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THE HIGH COURT
DUBLIN

No. 2005/3320P

JAMES KENNY

APPLICANT

AND
THE PROVOST, FELLOWS AND SCHOLARS OF THE UNIVERSITY OF DUBLIN, TRINITY COLLEGE AND AN BORD PLEANÁLA

RESPONDENTS

Judgment of Mr. Justice Frank Clarke on Thursday, 30th March 2006

1. Mr. Justice Clarke: These proceedings are brought by Mr. Kenny in relation to a planning permission obtained by Trinity College in respect of the premises at Trinity Hall, Dartry. Trinity College applied for planning permission to Dublin Corporation, as it then was, for development at Trinity Hall in April 1999.The planning permission was granted on14th November 1999. A number of parties, including Mr. Kenny, subsequently appealed to An Bord Pleanála. An Bord Pleanála granted planning permission. Mr. Kenny commenced proceedings on 3rd October 2000seeking leave to judicially review the decision of An Bord Pleanála. That leave was refused by McKechnie J on 15th December 2000. It is in respect of that judgment that Mr. Kenny seeks in these proceedings an order setting aside the judgment on the grounds of fraud. I will return in more detail to the basis upon which he seeks such an order in due course.

2. It should also be noted that a number of proceedings which were not directly concerned with a challenge to the planning permission, but in respect of which the planning permission was relevant, have also been brought in the intervening period by Mr. Kenny.

3. Mr. Kenny obtained leave to seek judicial review of a separate decision, being a compliance order, on4th July 2002. In those proceedings, Trinity College were notice parties and Dublin City Council was the respondent. The proceedings were determined by Murphy J in a judgment of 19th October 2004 in which Mr. Kenny's application for judicial review was refused. A Notice of Appeal has been brought to those proceedings, which I understand is still pending.

4. In July 2002, Mr. Kenny commenced proceedings under Section 160 of the Planning and Development Act 2000in which proceedings he contended that Trinity College had failed to comply with the provisions of the planning permission. Those proceedings are still pending and are, as I understand it, currently awaiting a date.

5. It should also be noted that in respect of a variety of the proceedings which I have outlined to date, costs orders have been made which are not the subject of any stay and have at least in some cases been the subject of taxation with the costs not as yet being discharged.

6. Returning to direct challenges to the planning permission itself, I should also note that in March 2001, McKechnie J had refused Mr. Kenny the certificate necessary to enable him to appeal the original challenge to the planning permission to the Supreme Court. On 7th November 2002, Mr. Kenny instituted proceedings against Trinity and the City Council seeking to have the original judgment and order of McKechnie J set aside.

7. In those proceedings, it was alleged that Trinity had perpetrated a fraud on the Court in relation to the failure to disclose the lodgment of a fire safety certificate which indicated the location of boilers at a different location to that indicated to the Court. It was accepted in those proceedings that Trinity had not disclosed the fire safety certificate, but it was contended on Trinity's behalf that that issue was irrelevant to the matters which were before the Court.

8. Trinity sought to have those proceedings struck out on the grounds that they were frivolous, vexatious and disclosed no cause of the action and were therefore bound to fail. In this Court, the President took the view that the pleadings did not disclose a cause of action, but on the basis of extraneous material, took the view that Mr. Kenny had crossed the threshold necessary to be allowed continue with the proceedings.

9. However, an appeal was brought against that finding, and those set-aside proceedings were struck out by order of the Supreme Court on 20th June 2003 on the basis that they failed to disclose a cause of action. Costs were also awarded in respect of that application.

10. Mr. Kenny commenced a second set of proceedings seeking to have the order of McKechnie J set aside on3rd July 2003. In those proceedings, an express plea of fraud on the Court was made. Those proceedings were struck out by Murphy J on 24th March 2004. An appeal was brought by Notice of Appeal dated 28thApril 2004 against the decision of Murphy J to strikeout. It should also be noted that Trinity had, in the same application in which it sought so strike out those proceedings, sought an order, frequently referred to as an Isaac Wunder order, which would preclude Mr. Kenny from bringing any further proceedings save with leave of the Court. Mr. Justice Murphy had refused that order and as against that refusal, Trinity College had cross-appealed.

