discussed in this decision. In short, although the Plaintiff cannot be required to furnish more than he knows, where the particular is appropriate in order to better understand the nature of the Plaintiff’s case, the Plaintiff must be directed to provide such information as he does know or can provide at this point. This is, in my view, necessary. For this to be done results in an appropriate narrowing of the issues in advance of the discovery and does not result in an undue narrowing of same. It is uncontroversial to say that relevance, insofar as discovery is concerned, will be determined with reference to the pleadings. As such, it is appropriate that the true nature of the dispute between the parties is clarified to the fullest extent possible, consistent with the authorities referred to in this judgment, in advance of discovery requests being made

This Court’s decision summarised

82. This decision is underpinned by the principles found in the authorities to which I have referred. In my view, the particulars sought by the Volkswagen Defendants, which are the subject of the present appeal, can fairly be said to be directed to the pleas made by the Plaintiff and seek clarity as to the nature of the case against the Volkswagen Defendants. It is a matter of fact that, by the time the appeal came before this Court, the Volkswagen Defendants had already delivered a defence by way of a full traverse and the sequence of events leading up to that has been explained in this judgment. That, of itself, does not seem to me to be a sufficient reason not to direct the Plaintiff to furnish, in advance of discovery, the replies to particulars which are sought in the present case, all of which, it seems to me, are directed to the nature of the claim made by the Plaintiff.
83. Among other things, the Plaintiff pleads that the Volkswagen Defendants made "*representations fraudulently*" and that the Volkswagen Defendants "*were guilty of fraud*" in making the said representations and by reason of *inter alia* "*fraud*", the Plaintiff has suffered loss, damage, inconvenience, upset and/or expense. To plead fraud and to plead that representations were made fraudulently is distinct from, say, a plea of negligence or negligent misstatement. It is uncontroversial to suggest that, to establish fraud, a Plaintiff must prove (i) the making of a false representation by the Defendant in question; (ii) that the false representation was made knowingly or without a belief in its truth or was made recklessly, not caring whether same was true or false; (iii) that the Defendant intended the representation to be acted on by the Plaintiff; (iv) that the Plaintiff acted on foot of the representation, and; (v) sustained damages as a consequence of reliance on the representation. It seems to me that the particulars seek *inter alia* (a) clarity as to how the Plaintiff says the Volkswagen Defendants are guilty of fraud which negatively impacted on him; (b) clarity as to how the alleged fraud is connected to what the Plaintiff says were representations; (c) clarity as to how the allegedly fraudulent representations were made and by whom, and via what means; (d) clarity as to how the Plaintiff says the allegedly fraudulent representations induced him to make a purchase; (e) clarity as to how the Plaintiff says that the representations which he maintains were fraudulent caused him to sustain loss and the nature of that loss. These particulars, it seems to me, legitimately arise from the case which the Plaintiff brings against the Volkswagen Defendants and seek further and necessary clarity of the nature of the Plaintiff's pleaded claim.
84. In the narrative which appears under the heading "Particulars of loss and damage", certain dates are referred to by the Plaintiff. It is claimed by the Plaintiff that "*In or about the beginning of 2008*", the Defendants conceived the idea of installing, into a specific type of diesel engine, what the Plaintiff describes as a "*cheat device*". The Plaintiff goes on to say that "*in or about September 2015*" the Defendants "*publicly admitted*" that the said cheat device was in approximately 11 million vehicles. The Plaintiff then says that "*By letter dated October, 2015*", the Plaintiff was informed by the Defendants that his motor car was once such vehicle. The only other date referred to by the Plaintiff is "*March 2016*" when the Plaintiff says that he was informed by means of a letter from the Defendants that his motor car was required to undergo a software update and what is referred to as a "*technical measure*" which the Plaintiff says was "*to rectify the conceals*

cheat device with which the said engine was fitted". It will, of course, be for the Plaintiff to "stand up" the foregoing as a result of evidence but, even at this juncture, it could hardly be considered to be unreasonable or unnecessary, from the perspective of clarifying the true nature of the Plaintiff's case, for the Volkswagen Defendants to be permitted to ask further questions of the Plaintiff with a view to clarifying how the fraud which the Plaintiff alleges is connected to what the Plaintiff says were representations to him which he says were false and which the Plaintiff says induced him into a contract which he says resulted in loss to him. This is particularly so, given that the agreement at the heart of the present dispute dates from 23 April 2015 and given that the motor car in question was purchased from the Third Named Defendant.

