THE HIGH COURT

[2010 No. 5159 P.]

BETWEEN

DERMOT DESMOND

PLAINTIFF

AND

MR. JUSTICE MICHAEL MORIARTY (SOLE MEMBER OF THE TRIBUNAL OF INQUIRY INTO PAYMENTS TO MESSRS CHARLES HAUGHEY AND MICHAEL LOWRY)

DEFENDANT

JUDGMENT of Ms. Justice Dunne delivered the 17th day of February 2012

This is an application on behalf of the defendant by way of notice of motion seeking the following relief:-

> (a) An order pursuant to O. 19, r. 28 of the Rules of the Superior Courts striking out or dismissing the plaintiff's claims on the grounds that the statement of claim delivered herein discloses no reasonable cause of action and/or the action is shown by the pleadings to be frivolous and/or vexatious;
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> (b) Further or in the alternative, an order pursuant to the inherent jurisdiction of the court dismissing or, alternatively, striking out the plaintiff's claims against the defendants on the grounds that the proceedings have no reasonable prospect of success, are bound to fail and are an abuse of the process of the court;
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> (c) Further or in the alternative, an order pursuant to O. 19, r. 27 of the Rules of the Superior Courts striking out the statement of claim in its entirety on the grounds that it contains matters which are unnecessary and/or scandalous and which may tend to prejudice, embarrass or delay the fair trial of the action.

The plaintiff in these proceedings previously commenced judicial review proceedings against the defendant bearing the title "Dermot Desmond, Applicant and Mr. Justice Michael Moriarty (Sole Member of the Tribunal of Inquiry into Payments to Messrs Charles Haughey and Michael Lowry) Respondent, Record No. 2003 No. 315 J.R." (hereinafter referred to as "the Judicial Review Proceedings") for the purpose of seeking to prevent the defendant from introducing the Report of John A. Glackin into the affairs of Chestvale Properties Limited and Hoddle Investments Limited (hereinafter referred to as "the Glackin Report" into evidence at the Tribunal and to question witnesses in relation to the report. The plaintiff in the judicial review proceedings sought the reliefs claimed therein on the grounds, *inter alia*, that the Glackin Report concerned issues which fell outside the terms of reference of the Tribunal and that, as such, any inquiry into or investigation of the Glackin Report was *ultra vires* the defendant. The plaintiff was unsuccessful before the High Court in the judicial review proceedings and appealed to the Supreme Court. His appeal was rejected by the Supreme Court on the 20th January, 2004.

The plaintiff in these proceedings now seeks to have the judgments of the High Court delivered on the 8th August, 2003, (Quirke J.) and of the Supreme Court delivered on the 20th January, 2004, set aside and seeks further related and ancillary relief. The basis upon which the relief is sought is the plaintiff's contention that the defendant caused or permitted misleading, untrue and inaccurate evidence to be given to the High Court and the Supreme Court such that the High Court and the Supreme Court refused the plaintiff's application for judicial review. It is contended in those circumstances that the judgments and orders of the High Court and the Supreme Court "were obtained by fraud on the part of the defendant and his servants or agents". It is further pleaded that the failure by the defendant to make disclosure of material described in the statement of claim amounted to a fundamental breach of principles of fair procedures which went to the heart of the evidence led by or on his behalf before the High Court and the Supreme Court. On that basis it is contended that the judgments and orders of the High Court and the Supreme Court are a nullity and ought to be impeached and set aside. Essentially, it is contended that an affidavit sworn by John Davis on behalf of the defendant on the 22nd May, 2003, in the judicial review proceedings was misleading, untrue and inaccurate by reason of wilful or reckless misstatements contained therein and wilful or reckless omissions therefrom.

Background

Some information as to the background is necessary before considering the legal issues. The Tribunal was inquiring into the circumstances surrounding, *inter alia*, the competition for the second GSM mobile phone licence. An application was made for the licence by the ESAT consortium. After the application was made, the plaintiff herein became a member of the ESAT consortium through his company, International Investment and Underwriting Limited ("IIU"). The ESAT consortium was ultimately successful in its application. Following the decision to award the exclusive right to negotiate with the Department for the award of the second GSM mobile telephone licence in October 1995, the Department of Transport Energy and Communications wrote to the Office of the Attorney General requesting legal advice in relation to changes in the composition of the ESAT consortium. It appears that advices were furnished to the Office of the Attorney General on the 9th May, 1996, by Richard Nesbitt S.C. to the effect that a change in the ownership of the ESAT consortium should not affect the decision to grant the second GSM mobile telephone licence to the consortium unless the change in ownership would in some way compromise the service to be provided by the consortium. That opinion was communicated to the Department around the 13th May, 1996. A few days later on the 16th May, 1996, the second GSM mobile telephone licence was awarded to ESAT.

Subsequently, the Tribunal, in the course of its inquiries, sought information in relation to the opinion of Mr. Nesbitt S.C. These inquiries took place between June 2002 and December 2002, when the Tribunal commenced its second module. In the opening statement in respect of the second module, it appeared that the Tribunal took the view that the opinion furnished by Mr. Nesbitt S.C. only addressed the question of changes in the consortium after the GSM licence had been granted; that the Department had not pursued the issue of changes in the consortium prior to the award of the licence and that the Department continued to be concerned about the ownership issue in May 1996. Ultimately a copy of the opinion furnished by Mr. Nesbitt to the Department was made available to the plaintiff in April 2009 and in March 2010 it was acknowledged by the defendant herein, in his capacity as the chairman

of the Tribunal that "two not insignificant errors have been made ..." namely that (a) the Tribunal had been mistaken in asserting that the Attorney General had in 2002 expressed the view that the Nesbitt opinion did not deal with pre-award changes in the composition of the ESAT consortium and (b) the Tribunal had erred in not making available to the parties its note of the Tribunal meeting with Richard Nesbitt S.C. and two relevant officials from the office of the Attorney General.

Thus, it will be seen that the opening statement in respect of the second module before the Tribunal took place in circumstances where the Tribunal was in error as to the Attorney General's view expressed in 2002 in the course of the Tribunal's enquiries as to the effect of the opinion obtained from Mr. Nesbitt. The Tribunal embarked on the hearing of the relevant module on the basis that the opinion only addressed the question of changes in the consortium after the licence had been granted. That is the context in which the judicial review proceedings brought by the plaintiff herein were ultimately unsuccessful as already mentioned.

The plaintiff herein seeks to have the decision of the High Court and the Supreme Court in the judicial review proceedings set aside in circumstances where it is now clear that the Tribunal was labouring under a misapprehension as to the effect of the advices relating to the change in membership of the consortium furnished to officials of the Department at the time of those proceedings. The focus of the Tribunal's enquiries at that point was the question as to whether the involvement of the plaintiff as a member of the consortium would have had an effect on the decision of the Department in relation to the awarding of the licence.

The plaintiff herein seeks to rely on the non disclosure of information in the possession of the Tribunal as to the legal advices/opinion furnished to the Department by the Attorney General. The essence of the case now being made in these proceedings by the plaintiff is that the Tribunal had information in its possession that the Department had, in fact, been advised that it was in order for the identity and configuration of the consortium to be changed and that information was not before the High Court and the Supreme Court in the judicial review proceedings. It is on that basis that the judgments of those Courts is sought to be set aside.

The judicial review proceedings
The judgments of the High Court and the Supreme Court in the judicial review proceedings are to be found in 2004 1 I.R. 334. Paragraph 7 of the judgment of Quirke J., at p. 339, sets out the opening statement of counsel on behalf of the Tribunal at the commencement of the second module of the inquiry. One of the matters of interest to the Tribunal concerned the identity of the consortium behind the ESAT application and whether that identity was known to the evaluators and, if not known, was that due to any intervention on the part of Michael Lowry. It was also sought to be clarified:

> "Whether the applicant or IIU, although a part of the consortium to which the competition result was rewarded, that is the licence issued, in fact avoided the evaluation process and whether this was a result of any intervention on the part of, or as a result of exertion of any influence by Mr. Michael Lowry".

The issue that gave rise to the judicial review proceedings was the use of the Glackin report in the examination of certain witnesses by counsel for the Tribunal. The Glackin report is a public report which was published on the 1st July, 1993 relating to an investigation in respect of the ownership of the Johnston Mooney & O'Brien site in Ballsbridge, Dublin. That report made findings critical of the plaintiff. In the judicial review proceedings it was contended by the applicant that he had not been afforded fair procedures by the respondent in that:

> (a) the contents of the report were not relevant to the inquiry being undertaken by the Tribunal;
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> (b) neither he nor his legal advisers had received any or any adequate notice of the likelihood that particular witnesses would be examined in relation to the report;
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> (c) the applicant was, consequently, compromised in his ability to defend his good name;
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> (d) the Tribunal had permitted the use of pejorative language by counsel for the Tribunal with respect to the applicant.

It is impossible to consider the application now before the Court without looking in some detail at the judgments in that case and the issues that arose.