11. The instant proceedings were commenced against both Trinity and the board on 5th October, and the matter which is currently before the Court is a motion in which Trinity College seeks an order striking out the proceedings as being frivolous and vexatious, disclosing no cause of action and being bound to fail and in addition renews its application for a so-called Isaac Wunder order.

12. The central contention upon which these new proceedings are based is an allegation made by Mr. Kenny that four photomontages that were submitted with the original Environmental Impact Statement to the board as part of the original planning process were, as he described it, manipulated and, it is contended, so done for the purposes of disguising the height of the buildings. Upon that basis, it is contended that a fraud was perpetrated on the Court, and that in substance, the judgment and order of McKechnie J was secured by fraud. It should be said that that allegation is strenuously denied by Trinity, but it does not seem to me at this stage that it is a matter for me to determine the validity or otherwise of that contention.

13. Before going on to deal with the specific issues that arise in a motion such as that brought by Trinity in this case, it seems to me that I should identify what the role of this Court is in relation to planning matters. That applies not only to the matter which is currently before me but in all matters of which the Court's jurisdiction is invoked in respect of planning matters.

14. This Court is not a court of appeal upon the merits or otherwise of planning decisions made by the appropriate planning authorities. Still less is this Court a tribunal of inquiry charged with looking into whether planning permissions have been properly dealt with. The Oireachtas has determined in the planning legislation, most recently the 2000 Act, that planning decisions are primarily a

decision for the planning authority, or where there is an appeal against the decision of the planning authority, for An Bord Pleanála. It is neither right nor proper for this Court to in any way take away from the proper jurisdiction of those bodies to make decisions in the planning process.

15. However, where there is significant noncompliance with planning law or where there are significant failures in the planning process, this Court can, on what are sometimes referred to as judicial review principles, intervene. But it is important to note that, again, the Oireachtas has determined that by virtue of the provisions of the 2000 Act, any challenge to a planning permission must be by way of judicial review and must also comply with strict time limits which can, of course, be extended in an appropriate case. But it is clear from that view of the role of the Courts, that any challenge brought before the Court is limited to a consideration by the Court of the particular issues that are put forward by the applicant who invokes the Court's jurisdiction. The Court is not involved in a general consideration of the validity of the planning permission, let alone the appropriateness of planning permission having been granted in the first place.

16. The Court's role in any planning challenge is narrowly confined to a consideration of whether, applying appropriate judicial review principles, the issues which are alleged to have tainted the planning process or the planning decision are well made out, and in the case of an application for leave, the Court is concerned whether substantial grounds for any such contention have been made out.

17. The original hearing before and decision of McKechnie J was therefore limited in that way to the issues which were raised before him, and so far as the facts had to be considered by him, it was only those facts which were relevant to the issues which had been raised before him which were material to his consideration.

18. In passing, I should note that it is common practice in planning challenges for the parties to place before the Court, for completeness, the totality of the planning documents which were before the relevant planning authority, be it the local planning authority or the board. That does not mean that all of all such documents are relevant to the Court's consideration. I should also make it clear that I am not in any way criticising the practice which I have just identified. It is appropriate, lest perhaps issues that were not absolutely clearly material become important, that the Court should have all relevant documentation before it. But the fact that documents are before the Court in the sense that they are exhibited in affidavits filed in the course of the process by either side does not make all of the contents of all of those documents relevant. The only matters that are relevant to the Court's consideration are matters which are material to the specific issues raised in the proceedings.

19. I think it is important in that context to go to the judgment delivered by McKechnie J which is under consideration in this case. It is clear from that judgment that the grounds raised on behalf of Mr. Kenny were four in number.

20. The first concerned a question of whether Condition 8 of the planning permission was consistent with the so-called *Boland* principles, and I will return to that matter in due course.

21. The second ground was as to whether there was an excessive absence of detail in respect of the boiler house necessary for the development, and that was put in a number of different ways.

22. Thirdly, it was contended that the Environmental Impact Statement submitted in respect of the proposal was inadequate, but as is clear from the judgment of Mr. Justice McKechnie, the factual basis for that contention was, as he put it, almost identical to that forming the basis of the ground last mentioned, namely the inadequate details available or submitted in respect of the proposed boiler house facilities.