85. In skilled submissions for the Plaintiff, senior counsel suggests that the representations made by the Volkswagen Defendants are clearly identified, namely those made by a Mr. O'Rourke of the Third Named Defendant as well as representations made by way of specifications and advertisements and marketing material and the like. It seems to me, however, that it is not entirely clear from the current state of the pleadings as to whether the Plaintiff is making the case that the only oral representations he ever received came from Mr. O'Rourke of the Third Named Defendant. In other words, the very sophisticated way the case has been pleaded to date, seems to me to make the case that the Volkswagen Defendants and/or each of them made oral and/or written representations directly to the Plaintiff which the Plaintiff says were fraudulent and which the Plaintiff says he relied upon, and which, according to the Plaintiff, caused him damage as a result of acting on foot of such representation. To my mind, clarifications by counsel, while of course welcome, are not a substitute for the Plaintiff setting out with greater clarity, in writing, by way of replies to the particulars sought, the true nature of the case which he makes. One example of this concerns the topic of the loss which the Plaintiff pleads as against the Volkswagen Defendants and the relief he seeks in the proceedings as a consequence of the damage which the Plaintiff says he incurred.

The sale of the Plaintiff's car in May 2018

86. Towards the end of the hearing, as I explained earlier in this decision, counsel for the Volkswagen Defendants informed the court that his client's understanding was that the Plaintiff had sold the motor car in question in May 2018. Counsel for the Plaintiff informed the court that this did not accord with his instructions. The Plaintiff's counsel very fairly acknowledged the need for the court to know the position and matters were left on the basis that it would be clarified promptly. In an email sent on 21 November 2020, Mr. Liam Moloney, solicitor for the Plaintiff, confirmed that "*the Plaintiff did in fact sell the vehicle in May 2018 and he did this unknown to me*". The foregoing is of significance. Earlier in this decision, I referred to the relief which the Plaintiff is seeking as against the Volkswagen Defendants. References are made in the pleadings to, inter alia, the motor car's longevity, fuel consumption, performance and emissions levels and to a diminution in value. The Plaintiff's pleaded claims include repudiation and/or rescission and a return of monies to the Plaintiff. To repudiate an agreement in relation to a motor care which was purchased, involves handing that car back and receiving the purchase price paid. The fact that the Plaintiff, unknown to his solicitor and counsel, sold the relevant motor car two and a half

years ago is plainly of significance to the claim which the Plaintiff makes in the present case. To my mind, it underlines the legitimacy of the particulars which were sought by the Volkswagen Defendants in an effort to clarify further the true nature of the Plaintiff's claim against them, including, in respect of the issue of loss.