Reference was made in the course of the judgment of Quirke J. to the evidence of Mr. John Loughrey who was the secretary of the Department for Transport, Energy and Communications. His evidence commenced on the 14th February, 2003 and in the course of his evidence he referred to the Glackin report. Quirke J. noted at p. 344 of his judgment as follows:

> "Mr. Loughrey, in evidence, told the Tribunal that at the time when the licence was awarded, he had read the Glackin report and knew of its determinations and criticisms.
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> He felt that he was entitled to rely upon a written confirmation by a reputable accountancy firm, Messrs. Farrell Grant Sparks, that IIU was 'in a position to make this investment and to make the underwriting commitment'. He was aware that IIU was beneficially owned by the applicant.
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> He had been informed that the Department was seeking legal advice as to the implications of a re-configuration of the share interest in ESAT Digifone but was unaware the explicit legal advice had not been received when the licence was awarded.
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> After the conclusion of his direct testimony, Mr. Loughrey was cross examined in detail by counsel for the applicant and by the legal representatives of other interested parties."
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> Quirke J. noted at p. 349 as follows:-
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> "On the undisputed facts which have given rise to these proceedings, the applicant is the owner of a significant interest in ESAT Digifone and, during the course of the evaluation process up to and including the 25th October, 1995, when the identity of the winner of the competition for the licence was announced, the evaluation team was under the impression that the interest in ESAT Digifone which had been acquired by the applicant on the 29th September, 1995, was, in fact, owned by the financial institutions.
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> When the tribunal discovered (as it did) that, at the time when it made its recommendation the licence should be awarded to ESAT Digifone, the evaluation team was under an erroneous impression as to the true ownership of that consortium, its terms of reference not only entitled it, but probably obliged it, to investigate how that had occurred. That further

investigation necessarily required the inquiry referred to in the opening statement read by counsel for the Tribunal on the lih December 2002,:

"Whether the applicant or IIU, although a part of the consortium to which the competition result was rewarded, that is the licence issued, in fact avoided the evaluation process and whether this was a result of any intervention on the part of, or as a result of exertion of any influence by Mr. Michael Lowry".

It follows that the question of whether the applicant or his company, IIU, avoided the evaluation process was, is and remains relevant to the work of the tribunal under its terms of reference. It follows, further, that an evaluation of the applicant is similarly relevant to the work of the tribunal."

Quirke J. concluded this part of his judgment at p.351 by stating:-

"In the instant case, the court may not interfere with the exercise by the respondent of his discretion to admit the Glackin report in evidence or to permit the questioning of witnesses as to its contents unless the court is satisfied that, by so doing, the respondent has interfered with the constitutionally guaranteed rights of the applicant in such an unreasonable and disproportionate manner as to require intervention. I am not so satisfied.

I have already held that the Glackin report was and remains relevant to the work of the tribunal and its terms of reference. It was published on the 1st July, 1993 and has now been in the public domain for some ten years. It is a document of record which is freely available to the members of the public who wish to purchase or peruse it.

Whilst accepting the need to balance the rights of the applicant, on the one hand, with the public interest, on the other, I have no doubt that the achievement of such a balance does not require or entitle the court to interfere with the exercise by the respondent of his discretion in this case."

The Supreme Court judgment (Denham J.) also made reference to the evidence of Mr. Loughrey. It was stated at p. 363 of the judgment as follows:

"Mr. John Loughrey gave evidence to the Tribunal that at the time when the licence was awarded he had read the Glackin Report and knew of its criticisms. However, he felt that he was entitled to rely upon a written confirmation by a reputable accountancy firm Messrs. Farrell Grant Sparks that IIU was 'in a position to make this investment and to make the underwriting commitment.' He was aware that IIU was beneficially owned by the applicant. He had been informed that the Department was seeking legal advice as to the implications of a reconfiguration of the share interest in ESAT Digifone. Mr. Loughrey was cross-examined by counsel for the applicant and by legal representatives of other interested parties."

The Supreme Court went on at p. 367 to give its decision in relation to the question of relevance. The point was made that a resolution of the House of the Oireachtas in establishing a Tribunal enjoyed the presumption of constitutionality. It was noted that this Tribunal was established by the Dáil and Seanad. The judgment pointed out that the inquiry is not a court even though it is chaired a High Court judge. It was further noted that the terms of reference given to the Tribunal were wide ranging. It then continued as follows:-

"While the powers vested in the Tribunal must be exercised within the constitutional framework, the very nature of the Tribunal is that it is fact finding, that is the reason for its establishment. Further, this fact finding should, where possible, proceed in public: *Bailey v. Flood*, (Unreported, High Court, Morris P., 6th March, 2000). This inquiry is into the award of a licence and the details of the business transactions leading up to it, including the evaluation of the bidders. This is a complex arena of fact finding in which the Tribunal has already invested considerable time. Counsel stated that the Tribunal has already heard 100 days of evidence on this module as well as doing the preparatory work. This is not an appeal on the facts. In judicial review the court is not hearing an appeal. The court is reviewing the procedures.

On the matter of relevance, the onus was on the applicant to make the case that the Tribunal acted *ultra vires*. I am satisfied that such a case has not been made out.

The context of the module was set out by the Tribunal in the opening statement, which has been set out previously in this judgment. The Tribunal is inquiring as to what were the true facts of ESAT's financial position at and prior to the 16th May, 1996, as to how aware the Department was of those facts and, if they were not aware, whether that was due to any intervention by Mr. Michael Lowry or to some other factor. It is also inquiring as to what were the true facts concerning the identity of the Consortium, who were the true applicants, the true facts concerning the ownership of the ESAT Digifone Consortium, and what was the state of knowledge of the evaluators at relevant times.

In the context of such an inquiry it is not unreasonable to determine that the former business transactions of the applicant are relevant to the inquiry as to whether the applicant avoided the evaluation process and as to whether this was the result of any influence by Mr. Michael Lowry. The Glackin Report is a report of an investigation into former business dealings of the applicant. It is a public document. It is not unreasonable to consider it relevant to the work of the Tribunal. The decision that this public document not be excluded is not a decision so unbalanced or unreasonable as to require intervention by a court. Further, the decision is not disproportionate in the context of the inquiry to the interests of the applicant. I would uphold the findings of the High Court on this aspect of the appeal."

The Supreme Court went on to deal with the issue of fair procedures at p. 368 of its judgment and the question of freedom of speech at p. 307 concluding with the following paragraph at p. 371-2:-

"However, the information in issue was already in a public document, the Glackin Report, which has been the subject of considerable media coverage over recent years. Thus, the information was already in the public domain. I am satisfied that there was no interference with the constitutional right to privacy of the applicant, and the issue of weighing that right against the exigencies of the common good does not arise for consideration. However, if it did, the rights of the applicant are not such as to curb the public inquiry established by the representatives of the people from their use of the Glackin Report. To allow the applicant's right to his good name to prevail over freedom of speech in such a situation in the Tribunal on this issue would be wholly disproportionate."

The Supreme Court concluded its judgment as follows at p. 372:-

> "I have dealt with this appeal in some detail. However, fundamentally it is a simple case, arising on a single issue, the Glackin Report. There is a certain air of shadow boxing in this case. To challenge references to a public document by the Tribunal was to assume an immense burden. For a court to exclude references to a public document by the Tribunal and its counsel in questions or submissions would be an extraordinary intrusion on the working of the Tribunal which I would envisage arising only in wholly extraordinary circumstances. Such circumstances do not arise in this case. If, on the other hand, the applicant wished to contest the Glackin Report that would be a matter for another arena. However that is not an issue for the Tribunal."

In the course of the submissions on behalf of the defendant in these proceedings before me, it was submitted that it was clear that the battleground in the judicial review proceeding was the Glackin report. That view is one shared by counsel on behalf of the plaintiff in their submissions.

The present proceedings

I now want to look at the statement of claim herein. The plaintiff has claimed a number of reliefs including the following:-

> "(i) A declaration that the affidavit sworn by John Davis on behalf of the defendant on the 22nd May, 2003 in the judicial review proceedings entitled Dermot Desmond, applicant, and Mr. Justice Michael Moriarity (Sole member of the Tribunal of Inquiry into payments to Messrs Charles Haughey and Michael Lowey), respondent, record No. 2003 No. 315 J.R. was misleading, untrue and inaccurate by reason of the wilful or reckless misstatements therein and the wilful or reckless omissions therefrom.
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> (ii) A declaration that this Honourable Court was misled into giving its judgment in order of the 8th August, 2003, in the proceedings described in para. (i) herein by fraud on the part of the defendant, his servants or agents. (iii) A declaration that the judgment and order of this Honourable Court given on the 8th August, 2003, in the proceedings described in para (i) herein are a nullity by reason of fraud on the part of the defendant, his servants or agents.
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> (vii) A declaration that the Supreme Court was misled into giving its judgment and order of the 20th January, 2004, in the Supreme Court appeal ... by fraud on the part of the defendant, his servants or agents.
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> (viii) A declaration that the judgment and order of the Supreme Court on the 20th January, 2004, in the proceedings described in para. (vi) (sic) herein are a nullity by reason of fraud on the part of the defendant, his servants or agents. (ix) An order impeaching the judgment of the Supreme Court given on the 20th January, 2004, in the proceedings described in para. (vi) (sic) herein."

Other relief is also sought in the proceedings but it is not necessary to set that out at this point.

Para. 8 to 15 inclusive of the statement of claim are important as they refer to the specific statements which are alleged by the plaintiff herein to be misleading and/or untrue and/or incorrect. I will refer in detail to those paragraphs in the statement of claim later on in this judgment and therefore, I will not set them out at this point. Those paragraphs of the statement of claim encapsulate the allegations of the plaintiff to the effect that the defendant caused or permitted misleading, untrue and inaccurate evidence to be given to the High Court and on appeal to the Supreme Court in respect of matters dealt with in the judgments sought to be set aside.