23. The fourth ground concerned a contention that the gate lodge was a protected structure and that the permission was invalid by virtue of an inadequate recognition of that fact.

24. If one looks at the judgment and the issues which clearly arose which led to that judgment, it is clear that the issue under ground one was concerned with the proper construction or interpretation of Condition 8 in the planning permission and whether on a proper construction of that condition it gave too wide a discretion left over for further agreement between Trinity College as developer and Dublin City Council as the planning authority.

25. The only issue before McKechnie J was as to whether, as was contended for on behalf of Mr. Kenny, Condition 8 allowed an excessive discretion back to the planning authority. The judgment of the Supreme Court in *Boland* sets out the test by reference to

26. which it is permissible for An Bord Pleanála to leave over matters for further agreement. The matters which are permitted to be left over for further agreement are described as technical matters of detail. McKechnie J was persuaded that there were not substantial grounds for contending, on a proper construction of Condition 8, that it conferred the breadth of discretion which was contended for on behalf of Mr. Kenny. In substance, the issue really concerns the proper construction Of Condition 8, and it does not seem to me that the contents of the EIS were relevant to that issue at all.

27. It is clear from the judgment that the other three issues concerned either the boiler house and the gate lodge and, again, had no direct relevance to the EIS so far as the issues which are now before this Court are concerned. The only issue of relevance to the EIS was that concerning the boiler house. In those circumstances, it does not seem to me that there is any basis for suggesting that the photomontages concerned had any relevance to the narrow issues which were properly before and considered by McKechnie J when he came to deliver judgment.

28. Just as, therefore, the Supreme Court took the view in respect of an earlier challenge to the same judgment of McKechnie J that the question of the fire safety certificate was irrelevant, I also have come to the view that there is no basis for contending that the photomontage issue could have any relevance to those issues.

29. If there is any substance to the contentions which Mr. Kenny puts forward, and it seems to me it would be wholly inappropriate for me on an application such as this to pass any comment on those matters save to note that they are strenuously denied, it seems to me that it would amount to a new challenge to the planning permission on separate and distinct grounds from those which were rejected by McKechnie J, and in that regard I agree with the submissions of counsel on behalf Trinity College.

30. Having conducted that analysis, it seems to me that it is appropriate that I should look to the Statement of Claim in these proceedings. The Statement of Claim in the proceedings which are now before me essentially seeks two reliefs in substance, thought here are a number of ancillary matters concerning costs which are also raised.

31. The first relief is described as a reinstatement of the original challenge to the planning permission, and the second is a setting

aside of the judgment and order of Mr. Justice McKechnie to which I have referred. It seems to me that two logically comes before one as there could be no conceivable basis for allowing the reinstatement of an application which has already been rejected unless one were to set aside the order rejecting that application in the first place.

32. Reinstatement would not, it seems to me, be appropriate for an entirely new cause of action in that if Mr. Kenny has an entirely new cause of action, he does not need a court order to allow him to bring it. He would of course face a very grave difficulty at this stage in mounting a new cause of action having regard to the time which has elapsed, but that is a different matter which may or may not fall to be decided on some other occasion.

33. Having been satisfied that any case which he might have at this stage is, if anything, a new case, it does not seem to me that there is any basis for making a reinstatement order. Having also come to the view that the matter contended for as being a fraud on the Court related to an issue which was not before the Court, it seems to me that I should refer to the legal principles applicable to making orders of the type sought both by Mr. Kenny in the substantive proceedings and by Trinity College in this application.

34. Mr. Kenny, not surprisingly, placed reliance on the case of *Waite -v- House of Spring Gardens*, and the judgment of Barrington J in this Court. It is appropriate to note that the application in respect of which Barrington J gave judgment on26th June 1985 was an application similar to that which was brought by Trinity in this case. In other words, there had been a substantive hearing and the plaintiffs had lost. They had brought proceedings seeking to have the original adverse order set aside on the grounds that it was procured by fraud. The defendants had brought a motion seeking to have those proceedings struck out on the basis of being bound to fail or disclosing no cause of action. So the process was at the same stage as it is now.

35. In passing I should note that Barrington J approved of the judgment of the Court of Appeal in the United Kingdom in *Jonesco and Beard* (1930) AC 298 in which the House of Lords determined that the appropriate way to challenge an existing decision of the Court on the basis of fraud was by a new substantive action, a writ in the case of the United Kingdom and plenary summons here.