87. I also take the view that the fact the Plaintiff sold the motor car in question is something the Plaintiff should have informed his solicitor about as soon as he sold the car in May 2018. It must have been obvious to the Plaintiff that selling the vehicle was of considerable relevance to his claim against the Defendants in the proceedings, in particular, his claim for rescission. Had the Plaintiff done this, Judge O'Sullivan would have had this relevant information when the motion was heard in the Circuit Court on 19 October 2018 (some 5 months *after* the car was sold) and, in my view, this is information the Circuit Court Judge should have had. This court is grateful to the Mr. Moloney and to the Plaintiff's counsel for the clarity provided, but this court knows only the information contained in Mr. Moloney's 21 November 2020 email, which I have quoted above. The said email provided no information in relation to, for example, the sale price. The foregoing, however, fortifies me in the view that it is appropriate to direct the Plaintiff to furnish replies to all the particulars sought, including particulars 28, 40 and 42 which are particulars directed to the issue of alleged loss.
88. In short, having regard to the pleaded case, I am satisfied that the Plaintiff must clarify what representations he relied on, who allegedly made them, what form they allegedly took. He also needs to identify the source of the contractual terms contended for, insofar as the Volkswagen Defendants are concerned. He also needs to provide particulars of the alleged loss or losses. He also needs to clarify what he says is the basis for the plea that the Volkswagen Defendants made representations fraudulently or recklessly. He needs to specify the nature and extent of the dishonesty and fraud, insofar as he pleads same against the Volkswagen Defendants, and needs to provide adequate detail as to how the Plaintiff alleges that the fraud took place. The Plaintiff also needs to clarify what he says the consequences of the alleged fraud are for him. I am satisfied that the foregoing is what the relevant particulars seek. I am satisfied that to direct the Plaintiff to furnish replies to these particulars does not offend the principles in *National Educational Welfare Board* and does not create a "Catch - 22" situation for the Plaintiff. Rather, it affords the necessary opportunity for the true nature of the Plaintiff's case to be understood, noting - in line with the decision Mr. Justice O'Donnell J. in *Quinn Insurance Ltd.* - that it is open to the Plaintiff, when explaining with more particularity the true nature of the case, to qualify his replies with reference to the limits of the information currently available to him.
89. In circumstances where counsel for the Volkswagen Defendants made it clear that it was sufficient, for the purposes of this appeal, to focus on Part 1, only, of the Schedule to the 19 November 2019 notice of appeal, I will now set out the court's decision in relation to each of the particulars in respect of which the appeal is brought:

- Particular 12 – I am directing that the Plaintiff reply to same. Particular 12 seeks information concerning the basis relied upon by the Plaintiff with respect to what he says were fraudulent representations. In my view, although fraud is undoubtedly pleaded, it does not seem to me to be pleaded with particularity or in sufficient terms. In directing the Plaintiff to reply to Particular 12, it is open to the Plaintiff to qualify their response by reference to the limits of the information available to them. The fact that the Plaintiff may need to qualify their response in such a manner does not seem to me to be, of itself, a reason or an adequate reason not to direct a reply to particulars which, it seems to me, is necessary to clarify the nature of the claim. Given the fact that the Plaintiff acquired the motor vehicle in question as long ago as April 2015, it strikes me that the Plaintiff must have at least some details available to him in support of the plea made at para. 9 of the equity civil bill which, itself, refers to representations described in paras. 7 and 8 to which Particular 12 is directed.
- Particular 13 – I am directing the Plaintiff to furnish a reply. Given the pleaded case, it seems to me to be entirely fair and necessary for the Plaintiff to say how he says each of the alleged representations were allegedly made fraudulently.
- Particular 14 – I am directing the Plaintiff to furnish a reply. The Plaintiff must know the identities of the servants or agents who, according to him, made fraudulent representations to him.
- Particular 17 – I am directing the Plaintiff to furnish a reply. Particular 17 seeks clarification as to the basis upon which the Plaintiff relies to make pleas of dishonesty and fraud against the Volkswagen Defendants. In my view this is appropriate and necessary to clarify the nature of the case made. Again, as O'Donnell J. makes clear in *Quinn Insurance Ltd.*, it is open to a Plaintiff to qualify their response by reference to any limits on the information available to him.
- Particular 19 – I am directing the Plaintiff to furnish a reply. This seeks particulars of the representations referred to in para. 11 of the equity civil bill. It seems to me that it is appropriate and necessary given the nature of the case and the scope of the pleadings, with the Plaintiff being in a position to qualify their response with reference to any limits on information available. The identities of the servants or agents of the Volkswagen Defendants is something explicitly referred to in Particular 19(ii) and it seems to me that the Plaintiff must have capacity to provide details, in advance of discovery, as to who he says allegedly made representations to him on behalf of the Volkswagen Defendants. In the manner referred to earlier, the words “*and/or evidence*” should be discounted from Particular 19. What the Plaintiff alleges to be the relationship between the Volkswagen Defendants and its servants or agents also seems to me to be a particular which arises from the pleaded case, insofar as the Plaintiff makes a wide range of pleas against the Defendants and /or each of them, their respective servants or agents. Once again,

it is open to the Plaintiff to qualify his reply with reference to the limits on information available to him.