I should also refer to the notice for particulars dated the 30th July, 2010, sent to the solicitors for the plaintiff on behalf of the defendant and the reply thereto. The following particular was raised at para. 1(a):-

> "With reference to paras. 8 to 15 of the statement of claim:

(a) please confirm whether each and every allegedly fraudulent and/or misleading and/or untrue and/or inaccurate statement on behalf of the defendant by way of evidence in the proceedings entitled [the judicial review proceedings] is pleaded in paras. 8 to 15 of the statement of claim."

The response furnished by letter dated the ih September, 2010, was in the following terms:

> '1(a) The plaintiff confirms that each and every statement made on behalf of the defendant in the judicial review proceedings which the plaintiff alleges was misleading and/or untrue and/or incorrect is pleaded in paras. 8 to 15 of the statement of claim. As is apparent from the statement of claim, the plaintiff has not pleaded that the aforesaid statements were made fraudulently; he has pleaded that the effect of those misleading and/or untrue and/or incorrect statements and of the failure by the defendant to disclose or acknowledge the matters pleaded in para. 32(c), (d), (e), (f), (g), (h), (i), (j), (l) and (n) of the statement of claim had herein, was that the High Court and the Supreme Court were presented with misleading, untrue and inaccurate evidence by the defendant. In this regard, the plaintiff will argue that the aforesaid statements must be considered and construed in the light of the whole of the Tribunal's affidavit sworn by Mr. Davis on the 22nd May, 2003, and, in particular, in the light of the omissions therefrom. The misleading, untrue and inaccurate evidence given on behalf of the defendant meant that the plaintiff and his legal advisers were unable to and/or were hindered in their ability to properly and fully prosecute the judicial review proceedings. This in turn resulted in the High and Supreme Courts being deceived by the defendant and his servants and agents, and it is on this basis that the plaintiff pleads that the judgments and orders of the High and Supreme Courts were obtained by fraud."

For completeness I will refer to one other particular raised on behalf of the defendant, namely:-

> "4:
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> With reference to paras. 32 of the statement of claim:
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> (d) Please clarify whether it is alleged that the statement identified in response to the request at para. 4(a) were deliberately made with the intention and for the purpose of deceiving/misleading the court in the judicial review proceedings and, if it is so alleged please provide full and detailed particulars of the allegation in that regard."
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> The response to this particular was in the following terms:-
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> "4(d) As is apparent from the statement of claim, the plaintiff alleges that the statements were made deliberately or recklessly. The allegation is fully particularised in the statement of claim."

The Legal Principles
The first relief sought by the defendant herein is an order pursuant to O. 19, r. 28 of the Rules of the Superior Courts which provides:-

> "The Court may order any pleading to be struck out, on the ground that it discloses no reasonable cause of action or answer and in any such case or in case of the action or defence being shown by the pleadings to be frivolous or vexatious, the Court may order the action to be stayed or dismissed, or judgement to be entered accordingly, as may be just."

The second relief sought is an order pursuant to the inherent jurisdiction of the court dismissing or alternatively striking out the plaintiff's claim against the defendant on the ground that the proceedings have no reasonable prospects of success, are bound to fail and are an abuse of the court. The final order sought is an order pursuant to O. 19, 2. 27 of the Rules of the Superior Courts which provide as follows:-

> "The Court may at any stage of the proceedings order to be struck out or amended any matter in any endorsement or pleading which may be unnecessary or scandalous, or which may tend to prejudice, embarrass, or delay the fair trial of the action; and may in any such case, if it shall think fit, order the costs of the application to be paid as between solicitor and client."

Order 19, r. 28 of the RSC and the Inherent Jurisdiction of the Court.
I was referred to a number of authorities starting with the Supreme Court decision in the case of *Aer Rianta v. Ryanair Limited* [2004] 1 I.R. 506, in which Denham J. stated at p. 509:-

> "The jurisdiction under O. 19 r. 28 to strike out pleadings is one a court is slow to exercise. A court will exercise caution in utilising this jurisdiction. However, if a court is convinced that a claim will fail such pleadings will be struck out."

Both parties in their submissions referred to that decision and there is no doubt that as a general proposition courts will be slow to exercise the jurisdiction under O. 19, r. 28. The other point made clear in that decision is that the reference to a pleading contained in O. 19, r. 28 is a reference to the entire document as opposed to parts thereof. In other words, if the defendant is successful in the application under O. 19, r. 28, the entire statement of claim that will be struck out.

A number of other judgments were opened to the court in respect of the argument in respect of O. 19, r. 28 and I propose to refer to them at some length. The first of those authorities I wish to refer to is the decision of the Supreme Court in the case of *Kenny v. Trinity College Dublin* [2008] 2 I.R. 40. That was a case in which the plaintiff sought to overturn a High Court order refusing him leave to apply for judicial review on the basis that McKechnie J. in the High Court was misled by fraud on the part of Trinity. The Supreme Court in that case considered the law regarding the setting aside of a final judgment. It was accepted by the court that there is a right to maintain an action to set aside a judgment which has been obtained by fraud. (See para. 48 of the judgment.) Fennelly J. set out a number of matters in the course of his judgment which are relevant to the exercise of a court's jurisdiction to set aside a judgment obtained by fraud. He noted at para. 49 of the judgment as follows:-

> "The jurisdiction to set aside judgments on the ground of fraud must be seen against the background of the important principle of *res judicata* and of the public policy which discourages endless litigation expressed in the maxim: *interest rei publicae ut sit finis litum*. Keane J, as he then was, commented thus in *Dublin Corporation v Building & Allied Trade Union* and others [1996] 2 I.L.R.M. 547, at 556:
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> > 'it is important to bear in mind that the public interest referred to reflects, in part at least, the interest of all parties who resort to litigation in obtaining a final and conclusive determination of their disputes.'

He continued in that judgment to identify three aspects of the power to set aside judgments, a power which he described as "important, though exceptional". Those three aspects as described by Fennelly J. in para. 50 are:-

> "Firstly, the quality or degree of fraud or dishonesty that must be alleged; secondly, the extent to which it must be shown that the alleged fraud affected the impugned judgment; thirdly, the particularity with which the fraud must be pleaded."

Fennelly J. then considered the degree of fraud that must be alleged. He made reference to two authorities *Tassan Din v. Banco Ambrosiano SPA* [1991] 1 I.R. 569, a judgment of Murphy J. to which I will be referring in due course, and he also referred to the *Ampthill Peerage* case, 1997 A.C 547. Having referred to a number of passages from the *Ampthill Peerage* case, he went on to say at para. 54 as follows:-

> "54. I am satisfied that, in order to ground an action to set aside a judgment, the plaintiff must allege fraud in the true sense, that is deliberate and purposeful dishonesty, knowing and intentional deceit of the court. That approach is consistent with the statement of principle made by Keane J, in *Dublin Corporation v Building & Allied Trade Union and others*, with the interests of parties to litigation who have secured a final decision of a court and with the overriding public interest in finality of litigation.
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> 55. In addition, the fraud alleged must be such as to affect the impugned decision in a fundamental way. It will not suffice to allege that the new situation revealed by the uncovering of the fraud might have affected the judgment. It will not be enough to show, for example, that a witness lied unless it is shown that the true version of his evidence would probably have affected the outcome. Mr Galligan, on behalf of Trinity, submitted that the court should adopt the test adopted by O'Hanlon J in *Kelly v Ireland*, cited above. The test would be whether new evidence 'changes the whole aspect of the case.' That was, of course, a very different type of case. The plaintiff claimed damages for alleged assault by gardai. He had been convicted in a criminal trial, where the court had rejected as untrue the allegations now made in a civil action. Thus, there was a question of issue estoppel. However, in the course of the proceedings, the plaintiff claimed in addition to have found new evidence which had not been before the criminal court. O'Hanlon J adopted the test I have mentioned, following a dictum of Goff L.J. in *McIlkenny v Chief Constable of the West Midlands* [1980] QB 283. Would the alleged new evidence 'change the whole aspect of the case?' I believe that, in an action to set aside a judgment based on an allegation that the court was deliberately deceived into making the impugned decision no less stringent test should

be required. There must be something fundamental, something that goes to the root of the case.

56. An additional point arises. In general, a court approaches an application to dismiss pursuant to Order 19, rule 28 on the basis of the pleadings. Do the pleadings, as they are read by the court, disclose a cause of action? Would the alleged facts, if true, confer a cause of action? That test clearly applies in a modified form to such an application when made in a case such as the present. Where the substance of the claim is the validity of a final decision of a court of competent jurisdiction, the court hearing an application to dismiss must be permitted to examine the impugned decision, including the reasoning of the judgment. It cannot be constrained by the version of that decision disclosed in the pleadings seeking to set it aside.

57. The third matter is the necessity for particularity in pleading. It is the unanimous view of the various judges cited in argument that the allegation of fraud said to have deceived the former court must be pleaded with particularity and exactness. . . . In essence, the nature of the fraud, deceit or dishonesty must be clearly and unambiguously alleged."

Relying on the passages referred to above, it was submitted on behalf of the defendant that the principles of fair procedures and natural and constitutional justice to do not provide an independent basis upon which final judgments and orders of the High Court and Supreme Court can be set aside or otherwise enable a litigant to circumvent the principles as set out above.