36. So there is no doubt both from *House of Spring Gardens* and from many other authorities to the same effect that this Court has a jurisdiction to set aside a previous order of the Court on the grounds that it was procured by fraud, and that the appropriate way in which to seek to do that is by means, in this jurisdiction, of issuing substantive proceedings by plenary summons. To that extent, it seems to me that the proceedings are proper in the sense that they follow the proper procedure.

37. It is also implicit in the judgment of Barrington J that the ordinary rules derived from the decision in *Barry -v- Buckley* and other like authorities apply equally to a case of this type so that the Court has a jurisdiction to dismiss a claim of the type brought on the basis that it is frivolous or vexatious, does not disclose a cause of action or is bound to fail.

38. The motion in *Waite -v- House of Spring Gardens* to dismiss was unsuccessful, but it is important to understand the reasoning of the Court in coming to that view which can be found at page 6 of the judgment which, having referred to what had transpired on appeal before the Supreme Court, Barrington J when on to say the following:

> "That judgment therefore stands and no doubt any plaintiff attempting to set it aside will carry a very heavy onus. In these proceedings nevertheless the former Chief Justice did say that if the matters deposed to and the affidavits filed in the Supreme Court were true, they indicated that the trial judge and the Supreme Court had been deceived in a manner which ought not be countenanced in the administration of justice. In the circumstances, I do not think that I have any jurisdiction to strike out or stay the new proceedings."

39. It is therefore clear that the application to dismiss failed in *House of Spring Gardens* because of the finding by Barrington J (relying upon the comments of the Chief Justice) that if the averments contained in the affidavits were true, the Court had been deceived. But the real issue in this case is that even if the matters contended for by Mr. Kenny are found to be correct (and as I have said more than once before this is hotly contested), would it be the case that it could on any basis provide grounds for setting aside the judgment of Mr. Justice McKechnie?

40. Like the Supreme Court in respect of the earlier attempt to set aside the judgment of McKechnie J, I have come to the view that the issue raised was irrelevant to the issues which were before McKechnie J. They were therefore not matters which were material to his consideration, and therefore even if it could be established that there was fraud in respect of those matters, it was a fraud on the planning board in the planning process rather than a fraud upon the Court and could not amount to a basis for setting aside the final judgment of the Court in respect of a planning challenge on the grounds which were then before the Court. In those circumstances, it seems to me that these proceedings are bound to fail, and in exercise of inherent jurisdiction of the Court as identified in *Barry -v- Buckley*, it seems to me that it is appropriate that I should dismiss the proceedings.

41. The second leg of application brought on behalf of Trinity is to seek a so-called Isaac Wunder order. There is no doubt that the Court has a jurisdiction to make such an order. Keane CJ in *Riordan -v- Ireland* 4 [2001] 3 IR 365 noted the following:

> "It is, however, the case that there is vested in this Court, as there is in the High Court, an inherent jurisdiction to restrain the institution of proceedings by a named person in order to ensure that the process of the Court is not abused by repeated attempts to reopen litigation or to pursue litigation which is plainly groundless and vexatious. The Court is bound to uphold the right of other citizens including their right to be protected from unnecessary harassment and expense, rights which are enjoyed by the holders of public office as well as private citizens. This Court would be failing in its duty, as would the High Court, if it allowed the process to be repeatedly invoked in order to reopen issues already determined or to pursue groundless and vexatious litigation."

42. In a similar vein in *Carney -v- Ireland*, Murray J noted the following:

> "Also in cases of this nature it may be a protection for litigants who seem to have a not altogether rational persistence in bringing proceedings that are bound to fail and thus incurring unnecessary costs on their own behalf. But irrespective of that, the defendants are entitled to be protect form an abuse of the process by repeated litigation over the same issues, and in my view the Learned High Court Judge was correct in imposing a litigation restriction order."