- Particular 22 – I am directing the Plaintiff to reply. This seeks particulars of allegations referred to in para. 13 of the equity civil bill. The Plaintiff must know whether the alleged representations were made orally or not. If made orally, the Plaintiff must know, at least approximately, the date of such representations and the individual or individuals who allegedly made them. Although the production of documentation is normally a matter for discovery, it is by no means uncommon for a party to agree, in response to a notice for particulars, to provide a copy of certain documentation requested. I do not regard the request at particular 22(iii) to be inappropriate, as it is within the power of the Plaintiff to agree or not, when replying to particulars, to provide a copy of such written representations are alleged to have been made and which are within the Plaintiff's possession.
 - Particular 24 – I am directing the Plaintiff to furnish a reply. Once again, the response by the Plaintiff can be qualified by reference to any limits in respect of the information available to him. The fact that such limits may exist does not seem to me to be a sufficient reason not to direct the Plaintiff to furnish a reply to these particulars which are directed at the nature of the case the Plaintiff makes.
 - Particular 28 – I am directing the Plaintiff to reply. Again, the Plaintiff can qualify his response with reference to any limits on the information available.
 - Particular 29 – I am directing the Plaintiff to reply, subject to the deletion of the words "or evidence". The Plaintiff has undoubtedly pleaded loss, damage, inconvenience, upset and/or expense. The Volkswagen Defendants are entitled to seek particulars in relation to same, over and above what is contained in the equity civil bill.
 - Particular 40 – I am directing that the Plaintiff reply. Once more, the Volkswagen Defendants are entitled to seek particulars in respect of the plea that the Plaintiff's motor vehicle may be subjected to a diminution in value, subject to deletion of the words "or evidence".
 - Particular 42 – In circumstances where the Plaintiff has pleaded inter alia repudiation, the Volkswagen Defendants are entitled to seek these particulars and I am directing the Plaintiff to reply.
90. Given the foregoing decision which is to direct that the Plaintiff provide replies to all the particulars detailed in part 1 of the Schedule to the Volkswagen Defendants' Notice of Appeal (being particulars 12, 13, 14, 17, 19, 22, 24, 28, 29, 40 and 42 as per the 9 October 2019 Notice for Particulars) it follows that the Volkswagen Defendants are also entitled to replies to all particulars detailed in part 2 of the same Schedule (being particulars sought on 15 December 2017), the particulars set out in part 2 constituting a repeat of the particulars in part 1.

91. Although I have not, for the purposes of this decision, had regard to ex tempore decision of Ms. Justice Baker, delivered on 2 May 2018 in *Curry v. Volkswagen AD & Ors.*, it should be emphasised – as Baker J. did in that case - that what this Court has decided relates to the very narrow question as to what particulars the Plaintiff should or should not reply to in this particular case. Insofar as particulars are concerned, each and every case turns, as it must, on the unique facts in the case itself, having regard to the contents of the pleadings delivered. It is based exclusively on a consideration of the pleadings in the present case, and guided by the principles derived from the authorities, that this Court's decision has been made.

92. On 24 March 2020 the following statement issued in respect of the delivery of judgments electronically:-

"The parties will be invited to communicate electronically with the Court on issues arising (if any) out of the judgment such as the precise form of order which requires to be made or questions concerning costs. If there are such issues and the parties do not agree in this regard concise written submissions should be filed electronically with the Office of the Court within 14 days of delivery subject to any other direction given in the judgment. Unless the interests of justice require an oral hearing to resolve such matters then any issues thereby arising will be dealt with remotely and any ruling which the Court is required to make will also be published on the website and will include a synopsis of the relevant submissions made, where appropriate."

Having regard to the foregoing, the parties should correspond with each other with regard to the appropriate costs order to be made. In default of agreement between the parties on that issue, short written submissions should be filed in the Central Office and, having regard to the approaching end of Term, such submissions should be filed within 28 days of delivery of this judgment.