At the risk of being repetitious, I think it would be helpful to summarise the principle enunciated by Fennelly J. in the course of his judgment cited above as follows:-

1. The jurisdiction to set aside judgments on the ground of fraud must be viewed against the background to the principle of res judicata and public policy which discourages endless litigation.

2. There are three aspects to this exceptional power:

(a) the quality or degree of fraud or dishonesty that must be alleged.

(b) The extent which it must be shown that the alleged fraud affected the impugned judgment.

(c) The particularity with which the fraud must be pleaded.

3. The plaintiff must allege fraud in the true sense, that is deliberate and purposeful dishonesty, knowing and intentional deceit of the court.

4. The fraud alleged must be such as to affect the impugned decision in a fundamental way. It is not enough to show that a witness lied unless it is shown that the true version of his evidence would probably have affected the outcome. In other words, it is necessary to show that there was something fundamental going to the root of the case that led to the court being deliberately deceived into making the impugned decision.

5. The court hearing an application to set aside an impugned decision must be permitted to examine the impugned decision, including the reasoning of the judgment.

6. The allegation of fraud must be pleaded with particularity and exactness.

One of the cases referred to by Fennelly J. in that judgment was the decision in *Tassan Din v. Banco Ambrosiano SPA* [1991] 1 I.R. 569 in which the plaintiff sought to set aside the order of the Supreme Court in the original proceedings. Murphy J. held in dismissing the proceedings, *inter alia*,

1. That the court's jurisdiction to strike out a plaintiff's claim which was frivolous or vexatious or an abuse of the process of the court should be exercised with great caution, but where the court was satisfied that the plaintiff's case must fail, the court should exercise its jurisdiction to strike out the plaintiff's claim to avoid injustice to the defendant

…

6. That where a party sought to impeach a decision of the Supreme Court for fraud he must plead (and ultimately prove) exactly and with particularity the fraud upon which he relies and the manner in which the alleged fraud resulted in the perverse decision. That the documents which the plaintiff’s alleged were deliberately and fraudulently not discovered by the defendants in the original proceedings would not have advanced the plaintiff’s' case and accordingly could not have altered the decision of the Supreme Court which accordingly was not obtained by fraud."

In the course of the judgment, Murphy J. referred to the inherent jurisdiction of the court to stay proceedings and I will deal with that jurisdiction subsequently in the course of this judgment. He also dealt with the arguments in relation to the question of setting aside a decision of the Supreme Court and he stated in that regard as follows at p. 574:-

"Notwithstanding that forceful argument it was conceded on behalf of the defendants, for the purposes of the argument in this court, that a decision of the Supreme Court could be set aside by proceedings brought for that purpose in the High Court if, and only if, the plaintiff’s seeking the rectification established that the order of the Supreme Court was obtained by fraud. In this context reference was made to the decision of Barrington J. in *Waite v. House Spring Gardens Ltd*. (Unreported, High Court, 26th June, 1985) in which the learned judge made the following observations:-

'There is no doubt that an action may be brought to set aside a judgment obtained by a fraud and that no leave is required of the court prior to the institution of such proceedings. (See Halsbury's Laws of England (4th Edition) Vol. 26, para. 560; Vol. 16, para. 1553; Vol. 8, paragraph 727).

The Annual Practice for 1985 at p. 1047 para. 71/9/2 says that in an application to set aside a judgment on the grounds that it was obtained by fraud it is immaterial that the facts on which the defendants relied to establish fraud were known to them and could have been raised in the original proceedings. (See *Syal v. Heyward and Anor*. [1948] 2 All E.R. 576). This appears to be the law at any rate where a fraud on the court is in issue;

> In *Janesco v. Beard* [1930] A.C. 298 the House of Lords held that it was the settled practice of the court that the proper method of impeaching a completed judgment on the ground of fraud was by action in which the particulars of the alleged fraud were exactly set out.'
>
> On behalf of the defendants it is argued that plaintiff's seeking to impeach a decision of the Supreme Court must at the hearing of the action prove the necessary fraud (and to the degree of proof laid down by the Supreme Court in their judgment in the earlier action) but in addition must plead exactly and with particularity the fraud on which they rely."

Murphy J. in regard to the issue of fraud noted at p. 576 of the judgment as follows:-

> "The emphasis throughout the material paragraphs of the statement of claim is on the want of natural justice. The word 'fraud' nowhere appears in the statement of claim and apart from mistake or negligence the only form of wrongdoing ascribed to the defendants in the original proceedings is described as 'deliberate concealment' which, though closely allied to fraud, may not be identical thereto particularly as the statement of claim does not aver any positive duty on the Bank or the liquidators to make available the documents or the evidence which it is alleged they concealed. It is not expressly pleaded that an order for discovery was made in the original proceedings and the only basis for inferring that such an order was made is to be found in para. 14, sub para. 4 of the statement of claim which complains of the failure to disclose certain evidence and depositions 'in discovery'."

Murphy J. then went on to refer to the *Ampthill Peerage* case [1977] A.C. 547 and quoted from the judgment of Lord Simon in the following terms:-

> "To impeach a judgment on the ground of fraud it must be proved that the court was deceived into giving the impugned judgment by means of a false case known to be false or not believed to be true or made recklessly without any knowledge of the subject. No doubt, suppression of the truth may sometimes amount to suggestion of the false: The *Alfred Nobel* [1918] P. 293. But, short of this, lack of frankness or an ulterior or oblique or indirect motive is insufficient.
>
> Moreover *Janesco v. Beard* [1930] A.C. 298, a decision of your Lordships' House, confirmed that, to impugn a judgment on the ground of fraud, the fraud must be alleged with particularity and proved distinctly. A person is not permitted merely to allege fraud in the hope of discovering it as the case develops.
>
> You cannot go to your adversary and say 'You obtained the judgment by fraud, and I will have a rehearing of the whole case' until that fraud is established'."
>
> Murphy J. continued:-
>
> "There is one further sentence from the decision of Lord Simon which is material to the present case, namely, (at page 591):-
>
> > 'The impugner of a judgment as obtained by fraud must adduce evidence of facts discovered since the judgment which show a reasonable probability (which I take to mean a *prima facie* case) of such fraud as would invalidate the judgment, before he can call on the person whose judgment he seeks to nullify to make any sort of disclosure."

Murphy J. went on to quote a further passage from the judgment of Lord Wilberforce in the *Ampthill Peerage* case defining fraud, in which it was said:-

> "In relation to judgments, and this case is surely *a fortiori* or at least analagous, it is clear that only fraud in a strict legal sense will do. There must be conscious and deliberate dishonesty, and the declaration must be obtained by it. Authorities as to judgments make clear that anyone wishing to attack a judgment on the grounds of fraud must make his allegation with full particularity, must when he states it be prepared to prove what he alleges and ultimately must strictly prove it."
>
> Murphy J. continued in his judgment by saying:-
>
> "In the light of the foregoing I am satisfied that nothing short of fraud pleaded with particularity (and ultimately established on the balance of probabilities) would be sufficient grounds in the present case for upsetting the decision given by the Supreme Court on the 8th April, 1987."

As I have already said that case was relied on by Fennelly J. in the course of his judgment in the case of *Kenny v. Trinity College Dublin* and I think it can be seen from the passages referred to above, that in formulating the principles set out in the Kenny decision, Fennelly J. had regard to a number of the principles identified by Murphy J. in the course of his judgment in *Tassan Din*.

Therefore, it appears that in order to set aside a judgment on the ground of fraud that there has be (1) purposeful wrongdoing (2) an element of dishonesty and (3) the order sought to be set aside has to be shown to have been made as a consequence of the alleged wrongdoing. In other words, the court has to be shown to have been deceived into making the impugned order. Before leaving the judgment in *Tassan Din v. Banco Ambrosiano SPA*, there is one other passage that I think I should refer to very briefly. Murphy J. noted at p. 574 that:-

> "Obviously it would be vexatious and an abuse of the process of the court to litigate any matter which was already concluded by a final and binding order of the court."

The plaintiff in his submissions did not demur from the principles applicable to the question of setting aside a judgment on the ground of fraud, but submitted that the requirements had been met by the plaintiff in this case.

It was emphasised on behalf of the defendant that the plaintiff had to establish an arguable case that there was fraud. Reliance was placed on the Supreme Court decision in *Bula Holdings v. Roche* [2009] I.E.S.C. 36, in which Kearns J. at internal pagination 8 stated:-

> "This then is the entire basis for the allegation of fraud which, it is acknowledged, would constitute the only basis for setting aside previous decisions of the High Court and of this Court."

It was noted in that case that the allegations of fraud contained in pleadings and correspondence were allegations of the utmost gravity and seriousness and it was found in that case that the proceedings concerned had no reasonable prospect of success and were an abuse of process.

In the course of the written submissions furnished on behalf of the defendant in respect of O. 19, r. 28, reference was made to a number of decisions including the case of *Adams v. Minister for Justice* [2011] 21.L.R.M. 452 and *Ó Siodhachain v. O'Mahoney* (Unreported, Supreme Court, 7th December, 2001), in which Keane J. stated as follows:-

> "The statement of claim delivered in the proceedings and in which the third named defendant was joined as a defendant, claims in paragraph 4b an order for damages against the first, second and third named defendants for deceit. That is effectively a claim of fraud against the third named defendant and the court is satisfied having examined with care the statement of claim filed on behalf of the plaintiff that even if the facts there alleged were proved, it would not in any way substantiate so grave an allegation as an allegation of fraud against any person but particularly a solicitor and an officer of this court.
>
> The court is satisfied that the learned High Court judge was perfectly correct in dismissing these proceedings. The court is so satisfied not only because they disclose no cause of action against the third named defendant but because they are also satisfied that in the inherent jurisdiction of the High Court it was proper to strike the proceedings out as being a clear abuse of the process of the court."