43. Finally, I place reliance on the judgment of Peart J in *London and Global Limited in Liquidation -v- Lambe* in which he noted at page 6 the following:

> "Nevertheless, there comes a time when the exercise of that constitutional right of access to the courts interferes with another's right to finality to litigation and indeed the right of the general public in that regard given that the resources of

the courts in terms of time and cost are funded from taxpayers' money. That right to finality runs alongside and independently of the rights of the parties. The order sought by the plaintiff is one which the Court can make in the exercise of its inherent jurisdiction to protect its processes from abuse. It is a jurisdiction which must be used sparingly and only where it is clear that no injustice will arise. That assessment as to any possible injustice will usually involve a consideration of whether any reasonable and *bona fide* ground exists which ought to be litigated. In addition, the Court can look at the entire history of the litigation to date and consider whether it is reasonable to perceive it as vexatious and an abuse of process."

44. Applying those principles to the facts of this case, it seems to me that I have to take into account the following matters: I have now come to the view that what is, in effect, a third attempt to set aside the judgment of McKechnie J has failed. In respect of all of the matters so far litigated, and on that I should note that I am mindful that there are still appeals in respect of some matters, including one of the applications of the type of which I am concerned, but nonetheless, all matters have been held to be bound to fail. It is also difficult to avoid the conclusion that the instant proceedings were, at least in some part, brought about with a view to preventing cost orders which are currently in being from having continued effect, and that is a factor that also has to be taken into account.

45. I am mindful of the fact that at the time the matter came before Murphy J, he was not persuaded that the point had been reached where it would be appropriate to make an order of the type now sought. However, as was noted by Mr. Justice Peart in *London and Global*, a time comes when such an order has to be made, and it seems to me that that time has now come in respect of the litigation between Mr. Kenny and Trinity subject to a number of comments which I will make.

46. Firstly, clearly nothing in this judgment should preclude any of the matters which are currently under appeal from reaching their natural conclusion in the ordinary way, and I wish to make it clear that Mr. Kenny is of course entitled to pursue any appeals that are properly before the courts to their natural conclusion.

47. Secondly, the order which is normally made is an order preventing any further proceedings against the defendants in these proceedings save with leave of the Court. That will not preclude Mr. Kenny, and I want to make this clear lest there be any doubt about it, from bringing independent proceedings seeking to challenge the grant of the planning permission on the basis of the fraud on the board which he contends.

48. However, as I have indicated in the course of this judgment, he faces a very significant difficulty in maintaining those proceedings in that such proceedings are, in the ordinary way, required to be brought within three months of the decision sought to be challenged. That decision is now upwards of six years old, and while I should express no view on the merits or otherwise of any extension-of-time application that might be brought, Mr. Kenny will have to persuade a court that he is entitled to bring those proceedings at such a remove. He faces an uphill struggle in doing that, but it is not for me to comment any further in relation to that. But what I do want to make clear is that the order which I propose making does not preclude Mr. Kenny from seeking, on notice to the various defendants or notice parties, leave to seek judicial review on new grounds based on the fault which he contends, provided of course that he can persuade this Court that an extension of time should be granted.

49. Therefore, with those clarifications, I will propose making the Isaac Wunder order sought in the issued terms.

50. Mr. Galligan: Perhaps you might include in that order an order that the respondent, Trinity College, does not need to take any steps in relation to any proceedings issued. Of course as your Lordship is aware in the context of the leave procedure under the Planning Act, the proceedings are instituted by simply serving the proceedings within a period of eight weeks of the decision actually being made, and perhaps if that can be included in some way in the order just to make it clear beyond doubt that one does not have to deal with those proceedings --

51. Mr. Justice Clarke: Unless and until --

52. Mr. Galligan: Unless and until the leave of the Court is maintained.

53. Mr. Justice Clarke: Yes. Clearly if Mr. Kenny brings proceedings, they will have to be served on Trinity. I think I should clarify that it is a matter for Trinity to determine whether they wish to involve themselves in any way on an initial application and Mr. Kenny to be allowed litigate those matters before the Court. I appreciate that if defendants had to come in in such cases, in all cases, it might defeat the purpose of the order. So I make it clear that it is a matter for Trinity to attend or otherwise as they think appropriate in respect of any applications that Mr. Kenny may bring.

54. Mr. Galligan: Also, just to ensure that no steps have to be taken in response to the proceedings if they are issued merely by way of service, and it is in advance of leave application being made to the Court in respect of the Isaac Wunder order.