I was also referred to the decision in the case of *Fay v. Tegral Pipes Limited* [2005] 2 I.R. 261. That case concerned the words "frivolous and vexatious". It was stated therein as follows:-

> "While the words 'frivolous and vexatious' are frequently used in relation to applications such as this, the real purpose of the jurisdiction is to ensure that there will not be an abuse of the process of the courts. Such abuse cannot be permitted for two reasons. Firstly, the courts are entitled to ensure that the privilege of access to the courts, which is of considerable constitutional importance in relation to genuine disputes between parties, will only be used for the resolution of genuine disputes and not as a forum for lost causes which, no matter how strongly the party concerned may feel about them, nevertheless have no basis for a complaint in law. The second and equally important purpose of the jurisdiction is to ensure that litigants will not be subjected to the time consuming, expensive and worrying process of being asked to defend a claim which cannot succeed."

I was also referred in the course of argument to a number of judgments in relation to the inherent jurisdiction to strike out a claim which has no reasonable prospect of success, is bound to fail and/or is an abuse of the process of the court. In that context reference was made to the well known decision in the case of *Barry v. Buckley* [1981] I.R. 306. Reference was also made to a number of other decisions including *Sun Fat Chan v. Osseous Limited* [1992] 1 I.R. 425 and *Jodifern v. Fitzgerald* [2000] 3 I.R. 321, in which Barron J. made the following comments at p. 333:-

> "The function of the court is to consider one question only, was it proper to institute the proceedings? This question must be answered in the light of the statement of claim and such incontrovertible evidence as the defendant may adduce. If the claim could never have succeeded, then the proceedings should be struck out. There is no room for considering what evidence should be accepted or how it should be interpreted. To do the latter is to enter on to some sort of hearing of the claim itself."

The decisions referred to above, *Barry v. Buckley, Sun Fat Chan v. Osseous Limited and Jodifern v. Fitzgerald*, are so well known that I do not think it is necessary to set out in detail the principles to be found in those judgments. It is clear from the judgments that the court has an inherent jurisdiction to strike out proceedings which are an abuse of process. Proceedings which are frivolous or vexatious will be stayed. Proceedings will also be stayed if it is clear that the plaintiff's claim must fail. It has been said over and over that the jurisdiction to strike out or stay such proceedings is one which should be exercised sparingly and only in clear cases.

Order 19, r. 27

The final ground relied on by the defendant was in respect of the provisions of O. 19, r. 27 of the Rules of the Superior Courts. Reference was made in the submissions on behalf of the defendant to the decision in the case of *Riordan v. Hamilton* (Unreported, Supreme Court, 9th October, 2002). It was stated therein as follows:

> "Finally as regards the order striking out the statement of claim, the learned High Court judge correctly stated that 'The purpose of pleadings is to convey what the nature of the action is. Pleadings should not be used for an opportunity of placing unnecessary or scandalous matters on the record of the court or as an opportunity of disseminating such matters when they having nothing to do with any dispute between the parties. Allegations are not scandalous where they would be admissible in evidence to show the truth of any allegation in the pleadings which is material to the relief claimed'. Like the learned High Court judge I do not think it is necessary to spend time reciting the lengthy Statement of Claim but he was correct to regard it as containing 'contemptuous language and scandalous allegations' to advance a view which does not accord with 'fairness', 'constitutional right or with any modicum of decency'."

Relying on the replies to the notice of particulars referred to previously, it was submitted on behalf of the defendant that it was manifest that the statement of claim contains matters which were unnecessary and/or scandalous and which may tend to prejudice, embarrass or delay the fair trial of the action and for these reasons it was submitted that the statement of claim should be struck out in its entirety.

By way of response, the plaintiff submitted that the contentions on the part of the defendant in relation to the interpretation of O. 19, r. 27, were inappropriate. It was contended that, having regard to the decision in *Aer Lingus v. Ryanair* [2004] 1 I.R. 506, it was clear from the wording of r. 27 that it is directed towards the striking out of any matter in any endorsement or pleading rather than the striking out of the endorsement or pleading in its entirety. The judgment of Denham J. at p. 509-510, to which I have referred previously, is very clear on this point where she stated that "Part of a pleading is specifically addressed in O. 19, r. 27." There is merit in the argument to the effect that if one is seeking to strike out the entire claim then the appropriate rule to invoke is O. 19, r. 28, but if one is seeking to strike out part of a pleading, then the appropriate rule to invoke is O.19, rule 27. In the context of this case, I am satisfied that it is appropriate to consider this matter on the basis of O. 19, r. 28 and the inherent jurisdiction of the court rather than on the basis of O.19, r. 27.

Fair procedures/breach of constitutional rights

This is a case in which the plaintiff is seeking to set aside a final judgment of the High and Supreme Courts and it is accepted by the

plaintiff that in order to succeed in the proceedings it has to be shown that the case falls within one of the exceptions to the principle that any decision of the Supreme Court will be final and conclusive. Therefore, the plaintiff has to show that the judgment of the Supreme Court is one that can be set aside on the grounds of fraud. It was also submitted on behalf of the plaintiff that there was a jurisdiction to review an earlier decision on the grounds of breach of fair procedures and constitutional rights. I now propose to refer briefly to the submissions in that regard.

The plaintiff submitted that there was jurisdiction to set aside a final judgment of the Supreme Court on the basis of a breach of fair procedures or a breach of constitutional rights. Reliance was placed on the decision in Re. *Greendale Developments Limited (No.3)* [2002] I.R. 514 and *L.P. v. M.P.* [2002] 1 I.R. 219. I propose to refer to the latter judgment as it helpfully sets out the principles to be derived from the decision in Re. *Greendale Developments Limited*.

The decision in *L.P. v. M.P.* arose from a final order of the High Court on a Circuit Appeal. The question that arose was whether the Supreme Court had jurisdiction to set aside an unappealable order of the High Court. It was stated *obiter* in the course of the decision that the Supreme Court had jurisdiction to amend its own orders in exceptional circumstances which went to the root of administration of constitutional justice. The High Court had a similar jurisdiction in respect of final and unappealable orders of that court and this was done by way of a distinct and substantive application to that court. It was held in that case that the grounds upon which a final order might be challenged were limited to correcting the final judgment to ensure that it reflected the intention of the court which made it and to set aside an order that was obtained by fraud.

In the course of the decision in that case, Murray J., delivering the judgment of the court, made the following observations at p. 228:-

> "However, the position may be otherwise when a final order is challenged on the grounds that the judicial proceedings in question were gravely flawed by reason of a fundamental breach of fair procedures and justice guaranteed by the Constitution. This question was expressly addressed by this court in the judgments of Denham and Barron JJ. in *Re Greendale Developments Ltd. (No. 3)* [2000] 2 I.R. 514 with whom both Barrington and Lynch JJ. agreed.
>
> In *In re Greendale Developments Ltd. (No. 3)* [2000] 2 I.R. 514 at p. 542 Denham J. held that: 'The Supreme Court has jurisdiction and a duty to protect constitutional rights. This jurisdiction may arise even if there has been what appears to have been a final order. However, it will only arise in exceptional circumstances. The burden on the applicants to establish that exceptional circumstances exist is heavy'.
>
> Later in her judgment at pp. 544 and 545 Denham J. concluded:-
>
> 'It would only be in most exceptional circumstances that the Supreme Court would consider whether a final judgment or order should be rescinded or varied. Such a jurisdiction is dictated by the necessity of justice. A case will only be reopened where, through no fault of the party, he or she has been subject to a breach of constitutional rights.'
>
> Barron J. in *Re. Greendale Developments Limited (No. 3)* [2000] 2 I.R. 514 at p. 546 stated that, there may be circumstances which might exclude the application of Article 34.4.6 concerning the finality of decisions of the Supreme Court. He then added:-
>
> 'Nevertheless, where such circumstances exist, this court must be free to so declare and to indicate the procedures whereby such circumstances should be investigated. Not to be able to do so would conflict with the guarantee of fair procedures enshrined in the Constitution.
>
> The Constitution requires the decisions of this court to be final and conclusive for good reason. There must be certainty in the administration of justice. Uncertainty can lead to injustice. In my view, these provisions must prevail unless there has been a clear breach of the principles of natural justice to which the applicant has not acquiesced and such that a failure to take steps to remedy such breach would, in the eyes of right minded citizen's damage the authority of this court. I believe that the jurisdiction of this court has always been to this effect.'

Murray J., having quoted at length from the judgements in *In re Greendale Developments Ltd.*, went on to state at p. 229 as follows:-

> "It follows from the foregoing judgments that the courts have an inherent jurisdiction to amend or set aside a final order in exceptional circumstances where those circumstances clearly establish that there has been a fundamental denial of justice through no fault of the parties concerned and where no other remedy, such as an appeal, is available to those parties."
>
> He then continued:-
>
> "Rulings on questions of law and procedure are matters for judicial appreciation and discretion which are inherent in judicial proceedings and are properly governed by the principle of finality in courts of last instance. Otherwise, I confine myself to saying that the exceptional circumstances which could give rise to the inherent jurisdiction of the court must constitute something extraneous going to the very root of the fair and constitutional administration of justice. In order to emphasise that the remedy is confined to such matters, it may be appropriate to recall the observations of Lord Simon in *The Ampthill Peerage* [1977] A.C. 547 cited with approval, by Murphy J. in *Tassan Din v. Banco Ambrosiano S.P.A.* [1991] 1 I.R. 569 at p. 581:-
>
> > 'And once the final appellate court has pronounced its judgment the parties and those who claim through them are concluded; and, if the judgment is as to the status of a person, it is called a judgment *in rem* and everyone must accept it. A line can thus be drawn closing the account between the contestants. Important though the issues may be, how extensive whatsoever the evidence, whatever the eagerness for further fray, society says: 'We have provided courts in which your rival contentions have been heard. We have provided a code of law by which they have been adjudged. Since judges and juries are fallible human beings, we have provided appellate courts which do their own fallible best to correct error. But in the end you must accept what has been decided. Enough is enough."

By way of response to the arguments of the plaintiff in respect of this ground, it was submitted on behalf of the defendant that the decision in the case of *L.P. v. M.P.* reiterated: "That the grounds upon which a final order might be challenged were limited to

correcting the final judgment to ensure that it reflected the intention of the court which made it and to set aside an order that was obtained by fraud."

It was submitted that the decision in *L.P. v. M.P.* indicated that the jurisdiction described therein could only arise in exceptional circumstances. The point was made that a denial of fair procedures, for example, on the basis that there was new evidence which was not available to a party previously would not avail a party in seeking to set aside a final judgment.

I want to make some observations on the judgment in *Re. Greendale Developments Limited*. It is clear from that judgment that there is a jurisdiction to set aside a final order in certain circumstances. The headnote to that judgment stated that the decision of the court on a matter raised before it and in respect of which a final order was made was final and conclusive. It continued:

> "That where a final order was made and perfected, it could only be interfered with (i) in special or unusual circumstances; (ii) where there had been an accidental slip in the judgment as drawn up; or (iii) where the court itself found that the judgment as drawn up did not correctly state what the court actually decided and intended."

In the course of his judgment in that case Hamilton C.J. at p. 523 referred to the submissions on behalf of the applicant as to whether and in what circumstances the court had a jurisdiction to rescind or vary an earlier order it had made and considered the question as to whether it had such jurisdiction. Counsel for the applicant in making the contention that there was such jurisdiction relied on the judgment in the House of Lords in *R. v. Bow Street Magistrates, ex parte Pinochet (No. 2)* [1999] 2 W.L.R. 272. Hamilton C.J, set out the following passage from that case at p. 523:-

> "In the course of his speech in that case, Lord Browne-Wilkinson stated at p. 281 of the report:-
>
> > As I have said, the respondents to the petition do not dispute that your Lordships have jurisdiction in appropriate cases to rescind or vary an earlier order of this House. In my judgment, that concession was rightly made both in principle and on authority.
> >
> > In principle it must be that your Lordships, as the ultimate court of appeal, have power to correct any injustice caused by an earlier order of this House. There is no relevant statutory limitation on the jurisdiction of the House in this regard and therefore its inherent jurisdiction remains unfettered. 'In *Broome v. Cassell and Co. (No. 2)* [1972] A.C. 1136, your Lordships varied an order for costs already made by the House in circumstances where the parties had not had a fair opportunity to address argument on the point.
> >
> > However, it should be made clear that the House will not reopen any appeal save in circumstances where, through no fault of a party, he or she has been subjected to an unfair procedure. Where an order has been made by the House in a particular case there can be no question of that decision being varied or rescinded by a later order made in the same case just because it is thought that the first order is wrong.'
>
> It is important to note that this passage states that there is no relevant statutory limitation on the jurisdiction of the House in this regard and therefore its inherent jurisdiction remains unfettered.
>
> This passage clearly envisages and accepts that the jurisdiction of the House of Lords in this regard *viz*. to rescind or vary an earlier order of the House of Lords could be limited by statute.
>
> The position of the Supreme Court is substantially different.
>
> The Supreme Court was established by s. 1(1) of the Courts (Establishment and Constitution) Act, 1961, which, as stated in the long title thereof, was an Act to establish, in pursuance of Article 34 of the Constitution, *inter alia*, a court of final appeal."

Hamilton C.J. went on to set out certain of the provisions of Article 34 of the Constitution and continued:-

> "The Supreme Court is, as appears from the aforesaid provisions of the Constitution, a court established in pursuance of the provisions of Article 34 and its jurisdiction is therein set forth. Its jurisdiction is not unfettered but is limited by the provisions of the Constitution and is subject to the provision contained in Article 34.4.6."

For completeness I should set out the provisions of Article 34.4.6 which provides that:-

> "The decision of the Supreme Court shall in all cases be final and conclusive."

The *Pinochet* case referred to above in the passage quoted from Hamilton C.J. is of interest because that was a case in which an application was made that the House of Lords set aside its previous decision on the ground of apparent bias on the part of a judge and it was held by the House of Lords granting the petition, that as the ultimate Court of Appeal, the House had power to correct any injustice caused by one of its earlier orders.

I want to consider one further passage from p. 536 of the judgment of Hamilton C.J. in the case of in *Re. Greendale Developments Limited (No. 3)*, where he stated:-

> "As I have already stated, it is clear from the judgment of the Supreme Court delivered in this case that all the issues raised by the applicants therein including what was described as the core issue (*ultra vires*) were dealt with in the judgment of the court and that regard was had to the submissions (both oral and written) of counsel for the said applicants.
>
> Consequently, there was no breach of fair procedures in the manner in which the appeal was heard or in the determination by the court of the issues raised therein and there are no special or unusual circumstances in this case which would justify this court granting to the applicants the relief sought in the motion herein even if the Court had jurisdiction so to do.
>
> The common law and public policy recognised the desire for finality in proceedings *inter partes* and Article 34.4.6 of the Constitution incorporated into the Constitution this desire and expressed it in clear and unambiguous terms. It provided

> that the decision of the Supreme Court shall in all cases be final and conclusive. The said provision is expressed to apply in all cases and there is nothing in the circumstances of this appeal which would justify disregarding the said provision."

It seems to me that in invoking the jurisdiction to set aside a final order on the basis of correcting an injustice, what seems to be in contemplation is a want of fair procedures or breach of constitutional rights on the part of the court itself as in the *Pinochet* case where the issue related to the apparent bias of one member of the court. I reiterate what was said by Hamilton C. J. referred to above: "there was no breach of fair procedures in the manner in which the appeal was heard or in the determination by the court of the issues raised therein". If one examines the judgment of Denham J in the same case at p. 543, she sets out in great detail the issues of fair procedure in the case by reference to a number of facts. The facts referred to largely concern the conduct of the hearing before the Supreme Court. There is some reference to the conduct of the litigation in general terms but, for example, it is noted in the course of p. 543 as follows:-

> "When the judgment of the court was given on the 20th February, 1997, counsel for the applicant gave no indication that he considered that the court had done something he should bring to their attention as being in breach of the applicants' constitutional rights."

Other facts relied on turned on delay on the part of the applicant in raising the Issue. She concluded that "all the issues raised by the applicants therein, including what was described as the core issue (*ultra vires*), were dealt with in the judgment of the court and that regard has had to all submissions (both oral and written) of counsel for the said applicants".

In other words, it seems to me that in seeking to set aside a judgment on this exceptional ground, one is considering the conduct of the proceedings by the court or courts which heard the proceedings. There is no suggestion of any kind in this case that there was any lack of fair procedures or breach of constitutional rights by virtue of the conduct of the hearing of the proceedings by the High Court and the Supreme Court in the judicial review proceedings. For that reason, I have come to the conclusion that there is no basis upon which the plaintiff can avail of this exceptional jurisdiction as there is no evidence or allegation of a want of fair procedures or a breach of constitutional rights on the part of the courts in dealing with the judicial review proceedings.

Having said that, I have one other concern about the exceptional jurisdiction to set aside a judgement on the grounds of a want of fair procedures and/or breach of constitutional rights referred to in the case of *L.P. v. M.P.* I think one passage from the judgement of Murray J. needs to be reiterated in respect of the procedures for seeking to set aside a final order. He said at p. 230:-

> "Having regard to the provisions of Article 34-4-6, 'the decision of the Supreme Court shall in all cases be final and conclusive' it seems to me inconceivable that any court other than the Supreme Court could have jurisdiction to amend or vary its own decisions on the grounds of a breach of constitutional justice alleged to have occurred in the course of a hearing before it.
>
> The situation regarding a final and an unappealable order of the High Court gives rise to very different considerations. The Supreme Court is not a court of first instance and does not (save for limited exceptions) exercise original jurisdiction. The High Court is a court of first instance with original jurisdiction."