55. Mr. Justice Clarke: Yes, I make it clear that it is unnecessary for Trinity to take any steps unless and until the Court has indicated that it is appropriate for Mr. Kenny to go forward in those cases. Obviously if the Court does give such an indication, then Trinity would have to involve itself to protect its own interests in the proceedings.

56. Mr. Galligan : I seek my costs.

57. Mr. Justice Clarke: I will hear Mr. Kenny in relation to costs.

58. Mr. Kenny: My Lord, I would like to ask for a stay on your order because as your Lordship has indicated, the next step that is open to me, apart from obviously appealing the decision here, is to apply for a new judicial review. That will have to take its course, but I think I have indicated sufficiently to your Lordship the other day that the basis upon which that course, if I follow it, will be that the planning application was invalid. If the planning application was invalid, I think it will follow very swiftly that the planning permission was also invalid, and likewise it would follow, I think that would seriously affect the status of Judge McKechnie's refusal to grant leave because it would then appear that his judgment may turn out to be a nullity.

59. Mr. Justice Clarke: How could it be a nullity? He was not asked to say what it was...(INTERJECTION).

60. Mr. Kenny: Well, I cannot say this at this moment, my Lord, but what I would be seeking to establish in the judicial review proceedings which I have in mind is that the planning permission itself was invalid.

61. Mr. Justice Clarke: That would not affect the validity of Mr. Justice McKechnie's decision if it was simply on the grounds that you

put forward were not valid.

62. Mr. Kenny: Well, I would hope to establish obviously at a later date, my Lord, that there is a question of revocability. All court judgments are not irrevocable. I think the judgment or the refusal of Mr. Justice McKechnie is possibly in the category of one of those which can be revoked by the Court. So although it may be a valid decision, if it turns out that it was based upon an invalid application, it is extremely -- I would say those proceedings were entirely tainted and that he would have been misled. But that is perhaps for another day. In regard to costs, my Lord, I make the point already to your Lordship that I consider that these are in the public interest, that a fraud upon various authorities, including the Court and the planning authority, and possibly the board as well, is in the nature of the public interest, and I think that the costs should -- that there should be no order as to costs.

63. Mr. Galligan: I am fairly opposed to a stay...(INTERJECTION).

64. Mr. Justice Clarke: I do not need to hear you.

65. Mr. Galligan: I ask just in relation to the costs that your Lordship would include the stenographer's costs.

66. Ms. Egan: As your Lordship is aware, An Bord Pleanála makes a similar application, and I am just seeking clarification firstly that the Isaac Wunder order granted also encompasses my client.

67. Mr. Justice Clarke: It encompasses the board.

68. Ms. Egan: Thank you, and I am also seeking my costs.

69. Mr. Justice Clarke: It seems to me that given the view that I have taken, which is that these are the third set of proceedings seeking to challenge the order of Mr. Justice McKechnie and that there was no basis upon which they could succeed, that the costs must follow the event. I will therefore grant both Trinity and the board their costs in this application. I will not put a stay on the order generally because it seems to me that, if I am right, the substantive proceedings should be stayed. However, I will put a stay on the order for costs in the event that there is an appeal on the usual terms. If there is an appeal within 21 days, then the order for costs will be stayed.

70. Mr. Kenny: In order that I can circumscribe the terms of your Lordship's orders, the effect it seems to me is that the setting aside of Mr. Justice McKechnie's order is refused. There are substantive proceedings already in being which encompass much more ground than Mr. Justice McKechnie's order, and there is the question therefore of the status of my application in respect of the fraud itself.

71. Mr. Justice Clarke: The only proceedings that were before me are proceedings record number 2005/332 OP. Those proceedings are now at an end. My order has nothing to do with any other set of proceedings other than that you are now precluded from bringing any other cases without first seeking the Court's leave.

72. Mr. Galligan : It would be helpful if the Court would clarify that the taxation of the costs in the various other proceedings could proceed if Mr. Kenny had sought a stay in relation to those...(INTERJECTION).

73. Mr. Justice Clarke: The only matter which I am staying is the costs of this case in the event of an appeal. If any other matter in respect of which there is not a stay remains unstayed, it can proceed.

74. Mr. Galligan: May it please your Lordship.

75. Mr. Justice Clarke: I will give back to the parties the various papers which I had.