In this context I want to refer to one other decision which was contained in the authorities furnished by the plaintiff herein, that is the decision in the case of *Bula Limited v. Tara Mines Limited (No. 6)* [2000] 4 I.R. 412. There are two aspects of the decision to which I wish to refer. First of all, it was an application to set aside an order for the Supreme Court. The issues that arose in that case was that there had been an appeal from a decision of the High Court to the Supreme Court. The appeal was heard by Hamilton C.J., Barrington and Keane J.J.. The issue in that case related to the fact that Keane J. as he then was, had, prior to his appointment to the Bench advised the first respondent in relation to an exempted development under the planning legislation and was due to appear for the first respondent in an anticipated hearing before An Bord Pleanála, but did not do so in the light of his appointment to the High Court. It was contended that objective bias arose from the connection between Keane J. and the respondents. There was also an issue in relation to Barrington J. in that he had acted for the fifteenth respondent in two sets of proceedings relating to the Tara respondents, he had acted against the Tara respondents and had prepared two sets of advices for the first respondent.

Without dealing with the facts of that case to any great extent, there are two observations to make. It is interesting to note that the application was predicated on an alleged want of procedural fairness given that two of the judges who heard the appeal had a professional connection with some of the respondents in the past. Thus, there was an allegation of objective bias as a result of those connections. Therefore, the issue related to a want of fair procedures on the part of the court itself. I have already dealt with the question of the jurisdiction to set aside a final and conclusive order of the Supreme Court on the grounds of want of fair procedures and/or breach of constitutional rights and it is not necessary to say anything else on the subject save that this decision lends force to my conclusions on the issue. The second point to note is that the application in that case was an application made by notice of motion to the Supreme Court. In other words, the application was not made by way of separate proceedings; instead, an application was made to the Supreme Court to set aside the final order of the Supreme Court. This appears to fall into line with the observations of Murray J. in the case of *L.P. v. M.P.* that in circumstances where there was a final and unappealable order of the High Court the party in those proceedings "must seek a remedy by way of substantive proceedings before the High Court in the first instance". To that extent one wonders could an order ever be made by the High Court setting aside a final judgment of the Supreme Court on these grounds? The answer to this question may not be easy to ascertain, particularly as it is clear from the authorities that, if the basis of the application to set aside is fraud, it would appear to be appropriate to seek such relief by way of a separate action. This issue is not one that was considered in the course of arguments or submissions. For that reason I am not inclined to express a view on this issue although it may be necessary to consider the point in the future.

In any event, I am satisfied that the jurisdiction to set aside an order on the exceptional grounds identified in *Re. Greendale Developments Limited and L.P. v. M.P.* does not arise on the facts of this case for the reasons set out above.

The Application of the Legal Principles
I have set out at length the principles to be derived from the case law culminating in the judgement of Fennelly J. in the case of *Kenny v. Trinity College Dublin* [2008] I.E.S.C. 18 and it is not necessary to repeat those principles here.

Suffice to say that if the plaintiff has not "alleged fraud in the true sense, that is, deliberate and purposeful dishonesty, knowing and intentional deceit of the court" which is shown "to affect the impugned decision in a fundamental way", the application of the defendant pursuant to O. 19, r. 28, and the inherent jurisdiction of the court, must be granted.

The averments of Mr. John Davis, solicitor to the Tribunal in the affidavit sworn on the 22nd May 2003 are at the heart of these proceedings. Those averments were in reply to an averment of the plaintiff in an affidavit sworn by him on the 12th May, 2003,

relating to the evidence of Mr. John Loughery, the then Secretary of the Department of Communications, Marine and Natural Resources, before the Tribunal.

I now propose to refer to the statement of claim herein. It is set out in para. 7 of the statement of claim as follows:-

> "At para. 4 of the plaintiff's said affidavit, the plaintiff averred that:
>
> > 'As the Secretary of the Department [of Communications, Marine and Natural Resources], Mr. John Loughrey confirmed in giving evidence to the Tribunal, [the Glackin report] had no relevance. He was aware of the report, took legal advice at the time of the award of the licence and it was confirmed that under the rules of the competition, the Department could not have disqualified me from being a member of the successful consortium.'

Paragraphs 9 to 13 inclusive contain the relevant averments from the affidavit of Mr. Davis and they are as follows:-

> "9. At para. 20 of the Tribunal's affidavit, Mr. Davis averred that:
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> > 'The Applicant's purported representation of Mr. Loughreys's testimony in relation to the relevance of the Glackin report is misleading in a number of significant respects. By his selective juxtapositioning of testimony of Mr. Loughery, the applicant has failed to present this Honourable Court with a complete and accurate statement of his evidence.'
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> 10. At para. 29 of the Tribunal's affidavit, Mr. Davis averred that:
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> > 'Moreover, the applicant's purported representation of Mr. Loughrey's testimony is misleading in a number of significant respects. By his selective juxtapositioning of the testimony of Mr. Loughery, the applicant intimates that Mr. Loughery took legal advice in relation to the impact of the Glackin report and, in particular, that he took legal advice on the question of whether, under the rules of the competition, the findings of the Glackin report could have disqualified the applicant from being a member of the successful consortium. However, Mr. Loughery did not suggest at any stage during his evidence to the Tribunal that he sought legal advice in relation to any of these matters. Specifically, Mr. Loughery did not suggest that he sought legal advice in relation to the impact of the Glackin report. Nor did he suggest that he sought legal advice on whether the contents of the Glackin report would disqualify the applicant from being a member of the successful consortium. Nor did he suggest that he sought legal advice on the question of whether, under the rules of the competition, the Department could have disqualified the applicant from being a member of a successful consortium, whether on the basis of the Glackin report or otherwise. There is no basis in the transcript to support the applicant's implicit claims in this regard.'
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> 11. At para. 30 of the Tribunal's affidavit, Mr. Davis averred that:
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> > 'The relevant portions of the evidence of Mr. Loughery in the present context are contained on pp. 13 to 14 and pp. 51 to 52 of the transcript of the proceedings of the Tribunal on day 189 and I beg to refer to two copies of the said extracts upon which, pinned together and marked with the letters 'JD1' and 'JD2;' respectfully [sic], I have signed my name prior to the swearing hereof. The said evidence indicates that Mr. Loughrey was aware that the evidence of the ownership of the vehicle to take the licence was a major issue and that advice had been sought on this issue; the evidence also indicates that Mr. Loughrey fully accepted that such advice had not been received. (See p. 51, line 14). Other evidence heard by the Tribunal indicates that legal advice was sought and obtained on the question of the extent to which ownership changes would be permitted in the case of a consortium to which the licence had been granted after the licence had been granted (ie. after the consortium had gone into operation) but that no such advice had been obtained in relation to the period between the application for the licence and the granting thereof.'
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> 12. At para. 33 ofthe Tribunal's affidavit, Mr. Davis averred that:-
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> > 'For the reasons outlined above, the Glackin report could only have been immaterial to the licensing process if it had been completely discredited in every respect as regards the applicant and this fact had been established before the licensing process and the licence evaluators were aware of this fact.'
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> 13. At para. 35 of the Tribunal's affidavit, Mr. Davis averred that:-
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> > 'Notwithstanding his failure to establish that the Glackin report was patently irrelevant to an assessment of the ESAT Digifone consortium and, by extension, the present work of the Tribunal, the applicant reiterates his claim that the report is irrelevant and, moreover, claims that 'despite being aware of its irrelevance, the respondent continues to permit its introduction, as part of a much wider inquiry by the Tribunal into relevant matters.' It is clear from my previous averments herein that the Glackin report is considered to be relevant to the work of the Tribunal.'

I think I should also refer to para. 15 of the statement of claim which is in the following terms:-

> "15. The extract from the opening statement quoted in the Tribunal's affidavit was preceded in the opening statement by the following statement by counsel for the Tribunal:-
>
> > 'Now, an opinion was furnished by counsel through the office of the Attorney General, which addressed the question of change of ownership after the issue of the licence. The specific issue of changes in the ownership of the consortium between the date of the application and the date of the issue of the licence does not appear to have been further pursued by the Department. It appears that the Department continued to be concerned about the ownership issue in May 1996.'

Paragraph 16 of the statement of claim summarises the evidence of the defendant to the court in the judicial review proceedings as follows:-

> "16. In the premises, the evidence of the defendant to this Honourable Court was that:

(a) The Department of Communications, Marine and Natural Resources (hereinafter "the Department") have not received legal advice in relation to a change in the ownership of the ESAT Digifone consortium.

(b) The legal advice received by the Department addressed the question of change of ownership after the issue of the licence and did not address the period between the application for the licence and the granting thereof.

(c) It was therefore necessary for the Tribunal to inquire whether the plaintiff had avoided the evaluation process carried out prior to the grant of the second GSM mobile telephone licence.

(d) The contents of the Glackin report were therefore relevant to the Tribunal's inquiry."

The advices given to the Department are central to the proceedings now brought to set aside the judgment of the High Court and the Supreme Court in the judicial review proceedings.

Paragraphs 46, 47, 48, 49, and 50 of the affidavit of John Davis sworn on the 11th March, 2011, in these proceedings sets out the circumstances surrounding the obtaining of the opinion of Mr. Richard Nesbitt S.C. in 1996, the correspondence that took place between the Tribunal and the Department in relation to those advices and details of a meeting that took place on the 18th October 2002, with two representatives of the office of the Attorney General together with Mr. Nesbitt and officials of the Tribunal, including Mr. Davis. That meeting referred to the advices furnished by Mr. Nesbitt. In para. 50 of the affidavit, reference was made to an article which appeared in the Sunday Business Post indicating the evidence that was likely to be heard before the Tribunal to the effect that before the award of the licence was made, advice was sought from the office of the Attorney General on whether consortia should be permitted to alter the make up of their investors and it was indicated that in the light of that article, correspondence took place between the Tribunal and the Attorney General. Mr. Davis continued in his affidavit at para. 50 as follows:-

> "When the Tribunal received the letter of the Attorney General dated the 20th December, 2002, stating that Messrs McFadden and Gormley had no recollection of furnishing the advice referred to in the article, and that there was no copy of any advice 'of the type mentioned' having been given by the Attorney General or any other person in his office, the Tribunal mistakenly believed that the Attorney General was confirming that no advice of the type which the Tribunal had anticipated finding had in fact been furnished at any time. While the Attorney General in that letter had informed the Tribunal that Mr. Towey's request of the 24th April, 1996, had been 'dealt with' in the opinion of the 9th May, 1996, the Tribunal interpreted that third numbered paragraph of the letter in the light of the earlier paragraphs of his response. In other words, the Tribunal understood the letter to mean that no advice, of the type referred to in the article was given at any time, and that accordingly while the opinion of 9th May 1996, 'dealt with' Mr. Towey's request for advice, it did not in fact contain any such advice. I am advised that the Tribunal has acknowledged that its understanding of the letter was erroneous. What the Tribunal did not appreciate was that the letter was not intended to differ from or supersede an earlier commentary received on the 30th September, 2002, from the office of the Attorney General, or what was stated at the meeting with Messrs McFadden and Gormley on the 18th October, 2002. I am advised that the Tribunal accepts that it should have had greater regard to those earlier matters when interpreting the said correspondence from the Attorney General."

An affidavit was sworn in reply by John Shaw on behalf of the plaintiff herein on the 4th April, 2011. He is strongly critical of the affidavit sworn herein by Mr. Davis and in particular at para. 20 he stated:-

> "I say and believe that Mr. Davis's affidavit goes on to discuss the aforesaid correspondence and meeting and concludes in para. 53 that 'notwithstanding the foregoing, it was reasonable in May 2003, for the Tribunal to hold the working view and believe that the opinion of Richard Nesbitt S.C. did not address the questions raised in the letter of the 24th April, 1996'. I say and believe that this averment quite simply defies logic and belief."

He went on to point out that the critical affidavit at in the judicial review proceedings was sworn by Mr. Davis on the 22nd May, 2003, only seven months after he had personally attended and taken a note of the meeting held on the 18th October, 2002. Mr. Davis swore a further affidavit on the 9th May, 2011, taking issue with the averments of Mr. Shaw in that affidavit.

It is important to recall the notice for particulars sent by the defendant in respect of the statement of claim herein and in particular to the particulars set out at para. 1(a) and the response thereto. It was made clear that in regard to paras. 8 to 15 of the statement of claim in the replies to the particulars that it was not being alleged that the statements contained in those paragraphs, were made fraudulently. It is instead contended that the High Court and the Supreme Court were presented with misleading, untrue and inaccurate evidence by the defendant. There is no doubt that the Tribunal was mistaken in its interpretation or understanding of the position in relation to the advices furnished by the Attorney General's office to the Department; indeed, it seems clear that remained the position throughout a period of time up to 2009.

It seems to me that the high water mark of the plaintiff's case in these proceedings is to be found in the replies to the particulars raised at 1(a) in which it was pointed out on behalf of the plaintiff herein that "The plaintiff has not pleaded that the aforesaid statements were made fraudulently. He has pleaded ... that the High Court and the Supreme Court were presented with misleading, untrue and inaccurate evidence by the defendant". That being so, one has to ask if the plaintiff has demonstrated fraud in the true sense of deliberate and purposeful dishonesty, and knowing and intentional deceit of the court such that it led to the making of the impugned decision. It seems to me that insofar as evidence was given by Mr. Davis which is now the subject of this challenge, Mr. Davis was putting before the High Court the evidence given by Mr. Loughery. It is patently obvious that Mr. Davis was labouring under a misapprehension, as was the Tribunal, in relation to the nature of the opinion furnished to the Attorney General and thereafter to the Department at the time he swore his affidavit. That this is so is borne out by the contents of the opening statement in respect of the second module. It is also borne out by the manner in which Mr. Loughery was cross examined at the Tribunal in 2003. It is also borne out by the evidence given by Mr. Loughery that he would have given different evidence in 2003, if he had been made aware of the letter of the Attorney General of the 20th December, 2002. To that extent, it could be said that the averments of Mr. Davis were misleading.

However, what is absent from the facts of this case as pleaded is any material that would suggest that, insofar as the averments of Mr. Davis were wrong as to the advices furnished by Mr. Nesbitt, there was deliberate and purposeful dishonesty on his part or on the part of the Tribunal in putting that evidence before the High and Supreme Court in the judicial review proceedings. An assertion that the High Court and Supreme Court were presented with "misleading, untrue and inaccurate evidence" simply does not meet the necessarily stringent threshold set out in Kenny v Trinity College Dublin for the setting aside of a final and conclusive judgment. As

was stated in that case, "the nature of the fraud, deceit or dishonesty must be clearly and unambiguously alleged." It seems to me to be abundantly clear that whatever led to the mistaken understanding of the Tribunal in relation to the advices furnished to the Department in respect of the ownership and change of ownership of the ESAT consortium, the one thing that can be said is, that, having regard to the matters pleaded in the statement of claim and the replies to particulars, there was no deliberate and purposeful dishonesty or knowing and intentional deceit of the court by the defendant, his servants or agents.

There is simply nothing in the pleadings in my view, which alleges fraud in the true sense. To that extent it seems to me that the plaintiff has failed to satisfy the first requirement in relation to the setting aside of a judgment on the grounds of fraud.

That finding should be sufficient to dispose of this matter. For the sake of completeness, I feel I should consider one final issue. It is also a fundamental requirement of an application to set aside a judgment on the grounds of fraud, that that which is alleged to have been fraud must be such as to effect the impugned decision in a fundamental way. The essence of the case before the court in the judicial review proceedings was that the reference to the contents of the Glackin report by the Tribunal in the examination of certain witnesses meant that he had not been afforded fair procedures by the respondent in that (a) the contents of the report were not relevant to the inquiry being undertaken by the Tribunal; (b) neither he nor his legal advisers had received any or any adequate notice of the likelihood that particular witnesses would be examined in relation to the report and (c) the applicant was compromised in his ability to defend his good name and finally that the Tribunal had permitted the use of pejorative language by counsel for the Tribunal with respect to the applicant.

It has been said before that in considering this issue, the court hearing an application to dismiss must be permitted to examine the impugned decision, including the reasoning of the judgment. (See *Kenny v Trinity College Dublin*). The judgment of Quirke J. set out in detail the relief sought, the facts relevant to the application before the court in the judicial review proceedings, the opening statement of counsel for the Tribunal on the commencement of the second module. One of the key issues was the identity of the membership of the Esat consortium and the extent to which that was known by the evaluators of the applications for the GSM licence. The plaintiff was represented at the Tribunal. At least one witness other than Mr. Loughrey was examined about the Glackin report. The central issue was the relevance of the Glackin report to the Tribunal. The applicant was seeking to prevent its use at the Tribunal and claimed in the alternative, a breach of fair procedures in the use of the report at the Tribunal. It was noted at p. 349 of the judgement of Quirke J. at p. 349 as follows:

> "On the undisputed facts which have given rise to these proceedings, the applicant is the owner of a significant interest in Esat Digifone and, during the course of the evaluation process up to and including the 25th October 1995, when the identity of the winner of the competition for the licence was announced, the evaluation team was under the impression that the interest in Esat Digifone which had been acquired by the applicant on the 29th September 1995 was, in fact, owned by the financial institutions."
>
> He continued:
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> "It was perfectly reasonable for that investigation [into the award of the licence] to include an inquiry into and a detailed analysis of the evaluation process which resulted in the recommendation that the licence should be awarded to Esat Digifone."

The judgment then continues to deal with the issue of fair procedures. That is the context in which the judgment was delivered. There is nothing to suggest in the judgment that the court relied on the impugned averments of Mr. Davis in reaching the decision or that they went to the root of the decision. The same applies to the decision of the Supreme Court in the judicial review proceedings. It is worth remembering the comments of Denham J. at the end of her judgment which I have referred to above where she stated at p.372:

> "I have dealt with this appeal in some detail. However, fundamentally it is a simple case, arising on a single issue, the Glackin Report. There is a certain air of shadow boxing in this case. To challenge references to a public document by the Tribunal was to assume an immense burden. For a court to exclude references to a public document by the Tribunal and its counsel in questions or submissions would be an extraordinary intrusion on the working of the Tribunal which I would envisage arising only in wholly extraordinary circumstances. Such circumstances do not arise in this case. If, on the other hand, the applicant wished to contest the Glackin Report that would be a matter for another arena. However that is not an issue for the Tribunal."

To paraphrase the comments of Denham J., the plaintiff in these proceedings has assumed an immense burden in seeking to set aside a final and conclusive decision of the Supreme Court on the grounds of fraud. There is simply nothing in the judgments to show how it could be said that the matters complained of by the plaintiff in the affidavit of Mr. Davis were such as to affect the impugned decision in a fundamental way or to have been something that went to the root of the case.

Accordingly, I am not satisfied that the plaintiff's case taken at its height has alleged fraud in the true sense such that the statement of claim herein discloses a reasonable cause of action. Therefore, the plaintiff's case herein is one that must fail. In those circumstances, it seems to me that the defendant herein is entitled to the relief sought herein.